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Consultative Council of European Judges

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**CONSULTATIVE COUNCIL OF  
EUROPEAN JUDGES  
(CCJE)**

Collection of Opinions Nos. 1 to 26  
(2001 – 2023)

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# Magna Carta of Judges<sup>1</sup>

## (Fundamental principles)

### *Introduction:*

*On the occasion of its 10<sup>th</sup> anniversary, the CCJE adopted, during its 11<sup>th</sup> plenary meeting (Strasbourg, 17-19 November 2010), a Magna Carta of Judges (Fundamental Principles) summarising and codifying the main conclusions of the Opinions that it already adopted. Each of those 12 Opinions, brought to the attention of the Committee of Ministers of the Council of Europe, contains additional considerations on the topics addressed in this document (see [www.coe.int/ccje](http://www.coe.int/ccje)).*

### **Rule of law and justice**

1. The judiciary is one of the three powers of any democratic state. Its mission is to guarantee the very existence of the Rule of Law and, thus, to ensure the proper application of the law in an impartial, just, fair and efficient manner.

### **Judicial Independence**

2. Judicial independence and impartiality are essential prerequisites for the operation of justice.
3. Judicial independence shall be statutory, functional and financial. It shall be guaranteed with regard to the other powers of the State, to those seeking justice, other judges and society in general, by means of national rules at the highest level. The State and each judge are responsible for promoting and protecting judicial independence.
4. Judicial independence shall be guaranteed in respect of judicial activities and in particular in respect of recruitment, nomination until the age of retirement, promotions, irremovability, training, judicial immunity, discipline, remuneration and financing of the judiciary.

### **Guarantees of independence**

5. Decisions on selection, nomination and career shall be based on objective criteria and taken by the body in charge of guaranteeing independence.
6. Disciplinary proceedings shall take place before an independent body with the possibility of recourse before a court.
7. Following consultation with the judiciary, the State shall ensure the human, material and financial resources necessary to the proper operation of the justice system. In order to avoid undue influence, judges shall receive appropriate remuneration and be provided with an adequate pension scheme, to be established by law.
8. Initial and in-service training is a right and a duty for judges. It shall be organised under the supervision of the judiciary. Training is an important element to safeguard the independence of judges as well as the quality and efficiency of the judicial system.
9. The judiciary shall be involved in all decisions which affect the practice of judicial functions (organisation of courts, procedures, other legislation).

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<sup>1</sup> Due to an incoherence between the English and the French versions highlighted by several CCJE members and for a better coherence with Opinion No. 3 of the CCJE (paragraph 57), the Secretariat previously modified paragraph 22 of the Magna Carta as officially adopted by the CCJE in November 2010. Following the last meeting of the Bureau (March 2011), it has been decided to come back to this version. **Therefore, is requested to Each user to verify that paragraph 22 of the Magna Carta used since then corresponds to the appended text.**

10. In the exercise of their function to administer justice, judges shall not be subject to any order or instruction, or to any hierarchical pressure, and shall be bound only by law.
11. Judges shall ensure equality of arms between prosecution and defence. An independent status for prosecutors is a fundamental requirement of the Rule of Law.
12. Judges have the right to be members of national or international associations of judges, entrusted with the defence of the mission of the judiciary in the society.

#### **Body in charge of guaranteeing independence**

13. To ensure independence of judges, each State shall create a Council for the Judiciary or another specific body, itself independent from legislative and executive powers, endowed with broad competences for all questions concerning their status as well as the organisation, the functioning and the image of judicial institutions. The Council shall be composed either of judges exclusively or of a substantial majority of judges elected by their peers. The Council for the Judiciary shall be accountable for its activities and decisions.

#### **Access to justice and transparency**

14. Justice shall be transparent and information shall be published on the operation of the judicial system.
15. Judges shall take steps to ensure access to swift, efficient and affordable dispute resolution; they shall contribute to the promotion of alternative dispute resolution methods.
16. Court documents and judicial decisions shall be drafted in an accessible, simple and clear language. Judges shall issue reasoned decisions, pronounced in public within a reasonable time, based on fair and public hearing. Judges shall use appropriate case management methods.
17. The enforcement of court orders is an essential component of the right to a fair trial and also a guarantee of the efficiency of justice.

#### **Ethics and responsibility**

18. Deontological principles, distinguished from disciplinary rules, shall guide the actions of judges. They shall be drafted by the judges themselves and be included in their training.
19. In each State, the statute or the fundamental charter applicable to judges shall define the misconduct which may lead to disciplinary sanctions as well as the disciplinary procedure.
20. Judges shall be criminally liable in ordinary law for offences committed outside their judicial office. Criminal liability shall not be imposed on judges for unintentional failings in the exercise of their functions.
21. The remedy for judicial errors should lie in an appropriate system of appeals. Any remedy for other failings in the administration of justice lies only against the state.
22. It is not appropriate for a judge to be exposed, in respect of the purported exercise of judicial functions, to any personal liability, even by way of reimbursement of the state, except in a case of wilful default.

#### **International courts**

23. These principles shall apply *mutatis mutandis* to judges of all European and international courts.

# Opinion No. 1 (2001)

of the Consultative Council of European Judges (CCJE)  
to the Committee of Ministers of the Council of Europe

## Standards concerning the independence of the judiciary and the irremovability of judges

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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<sup>1</sup>. It has an 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<sup>2</sup>. Independence thus serves as the guarantee of impartiality<sup>3</sup>. 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 to be free there from. 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 means by which it may be secured, at a constitutional or lower legal level<sup>4</sup>, 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.

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<sup>1</sup> 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).

<sup>2</sup> 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 Kyrgyzstan, April 1998).

<sup>3</sup> See paragraph 12 below.

<sup>4</sup> See paragraphs 14-16 below.



## 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 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<sup>5</sup>, political considerations may still

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<sup>5</sup> See further paragraph 43 below.

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 Personal senates (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 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<sup>6</sup> 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

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<sup>6</sup> 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.

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 Personal senates (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.
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<sup>7</sup> 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”.
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”)<sup>8</sup> – 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.

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<sup>7</sup> 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.

<sup>8</sup> See paragraph 24 above.

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”.

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<sup>9</sup> was optional was felt to be a weakness. In Croatia, the extent of potential political influence over the body was identified as a problem<sup>10</sup>.
42. The following systems will serve as three examples of a higher judiciary council meeting the suggestions of the European Charter.
- 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<sup>11</sup>.
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, 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<sup>12</sup> - pointed in a general direction which the CCJE wished to commend. This is particularly**

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<sup>9</sup> the President on advice from the Prime Minister.

<sup>10</sup> See paragraph 20 above.

<sup>11</sup> See paragraph 20 above.

<sup>12</sup> See paragraphs 38-39 above.

**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).**
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 22<sup>nd</sup> 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 “fulfilment 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<sup>13</sup>, 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 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.

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<sup>13</sup> See paragraphs 37 and 45 above.

### *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<sup>14</sup>. 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 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 and consultative bodies*.
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

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<sup>14</sup> 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.



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<sup>15</sup>.

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, 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

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<sup>15</sup> See also paragraph 27 above.

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.

## Opinion No. 2 (2001)

of the Consultative Council of European Judges (CCJE)  
to the Committee of Ministers of the Council of Europe

### 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

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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 21<sup>st</sup> 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<sup>1</sup> – 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.**

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<sup>1</sup> See the Opinion N° 1 (2201) on standards concerning the independence, efficiency and role of judges, under the heading "the appointing and consultative bodies".

## Opinion No. 3 (2002)

of the Consultative Council of European Judges (CCJE)  
to the Committee of Ministers of the Council of Europe

### The principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality

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1. The Consultative Council of European Judges (CCJE) drafted this opinion on the basis of replies by the Member States to a questionnaire and texts drawn up by the CCJE Working Party and the specialist of the CCJE on this topic, Mr Denis SALAS (France).
  2. The present opinion makes reference to CCJE Opinion No. 1 (2001) (CCJE(2001) 43) on standards concerning the independence of the judiciary and the irremovability of judges, particularly paragraphs 13, 59, 60 and 71.
  3. In preparing this opinion, the CCJE took into account a number of other documents, in particular:
    - the United Nations "Basic principles on the independence of the judiciary" (1985);
    - Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and role of judges;
    - the European Charter on the Statute for Judges (1998) (DAJ/DOC(98) 23);
    - the Code of judicial conduct, the Bangalore draft<sup>1</sup>.
  4. The present opinion covers two main areas:
    - the principles and rules governing judges' professional conduct, based on determination of ethical principles, which must meet very high standards and may be incorporated in a statement of standards of professional conduct drawn up by the judges themselves (A);
    - the principles and procedures governing criminal, civil and disciplinary liability of judges (B).
  5. The CCJE questioned, in this context, whether existing rules and principles were in all respects consistent with the independence and impartiality of tribunals required by the European Convention on Human Rights.
  6. The CCJE therefore sought to answer the following questions:
    - What standards of conduct should apply to judges ?
    - How should standards of conduct be formulated ?
    - What if any criminal, civil and disciplinary liability should apply to judges ?
  7. The CCJE believes that answers to these questions will contribute to the implementation of the framework global action plan for judges in Europe, especially the priorities relating to the rights and responsibilities of judges, professional conduct and ethics (see doc. CCJE (2001) 24, Appendix A, part III B), and refers in this context its conclusions in paragraphs 49, 50, 75, 76 and 77 below.
- A. STANDARDS OF JUDICIAL CONDUCT**
8. The ethical aspects of judges' conduct need to be discussed for various reasons. The methods used in the settlement of disputes should always inspire confidence. The powers entrusted to judges are strictly linked to the values of justice, truth and freedom. The standards of conduct applying to judges are the corollary of these values and a precondition for confidence in the administration of justice.

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<sup>1</sup> This has since been revised in November 2002, to become The Bangalore Principles of Judicial Conduct. The CCJE did not have these Principles before it. The Explanatory Note to them acknowledges the input of the CCJE' s Working Party in June 2002.

9. Confidence in the justice system is all the more important in view of the increasing globalisation of disputes and the wide circulation of judgments. Further, in a State governed by the rule of law, the public is entitled to expect general principles, compatible with the notion of a fair trial and guaranteeing fundamental rights, to be set out. The obligations incumbent on judges have been put in place in order to guarantee their impartiality and the effectiveness of their action.

**1) What standards of conduct should apply to judges?**

10. Any analysis of the rules governing the professional demands applicable to judges should include consideration of the underlying principles and the objectives pursued.
11. Whatever methods are used to recruit and train them and however broad their mandate, judges are entrusted with powers and operate in spheres which affect the very fabric of people's lives. A recent research report points out that, of all the public authorities, it is probably the judiciary which has changed the most in the European countries<sup>2</sup>. In recent years, democratic societies have been placing increasing demands on their judicial systems. The increasing pluralism of our societies leads each group to seek recognition or protection which it does not always receive. Whilst the architecture of democracies has been profoundly affected, national variations remain marked. It is a truism that the East European countries that are emerging from authoritarian regimes see law and justice as providing the legitimacy essential for the reconstruction of democracy. There more than elsewhere, the judicial system is asserting itself in relation to other public authorities through its function of judicial supervision.
12. The powers entrusted to judges are subject not only to domestic law, an expression of the will of the nation, but also to the principles of international law and justice as recognised in modern democratic societies.
13. The purpose for which these powers are entrusted to judges is to enable them to administer justice, by applying the law, and ensuring that every person enjoys the rights and/or assets that are legally theirs and of which they have been or may be unfairly deprived.
14. This aim is expressed in Article 6 of the European Convention on Human Rights which, speaking purely from the point of view of users of the judicial system, states that "*everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*". Far from suggesting that judges are all-powerful, the Convention highlights the safeguards that are in place for persons on trial and sets out the principles on which the judge's duties are founded: independence and impartiality.
15. In recent years, there has been some recognition of the need for increased assurances of judicial independence and impartiality; independent bodies have been set up to protect the judiciary from partisan interference; the significance of the European Convention on Human Rights has been developed and felt through the case-law of the European Court in Strasbourg and national courts.
16. Independence of the judge is an essential principle and is the right of the citizens of each State, including its judges. It has both an institutional and an individual aspect. The modern democratic State should be founded on the separation of powers. Each individual judge should do everything to uphold judicial independence at both the institutional and the individual level. The rationale of such independence has been discussed in detail in the Opinion N° 1 (2001) of the CCJE, paragraphs 10-13. It is, as there stated, inextricably complemented by and the pre-condition of the impartiality of the judge, which is essential to the credibility of the judicial system and the confidence that it should inspire in a democratic society.
17. Article 2 of the "Basic principles on the independence of the judiciary" drawn up by the United Nations in 1985 stipulates that "the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason". Under Article 8, judges "shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary".

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<sup>2</sup> *Les mutations de la justice. Comparaisons européennes*, Ph. Robert and A. Cottino (ed.), Harmattan, 2001.

18. In its Recommendation N° R (94) 12 on the independence, efficiency and role of judges (Principle I.2.d), the Committee of Ministers of the Council of Europe stated that "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".
19. The European Charter on the Statute for Judges indicates that the statute for judges should ensure the impartiality which all members of the public are entitled to expect of the courts (paragraph 1.1). The CCJE fully endorses this provision of the Charter.
20. Impartiality is determined by the European Court both according to a *subjective* approach, which takes into account the personal conviction or interest of a particular judge in a given case, and according to an *objective* test, ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect<sup>3</sup>.
21. Judges should, in all circumstances, act impartially, to ensure that there can be no legitimate reason for citizens to suspect any partiality. In this regard, impartiality should be apparent in the exercise of both the judge's judicial functions and his or her other activities.

#### **a. Impartiality and conduct of judges in the exercise of their judicial functions**

22. Public confidence in and respect for the judiciary are the guarantees of the effectiveness of the judicial system: the conduct of judges in their professional activities is understandably seen by members of the public as essential to the credibility of the courts.
23. Judges should therefore discharge their duties without any favouritism, display of prejudice or bias. They should not reach their decisions by taking into consideration anything which falls outside the application of the rules of law. As long as they are dealing with a case or could be required to do so, they should not consciously make any observations which could reasonably suggest some degree of pre-judgment of the resolution of the dispute or which could influence the fairness of the proceedings. They should show the consideration due to all persons (parties, witnesses, counsel, for example) with no distinction based on unlawful grounds or incompatible with the appropriate discharge of their functions. They should also ensure that their professional competence is evident in the discharge of their duties.
24. Judges should also discharge their functions with due respect for the principle of equal treatment of parties, by avoiding any bias and any discrimination, maintaining a balance between the parties and ensuring that each receives a fair hearing.
25. The effectiveness of the judicial system also requires judges to have a high degree of professional awareness. They should ensure that they maintain a high degree of professional competence through basic and further training, providing them with the appropriate qualifications.
26. Judges must also fulfil their functions with diligence and reasonable despatch. For this, it is of course necessary that they should be provided with proper facilities, equipment and assistance. So provided, judges should both be mindful of and be able to perform their obligations under Article 6.1 of the European Convention on Human Rights to deliver judgment within a reasonable time.

#### **b. Impartiality and extra-judicial conduct of judges**

27. Judges should not be isolated from the society in which they live, since the judicial system can only function properly if judges are in touch with reality. Moreover, as citizens, judges enjoy the fundamental rights and freedoms protected, in particular, by the European Convention on Human Rights (freedom of opinion, religious freedom, etc). They should therefore remain generally free to engage in the extra-professional activities of their choice.
28. However, such activities may jeopardise their impartiality or sometimes even their independence. A reasonable balance therefore needs to be struck between the degree to which judges may be involved in society and the need for them to be and to be seen as independent and impartial in the discharge of their duties. In the last analysis, the question must always be asked whether, in the

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<sup>3</sup> See for example Piersack case, judgment of 1 October 1982, Series A 53, para. 30, De Cubber case, judgment of 26 October 1984, Series A 86, para. 24, Demicoli case, judgment of 27 August 1991, Series A 210, para. 40, Sainte-Marie case, judgment of 16 December 1992, Series A 253-A, para. 34.

particular social context and in the eyes of a reasonable, informed observer, the judge has engaged in an activity which could objectively compromise his or her independence or impartiality.

29. Judges should conduct themselves in a respectable way in their private life. In view of the cultural diversity of the member states of the Council of Europe and the constant evolution in moral values, the standards applying to judges' behaviour in their private lives cannot be laid down too precisely. The CCJE encourages the establishment within the judiciary of one or more bodies or persons having a consultative and advisory role and available to judges whenever they have some uncertainty as to whether a given activity in the private sphere is compatible with their status of judge. The presence of such bodies or persons could encourage discussion within the judiciary on the content and significance of ethical rules. To take just two possibilities, such bodies or persons could be established under the aegis of the Supreme Court or judges' associations. They should in any event be separate from and pursue different objectives to existing bodies responsible for imposing disciplinary sanctions.
30. Judges' participation in political activities poses some major problems. Of course, judges remain citizens and should be allowed to exercise the political rights enjoyed by all citizens. However, in view of the right to a fair trial and legitimate public expectations, judges should show restraint in the exercise of public political activity. Some States have included this principle in their disciplinary rules and sanction any conduct which conflicts with the obligation of judges to exercise reserve. They have also expressly stated that a judge's duties are incompatible with certain political mandates (in the national parliament, European Parliament or local council), sometimes even prohibiting judges' spouses from taking up such positions.
31. More generally, it is necessary to consider the participation of judges in public debates of a political nature. In order to preserve public confidence in the judicial system, judges should not expose themselves to political attacks that are incompatible with the neutrality required by the judiciary.
32. From reading the replies to the questionnaire, it seems that in some States a restrictive view is taken of judges' involvement in politics.
33. The discussions within the CCJE have shown the need to strike a balance between the judges' freedom of opinion and expression and the requirement of neutrality. It is therefore necessary for judges, even though their membership of a political party or their participation in public debate on the major problems of society cannot be proscribed, to refrain at least from any political activity liable to compromise their independence or jeopardise the appearance of impartiality.
34. However, judges should be allowed to participate in certain debates concerning national judicial policy. They should be able to be consulted and play an active part in the preparation of legislation concerning their statute and, more generally, the functioning of the judicial system. This subject also raises the question of whether judges should be allowed to join trade unions. Under their freedom of expression and opinion, judges may exercise the right to join trade unions (freedom of association), although restrictions may be placed on the right to strike.
35. Working in a different field offers judges an opportunity to broaden their horizons and gives them an awareness of problems in society which supplements the knowledge acquired from the exercise of their profession. In contrast, it entails some not inconsiderable risks: it could be viewed as contrary to the separation of powers, and could also weaken the public view of the independence and impartiality of judges.
36. The question of judges' involvement in a certain governmental activities, such as service in the private offices of a minister (*cabinet ministériel*), poses particular problems. There is nothing to prevent a judge from exercising functions in an administrative department of a ministry (for example a civil or criminal legislation department in the Ministry of Justice); however, the matter is more delicate with regard to a judge who becomes part of the staff of a minister's private office. Ministers are perfectly entitled to appoint whomsoever they wish to work in their private office but, as the minister's close collaborators, such staff participates to a certain extent in the minister's political activities. In such circumstances, before a judge enters into service in a minister's private office, an opinion should ideally be obtained from the independent organ responsible for the appointment of judges, so that this body could set out the rules of conduct applicable in each individual case.



### **c. Impartiality and other professional activities of judges<sup>4</sup>**

37. The specific nature of the judicial function and the need to maintain the dignity of the office and protect judges from all kinds of pressures mean that judges should behave in such a way as to avoid conflicts of interest or abuses of power. This requires judges to refrain from any professional activity that might divert them from their judicial responsibilities or cause them to exercise those responsibilities in a partial manner. In some States, incompatibilities with the function of judge are clearly defined by the judges' statute and members of the judiciary are forbidden from carrying out any professional or paid activity. Exceptions are made for educational, research, scientific, literary or artistic activities.
38. Different countries have dealt with incompatible activities to varying effects (a brief summary is annexed) and by various procedures, though in each case with the general objective of avoiding erecting any insurmountable barrier between judges and society.
39. The CCJE considers that rules of professional conduct should require judges to avoid any activities liable to compromise the dignity of their office and to maintain public confidence in the judicial system by minimising the risk of conflicts of interest. To this end, they should refrain from any supplementary professional activity that would restrict their independence and jeopardise their impartiality. In this context, the CCJE endorses the provision of the European Charter on the Statute for Judges under which judges' freedom to carry out activities outside their judicial mandate "may not be limited except in so far as such outside activities are incompatible with confidence in, or the impartiality or the independence of a judge, or his or her required availability to deal attentively and within a reasonable period with the matters put before him or her" (para. 4.2). The European Charter also recognises the right of judges to join professional organisations and a right of expression (para. 1.7) in order to avoid "excessive rigidity" which might set up barriers between society and the judges themselves (para. 4.3). It is however essential that judges continue to devote the most of their working time to their role as judges, including associated activities, and not be tempted to devote excessive attention to extra-judicial activities. There is obviously a heightened risk of excessive attention being devoted to such activities, if they are permitted for reward. The precise line between what is permitted and not permitted has however to be drawn on a country by country basis, and there is a role here also for such a body or person as recommended in paragraph 29 above.

### **d. Impartiality and judges' relations with the media**

40. There has been a general trend towards greater media attention focused on judicial matters, especially in the criminal law field, and in particular in certain west European countries. Bearing in mind the links which may be forged between judges and the media, there is a danger that the way judges conduct themselves could be influenced by journalists. The CCJE points out in this connection that in its Opinion No. 1 (2001) it stated that, while the freedom of the press was a pre-eminent principle, the judicial process had to be protected from undue external influence. Accordingly, judges have to show circumspection in their relations with the press and be able to maintain their independence and impartiality, refraining from any personal exploitation of any relations with journalists and any unjustified comments on the cases they are dealing with. The right of the public to information is nevertheless a fundamental principle resulting from Article 10 of the European Convention on Human Rights. It implies that the judge answers the legitimate expectations of the citizens by clearly motivated decisions. Judges should also be free to prepare a summary or communiqué setting up the tenor or clarifying the significance of their judgements for the public. Besides, for the countries where the judges are involved in criminal investigations, it is advisable for them to reconcile the necessary restraint relating to the cases they are dealing with, with the right to information. Only under such conditions can judges freely fulfil their role, without fear of media pressure. The CCJE has noted with interest the practice in force in certain countries of appointing a judge with communication responsibilities or a spokesperson to deal with the press on subjects of interest to the public.

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<sup>4</sup> For a detailed analysis of incompatibilities, see the Communication by Jean-Pierre Atthenont, presented at the seminar organised by the Council of Europe on the statute for judges (Bucharest, 19-21 March 1997) and the Communication by Pierre Cornu presented at a seminar organised by the Council of Europe on the statute for judges (Chisinau, 18-19 September 1997).

## 2) How should standards of conduct be formulated?

41. Continental judicial tradition strongly supports the idea of codification. Several countries have already established codes of conduct in the public sector (police), in regulated professions (solicitors, doctors) and in the private sector (press). Codes of ethics have also recently been introduced for judges, particularly in East European countries, following the example of the United States.
42. The oldest is the Italian "Ethical Code" adopted on 7 May 1994 by the Italian Judges' Association, a professional organisation of the judiciary. The word "code" is inappropriate, since it consists of 14 articles which cover the conduct of judges (including presidents of courts) in its entirety and includes public prosecutors<sup>5</sup>. It is clear that the code does not consist of disciplinary or criminal rules, but is a self-regulatory instrument generated by the judiciary itself. Article 1 sets out the general principle: "In social life, the judge must behave with dignity and propriety and remain attentive to the public interest. Within the framework of his functions and in each professional act he must be inspired by the values of personal disinterest, independence and impartiality".
43. Other countries, such as Estonia, Lithuania, Ukraine, Moldova, Slovenia, the Czech Republic and Slovakia, have a "judicial code of ethics" or "principles of conduct" adopted by representative assemblies of judges and distinct from disciplinary rules.
44. Codes of conduct have some important benefits: firstly, they help judges to resolve questions of professional ethics, giving them autonomy in their decision-making and guaranteeing their independence from other authorities. Secondly, they inform the public about the standards of conduct it is entitled to expect from judges. Thirdly, they contribute to give the public assurance that justice is administered independently and impartially.
45. However, the CCJE points out that independence and impartiality cannot be protected solely by principles of conduct and that numerous statutory and procedural rules should also play a part. Standards of professional conduct are different from statutory and disciplinary rules. They express the profession's ability to reflect its function in values matching public expectations by way of counterpart to the powers conferred on it. These are self-regulatory standards which involve recognising that the application of the law is not a mechanical exercise, involves real discretionary power and places judges in a relationship of responsibility to themselves and to citizens.
46. Codes of professional conduct also create a number of problems. For example, they can give the impression that they contain all the rules and that anything not prohibited must be admissible. They tend to oversimplify situations and, finally, they create the impression that standards of conduct are fixed for a certain period of time, whereas in fact they are constantly evolving. The CCJE suggests that it is desirable to prepare and speak of a "statement of standards of professional conduct", rather than a code.
47. The CCJE considers that the preparation of such statements is to be encouraged in each country, even though they are not the only way of disseminating rules of professional conduct, since:
  - appropriate basic and further training should play a part in the preparation and dissemination of rules of professional conduct<sup>6</sup>;
  - in States where they exist, judicial inspectorates, on the basis of their observations of judges' behaviour, could contribute to the development of ethical thinking; their views could be made known through their annual reports;
  - through its decisions, the independent authority described in the European Charter on the Statute for Judges, if it is involved in disciplinary proceedings, outlines judges' duties and obligations; if these decisions were published in an appropriate form, awareness of the values underlying them could be raised more effectively;

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<sup>5</sup> It covers relations with individuals, the duty of competence, the use of public resources, the use of professional information, relations with the press, membership of associations, the image of impartiality and independence, the obligation to act correctly with collaborators, conduct in office and outside and the duties of presiding judges.

<sup>6</sup> In his summary report, presented following the first meeting of the Lisbon Network, Daniel Ludet stressed that training should offer a link and encourage discussion of judges' professional practices and the ethical principles on which they are based (see *Training of judges and prosecutors in matters relating to their professional obligations and ethics*. 1st meeting of the members of the network for the exchange of information on the training of judges and prosecutors, Council of Europe Publishing).

- high-level groups, consisting of representatives of different interests involved in the administration of justice, could be set up to consider ethical issues and their conclusions disseminated;
  - professional associations should act as forums for the discussion of judges' responsibilities and deontology; they should provide wide dissemination of rules of conduct within judicial circles.
48. The CCJE would like to stress that, in order to provide the necessary protection of judges' independence, any statement of standards of professional conduct should be based on two fundamental principles:
- i) firstly, it should address basic principles of professional conduct. It should recognise the general impossibility of compiling complete lists of pre-determined activities which judges are forbidden from pursuing; the principles set out should serve as self-regulatory instruments for judges, i.e. general rules that guide their activities. Further, although there is both an overlap and an interplay, principles of conduct should remain independent of the disciplinary rules applicable to judges in the sense that failure to observe one of such principles should not of itself constitute a disciplinary infringement or a civil or criminal offence;
  - ii) secondly, principles of professional conduct should be drawn up by the judges themselves. They should be self-regulatory instruments generated by the judiciary itself, enabling the judicial authority to acquire legitimacy by operating within a framework of generally accepted ethical standards. Broad consultation should be organised, possibly under the aegis of a person or body as stated in paragraph 29, which could also be responsible for explaining and interpreting the statement of standards of professional conduct.

### **3) Conclusions on the standards of conduct**

49. The CCJE is of the opinion that:
- i) judges should be guided in their activities by principles of professional conduct,
  - ii) such principles should offer judges guidelines on how to proceed, thereby enabling them to overcome the difficulties they are faced with as regards their independence and impartiality,
  - iii) the said principles should be drawn up by the judges themselves and be totally separate from the judges' disciplinary system,
  - iv) it is desirable to establish in each country one or more bodies or persons within the judiciary to advise judges confronted with a problem related to professional ethics or compatibility of non judicial activities with their status.
50. As regards the rules of conduct of every judge, the CCJE is of the opinion that:
- i) each individual judge should do everything to uphold judicial independence at both the institutional and the individual level,
  - ii) judges should behave with integrity in office and in their private lives,
  - iii) they should at all times adopt an approach which both is and appears impartial,
  - iv) they should discharge their duties without favouritism and without actual or apparent prejudice or bias,
  - v) their decisions should be reached by taking into account all considerations material to the application of the relevant rules of law, and excluding from account all immaterial considerations,
  - vi) they should show the consideration due to all persons taking part in the judicial proceedings or affected by these proceedings,
  - vii) they should discharge their duties with due respect for the equal treatment of parties, by avoiding any bias and any discrimination, maintaining a balance between the parties and ensuring each a fair hearing,
  - viii) they should show circumspection in their relations with the media, maintain their independence and impartiality by refraining from any personal exploitation of any relations with the media and from making any unjustified comments on the cases they are dealing with,
  - ix) they should ensure they maintain a high degree of professional competence,
  - x) they should have a high degree of professional awareness and be subject to an obligation of diligence in order to comply with the requirement to deliver their judgments in a reasonable time,

- xi) they should devote the most of their working time to their judicial functions, including associated activities,
- xii) they should refrain from any political activity which could compromise their independence and cause detriment to their image of impartiality.

## **B. CRIMINAL, CIVIL AND DISCIPLINARY LIABILITY OF JUDGES**

### **4) What criminal, civil and disciplinary liability should apply to judges?**

51. The corollary of the powers and the trust conferred by society upon judges is that there should be some means of holding judges responsible, and even removing them from office, in cases of misbehaviour so gross as to justify such a course. The need for caution in the recognition of any such liability arises from the need to maintain judicial independence and freedom from undue pressure. Against this background, the CCJE considers in turn the topics of criminal, civil and disciplinary liability. In practice, it is the potential disciplinary liability of judges which is most important.

#### **a. Criminal liability**

52. Judges who in the conduct of their office commit what would in any circumstances be regarded as crimes (e.g. accept bribes) cannot claim immunity from ordinary criminal process. The answers to questionnaire show that in some countries even well-intentioned judicial failings could constitute crimes. Thus, in Sweden and Austria judges (being assimilated to other public functionaries) can be punished (e.g. by fine) in some cases of gross negligence (e.g. involving putting or keeping someone in prison for too long).
53. Nevertheless, while current practice does not therefore entirely exclude criminal liability on the part of judges for unintentional failings in the exercise of their functions, the CCJE does not regard the introduction of such liability as either generally acceptable or to be encouraged. A judge should not have to operate under the threat of a financial penalty, still less imprisonment, the presence of which may, however sub-consciously, affect his judgment.
54. The vexatious pursuit of criminal proceedings against a judge whom a litigant dislikes has become common in some European states. The CCJE considers that in countries where a criminal investigation or proceedings can be started at the instigation of a private individual, there should be a mechanism for preventing or stopping such investigation or proceedings against a judge relating to the purported performance of his or her office where there is no proper case for suggesting that any criminal liability exists on the part of the judge.

#### **b. Civil liability**

55. Similar considerations to those identified in paragraph 53 apply to the imposition on judges personally of civil liability for the consequences of their wrong decisions or for other failings (e.g. excessive delay). As a general principle, judges personally should enjoy absolute freedom from liability in respect of claims made directly against them relating to their exercise in good faith of their functions. Judicial errors, whether in respect of jurisdiction or procedure, in ascertaining or applying the law or in evaluating evidence, should be dealt with by an appeal; other judicial failings which cannot be rectified in this way (including e.g. excessive delay) should, at most, lead to a claim by the dissatisfied litigant against the State. That the state may, in some circumstances, be liable under the European Convention of Human Rights, to compensate a litigant, is a different matter, with which this opinion is not directly concerned.
56. There are however European countries, in which judges may incur civil liability for grossly, wrong decisions or other gross failings<sup>7</sup>, particularly at the instance of the state, after the dissatisfied litigant has established a right to compensation against the state. Thus, for example, in the Czech Republic the state may be held liable for damages caused by a judge's illegal decision or incorrect judicial action, but may claim recourse from the judge if and after the judge's misconduct has been established in criminal or disciplinary proceedings. In Italy, the state may, under certain conditions, claim to be reimbursed by a judge who has rendered it liable by either wilful deceit or "gross negligence", subject in the latter case to a potential limitation of liability.

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<sup>7</sup> Merely because the State has been held liable for excessive delay, it by no means follows, of course, that any individual judge is at fault. The CCJE repeats what it said in paragraph 27 above.

57. The European Charter on the statute for judges contemplates the possibility of recourse proceedings of this nature in paragraph 5.2 of its text - with the safeguard that prior agreement should be obtained from an independent authority with substantial judicial representation, such as that commended in paragraph 43 of the CCJE's opinion no. 1 (2001). The commentary to the Charter emphasises in its paragraph 5.2 the need to restrict judges' civil liability to (a) reimbursing the state for (b) "gross and inexcusable negligence" by way of (c) legal proceedings (d) requiring the prior agreement of such an independent authority. The CCJE endorses all these points, and goes further. The application of concepts such as gross or inexcusable negligence is often difficult. If there was any potential for a recourse action by the state, the judge would be bound to have to become closely concerned at the stage when a claim was made against the state. The CCJE's conclusion is that it is not appropriate for a judge to be exposed, in respect of the purported exercise of judicial functions, to any personal liability, even by way of reimbursement of the state, except in a case of wilful default.

### c. Disciplinary liability

58. All legal systems need some form of disciplinary system, although it is evident from the answers given by different member states to the questionnaires that the need is much more directly felt in some, as opposed to other, member states. There is in this connection a basic distinction between common-law countries, with smaller professional judiciaries appointed from the ranks of experienced practitioners, and civil law countries with larger and on average younger, career judiciaries.
59. The questions which arise are:
- i) What conduct is it that should render a judge liable to disciplinary proceedings?
  - ii) By whom and how should such proceedings be initiated?
  - iii) By whom and how should they be determined?
  - iv) What sanctions should be available for misconduct established in disciplinary proceedings?
60. As to question (i), the first point which the CCJE identifies (repeating in substance a point made earlier in this opinion) is that it is incorrect to correlate breaches of proper professional standards with misconduct giving rise potentially to disciplinary sanctions. Professional standards, which have been the subject of the first part of this opinion, represent best practice, which all judges should aim to develop and towards which all judges should aspire. It would discourage the future development of such standards and misunderstand their purpose to equate them with misconduct justifying disciplinary proceedings. In order to justify disciplinary proceedings, misconduct must be serious and flagrant, in a way which cannot be posited simply because there has been a failure to observe professional standards set out in guidelines such as those discussed in the first part of this opinion.<sup>8</sup>
61. This is not to say that breach of the professional standards identified in this opinion may not be of considerable relevance, where it is alleged that there has been misconduct sufficient to justify and require disciplinary sanction. Some of the answers to questionnaires recognise this explicitly: for example, professional standards are described as having "a certain authority" in disciplinary proceedings in Lithuania and as constituting a way "of helping the judge hearing disciplinary proceedings by illuminating the provisions of the law on judges" in Estonia. They have also been used in disciplinary proceedings in Moldova. (On the other hand, the Ukrainian and Slovakian answers deny that there is any relationship between the two).
62. In some countries, separate systems have even been established to try to regulate or enforce professional standards. In Slovenia, failure to observe such standards may attract a sanction before a "Court of Honour" within the Judges' Association, and not before the judges' disciplinary body. In the Czech Republic, in a particularly serious situation of non-observance of the rules of professional conduct, a judge may be excluded from the "Judges' Union", which is the source of these principles.
63. The second point which the CCJE identifies is that it is for each State to specify by law what conduct may give rise to disciplinary action. The CCJE notes that in some countries attempts have been made to specify in detail all conduct that might give grounds for disciplinary proceedings leading to some form of sanction. Thus, the Turkish law on Judges and Prosecutors specifies gradations of offence (including for example staying away from work without excuse for various lengths of period)

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<sup>8</sup> It was for these reasons that the CCJE Working Party, during and after its meeting with the United Nations Commissioner for Human Rights on 18<sup>th</sup> June 2002, qualified its otherwise substantially positive attitude to the Bangalore Code in its present draft form by disagreeing with the direct link which it drew between the principles of conduct which it stated and the subjects of complaints and discipline (see paragraph 2(iii) of Appendix V, doc. CCJE-GT (2002) 7): see the CCJE-GT's comments No. 1 (2002) on the Bangalore draft.

with matching gradations of sanction, ranging from a warning, through condemnation [i.e. reprimand], various effects on promotion to transfer and finally dismissal. Similarly, a recent 2002 law in Slovenia seeks to give effect to the general principle *nulla poena sine lege* by specifying 27 categories of disciplinary offence. It is, however, very noticeable in all such attempts that, ultimately, they all resort to general “catch-all” formulations which raise questions of judgment and degree. The CCJE does not itself consider that it is necessary (either by virtue of the principle *nulla poena sine lege* or on any other basis) or even possible to seek to specify in precise or detailed terms at a European level the nature of all misconduct that could lead to disciplinary proceedings and sanctions. The essence of disciplinary proceedings lies in conduct fundamentally contrary to that to be expected of a professional in the position of the person who has allegedly misconducted him or herself.

64. At first sight, Principle VI.2 of Recommendation No. R (94) 12 might be thought to suggest that precise grounds for disciplinary proceedings should always “be defined” in advance “in precise terms by the law”. The CCJE fully accepts that precise reasons must be given for any disciplinary action, as and when it is proposed to be or is brought. But, as it has said, it does not conceive it to be necessary or even possible at the European level to seek to define all such potential reasons in advance in other terms than the general formulations currently adopted in most European countries. In that respect therefore, the CCJE has concluded that the aim stated in paragraph 60 c) of its Opinion No. 1 (2001) cannot be pursued at a European level.
65. Further definition by individual member States by law of the precise reasons for disciplinary action as recommended by Recommendation No. R (94) 12 appears, however, to be desirable. At present, the grounds for disciplinary action are usually stated in terms of great generality.
66. The CCJE next considers question (ii): by whom and how should disciplinary proceedings be initiated? Disciplinary proceedings are in some countries brought by the Ministry of Justice, in others they are instigated by or in conjunction with certain judges or councils of judges or prosecutors, such as the First President of the Court of Appeal in France or the General Public Prosecutor in Italy. In England, the initiator is the Lord Chancellor, but he has agreed only to initiate disciplinary action with the concurrence of the Lord Chief Justice.
67. An important question is what if any steps can be taken by persons alleging that they have suffered by reason of a judge's professional error. Such persons must have the right to bring any complaint they have to the person or body responsible for initiating disciplinary action. But they cannot have a right themselves to initiate or insist upon disciplinary action. There must be a filter, or judges could often find themselves facing disciplinary proceedings, brought at the instance of disappointed litigants.
68. The CCJE considers that the procedures leading to the initiation of disciplinary action need greater formalisation. It proposes that countries should envisage introducing a specific body or person in each country with responsibility for receiving complaints, for obtaining the representations of the judge concerned upon them and for deciding in their light whether or not there is a sufficient case against the judge to call for the initiation of disciplinary action, in which case it would pass the matter to the disciplinary authority.
69. The next question (iii) is: by whom and how should disciplinary proceedings be determined? A whole section of the United Nations Basic Principles is devoted to discipline, suspension and removal. Article 17 recognises judges' "right to a fair hearing". Under Article 19, "all disciplinary (...) proceedings shall be determined in accordance with established standards of judicial conduct". Finally, Article 20 sets out the principle that "decisions in disciplinary, suspension or removal proceedings should be subject to an independent review". At the European level, guidance is provided in Principle VI of Recommendation No. R (94) 12, which recommends that disciplinary measures should be dealt with by "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" and that judges should in this connection benefit, at the least, by protections equivalent to those afforded under Article 6.1 of the Convention on Human Rights. Further, the CCJE emphasises in this context that disciplinary measures include any measures adversely affecting a judge's status or career, including transfer of court, loss of promotion rights or pay.

70. The replies to the questionnaire show that, in some countries, discipline is ensured by courts specialising in cases of this type: the disciplinary committee of the Supreme Court (Estonia, Slovenia - where each level is represented). In Ukraine, there is a committee including judges of the same level of jurisdiction as the judge concerned. In Slovakia, there are now two tiers of committee, one of three judges, the second of five Supreme Court judges. In Lithuania, there is a committee of judges from the various tiers of general jurisdiction and administrative courts. In some countries, judgment is given by a Judicial Council, sitting as a disciplinary court (Moldova, France, and Portugal).<sup>9</sup>
71. The CCJE has already expressed the view that disciplinary proceedings against any judge should only be determined by an independent authority (or "tribunal") operating procedures which guarantee full rights of defence - see para. 60(b) of CCJE Opinion No. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges. It also considers that the body responsible for appointing such a tribunal can and should be the independent body (with substantial judicial representation chosen democratically by other judges) which, as the CCJE advocated in paragraph 46 of its first Opinion, should generally be responsible for appointing judges. That in no way excludes the inclusion in the membership of a disciplinary tribunal of persons other than judges (thus averting the risk of corporatism), always provided that such other persons are not members of the legislature, government or administration.
72. In some countries, the initial disciplinary body is the highest judicial body (the Supreme Court). The CCJE considers that the arrangements regarding disciplinary proceedings in each country should be such as to allow an appeal from the initial disciplinary body (whether that is itself an authority, tribunal or court) to a court.
73. The final question (iv) is: what sanctions should be available for misconduct established in disciplinary proceedings? The answers to questionnaire reveal wide differences, no doubt reflecting the different legal systems and exigencies. In common law systems, with small, homogeneous judiciaries composed of senior and experienced practitioners, the only formal sanction evidently found to be necessary (and then only as a remote back-up possibility) is the extreme measure of removal, but informal warnings or contact can prove very effective. In other countries, with larger, much more disparate and in some cases less experienced judiciaries, a gradation of formally expressed sanctions is found appropriate, sometimes even including financial penalties.
74. The European Charter on the Statute for Judges (Article 5.1) states that "the scale of sanctions which may be imposed is set out in the statute and must be subject to the principle of proportionality". Some examples of possible sanctions appear in Recommendation No. R (94) 12 (Principle VI.1). The CCJE endorses the need for each jurisdiction to identify the sanctions permissible under its own disciplinary system, and for such sanctions to be, both in principle and in application, proportionate. But it does not consider that any definitive list can or should be attempted at the European level.

## **5) Conclusions on liability**

75. As regards criminal liability, the CCJE considers that:
- i) judges should be criminally liable in ordinary law for offences committed outside their judicial office;
  - ii) criminal liability should not be imposed on judges for unintentional failings in the exercise of their functions.
76. As regards civil liability, the CCJE considers that, bearing in mind the principle of independence:
- i) the remedy for judicial errors (whether in respect of jurisdiction, substance or procedure) should lie in an appropriate system of appeals (whether with or without permission of the court);

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<sup>9</sup> In England, the Lord Chancellor is responsible for initiating and deciding disciplinary action. By agreement disciplinary action is initiated only with the concurrence of the Lord Chief Justice, and thereafter (unless the judge concerned waives this) another judge of appropriate standing, nominated by the Lord Chief Justice, is appointed to investigate the facts and to report, with recommendations. If the Lord Chief Justice concurs the Lord Chancellor may then refer the matter to Parliament (in the case of higher tier judges) or remove a lower tier judge from office, or take or authorise any other disciplinary action.

- ii) any remedy for other failings in the administration of justice (including for example excessive delay) lies only against the state;
- iii) it is not appropriate for a judge to be exposed, in respect of the purported exercise of judicial functions, to any personal liability, even by way of reimbursement of the state, except in a case of wilful default.

77. As regards disciplinary liability, the CCJE considers that:

- i) in each country the statute or fundamental charter applicable to judges should define, as far as possible in specific terms, the failings that may give rise to disciplinary sanctions as well as the procedures to be followed;
- ii) as regard the institution of disciplinary proceedings, countries should envisage introducing a specific body or person with responsibility for receiving complaints, for obtaining the representations of the judge and for considering in their light whether or not there is a sufficient case against the judge to call for the initiation of such proceedings;
- iii) any disciplinary proceedings initiated should be determined by an independent authority or tribunal, operating a procedure guaranteeing full rights of defence;
- iv) when such authority or tribunal is not itself a court, then its members should be appointed by the independent authority (with substantial judicial representation chosen democratically by other judges) advocated by the CCJE in paragraph 46 of its Opinion N° 1 (2001);
- v) the arrangements regarding disciplinary proceedings in each country should be such as to allow an appeal from the initial disciplinary body (whether that is itself an authority, tribunal or court) to a court;
- vi) the sanctions available to such authority in a case of a proven misconduct should be defined, as far as possible in specific terms, by the statute or fundamental charter of judges, and should be applied in a proportionate manner.



## Opinion No. 4 (2003)

of the Consultative Council of European Judges (CCJE)  
to the Committee of Ministers of the Council of Europe

### Appropriate initial and in-service training for judges at national and european levels

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#### Introduction

1. At a time when we are witnessing an increasing attention being paid to the role and significance of the judiciary, which is seen as the ultimate guarantor of the democratic functioning of institutions at national, European and international levels, the question of the training of prospective judges before they take up their posts and of in-service training is of particular importance (see Opinion of the CCJE N° 1 (2001), paragraphs 10-13 and Opinion N° 3 (2002), paragraphs 25 and 50.ix).
2. The independence of the judiciary confers rights on judges of all levels and jurisdictions, but also imposes ethical duties. The latter include the duty to perform judicial work professionally and diligently, which implies that they should have great professional ability, acquired, maintained and enhanced by the training which they have a duty, as well as a right, to undergo.
3. It is essential that judges, selected after having done full legal studies, receive detailed, in-depth, diversified training so that they are able to perform their duties satisfactorily.
4. Such training is also a guarantee of their independence and impartiality, in accordance with the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms.
5. Lastly, training is a prerequisite if the judiciary is to be respected and worthy of respect. The trust citizens place in the judicial system will be strengthened if judges have a depth and diversity of knowledge which extend beyond the technical field of law to areas of important social concern, as well as courtroom and personal skills and understanding enabling them to manage cases and deal with all persons involved appropriately and sensitively. Training is in short essential for the objective, impartial and competent performance of judicial functions, and to protect judges from inappropriate influences.
6. There are great differences among European countries with respect to the initial and in-service training of judges. These differences can in part be related to particular features of the different judicial systems, but in some respects do not seem to be inevitable or necessary. Some countries offer lengthy formal training in specialised establishments, followed by intensive further training. Others provide a sort of apprenticeship under the supervision of an experienced judge, who imparts knowledge and professional advice on the basis of concrete examples, showing what approach to take and avoiding any kind of didacticism. Common law countries rely heavily on a lengthy professional experience, commonly as advocates. Between these possibilities, there is a whole range of countries where training is to varying degrees organised and compulsory.
7. Regardless of the diversity of national institutional systems and the problems arising in certain countries, training should be seen as essential in view of the need to improve not only the skills of those in the judicial public service but also the very functioning of that service.
8. The importance of the training of judges is recognised in international instruments such as the UN Basic Principles on the Independence of the Judiciary, adopted in 1985, and Council of Europe texts adopted in 1994 (Recommendation N° R (94) 12 on the independence, efficiency and role of judges) and 1998 (European Charter on the Statute for Judges) and was referred to in paragraph 11 of the CCJE's Opinion N° 1.

## I. The right to training and the legal level at which this right should be guaranteed

9. Constitutional principles should guarantee the independence and impartiality on which the legitimacy of judges depends, and judges for their part should ensure that they maintain a high degree of professional competence (see paragraph 50 (ix) of the CCJE Opinion N° 3).
10. In many countries the training of judges is governed by special regulations. The essential point is to include the need for training in the rules governing the status of judges; legal regulations should not detail the precise content of training, but entrust this task to a special body responsible for drawing up the curriculum, providing the training and supervising its provision.
11. The State has a duty to provide the judiciary or other independent body responsible for organising and supervising training with the necessary means, and to meet the costs incurred by judges and others involved.
12. The CCJE therefore recommends that, in each country, the legislation on the status of judges should provide for the training of judges.

## II. The authority responsible for training

13. The European Charter on the Statute for Judges (paragraph 2.3) states that any authority responsible for supervising the quality of the training programme should be independent of the Executive and the Legislature and that at least half its members should be judges. The Explanatory Memorandum also indicates that the training of judges should not be limited to technical legal training, but should also take into account that the nature of the judicial office often requires the judge to intervene in complex and difficult situations.
14. This highlights the key importance attaching to the independence and composition of the authority responsible for training and its content. This is a corollary of the general principle of judicial independence.
15. Training is a matter of public interest, and the independence of the authority responsible for drawing up syllabuses and deciding what training should be provided must be preserved.
16. The judiciary should play a major role in or itself be responsible for organising and supervising training. Accordingly, and in keeping with the recommendations of the European Charter on the Statute for Judges, the CCJE advocates that these responsibilities should, in each country, be entrusted, not to the Ministry of Justice or any other authority answerable to the Legislature or the Executive, but to the judiciary itself or another independent body (including a Judicial Service Commission). Judges' associations can also play a valuable role in encouraging and facilitating training, working in conjunction with the judicial or other body which has direct responsibility.
17. In order to ensure a proper separation of roles, the same authority should not be directly responsible for both training and disciplining judges. The CCJE therefore recommends that, under the authority of the judiciary or other independent body, training should be entrusted to a special autonomous establishment with its own budget, which is thus able, in consultation with judges, to devise training programmes and ensure their implementation.
18. Those responsible for training should not also be **directly** responsible for appointing or promoting judges. If the body (i.e. a judicial service commission) referred to in the CCJE's Opinion N° 1, paragraphs 73 (3), 37, and 45, **is competent for training** and appointment or promotion, a clear separation should be provided between its branches responsible for these tasks.
19. In order to shield the establishment from inappropriate outside influence, the CCJE recommends that the managerial staff and trainers of the establishment should be appointed by the judiciary or other independent body responsible for organising and supervising training.
20. It is important that the training is carried out by judges and by experts in each discipline. Trainers should be chosen from among the best in their profession and carefully selected by the body responsible for training, taking into account their knowledge of the subjects being taught and their teaching skills.

21. When judges are in charge of training activities, it is important that these judges preserve contact with court practice.
  22. Training methods should be determined and reviewed by the training authority, and there should be regular meetings for trainers to enable them to share their experiences and enhance their approach.
- III. Initial training**
- a. Should training be mandatory?**
23. While it is obvious that judges who are recruited at the start of their professional career need to be trained, the question arises whether this is necessary where judges are selected from among the best lawyers, who are experienced, as (for instance) in Common Law countries.
  24. In the CCJE's opinion, both groups should receive initial training: the performance of judicial duties is a new profession for both, and involves a particular approach in many areas, notably with respect to the professional ethics of judges, procedure, and relations with all persons involved in court proceedings.
  25. On the other hand, it is important to take the specific features of recruitment methods into account so as to target and adapt the training programmes appropriately: experienced lawyers need to be trained only in what is required for their new profession. In some small countries with a very small judiciary, local training opportunities may be more limited and informal, but such countries in particular may benefit from shared training opportunities with other countries.
  26. The CCJE therefore recommends mandatory initial training by programmes appropriate to appointees' professional experience.
- b. The initial training programme**
27. The initial training syllabus and the intensiveness of the training will differ greatly according to the chosen method of recruiting judges. Training should not consist only of instruction in the techniques involved in the handling of cases by judges, but should also take into consideration the need for social awareness and an extensive understanding of different subjects reflecting the complexity of life in society. In addition, the opening up of borders means that future judges need to be aware that they are European judges and be more aware of European issues.
  28. In view of the diversity of the systems for training judges in Europe, the CCJE recommends:
    - i. that all appointees to judicial posts should have or acquire, before they take up their duties, extensive knowledge of substantive national and international law and procedure;
    - ii. that training programmes more specific to the exercise of the profession of judge should be decided on by the establishment responsible for training, and by the trainers and judges themselves;
    - iii. that these theoretical and practical programmes should not be limited to techniques in the purely legal fields but should also include training in ethics and an introduction to other fields relevant to judicial activity, such as management of cases and administration of courts, information technology, foreign languages, social sciences and alternative dispute resolution (ADR);
    - iv. that the training should be pluralist in order to guarantee and strengthen the open-mindedness of the judge;
    - v. that, depending upon the existence and length of previous professional experience, training should be of significant length in order to avoid its being purely a matter of form.
  29. The CCJE recommends the practice of providing for a period of training common to the various legal and judicial professions (for instance, lawyers and prosecutors in countries where they perform duties separate from those of judges). This practice is likely to foster better knowledge and reciprocal understanding between judges and other professions.
  30. The CCJE has also noted that many countries make access to judicial posts conditional upon prior professional experience. While it does not seem possible to impose such a model everywhere, and while the adoption of a system combining various types of recruitment may also have the advantage of diversifying judges' backgrounds, it is important that the period of initial training should include, in

the case of candidates who have come straight from university, substantial training periods in a professional environment (lawyers' practices, companies, etc).

#### **IV. In-service training**

31. Quite apart from the basic knowledge they need to acquire before they take up their posts, judges are "condemned to perpetual study and learning" (see report of R. Jansen "How to prepare judges to become well-qualified judges in 2003", doc. CCJE-GT (2003) 3).
32. Such training is made indispensable not only by changes in the law, technology and the knowledge required to perform judicial duties but also by the possibility in many countries that judges will acquire new responsibilities when they take up new posts. In-service programmes should therefore offer the possibility of training in the event of career changes, such as a move between criminal and civil courts; the assumption of specialist jurisdiction (e.g. in a family, juvenile or social court) and the assumption of a post such as the presidency of a chamber or court. Such a move or the assumption of such a responsibility may be made conditional upon attendance on a relevant training programme.
33. While it is essential to organise in-service training, since society has the right to benefit from a well trained judge, it is also necessary to disseminate a culture of training in the judiciary.
34. It is unrealistic to make in-service training mandatory in every case. The fear is that it would then become bureaucratic and simply a matter of form. The suggested training must be attractive enough to induce judges to take part in it, as participation on a voluntary basis is the best guarantee for the effectiveness of the training. This should also be facilitated by ensuring that every judge is conscious that there is an ethical duty to maintain and update his or her knowledge.
35. The CCJE also encourages in the context of continuous training collaboration with other legal professional bodies responsible for continuous training in relation to matters of common interest (e.g. new legislation).
36. It further stresses the desirability of arranging continuous judicial training in a way which embraces all levels of the judiciary. Whenever feasible, the different levels should all be represented at the same sessions, giving the opportunity for exchange of views between them. This assists to break-down hierarchical tendencies, keeps all levels of the judiciary informed of each other's problems and concerns, and promotes a more cohesive and consistent approach throughout the judiciary.
37. The CCJE therefore recommends:
  - i. that the in-service training should normally be based on the voluntary participation of judges;
  - ii. that there may be mandatory in-service training only in exceptional cases; examples might (if the judicial or other body responsible so decided) include when a judge takes up a new post or a different type of work or functions or in the event of fundamental changes in legislation;
  - iii. that training programmes should be drawn up under the authority of the judicial or other body responsible for initial and in-service training and by trainers and judges themselves;
  - iv. that those programmes, implemented under the same authority, should focus on legal and other issues relating to the functions performed by judges and correspond to their needs (see paragraph 27 above);
  - v. that the courts themselves should encourage their members to attend in-service training courses;
  - vi. that the programmes should take place in and encourage an environment, in which members of different branches and levels of the judiciary may meet and exchange their experiences and achieve common insights;
  - vii. that, while training is an ethical duty for judges, member states also have a duty to make available to judges the financial resources, time and other means necessary for in-service training.

#### **V. Assessment of training**

38. In order continuously to improve the quality of judicial training, the organs responsible for training should conduct frequent assessments of programmes and methods. An important role in this process should be played by opinions expressed by all participants to training initiatives, which may be encouraged through appropriate means (answers to questionnaires, interviews).

39. While there is no doubt that performance of trainers should be monitored, the evaluation of the performance of participants in judicial training initiatives is more questionable. The in-service training of judges may be truly fruitful if their free interaction is not influenced by career considerations.
40. In countries that train judges at the start of their professional career, the CCJE considers evaluation of the results of initial training to be necessary in order to ensure the best appointments to the judiciary. In contrast, in countries that choose judges from the ranks of experienced lawyers, objective evaluation methods are applied before appointment, with training occurring only after candidates have been selected, so that in those countries evaluation during initial training is not appropriate.
41. It is nevertheless important, in the case of candidates subject to an appraisal, that they should enjoy legal safeguards that protect them against arbitrariness in the appraisal of their work. In addition, in the case of States arranging for the provisional appointment of judges, the removal of these from office at the end of the training period should take place with due regard for the safeguards applicable to judges when their removal from office is envisaged.
42. In view of the above, the CCJE recommends:
- i. that training programmes and methods should be subject to frequent assessments by the organs responsible for judicial training;
  - ii. that, in principle, participation in judges' training initiatives should not be subject to qualitative assessment; their participation in itself, objectively considered, may however be taken into account for professional evaluation of judges;
  - iii. that quality of performance of trainees should nonetheless be evaluated, if such evaluation is made necessary by the fact that, in some systems, initial training is a phase of the recruitment process.

## **VI. The European training of judges**

43. Whatever the nature of their duties, no judge can ignore European law, be it the European Convention on Human Rights or other Council of Europe Conventions, or if appropriate, the Treaty of the European Union and the legislation deriving from it, because they are required to apply it directly to the cases that come before them.
44. In order to promote this essential facet of judges' duties, the CCJE considers that member states, after strengthening the study of European law in universities, should also promote its inclusion in the initial and in-service training programmes proposed for judges, with particular reference to its practical applications in day-to-day work.
45. It also recommends reinforcing the European network for the exchange of information between persons and entities in charge of the training of judges (Lisbon Network), which promotes training on matters of common interest and comparative law, and that this training should cater for trainers as well as the judges themselves. The functioning of this Network can be effective only if every member state supports it, notably by establishing a body responsible for the training of judges, as set out in section II above, and by pan-European co-operation in this field.
46. Furthermore, the CCJE considers that the co-operation within other initiatives aiming at bringing together the judicial training institutions in Europe, in particular within the European Judicial Training Network, can effectively contribute to the greater coordination and harmonisation of the programmes and the methods of training of judges on the whole continent.



## Opinion No. 5 (2003)

of the Consultative Council of European Judges (CCJE)  
to the Committee of Ministers of the Council of Europe

### The law and practice of judicial appointments to the European court of human rights

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1. The CCJE in its 4<sup>th</sup> meeting in Strasbourg, 24-28 November 2003, took note of the report dated May 2003 of the International Center for the Legal Protection of Human Rights (Interights) on "Law and Practice of Appointments to the European Court of Human Rights".
2. The CCJE welcomes the conclusions and recommendations proposed by the report. It regards them as an important step towards implementing the recommendations contained in its Opinion No. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges, which the CCJE wishes to affirm, concerning:

- (a) the appointment process for judges on international courts, in particular paragraph 56 of that Opinion stating:

"The CCJE agreed that the importance for national legal systems and judges of the obligations resulting from international treaties such as the European Convention on Human Rights 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."

Paragraphs 37 and 45 advocate the intervention of an independent authority with substantial judicial representation in relation to all judicial appointments.

- (b) the tenure of office, in particular paragraphs 57 and 52 stating:

"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."

"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."

3. The objective criteria for appointment as a judge to the European Court of Human Rights are fixed in Article 21 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which states:

"The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence."

4. The CCJE which consists of national judges from the 45 members States of the Council of Europe, emphasises the fundamental importance which it attaches to the appointment to the European Court of Human Rights of judges who not only meet such criteria but are the best candidates available for such appointment. The integrity and reputation of the Court, and so also of the Convention, depends upon this.





# Opinion No. 6 (2004)

of the Consultative Council of European Judges (CCJE)  
to the Committee of Ministers of the Council of Europe

## Fair trial within a reasonable time and judge's role in trials taking into account alternative means of dispute settlement

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### INTRODUCTION

1. Over the years, management of proceedings by the courts in Europe has been evolving towards fuller consideration of the interests of court users. Practitioners have directed attention to ways of meeting the public's expectations that all who seek justice should not only have readier access to the courts but also benefit from enhanced effectiveness of the procedures applied and more reliable guarantees that rulings delivered will be enforced.
2. The essential instrument of this evolution is the European Convention on Human Rights (ECHR), the case-law of the European Court of Human Rights (the Court) being consulted in order to interpret and apply its provisions.
3. Article 6 of the ECHR in particular has generated a fund of procedural law common to the different European states and brought into being general principles which, above and beyond the wealth and diversity of the national systems, are intended to secure the right of access to a court, the right to obtain a decision within a reasonable time at the end of a fair and equitable procedure, and the right to obtain enforcement of any judgment delivered.
4. The right to a fair trial is tending to become a true substantive right for the citizens of Europe, one whose enforcement is ensured by the Court and subsequently the domestic courts, for example by compensating litigants whose cases are not tried within a reasonable time.
5. For a number of years the Council of Europe has shown a constant concern to improve the public's access to justice, as reflected in its various Resolutions and Recommendations on legal aid, the simplification of procedures, reducing the costs of proceedings, the use of new technologies, reducing the courts' workload and alternative means of settling disputes.
6. The Court itself ensures that governments abide by the provisions of Article 6 of the ECHR, for example by reminding them, that any person wishing to bring legal proceedings must have access to a court, and that no state interference with this prerogative, whether in fact or in law, is permissible.
7. The Consultative Council of European Judges (CCJE) has given thought to how judges might participate in this effort to guarantee access to rapid and effective settlement of disputes.
8. It recalls that the 1<sup>st</sup> European Conference of Judges on "Early settlement of disputes and the role of judges", held at the Council of Europe on 24 and 25 November 2003, revealed that no matter how interesting and useful alternative measures such as mediation or conciliation may be, confidence in the judicial institution remains an essential feature of democratic societies.
9. It is therefore important that, when dealing with the justice system, citizens should know that they are dealing with an efficient institution.
10. In this context, this Opinion revolves around (A) the question of access to justice (B) the quality of the justice system and its assessment, quantitative statistical data, monitoring procedures (C) the courts' workload and case management and (D) alternative dispute resolution with the emphasis on the judge's role in the implementation of the principles laid down in the ECHR and the case-law of the Court.

## **A. ACCESS TO JUSTICE**

11. Public access to justice presupposes delivery of suitable information on the functioning of the judicial system.
12. The CCJE considers that all moves to provide the public with such information are to be encouraged.
13. The public should in particular be made aware of the nature of proceedings which may be brought, their possible duration, their cost and the risks involved in case of wrongful use of legal channels. Information should also be provided concerning alternative means of settling disputes which may be offered to parties.
14. This general information to the public can be supplemented by more precise information concerning in particular some of the landmark decisions delivered by the courts and how long it takes for cases to be dealt with in the various courts.
15. Information on the functioning of the judicial system can originate from various sources, such as the Justice Department (publication of information booklets, websites, etc.), the welfare services and the public legal advice services organised by lawyers' associations as well as other sources.
16. The courts themselves should participate in disseminating the information, particularly when they have public relations services. Amongst the relevant ways of disseminating information are the Internet sites run by certain courts.
17. The CCJE recommends the development of education programmes including a description of the judicial system and offering visits to courts. It also perceives a need to publish citizens' guides enabling potential litigants to gain a better grasp of the functioning of the judicial institutions, while also informing them of their procedural rights before the courts. Lastly, it recommends the general use of computer technology in order to provide members of the public with the same type of information on the functioning of the courts, the means of access to justice, the principal decisions delivered, and the statistical results of the courts.
18. The CCJE positively encourages the adoption of a simplified and standardised format for the legal documents needed to initiate and proceed with court actions. The recommended simplification is particularly advisable for minor litigation, for disputes involving consumers, and for cases in which the determination of the points of law and of fact raises virtually no difficulties (settlement of debts). It further recommends developing the technology whereby litigants may obtain, via computer facilities, the necessary documents for bringing an action before a court and either they or their representatives may be put directly in touch with the courts.
19. The CCJE also recommends that litigants be fully informed, by lawyers and courts or tribunals, even before proceedings are instituted, as to the nature and the amount of the costs they will have to bear, and that they be given an indication of the foreseeable duration of the proceedings up to the judgment.
20. In its Opinion No. 2 (2001), paragraph 9, the CCJE identified the importance of adequate funding to the operation of any judicial system. The question arises how far litigants, or others before court, can or should be expected to contribute to such funding through court fees. The CCJE considers that the judicial system should not obstruct access to justice through excessive costs. An efficient system of justice is of benefit to the public at large, not merely to those who also happen to become involved in litigation. The rule of law is demonstrated and established by the courts' efficient operation and judgments; and this enables the public at large to regulate and conduct its affairs securely and with confidence.
21. A legal aid system should be organised by the State to enable everyone to enjoy access to justice. Such aid should cover not only court costs but also legal advice as to the wisdom or the necessity of bringing an action. It should not be reserved for the neediest persons but should also be available, at least in part, to those whose average income does not enable them to bear the cost of an action unaided.
22. This system of partial legal aid allows the number of beneficiaries to be increased while preserving a certain balance between the authorities' obligation to facilitate access to justice, and individual responsibility. The CCJE considers that a judge or another authority acting judicially, should be able

to take part in decisions concerning the grant of aid. If the authority required to rule on an application for legal aid is obliged to refuse it where the contemplated action appears manifestly inadmissible or ill-founded, it is indispensable, should action be brought by a litigant who has been refused aid, that the judge involved in the relevant decision should refrain from trying the case, for the sake of compliance with the duty of objective impartiality according to Article 6 of the ECHR.

23. The CCJE considers that legal aid should be financed by a public authority and covered by a special budget so that the corresponding expenses are not charged to the operating budget of the courts.
24. The provision of legal assistance to the parties is an important component of access to justice for litigants.
25. The CCJE notes, that in certain States, the intervention of a lawyer during the proceedings is not necessary. Other States draw distinctions according to the magnitude of the financial interests and the type of dispute or proceedings. The right for a litigant to plead his or her case before a court either personally or through the representative of his or her choice appears particularly suited to simplified proceedings, litigation of minor financial importance, and cases involving consumers.
26. Nonetheless, even in cases where there is no need to engage a lawyer at the outset, the CCJE considers that there should be provision enabling the judge, as an exceptional measure, to order the intervention of counsel if the case presents particular problems or if there is a major risk that the rights of the defence will be infringed. In that event, representation by a lawyer should have the support of an effective legal aid system.
27. Resolution (78) 8<sup>1</sup> states in paragraph 1 of the appendix that “no one should be prevented by economic obstacles from pursuing or defending his rights (...)”.
28. One must nonetheless guard against having the remuneration of lawyers and court officers fixed in such a way as to encourage needless procedural steps. Provision must also be made, pursuant to Recommendation No. R (84) 5<sup>2</sup> (principle 2-1 in the appendix), for sanctioning abuse of court procedure.
29. Legal aid is not the sole means of assisting access to justice. Other methods which can be used for this purpose include for instance an insurance for court costs, covering a party’s own court costs and/or any sum payable to the other party where the case is lost.
30. The CCJE does not intend to discuss in detail, in this Opinion, a number of other arrangements for access to justice, including the conditional fees arrangement or the fixed expenses arrangement.

**B. QUALITY OF THE JUSTICE SYSTEM AND ITS ASSESSMENT; QUANTITATIVE STATISTICAL DATA; MONITORING PROCEDURES**

31. The provision of justice involves not only the work of judges and other legal professionals; it encompasses a number of activities performed within judicial institutions by governmental agents and private citizens; its operation heavily relies on judicial infra-structures (buildings, equipment, support staff, etc). Therefore, quality of the justice system depends both on the quality of infra-structures, which may be measured with criteria similar to those employed for other public services, and on the ability of legal professionals (judges, but also lawyers, prosecutors and clerks); even today it is possible to measure the work of such professionals against the benchmarks of law and of judicial or professional practice and deontology.
32. However, since the growing demand for justice in most countries are faced with limitations of the budget for the justice system, theory and practice suggest the possibility to assess the quality of judicial activity, with reference also to social and economic efficiency, through criteria that are sometimes similar to those employed for other public services.
33. The CCJE notes that a number of problems arise when applying to justice assessment criteria that do not take into account its specificities. Although similar considerations may apply to the activities of

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<sup>1</sup> Resolution (78) 8 on legal aid and advice.

<sup>2</sup> Recommendation No R (84) 5 of the Committee of Ministers to member States on the principles of civil procedure designed to improve the functioning of justice.

other legal professionals, the CCJE discussed the implications of such an approach to judicial activity.

34. The CCJE strongly emphasises, first of all, that the evaluation of "quality" of the justice system, i.e. of the performance of the court system as a whole or of each individual court or local group of courts, should not be confused with the evaluation of the professional ability of every single judge. Professional evaluation of judges, especially when aiming at decisions influencing their status or career, is a task that has other purposes and should be performed on the basis of objective criteria with all guarantees for judicial independence (see Opinion No. 1 (2001) of the CCJE, especially paragraph 45).
35. The practice of some countries shows an overlap which the CCJE deems inappropriate, between quality assessment of justice and professional evaluation of a judge. This overlap is reflected in the way in which statistics are collected. In some countries statistics are kept for each individual judge, in the others the figures are for each court. All are likely to keep records of the number of cases dealt with, but the former system attaches that figure to individuals. Systems which assess judges statistically typically include a figure for the percentage of successful appeals.
36. Some countries consider the percentage of the decisions reversed on appeal as an indicator. An objective evaluation of the quality of judicial decisions may be one of the elements relevant for the professional assessment of a single judge, (but even in this context one should take into account the principle of judicial internal independence and the fact that reversal of decisions must be accepted as a normal outcome of appeal procedures, without any fault on the part of the first judge). However, the use of reversal rates as the only or even necessarily an important indicator to assess the quality of the judicial activity seems inappropriate to the CCJE. Among several aspects that could be discussed with reference to this problem, the CCJE underlines that it is a feature of the justice system based on "procedures", that the quality of the outcome of a single case depends heavily on the quality of the previous procedural steps (initiated by the police, public prosecution, private lawyers or parties), so that evaluation of judicial performance is impossible without evaluation of each single procedural context.
37. The same considerations apply to other systems in which some assessment, through systems different from the observation of the reversal rate, is possible as to an individual decision taken by judges.
38. In some countries, assessment of quality of justice is done through collection of indicators measuring the performance of the court: how long it takes to deal with cases, how great the backlog is, how large the support staff is, the quantity and quality of infra-structures (with special reference to buildings and information technology), etc.
39. This approach is in principle acceptable, as it tends to evaluate "performance" of justice in a wider sense. However, the better approach, in the opinion of the CCJE, would be to evaluate justice in its even wider context, i.e. in the interactions of justice with other variables (judges and lawyers, justice and police, case law and legislation, etc.), as most malfunctions of the justice system derive from lack of coordination between several actors. The CCJE considers that it is also crucial to underline the interaction between the quality of justice and the presence of adequate infra-structures and support personnel.
40. Even if modern information technology allows very sophisticated data to be collected, the difficulty remains as to what variables should be measured and how and by whom the results should be interpreted.
41. As to data to be collected, no generally accepted criteria exist at this moment. This is due to the fact that administration of justice differs greatly from the purely administrative tasks that are typical of other public services, where measurement through indicators has developed and may be effective. For example, the fact that one court takes longer on average than another to deal with a case or has a greater backlog of cases may or may not mean that this court is less efficient.
42. Whatever may be the developments in this field, the CCJE considers that "quality" of justice should not be understood as a synonym for mere "productivity" of the judicial system; a qualitative approach should address rather the ability of the system to match the demand of justice in conformity with the general goals of the legal system, of which speed of procedures is only one element.

43. The CCJE recommends that, as it is impossible at the moment to rely upon widely accepted criteria, quality indicators should at least be chosen by wide consensus among legal professionals, it being advisable that the independent body for the self-governing of the judiciary play a central role in the choice and the collection of "quality" data, in the design of the data collection procedure, in the evaluation of results, in its dissemination as feed-back to the individual actors on a confidential basis, as well as to the general public; such involvement may reconcile the need for a quality evaluation to be carried out with the need for indicators and evaluators to be respectful of judicial independence.
44. Usually statistical data are collected by courts and sent to a central authority that may be the Supreme Court, the High Council for the Judiciary, the Ministry of Justice or the National Court Administration. In daily data collection court registrars may play an important role. In some cases private agencies have participated in the identification of quality indicators and in the design of a quality control system.
45. The publication of statistical data concerning pending and past cases in each court, available in some States, is a further step towards transparency of the situation of workloads. Appropriate forms should be studied for the release of even reserved information to researchers and to the judiciary, in order to allow improvements of the system.
46. The centralised authority that gathers the data only sometimes performs a constant monitoring process. This monitoring does not always have, however, a direct and immediate impact on the organisation of the courts or allocation of human and material resources.
47. The CCJE believes that it is in the interest of the judiciary that data collection and monitoring be performed on a regular basis, and that appropriate procedures allow a ready adjustment of the organisation of courts to changes in the caseloads.<sup>3</sup> In order to reconcile the realisation of this need with the guarantees of independence of the judiciary (namely, with the principle of irremovability of the judge and the prohibition of removal of cases from a judge), it seems advisable to the CCJE that the authority competent for data collection and monitoring should be the independent body mentioned in paragraphs 37 and 45 of its Opinion No. 1 (2001); if another body is competent for data collection and monitoring, the states should assure that such activities remain within the public sphere in order to preserve the relevant policy interests linked with the data treatment concerning justice; the independent body should however have power to take measures necessary to adjust the court organisation to the change in caseloads.
48. Smooth co-operation should take place among all actors as to interpretation and dissemination of data.

### **C. CASELOAD AND CASE MANAGEMENT**

49. This section covers measures that may reduce the workload of courts as well as measures to assist the handling of cases coming to court. The CCJE takes these subjects together<sup>4</sup> because both are of importance to the performance by courts of their duty to provide a fair trial within a reasonable time and there is a certain overlap.

#### **I. GENERAL**

50. Measures reducing the workload of courts included measures which have that object alone and measures that have an independent value. Recommendation No. R (86) 12 identifies measures applying to varying extents to criminal and civil courts<sup>5</sup>. Recommendations No. R (87) 18<sup>6</sup> and

<sup>3</sup> See part C, letter b.

<sup>4</sup> The issues of caseload and case management were dealt with within the framework of the 1<sup>st</sup> European Conference of Judges (see paragraph 8 above).

<sup>5</sup> Recommendation No. R (86) 12 of the Committee of Ministers to the member States concerning measures to prevent and reduce the excessive work-load in the courts. It covers:

- (a) conciliation (or, to use the more current term, "mediation") procedures, including lawyers' duty to promote conciliation;
- (b) other extra-judicial dispute resolution procedures, including arbitration (and, although not expressly mentioned, ombudsmen);
- (c) the judge's role to promote a friendly settlement;
- (d) the removal from judges of non-judicial tasks;
- (e) trial at first instance by single judges (as opposed to panels);
- (f) reviewing the competence of courts, to ensure a balanced distribution of workload;

No. R (95) 12<sup>7</sup> deal specifically with criminal cases. As examples, measures such as the removal of non-judicial tasks or ensuring a balanced workload aim directly at ensuring an appropriate workload. Consensual settlement (whether by the parties alone or through mediation<sup>8</sup>) has an independent worth, reflecting the values of freedom of choice and agreement, compared with a court-imposed solution. Decriminalisation of minor offences may take place to reduce workload, or it may reflect a conclusion that it is preferable that certain types of offenders (e.g. youths) should be dealt with outside the formal criminal justice system. Clarity about motives may assist to identify the merits of particular proposals.

51. The CCJE starts with miscellaneous topics where the criminal and civil positions can be taken together or compared.

(a) *Court administration*

52. The CCJE has identified two basic models of court management<sup>9</sup>. In one, the judges play little or no direct role in the management of the courts. They can devote more of their time to judging, rather than take up time on non-judicial tasks for which they may not be suited by training or inclination. Although the courts could not run properly without the judges at least being consulted about administrative matters, decisions about managing budgets, employing staff and court buildings and facilities are in the hands of the administrators. Since, whatever system is employed, the money to run it must come from central government, this system helps to keep judges separate from the political pressures that follow from having to meet performance targets.

53. A disadvantage is that it is judges who must deliver the primary objective of the court system, the efficient and just disposal of cases, but in this model, they have little control over the environment in which they are trying to meet this objective.

54. In the second basic system, the senior judge in a court effectively manages it as well. He or she will have at least some discretion over the spending of the budget, the hiring and firing of staff and the court building and its contents. The advantages and disadvantages are a mirror image of the first: judges are taken away from their primary role and made to undertake tasks for which their background may not have prepared them. They are more likely to find themselves in dispute with public authority. On the other hand, they have real control over the means of delivering justice in their courts and have a greater influence over policy in allocating resources.

55. Many countries have systems which fall somewhere between the two extremes. What can be said to be recognised as being increasingly important is that judges should be consulted and have the opportunity to have a say in basic decisions about the shape of modern justice and the priorities involved. The CCJE underlines the need for this.

(b) *Fluctuation in workloads*

56. The workload of particular courts will increase or decrease over time. Demographic changes and, in the criminal sphere, changes in criminal patterns will drive this. These may be temporary. For example, a court near a border may have a dramatic increase in cases concerning illegal immigration or a court near an airport an increase in cases concerning drug importation.

57. In some jurisdictions, judges and/or cases may be transferred relatively easily between courts, at least on a temporary basis. The CCJE regards such flexibility as generally desirable, provided that the independence of the individual judges is respected and, in the case of transfer of a judge, the

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(g) evaluating the impact of legal (expenses) insurance, to see whether it encourages the filing of ill-founded claims. Recommendation No. R (94) 12 of the Committee of Ministers to the member States reminded states that their duty to provide proper working conditions for judges included "taking appropriate steps to assign non-judicial tasks to other persons" in conformity with the earlier Recommendation.

<sup>6</sup> Recommendation No. R (87) 18 of the Committee of Ministers to the member States concerning the simplification of criminal justice.

<sup>7</sup> The Recommendation No. R (95) 12 of the Committee of Ministers to the member States on the management of criminal justice contains a variety of recommendations to address the increase in the number of complexity of cases, unwarranted delays, budgetary constraints and increased expectations from public and staff, under the headings of (I) Setting of objectives, (II) Management of workload, (III) Management of infrastructure, (IV) Management of human resources and (V) Management of information and communication.

<sup>8</sup> See section D of this Opinion.

<sup>9</sup> Cf its Opinion No. 2 (2001) on the Funding and Management of Courts, paragraphs 12-13.

judge consents. It recognises of course that it must be exercised with due regard for practical problems of access to justice. Those involved in cases and the public generally are entitled to expect that cases will normally be handled on a relatively local and convenient basis.

58. In other jurisdictions, the judge assigned is fixed from the outset, transfers of judges require their consent and transfers of cases are possible, if at all, only with the consent of the parties. There may however be mechanisms within any court, whereby, e.g., an elected presidium of judges may decide to transfer cases from an overloaded judge to another judge within the same court.
59. If there are permanent changes in workload, corresponding changes in court size will be needed, especially in the latter category of jurisdictions. Purely economic considerations (pointing towards closure of a local court) may here clash with the parties' and public's entitlement to relatively local and accessible justice. The CCJE encourages countries to study and develop appropriate criteria to enable these considerations to be taken into account and balanced, ensuring that, while adopting to the evolution of the workload, the changes to the courts' methods are not conceived as a way of harming the independence of judges.
60. Nevertheless, the CCJE refers to its Opinion No. 2 (2001), in particular paragraphs 4 and 5, dealing with adequate resources. The possibility to transfer judges or files from one court to other court should not encourage to accept structural lack of resources. Such flexibility cannot substitute a sufficient number of judges, which is necessary to meet the workload, which normally is to be expected.

(c) *Use of a single judge*

61. In criminal cases, Recommendation No. R (87) 18, paragraph D.2 states that a single judge should be used "wherever the seriousness of the offence allows". But, in serious cases involving the liberty of the subject, the collegiality of fact-finding provided by a panel of three or more judges, whether lay or professional, is an important safeguard against decisions influenced by one person's prejudices or idiosyncratic views. In practice, less serious cases are usually decided by one judge and more serious cases by a panel, although the dividing line differs considerably between countries.
62. In civil cases, the general practice in common law countries is that first instance judges (being experienced practitioners appointed relatively late in their professional career) sit singly. In other jurisdictions having a career judiciary (and in countries such as France, where *tribunaux de commerce* consist of laymen), panels are still used at first instance, although there seems to be a trend towards greater use of single judges.
63. The use of panels can compensate for lack of experience on the part of individual members. It assists to ensure consistency of quality and to impart experience to younger judges. It may be difficult to abandon this system where a young judge or lay person would otherwise be the sole member of a first instance tribunal.
64. The CCJE considers that countries should encourage training and career development to make the use of single judges easier to hear first instance cases, wherever this can be achieved commensurately with the experience and capabilities of the judges available and the nature of the proceedings in question.

(d) *Judges' assistance*

65. The CCJE noted in its Opinion No. 2 (2001) that in numerous countries the judges have insufficient means at their disposal. However, the CCJE points out the need that a genuine reduction of inappropriate tasks performed by judges can only take place by providing judges with assistants, with substantial qualifications in the legal field ("clerks" or "referendars"), to whom the judge may delegate, under the same judge's supervision and responsibility, the performance of specific activities such as research of legislation and case-law, drafting of easy or standardised documents, and liaising with lawyers and/or the public.

(e) *Extra-judicial activity*

66. The CCJE endorses the view that the non-judicial activities listed in the Appendix to Recommendation No. R (86) 12 should not normally be assigned to the judges. But there are other activities that may distract or detract from the performance of judicial duties, including activities in

relation to court administration, where adequate assistance is not provided or funded (see point (a) above) and activity as private arbitrators, which is in most countries anyway inadmissible.

67. Criticism is often also levelled at time spent by judges working on commissions and similar bodies. There is a point of view that “a judge should be judging” and other activity is a waste of a valuable resource.
68. The CCJE does not consider that too much should be made of this point. If the commission is examining an aspect relevant to judicial work and the judge can add value to the work of that body, the time spent in such work cannot be regarded as wasted. Further, a judge will be a better judge for having the broader view that can be gained by working with professionals from other disciplines and on subjects that are related to but fall outside his normal work.
69. On the other hand, there are risks in judges becoming involved in enquiries established for political reasons, involving judgments on non-legal matters which may lie outside their direct experience. Judges should consider carefully whether it is sensible for them to lend their skills and reputations to enquiries of this nature<sup>10</sup>.

(f) *Legal representation and the funding of legal costs*

70. In criminal cases, it is right that legal aid or free legal representation should be available without evaluation of the merits of the defendant's position. The problem seems to lie in the great differences between the nature and seriousness of the cases for which such aid or representation is made available in different countries. But in civil cases there is concern that methods of funding litigation may encourage ill-founded or excessive litigation, and this is not confined to legal expenses insurance<sup>11</sup>. In any legal system, there is a tendency for work to gravitate to areas where fees are available. Suitable control systems need to be introduced for evaluating the merits of claims in advance and eliminating from eligibility for legal aid claims where the merits and/or sum in issue do not appear to justify the likely expense<sup>12</sup>.

## II. CRIMINAL COURTS

71. The CCJE turns next to subjects of specifically criminal relevance: It is at the outset important to remember two obvious but fundamental differences between criminal and civil proceedings:

(i) Civil proceedings almost always involve two private parties. The public has a general interest in the proper disposal of civil litigation but it has no interest in the outcome of a particular case. In criminal proceedings, the public has a real interest in the proper disposal of each case.

(ii) Procedural delay or irregularity can be sanctioned in civil proceedings by orders for costs or, as a last resort, striking the action out. In criminal proceedings, the prosecution may be sanctioned in monetary terms<sup>13</sup> or in an extreme situation by dismissing the prosecution. It is much more difficult to sanction a defendant for delay or irregularity, although in some countries a defence lawyer may be ordered to pay wasted costs. The defendant himself usually lacks means to meet costs orders. And the ultimate sanction of dismissal of his case is not available. The court cannot say that he has forfeited his right to a trial because he has not complied with some procedural requirement.

72. Against this background, the CCJE examines certain specific problems.

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<sup>10</sup> The CCJE refers to its Opinion No. 3 (2002), where it considered judicial ethics.

<sup>11</sup> Concerning the last, see paragraph 26 above.

<sup>12</sup> A similar problem arises in respect of agreements (now permitted in the United Kingdom) for conditional fees – that is agreements whereby lawyers' fees are not to be paid by the claimant instructing the lawyer unless the claim succeeds, but are then payable by the losing defendant together with an uplift of up to 100% which goes to the benefit of the winning claimant's lawyers. Such agreements can be used by an impecunious claimant to vex defendants and force them to settle, since (i) the claimant and his lawyers have no incentive to agree a reasonable fee - on the contrary; and (ii) unless the claimant takes out legal expenses insurance, the defendant if he wins is unlikely to recover any costs from the losing claimant. The English courts have recently taken firmer control to limit the fees that can be agreed under such agreements and the conditions on which they can be made.

<sup>13</sup> One should consider if this is compatible with the public nature of the Prosecutor's Office in many countries.



(a) *Discretionary prosecution*

73. Recommendation No. R (87) 18 endorses the principle of discretionary prosecution “wherever historical development and the constitution of member states allow”, and states that, “otherwise, measures having the same purpose should be devised”. In the latter countries, the duties of independent public prosecutors (*ministère public*) may require cases to be brought before a court, and, if anyone has the power to suspend prosecution, it may only be a judge.
74. The Recommendation states that any decision not to prosecute should be “founded in law” (paragraph I.2), “exercised on some general basis, such as the public interest” (paragraph II.4) and only take place “if the prosecuting authority has adequate evidence of guilt” (paragraph I.2). The CCJE interprets the third condition as meaning no more than that, unless the prosecuting authority has adequate evidence of guilt, the question of discretionary prosecution cannot sensibly arise. But, where adequate evidence has not (yet) been obtained, the CCJE considers that it should be open to an investigating authority to decide that the seriousness and other circumstances of the offence, of the suspected offender and of the victim do not justify further efforts to obtain further evidence.
75. The Recommendation further states that a decision not to pursue, or to discontinue, criminal proceedings may be accompanied by a warning or admonition or be made subject to compliance with conditions (requiring in this latter case the alleged offender’s consent); that it should not be treated as a conviction or affect the offender’s record, unless he has admitted the offence; and that it should leave unaffected the victim’s right to seek reparation. In practice, the majority of (but very far from all) countries have some degree of discretion. One distinction is between those systems where cases may only be discontinued with conditions such as compensation to the victim and those where there exists a discretion to discontinue proceedings where it is deemed not to be in the public interest to continue them.
76. Three basic structures presently appear in Europe.
- (i) The prosecuting authority has neither the power to drop a case nor to impose conditions/sanctions upon an offender if the evidence justifies prosecution. It merely has the function of preparing a case for court.
  - (ii) The prosecuting authority has the power to decide whether or not to prosecute (i.e. to drop a case completely) even though there is sufficient evidence to prosecute.
  - (iii) The prosecuting authority has both the power to decide whether or not to prosecute and also the possibility of dropping the case with conditions or a fine imposed on the offender with his consent as an alternative to the case going to court. Within this broad category, there are considerable differences as to the prosecutorial power. In some countries a full range of conditions including counselling and community service may be imposed. In others, the only condition is payment of a sum of money.
77. The CCJE encourages further studies in individual states which do not presently have any system of or equivalent to discretionary prosecution so as to give effect to Recommendation No. R (87) 18. The CCJE is of the opinion that each state should consider the role that courts could have in verifying the procedure carried out, especially when the victim disputes the decision to drop a case taken by the prosecuting authority.

(b) *Simplified procedures*

78. All member states appear to have some forms of simplified procedure, e.g. for administrative breaches and less serious crime, although the nature and extent of such procedures vary greatly. The impact of articles 5 and 6 of the ECHR must be considered when introducing and providing for such procedures always allowing for the possibility of an appeal before the judge.

(c) *Guilty pleas and plea bargaining*

79. Recommendation No. R (87) 18 recommends this in principle. Its terms contemplate an early plea of guilty entered in court at an early stage of the proceedings, which is the common law model. However, few countries have a formal system of this nature. It - and more particularly what may go with it, plea bargaining and a reduced sentence for a plea of guilty - are anathema to many non-common law systems. However, a number of countries have a system of attenuated proceedings

where guilt is admitted. This functions in a similar way to a formal plea to the extent of allowing less evidence to be called and the case to proceed more swiftly.

80. The CCJE identifies, in any formal system for pleading guilty, advantages (perceived by common law systems) and possible dangers, as follows:

(i) Guilty pleas

81. If a defendant can be invited and is able to give a formal indication before a judge that he admits his guilt at an early stage in proceedings, a great deal of time and money will be saved. If this takes place in a formal setting, safeguards for a defendant can be built in. A confession made to the police may have been improperly obtained. A guilty plea is an acknowledgement that it was not. Lawyers must however have a professional obligation to confirm with the defendant that he really admits the necessary legal elements of the offence.

(ii) Plea bargaining

82. This encompasses two different things: charge bargaining and sentence bargaining.

83. **Charge bargaining** involves an agreement with the prosecution, whether formal or informal, that the prosecution will not proceed with one or more charges if the defendant admits others (e.g. involving a less serious offence). Such a procedure will not normally involve the judge at all, although there may be provision for judicial approval to be required. The argument in favour is that, if a defendant is willing to admit nine out of ten alleged burglaries, it cannot be in the interests of efficient justice that there should always have to be a full trial of the tenth charge simply because there is enough evidence to go to trial on it.

84. **Sentence bargaining** also occurs in a number of countries. But the common law has recognised that there are great dangers in allowing this to involve the judge. The danger is that a defendant may feel under pressure to plead guilty to an offence which he does not really admit in order to get a more lenient sentence from the judge who will be sentencing him.

(iii) Sentence discount

85. This is a different concept, which does not depend upon any bargain with anyone, whether prosecution or judge. The concept (accepted in some countries) is that a defendant who pleads guilty should normally receive a more lenient sentence than if he had not done so – the earlier the plea the greater the discount<sup>14</sup>.

86. Some may recoil from this idea. They would argue that what the defendant has done, he has done and that any offence deserves a certain punishment, once proved, whether it is admitted or not. The argument that a plea of guilty shows remorse is, in most cases, illusory. In some cases, a principled social answer is possible for those systems where trials are largely oral. If the main witness is vulnerable (particularly children and victims of sexual assault), the oral hearing may constitute a further trauma. In such cases, by his plea avoiding the need for a hearing, a defendant has lessened or avoided harm which his actions would otherwise have caused.

87. Outside this minority of cases, such an answer is not valid. If a man is charged with a series of burglaries because of fingerprint or scientific evidence, the only witnesses he has saved from giving evidence are professionals, well used to giving evidence. The reason for encouraging pleas of guilty by a discount then is the pragmatic advantages that guilty pleas bring in (i) ensuring the conviction of offenders, who know that they are guilty, but who would otherwise have no incentive not to insist on a trial in the hope that the evidence or witnesses against them might not persuade a jury or judge and (ii) shortening cases (and avoiding delay to other trials, even in cases where a conviction would anyway have resulted from a full trial. These are real pragmatic benefits for society as a whole.

88. But it is clear that, if sentence discounts are to be permitted, certain safeguards must be in place. Care must be taken by the lawyers and the judges to ensure that the pleas of guilty are voluntary and represent real admissions of guilt. Judges should not mention or be involved in any discussions between lawyers and the defendant regarding the possibility of such a discount. Judges should have the power not to approve of any plea, which it appears may not be truthful or in the public interest.

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<sup>14</sup> Generally up to one-third of the length of the sentence that would otherwise be passed.

89. The CCJE doubts whether it would be realistic to recommend immediate implementation of a system of sentence discount for a guilty plea in all member states. But the CCJE recommends all countries to consider whether such a system might not bring benefits to their criminal justice process.

### III. CIVIL COURTS

90. Recommendation No. R (84) 5 identified nine “principles of civil procedure designed to improve the functioning of civil justice”. This was a far-sighted early Recommendation, but still in practice often unimplemented. The CCJE considers that it would, if implemented generally, offer a real guarantee of compliance with states’ duty under article 6 of the ECHR to ensure “a fair and public hearing within a reasonable time” in civil proceedings.

91. The nine principles set out core elements of the case management powers which the CCJE considers that judges should have and exercise from the commencement to the conclusion of all civil (including administrative) proceedings in order to ensure compliance with article 6 of the ECHR. The CCJE will therefore summarise and comment on these Principles in a little detail.

92. Principle 1 of the Recommendation suggests a limit in proceedings of “not more than two hearings”, one preliminary and the second for evidence, arguments and, if possible, judgment, with no adjournments allowed “except when new facts appear and in other exceptional and important circumstances” and sanctions on parties, witnesses and experts failing to comply with court time-limits or non-attendance.

93. The CCJE views this principle as a general template. Some systems take evidence over a number of hearings. Others handle very large litigation which could not possibly be conducted within the constraints of one preliminary and one final hearing. The most important point is that judges should from the outset control the timetable and duration of proceedings, setting firm dates and having (and being willing wherever appropriate to exercise) power to refuse adjournments, even against the wishes of both parties.

94. Under Principle 2, judges should have power to control abuse of procedure, by sanctions on a party or lawyers.

95. Principle 3 reflects the essence of modern case management:

“The court should (...) play an active role in ensuring the rapid progress of the proceedings, while respecting the rights of the parties, including the right to equal treatment. In particular, it should have proprio motu powers to order the parties to provide such clarifications as are necessary; to order the parties to appear in person; to raise questions of law; to call for evidence, at least in those cases where there are interests other than those of the parties at stake; to control the taking of evidence; to exclude witnesses whose possible testimony would be irrelevant to the case; to limit the number of witnesses on a particular fact where such a number would be excessive (...).”

96. Principle 4 supplements this, by providing that the court should, except in cases expressly prescribed by law, be able to decide whether to use written or oral proceedings.

97. Principle 5 addresses what is, in the CCJE’s view, a vital aspect of efficient case management: the need to crystallise the parties’ claims and the nature of their evidence at the earliest possible stage – *and* to exclude the admission of new facts on appeal, unless they were (or, the CCJE would suggest, could not reasonably have been) known at first instance or there was some other special reason.

98. In some countries, the rules or culture governing litigation allow parties to correct and supplement their cases and evidence almost without restriction – even at an appellate level (see further below). The CCJE considers that this is no longer acceptable, and that the time has come to re-examine such rules and change such culture. Parties are entitled to “a fair ...hearing within a reasonable time” of their claim or defence, not to indefinite opportunities to present further and different cases - and especially not so by way of a second instance hearing on appeal.

99. Principle 6 is the important injunction that “Judgment should be given at the conclusion of the proceedings or as far as possible thereafter. The judgment should be as concise as possible. It may invoke any rule of law but it should with certainty resolve, expressly or implicitly, all claims raised by the parties”. Some states or courts operate more or less with formal rules stipulating maximum

period(s) within which judgments should be delivered. Principle 7 (“steps should be taken to deter the abuse of post-judgment legal remedies”) lies outside the central concerns of this Opinion.

100. Principle 8 identifies some aspects of case management, including special procedures for (a) urgent cases, (b) undisputed cases, liquidated claims and small claims, (c) specific types of case. Among these are, it states:
- “simplified methods of commencing litigation; no hearing or the convening of only one hearing, or (...) of a preliminary preparatory hearing; exclusively written or oral proceedings (...); prohibition or restriction of certain exceptions and defences; more flexible rules of evidence’ no adjournments or only brief adjournments; the appointment of a court expert (...); an active role for the court in conducting the case and in calling for and taking evidence.”
101. Principle 9 emphasises the need for “the most modern technical means [to] be made available to the judicial authorities”. The CCJE endorses and underlines the relationship between efficient technology and judges’ ability to keep track of and control the litigation on their or their courts’ dockets.
102. The general rationale of all these principles is that civil litigation threatens to become complex and lengthy to the point where it is not possible to comply with the requirements of article 6 (1) of the ECHR either in any particular case(s) or in any other cases, the speedy and efficient conduct of which is indirectly affected by the time and resources occupied by the former case(s).
103. States have to provide adequate - but not infinite - resources and funding for civil as well as criminal litigation<sup>15</sup>. Because neither the state nor parties have infinite resources, courts must control litigation, in the interests both of individual litigants and litigants in other cases.
104. Individual cases need to be conducted “proportionately”, meaning both in a manner that enables the parties thereto to obtain justice at a cost commensurate with the issues involved and the amounts at stake, and in a manner that enables other litigants to obtain their fair share of the court’s time for their disputes.
105. In short, parties are entitled to an appropriate share of the court’s time and attention, but in deciding what is appropriate it is the judge’s duty to take into account the burden on and needs of others, including the state which is itself funding the court system and other parties who wish to use it.
106. Different countries have differing levels of implementation of the principles in Recommendation No. R (84) 5. The general direction of legal reforms of civil procedure instituted over recent years has been in this direction. Judges have been given greater power on the “formal conduct” of civil proceedings, though not over their substantive progress – they cannot, for example, take steps to introduce into a case factual evidence that the parties have not adduced. However, in some member states it is still not the judge’s role to decide whether the procedure should be oral or written, or when to resort a summary judgment or to set time limits, because these matters are fixed by law. The CCJE considers that these restrictions to the powers of control and impetus of the judge on the progress of the procedure are not compatible with efficiency of justice.
107. The CCJE will now consider certain procedures which have been adopted or suggested in this area:
- (a) Pre-action protocols
108. Pre-action protocols (developed in the United Kingdom) prescribe steps which should be taken before proceedings are even commenced. They are formulated by co-operation between representatives of those interested on both sides of certain familiar types of dispute (personal injury or medical negligence or construction industry insurers, lawyers and interested bodies). Their purpose is to achieve early identification of the issues, by exchange of information and evidence, which may enable parties to avoid litigation and reach a settlement. If settlement cannot be reached they ensure that parties are in a much better position to respond to timetables imposed once proceedings are issued. The court may sanction failure to follow a pre-action protocol.

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<sup>15</sup> Cf CCJE Opinion No. 2 (2001).

(b) Pre-action information

109. This is a feature of litigation which enables a court, before litigation is begun, to order disclosure of documents by a person likely to be a party to such proceedings, where this is desirable, amongst other reasons, to enable that person to know whether the facts justify proceedings at all, or to enable him to take better informed steps to resolve the dispute amicably without proceedings.

(c) Protective measures

110. It is important that these should be available, where required, at an early stage, including in some cases before notification of the issue of proceedings to a defendant, or their purpose may be defeated.
111. A wide range of protective measures is available. Three main groups can be identified:
- (i) measures aiming to secure enforcement, e.g. seizure or a “freezing” injunction;
  - (ii) measures intended to settle the situation provisionally (for instance, in family matters); and
  - (iii) measures anticipating the final judgment.
112. In many countries, the claimant has to present an appearance of right (*fumus bonis iuris*) and he must normally show a risk that, without such measures, any final judgment obtained could not be enforced (*periculum in mora*). The measure can be ordered without hearing the other party (*ex parte*) but, after making such an order, the defendant has a right to be heard, when the measure can be either confirmed or revoked.

113. Injunctive relief is also widely available in other situations in member states (sometimes only if the claim has a documentary basis), in order to settle provisionally some aspect(s) of the dispute. Common law countries have also developed the tool of the “Anton Piller” order, whereby the court can order a search for documents or other evidence in the defendant’s possession or control, which might otherwise be destroyed or concealed. “*Mesures d’instruction*” in *futurum* can fulfil a similar function in France and other countries.

(d) Commencement of proceedings

114. Most member states have provided certain simplified (including electronic) methods of commencing litigation. But differences between the traditional methods of commencing proceedings make it difficult to compare the different methods of simplification. For example, in some countries, proceedings have always been begun by steps taken in court, whereas in others the plaintiff has had to notify the claim to the defendant before going to court. In the latter states, the simplification may simply consist in allowing proceedings to be begun without this step being taken.

(e) Identification of the parties’ cases

115. The CCJE has already underlined the importance of this in its discussion (above) of Principle 5 of Recommendation No. R (85) 5. It is central to good case management that each party in civil proceedings should have to be as explicit as possible as soon as possible regarding its case – and that changes or additions to a party’s case should not be made as of right, but should require the judge’s permission, which should only be given or withheld having regard to the stage which the proceedings have reached and the effect on their conduct as well as on other parties.

(f) Summary proceedings

116. There are major differences in terminology in this area. Not all states understand the concept of summary, simplified and accelerated procedures in the same sense. Some only speak of procedures as summary when their outcome does not have the force of *res judicata*, and refer to simplified procedures when certain steps have been eliminated or made easy, and to accelerated procedures when time limits have been abbreviated compared with ordinary proceedings. These features can of course coincide, so that a procedure can, at the same time, be summary, simplified and accelerated.
117. Common law jurisdictions in contrast use the word “summary” to cover simplified and accelerated procedures leading to a final (*res judicata*) decision, although they also have procedures for provisional judgments, e.g. procedures whereby the court may, if provisionally satisfied that a defendant will be liable in debt or damages, order an “interim” payment of not more than a

“reasonable proportion” of the liability to be paid to the claimant. If at a trial the claimant then fails to prove his case, the claimant must repay the interim payment, with interest.

118. Two civil law procedures are of particular importance: i) the order for payment (*Mahnverfahren*, *injonction de payer*); ii) the *référé* or, in the Netherlands, *kort geding*:

(i) The order for payment (or *Mahnverfahren*) is a procedure especially suited to uncontested monetary debts. At a claimant’s request, the court issues an order to pay without having heard the other party. In some countries a documentary basis is required for issuing the order, in other countries it is sufficient with the statement done by the claimant. If the defendant remains passive during the delay established by the law, the order becomes enforceable like an ordinary judgment. If the defendant objects, the plaintiff has to start a normal procedure if he wants to recover his debt. It is the debtor’s silence that transforms the initial order of payment into a judicial and enforceable decision that has the force of *res judicata*. In some countries a court clerk is in charge of the procedure. It is a written procedure, which permits computerized treatment (already in operation in some countries). Many cases are determined by this procedure.

(ii) The procedure of *référé* or *kort geding* enables a judge to decide any question after hearing the parties on the basis of the sometimes limited evidence that they are able to put before the court within a short time-limit. A decision is then rendered either immediately after the hearing or within a very short time. This is directly enforceable but the judgment does not have the force of *res judicata*. A party is free to commence a procedure on the merits, but if none is initiated, the *référé* judgment will determine the rights and obligations of the parties. Thus, the procedure on the merits will often never take place. Because of the importance of the *référé*, an experienced judge (often the president of the court) is normally in charge of this kind of procedure. The *référé* procedure in practice also assists to alleviate a court’s workload, and to avoid the delays inherent in some states in ordinary civil proceedings.

(g) Interlocutory judgments

119. The power to “direct a separate trial of any issue” can have real importance. To take an example, matters fundamental to jurisdiction should, in the CCJE’s view, be resolved by a separate judgment at the outset of proceedings. This avoids the need for unnecessary, costly and time-consuming argument and investigation on the merits. But in some countries there exists no procedure for giving interlocutory judgments, and in others any interlocutory judgment can only be appealed after the first instance court has gone into and determined the rest of the case.

120. The CCJE recognises that care is necessary in the selection and definition of issues suitable to be dealt with by interlocutory judgment. There is a risk that time, effort and costs may be spent on an interlocutory issue (or on an appeal in an interlocutory issue), when it would be speedier and simpler to resolve the rest of the case. With that caveat, the CCJE recommends that the procedure for giving interlocutory judgments should be available, and that immediate appeals in respect of interlocutory judgments should normally be permissible.

121. The remedies for avoiding delays due to such appeals should consist in either a requirement to obtain the permission of the court of first instance or appeal for any immediate appeal and/or a speedy appellate system.

(h) Evidence and documentation

122. Most states have flexible rules of evidence. In protective and summary procedures, the judgment will not necessarily be based on full evidence. In protective measures, the claimant need only present an appearance of his right (*prima facie* evidence) in civil law countries, or need normally only show an arguable case on the facts in common law countries.

123. There are important differences in relation to disclosure of documentation between common law and civil law countries. In the former each party must voluntarily make disclosure of relevant documents (that is documents on which he relies in support of his contentions or which materially affect his case or support the other party’s case). The requirement to disclose unfavourable as well as favourable documents often proves a considerable incentive to settlement - either before or after disclosure has had to be made. It is also a considerable aid to fact-finding, at trial.

124. However, this procedure does rely on the honesty of legal advisers in advising their clients regarding production of documents, and it also involves legal and other costs in searching for and producing documents. It may be said therefore to be particularly suitable for larger or more complex cases.
125. In many other countries (especially civil law systems) a party can only gain access to a document under his opponent's control and upon which the latter does not intend to rely, by applying for an order that the particular document be made available. This implies that the party seeking the order has to know previously the existence of the document and has to identify it, which is not always easy.
- (i) General case management powers
126. These are important at every stage of civil proceedings, to enable cases to be managed appropriately and proportionately. Judges should be able to exercise them by giving directions on paper, without the parties necessarily having any right to an oral hearing. They should be exercisable as contemplated by Recommendation No. R (84) 5 both in relation to pre-trial preparation and in relation to any trial.
- (j) Incentives in respect of costs and interest
127. English law and some other systems have introduced provisions for offers to settle and payments into court, which can have severe financial consequences for a party failing at trial to better the other side's previous offer. A claimant may offer to accept, or a defendant may offer to pay, less than the full claim. (In the case of a money claim, the defendant must also follow up his offer, by paying the money into court.) If a claimant gets more than he offered to accept, or a defendant is ordered to pay less than he offered to pay, then, save in the case of small claims, adverse consequences may follow in costs, and also, for a defendant, in interest.
128. In some countries, where lawyers' fees are regulated by statute, the legislature, in order to provide an incentive for lawyers to encourage settlement, has raised the statutory settlement fees for lawyers to 150% of the normal full fee.
- (k) Enforcement
129. There are at present differences in attitude to enforcement of first instance judgments. In common law jurisdictions, the general rule is that such judgments are automatically enforceable, unless the court for good reason orders a stay. Good reason could include any unlikelihood of recovering monies paid, if the judgment were later set aside on a successful appeal. In civil law countries, in contrast, the position is sometimes regulated by law, sometimes left to the judge to decide. The judge may then grant provisional enforcement of the judgment, especially if there is a danger that, during the delay involved in any appeal, a situation might occur or be brought about by the losing party whereby the judgment would never be honoured. Normally, however, the winning party would then be required to provide security for any damage that might occur as a result of the enforcement if the judgment was reversed on appeal. It can be said to be usual in the case of money judgments for the judgment to be made enforceable by law or by the judge unless the debtor puts up security.
130. The CCJE considers that, to ensure the efficiency of justice, all countries should have procedures for provisional enforcement, which should normally be ordered, subject to satisfactory protection being made available to the losing party against the event of a successful appeal.
- (l) Appeals
131. The different appellate systems divide into two broad groups: (a) appeals limited to revision on matters of law and the assessment of evidence, with no possibility on appeal of fresh new evidence or of a decision on any point not raised before the first instance judge; and (b) appeals in which such limitations do not exist and the court can hear new evidence and take into account new points raised in the proceedings before the appellate court.
132. There are intermediate systems, which in some cases or at some instances permit what is described as the "ordinary remedy" of an unlimited appeal, but in other cases or at other instances (e.g. in a court of cassation or Supreme Court) only permit the "extra-ordinary remedy" of a "review" on limited basis and in specific circumstances.

133. The difference between (a) and (b) is sometimes explained as being that in the former group an appeal is viewed primarily as a technique for ensuring uniformity in the application of legal principles (*ius constitutionis*), whereas in the latter group it is viewed as a procedural right, the main function of which is to give a party another opportunity (*ius litigationis*). That raises the question whether it is necessary or desirable that a party should have such a procedural right at any level, even a second instance level.
134. The CCJE has, in considering Principle 5 of Recommendation No. R (84) 5 (above), pointed out that nothing in article 6 of the ECHR requires the right to the appeal.
135. Although conscious of the weight of tradition in some countries favouring an unlimited right to (in effect) relitigate issues on appeal to a second instance, the CCJE wishes to indicate its disapproval in principle of this approach. There ought to be limitations on a party's right to adduce fresh evidence or to raise fresh points of law. An appeal ought not to be or to be regarded as an unlimited opportunity to make corrections in respect of matters of fact or law which a party could and should have put before a first instance judge. This undermines the role of the first instance judge, and has the potential to make irrelevant any case management by a first instance judge.
136. In the CCJE's view, it also tends to frustrate the legitimate expectations of the other party to the litigation, and to increase the length, cost and strain of litigation.
137. The CCJE notes, however, that even in countries accepting a *ius litigationis*, mechanisms (e.g. the power to declare hopeless appeals to be "manifestly ill-founded") have been developed which constitute a partial safety valve, reducing to some extent the over-loading of the appellate system.
138. The CCJE therefore recommends that controls on unmeritorious appeal be introduced, either by provision of a leave to appeal to be granted by a court or by an equivalent mechanism that ensures that the speedy disposition of meritorious appeals is not impaired.

#### **D. ALTERNATIVE DISPUTE RESOLUTION (ADR)**

139. The Council of Europe has produced several instruments concerning alternative dispute resolution methods (ADR).<sup>16</sup> Being aware of the many positive effects of ADR, among which is its potential to lead to speedy settlement of disputes, the CCJE proposed that ADR be one of the items to be dealt with at the 1<sup>st</sup> European Conference of Judges, within the larger framework of "case management".
140. The 1<sup>st</sup> European Conference of Judges demonstrated the importance of ADR in the early settlement of disputes.<sup>17</sup> It is apparent that while ADR must not be regarded as a perfect way of alleviating the courts' excess workload, it is definitely useful and effective because it places the accent on an agreement between the parties, which is always preferable to an imposed judgement.
141. In the future the CCJE may engage in specific consideration of ADR. At present, within the scope of an opinion concerned with the reasonable duration of trials and the role of judges in the trial, the CCJE considers it necessary to encourage the development of ADR schemes, which are particularly suited to certain types of litigation, and to increase public awareness of their existence, the way they operate and their cost.
142. Since ADR and the justice system share similar objectives, it is essential that legal aid should be available for ADR as it is for standard court proceedings. However, both legal aid resources as well as any other public expenditures to support ADR should make use of a special budget, so that the corresponding expenses are not charged to the operating budget of the courts (see paragraph 23 above).

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<sup>16</sup>The Council of Europe has produced the following Recommendations relating to alternative dispute resolution:

- Recommendation No R (98) 1 of the Committee of Ministers to the member States on family mediation;
- Recommendation No R (99) 19 of the Committee of Ministers to the member States concerning mediation in penal matters;
- Recommendation Rec (2001) 9 of the Committee of Ministers to the member States on alternatives to litigation between administrative authorities and private parties;
- Recommendation Rec (2002) 10 of the Committee of Ministers to the member States on mediation in civil matters.

<sup>17</sup> The Conference mainly concentrated on ADR in civil matters.



143. The discussions held within the CCJE focused specifically on the scope of mediation, on the role of the judge in mediation during court proceedings, on confidentiality of mediation operations, on the possibility that courts supervise training/accreditation in mediation and judges act as mediators and on the necessity of a judicial confirmation of the mediation agreement between the parties. Separate considerations were made, when relevant, for criminal law matters, on one hand, and civil law (and administrative law) matters, on the other hand.
144. As for the scope of ADR, the relevant Council of Europe recommendations show that it is not confined to civil proceedings. The scope of mediation in criminal matters raises specific questions, on which the CCJE's discussions concentrated.
145. Unlike ADR in civil matters, criminal mediation is not useful to alleviate the current workload of the court system, although it may have a preventative effect in respect of future crimes.
146. Recommendation No. R (99) 19 concentrates solely on "mediation" between offender and victim. However, although there is a need for further research, the CCJE considers that nowadays the wider debate concerns the broader concept of "restorative justice", i.e. procedures allowing diversion from the normal criminal process before it starts (soon after arrest), after it has started as part of the sentencing process or even during the execution of punishment. Restorative justice provides an opportunity for victims, offenders and sometimes representatives of the community to communicate, indirectly or directly, if necessary through a facilitator, about an offence (usually a minor offence concerning property or offences by young offenders) and how to repair the harm caused. This can lead to the offender making reparation - either to the victim, if the victim wishes, or to the wider community, for example by repairing property, cleaning premises, etc.
147. Therefore the scope of restorative justice in criminal matters is not as wide as ADR in civil matters; society may set "boundaries of permission" outside which it would not support the resolution of a criminal case other than by the normal court process. In contrast with civil cases, the community will also often be a proper participant in the process of restorative justice. Reconnecting offenders with the community they have harmed, including through repair of some of the damage they have caused, and involving the community in creating solutions to crime in their area, is at the heart of much restorative justice.
148. In a number of respects schemes for restorative justice require more careful implementation than ADR in civil disputes, as bringing victims and offenders into contact is a much more sensitive process than bringing two parties to a civil dispute together; its success depends in part on a cultural change for criminal justice practitioners used to the normal trial and punishment model of justice.
149. The CCJE discussed the role of the judge in mediation decisions considering first of all that recourse to mediation, in civil and administrative proceedings, may be chosen on the parties' initiative or, alternatively, the judge may be allowed to recommend that the parties appear before a mediator, with their refusal to do so sometimes being relevant to costs.
150. The second system has the advantage of having parties, who are in principle reluctant to seek an agreement, initiate a discussion; in practice, this step can in itself prove decisive in breaking the deadlock in a contentious situation.
151. In any case, the parties should also be allowed to refuse recourse to mediation; such a refusal should not infringe the party's right to have his/her case decided.
152. As for the role of the judge in criminal mediation, it is evident that, if a criminal case is diverted from the normal prosecution process before proceedings have been started, the judge will usually have no role. If the case is diverted to restorative justice after it has started, it will require an order of a judge so diverting it. There are also differences relating to the adoption, in the several countries, of the principles of discretionary or mandatory prosecution.
153. In view of the fact that within the restorative justice system obligations are imposed on the offender and restrictions may apply in the victim's interest, the CCJE considers that it may be good practice to give to all restorative justice arrangements (or, if appropriate, those that are more than mere warnings with no legal relevance) the formality of judicial approval. This will allow control of the offences that might give rise to restorative justice and of the conditions governing respect for the right to a fair trial and other provisions of the ECHR.

154. Must mediation operations be confidential? The CCJE's discussions show that this question must be answered in the affirmative regarding civil and administrative disputes. Seeking an agreement means, in general, that the parties must be able to talk to the mediator in confidence about possible proposals for settlement, without it being possible for this information to be divulged.
155. However, it would be useful to specify whether confidentiality should be absolute or whether it may be lifted by agreement between the parties. Also, one should ask whether the documents used during mediation may be produced in court if mediation has failed.
156. As the mediation procedure is based on agreement, it would seem possible to the CCJE to lift confidentiality in the event of an agreement between the parties; on the other hand, without such agreement it is inappropriate for the judge to take account of documents revealing one party's attitudes or the proposals made by the mediator for settling the dispute. It is open to question whether and how far the judge may (as permitted in some jurisdictions) consider refusal to access mediation or to accept a friendly settlement when making orders relating to trial expenses or costs.
157. As for confidentiality in ADR in criminal matters, the CCJE considers that, since the offender must be encouraged to speak frankly during the restorative justice process, confidentiality should also apply to this type of ADR. This poses the problem, especially in those systems where prosecution is obligatory, of what should be the consequences of admission of other offences on the part of the offender or of persons who are not participating in the mediation process.<sup>18</sup>
158. Both in criminal and civil-administrative matters, the CCJE emphasises the need that ADR schemes be closely associated with the court system, since mediators should possess relevant skills and qualifications, as well as the necessary impartiality and independence for such a public service.
159. Therefore the CCJE emphasises the importance of training in mediation.
160. Recourse to mediators or mediation institutions outside the judicial system is an appropriate arrangement, provided that the judicial institution can supervise the competence of these mediators or private institutions as well as the arrangements for their intervention and their cost. The CCJE considers that appropriate legal provisions or court practice should confer the judge the power to direct the parties to appear before a judicially appointed mediator.
161. The CCJE considers it possible for judges to act as mediators themselves. This allows judicial know-how to be placed at the disposal of the public. It is nevertheless essential to preserve their impartiality in particular by providing that they will perform this task in disputes other than those they are required to hear and decide. The CCJE considers that a similar measure be taken within those systems that already provide for the duty of the judge to attempt conciliation of the parties to a case.
162. Judicial supervision of appointment of mediators is only one of the elements of a system designed to prevent dangers connected with privatisation of dispute resolution (and possible restrictions of substantial and procedural rights of the parties) that may result from a wide recourse to ADR. The CCJE considers that it is also essential that courts control the mediation proceedings and their outcome.
163. It emerged from the CCJE's discussions that in some circumstances the parties may be granted the right to settle a dispute by an agreement which is not subject to confirmation by the judge. However, such confirmation might prove essential in certain cases, particularly where enforcement measures have to be considered.
164. At least in this case the judge must enjoy substantial supervisory powers, particularly concerning respect for equality between the parties, the reality of their consent to the measures provided for by the agreement and respect for the law and for public policy. As for specific aspects concerning criminal mediation, the CCJE may recall here the considerations in paragraph 147 above.

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<sup>18</sup> Paragraph 14 of Appendix to Recommendation No. R (99) 19 only states that "Participation in mediation should not be used as evidence of admission of guilt in subsequent legal proceedings".

## **SUMMARY OF THE RECOMMENDATIONS AND CONCLUSIONS**

### **A. Access to justice**

- A.1. States should provide dissemination of suitable information on the functioning of the judicial system (nature of proceedings available; duration of proceedings in the average and in the various courts; costs and risks involved in case of wrongful use of legal channels; alternative means of settling disputes offered to parties; landmark decisions delivered by the courts - see paragraphs 12-15 above).
- A.2. In particular:
- citizens' guides should be made available;
  - courts themselves should participate in disseminating the information;
  - education programmes should include a description of the judicial system and should offer visits to courts (see paragraphs 16-17 above).
- A.3. Simplified and standardised formats for the legal documents needed to initiate and proceed with court actions should be adopted, at least for some sectors of litigation (see paragraph 18 above).
- A.4. Technology should be developed whereby litigants may, via computer facilities:
- obtain the necessary documents for bringing an action before a court;
  - be put directly in touch with the courts;
  - obtain full information, even before proceedings are instituted, as to the nature and the amount of the costs they will have to bear, and indication of the foreseeable duration of the proceedings up to the judgment (see paragraph 19 above).
- A.5. The remuneration of lawyers and court officers should be fixed in such a way as not to encourage needless procedural steps (see paragraph 28 above).
- A.6. Provision should be made, pursuant to Recommendation No. R (84) 5 (principle 2-1 in the appendix), for sanctioning abuse of court procedure (see paragraph 28 above).
- A.7. States should guarantee the right for a litigant to plead his or her case before a court either personally or through the representative of his or her choice, particularly when simplified proceedings, litigation of minor financial importance, and consumers' cases are involved; there should be, however, provision enabling the judge, as an exceptional measure, to order the intervention of counsel if the case presents particular problems (see paragraphs 24-26 above).
- A.8. A legal aid system should be organised by the State to enable everyone to enjoy access to justice, covering not only court costs but also legal advice as to the wisdom or the necessity of bringing an action; it should not be reserved for the neediest persons but should also be available, at least in part, to those whose average income does not enable them to bear the cost of an action unaided; the judge should be able to take part in decisions concerning the grant of aid, making sure that the obligation of the objective impartiality is respected (see paragraphs 21 and 22 above).
- A.9. Legal aid ought to be financed by a public authority and covered by a special budget, so that the corresponding expenses are not charged to the operating budget of the courts (see paragraph 23 above).

### **B. Quality of the justice system and its assessment; quantitative statistical data; monitoring procedures**

- B.1. The quality of the justice system depends both on the quality of infra-structures, which may be measured with criteria similar to those employed for other public services, and on the ability performance of legal professionals (judges, but also lawyers, prosecutors and clerks), whose work may be only measured against the benchmarks of law and of judicial or professional practice and deontology (see paragraph 31 above).
- B.2. It is necessary to assess the quality of judicial activity, with reference also to social and economic efficiency, through criteria that are sometimes similar to those employed for other public services (see paragraphs 32 and 33 above).
- B.3. The evaluation of the activity of the court system as a whole or of each individual court or local group of courts should not be confused with the evaluation of the professional ability of every single judge,

which has other purposes. Similar considerations may apply to the activities of other legal professionals involved in the functioning of the court system (see paragraphs 33 and 34 above).

- B.4. The overlap between quality assessment of justice and professional evaluation of a judge should also be avoided when designing judicial statistics; in particular, the use of reversal rates as the only or even necessarily an important indicator to assess the quality of the judicial activity is inappropriate; the same consideration applies to other systems in which some assessment, through systems different from the observation of the reversal rate, is possible as to an individual decision taken by judges (see paragraphs 35-37 above).
- B.5. Although no generally accepted criteria exist at this moment as to data to be collected, the goal of data collection should consist in the evaluating justice in its wider context, i.e. in the interactions of justice with other variables (judges and lawyers, justice and police, case law and legislation, etc.), as most malfunctions of the justice system derive from lack of coordination between several actors (see paragraph 39 above).
- B.6. It is also crucial to underline, in the data collection procedures, the interaction between the quality of justice and the presence of adequate infra-structures and support personnel (see paragraphs 31 and 39 above).
- B.7. Furthermore, "quality" of justice should not be understood as a synonym for mere "productivity" of the judicial system; a qualitative approach should address rather the ability of the system to match the demand of justice in conformity with the general goals of the legal system, of which speed of procedures is only one element (see paragraphs 38-42 above).
- B.8. Quality indicators should be chosen by wide consensus among legal professionals (see paragraph 43 above).
- B.9. Data collection and monitoring should be performed on a regular basis, and procedures carried out by the independent body should allow a ready adjustment of the organisation of courts to changes in the caseloads (see paragraphs 46-48 above).
- B.10. In order to reconcile the realisation of this need with the guarantees of independence of the judiciary, the independent body mentioned in paragraphs 37 and 45 of the CCJE's Opinion No. 1 (2001) should be competent for the choice and the collection of "quality" data, the design of the data collection procedure, the evaluation of results, its dissemination as feed-back, as well as the monitoring and follow-up procedures. The States should, in any case, assure that such activities remain within the public sphere in order to preserve the relevant policy interests linked with the data treatment concerning justice (see paragraphs 43-48 above).

### **C. Case-load and case management**

#### *General*

- C.1. The recommendations in Recommendation No. R (87) 18 regarding reduction in the workload of courts should be implemented.
- C.2. States should provide adequate resources for criminal and civil courts, and judges should (even where they have no direct administrative role) be consulted and have a say in basic decisions about the shape of modern justice and the priorities involved (see paragraphs 52-55 above).
- C.3. Judges should encourage consensual settlement (whether by the parties alone or through mediation) since it has an independent worth, reflecting the values of freedom of choice and agreement, compared with a court-imposed solution (see paragraph 50 above and section D below).
- C.4. It is generally desirable, in countries whose constitutional arrangements so permit, that there should be some flexibility enabling judges and/or cases to be transferred relatively easily between courts, at least on a temporary basis and subject to their consent, to cater for fluctuations in workload. Regard should always be had, when considering court closures, to the right of citizens to have convenient access to their courts (see paragraph 57-60 above).

- C.5. The use of a single judge should be facilitated to determine guilt or innocence within conditions mentioned in paragraphs 61-64 above. The CCJE also considers that countries should encourage training and career development to make full use of single judges to hear first instance cases, wherever this can be achieved commensurately with the experience and capabilities of the judges available and the nature of the proceedings (see paragraphs 61-64 above).
- C.6. The judges should have one or more personal assistants having good qualifications in the legal field to which they can delegate certain activities (see paragraph 65 above).
- C.7. The non-judicial activities listed in Recommendation No. R (86) 12 should be assigned to bodies or individuals other than judges, and attention should be given to the risks inherent when judges are permitted to undertake other private work, which might impact on their public duties. Judges should not be discouraged from serving on relevant commissions and other out-of-court bodies but should exercise particular caution before accepting appointment in cases where essentially non-legal judgments are involved (see paragraphs 66-69 above).
- C.8. In criminal cases, legal aid or free legal representation should be available without evaluation of the merits of the defendant's position. The CCJE recommends further study of the differences between the nature and seriousness of the cases for which such aid or representation is available in different countries. In civil cases suitable control systems need to be introduced for evaluating the merits of claims in advance (see paragraph 70 above).
- C.9. In respect of all aspects of case management, comparative study of other states' experience offers valuable insights into specific procedural measures that may be introduced, a number of which are discussed in more details in the text above.

#### *Criminal cases*

- C.10. Further studies ought to be encouraged in individual states which do not presently have any system of or equivalent to discretionary prosecution so as to give effect to Recommendation No. R (87) 18 (see paragraphs 73-77 above).
- C.11. All countries should consider whether a system of sentence discount for a guilty plea might not bring benefits to their criminal justice. Any such plea must be in court and be taken by a judge. Lawyers should have a professional obligation to ensure that the plea of guilty is entered voluntarily and with the intention to admit each of the elements of the offence charged (see paragraphs 79- 89 above).

#### *Civil cases*

- C.12. To comply with their duties under article 6 of the ECHR to ensure "a fair and public hearing within a reasonable time", states should provide adequate resources and courts should conduct individual cases in a manner which is fair and proportionate as between the particular parties and takes into account the interests of other litigants and the public generally; that means conducting such litigation in a manner that enables the parties thereto to obtain justice at a cost commensurate with the issues involved, the amounts at stake and (without prejudice to the state's duty to provide appropriate resources) the court's own resources and that enables other litigants to obtain their fair share of the court's time for their own disputes (see paragraphs 103-104 above).
- C.13. The key to conducting litigation proportionately is active case management by judges, the core principles of which are stated in Recommendation No. R (84) 5. The most important point is that judges should from the outset and throughout legal proceedings control the timetable and duration of proceedings, setting firm dates and having power to refuse adjournments, even against the parties' wishes (see paragraphs 90-102 above).
- C.14. Parties should be required to define and commit themselves to their cases and evidence at an early stage, and judges should have power, both at first instance and on any appeal, to exclude amendments and/or new material after that stage (see paragraphs 122-125 above).
- C.15. States should introduce (a) effective protective measures, (b) summary, simplified and/or abbreviated procedures and (c) procedures for early determination of preliminary issues (including jurisdictional issues) and for the speedy resolution of any appeal in respect of such preliminary issues (see paragraphs 111-131 above).

- C.16. Court judgments should be immediately enforceable, notwithstanding any appeal, subject to provision of security where appropriate to protect the losing party in the event of a successful appeal (see paragraphs 129-130 above).
- C.17. Countries should give consideration to the possibility of introducing into their systems controls on unmeritorious appeals, in order to ensure that the speedy disposition of meritorious appeals is not impaired (see paragraph 138 above).

**D. Alternative dispute resolution (ADR)**

- D.1. It is necessary to encourage the development of ADR schemes and to increase public awareness of their existence, the way they operate and their cost (see paragraph 141 above).
- D.2. Legal aid should be available for ADR as it is for standard court proceedings; both legal aid resources as well as any other public expenditures to support ADR should make use of a special budget, so that the corresponding expenses are not charged to the operating budget of the courts (see paragraph 142 above).
- D.3. Although, unlike ADR in civil matters, criminal mediation is not useful to alleviate the current workload of the court system, it may have a preventative effect in respect of future crimes; since Recommendation No. R (99) 19 concentrates solely on "mediation" between offender and victim, there is a need for further research on the broader concept of "restorative justice", i.e. procedures allowing diversion from the normal criminal process before it starts (soon after arrest), after it has started as part of the sentencing process or even during the execution of punishment; since schemes for restorative justice require more careful implementation than ADR in civil disputes, as bringing victims and offenders into contact is a much more sensitive process than bringing two parties to a civil dispute together, the success of such schemes depends in part on a cultural change for criminal justice practitioners used to the normal trial and punishment model of justice (see paragraphs 146-149 above).
- D.4. Recourse to mediation, in civil and administrative proceedings, may be chosen on the parties' initiative or, alternatively, the judge should be allowed to recommend it; the parties should be allowed to refuse recourse to mediation; such a refusal should not infringe the party's right to have his/her case decided (see paragraphs 150-152 above).
- D.5. In criminal mediation, if a criminal case is diverted from the normal prosecution process after it has started, it should require an order of a judge; all restorative justice arrangements (or, if appropriate, those that are more than mere warnings with no legal relevance) should have the formality of judicial approval (see paragraphs 151-152 above).
- D.6. Information provided during mediation operations in civil and administrative disputes should be confidential; confidentiality may be lifted in the event of an agreement between the parties; it is open to question whether and how far the judge may consider refusal to access mediation or to accept a friendly settlement when making orders relating to trial expenses or costs (see paragraphs 154-156 above).
- D.7. Confidentiality should also apply to ADR in criminal matters, especially in those countries where prosecution is obligatory. This poses the problem of what should be the consequences of admission of other offences on the part of the offender or of persons who are not participating in the mediation process (see paragraph 157 above).
- D.8. Both in criminal and civil-administrative matters, ADR schemes should be closely associated with the court system; appropriate legal provisions or court practice should confer the judge the power to direct the parties to appear before a judicially appointed, trained mediator, who may prove possession of relevant skills and qualifications, as well as of the necessary impartiality and independence for such a public service (see paragraphs 157-159 and 161 above).
- D.9. Judges may act as mediators themselves, since this allows judicial know-how to be placed at the disposal of the public; it is nevertheless essential to preserve their impartiality in particular by providing that they will perform this task in disputes other than those they are required to hear and decide (see paragraph 161 above).

- D.10. ADR settlement agreements should be subject to confirmation by the judge, particularly where enforcement measures have to be considered; in this case the judge must enjoy substantial supervisory powers, particularly concerning respect for equality between the parties, the reality of their consent to the measures provided for by the agreement and respect for the law and for public policy; as for specific aspects concerning criminal mediation, further guarantees should apply (see paragraphs 162-164 above).

## APPENDIX

### List of the Council of Europe texts and instruments cited in this Opinion

- Opinion No. 1 (2001) of the Consultative Council of European Judges (CCJE) on standards concerning the independence of the judiciary and the irremovability of judges.
- Opinion No. 2 (2001) of the Consultative Council of European Judges (CCJE) on the funding and management of courts with reference to the efficiency of the judiciary and to article 6 of the European Convention on Human Rights.
- Opinion No. 3 (2002) of the Consultative Council of European Judges (CCJE) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality.
- Resolution (78) 8 on legal aid and advice.
- Recommendation No. R (84) 5 of the Committee of Ministers to the member States on the principles of civil procedure designed to improve the functioning of justice.
- Recommendation No. R (86) 12 of the Committee of Ministers to the member States concerning measures to prevent and reduce the excessive workload in the courts.
- Recommendation No. R (94) 12 of the Committee of Ministers to the member States on the independence, efficiency and role of judges.
- Recommendation No. R (87) 18 of the Committee of Ministers to the member States concerning the simplification of criminal justice.
- Recommendation No. R (95) 12 of the Committee of Ministers to the member States on the management of criminal justice.
- Recommendation No. R (98) 1 of the Committee of Ministers to the member States on family mediation.
- Recommendation No. R (99) 19 of the Committee of Ministers to the member States concerning mediation in penal matters.
- Recommendation Rec (2001) 9 of the Committee of Ministers to the member States on alternatives to litigation between administrative authorities and private parties.
- Recommendation Rec (2002) 10 of the Committee of Ministers to the member States on mediation in civil matters.





# Opinion No. 7 (2005)

of the Consultative Council of European Judges (CCJE)  
to the Committee of Ministers of the Council of Europe

## Justice and society

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### INTRODUCTION

1. For 2005 the Consultative Council of European Judges (CCJE) was given the task<sup>1</sup> of adopting an opinion on "Justice and Society" for the attention of the Committee of Ministers of the Council of Europe.
2. In this regard, the CCJE considered the following points which appear in the Framework Global Action Plan for Judges in Europe:
  - relations with the public, the educational role of the courts in a democracy (see Part V b of the Action Plan),
  - relations with all those involved in court proceedings (see Part V c of the Action Plan);
  - accessibility, simplification and clarity of the language used by the court in proceedings and decisions (see Part V d of the Action Plan).
3. The preparatory work was carried out on the basis of:
  - consideration of the *acquis* of the Council of Europe as well as of the results of the 5th meeting of the Presidents of European Supreme Courts on "The Supreme Court: publicity, visibility and transparency" (Ljubljana, 6-8 October 1999), the Conference of the Presidents of the Associations of Judges on "Justice and society" (Vilnius, 13-14 December 1999) and the European Ministerial Conference on Mass Media Policy (Kyiv, Ukraine, 10-11 March 2005);
  - replies by delegations to a questionnaire (with an explanatory note) prepared by the Vice Chair of the CCJE and submitted to the CCJE plenary meeting which took place in Strasbourg on 22-24 November 2004;
  - a report prepared by the specialist of the CCJE on this topic, Mr Eric COTTIER (Switzerland);
  - the contributions of participants in the 2nd European Conference of Judges on the theme of "Justice and the Media", organised by the Council of Europe within the framework of the Polish Chairmanship of the Committee of Ministers on the initiative of the CCJE in co-operation with the Polish National Council of the Judiciary and with the support of the Polish Ministry of Justice (Cracow, Poland, 25-26 April 2005)<sup>2</sup>;
  - a draft opinion prepared by the Working Party of the CCJE (CCJE-GT) in 2005.
4. In preparing this Opinion, the CCJE also considered the "Warsaw Declaration", issued by the Third Summit of Heads of State and government of the Council of Europe, held in Warsaw on 16-17 May 2005, whereby the Summit reaffirmed the commitment "to strengthening the rule of law throughout the continent, building on the standard setting potential of the Council of Europe". In this framework, the Heads of State and government stressed "the role of an independent and efficient judiciary in the member States".

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<sup>1</sup> See specific terms of reference of the CCJE for 2004-2005, adopted by the Committee of Ministers at the 876<sup>th</sup> meeting of the Ministers' Deputies (17 March 2004, item 10.1).

<sup>2</sup> The Conference participants – i.e. judges and other people with a professional interest in the subject, including representatives of the media and international organisations, parliamentarians and experts on the subject under discussion – focused, on the one hand, on the relevant provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the case-law of the European Court of Human Rights, and Council of Europe texts and other instruments on the right to public information, which the press effectively safeguards, and, on the other, on the requirements of the right to a fair public trial by an independent and impartial tribunal with a view to protecting human dignity, privacy, the reputation of others and the presumption of innocence, the ultimate aim being to find ways of striking a balance between conflicting rights and freedoms.

5. This Opinion concerns (A) the relations of the courts with the public, with special reference to the role of the courts in a democracy, (B) the relations of the courts with those involved in court proceedings, (C) the relations of the courts with the media, and (D) accessibility, simplification and clarity of the language used by the courts in proceedings and decisions.

**A. THE RELATIONS OF THE COURTS WITH THE PUBLIC WITH SPECIAL REFERENCE TO THE ROLE OF THE COURTS IN A DEMOCRACY**

6. The development of democracy in European states means that the citizens should receive appropriate information on the organisation of public authorities and the conditions in which the laws are drafted. Furthermore, it is just as important for citizens to know how judicial institutions function.
7. Justice is an essential component of democratic societies. It aims to resolve disputes concerning parties and, by the decisions which it delivers, to fulfil both a “normative” and an “educative” role, providing citizens with relevant guidance, information and assurance as to the law and to its practical application<sup>3</sup>.
8. Courts are, and are accepted by the public at large as being, the proper forum for the ascertainment of legal rights and obligations and the settlement of disputes relative thereto; the public at large have respect for and confidence in the courts' capacity to fulfil that function<sup>4</sup>. However, the understanding of the role of the judiciary in democracies - especially, the understanding that the judge's duty is to apply the law in a fair and even-handed manner, with no regard to contingent social or political pressures – varies considerably in different countries and socio-economic settings in Europe. The levels of confidence in the courts' activity are consequently not uniform<sup>5</sup>. Adequate information about the functions of the judiciary and its role, in full independence from other state powers, can therefore effectively contribute toward an increased understanding of the courts as the cornerstone of democratic constitutional systems, as well as of the limits of their activity.
9. Most citizens' experience of their court system is limited to any participation they might have had as litigants, witnesses, or jurors. The role of the media is essential in broadcasting information to the public on the role and the activities of the courts (see section C below); but, aside from communication through the media, the CCJE's discussions have highlighted the importance of creating direct relations between the courts and the public at large. Integrating justice into society requires the judicial system to open up and learn to make itself known. The idea is not to turn the courts into a media circus but to contribute to the transparency of the judicial process. Admittedly, full transparency is impossible, particularly on account of the need to protect the effectiveness of investigations and the interests of the persons involved, but an understanding of how the judicial system works is undoubtedly of educational value and should help to boost public confidence in the functioning of the courts.
10. The first way to make judicial institutions more accessible is to introduce general measures to inform the public about courts' activities.
11. In this connection, the CCJE would refer to its recommendations in Opinion No. 6 (2004) regarding the educative work of courts and the need to organise visits for schoolchildren and students or any other group with an interest in judicial activities. This does not alter the fact that it is also the state's important duty to provide everyone, while at school or university, with civic instruction in which a significant amount of attention is given to the justice system.
12. This form of communication is more effective if those who work in the system are directly involved. Relevant school and university education programmes (not confined to law faculties) should include a description of the judicial system (including classroom appearances by judges), visits to courts, and active teaching of judicial procedures (role playing, attending hearings, etc.)<sup>6</sup>. Courts and associations of judges can in this respect co-operate with schools, universities, and other educational agencies, making the judge's specific insight available in teaching programmes and public debate.

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<sup>3</sup> See Conclusions of the Fifth Meeting of the Presidents of European Supreme Courts, Ljubljana, 6-8 October 1999, paragraph 2.

<sup>4</sup> See, e.g., European Court of Human Rights, case *Sunday Times vs. United Kingdom*, judgment of 26 April 1979, Series A, No. 30 where the notions mentioned in the text are said to be included in the phrase “authority of the judiciary” contained in art. 10 of the ECHR.

<sup>5</sup> See Conclusions of the Meeting of the Presidents of the Associations of Judges on “Justice and Society”, Vilnius, 13-14 December 1999, paragraph 1.

<sup>6</sup> See Conclusions of the Meeting of the Presidents of the Associations of Judges on “Justice and Society”, Vilnius, 13-14 December 1999, paragraph 1.

13. The CCJE has already stated in general terms that courts themselves should participate in disseminating information concerning access to justice (by way of periodic reports, printed citizen's guides, Internet facilities, information offices, etc.) ; the CCJE has also already recommended the developing of educational programmes aiming at providing specific information (e.g., as to the nature of proceedings available; average length of proceedings in the various courts; court costs; alternative means of settling disputes offered to parties; landmark decisions delivered by the courts) (see paragraphs 12-15 of the CCJE's Opinion No. 6 (2004)).
14. Courts should take part in general framework programmes arranged by other state institutions (Ministries of Justice and Education, Universities, etc.). But, in the CCJE's opinion, courts should also take their own initiatives in this respect.
15. Whereas relations with individual justice users have traditionally been dealt with by the courts, albeit in an unstructured way, courts have been reluctant in the past to have direct relations with the members of the general public who are not involved in proceedings. Publicity of hearings in the sense enshrined in Art. 6 of the European Convention on Human Rights (ECHR) has been traditionally viewed as the only contact between courts and the general public, making the mass media the sole interlocutors for courts. Such an attitude is rapidly changing. The duties of impartiality and discretion which are the responsibility of judges are not to be considered today as an obstacle to courts playing an active role in informing the public, since this role is a genuine guarantee of judicial independence. The CCJE considers that member states should encourage the judiciaries to take such an active role along these lines, by widening and improving the scope of their "educative role" as described in paragraphs 9-12 above. This is no longer to be limited to delivering decisions; courts should act as "communicators" and "facilitators". The CCJE considers that, while courts have to date simply agreed to participate in educational programmes when invited, it is now necessary that courts also become promoters of such programmes.
16. The CCJE considered direct initiatives of the courts with the public, not depending on the activity of the media and/or actions for which other institutions are responsible. The following measures were considered and recommended:
  - creation of offices in courts in charge of reception and information services;
  - distribution of printed materials, opening of Internet sites under the responsibility of courts;
  - organisation by courts of a calendar of educational fora and/or regular meetings open in particular to citizens, public interest organisations, policy makers, students ("outreach programmes").
17. A specific discussion was devoted by the CCJE to these "outreach programmes". The CCJE notes with interest that in some countries courts have been known to organise, often with the support of other social actors, educational initiatives that bring teachers, students, parents, lawyers, community leaders and the media into the courts to interact with judges and the justice system. Such programmes usually incorporate the use of professionals with prepared resources and provide a network for teachers' professional development.
18. Some actions are tailored for individuals who, because of their socio-economical and cultural conditions, are not completely aware of their rights and obligations, so that they do not exert their rights or, worse still, find themselves involved in legal proceedings due to not carrying out their obligations. The image of justice in the neediest social groups is therefore dealt with through programmes that are closely linked to arrangements for "access to justice", including but not limited to legal aid, public information services, free legal counsel, direct access to the judge for small claims, etc. (see section A of the CCJE's Opinion No. 6 (2004)).
19. The CCJE recommends a general support from the European judiciaries and the states, at the national and international levels, for judicial "outreach programmes" as described above; they should become a common practice. The CCJE considers that such programmes go beyond the scope of general information to the public. They aim at shaping a correct perception of the judge's role in society. In this context, the CCJE considers that – while it is for the Ministries of Justice and Education to provide for general information on the functioning of justice and to define school and university teaching syllabi - courts themselves, in conformity with the principle of judicial independence, should be recognised as a proper agency to establish "outreach programmes" and to hold regular initiatives consisting in conducting surveys, arranging focus groups, employing lawyers and academics for public fora, etc. In fact, such programmes have the goal of improving the understanding and confidence of society with regard to its system of justice and, more generally, of strengthening judicial independence.

20. In the CCJE's opinion, in order to develop the above programmes judges should be given the opportunity to receive specific training as to relations with the public. Courts should also have the possibility to employ staff specifically in charge of liaising with educational agencies (public relations offices, as mentioned above, could also be given this task).
21. It seems to the CCJE that a role co-ordinating the various local initiatives, as well as promoting nation-wide "outreach programmes", should be given to the independent body mentioned in paragraphs 37 and 45 of its Opinion No. 1 (2001). This independent body may also, by incorporating the use of professionals with prepared resources, satisfy more sophisticated information needs issuing from policy makers, academics, public interest groups.
22. The CCJE has already advised that appropriate funding, not subject to political fluctuations, should be provided for judicial activities and that judicial bodies should be involved in decisions concerning budget allocations by legislatures, e.g. through a co-ordination role of the above mentioned independent body (see Opinion No. 2 (2001), paragraphs 5, 10 and 11). The CCJE recommends that adequate funding should also be provided for activities explaining and making transparent the judicial system and the principles of justice in society by the court system itself, according to the principles stated in its Opinion No. 2 (2001). Expenses related to "outreach programmes" should be covered by a special budget item, so that they are not charged to the operating budget of courts.
23. The CCJE's discussions showed that, in order to effectively shape a correct perception of justice in society, similar principles, as developed for judges, may apply for public prosecutors. Bearing in mind the *acquis* of the Council of Europe concerning public prosecutors<sup>7</sup>, it seems important to the CCJE that public prosecutors, with regard to the part of the proceedings falling within their jurisdiction, should contribute to the supply of information to the public.

## **B. THE RELATIONS OF THE COURTS WITH PARTICIPANTS IN COURT PROCEEDINGS**

24. The image that the public has of the justice system is influenced by the media, but is also very much shaped by the impressions gleaned by citizens who participate in trials as parties, jurors or witnesses.
25. Such impressions will be negative if the justice system, through its actors (judges, public prosecutors, court officials), appears biased or inefficient in any way. Negative perceptions of this kind will easily spread.
26. The CCJE has dealt in previous Opinions (especially Opinions No. 1 (2001), No. 3 (2002) and No. 6 (2004)) with the need for judges to maintain (in fact and in appearance) strict impartiality and for courts to achieve a just resolution of disputes within a reasonable time. The present Opinion is concerned with the avoidance or correction of ignorance and misapprehensions about the justice system and its operation.
27. The CCJE considers that, in order to foster better understanding of the role of the judiciary, an effort is required to ensure in so far as possible that the ideas that the public has about the justice system are accurate and reflect the efforts made by judges and court officials to gain their respect and trust concerning courts' ability to perform their function. This action will have to show clearly the limits of what the justice system can do.
28. To improve their relations with the public, a number of justice systems or individual courts have set up programmes which help to shape: (a) the ethical training of judges, court staff, lawyers, etc; (b) court facilities; (c) judicial proceedings.

### **a) ethical training of judges, court staff, lawyers, etc**

29. Some training programmes are intended to ensure that courts are seen, under all aspects of their behaviour, to be treating all parties in the same way, i.e. impartially and without any discrimination based on race, sex, religion, ethnic origin or social status. Judges and court staff are trained to recognise situations in which individuals may feel that a biased approach is, or seems to be, being taken, and to deal with such situations in a way that enhances confidence in and respect for the courts. Lawyers

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<sup>7</sup> See, on this subject, Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe on the Role of Public Prosecution in the Criminal Justice System.

organise and are given special ethical training to prevent them from contributing, whether intentionally or not, to mistrust of the justice system.

#### **b) court facilities**

30. Some programmes tackle the causes of potential mistrust vis-à-vis the courts that lie in their internal organisation. For instance, moving the public prosecutor's chair away from the bench and placing it at the same level as the defence will reinforce the impression of equality of arms which a court is supposed to convey. Likewise, the removal from court premises of any visual allusion, for example to a specific religion or political authority, may help to dispel fears of unwarranted bias or a lack of independence of judges. Allowing the accused to appear without handcuffs in court even if he or she has been detained pending trial – save in cases where there is a security risk – and replacing enclosures in courtrooms with other security measures can help to give a clearer impression that the presumption of innocence which defendants enjoy is effectively guaranteed by the courts. A mention should also be made of the benefits, in terms of improving courts' transparency, of setting up court reception services to provide the users of judicial services with information about the conduct of proceedings or the progress made in a particular case, to help users with formalities and, if the layout of the buildings so requires, to accompany them to the office or the courtroom they are looking for.

#### **c) judicial proceedings**

31. Some measures are intended to do away with those parts of the proceedings which may cause offence (compulsory religious references in oaths, forms of address, etc.). Others are intended to introduce procedures which ensure for example that, before appearing in court, parties, jurors or witnesses are received, on their own or in group, by court staff who describe to them, either orally or using audiovisual material produced in collaboration with social scientists, what their court experience is expected to be like. The aim of these presentations is to dispel any misconceptions about what actually happens in courts.
32. The CCJE supports all the steps described in paragraphs 29, 30 and 31 where they strengthen the public perception of impartiality of judges and enable justice to be carried out properly.

### **C. THE RELATION OF THE COURTS WITH THE MEDIA**

33. The media have access to judicial information and hearings, according to modalities and with limitations of established by national laws (see, e.g. Recommendation Rec(2003)13 on the provision of information through the media in relation to criminal proceedings). Media professionals are entirely free to decide what stories should be brought to the public's attention and how they are to be treated. There should be no attempt to prevent the media from criticising the organisation or the functioning of the justice system. The justice system should accept the role of the media which, as outside observers, can highlight shortcomings and make a constructive contribution to improving courts' methods and the quality of the services they offer to users.
34. Judges express themselves above all through their decisions and should not explain them in the press or more generally make public statements in the press on cases of which they are in charge. Nevertheless it would be useful to improve contacts between the courts and the media:
- i) to strengthen understanding of their respective roles;
  - ii) to inform the public of the nature, the scope, the limitations and the complexities of judicial work;
  - iii) to rectify possible factual errors in reports on certain cases.
35. Judges should have a supervisory role over court spokespersons or staff responsible for communicating with the media.
36. The CCJE would refer to the conclusions of the 2<sup>nd</sup> European Conference of Judges (see paragraph 3 above) in which the Council of Europe was asked both to facilitate the holding of regular meetings between representatives of the judiciary and the media and to consider drafting a European declaration on relations between justice and the media complementing Recommendation Rec(2003)13 on the provision of information through the media in relation to criminal proceedings.
37. States should encourage exchanges, in particular by round tables, on the rules and practices of each profession, in order to highlight and explain the problems they face. The CCJE considers that the Council of Europe could usefully establish or promote such contacts at European level, so as to bring about greater consistency in European attitudes.

38. Schools of journalism should be encouraged to set up courses on judicial institutions and procedures.
39. The CCJE considers that each profession (judges and journalists) should draw up a code of practice on its relations with representatives of the other profession and on the reporting of court cases. As the experience of states which already have such a system shows, the judiciary would define the conditions in which statements may be made to the media concerning court cases, while journalists would produce their own guidelines on reporting of current cases, on the publicising of the names (or pictures) of persons involved in litigation (parties, victims, witnesses, public prosecutor, investigating judge, trial judge, etc.), and on the reporting of judgments in cases which attracted major public interest. In conformity with its Opinion No. 3 (2002), paragraph 40, the CCJE recommends that national judiciaries take steps along these lines.
40. The CCJE recommends that an efficient mechanism, which could take the form of an independent body, be set up to deal with problems caused by media accounts of a court case, or difficulties encountered by a journalist in the accomplishment of his/her information task. This mechanism would make general recommendations intended to prevent the recurrence of any problems observed.
41. It is also necessary to encourage the setting up of reception and information services in courts, not only, as mentioned above, to welcome the public and assist users of judicial services, but also to help the media to get to understand the workings of the justice system better.
42. These services, over which judges should have a supervisory role, could pursue the following aims:
- to communicate summaries of court decisions to the media;
  - to provide the media with factual information about court decisions;
  - to liaise with the media in relation to hearings in cases of particular public interest.
  - to provide factual clarification or correction with regard to cases reported in the media (see also paragraph 34, iii above). The court reception services or spokesperson<sup>8</sup> could alert the media to the issues involved and the legal difficulties raised in the case in question, organise the logistics of the hearings and make the appropriate practical arrangements, particularly with a view to protecting the people taking part as parties, jurors or witnesses.
43. All information provided to the media by the courts should be communicated in a transparent and non-discriminatory manner.
44. The question of whether TV cameras should be allowed into courtrooms for other than purely procedural purposes has been the subject of wide-ranging discussions, both at the 2<sup>nd</sup> Conference of European Judges (see paragraph 3 above) and at meetings of the CCJE. Some members of the CCJE have expressed serious reservations about this new form of public exposure of the work of the courts.
45. The public nature of court hearings is one of the fundamental procedural guarantees in democratic societies. While international law and national legislation allow exceptions to the principle that judicial proceedings should be conducted in public, it is important that these exceptions should be restricted to those permitted under article 6.1. of the ECHR.
46. The principle of public proceedings implies that citizens and media professionals should be allowed access to the courtrooms in which trials take place, but the latest audiovisual reporting equipment gives the events related such a broad impact that they entirely transform the notion of public hearings. This may have advantages in terms of raising public awareness of how judicial proceedings are conducted and improving the image of the justice system, but there is also a risk that the presence of TV cameras in court may disturb the proceedings and alter the behaviour of those involved in the trial (judges, prosecutors, lawyers, parties, witnesses, etc.).
47. Where television recording of judicial hearings occurs, fixed cameras should be used and it should be possible for the presiding judge both to decide on filming conditions and to interrupt filming broadcasting at any time. These and any other necessary measures should protect the rights of the persons involved and ensure that the hearing is properly conducted.

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<sup>8</sup> See Conclusions of the 5<sup>th</sup> Meeting of the Presidents of European Supreme Courts, Ljubljana, 6-8 October 1999, paragraph 4, where it is also made clear that a spokesperson should not give a personal opinion on a decision already delivered or a case still pending.

48. The opinion of the persons involved in the proceedings should also be taken into account, in particular for certain types of trial concerning people's private affairs.
49. In view of the particularly strong impact of television broadcasts and the risk of a tendency towards unhealthy curiosity, the CCJE encourages the media to develop their own professional codes of conduct aimed at ensuring balanced coverage of the proceedings they are filming, so that their account is objective.
50. There may be overriding reasons justifying the filming of hearings for specific cases which are strictly defined, for example for educational purposes or to preserve a record on film of a hearing of particular historical importance for future use. In these cases, the CCJE emphasises the need to protect the persons involved in the trial, particularly by ensuring that filming methods do not disrupt the proper conduct of the hearing.
51. While the media plays a crucial role in securing the public's right to information, and acts, in the words of the European Court of Human Rights, as "democracy's watchdog", the media can sometimes intrude on people's privacy, damaging their reputation or undermining the presumption of their innocence, acts for which individuals can legitimately seek redress in court. The quest for sensational stories and commercial competition between the media carry a risk of excess and error. In criminal cases, defendants are sometimes publicly described or assumed by the media as guilty of offences before the court has established their guilt. In the event of a subsequent acquittal, the media reports may already have caused irremediable harm to their reputation, and this will not be erased by the judgment.
52. Courts need therefore to accomplish their duty, according to the case-law of the European Court of Human Rights, to strike a balance between conflicting values of protection of human dignity, privacy, reputation and the presumption of innocence on the one hand, and freedom of information on the other.
53. As stated in the conclusions of the 2<sup>nd</sup> European Conference of Judges (see paragraph 3 above), criminal-law responses to violations of personality rights (such as reputation, dignity or privacy) should be limited to quite exceptional cases<sup>9</sup>. However, the courts do have a duty to ensure that civil damages are awarded, taking account not just of the damage incurred by the victim, but also the seriousness of the infringements suffered and the scale of the publication concerned.
54. The courts should be entitled, in exceptional cases that are strictly defined in order to avoid any accusation of censorship, to take urgent measures to put an immediate stop to the most serious infringements of people's personality rights (such as reputation, dignity or privacy), through the confiscation of publications or through broadcasting bans.
55. When a judge or a court is challenged or attacked by the media (or by political or other social actors by way of the media) for reasons connected with the administration of justice, the CCJE considers that, in view of the duty of judicial self-restraint, the judge involved should refrain from reactions through the same channels. Bearing in mind the fact that the courts can rectify erroneous information diffused in the press, the CCJE believes it would be desirable that the national judiciaries benefit from the support of persons or a body (e.g. the Higher Council for the Judiciary or judges' associations) able and ready to respond promptly and efficiently to such challenges or attacks in appropriate cases.

#### **D. ACCESSIBILITY, SIMPLIFICATION AND CLARITY OF THE LANGUAGE USED BY THE COURTS IN PROCEEDINGS AND DECISIONS**

56. The language used by the courts in their procedures and decisions is not only a powerful tool available to them to fulfil their educational role (see paragraph 6 above), but it is obviously, and more directly, the "law in practice" for the specific litigants of the case. Accessibility, simplicity and clarity of the language of courts are therefore desirable<sup>10</sup>.
57. The CCJE notes that in some European countries, judges believe that very short judgments reinforce the authority of the judgment; in some other countries, judges feel obliged, or are obliged by the law or practice, to explain extensively in writing all aspects of their decisions.

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<sup>9</sup> See paragraph 28 of the Action Plan adopted by the Ministerial Conference on Mass Media Policy (Kyiv, 10-11 March 2005), whereby the necessity of a review of the situation in member States regarding legislation on defamation was affirmed.

<sup>10</sup> See Conclusions of the 5<sup>th</sup> Meeting of the Presidents of European Supreme Courts, Ljubljana, 6-8 October 1999, paragraph 1.

58. Without having the aim to deal in depth with a subject which is heavily influenced by national legal styles, the CCJE considers that a simple and clear judicial language is beneficial as it makes the rule of law accessible and foreseeable by the citizens, if necessary with the assistance of a legal expert, as the case-law of the European Court of Human Rights suggests.
59. The CCJE considers that judicial language should be concise and plain, avoiding - if unnecessary - Latin or other wordings that are difficult to understand for the general public<sup>11</sup>. Legal concepts and rules of law may be quite sufficiently explained by citing legislation or judicial precedents.
60. Clarity and concision, however, should not be an absolute goal, as it is also necessary for judges to preserve in their decisions precision and completeness of reasoning. In the CCJE's opinion, legislation or judicial practice concerning reasoning of judgments should provide that some form of reasoning always exists, and that sufficient discretion is left to the judge in choosing whether to give, where permissible, an oral judgment (which may be transcribed from a recording upon request or in case of need) and/or a short written reasoned judgment (e.g. in the form of the "*attendu*" style decision adopted in some countries) or an extensive written reasoned judgment, in all those cases in which reference to established precedents is not possible and/or the factual reasoning so requires. Simplified forms of reasoning may apply to orders, writs, decrees and other decisions that have a procedural value and do not concern the substantive rights of the parties.
61. An important aspect of accessibility of law, as enshrined in judicial decisions, is represented by their ready availability to the general public<sup>12</sup>. In view of this goal, the CCJE recommends that at least all Supreme Court and other important court decisions be accessible through Internet sites at no expense, as well as in print upon reimbursement of the cost of reproduction only; appropriate measures should be taken, in disseminating court decisions, to protect privacy of interested persons, especially parties and witnesses.

## SUMMARY OF THE RECOMMENDATIONS AND CONCLUSIONS

### A. The relations of the courts with the public with special reference to the role of the courts in a democracy

- A.1. It is the state's important duty to provide everyone, while at school or university, with civic instruction in which a significant amount of attention is given to the justice system (see paragraph 11 above).
- A.2. Relevant school and university education programmes should include a description of the judicial system, visits to courts, and active teaching of judicial procedures. Courts and associations of judges can in this respect co-operate with schools, universities, and other educational agencies, making the judge's specific insight available in teaching programmes and public debate (see paragraph 12 above).
- A.3. Courts should take part in general framework programmes arranged by other state institutions and take an active role in providing information to the public (see paragraphs 14 and 15 above).
- A.4. The following measures are thus recommended (see paragraphs 16 to 19 above):
- creation of offices in courts in charge of reception and information services;
  - distribution of printed materials, opening of Internet sites under the responsibility of courts;
  - organisation by courts of a calendar of educational fora and/or regular meetings open to citizens, public interest organisations, policy makers, students, etc.;
  - "outreach programmes" and programmes for access to justice.
- A.5. Judges should be given the opportunity to receive specific training as to relations with the public and courts should also have the possibility to employ staff specifically in charge of liaising with educational agencies (see paragraph 20 above).

<sup>11</sup> See Conclusions of the Meeting of the Presidents of the Associations of Judges on "Justice and Society", Vilnius, 13-14 December 1999, paragraph 1.

<sup>12</sup> See Conclusions of the 5<sup>th</sup> Meeting of the Presidents of European Supreme Courts, Ljubljana, 6-8 October 1999, paragraph 1.



- A.6. A role co-ordinating the various local initiatives, as well as promoting nation-wide "outreach programmes", should be given to the independent body mentioned in paragraphs 37 and 45 of its Opinion No. 1 (2001) (see paragraph 21 above).
- A.7. Adequate funding, not charged to the operating budget of courts, should be provided to the courts for activities explaining and making transparent the principles and the mechanisms of justice in society as well as for expenses related to "outreach programmes" (see paragraph 22 above).
- A.8. Public prosecutors, with regard to the part of the proceedings falling within their jurisdiction, should contribute to the supply of information to the public (see paragraph 23 above).

## **B. The relations of the courts with participants in court proceedings**

- B.1. The CCJE considers that, in order to foster better understanding of the role of the judiciary, an effort is required to ensure in so far as possible that the ideas that the public has about the justice system are accurate and reflect the efforts made by judges and court officials to gain their respect and trust concerning courts' ability to perform their function. This action will have to show clearly the limits of what the justice system can do (see paragraphs 24 to 27 above).
- B.2. The CCJE supports all the steps aiming at strengthening the public perception of impartiality of judges and enabling justice to be carried out (see paragraphs 28 to 32 above).
- B.3. Such initiatives may include (see paragraphs 28 to 32 above):
- training programmes in non-discrimination and equal treatment organised by courts for judges and court staff (in addition to the similar programmes organised by lawyers or for lawyers);
  - court facilities and arrangements designed to avoid any impression of inequality of arms;
  - procedures designed to avoid giving unintended offence and to ease the involvement of all concerned in judicial proceedings.

## **C. The relations of the courts with the media**

- C.1. The CCJE considers that it would be useful to improve contacts between the courts and the media (see paragraph 34 above):
- to strengthen understanding of their respective roles;
  - to inform the public of the nature, the scope, the limitations and the complexities of judicial work;
  - to rectify possible factual errors in reports on certain cases.
- C.2. Judges should have a supervisory role over court spokespersons or staff responsible for communicating with the media (see paragraph 35 above).
- C.3. The CCJE considers that states should encourage exchanges, in particular by round tables, on the rules and practices of each profession and that the Council of Europe could usefully establish or promote such contacts at European level, so as to bring about greater consistency in European attitudes (see paragraph 36 and 37 above).
- C.4. Schools of journalism should be encouraged to set up courses on judicial institutions and procedures (see paragraph 38 above).
- C.5. The CCJE considers that each profession (judges and journalists) should, draw up a code of practice on its relations with representatives of the other profession and on the reporting of court cases (see paragraph 39 above).
- C.6. The CCJE recommends that an efficient mechanism be set up, which could take the form of an independent body to deal with problems caused by media accounts of a court case or difficulties encountered by a journalist in the accomplishment of his/her information task, to make general recommendations intended to prevent the recurrence of any problems observed (see paragraph 40 above).
- C.7. It is also necessary to encourage the setting up of reception and information services in courts under the supervision of the judges in order to help the media to get to understand the workings of the justice system better by (see paragraphs 41 and 42 above):
- communicating summaries of court decisions to the media;
  - providing the media with factual information about court decisions;

- liaising with the media in relation to hearings in cases of particular public interest;
- providing factual clarification or correction with regard to cases reported in the media.

- C.8. The CCJE considers that all information provided to the media by the courts should be communicated in a transparent and non-discriminatory manner (see paragraph 43 above).
- C.9. The CCJE considers, that where television recording of judicial hearings occurs, fixed cameras should be used and it should be possible for the presiding judge both to decide on filming conditions and to interrupt filming broadcasting at any time. These and any other necessary measures should protect the rights of the persons involved and ensure that the hearing is properly conducted. Furthermore, the opinion of the persons involved in the proceedings should also be taken into account, in particular for certain types of trial concerning people's private affairs (see paragraphs 44 to 48 above).
- C.10. The CCJE encourages the media to develop their own professional codes of conduct aimed at ensuring balanced coverage of the proceedings they are filming, so that their account is objective (see paragraph 49 above).
- C.11. The CCJE considers that there may be overriding reasons justifying the filming of hearings for restricted use specified by the court (for example for educational purposes or to preserve a record on film of a hearing of particular historical importance for future use), in these cases, it is necessary to protect the persons involved in the trial, particularly by ensuring that filming methods do not disrupt the proper conduct of the hearing (see paragraph 50 above).
- C.12. The CCJE considers that criminal-law responses to violations of personality rights should be limited to quite exceptional cases. However, the judges do have a duty to ensure that civil damages are awarded, taking account not just of the damage sustained by the victim, but also the seriousness of the infringements suffered and the scale of the publication concerned. The courts should be entitled, in exceptional cases, to take urgent measures to put an immediate stop to the most serious infringements of people's personality rights through the confiscation of publications or through broadcasting bans (see paragraphs 51 to 54 above).
- C.13. When a judge or a court is challenged or attacked by the media for reasons connected with the administration of justice, the CCJE considers that in the view of the duty of judicial self-restraint, the judge involved should refrain from reactions through the same channels. Bearing in mind the fact that the courts can rectify erroneous information diffused in the press, the CCJE believes it would be desirable that the national judiciaries benefit from the support of persons or a body (e.g. the Higher Council for the Judiciary or judges' associations) able and ready to respond promptly and efficiently to such challenges (see paragraph 55 above).

**D. Accessibility, simplification and clarity of the language used by the courts in proceedings and decisions**

- D.1. The CCJE considers that accessibility, simplicity and clarity of the language of courts are desirable (see paragraphs 56 to 58 above).
- D.2. The CCJE considers that judicial language should be concise and plain, avoiding - if unnecessary - Latin or other wordings that are difficult to understand for the general public. Legal concepts and rules of law may be quite sufficiently explained by citing legislation or judicial precedents (see paragraph 59 above).
- D.3. In the CCJE's opinion, judicial reasoning should always be precise and complete, though simplified reasoning may be appropriate in procedural matters, and judges may, where permissible, give their reasoning orally (subscription to later transcription if required) rather than in writing (see paragraph 60 above).
- D.4. The CCJE recommends that at least all Supreme Court and other important court decisions be accessible through Internet sites at no expense, as well as in print upon reimbursement of the cost of reproduction only; however appropriate measures should be taken in disseminating court decisions, to protect privacy of interested persons, especially parties and witnesses (see paragraph 61 above).

# Opinion No. 8 (2006)

of the Consultative Council of European Judges (CCJE)  
to the Committee of Ministers of the Council of Europe

## The role of judges in the protection of the rule of law and human rights in the context of terrorism

### A. INTRODUCTION

#### a. General context

1. In order to implement the Action Plan adopted at the 3<sup>rd</sup> Summit of the Heads of state and Government of the Council of Europe<sup>1</sup>, inviting European states to ensure an efficient protection of human rights while intensifying the fight against terrorism, the Committee of Ministers entrusted the Consultative Council of European Judges (CCJE) with the task to adopt in 2006 an Opinion on *the role of the Judge and the balance between protection of the public and human rights, in the context of the fight against terrorism*<sup>2</sup>.
2. The Council of Europe has made specific efforts in the fight against terrorism, in order to strike a proper balance between the safeguard of individual rights and freedoms and public security. The Council of Europe's actions are based on three objectives:
  - strengthening legal action against terrorism ;
  - safeguarding fundamental democratic values;
  - addressing the causes of terrorism.
3. This specific action has resulted in a number of legal instruments of the Council of Europe, which are *inter alia* the following:
  - European Convention on the Suppression of Terrorism [ETS No. 90] and Amending Protocol [ETS No. 190] ;
  - European Convention on Extradition [ETS No. 24] and first and second Additional Protocols [ETS No. 86 and ETS No. 98] ;
  - European Convention on Mutual Assistance in Criminal Matters [ETS No. 30] and first and second Additional Protocols [ETS No. 99 and ETS No. 182] ;
  - European Convention on the Transfer of Proceedings in Criminal Matters [ETS No. 73] ;
  - European Convention on the Compensation of Victims of Violent Crimes [ETS No. 116] ;
  - Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime [ETS No. 141];
  - Convention on Cybercrime [ETS No. 185] and Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems [ETS No. 189] ;
  - Council of Europe Convention on the Prevention of Terrorism [CETS No. 196] ;
  - Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism [CETS No. 198].
4. In the context of this Opinion, the CCJE also refers to other relevant international instruments by the European Union (see in particular the EU Action Plan on combating terrorism)<sup>3</sup> and by the United Nations, and *inter alia*:
  - Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973 ;
  - International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979 ;
  - International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997 ;
  - International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999 ;

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<sup>1</sup> Warsaw, 16 - 17 May 2005.

<sup>2</sup> 956th meeting of Ministers' Deputies (15 February 2006).

<sup>3</sup> Council of the European Union, 5771/1/06.

- International Convention for the Suppression of Acts of Nuclear Terrorism, New York, 13 April 2005 ;
- Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963 ;
- Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 December 1970 ;
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971 ;
- Convention on the Physical Protection of Nuclear Material, signed at Vienna on 3 March 1980 ;
- Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 24 February 1988 ;
- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988 ;
- Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988 ;
- Convention on the Marking of Plastic Explosives for the Purpose of Detection, signed at Montreal on 1 March 1991.

5. As some of their provisions are relevant in this specific context, the CCJE also wishes to recall the Geneva Conventions of 12 August 1949:

- Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;
- Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;
- Convention (III) relative to the Treatment of Prisoners of War;
- Convention (IV) relative to the Protection of Civilian Persons in Time of War.

6. The CCJE additionally wishes to recall its Opinion No. 6 (2004) on fair trial within a reasonable time and judge's role in trials taking into account alternative means of dispute settlement and Opinion No. 7 (2005) on justice and society.

#### **b. Reconciliation of Human Rights with the need to take measures against terrorism**

7. The Council of Europe has already underlined on several occasions that the fight against terrorism is possible, while respecting human rights.

8. With this aim in July 2002 the Committee of Ministers adopted<sup>4</sup> the Guidelines on human rights and the fight against terrorism. These guidelines affirm the obligation of the state to protect everyone against terrorism, while reiterating the need to avoid arbitrary measures, and to ensure that all measures taken to combat terrorism be lawful, and that torture be prohibited.

9. The legal framework set out in the guidelines concerns, in particular, the collecting and processing of personal data, measures which interfere with privacy, arrest, police custody and pre-trial detention, legal proceedings, extradition and the compensation of victims.

10. Pursuant to this, in March 2005 the Committee of Ministers adopted<sup>5</sup> the Guidelines on the protection of victims of terrorist acts which recognise their suffering and the need to support them.

11. Everyday experience and current events show that, while terrorism is not a new problem, it has recently taken on an unprecedented international scale. Fighting terrorism is a specific and particularly difficult challenge for the states and law enforcement agencies and subsequently for the court system, which must react creatively, within the framework of the European Convention of Human Rights.

12. There is an obvious conflict between terrorism and the exercise of individual rights and freedoms because terrorism not only seriously jeopardises fundamental rights, including the right to life and to bodily integrity, and undermines the principles of rule of law and pluralist democracy, but it also is likely to lead states to impose restrictions which themselves, unless care is taken, might be detrimental to human rights.

<sup>4</sup> 804th meeting of Ministers' Deputies, 11 July 2002.

<sup>5</sup> 917th meeting of Ministers' Deputies, 2 March 2002.

13. Within this framework the CCJE has considered it appropriate, as a body composed solely of judges, to examine the role of the judge in the protection of the Rule of law and Human Rights in the context of terrorism.
14. The CCJE considers that the judge, charged with the dual functions of dealing with transgressions of the law and protecting constitutional rights and freedoms of individuals, must have an essential role in the legal frameworks devised by the states, and must be granted all necessary powers to fruitfully perform such tasks.
15. The CCJE considers that, if terrorism must be regarded as creating a special situation justifying temporary and specific measures which limit certain rights because of the exceptional danger it poses, these measures must be determined by the law, be necessary and proportionate to the aims of a democratic society (see, as regards the right of expression, Article 10 paragraph 2 of the European Convention of Human Rights, and, in general, principle 3 of the Guidelines on human rights and the fight against terrorism), and be subject to scrutiny and control with regard to their legitimacy by those judges that, according the legal traditions of the several states, ordinarily have jurisdiction in the area of the law concerned (civil, criminal or administrative courts – as opposed to *tribunaux d'exception* operating outside the ordinary legal system - see also paragraphs 26, 33-34 and 42 and following below).
16. These measures may in no case infringe the citizens' rights and freedoms to such an extent that the basic principles of democratic societies are themselves put at risk.
17. In view of the above general considerations, it is appropriate to examine the implications of measures that may be taken within the frameworks of administrative law (part B) and criminal law (part C) in the fight against terrorism, and also the role of the judge in the protection of freedom of expression (part D).

## **B. ADMINISTRATIVE LAW MEASURES**

18. In the discharge of their duty to protect their populations by preventing terrorist acts, states may through their administrative authorities take measures which are distinct from the criminal sanctions applied to terrorist offences already committed.
19. Deportation of foreigners, visa and residence permits requirements, identity controls, prohibition of associations, prohibition of assemblies, wire-tapping, installation of video-cameras and monitoring activities by use of information technology are all examples of such preventive measures.
20. Such preventive measures - like penal measures - require that a balance be maintained between the obligation to protect people against terrorist acts and the obligation to safeguard human rights.
21. Judges should have a very important role to play in ensuring that such a balance is properly struck. Of course, it is primarily for the states to enact and the administrative authorities to apply the measures necessary to strike such a balance. When the courts take due account of the legislation passed to combat perceived terrorist threats, such legislation and administrative actions must be subject to judicial scrutiny and review to ensure that they are legal, necessary and proportionate.
22. In this context international and European legal instruments must be observed, including the obligations which stem from the European Convention on Human Rights. The protection of national security may result in the restriction of some individual rights of the Convention<sup>6</sup>.

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<sup>6</sup> Article 8 (right to respect for private and family life), Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression), and Article 11 (freedom of assembly and association).

23. Preventive measures against terrorism must, however, never breach fundamental rights such as right to life (Article 2 of the European Convention on Human Rights) or prohibition of torture or inhuman or degrading treatment or punishment (Article 3 of the European Convention on Human Rights).
24. With respect to Article 3, the CCJE notes that the European Court of Human Rights states that terrorism cannot justify derogation from the absolute prohibition of torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct<sup>7</sup>. The Court took the view that, in assessing whether there is a real risk of treatment in breach of Article 3 in expulsion cases, the fact that the person is perceived as a danger to the national security of the state is not a material consideration<sup>8</sup>.
25. Effective access to judicial review of administrative acts aimed at preventing terrorism should be ensured as provided by Recommendation Rec(2004)20 of the Committee of Ministers to member states on judicial review of administrative acts<sup>9</sup>. To be effective under Article 13 of the European Convention on Human Rights the remedy should exist regardless of the question whether the person concerned is perceived as a danger to national security<sup>10</sup>.
26. Judicial review comprises the review of any violation of law by those judges that, according the legal traditions of the several states, ordinarily have jurisdiction in the area of the law concerned (for this and the following requirements, see Rec(2004)20 mentioned in paragraph 25). The court – usually a civil or an administrative court - should be in a position to examine all of the legal and factual issues and should not be bound by the fact-finding of the authorities.
27. The right to a fair hearing in particular shall be guaranteed (Article 6 of the European Convention on Human Rights). This implies *inter alia* that there shall be equality of arms between the parties to the proceedings and that the proceedings shall be adversarial in nature.
28. The right to a fair hearing requires that all evidence admitted by the court should in principle be made available to the parties with a view to adversarial arguments<sup>11</sup>. The question arises as to what extent limitations to access to documents, witnesses or other sources of evidence might be admissible, if security reasons are involved. When access to evidence is granted to lawyers and not to the parties personally, because direct disclosure to persons concerned of sources of evidence may jeopardise the public interest, potentially difficult issues arise as to whether it is or not a substantial limitation of effective remedy and of defense<sup>12</sup>. Whatever the solution might be as regards access to evidence by the parties and defence lawyers, the CCJE is of the opinion that no

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<sup>7</sup> See European Court of Human Rights, judgement *Chahal v. the United Kingdom* (15.11.1996), paragraph 79: "[the European Court of Human Rights] is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct."

<sup>8</sup> See European Court of Human Rights, judgement *Chahal v. the United Kingdom* (15.11.1996), paragraphs 80 and 149.

<sup>9</sup> Adopted by the Committee of Ministers on 15 December 2004.

<sup>10</sup> See European Court of Human Rights, judgement *Chahal v. the United Kingdom* (15.11.1996), paragraph 151: "In such cases, given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3. This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State."

<sup>11</sup> See Recommendation Rec(2004)20: The proceedings should be adversarial in nature. All evidence admitted by the tribunal should in principle be made available to the parties with a view to adversarial argument (paragraph B.4.d).

<sup>12</sup> The European Court of Human Rights deals with the access to evidence of the parties and defense lawyers in the *Chahal* judgment by referring indirectly to the Canadian legislation: "The intervenors (...) were all of the view that judicial review did not constitute an effective remedy in cases involving national security. Article 13 required at least that some independent body should be apprised of all the facts and evidence and entitled to reach a decision which would be binding on the Secretary of State. In this connection, Amnesty International, Liberty, the AIRE Centre and JCWI (...) drew the Court's attention to the procedure applied in such cases in Canada. Under the Canadian Immigration Act 1976 (as amended by the Immigration Act 1988), a Federal Court judge holds an in camera hearing of all the evidence, at which the applicant is provided with a statement summarising, as far as possible, the case against him or her and has the right to be represented and to call evidence. The confidentiality of security material is maintained by requiring such evidence to be examined in the absence of both the applicant and his or her representative. However, in these circumstances, their place is taken by a security-cleared counsel instructed by the court, who cross-examines the witnesses and generally assists the court to test the strength of the State's case. A summary of the evidence obtained by this procedure, with necessary deletions, is given to the applicant."

limitations should apply to the possibility for the judge to have direct and personal access to documents, witnesses and other sources of evidence, in order to allow the court to ascertain all relevant facts and thus rule on an effective remedy (Article 13 of the European Convention on Human Rights).

29. The above stated principles also apply to the decisions concerning expulsion or deportation of an alien or refusal of a residence permit or of any form of protection (for example refugee status or subsidiary protection), if charges of a terrorist danger are involved.
30. Although Article 6 of the European Convention on Human Rights is not applicable as regards expulsion and deportation of aliens,<sup>13</sup> the right to a fair hearing has to be observed also with respect to these measures (see Recommendation Rec(2004)20, paragraph 4).
31. The CCJE considers that similar judicial supervisory powers should be effectively guaranteed with regard to the application of limitations to aliens' freedom of movement pending procedures of expulsion or deportation. In addition, surveillance on conditions of such limitations should be guaranteed on a similar basis as for detention conditions.
32. At any rate no irreparable action can be taken while proceedings are pending<sup>14</sup>. This means that a deportation during proceedings is never admissible if absolute rights such as those protected by Article 2 or Article 3 of the European Convention on Human Rights are at risk<sup>15</sup>. Interests of public order or national security – as for example mentioned by Article 1 of the Protocol No. 7 to the European Convention on Human Rights of 22 November 1984 – are immaterial, if absolute rights are involved.
33. The CCJE considers that, because of the delicate task of guaranteeing fundamental rights and freedoms, supervision of all administrative law measures concerning expulsion of aliens (as well as their provisional surveillance), visa requirements, identity controls, prohibition of association, prohibition of assemblies, wire-tapping, installation of video-cameras, the search for persons by use of information technology, should be entrusted to ordinary courts (including administrative courts) composed of professional judges, established by the law, with full guarantees of independence.
34. The task of providing an effective remedy may only be entrusted to the ordinary judiciary and/or judges, as they are established according to the legal traditions of some countries, having specialised knowledge (e.g. administrative judges – see paragraph 26 above).

### **C. CRIMINAL LAW MEASURES**

35. The need for a response to acts of terrorism by criminal law measures has long since been affirmed in Council of Europe texts (see Recommendation 703(1973) of the Parliamentary Assembly on international terrorism); such a response entails the taking by the states of appropriate measures concerning substantive law (a); part (b) will be devoted to the unchanged role of the judge in terrorist criminal proceedings.

#### **a. Substantive law**

36. Many states have included the specific offence of "terrorism" in their domestic criminal laws, thus reflecting a common desire expressed in various international instruments of the United Nations, the Council of Europe and the European Union.
37. In view of the gravity of the offences which are regarded as terrorist as well as of procedural consequences stemming from them, it is important that the basic principles of criminal law be applicable to terrorist offences as to any other criminal offence, and that the elements of such offence be clearly and precisely defined.

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<sup>13</sup> See, for example, European Court of Human Rights, judgement *Maaouia v. France* (5.10.2000), paragraph 40: "The Court concludes that decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6 § 1 of the Convention".

<sup>14</sup> See European Court of Human Rights, judgement *Mamatkulov and Askarom v. Turkey*, 4.02.2005, paragraph 124: "Indeed it can be said, that, whatever the legal system is question, the proper administration of justice requires that no irreparable action be taken while proceedings are pending".

<sup>15</sup> See also the already mentioned *Chahal* judgement, according to which the Convention prohibits in absolute terms torture.

38. Compliance with these criteria is essential, not only for proof of guilt in offences involving direct attack on persons or property, but also in any case in which domestic legislations provide for classifying certain other conducts, such as preparation for or financing of terrorist activities, as terrorist.

39. As terrorism does not respect national boundaries, the states' legal response to it must be international. Existing international legal instruments in this field provide a common normative basis for the fight against terrorism. It would assist national judges, especially in the field of inter-state cooperation (e.g. in relation to exchange of information and judicial assistance), if the international community were to develop agreed definitions of terrorist offences conforming to the standards of Article 7 of the European Convention on Human Rights. Judges, as interpreters of the law, should - on their part - keep into account the international dimension of the phenomenon when applying the law.

**b. The role of the judge remains unchanged in terrorist criminal proceedings**

40. In the context of criminal law also, judges have a central role in ensuring that a proper balance is struck, as regards both substantive and procedural law, between the need to detect and pursue offences of terrorism and the safeguarding of the human rights of those suspected of and charged with such offences.

41. Having regard to the above mentioned needs, some questions concerning the role of the judge in proceedings in the field of terrorism may be addressed.

**i. The refusal of "*tribunaux d'exception*"**

42. The CCJE notes that a virtually universal response by European states to the requirement of a balance between security against terrorism and the safeguarding of human rights has been the refusal to establish "*tribunaux d'exception*" (see paragraph 15 above) as a reaction to the current threat posed by terrorism.

43. States should trust their existing court structures to strike such a balance - in compliance with the law generally applicable in democratic states, including international Conventions and in particular the European Convention of Human Rights.

44. The CCJE considers that the role of the judge in cases concerning terrorist acts must not differ from the role of the judge plays in relation to the other offences, and that the nature of the subject matter does not justify a departure from ordinary rules governing the courts' competence.

45. Nonetheless, the importance of terrorism suggests that crimes relating of category should be dealt with by courts having jurisdiction to hear and determine the most serious crimes, where such competence is divided between national courts.

46. The CCJE acknowledges that local circumstances or needs pertaining to judges' security may sometimes justify the recourse to specialised courts competent for terrorist cases.

47. At any rate, it is important that these particular courts are composed of independent judges and apply ordinary rules of procedure fully respecting the right of defence and, in principle, the right to a public hearing, in such a way that fairness of the proceeding is in all cases guaranteed.

48. It is necessary to avoid a situation where on the one hand investigators have specific expertise in the area of terrorism, but, on the other hand judges and public prosecutors may encounter difficulties because of a lack of information and knowledge.

49. Training of judges must address all the areas of criminal and financial law relevant for the understanding of terrorist activities, and must involve an international dimension with the aim of promoting creation of judicial networks that are essential for exchange of information and other forms of cross-border co-operation.

50. Training initiatives should also aim at emphasising the particular function of judges, who must always preserve a balance between the necessity of repressing crime and respect of fundamental rights even when dealing with terrorist activities.



## ii. The role of the judge during investigations

51. The CCJE considers that, however serious the offence may be, the courts should, at all stages of investigations, ensure that restrictions of individual rights be limited to those strictly necessary for the protection of public interest<sup>16</sup>. The courts should evaluate the validity and legitimacy of evidence collected by investigators and have the legal power to refuse evidence obtained by means of torture or inhuman or degrading treatment, or by violating the rights of the defence, or by other illegal actions. The courts should ensure that decisions concerning investigations be in accordance with the rules of fair trial and equality of arms.
52. Although investigations are conducted in some states by special information services, which are an essential instrument for investigation or prevention of crime, the activities of such information services must not develop in violation of applicable laws, and must be subjected to democratic control conforming to requirements of the European Convention of Human Rights<sup>17</sup>.
53. The CCJE considers that all orders of freezing, seizure or confiscation of assets, aimed at preventing financing of terrorism, should be strictly prescribed by law and ultimately be subject to the court's authorisation and regular supervision, as they can seriously infringe the rights of privacy and property.
54. The Council of Europe adopted a Recommendation Rec(2005)10 of the Committee of Ministers to member states on special investigation techniques in relation to serious crimes including acts of terrorism<sup>18</sup>.
55. This recommendation stresses that use of special investigation techniques is a crucial tool in the context of fight against serious crimes, actually committed or at the preparatory stage, but it also stipulates that such techniques may be only resorted to within the framework and under conditions that must be clearly defined by the law, under adequate supervision of judicial authorities or other "independent bodies". The CCJE doubts that supervision may be possibly entrusted to the competence of "independent bodies" other than those judges that, according the legal traditions of the several states, ordinarily have jurisdiction in the area of the law concerned (see paragraph 26 above); the concept of "independent bodies" lacks precision and does not guarantee fairness of the proceeding as required by Art. 6 paragraph 1 of the European Convention of Human Rights.
56. The CCJE considers that such special investigation techniques must respect the principles of legality and proportionality; that they must in any case be viewed as temporary measures and their application should be regularly supervised (including, in principle, a previous authorisation) by the competent court.

## iii. The role of the judge during detention

57. The CCJE recalls that the provisions of Article 5 paragraphs 3 and 4 of the European Convention of Human Rights shall be respected as to pending trial detention and conviction of persons in relation to terrorist charges<sup>19</sup>. Detention is a sanction to be imposed by a court on persons whose guilt has

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<sup>16</sup> See also, for the role that the public prosecution services may play in ensuring protection of human rights, Recommendation Rec(2000)19 on the role of public prosecution in the criminal justice. The CCJE will examine in detail, in a future opinion, the relations between the judiciary and public prosecution (see Framework Global action plan for Judges in Europe, Document CCJE (2001) 24).

<sup>17</sup> See for instance: "Venice Commission: Internal Security Services in Europe" (CDL/Inf (98)6).

<sup>18</sup> According to the Recommendation Rec(2005)10, special investigation techniques are: "techniques applied by the competent authorities in the context of criminal investigations for the purpose of detecting and investigating serious crimes and suspects, aiming at gathering information in such a way as not to alert the target persons".

<sup>19</sup> Article 5 paragraph 3 of the European Convention of Human Rights: "Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a Judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."; Article 5 paragraph 4 of the European Convention of Human Rights: "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. " Furthermore, in the judgement *Brogan and others v. the United Kingdom* (29.11.1988), the European Court of Human Rights states in paragraph 61 that the investigation of terrorist offences undoubtedly presents the authorities with special problems. The Court accepts that, subject to the existence of adequate safeguards, the context of terrorism in the case at hand "has the effect of prolonging the period during which the authorities may, without violating Article 5 paragraph 3, keep a person suspected of serious terrorist offences in custody before bringing him before a Judge or other judicial officer. The difficulties alluded to by the Government, of judicial control over decisions to arrest and detain suspected

been established. However, under exceptional cases, persons can be detained before a judicial decision has been taken as a preventive measure (custody, refusal of bail before a formal charge, etc., both before and during trial).

#### - **Detention of suspects**

58. As to custody or detention prior to a decision establishing guilt, the practice differs from state to state in the scope of the measures restricting human rights which each tolerates. Thus, while certain countries have, in terrorist cases, extended the period of police custody, or even detention on remand, for which the ordinary law provides, others do not intend to depart from the provisions of ordinary law.
59. As freedom of movement is one of fundamental rights of democratic states, the CCJE considers not only that measures likely to interfere with the exercise of this right must be clearly determined by the law, but also that judges – in their capacity as guarantors of individual freedoms – must have the task to supervise custody and detention measures ordered before guilt has been established.
60. This supervision implies that the judge should be able to verify the existence of legal and factual conditions for detention (therein included the verification of suspicion grounds, on the basis of charges that should be readily made known to the person detained), to make sure that personal dignity and the right of defence be guaranteed, to ensure that restrictions to these rights made necessary by the nature of facts are strictly proportional to the goal to be achieved and that they do not adversely affect the principle itself of a right to defence, to test that the person detained be not subjected to torture or any other inhuman or degrading treatment, to declare as unlawful detention measures that are secret, or unlimited in duration (it being for the judge to set the period of detention), or that do not provide for appearance before a court established according to the law. If, in performing such functions, the judge learns that a person may have been subject to secret arrest, detention and/or transportation, he should refer the matter to the authorities responsible for criminal investigations.

#### - **Post trial detention**

61. As for detention of persons whose guilt has been established, the CCJE considers that the seriousness of terrorist crimes does not justify any derogation from general rules established by the law in the area of criminal proceedings and detention measures; in particular it cannot authorise a judge to apply a criminal sanction according to standards of evidence that derogate from general rules.

#### - **Detention conditions**

62. This Opinion is not the appropriate place to discuss conditions of detention, though this matter deserves further consideration in a future Opinion by the CCJE<sup>20</sup>. This subject reflects the difficulty of meeting the requirements of both human rights and protection of the public interest. In many countries there is a great temptation to give automatic priority to security matters, which may entail a risk of abuse.
63. The CCJE, for present purposes only, draws the attention to Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, adopted on 11 January 2006.

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terrorists may affect the manner of implementation of Article 5 paragraph 3, for example in calling for appropriate procedural precautions in view of the nature of the suspected offences. However, they cannot justify, under Article 5 paragraph 3 dispensing altogether with "prompt" judicial control". The Court adds that the scope for flexibility in interpreting and applying the notion of "promptness" is very limited (paragraph 62). In the Court's view, even the shortest of the four periods of detention in the case at hand, four days and six hours spent in police custody, falls outside the strict constraints as to time permitted by the first part of Article 5 paragraph 3. "The undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5 paragraph 3."

<sup>20</sup> See Framework Global action plan for Judges in Europe, adopted by the Committee of Ministers at its 740<sup>th</sup> meeting, Document CCJE (2001) 24.

64. Persons detained as terrorist suspects should be guaranteed prompt access to legal assistance and representation by a lawyer of their choice, wherever they are detained. Courts should be able to grant appropriate relief and make appropriate orders to ensure that detained persons are not subject to inhuman or degrading treatment or punishment and, to that end, should be able (if they so determine, also of their own motion) to inspect any place of detention and have free access to any person detained there.

**iv. The role of the judge in the protection of witnesses, victims and collaborators of justice**

65. Trials for terrorist offences are often based on testimony of people who are closely connected to terrorist groups and who are more vulnerable than others to the use of intimidation against them or against people close to them; this poses the question of protection of these persons.

66. Victims of terrorist acts should also be protected against pressures or threats that may be likely to prevent them from appearing in court.

67. Protection of witnesses would prove difficult on a merely national basis, given the conditions in the country where they are located. International co-operation which accords with standards that have already been developed in other fields is therefore necessary<sup>21</sup>.

68. A judge has to strike a balance between the need for protection of the witnesses/victims of the crime and the right of the defendant to a fair trial. This balance poses difficulties when the witnesses and victims are under a protection programme, in which cases contact between the suspects and/or their defence lawyers may be prevented, even during a trial.

69. The CCJE suggests that, since the role of the judge includes fully ensuring right to defence and equality of arms, judges – in cases in which witnesses are absent from court or anonymous and therefore the defendant was unable to challenge and question them - should base no conviction solely or to a decisive extent on the statements of witnesses to investigators.

70. Further challenges face the court systems when the fight against terrorism is based on elements obtained from intelligence services (often involving the transfrontier provision of intelligence). The protection of sources, witnesses and intelligence service members is there at stake. The CCJE considers that in this field similar principles as those mentioned in paragraph 69 must be applied.

71. On the other hand, the CCJE considers that the judge should also take into account the international legal provisions, including anti terrorist legislation, safeguarding the position of the victims of serious crimes, especially when they are witnesses in a case. It is for the judge to ensure at every stage of the procedure that all effective measures are taken for the alleged victims to fully exercise their rights while at the same time fully respecting the rights of the defendant. When the relevant power is not entrusted to other authorities, or in cases where such authorities fail to provide adequate measures, the judge should be able to ensure the safety of the victims, the protection of their family and private life, their access to justice, and fair treatment, free legal aid. No unreasonable limitation should be placed on such power by other organs of the state for financial or other reasons.

72. The CCJE also suggests that, when specific conditions to be set by the law are met, the victim be granted adequate compensation, for example from the state or by the confiscation of the property of the perpetrators in order to be used to compensate the victims<sup>22</sup>.

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<sup>21</sup> Recommendation Rec(2005)9 of the Committee of Ministers of the Council of Europe to Member States on the protection of witnesses and collaborators of justice. See also Guidelines on the Protection of Victims of Terrorist Acts, adopted by the Committee of Ministers of the Council of Europe on 2 March 2005, Recommendation Rec(85)11 of the Committee of Ministers to Member States on the position of the victim in the framework of criminal law and procedure and Recommendation Rec(97)13 of the Committee of Ministers to Member States concerning intimidation of witnesses and the rights of the defence.

<sup>22</sup> See Guidelines on the protection of victims of terrorist acts: "Victims of terrorist acts should receive fair, appropriate and timely compensation for the damages which they suffered. When compensation is not available from other sources, in particular through the confiscation of the property of the perpetrators, organisers and sponsors of terrorist acts, the State on the territory of which the terrorist act happened must contribute to the compensation of victims for direct physical or psychological harm, irrespective of their nationality (principle 7.1)".

73. Finally the CCJE stresses that it is necessary for the state to ensure the safety of investigators, judges and personnel in the judiciary involved in dealing with terrorism matters.
- D. THE ROLE OF THE JUDGE IN THE PROTECTION OF FREEDOM OF EXPRESSION AND OTHER RIGHTS AND FREEDOMS**
74. Terrorism strikes at the very fabric of democracy.
75. Despite the increase of terrorist activities, the CCJE considers that the national judge should always respect the basic principles of the rule of law, which are essential in democratic society, including the freedom of expression and other individual rights. As the fight against terrorism must never lead to the undermining of the values and freedoms that terrorists intend to destroy, it is vital for democracies that courts remain the guardians of the crucial demarcating line between a democratic society and a society that fights back using methods that themselves unduly curtail freedom of expression or infringe other rights and freedoms, such as the rights of minorities or political freedoms.
76. In discussing the role of the judge, as interpreter of the law, in the process of identifying conducts coming under the definition of terrorism, the CCJE may make reference, e.g., to the Council Framework Decision 2002/475/JHA by which the European Union has required member states to treat as terrorist offences and to punish a list of national offences “which, given their nature or context, may seriously damage a country or an international organization where committed with the aim of seriously intimidating a population, or unduly compelling a Government or international organization to perform or abstain from performing any act, or seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country of an international organization”. Member states are also required to make punishable intentional acts of “directing a terrorist group” or participating in its activities .... with knowledge that such participation will contribute to its criminal activities and to make punishable inciting or aiding or abetting, or generally attempting to commit any of the offences previously referred to.
77. However, recital (10) of the Framework Decision records that nothing in it is to be interpreted as being intended to reduce or restrict fundamental rights or freedoms (including the right of assembly and association, freedom of expression, the right to join trade unions, to strike and demonstrate, etc.); article 5 provides also that the penalties to be imposed must be not merely effective and dissuasive, but also proportionate. The CCJE shares such an approach.
78. In particular, the CCJE understands and accepts the need and duty of states to secure a free and safe society, but it considers that this should be achieved through the law and its due application without sacrificing fundamental freedoms.
79. Specific problems are posed by voices that seek to justify terrorism as a reaction to suggested political, ideological, religious and economic oppression in particular areas of the world. Since in some instances these conducts may represent a danger for democratic societies, the extended prohibition of expressions of praise or glorification ("*Apologie du terrorisme*") has thus become, in recent times, a significant additional response to the threat of terrorism.
80. A clear distinction exists in principle between statements or other conducts representing the exercise of fundamental rights and freedoms, even though highly contentious or politically motivated, and illegitimate incitement, encouragement, support or praise for acts of criminal terrorism. This distinction needs in the first instance to be drawn by legislatures and applied by the executive, but the way in which it is drawn and applied must remain susceptible to review by the courts. While the courts in a democracy can and should take account of the views of other branches of the state, they have an independent duty to consider the need for and proportionality of measures which may infringe fundamental rights guaranteed by the national constitution or the European Convention on Human Rights.
81. Terrorist offences should be defined in legislation and subject to the ordinary criminal law. The determination of whether a particular activity contravenes the law should also be made by the ordinary courts, in accordance with the rule of law and the European Convention on Human Rights and on the basis of evidence obtained by admissible means, not involving any improper pressure. Courts may take pre-emptive measures available in the civil and criminal law fields to prohibit or restrain the preparation or dissemination of material the issue or use of which would involve or incite the commission of a terrorist offence.

82. Judges face difficult and sometimes controversial decisions when determining whether national legislation complies with fundamental rights or freedoms and when determining whether particular conduct constitutes a terrorist offence within the scope of such legislation. The difficulties may be particularly acute when the issue is whether words or conduct amount to illegitimate incitement to commit a terrorist act, or to praising terrorism. Practice also shows that judges, on the basis of present definitions of terrorism at the national and international level, may face difficulties to determine whether certain violent political actions, usually committed or to be committed abroad, and/or their financing or the training or recruiting in order to commit the same, should be regarded as terrorist acts or should not, as may happen in some cases involving individual or collective self-defence under article 51 of the Charter of the United Nations.
83. Terrorist cases, and especially those posing the above mentioned difficulties, are usually closely followed by the media and the general public, often with criticism and debate concerning judicial decisions. The efforts of States to prevent terrorism have led to criminalising of certain acts the classification of which as a crime is separated by a thin line from actions which might constitute the exercise of freedom of expression or political freedoms. The CCJE considers that the decision of the States to entrust judges the responsibility of making such distinction makes it necessary that such trials be conducted in a calm atmosphere.
84. It is for both politicians and the media to refrain from attempting to apply pressure on or to attack judges, beyond what may be considered legitimate criticism. It is the duty of an appropriate independent body to react to such attacks (see the CCJE's Opinion No. 6, paragraph C.13). The CCJE considers that the judiciary, on its part, should ensure that trials are conducted by well trained professional judges; appropriate training actions should help judges develop their understanding of terrorism and of its historical, political and social context.
85. The basic message is that the threats to security and the Rule of law posed by terrorism should not give rise to measures which themselves tend to undermine fundamental democratic values, human rights or principles of the Rule of law. This is a message which, if put into effect, reduces the risk that measures taken with a view to countering terrorism will themselves fuel new tensions or even promote terrorism itself. It is a message which needs to be understood and accepted in democracies by the public, politicians, media and courts alike.

## **SUMMARY OF THE RECOMMENDATIONS AND CONCLUSIONS**

In the light of the above considerations, the CCJE recommends that the states:

- a. consult the national judiciaries when elaborating a legislation that might affect substantial and procedural rights and ensure that all administrative or repressive measures taken, which would affect the rights of people in the fight against terrorism, be controlled by an independent judicial authority;
- b. refuse to establish tribunaux d'exception or legislation incompatible with universally recognised rights, either in the context of administrative actions to prevent acts of terrorism or in the context of a criminal trial ;
- c. to be vigilant that the fundamental principles of criminal law apply in the same way to acts of terrorism as they do to any other offences, and to ensure that the constitutive elements of these offences are clearly and precisely defined;
- d. to facilitate international cooperation in the fight against terrorism, particularly when elaborating, under the auspices of the international organizations, concerted definitions of offences related to terrorism;
- e. to guarantee the security of witnesses and victims of acts of terrorism, as well as of investigators, judges and other judicial staff involved in these cases;

The CCJE also recommends that national judiciaries:

- a. develop their understanding of terrorism and of its historical, political and social context, as well as their knowledge of relevant national and international legal instruments;

- b. in discharging their functions as interpreters of the law and guarantors of individual rights and freedoms, ensure, on the one hand, that the offence of "terrorism" (including incitement, preparations to commit such acts and the financing of such acts) reaches the goal set by legislators, and, on the other hand, that prosecutions for "terrorism" are not abused in its scope, and to see that the protection of the public interest is reconciled with respect for human rights and fundamental freedoms;
- c. to constantly ensure that a balance is struck between the need to protect witnesses and the victims of acts of terrorism and the rights of the persons involved in these acts.

# Opinion No. 9 (2006)

of the Consultative Council of European Judges (CCJE)  
to the Committee of Ministers of the Council of Europe

## The role of national judges in ensuring an effective application of international and European law

### INTRODUCTION

1. The Committee of Ministers required the Consultative Council of European Judges (CCJE) to examine in particular some questions (which appear in the Framework global Action Plan for Judges in Europe<sup>1</sup>) such as the application by national judges of the European Convention on Human Rights and other international legal instruments, the dialogue between national and European judicial institutions and the availability of information on all relevant international texts.
2. The CCJE noted that national legal systems have, increasingly, to deal with legal issues of an international nature, as a result both of globalisation and of the increasing focus of international and European law<sup>2</sup> on relations between persons rather than states. This development necessitates changes in judicial training, practice and even culture, if national judges are to administer justice meeting the needs and aspirations of the modern world and respecting the legal principles recognised by democratic states.
3. Such an evolution should have, first of all, important consequences on the training of judges, on the nature of the relationships between international judicial institutions and on the hierarchy of norms to be respected by the judge in the context of increasing legal sources; secondly, this requests that state authorities use widely additional resources in ensuring the carrying out of the above mentioned activities.
4. Therefore, the CCJE deemed it useful to review the situation of the means made available to the judge so as to work efficiently in an international context and thus to address the application by the national judge of the European and international law. The aim of this Opinion is to achieve a sound application of international and European law, particularly human rights law. The training of judges, availability of relevant information and documentation as well as translation and interpretation are means to reach this goal.
5. In this regard, the CCJE underlines that national judges are the guarantors of the respect and proper implementation of international and European treaties to which the state they belong to is a party, including the European Convention of Human Rights.
6. This Opinion complements CCJE's Opinion N° 4 (2003) on appropriate initial and in-service training for judges at national and European levels; the considerations contained in that Opinion, in fact, are applicable, in their entirety, to the issues addressed by the present Opinion.

### **A. PROVIDING NATIONAL JUDGES WITH INFORMATION AND DOCUMENTATION ON ALL RELEVANT INTERNATIONAL AND EUROPEAN LEGAL INSTRUMENTS<sup>3</sup>**

#### **a. Good knowledge by judges of international and European Law**

7. In a context of increasing internationalisation of societies, international and European legislation and case-law have a growing influence on national legislation and court practice; these areas of law must be properly understood by judges in order to perform their judicial functions according to the principle of the rule of law shared by democratic countries. Therefore, judges must be prepared to be acquainted with and participate in the international evolution of legal practice. They must know and be able to apply international and European law, in particular regarding human rights issues.

<sup>1</sup> Adopted by the Committee of Ministers at its 740<sup>th</sup> meeting, Document CCJE (2001) 24.

<sup>2</sup> The notion of European law is herein used in a broader sense, so as to include the instruments of the Council of Europe, especially the European Convention on Human Rights, as well as European Community Law and other instruments of the European Union, where appropriate and as far as applicable to the member States.

<sup>3</sup> See point IV (d) of the Framework Global Action Plan for Judges in Europe.

**b. Providing judges with the means to access information on international and European law**

8. International and European norms, as well as court practice, are rapidly growing both numerically and in complexity. If a country's judges are to be comfortable in the European and international context, the state, in order to remain consistent vis-à-vis its own international commitments, should take the appropriate measures to ensure that judges can gain a full understanding of the relevant European and international reference texts, in particular those related to the human rights protection, enabling them to better perform their activities.

**c. Including international and European law in the curricula of universities and training courses for judges**

9. In many countries courses in international law, European law, including human rights instruments, form parts of the legal curriculum in universities. However, only in some countries it is necessary for candidates to have an in-depth knowledge of these subjects to obtain a judicial post.
10. The CCJE considers that it is important that international and European legal issues be part of university curricula and also be considered in entry examinations to the judicial profession, where such examinations exist.
11. Appropriate initial and in-service training schemes on international subjects should be organised for judges, in both general and specialist areas of activity. Although differences exist among European countries with respect to the systems of initial and in-service training for judges, training in international and European law is equally important to all the judicial traditions in Europe.
12. In some countries special training initiatives in international and European law are organised specifically for judges, or for judges and prosecutors, by judicial training institutions (including judicial service commissions) or ministries of justice, as well as jointly by these agencies<sup>4</sup>. In other countries, no special training in international and European law is provided; in these countries judges usually may take part in general training courses organised by the judiciary itself or by other bodies (universities, bar associations, foreign judicial training schools).
13. In this respect, the CCJE therefore notes the *acquis* of the Council of Europe concerning the training of judges on the application of international treaties<sup>5</sup>, affirming the needs (a) to develop the study of international law, treaties, European and other international institutions within the framework of university courses; (b) where appropriate, to introduce tests on the application of international norms in examinations and entrance competitions for judges; (c) to develop the international dimension in initial and further training of judges; (d) to organise, within the framework of the Council of Europe, and in collaboration with European institutions and other international organisations, training seminars for judges and prosecutors aimed at promoting a better knowledge of international instruments.

**d. Ensuring good quality judicial training in the field of international and European law**

14. With reference to international and European law training, the CCJE considers that members of the judiciary should be substantially represented among instructors. Such judicial training should include specific aspects relevant for court practice, and be accompanied by relevant study materials, possibly including distance learning materials provided over the internet. The CCJE encourages cooperation between national training institutions in this field and calls for the transparency of the information on such training programmes and the modalities to participate.

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<sup>4</sup> Member States of the Council of Europe participate in the so-called "Lisbon Network" (the network for the exchange of information on the training of judges and prosecutors), composed of national agencies responsible for training of judges and prosecutors.

<sup>5</sup> See in particular the conclusions of the second meeting of the Lisbon Network (Bordeaux, 2-4 July 1997).



**e. Continuous and accessible information on international and European law available to all judges**

15. The CCJE notes that complete and up-to-date information on international and European legal texts and case-law is not regularly offered to judges. Even in those cases in which legal information is received by judges either electronically or on paper, official journals of the countries rarely include information on international and European law. Some countries, however, issue special legal circulars that include information on international law. Other institutions such as judicial academies, training centres or court administrations sometimes provide information on the recent case-law of international and European courts. Information may also be contained in the national legal periodicals.
16. The provision of internet access cannot, by itself, be regarded as a sufficient discharge of a state's duty to provide sufficient information, or means of obtaining information, on international and European legal subjects.
17. The CCJE recommends that all judges should have access to paper and electronic versions of legal instruments, so as to enable accurate research in international and European legal spheres. Such opportunities should be offered to judges through specialist support, if necessary by the way of a centralised service, which may ensure that judges are informed even beyond the contingent necessities of their work.
18. Only in a few countries ministries of justice or of foreign affairs provide judges with translations into their own language of relevant texts, including the judgments of the European Court of Human Rights concerning their own country. In the opinion of the CCJE, this situation should be rapidly changed by states; appropriate state support should also include the creation of efficient translation services for legal texts that could be of use to judicial practice (see also paragraph 23 below).
19. In order to facilitate the work of judges, complete and up to date digested, indexed and annotated information should be readily available, as the judge alone has to evaluate the relevance of information, if necessary with the help of court documentation services and judicial assistants<sup>6</sup>. Co-operation of centralised and local court documentation services and/or libraries with legal libraries and documentation centres outside the judiciary should also be encouraged.

**f. Providing the judges with the means to access information in foreign languages**

20. In taking account of what is set out above, the CCJE notes that knowledge of foreign languages is an important tool for the national judge to keep informed about developments in international and European law.
21. At present, foreign language courses for judges are only available free of charge in some countries; sometimes such courses are partly subsidised by the state; sometimes such incentives are offered to particular judges who are working in close contact with international and European institutions.
22. The CCJE encourages the taking of appropriate measures including the allocation of grants, aimed at teaching judges foreign languages as part of their basic or specialised training.
23. States should ensure that courts have available legal and international services for the translation of documents that judges may require to keep themselves informed in relevant areas of international and European law. The CCJE is aware of the importance of the costs needed for the functioning of these services and recommends that they are funded through a budget that is presented separately in the State budget so as to avoid that the funds allocated to the functioning of courts are not subsequently reduced.
24. These translations and interpretations must be performed by qualified professionals, whose competences must be susceptible to verification by judges, as they concern a judicial function.

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<sup>6</sup> See also paragraph 65 of the CCJE's Opinion No. 6 (2004) on fair trial within a reasonable time and judge's role in trials taking into account alternative means of dispute settlement.

## **B. DIALOGUE BETWEEN NATIONAL AND EUROPEAN JUDICIAL INSTITUTIONS<sup>7</sup>**

### **a. A necessary dialogue, be it formal or informal**

25. National courts have responsibility for administering European law. They are required in many cases to apply it directly. They are also required to interpret national law in conformity with European standards.
26. For all national judges, the case law of the European Court of Human Rights and, where appropriate the Court of Justice of the European Communities serves as a reference in the process of developing a body of European law.
27. The dialogue between national and European judicial institutions is necessary and already occurs in practice; the evolution of it must be supported through appropriate actions.
28. In order to encourage effective dialogue between national and European courts, there should be initiatives aimed at national judges to foster the exchange of information and also, wherever possible, direct contact between institutions.
29. This dialogue can take place at various levels. At a formal, procedural level, an institutional form of dialogue is exemplified by the preliminary ruling procedure used in order to gain access to the Court of Justice of the European Communities. National judges could also be given wider opportunities to participate in the functioning of the European Court of Human Rights. In a more informal way, forms of dialogue can occur during visits and/or stages of judges at the European Court of Human Rights, the Court of Justice of the European Communities and other international and European courts, as well as during seminars and colloquia, at a domestic and international level.
30. The CCJE notes that informal dialogue is considered to be part of the judicial training programmes. Participants in such actions are, at present and mostly judges of the higher courts (Supreme Courts, Constitutional Courts). The CCJE considers that, although it is necessary that judges of the highest courts have close relations with international jurisdictions, national training agencies should ensure that such occasions of dialogue are not only confined to judges of the higher courts, because in many cases it is the judges of first instance who are required immediately to evaluate, apply and interpret European norms or case-law. The experience of different countries shows that informal dialogue in small-scale meetings has proven to be most productive.

### **b. Direct interaction between national judges**

31. Dialogue between national and European courts is but one aspect of interaction between judges at a European level: the relations of judges from different countries with each other are also of great importance. National judges often have to consider how the judges in other countries have applied and/or interpreted international and European law and they are keen to learn from each other's experiences. Such dialogue between judges from different countries is also important to reassert the principle of mutual confidence among European judicial systems, in order to facilitate the international circulation of national decisions and to simplify the proceedings for their enforcement in the various countries.
32. Direct contacts between judges from different countries, including those organised by national judicial training institutions, in the context of seminars, exchanges of judges, study visits, etc, are particularly relevant. In this area, useful partners may be found in co-operation schemes active at a European level.
33. Judges must be provided with practical information about the specific exchanges organised in this framework and be granted an equal access to these exchanges when they wish to take part in it.

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<sup>7</sup> See point IV c of the Framework Global Action Plan for Judges in Europe.

## **C. THE APPLICATION BY NATIONAL COURTS OF INTERNATIONAL AND EUROPEAN LAW<sup>8</sup>**

### **a. The role of the judge and the hierarchy of norms**

34. Each country's application of the international and European standards depends to a large extent on the status of such standards in national law, including under the Constitution.
35. It was observed that obstacles exist in achieving this objective. These obstacles were considered to be the result of problems in accessing information, problems of a 'psychological' nature and specific legal problems<sup>9</sup>.
36. The first two obstacles can be tackled through the actions described above, aimed at achieving better access to European legal documentation and improved dialogue between institutions.
37. As regards obstacles of a legal nature, the CCJE notes that, generally, countries recognise the primacy of international treaties over national law when ratified and/or, when necessary, incorporated into national law. In most cases this primacy is stipulated in the constitution of individual states, while also according primacy to the constitution itself. In a few countries, the primacy of international law stems from the decisions of the national Supreme Court. Usually, the rank of the European Convention of Human Rights is below the national constitution, but the Convention normally has a special position *vis-à-vis* ordinary acts of parliament; the practical implementation of this principle, however, shows a number of variants.
38. In most cases, national laws and legal traditions allow courts, when faced with a conflict between a supranational provision and a provision of domestic law, to decide in favour of the international convention or treaty. There is an alternative, which requires national courts to stay the proceedings and refer the case to their Constitutional Court. But there are countries where courts are obliged to apply the provisions of domestic law, even if they conflict with, for example, the European Convention of Human Rights.
39. Each state has its own system for interpreting these instruments and incorporating them into domestic law, depending on the status accorded to them. To avoid uncertainty, courts should interpret and give effect to all domestic legislation and develop domestic case-law as far as possible so as to be consistent with European law and international and European principles and concepts.
40. Judges, together with the legislative and executive branches of government, are bound by the Rule of law. The CCJE considers that it is important for judges in different countries to ensure the respect for international and European law, which promote the principle of rule law, by having due regard to such law, regardless of the national legal systems.

### **b. National and international/European case-law and instruments, in particular the Council of Europe recommendations**

41. Case-law influences the application of international and European standards because the judiciary must interpret national law in the light of supranational law, while upholding national constitutional standards.
42. As to the role played by the case-law of the European Court of Human rights and, where appropriate, the Court of Justice of the European Communities, there appears to be two tendencies: the first, and most common, is where national courts take the decisions of these courts into account even in cases where they are not binding. The second tendency is for this case-law to be accorded the status of a precedent, which national courts must follow.
43. Although national judges take into account and apply international and European law, this does not ensure that national legislation conforms to the recommendations of the Council of Europe, which are considered as "soft law".

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<sup>8</sup> See point IV (b) of the Framework Global Action Plan for Judges in Europe.

<sup>9</sup> See in particular the conclusions of the second meeting of the Lisbon Network (Bordeaux, 2-4 July 1997).

44. The Committee of Ministers of the Council of Europe may make recommendations to member states on matters for which it has agreed 'a common policy'. Recommendations are not binding on Member states, although the Statute of the Council of Europe empowers the Committee of Ministers to ask member governments 'to inform it of the action taken by them' on recommendations (see articles 15.b of the Statute of the Council of Europe).
45. The CCJE stresses that it is advisable that, during the preparation of new legislation, law makers refer to Council of Europe recommendations. Similarly, judges, in applying the law, should as far as possible interpret it in a manner which conforms to international standards even if set by "soft law".

**c. Observance of the judgments of European Court of Human Rights**

46. In some states, even prior to the lodging of an application with the European Court of Human rights, it is possible to apply for judicial review of a final decision that appears in conflict with the decisions of the European Convention of Human Rights. However, the CCJE notes that, in a large number of countries, a decision of the European Court of Human rights against the state concerned is required before it is possible to apply for review of a final decision.
47. A claim for compensation for violations of the European Convention on Human Rights may usually be lodged only after the Court has found a violation. In most countries, it is not possible to seek a finding of such violations and compensation before the Court has found a violation.
48. The CCJE is aware that in most of the countries the implementation of the judgements of the Court is not prescribed by national law; in some countries implementation measures may be granted by the Constitutional Court.
49. Stressing the significance of enforcing the common important rights as they are enshrined in the European Convention of Human Rights and emphasising that national judges are also European judges, the CCJE encourages judges, wherever possible, to use all resources available to them in interpreting the law or within existing procedural law: a) to re-open cases if a breach of the convention occurred, even before a judgement of the European Court of Human rights is issued and b) to grant compensation for violations as soon as possible. Legislators should consider amending the procedural law to facilitate this European task of the national judiciary<sup>10</sup>.

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<sup>10</sup> The CCJE finds it relevant to recall that under Protocol no14 to the European Court of Human Rights, opened for signature in May 2006, the Committee of Ministers will be empowered, if it decides by a two-thirds majority to do so, to bring proceedings before the Court where the State refuses to comply with a judgment. The Committee of Ministers will also have a new power to ask the Court for an interpretation of a judgment. This is to assist the Committee of Ministers in its task of supervising the execution of judgments and particularly in determining what measures may be necessary to comply with a judgment.

## SUMMARY OF THE RECOMMENDATIONS AND CONCLUSIONS

A. *In the fields of training of judges in international and European law, access of judges to relevant information, foreign language courses and translation facilities, the CCJE recommends that:*

- (a) States should, while preserving the independence of judiciary through the appropriate independent bodies responsible for the training of judiciary, provide adequate means to ensure training of judges in international and European law;
- (b) Prior knowledge of international and European law and case-law should be ensured by the inclusion of these topics in the curricula of the law faculties;
- (c) Appropriate knowledge of international and European law should be one of the conditions that appointees to judicial posts should meet, before they take up their duties;
- (d) Training in international and European law should play a relevant role in the initial and in-service training of judges; judicial training in this area would benefit from international cooperation between national judicial training institutions;
- (e) Information on international and European law, including the decisions of the international and European Courts should be made available; with the co-operation of court documentation services, libraries and judicial assistants, the judge should be guaranteed an access to information suitably indexed and annotated; the information provided should be comprehensive and available promptly;
- (f) Appropriate measures – including the allocation of grants – should assure that judges gain full proficiency in foreign languages; additionally, courts should have translation and interpretation services of quality available apart from the ordinary cost of the functioning of courts.

B. *In view of the importance attaching to relations and cooperation of national judicial institutions both with each other and with international, particularly European, judicial institutions, the CCJE encourages:*

- (a) the development of direct contacts and dialogue between them, e.g. in conferences, seminars and bilateral meetings, with small scale meetings having especial value;
- (b) visits and study programmes, such as those organised by national judicial training institutions and national judicial institutions, as well as some international courts for individual judges in relation to other judicial institutions, national and international;
- (c) the inclusion in such contacts, dialogue, visits and programmes of judges of all instances, and not just of the higher judicial levels;
- (d) the provision of information and taking of steps to facilitate access by national judges to websites and data bases available to other national and international judiciaries.

C. *Despite differences in the legal systems in Europe, the CCJE welcomes the efforts that national judiciaries can make, in their role as interpreters and guardians of the rule of law, if necessary through appropriate exchanges of ideas between the several national judiciaries, in:*

- (a) ensuring, while respecting national legislation, that national law including the national case-law conforms to international and European law as applicable in the relevant states;
- (b) reducing, as far as possible, different applications of this principle in the systems bound by the same international standard;
- (c) assuring, specifically, that national law, including national case-law, respects the case-law of the European Court of Human Rights; in particular, by granting, wherever possible, that a case be re-opened after the European Court of Human Rights has found a violation of the ECHR or its protocols in the proceeding, and the violation cannot be reasonably eliminated or compensated in any other way than through a new hearing of the matter;
- (d) taking duly into account recommendations of the Council of Europe.



# Opinion No.10 (2007)

of the Consultative Council of European Judges (CCJE)  
to the Committee of Ministers of the Council of Europe

## The council for the judiciary at the service of society

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### I. INTRODUCTION

1. In 2007, the Committee of Ministers of the Council of Europe entrusted the Consultative Council of European Judges (CCJE) with the task of adopting an Opinion on the structure and role of the High Council for the Judiciary or another equivalent independent body as an essential element in a state governed by the rule of law to achieve a balance between the legislature, the executive and the judiciary.
2. The diversity of European systems is reflected in the choice made by states and the discussions on the name of the bodies entrusted with the protection of the independence of judges. In order to facilitate the reading of this Opinion, the CCJE decided to use in this text the single term of "Council for the Judiciary"<sup>1</sup>.
3. In accordance with its terms of reference, the CCJE considered the following points which appear in the Framework Global Action Plan for Judges in Europe<sup>2</sup>:
  - the respect for the guarantees of judicial independence in the member states at the constitutional, legislative and institutional levels (see Part I (a), (b), (c) and (d) of the Action Plan);
  - the setting up or strengthening of authorities who are independent from the legislative and/or executive authorities, with responsibility for managing judges' careers (see Part I (e) of the Action Plan).
4. The aim of this Opinion is to identify the core elements in relation to the general mission, composition and functions of the Council for the Judiciary with a view to strengthening democracy and to protecting the independence of the judiciary. The Opinion does not present a detailed description of principles for the composition or the functions of the Council for the Judiciary, neither does it create a single model for the Council for the Judiciary in Europe.
5. The composition and the functions of the Council for the Judiciary can vary from one country to another<sup>3</sup>. Conscious of this diversity but noticing at the same time a trend to create an independent Council for the Judiciary, the CCJE considered it necessary:
  - to stress the importance of the existence of a specific body entrusted with the protection of the independence of judges, in the context of respecting the principle of separation of powers;
  - to set guidelines and standards for member States wishing to implement or reform their Council for the Judiciary.
6. The provisions of this Opinion are relevant to all parts of the judicial system, in particular in the countries where a separate system of administrative justice exists, either within the framework of a single Council for the Judiciary (competent for ordinary and administrative justice), or through separate Councils<sup>4</sup>.
7. When preparing this Opinion, the CCJE examined and duly took into account in particular:
  - the *acquis* of the Council of Europe and in particular Recommendation No.R(94)12 of the Committee

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<sup>1</sup> This wording is already being used by the European Network of Councils for the Judiciary (ENCJ).

<sup>2</sup> Adopted by the Committee of Ministers at its 740<sup>th</sup> meeting – Document CCJE(2001)24.

<sup>3</sup> The detailed situation in the member states is described in the experts' reports (see paragraph 7) and in the national answers to the questionnaire which are available on the web site of the CCJE: [www.coe.int/CCJE](http://www.coe.int/CCJE).

<sup>4</sup> Some Councils are responsible for safeguarding the independence of judges, but are also responsible for public prosecutors. The CCJE has chosen to focus on the role of the Councils for the Judiciary as regards judges, according to its general mission. This does not prevent this Opinion applying, so far as it concerns judges, to those Councils which are common to judges and prosecutors. The possible issues relating to prosecutors have not been addressed in this Opinion. They might be examined at a later stage, where appropriate in cooperation with the Consultative Council of European Prosecutors (CCPE).

- of Ministers to member States on the independence, efficiency and role of judges<sup>5</sup>, the European Charter on the Statute for Judges of 1998 as well as Opinions No. 1, 2, 3, 4, 6 and 7 of the CCJE;
- the report on "Judicial Appointments" adopted in March 2007 by the Venice Commission during its 70th Plenary Session, as a contribution to the work of the CCJE<sup>6</sup>;
  - the replies by 40 delegations to a questionnaire concerning the Council for the Judiciary adopted by the CCJE during its 7th plenary meeting (8-10 November 2006);
  - the reports prepared by the specialists of the CCJE, Ms Martine VALDES-BOULOUQUE (France) on the current situation in the Council of Europe member States where there is a High Council for the Judiciary or another equivalent independent body and Lord Justice THOMAS (United Kingdom) on the current situation in states where such a body does not exist;
  - the contributions of participants in the 3rd European Conference of Judges on the theme of "Which Council for justice?", organised by the Council of Europe in co-operation with the European Network of Councils for the Judiciary (ENCJ), the Italian High Council for the Judiciary and the Ministry of Justice (Rome, 26-27 March 2007).

## **II. GENERAL MISSION: TO SAFEGUARD THE INDEPENDENCE OF THE JUDICIARY AND THE RULE OF LAW**

8. The Council for the Judiciary is intended to safeguard both the independence of the judicial system and the independence of individual judges. The existence of independent and impartial courts is a structural requirement of a state governed by the rule of law.
9. The independence of judges, in a globalised and interdependent society, should be regarded by every citizen as a guarantee of truth, freedom, respect for human rights, and impartial justice free from external influence. The independence of judges is not a prerogative or privilege granted in their own interest, but in the interest of the rule of law and of anyone seeking and expecting justice. Independence as a condition of judges' impartiality therefore offers a guarantee of citizens' equality before the courts.
10. The CCJE also takes the view that the Council for the Judiciary should promote the efficiency and quality of justice, so assisting to ensure that Article 6 of the European Convention on Human Rights is fully implemented, and to reinforce public confidence in the justice system. In this context, the Council for the Judiciary has the task to set up the necessary tools to evaluate the justice system, to report on the state of services, and to ask the relevant authorities to take the necessary steps to improve the administration of justice.
11. The CCJE recommends that the Council for the Judiciary be positioned at the constitutional level in those countries having a written Constitution, or in the equivalent basic law or constitutional instrument for other countries. Provisions should be made for the setting up of such body, for the definition of its functions and of the sectors from which members may be drawn and for the establishment of criteria for membership and selection methods<sup>7</sup>.
12. Beyond its management and administrative role vis-à-vis the judiciary, the Council for the Judiciary should also embody the autonomous government of the judicial power, enabling individual judges to exercise their functions outside any control of the executive and the legislature, and without improper pressure from within the judiciary.
13. In this perspective, the CCJE considers that it would be inappropriate for the Council for the Judiciary to be restricted by other authorities in its autonomy to decide on its own operating methods and on subjects for discussion. The relations between the Council for the Judiciary and the Minister of Justice, the Head of State and Parliament need to be determined. Furthermore, considering that the Council for the Judiciary does not belong to the hierarchy of the court system and cannot as such decide on the merits of the cases, relations with the courts, and especially with judges, need careful handling.
14. The Council for the Judiciary is also obliged to safeguard from any external pressure or prejudice of a political, ideological or cultural nature, the unfettered freedom of judges to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in accordance with the prevailing rules of the law<sup>8</sup>.

<sup>5</sup> In particular Principle I, 2.c. and Principle VI.3.

<sup>6</sup> See document CDL-AD(2007)028

<sup>7</sup> This principle has been stated by the CCJE in its Opinion No.1 (2001).

<sup>8</sup> See Recommendation No.R(94)12.



### **III. MEMBERSHIP: TO ENABLE AN OPTIMUM FUNCTIONING OF AN INDEPENDENT AND TRANSPARENT COUNCIL FOR THE JUDICIARY**

#### **III. A. A Council for the Judiciary composed by a majority of judges**

15. The composition of the Council for the Judiciary shall be such as to guarantee its independence and to enable it to carry out its functions effectively.
16. The Council for the Judiciary can be either composed solely of judges or have a mixed composition of judges and non judges. In both cases, the perception of self-interest, self protection and cronyism must be avoided.
17. When the Council for the Judiciary is composed solely of judges, the CCJE is of the opinion that these should be judges elected by their peers.
18. When there is a mixed composition (judges and non judges), the CCJE considers that, in order to prevent any manipulation or undue pressure, a substantial majority of the members should be judges elected by their peers<sup>9</sup>.
19. In the CCJE's view, such a mixed composition would present the advantages both of avoiding the perception of self-interest, self protection and cronyism and of reflecting the different viewpoints within society, thus providing the judiciary with an additional source of legitimacy. However, even when membership is mixed, the functioning of the Council for the Judiciary shall allow no concession at all to the interplay of parliamentary majorities and pressure from the executive, and be free from any subordination to political party consideration, so that it may safeguard the values and fundamental principles of justice.
20. When there is a mixed composition in the Council for the Judiciary, the CCJE is of the opinion that some of its tasks may be reserved to the Council for the Judiciary sitting in an all-judge panel.

#### **III.B. Qualifications of members**

21. Members, whether judges or not, must be selected on the basis of their competence, experience, understanding of judicial life, capacity for discussion and culture of independence.
22. The non-judge members may be selected among other outstanding jurists, university professors, with a certain length of professional service, or citizens of acknowledged status. Modern management of the judiciary might also require wider contributions from members experienced in areas outside the legal field (e.g. in management, finances, IT, social sciences).
23. Prospective members of the Council for the Judiciary, whether judges or non judges, should not be active politicians, members of parliament, the executive or the administration. This means that neither the Head of the State, if he/she is the head of the government, nor any minister can be a member of the Council for the Judiciary. Each state should enact specific legal rules in this area.
24. The CCJE considers that the composition of the Council for the Judiciary should reflect as far as possible the diversity in the society.

#### **III.C. Selection methods**

##### **III. C. 1. Selection of judge members**

25. In order to guarantee the independence of the authority responsible for the selection and career of judges, there should be rules ensuring that the judge members are selected by the judiciary.
26. The selection can be done through election or, for a limited number of members (such as the presidents of Supreme Court or Courts of appeal), ex officio.

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<sup>9</sup> The CCJE has not considered here the possible question of a Council for the Judiciary composed both by judges and prosecutors – see also footnote 4 above.

27. Without imposing a specific election method, the CCJE considers that judges sitting on the Council for the Judiciary should be elected by their peers following methods guaranteeing the widest representation of the judiciary at all levels<sup>10</sup>.
28. Although the roles and tasks of professional associations of judges and of the Council for the Judiciary differ, it is independence of the judiciary that underpins the interests of both. Sometimes professional organisations are in the best position to contribute to discussions about judicial policy. In many states, however, the great majority of judges are not members of associations. The participation of both categories of judges (members and non members of associations) in a pluralist formation of the Council for the Judiciary would be more representative of the courts. Therefore, judges' associations must be allowed to put forward judge candidates (or a list of candidates) for election, and the same arrangement should be available to judges who are not members of such associations. It is for states to design an appropriate electoral system including these arrangements.
29. In order to meet citizens' expectations that the Council for the Judiciary should be "depoliticised", the CCJE shares the view that competition for elections should comply with the rules set out by the Council for the Judiciary itself so as to minimise any jeopardy to public confidence in the judicial system.
30. The CCJE would have no objection to the development by states of methods, other than direct elections, guaranteeing the widest representation of the judiciary in the Council for the Judiciary. A method guaranteeing diverse and territorial representation could be adopted from some countries' experiences in forming court panels, i.e. drawing by lot members on the basis of one or more territorial lists including eligible candidates upon nominations by a sufficient number of peers.
31. The CCJE does not advocate systems that involve political authorities such as the Parliament or the executive at any stage of the selection process. All interference of the judicial hierarchies in the process should be avoided. All forms of appointment by authorities internal or external to the judiciary should be excluded.

### III. C. 2. Selection of non-judge members

32. Non-judge members should not be appointed by the executive. Although it is for each state to strike a balance between conflicting needs, the CCJE would commend a system that entrusts appointments of non-judges to non political authorities. If in any state any non judge members are elected by the Parliament, they should not be members of the Parliament, should be elected by a qualified majority necessitating significant opposition support, and should be persons affording, in the overall composition of the Council for the Judiciary, a diverse representation of society.

### III. C. 3. Selection of the Chair

33. It is necessary to ensure that the Chair of the Council for the Judiciary is held by an impartial person who is not close to political parties. Therefore, in parliamentary systems where the President / Head of State only has formal powers, there is no objection to appointing the Head of State as the chair of the Council for the Judiciary, whereas in other systems the chair should be elected by the Council itself and should be a judge.

### III.D. Number of members and duration of their mandate

34. The CCJE considers that the membership of the Council for the Judiciary should reflect the size of the judiciary and, consequently, the volume of tasks to be fulfilled. Although it is for the states to decide whether the members of the Council for the Judiciary should sit as full-time or part time members, the CCJE points out that full-time attendance means a more effective work and a better safeguard of independence. However, there is a need to ensure that judges sitting on the Council for the Judiciary are not absent for too long from their judicial work, so that, whenever possible, contact with court practice should be preserved. Terms of office which entail exclusive sitting on the Council for the Judiciary should be limited in number and time<sup>11</sup>.
35. The CCJE recommends that, in order to guarantee the continuity of the Council's activities, members of the Council for the Judiciary should not all be replaced at the same time.

<sup>10</sup> See also the European Charter on the statute for judges, paragraph 1.3.

<sup>11</sup> See, with reference to judges involved in training activities, Opinion No.4 (2003) of the CCJE, paragraph 21.

### **III. E. Status of members**

36. Members of the Council for the Judiciary (both judges and non-judges) should be granted guarantees for their independence and impartiality. The remuneration of the members of the Council for the Judiciary should be commensurate to their position and the workload within the Council.

## **IV. RESOURCES (TO ENSURE FINANCING, PERSONNEL, TECHNICAL EXPERTISE) AND LEGITIMATE DECISIONS OF THE COUNCIL FOR THE JUDICIARY**

### **IV. A. Budget and staff**

37. The CCJE stresses the importance of ensuring that the Council for the Judiciary is financed in such a way that it is enabled to function properly. It should have appropriate means to operate independently and autonomously as well as power and capacity to negotiate and organise its own budget effectively.
38. The Council for the Judiciary should have its own premises, a secretariat, computing resources and freedom to organise itself, without being answerable for its activities to any political or other authority. It should be free to organise its sittings and set the agenda for its meetings, as well as have the right to communicate directly with the courts in order to carry out its functions. The Council for the Judiciary should have its own staff according to its needs, and each member should have staff in accordance with the tasks assigned to him or her.

### **IV. B. Decisions of the Council for the Judiciary**

39. Some decisions of the Council for the Judiciary in relation to the management and administration of the justice system, as well as the decisions in relation to the appointment, mobility, promotion, discipline and dismissal of judges (if it has any of these powers) should contain an explanation of their grounds, have binding force, subject to the possibility of a judicial review. Indeed, the independence of the Council for the Judiciary does not mean that it is outside the law and exempt from judicial supervision.

### **IV.C. Technical expertise**

40. The Council for the Judiciary may request the expertise of other professionals on specific issues. Of course, these experts are not members of the Council and cannot take part in the decision process.

## **V. EXTENSIVE POWERS IN ORDER TO GUARANTEE THE INDEPENDENCE AND THE EFFICIENCY OF JUSTICE**

41. Overall the Council for the Judiciary should have a wide role in respect of competences which are interrelated, in order that it can better protect and promote judicial independence and the efficiency of justice.
42. The CCJE recommends that the Council for the Judiciary ensures that the following tasks, to be performed preferably by the Council itself, or in cooperation with other bodies, are fulfilled in an independent manner:
- the selection and appointment of judges (see point V.A);
  - the promotion of judges (see point V.A);
  - the evaluation of judges (see point V.B);
  - disciplinary and ethical matters (see point V.C);
  - the training of judges (see point V.D);
  - the control and management of a separate budget (see point V.E);
  - the administration and management of courts (see point V.F);
  - the protection of the image of judges (see point V.G);
  - the provision of opinions to other powers of the State (see point V.H);
  - the co-operation with other relevant bodies on national, European and international level (see point V.I).
  - the responsibility towards the public: transparency, accountability, reporting (see point VI).
43. One must be aware of and take into account the fact that there might be conflicts between different functions of the Council for the Judiciary, such as between appointing and training of judges, or between training and disciplinary matters, as well as between training and evaluation of judges. One way of

avoiding such conflict is to separate the different tasks between various branches of the Council for the Judiciary<sup>12</sup>.

44. The CCJE emphasises that the various tasks of the Council for the Judiciary are closely linked to the constitutional role of the Council for the Judiciary and that therefore the tasks should be set out in the Constitution, basic law or constitutional instrument. In order to ensure the best discharge of the Council's responsibilities, the problems with possible external and internal pressure (e.g. pressure of the legislature/executive) should be prevented by defining the type of tasks and the way they should be carried out.
45. Also there should be a close connection between the composition and the competences of the Council for the Judiciary. Namely, the composition should result from the tasks of the Council for the Judiciary. Certain functions of the Council for the Judiciary may require for example members of the legal professions, professors of law or even representatives of civil society.
46. Among Councils for the Judiciary, a distinction can also be made between Councils performing traditional functions (e.g. in the so-called "Southern European model" with competences for appointment of judges and evaluation of the judiciary) and Councils performing new functions (e.g. in the so-called "Northern European model" with competences for management and budget matters). The CCJE encourages attributing both traditional and new functions to the Council.
47. Furthermore, the competences of the Council for the Judiciary may be related to the functions of other similar bodies, such as a Council for prosecutors or in some countries a separate Council for administrative judges. It is also one of the responsibilities of the Council for the Judiciary to develop relations with these different bodies as well as to expand European and international contacts/co-operation.

#### **V. A. Selection, appointment and promotion of judges**

48. It is essential for the maintenance of the independence of the judiciary that the appointment and promotion of judges are independent and are not made by the legislature or the executive but are preferably made by the Council for the Judiciary<sup>13</sup>.
49. While it is widely accepted that appointment or promotion can be made by an official act of the Head of State, yet given the importance of judges in society and in order to emphasise the fundamental nature of their function, Heads of States must be bound by the proposal from the Council for the Judiciary. This body cannot just be consulted for an opinion on an appointment proposal prepared in advance by the executive, since the very fact that the proposal stems from a political authority may have a negative impact on the judge's image of independence, irrespective of the personal qualities of the candidate proposed.
50. Although this appointment and promotion system is essential, it is not sufficient. There must be total transparency in the conditions for the selection of candidates, so that judges and society itself are able to ascertain that an appointment is made exclusively on a candidate's merit and based on his/her qualifications, abilities, integrity, sense of independence, impartiality and efficiency. Therefore, it is essential that, in conformity with the practice in certain States, the appointment and selection criteria be made accessible to the general public by every Council for the Judiciary. The Council for the Judiciary shall also ensure, in fulfilling its role in relation to the court administration and training in particular, that procedures for judicial appointment and promotion based on merit are opened to a pool of candidates as diverse and reflective of society as a whole as possible.
51. In addition, where more senior posts are concerned, particularly that of a head of jurisdiction, general profiles containing the specificities of the posts concerned and the qualities required from candidates should be officially disseminated by the Council for the Judiciary in order to provide transparency and accountability over the choice made by the appointing authority. This choice should be based exclusively on a candidate's merits rather than on more subjective reasons, such as personal, political or an association/trade union interests.

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<sup>12</sup> See also Opinion No.4 (2003) of the CCJE.

<sup>13</sup> See also Opinion No.1(2001) of the CCJE.

## **V. B. Professional evaluation of judges**

52. The issues relating to the professional assessment of judges are twofold: firstly, the assessment of the quality of the judicial system and, secondly, the professional ability of judges.
53. The question of the quality assessment of the judicial system was touched upon by the CCJE in Opinion No. 6<sup>14</sup>. As far as the present Opinion is concerned, it is very important that, in each member State, the Council for the Judiciary holds a vital role in the determination of the criteria and standards of quality of the judicial service on the one hand, and in the implementation and monitoring of the qualitative data provided by the different jurisdictions on the other.
54. Quality of justice can of course be measured by objective data, such as the conditions of access to justice and the way in which the public is received within the courts, the ease with which available procedures are implemented and the timeframes in which cases are determined and decisions are enforced. However, it also implies a more subjective appreciation of the value of the decisions given and the way these decisions are perceived by the general public. It should take into account information of a more political nature, such as the portion of the State budget allocated to justice and the way in which the independence of the judiciary is perceived by other branches of the government. All these considerations justify the active participation of Councils for the Judiciary in the assessment of the quality of justice and in the implementation of techniques ensuring the efficiency of judges' work.
55. Where applicable, the question of the professional assessment of judges depends on whether a judge is recruited at the beginning of his/her career from among other candidates who have no previous professional experience or after many years of practice of a legal profession from among the most experienced and deserving practitioners. In the former case the candidate's professional qualities need to be assessed in order to determine his/her previously undisclosed abilities, while there is also utility in such an assessment in the latter case, having regard to the nature of the judicial role and the constant evolution of legal practice and the competencies it involves.
56. It is important to note that the assessment should not only consist of an examination of the legal expertise and the general professional abilities of judges, but also of more personal information, such as their personal qualities and their communication skills. If the practice of judicial functions presupposes great technical and personal qualities, it would be desirable to come to some common agreement at the European level concerning their identification. In this respect, the Council for the Judiciary should play a fundamental role in the identification of the general assessment criteria. However, the Council for the Judiciary should not substitute itself for the relevant judicial body entrusted with the individual assessment of judges.

## **V. C. Ethics and discipline of judges**

### **V. C. 1. Ethics**

57. The CCJE, when dealing with the questions of ethics and discipline in its Opinion No.3(2002), has pinpointed the need to clearly distinguish between these two matters.
58. The distinction between discipline and professional ethics brings about the need to provide judges with a collection of principles of professional ethics, which should be conceived as a working tool in judicial training and the everyday practice. The dissemination of case law on matters of discipline by the disciplinary authority marks a great improvement in the information available to judges; it allows them to engage in discussions on their practices, creating a "think tank" for these discussions. However, this is not sufficient in itself: the disciplinary decisions do not cover the entire scope of the rules of professional ethics, nor constitute the guide to good practices needed by judges.
59. The collection of principles of professional ethics should contain a synthesis of these good practices, with examples and comments; this should not amount to a code, the rigidity and falsely exhaustive nature of which being criticised. This guide of good practices should be the work of the judges themselves as it would be inappropriate for third parties, and in particular for other branches of government, to impose any principle on them.

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<sup>14</sup> Opinion No.6(2004) of the CCJE shows that this question should not be confused with the appreciation of the professional abilities of judges and it should take into consideration the specific nature of the judicial activity, to avoid assimilating it to an ordinary public service.

60. Given the distinction between professional ethics and discipline drawn up by the CCJE, the drafting of this collection of principles should be done by a body other than the one responsible for judges' discipline. There are several solutions for determining the competent body which should be responsible for judicial ethics:
- (i) to entrust this activity to the Council for the Judiciary, if this Council does not have a disciplinary function or has a special body for disciplinary matters with a separate composition within the Council for the Judiciary (see paragraph 64 below);
  - (ii) or to create, alongside the Council for the Judiciary, an ethics committee whose only function would be the drafting and monitoring of rules of professional ethics. Problems with the latter choice may arise from the criteria of selection of the committee members and the risk of conflict or disagreement between this committee and the Council for the Judiciary.
- The body entrusted with ethics could also, as the CCJE suggested in Opinion No. 3, advise judges on matters of professional ethics with which they are likely to be faced throughout their career.
61. In addition, the CCJE considers that associating persons external to the judiciary (lawyers, academics, representatives of the society, other governmental authorities) in the process of development of ethical principles is justified in order to prevent possible perception of self-interest and self protection, while making sure that judges are not deprived of the power to determine their own professional ethics.

#### V. C. 2. Discipline

62. The question of a judge's responsibility was examined by the CCJE in Opinion No.3(2002). The recent experiences of some States show the need to protect judges from the temptation to broaden the scope of their responsibility in purely jurisdictional matters. The role of the Council for the Judiciary is to show that a judge cannot bear the same responsibilities as a member of another profession: he/she performs a public function and cannot refuse to adjudicate on disputes. Furthermore, if the judge is exposed to legal and disciplinary sanctions against his/her decisions, neither judicial independence nor the democratic balance of powers can be maintained. The Council for the Judiciary should, therefore, unequivocally condemn political projects designed to limit the judges' freedom of decision-making. This does not diminish judges' duty to respect the law.
63. A judge who neglects his/her cases through indolence or who is blatantly incompetent when dealing with them should face disciplinary sanctions. Even in such cases, as indicated by CCJE Opinion No.3(2002), it is important that judges enjoy the protection of a disciplinary proceeding guaranteeing the respect of the principle of independence of the judiciary and carried out before a body free from any political influence, on the basis of clearly defined disciplinary faults: a Head of State, Minister of Justice or any other representative of political authorities cannot take part in the disciplinary body.
64. The Council for the Judiciary is entrusted with ethical issues; it may furthermore address court users' complaints. In order to avoid conflicts of interest, disciplinary procedures in first instance, when not addressed within the jurisdiction of a disciplinary court, should preferably be dealt with by a disciplinary commission composed of a substantial representation<sup>15</sup> of judges elected by their peers, different from the members of the Council for the Judiciary, with provision of an appeal before a superior court.

#### V.D. Training of judges<sup>16</sup>

65. The responsibility for organising and supervising judicial training should in each country be entrusted not to the ministry of justice or any other authority answerable to the legislature or the executive, but to the judiciary itself or preferably to the Council for the Judiciary; judges' associations can also play a valuable role in that respect. Furthermore, the conception of training programmes and their implementation should be entrusted, under the authority of the judiciary or preferably the Council for the Judiciary, to a special autonomous body (e.g. a training academy) with its own budget and which should work in consultation with judges. A clear division of functions should be encouraged between the Council for the Judiciary and the training academy, when it exists.

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<sup>15</sup> See paragraph 71 of Opinion N° (2003) 3 of the CCJE.

<sup>16</sup> The significance of the training for maintenance and development of professional competence of judges is emphasised in various documents of the United Nations and the Council of Europe. See Opinion No.4 (2003) of the CCJE and the Lisbon Network Report on the contribution of judicial training bodies to the concrete implementation of Opinion No.4 (2003) of the CCJE of 11.10.2006

66. The CCJE is of the opinion that, if the Council for the Judiciary has competence in training and appointment or promotion, a clear separation should be provided between its branches responsible for these tasks and ties should be avoided either with the ministry of justice (appointment of the trainers, budget allocation etc.), or with the ministry of education (accreditation, recognition of diplomas etc.).
67. The Council for the Judiciary should cooperate with the training body, during the initial and in-service training, to ensure an efficient and high quality training, and to guarantee that judges are selected based on objective and measurable criteria, a merit based system and proper training.

#### V. D. 1. Initial training

68. In order for candidates for appointment as judges to receive quality training, the CCJE recommends that the Council for the Judiciary should participate directly or in other ways cooperate with training institutions in the creation and the development of the programme for initial training, through which candidates will develop and deepen not only their legal knowledge of the national and international substantive and procedural law and practice, but also develop complementary skills, e.g. knowledge of foreign languages, ethics, alternative dispute resolution, so that society may be served by judges capable of applying the law correctly, and of critical and independent thinking, social sensitivity and open-mindedness.
69. In addition, the Council for the Judiciary should provide external evaluation of the initial training, in the sense that by following the professional development and success in everyday work of judges in the early years after appointment, it will evaluate the effectiveness of initial training and will be able to make suggestions for its improvement.

#### V. D. 2. Continuous training

70. The Council for the Judiciary should promote participation of judges in all training activities, as a significant part of their professional activity. The legal and ethical duty and right of judges is to work on their own professional development through participation in the continuous training which should be understood as a life long learning process. Judges, during the performance of their duties, should, in particular, follow changes in national and international legislation and practice<sup>17</sup>, be in touch with social trends and become acquainted with alternative dispute resolution methods. The CCJE recommends that the Council for the Judiciary should take into account judges' participation in training programmes when considering their promotion.
71. The reports and statistics for the evaluation of the work of the judges and the courts, annually prepared by the Council for the Judiciary, should contain data about the critical issues on which training should be focused<sup>18</sup>, such as case management, time management, budgeting, improvement of working techniques, public relations skills, communication techniques, legal research etc.
72. More generally, the Council for the Judiciary should be widely consulted in the process of selection of the topics which will be included in the yearly training programmes; the Council for the Judiciary should also monitor the way the programme is carried out and evaluate its effects on the quality of the performance of the judiciary.

#### V. E. Budget of the Judiciary

73. Although the funding of courts is part of the State budget, such funding should not be subject to political fluctuations. Decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence. The arrangements for parliamentary adoption of the judicial budget should include a procedure that takes into account the opinions of the judiciary<sup>19</sup>. If the Council for the Judiciary does not have a role of administration and management of the courts, it should at least be in a position to issue opinions regarding the allocation of the minimal budget which is necessary for the operation of justice, and to clarify its needs in order to justify its amount.

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<sup>17</sup> See Opinion No.9 (2006) of the CCJE.

<sup>18</sup> Especially the problem with duration of procedures in certain disputes, the most common breaches of human rights, backlog of cases, infringements of the law which most commonly lead to annulment and modification of judicial decisions, changes in the legislation, legal gaps which cause differences in the interpretation of the law, the need for harmonization of the case law, disciplinary procedures and their outcomes.

<sup>19</sup> See also Opinion No.2 (2001) of the CCJE.

74. The CCJE is of the opinion that the courts can only be properly independent if they are provided with a separate budget and administered by a body independent of the executive and legislature, whether it is a Council for the Judiciary or an independent agency.
75. Although it is advocated by some States that the ministry of justice is better placed to negotiate the court budget vis-à-vis other powers, especially the ministry of finances, the CCJE is of the opinion that a system in which the Council for the Judiciary has extended financial competences requires serious consideration in those countries where such is not the case at present. It must be stressed that extended financial powers for the Council for the Judiciary imply its accountability not only vis-à-vis the executive and the legislature, but also vis-à-vis the courts and the public.

#### **V. F. Court administration and management**

76. The determination of the conditions for the allocation of the budget to the various courts and the decision as to the body which should examine and report on the efficiency of the courts are sensitive issues. The CCJE considers that the Council for the Judiciary should have competence in this respect.
77. The Council for the Judiciary should not have competence in respect of performance management of individual judges.
78. The CCJE is of the opinion that the Council for the Judiciary can make a positive contribution to the promotion of quality of justice. Apart from developing policy in this respect, sufficient funding of the courts shall be provided to enable them to fulfil their obligations in this respect. In some countries systems have been set up to account for and measure the quality of justice; it is important to inquire into the results of such developments. As to developing policy measuring quality, it is important that the Council for the Judiciary can obtain from the courts relevant data and statistics.
79. The Council for the Judiciary should supervise the organisation of the inspection service so that inspection is compatible with judicial independence. This is particularly important where inspection services belong to the executive.

#### **V.G. Protection of the image of justice**

80. In its Opinion No.7(2005), the CCJE recommended the setting up of programmes, to be generally supported by the European judiciaries and states, aimed at going beyond the scope of giving general information to the public in the area of justice, and at helping to provide the correct perception of the judge's role in society. The CCJE considered that courts themselves should be recognised as a proper agency to organise programmes having the goal of improving the understanding and confidence of society with regard to its system of justice. In parallel, a role of co-ordinating the various local initiatives as well as promoting nation-wide "outreach programmes" should be given to the Council for the Judiciary which, with the assistance of professionals, may also provide more sophisticated information.
81. Again in its Opinion No.7(2005), the CCJE pointed out the role of an independent body – which could well be identified in the Council for the Judiciary or in one of its committees, if necessary with the participation of media professionals – in dealing with problems caused by media accounts of court cases, or difficulties encountered by journalists in carrying out their work.
82. Finally, in its above mentioned Opinion, the CCJE – dealing with the issue of judges or courts challenged or attacked by the media or by political or social figures through the media – considered that, while the judge or court involved should refrain from reacting through the same channels, the Council for the Judiciary or a judicial body should be able and ready to respond promptly and efficiently to such challenges or attacks in appropriate cases.
83. The Council for the Judiciary should have the power not only to disclose its views publicly but should also take all necessary steps before the public, the political authorities and, where appropriate, the courts to defend the reputation of the judicial institution and/or its members.
84. The Council for the Judiciary may also be the appropriate body to play a broader role in the field of the promotion and protection of the image of justice, as the performance of such a function often requires striking a balance between conflicting freedom of individuals, social and political actors, and the media, on the one hand, and the public interest in an independent and efficiently functioning justice system, on the other hand.



85. In this framework, the Council for the Judiciary could also address court users' complaints (See also paragraph 64 above).
86. The CCJE recommends that the Council for the Judiciary can perform such a function by availing itself of the help of the necessary professional assistance, as its staff in this area should not be restricted to lawyers but should also include journalists, social scientists, statisticians, etc.

#### **V.H. Possibility to provide opinions to other powers of state**

87. All draft texts relating to the status of judges, the administration of justice, procedural law and more generally, all draft legislation likely to have an impact on the judiciary, e.g. the independence of the judiciary, or which might diminish citizens' (including judges' own) guarantee of access to justice, should require the opinion of the Council for the Judiciary before deliberation by Parliament. This consultative function should be recognised by all States and affirmed by the Council of Europe as a recommendation.

#### **V.I. Co-operation activities with other bodies on national, European and international level**

88. The CCJE notes that in some States the responsibilities of the Council for the Judiciary are subdivided between several agencies. The resulting variety of national arrangements is further complicated by the fact that in some areas (e.g., training) a single institution may be competent, when in other areas competences are divided. It is not for the CCJE, at this stage, to take a stand with respect to an optimal scheme for the relations between separate agencies. Aware of the importance of national legal traditions as to the way in which such bodies have developed, the CCJE considers nonetheless the need to recommend that co-operation frameworks, under the leadership of the Council for the Judiciary, be set up, so that, when several agencies share the Council's tasks, smooth achievement of these tasks may be ensured. Such a process is also likely to favour institutional evolution in the sense of progressive unification of agencies (e.g. in the area of training). This also concerns co-operation with the Councils for the administrative judiciary. Cooperation with the Councils for the prosecutors, if such separate bodies exist, may also be appropriate.
89. The CCJE also stresses the importance of co-operation at the European and international levels between Councils for the Judiciary with respect to all areas in which Councils are active at the national level.
90. The CCJE acknowledges that the work of the European Network of the Councils for the Judiciary (which plays a general co-operative role between the councils for the judiciary) and the activities of the Lisbon Network and of the European Judicial Training Network (which are competent in the area of judicial training) deserve recognition and support. These Networks have been fruitful interlocutors for the CCJE.

### **VI. THE COUNCIL FOR THE JUDICIARY IN SERVICE OF ACCOUNTABILITY AND TRANSPARENCY OF THE JUDICIARY**

91. Given the prospect of considerable involvement of the Council for the Judiciary in the administration of the judiciary, transparency in the actions undertaken by this Council must be guaranteed. Transparency is an essential factor in the trust that citizens have in the functioning of the judicial system and is a guarantee against the danger of political influence or the perception of self-interest, self protection and cronyism within the judiciary.
92. All decisions by the Council for the Judiciary on appointment, promotion, evaluation, discipline and any other decisions regarding judges' careers must be reasoned (see also paragraph 39 above).
93. As it has already been mentioned, transparency, in the appointment and promotion of judges, will be ensured by publicising the appointment criteria and disseminating the post descriptions. Any interested party should be able to look into the choices made and check that the Council for the Judiciary applied the rules and criteria based on merits in relation to appointments and promotions.
94. When the Council for the Judiciary has budgetary powers, it is only logical that it should be accountable for the use of the funds in question to the Parliamentary assembly which adopted the budget. The portion of the budget allocated to the judicial system should be controlled by the Audit Office in charge of supervising the use of public money, when it exists.
95. When the Council for the Judiciary has disciplinary powers, judges who are the subject of disciplinary proceedings shall be fully informed of the grounds of the decision so that they can evaluate if they

should contemplate appealing against the decision (see paragraph 39 above). In addition, the Council for the Judiciary could consider the publication of decisions taken which are both formal and final, in order to inform, not only the whole of the judiciary, but also the general public of the way in which the proceedings have been conducted and to show that the judiciary does not seek to cover up reprehensible actions of its members.

96. The Council for the Judiciary should periodically publish a report of its activities, the aim of which being, on the one hand, to describe what the Council for the Judiciary has done and the difficulties encountered and, on the other, to suggest measures to be taken in order to improve the functioning of the justice system in the interest of the general public. The publication of this report may be accompanied by press conferences with journalists, meetings with judges and spokespersons of judicial institutions, to improve on the dissemination of information and on the interactions within the judicial institutions.

## **SUMMARY OF THE RECOMMENDATIONS AND CONCLUSIONS**

*In its Opinion No.10(2007) on « The Council for the Judiciary at the service of society », the CCJE recommends that:*

### *A. In general:*

- a) it is important to set up a specific body, such as the Council for the Judiciary, entrusted with the protection of the independence of judges, as an essential element in a state governed by the rule of law and thus respecting the principle of the separation of powers ;
- b) the Council for the Judiciary is to protect the independence of both the judicial system and individual judges and to guarantee at the same time the efficiency and quality of justice as defined in Article 6 of the ECHR in order to reinforce public confidence in the justice system;
- c) the Council for the Judiciary should be protected from the risk of seeing its autonomy restricted in favour of the legislature or the executive through a mention in a constitutional text or equivalent.

### *B. On the composition of the Council for the Judiciary:*

- a) in order to avoid the perception of self-interest, self protection and cronyism and to reflect the different viewpoints within society, the Council for the Judiciary should have a mixed composition with a substantial majority of judges, even if certain specific tasks should be held in reserve to an all-judge panel. The Council for the Judiciary may also be exclusively composed of judges;
- b) prospective members, whether judges or not, shall be appointed on the basis of their competence, experience, understanding of judicial life and culture of independence. Also, they should not be active politicians or members of the executive or the legislature;
- c) judge members should be elected by their peers, without any interference from political authorities or judicial hierarchies, through methods guaranteeing the widest representation of the judiciary; if direct elections are used for selection, the Council for the Judiciary should issue rules aimed at minimising any jeopardy to public confidence in the justice system;
- d) appointment of non-judge members, with or without a legal experience, should be entrusted to non-political ; if they are however elected by the Parliament, they should not be members of the Parliament, should be elected by a qualified majority necessitating significant opposition support, and should be persons affording, in the overall composition of the Council for the Judiciary, a diverse representation of society.

### *C. On the functioning of the Council for the Judiciary:*

- a) terms of office of members could be full-time but limited in number and in time in order to preserve contact with court practice; members (judges and non-judges) should be granted guarantees for their independence and impartiality;
- b) the Council for the Judiciary should manage its own budget and be financed to allow an optimum and independent functioning;

c) some decisions of the Council of the Judiciary shall be reasoned and have binding force, subject to the possibility of a judicial appeal ;

d) as an essential element of the public confidence in the justice system, the Council for the Judiciary should act with transparency and be accountable for its activities, in particular through a periodical report suggesting also measures to be taken in order to improve the functioning of the justice system.

*D. On the powers of the Council for the Judiciary:*

a) the Council for the Judiciary should have a wide range of tasks aiming at the protection and the promotion of judicial independence and efficiency of justice; it should also ensure that no conflicts of interest arises in the Council for the Judiciary in carrying out its various tasks;

b) the Council of the Judiciary should preferably be competent in the selection, appointment and promotion of judges; this should be carried out in absolute independence from the legislature or the executive as well as in absolute transparency as to the criteria of selection of judges;

c) the Councils for the Judiciary should be actively involved in the assessment of the quality of justice and in the implementation of techniques ensuring the efficiency of judges' work, but should not substitute itself for the relevant judicial body entrusted with the individual assessment of judges;

d) the Council for the Judiciary may be entrusted with ethical issues; it may furthermore address court users' complaints;

e) the Council for the Judiciary may be entrusted with organising and supervising the training but the conception and the implementation of training programmes remain the responsibility of a training center, with which it should cooperate to guarantee the quality of initial and in-service training;

f) the Council for the Judiciary may have extended financial competences to negotiate and manage the budget allocated to Justice as well as competences in relation to the administration and management of the various courts for a better quality of Justice ;

g) the Council for the Judiciary may also be the appropriate agency to play a broad role in the field of the promotion and protection of the image of justice;

h) prior to its deliberation in Parliament, the Council for the Judiciary shall be consulted on all draft legislation likely to have an impact on the judiciary, e.g. the independence of the judiciary, or which might diminish citizens' guarantee of access to justice;

i) co-operation with the different Councils for the Judiciary at the European and international levels should be encouraged.



# Opinion No.11 (2008)

of the Consultative Council of European Judges (CCJE)  
to the Committee of Ministers of the Council of Europe

## The quality of judicial decisions

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### GENERAL INTRODUCTION

1. The quality of justice is a constant and long-standing concern of the Council of Europe, as shown in particular by the conventions, resolutions and recommendations adopted under the Council's auspices on ways of facilitating access to justice, on improving and simplifying procedures, on reducing the courts' workload and on refocusing judges' work on purely judicial activities<sup>1</sup>.
2. In this context and in compliance with its terms of reference, the Consultative Council of European Judges (CCJE) has decided to devote Opinion No. 11 to quality of judicial decisions, which is a major component of quality of justice.
3. Clear reasoning and analysis are basic requirements in judicial decisions and an important aspect of the right to fair trial. Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR), for example, requires states to establish independent and impartial tribunals and promote the introduction of efficient procedures. The fulfilment of this obligation acquires real meaning when judges are, as a result, enabled to administer justice justly and correctly, in relation to their findings both in law and in fact, for the ultimate benefit of citizens. A high quality judicial decision is one which achieves a correct result - so far as the material available to the judge allows - and does so fairly, speedily, clearly and definitively.
4. With this in mind, the CCJE has already pointed out that judicial independence must be regarded as a citizens' right; it stated in its Opinion No. 1 (2001) that the independence of the judiciary "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". The CCJE has, in its opinions since 2001, put forward a number of suggestions as to how each system may not only guarantee that court users have a right of access to the courts, but also ensure, through the quality of the decisions given, that they can have confidence in the outcome of the judicial process<sup>2</sup>.
5. This opinion does not aim to challenge the basic principle that the assessment of the intrinsic quality of each judicial decision should only take place through the exercise of rights of recourse established by the law. This principle is a key consequence of the constitutional guarantee of independence of judges, regarded as one of the main features of the Rule of Law in democratic societies.
6. The CCJE considers that judges, whose task is to give quality decisions, are in a particularly good position to initiate a discussion on the quality of judicial decisions and to determine the factors for such quality and the conditions for assessing it.
7. A judicial decision must meet a number of requirements in relation to which some common principles can be identified, irrespective of the specific features of each judicial system and the practices of courts in different countries. The starting point is that the purpose of a judicial decision is not only to resolve a given dispute providing the parties with legal certainty, but often also to establish case law which may prevent the emergence of other disputes and to ensure social harmony.

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<sup>1</sup> All the texts on these issues demonstrate the spirit in which the Council of Europe addresses the need of quality of justice: "in the Council of Europe's view, the quality approach cannot refer to a single decision, but, as part of a comprehensive approach, depends on the quality of the judicial system, including judges, defence lawyers and court personnel, as well as the quality of the process leading up to decisions. The Council of Europe therefore recommends that efforts to improve the situation focus on each of these points" (unofficial translation), (Jean-Paul JEAN, "La qualité des décisions de justice au sens du Conseil de l'Europe", Colloquy organised on 8 and 9 March 2007 by the Faculty of Law and Social Sciences, University of Poitiers, on "The quality of judicial decisions" – see "CEPEJ Studies" N°4).

<sup>2</sup> See also the conclusions of the Conference on the quality of judicial decisions which was organised in the Supreme Court of Estonia in Tartu (18 June 2008) with the participation of the Estonian judicial community and the Working Party of the CCJE.

8. The report of Ms Maria Giuliana CIVININI, based on the replies given by the CCJE members to a questionnaire<sup>3</sup>, shows that countries have a very wide range of approaches to the assessment and improvement of quality of judicial decisions. It also emphasises that while the arrangements for assessing quality depend on the particular traditions of each legal system, all countries are nevertheless similarly committed to continuing improvement of the conditions under which judges have to give their decisions.
9. “Judicial decision” is used in this Opinion to mean a determination which decides a particular case or issue and is given by an independent and impartial tribunal within the scope of Article 6 of the ECHR including:
- decisions given in civil, social, criminal and most administrative matters;
  - decisions given at first instance, on appeal or by supreme courts, as well as by constitutional courts;
  - provisional decisions;
  - final decisions;
  - decisions in the form of judgments or orders given by tribunals sitting as a panel or as a single judge;
  - decisions given with or without the possibility of minority opinions;
  - decisions given by professional or non-professional judges or by courts combining the two (échevinage).

## **PART I. QUALITY FACTORS OF JUDICIAL DECISIONS**

### **A. The external environment: legislation and economic and social context**

10. The quality of a judicial decision depends not only on the individual judge involved, but also on a number of variables external to the process of administering justice such as the quality of legislation, the adequacy of the resources provided to the judicial system and the quality of legal training.

#### **1. The legislation**

11. Judicial decisions are primarily based on laws passed by legislatures or, in common law systems, upon such laws and upon principles established by judicial precedent. These sources of law not only decide what are the rights that users of the system of justice have and what conduct is punished by criminal law, but also define the procedural framework within which judicial decisions are taken. Thus the choices made by legislatures influence the type and volume of cases brought before courts, as well as the ways in which they are processed. The quality of judicial decisions may be affected by over-frequent changes in legislation, by poor drafting or uncertainties in the content of laws, and by deficiencies in the procedural framework.
12. Therefore the CCJE considers it desirable that national parliaments should assess and monitor the impact of legislation in force and legislative proposals on the justice system and introduce appropriate transitional and procedural provisions to ensure that judges can give effect to them by high quality judicial decisions. The legislator should ensure that legislation is clear and simple to operate, as well as in conformity with the ECHR. In order to facilitate interpretation, preparatory works of legislation should be readily accessible and drawn up in an understandable language. Any draft legislation concerning the administration of justice and procedural law should be the subject of an opinion of the Council for the Judiciary or equivalent body before its deliberation by Parliament.
13. To achieve quality decisions in a way which is proportionate to the interests at stake, judges need to operate within a legislative and procedural framework that permits them to decide freely on and to dispose effectively of (for example) the time resources needed to deal properly with the case. The CCJE refers to the discussion of “case management” in its Opinion No. 6 (2004)<sup>4</sup>.

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<sup>3</sup> See the questionnaire on the quality of judicial decisions and the replies on the website of the CCJE: [www.coe.int/ccje](http://www.coe.int/ccje).

<sup>4</sup> Specifically concerning procedural laws, the CCJE wishes to recall here its Opinion No. 6 (2004), by which it recommended, in view of ensuring quality judicial decisions delivered in a reasonable timeframe, that legislators make optimal choices in the balance between length of trials and availability of ADR, plea-bargaining schemes, simplified and/or accelerated and summary procedures, as well as procedural rights of the parties, etc. Furthermore, financial resources should be guaranteed for ADR schemes.

## 2. Resources

14. The quality of a judicial decision is directly conditioned by the funding made available to the judicial system. Courts cannot operate efficiently with inadequate human and material resources. Adequate judicial remuneration is necessary to shield from pressures aimed at influencing judges' decisions and more generally their behaviour<sup>5</sup> and to ensure that the best candidates enter the judiciary. The assistance of a qualified staff of clerks, and the collaboration of judicial assistants, who should relieve the judges of more routine work and prepare the papers, can evidently contribute to improve the quality of decisions delivered by a court. If such resources are lacking, effective functioning of the judicial system to achieve a high quality product will be impossible<sup>6</sup>.

## 3. Judicial actors and legal training

15. Even if one focuses only on the actors within the justice system, the quality of the performance of the judicial system depends clearly on the interaction of many roles: the police, prosecutors, defence lawyers, clerks, the jury where applicable, etc. The judge is only one link in the chain of such co-actors, and not necessarily even the final one as the enforcement stage is of equal importance. Even when one concentrates only on the quality of judicial decisions, it follows from what has already been said that judges' performance of their role is, although central, not the only factor conditioning the production of a judicial decision of quality.
16. The quality of judicial decision depends among others factors on the legal training of all the legal professionals involved in the proceedings. Therefore the CCJE wishes to emphasise the role of legal education and training in general.
17. This means, for judges in particular, that there should be high quality legal training at the start of a legal professional career<sup>7</sup> and a continuous training programme thereafter to maintain and improve professional techniques. Such training needs not only to equip judges with the abilities necessary to give effect to changes in domestic and international legislation and legal principles, but should also promote other complementary skills and knowledge in non-legal matters, giving them a good background understanding of the issues coming before them.
18. Judges also need training in ethics and communication skills to assist them in dealing with the parties in judicial proceedings as well as with the public and the media. Particular importance attaches to training to improve their organisational capacities in the areas of efficient case preparation and management (for example, by use of IT, case management, working techniques, judgment/decision writing techniques - including guidelines with general models for drafting decisions, normally leaving judges some freedom to choose their individual style), all this with the aim of managing trial cases without unnecessary delay or unnecessary steps<sup>8</sup>.
19. Furthermore, court presidents should be trained in the management of human resources, strategic planning to regulate and manage case flows, as well as efficient planning and use of budgetary and financial resources. Administrative staff and court assistants should be specially trained in preparing the hearings and monitoring and ensuring the smooth progress of cases (for example, in relation to the use of IT, case and time management techniques, drafting of judgments, foreign languages, communication with the parties and the public and legal research). This will assist to relieve judges of administrative and technical duties and allow them to focus their time on the intellectual aspects and management of the trial process and decision-making.

### B. The internal environment: professionalism, procedure, hearing and decision

20. The quality of judicial decisions also depends on internal factors such as judges' professionalism, procedures, case management, hearings and elements inherent to the decision.

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<sup>5</sup> See CCJE's Opinion N° 1 (2001), paragraph 61.

<sup>6</sup> See CCJE's Opinion N° 2 (2001).

<sup>7</sup> See CCEJ's Opinion No. 4 (2003).

<sup>8</sup> Brochures, case studies of good and bad practices, standard models for writing judgments together with methodologies, fact sheets and bench books, developed for training purposes could be broadly disseminated among judges.

## **1. The professionalism of the judge**

21. Judges' professionalism is the primary guarantee of a high quality judicial decision. This involves a high level legal training of judges in accordance with the principles defined by the CCJE in its Opinions N° 4 (2003) and N° 9 (2006), as well as the development of a culture of independence, ethics and deontology in accordance with Opinions No. 1 (2001) and 3 (2002).
22. A judicial decision may need not only to take account of the relevant legal material but also to have regard to non-legal concepts and realities relevant to the context of the dispute such as, for example, ethical, social or economic considerations. This requires the judge to be aware of such considerations when deciding the case.
23. The procedures for evaluating or giving guidance in respect of judicial performance by judicial authorities are capable of improving their competence and the quality of judicial decisions.

## **2. The procedure and management of the case**

24. If the outcome is to be a high quality decision which will be accepted both by the parties and by society, the procedure must be clear, transparent and satisfying the ECHR requirements.
25. However, the mere existence of a procedural law meeting these requirements is not sufficient. The CCJE is of the opinion that the judge must be able to organise and conduct the proceedings actively and accurately. The proper development of the proceedings is conducive to the quality of the final product – the decision<sup>9</sup>.
26. Whether a decision is given in a reasonable time in accordance with Article 6 ECHR can also be regarded as an important element of its quality. However tension can arise between the speed with which a proceeding is conducted and other factors relevant to quality such as the right to a fair trial also safeguarded by Article 6 ECHR. Since it is important to safeguard social harmony and legal certainty, the time element must obviously be considered, but is not the only factor to be taken into account. The CCJE refers to its Opinion No. 6 (2004) where it underlined that "quality" of justice cannot be equated with simple "productivity". The qualitative approach must also take into account the capacity of the judicial system to address the demands upon it according to the general objectives of the system, among which the speediness of the procedure is only one element.
27. Some countries have established standard models of good practices in case management and conduct of hearings. Such initiatives should be encouraged to promote good case management by each judge.
28. The importance of consultations between judges at which information and experiences can be exchanged should also be stressed. These enable judges to discuss case management and to address difficulties met in the application of legal principles and possible conflicts in the case law.

## **3. The hearing**

29. The hearing should comply with all ECHR requirements, thus ensuring for parties and society at large compliance with the minimum standards of a properly designed and fair trial. The proper development of the hearing will have a direct impact on the parties and society's understanding and acceptance of the final decision . It should also give the judge all the elements necessary for the proper assessment of the case; therefore it has a critical impact on the quality of the judicial decision. A hearing should be held whenever the case law of the ECHR so prescribes .
30. A transparent and open hearing as well as compliance with the adversarial principle and the principle of the equality of arms are necessary prerequisites if the decision is to be accepted by the parties themselves and by the general public.

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<sup>9</sup> In its Opinion No. 6 (2004), the CCJE, developing the principles set out in Recommendation No. R (84) 5, stressed the importance of the judge's active role in the management of civil proceedings (see in particular paragraphs 90-102 and 126).



#### 4. The elements inherent to the decision

31. To be of high quality, a judicial decision must be perceived by the parties and by society in general as being the result of a correct application of legal rules, of a fair proceeding and a proper factual evaluation, as well as being effectively enforceable. Only then will the parties be convinced that their case has been properly considered and dealt with and will society perceive the decision as a factor for restoring social harmony. To achieve these aims, a number of requirements must be met.

##### a. Clarity

32. All judicial decisions must be intelligible, drafted in clear and simple language - a prerequisite to their being understood by the parties and the general public. This requires them to be coherently organised with reasoning in a clear style accessible to everyone<sup>10</sup>.

33. Each judge may opt for a personal style and structure or make use of standardised models, if they exist. The CCJE recommends that judicial authorities compile a compendium of good practices in order to facilitate the drafting of decisions.

##### b. Reasoning

34. Judicial decisions must in principle be reasoned<sup>11</sup>. The quality of a judicial decision depends principally on the quality of its reasoning. Proper reasoning is an imperative necessity which should not be neglected in the interests of speed. Proper reasoning requires judges to have proper time to prepare their decisions.

35. The statement of the reasons not only makes the decision easier for the litigants to understand and be accepted, but is above all a safeguard against arbitrariness. Firstly, it obliges the judge to respond to the parties' submissions and to specify the points that justify the decision and make it lawful; secondly, it enables society to understand the functioning of the judicial system.

36. The reasons must be consistent, clear, unambiguous and not contradictory. They must allow the reader to follow the chain of reasoning which led the judge to the decision.

37. The reasoning must reflect the judges' compliance with the principles enunciated by the European Court of Human Rights (namely the respect for the right of defence and the right to a fair trial). Where provisional decisions concern individual freedoms (e.g. arrest warrants) or may affect the rights of individuals or assets (e.g. the provisional custody of a child or the preventive attachment of real property or the seizure of bank accounts), an appropriate statement of the reasons is required.

38. The statement of the reasons must respond to the parties' submissions, i.e. to their different heads of claim and to their grounds of defence. This is an essential safeguard because it allows litigants to ensure that their submissions have been examined and therefore that the judge has taken them into account. The reasoning must be free of any insulting or unflattering remarks about the parties.

39. Without affecting the possibility or even the obligation for judges to act on their own motion in certain contexts, judges need only respond to relevant arguments capable of influencing the resolution of the dispute.

40. The statement of reasons should not necessarily be long, as a proper balance must be found between the conciseness and the proper understanding of the decision.

41. The obligation on courts to give reasons for their decisions does not mean replying to every argument raised by the defence in support of every ground of defence. The scope of this duty can vary according to the nature of the decision. In accordance with the case-law of the European Court of Human Rights<sup>12</sup>, the extent of the reasons to be expected depends on the various arguments open to each party, as well as on the different legal provisions, customs and doctrinal principles as

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<sup>10</sup> Reference should be made in this connection to Opinion No. 7 (2005) of the CCJE, especially paragraphs 56 to 61.

<sup>11</sup> Exceptions may include, among others, decisions involving the management of the case (e.g. adjourning the hearing), minor procedural issues or essentially non-contentious issues (judgments by default or by consent), decisions by an appeal court affirming a first instance decision after hearing similar arguments on the same grounds, jury decisions and some decisions concerning leave to appeal or to bring a claim, in countries where such leave is required.

<sup>12</sup> See in particular ECr.HR: Boldea vs Romania, 15 February 2007, § 29; Van de Hurk vs the Netherlands, 19 April 1994, § 61.

well as the different practices regarding presentation and drafting of judgments and decisions in different states. In order to respect the principle of fair trial, the reasoning should demonstrate that the judge has really examined all the main issues which have been submitted to him or her<sup>13</sup>. In the case of a jury, the judge's charge to the jury must clearly explain the facts and issues that the jury must decide.

42. In terms of content, the judicial decision includes an examination of the factual and legal issues lying at the heart of the dispute.
43. When examining factual issues, the judge may have to address objections to the evidence, especially in terms of its admissibility. The judge will also consider the weight of the factual evidence likely to be relevant for the resolution of the dispute.
44. Examining the legal issues entails applying the rules of national, European<sup>14</sup> and international law<sup>15</sup>. The reasons should refer to the relevant provisions of the Constitution or relevant national, European and international law. Where appropriate, reference to national, European or international case-law, including reference to case-law from courts of other countries, as well as reference to legal literature, can be useful or in a common law system essential.
45. In common law countries, decisions of higher courts that settle a legal issue serve as binding precedents in identical disputes thereafter. In civil law countries, decisions do not have this effect but can nevertheless provide valuable guidelines to other judges dealing with a similar case or issue, in cases that raise a broad social or major legal issue. Therefore the statement of the reasons, deriving from a detailed study of the legal issues addressed, needs to be drawn up with special care in such cases in order to meet the parties' and society's expectations.
46. In many cases, examining the legal issues means interpreting legal rules.
47. While recognising the judges' power to interpret the law, the obligation of the judges to promote legal certainty has also to be remembered. Indeed legal certainty guarantees the predictability of the content and application of the legal rules, thus contributing in ensuring a high quality judicial system.
48. Judges will apply the interpretative principles applicable in both national and international law with this aim in mind. In common law countries, they will be guided by any relevant precedent. In civil law countries, they will be guided by case law, especially that of the highest courts, whose task includes ensuring the uniformity of case law.
49. Judges should in general apply the law consistently. However when a court decides to depart from previous case law, this should be clearly mentioned in its decision. In exceptional circumstances, it may be appropriate for the court to specify that this new interpretation is only applicable as from the date of the decision in issue or from a date stipulated in such decision.
50. The volume of cases reaching higher courts can also affect both the speed and the quality of judicial decision-making. The CCJE recommends the introduction of mechanisms appropriate to the legal traditions of each country to regulate access to such courts.

### **c. Dissenting opinions**

51. In some countries judges can give a concurring or dissenting opinion. In these cases the dissenting opinion should be published with the majority's opinion. Judges thus express their complete or partial disagreement with the decision taken by the majority of judges who gave the decision and the reasons for their disagreement, or maintain that the decision given by the court can or should be based on grounds other than those adopted. This can contribute to improve the content of the decision and can assist both in understanding the decision and the evolution of the law.
52. Dissenting opinions should be duly reasoned, reflecting the judge's considered appreciation of the facts and law.

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<sup>13</sup> See in particular ECr.HR : *Boldea vs Romania*, 15 February 2007, § 29; *Helle vs Finland*, 19 February 1997, § 60.

<sup>14</sup> The expression "European Law" is intended to include the *acquis* of the Council of Europe and European Community Law.

<sup>15</sup> See Opinion No. 9 (2006) of the CCJE.

#### **d. Enforcement**

53. Any order made by or following a judicial decision should be written in clear and unambiguous language, so as to be readily capable of being given effect or, in the case of an order to do or not do or pay something, readily enforced.
54. As interpreted by the European Court of Human Rights, the right to a fair trial enshrined in Article 6 ECHR implies not only that the judicial decision must be given within a reasonable time, but also that it must be, where relevant, effectively enforceable for the benefit of the successful party. Indeed the Convention does not establish theoretical protection of human rights, but aims to ensure that the protection it provides is given practical effect.
55. Such order must accordingly have the following major characteristics:
- (i) It must first of all, where relevant, be enforceable in terms of wording: this means that the decision must include operative provisions that clearly state, without any possibility of uncertainty or confusion, the sentence, obligations or orders imposed by the court. An obscure decision which is open to different interpretations impairs the effectiveness and credibility of the judicial process.
  - (ii) An order must also be enforceable under the relevant system of execution: that is how it will be effectively executed. There are in most legal systems procedures whereby execution may be stayed or suspended. A stay or suspension is undeniably legitimate in some cases. But it can be sought for tactical purposes, and the inappropriate grant of a stay or suspension can lead to paralysis of the judicial process and permit procedural strategies designed to make court decisions inoperative. To ensure the efficiency of justice, all countries should have procedures for provisional enforcement<sup>16</sup>.
56. An order of good quality (in a non-criminal matter) may be useless without the existence of a simple and efficient procedure for executing it. It is important that this procedure be subject to judicial supervision, by judges able to resolve any difficulties that may arise during the process of executing the decision, according to efficient procedures which should not involve undue costs for the parties.

#### **PART II. EVALUATION OF THE QUALITY OF JUDICIAL DECISIONS**

57. The CCJE stresses that the merits of individual judicial decisions are primarily controlled by the appeal or review procedures available in national courts and by the right of access to the European Court of Human Rights. States should ensure that their national procedures meet the requirements laid down in decisions of the latter Court.

##### **A. The substance of the evaluation**

58. Since the nineties, there has been a growing awareness that the quality of judicial decisions cannot be evaluated properly by assessing solely the intrinsic legal value of the decisions. As shown in the first part of this Opinion, the quality of judicial decisions is influenced by the quality of all the preparatory steps that precede them and therefore the legal system as a whole has to be examined. Moreover, seen from the perspective of the court users, it is not only the legal quality *stricto sensu* of the actual decision that matters; attention has also to be paid to other aspects such as the length, transparency and conduct of the proceedings, the way in which the judge communicates with the parties and the way in which the judiciary accounts for its functioning to society.
59. The CCJE underlines that any method of evaluating the quality of judicial decisions should not interfere with the independence of the judiciary either as a whole or on an individual basis.
60. The evaluation of the quality of judicial decisions must be done above all on the basis of the fundamental principles of the ECHR. It cannot be done only in the light of considerations of an economic or managerial nature. The use of economic methods must be considered carefully. The role of the judiciary is above all to apply and give effect to the law and cannot properly be analysed in terms of economic efficiency.

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<sup>16</sup> See Opinion No. 6 (2004) of the CCJE, paragraph 130.

61. Any quality evaluation system should strictly aim at promoting the quality of judicial decisions and not serve as a mere bureaucratic tool or an end in itself. It is not an instrument of external control of the judiciary.
62. The CCJE recalls that the evaluation of the quality of justice, i.e. of the performance of the court system as a whole or of any individual court or local group of courts, should not be confused with the evaluation of the professional ability of any individual judge for other purposes<sup>17</sup>.
63. Evaluation procedures should aim, above all, at identifying the need, if any, for amendment of legislation, for changing or improving judicial procedures and/or for further training of judges and court staff.
64. The subjects, methods and procedure of evaluation should be defined properly and be understandable. They should be determined by judges or in close co-operation with judges.
65. The evaluation must be transparent. Personal or identifying data of judges must remain confidential.
66. The evaluation of the quality of judicial decisions should not make judges deal with the facts or reach their decision on the substance of a case in a uniform way, without taking into account the circumstances peculiar to each case.
67. Any evaluation of judicial decisions must take into account the different types and levels of courts, the different kinds of disputes and the differing skills and expertise required to resolve them.

**B. The evaluation methods (including bodies entrusted with the evaluation of the quality of judicial decisions)**

68. The CCJE stresses that (especially if use is made of quantitative and qualitative statistics) it is desirable to combine different methods of evaluation, linked to different quality indicators and multiple information sources. No single method should prevail over others. Evaluation methods can be accepted, provided that they are considered with the necessary scientific rigour, knowledge and care and are defined in a transparent way. Moreover, the evaluation systems must not challenge the legitimacy of judicial decisions.
69. The CCJE considers that states are not necessarily bound to adopt the same evaluation system and methodological approach; and that, although it is not within the scope of this Opinion to undertake a detailed commentary on the various quality evaluation systems, it is nevertheless possible, on the basis of national experiences, to draw up a list of the most suitable methods.

**1. Self evaluation by judges and evaluation by other actors within the justice system**

70. The CCJE encourages peer review and self evaluation by judges. The CCJE also encourages the participation of "external" persons (e.g. lawyers, prosecutors, law faculties professors, citizens, national or international non-governmental organisations) in the evaluation, provided that the independence of the judiciary is fully respected. Such external evaluation must not of course be used as a method of compromising judicial independence or the integrity of the judicial process. The first point of reference in the evaluation of judicial decisions must be the availability of a timely and effective appeal procedure.
71. By their case-law, their examination of judicial practices and their annual reports, superior courts may contribute to the quality of judicial decisions and their evaluation; in this respect, it is of utmost importance that their case-law is clear, consistent and constant. The superior courts may also contribute to the quality of judicial decisions by developing guidelines for the lower courts, in which attention is drawn to the applicable principles, in accordance with the relevant case-law.

**2. Statistical methods**

72. The quantitative statistical method involves taking statistics at court level (statistics on cases pending as well as cases filed and cases decided, the number of hearings in each case, cancelled hearings, the length of proceedings, etc.). The quantity of the work done by the court is one of the yardsticks

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<sup>17</sup> See Opinion No. 6 (2004) of the CCJE, part B paragraph 34 and Opinion No. 10 (2007) of the CCJE, paragraphs 52 to 56 and 78.

for measuring the capability of the administration of justice to meet citizens' needs. This capability is one of the indicators of the quality of justice. This method of analysis accounts for court activities, but cannot alone be sufficient to assess whether the actual decisions delivered are of satisfactory quality. The nature of the decisions depends on the merits of each individual case. A judge may, for example, have to give a series of associated decisions in cases of little merit. Statistics are not an accurate guide in every situation, and must always be placed in context. This method allows nonetheless an assessment whether cases have been handled within an appropriate timeframe, or whether a backlog exists which may justify the allocation of additional resources and the taking of measures aiming at its reduction or elimination.

73. In a qualitative statistical method, decisions are classified according to their type, subject and complexity. This method allows a weighting of different types of cases to establish an efficient and correct distribution of work and the minimum and the maximum workload that can be required from a court. A feature of this method is that it takes into account the specificities of certain cases or types of issue, so as to make allowance for those where, although the number of decisions given is limited, a considerable amount of work is involved. The difficulty about qualitative statistical assessment lies, however, in defining which factors to take into account and in determining which authorities are competent to establish them.
74. Both the limited number of appeals and the number of successful appeals can be objectively ascertainable and relatively reliable quality indicators. However the CCJE stresses that neither the number of appeals nor their rate of success necessarily reflects on the quality of the decisions subject to appeal. A successful appeal can be no more than a different evaluation of a difficult point by the appeal judge, whose decision might itself have been set aside had the matter gone to a yet higher court<sup>18</sup>.

### 3. The role of the Council for the judiciary

75. National or international bodies in charge of the evaluation of judicial decisions should be composed of members who are fully independent of the executive power. In order to avoid any pressure, in the states where a Council for the Judiciary<sup>19</sup> exists, this Council should be entrusted with the evaluation of the quality of decisions. Within the Council, data processing and quality evaluation should be undertaken by departments other than those responsible for judicial discipline. For the same reason, where there is no Council for the Judiciary, the evaluation of the quality of decisions should be undertaken by a specific body having the same guarantees for the independence of judges as those possessed by a Council for the Judiciary.

## MAIN CONCLUSIONS AND RECOMMENDATIONS

- a) **The external indicators on which the quality of judicial decision depends** include the quality of laws passed by **legislatures**. Therefore it is important that national parliaments assess and monitor the impact of legislation in force and legislative proposals on the justice system.
- b) The quality of decision making depends on **the allocation of adequate human, financial and material resources** to each judicial system as well as **the maintenance of financial security for each judge** within that system.
- c) The quality of legal education and **training of judges and other legal professionals** are of paramount importance in ensuring a judicial decision of high quality.
- d) It is also important to provide training of judges in non legal matters and to train **court** staff in order to relieve judges of administrative and technical duties and allow them to focus on the intellectual aspect of decision making.
- e) The standard of quality of judicial decisions is clearly the result of **interactions between the numerous actors in the judicial system**.

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<sup>18</sup> See Opinion No. 6 (2004) of the CCJE, paragraph 36.

<sup>19</sup> These Councils for the Judiciary should be constituted and operate in the manner recommended by the CCJE in its Opinion No. 10 (2007).

- f) The **professionalism** of the judge is the primary guarantee for the quality of a decision and an important part of the **internal environment influencing a judicial decision**. Professionalism involves a high level legal training of judges, as well as the development of a culture of independence, ethics and deontology. It requires the judge to be aware of not only legal material but also non-legal concepts.
- g) Other elements of the internal environment affecting the judicial decision are the **procedure and management of the case**. Procedure must be clear, transparent and predictable. The judge must be able to organise and conduct the proceedings actively and accurately. The decision must be given in a reasonable time. However, the speediness of the procedure is not the only factor to be taken into account, since judicial decisions must safeguard the right to a fair trial, social harmony and legal certainty.
- h) **Standard models of good practices in case management** should be encouraged, as well as consultation meetings between judges.
- i) **A hearing** should be held whenever the case law of the European Court of Human Rights so prescribes and should comply with all ECHR requirements, thus ensuring for litigants and society at large observance with the minimum standards of a properly designed and fair trial.
- j) A fair conduct of the proceedings, correct application of legal principles and evaluation of the factual background as well as enforceability are the key elements contributing toward a high quality decision.
- k) The decision must be intelligible and **drafted in clear and simple language, with each judge being permitted** however to choose his or her own style or to make use of standardised models.
- l) The CCJE recommends that judicial authorities compile a **compendium of good practices** in order to facilitate the drafting of decisions
- m) **Judicial decisions must in principle be reasoned**. Their quality depends principally on the quality of its reasoning. Reasoning may involve interpreting legal principles, taking care always to ensure legal certainty and consistency . However, when a court decides to depart from previous case law, this should be clearly mentioned in its decision.
- n) The CCJE recommends the introduction of **mechanisms** appropriate to the legal traditions of each country **to regulate access to higher courts**.
- o) **Dissenting opinions** of judges, where allowed, can contribute to improve the content of decision and can assist both in understanding the decision and the evolution of the law. These opinions should be duly reasoned and should be published.
- p) Any order made by or following a judicial decision should be written in clear and unambiguous **language**, so as to be readily capable of being given effect or, in the case of an order to do or not do or pay something, **readily enforced**.
- q) The CCJE stresses that the merits of individual **judicial decisions are controlled by the appeal or review procedures** available in national courts and by the right of access to the European Court of Human Rights.
- r) **The judicial system as a whole has to be examined** in order to **evaluate** the quality of judicial decisions. Attention should be given to the length, transparency and the conduct of the proceedings.
- s) The evaluation must be done on the basis of fundamental principles of the ECHR. It cannot be done only in the light of considerations of an economic or managerial nature.
- t) Any method of evaluating the quality of judicial decision should not interfere with the independence of the judiciary as a whole or on an individual basis, should not serve as bureaucratic tool or an end in itself, and should not be confused with the evaluation of the professional abilities of individual judges for other purposes. Moreover, evaluation systems must not challenge the legitimacy of judicial decisions.
- u) Above all any evaluation procedure should aim at identifying the need, if any, for amendment of legislation, for changing or improving judicial procedures and/or for further training of judges and court staff.

- v) The CCJE stresses that it is desirable that **different methods of evaluation are combined**. Evaluation methods should be considered with the necessary scientific rigour, knowledge and care, as well as defined according to transparent means.
- w) The CCJE encourages peer review **and self evaluation** by judges. The CCJE also encourages the participation of “external” persons in the evaluation, provided that the independence of the judiciary is fully respected.
- x) By their case-law, their examination of judicial practices and their annual reports, **superior courts** may contribute to the quality of judicial decisions and their evaluation; in this respect, it is of utmost importance that their **case-law is clear, consistent and constant**.
- y) The evaluation of the quality of decisions must lie in the power of the **Council for the judiciary**, where it exists, or of an independent body with the same guarantees for the independence of judges.





## Opinion No.12 (2009)

of the Consultative Council of European Judges (CCJE)  
to the Committee of Ministers of the Council of Europe

### The relations between judges and prosecutors in a democratic society

**This Opinion, jointly adopted by the CCJE and the CCPE contains:**

- a Declaration, called « Bordeaux Declaration » ;
- an Explanatory Note.

### **BORDEAUX DECLARATION**

#### **“JUDGES AND PROSECUTORS IN A DEMOCRATIC SOCIETY”<sup>1</sup>**

The Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE), at the request of the Committee of Ministers of the Council of Europe to provide an opinion on relationships between judges and prosecutors, agreed on the following:

1. It is in the interest of society that the rule of law be guaranteed by the fair, impartial and effective administration of justice. Public prosecutors and judges shall ensure, at all stages of the proceedings, that individual rights and freedoms are guaranteed, and public order is protected. This involves the total respect of the rights of the defendants and of the victims. A decision of the prosecutor not to prosecute should be open to judicial review. An option may be to allow the victim to bring the case directly to the court.
2. The fair administration of justice requires that there shall be equality of arms between prosecution and defence, as well as respect for the independence of the court, the principle of separation of powers and the binding force of final court decisions.
3. The proper performance of the distinct but complementary roles of judges and public prosecutors is a necessary guarantee for the fair, impartial and effective administration of justice. Judges and public prosecutors must both enjoy independence in respect of their functions and also be and appear independent from each other.
4. Adequate organisational, financial, material and human resources should be put at the disposal of justice.
5. The role of judges – and, where applicable, of juries – is to properly adjudicate cases brought regularly before them by the prosecution service, without any undue influence by the prosecution or defence or by any other source.
6. The enforcement of the law and, where applicable, the discretionary powers by the prosecution at the pre-trial stage require that the status of public prosecutors be guaranteed by law, at the highest possible level, in a manner similar to that of judges. They shall be independent and autonomous in their decision-making and carry out their functions fairly, objectively and impartially.
7. The CCJE and the CCPE refer to the consistent case-law of the European Court of Human Rights in relation to article 5 paragraph 3 and article 6 of the European Convention of Human Rights. In particular, they refer to the decisions whereby the Court recognized the requirement of independence from the executive power and the parties on the part of any officer authorized by law to exercise judicial power but which does not, however, exclude subordination to higher independent judicial authority. Any attribution of judicial functions to prosecutors should be restricted to cases

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<sup>1</sup> This Declaration is accompanied by an Explanatory Note. This Declaration has been jointly drafted by the Working Groups of the CCJE and the CCPE in Bordeaux (France) and has been officially adopted by the CCJE and the CCPE in Brdo (Slovenia) on 18 November 2009.

involving in particular minor sanctions, should not be exercised in conjunction with the power to prosecute in the same case and should not prejudice the defendants' right to a decision on such cases by an independent and impartial authority exercising judicial functions.

8. For an independent status of public prosecutors, some minimal requirements are necessary, in particular:
  - that their position and activities are not subject to influence or interference from any source outside the prosecution service itself;
  - that their recruitment, career development, security of tenure including transfer, which shall be effected only according to the law or by their consent, as well as remuneration be safeguarded through guarantees provided by the law.
9. In a State governed by the rule of law, when the structure of prosecution service is hierarchical, effectiveness of prosecution is, regarding public prosecutors, strongly linked with transparent lines of authority, accountability, and responsibility. Directions to individual prosecutors should be in writing, in accordance with the law and, where applicable, in compliance with publicly available prosecution guidelines and criteria. Any review according to the law of a decision by the public prosecutor to prosecute or not to prosecute should be carried out impartially and objectively. In any case, due account shall be given to the interests of the victim.
10. The sharing of common legal principles and ethical values by all the professionals involved in the legal process is essential for the proper administration of justice. Training, including management training, is a right as well as a duty for judges and public prosecutors. Such training should be organized on an impartial basis and regularly and objectively evaluated for its effectiveness. Where appropriate, joint training for judges, public prosecutors and lawyers on themes of common interest can contribute to the achievement of a justice of the highest quality.
11. The interest of society also requires that the media are provided with the necessary information to inform the public on the functioning of the justice system. The competent authorities shall provide such information with due regard in particular to the presumption of innocence of the accused, to the right to a fair trial, and to the right to private and family life of all persons involved in proceedings. Both judges and prosecutors should draw up a code of good practices or guidelines for each profession on its relations with the media.
12. Both public prosecutors and judges are key players in international cooperation in judicial matters. The enhancement of mutual trust between competent authorities of different states is necessary. In this context, it is imperative that information gathered by prosecutors through international cooperation and used in judicial proceedings is transparent in its content and origin, as well as made available to the judges and all parties, with a view to an effective protection of human rights and fundamental freedoms.
13. In member States where public prosecutors have functions outside the criminal law field, the principles mentioned herein apply to these functions.

## EXPLANATORY NOTE

### I. INTRODUCTION:

#### a. Purpose of the Opinion

1. It is an essential task of a democratic State based on the rule of law to guarantee that fundamental rights and freedoms as well as equality before the law are fully respected, in accordance, in particular, with the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) as well as the case-law of the European Court of Human Rights (the Court). At the same time it is important to ensure security and justice in society by assuring effective measures in respect of criminal conduct. Security in society must also be guaranteed in a democratic state by an effective enforcement of penalties imposed for criminal conduct (Declaration, paragraph 1).
2. Thus, it is the mission of the State to set up and to ensure the functioning of an efficient justice system respectful of human rights and fundamental freedoms. While numerous actors participate in this mission, be they from the public or (as in the case of lawyers) private sector, a key role in ensuring the functioning of justice in an independent and impartial way is played by judges and public prosecutors.
3. In their previous Opinions, the Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE) addressed many important aspects of the efficiency of justice with emphasis on human rights and fundamental freedoms. It should be underlined that the common goal of judges and prosecutors, including that of public prosecutors who have tasks outside the criminal law field, is to ensure a fair, impartial and effective justice. The novelty of this Opinion is that it has been drafted by judges and prosecutors representing their national colleagues and it deals with matters which the judges and prosecutors have agreed on the basis of their practical experience.
4. Hence, the text focuses on essential aspects of the two missions and in particular: independence, respect of individual rights and freedoms, objectivity and impartiality, ethics and deontology, training and relations with the media.
5. The present Opinion should be considered in the context of the relations of judges and prosecutors with professional persons dealing with justice involved in the various stages of judicial proceedings, such as lawyers, judicial experts, court clerks, bailiffs, police, as suggested by the Framework Global Action Plan for Judges in Europe, adopted by the Committee of Ministers on 7 February 2001 and the Recommendation (2000)19 on the role of prosecution in the criminal justice system, adopted by the Committee of Ministers on 6 October 2000.

#### b. Diversity of national systems

6. In the member States of the Council of Europe, many legal systems exist side by side:
  - i. the Common Law systems in which there is a clear division between judges and prosecutors and where *the criminal investigation power* is not combined with other functions;
  - ii. the Continental Law systems where one may observe different types in which either judges and prosecutors are part of the « judicial corps » or, on the contrary, only judges may belong to that corps

In addition, in these various systems, the public prosecution's autonomy from the executive can be complete or limited.

7. The objective of this Opinion is to identify, in the light of the Court s' case law, a basis of applicable principles and approaches while taking into account common points as well as differences.
8. The guarantee of separation of functions represents an essential condition of the judge's impartiality towards the parties in the proceedings. Impartiality, as stated in Opinion No. 1 of the CCJE on standards concerning the independence of the judiciary and the irremovability of judges (2001), is first among the institutional guarantees that define the position of a judge. Furthermore, it presupposes that the public prosecution is allocated the burden of proof and the filing of indictments, which constitutes one of the first procedural guarantees of the ultimate decision.

9. In every system, the judge's role is therefore different to that of the public prosecution. Their respective missions remain nevertheless complementary. There are no hierarchic ties between the judge and the prosecutor.
10. The independence of the public prosecution service constitutes an indispensable corollary to the independence of the judiciary. The role of the prosecutor in asserting and vindicating human rights, both of suspects, accused persons and victims, can best be carried out where the prosecutor is independent in decision-making from the executive and the legislature and where the distinct role of judges and prosecutors is correctly observed. In a democracy based on the rule of law, it is the law that provides the basis for prosecution policy (Declaration, paragraph 3).

### **c. Peculiarities of functions**

11. Prosecutors and judges must both carry out their functions fairly, impartially, objectively and consistently, must respect and strive to protect human rights and seek to ensure that the justice system operates promptly and efficiently.
12. In carrying out their functions, prosecutors rely on either a system of discretionary prosecution (the opportunity principle) or a system of mandatory prosecution (the legality principle), but in both cases prosecutors not only act on behalf of the society as a whole, but also discharge duties to particular individuals, namely the accused person to whom a duty of fairness is owed, as well as the victims of crime to whom a duty is owed to ensure that their rights are fully taken into account. In that sense and without prejudice to the respect for the principle of equality of arms, the prosecutor can not be considered equal to other parties (Declaration, paragraph 2). Prosecutors should also take proper account of the views and concerns of victims and take or promote actions to ensure that victims are informed of both their rights and the course of the proceedings. They should not initiate or continue prosecution when an impartial investigation on the basis of the available evidence shows the charge to be unfounded.

### **d. Existing international instruments**

13. Several texts of the Council of Europe as well as the case-law of the Court address directly or implicitly topics related to the relationship between judges and prosecutors.
14. First and foremost, the Court assigns tasks to judges only in their capacity as the guardians of rights and freedoms – see in particular Articles 5 (right to liberty and security) and 6 (right to a fair trial) - but it does so also to public prosecutors (as a result of Article 5 paragraphs 1a and 3, and 6).
15. The Court, one of whose tasks is to interpret the ECHR, has given several rulings on matters affecting the relationship between judges and public prosecutors.
16. In particular it has dealt with the problem of a person serving in turn as prosecutor and judge in the same case (judgment of 1 October 1982 in *Piersack v. Belgium*, §§ 30-32), the need to guarantee that no political pressure is ever put on the courts or the prosecuting authorities (judgment of 12 February 2008, in *Guja v. Moldova*, §§ 85-91), the need to protect judges and public prosecutors in the context of freedom of expression (judgment of 8 January 2008, in *Saygılı and Others v. Turkey*, §§ 34-40), procedural obligations of courts and public prosecutors' departments to investigate, prosecute and punish human rights violations (judgment of 15 May 2007, in *Ramsahai and Others v. the Netherlands*, §§ 321-357) and lastly the prosecuting authorities' contribution to the standardization of case-law (judgment of 10 June 2008, in *Martins de Castro and Alves Correia de Castro v. Portugal*, §§ 51-66).
17. In the area of criminal procedure, the Court has examined the status and powers of the public prosecution service and the requirements of Article 5 paragraph 3 of the ECHR (with regard to other officers "authorized by law to exercise judicial power") in the context of various factual situations (see, *inter alia*, the judgments of 4 December 1979, in *Schiesser v. Switzerland*, §§ 27-38, in *De Jong, Baljet and Van den Brink v. the Netherlands*, §§ 49-50, in *Assenov and Others v. Bulgaria*, §§ 146-150, in *Niedbala v. Poland*, §§ 45-47, in *Pantea v. Romania*, §§ 232-243, and 10 July 2008, in *Medvedev and Others v. France*, §§ 61, 67-69). The Court has also examined the status, jurisdiction and supervisory powers of the prosecuting authorities in cases of telephone monitoring (judgment of 26 April 2007, in *Dumitru Popescu v. Romania*, §§ 68-86) and the presence of the prosecuting authorities at the deliberations of Supreme Courts (judgments of 30 October 1991, in *Borgers v. Belgium*, §§ 24-29, and 8 July 2003, in *Fontaine and Berlin v. France*, §§ 57-67).

18. Lastly, outside the criminal sphere, the Court has a well established body of case-law on the “doctrine of appearances”, according to which the presence of prosecutors at the deliberations of courts is contrary to Article 6 paragraph 1 of the ECHR (judgments of 20 February 1996, in *Lobo Machado v. Portugal*, §§ 28-32, and 12 April 2006, in *Martinie c. France* [GC], §§ 50-55).
19. Other texts have been drawn up by the Council of Europe :
  - Recommendation Rec(94)12 of the Committee of Ministers on the Independence, Efficiency and Role of Judges recognizes the links between judges and public prosecutors, at least in countries where the latter have judicial authority within the meaning attached to this expression by the Court;
  - Recommendation Rec(2000)19 of the Committee of Ministers on the Role of Public Prosecution in the Criminal Justice System explicitly highlights the relations between judges and prosecutors, while underlining the general principles that are crucial for ensuring that these relationships contribute unequivocally to the proper performance of judges’ and public prosecutors’ tasks. It particularly emphasizes the obligation of States to “take appropriate measures to ensure that the legal status, the competencies and the procedural role of public prosecutors are established by law in a way that there can be no legitimate doubt about the independence and impartiality of the court judges”.
  - Recommendation Rec (87)18 of the Committee of Ministers concerning the Simplification of Criminal Justice provides different examples of tasks previously vested solely in judges and currently entrusted to the public prosecution service (whose primary mission still consists in undertaking and directing prosecutions). These new tasks create additional requirements concerning the organisation of the public prosecution service and the selection of the people called upon to assume those functions.

## II. STATUS OF JUDGES AND PUBLIC PROSECUTORS

### a. Guarantees for the internal and external independence of judges and public prosecutors; the rule of law as a condition for their independence

20. Judges and public prosecutors should be independent from each other and also enjoy effective independence in the exercise of their respective functions. They discharge different duties in the justice system and in society at large. Therefore different perspectives of institutional and functional independence exist (Declaration, paragraph 3).
21. The judiciary is based on the principle of independence from any external power and from any instructions coming from any source, as well as on the absence of internal hierarchy. Its role and, where applicable, that of juries, is to properly adjudicate cases brought before them by the prosecution services and the parties. This involves the absence of all undue influence by the public prosecutor or the defence. Judges, prosecutors and defence lawyers should each respect the roles of the others. (Declaration, paragraph 5).
22. The fundamental principle of independence of judges is enshrined in Article 6 of the ECHR and stressed in previous opinions of the CCJE.
23. The function of judging implies the responsibility for making binding decisions for the persons concerned and for deciding litigation on the basis of the law. Both are the prerogative of the judge, a judicial authority independent from the other State powers<sup>2</sup>. This is, in general, not the mission of public prosecutors, who are responsible for bringing or continuing criminal proceedings.
24. The CCJE and the CCPE refer to the consistent case-law of the Court in regard to article 5, paragraph 3 and article 6 of the ECHR. In particular, they refer to the decision in the case *Schiesser vs. Switzerland*, whereby the Court recognized the requirement of independence from the executive and the parties on the part of any «officer authorized by law to exercise judicial powers», which does not, however, exclude subordination to higher independent judicial authority (Declaration, paragraph 7).

<sup>2</sup> See in particular Opinion No.1 (2001) of the CCJE on standards concerning the independence of the judiciary and the irremovability of judges and Recommendation Rec(94)12 on the independence, efficiency and role of judges.

25. Some member States assign to public prosecutors the power to make binding decisions in some areas instead of pursuing criminal prosecutions or in order to protect certain interests. The CCJE and the CCPE consider that any attribution of judicial functions to prosecutors should be limited to cases involving minor sanctions, should not be exercised in conjunction with the power to prosecute in the same case and should not prejudice the defendant's rights to a decision on such case by an independent and impartial authority exercising judicial functions. Under no circumstances, should any such attribution allow public prosecutors to take final decisions restricting individual freedoms and involving deprivation of liberty with no right to appeal to a judge or a court (Declaration, paragraph 7).
26. The public prosecution service is an independent authority whose existence should be based on the law at the highest possible level. In democratic states neither the parliament nor any governmental body should seek to unduly influence a particular decision taken by public prosecutors in relation to individual cases in order to determine how a prosecution in any particular case should be conducted, or constrain public prosecutors to change their decisions (Declaration, paragraphs 8 and 9).
27. The independence of public prosecutors is indispensable for enabling them to carry out their mission. It strengthens their role in a state of law and in society and it is also a guarantee that the justice system will operate fairly and effectively and that the full benefits of judicial independence will be realised (Declaration, paragraphs 3 and 8). Thus, akin to the independence secured to judges, the independence of public prosecutors is not a prerogative or privilege conferred in the interest of the prosecutors, but a guarantee in the interest of a fair, impartial and effective justice that protects both public and private interests of the persons concerned.
28. The function of the prosecutor, which may be characterized by the principles of mandatory or discretionary prosecution, differs according to the system existing in each country, according to the position which the public prosecutor occupies in the institutional landscape and in the criminal procedure.
29. Whatever their status, public prosecutors must enjoy complete functional independence in the discharge of their legal roles, whether these are penal or not. Whether they are under a hierarchical authority or not, in order to ensure their accountability and prevent proceedings being instituted in an arbitrary or inconsistent manner, public prosecutors must provide clear and transparent guidelines as regards the exercise of their prosecution powers, (Declaration, paragraph 9).
30. In this respect, the CCJE and CCPE wish to recall in particular Recommendation (2000)19 which recognises that, in order to promote equity, consistency, and efficiency in the activity of the public prosecution service, States should seek to define general principles and criteria to serve as a reference against which decisions are taken by prosecutors in individual cases.
31. Directions to prosecutors should be in writing, in accordance with the law and, where applicable, in compliance with publicly available prosecution guidelines and criteria (Declaration, paragraph 9)3.
32. Any decision to prosecute or not to prosecute must be legally sound. Any review according to the law of a decision by the prosecutor to prosecute or not to prosecute should be carried out impartially and objectively, whether or not it is being carried out within the prosecution service itself or by an independent judicial authority. The interest of the victim as well as any other person's legal interests, should always be duly taken into account. (Declaration, paragraph 9).
33. The complementary nature of judges' and prosecutors' functions means that both are conscious that impartial justice requires equality of arms between the public prosecution service and the defence, and that public prosecutors must act at all times honestly, objectively and impartially. Judges and public prosecutors have, at all times, to respect the integrity of the suspects, accused persons and victims, as well as the rights of the defence (Declaration, paragraphs 2 and 6).
34. The independence of the judge and of the prosecutor is inseparable from the rule of law. Judges as well as prosecutors act in the common interest, in the name of the society and its citizens who want their rights and freedoms guaranteed in all their aspects. They intervene in areas where the most sensitive human rights (individual freedom, privacy, protection of possessions, etc.) deserve the

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<sup>3</sup> See also the CCPE Opinion N°3 (2008) on the role of public prosecutor outside the criminal law field.

greatest protection. Prosecutors must ensure that evidence is gathered and proceedings are initiated and continued in accordance with the law. In doing so, they must uphold the principles laid down by the ECHR and other international legal instruments, notably respect for the presumption of innocence, the rights of the defence and a fair trial. Judges must see to it that those principles are respected in proceedings before them.

35. While a public prosecutor is permitted to refer to the judge actions and petitions defined by law and to put before the judge the matters of fact and law supporting the same, the prosecutor may not interfere in any way in the judge's decision making process and is bound to abide by the judge's decisions. The prosecutor cannot oppose the enforcement of such decisions, other than by exercising such right of recourse as may be provided for by law (Declaration, paragraphs 4 and 5).
36. The activity and the demeanour of the public prosecutor and the judge should leave no doubt as to their objectivity and impartiality. Judges and public prosecutors must both enjoy independence in respect of their functions and also be and appear independent from each other. In the eyes of litigants and the society as a whole, there must not be even a hint of connivance between judges and prosecutors or confusion between the two functions.
37. Respect for the above principles implies that the status of prosecutors be guaranteed by law at the highest possible level in a manner analogous to that of judges. The proximity and complementary nature of the missions of judges and prosecutors create similar requirements and guarantees in terms of their status and conditions of service, namely regarding recruitment, training, career development, discipline, transfer (which shall be effected only according to the law or by their consent), remuneration, termination of functions and freedom to create professional associations (Declaration, paragraph 8).
38. Both judges and prosecutors should, according to the national system in force, be directly associated with the administration and the management of their respective services. For this purpose, sufficient financial means as well as infrastructure and adequate human and material resources should be put at the disposal of judges and prosecutors and should be used and managed under their authority (Declaration, paragraph 4).

#### **b. Ethics and deontology of judges and public prosecutors**

39. Judges and prosecutors should be individuals of high integrity and with appropriate professional and organisational skills. Due to the nature of their functions, which they have accepted knowingly, judges and prosecutors are constantly exposed to public criticism and must, in consequence, set themselves a duty of restraint without prejudice, in the framework of the law, to their right to communicate on their cases. As principal actors in the administration of justice, they should at all times maintain the honour and dignity of their profession and behave in all situations in a way worthy of their office<sup>4</sup> (Declaration, paragraph 11).
40. Judges and prosecutors should refrain from any action and behaviour that could undermine confidence in their independence and impartiality. They should consider cases submitted to them with due care and within a reasonable time, objectively and impartially.
41. Public prosecutors should refrain from making public comments and statements, using the media, which may create an impression of putting direct or indirect pressure on the court to reach a certain decision or which may impair the fairness of the procedure.
42. Judges and prosecutors should strive to acquaint themselves with ethical standards governing the functions of each other. This will enhance understanding and respect for each other's missions, thereby increasing the prospects of a harmonious collaboration.

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<sup>4</sup> For judges see for example the Opinion No. 3 (2002) of the CCJE on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behavior and impartiality (2002) and The Bangalore Principles of Judicial Conduct (adopted by the UN ECOSOC in 2006) and the Universal Charter of the Judge, adopted by the Central Council of the International Association of Judges on 17 November 1999 in Taipei (Taiwan). For prosecutors besides the UN guidelines on the role of the prosecutors (1990), see the European Guidelines on Ethics and Conduct for Public Prosecutors (The Budapest Guidelines) adopted by the Prosecutors General of Europe on 31 May 2005 at their Conference in Budapest.

### **c. Training of judges and public prosecutors**

43. The highest level of professional skill is a pre-requisite for the trust which the public has in both judges and public prosecutors and on which they principally base their legitimacy and role. Adequate professional training plays a crucial role since it allows the improvement of their performance, and thereby enhances the quality of justice as a whole (Declaration, paragraph 10).
44. Training for judges and prosecutors involves not only the acquisition of the professional capabilities necessary for access to the profession but equally permanent training throughout their career. It addresses the most diverse aspects of their professional life, including the administrative management of courts and prosecution departments, and must also respond to the necessities of specialisation. In the interests of the proper administration of justice, the permanent training required to maintain a high level of professional qualification and to make it more complete is not only a right but also a duty for judges and public prosecutors (Declaration, paragraph 10).
45. Where appropriate, joint training for judges, public prosecutors and lawyers on themes of common interest can contribute to the achievement of a justice of the highest quality. This common training should make possible the creation of a basis for a common legal culture (Declaration, paragraph 10).
46. Different European legal systems provide training for judges and prosecutors according to various models. Some countries have established an academy, a national school or other specialised institution; some others assign the competence to specific bodies. International training courses for judges and prosecutors should be arranged. It is essential, in all cases, to assure the autonomous character of the institution in charge of organising such training, because this autonomy is a safeguard of cultural pluralism and independence.<sup>5</sup>
47. In this context, much importance attaches to the direct contribution of judges and prosecutors towards training courses, since it enables them to provide opinions drawn from their respective professional experience. Courses should not only cover the law and protection of individual freedoms, but should also include modules on management practices and the study of judges' and the prosecutors' respective missions. At the same time, additional lawyers' and academic contributions are essential to avoid taking a narrow-minded approach. Finally, the quality and efficiency of training should be assessed on a regular basis and in an objective manner.

## **III. ROLES AND FUNCTIONS OF JUDGES AND PUBLIC PROSECUTORS IN THE CRIMINAL PROCEDURE**

### **a. Roles between judges and public prosecutors in the pre-criminal procedure**

48. At the pre-trial stage the judge independently or sometimes together with the prosecutor, supervises the legality of the investigative actions, especially when they affect fundamental rights (decisions on arrest, custody, seizure, implementation of special investigative techniques, etc).
49. As a general rule, public prosecutors should scrutinise the lawfulness of investigations and monitor the observance of human rights by the investigators when deciding whether a prosecution should commence or continue.
50. Recommendation Rec(2000)19 provides that when the police is placed under the authority of public prosecutors or when police investigations are either conducted or supervised by the prosecutor, the State should take effective measures to guarantee that the public prosecutor may give instructions and may carry out evaluations and controls, and can sanction the violations. Where the police is independent from public prosecutors, the recommendation merely provides that the State should take effective measures to ensure that there is an appropriate and functional cooperation between public prosecutors and the investigative authorities.

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<sup>5</sup> See Opinion No. 4 (2003) of the CCJE on appropriate initial and in-service training for judges at national and European levels and Opinion No. 10 (2007) of the CCJE on the Council for the Judiciary at the service of society, paragraphs 65-72.



51. Even in systems where the investigation is supervised by the prosecutor whose status invests him with a judicial authority, it is essential that any measures taken in this context which involve significant infringements of freedoms, in particular temporary detention, are monitored by a judge or a court.

**b. Relations between judges and public prosecutors in the course of prosecution and court hearing**

52. In some States, public prosecutors can regulate the flow of cases by exercising a discretionary power to decide which cases will be brought before the court and which cases can be dealt with without court proceedings (conciliation between the accused and the victim, pre-trial settlement of the case with the consent of the parties, plea bargaining-related simplified and shortened procedures, mediation, etc), all of which contributes towards reducing the burden on the judicial system and determining prosecution priorities.

53. Such public prosecution powers, which reflect the modernisation, socialisation, humanisation and rationalisation of the administration of criminal justice, are useful in reducing the case overload of courts. On the other hand, as soon as prosecutors have the right not to present particular cases in court, it is necessary to avoid arbitrary actions, discrimination or possible unlawful pressures from the political power and to protect the rights of victims. It is also necessary to enable any person affected, in particular the victims, to seek a review of the prosecutor's decision not to prosecute. An option may be to allow the victim to bring the case directly to the court.

54. Therefore, in countries which operate a system of discretionary prosecution, the prosecutor should give careful consideration on whether to prosecute or not, taking into account any general guidelines or criteria which have been adopted with a view to achieving consistency in prosecution decisions.

55. The impartiality of the prosecutors during the procedure should be understood in this sense: they should proceed fairly and objectively to ensure that the court is provided with all relevant facts and legal arguments and, in particular, ensure that evidence favourable to the accused is disclosed; take proper account of the position of the accused person and the victim; verify that all evidences have been obtained through means that are admissible by the judge according to the rules of a fair trial and refuse to use evidence obtained through human rights violations, such as torture (Declaration, paragraph 6).

56. Prosecutors shall not initiate or continue prosecution and shall make every effort to stop proceedings when an impartial investigation or a review of the evidence shows the charge to be unfounded.

57. In essence, during proceedings judges and prosecutors carry out their respective functions for the purpose of a fair criminal trial. The judge supervises the legality of evidence taken by the public prosecutors or investigators and may acquit an accused when there is insufficient or unlawfully obtained evidence. The public prosecutors may also have a right to appeal a court decision.

**c. The rights of the defence at all levels of procedure**

58. Judges must apply the rules of criminal procedure while fully respecting the rights of the defence (giving the defendants the possibility of exercising their rights, notifying the defendants of their charge, etc.), the rights of the victims in the procedure, the principle of equality of arms and the right to a public hearing, so that a fair trial is guaranteed in all cases<sup>6</sup> (Declaration, paragraphs 1, 2, 6 and 9).

59. An indictment plays a crucial role in a criminal proceedings: it is from the moment of its service that defendants are formally put on written notice of the factual and legal basis of the charges against them (the European Court of Human Rights judgment of 19 December 1989 in *Kamasinski v. Austria*, § 79). In a criminal process, the "fair hearing" required by Article 6 paragraph 1 of the ECHR entails that defendants must have the right to challenge the evidence against them, as well as the legal basis of the charge.

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<sup>6</sup> See Opinion No. 8 (2006) of the CCJE on the role of judges in the protection of the rule of law and human rights in the context of terrorism.

60. In countries where public prosecutors supervise the investigation, it is also for the prosecutor to ensure that the rights of the defence are respected. In countries where the criminal investigation is directed by the police or other law-enforcement authorities, judges are involved as guarantors of individual freedoms (habeas corpus), particularly as regards pre-trial detention, and it is for them to ensure that the rights of the defendant are respected.
61. In many countries, however, the judge and the prosecutor only become responsible for monitoring the exercise of the rights of the defence once the investigation has been completed and examination of the charges begins. At this point it is for the prosecutor, who receives the investigators' reports, and the judge, who examines the charges and the evidence gathered, to ensure that everyone charged with a criminal offence has, in particular, been informed promptly, in a language he/she understands and in detail, of the nature and cause of the accusation against him/her.
62. Depending on their role in a particular country, prosecutors and judges must then ensure that the person has had adequate time and facilities for the preparation of his/her defence, that he/she is properly defended, if necessary by an officially appointed lawyer paid by the state, and has access, if necessary, to an interpreter, and is able to request the taking of actions necessary to establish the truth.
63. Once the case has been brought before the trial court, the powers of the judge and the prosecutor vary according to the role they play during the trial. In any event, if any of the components of respect for the rights of the defence is lacking, either the judge or the prosecutor, or both, depending on the particular national system, should be able to draw attention to the situation and objectively remedy it.

#### **IV. RELATIONS OF JUDGES AND PUBLIC PROSECUTORS OUTSIDE THE CRIMINAL LAW FIELD AND IN SUPREME COURTS**

64. Depending on the State in which they operate, prosecutors may or may not have tasks and functions outside the criminal law field.<sup>7</sup> Where prosecutors have such tasks and functions these can include, inter alia, civil, administrative, commercial, social, electoral and labour law as well as the protection of the environment, social rights of vulnerable groups such as minors, disabled persons and persons with very low income. The role of prosecutors in this respect should not allow them to exercise undue influence on the final decision making process of the judges (Declaration, paragraph 13).
65. The role that public prosecutors have in certain countries before the Supreme Court is also worth mentioning. This role is comparable with that of the advocate general before the Court of Justice of the European Communities. Before these jurisdictions, the attorney general (or equivalent) is not a party and does not represent the State. He is an independent authority who sets down conclusions, in each case or only in cases of particular interest, in order to clarify for the court all aspects of the questions of law that are before it, with a view to ensuring the correct application of the law.
66. According to the rule of law in a democratic society all these competences of public prosecutors as well as the procedures of exercising these competences have to be precisely established by law. When prosecutors act outside the criminal law field, they should respect the exclusive competence of the judge or court and take into account the principles developed in particular in the case-law of the Court as follows:
  - i. The participation of the prosecution in court proceedings should not affect the independence of the courts;
  - ii. The principle of separation of powers should be respected in connection with the prosecutors' tasks and activities outside the criminal law field, on the one hand, and with the role of courts to protect human rights, on the other hand;
  - iii. Without prejudice of their prerogatives to represent the public interest, prosecutors should enjoy the same rights and obligations as any other party and should not enjoy a privileged position in the court proceedings (*equality of arms principle*);
  - iv. The action of prosecutors' services on behalf of society to defend the public interest and the rights of individuals shall not violate the principle of binding force of final court decisions (*res judicata*) with some exceptions established in accordance with international obligations including the case-law of the Court.

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<sup>7</sup> See e.g. the CCPE Opinion N°3 on "the role of public prosecution outside the criminal law field".

The other principles mentioned in the Declaration apply to all the functions of the public prosecutors outside the criminal law field, *mutatis mutandis* (Declaration, paragraph 13).

## V. JUDGES, PUBLIC PROSECUTORS AND THE MEDIA (Declaration, paragraph 11)

67. Media play an essential role in a democratic society in general and more specifically in relation to the judicial system. The perception in society of the quality of justice is heavily influenced by media accounts of how the justice system works. Publicity also contributes to the achievement of a fair trial, as it protects litigants and defendants against a non-transparent administration of justice.
68. The expanding public and media attention to criminal and civil proceedings has led to an increasing need for objective information to be provided to the media both from the courts and public prosecutors.
69. It is of fundamental importance in a democratic society that the courts inspire confidence in the public<sup>8</sup>. The public character of proceedings is one of the essential means whereby confidence in the courts can be maintained.
70. Within the Council of Europe two main documents deal with this issue: a) Recommendation Rec (2003)13 on the Provision of Information through the Media in Relation to Criminal Proceedings, and b) Opinion No. 7 of the CCJE on Justice and Society (2005).
71. Bearing in mind the right of the public to receive information of general interest, journalists should be provided with necessary information in order to be able to report and comment on the functioning of the justice system, subject to the obligations of discretion of the judges and prosecutors on pending cases and to the limitations established by national laws and in accordance with the case-law of the Court.
72. Media, as well as judges and public prosecutors, shall respect fundamental principles such as the presumption of innocence<sup>9</sup> and the right to a fair trial, the right to private life of the persons concerned, the need to avoid an infringement of the principle and of the appearance of impartiality of judges and public prosecutors involved in a case.
73. Media coverage of cases under investigation or on trial can become invasive interference and produce improper influence and pressure on judges, jurors and public prosecutors in charge of particular cases. Good professional skills, high ethical standards and strong self-restraint against premature comments on pending cases are needed for judges and public prosecutors to meet this challenge.
74. Media liaison personnel, for example public information officers or a pool of judges and prosecutors trained to have contact with the media, could help the media to give accurate information on the courts' work and decisions, and also assist judges and prosecutors.
75. Judges and prosecutors should mutually respect each other's specific role in the justice system. Both judges and prosecutors should draw up guidelines or a code of good practice for each profession on its relations with the media<sup>10</sup>. Some national codes of ethics require judges to refrain from public comments on pending cases, in order not to make statements that might cause the public to question the judges' impartiality<sup>11</sup>, and to avoid violation of the presumption of innocence. In any case, judges should express themselves above all through their decisions; discretion and the choice of words are important where judges give statements to the media on cases pending or decided in accordance with the law<sup>12</sup>. Public prosecutors should be cautious when commenting on the procedure followed by the judge or upon the judgment issued, stating his/her disagreement concerning a decision by means of an appeal, if appropriate.

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<sup>8</sup> On this issue, see European Court of Human Rights, *Olujić v. Croatia*, (Application no. 22330/05)

<sup>9</sup> See among others: principle I of the appendix to Recommendation Rec (2003)13 and the corresponding Explanatory Memorandum.

<sup>10</sup> Proposed for judges and for journalists by Opinion No. 7 of the CCJE on justice and society, paragraph 39 (2005).

<sup>11</sup> See e.g. Opinion No. 3 of the CCJE on ethics and liability of judges, paragraph 40 (2003).

<sup>12</sup> See e.g. European Court of Human Rights, *Daktaras v. Lithuania* (Application no. 42095/98) and *Olujić v. Croatia*, (Application no. 22330/05).

## **VI. JUDGES, PROSECUTORS AND INTERNATIONAL CO-OPERATION** (Declaration, paragraph 12)

76. In order to ensure the effective protection of human rights and fundamental freedoms, it is important to note the need for an efficient international cooperation notably between the Council of Europe member states on the basis of values enshrined in relevant international instruments, in particular the ECHR. International co-operation must be built on mutual trust. Information gathered through international cooperation and used in judicial procedures must be transparent in its content and origin as well as available to judges, public prosecutors and to the parties. It will be necessary to prevent international judicial cooperation from taking place without any judicial monitoring and without taking adequately into account, in particular, the rights of defence and the protection of personal data.

# Opinion No.13 (2010)

of the Consultative Council of European Judges (CCJE)  
to the Committee of Ministers of the Council of Europe

## The role of judges in the enforcement of judicial decisions

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### I. Introduction

1. The Committee of Ministers of the Council of Europe instructed the Consultative Council of European Judges (hereafter "CCJE") to adopt, in 2010, an Opinion "on the role of judges in the relation to the other functions of State and other actors in the enforcement of judicial decisions"<sup>1</sup>.
2. The CCJE has drafted this Opinion on the basis of replies to a questionnaire received from 34 member states. The replies of almost all member states identify the existence of serious obstacles to effective and adequate enforcement of judicial decisions. These obstacles arise in the civil, administrative and criminal spheres. With regard to civil and administrative matters, member states report, in particular, the complexity and cost of the enforcement procedures. With regard to criminal matters, member states report for example inadequate prison conditions and laxity in the execution of penalties.
3. This Opinion will propose concrete means to improve the role of the judge in the enforcement of judicial decisions and not deal with the enforcement procedure in general.
4. In order to do so, the judge's role will be examined as regards the enforcement of judicial decisions in the civil, administrative and criminal fields, as well as of decisions taken by international courts, notably by the European Court of Human Rights (hereafter "the Court").
5. To draft this Opinion, the CCJE relies on instruments adopted by the Council of Europe, in particular:
  - the European Convention on Human Rights (hereafter „ the ECHR“), in particular Articles 5, 6, 8 and 13 and Article 1 of Protocol No. 1;
  - the Interlaken Declaration at the High Level Conference on the Future of the Court (February 19, 2010);
  - the Recommendation Rec(2003) 16 of the Committee of Ministers to member states on the execution of administrative and judicial decisions in the field of administrative law;
  - the Recommendation Rec(2003) 17 of the Committee of Ministers to member states on enforcement;
  - the Recommendation Rec(2006) 2 of the Committee of Ministers to member states on the European Prison Rules;
  - the Recommendation Rec(2008) 2 of the Committee of Ministers to member states on efficient domestic capacity for rapid execution of judgments of the Court;
  - Report of the CEPEJ "European judicial systems" (2010 Edition);
  - "Enforcement of Court decisions in Europe" (CEPEJ Studies No. 8);
  - CEPEJ Guidelines for a better implementation of the existing Council of Europe's Recommendation on enforcement;
  - 3rd Annual Report 2009 on the supervision of the execution of judgments of the Court;
  - the Convention for the Protection of Personal Data (ETS No. 108);
  - the views of the Commissioner for Human Rights "The imperfect implementation of judicial decisions undermines confidence in the justice of states" (31 August 2009);
  - the Conventions of the Council of Europe on enforcement of sentences and extradition: the European Convention on Extradition (ETS No. 24) and its protocols (ETS No. 86 and 98), the European Convention for the Supervision of Conditionally Sentenced or paroled (ETS No. 51), the European Convention on the International Validity of Criminal Judgments (ETS No. 70), the Convention on the Transfer of Sentenced Persons (ETS No. 112) and its Additional Protocol (ETS No. 167);

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<sup>1</sup> See the 2010 terms of reference of the CCJE approved by the Committee of Ministers at the 1075th meeting of the Ministers Deputies (20th January 2010).

as well as the Court case-law on this matter, in particular:

- *Hornsby v. Greece* (19 March 1997, No. 18357/91);
- *Burdov v. Russia Nr 2* (15 January 2004, No. 33509/04);
- *Akashev v. Russia* (12 June 2008, No. 30616/05);
- *Zielinski and Pradal and Gonzalez and Others v. France* (28 October 1999, No. 24846/94 and acc);
- *Cabourdin v. France* (11 April 2006, No. 60796/00);
- *Immobiliare Saffi v. Italy* (28 July 1999, GC No. 22774/93);
- *Papon v. France* (25 July 2002, No. 54210/00);
- *Annoni Di Gussola and Desbordes and Omer v. France* (14 November 2000, No. 31819/96, 33293/96).

## II. General principles

6. Enforcement should be understood as putting into effect judicial decisions and also other judicial or non-judicial enforceable titles. It may involve an order to do, to refrain from doing or to pay what has been adjudged. It may involve the imposition of financial penalties or a custodial sentence.
7. The effective enforcement of a binding judicial decision is a fundamental element of the rule of law. It is essential to ensure the trust of the public in the authority of the judiciary. Judicial independence and the right to a fair trial (Article 6 of the ECHR) is in vain if the decision is not enforced.
8. The enforcement procedure must be implemented in compliance with fundamental rights and freedoms (Articles 3, 5, 6, 8, 10, 11 of the ECHR, data protection, etc.).
9. The decision to be enforced must be precise and clear in determining the obligations and rights engaged in order to avoid any obstacle to effective enforcement<sup>2</sup>.
10. Decisions of the Court show that, in some cases, legislative or executive powers have attempted to influence enforcement through refusal or suspension or denial of resort to the police. They also have interfered in pending litigation by enacting provisions, often declared as being of a retroactive or interpretative nature, aiming at changing the foreseeable outcome of one or more court cases or introducing new remedies for their review<sup>3</sup>.
11. The enforcement of a decision must not be undermined by extraneous intervention whether from the executive or the legislator by imposing retroactive legislation.
12. The very notion of an “independent” tribunal set out in Article 6 of the ECHR implies that its power to give a binding decision may not be subject to approval or ratification, or that the decision may not be altered in its content, by a non-judicial authority, including the Head of State<sup>4</sup>. All branches of states should therefore ensure that the legal provisions providing for the independence of courts, existing in their constitutions or at the highest level of their legislation, are construed in such a way that they call for prompt enforcement of judicial decisions with no interference of other powers of the State, with the sole exceptions of amnesty and pardon in criminal matters. The suspension of enforcement of a judicial decision may only take place by way of another judicial decision.
13. There should be no postponement of the enforcement procedure, except on grounds prescribed by law. Any deferral should be subject to the judge’s assessment.
14. The enforcement agents should not have the power to challenge or vary the terms of the judgment.
15. If it is necessary for a party to have a decision enforced, the enforcement procedure should be easily initiated. Any obstacle to this, for instance excessive costs, should be avoided.

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<sup>2</sup> See *Privalikhin vs. Russia* of 12 May 2010: the Court reaffirmed that in order to decide if the execution delay was reasonable, the Court will look at how complex the enforcement proceedings were, how the applicant and the authorities behaved, and what the nature of the award was (see also *Raylyan v. Russia*, no. 22000/03, § 31, 15 February 2007).

<sup>3</sup> See for example, *Immobiliare Saffi v. Italy*, 28 July 1999, and other 156 cases v. Italy; *Zielinski and Pradal and Gonzales and others v. France*, 28 October 1999; *Cabourdin v. France*, 11 April 2006.

<sup>4</sup> See for example, *Van de Hurk v. the Netherlands*, 19 April 1994; *Findlay v. The United Kingdom*, 25 February 1997, especially §77.

16. Enforcement should be swift and effective. Therefore necessary funds have to be provided for enforcement. Clear legal regulations should determine the available resources, the authorities in charge and the applicable procedure for their allocation.
17. Member states should provide for an accelerated or urgent enforcement procedure where delay might cause an irreversible wrong (some family cases, cases where the defendant has absconded, cases of expulsion, risk of damage to property, etc.).
18. In order for judges to fulfil their tasks, the judiciary should be entrusted with the following missions concerning enforcement:
  - an appeal to a judge if the enforcement is not initiated or is delayed by the relevant bodies; a judge should also be involved when fundamental rights of the parties are concerned; in all cases, the judge should have the power to grant just compensation;
  - an appeal or complaint to a judge if there is any abuse in the enforcement procedure;
  - an appeal to a judge in order to settle litigation concerning enforcement and to give orders to state authorities and other relevant bodies to enforce decisions; at the final stage, it should be up to the judge to use all possible ways to ensure enforcement;
  - to identify and take due account of the rights and interests of third parties and members of the family including those of children.
19. In some systems, parties may be forced to comply with the judicial decision by way of indirect coercion, for example by imposing fines or legal provisions stating that criminal charges may be brought in the case of a refusal to execute. The CCJE considers that such indirect enforcement measures, which should in all cases be provided by the law and allowed by the judge, both in the decision or even afterwards, are especially important to ensure enforcement in urgent matters, in matters in which the specific performance may not be substituted by an equivalent satisfaction and in family matters, in which the use of force may harm the interest of children. In view of the benefits associated with indirect coercion, the CCJE recommends that courts ensure the widest use of such remedies, which also allow in most cases a prompt enforcement.
20. The CCJE considers that a transparent regulatory framework, preferably of legislative nature, should apply to costs of enforcement. The amount of fees should take into account the nature of the activity required from the enforcement agents, not necessarily in proportion to the value of the claim. In case of a dispute, costs should be assessed by the court.
21. For purposes of guaranteeing access to justice, alternative legal aid or financing arrangements should be proposed to claimants who are unable to pay the costs of enforcement (by public funding or reduction of costs).
22. The vital importance of enforcement to comply with the Rule of law requires that data about enforcement are included in systems of evaluation of justice and in information on judicial systems provided to court users, the general public and the media, as proposed in Opinion No. 6 of the CCJE (Parts A and C).
23. The CCJE recommends that the Council for the Judiciary, or any other relevant independent body, publish regularly a report on the effectiveness of enforcement, including data on delays and their causes, as well as on different enforcement methods. A special section should deal with the enforcement of judicial decisions against public entities.

### **III. The role of the judge in the enforcement of judicial decisions in civil matters**

24. Enforcement of a judicial decision shall not require the commencement of entirely fresh proceedings and enforcement procedures shall not permit reopening of the merits of the original judicial decisions. But the judge may have power to suspend or postpone enforcement to take account of the particular circumstances of the litigants, for example to give effect to Article 8 of the ECHR.
25. If the rule of law is to be maintained and litigants' trust in the judicial system is to be ensured, enforcement activities must be proportionate, fair and effective. For example, tracing and attachment of the defendants' assets should be made as effective as possible, while taking account of the applicable provisions on human rights, protection of personal data and the need for judicial review.
26. When the parties are free to dispose of their rights and where the parties together reach a lawful agreement on enforcement, no legal provision should prevent the agreement from taking effect.

27. The fundamental right of data protection should be reconciled with the possibility to use, within enforcement procedures, information contained in databases on assets of debtors. This requires a precise legal regulation of the procedure and the authorisation to resort to the database, with the aim to guarantee an effective and complete enforcement and prevent any misuse. All state organs in charge of databases containing the information needed for effective enforcement should be bound to convey this information to the courts.
28. Repeated use of information on a defendant's assets in connection with subsequent proceedings to which the same defendant is a party should have a clear and specific legal framework (setting of strict time limits for retention of data, etc.) and be subject to all procedural prerequisites to start an enforcement procedure.

#### **IV. The role of judges in the enforcement of judicial decisions in administrative matters**

29. The CCJE considers that most of the principles set out regarding enforcement in civil matters also apply "*mutatis mutandis*" to enforcement in administrative matters, whether enforcement is against a private person or a public institution.
30. However, some special considerations arise concerning the execution of judicial decisions against public entities. These may arise in administrative law, but also in civil law disputes.
31. First, the CCJE considers that, in a state governed by the Rule of law, public entities are above all bound to respect judicial decisions, and to implement them in a rapid way "*ex officio*". The very idea of a state body refusing to obey a court decision undermines the concept of primacy of the law.
32. A large amount of cases brought before the Court concerns the non-execution of judicial decision by public bodies. A state should respect judgments delivered against it without delay and without requiring the claimant to use enforcement procedures. The Court has repeatedly admitted claims by claimants who have either not used such procedures, or have had to do so, saying that "a person who has obtained an enforceable judgment against the state as a result of successful litigation cannot be required to resort to enforcement proceedings in order to have it executed"<sup>5</sup>.
33. When recourse to forced execution is necessary, states should ensure that their domestic legislations allow criminal and disciplinary prosecution of officials to whom refusal or delay of execution is attributable, as well as to question their civil liability.
34. States should recover against such officials any additional costs incurred due to refusal or delay of enforcement. Acts by public officials delaying or denying enforcement should always be subject to an effective judicial review.
35. Legislative interference with pending execution is impermissible above all when a public entity is the debtor.
36. The same enforcement agents, as for enforcement against private bodies, should be competent and the same procedural principles should apply. Judges should not suffer restrictions in applying the same legal provisions and in ensuring effective compensation for delays in the enforcement procedure (indexation, default interest at the same rate generally applicable, specific damages, other penalties)<sup>6</sup>.

<sup>5</sup> See *Koltsov v. Russia*, 24 February 2005, §16; see also *Petrushko v. Russia*, 24 February 2005, §18; *Metaxas v. Greece*, 27 May 2004, §19.

<sup>6</sup> Such compensation is also a direct requirement of the ECHR (in particular Article 1 of Protocol no. 1). According to the Court, the mere fact that the authorities complied with the judgments cannot be viewed as automatically depriving the applicant of his/her victim status under the Convention, if no adequate redress was offered for the delay in proceedings (see for example, *Petrushko v. Russia*, 24 February 2005, §15). The adequate compensation eventually paid after the delay must take into account the various circumstances with a view to compensate the gap between the sum due and the sum finally paid to the creditor and to compensate for losses of use (see for example, *Akkus v. Turkey*, 9 July 1997, *Angelov v. Bulgaria*, 22 April 2004, *Eko-Elda Avee v. Greece*, 9 March 2006). Redress may also be demanded for non-pecuniary damages (see for example, *Sandor v. Romania*, 24 March 2005). The absence of state responsibility for delay under these different heads of prejudice could not be justified by the impossibility of establishing any *culpa* or fault on the part of public authorities (see *Solodyuk v. Russia*, 12 July 2005, §16).



37. Judgments concerning a decision by an administrative authority denying an alien's right to stay on the state's territory frequently involve the question whether the alien could be expelled. In this context, expulsion constitutes the enforcement of the authority's decision. The CCJE considers that, in order to secure effective judicial review, states should not prevent the court from examining the admissibility of expulsion in its final or interim decision concerning the act taken by the administrative authority.

#### **V. The role of judges in the enforcement of judicial decisions in criminal matters**

38. In criminal matters, respect of the Rule of law requires the full implementation of criminal sanctions or penalties, regardless of the nature of the sentence imposed. Thus, member states should refrain from developing policies which result in minor penalties that are not actually enforced, whether for budgetary reasons, lack of prison accommodation or expediency. The result of such policies is to undermine the authority of judicial decision making, and thereby the rule of law itself.

39. A penalty may take the form of a term of imprisonment, a fine, or another sanction (for instance, disqualification from driving, professional prohibition, etc.). As a general rule, the actual implementation of such sanctions is not a matter for the judge to decide on; such measures are to be put into effect by prosecutors, police authorities or any relevant administrative authority. Either public or private officials, such as bailiffs may be appointed by a judge or another competent authority to carry out such duties. In any case, the performance of such powers and the implementation of penal measures have a direct impact on individual rights. The role of a judge is to protect and guarantee such rights within the framework of the judicial decision to be enforced.

40. A term of imprisonment may be looked at from two different standpoints. The first relates to modalities of the enforcement of the sentence, namely the duration and mode of implementation which may involve questions such as remission of sentence, parole, limited detention or provisional release under judicial supervision or electronic surveillance. The second standpoint relates to the physical or psychological conditions or the effects of imprisonment, which may give rise to questions as to the lawfulness of the detention itself or the conditions of the detention.

41. In some member states, the modalities of enforcement of the sentence may fall within the function of judges. In other member states, this category is dealt with by a parole board or other administrative authorities. In either case, the implementation of such measures must be subject to fairness in procedure and to judicial supervision and review.

42. Any alteration in the nature or location of the detention, for example by placement in a psychiatric institution because of the prisoner's mental health, must be subject to a right of appeal or judicial review.

43. Deprivation of liberty, of whatever nature, must at all times be in accordance with Article 3 and Article 8 of the ECHR. A person detained by police authorities or a sentenced prisoner must not, at any time, be subject to inhuman or degrading treatment. Human dignity must be protected at all times during detention. The requirements of Article 8.1 of the ECHR (respect for private and family life) must also be met, subject to the stipulations of Article 8.2 of the ECHR (possibility of interference by a public authority). It is the duty of the judge to protect and vindicate these rights and guarantees as applicable in each member state.

44. In some member states, the judge carries out *ex officio* the supervision of prison conditions. In other member states, the judge cannot assume *ex officio* jurisdiction in this matter. Whatever system in force, the legislation of each Member states should enable the convicted person, his/her counsel as well as the prosecution to bring a case before the judge whenever the conditions of detention violate fundamental rights guaranteed by Articles 3 and 8 of the ECHR. This legislation should also provide mechanisms that allow independent administrative authorities to supervise prison conditions and to refer, if need be, a case to the Court.

45. Contact between a judge and enforcement authorities (Ministry of Justice, prison authorities, social services, the directors of prisons) will generally be limited to disputed enforcement issues, both in the event that such authorities are questioned on conditions of detention or modalities of implementation of the penalty, and in the event that they are requested to provide their opinion as to how the penalty is to be implemented. In all cases, the judge must take all necessary steps to be provided with all relevant information by the authorities. These authorities must also provide and submit such information to the parties contesting any relevant issue.

46. Implementation of non-custodial sentences may have an impact on property (for instance fines, forfeitures or the closing of a business) or affect personal rights (such as a prohibition to exercise certain rights, disqualification from driving). All such issues may give rise to legal issues. A convicted person must be able to address and request a judge to review any disputes which arise thereof.
47. It is also necessary to ensure that judges, responsible for executing sentences, have specific training allowing them to clearly understand any legal, technical, social and human dimensions of this matter. Such training must be devised and led in interaction with all the authorities or services involved in the process of implementation including judges, prosecutors, ministerial officials, prison staff and administration, directors of penal institutions, as well as social workers, lawyers and others.

## **VI. The role of judges in the enforcement on the international level**

### **1. Implementation of decisions of the European Court of Human Rights**

48. In its Opinion n° 9, the CCJE gave its viewpoint on the role of the judge regarding the implementation of international case-law, especially that of the Court. It has, notably, specified how the judge should comply with the Court's case-law.
49. When a state is condemned to pay compensation by the Court, the creditor should, in case of non-enforcement of the decision of the Court, have the right to request the enforcement by the national judge, without prejudice to measures which could be taken at a supranational level.

### **2. International co-operation and cross-border enforcement**

50. At a time where justice is characterised by growing mobility and the development of international trade, the priority should be given to develop and promote an area of justice common to European citizens, by removing any remaining obstacles in the exercise of their rights. Thus judicial rulings must be recognised and enforced between member states without hindrance.
51. The principles of mutual trust and recognition are cornerstones of the construction of a European legal area, while respecting the diversity of national systems. Mutual recognition implies that decisions given at the national level have an effect in other member states, in particular in their legal system. It is therefore essential to increase exchanges between legal professionals. Their different networks should reinforce and restructure themselves and coordinate with each other.
52. Systematic European training for all judges and prosecutors should be provided; they should take part in training initiatives or exchanges in other states. Moreover, distance teaching programmes (e-learning) and common training material should be developed to instruct the judicial professions on how to deal with the European mechanisms (relations with the Court, the CJUE, use of the instruments of mutual recognition and judicial co-operation, comparative law, etc.).

#### **a. In civil and administrative matters**

53. In civil litigation, judicial rulings should be enforced directly and without any further intermediate measure. It will thus be necessary to move ahead gradually and cautiously with the process of eliminating the exequatur clause from certain decisions in civil and commercial matters.
54. Meanwhile, the speed of procedures and the effectiveness of the enforcement of court decisions should be enhanced by improved international arrangements regarding the taking and enforcement of provisional and precautionary measures.
55. In addition, mutual recognition could be extended to areas not covered yet by European law and essential to everyday life, such as inheritances and wills, matrimonial property regimes and the pecuniary consequences of the separation of couples.

#### **b. In criminal matters**

56. In criminal matters, international co-operation involves many areas. Examples to be recalled may concern the serving of a sentence in the country of origin, determined by a judicial decision issued in another country, extradition requests, the European Arrest Warrant, the recognition of judicial decisions in criminal matters, judicial cooperation, etc.

57. The enforcement of a foreign judgment is to be realised under a convention between states and is based on mutual trust in the judicial system of each of them. The judge in the country of enforcement must honour that trust. Thus, this judge shall not change or challenge the decision of the judge in the country of origin. He or she will not refuse the execution thereof other than on the grounds of exclusion provided in the convention between the countries of enforcement and of origin, or when the decision is contrary to the fundamental rights of the persons concerned.
58. However, in the area of transfer of condemned persons, the judge can adapt the sanctions pronounced by the foreign judge when this possibility exists under the convention binding the states concerned.

## **VII. Conclusions**

- A. The effective enforcement of a binding judicial decision is a fundamental element of the rule of law. It is essential to ensure the trust of the public in the authority of the judiciary. Judicial independence and the right to a fair trial is in vain if the decision is not enforced.
- B. The very notion of an “independent” tribunal set out in Article 6 of the European Convention on Human Rights implies that its power to give a binding decision may not be subject to approval or ratification, or the decision altered in its content, by a non-judicial authority, including the Head of State.
- C. All branches of states should ensure that the legal provisions providing for the independence of courts, existing in their constitutions or at the highest level of their legislation, are construed in such a way that they call for prompt enforcement of judicial decisions with no interference by other powers of the State, with the sole exceptions of amnesty and pardon in criminal matters. The suspension of enforcement of a judicial decision may only take place by way of another judicial decision.
- D. There should be no postponement of the enforcement procedure, except on grounds prescribed by law. Any deferral should be subject to the judge’s assessment. The enforcement agents should not have the power to challenge or vary the terms of the judgment.
- E. In criminal matters, states should refrain from developing policies which result in minor penalties that are not actually executed.
- F. The CCJE considers that, in a state governed by the rule of law, public entities are above all bound to respect judicial decisions, and to implement them in a rapid way “ex officio”. The very idea of a state body refusing to obey a court decision undermines the concept of primacy of the law.
- G. Enforcement should be fair, swift, effective and proportionate.
- H. The parties should be able to initiate enforcement proceedings easily. Any obstacle to this, for instance excessive cost, should be avoided.
- I. All enforcement proceedings must be implemented in compliance with fundamental rights and freedoms recognized by the ECHR and other international instruments.
- J. The deprivation of liberty must be in accordance with the rights protected by Articles 3 and 8 of the ECHR, while having regard to the stipulations recognized by Article 8.2 of the latter. It is the duty of the judge to protect and vindicate these rights.
- K. Whether the modalities of execution of a sentence are under the responsibility of the judge, a parole board, or an administrative authority, the implementation of such measures must be subject to fairness in procedure and to judicial supervision and review.
- L. The principles of trust and mutual recognition are cornerstones of the construction of a European legal area. Mutual recognition implies that decisions given at the national level have an effect in other member states, in particular in their legal system. It is therefore essential to increase exchanges between legal professionals. Their different networks should reinforce and restructure themselves and coordinate with each other.

- M. The CCJE recommends that the Judicial Councils, or any other relevant independent body, should regularly publish a report on the effectiveness of enforcement. A separate section should deal with the execution of judgments against public entities.

# Opinion No. 14 (2011)

of the Consultative Council of European Judges (CCJE)  
to the Committee of Ministers of the Council of Europe

## Justice and information technologies (IT)

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### A. Introduction

1. In 2011, the Consultative Council of European Judges was given the task of adopting an Opinion for the attention of the Committee of Ministers on non-materialisation of the judicial process. In its discussions, the CCJE concluded that the title “Justice and Information Technologies” reflects the intended subject of this opinion in a more comprehensive and readily recognisable way than the previous title. Therefore, this new title has been chosen for this Opinion.
2. The Opinion was prepared on the basis of previous CCJE Opinions and of the Magna Carta of judges, as well as replies by member States to a questionnaire prepared by the CCJE on the non-materialization of the judicial process and on a preliminary report prepared by an expert, Ms Dory Reiling (Netherlands).
3. In preparing this Opinion, the CCJE also considered relevant Council of Europe instruments, in particular the 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data as well as the Report “European Judicial Systems” (Edition 2010) by the European Commission for the Efficiency of Justice (CEPEJ) (specifically, Chapter 5.3 on Information and Communication Technologies in the courts). It also took into account other international legal instruments such as the European Union’s European Justice Strategy and the European Union’s Data Protection Directive, Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

### B. Scope of the Opinion and general principles

4. This Opinion deals with the application of modern information and communication technology (IT) in courts. It focuses on the opportunities that IT offers in relation to, and its impact on, the judiciary and the judicial process. In particular, it addresses questions such as access to justice, the rule of law, the independence of judges and the judiciary, the functioning of courts and the parties’ rights and duties. It does not concern itself primarily with the technical aspects of IT.
5. IT should be a tool or means to improve the administration of justice, to facilitate the user’s access to the courts and to reinforce the safeguards laid down in Article 6 ECHR: access to justice, impartiality, independence of the judge, fairness and reasonable duration of proceedings.
6. The introduction of IT in courts in Europe should not compromise the human and symbolic faces of justice<sup>1</sup>. If justice is perceived by the users as purely technical, without its real and fundamental function, it risks being dehumanised. Justice is and should remain humane as it primarily deals with people and their disputes. This is best seen when evaluating the demeanour of litigants and their witnesses, which is an exercise performed in a court of law by the judge trying the case.
7. The Magna Carta of Judges entrusts judges with co-responsibility for access to swift, efficient and affordable dispute resolution. Judges must identify the advantages and disadvantages of IT and identify and eliminate any risks to the proper administration of justice. IT must not diminish parties’ procedural rights. Judges must be mindful of such risks as they are responsible for ensuring that parties’ rights are protected.

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<sup>1</sup> On the relationships between symbolism and justice and the risks in the de-ritualisation of the judicial process which is a trend of modern democracies, see A. Garapon, “*Bien juger – Essai sur le rituel judiciaire*” (Odile Jacob, Paris, 2001), also offering an extensive bibliography in an appendix.

8. Judges need to be involved in assessing the impact of IT, especially when it may be required or decided that documentary matters and/or proceedings may be conducted by electronic means. IT must not prevent judges from applying the law in an independent manner and with impartiality.
9. Not all individuals have access to IT. At present, more traditional means of access to information should not be abolished. Help desks and other forms of assistance within courts should not be removed because of an erroneous argument that IT has made justice “accessible for all”. This is a particularly pressing concern as regards the protection of vulnerable persons.
10. The use of IT should not diminish procedural safeguards for those who do not have access to new technologies. States must ensure that parties without such access are provided specific assistance in this field.
11. Having regard to the important role that IT technology plays today in the administration of justice, it is particularly important to ensure that difficulties in the functioning of IT do not prevent the court system, even for short periods, from taking decisions and ordering appropriate procedural steps. Appropriate alternatives should always be available whenever the IT system is under maintenance, or when technical incidents occur, in order to avoid any adverse impact on court activity.
12. Particular care should be taken to evaluate proposed legislation in advance with reference to its implications for the appropriate IT treatment of cases arising under it. The CCJE recommends that such legislation comes into force only after the IT systems have been adjusted to the new requirements, and court personnel are properly trained.
13. IT assisted treatment of judicial proceedings is especially important in the area of international and European judicial co-operation. IT facilities may be particularly relevant in areas such as the transmission of rogatory commissions and other requests for judicial co-operation, in the service and notification of judicial documents in member States as well as for cross-border taking of evidence (e.g. by way of video-conferencing). The CCJE recommends that member States develop methods of mutual access to each national IT systems, as well as making such systems compatible with one another. This will ensure that IT enhances co-operation of judges in different countries, and do not constitute an obstacle.
14. The CCJE welcomes the solutions envisaged by some states in the application of EU regulations, allowing the electronic initiation of civil claims in one country by residents in another country, as well as video-conferencing in the context of international cooperation.
15. The use of IT improves access to justice, as well as increases its effectiveness and transparency. On the other hand, it requires major financial investments. The CCJE’s recommendation that access to justice should be enhanced by using IT therefore, necessarily means that States must make adequate financial allocations to the judicial system for this purpose.
16. Data and information, such as those contained in case registers, individual case files, preparatory notes and drafts, judicial decisions and statistical data on the evaluation of judicial processes and court management, need to be managed with appropriate levels of data security. Within the courts, access to information should be limited to those who need it in order to accomplish their work.
17. Having regard to the nature of the disputes brought before courts, the online availability of certain judicial decisions could place privacy rights of individuals at risk and jeopardize the interests of companies. Therefore courts and judiciaries should ensure that appropriate measures are taken for safeguarding data in conformity with the appropriate laws.
18. The CCJE encourages the development of IT as a tool to improve communication between the courts to the media, for example, by giving the media easier access to judicial decisions as well as notice of forthcoming hearings.

### **C. IT and access to justice**

19. Full, accurate and up to date information about procedure is a fundamental aspect of the guarantee of access to justice identified in Article 6 of the Convention (ECHR). Judges must therefore ensure that accurate information is available to any person engaged in court proceedings. Such information should generally include details or requirements necessary to invoke jurisdiction. Such measures are necessary to ensure the necessary equality of arms.

20. In any case, Justice cannot be disconnected from its users, and the IT development should not be used to justify courts being dispensed with.
21. IT creates new opportunities to provide court users with general information on the judicial system, its activities, case-law, the costs of proceedings, ADR etc. The CCJE recommends that full use be made by the judicial system of the internet and other new technologies to provide the general public with those elements which, in its Opinion N° 6 (paragraphs 12 and following) the CCJE has already concluded should be widely publicised.
22. IT is a valuable tool to support the role of courts. IT can also improve the ways in which courts can provide the concerned persons with detailed information on procedures in general. Therefore, the CCJE recommends that Courts introduce user-friendly electronic information services.
23. IT enables court users to initiate court proceedings electronically (e-filing). The CCJE encourages further development of this practice<sup>2</sup>.
24. The CCJE considers that the judiciary should make case law, or at least landmark decisions, available on the internet i) free of charge, ii) in an easily accessible form, and iii) taking account of personal data protection. The CCJE welcomes initiatives to introduce international case-law identifiers (like the European Union case-law identifier ECLI<sup>3</sup>) which will improve access to foreign case-law.

#### **D. IT in court procedure**

25. IT offers opportunities for more efficient, clear and certain case processing.
26. Computerisation assists courts in rationalising file management as well as in registering and keeping track of cases. In this way, a series of files or connected cases can be managed under more secure conditions ; templates may be designed to support the formulation of judicial decisions or orders and multi-criteria statistics for each type of litigation, which can be made publicly available.
27. Computerisation can also improve the quality of the judge's work, for example through databases with links to judicial decisions, legislation , studies of identical questions of law, legal commentaries on previous decisions delivered by a court, and other forms of knowledge-sharing between judges. The most advanced and complete methods of this kind existing on the market should be made available free of charge to judges, who need to be able to verify all sources of legal information available to other actors in the judicial process (defence lawyers, experts, etc.). The aids to judicial decision must be designed and seen as an ancillary aid to judicial decision-making, and to facilitate the judge's work, not as a constraint.
28. The use of IT should not, however, diminish the procedural safeguards (or affect the composition of the tribunal) and should in no event deprive the user of his/her rights to an adversarial hearing before a judge, the production of original evidence, to have witnesses or experts heard and to present any material or submission that he/she considers useful. Moreover, the use of IT should not prejudice mandatory hearings and the completion of other essential formalities prescribed by law. The judge must also retain, at all times, the power to order the appearance of the parties, to require the production of documents in their original form and the hearing of witnesses. Security requirements must not be an obstacle to these possibilities.
29. Resort to IT simplifies exchanges of documents. The parties and their representatives can access information about the cases in which they are involved before the court. In this way, they can follow the progress of their case by accessing the computerised case history.
30. Video-conferencing may facilitate hearings in conditions of improved security or the hearing remotely of witnesses or experts. It could, however, have the disadvantage of providing a less direct or accurate perception by the judge of the words and reactions of a party, a witness or an expert.

<sup>2</sup> See for example Regulation (EC) No 1896/2006 of 12.12.2006 (on European Payment Order) and Regulation (EC) No 805/2004 of 21.4.2004 (on European Enforcement Order for uncontested claims).

<sup>3</sup> See OJ C127, 29.4.2011, p.1 : Council conclusions inviting the introduction of the European Case Law Identifier (ECLI) and a minimum set of uniform metadata for case law.

Special care should be taken so that video-conferencing and adducing evidence by such means should never impair the guarantees of the defence.

31. The role of IT should remain confined to substituting and simplifying procedural steps leading to an individualised decision of a case on the merits. IT cannot replace the judge's role in hearing and weighing the factual evidence in the case, determining the law applicable and taking a decision with no restrictions other than those prescribed by law.

#### **E. IT governance**

32. IT should be used to enhance the independence of judges in every stage of the procedure and not to jeopardize it. Since judges play an important role in safeguarding both their individual and institutional independence and their impartiality, they need to be involved in decisions that have consequences in those areas.
33. IT access to information can contribute to a greater autonomy of judges in performing their tasks.
34. Over dependence on technology and on those who control it can pose a risk to justice. Technology must be suitable for the judicial process, and for all aspects of a judge's work. Judges should not be subject, for reasons solely of efficiency, to the imperatives of technology and those who control it. Technology also needs to be adapted to the type and level of complexity of cases.
35. The CCJE considers that instructions, templates or other suggestions as to form or content of decisions should not be addressed to judges by whatever other authority on the basis of needs reflecting the architecture of IT systems to be employed in the judicial process; rather, this architecture should be flexible, and ready to adjust to judicial case-law or practices.
36. Dialogue is absolutely necessary between those developing technology and those responsible for the judicial process. IT governance should be within the competence of the Council for the judiciary or other equivalent independent body. Regardless of which body is in charge of IT governance, there is the need to ensure that judges are actively involved in decision making on IT in a broad sense.
37. Judges should have flexibility when it comes to deciding how to manage cases and deal with back office work. The case management system should not limit this flexibility.
38. Judges and court staff have both a right and a duty to initial and on-going IT training so they can make full and appropriate use of IT systems.
39. IT can be an important tool for strengthening transparency, and objectivity in distributing cases and fostering case management. It can play a role in relation to the evaluation of judges and courts. However, data collected from IT systems should not be the sole basis for analysis of the work of an individual judge. Statistical data should be examined by the Council for the Judiciary or another equivalent independent body<sup>4</sup>.
40. Managing and developing IT presents a challenge for any organisation. For judiciaries, it presents a new and demanding challenge for their governance structures. Information-based management is an opportunity for developing institutional independence.
41. Funding for IT should be based on its contribution to improve court performance, the quality of justice and the level of service to the citizens.

#### **F. Conclusions - Recommendations**

- i. The CCJE welcomes IT as a mean to improve the administration of justice;
- ii. IT can contribute to the improvement of access to justice, case-management and the evaluation of the justice system;
- iii. IT plays a central role in the provision of information to judges, lawyers and other stakeholders in the justice system as well as to the public and the media;

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<sup>4</sup> See also Opinions of the CCJE No.1(2001) para 9, No.10(2007) and No. 11(2008).



- iv. IT has to be adapted to the needs of judges and other users, it should never infringe guarantees and procedural rights such as that of a fair hearing before a judge;
- v. Judges should be involved in all decisions concerning the setting up and development of IT in the judicial system;
- vi. Consideration must be given to the needs of those individuals who are not able to use IT facilities;
- vii. The judge must retain, at all times, the power to order the appearance of the parties, to require the production of documents in their original form and the hearing of witnesses;
- viii. The CCJE encourages the use of all aspects of IT to promote the important role of the judiciary in guaranteeing the rule of law (/the supremacy of law) in a democratic state;
- ix. IT should not interfere with the powers of the judge and jeopardise the fundamental principles enshrined in the Convention.



# Opinion No. 15 (2012)

of the Consultative Council of European Judges (CCJE)  
to the Committee of Ministers of the Council of Europe

## The specialisation of judges

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### Introduction

1. In accordance with the Terms of Reference given to it by the Committee of Ministers, the Consultative Council of European Judges (CCJE) has decided to prepare in 2012 an Opinion on the specialisation of judges.
2. The Opinion was prepared on the basis of previous CCJE Opinions, the Magna Carta of Judges, the member States' replies to a questionnaire on the specialisation of judges prepared by the CCJE, and the preliminary report by the expert of the CCJE, Ms Maria Giuliana Civinini (Italy).
3. In preparing this Opinion, the CCJE has also relied on the *acquis* of the Council of Europe, in particular the European Charter on the Statute for Judges, Recommendation Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, and the report on "European Judicial Systems" (2010 edition) by the European Commission for the Efficiency of Justice (CEPEJ)<sup>1</sup>.
4. The replies of member States to the questionnaire and the report by the expert show that specialist judges and/or specialist courts are common in member States. Such specialisation is a reality, and it takes a wide variety of forms, involving either setting up specialist chambers within existing courts or creating separate specialist courts. This trend has spread throughout Europe<sup>2</sup>.
5. In the context of the present Opinion, the "specialist judge" is a judge who deals with limited areas of the law (e.g. criminal law, tax law, family law, economic and financial law, intellectual property law, competition law) or who deals with cases concerning particular factual situations in specific areas (e.g. those relating to social, economic or family law).
6. Jurors who take part in criminal cases<sup>3</sup> have not been included within the definition of "specialist judges" mentioned above. Jurors do not sit in all criminal cases. They are not subject to the same codes and rules as judges who are part of the regular corpus of judges; nor are they part of the judicial hierarchy or subject to its disciplinary and ethical rules.
7. The purpose of this Opinion is to examine the main problems relating to specialisation, given the overriding need to secure the protection of fundamental rights and the quality of justice as well as the status of judges.

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<sup>1</sup> Although these reference documents do not deal specifically with the specialisation of judges, they cover specialist judges where the principles which they set out are applicable to all judges.

<sup>2</sup> In the CCJE's questionnaire, the following specialisations were identified as examples common in many European countries: Family courts, Juvenile courts, Administrative courts/councils of state, Immigration/Asylum Courts, Courts of public finances, Military Courts, Tax Courts, Labour/social courts, Courts for agricultural contracts, Consumers' claims courts, Small claims courts, Courts for wills and inheritances, Patent/copyrights/trademark courts, Commercial courts, Bankruptcy courts, Courts for land disputes, *Cours d'arbitrage*, Serious crimes courts/courts of assize, Courts for the supervision of criminal investigations (e.g. authorising arrest, wire-tapping etc.), Courts for the supervision of criminal enforcement and custody in penitentiaries.

European Union law stipulates the creation of specialist chambers or courts in specific legal fields such as Community trademarks (Community Trade Mark Courts, Art. 90 of the Regulation (EC) No. 40/94 of the Council of 20 December 1993 on Community trade marks) and Community designs (Community Design Court, Art. 80 of Regulation (EC) No. 6/2002 of the Council of 12 December 2001 on Community designs).

<sup>3</sup> For example, at Assize Courts in several member States "jurors" are defined as persons who are chosen at random to be part of a jury, as opposed to persons who sit as non-legally trained members of a court; see also paragraph 43 below. Such jurors may in criminal cases decide upon the sentence as well as decide the guilt of a defendant, and in civil cases they may decide upon damages.

## **A. Possible advantages and disadvantages of specialisation**

### **a. Possible advantages of specialisation**

8. Specialisation often stems from the need to adapt to changes in the law rather than from any deliberate choice. The constant adoption of new legislation, whether at the international, European or domestic level, and changing case-law and doctrine are making legal science increasingly vast and complex. It is difficult for the judge to master all these fields, while at the same time society and litigants demand more and more professionalism and efficiency from the courts. Specialisation of judges can ensure that they have the requisite knowledge and experience in their field of jurisdiction.
9. An in-depth knowledge of the legal field in question can improve the quality of the decisions taken by a judge. Specialist judges can acquire greater expertise in their specific fields, which can thereby enhance their courts' authority.
10. Concentrating case-files in the hands of a select group of specialist judges can be conducive to consistency in judicial decisions and consequently can promote legal certainty.
11. Specialisation can help judges, by repeatedly dealing with similar cases, to gain a better understanding of the realities concerning the cases submitted to them, whether at the technical, social or economic levels, and therefore to identify solutions better suited to those realities.
12. Specialist judges who provide knowledge of a science other than law can foster a multidisciplinary approach to the problems under discussion.
13. Specialisation through greater expertise in a certain legal field may help improve the court's efficiency and case management, taking into account the ever growing number of cases.

### **b. Possible limits and dangers of specialisation**

14. Whilst judicial specialisation is desirable for a number of reasons, there are several dangers in it. The main risk in judicial specialisation is to be found in the possible separation of specialist judges from the general body of judges.
15. Judges who, for reasons of specialisation, have previously had to decide on the same issues might tend to reproduce these previous decisions, which can hamper the evolution of case-law in line with society's needs. This danger also arises where decisions in a specific field are always taken by the same select group of judges.
16. Specialist legal professionals tend to develop concepts which are specific to their field and are (often) unknown to other lawyers. This can lead to compartmentalisation of the law and procedure, cutting specialist judges off from legal realities in other fields, and potentially isolating them from general principles and fundamental rights. This compartmentalisation could undermine the principle of legal certainty.
17. Society may expect to have specialist judges where this is, in practice, not possible. Specialisation is only possible when courts reach a sufficient size. Smaller courts may find it impossible to set up specialist chambers, or an adequate number of such chambers. This forces judges to be versatile, and thus to have the ability to address a range of specialist matters. Excessive individual specialisation of judges would hamper this necessary versatility.
18. In some cases specialisation of judges may be detrimental to the unity of the judiciary. It can give judges the impression that their expertise in their specialist field places them in an elite group of judges who are different from the others. It may also give the general public an impression that some judges are "super-judges" or, on the contrary, that a court is an exclusively technical body separate from the actual judiciary. This may result in a lack of public confidence in courts that are not thought to be specialist enough.
19. Setting up a highly specialist court may have the purpose or the effect of separating judges from the rest of the judiciary and exposing them to pressure from the parties, interest groups or other State powers.

20. In a select field of law, the danger of an impression of excessive proximity between judges, lawyers and prosecutors during joint training courses, conferences or meetings is real. This could not only tarnish the image of judicial independence and impartiality, but could also expose judges to a real risk of secret influence and therefore orientation of their decisions.
21. Since courts require an adequate workload, setting up a court specialising in a very restricted field can have the effect of concentrating that specialisation within a single court for the whole country or for one national region. This may hamper access to courts or create too great a distance between the judge and the litigant.
22. There is a danger that a specialist judge who is part of a bench and who is responsible for providing particular technical or expert advice may express a personal opinion or account of the facts directly to his or her colleagues without such matters being presented to the parties for their submissions<sup>4</sup>.
23. Setting up specialist courts in response to public concerns (e.g. anti-terrorist courts)<sup>5</sup> can result in the public authorities granting them material and human resources unavailable to other courts.

**B. General principles – respect for fundamental rights and principles: position of the CCJE**

24. The CCJE stresses, above all, the fact that all judges, whether generalist or specialist, must be expert in the art of judging. Judges have the know-how to analyse and appraise the facts and the law and to take decisions in a wide range of fields. To do this they must have a broad knowledge of legal institutions and principles.
25. The member States' replies and the expert's report demonstrate that most cases submitted to courts are dealt with by generalist judges, highlighting the predominant role played by such judges.
26. In principle, judges should be capable of deciding cases in all fields. Their general knowledge of the law and its underlying principles, their common sense and knowledge of the realities of life give them an ability to apply the law in all fields, including specialist areas, with expert assistance if necessary<sup>6</sup>. The role of the "generalist judge" can never be underestimated.
27. In any given court, generalist judges are usually assigned to various specialist sectors, changing assignments several times in the course of their careers. This gives them broad experience of a variety of legal fields, thus enabling them to adapt to new assignments and meet litigants' needs. This is why it is vital, from the outset, for judges to have general training in order to acquire the requisite flexibility and versatility to cope with the needs of a general court, which has to deal with an enormous variety of matters, including those requiring a certain degree of specialisation.
28. Nevertheless, the law has become so complex or specific in some fields that a proper consideration of cases in these fields demands a higher degree of specialisation. The provision of appropriately qualified judges who are responsible for specific fields is therefore recommended.
29. Specialist judges, like all judges, must meet the requirements of independence and impartiality set out in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention). Specialist courts and judges must also meet all the other conditions set out in this provision of the Convention: access to the court, due process, right to a fair hearing and right to be heard within a reasonable time. It is incumbent on the courts to organise their specialist chambers in such a way as to respect these requirements.
30. The CCJE considers that the creation of specialist chambers or courts must be strictly regulated. Such bodies should not undermine the remit of the generalist judge, and must in all cases provide the same safeguards and quality. At the same time, regard must be had to all the criteria governing a judge's work: court size, service requirements, the fact that it is increasingly difficult for judges to master all legal areas and the cost of specialisation.
31. Specialisation must never stand in the way of the quality requirements which every judge must meet. The CCJE notes that these requirements were listed in its Opinion No. 11 (2008) on the quality of judicial decisions, and that the requirements are applicable to all judges and therefore also to

<sup>4</sup> An example here is a patent court with non-jurist judges having specific technical knowledge.

<sup>5</sup> "Specialist courts" must be distinguished from "ad hoc" or extraordinary courts – see also paragraph 37 below.

<sup>6</sup> As, for example, in the areas of health, industrial accidents, fire, building, technological affairs etc.

specialist judges. Everything necessary must be done to guarantee the optimum conditions for the administration of justice in specialist courts.

32. In principle, general procedural rules must also apply in specialist courts. Introducing specific procedures for each specialist court is liable to lead to a proliferation of such procedures, creating risks vis-à-vis access to justice and certainty of the law. Specific procedural rules are only permissible if they respond to one of the needs which led to the setting up of the specialist court (e.g. proceedings relating to family law, where examination of children is subject to specific rules geared to safeguarding their interests).
33. It is always vital to ensure that the principles of a fair trial are respected, namely impartiality of the tribunal as a whole and the judge's freedom to assess evidence. It is also vital that where the system of an assessor or expert who sits as part of the judicial tribunal exists, the parties retain the ability to respond to advice given to the legally trained judge by this assessor or expert. Otherwise an expert view could be included in a judgment without the parties having had the opportunity to test or challenge it. The CCJE would regard as preferable a system where the judge appoints an expert or the parties can themselves call experts as witnesses whose findings and conclusions can be challenged and debated between the parties before the judge.
34. All cases, whether before a specialist or generalist court, must be examined with the same diligence. There are no grounds for prioritising cases dealt with by specialist courts. The only permissible priorities are those based on objective need, e.g. proceedings involving deprivation of liberty or urgent measures in matters of custody of children, protection of property or persons, environment, public health, public order or security.
35. While specialist courts must benefit from adequate human, administrative and material resources necessary to perform their work, this must not be to the detriment of other courts which should enjoy the same conditions in terms of resources.
36. The CCJE considers that greater mobility and flexibility on the part of judges might help remedy the above-mentioned disadvantages of specialisation. Judges should be entitled to change court or specialisation in the course of their career, or even move from specialist to generalist duties or vice-versa. Mobility and flexibility not only provide judges with more varied and diversified career opportunities but also allow them to take stock and move into other legal disciplines, which necessarily fosters the development of case-law and law in general. However, such mobility and flexibility should not endanger the principle of independence and irremovability of judges<sup>7</sup>.
37. Providing specialist judges to meet the complexity or particular requirements in specific legal fields is a separate matter from setting up special, *ad hoc* or extraordinary courts as dictated by individual or specific circumstances. There is a potential danger of these latter courts failing to provide all the safeguards enshrined in Article 6 of the Convention. The CCJE has already expressed its objections to the establishment of such courts, and refers here to the content of its Opinion No. 8 (2006) on the role of judges in protecting the rule of law and human rights in the context of terrorism. In any event, the CCJE stresses that where such courts do exist, they must fulfil all the safeguards incumbent on ordinary courts.
38. In sum, the CCJE believes that specialisation can only be justified if it promotes the administration of justice, i.e. if it proves preferable in order to ensure the quality of both the proceedings and the judicial decisions.

## **C. Certain aspects of specialisation**

### **1. Specialisation of judges**

39. In the view of the CCJE the principles of this Opinion are applicable to the types of specialist courts considered below.
40. The replies to the questionnaire demonstrate that there are significant differences between member States concerning the types of judge used in "specialist" courts and tribunals.

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<sup>7</sup> See Opinion No. 1 (2001) of the CCJE, paragraphs 57, 59 and 60.

41. Specialisation can be brought about by different means. Depending upon what the legal framework of the relevant state permits, there can be either specialist courts that are separate and distinct from the general organisation of the judiciary as a whole or specialist courts or chambers that are part of the general judicial system. The jurisdiction of specialist courts or chambers will often differ from that of general courts; there are frequently far fewer of them, and they are sometimes only found in a country's capital. Specialist courts and chambers may include lay judges.

42. The most widespread means of achieving specialisation is by the creation of specialist chambers or departments. This can be achieved often by means of internal court rules. The main sectors of specialisation are: family and juvenile law; intellectual property law; commercial law; insolvency law; serious crimes; the investigation of crimes and the enforcement of criminal sanctions.

**i. "Non-jurist judges"**

43. In many Member States there are specialist courts or tribunals which consist of one or more judges with a legal training and one or more members of the court or the tribunal who are non-lawyers. There is a large variety of such "non-jurist judges", and it is impossible to give a comprehensive analysis of them here. Frequently these "non-jurist judges" either represent one or other group of interests (e.g. employers or employees; landlords and tenants, *échevins*), or have a specific expertise appropriate to the specialist court or tribunal concerned.

**ii. Professional judges**

44. Professional judges may become specialist judges by several means. It may be by means of experience gained either as a specialist lawyer before appointment as a judge or as a result of experience in specialist work following the appointment as a judge. Alternatively, the specialist judge may have received specific training in a specialist area of the law or in a non-legal area and then been appointed to a specialist court or deal with specialist cases in a general court.

45. Specialisation of judges at the higher levels of a court structure where it exists should still permit a certain degree of versatility in the judges so that there can be flexibility in dealing with all types of cases at the higher level. This flexibility is necessary to ensure that appellate courts fulfil their legal and constitutional mission, i.e. to guarantee consistency in the interpretation and application of legislation and of case-law. Also, this flexibility will ensure that a specialised area is not dealt with, at an appellate level, by too narrow a group of judges, who might then be in the position to impose their view in a certain field and thus to prevent developments of the law in that area.

**2. Specialisation of certain courts or courts within a larger group**

46. In some jurisdictions there are specialist courts which exist apart from the generalist courts<sup>8</sup>. In some cases these separate specialist courts have been created as a result of EU instruments providing for the establishment of specialist courts or sections of courts with a larger jurisdiction<sup>9</sup>. In other cases the specialist court may be a part of a larger court grouping<sup>10</sup>. In each case the court itself is specialist as are the judges who sit in it. The structure adopted in each country is partly a result of history and partly a result of the demand for a particular type of specialist court or judge in that jurisdiction.

**3. Regional distribution of specialist judges**

47. It is necessary to take account of the fact that in some highly specialised areas the number of cases brought before courts is very low. In that case it may be necessary to concentrate the specialist judges in one court so as to ensure that they have a balanced caseload per judge and so that they can take on other, non-specialist work as well. However, if this concentration is carried too far there is the risk that the specialist court may become remote from the court users; a problem which in the view of the CCJE should be avoided.

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<sup>8</sup> Examples might be the *tribunaux de commerce* in France, labour tribunals in Belgium, Employment Tribunals in the UK.

<sup>9</sup> See examples listed in footnote 2.

<sup>10</sup> In England and Wales the Patent Court is a part of the Chancery Division which deals mostly with property and tax disputes. The Commercial Court is a part of the Queen's Bench Division, which deals with contract and delict disputes and administrative law issues.

#### **4. Human, material and financial resources**

48. It is essential that specialist judges and courts are provided with adequate human and material resources, especially information technology.
49. Where the expected caseload for specialist courts is small in comparison to other courts, consideration should be given to developing and using resources and technologies which can be used collectively by several specialist courts or better still by all courts. Merging human and material resources can be a means to avoid problems connected with organising specialisation. Creating large “justice centres” with generalist and specialist courts and panels could, however, with increasing distance between court locations, impede easy access to courts.
50. The requirements and costs of specialist courts and judges may be greater than those of generalist courts and judges, e.g. because special precautions are required, because files are voluminous, or because trials and judgements are lengthy.
51. When such additional cost items can be identified in a given field of specialisation, there is justification for charging a specific group of litigants with higher fees, in order to cover the whole or part of those extra costs. This may apply, for example, to commercial or industrial construction cases, or to patent or competition cases, but not, for example, to specialisations in child custody cases, child maintenance cases, or other types of family cases. Higher costs for specialised cases should not exceed the additional work undertaken by the courts and should be proportionate to the work entailed for the courts and to the benefits of specialisation, both for litigants and for the courts. Nor does the introduction of specialist courts simply with the aim of obtaining more revenue seem either sensible or justifiable.

#### **D. Specialisation and status of the judge**

##### **1. Status of the specialised judge**

52. In all the types of specialisation described above, it is important that the role of the judge as a member of the judiciary remains unaltered. The specialisation of judges cannot justify or demand any deviation from the principle of the independence of the judiciary in any of its aspects (i.e. the independence of both courts and individual judges, see CCJE Opinion No. 1 (2001)).
53. The guiding principle should be to treat specialist judges, with respect to their status, in no way differently from generalist judges. Laws and rules governing appointment, tenure, promotion, irremovability and discipline should therefore be the same for specialist as for generalist judges.
54. This can best be achieved by the existence of one constituent body of both generalist and specialist judges. A single corpus of judges will guarantee that all judges respect fundamental rights and principles which must be universally applicable. Accordingly, the CCJE is not in favour of the creation of different judicial bodies or systems according to particular specialisations, which could result in different judges being subject to different rules in different organisations.
55. The CCJE is aware that in many European countries there are, traditionally, several distinct judicial hierarchies (e.g. in ordinary and administrative courts). They may also be linked to differences in the status of judges. The CCJE considers that such separate hierarchies may complicate the administration of and access to justice.
56. In the CCJE’s view, it should be ensured that:
- jurisdictional disputes do not restrict access to justice or cause delays contrary to Article 6 of the Convention;
  - appropriate access to other judicial hierarchies, specialist courts, bodies and functions is available to all judges;
  - all judges of the same seniority receive the same remuneration, with the exception of any specific additional remuneration for special duties (see the following paragraph).
57. The principle of equal status for generalist and specialist judges should also apply to remuneration. Recommendation No. Rec(2010)12 of the Committee of Ministers provides in Article 54 that remuneration of judges should be “commensurate with their profession and responsibilities”, in order,



inter alia, to “shield them from inducements aimed at influencing their decisions”<sup>11</sup>. Taking this into account, any additional salary or any other emolument granted by virtue solely of a judge’s specialisation does not seem justified, because the specifics of the profession and the burden of responsibilities, as a rule, are of equal weight for the generalist and the specialist judge. Additional salary, other emoluments or certain remuneration (e.g. in case of night duty) may be justified where specific grounds can be identified which permit the conclusion that either the specifics of the profession of the specialist judge or the burden of his/her responsibilities (including a personal burden that may come with an assignment in a specialist function) demand such compensation.

58. The rules of ethics and of criminal, civil and disciplinary liability of judges must not differ between generalist and specialised judges. Standards of judicial conduct as set out in CCJE Opinion No. 3 (2002) must apply equally to specialist and non-specialist judges. Sufficient grounds for any different treatment have not been identified.
59. If a specialist judge is likely to be dealing with only a small and specialist group of lawyers, or even litigants, he/she may need to take caution in his own conduct to ensure his/her impartiality and independence.

## **2. Evaluation and promotion**

60. As regards evaluation of a judge’s work performance, the criteria are manifold and well known (see CCJE Opinions Nos. 3 and 10 (2007)). Specialisation in itself does not justify granting a higher value to the specialist judge’s work. Flexibility shown in accepting one or more fields of specialisation may be a relevant factor for evaluation of a judge’s work performance.
61. The council for the judiciary or other independent body responsible for evaluating the performance of judges should, therefore, be very careful in determining whether and to what extent the performance of an individual specialist judge is comparable to that of a generalist judge. This exercise requires particular diligence and consideration, as it is generally easier to obtain a clear picture of a generalist’s performance than that of a specialist who may be a member of a small group and whose work may not be as transparent or known for the evaluator.
62. With regard to promotion, similar considerations apply<sup>12</sup>. In the CCJE’s view to grant earlier promotions to specialist judges just because of their specialisation is not justifiable.

## **3. Availability of training and specialisation**

63. The principles set out in the CCJE Opinion No. 4 (2003) for general training apply equally to specialist training. It follows from the fact that, in principle, the status of specialist judges does not differ from that of generalist judges that all the requirements as to safeguarding judges’ independence and as to providing the best possible quality of training apply both to the generalist judges’ and the specialist judges’ fields. Generally, training courses should be open to all judges.
64. In principle, a judge’s wish to specialise should be respected. In this regard the CCJE refers to its Opinion No. 10, and in particular to the provisions dealing with the selection of judges. Equally, sufficient training<sup>13</sup> should be available within a reasonable time once such a wish is known. Such training should be offered prior to the judge’s assignment in the specialist field and it should be completed before starting the new functions.
65. There must be a balance between training requirements and their usefulness and, on the other hand, the resources available. Therefore, specialist training cannot, for example, be expected where resources for such training cannot be provided or could only be provided at the expense of more important training needs. Assignment in a specialist field cannot be demanded if, for example, the expected caseload in the respective field is too small to justify specialist courts or panels. The size of the court, of the court district, of the region, even of the state, may warrant different solutions as to specialisation and with respect to training in special fields. Where appropriate, however, co-operation in continuous training across national borders could be helpful.

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<sup>11</sup> See also CCJE Opinion No. 1, paragraph 61.

<sup>12</sup> See CCJE Opinion No. 1, paragraph 29.

<sup>13</sup> See CCJE Opinion No. 4, paragraph 30.

#### **4. Role of the Council for the Judiciary**

66. The powers and responsibilities of a high council for the judiciary, where such a body exists, or an equivalent body, have to be applied in the same manner to generalist and specialist judges. Specialists should be represented or have the opportunity to present their problems in the same way as generalists. Any preferential treatment of one group or another should be avoided, in the public interest.

#### **5. Specialisation and participation in judges' associations**

67. Specialist judges must have the same right as all other judges to become and remain members of judges' associations. In the interests of the cohesion of the judicial body as a whole, separate associations for specialist judges are not desirable. Their specific subject-orientated interests as specialist judges, such as professional exchanges, conferences, meetings etc. should be provided for; however, their status-related interests can and should be safeguarded within a general association of judges.

#### **Conclusions**

- i. The CCJE stresses, above all, the fact that all judges, whether generalist or specialist, must be expert in the art of judging.
- ii. In principle, the predominant role in judicial adjudication should be undertaken by "generalist" judges.
- iii. Specialist judges and courts should only be introduced when necessary because of the complexity or specificity of the law or facts and thus for the proper administration of justice.
- iv. Specialist judges and courts should always remain a part of a single judicial body as a whole.
- v. Specialist judges, like "generalist" judges, must meet the requirements of independence and impartiality in accordance with Article 6 of the European Convention on Human Rights.
- vi. In principle, generalist and specialist judges should be of equal status. The rules of ethics and liability of judges must be the same for all.
- vii. Specialisation must not dilute the quality of justice, either in "generalist" courts or in specialist courts.
- viii. Mobility and flexibility on the part of judges will often be sufficient to meet the needs for specialisation. In principle, the opportunity to specialise and to undertake training as such should be available to all judges. Specialist training should be organised by public judicial training institutions.
- ix. Rather than having specialist, non-jurist assessors sitting in specialist panels of judges, it is preferable that experts be appointed by the court or the parties and their opinions be subject to challenges and submissions by the parties.
- x. The powers and responsibilities of a council of the judiciary or similar body should apply equally to generalist and specialist judges.

# Opinion No. 16 (2013)

of the Consultative Council of European Judges (CCJE)  
to the Committee of Ministers of the Council of Europe

## The relations between judges and lawyers

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### I. INTRODUCTION

1. In accordance with the terms of reference entrusted to it by the Committee of Ministers, the Consultative Council of European Judges (CCJE) decided to prepare, for 2013, an Opinion on the relations between judges and lawyers with a view to the better quality and efficiency of justice.
2. The Opinion has been prepared on the basis of previous CCJE Opinions and the relevant instruments of the Council of Europe, in particular the European Charter on the Statute for Judges (1998), the Magna Carta of Judges (2010) and the Committee of Ministers' Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities. It also takes account of the United Nations Basic Principles on the Independence of the Judiciary (1985), the United Nations Basic Principles on the Role of Lawyers (1990), the Bangalore Principles of Judicial Conduct (2002) and the Commentary of the Judicial Integrity Group on the Bangalore Principles (2007). Further, the Opinion draws on the work of the Council of Bars and Law Societies of Europe (CCBE), notably the Code of Conduct for European Lawyers (1998, amended in 2002 and 2006) and the Charter of Core Principles of the European Legal Profession (2006).

It takes account of the states' replies to the questionnaire and the report drawn up by the scientific expert Ms Natalie FRICERO (France), as well as the contributions made in the conference in Paris on 7 November 2012, organised jointly by the CCJE and the Paris Bar Association, and the conference in Rome on 13 June 2013, organised by the CCJE, the Italian High Council for the Judiciary and the National Bar Council of Italy.

The CCJE has also consulted the CCBE in the course of the preparation of this Opinion.

### II. RESPECTIVE ROLES OF JUDGES AND LAWYERS IN THE FUNCTIONING OF JUSTICE

3. States governed by the rule of law should organise their judicial systems in such a way that the supremacy of law and respect for fundamental rights and freedoms are guaranteed in conformity with the European Convention on Human Rights (hereafter the Convention), as well as the case-law of the European Court of Human Rights (hereafter the Court). Both judges and lawyers have vital roles to play in fulfilling this objective in the best possible way.

The CCJE has already acknowledged the essential role of co-operation among the various parties involved in the proper functioning of justice and the interaction between these actors. Thus, in paragraph 10 of its Opinion No. 12 (2009), the CCJE affirmed that the sharing of common legal principles and ethical values by all the professionals involved in the legal process is essential for the proper administration of justice.

4. Judges and lawyers have different roles to play in the legal process, but the contribution of both professions is necessary in order to arrive at a fair and efficient solution to all legal processes according to law.
5. Paragraph 2 of the UN Basic Principles on the Independence of the Judiciary stipulates that the judiciary shall decide matters before them impartially, on the basis of the facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. In the same document, paragraph 6 states that the principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

The CCJE stressed in its Opinion No. 1 (2001) that judicial independence is not a prerogative or privilege in the interests of the judges, but is a pre-requisite to the rule of law and a guarantee for those seeking and expecting justice.

6. Within the framework of their professional obligation to defend the rights and interests of their clients, lawyers must also play an essential role in the fair administration of justice. Paragraph 6 of the Commentary on the Charter of Core Principles of the European Legal Profession of the CCBE defines the lawyer's role as follows: *"The lawyer's role, whether retained by an individual, a corporation or the state, is as the client's trusted adviser and representative, as a professional respected by third parties, and as an indispensable participant in the fair administration of justice. By embodying all these elements, the lawyer, who faithfully serves his or her own client's interests and protects the client's rights, also fulfils the functions of the lawyer in Society - which are to forestall and prevent conflicts, to ensure that conflicts are resolved in accordance with recognised principles of civil, public or criminal law and with due account of rights and interests, to further the development of the law, and to defend liberty, justice and the rule of law"*. As it is stated in paragraph 1.1 of the Code of Conduct for European Lawyers of the CCBE, respect for the lawyer's professional function is an essential condition for the rule of law and democracy in society. The UN Basic Principles on the Role of Lawyers state that adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession. Principle 12 stipulates that lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.
7. Judges and lawyers must be independent in the exercise of their duties, and must also be, and be seen to be, independent from each other. This independence is affirmed by the statute and ethical principles adopted by each profession. The CCJE considers such independence vital for the proper functioning of justice.

The CCJE refers to Recommendation CM/Rec (2010)12, paragraph 7, which states that the independence of judges should be guaranteed at the highest possible legal level. The independence of lawyers should be guaranteed in the same way.

8. The CCJE refers to paragraph 12 of Recommendation CM/Rec(2010)12 which states that, without prejudice to their independence, judges and the judiciary should maintain constructive working relations with institutions and public authorities involved in the management and administration of the courts, as well as all the professionals whose tasks are related to the work of judges, in order to facilitate an effective and efficient administration of justice. Constructive relations are equally necessary in the course of proceedings, in order to obtain a fair and efficient solution to the legal process concerned.
9. Two areas of relations between judges and lawyers may be distinguished:
  - on the one hand, the relations between judges and lawyers which stem from the procedural principles and rules of each state and which will have a direct impact on the efficiency and quality of judicial proceedings. In the conclusions and recommendations set out in its Opinion No. 11 (2008) on the quality of judicial decisions, the CCJE pointed out that the standard of quality of judicial decisions will clearly be the result of interactions between the numerous actors in the judicial system;
  - on the other hand, the relations which result from the professional conduct of judges and lawyers and which require mutual respect for the roles played by each side and a constructive dialogue between judges and lawyers.

### **III. IMPROVEMENT OF PROCEDURAL RELATIONS, DIALOGUE AND COMMUNICATION DURING PROCEEDINGS**

10. Judges and lawyers share a fundamental obligation, namely compliance with the procedural rules and the principles of a fair trial.

The CCJE is of the opinion that constructive relations between judges and lawyers will improve the quality and efficiency of proceedings. They will also help in meeting the parties' needs: litigants expect that they and their lawyers will be heard and also expect judges and lawyers to contribute together to a fair resolution of their case according to law and within a reasonable time.

11. However, the quality and efficiency of judicial proceedings depend in the first place on adequate procedural legislation and rules on the principal aspects of procedure for civil, criminal and administrative cases. States should establish such provisions in accordance with Article 6 of the

Convention. The drafting process for these provisions should involve the consultation of judges and lawyers, not in the interests of the two professions, but in the interest of the fair administration of justice. Consultation of court users is also important. It is also essential that these procedural frameworks are regularly evaluated and updated, where necessary, and that judges, lawyers and court users are involved in this process.

12. The CCJE considers that such legislation should provide judges with effective procedural tools to implement the principles of a fair trial and to prevent undue delays or illegitimate delaying tactics. Such legislation should be sufficiently firm, and should provide for clear and fair time-limits, while also permitting the necessary flexibility.
13. Procedural rules form an essential tool to enable the resolution of legal disputes. Procedural rules determine the respective roles of judges and lawyers. It is essential that both judges and lawyers have a good knowledge and understanding of these rules, in the interest of a fair and timely resolution of the proceedings.
14. Guidelines agreed upon at an institutional level can also be useful to encourage co-operation and dialogue. The CCJE considers that courts should encourage the establishment of good practices resulting from agreements between the courts and the Bar. Agreements concerning the management and conduct of proceedings have been established in many judicial systems, taking a variety of forms<sup>1</sup>. The CCJE reaffirms that such procedural agreements should comply with procedural law and should be made public in order to ensure transparency for lawyers and litigants.
15. In practice, procedural rules, whether they concern civil, criminal or administrative cases, are often complex and allow a variety of procedural stages and intermediate appeals. This may cause unreasonable delays and high costs to the parties, as well as to society in general. The CCJE strongly supports efforts to analyse and evaluate the existing procedural rules in member States and to develop, where necessary, more transparent and adequate rules.

The international exchange of experience, by both judges and lawyers, should foster the development of “best practices” in the area of procedural frameworks. However, the different social and legal traditions of countries should be taken into account.

16. Equal access to information on procedural and substantive laws, and also to landmark case-law, should be provided as far as possible, both for judges and lawyers. The CCJE refers to paragraph 24 of Opinion No. 14 (2011), in which it considered that the judiciary should make case law, or at least landmark decisions, available on the internet i) free of charge, ii) in an easily accessible form, and iii) taking account of personal data protection.
17. Judges and lawyers must co-operate in meeting the needs of the parties. To this end, the CCJE considers it important to develop planning hearings and procedural calendars, to facilitate, in the interests of the parties, an effective co-operation between judges and lawyers. Further, judges and lawyers must cooperate in facilitating the friendly settlements in the interests of the parties. In its Opinion No. 6 (2004), the CCJE recommended the development of arrangements for the friendly settlement of cases. Joint training sessions can improve the understanding of the respective roles of judges and lawyers in the field of friendly settlements of disputes, by the processes of conciliation or mediation.
18. It is necessary to establish proper communication between courts and lawyers to ensure the speed and efficiency of proceedings. The CCJE considers that states should introduce systems facilitating computer communication between the courts and lawyers, in order to improve the service for lawyers and to enable them to consult easily the procedural status of cases. In its Opinion No. 14 (2011) on “Justice and Information Technologies”, the CCJE notes that information technologies play a central role in the provision of information to judges, lawyers and other stakeholders in the justice system as well as to the public and the media.

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<sup>1</sup> See CEPEJ Studies No. 16, Contractualisation and judicial process in Europe.

#### **IV. DEVELOPMENT OF MUTUAL UNDERSTANDING AND RESPECT FOR EACH OTHER'S ROLE - ETHICAL PRINCIPLES**

19. Judges and lawyers each have their own set of ethical principles. However, several ethical principles are common to both judges and lawyers, e.g. compliance with the law, professional secrecy, integrity and dignity, respect for litigants, competence, fairness and mutual respect.
20. The ethical principles of judges and lawyers should also concern themselves with the relations between the two professions.

With regard to judges, the CCJE stated in Opinion No. 3 (2002), paragraph 23, that judges should show the proper consideration due to all persons (for example, parties, witnesses, counsel) and no distinction should be made based on unlawful grounds or which would be incompatible with the appropriate discharge of their functions. Paragraph 5.3 of the Bangalore Principles states that a judge shall carry out his/her judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties. A judge must maintain order and dignity of debate in all proceedings before the court and be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity.

With regard to lawyers, paragraphs 4.1, 4.2, 4.3 and 4.4 of the CCBE Code of Conduct for European Lawyers express the following principles: a lawyer who appears, or takes part in a case, before a court or tribunal must comply with the rules of conduct applied before that court or tribunal. A lawyer must always have due regard for the fair conduct of the proceedings. A lawyer shall, while maintaining due respect and courtesy towards the court, defend the interests of the client honourably and fearlessly without regard to the lawyer's own interests or to any consequences to him- or herself or to any other person. A lawyer shall never knowingly give false or misleading information to the court.

21. The CCJE considers that the relations between judges and lawyers should be based on the mutual understanding of each other's role, on mutual respect and on independence vis-à-vis each other.

The CCJE accordingly considers it necessary to develop dialogues and exchanges between judges and lawyers at a national and European institutional level on the issue of their mutual relations. The ethical principles of both judges and lawyers should be taken into account. In this regard, the CCJE encourages the identification of common ethical principles, such as the duty of independence, the duty to sustain the rule of law at all times, co-operation to ensure a fair and swift conduct of the proceedings and permanent professional training. Professional associations and independent governing bodies of both judges and lawyers should be responsible for this process.

22. Training conferences for judges and lawyers should deal with their respective roles and with their relations, with the general aim of promoting the fair and efficient settlement of disputes, whilst respecting the independence of both sides. The CCJE refers to paragraph 10 of its Opinion No. 12 (2009), in which it considered that, where appropriate, joint training for judges, public prosecutors and lawyers on themes of common interest could contribute to the achievement of justice of the highest quality.
23. In the member States of the Council of Europe, judges are recruited in a wide variety of ways. The CCJE refers to the CEPEJ report "Evaluation of European Judicial Systems - Edition 2012", Chapter 11.1. In some countries, judges are mainly recruited from amongst experienced lawyers. In other countries, judges and lawyers do not share a common career. In these countries, the development of mutual understanding between the two professions is particularly important. One possible way of fostering such understanding would be the establishment of internships for trainee-judges in law firms and for trainee-lawyers in courts. If this is done, it is essential that the requirements of the independence and impartiality of the judiciary are guaranteed and that internships are organised in a transparent way.
24. Relations between judges and lawyers should always preserve the court's impartiality and image of impartiality. Judges and lawyers should be fully conscious of this, and adequate procedural and ethical rules should safeguard this impartiality.

25. Both judges and lawyers enjoy freedom of expression under Article 10 of the Convention.

Judges are, however, required to preserve the confidentiality of the court's deliberations and their impartiality, which implies, inter alia, that they must refrain from commenting on proceedings and on the work of lawyers.

The freedom of expression of lawyers also has its limits, in order to maintain, as is provided for in Article 10, paragraph 2 of the Convention, the authority and impartiality of the judiciary<sup>2</sup>. Respect towards professional colleagues, respect for the rule of law and the fair administration of justice - the principles (h) and (i) of the Charter of Core Principles of the European Legal Profession of the CCBE - require abstention from abusive criticism of colleagues, of individual judges and of court procedures and decisions.

## V. RECOMMENDATIONS

The CCJE reaffirms that "*the sharing of common legal principles and ethical values by all the professionals involved in the legal process is essential for the proper administration of justice*", and sets out the following recommendations:

- I. The CCJE recommends that states establish appropriate procedural provisions, which must define the activities of judges and lawyers and empower judges to implement effectively the principles of a fair trial and to prevent illegitimate delaying tactics of the parties. It also recommends that judges, lawyers and court users be consulted in the drafting of these provisions and that these procedural frameworks be regularly evaluated.
- II. The CCJE supports the international exchange of experience between judges and lawyers with a view of developing "best practices" in the area of procedural frameworks, taking into account, however, the different social and legal traditions of the countries concerned.
- III. The CCJE recommends that judges organise case management hearings within the framework of the relevant procedural laws, and establish, in consultation with the parties, procedural calendars, e.g. by specifying the procedural stages, setting out reasonable and appropriate timeframes and structuring the manner and timing of the presentation of written and oral submissions and evidence.
- IV. The CCJE recommends developing lines of communication between courts and lawyers. Judges and lawyers must be in a position to communicate at all stages in proceedings. The CCJE considers that states should introduce systems facilitating computer communication between the courts and lawyers.
- V. In order to meet the needs of the parties, the CCJE recommends developing arrangements for the friendly settlement of disputes. It considers that understanding the respective roles of judges and lawyers in the framework of friendly settlements by conciliation or mediation is a vital factor for developing this approach and that, as far as possible, joint training sessions on the various modes of friendly settlement should be provided.
- VI. The CCJE recommends the development of dialogues and exchanges between judges and lawyers at an institutional level (both national and international) on the issue of their mutual relations, whilst taking full account of the ethical principles of both lawyers and judges. Such dialogue should facilitate mutual understanding of and respect for the role of each side, with respect for the independence of both judges and lawyers.
- VII. The CCJE considers that, where appropriate, joint training for judges and lawyers on the themes of common interest can improve the quality and efficiency of proceedings.

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<sup>2</sup> See also ECHR *Nikula v. Finland*, 21 March 2002; ECHR *Amihalachioaie v. Moldova*, 20 April 2004.





# Opinion No. 17 (2014)

of the Consultative Council of European Judges (CCJE)  
to the Committee of Ministers of the Council of Europe

## The evaluation of judges' work, the quality of justice and respect for judicial independence

### PART ONE: INTRODUCTION

#### A. Objects of the Opinion

1. The rule of law in a democracy requires not only judicial independence but also the establishment of competent courts rendering judicial decisions of the highest possible quality. The Consultative Council of European Judges (CCJE) has paid constant attention to two fundamental matters. First, the protection of judicial independence<sup>1</sup> and secondly, ways of maintaining and improving the quality and efficiency of judicial systems<sup>2</sup>. The individual evaluation of judges is relevant to both these issues. In this Opinion, the phrase "individual evaluation of judges" comprises the assessment of individual judges' professional work and their abilities.
2. In accordance with the terms of reference entrusted to it by the Committee of Ministers, the CCJE resolved to focus on how the individual evaluation of judges' work can improve the quality of justice without infringing judicial independence. This Opinion mainly addresses the individual evaluation of judges who have already been appointed to office for their period of tenure; it does not discuss either judges' first appointment<sup>3</sup> or their initial training<sup>4</sup>. Though it touches upon the relationship between disciplinary proceedings and evaluation, the Opinion does not primarily address questions of discipline or criminal responsibility<sup>5</sup>. Nor does it discuss the evaluation of the performance of a country's judicial system as a whole or of constituent courts in a judicial system. Those are major topics on their own which raise separate important issues and perspectives.
3. This Opinion has been prepared on the basis of previous CCJE Opinions and the Magna Carta of Judges (2010) and the relevant instruments of the Council of Europe, in particular the European Charter on the Statute for Judges (1998) and Recommendation CM/Rec(2010)12 of the Committee of Ministers on judges: independence, efficiency and responsibilities (hereafter Recommendation CM/Rec(2010)12). It also takes account of the United Nations Basic Principles on the Independence of the Judiciary (1985), the Bangalore Principles of Judicial Conduct (2002), the General Report<sup>6</sup> of the International Association of Judges (IAJ) (2006) (hereafter IAJ General Report), the OSCE Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010) – Judicial Administration, Selection and Accountability (hereafter Kyiv Recommendations), and the Report of 2012-2013 of the European Network of Councils for the Judiciary (ENCJ) on minimum standards regarding evaluation of professional performance and irremovability of members of the judiciary (hereafter ENCJ Report). The Opinion takes account of the member states' replies to the questionnaire on the individual evaluation and assessment of functioning judges and of a preparatory report drawn up by the expert appointed by the CCJE, Ms Anne SANDERS (Germany).

#### B. The key tasks of the judge as the object of the evaluation

4. Judges perform indispensable duties in each democratic society that respects the rule of law<sup>7</sup>. Judges must protect the rights and freedoms of all persons equally. Judges must take steps to provide efficient and affordable dispute resolution<sup>8</sup> and decide cases in a timely manner and independently and must be

<sup>1</sup> See the CCJE Opinion No. 1(2001).

<sup>2</sup> See the CCJE Opinions No. 3(2002), No 4(2003), No. 6(2004), No. 11(2008), No. 14(2011).

<sup>3</sup> See the CCJE Opinion No. 1(2001), paras 17-56.

<sup>4</sup> See the CCJE Opinion No. 4(2003), paras 23-30.

<sup>5</sup> See the CCJE Opinion No. 3(2002), para 51-77.

<sup>6</sup> This Report is entitled "How can the appointment and assessment (qualitative and quantitative) of judges be made consistent with the principle of judicial independence?", see at <http://www.iaj-uim.org/iuw/wp-content/uploads/2013/02/ISC-2006-conclusions-E.pdf>

<sup>7</sup> See Recommendation CM/Rec(2010)12, paras 59 – 65.

<sup>8</sup> See the CCJE Magna Carta of Judges (2010), para 15.

bound only by the law. They must give cogent reasons for their decisions<sup>9</sup> and must write in a clear and comprehensible manner<sup>10</sup>. Moreover, all binding decisions of judges must also be enforced effectively<sup>11</sup>. Judicial independence does not mean that judges are not accountable for their work. The CCJE has laid emphasis on maintaining and improving the quality and efficiency of judicial systems in the interest of all citizens<sup>12</sup>. Where it exists, the individual evaluation of judges should aim at improving the judiciary while ensuring the highest quality possible. That exercise must be done in the interest of the public as a whole.

### **C. Primacy of independence: the problem of reconciling evaluation with judicial independence**

5. Judicial independence is a pre-requisite for safeguarding the rule of law and the fundamental guarantee of a fair trial<sup>13</sup>. As the CCJE has indicated in its previous Opinions, judicial independence can be compromised by various matters which may have an adverse impact on the administration of justice<sup>14</sup>, such as a lack of financial resources<sup>15</sup>, problems concerning the initial and in-service training of judges<sup>16</sup>, unsatisfactory elements regarding the organisation of the judiciary and also the possible civil and criminal liability of judges<sup>17</sup>.
6. Accordingly, the fundamental rule for any individual evaluation of judges must be that it maintains total respect for judicial independence<sup>18</sup>. When an individual evaluation has consequences for a judge's promotion, salary and pension or may even lead to his or her removal from office, there is a risk that the evaluated judge will not decide cases according to his or her objective interpretation of the facts and the law, but in a way that may be thought to please the evaluators. Therefore, any evaluation of judges by members of the legislative or executive arms of the state is especially problematic. However, the risk to judicial independence is not completely avoided even if the evaluation is undertaken by other judges. Judicial independence depends not only on freedom from undue influence from external sources, but also requires freedom from undue influence internally, which might in some situations come from the attitude of other judges<sup>19</sup>, including presidents of courts.

## **PART TWO: CURRENT PRACTICE IN MEMBER STATES**

### **D. Why have evaluation at all and what types of evaluation are currently there?**

7. Evaluation of judges is undertaken in order to assess the abilities of individual judges and the quality and quantity of the tasks they have completed. Evaluation is used, for example: to provide feedback, to identify training needs and to determine "performance based" salaries. It can also be used in order to seek out suitable candidates for promotion. It is argued by some that, in these ways, individual evaluation can, in principle, assist in improving the quality of a judicial system and can thereby also ensure the proper accountability of the judiciary towards the public.
8. The ENCJ Report distinguishes between countries using "formal" and "informal" evaluation systems. In summary, these systems are:
  - (I) Formal
9. In the case of most formal evaluations, the aims of the evaluation, the criteria used, the composition of the evaluating body, the procedure for evaluation and its possible consequences are all clearly set out in advance of any evaluation exercise. If evaluation is conducted in such a formal way, the rights and duties of the evaluated judge and the evaluating body will be regulated by means of primary or subordinate legislation.

<sup>9</sup> See the CCJE Opinion No. 11 (2008), para 36.

<sup>10</sup> See the CCJE Opinion No. 11 (2008), para 32.

<sup>11</sup> See the CCJE Opinion No. 13(2010), Conclusion A; the CCJE Magna Carta of Judges (2010), para 17.

<sup>12</sup> See the CCJE Opinions No. 1(2001), No. 3(2002), No 4(2003), No. 6(2004) and No. 11(2008).

<sup>13</sup> See the CCJE Opinion No. 1(2001), para 10; Recommendation CM/Rec(2010)12, paras 3 and 11; the CCJE Magna Carta of Judges (2010), para 2.

<sup>14</sup> See the CCJE Magna Carta of Judges (2010), paras 3 and 4.

<sup>15</sup> See the CCJE Opinion No. 2(2001), para 2.

<sup>16</sup> See the CCJE Opinion No. 4(2003), paras 4, 8, 14 and 23-37.

<sup>17</sup> See the CCJE Opinion No. 3(2002), para 51.

<sup>18</sup> See the CCJE Opinion No. 1(2001), especially para 45, the CCJE Opinion No. 6(2004), para 34.

<sup>19</sup> See the CCJE Opinion No. 1(2001), para 66, Recommendation CM/Rec(2010)12, paras 22-25.

(II) Informal

10. An informal evaluation will not use either formalised ratings or criteria. It will usually have no direct consequences for the evaluated judge. An informal evaluation might be conducted by way of a discussion which will allow the evaluated judge to address problems, show his or her abilities and agree on career goals<sup>20</sup>. An informal gathering of information about a judge who is a candidate for promotion<sup>21</sup> might also be regarded as an informal evaluation.

**E. Evaluation as practiced in member states**

(I) Where it is used

11. Twenty four member states explained in their answers to the questionnaire that they evaluate judges in a more or less formal way (Albania, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Estonia, France, Georgia, Germany, Greece, Hungary, Italy, Republic of Moldova, Monaco, The Netherlands, Poland, Romania, Slovenia, Spain, “the former Yugoslav Republic of Macedonia”, Turkey, Ukraine). Estonia and Ukraine evaluate judges only before their permanent appointment. Nine member states (Czech Republic, Denmark, Finland, Iceland, Luxembourg, Norway, Sweden, Switzerland, United Kingdom) stated that they did not use a formal system of individual evaluation. However, Sweden uses certain evaluation tools in order to ascertain a small part of a judge’s wages according to his/her performance<sup>22</sup>, Finland and Switzerland use them in preparation of career development discussions. In the United Kingdom, informal evaluation takes place when a judge’s application for promotion is under consideration.

(II) The aims of the countries that use it: quality of judges; promotion; remuneration and discipline

12. In the majority of countries that use some form of individual evaluation, it aims at assessing, maintaining and improving the quality of the work of judges and the judicial system. Many countries explained that the aim of evaluation is not only for assessing achievements and skills but also in order to identify training needs and to provide feedback. Many member states use evaluation as a basis for decisions on the promotion of judges. For some member states, evaluation is especially important when deciding on the lifetime appointment of recently appointed judges<sup>23</sup>. Other member states use evaluation to ascertain any elements of remuneration or pension based on the individual performance of a judge<sup>24</sup>.

(III) Criteria used

13. In most member states, a number of quantitative and qualitative criteria are used for individual evaluation of judges. Thus factors such as the number of cases decided by the evaluated judge, the time spent on each case and the average time to complete a judgment are frequently taken into account as “quantitative” criteria. Many member states consider as important the number of decisions issued by the evaluated judge and/or the number of cases otherwise concluded (e.g. by settlement or withdrawal)<sup>25</sup>. In some member states, the productivity of a judge is measured against a fixed quota<sup>26</sup> or against the average number of decisions handed down by other judges<sup>27</sup>. As “qualitative” criteria, the quality of a judge’s analysis and the way in which the judge handles complex cases is considered of great importance in the evaluation process. In many member states, the number or percentage of decisions reversed on appeal are factors that are considered of great importance in the evaluation process<sup>28</sup>. In others<sup>29</sup>, because of the principle of judicial independence, neither the numbers of decisions reversed on appeal nor the reasons for the reversal are taken into account, unless they reveal

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<sup>20</sup> See e.g. the system in Finland and the Netherlands.

<sup>21</sup> As in the United Kingdom.

<sup>22</sup> However, stringent safeguards are in place to protect a judge’s independence in the process.

<sup>23</sup> Bulgaria, Estonia, Germany, Hungary, Ukraine.

<sup>24</sup> Spain, Sweden (however, only a very small percentage of the salary is set individually and stringent safeguards are in place to protect the judges’ independence). In Belgium and Bulgaria, a judge’s salary can be reduced because of poor evaluation results. In Turkey, salaries and pensions may be increased because of evaluation results.

<sup>25</sup> Albania, Austria, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Estonia, France, Germany, Greece, Hungary, Italy, Poland, Romania, Slovenia, Spain (when performance based salaries are determined), “the former Yugoslav Republic of Macedonia”, Turkey.

<sup>26</sup> Bosnia and Herzegovina, Spain.

<sup>27</sup> Germany, Poland,

<sup>28</sup> Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, Georgia, Greece, Hungary, Republic of Moldova, Poland, Romania, Spain, “the former Yugoslav Republic of Macedonia”, Turkey.

<sup>29</sup> France and Germany.

grave mistakes. Other factors considered are the ability to mediate between parties, the ability to draft clear and comprehensible judgments, the ability to cooperate with other colleagues, to work in areas of law that are new to the judge and the readiness to take on extra activities within the court's administration such as mentoring and educating recently appointed judges or lawyers<sup>30</sup>. Organisational skills, work ethic<sup>31</sup> or scholarly activities such as publications and lecturing<sup>32</sup> are also treated as factors. Violations of ethical and professional rules/standards are considered in the evaluation process in almost all member states where there is an evaluation of judges and such principles are laid down. All member states which completed the questionnaires differentiate between the process of evaluation and disciplinary measures.

14. The way criteria are assessed in the evaluation process differs widely. Most member states report assigning ratings to evaluated judges. The rating systems used are roughly comparable and use grades such as "very good", "good", "sufficient" and "insufficient"<sup>33</sup> or A, B, C<sup>34</sup>. Some countries refer to the evaluated judge's suitability for promotion in their ratings<sup>35</sup>. Other member states deny using formal ratings<sup>36</sup>. In some member states, data such as the number of cases a judge has decided will be turned into a percentage or into a figure which reflects the performance of each individual judge compared to other judges<sup>37</sup>. In some states, judges whose work has been studied are ranked from the best to the least good judge according to their evaluation<sup>38</sup>. Hungary determines the respective grade of a judge by matching a judge's performance against a "productivity factor". In other states, such quantitative and qualitative factors only provide the starting point for an individual assessment<sup>39</sup>. In some member states, the opinion of bar associations<sup>40</sup>, litigants, colleagues and more senior judges<sup>41</sup> are taken into account.

#### (IV) Types of evaluation and methods/procedures used

15. In most countries, evaluations are conducted routinely and regularly. But member states have adopted different degrees of formality of procedure. Thus Albania, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, France, Georgia, Germany, Greece, Hungary, Italy, Republic of Moldova, Monaco, Poland, Romania, Slovenia, Spain, "the former Yugoslav Republic of Macedonia" and Turkey all use formal evaluation systems. Finland, The Netherlands, Switzerland and the United Kingdom use more informal evaluation systems.
16. In some countries, the evaluation process is in the form of a career development discussion which may be more or less formal in nature. In that discussion, the evaluated judge and the evaluator/the evaluating commission consider career and development goals<sup>42</sup>. In some cases, the evaluation process starts with a self-assessment of the evaluated judge<sup>43</sup>. In other countries, a Council for the Judiciary or a subgroup of it gathers information on the work of the evaluated judge and will decide on the evaluation<sup>44</sup>.
17. In other member states, a single evaluator, usually the president of the court where the evaluated judge performs his or her duties, gathers the relevant information on the judge's work<sup>45</sup>. This will often involve reading the judge's decisions, visiting hearings chaired by the judge and interviewing the individual judge. Often, the evaluator makes the final decision after the judge has had the opportunity to comment on a preliminary draft. In some member states, other professionals take part in the evaluation process<sup>46</sup>.

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<sup>30</sup> Austria, Germany, Slovenia.

<sup>31</sup> Germany, Poland, Sweden.

<sup>32</sup> Croatia, Germany.

<sup>33</sup> Albania, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, France, Germany, Greece, Italy, Republic of Moldova, Monaco, Romania, Slovenia, "the former Yugoslav Republic of Macedonia".

<sup>34</sup> Georgia, Turkey.

<sup>35</sup> Hungary, Slovenia.

<sup>36</sup> Cyprus (with productivity factor), Estonia, Finland, The Netherlands, Sweden, UK.

<sup>37</sup> Bulgaria, Croatia, Estonia, Spain, "the former Yugoslav Republic of Macedonia", Turkey.

<sup>38</sup> Croatia.

<sup>39</sup> Austria, France, Germany.

<sup>40</sup> Greece.

<sup>41</sup> Austria, Germany, Hungary, Monaco, United Kingdom.

<sup>42</sup> Belgium, Finland, France, Monaco, Romania, Switzerland.

<sup>43</sup> Belgium, France, Romania.

<sup>44</sup> Albania, Austria, Bulgaria, Austria, Croatia, Estonia, Italy, Republic of Moldova, Slovenia, "the former Yugoslav Republic of Macedonia", Turkey.

<sup>45</sup> Germany, Greece, Hungary, The Netherlands.

<sup>46</sup> Legal academics and Bar Associations in Estonia; Bar Associations in Greece and psychologists in certain circumstances in Romania.

In Poland, individual evaluation of judges is undertaken in the course of regular court inspections carried out by inspector judges from other courts<sup>47</sup>.

18. Under most systems, the evaluated judge can comment on the draft opinion and is able to challenge the final decision.
19. Some countries reported that though there was no formal peer review procedure, judges were free to assist each other by giving advice and feedback informally<sup>48</sup>. In Austria, a voluntary peer evaluation project was initiated by the Austrian Judges' Association. Judges visit each other's hearings and provide informal feedback.

#### (V) Consequences

20. In most member states, the individual evaluation of judges is an important factor in relation to a judge's chances for promotion and – in particular for a recently appointed judge - of obtaining security of tenure<sup>49</sup>. In some member states, evaluation also plays a role in determining performance related salaries and pensions<sup>50</sup>. Moreover, in some member states, poor performance can lead to the initiation of disciplinary procedures<sup>51</sup>, pay cuts and even a judge's dismissal from office<sup>52</sup>.

### PART THREE: ANALYSIS AND RECOMMENDATIONS

#### F. Why are there different types of evaluation?

##### (I) Judicial structure of a country (how judges are chosen, age, training, promotion etc.)

21. The decision of whether and, if so, how to evaluate judges is inextricably linked to the way in which the judicial structures of different member states have evolved. In particular the stage in their career at which a person is appointed a judge and the criteria by which they may be promoted to higher office would appear to be especially important in determining the type of evaluation that is used. For example, if newly appointed judges have had successful careers as practicing lawyers before appointment as judges (as in the Nordic countries, the United Kingdom and Cyprus) a judicial system might find less need for formal individual evaluation than a system where judges are appointed immediately or soon after finishing their legal education (as in France, Germany and Spain). In a legal system where promotions are made according to seniority (as, for example, in Luxembourg), a judge's qualifications have less need to be assessed by means of individual evaluation.

##### (II) Culture of the country concerned

22. The decision whether and how to evaluate judges is also inextricably linked to the history and culture of a country and those of its legal system. Consequently, the assessment of the need for judicial evaluation differs widely in the member states. Romania and "the former Yugoslav Republic of Macedonia" explained that judicial independence<sup>53</sup> and the trust of the public in the judicial system<sup>54</sup> could be promoted through the individual evaluation of judges. Slovenia stated evaluation ensured judicial accountability and with it the quality of the judicial service. Spain argued that ascertaining a variable part of the salary according to the number of cases a judge had decided would respect judicial independence, whilst the evaluation of judges according to qualitative criteria<sup>55</sup> would endanger it. France and Germany, on the other hand, stated that evaluating only quantitative performance might compromise judicial independence. However, other countries, for example Norway and Switzerland, find evaluation unnecessary to ensure a legal system of high quality. Denmark, Luxembourg and Switzerland stated that individual evaluation of judges was simply incompatible with judicial independence. Here, a judge's conduct may only be judged in the course of disciplinary procedures.

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<sup>47</sup> Greece uses a roughly comparable system.

<sup>48</sup> Bosnia and Herzegovina, Finland, Germany, Greece.

<sup>49</sup> Bulgaria, Estonia, Georgia, Germany, Greece, Ukraine.

<sup>50</sup> Bulgaria, Sweden (however, only a very small percentage of the salary is set individually and stringent safeguards are in place to protect a judge's independence in the process), Spain, Turkey.

<sup>51</sup> Belgium, Bulgaria, Croatia, Cyprus, Greece, Hungary, Poland, Slovenia.

<sup>52</sup> Austria, Estonia, only in rare cases: Greece, Hungary, Italy, Republic of Moldova, Poland, Romania, Slovenia, "the former Yugoslav Republic of Macedonia".

<sup>53</sup> "The former Yugoslav Republic of Macedonia".

<sup>54</sup> Romania.

<sup>55</sup> However, in Spain, qualitative criteria are taken into account when a judge's promotion is in question.

Thus, it appears that what is regarded as imperative for judicial independence in one country is seen to be counterproductive for it in another.

#### **G. The choice in principle: to evaluate or not to evaluate**

23. Two key requirements of any judicial system must be to produce justice of the highest quality and proper accountability in a democratic society. Some form of evaluation of judges is necessary to meet these requirements. The fundamental question is whether such evaluation must be of a “formal” character. The CCJE encourages all member states to consider this question. The answer each member state gives will be in accordance with its judicial system, traditions and culture. If a member state decides that these two key requirements can be met by means other than formal evaluation of individual judges, it could decide not to have such a formal evaluation. If it concludes these requirements cannot be met by other means, the CCJE recommends the adoption of a more formal system of individual evaluation of judges as discussed below.
24. All evaluation should aim at maintaining and improving the quality of the work of judges and thereby the whole judicial system.
25. Informal assessment can take the form of assisting judges by giving them an opportunity for self-assessment, providing feedback and determining their training needs. All these can be effective ways of improving the skills of judges and thereby improving the overall quality of the judiciary. Informal peer review, self-evaluation by judges and advice among judges can also be helpful and should be encouraged<sup>56</sup>.

#### **H. If there is formal evaluation: how to do it?**

(l) Possible aims and their effect on judicial independence

(a) Assisting with the problems of working conditions

26. Judicial systems should use information gathered in evaluation procedures not only to evaluate individual judges but also to provide material which can assist in improving the organisational structure of courts and the working conditions of judges. It would be particularly unjust that an individual judge be evaluated negatively because of problems caused by poor working conditions that he or she cannot influence, such as for example delays caused by massive backlogs, or because of lack of judicial personnel or an inadequate administrative system.

(b) Promotion

27. The CCJE<sup>57</sup> and the UN<sup>58</sup> both state that the appointment and promotion of judges should not be based on seniority alone but on objective criteria, in particular ability, integrity and experience. If promotions are made according to such objective criteria, it follows that when judges apply for promotion, they must, at that stage at least, be evaluated in some form. Therefore, gathering information on the suitability for promotion of a judge can be an important objective for the individual evaluation of judges.

(c) Remuneration

28. In a few member states, it is the fact that a judge's remuneration is influenced by his/her evaluation results<sup>59</sup>. However, the CCJE endorses the Recommendation of the Committee of Ministers Rec(2010)12 that “systems making judges' core remuneration dependent on performance should be avoided as they could create difficulties for the independence of judges”<sup>60</sup>. The CCJE also endorses the view that a judge's pension should not depend on performance.

(d) Discipline

29. Although violations of ethical and professional rules/standards can be considered in the evaluation process, member states should clearly differentiate between evaluation and disciplinary measures and

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<sup>56</sup> See the CCJE Opinion No. 11(2008), para 70.

<sup>57</sup> See the CCJE Opinion No. 1(2001), paras 17 and 29.

<sup>58</sup> See UN Basic Principles on the Independence of the Judiciary (1985), para 13.

<sup>59</sup> Spain, Sweden (however, only a very small percentage of the salary is set individually).

<sup>60</sup> See Recommendation CM/Rec(2010)12, para 55; see also the IAJ General Report (2006), Conclusions, para 12.

processes. The principles of security of tenure and of irremovability are well-established key elements of judicial independence and must be respected<sup>61</sup>. Therefore, a permanent appointment should not be terminated simply because of an unfavourable evaluation. It should only be terminated in a case of serious breaches of disciplinary or criminal provisions established by law<sup>62</sup> or where the inevitable conclusion of the evaluation process is that the judge is incapable or unwilling to perform his/her judicial duties to a minimum acceptable standard, objectively judged. In all cases there must be proper procedural safeguards for the judge being evaluated and these must be scrupulously observed.

#### (II) Framework for formal evaluation

30. Where a system of formal individual evaluation is applied, its basis and main elements (criteria, procedure, consequences of the evaluation) should be set out clearly and exhaustively by primary legislation. Details can be regulated in subordinate legislation<sup>63</sup>. The Council for the Judiciary (where it exists) should play an important role in assisting in formulating these matters, especially the criteria.

#### (III) Criteria for formal evaluation

31. The formal individual evaluation of judges must be based on objective criteria published by the competent judicial authority<sup>64</sup>. Objective standards are required not merely in order to exclude political influence, but also for other reasons, such as to avoid the risk of a possible impression of favouritism, conservatism and cronyism, which exists if appointments/evaluations are made in an unstructured way or on the basis of personal recommendations<sup>65</sup>. These objective standards should be based on merit, having regard to qualifications, integrity, ability and efficiency<sup>66</sup>.
32. The CCJE notes that the ENCJ Report recommends that the criteria for the evaluation of professional performance of judges should be comprehensive, and should include both quantitative and qualitative indicators, in order to allow a full and deep assessment of the professional performance of judges<sup>67</sup>.
33. The CCJE notes that the Kyiv Recommendations<sup>68</sup> state that there should be evaluation according to the following criteria: professional competence (knowledge of law, ability to conduct court proceedings, capacity to write reasoned decisions), personal competence (ability to cope with the workload, ability to decide, openness to new technologies), social competences, i.e. ability to mediate, respect for the parties, and, in addition, the ability to lead for those whose positions require it.
34. In general, the CCJE agrees with the qualitative criteria identified in the Kyiv Recommendations. The CCJE considers that evaluations should not be based solely on quantitative criteria. Further, although the efficiency of a judge's work can be an important factor for evaluation, the CCJE considers that a heavy reliance on the number of cases a judge has decided is problematic because it might lead to false incentives.
35. The quality of justice cannot be understood as if it were a synonym for mere "productivity" of the judicial system<sup>69</sup>. The CCJE cautions that insufficient funding and budget cuts might result in a judicial system overemphasising "productivity" in the individual evaluation of judges. Therefore, the CCJE stresses again that all the general principles and standards of the Council of Europe place a duty on member states to make financial resources available that match the needs of different judicial systems<sup>70</sup>. The CCJE believes that the quality, not merely the quantity, of a judge's decisions must be at the heart of individual evaluation. In the Opinion No. 11 (2008), the CCJE discussed the importance of high quality judgments. In order to evaluate the quality of a judge's decision, evaluators should concentrate on the methodology a judge applies in his/her work overall, rather than assessing the legal merits of individual decisions<sup>71</sup>. The latter must be determined solely by the appeal process. Evaluators must consider all aspects that constitute good judicial performance, in particular legal knowledge, communication skills, diligence, efficiency and integrity. To do that, evaluators should consider the whole breadth of a judge's

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<sup>61</sup> See Recommendation CM/Rec(2010)12, para 49.

<sup>62</sup> See Recommendation CM/Rec(2010)12, para 50.

<sup>63</sup> See the ENCJ Report 2012-2013, sections 4.17-4.18.

<sup>64</sup> See Recommendation CM/Rec(2010)12, para 58.

<sup>65</sup> See the CCJE Opinion No. 1(2001), para 24.

<sup>66</sup> See the CCJE Opinion No. 1(2001), para 25.

<sup>67</sup> See the ENCJ Report 2012-2013, section 4.8.

<sup>68</sup> See the Kyiv Recommendations (2010), para 27.

<sup>69</sup> See the CCJE Opinion No. 6(2004), para 42.

<sup>70</sup> See Recommendation CM/Rec(2010)12, para 32, and CCJE Opinion No. 2(2001), para 4.

<sup>71</sup> See the CCJE Opinion No. 11(2008), para 57.

work in the context in which that work is done. Therefore, the CCJE continues to consider it problematic to base evaluation results on the number or percentage of decisions reversed on appeal<sup>72</sup>, unless the number and manner of the reversals demonstrates clearly that the judge lacks the necessary knowledge of law and procedure. It is noted that the Kyiv Recommendations<sup>73</sup> and the ENCJ Report<sup>74</sup> reach the same view.

(IV) How to evaluate?

(a) Who does it: managers/judges/other professionals?

36. Evaluators should have sufficient time and resources to permit a comprehensive assessment of every judge's individual skills and performance. The evaluated judge should be informed who the evaluators are and the judge must have the right to ask for the replacement of any evaluator who might objectively be perceived as biased.
37. In order to protect judicial independence, evaluation should be undertaken mainly by judges. The Councils for the Judiciary (where they exist) may play a role in this exercise<sup>75</sup>. However, other means of evaluation could be used, for example, by members of the judiciary appointed or elected for the specific purpose of evaluation by other judges. Evaluation by the Ministry of Justice or other external bodies should be avoided<sup>76</sup>; nor should the Ministry of Justice or other bodies of the executive be able to influence the evaluation process.
38. In addition, other professionals who can make a useful contribution to the evaluation process might participate in it. However, it is essential that such assessors are able to draw on sufficient knowledge and experience of the judicial system to be capable of properly evaluating the work of judges. It is also essential that their role is solely advisory and is not decisive.

(b) How is it to be done: sources of evidence

39. Sources of information used in the evaluation process must be reliable<sup>77</sup>. This is especially so in respect of information on which an unfavourable evaluation is to be based. Also, it is essential that such an evaluation is based on sufficient evidence. The evaluated judge should have immediate access to any evidence intended to be used in an evaluation so it can be challenged if necessary<sup>78</sup>. Individual evaluation of judges and the inspection assessing the work of a court as a whole should be kept entirely separate. However, facts discovered during a court inspection can be taken account in the individual evaluation of a judge<sup>79</sup>.

(c) When is it to be done – regularly? Promotion only? Other bases?

40. A member state that decides to introduce individual formal evaluation must decide whether to evaluate judges regularly or only for special occasions, for example when a judge is a candidate for promotion<sup>80</sup>. Regular evaluations permit a full picture of a judge's performance to be created. They should not take place too often, however, in order to avoid an impression of constant supervision which could, by its very nature, endanger judicial independence.

(d) Procedural fairness for the evaluated judge

41. As the CCJE has stated before, all procedures of individual evaluation should enable judges to express their views on their own activities and on the assessment that is made of these activities<sup>81</sup>. Any procedure should also enable them to challenge assessments before an independent authority or a court. The evaluated judge must therefore have the opportunity to contribute to the evaluation process in a way that is useful, for example by commenting on a preliminary draft or by being heard in the

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<sup>72</sup> See the CCJE Opinion No. 11(2008), para 74, and CCJE Opinion No. 6(2004), para 36.

<sup>73</sup> See the Kyiv Recommendations (2010), para 28.

<sup>74</sup> See the ENCJ Report 2012-2013, section 4.12.

<sup>75</sup> See the CCJE Opinion No. 10 (2007), paras 42 and 52-56.

<sup>76</sup> See the ENCJ Report 2012-2013, sections 4.13-4.15.

<sup>77</sup> See the ENCJ Report 2012-2013, section 4.16.

<sup>78</sup> See the ENCJ Report 2012-2013, section 4.19.

<sup>79</sup> As in Austria or Bulgaria.

<sup>80</sup> As in Croatia or United Kingdom.

<sup>81</sup> See Recommendation CM/Rec(2010)12, para 58. See also the ENCJ Report 2012-2013, section 4.19.



evaluation process. Moreover, the evaluated judge must have an effective right to challenge an unfavourable evaluation, particularly when it affects the judge's "civil rights" in the sense of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The more serious the consequences of an evaluation can be for a judge, the more important are such rights of effective review.

(e) Consequences for judges and others

42. The CCJE cautions against expressing evaluation results only in terms of points, figures, percentages or numbers of decisions made. All such methods, if used without further explanation and evaluation, can create a false impression of objectivity and certainty. The CCJE also considers detailed permanent ranking of judges as a result of their evaluation<sup>82</sup> as undesirable. Not only does such a ranking give a false impression of objectivity and certainty; even worse, it is inflexible and difficult to change without engaging in an exercise that "re-ranks" all judges of a similar level. Thus, such a system is impractical and, particularly if it is made public, is unjust. It does nothing to improve either the efficiency of the judges or their independence.
43. However, a system of ranking for specific purposes, such as promotion, can be useful. For example, if two or more judges have applied or are being considered for appointment to one position, it is likely that the candidates will be put in some form of "ranking" for that purpose.
44. The results of an individual evaluation will probably have a direct effect on a judge's career and particularly on his/her chances for promotion. Moreover, training needs and the allocation of additional resources<sup>83</sup> may be determined according to evaluation results. As already noted, except in exceptional circumstances, dismissal from office should not be the consequence of an unfavourable evaluation alone but only in the case of a serious breach of disciplinary rules or the criminal law, following a proper procedure and based on reliable evidence<sup>84</sup>. However, as already also noted, dismissal may be the consequence if the inevitable conclusion of the evaluation process is that the judge is incapable or unwilling to perform his/her judicial duties to a minimum acceptable standard, objectively judged. In all such cases, the need for procedural safeguards for the judge is particularly important and these must be scrupulously observed.
45. Using individual evaluation to determine the salaries and pensions of judges should be avoided<sup>85</sup>. Such a process could plainly influence judges' behaviour (to the detriment of the parties in individual cases) and also endanger judicial independence<sup>86</sup>.

**I. Reconciliation of independence and evaluation in the light of this discussion; public accountability**

46. The reconciliation of the principle of judicial independence with any process of individual evaluation of judges is difficult. But the correct balance is of crucial importance. Ultimately, judicial independence must be paramount at all times.
47. In summary, the means of achieving this balance include the following: (1) There must be plain and transparent rules with respect to the procedure, criteria and consequences of evaluation. (2) The evaluated judge should have the right to be heard in the process, and to challenge an unsatisfactory evaluation, including the right of immediate access to material relating to the evaluation. (3) Evaluation should not be based solely on the numbers of decided cases but should focus primarily on the quality of a judge's decisions and also his/her judicial work overall. (4) Some consequences, such as the dismissal from office because of a negative evaluation, should be avoided for all judges who have obtained tenure of office, except in exceptional circumstances.
48. The formal individual evaluation of judges, where it exists, should help to improve and maintain a judicial system of high quality for the benefit of the citizens of member states. This should thereby help maintain public confidence in the judiciary. This requires that the public must be able to understand the general principles and procedure of the evaluation process. Therefore, the procedural framework and

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<sup>82</sup> As in Albania.

<sup>83</sup> See the ENCJ Report 2012-2013, section 4.11.

<sup>84</sup> See Recommendation CM/Rec(2010)12, paras 49 and 50.

<sup>85</sup> However, in Sweden only a very small amount of a judge's salary is determined by evaluation results and stringent safeguards are in place to protect a judge's independence.

<sup>86</sup> See the IAJ General Report (2006), Conclusions, para 12. See also Recommendation CM/Rec (2012)12, para 55.

methods of evaluation should be available to the public. Moreover, in the view of the CCJE, the individual evaluation process for career or promotion purposes should not take account of public views on a judge. They may not always be the result of complete or fully understood information or such views may possibly even be based on a misunderstanding of the judges' work overall. The process and results of individual evaluations must, in principle, remain confidential and must not be made public. To do so would almost certainly endanger judicial independence, for the obvious reason that publication could discredit the judge in the eyes of the public and possibly make him/her vulnerable to attempts to influence him/her. In addition, publication may mean the judge is subjected to verbal or other attacks.

## **J. Recommendations**

49. The CCJE makes the following principal recommendations:

1. Some form of evaluation of individual judges is necessary to fulfill two key requirements of any judicial system, namely justice of the highest quality and proper accountability in a democratic society (paragraph 23).
2. If, after careful analysis a member state decides that these key requirements cannot be met by other means (e.g. "informal" evaluation), the CCJE recommends the adoption of a more formal system of individual evaluation (paragraph 23).
3. The aim of all individual judicial evaluation adopted by a member state, whether it be "formal" or "informal", must be to improve the quality of the work of the judges and, thereby, a country's whole judicial system (paragraph 24).
4. The CCJE encourages all member states to use informal evaluation procedures that help improving the skills of judges and thereby the overall quality of the judiciary. Such means of informal evaluation include assisting judges by giving them an opportunity for self-assessment, providing feedback and informal peer-review (paragraph 25).
5. The basis and main elements for formal evaluation (where it exists) should be set out clearly and exhaustively in primary legislation. Details may be regulated by subordinate legislation which should also be published. The Council for the Judiciary (where it exists) should play an important role in assisting in formulating these matters, especially the criteria for evaluation (paragraph 30).
6. Evaluation must be based on objective criteria. Such criteria should principally consist of qualitative indicators but, in addition, may consist of quantitative indicators. In every case, the indicators used must enable those evaluating to consider all aspects that constitute good judicial performance. Evaluation should not be based on quantitative criteria alone (paragraphs 31-35).
7. Expressing evaluation results by numbers, percentages or by ranking judges without further information should be avoided as this could create a false impression of objectivity and certainty. The CCJE opposes any permanent ranking of judges. However, a system of ranking is acceptable for certain specific purposes such as promotion (paragraphs 42-43).
8. In order to safeguard judicial independence, individual evaluations should be undertaken primarily by judges. The Councils for the Judiciary (where they exist) may play a role in the process. Evaluations by the Ministry of Justice or other external bodies should be avoided (paragraph 37).
9. The sources of evidence on which evaluations are based must be sufficient and reliable, particularly if the evidence is to form the basis of an unfavourable evaluation (paragraphs 39, 44).
10. Individual evaluation of judges should - in principle - be kept separate, both from inspections assessing the work of a court as a whole, and from disciplinary procedures (paragraphs 29, 39).
11. It is essential that there is procedural fairness in all elements of individual evaluations. In particular judges must be able to express their views on the process and the proposed conclusions of an evaluation. They must also be able to challenge assessments, particularly when it affects the judge's "civil rights" in the sense of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (paragraph 41).
12. An unfavourable evaluation alone should not (save in exceptional circumstances) be capable of resulting in a dismissal from office. This should only be done in a case of serious breaches of

disciplinary rules or criminal provisions established by law or where the inevitable conclusion of the evaluation process is that the judge is incapable or unwilling to perform his/her judicial functions to an objectively assessed minimum acceptable standard. These conclusions must follow a proper procedure and be based on reliable evidence (paragraphs 29, 44).

13. The use of individual evaluations to determine the salary and pension of individual judges is to be avoided as this process could plainly influence judges' behaviour and so endanger judicial independence and the interests of the parties (paragraphs 28, 45).
14. The principles and procedures on which judicial evaluations are based must be made available to the public. However, the process and results of individual evaluations must, in principle, remain confidential so as to ensure judicial independence and the security of the judge (paragraph 48).



# Opinion No.18 (2015)

of the Consultative Council of European Judges (CCJE)  
to the Committee of Ministers of the Council of Europe

## The position of the judiciary and its relation with the other powers of state in a modern democracy

### I. Introduction. The reason for the Opinion and its scope

1. Over recent decades, the relationship between the three powers of the state (legislative, executive and judicial) has been transformed. The executive and legislative powers have grown more interdependent. The power of the legislature to hold the executive to account has decreased<sup>1</sup>. At the same time, the role of the judiciary has evolved. The number of cases brought to the courts and the number of legislative acts the courts must apply have increased dramatically. The growth of executive power in particular has led to more challenges to its actions in court and this in turn has led some to question the scope of the role of the judiciary as a check on the executive. There has been an increasing number of challenges in the courts to legislative powers and actions. As a result, the judiciary has increasingly had to examine and has sometimes even restrained the actions of the other two powers<sup>2</sup>. Today, for parties in litigation, and for society as a whole, the court process provides a kind of alternative democratic arena, where arguments between sections of the public and the powers of the state are exchanged and questions of general concern are debated. Courts rule on issues of great economic and political importance. International institutions, especially the Council of Europe and the European Court of Human Rights (ECtHR), the European Union and the Court of Justice of the European Union (CJEU) have all had a considerable influence in member states, particularly in strengthening the independence of the judiciary and in its role in the protection of human rights. Moreover, the application of European and international rules and standards and the implementation of decisions of the ECtHR and the CJEU have provided new challenges for the judiciaries in the member states and sometimes their application by courts has been challenged by politicians or commentators.
2. Although, in general, “the separation of powers” is accepted by all member states, a number of conflicts and tensions have surfaced in recent years that raise concern. Such concerns have been expressed in the Reports of the Secretary General of the Council of Europe in 2014 and 2015<sup>3</sup> as well as in the Situation Reports of the CCJE in 2013 and 2015. For example: in some countries, new political majorities have questioned the position of judges who are already in post<sup>4</sup>. In 2015, the Secretary General of the Council of Europe noted shortcomings in the enforcement of court decisions<sup>5</sup>. In some member states, the executive exercises considerable influence over the administration of the judiciary, thereby bringing into question the institutional independence of the judiciary and the independence of individual judges<sup>6</sup>. Economic crises and chronic underfunding of the judicial system in several member states raise the question of the budgetary responsibility of the legislature towards the judiciary<sup>7</sup>. A lack of legislation or (at the other extreme) rapidly changing legislation may be contrary to the principle of legal certainty<sup>8</sup>. There have also been verbal attacks on the judiciary by members of the executive and legislature. In 2014 and 2015, the Secretary General of the Council of Europe remarked that politicians and other commentators who have publicly criticised court decisions in recent years have thereby undermined the public confidence in the

<sup>1</sup> See Gardbaum, “Separation of Powers and the Growths of Judicial Review in Established Democracies (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn From Sale?)”, 62 *American Journal of Comparative Law* (2014) 613.

<sup>2</sup> Scholars have identified a “global expansion of judicial power”: see Tate and Vallinder (eds), *Global Expansion of Judicial Power*, New York University Press, 1997.

<sup>3</sup> See respectively the Secretary General’s Reports on the “State of Democracy, Human Rights and the Rule of Law in Europe” for 2014 and 2015, hereafter referred to respectively as the “CoE Secretary General’s Report (2014)” and the “CoE Secretary General’s Report (2015)”.

<sup>4</sup> See the CCJE report on the situation of the judiciary and judges in the member states of the Council of Europe (2013), paras 13-18.

<sup>5</sup> See the CoE Secretary General’s Report (2015), p. 14, 17, 27.

<sup>6</sup> See the CoE Secretary General’s Report (2015), p. 20-21.

<sup>7</sup> See for legal aid: the CoE Secretary General’s Report (2015) p. 22-23.

<sup>8</sup> See the CoE Secretary General’s Report (2015), p. 19.

judiciary in various countries<sup>9</sup>. Politicians and the media have suggested that judiciaries are not sufficiently “accountable” to society. Such comments, which have included statements which question the “legitimacy” of judiciaries, were reported by member states in response to the questionnaire sent out in preparation of this Opinion. Clearly, all these comments and actions must be viewed against the fact that today, in most European countries, traditional sources of authority are no longer as readily accepted as once they were. There has been a decline in “deference” towards public institutions. In the same vein, it is often stated nowadays that an application of basic democratic principles requires that there be a greater need for openness and transparency in the work of public institutions. All this means that those involved in providing public services have increasingly had to “account” for the way in which they carry out their work.

3. Therefore, in accordance with the terms of reference entrusted to it by the Committee of Ministers, the Consultative Council of European Judges (CCJE) resolved to reflect upon the legitimacy and accountability of the judiciary and the proper relationship between the three powers of state in a modern democracy and their responsibilities towards one another and to society in general in the 21<sup>st</sup> century.
4. This Opinion examines the following questions:
  - i. What relationship should there be between the judicial power of a state and the legislative and the executive powers?
  - ii. On what bases do judiciaries establish their right to act as such in a democratic society? How is the “legitimacy” of judicial power demonstrated?
  - iii. To what extent and in what ways should judiciaries be accountable to the societies they serve and to the other powers of the state?
  - iv. How can the three powers of the state exercise their respective authority in such a way as to achieve and maintain a proper balance between themselves and also act in the interest of the society they all serve?

This Opinion will not examine the basic principles of judicial independence, since this was considered in CCJE Opinion No. 1 (2001). The relationship of courts with the media was discussed in Opinion No. 7 (2005) Part C, and so that also will not be examined in detail in this Opinion.

5. This Opinion has been prepared on the basis of previous CCJE Opinions, the CCJE Magna Charta of Judges (2010), and the relevant instruments of the Council of Europe, in particular the European Charter on the Statute for Judges (1998), and Recommendation CM/Rec(2010)12 of the Committee of Ministers on judges: independence, efficiency and responsibilities (hereafter “Recommendation CM/Rec(2010)12”). It also takes account of the OSCE Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010) – Judicial Administration, Selection and Accountability (hereafter “Kyiv Recommendations”); the 2013-2014 Report of the European Network of Councils for the Judiciary (ENCJ) on Independence and Accountability of the Judiciary (hereafter “ENCJ Report 2013-2014”); the reports of the Venice Commission on the Rule of Law (March 2011), on the Independence of the Judicial System, part I: the Independence of Judges (March 2010) and the Opinion No. 403/2006 of the Venice Commission on Judicial Appointments adopted at its 70th Plenary Session on 16-17 March 2007 (hereafter “Venice Commission, Judicial Appointments, 2007”); the Bangalore Principles of Judicial Conduct (2002); the CoE Secretary General’s Reports (2014) and (2015); the New Delhi Code of Minimum Standards of Judicial Independence (New Delhi Standards 1982). This Opinion takes account of member states’ replies to the questionnaire on the independence of the judiciary and its relation with the other powers of the state in a modern democracy and of a preparatory report drawn up by the scientific expert appointed by the Council of Europe, Ms Anne SANDERS (Germany). Moreover, the Opinion has benefited from contributions made in a seminar held in Strasbourg on 19 March 2015<sup>10</sup>. The opinion has also

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<sup>9</sup> See the CoE Secretary General’s Report (2014), p. 22; the CoE Secretary General’s Report (2015), p. 27.

<sup>10</sup> In addition to the members of the CCJE Working Group, the seminar was attended by Professor Robert Hazell (the Constitution Unit, University College, London, United Kingdom), Mr Andrew Drzemczewski (Head of Legal Affairs and Human Rights Department of the Secretariat of the Parliamentary Assembly of the Council of Europe), Ms Anna Maria Telvis and Ms Ann Speck (Human Rights Association) and Mr Ziya Tanyar (Secretariat of the Venice Commission of the Council of Europe).

benefited from the seminar organised by the Norwegian Association of Judges held in Bergen (Norway) on 4 June 2015<sup>11</sup>.

## II. The constitutional framework of a modern democracy: where does the judiciary fit in?

6. It is generally accepted that a modern democratic state should be founded on the separation of powers<sup>12</sup>. The judiciary is one of the three essential but equal pillars of a modern democratic state<sup>13</sup>. All three powers provide a public service and must hold each other accountable for their actions. In a democratic state which is subject to the rule of law, none of the three powers of state act for their own interest but in the interests of the people as a whole. In a democratic state bound by the rule of law, ("Etat de droit" or "Rechtsstaat") all the three powers must act on the basis of and within the limitations provided by law. The responses of member states to the questionnaire show that all member states recognise these fundamental principles.
7. In a democratic society it is the responsibility of the legislature to design the legal framework in which and by which society lives. The executive power is responsible for the administration of society (in so far as state agents have to carry it out) in accordance with the legal framework established by the legislature. The judiciary's function is to adjudicate between members of society and the state and between members of society themselves. Frequently the judiciary is also called upon to adjudicate on the relationship between two or even all three powers of the state<sup>14</sup>. All this must be done according to the rule of law. An independent and efficient court system is a corner stone of the rule of law<sup>15</sup>. The goal of any independent and efficient court system must therefore be to ensure the fair, impartial adjudication of legal disputes, thereby protecting the rights and liberties of all persons seeking justice. To achieve this goal, in any particular case the court must find the relevant facts in a fair procedure, apply the law and must provide effective remedies. In criminal cases, a court system must impartially and independently decide on whether and how certain actions deserve punishment<sup>16</sup>. In modern democratic states, an independent judiciary will ensure that governments can be held to account for their actions which are justiciable and will be responsible for ensuring that duly enacted laws are applied correctly. To a greater or lesser extent (depending on the particular constitutional arrangements in a state), the judiciary also ensures that the laws comply with any relevant constitutional provisions or higher law, such as that of the European Union<sup>17</sup>.
8. The widely differing histories, cultures and legal traditions of the member states of the Council of Europe have produced different "models" of constitutional structures which are, in many cases, constantly developing. Globalisation and the increasing influence of international and European organisations necessitate changes in the constitutional structures of individual member states. In particular, decisions of the ECtHR have done much to advance the protection of human rights and judicial independence and have had their effect on member states' constitutions. However, all these influences have also produced stresses on the relationship between the three powers of the state, especially in the relationship between the judiciary and the other two powers.
9. In principle the three powers of a democratic state should be complementary, with no one power being "supreme" or dominating the others<sup>18</sup>. In a democratic state, ultimately it is the will of the people, expressed through the proper democratic process that is supreme (sovereignty of the people). It is also fallacious to imagine that any one of the three powers of state can ever operate in complete isolation from the others. The three powers rely on one another to provide the totality of public services necessary in a democratic society. So, while the legislature provides the legislative

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<sup>11</sup> Contributions made by Professor Jørn Øyrehagen Sunde (University of Bergen), Ms Hanne Sophie Greve (President of the Gulating Court of Appeal, former judge at the European Court of Human Rights) and Ms Ingerd Thune (President of the Norwegian Association of Judges).

<sup>12</sup> See the CCJE Opinion No. 3(2002), para 16.

<sup>13</sup> See the CCJE Opinion No. 1(2001), para 11; see also the CCJE Magna Charta of Judges (2010), para 1.

<sup>14</sup> The CCJE recognises that this last task is sometimes carried out by a Constitutional Court and that, in some systems, the Constitutional Courts are not necessarily seen as part of the judiciary.

<sup>15</sup> See the CoE Secretary General's Report (2014), p. 22.

<sup>16</sup> See also for the functions of the judiciary: Garapon, Perdrille, Bernabé, Synthèse du rapport de l'HEJ La prudence et l'autorité: L'office du juge au XXI<sup>e</sup> siècle (2013).

<sup>17</sup> See the CCJE Opinion No. 1(2001), para 11.

<sup>18</sup> Alexander Hamilton, in Federalist 78, described the judiciary as the least dangerous of the three powers because it had "no influence over either the sword or purse..... It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments". Hamilton's view may not reflect the reality of judicial power over executive or even legislative action in Europe of the 21<sup>st</sup> century.

framework, it is the judiciary that must interpret and apply it by virtue of its decisions and the executive is often responsible for the enforcement of judicial decisions in the interest of society<sup>19</sup>. In this way the three powers function in a relationship of interdependence, or of convergence and divergence. Accordingly, there can never be a complete “separation of powers”<sup>20</sup>. Rather, the three powers of the state function as a system of checks and balances that holds each accountable in the interest of society as a whole. It has to be accepted, therefore, that a certain level of tension is inevitable between the powers of the state in a democracy. If there is such “creative tension”, it shows that each power is providing the necessary check on the other powers and thus contributing to the maintenance of a proper equilibrium. If there were no such tension between the three powers, the suspicion might arise that one or two powers had stopped holding the other to account on behalf of society as a whole and thus, that one or more powers had obtained domination over the rest. Thus, the fact of tension between the judiciary and the other two powers of the state should not necessarily be seen as a threat to the judiciary or its independence, but rather as a sign that the judiciary is fulfilling its constitutional duty of holding the other powers to account on behalf of society as a whole.

### III. Independence of the judiciary and separation of the powers

10. The judiciary must be independent to fulfil its role in relation to the other powers of the state, society in general, and the parties to litigations<sup>21</sup>. The independence of judges is not a prerogative or privilege granted in their own interest, but in the interest of the rule of law and of all those who seek and expect justice. Judicial independence is the means by which judges' impartiality is ensured. It is therefore the pre-condition for the guarantee that all citizens (and the other powers of the state) will have equality before the courts<sup>22</sup>. Judicial independence is an intrinsic element of its duty to decide cases impartially<sup>23</sup>. Only an independent judiciary can implement effectively the rights of all members of society, especially those groups that are vulnerable or unpopular<sup>24</sup>. Thus, independence is the fundamental requirement that enables the judiciary to safeguard democracy and human rights<sup>25</sup>.
11. The principle of the separation of powers is itself a guarantee of judicial independence<sup>26</sup>. However, despite the frequently expressed importance of judicial independence, it must be pointed out that nobody – including the judiciary - can be completely independent from all influences, in particular social and cultural influences within the society in which it operates. After all: “No man is an island, entire unto itself”<sup>27</sup>. No judiciary – as with any power in a democratic state - is completely independent. The judiciary relies on the others to provide resources and services, in particular on the legislature to provide finances and the legal framework which it has to interpret and apply. Although the task of deciding cases according to the law is entrusted to the judiciary, the public relies on the executive to enforce judicial decisions. Shortcomings in the enforcement of judicial decisions undermine judicial authority and question the separation of powers<sup>28</sup>. Whilst all three powers share responsibility for ensuring that there is a proper separation between them, neither that principle nor that of judicial independence should preclude dialogue between the powers of the state. Rather, there is a fundamental need for respectful discourse between them all that takes into account both the necessary separation as well as the necessary interdependence between the powers. It remains vital, however, that the judiciary remains free from inappropriate connections with and undue influence by the other powers of the state<sup>29</sup>.

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<sup>19</sup> See the CCJE Opinion No. 13(2010) on the role of judges in the enforcement of judicial decisions.

<sup>20</sup> See Aharon Barak, “The Judge in a Democracy” (Princeton Press 2008), Ch. 2.

<sup>21</sup> See the CCJE Opinion No. 1(2001), paras 11, 12.

<sup>22</sup> See the CCJE No. 3(2002), para 9.

<sup>23</sup> For example: all English and Welsh judges on appointment have to swear to decide cases “according to the laws and usages of this Realm, without fear or favour, affection or ill will”.

<sup>24</sup> See e.g. the judgments of the ECtHR in the following cases: *Orsus v. Coratia* of 16.03.2010 – 15766/03 – para 147; *Sejdić and Finci v. Bosnia and Herzegovina* of 22.12.2009 – 27996/06 and 34836/06 – para 43; *Muñoz Díaz v Spain* of 08.12.2009 – 49151/07 – para 61, *D.H. and others v. Ukraine* of 23.11.2007 – 57325/00 - para 176; *Gorzelik v. Poland* of 17.2.2004 - 44158/98, paras 89-90, *Metropolitan Church of Bessarabia v. Moldova* of 13.12.2001 – 45701/99 – para 116, *Sidiropoulos v. Greece* of 10.07.1998 – 26695/95 - para 41, see on the protection of minorities by courts: *Sandalow*, Judicial Protection of Minorities, Mich. L. Rev. 75 (1977) 1162; *Cover*, The Origins of Judicial Activism in the Protection of Minorities, Yale Law School Legal Repository (1982).

<sup>25</sup> See *Volkov v. Ukraine* of 09.1.2013 - 21722/11 - para 199.

<sup>26</sup> See also the CoE Secretary General's Report (2014), p. 22.

<sup>27</sup> The English poet John Donne in Meditation XVII.

<sup>28</sup> See the CoE Secretary General's Report (2015), p. 14, 17, 27, see also the CCJE Opinion No. 13(2010) on the role of judges in the enforcement of judicial decisions.

<sup>29</sup> See the CCJE Opinion No. 1(2001), para 11.



#### **IV. The legitimacy of judicial power and its elements**

##### **A. The importance of legitimacy**

12. All three powers of the state exercise considerable authority. The legislature drafts laws and allocates the state's budget. The executive exercises authority, even to the extent of using physical force (within the law) in order to uphold and enforce the laws of the land. The judiciary not only decide matters of fundamental importance to individual citizens and to society at large but also affect with their judgments and rulings even the ordinary affairs of every individual who seeks the aid of the courts. In order to do this, judges are given an authority and powers which are very far reaching. Such authority and powers are exercised on behalf of society as a whole. Consequently, society and the other powers of the state are entitled to be satisfied that all those given that authority and power (that is the judges individually and collectively), have a legitimate basis on which to exercise it in the name of society as a whole. In all modern democratic states at least one constituent body of the legislature is directly elected by the citizens of the state. There is force in the argument that legislatures and executives that are appointed (directly or indirectly) through elected representatives must thereby have "democratic legitimacy". It is perfectly proper to ask: from where does the judicial power derive its "legitimacy"?

##### **B. Different elements of legitimacy of judicial power**

###### **(1) The judicial power as a whole**

13. The judicial power is created as a part of the constitutional framework of democratic states that are subject to the rule of law. By definition, therefore, if the constitutional framework of such a state is legitimate, then the basis of judicial power as a part of that constitution is just as legitimate and just as necessary a part of the democratic state as the other two component powers<sup>30</sup>. All member states have some form of a constitution which, by differing means, (e.g. by long custom or a popular vote) is accepted as being the legitimate foundation of the state. The constitutions of all member states recognise and create (whether explicitly or implicitly) the role of a judiciary which is there to uphold the rule of law and to decide cases by applying the law in accordance with legislation and case law. Thus, the fact that a constitution creates a judiciary to carry out this role must itself thereby confer legitimacy upon the judiciary as a whole. When deciding cases, each individual judge exercises his authority as a part of the judiciary. Accordingly, the very fact that the judiciary is a part of a state's constitution provides legitimacy not only for the judiciary as a whole but each individual judge.

###### **(2) Constitutional or formal legitimacy of individual judges**

14. In order to perform the judicial functions legitimised by the constitution, each judge needs to be appointed and thus become part of the judiciary. Each individual judge who is appointed in accordance with the constitution and other applicable rules thereby obtains his or her constitutional authority and legitimacy. It is implicit in this appointment in accordance with constitutional and legal rules that individual judges are thereby given the authority and appropriate powers to apply the law as created by the legislature or as formulated by other judges. The legitimacy conferred on an individual judge by his appointment in accordance with the constitution and other legal rules of a particular state constitutes an individual judge's "constitutional or formal legitimacy".
15. The CCJE has noted the different methods of appointment of judges in the member states of the Council of Europe<sup>31</sup>. These include, for example: appointment by a council for the judiciary or another independent body, election by parliament and appointment by the executive. As the CCJE has pointed out, each system has advantages and disadvantages<sup>32</sup>. It can be argued that appointment by vote of Parliament and, to a lesser degree, by the executive can be seen to give additional democratic legitimacy<sup>33</sup>, although those methods of appointment carry with them a risk of

<sup>30</sup> See the CCJE Opinion No. 1(2001), para 11; see also the CCJE Magna Charta of Judges (2010), para 1.

<sup>31</sup> See the CCJE Opinion No. 1(2001), paras 19-23; see also the Venice Commission, Judicial Appointments, 2007, paras 9-17.

<sup>32</sup> See the CCJE Opinion No. 1(2001), para 33.

<sup>33</sup> See e.g.: Fabian Wittreck, *Die Verwaltung der Dritten Gewalt*, Mohr-Siebeck, Tübingen, 2006. He argues that the legitimacy of all officials in a state derives ultimately from "the will of the people" (Art. 20(2) of the German Constitution). A similar argument can be advanced for other constitutions. See e.g. the Art. 3 of the Declaration of the Rights of Man and of the Citizen of 1789, integrated into the French Constitution: "The principle of any Sovereignty lies primarily in the Nation" ("Le principe de toute Souveraineté réside essentiellement dans la Nation").

politicisation and a dependence on those other powers<sup>34</sup>. To counter those risks, the CCJE has recommended 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<sup>35</sup>.

The CCJE has also recommended the participation of an independent authority with substantial representation chosen democratically by other judges in decisions concerning the appointment or promotion of judges<sup>36</sup>. The constitutional legitimacy of individual judges who have security of tenure must not be undermined by legislative or executive measures brought about as a result of changes in political power.

### (3) Functional legitimacy of individual judges

16. Judicial appointment in accordance with the constitution and law of a state, the exercise of the constitutional role of judges in deciding cases according to the legal framework designed by the legislature and the necessity that each judge must undertake to work within the established legal rules of conduct all provide an initial legitimacy for the judge. But legitimacy cannot rest there. As the CCJE has pointed out before, public confidence in and respect for the judiciary are the guarantees of the effectiveness of a judicial system<sup>37</sup>. To achieve and maintain legitimacy continuously, each judge and the judiciary as a whole can only do so by earning and retaining the confidence of the public. This second kind of legitimacy can be called "functional legitimacy".
17. "Functional legitimacy" must be earned through work of the highest possible quality which respects high ethical standards. In its previous Opinions, the CCJE has discussed different aspects of good judicial work and the ways of maintaining and improving the quality and efficiency of judicial systems in the interest of the society. Thus the CCJE has given Opinions on various means of achieving this, i.e. initial and in-service training of judges<sup>38</sup>, fair trial within a reasonable time<sup>39</sup>, effective application of international and European law<sup>40</sup>, councils for the judiciary at the service of society<sup>41</sup>, the quality of judicial decisions<sup>42</sup>, the effective enforcement of judicial decisions<sup>43</sup>, information technologies<sup>44</sup>, the specialisation of judges<sup>45</sup>, and the evaluation of judges<sup>46</sup>. The CCJE has stated that, in order to provide judicial services of high quality, the judiciary must also work with prosecutors<sup>47</sup> and lawyers<sup>48</sup> in an appropriate way. By applying these principles, individual judges and so the judiciary as a whole should achieve the overall goal of providing judgments of the highest possible quality in accordance with high ethical standards. Individual judges and the judiciary collectively will maintain legitimacy and the respect of its citizens by their efficiency and the quality of their work.
18. Judges must fulfil their duties within the provisions set out in the disciplinary and procedural rules<sup>49</sup> and (obviously) the criminal law. The powers of a judge are linked to the values of truth, justice, fairness, and freedom. Therefore, judges must perform their duties according to the highest standard

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<sup>34</sup> See the CCJE Opinion No. 1(2001), para. 33.

<sup>35</sup> See the CCJE Opinion No. 1(2001), para 37.

<sup>36</sup> See the CCJE Opinion No. 1(2001), para 45, rec. 4; Opinion No. 10(2007), paras 48-51. According to the ECtHR, judicial appointments by the legislature and the executive are permissible as long as the appointed judges are free from influence or pressure when carrying out their adjudicatory role. See: *Flux v. Moldova* of 3.7.2007 – 31001/03 - para 27. The notion of separation of powers and its importance for judicial appointment has also been discussed by the ECtHR: see *Volkov v. Ukraine* of 9.1.2013 - 21722/11 - para 109, and *Maktouf and Damjanovic v. Bosnia and Herzegovina* of 18.7.2013 – 34179/08 - para 49. The Venice Commission considers appointment of ordinary judges by vote of the Parliament inappropriate (Venice Commission, Judicial Appointments, 2007, para 12) and recommends appointment by a council for the judiciary with a substantial number or majority of members being elected by the judiciary: Venice Commission, Judicial Appointments, 2007, para 29.

<sup>37</sup> See the CCJE Opinion No. 3(2002), para 22.

<sup>38</sup> See the CCJE Opinion No. 4(2003).

<sup>39</sup> See the CCJE Opinion No. 6(2004).

<sup>40</sup> See the CCJE Opinion No. 9(2006).

<sup>41</sup> See the CCJE Opinion No. 10(2007)

<sup>42</sup> See the CCJE Opinion No. 11(2008).

<sup>43</sup> See the CCJE Opinion No. 13(2010).

<sup>44</sup> See the CCJE Opinion No. 14(2011).

<sup>45</sup> See the CCJE Opinion No. 15(2012).

<sup>46</sup> See the CCJE Opinion No. 17(2014).

<sup>47</sup> See the CCJE Opinion No. 12(2009).

<sup>48</sup> See the CCJE Opinion No. 16(2013).

<sup>49</sup> One example of a necessary procedural rule is the need for a judge to recuse himself where there may be an actual or perceived conflict of interest.

of professional conduct<sup>50</sup>. In its Opinion No. 3 (2002), the CCJE discussed such standards and principles of professional conduct<sup>51</sup>. Working within these principles helps to ensure the legitimacy of individual judges who are part of the judiciary as a whole.

19. Like all other powers, the judiciary must also earn trust and confidence by being accountable to society and the other powers of the state<sup>52</sup>. It is therefore necessary to examine why and how the judicial power and individual judges are to be accountable to society.

## **V. Accountability of judicial power**

### **A. Why is accountability important?**

20. In recent years, public services have moved towards more openness and have accepted that they must provide a fuller explanation of their work for the public they serve. As a consequence, the notion of accountability to the public has become of increasing importance throughout public life<sup>53</sup>. A public body will be “accountable” if it provides explanations for its actions and, of equal importance, the public body assumes responsibility for them. This “accountability” is as vital for the judiciary as for the other powers of the state because it, like them, is there to serve the public<sup>54</sup>. Moreover, provided a careful balance is observed, the two principles of judicial independence and accountability are not irreconcilable opposites. In the judicial context, “accountable” must be understood as being required to give an account, that is: to give reasons and to explain decisions and conduct in relation to cases that the judges must decide. “Accountable” does not mean that the judiciary is responsible to or subordinate to another power of the state, because that would betray its constitutional role of being an independent body of people whose function is to decide cases impartially and according to law. If the judiciary were “accountable” to another power of state in the sense of being responsible or subordinate to it, then when cases involve those other powers of state, the judiciary could not fulfil its constitutional role as stated above.
21. The judiciary (as with the other two powers of state) provides a public service. It is axiomatic that it should account (in the sense explained above) to the society it serves. Judicial authority must be exercised in the interest of the rule of law and of those seeking and expecting justice<sup>55</sup>. Therefore, the judiciary faces the responsibility of demonstrating to the other powers of the state and to society at large the use to which its power, authority and independence have been put<sup>56</sup>. There has been an increasing demand by court users for a more effective court system. Better access to the courts has been considered of increasing importance<sup>57</sup>. Effectiveness and accessibility are aspects of demonstrating “accountability”. The CCJE has recognised these trends before. In stipulating that judicial systems should produce justice of the highest quality and of proper accountability in a democratic system, the CCJE has emphasised one aspect of providing judicial “accountability” to society at large<sup>58</sup>.
22. There are further reasons why the judicial power should be accountable to the other powers of the state in the sense discussed above. First, it is the legislature which creates the legislative framework which the judiciary applies. Therefore, the legislature is entitled to have an account, in properly formulated reasons in decisions, of how the laws it has enacted are being interpreted and applied by the judiciary. Secondly, for the fulfilment of its duties towards society, the judiciary receives financial resources through decisions of the legislature and, in many member states, the executive. As the CCJE has stressed before, the general principles and standards of the Council of Europe place a duty on member states to make financial resources available that match the needs of different judicial systems<sup>59</sup>. It is evident from the responses to the CCJE questionnaire that the administrative and

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<sup>50</sup> See the CCJE Opinion No. 3(2002), para 8.

<sup>51</sup> See also the CoE Secretary General’s Report (2015), p. 9.

<sup>52</sup> In its 2013-2014 Report, the ENCJ has explained that a judiciary that claims independence but which refuses to be accountable to society will not enjoy the trust of society. See the ENCJ Report 2013-2014, p. 4.

<sup>53</sup> See for a discussion of judicial accountability: Graham Gee, Robert Hazell, Kate Malleson and Patrick o’Brien “The Politics of Judicial Independence in the UK’s Changing Constitution”, Cambridge University Press, 2015, pp. 16 – 22.

<sup>54</sup> See on the importance of good governance and judiciary in the CCJE Opinion No. 7(2005), the CCJE Opinion No. 10(2007) and the CCJE Opinion No. 14(2011).

<sup>55</sup> See the CCJE Opinion No. 1(2001), para 11; Opinion No. 10(2007), para 9.

<sup>56</sup> See the ENCJ Report 2013-2014, p. 13.

<sup>57</sup> See the CCJE Opinion No. 6(2004), para 1.

<sup>58</sup> See the CCJE Opinion No. 17(2014), para 23.

<sup>59</sup> See Recommendation CM/Rec(2010)12, para 32, and the CCJE Opinion No. 2(2001), para 4; Opinion No. 10(2007), para 37; Opinion No. 17(2014), para 35.

financial autonomy of judiciaries in member states varies considerably. The CCJE has recommended increasing the court's administrative and financial autonomy in order to protect judicial independence<sup>60</sup>.

However, whatever way the budgetary and administrative stewardship of the judiciary is organised in a particular state, a judiciary's resources are allocated by parliament and come, ultimately, from tax paying citizens. Thus, just as the legislature and the executive are accountable for how they allocate resources, so also must the judiciary account to society for how the financial resources allocated to it are spent in the fulfilment of its duties towards society<sup>61</sup>.

## **B. How is accountability to be carried out?**

### **(1) What should the judiciary be accountable for?**

23. Justice aims to resolve disputes and, by the decisions which it delivers, the judiciary fulfils both a "normative" and "educative" role, providing citizens with relevant guidance, information and assurance as to the law and its practical application<sup>62</sup>. Therefore, first and foremost, the judiciary must be accountable through the work of the judges in deciding the cases brought before them, more particularly through their decisions and the reasons given for them. Judicial decisions must be open to scrutiny and appeal<sup>63</sup>. This may be called "judicial accountability" and it is paramount. In accordance with the fundamental principle of judicial independence, the appeal system is in principle the only way by which a judicial decision can be reversed or modified after it has been handed down and the only way by which judges can be held accountable for their decisions, unless they were acting in bad faith.
24. In countries where judges are responsible for the management of the court system (which sometimes includes the court budget), the judiciary must be held accountable for their stewardship to the other powers of the state and to society at large<sup>64</sup>. In this area, judges entrusted with managing public funds are, in principle, in the same position as any other public authority that has responsibility for spending tax payers' money.

### **(2) To whom are judges accountable?**

25. Individual judges and the judiciary as a whole are accountable at two levels. First, they are accountable (in the sense described above) to the particular litigants who seek justice in particular judicial proceedings. Secondly, they are accountable (in the same sense) to the other powers of the state and, through them, to society at large.

### **(3) How is it done?**

#### **(a) Different elements of accountability**

26. There are different forms of accountability. First, as explained above, judges are made to account for their decisions through the appeal process ("judicial accountability"). Secondly, judges must work in a transparent fashion. By having open hearings and by giving reasoned judgments which are made available to the public (save in exceptional circumstances), individual judges will explain their actions and their decisions to the litigants who are seeking justice, the judge is also rendering an account of his or her actions to the other powers the state and to society at large. This form of accountability can be described as "explanatory accountability". Thirdly, if a judge has engaged in improper actions he/she must be held accountable in a more robust way, e.g. through the application of disciplinary procedures and, if appropriate, the criminal law. This can be called "punitive accountability".

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<sup>60</sup> See the CCJE Opinion No. 2(2001), para 14, and Opinion No. 10(2007), para 12.

<sup>61</sup> There is a duty of the other powers of the state to provide adequate funds for the judiciary: CCJE Opinion No. 2 (2001).

<sup>62</sup> See the CCJE Opinion No. 7(2005), para 7.

<sup>63</sup> Contini and Mohr "Reconciling independence and accountability in judicial systems", 3 Utrecht Law Review (2007) 26, 31-32, called this "legal and judicial accountability".

<sup>64</sup> Contini and Mohr "Reconciling independence and accountability in judicial systems", 3 Utrecht Law Review (2007) 26, 33-34, called this "managerial accountability".

## **(b) Explanatory accountability**

### **(i) Open hearings and judgments**

27. Fundamental tenets of judicial work, such as the requirement to hold public hearings and to give reasoned decisions that are available to the public, are founded on the principle that judges must give an account of their conduct and decisions. In public hearings, judges hear the evidence of the litigants and witnesses and the submissions of lawyers. Judges will (usually) explain the law publicly. The public at large can attend public court hearings to learn about the law and the judge's (or judges') conduct toward the parties before them<sup>65</sup>. This open procedure ensures a fair trial in accordance with Article 6 of the European Convention on Human Rights. Moreover, by attending hearings, (or, in some states, by viewing hearings on television<sup>66</sup> or on line) and through reporting of hearings, the public can understand better the judicial process. By this means, judges and the judiciary overall are also held to account. While formal procedural rules are important for public confidence in the judiciary, the practical experiences of citizens observing the judiciary in action and the availability of accurate information published by the media about the conduct of individual trials are of decisive importance<sup>67</sup>.
28. Judges must give reasons for their decisions, which should be made public save in exceptional circumstances. In this way, judges account for their decisions and enable the litigants and society at large to understand and to question their reasoning. Decisions must therefore be readily comprehensible, as the CCJE has stated before<sup>68</sup>. In a case where the losing party does not agree with the decision, it can be appealed. The existence (even threat) of an appeal system should ensure a high standard of judicial decision making that is made within a reasonable time. This is in the interest of the parties and of society at large. In a case where a trial has not been concluded within a reasonable time<sup>69</sup>, special legal remedies can be sought, preferably in local courts or, if such remedies are not available, in the European Court of Human Rights. After the duty of the judge is completed and the decision is handed down, the public interest demands that it must be swiftly and effectively enforced<sup>70</sup>. In this respect, the judiciary is often reliant on the executive power to give effect to its decisions.

### **(ii) Other mechanisms of explanatory accountability**

29. There are several other ways that the judiciary can be made to account for its work and – if applicable – for its stewardship of the system for the administration of justice. Such means must never be misused by the other powers of state to interfere with the work of the judiciary. One obvious means is external: for example, by annual reports which are available to the general public. Other external methods by which the judiciary can be held accountable are: audits of a public audit committee, the work of inspectorates<sup>71</sup> and investigations. At a local or national level, many member states have set up “Ombudsman”, Public or Citizens’ Advocates or Mediators, or Inspectors General, appointed by the executive or by parliament, often with a significant degree of independence. These often work to hold the judiciary accountable. (The question of how to achieve a proper balance between accounting and external interference will be discussed in Section VI below).
30. The other means is internal: by the individual evaluation of judges. In most member states, judges are subject to some form of individual evaluation at some stage or other of their careers after appointment. Evaluation can be a useful means to hold judges accountable. As explained by the CCJE, the individual evaluation of the judges’ work can help to gain information on the abilities of individual judges and of the strength and weaknesses of a judicial system. Evaluation can help to identify the best candidates for promotion thereby maintaining or even improving the quality of a

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<sup>65</sup> On relations of the courts with participants in court proceedings, see the CCJE Opinion No. 7(2005), paras 24-26. Exceptions can be made in cases where the litigants’ interests for their privacy demand it.

<sup>66</sup> See on the sensitive issue of television in court procedures: the CCJE Opinion No. 7(2005), paras 44-50.

<sup>67</sup> See the CCJE Opinion No. 7(2005), paras 9, 24-26; see also Bühlmann and Kunz, “Confidence in the Judiciary: Comparing the Independence and Legitimacy of Judicial Systems”, *West European Politics* Vo. 34, No. 2 (2011) 317, 332.

<sup>68</sup> See about the quality of judicial decisions the CCJE Opinion No. 11(2008); Opinion No. 7(2005), para 56.

<sup>69</sup> See the CCJE Opinion No. 6(2004).

<sup>70</sup> See the CCJE Opinion No. 13(2010); see the CoE Secretary General’s Report (2015), p. 14, 17, 27.

<sup>71</sup> See the CCJE Opinion No. 1(2001), paras 27, 69 rec. 10.

judicial system<sup>72</sup>. Evaluation must not be abused, e.g. to put political pressure on a judge or to question individual judgments.

### (iii) Discussion with other powers of state

31. Each of the three powers of the state depends on the other two to work effectively. Discussion between all is crucial to improve the effectiveness of each power and its cooperation with the other two powers. Provided that such discussions are undertaken in an atmosphere of mutual respect and have particular regard to the preservation of the independence and impartiality of any judges participating in such exchanges<sup>73</sup>, these discussions will be beneficial to all three powers of the state<sup>74</sup>. The CCJE has stressed the importance of judges participating in debates concerning national judicial policy. In addition, the judiciary should be consulted and play an active part in the preparation of any legislation concerning their status and the functioning of the judicial system<sup>75</sup>. The expertise of judges is also valuable when it comes to matters outside judicial policy. For example, by giving evidence to parliamentary committees, representatives of the judiciary (e.g. the highest authority of the judiciary or the High Council of Justice) can raise concerns about legislative projects and give the perspective of the judiciary on various practical questions. Some member states reported positive experiences with such exchanges<sup>76</sup>. In some member states, the judiciary engages in dialogue with the executive, when judges take a temporary leave of absence to work in the civil or criminal department of a ministry of justice<sup>77</sup>. In other member states, however, this is seen as a violation of judicial independence<sup>78</sup>.

### (iv) Dialogue with the public

32. As the CCJE has noted before, dialogue with the public, directly or through the media, is of crucial importance in improving the knowledge of citizens about the law and increasing their confidence in the judiciary<sup>79</sup>. In some member states, the appointment of lay judges is seen as providing a helpful link between the judiciary and the public. The CCJE recommended in its Opinion No. 7(2005) on “justice and society” that the judiciary and individual courts should actively reach out to the media and the public directly<sup>80</sup>. For example, courts should assume an educative role by organising visits for schoolchildren and students, by providing information, and by actively explaining court decisions to the public and the media in order to improve understanding and prevent misunderstandings<sup>81</sup>. While there is a risk in engaging with the media, courts can help avoiding public misrepresentations through active contact and explanation. In so doing, the judiciary can be accountable to the society and ensure that the public perceptions of the justice system are accurate and reflect the efforts made by judges. In this way, the judges can also educate the public that there are limits to what a judicial system can do<sup>82</sup>.

### (c) “Punitive accountability”

33. As the CCJE has discussed previously, all judicial actions must be in accordance with the applicable principles of professional conduct, established disciplinary rules and – within conditions which preserve judicial independence and impartiality – the criminal law. Principles of professional conduct will be separate from their enforcement through disciplinary systems<sup>83</sup>. Given the importance of ethics and integrity for the public’s confidence in the judiciary, judges must behave with integrity both in their official functions and in their private lives<sup>84</sup> and will be accountable for their conduct if it is outside accepted norms. Sometimes the conduct of individual judges is too aberrant for mere explanation to

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<sup>72</sup> See the CCJE Opinion No. 17(2014).

<sup>73</sup> See the ECtHR: *Baka v. Hungary* of 27.5.2015 - 20261/12 – paras 99-102

<sup>74</sup> Contini and Mohr “Reconciling independence and accountability in judicial systems”, 3 *Utrecht Law Review* (2007) 26, 41-42, advocated the concept of “cooperative accountability”.

<sup>75</sup> See the CCJE Opinion no. 3(2002), para 34; Belgium and Montenegro reported exchanges of this kind.

<sup>76</sup> See on relations between judges and parliament in the UK: Graham Gee, Robert Hazell, Kate Malleson and Patrick O’Brien: “The Politics of Judicial Independence in the UK’s Changing Constitution”, Cambridge University Press, 2015, pp. 92-125.

<sup>77</sup> See the CCJE Opinion No. 3(2003), para 36.

<sup>78</sup> See the Decision of the Constitutional Court of Lithuania of 21.12.1999, IV.9.

<sup>79</sup> See the CCJE Opinion No. 7(2005).

<sup>80</sup> See the CCJE Opinion No. 7(2005), C.

<sup>81</sup> See the CCJE Opinion No. 7(2005), paras 7-23.

<sup>82</sup> See the CCJE Opinion No. 7(2005), para 27.

<sup>83</sup> See the CCJE Opinion No. 3(2002), para 49, recommendation iii.

<sup>84</sup> See the CCJE Opinion No. 3(2002), para 50, recommendation ii.

suffice. The corollary of society granting such extensive powers and trust to judges is that there must be some means of holding judges responsible, and even removing them from office, in cases of misbehaviour so gross as to justify such a course<sup>85</sup>. This is particularly so in cases of judicial corruption<sup>86</sup>, which fundamentally undermine public confidence in judicial impartiality and independence. In other cases of judicial misconduct, criminal<sup>87</sup>, civil<sup>88</sup>, or disciplinary liability<sup>89</sup> will be appropriate, depending on the nature of the misconduct.

## **VI. How do the requirements of “legitimacy” and “accountability” affect the relationship that the judiciary has with the other two powers of the state?**

34. Legitimacy and accountability are closely linked. The judiciary should strive to retain and demonstrate its legitimacy by being accountable to the public. The principal means of doing so are by providing work of the highest possible quality and by explaining its actions and conduct to the other powers of the state and, both through them and directly, to society at large. As already noted, no one power of the state can act in complete isolation and separately from the other two. All powers function in a relationship of interdependence. Exchange and dialogue between the judiciary and the other powers of the state is therefore recommended. However, while all the mechanisms described above can be valuable in ensuring that the judiciary is accountable, they also bear the risk of being misused.
35. The full recognition of the basic safeguards of judicial independence, such as security of tenure, no change of function or location without a judge's consent, appointment and promotion free from political influence, sufficient remuneration, and safety of life and property<sup>90</sup>, is a prerequisite for any satisfactory discussions between the three powers of the state. If such basic safeguards are respected, judicial independence will not suffer but, on the contrary, will benefit from an increased legitimacy earned through a combination of the satisfactory exercise of the judiciary's constitutional function and the judges' participation in exchanges. Continuance of both judicial independence and judicial legitimacy are not automatic: both have to be constantly earned<sup>91</sup>. The judiciary's legitimacy and its independence is safeguarded best by excellent performance. To achieve this and earn the respect of the public, an independent and accountable judiciary is open to justified criticism, learns from its mistakes and thereby continually improves its work. This way, independence and accountability do not contradict but, rather, enhance each other. However, it is important to emphasise that a judge is not responsible for the politics of a previous government or regime. Judges must not be subjected to criticism or a disciplinary process simply because they applied the law as laid down by a previous regime, unless they misapplied the law in bad faith.
36. It is especially difficult to balance the need to safeguard the judicial process from distortion and pressure from political sources against the need for open discussion of matters of public interest concerning the administration of justice. On the one hand, as the CCJE has pointed out, judges must accept that they are public figures and must not be over-sensitive<sup>92</sup>. Thus, when judges engage with the other powers of the state and society at large, they must take responsibility themselves to safeguard their independence<sup>93</sup> and impartiality. On the other hand, in all their dealings with the judiciary the other powers of the state must respect the principles of judicial independence and impartiality. Dialogue between the judiciary and other powers of state as well as with the public at large can be misused to violate judicial independence. For example, it is not acceptable for other powers of the state to criticise judicial decisions in a way that undermines judicial authority and encourages disobedience and even violence against judges<sup>94</sup>. It is also not acceptable that valid critical comments by a member of the judiciary of one of the other powers of state (or a member of it) that are made in the course of judicial duties should be met by removal from judicial office by one or other power of the state<sup>95</sup>. It is essential that dialogue between the three powers of the state and

<sup>85</sup> See the CCJE Opinion No. 3(2002), para 51.

<sup>86</sup> See the CoE Secretary General's Report (2015), p. 24-25; see also the work of GRECO in the fourth evaluation round [www.coe.int/greco](http://www.coe.int/greco).

<sup>87</sup> See the CCJE Opinion No. 3(2002), paras 52-54.

<sup>88</sup> See the CCJE Opinion No. 3(2002), paras 55-57.

<sup>89</sup> See the CCJE Opinion No. 3(2002), paras 58-74; see also Kyiv Recommendations, paras 25-26.

<sup>90</sup> See the CCJE Opinion No. 1(2001); Recommendation CM/Rec(2010)12, Chapter II, V, VI; see the CCJE Magna Charta of Judges (2010), paras 2-13;

<sup>91</sup> See the ENCJ Report 2013-2014, p. 4, 9.

<sup>92</sup> See the CCJE Opinion No. 1(2001), para 63.

<sup>93</sup> The ENCJ Report describes the perception of judges of their own independence as an aspect of “subjective independence”, the ENCJ Report 2013-2014, p. 13, 3.3.2.

<sup>94</sup> See Recommendation CM/Rec(2010)12, para 18.

<sup>95</sup> See ECtHR: *Baka v. Hungary* of 27.5.2015 - 20261/12.

between the judiciary and the general public, as well as any inspections and investigations that are undertaken, are conducted in a climate of mutual respect. These processes must never be used to influence a particular judicial decision or to encourage disrespect or disobedience to judicial decisions.

37. With respect to civil, criminal and disciplinary liability (what has been called above “punitive accountability”), the CCJE stresses that the principal remedy for judicial errors that do not involve bad faith must be the appeal process. In addition, in order to protect judicial independence from undue pressure, great care must be exercised in framing judges’ accountability in respect of criminal, civil and disciplinary liability<sup>96</sup>. The tasks of interpreting the law, weighing of evidence and assessing the facts that are carried out by a judge to determine cases should not give rise to civil or disciplinary liability against the judge, save in cases of malice, wilful default or, arguably, gross negligence<sup>97</sup>. Furthermore, in the event that the state has had to pay compensation to a party because of a failing in the administration of justice, only the state, not a litigant, should have the power to establish, through court action, any civil liability of a judge<sup>98</sup>.
38. It is appreciated that there are considerable differences in the constitutional structures of member states with the result that there is a considerable variation in the experience of individual states’ on how the three powers interact. However, every country can learn from the experience of others. Not only can best practices be shared; first and foremost, international exchanges can help understand common problems and principles. Thus the experiences and practices of all member states should be shared through international and European institutions, including in particular the bodies of the Council of Europe.

## VII. The need for restraint in the relations between the three powers

39. As already discussed, the three powers function in a relationship of interdependence. In that sense there can never be a complete “separation of powers”. However, in order to achieve a proper balance of the three powers of state, each power must exercise proper restraint in its relations with the other powers.

### A. “Judicial restraint”

40. The judiciary, as one of the three powers of the state, is accountable to the society it serves. Accordingly, the judiciary, like the other powers of the state, must always have the best interest of the public as its fundamental concern. This requires that the judiciary must recognise the social and economic conditions in which the other two powers of the state have to work. Moreover, the judiciary must be aware that there are limits to judicial and legal intervention in relation to political decisions that have to be made by the legislative and executive powers. Therefore, all courts within the judicial power must take care not to step outside the legitimate area for the exercise of judicial power. The CCJE recognises that both the legislative and the executive powers have legitimate concerns that the judicial power should not overstep its role.
41. In its dealings with the other two powers of state, the judiciary must seek to avoid being seen as guarding only its own interests and so overstating its particular concerns. Rather, the judiciary must take responsibility for the society it serves. The judiciary must show understanding and responsibility towards the needs of the public and the exigencies of the public purse. The judiciary can provide their insights on the possible effect of proposed legislation or executive decisions on the ability of the judiciary to fulfil its constitutional role. Judiciaries must also take care not to oppose all proposed changes in the judicial system by labelling it an attack on judicial independence. But, if judicial independence or the ability of the judicial power to exercise its constitutional role are threatened, or attacked, the judiciary must defend its position fearlessly. Examples of decisions which might come

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<sup>96</sup> See Recommendation CM/Rec(2010)12, Chapter VII; the CCJE Opinion No. 3(2002), para 51; see for an example of such a misuse: *Volkov v. Ukraine*, ECtHR of 9.1.2013 - 21722/11 – esp. para 199.

<sup>97</sup> See the CCJE Opinion No. 3 (2002), paras 75, 76; see also Recommendation CM/Rec(2010)12, paras 66-71. The liability of the state is another matter with which this Opinion is not concerned. In the following decisions, the CJEU held in favour of state liability for damage caused by judicial decisions. The CJEU did not mention a liability of the judges who gave the judgments which caused the damage in question: CJEU (30 Sept. 2003, C-224/01, *Köbler vs. Austria*; Great Chamber, 13 June 2006, C-173/03, *Traghetti del Mediterraneo s.p.a. in liquidazione v. Repubblica Italiana*; 24 November 2011, C-379/10, *Commission v. Repubblica Italiana*; 9 Sept. 2015, C-160/14, *João Filipe Ferreira da Silva e Brito v. Estado português*).

<sup>98</sup> See Recommendation CM/Rec (2010)12, paras 66 and 67. See the CCJE Magna Carta of Judges (2010), para 22.



into those categories are massive reductions in legal aid or the closure of courts for economic or political reasons.

42. If it is necessary to criticise another power of the state or a particular member of it in the course of a judgment in a dispute or when it is necessary in the interests of the public, that must be done. For example, therefore, courts may criticise legislation or the failure of the legislative to introduce what the court would regard as adequate legislation. However, just as with the other powers of the state in relation to the judiciary, criticism by the judiciary must be undertaken in a climate of mutual respect. Judges, like all other citizens, are entitled to take part in public debate, provided that it is consistent with maintaining their independence or impartiality. The judiciary must never encourage disobedience and disrespect towards the executive and the legislature. In their professional and private relations with the representatives of the other powers, judges must avoid any conflict of interest and avoid any behaviour that might create a perception that judicial independence and impartiality and the dignity of the judiciary in general is impugned. As long as criticism is undertaken in a climate of mutual respect, it can be beneficial to society as a whole. However, it cannot be too often emphasised that it is not acceptable that reasonable critical comments from the judiciary towards the other powers of the state should be answered by removals from judicial office or other reprisals<sup>99</sup>. The CCJE also emphasizes that inadmissible behaviour by representatives of the legislative and executive powers and by politicians may occur in the form of connivance and, in certain cases, support for aggression or even radical, violent and unlawful actions against the judiciary<sup>100</sup>. Direct or indirect support for such actions against the judiciary is totally unacceptable. Not only are such actions a direct attack on judicial independence, they also stifle legitimate public debate by judges.

## **B. Restraint of the other powers**

43. Judicial restraint must be matched by an equal degree of responsibility and restraint from the other powers of the state. Above all the other powers of the state must recognise the legitimate constitutional function that is carried out by the judiciary and ensure it is given sufficient resources to fulfil it. This function of adjudicating on all legal disputes and of interpreting and applying the law is as fundamental to the well-being of a modern democratic state governed by the rule of law as are the functions of the legislative and executive powers of the state. In a state governed by the principle of separation of powers, interferences between the action of one branch of the State and other branches must be maintained within the bounds of the law and internationally accepted standards. The CCJE considers that, when an unwarranted interference does occur, the powers of the state should loyally cooperate to restore the balance and so the confidence of society in a smooth functioning of public institutions. In all cases of conflict with the legislature or executive involving individual judges the latter should be able to have recourse to a council for the judiciary or other independent authority, or they should have some other effective means of remedy<sup>101</sup>.

### **(1) Questioning the appointment of judges already selected**

44. Decisions which remove basic safeguards of judicial independence are unacceptable even when disguised<sup>102</sup>. For example, a new parliamentary majority and government must not question the appointment or tenure of judges who have already been appointed in a proper manner. The tenure of individual judges can only be questioned if some breach of disciplinary rules or the criminal law by an individual judge is clearly established in accordance with proper judicial procedures.

### **(2) Legislation: changes to the system of justice**

45. The question of when and how often legislation should be changed falls within the responsibility of the legislature. However, too many changes within a short period of time should be avoided if possible, at the very least in the area of the administration of justice<sup>103</sup>. Where changes to the system of justice are made, care must be taken to ensure that they are accompanied by adequate financial, technical and procedural provisions and that there will be sufficient human resources<sup>104</sup>. Otherwise there is a risk of instability in the proper administration of justice and the public might perceive (wrongly) that any failings in administering a new system were the fault of the judiciary. That can lead

<sup>99</sup> See ECtHR: *Baka v. Hungary* of 27.5.2015 - 20261/12.

<sup>100</sup> See the Open Letter of the Supreme Court of Ukraine, p. 2.

<sup>101</sup> See Recommendation(2010)12, Art. 8.

<sup>102</sup> See the CCJE report on the situation of the judiciary and judges in the member states of the Council of Europe (2013), paras 13-18.

<sup>103</sup> See the CoE Secretary General's Report (2015), p. 17.

<sup>104</sup> See the CCJE Opinion No. 11(2008).

to unnecessary mistrust and conflict.

### **(3) Legislature: parliamentary investigation committees**

46. There is a danger of an overlap between the proper role of the judges and that of parliamentary investigation committees. The CCJE recognises that national or local parliamentary bodies may, under the legislation of many member states, set up committees of inquiry to investigate social phenomena or alleged breaches of or a poor application of law. The powers of these committees are often similar to those of judicial authorities, such as the power to summon witnesses, order disclosure or seizure of documentary evidence, etc.

In the CCJE's opinion, in order to preserve a proper separation of powers, in general the reports of committees of inquiry should never interfere with investigations or trials that have been or are about to be initiated by judicial authorities. If such reports must comment on existing judicial decisions in individual cases, they must do so with proper respect and should refrain from expressing any criticism in terms that would amount to a revision of decisions made. However, if the inquiry is investigating possible defects in the administration of justice which have been highlighted by a particular case, those proceedings can, with due care, be examined. An inquiry can never replace a proper judicial process.

### **(4) "Ombudsman", Public or Citizens' Advocates or Mediators, and Inspectors General**

47. "Ombudsman", Public or Citizens' Advocates or Mediators and Inspectors General appointed by the executive or by parliament often act with a significant degree of independence. They have the task of protecting the interests of the public by investigating and addressing complaints by individuals alleging violation of rights, usually by public entities. The tasks of such bodies is to investigate complaints and attempt to resolve them, usually through recommendations (binding or not) or mediation. This may, however, interfere with the development of individual cases that have been or are about to be initiated before a court. Such interventions must be prevented. Therefore, the CCJE recommends that legislation of member States clarifies the relationships between "ombudsman" (or similar agencies') powers and the powers of the courts. A good solution may be found in the rule, adopted in some states, whereby resort to such agencies should be made available before addressing the court; but when court proceedings are initiated, parties may appear before the agency only upon the recommendation of the judge in charge of the case.

### **(5) Administration of courts and inspections**

48. Over the last decades, self-administration by the judiciary has been introduced or its scope enlarged in many member states. The models used in respect to the administration of the judiciary vary. In some countries, the administration of justice is undertaken by the Ministry of Justice; in others by independent agencies and in others by Councils for the judiciary. The CCJE has made recommendations on these issues<sup>105</sup>. In some countries, the executive, through ministries of Justice have exerted considerable influence on the administration of courts through directors of courts and judicial inspections, or, in cases where the court administration is directly dependent on a ministry of Justice. The presence of officials of the executive within the organising bodies of courts and tribunals should be avoided. Such a presence can lead to interferences with the judicial function, thus endangering judicial independence.
49. Problems on the interaction between the executive and the judiciary can occur in those states in which the Minister of Justice or other ministries or agencies, e.g. those having a power of audit and/or financial control, have the power to order inspections at courts. Such inspections may have different goals. For example, the inspection may be in order to acquire information to decide on financial allocations, or to obtain information concerning possible re-organisation of the court service, or to obtain information in order to take possible disciplinary actions against court staff and/or judges. Inspectorates are sometimes composed of judges or former judges, and are sometimes even established within High Councils for Justice. The CCJE considers that, while an insight by external investigators can help to see shortcomings in a particular institution, such as the judiciary, it is vital that, the activities of inspectors should never interfere with the development of judicial investigations and trials. The right of other powers of the state to be informed of or to investigate the system of justice should in all cases be exercised having regard to the limits imposed by judicial independence

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<sup>105</sup> See the CCJE Opinion No. 10(2007).

and (where provided for by law) by the secrecy of judicial investigations. Inspections should never concern individual cases, in particular cases that are pending trial.

## **(6) Budgetary autonomy**

50. The consequences of public financial difficulties, especially those resulting from the economic crisis since 2008, have caused serious problems in many member states. Access to courts and legal aid has been reduced, the workload of the courts has increased and the judiciary has been restructured. In their answers to the questionnaire, many member states reported discussions concerning the remuneration of judges. Salaries for judges have been frozen for many years or even lowered in recent years.
51. It is accepted that, subject to constitutional provisions, ultimately the decisions on the funding of the system of justice and the remuneration of judges must fall under the responsibility of the legislature. However, European standards should always be obeyed. The CCJE has made recommendations about the funding of the judiciary<sup>106</sup>. The judiciary should explain its needs to parliament and, if applicable, to the ministry of Justice. In the case of a severe economic downturn, judges, like all other members of society, have to live within the economic position of the society they serve. However, chronic underfunding of the judicial system should be regarded by society as a whole as unacceptable. This is because such chronic underfunding undermines the foundations of a democratic society governed by the rule of law.

## **(7) Criticism by members of the executive and legislature**

52. Politicians and others in public positions in member states often make comments that either demand that judicial powers be restricted or show little understanding of the role of an independent judiciary. Such comments are made especially during election campaigns, when decisions on constitutional issues have been given, or on pending cases. In principle, the judiciary must accept that criticism is a part of the dialogue between the three powers of the state and with the society as a whole. However, in the view of the CCJE, there is a clear line between freedom of expression and legitimate criticism on the one hand, and disrespect and undue pressure against the judiciary on the other. Politicians should not use simplistic or demagogic arguments to make criticisms of the judiciary during political campaigns just for the sake of argument or in order to divert attention from their own shortcomings. Neither should individual judges be personally attacked. Politicians must never encourage disobedience to judicial decisions let alone violence against judges, as this has occurred in some member states. The executive and legislative powers are under a duty to provide all necessary and adequate protection where the functions of the courts are endangered by attacks or intimidations directed at members of the judiciary. Unbalanced critical commentary by politicians is irresponsible and causes a serious problem because public trust and confidence in the judiciary can thereby be unwittingly or deliberately undermined. In such cases, the judiciary must point out that such behaviour is an attack on the constitution of a democratic state as well as an attack on the legitimacy of another state power. Such behaviour also violates international standards.
53. Individual courts and the judiciary as a whole need to discuss ways in which to deal with such criticism. Individual judges who have been attacked often hesitate to defend themselves (particularly in the case of a pending trial) in order to preserve their independence and to demonstrate that they remain impartial. In some countries, councils for the judiciary or the Supreme Court will assist judges in such situations. These responses can take the pressure off an individual judge. They can be more effective if they are organised by judges with media competence.
54. The rule that any analyses and criticisms by one power of state of the other powers should be undertaken in a climate of mutual respect applies as much to the judiciary as it does to members of the legislature and the executive. In fact, it is even more important for the judiciary to take extra care, because judges often have to decide whether the executive or the legislature have conducted themselves according to law. Furthermore, there will be no confidence in the decisions of a judiciary which permits its members to make unreasonable or disrespectful comments of the other powers of state. Those types of remark will only lead to a “war of words” which will itself undermine public confidence in the judiciary. Ultimately, a “war” like this could lead to the judiciary being unable to carry out its constitutional function of deciding disputes between citizens and between citizens and the state in a manner that is, and is seen to be, both independent and impartial. That would be to the detriment of society and democracy, which it is the judiciary’s duty to serve and safeguard.

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<sup>106</sup> See the CCJE Opinion No. 2(2001).

## **VIII: Summary of principal points**

1. The judiciary is one of the three powers of state in a democracy. They are complementary, with no one power being “supreme” or dominating the others (paragraph 9).
2. In a democratic state, the three powers of the state function as a system of checks and balances that holds each accountable in the interest of society as a whole (paragraph 9).
3. The principle of the separation of powers is itself a guarantee of judicial independence. The judiciary must be independent to fulfil its constitutional role in relation to the other powers of the state, society in general, and the parties to any particular dispute (paragraph 10).
4. The legitimacy of the judiciary and individual judges is given, first and foremost, by the constitution of each of the member states, all of which are democracies governed by the rule of law. The constitution creates the judiciary and thereby confers legitimacy on the judiciary as a whole and the individual judges who exercise their authority as part of the judiciary: “constitutional legitimacy”. The constitutional legitimacy of individual judges who have security of tenure must not be undermined by legislative or executive measures brought about as a result of changes in political power (paragraphs 13 - 15 and 44).
5. This constitutional legitimacy of the judiciary is reaffirmed by public confidence in and respect for the judiciary. These must be constantly earned and retained by the judiciary through excellent work of the highest standards: this is what the CCJE calls “functional legitimacy” (paragraphs 16 – 19).
6. The judiciary (like the other two powers of state) provides a public service. Therefore, the judiciary, like the other powers, has the responsibility of demonstrating to the other powers of the state and to society at large the use to which its power, authority and independence have been put. This can be called “accountability” (paragraphs 20 - 22). This “accountability” takes several forms.
7. First, there is the appeal system. The appeal system is, in principle, the only way by which a judicial decision can be reversed or modified after it has been handed down and the only way by which judges acting in good faith can be held accountable for their decisions. The CCJE has called this “judicial accountability” (paragraphs 23, 26).
8. Secondly, judges are made accountable by working in a transparent fashion, by having open hearings and by giving reasoned judgments, engaging with the public and the other powers of state. The CCJE has called this form of accountability “explanatory accountability” (paragraphs 27-32).
9. Thirdly, if a judge has engaged in improper actions of a sufficiently serious nature, he or she must be held accountable in a robust way, e.g. through the application of disciplinary procedures and, if appropriate, the criminal law. The CCJE has called this “punitive accountability”. Care must be taken, in all cases, to preserve judicial independence (paragraphs 33 and 37).
10. With regard to the relations between the three powers of the state: first, judges, like all other citizens, are entitled to take part in public debate, provided that it is consistent with maintaining their independence and impartiality (paragraph 42).
11. The other powers of the state should recognise the legitimate constitutional function that is carried out by the judiciary and ensure it is given sufficient resources to fulfil those functions. Analyses and criticisms by one power of state of either of the other powers should be undertaken in a climate of mutual respect (paragraph 42).
12. The judiciary must be aware that there are limits to judicial and legal intervention in relation to political decisions that have to be made by the legislative and executive powers. Therefore, all courts within the judicial power must take care not to step outside the legitimate area for the exercise of judicial power (paragraph 40).
13. Decisions of the legislative or executive powers which remove basic safeguards of judicial independence are unacceptable even when disguised (paragraph 44).
14. Ministries of Justice must not exert influence on the administration of courts through directors of courts and judicial inspections in any way that might endanger judicial independence. The presence

of officials of the executive within the organising bodies of courts and tribunals should be avoided. Such a presence can lead to interference in the judicial function, thus endangering judicial independence (paragraphs 48-49).

15. In order to preserve a proper separation of powers, committees of inquiry or investigation (whether parliamentary or otherwise), should never interfere with investigations or trials that have been or are about to be initiated by judicial authorities. Such non-judicial investigations are never a substitute for a judicial process (paragraph 46).
16. The CCJE recommends that legislation of member States clarifies the relationships between the powers of the “Ombudsman” (or similar agencies’) and the powers of the courts (paragraph 47).
17. Chronic underfunding of the judiciary should be regarded by society as a whole as an unacceptable interference with the judiciary’s constitutional role, because it undermines the foundations of a democratic society governed by the rule of law (paragraph 51).
18. Analyses and criticisms by one power of state of the other powers should be undertaken in a climate of mutual respect. Unbalanced critical commentary by politicians is irresponsible and can cause a serious problem. It can undermine public trust and confidence in the judiciary and could, in an extreme case, amount to an attack on the constitutional balance of a democratic state (paragraph 52). Individual courts and the judiciary as a whole need to discuss ways in which to deal with such criticism (paragraph 53).
19. The executive and legislative powers are under a duty to provide all necessary and adequate protection where the functions of the courts are endangered by physical attacks or intimidations directed at members of the judiciary (paragraph 52).
20. Politicians must never encourage disobedience to judicial decisions let alone, as it has happened in certain states, violence against judges (paragraph 52).



# Opinion No.19 (2016)

of the Consultative Council of European Judges (CCJE)  
to the Committee of Ministers of the Council of Europe

## The role of court presidents

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### I. Introduction

1. In accordance with the terms of reference entrusted to it by the Committee of Ministers, the Consultative Council of European Judges (CCJE) decided to prepare an Opinion on the role of court presidents focusing in particular on areas relating to the independence, quality and efficiency of justice.
2. The purpose of this Opinion is to examine issues and concerns relating to the role of court presidents, given the overriding need to ensure a more effective functioning of an independent judiciary and an enhanced quality of justice.
3. The Opinion has been prepared on the basis of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter the ECHR), the CCJE's Magna Carta of Judges (2010) and previous CCJE Opinions: No. 1(2001) on standards concerning the independence of the judiciary and the irremovability of judges, No. 2(2001) on the funding and management of courts, No. 10(2007) on the Council for the Judiciary in the service of society, No. 12(2009) on the relations between judges and prosecutors in a democratic society, No. 16(2013) on the relations between judges and lawyers, No. 17(2014) on the evaluation of judges' work, the quality of justice and respect for judicial independence, and No. 18(2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy, as well as relevant instruments of the Council of Europe, in particular the European Charter on the Statute for Judges (1998) and the Committee of Ministers' Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities (hereafter Recommendation CM/Rec(2010)12). This Opinion also takes account of the Council of Europe Plan of Action on strengthening judicial independence and impartiality (CM(2016)36final), of the Report 2013-2014: Minimum Judicial Standards IV – Allocation of Cases of the European Network of Councils for the Judiciary (ENCJ) (hereafter the ENCJ Report), of the United Nations Basic Principles on the Independence of the Judiciary (1985) and of the OSCE Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010) – Judicial Administration, Selection and Accountability.
4. This Opinion takes account of the replies of the CCJE members to the questionnaire on the role of court presidents<sup>1</sup>, and of the preliminary draft prepared by the expert appointed by the CCJE, Mr Marco FABRI (Italy), along with the synthesis of the replies to the questionnaire.
5. The different rules, structures and organisation of the judicial systems in member states influence the role of court presidents. This role is influenced to a significant extent by the management framework of each national judicial system as well as the legal, social, political traditions and practices that prevail in their jurisdictions.

### II. Role and tasks of court presidents

6. The role of court presidents is:
  - to represent the court and fellow judges;
  - to ensure the effective functioning of the court and thus to enhance its service to society;
  - to perform jurisdictional functions.

In performing their tasks, court presidents protect the independence and impartiality of the court and of the individual judges.

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<sup>1</sup> 38 members of the CCJE have replied to the questionnaire.

## A. Representing the court and fellow judges

7. Court presidents fulfil a key role of representing the courts. According to the information provided by the CCJE members as regards the situation in member states, the extent of this particular role is increasing. By this process, the court presidents contribute to developing the whole judicial system as well as to ensuring the maintenance and delivery of high quality independent justice by their individual courts.

In general, the court presidents may have a role in maintaining and developing relations with other bodies and institutions, for example:

- the Council for the Judiciary or a similar body where appropriate;
- other courts;
- the prosecution service<sup>2</sup>;
- the Bars<sup>3</sup>;
- the Ministry of Justice;
- the media;
- the general public.

The main duty of court presidents must remain to act at all times as guardians of the independence and impartiality of judges and of the court as a whole.

8. Court presidents are judges and therefore part of the judiciary. The level, intensity and scope of the participation of court presidents in the work of relevant bodies of judicial self-government and autonomy, such as the Council for the Judiciary, Congress of Judges, General Assembly of Judges, professional organisations of judges, depends on the national legal system. It is important that presidents, with their broad experiences, give their input in these bodies. However, concentration of functions and powers in the hands of only a limited group of persons should be avoided.
9. Through co-operation and interaction with other courts, presidents may share experiences and identify best practices of court administration and delivery of services to the court users. It would be desirable that such co-operation be extended to the international level and draw on all available means of communication.
10. Judicial training and education is often organised and managed by central judicial institutions and as a result, court presidents often perform a limited role in this area. Presidents should advise the judicial training institutions on the needs for specific training courses. They should make use of the specialised expertise and knowledge of their training institutes concerning training and development. Moreover, presidents play an important role in encouraging the judges to participate in relevant training courses and to create the conditions for this. This also applies in relation to the education and training of non-judge court staff.
11. The relations of court presidents with other organs of the state should be based on the fundamental principle of equality and separation of state powers. In some countries, the executive power exerts, through Ministries of Justice, considerable influence on the administration of courts through directors of courts and judicial inspections. The CCJE has taken the position that the presence of officials of the executive within the organising bodies of courts and tribunals should be avoided. Such a presence can lead to interferences with the judicial function, thus endangering judicial independence<sup>4</sup>. Anyway, in such cases, court presidents have an important role to prevent possible interferences into the court activities by the executive.
12. In their relations with the media, court presidents should keep in mind that the interests of society require that the media be provided with the necessary information to inform the public on the functioning of the justice system. However, such information should be provided with due regard to the presumption of innocence, the right to a fair trial and the right to respect for private and family life of all persons involved in the proceedings<sup>5</sup>, as well as the preservation of the confidentiality of deliberations.

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<sup>2</sup> See CCJE Opinion No.12(2009), Bordeaux Declaration, paragraph 3.

<sup>3</sup> See CCJE Opinion No. 16(2013), paragraph 10.

<sup>4</sup> See CCJE Opinion No. 18(2015), paragraphs 48 and 49.

<sup>5</sup> See CCJE Opinion No.12(2009), Bordeaux Declaration, paragraph 11; see CCJE Opinion No. 7(2005) on justice and society.



## B. Relations within the court: independence of judges

13. There are several principles that are essential in the relations between the court president and other judges of the court and the work of the court president in this context. Internal judicial independence requires that individual judges be free from directives or pressure from the president of the court when adjudicating cases<sup>6</sup>. Court presidents, acting as guardians of the court's independence, impartiality and efficiency, should themselves respect the internal independence of judges within their courts<sup>7</sup>.
14. It is of essential importance that court presidents administer courts in strict accordance with fundamental principles of judicial power. In general, this requires that those who are appointed as court presidents should have an extensive experience in adjudicating cases.
15. The CCJE considers it very important that court presidents, after appointment, continue to perform as judges. A continuing practice is not only important to allow presidents to ensure their continuing professionalism and maintaining contact with other judges in accordance with the principle of *primus inter pares*, but also to best fulfil their organisational role through direct awareness of issues arising in daily practice. The caseload of court presidents may be reduced having regard to their managerial tasks.
16. Coherent and consistent case-law is an important part of legal certainty. Presidents of courts have a role in ensuring the quality, coherence and consistency of judicial decisions. This task can be fulfilled only if the court presidents promote consistency in the interpretation and citation of the case-law of the court itself, higher courts, Supreme Court and international courts (for example, by facilitating education and training including seminars, meetings, ensuring access to the relevant databases, as well as promoting dialogue and the exchange of information between different instances, etc.). The CCJE emphasises that, in the course of fulfilling these tasks, court presidents must respect the principle of judicial independence.
17. Court presidents should also be empowered to monitor the length of court proceedings. This is closely linked to the reasonable length clause of Article 6 of the ECHR and the requirements of national legislation. Monitoring of the length of proceedings and actions to be undertaken by court presidents to speed up the disposition of cases must be balanced with the judges' impartiality, independence and with judicial confidentiality<sup>8</sup>.
18. Court presidents should lead by example and create a climate where the judges can address them when they need support and assistance in relation to the exercise of their functions, including in matters of ethics and deontology.
19. Courts are essentially collegial bodies. The CCJE encourages the establishment of bodies composed of judges of the court which play an advisory role and which cooperate with the court president and give advice on key issues<sup>9</sup>.

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<sup>6</sup> See the judgments of the European Court of Human Rights (hereafter the ECtHR): *Baka v. Hungary* Grand Chamber no. 20261/12, 23 June 2016, paragraph 4 of the concurring opinion of Judge Sicilianos; *Parlov-Tkalčić v. Croatia*, no. 24810/06, 22 December 2009, paragraph 86; *Agrokompleks v. Ukraine*, no. 23465/03, 6 October 2011, paragraph 137; *Moiseyev v. Russia*, no. 62936/00, 9 October 2008, paragraph 182. "The absence of sufficient guarantees ensuring judges' independence within the judicial branch, and especially vis-à-vis their superiors within the judicial hierarchy, could lead the Court to conclude that an applicant's doubts as to the independence and impartiality of a court may be said to have been objectively justified", see *Baka v. Hungary* cited above, paragraph 4 of the concurring opinion of Judge Sicilianos; *Parlov-Tkalčić v. Croatia*, cited above, paragraph 86; *Agrokompleks v. Ukraine*, cited above, paragraph 137; *Moiseyev v. Russia*, cited above, paragraph 184; and *Daktaras v. Lithuania*, no. 42095/98, paragraphs 36 and 38, ECHR 2000-X.

<sup>7</sup> ECtHR Judge Siciliano has raised the question whether Article 6(1) of the ECHR could be interpreted in such a way as to recognise, in parallel to the right of persons involved in court proceedings to have their cases heard by an impartial court, a subjective right for judges to have their individual independence safeguarded and respected by the state, see the ECtHR judgment: *Baka v. Hungary* Grand Chamber no. 20261/12, 23 June 2016, paragraphs 5-6 and 13-15 of the concurring opinion of Judge Sicilianos.

<sup>8</sup> In exercising this duty, the court presidents can use the tools and instruments developed by the European Commission for the Efficiency of Justice (CEPEJ) such as the revised Saturn Guidelines for Judicial Time Management (CEPEJ(2014)16), Time Management Checklist (CEPEJ(2005)12REV) and others.

<sup>9</sup> In some member states, such advisory bodies are statutory prescribed by law. See the work of the Council of Europe's Group of States against Corruption (GRECO) in the fourth round evaluation that deals with the prevention of corruption among parliamentarians, judges and prosecutors: GRECO has issued recommendations to many of the member states

20. Judges may experience a certain “gap” between them and presidents. It is important that this “gap” be bridged. This can be achieved if the presidents have a close relationship with the judicial work and if the judges are interested in and bear a certain responsibility for the functioning of the court as a whole and the managerial issues involved.
21. Cases should be allocated to judges in accordance with objective pre-established criteria. They should not be withdrawn from a particular judge without valid reasons. Decisions on the withdrawal of cases should only be taken on the basis of pre-established criteria following a transparent procedure<sup>10</sup>. Where the court presidents have a role in the allocation of cases among the members of the court, these principles should be followed.
22. Responses submitted by the CCJE members show that presidents perform a function of collecting data and assessing the performance of the court as a whole. In some member states, one of the functions of the court president is to evaluate the performance of individual judges. Some concerns have been expressed about analysing the performance of individual judges. In some member states, this is seen as posing a possible threat to judicial independence. Where presidents do play such a role, there must be appropriate legal and transparent safeguards in place to ensure impartiality and objectivity of that review<sup>11</sup>.
23. Where court presidents have a role in receiving and responding to parties’ complaints concerning cases pending in the court, they should have due regard to the principle of independence of judges, as well as to the legitimate expectations of the parties to the case and society as a whole<sup>12</sup>.

### **C. Managerial role<sup>13</sup>**

24. The CCJE recognises that the managerial role of court presidents in member states varies<sup>14</sup>. There is, however, a general trend towards a wider managerial role for court presidents. This is a result of demands for a better service to court users and society and reflects the general view that presidents playing that role can enhance court performance. In this regard, the CCJE stresses that various models focusing on the managerial function are possible. Any managerial model must serve the better administration of justice and not be an objective in itself. The CCJE considers that any central authority responsible for managing the judiciary should only perform those tasks which cannot be performed effectively at the level of courts.
25. While judicial systems vary, the managerial functions have to be framed and adapted to the specific environment of the judicial organ of state respecting its independence and the independence and impartiality of individual judges. As it is in the case of relations between court presidents and other judges, the managerial functions of the presidents are also based on these fundamental values. The presidents should never engage in any actions or activities which may undermine judicial independence and impartiality<sup>15</sup>.
26. Replies of the CCJE members show that in some cases, court presidents have an explicit strategic planning function. The CCJE takes the view that the obligation of court presidents to provide fair and impartial justice will inevitably require that goals are defined and strategies developed in order to address various challenges and issues affecting the judiciary.
27. Court presidents are responsible for managing the operation of the court, including managing court staff and material resources and infrastructure. It is crucial that they have the necessary powers and resources to fulfil this task efficiently.

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towards establishing a mechanism for providing confidential counseling on ethics and integrity issues to judges in the course of fulfilment of their duties.

See [http://www.coe.int/t/dghl/monitoring/greco/evaluations/index\\_en.asp](http://www.coe.int/t/dghl/monitoring/greco/evaluations/index_en.asp).

<sup>10</sup> See the Council of Europe Plan of Action on strengthening judicial independence and impartiality (CM(2016)36final), Action 2.1.

<sup>11</sup> See CCJE Opinion No. 17(2014), conclusion 11, see also CCJE Opinion No. 10(2007), paragraphs 42 and 53.

<sup>12</sup> See CCJE Opinion No. 10(2007), paragraphs 42 and 64.

<sup>13</sup> See CCJE Opinion No. 6(2004), paragraphs 52-55.

<sup>14</sup> See CCJE Opinion No. 18(2015), paragraph 48.

<sup>15</sup> See the Council of Europe Plan of Action on strengthening judicial independence and impartiality (CM(2016)36final), Action 1.5 (the first two paragraphs).

28. The role played by court presidents in managing the court staff varies quite significantly among the member states. The replies to the questionnaire show that in some member states, the powers of the court presidents can be very broad. They can deal with selection and recruitment, setting remuneration levels, transfer, discipline, performance assessment and dismissal. In other member states, the powers of the presidents are very limited and most of the managing tasks are fulfilled by an outside body or person.
29. Replies submitted by the CCJE members also show that court presidents have functions in relation to the maintenance and security of court infrastructure. If all these powers are exercised by organs appointed by, and accountable to the executive, for example to the Ministry of Justice or to the central authority, the CCJE's view is that court presidents should be involved and should have significant influence on how these services are provided.
30. These powers should be exercised in a way that is both professional and transparent. There is a clear advantage if this responsibility is shared with the "court manager" or "administrative director", who can have a different level of authority in the management of court personnel. In such cases, these officials should be appointed by, and be accountable to, court presidents.
31. Court presidents should also have the authority to establish organisational units or divisions in the court, as well as individual posts and positions in order to respond to various needs within the court operations. Where court presidents intend to make significant changes in the organisation of the court, the judges should be consulted.
32. In some member states, court presidents have some functions in the allocation of the court budget. For example, they analyse the resources needed to deal with the caseload within a reasonable time, and then negotiate with the central authorities in charge of budget allocation. This is a significant issue: it depends heavily on the administration framework of the judicial system, on the extent of its autonomy, and on the division of responsibilities within the system. The criteria used in the process of the allocation of financial and human resources to different courts are a key factor for defining the role of the court presidents. That role, if not decisive, should be significant. This is especially important in view of the existence, in some member states, of judicial systems where the allocation of resources is strictly centralised, and the discretion of the court presidents is very limited.
33. However, presidents should have the power to manage the budget within their courts. This power implies that court presidents are accountable. In order to perform this task, court presidents should be assisted by skilled professionals from among the non-judge court staff.

### **III. Election / selection, term of office, removal**

#### **A. Qualifications required for becoming president of a court**

34. The minimum qualification to become president of a court is that the candidate should have all the necessary qualifications and experience for appointment to judicial office in that court.
35. In addition, they should have managerial abilities and skills. The CCJE has already observed that when judges are given responsibility for the administration of the courts, they should receive appropriate training and have the necessary support to carry out the task<sup>16</sup>.
36. Thus, the qualifications for appointment as court presidents should reflect the functions and tasks they will have to carry out. Greater managerial functions demand more managerial abilities and skills.

#### **B. Body to elect / select court presidents**

37. The manner in which presidents of courts are selected, appointed or elected varies in the member states as the responses to the questionnaire show. These procedures are affected by the existing system of judicial administration and the role of presidents of courts. In some systems, presidents are appointed or promoted from among judges, while others allow for appointments or selections to be made from outside. In the case of the former, the merits of the candidate as well as his or her judicial experience are taken into account.

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<sup>16</sup> See CCJE Opinion No. 2(2001), paragraph 13; see also the document "Training to leadership" of the European Judicial Training Network (EJTN) of June 2016.

38. The CCJE considers that the procedures for the appointment of presidents of courts should follow the same path as that for the selection and appointment of judges. This will include a process of evaluation of the candidates and a body having the authority to select and/or appoint judges in accordance with the standards established in Recommendation CM/Rec(2010)12 and previous Opinions of the CCJE<sup>17</sup>.

In any event, the system of selection and appointment of presidents of courts should include, as a rule, a competitive selection process based on an open call for applications of candidates who meet pre-determined conditions set out in the law.

39. The CCJE also wishes to stress that, irrespective of the existing rules of procedures and what bodies are empowered to decide which candidate will take on the position of court president, what is essential is that the best candidate is selected and/or appointed as stated in Recommendation CM/Rec(2010)12<sup>18</sup> and in CCJE Opinion No.1(2001): "...the authorities responsible in member States 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 qualifications, integrity, ability and efficiency"<sup>19</sup>.

The CCJE is of the opinion that the judges of the court in question could be involved in the process. This can take the form of a binding or advisory vote.

40. In some member states, presidents of courts are not selected and/or appointed but are elected by their peers - the judges of the court. The CCJE is of the opinion that in such a system, objective criteria of merit and competence should also prevail.

### **C. Evaluation of the work of court presidents**

41. In general, the performance of court presidents is subject to evaluation in the same way as the work of ordinary judges, with all the necessary safeguards to be respected<sup>20</sup>.
42. In addition, based on the specific role of the court presidents, appraisal can take place to assess the overall work done, including the managerial functions, in order to explore the possibility of improvements, and in order to learn from experience. Such appraisal should be appropriate for the presidents' tasks and responsibilities.
43. Only few member states indicate that they have specific appraisals for court presidents. This appraisal assumes the existence of objective indicators. In general, the evaluation of judges may indeed be based on a number of quantitative and qualitative criteria<sup>21</sup>. However, there are very few specific practices in member states when it comes to evaluating the managerial performance of a court president. In member states where the drafting of a work plan for the court takes place, this may provide a basis for evaluation of the managerial performance.

### **D. Term of office**

44. Member states have chosen different options regarding the terms of office of presidents of courts, which may range from two to seven years, renewable once or several times. In some countries, court presidents, once elected/selected, can hold the office until their retirement. On the one hand, the term of office should be long enough to gain sufficient experience and to permit the realisation of ideas to offer better services to the court users. On the other hand, the term of office should not be too long, since this can lead to routine and can hinder the development of new ideas. The CCJE recommends to find, depending on the concrete institutional framework of the respective country, an adequate balance between these two perspectives. It should also be considered that each election or appointment of a president provides a certain influence of the electing or appointing body on the respective court.

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<sup>17</sup> See CCJE Opinion No. 10 (2007), paragraph 51.

<sup>18</sup> See Recommendation CM/Rec(2010)12, Chapter VI, paragraphs 44 and 45.

<sup>19</sup> See CCJE Opinion No. 1(2001) on standards concerning the independence of the judiciary and the irremovability of judges, paragraphs 25 and 29.

<sup>20</sup> See CCJE Opinion No. 17(2014) on the evaluation of judges' work, the quality of justice and respect for judicial independence.

<sup>21</sup> See CCJE Opinion No. 17(2014), paragraph 13.

45. The safeguards of irremovability from office as a judge apply equally to the office of a court president. The CCJE agrees that “the security of tenure and conditions of service of judges are absolutely necessary elements for the maintenance of judicial independence, according to all international legal standards, including those of the Council of Europe<sup>22</sup>. There is nothing in these standards to suggest that the principle of irremovability of judges should not apply to the term of office of presidents of courts, irrespective of whether they perform, in addition to their judicial duties, administrative or managerial functions”<sup>23</sup>.
46. These standards are not inconsistent with time limited presidencies. When judges are appointed to the presidency of a court for a particular term, they should serve that term in full. A president can only be removed from office (e.g. following disciplinary proceedings) following the application - as a minimum - of those safeguards and procedures that would apply when consideration is being given to a removal from office of an ordinary judge<sup>24</sup>. Serious organisational failures or an incapacity to fulfil the functions of court president can lead to a procedure for removal. Any pre-term removal should be subject to clearly established procedure and safeguards, with clear and objective criteria.
47. Furthermore, the procedure in the case of pre-term removal should be transparent and any risk of political influence should be firmly excluded. Consequently, the participation in this process of executive authorities, e.g. the Ministry of Justice, should be avoided. Furthermore, the procedures should not depart from those applied in the case of other judges.
48. Termination of the term of office of a court president, whether as a result of the end of mandate or in the case of pre-term removal, should in principle not affect his/her position as a judge.

#### **IV. Presidents of Supreme Courts**

49. Presidents of the highest courts have different roles and duties which arise from the specific role of these courts and their role as a figure which is somehow the personification of the whole judicial system, especially in those member states where there is one Supreme Court. Nevertheless, the CCJE is of the opinion that, besides the above-mentioned important roles, presidents of Supreme Courts are also presidents of their courts and in that respect, all tasks and principles enunciated in this Opinion generally apply also to presidents of Supreme Courts.
50. Presidents of Supreme Courts may also have additional specific tasks according to the place which they occupy within the national judiciary. These specific tasks vary among member states and may include, for example, the following:
  - representing the national judiciary;
  - providing opinions reflecting the views of the judiciary on strategic developments and the elaboration of legislation affecting the functioning of the judiciary;
  - being consulted in the process of the preparation of the state budget and the allocation of resources with regard to the judicial budget<sup>25</sup>;
  - preparing annual reports for the attention of the Parliament on the current state of affairs within the judiciary<sup>26</sup>.
51. In some member states, presidents of Supreme Courts are *ex officio* members of the Councils for the Judiciary and in this capacity they are centrally involved in all matters related to the administration of the judiciary, appointment, promotion, transfer and dismissal of judges, disciplinary proceedings against judges, resolving various disputes, and so on.
52. In view of the specific tasks of presidents of Supreme Courts, the CCJE cautions against the risk of excessive accumulation of different powers within their authority which may have a negative effect on the independence of the judiciary and the confidence of the public in its impartiality.

<sup>22</sup> See i.a. Recommendation CM/Rec(2010)12, Chapter 6, paragraphs 49 and 50.

<sup>23</sup> See the judgment of the ECtHR: *Baka v. Hungary* Grand Chamber no. 20261/12, 23 June 2016, paragraph 17 of the joint concurring opinion of Judges Pinto de Albuquerque and Dedov.

<sup>24</sup> See CCJE Opinion No. 1(2001) on standards concerning the independence of the judiciary and the irremovability of judges.

<sup>25</sup> See CCJE Opinion No. 2(2001), paragraph 10.

<sup>26</sup> See the Council of Europe Plan of Action on strengthening judicial independence and impartiality (CM(2016)36final), Action 1.5 (the third paragraph).

53. In almost all member states, the election/selection procedures for presidents of Supreme Courts are different from those designed for other court presidents. The CCJE stresses that the process of election/selection of presidents of Supreme Courts should conform to certain criteria and provide for safeguards in order to maintain the fundamental principles of independence of the judiciary and the impartiality of judges. The procedures for election/selection should be defined by law and be based on merit. They should formally rule out any possibility of political influence. Any such risk may be overcome by adopting a model whereby the election of the presidents is done by the judges of the Supreme Court concerned. The CCJE sees value in such a model.
54. Rules regarding the term of office of Supreme Court presidents vary greatly among member states: from one end of the spectrum, appointment for two years with the possibility of renewal once, to an indefinite appointment until retirement.
55. The CCJE does not attempt to prescribe which term of office is the most appropriate for presidents of Supreme Courts. This depends on the national legal system and accordingly the role and functions of the president. However, presidents should be given sufficient time to fulfil their tasks in an independent and impartial manner free from any political or other outside influence.

## **V. Conclusions and recommendations**

1. The role of court presidents is to represent the court and fellow judges, to ensure the effective functioning of the court, thus enhancing its service to society, and to perform jurisdictional functions (paragraph 6). In performing their tasks, court presidents protect independence and impartiality of the court and individual judges and they have to act at all times as guardians of these values and principles (paragraphs 6 and 7).
2. Court presidents have their role in contributing to the work of bodies of self-government. However, a concentration of functions and powers in the hands of only a limited group of persons should be avoided (paragraph 8).
3. In their relations with the media, court presidents should keep in mind the interest of society in being informed, while also having due regard to the presumption of innocence, the right to a fair trial and the right to respect for private and family life of all persons involved in the proceedings, as well as to the preservation of the confidentiality of deliberations (paragraph 12). Court presidents, acting as guardians of the court's independence, impartiality and efficiency, should themselves respect the internal independence of judges within their courts (paragraph 13).
4. Where court presidents have a role in collecting data and assessing the work of the court and of individual judges, appropriate safeguards must be in place to ensure impartiality and objectivity (paragraph 22).
5. Any managerial model in courts must facilitate the better administration of justice and not be an objective in itself. The court presidents should never engage in any actions or activities which may undermine judicial independence and impartiality (paragraphs 24 and 25).
6. The role of court presidents in the allocation of budgetary means to the court should be significant, if not decisive (paragraph 32), and they should have the power to manage the budget within their courts (paragraph 33).
7. The minimum qualification to become a court president is that the candidate should have all the necessary qualifications and experience for appointment to judicial office in that court. The skills and abilities for appointment as court presidents should reflect the functions and tasks they will have to carry out (paragraphs 34 and 36).
8. The CCJE considers that the procedures for the appointment of court presidents should follow the same path as that for the selection and appointment of judges in line with standards established in Recommendation CM/Rec(2010)12 and previous CCJE Opinions (paragraph 38). Judges of the court in question could be involved in the process of election, selection and appointment of court presidents. An advisory or even binding vote is a possible model (paragraph 39).
9. In general, the performance of court presidents is subject to evaluation in the same way as the work of ordinary judges, with all necessary safeguards to be respected (paragraph 41).

10. The principle of irremovability of judges should apply to the term of office of court presidents, irrespective of whether they perform, in addition to their judicial duties, administrative or managerial functions (paragraph 45). Removal of a court president before the expiration of his/her mandate should, as a minimum, be subject to the same safeguards as the removal of ordinary judges (paragraph 46).
11. The termination of the term of office of a court president should in principle not affect his/her position as a judge (paragraph 48).
12. Presidents of Supreme Courts are also presidents of their courts and in that respect, all tasks and principles enunciated in this Opinion generally apply also to them (paragraph 49).
13. The procedures for election/selection of Presidents of Supreme Courts should be defined by law and be based on merit and should formally rule out any possibility of political influence (paragraph 53).





# Opinion No. 20 (2017)

of the Consultative Council of European Judges (CCJE)  
to the Committee of Ministers of the Council of Europe

## The role of courts with respect to the uniform application of the law

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### I. Introduction

1. Equal and uniform application of the law ensures the generality of the law, equality before the law and legal certainty. On the other hand, the need to ensure uniform application of the law should not lead to its rigidity and unduly restrict the proper development of law, nor should it call the principle of judicial independence into question.
2. In accordance with the terms of reference entrusted to it by the Committee of Ministers, the Consultative Council of European Judges (CCJE) resolved to reflect upon the role of courts with respect to the uniform application of the law and to set out applicable standards and recommendations.
3. This Opinion has been prepared on the basis of previous CCJE Opinions, the CCJE Magna Charta of Judges (2010), and the relevant instruments of the Council of Europe, in particular the European Charter on the Statute for Judges (1998) and Recommendation [CM/Rec\(2010\)12](#) of the Committee of Ministers on judges: independence, efficiency and responsibilities (hereafter "Recommendation CM/Rec(2010)12").
4. This Opinion takes account of the replies of the CCJE members to the questionnaire on the role of courts with respect to the uniform application of the law prepared by the CCJE Bureau<sup>1</sup>, and of the report and the preliminary draft prepared by the scientific expert appointed by the Council of Europe, Professor Aleš GALIČ (University of Ljubljana, Slovenia), along with the analysis of the replies to the questionnaire.

### II. Why is the uniform application of the law important?

5. The uniform application of the law is essential for the principle of the equality before the law. Moreover, considerations of legal certainty and predictability are an inherent part of the rule of law. In a state governed by the rule of law, citizens justifiably expect to be treated as others and can rely on the previous decisions in comparable cases so that they can predict the legal effects of their acts or omissions.
6. The persistence of conflicting<sup>2</sup> court decisions can create a state of legal uncertainty likely to reduce public confidence in the judicial system, which is one of the essential components of a state based on the rule of law.<sup>3</sup> Uniform application of the law contributes to public confidence in the courts and enhances the public perception of fairness and justice.
7. If parties can know in advance where they stand, they might often decide not to go to court in the first place. It should be, to the greatest extent possible, for the lawyers to know how to advise their clients and hence for litigants to know their rights. Precedents/settled case law (hereafter the case law), setting out clear, consistent and reliable rules, may reduce the need for judicial intervention in resolving disputes. By being able to rely on previous decisions, reached in similar cases, in particular by higher courts, cases can be resolved more efficiently.

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<sup>1</sup> Answers to the questionnaire (national reports) have been received from the following 34 countries: Albania, Andorra, Armenia, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Finland, France, Georgia, Germany, Hungary, Iceland, Ireland, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, Republic of Moldova, Monaco, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, Slovenia, Switzerland, Sweden, "the former Yugoslav Republic of Macedonia", Turkey, Ukraine and the United Kingdom.

<sup>2</sup> Please note that in the French version of this Opinion, the term "conflicting" is translated as "contradictoire".

<sup>3</sup> The ECtHR, *Vinčić and others v. Serbia*, [44698/06](#), 1 December 2009.

8. As interpreted by the European Court of Human Rights (hereafter the ECtHR), the right to fair trial enshrined in Article 6 of the European Convention on Human Rights (hereafter the ECHR) is also linked to the requirements concerning the uniform application of the law. Certain divergences in interpretation can be accepted as an inherent trait of any judicial system which is based on a network of courts.<sup>4</sup> Different courts may thus arrive at divergent but nevertheless rational and reasoned conclusions regarding the same legal issue raised by similar factual circumstances.<sup>5</sup>
9. However, under certain circumstances conflicting decisions of domestic courts, especially courts of the last instance, can constitute a breach of the fair trial requirement enshrined in Article 6(1) of the ECHR. Thereby it has to be assessed whether (1) “profound and long-standing differences” exist in the case law of the domestic courts, (2) whether the domestic law provides for machinery for overcoming those inconsistencies, (3) whether that machinery has been applied and, (4) if appropriate, to what effect.<sup>6</sup> The CCJE welcomes the development which emphasises the close link between the uniformity and consistency of case law and the individual’s right to a fair trial.

### III. The case law as a source of law

10. Regardless of whether precedents are considered to be a source of law or not, or whether they are binding or not, referring to previous decisions is a powerful instrument for judges both in common law as well as in civil law countries. Nevertheless, the CCJE recognises that the difference between the common and civil law systems has traditionally been particularly significant in regard to treatment of precedent and case law in general.
11. In common law countries, decisions of higher courts that settle a legal issue serve as binding precedents in identical disputes thereafter.<sup>7</sup> Thus precedents are in principle binding *de jure* and thus considered to be a proper source of law. *Stare decisis*<sup>8</sup> - the legal principle of determining points in litigation according to precedent - is an important aspect of common law. In civil law countries, the guarantee of independence of judges has traditionally been construed as meaning, *inter alia*, that judges are independent and are, in their decision-making, bound (only) by the Constitution, international treaties, statutes and general principles of law, not by judicial decisions reached in similar cases. Therefore, in a number of civil law countries, case law has traditionally not been recognised as a binding source of law. Consequently, there have traditionally been important divergences between the common and civil law systems concerning the question of whether only a court of the same or a higher level can overrule a precedent, or whether every, i.e. also a lower, court can depart from the case law provided that such departure is not arbitrary.
12. Nevertheless, the CCJE has already observed that in civil law countries judges are guided by case law, especially that of the highest courts, whose task includes ensuring the uniformity of case law<sup>9</sup>. It follows from the reports of the CCJE members that in the majority of civil law jurisdictions, although lower courts are not formally bound by judgments of higher courts, they usually will follow their decisions in similar matters, whereby higher courts and the supreme court or the court of cassation<sup>10</sup> in particular, are aware of their role in ensuring the uniform application of the law. In addition, in some countries of a civil law tradition, (certain) judgments of the supreme court, sitting as a grand chamber (*en banc*) or in extended chamber, are binding – either for all courts or for all panels of the supreme court (until another judgment of a grand chamber is taken).
13. Consequently, in civil law countries, court rulings, especially of a supreme court, have a wider importance than in the specific case in respect of which that ruling was given and, from this perspective, it can be considered a source of law. With regard to civil law countries, reports submitted by the CCJE members quote constitutional rules relating to the rule of law, equality before the law, principle of justice, the right to a fair trial and the position of supreme courts as forming the basis for the concept of the uniform application of the law. Therefore, on the legislative level, laws relating to the organisation of courts (in particular the powers of the supreme court), the laws on constitutional courts and laws determining filtering criteria for the access to the supreme courts, are relevant.

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<sup>4</sup> The ECtHR, *Tomić and others v. Montenegro*, 18650/09 and others, 17 April 2012.

<sup>5</sup> The ECtHR, *Şahin and Şahin v. Turkey*, 13279/05, 20 October 2011.

<sup>6</sup> *Ibid.*

<sup>7</sup> See CCJE Opinion No. 11(2008) on the quality of judicial decisions, para 45.

<sup>8</sup> *Stare decisis* is Latin for “to stand by things decided”.

<sup>9</sup> See CCJE Opinion No. 11(2008) on the quality of judicial decisions, para 48.

<sup>10</sup> For the purposes of the present Opinion, the term “supreme courts” will be used for referring to the courts of highest instance.

14. According to the *stare decisis* doctrine, one precedential decision has a relevance. A consolidated trend of decisions on a certain point all in accord (settled case law, *jurisprudence constante*, *ständige Rechtsprechung*) has traditionally been required in order to become relevant in civil law countries. This will certainly not prevent a decision from having a jurisprudential value when the supreme court rules for the first time on a question of law which is not yet settled. It is accepted that there can be no formula as to how to identify the moment at which the case law can be considered settled. Numerous supreme courts in civil law countries are now empowered to select cases with intention of setting standards that should be applicable in future cases. Therefore, in these cases, already one judgment of a supreme court, when it was reached with intention to set a precedent, can count as an authoritative case law.

#### **IV. Means for ensuring the uniform case law**

##### **a. Formal, semi-formal and informal mechanisms**

15. There are formal, semi-formal and informal mechanisms with regard to the role of courts in achieving consistent case law.
16. Formal proceedings brought to appellate<sup>11</sup> and in particular to supreme courts or courts of cassation have the most direct impact on the uniform interpretation and application of the law. Such proceedings in the supreme courts are for example (1) deciding an individual litigant's appeal (a final appeal on points of law; revision, cassation), (2) special appeals brought by a public prosecutor (or a similar public body) bringing to the Supreme court (in civil cases) an important legal question with a goal of ensuring, the uniform application of the law or development of law through case law, whereby such a recourse in most systems results in a declaratory judgment, not affecting the rights of the litigants in the case at hand, (3) rendering interpretational statements (which are called e.g. "uniformity decision", opinions, principled legal opinions) in a purely abstract manner, not on appeal brought in an individual case and (4) preliminary rulings adopted in pending cases on narrowly defined points of law, upon the request of an inferior court.
17. Semi-formal mechanisms include e.g. regularly scheduled meetings of judges within a court, or with judges of different courts of the same level or with judges of a hierarchically senior court. Such meetings can have either a purely informal character or they might be institutionalised to a certain extent. Issuing "guidelines" (that generally leave room for individual assessments) in which attention is drawn to the applicable principles, in accordance with the established case law (such as scales for damages regarding personal injury in civil cases, sentencing in criminal cases or reimbursable lawyers' fees – where there is no lawyers' tariff applicable can have similar effects.
18. In the third place, there are purely informal mechanisms, such as informal consultations among judges seeking to establish consensus on several points of procedural and material law when practice shows divergent case law. Continued legal education and judicial training is extremely important for uniformity and predictability of the case law.
19. These semi-formal and informal mechanisms are intended to promote the uniform application of the law, but conclusions drawn in these contexts cannot infringe the independence of the individual judge.

##### **b. The role of supreme courts**

20. It is primarily a role of a supreme court to resolve contradictions in the case law. The supreme court must ensure uniformity of the case law so as to rectify inconsistencies and thus maintain public confidence in the judicial system.<sup>12</sup> There is an inherent link between considerations concerning the uniformity of the case law, on the one hand, and mechanisms for access to the supreme court, on the other.
21. The CCJE recognises that, on account of differences in legal traditions and organisation of judiciaries, access to supreme courts is framed differently across Europe. The same applies to the concepts as to whether supreme courts should predominantly serve the private function or the public function. The former consists of striving for just and correct resolution of every individual case for the benefit of the parties to this case. The latter is concerned with safeguarding and promoting the public interest in

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<sup>11</sup> The term "appellate courts" also refers to the appellate panels.

<sup>12</sup> The ECtHR, *Albu and others v. Romania*, 34796/09, 12 May 2012.

ensuring the uniformity of the case law and the development of law. As this would go beyond the scope of this Opinion, the CCJE does not attempt to prescribe how to organise supreme courts and access to them<sup>13</sup>. Nevertheless, the supreme court's responsibility to ensure uniform case law is likely to require the establishment of adequate selection criteria for admitting cases to the supreme court. Those countries which permit unfettered right to appeal may consider introducing a requirement for seeking leave or other appropriate filtering mechanism. The criteria for granting leave should facilitate the supreme court in fulfilling its role in promoting the uniform interpretation of the law. In that context, the CCJE recalls what was said in Recommendation No. R (95) 5<sup>14</sup>.

22. The introduction of such criteria for granting leave to appeal namely implies that a supreme court's resolution of the matter bears significance beyond the scope of the individual case. It will generally be expected to be followed in future cases and therefore offers a valuable guidance for lower courts and all future litigants and their lawyers. Only such selection criteria ensure that only cases of precedential value are adjudicated by a supreme court. At the same time, these are also the only criteria which may ensure that all such cases can reach a supreme court. Therefore, a supreme court can effectively perform the function of stating rules that should be effective in future cases in all areas of law. Other selection criteria, such as the value of a claim in civil cases or the severity of the sentence at stake in criminal matters, cannot serve these purposes.
23. The CCJE takes the view that the responsibility of supreme courts to ensure and maintain the uniformity of the case law thus should not be understood as if the supreme court is required to intervene as often as possible. In addition to causing delays in the supreme court's handling of cases and diminishing the quality of its adjudication, such an approach would inevitably cause contradictions within the case law of the supreme court itself, whereby it is also inevitable that if the number of cases decided by a supreme court is excessively high, its case law will frequently remain overlooked. Therefore, existence of conflicting judgments of lower courts cannot simply be cured by providing for an unrestricted access to the supreme court.
24. The existence of instruments for ensuring uniformity within the same court is particularly relevant for supreme courts. It is especially problematic if the supreme court itself becomes a source of uncertainty and of conflicting case law, instead of ensuring its uniformity. It is thus of paramount importance that within the supreme court, mechanisms exist which can remedy inconsistencies within this court. Such instruments may include e.g. referrals to grand chambers or convening larger panels where the case law of the supreme court is divergent or where reconsidering and possible overruling of an established precedent is considered. At least an "exchange of opinions" with the chamber, from which case law another chamber intends to depart, might be necessary. Informal mechanisms, as mentioned above in para 19, are also valuable.
25. The CCJE is of the opinion that a divergent case law in appellate level of jurisdiction (either within the same appellate court or between different appellate courts) is best addressed by a possibility to file a further appeal on points of law to the supreme court.

### **c. The role of appellate courts**

26. It should be recalled that if access to the supreme courts is shifting from a matter of a right to a matter of exception, it is the courts of appeal that are becoming the highest instance for most cases. They should therefore be in a position to accomplish their role in ensuring the quality of justice which includes the need to secure the uniform application of the law. Achieving consistency of the case law may take time, and periods of conflicting case law may therefore be tolerated without undermining the principle of legal certainty.<sup>15</sup> Consequently, in the CCJE's view, it cannot be automatically imposed on a supreme court to intervene as soon as there are divergent decisions on the level of appellate courts. It can be expected in numerous cases that the uniform application of laws should in due time be achieved on the level of appellate courts. Therefore, appellate courts have an important role in ensuring uniform application of laws.

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<sup>13</sup> See CCJE Opinion No. 11 (2008) on the quality of judicial decisions.

<sup>14</sup> See Recommendation No. R (95) 5 of the Committee of Ministers to member states concerning the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases (Article 7 (c)): "Appeals to the third court should be used in particular in cases which merit a third judicial review, for example cases which would develop the law or which would contribute to the uniform interpretation of the law. They might also be limited to appeals where the case concerns a point of law of general public importance. The appellant should be required to state his reasons why the case would contribute to such aims".

<sup>15</sup> The ECtHR, *Albu and others v. Romania*, 34796/09, 12 May 2012.

#### **d. Specialised courts**

27. The existence of specialised courts on the lower level does not necessarily have significant adverse effects on the uniformity of the case law if in the top of the structure of judiciary there exists a single supreme court with general jurisdiction. If, however, there exist multiple “supreme courts” or courts with final jurisdiction and when they may deal with the same legal issues, this could cause problems concerning the uniform application of law. In accordance with the case law of the ECtHR, it is essential in such cases that the domestic law provides for formal or informal mechanisms for overcoming the inconsistencies between these unrelated and independent supreme courts and that such mechanisms produce consolidating effects<sup>16</sup>.

#### **e. Binding interpretative statements *in abstracto***

28. In the CCJE’s view, the public role of a supreme court, which consists of providing guidance *pro futuro* thus ensuring the uniformity of the case law and the development of law, should be achieved through a proper filtering system of appeals. This should be preferred over making law *in abstracto* in the form of binding interpretative statements or general opinions, adopted in plenary sessions of a supreme court. Such instruments, as (still) existing in several countries<sup>17</sup>, are (unlike the instrument of preliminary rulings) adopted irrespective of any real-life or pending cases and without the parties to such cases and their lawyers being able to argue their positions. While admitting that such instruments can have a positive impact on uniformity of the case law and legal certainty, the CCJE is of the opinion that they raise concerns from the viewpoint of the proper role of judiciary in the system of separation of state powers.

#### **f. Preliminary rulings**

29. In some countries, there is a possibility for courts of lower instance to refer, in the framework of pending cases, a question of interpretation of a point of law to the supreme court. This may contribute to the uniformity in application of the law since future divergences may be avoided. On the other hand, such preliminary rulings may provide a premature authoritative answer to the question and thus hinder the successive development of the law.

### **V. Departure from the case law**

#### **a. The need to prevent rigidity and obstacles for the development of law**

30. The CCJE is of the view that seeking to ensure equality, uniform interpretation and application of the law should not lead to rigidity and to obstacles for the development of law. Therefore, the requirement that “like cases should be treated alike” must not be framed in absolute terms. The case law development is not, in itself, contrary to the proper administration of justice since a failure to develop and adapt the case law would risk hindering reform or improvement<sup>18</sup>. Changes in society may trigger the need for a new interpretation of the law and thus overruling of a precedent. Moreover, decisions from supranational courts and treaty bodies (such as the Court of Justice of the EU or the ECtHR) often result in the need to adjust the domestic case law as well.
31. The need for improving a previous interpretation of the law might be the other reason for departing from the case law. This, however, should happen only when there are pressing needs to overrule. It is the view of the CCJE that considerations of legal certainty and predictability should support a presumption that a legal question, on which there already is a well-established case law, shall not be reopened. Thus, the more the case law regarding a certain issue is uniformly settled, the greater is the burden on a judge who departs from such case law to provide persuasive reasons.

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<sup>16</sup> The ECtHR, *Sahin and Sahin v Turkey*, 13279/05, 20 October 2011.

<sup>17</sup> These instruments, referred to under no. 3 of para 16 above, are different (as they are binding, and issued with no reference to a pending case) from those referred to under no. 2 of the same para, for which no objections arise.

<sup>18</sup> The ECtHR, *Sahin and Sahin v Turkey*, 13279/05, 20 October 2011, para 58.

#### **b. The requirement to provide explicit reasons for departure from established case law**

32. The CCJE has already adopted the position that while judges should in general apply the law consistently, it is of paramount importance that when a court decides to depart from previous case law, this should be clearly mentioned in its decision<sup>19</sup>. It should explicitly follow from the reasoning that the judge knew that the settled case law was different concerning the relevant matter and it should thoroughly be explained why the previously adopted position should not stand. Only then can it be established whether the departure was conscious (whether the judge consciously departed from the case law in an effort to ultimately change it) or whether the court neglected or was simply unaware of the previous case law. In addition, only in such manner can a genuine development of law be achieved. Failing compliance with these requirements can be considered arbitrary and the individual's right to a fair trial would be violated<sup>20</sup>.

#### **c. The principle of judicial independence and the binding force of the case law**

33. According to the *stare decisis* doctrine in common law countries, only superior courts and, under some conditions, courts of the same level may depart from a previous precedent, whereas lower courts are generally bound by precedents of higher courts. Therefore, the latter is not considered to be incompatible with the requirements of judicial independence<sup>21</sup>.
34. On the contrary, in many civil law countries, the (constitutional) guarantee of independence of judges is construed as meaning, *inter alia*, that judges are, in their decision-making, bound (only) by the Constitution, international treaties and statutes, not by judicial decisions of hierarchically superior courts, reached in previous similar cases. It is thus accepted that also inferior courts may depart from settled case law of hierarchically superior courts. The CCJE agrees that different legal traditions may lead to different perceptions as to the interface between precedents of higher courts and judicial independence of judges in lower courts and that these different approaches may continue to coexist.
35. It is however essential that, firstly, when the lower court may depart from the case law established on the superior level, the requirements concerning reasons, as elaborated in the sub-chapter b above, fully apply. Secondly, in case when a lower court departs from the case law of a higher court, a possibility of appeal should in general be open to such higher court. The latter should have the last word concerning the disputed issue and should be in a position to determine whether it will insist on its previous case law, or whether it will agree with the arguments of the lower court that the case law should be changed.
36. If the parties justifiably rely on the existing case law, the court that considers departing from it should, in the CCJE's view, so far as possible avoid causing undue surprise. It should enable the parties to realise that such a change is indeed considered and thus give them opportunity to prepare and possibly adjust their arguments. In exceptional circumstances, even a prospective overruling could be an acceptable tool to prevent undue harshness to parties which have justifiably relied on existing case law.

#### **d. Distinguishing cases**

37. Adjudication implies the assessment of all the specific circumstances of the case at hand. In this perspective too, there are limits to uniformity. The relevance of the case law presupposes that the previous case was indeed based on essentially similar facts. When relying on case law, due consideration should be given to the context and circumstance of the case wherein they were adopted.
38. Adequate focus should be devoted to analysing relevant case law including developing proper techniques for distinguishing cases. These can have the effect that the case is taken out of the category of cases apparently covered by the earlier decision so that on a close and critical analysis, the earlier decision is not in fact a relevant precedent. Giving two disputes different treatment cannot be considered to give rise to conflicting case law when this is justified by differences in the factual situation in question.

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<sup>19</sup> See CCJE Opinion No. 11(2008) on the quality of judicial decisions, para 49.

<sup>20</sup> See the case *Brezovic v. Croatia*, ECtHR.

<sup>21</sup> Strictly speaking, a precedent set by lower courts in common law countries is never binding on a higher court.

#### **e. The consequences for judges for not following the established case law**

39. Legal knowledge, including that of the case law, is an aspect of judicial competence and diligence; nevertheless, a judge acting in a good faith, who consciously departs from the settled case law and provides reasons for doing so, should not be discouraged from triggering a change in the case law. Such departure from the case law should not result in disciplinary sanctions or affect the evaluation of the judge's work, and should be seen as an element of the independence of the judiciary.

#### **VI. Publication and reporting of the case law**

40. An adequate system of reporting case law is essential for ensuring uniform application of law. At least judgments of the supreme courts and appellate courts should be published in order to make them known not just to the parties to the individual case but, so as to enable them to rely on these judgments in future cases, to other courts, lawyers, prosecutors, academics and general public<sup>22</sup>.
41. Official, semi-official and private kinds of reports can be in place, in a traditional paper form or in a form of electronic data-bases privately or publicly. Judges should have access, and be trained to use free of charge at least one electronic data base with the case law of the supreme court and of appellate courts.
42. The CCJE acknowledges that different legal traditions influence different styles of judicial decisions and also different concepts as to which decisions should be published and in what form. The CCJE however wishes to stress that due regard must also be given to the factual circumstances and the context of the case, so that the possible use of the reported decision in future cases will not unduly be extended to cases, based on insufficiently similar circumstances. The CCJE welcomes the practice to publish summaries of decisions (indexes or maxims), including factual background, so as to make the search for precedents easier.
43. Where supreme courts or appellate courts produce a huge amount of the case law, its mere publication does not yet enable judges, lawyers and academics to keep a proper track of it. For such circumstances, the CCJE sees a value in a system that a selection of judgments, which set important standards to be followed in future cases, is published in a form (for example "a collection of landmark decisions") with a purpose to ensure to a greater extent that they will be taken into account.

#### **VII. Other relevant aspects**

##### **a. Responsibilities of all three state powers**

44. The concept of the uniform application of the law is relevant to all organs of state: the legislature, the executive and the judiciary. In this respect too, the organs of state are interconnected and interdependent as they all have an obligation to foster coherent legal rules and coherent application of these rules. The law must as far as possible be clear, foreseeable and consistent and when amending laws, the legislature should have due regard to the case law that has developed in the areas, where the change is attempted. The courts can better ensure uniform application of laws if laws are logically consistent, well drafted, clearly worded, avoiding unnecessary ambiguity and without internal contradictions.
45. The CCJE, while admitting that legislative reforms are inevitable in a highly regulated modern society, wishes to warn that frequent, sometimes incoherent and hasty, changes of laws affect the quality of legislation and legal certainty. Piecemeal nature of amendment and the complexity of laws (as amended) compromise the principle of legal certainty.
46. Contradictions in the case law are sometimes a consequence of ambiguously drafted laws which prevent courts from being able to arrive at a uniform and generally acceptable interpretation. The CCJE considers it in such circumstances to be ultimately the responsibility of the legislature to change the law. This is not to suggest that casuistic and detailed regulation is a desired goal. Broad definitions and open norms are often indispensable as they allow courts much needed flexibility and may be useful when the need arises to fill gaps in law. As the ECtHR reiterates, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances<sup>23</sup>.

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<sup>22</sup> See CCJE Opinion No. 14(2011) on justice and information technologies (IT).

<sup>23</sup> The ECtHR, *Borisenko and Yerevanyan Bazalt Ltd. v. Armenia*, 18297/08, 14 April 2009.

## **b. The role of lawyers and prosecutors**

47. The role of lawyers and public prosecutors in ensuring uniform application of laws is very important. For ensuring the best quality of justice for the parties, adequate contribution should be made by the lawyers and public prosecutors. They should engage in a proper research of the case law and submit arguments for the applicability or, respectively, the inapplicability of previous decisions.

## **c. Ensuring uniform application of international and supra-national law**

48. Internationalisation of law creates a challenge as to how to ensure uniformity in application among different countries. Concerning international treaties, due regard should be given to the need to achieve their uniform application in all contracting states. Contradictions between national laws and international treaties should be avoided. These goals should be pursued regardless of whether a state adheres to the “dualist system” (meaning that international law is not directly applicable, an implementing domestic legislation is necessary) or to the “monist system” (meaning that international law does not need to be translated into national law and can, once the international treaty is ratified, be directly applied by the courts). This includes clarifying the proper interaction of legal rules on different levels, in order to secure that co-existent and partly integrated systems of law are functioning as a whole<sup>24</sup>.

## **VIII. Main conclusions and recommendations**

- a. Regardless of whether precedents are considered to be a source of law or not or whether they are binding or not, reasoning with previous decisions is a powerful instrument for judges both in common law as well as in civil law countries.
- b. Equal and uniform application of the law ensures the generality of the law, equality before the law and legal certainty in a state governed by a rule of law. Uniform application of laws enhances the public perception of fairness and justice, and the confidence in the administration of justice.
- c. A persistence of conflicting decisions of courts, especially courts of the last instance, can trigger a breach of the fair trial requirement enshrined in Article 6(1) of the ECHR.
- d. The need to ensure uniform application of the law should not lead to rigidity and unduly restrict the proper development of law and neither should it jeopardise the principle of judicial independence.
- e. It is primarily a role of a supreme court to resolve conflicts in the case law and to ensure consistent and uniform application of laws as well as to pursue development of law through the case law.
- f. From the perspective of ensuring uniformity and consistency of the case law, it is most appropriate if the supreme court is empowered to grant leave to appeal or use another appropriate filtering mechanism. The selection criteria should pursue the public function of the supreme court to safeguard and promote the uniformity of the case law and the development of law.
- g. Making law *in abstracto* in the form of binding interpretative statements or general opinions, adopted in plenary sessions of a supreme court, while admitting that this can have a positive impact on the uniformity of the case law and legal certainty, raises concerns from the viewpoint of the proper role of the judiciary in the system of separation of state powers.
- h. Appellate courts also have an important role in ensuring uniform application of laws.
- i. It is of paramount importance that within the highest court, mechanisms exist which can remedy inconsistencies within this court.
- j. If there exist multiple courts with final jurisdiction for specific areas of law, it is essential that the domestic law provides for formal or informal mechanisms for overcoming the inconsistencies between these unrelated and independent supreme courts and that such mechanisms produce consolidating effects.

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<sup>24</sup> On this issue, the CCJE refers to its Opinion No. 9(2006) on the role of national judges in ensuring an effective application of international and European law.



- k. When a court decides to depart from previous case law, this should clearly be stated in its decision. It should follow from the reasoning that the judge knew that the settled case law on the point was different, and it should thoroughly be explained why the previously adopted position should not stand.
- l. The applicability of previous decisions should not be extended to the factual and legal situations of another case, if a close and critical analysis would lead to the finding that the circumstances and the context of the cases do not match.
- m. An adequate system of reporting the case law of supreme courts and appellate courts is essential for ensuring uniform application of law.



# Opinion No. 21 (2018)

of the Consultative Council of European Judges (CCJE)  
to the Committee of Ministers of the Council of Europe

## Preventing corruption among judges

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### I. Introduction

1. In accordance with the mandate given to it by the Committee of Ministers, the Consultative Council of European Judges (CCJE) has prepared the following Opinion on preventing corruption among judges.
2. Corruption among judges is one of the main threats to society and to the functioning of a democratic state. It undermines judicial integrity which is fundamental to the rule of law and is a core value of the Council of Europe. Judicial integrity is the foremost pre-condition for effective, efficient and impartial national justice systems. It is closely interlinked with the concept of judicial independence: the latter enables integrity, and integrity reinforces independence. Judicial integrity has become all the more important nowadays in the context of numerous attacks on the judiciary.
3. Unfortunately, corruption remains too often a reality in several member States, which hampers public trust in their judicial system, and therefore in its overall political system<sup>1</sup>. Judges share responsibility for identifying and responding to corruption and for oversight of judicial conduct. The CCJE wishes to focus on the position of judges themselves, within their judicial capacity, regarding ways of both ensuring judicial integrity vis-à-vis the attempts at corrupting the judiciary and the role of judges in the fight against corruption.
4. This Opinion has been prepared on the basis of previous CCJE Opinions, the CCJE Magna Carta of Judges (2010), and relevant instruments of the Council of Europe, in particular the European Charter on the Statute for Judges (1998), Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities (hereafter CM/Rec(2010)12), the Criminal Law Convention on Corruption (1999)<sup>2</sup>, the Additional Protocol (2003) to this Convention<sup>3</sup>, and the Civil Law Convention on Corruption (1999)<sup>4</sup>. The United Nations Convention against Corruption (2003) has also been taken into account.
5. The Opinion is based, in particular, on the findings and recommendations of the Council of Europe's Group of States against Corruption (GRECO), including notably its report on "Corruption Prevention. Members of Parliament, Judges and Prosecutors. Conclusions and Trends" (GRECO's Fourth Evaluation Round). The Opinion further takes into account the Resolution (97)24 on the twenty guiding principles for the fight against corruption and Recommendation Rec(2000)10 on codes of conduct for public officials, as well as the Parliamentary Assembly's Resolution 2098(2016), Resolution 1703(2010), Recommendation 2019(2013) and Recommendation 1896(2010) on judicial corruption. The conclusions of the European Conference of Judges on "Judicial Integrity and Corruption" organised by the CCJE on 7<sup>th</sup> November 2017 in Strasbourg have also been considered and drawn on.
6. The Opinion also takes account of the replies of the CCJE members to the questionnaire on judicial integrity and fighting/preventing corruption in the judicial system, and of the synthesis of these replies

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<sup>1</sup> See the Council of Europe Secretary General's annual reports on "The state of democracy, human rights and the rule of law in Europe".

<sup>2</sup> ETS 173. The Convention sets out common standards for corruption offences – among others, the establishment of criminal offences for active and passive bribery (as well as aiding and abetting in such offences) of public officials, including judges and officials of international courts.

<sup>3</sup> ETS 191. The Protocol requires the establishment of criminal offences for active and passive bribery of domestic and foreign arbitrators and jurors.

<sup>4</sup> ETS 174. The Convention deals with compensation for damage, liability and other civil law matters in relation to corruption.

and the preliminary draft prepared by the scientific expert appointed by the Council of Europe, Dr Rainer HORNUNG<sup>5</sup>.

7. The replies to the questionnaire have illustrated that the situation of actual and/or perceived corruption differs widely among the member States – from countries where corruption has not been an issue, to countries with occasional reported cases of judicial corruption, and to countries where actual and/or perceived corruption in the judiciary is a matter of major concern among the public. Accordingly, one of the tasks of this Opinion is to find common ground and to bridge the existing gaps. This also means that there are often no uniform solutions, and that some of the recommendations issued will be less relevant for certain member States than for others.

## **II. Judicial corruption – what is it?**

### **A. Definition of judicial corruption**

8. All Council of Europe member States have adopted criminal legislation – and sometimes accompanying regulatory instruments – on general corruption, especially as far as public officials are concerned. For example, a public official's acceptance of a bribe is punished severely by all member States. However, the definition of corruption differs. There is, in the legislation of the member States, no common understanding beyond the fact that giving and accepting a bribe is specific phenomena of corruptive behaviour and is criminally punishable. As concerns more specifically the corruption of judges, a minority of Council of Europe member States have formally adopted particular criminal statutes which provide for more severe penalties for judges accepting bribes than for other public officials. In the vast majority of member States, judicial corruption falls under the same definitions of criminal offences as corruption by other public officials.
9. However, the CCJE takes the view that within the scope and for the purpose of this Opinion, corruption of judges must be understood in a broader sense. The reason for this is the very important role a judge plays as an independent and objective arbitrator in the cases brought to his/her court. For the purpose of this Opinion, judicial corruption comprises dishonest, fraudulent or unethical conduct by a judge in order to acquire personal benefit or benefit for third parties.
10. As can be seen in the responses to the questionnaire<sup>6</sup>, the perception of corruption in the judiciary in certain member States, for various reasons, may not be an accurate reflection of the reality. Perception can be as detrimental to the functioning of a democratic state as actual corruption. Accordingly, an extra chapter of this Opinion (see below Chapter IV) is devoted to describing and tackling this specific problem.

### **B. Factors leading possibly to corruption among judges**

11. Reasons for actual corruption inside the judiciary are manifold. They range from undue influence from outside the judicial branch to factors within the court system, and can be grouped into several categories: structural, economic, social and personal. However, all of the factors outlined below that contribute to the corruptibility of a judge share a common characteristic that they constitute a threat to judicial independence and to judicial integrity. Often, two or more factors are closely connected. This list of factors is not intended to be exhaustive. It is just meant to illustrate the main dangers of corruption a judicial system might encounter.
12. It is vital for the good functioning of the system in any democratic state that the judiciary is truly independent. Whenever there is a lasting structural imbalance/impairment between the three branches of state and where checks and balances are weak or ignored, there is a serious threat to the independence, impartiality and integrity of the judicial system.
13. A lack of transparency caused by preventing access to information relating to the judicial system facilitates corrupt behaviour, and is therefore often an important trigger for corruption. There is clear evidence that a judicial system with a (traditionally) high degree of transparency and integrity presents the best safeguard against corruption.

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<sup>5</sup> Dr HORNUNG is presently Deputy Chief Prosecutor (and anti-corruption contact point) at the Lörrach Prosecution Office in Germany. He was Director of the German Judicial Academy in 2011-2015. Dr Hornung was one of Germany's experts during GRECO's 4<sup>th</sup> Evaluation Round.

<sup>6</sup> See paragraphs 6-7 of the present Opinion.

14. Poor working conditions, which include insufficient salaries and social benefits, poor infrastructure and equipment, along with a heavily understaffed judiciary and the like, can motivate a judge to accept an improperly offered favour more easily.
15. The CCJE draws attention to the interaction between judicial corruption and the acceptance and tolerance of corruption within society in general. A poor climate within the judiciary itself can be equally damaging. A lack of regulations concerning a judge's ethical conduct, a lack of general awareness of the dangers of corruption, and a lack of guidance from court management can lead to judges becoming indifferent to the requirements of objective and impartial justice.
16. A judge might be the victim of undue pressure, be it by peers or by influential groups within the court system. It seems to be a rather widespread perception that judges cannot sufficiently defend themselves against these kinds of pressure due to the very specific nature of the role and position they hold.
17. Another series of factors which can potentially lead to a judge's corrupt behaviour are more intrinsic in nature. Subjective considerations linked to one's personal advancement and promotion can make a judge indifferent as to the risk of bias in a given case. Furthermore, the image of a judge, and as a consequence also the image of the judiciary as such, is seriously tainted whenever a judge decides a case in which he/she holds direct or indirect personal or financial interests capable of being affected by the outcome.

### **III. Preventing corruption among judges**

#### **A. General safeguards against corruption**

18. It is not exaggerated to state that effective prevention of corruption in the judicial system depends to an important extent on the political will in the respective country to truly and sincerely provide the institutional, infrastructural and other organisational safeguards for an independent, transparent, and impartial judiciary. Each member State should implement the necessary legislative and regulatory framework to prevent corruption within the justice system. They should also take all necessary steps to guarantee and foster a culture of judicial integrity, a culture of zero tolerance towards corruption concerning all levels of the court system, court staff included, and at the same time a culture of respect for the specific role of the judiciary. However, combating corruption should not be used to impair the independence of the judiciary.
19. Good political will is first and foremost required when proper staffing, infrastructure, and equipment of the judiciary are at stake. Proper working conditions (such as functional court buildings and equipment, as well as sufficient court staff) compatible with the dignity of the judicial mission can serve as strong deterrents from any corruptive behaviour. Accordingly, the CCJE wishes to stress that it is every country's responsibility to provide sufficient budgetary means for a reasonably well-equipped judiciary which can render justice through well-reasoned and timely decisions. It also calls upon the competent authorities to always provide the judicial branch with adequate salaries, retirement pensions and other social benefits. It is also worth noting in this context that a court system is only as strong and robust as its pillars. Therefore, adequate salaries, social benefits and equipment for non-judge court staff are as vital for a corruption-free judiciary as proper working conditions for the judges themselves.
20. Rules on a judge's proper conduct can serve as an effective safeguard to prevent corruption. In many member States, the Constitution and/or the statute on the functioning of the judiciary fix rules as to a judge's required behaviour inside and outside the courts. The most widespread examples of such rules are the obligation of discretion and the obligation of reserve. Often, these rather generic rules – both on the conduct in court and outside the court – are accompanied by, and specified in, regulations and/or guidelines.
21. The CCJE wishes to stress, however, that there is a clear link between the degree of transparency of a judicial system, on the one hand, and the role which the judges assume in society, on the other. It is undisputed that due to his/her particular role in the interplay between the balance of powers, a judge should always show the discretion and reserve necessary for the proper exercise of his/her duty. But this does not mean that a judge must be a societal outsider. It seems, in fact, to be easier for someone positioned in the midst of society and in touch with its realities to render – and where necessary to explain – a judgment which the general public can understand and accept. However, a

judge should refrain from any political activity liable to compromise his/her independence or jeopardise the appearance of impartiality. The CCJE maintains in this respect what has been already stated in its Opinion N° 3 (2002) on the ethics and liability of judges<sup>7</sup>.

## **B. Strengthening the integrity of judges**

22. The most important safeguard to prevent corruption among judges seems to be the development and fostering of a true culture of judicial integrity. There does not seem to be a uniform definition of this term, but there is nevertheless a broadly shared understanding of what are the constitutive elements of judicial integrity.

### **a. Regulatory institutional and organisational framework**

23. One important pillar of judicial integrity is the already mentioned formal – legislative or otherwise regulatory – framework concerning the position of the judiciary as such and of the individual judge in a given system. In Council of Europe member States, as a general rule, a combination of each individual member's Constitution (where there is a written one) and the central statute(s) on the functioning of the judiciary (including any by-laws, directives, circulars, etc.) fix rules, both on the organisation the judicial system (including rules on institutional independence) and on an individual judge's expected conduct inside and outside the courts.

24. The overarching core principles are regularly fleshed out in specific rules on a judge's career development - selection, appointment, promotion and advancement, training, performance appraisal and the disciplinary responsibility of judges. Here again, the CCJE wishes to note that it fully respects the very different judicial cultures and traditions among the member States. However, it is possible, based on a comparative analysis and professional experience, to detect and describe objective criteria for proper and transparent career development within the judiciary. Respect for these criteria has a positive impact on the fostering of a climate of judicial integrity in each system, and this is true regardless of the country's specific setting. On an institutional level, the CCJE considers that the judiciary itself should, in essence, be responsible for the career development of its judges, including training through autonomous judicial training institutions.

25. The majority of member States have entrusted high judicial councils or other self-governing bodies composed at least of a majority of judicial practitioners with the most relevant decisions as to selection, appointment, promotion and advancement along with performance appraisal and disciplinary proceedings. Another suitable way is to involve the relevant Supreme Court in these decisions. As to the selection, appointment and promotion of judges, the CCJE deems it very important that the process is based on objective findings as regards the legal and extra-legal skills of the candidates. The decisions should be merit-based<sup>8</sup> and taken by essentially non-political bodies<sup>9</sup> with at least a majority of persons drawn from the judiciary. Regardless of the method adopted by the member State, unsuccessful candidates should have the right to challenge the decision or at least the procedure under which the decision was made so as to ensure objectivity and transparency in the process<sup>10</sup>. The general public should have a general insight into the selection and appointment procedure<sup>11</sup>.

26. The CCJE strongly advises against background checks that go beyond the generally accepted checks of a candidate's criminal record and financial situation. Nevertheless, some countries carry out very thorough background integrity checks which include the personal, family and social background of the candidate. These checks are usually carried out by the security services. In countries where such checks occur, they should be made according to criteria that can be objectively assessed. Candidates should have the right to have access to any information obtained. A candidate who is rejected on the basis of such a control must have the right to appeal to an independent body and, to this end, have access to the results of such control.

27. A distinction should be made between candidate judges entering the judiciary and serving judges. In no circumstances should the fight against corruption of judges lead to the interference by secret

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<sup>7</sup> See especially paragraphs 27 et seq. of Opinion N° 3 (2002).

<sup>8</sup> See CM/Rec(2010)12, paragraph 44.

<sup>9</sup> See CM/Rec(2010)12, paragraph 46.

<sup>10</sup> See CM/Rec(2010)12, paragraph 48.

<sup>11</sup> See Opinion No.10(2007) of the CCJE, paragraphs 42, 50.

services in the administration of justice. Corruption of judges is an offence and should therefore be tackled within the framework of established legislation.

28. Additionally, the CCJE wishes to draw attention to the negative effects of lustration as a means to combat corruption. The process where all judges are screened for corruption, and those who do not pass the review are dismissed and possibly prosecuted, can be instrumentalised and thus misused to eliminate politically “undesirable” judges. The mere fact of being a judge in a member State where the judiciary is compromised at a systemic level is, by democratic standards, not sufficient to establish responsibility on the part of individual judges. Another issue that arises concerns guarantees that the process will be conducted by competent, independent, and impartial bodies.
29. Properly done, a system of evaluation is a very effective means to make promotion and advancement decisions more objective and reliable. This also contributes to the transparency of the judicial system as a whole. In this context, the CCJE would recall the principles enunciated in its Opinion No. 17(2014) on the evaluation of judges’ work. A good system of performance appraisal also takes into account the judicial integrity of the evaluated judge. This is different from scrutinising individual decisions rendered by the judge, as this would constitute an evident infringement of judicial independence.
30. Lastly, disciplinary proceedings are another important regulatory mechanism to fight corruption. In the CCJE’s view, disciplinary proceedings should always be carried out essentially by judicial bodies (such as a disciplinary commission or court, or a branch of the high judicial council). This not only gives the judiciary a good self-regulatory instrument, but it also guarantees that persons with the requisite professional background assess whether the behaviour in question should entail disciplinary liability, and if so what sanction would be adequate and proportionate<sup>12</sup>. Further, judges should always be entitled to appeal disciplinary sanctions rendered against them to a judicial body<sup>13</sup>.

#### **b. Guidelines on ethical conduct, ethical counselling, and training on ethics**

31. In virtually all member States, the aforementioned regulatory framework is accompanied by a set of written principles of / guidelines for ethical conduct. These principles have as a general rule been elaborated either by a body or several bodies of judicial self-governance, or the respective country’s (main) judges’ association.
32. As important as the development and adoption of these rules is, clearly they will only be internalised by the judges if they are understood and applied in practice. In order to attain this goal, it is the competent authorities’ task to give their judges proper guidance on how to behave when faced with specific ethical dilemmas. This guidance should be offered from within the judiciary itself. One possibility is making available to the judges electronic or paper materials explaining how best to behave in given concrete scenarios. On the basis of such materials, discussions could be held at regular intervals between members of each court and/or members of different courts. Additionally, the CCJE considers that a vital aspect of implementing a true culture of integrity in the judiciary is to provide proper training on ethical conduct. It should be each judge’s duty, regardless of age and seniority, to regularly undergo such training. This training could also be carried out in less formal in-house formats in peer groups. Guided collegial exchanges and discussions seem to be a good means to foster awareness of the dangers of corruption.
33. However, the CCJE wishes to underline that these training offers should be complemented by offers of individual ethical counselling, which would once again be preferably conducted by peers. A good solution can be to appoint an ethics officer or an ethics commission in each court of a certain size<sup>14</sup>. It is the court presidents’ responsibility to take the initiative in this regard. They play a vital role in the implementation of a sound concept of ethical guidance in their respective courts, and thus in the promotion of a true culture of judicial integrity. This understanding of a court president’s role as to ethical guidance is in line with CCJE Opinion N° 19 (2016) on the role of court presidents<sup>15</sup>. Additionally, the central judicial authorities should offer confidential ethical counselling on request.

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<sup>12</sup> As to disciplinary sanctions, see in-depth *infra* sub C.

<sup>13</sup> The European Court of Human Rights (hereafter the ECtHR) has found violations when this was not the case: see *Baka v. Hungary*, 23 June 2016; see also *Paluda v. Slovakia*, 23 May 2017.

<sup>14</sup> See paragraph 49 iv) of CCJE’s Opinion N° 3 (2002) on ethics and liability of judges.

<sup>15</sup> Cf. especially paragraphs 18 and 19 of this Opinion.

### **c. Avoiding conflicts of interests**

34. The CCJE considers that systemic safeguards should exist to avoid situations where a judge decides a case in which he/she holds direct or indirect personal or financial interests capable of being affected by the outcome.
35. Any acceptance of a gift by a judge in relation to the performance of his/her judicial duties is likely to give rise to a perception of undue influence. This is why most member States have rules, for example, on the acceptance of gifts and other benefits by judges (and other public officials) within the exercise of their profession. Low (objective) value thresholds, on the one hand, and the definition of what is acceptable hospitality, on the other, can give the judges clear and understandable guidance, especially when combined with recommendations on how to proceed when an improper gift has been given. The CCJE welcomes GRECO's recommendations to a number of member States as regards the implementation and/or fine-tuning of rules for the acceptance of gifts and other benefits by judges, adopted in its Fourth Evaluation Round entitled "The prevention of corruption in respect of members of Parliament, judges and prosecutors"<sup>16</sup>.
36. Another often regulated aspect of a judge's conduct is his/her activities outside of court and the way he/she conducts his/her private life. These rules diverge considerably among member States. In some countries, it is not unusual to find quite strict regulations forbidding, for example, retired judges or those that have otherwise left office from becoming members of a political party, any external professional activity, or even the establishment of a social media account. Other countries, where corruption has not been an issue, have quite loose and liberal rules, such as simply asking the judges to divulge (teaching or scientific) activities outside the court. The CCJE welcomes the disclosure of activities outside court to internal structures in the court system, as far as conflict of interest might occur, and preferably, if applicable, to the general public.
37. GRECO has issued, in its aforementioned Fourth Evaluation Round, recommendations to a number of countries as to the implementation or improvement of a system of asset declaration to comprehensively record in a regular – often annual – rhythm the judges' revenues and other assets. GRECO also recommends having a specific body inside or outside the judiciary charged with the scrutiny of the timeliness and accuracy of such declarations. Non-compliance with these rules may constitute, in certain countries, administrative misdemeanours or disciplinary offences<sup>17</sup>. Some countries have extended the asset declaration obligation to spouses and other close relatives of the judges. Sometimes, the declarations of all or certain categories of judges are made publicly accessible.
38. The CCJE considers that a robust system for declaring assets can contribute to the identification and subsequent avoidance of conflicts of interests if relevant steps are taken, and thereby lead towards more transparency inside the judiciary, and contribute to the fostering of a climate of judicial integrity.
39. However, in view of a judge's right to privacy and the right to privacy of his/her family members, the implementation of such a system should always be strictly in line with the principle of proportionality. The first element of the latter is the question of necessity. In the many member States where corruption has not been an issue, or at the least very little in the way of actual corruption, it does not seem necessary to implement a general system of asset declarations. In such countries, it might even be detrimental to the quality of the judiciary to introduce an obligation of systematic asset declaration. Other suitable candidates for a judge's post might refrain from applying because they see such a far-reaching obligation as an unjustified intrusion into their private lives.
40. In addition, the CCJE is of the view that even in countries where a system of asset declaration exists, due attention should always be given to the proportionality of the details of the respective regulation. Disclosure to stakeholders outside the judiciary should only be done on demand, and only if a legitimate interest is credibly shown<sup>18</sup>. Confidential information should never be divulged and the privacy of third parties such as family member should be protected even more strongly than that of the judges.

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<sup>16</sup> See <https://www.coe.int/en/web/greco/evaluations/round-4> .

<sup>17</sup> Cf. in-depth infra sub C.

<sup>18</sup> For example, member States report of incidents leading to the destruction of property and even lives of judges and members of their families provoked by such disclosure.



41. Another effective safeguard against potentially corrupt judges deciding a case is the principle of the natural judge. Case allocation can be done either electronically or based on an annual case allocation scheme elaborated within the court system. Objective criteria for the case allocation can be a rotation in cycles, a party's last names, local court districts, specialisations, etc. It is important for the transparency of the process, and thus the reputation of a judiciary, that this system cannot be manipulated<sup>19</sup>.
42. In some Council of Europe member States where corruption has not been an issue, especially from the common law system and from Scandinavia, court presidents have quite broad discretion in allocating the incoming cases to judges<sup>20</sup>. They will strive as a general rule to guarantee a fair allocation of the workload, all by taking into account the factors for case allocation as mentioned in the foregoing paragraph. This "softer" approach to case allocation is perfectly legitimate as long as the chosen system ensures in practice the fair and time-efficient administration of justice, and thus enhances public confidence in the integrity of the judiciary<sup>21</sup>.
43. In any event, potential conflicts of interests of judges are not automatically eliminated by a system of random case allocation. In fact, the random allocation can result in the attribution of a case to a judge who is a close relative of one of the parties. This is why it is important for each judiciary to have robust rules in place on recusal and self-recusal of judges in the event of an apparent or even only potential bias in a given case. All member States have rules of this kind (either legislative or case law-based). The definitions of potential bias adopted by member States are also very similar in this regard.
44. However, the truly vital point for the degree of a given country's judicial integrity is the actual implementation and application of the rules on recusal and self-recusal. The CCJE considers that any member State encountering the phenomenon of judges' reluctance to self-recuse (seeing it, for example, as a dishonourable step), should take the necessary measures to implement a culture of self-recusal, i.e. an environment where it is a matter of course for any judge to divulge a potential bias in a given case. This can be done by regular reminders, individual or peer group counselling on ethical conduct and/or formal in-service training. It is important to remember, however, that these concerns must be balanced against considerations of judicial efficiency and discouraging judge-shopping (forum-shopping) by litigants<sup>22</sup>.

**d. The responsibility of each judge to act against corruption within the judiciary**

45. As important as a comprehensive framework and ethical guidelines are, their effectiveness depends on the willingness of each judge to apply them in their every-day work. Each judge carries a personal responsibility, not only for his/her own conduct but also for that of the judiciary as a whole.
46. Judges, as holders of public office, have an obligation to report to the competent judicial authorities offences they discover in the performance of their duties, in particular, acts of corruption committed by colleagues.

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<sup>19</sup> IT must not prevent judges from applying the law in an independent manner and with impartiality, see CCJE Opinion No. 14(2011), paragraph 8. IT governance should be within the competence of the Council for the judiciary or other equivalent independent body. Regardless of which body is in charge of IT governance, there is the need to ensure that judges are actively involved in decision-making on IT in a broad sense, see CCJE Opinion No. 14(2011), paragraph 36.

<sup>20</sup> The CCJE confirms its previous position that, where the court presidents have a role in the allocation of cases among the members of the court, this should be done in accordance with objective pre-established criteria following a transparent procedure, see CCJE Opinion No. 19(2016), paragraph 21.

<sup>21</sup> GRECO dealt with this issue in its already mentioned 4<sup>th</sup> Evaluation Round. As concerns the United Kingdom, it found that "case management appears to be adequate; external interference in the adjudication of particular cases is not perceived as a source of concern in the United Kingdom" (paragraph 119). As concerns Norway, GRECO had the "impression that case allocation policies in courts were not formalised and lacked transparency and clarity to some degree /.../ and better information and foreseeability concerning case allocation or case re-allocation to a given judge could benefit the public" (paragraph 111).

See also the European Network of Councils for the Judiciary (ENCJ)'s 2013-14 Report on "Minimum Judicial Standards IV: Allocation of Cases". This very thorough 138-page Report is based on a vast research project involving 17 different EU member countries with very different judicial cultures and traditions.

<sup>22</sup> Judge-shopping (forum-shopping) is a practice of trying to replace the judge assigned to the case by another judge. An unjustified self-recusal of the natural judge in such case could be a symptom of corruptive action.

47. The CCJE wishes to emphasise that judges, having assumed responsibility for the integrity of the judiciary, should not be questioned as to their loyalty in their future career, regardless of whether their concerns in the final analysis were proven to be well-founded or not. At the same time, the authorities, to whose attention such cases are brought, should always be careful when investigating such allegations.

### **C. The preventive effect of properly investigating and penalising corruption among judges**

48. Evidently, adequate criminal, administrative or disciplinary penalties for a judge's corrupt behaviour, and severe actual sanctions pronounced against corrupt judges, can serve as a strong deterrent and thus have a preventive effect. The CCJE reiterates what has already been said in a more general context in its Opinion N° 3 (2002) on the ethics and liability of judges as regards the criminal and disciplinary liability of judges<sup>23</sup>.
49. Corruption committed by a judge must be addressed in accordance with the principle of proportionality and taking into account its seriousness. It may be sanctioned by a measure removing the judge from office or by another appropriate disciplinary measure following disciplinary proceedings. Criminal acts must be punished by the penalties provided for by criminal law, up to a term of imprisonment. The seriousness of criminal acts can be assessed in particular by their impact on the general public's confidence in the judicial system.
50. In a non-negligible number of member States, the problem in fighting and preventing corruption among judges is not so much the definition of criminal, administrative or disciplinary corruption offences and the penalties, but rather the investigation, indicting and judging of corrupt high-level officials, judges included. It is in the CCJE's view of utmost importance to avoid the deeply damaging impression that the higher-ranking, the cleverer and the better defended an allegedly corrupt public official is, the more he/she benefits from a de facto immunity. Depending on a given country's history, traditions and administrative structure, as well as the actual extent of corruption inside the system, it might be necessary to establish specialised investigative bodies and specialised prosecutors to fight corruption among judges. As to specialised courts, the CCJE confirms its position set out in its Opinion No. 15(2012) on the specialisation of judges. It should be possible to introduce specialised courts only under exceptional circumstances, when necessary because of the complexity of the problem and thus for the proper administration of justice.
51. However, the CCJE, inspired by GRECO's findings, calls on member States to consider introducing, independent of the existence of decentralised authorities and bodies, a central anti-corruption authority at the national level. This authority does not necessarily have to have investigative and/or prosecutorial competencies, but it should serve as a competent and impartial interlocutor and networker, when cases of high-gearred corruption are at stake.

### **D. International instruments, mechanisms and cooperation for preventing corruption among judges**

52. Finally, the CCJE wishes to stress that the proper use of mechanisms and instruments of international cooperation in the field of prevention of corruption among judges can also be a strong preventive factor. The judiciary may benefit from the guidance they get by evaluation reports with specific recommendations from world-wide or regional institutions such as the Council of Europe's Venice Commission and GRECO, as well as UNCAC, OSCE, OECD, the UN global judicial integrity network and similar. As a rule, these reports are based on well-reflected and reciprocity-based monitoring mechanisms involving field visits and highly qualified experts, both from the monitoring institution and the monitored country.
53. It should be underlined that countries where the judiciary is more or less corruption-free also benefit from such evaluation reports. The recommendations allow them to fine-tune their institutional, organisational and other safeguards against corruption, including those within the judiciary.

## **IV. Perceived corruption**

54. A non-negligible number of member States have reported in their replies to the questionnaire preparing this Opinion the phenomenon – at first sight quite odd – that the public perception of corruption inside the judiciary is considerably higher than the actual amount of cases against corrupt

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<sup>23</sup> See especially paragraphs 51 to 77 of this Opinion.

judges would suggest. Even though only a very small percentage of interviewees could report on personal negative experiences with corrupt judges, a very significant share of the same polled group was of the view that the judiciary was among the most corrupt institutions in the country.

55. The CCJE considers that reasons for the existence or non-existence of a significant discrepancy between actual and perceived judicial corruption in a given country lies principally in the (non-)transparency, i.e. (non-)openness or taciturnity of the judicial system. It has already been highlighted that the judiciary as the third power of state is to a certain extent hampered in its information policy by specific obligations which make it difficult to respond effectively to criticism from the outside. These are namely: the obligation of discretion, including the right to a fair trial and respect for the presumption of innocence, as well as the obligation of reserve.
56. Outside the judiciary, the misbehaviour of other professional groups plays an important role among factors leading to the perception of corruption among judges. For example, in pending cases it is not uncommon for prosecutors and lawyers to use tactics, such as litigation through the media, to influence public opinion.
57. In principle, the judiciary must accept that criticism is part of the dialogue between the three powers of state and with society as a whole, where free and diverse media plays an indispensable role. However, there is a clear line between freedom of expression and legitimate criticism on the one hand, and disrespect and undue pressure against the judiciary on the other<sup>24</sup>. Politicians, others in public positions and the media, particularly in pending cases and during political campaigns, might use simplistic, populist, or demagogic arguments and deliberately misinform the public to make irresponsible criticisms of the judiciary and do not respect the presumption of innocence. Consequently, this may also create an atmosphere of public mistrust in the judiciary and can in some cases infringe the principle of a fair trial as set out in Article 6 of the European Convention on Human Rights (hereafter the ECHR)<sup>25</sup>.
58. Several mechanisms exist to enhance the prerequisite legitimacy<sup>26</sup> and transparency of the judiciary, and thereby public confidence and trust in the judiciary. They all can be summarised by the necessity of a proactive information policy, such as providing general information about the functioning of the judicial system and informing the public in sensitive cases where there is a “whiff” of corruptibility.
59. The CCJE confirms in this context the views set out in its Opinion No. 7 (2005) on justice and society, concerning the necessary dialogue with all stakeholders in the justice system. In order to promote transparency and public confidence, as stated in Opinion No. 7(2005), it is judges’ responsibility to use accessible, simple and clear language in the proceedings and in their judgments.
60. Court presidents play a vital role in the enhancement of transparency in their courts. The CCJE reiterates the aforementioned Opinion N° 19 (2016) and holds that the interests of society require that court presidents inform the public through the media about the functioning of the justice system<sup>27</sup>. This includes pending cases. Sometimes, quick and regular information (which can be given without breach of confidentiality) is of the essence even before an actual verdict is rendered. This can take the form of a press release or an interview.
61. The CCJE considers in this context that court presidents and/or press spokespersons (media relation officers) from within the judiciary should benefit from hands-on media training.
62. However, transparency and public trust in the judiciary is not fostered only by a proactive approach to the media and the general public, but to a significant extent by the way the participants in court proceedings are treated<sup>28</sup>. A judge who explains his/her decisions – and in given cases the pathway

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<sup>24</sup> See paragraph 52 of CCJE Opinion N° 18 (2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy.

<sup>25</sup> See ECtHR judgment *Pesa v. Croatia*, No. 40523/08, 8 April 2010.

<sup>26</sup> CCJE Opinion N° 18 (2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy contains ample considerations as to ways of guaranteeing and enhancing the legitimacy of the judiciary and at the same time its accountability.

<sup>27</sup> See paragraph 12 of CCJE Opinion No. 19 (2016); see also paragraph 32 of the aforementioned Opinion N° 18 (2015).

<sup>28</sup> This has already been highlighted in CCJE Opinion N° 7 (2005) on justice and society, especially in paragraphs 24 to 32. It is also in accordance with the Plan of Action of the Council of Europe on strengthening judicial independence and impartiality, CM(2016)36 final.

to find the solution – in an understandable way will as a rule generate a feeling of fair treatment even on the part of the party which ultimately loses the case<sup>29</sup>.

63. Also, the CCJE considers it vitally important for the perception of a transparent, fair and impartial judiciary that judges and private lawyers, and also public prosecutors, maintain an on-going dialogue, all by respecting their different professional positions and roles, and more specifically the principle of judicial independence. The CCJE reiterates in this connection the views expressed in its Opinion N°16 (2013) on the relations between judges and lawyers<sup>30</sup>.
64. The trend that can be observed in some member States of attempts to undermine justice systems is a real threat to the principle of the rule of law and the proper functioning of democratic society. Notwithstanding any intention to restrict the justified comments by the public about the work of courts, the role of protecting the constitutional position of the judiciary lies not only with judges but also with representatives of the executive and legislative powers, representatives of civil society, the media and so on. Public criticism of the judiciary should always comply with the requirements set out by Article 10(2) of the ECHR and paragraph 18 of CM/Rec(2010)12.
65. Consequently, the CCJE wishes to stress that it is every country's responsibility to provide sufficient budgetary means for a well-equipped judiciary which can render justice through well-reasoned and timely decisions<sup>31</sup>.

## V. Conclusions and recommendations

- a. Corruption among judges is one of the main threats to society and to the functioning of the democratic state. It undermines judicial integrity which is fundamental to the rule of law and is a core value of the Council of Europe. It becomes all the more important nowadays in the context of numerous attacks on the judiciary. Judicial corruption severely affects public trust in the administration of justice.
- b. Corruption of judges must be understood, for the purposes of this Opinion, in a broader sense so that it comprises dishonest, fraudulent or unethical conduct by a judge in order to acquire personal benefit or benefit for third parties.
- c. Reasons for actual corruption inside the judiciary range from undue influence from outside the judicial branch to factors within the court system, and can be grouped into several categories: structural, economic, social and personal.
- d. Effective prevention of corruption within the judicial system depends to an important extent on the political will in the respective country to provide the institutional, infrastructural and other organisational safeguards. The most important safeguard to prevent corruption among judges seems to be the development and fostering of a true culture of judicial integrity.
- e. The legislative or otherwise regulatory framework is an important safeguard against corruption. It should provide for independence at all stages of a judge's career: selection, appointment, relocation, promotion and advancement, training, performance appraisal and disciplinary responsibility of judges. Respect for objective criteria for career development within the judiciary has a positive impact on fostering of a climate of judicial integrity.
- f. The CCJE strongly advises against background checks that go beyond the generally accepted checks of a candidate's criminal record and financial situation. In countries where such checks occur, they should be made according to criteria that can be objectively assessed. Candidates should have the right to have access to any information obtained. A distinction should be made between candidate judges entering the judiciary and serving judges.
- g. The competent authorities should always provide the judicial branch with adequate funds for the dignified and proper accomplishment of its mission. Adequate salaries, retirement pensions and other social benefits, a manageable workload, a proper working infrastructure and job security for both judges and court staff are vital for the legitimacy and good reputation of a judicial system. These are also important safeguards against corruption in the judiciary.

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<sup>29</sup> See CCJE Opinion N° 11(2008) on the quality of judicial decisions.

<sup>30</sup> Cf. especially paragraphs 10 to 25.

<sup>31</sup> See CM/Rec(2010)12, paragraphs 32-33; see also CCJE Opinion N° 2(2001), paragraphs 2-5.

- h. In all member States, judges should be provided with a set of rules / principles / guidelines on ethical conduct. These should be illustrated by practical examples, and accompanied by formal ethics training, as well as individual or peer group confidential ethical counselling. The judiciary should provide counselling in the courts and at central level in this respect.
- i. A robust system for declaring assets can contribute to the identification and subsequent avoidance of conflicts of interests if relevant steps are taken, and thereby lead towards more transparency inside the judiciary, and contribute to the fostering of a climate of judicial integrity.
- j. Potential conflicts of interests of judges are not automatically eliminated by a system of random case allocation. This is why it is important for each judiciary to have robust rules in place on recusal and self-recusal of judges in the event of an apparent or even only potential bias in a given case.
- k. The effectiveness of ethical guidelines depends on the willingness of each judge to apply them in their every-day work. Each judge carries a personal responsibility, not only for his/her own conduct but also for that of the judiciary as a whole.
- l. Adequate criminal, administrative or disciplinary penalties for a judge's corrupt behaviour can serve as a strong deterrent and thus have a preventive effect. Cases of judicial corruption should always be addressed with a sense of proportion.
- m. The proper use of mechanisms and instruments of international cooperation in the field of prevention of corruption among judges can be a strong preventive factor, including the Council of Europe's institutions such as GRECO and the Venice Commission, as well as other organisations such as the UN Global Judicial Integrity Network, UNCAC, OSCE, OECD and others.
- n. The phenomenon of perceived corruption, where the public distrust in the impartiality of the judiciary is much higher than the actual number of corruption cases, is usually the result of systemic deficiencies at national level concerning the transparency and openness of the judicial system.
- o. Several mechanisms exist to enhance transparency and thereby the public trust in the judiciary. These mechanisms can all be summarised by the necessity of a proactive information policy, such as providing general information about the functioning of the judicial system and informing the public in sensitive cases, keeping, however, in mind the obligation of discretion and reserve, including the right to a fair trial and respect for the presumption of innocence.



# Opinion No. 22 (2019)

of the Consultative Council of European Judges (CCJE)  
to the Committee of Ministers of the Council of Europe

## The role of judicial assistants

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### I. INTRODUCTION

1. The European Convention on Human Rights (ECHR) guarantees the right to an independent and impartial tribunal established by law<sup>1</sup>. Judges' independence and impartiality are protected both during their appointment and in the exercise of their duties so that they can adjudicate according to these guarantees. When judges are supported in the adjudicative process by assistants, the quality and efficiency of their work can further be improved in the interests of society and the parties to the proceedings. However, this must be done in a way not endangering the parties' rights under Article 6 of the ECHR. Therefore, in accordance with the mandate given to it by the Committee of Ministers, the Consultative Council of European Judges (CCJE) has prepared the present Opinion.
2. This Opinion has been prepared on the basis of previous CCJE Opinions, the CCJE Magna Carta of Judges (2010), and relevant instruments of the Council of Europe, in particular the European Charter on the Statute for Judges (1998), and Recommendation CM/Rec(2010)12 of the Committee of Ministers on judges: independence, efficiency and responsibilities.
3. The Opinion also takes account of the replies of the CCJE members to the questionnaire "on the role of court clerks and legal assistants within the courts and their relationships with judges", of the summary of these replies and the preliminary draft prepared by the scientific expert appointed by the Council of Europe, Prof. Dr. Anne Sanders (University of Bielefeld/Higher Regional Court of Hamm).

### II. Support for judges: the scope of the opinion

#### A. Who are judicial assistants?

4. The work of judges can be supported by different kinds of assistants and court staff. This Opinion focuses on judicial assistants. Judicial assistants have a legal education and support judges or panels of judges in their adjudicative work. Judicial assistants undertake a wide range of tasks such as research, preparing memos on legal questions or drafting judgments. Such persons may have many different titles including judicial assistants, law clerks, legal officers, secretaries, Referendare, Wissenschaftliche Mitarbeiter, Gerichtsschreiber, référendaires or greffiers<sup>2</sup>.

#### B. Court staff outside the scope of the Opinion

5. Court employees managing security, the maintenance of court buildings and IT-services are indispensable for a court system. However, they are outside the scope of the Opinion.
6. Just like judicial assistants, administrative assistants often work closely with judges. They work, for example, on the organisation of files, correspondence, preparation of official versions of decisions, collecting documents and statistical data. While there can be considerable overlap between their work and the work of judicial assistants, this Opinion focuses on the status and duties of judicial assistants.
7. Undergraduate law students who work as interns at a court are outside the scope of the Opinion even if they provide support for judges.

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<sup>1</sup> Article 6 of the ECHR.

<sup>2</sup> The information on the practice in the member States provided in this Opinion is highly condensed. For more detailed information, the reader is invited to refer to the responses of the CCJE members and the summary of the responses provided at <https://www.coe.int/en/web/ccje/opinion-no.-22-on-the-role-of-court-clerks-and-legal-assistants-within-the-courts-and-their-relationships-with-judges> .

8. Judicial officers or *Rechtspfleger*, or the Spanish *Letrados de la Administración de Justicia*, who have limited decision-making powers in certain cases, for example on questions of enforcement or registration, are also outside the scope of the Opinion. Such judicial officers decide their own cases and work on their own tasks rather than support judges in their adjudicative work. There are, however, member States where judicial assistants also have certain decision-making powers on their own which are distinct from the support they provide for judges. Moreover, in many member States, special court staff also performs duties such as registration, the authentication of judgments and other documents and also writing the official protocol of the hearing, such as the Belgian *greffier*. These specific duties are outside the Opinion as well, because they might demand a certain degree of independence even from the judge.
9. Judicial staff with the same title might perform different duties in different member states. Where they have a dual role, this Opinion is confined to that part of the role which consists of supporting the role of the judge.
10. In many cases, judges must rely on the knowledge and experience of experts with non-legal expertise to decide cases adequately. However, such experts, even if they are employed by a court on a permanent basis, are outside the scope of this Opinion.

### III. The role and duties of judges and judicial assistants

#### A. What should be the rationale for employing judicial assistants?

##### 1. *Supporting the administration of justice*

11. Supporting the administration of justice in the interest of society should be the main rationale for employing judicial assistants. Competent judicial assistants can provide valuable support to judges and thereby help to improve the quality of judicial decisions. The work of judicial assistants with specialised legal knowledge can be particularly useful<sup>3</sup>. Nevertheless, the appointment of qualified judges and adequate training opportunities for judges should not be neglected in favour of hiring judicial assistants.

##### 2. *Educating young lawyers, especially (future) judges*

12. The work of judicial assistants can also serve educational purposes. By serving as judicial assistants, young lawyers can gain a useful understanding of the work of courts. This is shown in the experience of the member States. In some member States, supporting a judge is a mandatory part of legal education before practice<sup>4</sup>. In other member States, serving as a judicial assistant is a formal or informal prerequisite or at least considered a helpful experience before applying to become a judge<sup>5</sup>. Even in countries where there is no career judiciary and judges are appointed from the ranks of successful practitioners, obtaining a perspective from “behind the bench” is considered useful<sup>6</sup>. In yet other countries, where young judges may serve as judicial assistants for a limited time at higher courts, such secondments<sup>7</sup> can provide useful insights and experience before promotion to senior judicial posts.

##### 3. *Efficiency*

13. Deciding cases in a timely and cost-efficient way is an important goal for every judiciary. Moreover, the quality of judicial decisions after a fair consideration of the issues<sup>8</sup> is an essential aspect of an efficient judiciary. Judicial assistants can be an important tool to unburden judges from non-judicial tasks, in order to speed up the work of courts and reduce backlogs<sup>9</sup>, and also to help them in preparing decisions of a higher quality. As the CCJE has pointed out, it is the responsibility of the member States to ensure adequate resources to enable courts to provide judicial work of high quality in the interest of the public.<sup>10</sup> First and foremost, this requires providing the financial means to appoint

<sup>3</sup> For example, in international and European law: CCJE Opinion No. 9 (2006) para 19, Rec. A(e).

<sup>4</sup> Germany, Slovenia.

<sup>5</sup> Belgium, Bosnia and Herzegovina, Finland, Georgia, Poland, Republic of Moldova, Slovenia, Sweden, Switzerland.

<sup>6</sup> Ireland, United Kingdom.

<sup>7</sup> Albania, Croatia, Germany, Slovenia.

<sup>8</sup> See Recommendation CM/Rec(2010)12, para 31; for the quality of judicial decisions see CCJE Opinion No. 11 (2008).

<sup>9</sup> See CCJE Opinion No. 6 (2004) para 65.

<sup>10</sup> See Recommendation CM/Rec(2010)12, para 32, and CCJE Opinion No. 2 (2001), para 4; Opinion No. 10 (2007), para 37; Opinion No. 17 (2014), para 35; Opinion No. 18 (2015), para 22.



enough judges. However, judges do not work alone in courts. Therefore, adequate funding to employ qualified court staff, including judicial assistants, is necessary<sup>11</sup>.

14. There must be a balance between a speedy judicial process and the right of the parties to an independent and impartial court. Article 6 of the ECHR guarantees the right of parties to have a decision by a fair and impartial tribunal. A judicial assistant is not part of that tribunal. Therefore, judicial assistants should not be employed at the expense of appointing judges in adequate numbers. If the workload of judges is too high, this might increase the pressure to delegate more duties to judicial assistants than is desirable<sup>12</sup>.
15. By supporting the decision-making of judges, judicial assistants may help to improve a court's work at all levels. Member States should reflect carefully whether to employ judicial assistants, and if so, in what instances of courts they should be employed and how to organise their work in order to support the quality and timeliness and thereby the efficiency of the judicial system. In this process, member States must be aware that different purposes of employing judicial assistants may be mutually exclusive. If member States aim to support speedy decision-making with judicial assistants, this purpose cannot be achieved by employing judicial assistants for purely educational purposes because that burdens judges with mentoring and teaching.
16. While all member States using judicial assistants agree that they provide valuable assistance and save judges' time, only very few member States collect data on how useful judicial assistants actually are<sup>13</sup>. It is therefore recommended that member States evaluate the contribution of judicial assistants.

## **B. The role of the judge and the role of the judicial assistant**

### *1. The role of the judge*

17. The understanding of the role of the judge in any judicial system is inextricably linked to its history, legal and judicial culture. Therefore, the role of the judge is still understood in different ways in different Member States. Considerable differences, might still exist, for example, between civil law and common law countries. In common law systems, writing a judgment may be perceived as a personal duty which should not be delegated to or shared with an assistant, regardless of how qualified the assistant may be.
18. Regardless of how different the practices and traditions of judicial systems may be, decision-making is at the heart of the judge's role everywhere. Article 6 of the ECHR establishes requirements for the legitimacy of judicial decisions. Procedures<sup>14</sup> and substantial guarantees of judicial independence and impartiality aim at protecting the decision-making of the individual judge<sup>15</sup>. These guarantees ensure that judges are free to decide cases independently and impartially, in accordance with the law and their interpretation of the facts<sup>16</sup>. These guarantees are not privileges granted in the judges' own interest, but in the interest of the rule of law and the persons seeking justice as guaranteed by Article 6 of the ECHR<sup>17</sup>. Decision-making is therefore not the privilege of judges which can be delegated at will but is at the heart of their duties in a society based on the rule of law. Judges are not simply case managers but must command the law and facts in a way that judicial decisions remain fully theirs.

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<sup>11</sup> See CCJE Opinion No. 11 (2008) para 14; CCJE Opinion No. 2(2001), para 8.

<sup>12</sup> For the effects of an increased workload on the work with judicial assistants see Nina Holvast, *In the shadow of the judge - the involvement of judicial assistants in Dutch district courts*, 2017, p. 179-181; see also Peter Bieri, *Law Clerks in Switzerland – A Solution to Cope with the Caseload*, 7 *International Journal for Court Administration* (2016).

<sup>13</sup> Czech Republic, United Kingdom; in Croatia research found that courts with judicial assistants are more productive than courts without such support.

<sup>14</sup> For the importance of the appointment of judges, see Recommendation CM/Rec(2010)12, paras 3, 4. See also European Court of Human Rights (ECtHR) decision of 12 March 2019 - *Astradsson v. Iceland* - Case no 26374/18.

<sup>15</sup> See the EU Charter of Fundamental Rights: Court of Justice of European Union (CJEU), decision of 27 February 2018 - *Associação Sindical dos Juizes Portugueses v. Tribuna de Contas* - C 64/16, para 44. For the importance of separation of powers and judicial independence as an element of public importance in the freedom of speech, see ECtHR, decision of 23 June 2016 – 20261/12 *Baka v. Hungary* paras 162-176.

<sup>16</sup> Recommendation CM/Rec(2010)12, para 5.

<sup>17</sup> Recommendation CM/Rec(2010)12, para 11.

## 2. *The role of the judicial assistant*

19. The role of the judicial assistant follows from the role of the judge. Judicial assistants must support judges in their role, not replace them. Whatever their duties are, they must be supervised by the judge or judges who remain responsible for the decision-making in all aspects. However, by supporting judges in their adjudicative process, judicial assistants are involved in the exercise of judicial tasks. Therefore, they must comply with the highest professional and ethical standards and thereby help to build high public trust in judicial institutions<sup>18</sup>.

### **C. The work of judicial assistants**

20. Each legal system must decide whether and to what extent judicial assistants should be engaged. This decision will depend on many factors, including legal traditions and the understanding of the role of the judge and the parties.

#### 1. *Which duties and responsibilities must remain with the judge?*

21. As already mentioned, decision-making is at the heart of the judge's duties in all legal systems. Therefore, it must remain with the judge or with the panel of judges responsible for the case. Decision-making requires applying the law on the basis of a comprehensive understanding of the facts. Judges hold hearings to establish the facts and to discuss the issues in dispute with advocates and parties. For example, in criminal cases, the hearing provides the opportunity to hear the victim and the accused. The drafting of the judgment must build on the judge's decision-making in every aspect of the case<sup>19</sup>.

22. The closer judicial assistants come to the decision-making process, the more important it is that judges and judicial systems remain cautious. All preparatory work requires keeping a balance between efficient work organisation and the control of the judge. From the judges' perspective, this should be done by closely supervising the work of judicial assistants.

#### 2. *Work of judicial assistants related to the decision-making process*

23. The responses of the member States show a variety of duties of varying responsibility that judicial assistants may undertake. If judicial assistants work actively in the decision-making process, member States must ensure that the judge remains in control in order to ensure the rights of the parties under Article 6 of the ECHR.

##### (i) Organising papers and researching facts

24. Judicial assistants may help researching facts, for example by organising and sifting through large documents under the guidance and supervision of the judge<sup>20</sup>. However, since judicial decision-making builds on the facts, the establishment and evaluation of facts remains the sole responsibility of the judge. Consequently, an assistant's role should remain limited in this respect.

##### (ii) Drafting decisions or writing memos with a proposal for a decision

25. In many member States, judicial assistants are involved in drafting decisions and judgments. This may also include drafting procedural decisions<sup>21</sup>. Some member States do not, however, allow the involvement of judicial assistants in the drafting process<sup>22</sup>. If judicial assistants are involved in the drafting process, they should work under the close supervision and with the guidance of the judge. Therefore, the member States should consider whether and to what extent it is appropriate to allow the presence and participation of judicial assistants at deliberations of cases.

26. If judicial assistants prepare complete drafts, there is a risk that the assistant's suggestions steer the judge's thinking (anchoring effect). Such an effect is also possible, however, if a judicial assistant just

<sup>18</sup> See Model Code of Ethics for Legal Associates and Advisors in Courts and Prosecutor's Offices in Bosnia and Herzegovina p. 4.

<sup>19</sup> About the importance of the professionalism of judges, see CCJE Opinion No. 11 (2008), paras 21-23.

<sup>20</sup> In Malta, judicial assistants collect evidence for judges.

<sup>21</sup> Andorra, Austria, Belgium, Croatia, Finland, Georgia, Latvia, Lithuania, Republic of Moldova, Russian Federation, Sweden, Ukraine.

<sup>22</sup> Andorra, Ireland, United Kingdom.

prepares a memo on how a case should be decided<sup>23</sup>. These risks may be particularly high if judicial assistants prepare a first draft or memo without guidance from the judge. However, even if such a draft judgment or memo is written after a judge has expressed a preliminary view, handing over the drafting to an assistant may prevent a judge from truly familiarising himself/herself with the case. In this situation, a judge may not realise that an initial impression may be changed by more detailed work on the draft judgment. Judges should be aware of these risks and ensure that they remain responsible for judgments at all times.

(iii) Independent work on cases

27. In some member States, judicial assistants work more independently on cases, for example by deciding procedural issues such as appointing an expert or deciding on the costs of proceedings. In a small number of member States, judicial assistants can also conduct hearings and work on minor cases<sup>24</sup>. In many cases, the judicial assistants' decisions require the approval of a judge. If member States allow judicial assistants to undertake such important tasks, this can only be done with a legal basis and under close supervision of the judge.

(iv) Work in the selection of cases for appeal or constitutional review

28. Supreme and constitutional courts have a unique role in the unification of case law<sup>25</sup> and often receive a large number of cases. Judicial assistants who serve at supreme and constitutional courts often summarise the facts of cases and the relevant law and make suggestions whether a case should be admitted for appeal or constitutional review<sup>26</sup>. Such help in the "sifting" of applications can help judges to focus on important cases while assistants help to deal more quickly with routine cases. However, there is a risk that judicial assistants gain influence on the selection of cases. Member States must be aware of such risks and ensure that judges remain in control of deciding and selecting cases themselves.

3. *Work of judicial assistants outside the decision-making process*

(i) Legal research

29. Judicial assistants may undertake research (if not done by the parties) of the law, including the analysis of case law. This is the practice in all member States where judicial assistants are employed. In some member States, however, research is primarily seen as the duty of the parties<sup>27</sup>. If, however, judicial assistants prepare memos with a proposal for a decision and/or reasons for a decision, they become more involved in the decision-making process.

(ii) Writing the official record of court hearings

30. In many countries, writing the official record of the court hearing has been and remains an important duty of certain judicial assistants<sup>28</sup>. This task is now taken over more and more by technology but might remain important in some cases.

(iii) Preparing decisions for publication

31. Other duties of judicial assistants may include proofreading of decisions, crosschecking references or preparing decisions for publication (especially including anonymisation).

(iv) Preparing information for the media

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<sup>23</sup> For an academic discussion of this problem with further references, see Nina Holvast, *In the shadow of the judge, the involvement of judicial assistants in Dutch district courts*, 2017, p. 216.

<sup>24</sup> Such opportunities are open in Bosnia and Herzegovina, Croatia, the Czech Republic, Finland, Iceland, Slovenia and Sweden.

<sup>25</sup> For the role of supreme courts in ensuring the uniformity of case law, see CCJE Opinion No. 20 (2017), paras 20-25.

<sup>26</sup> Andorra, Austria, Croatia, Czech Republic, Finland, Georgia, Germany, Iceland, Lithuania, Norway, Poland, Romania, Slovenia, Spain.

<sup>27</sup> United Kingdom.

<sup>28</sup> Andorra, Austria, Belgium, Finland, France, Monaco, Romania, Russian Federation, Sweden, Switzerland.

32. The CCJE has recognised the importance of providing the media with summaries of court decisions, factual information and information about hearings<sup>29</sup>. Drafting such papers under the supervision of a judge can be an important duty of judicial assistants.

(v) Administrative duties

33. While administrative duties are usually performed by administrative assistants, duties such as writing the official protocols of hearings, the organisation of files, correspondence with the parties, the preparation of official copies of decisions, and the collection of statistical data are performed by judicial assistants in some member States.
34. Some regulations or guidelines should inform judges and judicial assistants of what kind of work can be delegated to judicial assistants, thereby creating transparency and accountability about an acceptable involvement of judicial assistants in the decision-making process<sup>30</sup>. In particular, judicial systems must take into account that for overburdened judges, the temptation to involve judicial assistants more actively in the decision-making process can be very high.

#### **D. The interaction of judges and judicial assistants**

1. *Judicial assistants under the guidance of judges*

35. The protection of judicial independence is a prerequisite to the rule of law. Judicial assistants are not judges and therefore have no right in that capacity to judicial independence. Therefore, in their role as judicial assistants, they are not independent of the judges they support. In that capacity, they must follow the orders of judges.

2. *The leadership role of the judges*

36. As already mentioned, judges are not simply case managers. However, if assistants work with them, judges must have a leadership role which entails giving constructive feedback, helping the judicial assistant's development, building mutual trust, and planning which tasks can be delegated. This role is particularly strong if working with the assistant serves an educational purpose. The higher the number of assistants a judge works with, the more important such managerial skills become. Judges should be taught how to lead, delegate and communicate and be supported in their role by receiving adequate advice.

3. *Clear instructions*

37. Judges must give clear instructions to judicial assistants and provide them with all necessary information to enable them to do their work in the best possible way.

4. *Mutual respect*

38. Judges and judicial assistants should respect and appreciate each other's role and respective duties. Judicial assistants must respect the limitation of their role in respect to the role of the judge. Judges, however, must appreciate and respect the important contribution which judicial assistants make to the work of the court.

5. *Exchange*

39. On the basis of mutual respect and understanding of the respective roles of judicial assistant and judge, both can and should engage in mutually beneficial exchange. Since some people prefer "thinking out loud" over "thinking on paper", a judicial assistant serving as a "sounding board" can be useful for the judge, especially if the judge is not part of a panel of judges but sits alone. Constructive feedback is useful for both assistants and judges.

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<sup>29</sup> CCJE Opinion No. 7 (2005), para 42.

<sup>30</sup> For the importance of regulation from an academic perspective, see Nina Holvast, In the shadow of the judge, the involvement of judicial assistants in Dutch district courts, 2017, p. 217-219.

## 6. *Regulation of working relationship*

40. The role and duties of judicial assistants should be recognised by the member States. Some member States have regulated the working relationship of judges and judicial assistants by statute or internal regulations<sup>31</sup>. Member States should identify critical issues in the relationship between judges and assistants and consider the best ways to resolve them. This can be through regulation, standards and guidelines or codes of conduct for the interaction of judges and judicial assistants. Soft law mechanisms and ethical rules can also help to avoid conflicts between judges and judicial assistants, and explain, for example, how to deal with a personality conflict<sup>32</sup>.

## IV. The status of judicial assistants

### A. The practice in the member States

41. The information provided by the member States shows a number of different approaches to the status and organisation of judicial assistants. In most member States, judicial assistants work at all courts and instances. In some member States, they are only engaged at the higher courts and constitutional court<sup>33</sup>, or only the constitutional court<sup>34</sup>, or at specialised courts<sup>35</sup>. Judicial assistants can be civil servants<sup>36</sup> or employees<sup>37</sup>, for a limited time or with long-term contracts. In some countries, judicial assistants can be first or second instance judges who serve as judicial assistants for a limited time before going back to their courts<sup>38</sup>. While such seconded judges serve as judicial assistants, they keep their status as judges of the court they come from.

### B. Selection

#### 1. *Selection process*

42. Judicial assistants should be selected in a transparent process based on objective, merit-based criteria taking into account experience, qualifications, legal skills, integrity, communication skills and motivation. Diversity can be a factor in the selection process. If working as a judicial assistant is a prerequisite (formal or informal) for becoming a judge, this must be taken into account in the selection process. An educational purpose of a judicial assistant scheme must be given adequate weight in the selection process. If working as a judicial assistant is a necessary requirement of qualification for legal practice<sup>39</sup>, as is the case in some member States<sup>40</sup>, these principles cannot be fully taken into account, because every qualified candidate must be given the chance to obtain the necessary qualifications for practicing law.

#### 2. *External independence of the judiciary*

43. Judicial independence must be protected against external pressures (external independence<sup>41</sup>). Because of the proximity of judicial assistants to the adjudicative process, the independence of the

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<sup>31</sup> In Croatia, judicial assistants are even mentioned in the Constitution.

<sup>32</sup> The Model Code of Conduct for Legal Associates and Advisors in Courts and Prosecutor's Offices in Bosnia and Herzegovina provides a helpful example.

<sup>33</sup> Austria, Cyprus, Denmark, Germany (at first and second instance courts, however, graduates (Referendare) work for limited periods as a necessary requirement of qualification for legal practice), Ireland, Luxembourg, Norway, Spain, United Kingdom.

<sup>34</sup> Italy.

<sup>35</sup> Albania.

<sup>36</sup> Andorra, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Denmark, Finland, France, Georgia, Iceland, Lithuania, Luxembourg, Monaco, Romania, Russian Federation, Slovenia, Spain, Sweden, Switzerland.

<sup>37</sup> Bosnia and Herzegovina, Czech Republic, France, Latvia, Malta, Republic of Moldova, Norway, Poland, Spain, United Kingdom.

<sup>38</sup> Especially in Germany and Spain, but the model exists also - with variations - in Albania, Austria, Croatia and Slovenia.

<sup>39</sup> Legal practice in this sense could mean, depending on the national legal system in each country, working as a lawyer and/or prosecutor and/or judge.

<sup>40</sup> Germany and Slovenia, in some aspects Austria and Belgium. These interns or Referendare should not be confused with fully qualified judicial assistants who support judges for longer periods of time at all courts (Slovenia, Belgium) or the highest courts (Austria and Germany).

<sup>41</sup> See Recommendation CM/Rec(2010)12, paras 11-21, see CJEU, decision of 27 February 2018 - *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas* - C 64/16, para 44.

judiciary must be guaranteed in the selection process of judicial assistants. The judiciary, not the executive, should be responsible for the selection. Moreover, in principle, the judiciary is best suited to select candidates with the qualities and skills necessary to support the court, especially when there is a need for expertise in certain areas of law.

### 3. *Internal independence*

44. Judicial independence cannot only be infringed through external influences but also through measures taken within the judiciary (internal independence)<sup>42</sup>. Judicial assistants work closely with judges who must be able to rely on their trustworthiness, competence and motivation. This is especially important in cases where judicial assistants are assigned to an individual judge or panel of judges. In such cases, the individual judge who works with individual judicial assistants should have a say in their selection and assignment.

### 4. *Duration of employment*

45. Member States take different approaches to the length of time for which judicial assistants can be employed. In the majority of member States, serving as a judicial assistant can be a permanent career<sup>43</sup>. Although in such countries the position is not usually designed as a permanent career, in practice judicial assistants may stay for a long time or even until retirement. In particular, the latter can be the case in countries where the position of judicial assistants is meant to serve as a stepping stone to becoming a judge. If not enough new judges are hired, judicial assistants might get "stuck" in their position<sup>44</sup>. In other countries, serving as a judicial assistant is a short-term position, which also has an educational aspect<sup>45</sup>.
46. Both systems of long-term and short-term employment have advantages and disadvantages. Keeping experienced judicial assistants can make courts more efficient. Frequent changes mean that new assistants must be trained and need time to become helpful. Experienced assistants can save time and can work on routine cases more independently. However, there are disadvantages as well if judicial assistants stay too long. If judicial assistants become very experienced, they might gain too much influence in the adjudicative process. This would be problematic considering the guarantees of Article 6 of the ECHR emphasised above. If serving as a judicial assistant has an educational purpose, it is especially important that judicial assistants move on. Moreover, a regular change among judicial assistants can help courts and judges to stay more dynamic and connected with new developments.
47. If member States and their judicial systems engage judicial assistants for a longer time, they should recognise their responsibility as employer and provide training opportunities and/or advanced roles for experienced judicial assistants to help them in their development. It might be possible to promote such assistants to more important roles in the court administration, or to promote them to higher courts.
48. If it is possible in the respective judicial system, judicial assistants of the highest quality should be encouraged and supported on their way to becoming judges. This way, a judicial system can rely on candidates who have a comprehensive understanding of the duties and the role of a judge. To build on their experience can reduce training needs and help to develop an efficient court system.
49. Member States are encouraged to find a balance between the advantages and disadvantages of long and short-term engagements of judicial assistants. The time of work should not be too short, so that judicial assistants can provide support of high quality and gain valuable insights. However, in the light of the risks explained above, the stay of judicial assistants in the same role should also not be too long.

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<sup>42</sup> See Recommendation CM/Rec(2010)12, para 22-25, see CJEU, decision of 27 February 2018 - *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas* - C 64/16, para 44.

<sup>43</sup> Andorra, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Cyprus, Georgia, Switzerland, Latvia, Lithuania, Republic of Moldova, Monaco, Norway, Romania.

<sup>44</sup> Croatia, Slovenia.

<sup>45</sup> Austria, Czech Republic, Denmark, Finland, France, Germany, Ireland, Luxembourg (not much experience yet) Norway, Poland, Sweden, United Kingdom.

### **C. Evaluation**

50. If the performance of judicial assistants is evaluated, this should be done by the judge or judges with whom the judicial assistant has worked. This is especially important if working as a judicial assistant serves an educational purpose. Grades and references achieved in the process might be of considerable importance for a judicial assistant's career opportunities. Evaluations must be done according to objective criteria, taking into account an assistant's legal competence, integrity, motivation and efficiency. While evaluations of judicial assistants do not raise problems of judicial independence, the principles developed for the evaluation of judges can be taken as a guideline<sup>46</sup>. Like a judge, a judicial assistant should be heard in the evaluation process.

### **D. Training**

51. In a constantly changing legal environment, the judiciary should establish a culture of self-improvement and training for judges<sup>47</sup>. Such training opportunities should be open for judicial assistants in order to improve their ability to assist judges. If there is a system of training for judges, the training of judicial assistants should be offered by the same institution. It should take the assistants' training needs into account. Such training is of special importance if judicial assistants aim at becoming judges.

### **E. Organisation**

52. As the responses from the member States indicate, there are basically three different ways to organise judicial assistants: A judicial assistant or a number of them might work with one judge<sup>48</sup>. Judicial assistants might also be assigned to a panel of judges<sup>49</sup>. In a third approach, judicial assistants are organised in a pool and work with different judges<sup>50</sup>. In a rarely used fourth approach, teams of judicial assistants are built for special cases<sup>51</sup>.
53. A judicial system should carefully consider which approach best suits its legal tradition and court system. Each of these approaches has advantages and disadvantages. If judges work closely with the same assistant or assistants, a high degree of trust can be built. In this case, judges should have a say in the assignment of judicial assistants. The number of judicial assistants assigned to each judge should not be too high so that judges have the time to review their work carefully. An advantage of a pool system might be that judges work with judicial assistants with different qualities.

### **F. Remuneration**

54. The longer assistants work at courts, the more important it is that their work is paid adequately. Not only should the value of the work done by judicial assistants be properly recognised, but risks of corruption might arise as a result of underpaid judicial assistants.

### **G. Professional conduct**

#### *1. Impartiality*

55. The parties coming to court will expect impartiality not only from the judge hearing their case but also from a judicial assistant supporting the judge working on the case. Therefore, judicial assistants have a duty to reveal any conflict of interest. Moreover, member States should consider introducing rules demanding that judicial assistants recuse themselves according to the same criteria as apply to the recusal of a judge<sup>52</sup>. The CCJE recommends that member States consider introducing regulation allowing parties to challenge the participation of a judicial assistant.

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<sup>46</sup> See CCJE Opinion No. 17 (2014).

<sup>47</sup> See CCJE Opinion No. 4 (2003).

<sup>48</sup> This might be called a "cabinet system": Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Georgia, Germany, Ireland, Latvia, Lithuania, Malta, Republic of Moldova, Poland, Russian Federation, Spain (at the Constitutional Court), United Kingdom, Ukraine; it is also the practice at the Court of Justice of the European Union.

<sup>49</sup> Andorra, Belgium, Switzerland, Czech Republic, Finland, Germany, Iceland, Romania, Slovenia, Sweden.

<sup>50</sup> Andorra, Austria, Bosnia and Herzegovina, Denmark, Finland, Ireland, Latvia, Lithuania Supreme Court, Luxembourg, Monaco, Norway, Spain; it is also the practice at the European Court of Human Rights.

<sup>51</sup> Sometimes Finland; it is also the practice at the International Criminal Court (ICC).

<sup>52</sup> As in Croatia, Romania, Slovenia, Switzerland.

## 2. Confidentiality

56. Judicial assistants must keep confidential all information they gain in relation to their work. This is crucial for communications outside the court, e.g. with friends, on social media, with the press, with the parties, the executive and legislature. It is, however, also of importance inside the court, e.g. in relation to the court president and court management. Regulations regarding confidentiality must of course respect the rights and freedoms protected by Article 10 of the ECHR and other relevant provisions of the Convention.

## 3. Independence

57. Judicial assistants have a dual role: they are part of the court administration but also help judges in fulfilling their independent duties. Therefore, respecting and promoting judicial independence is an important duty of judicial assistants. This special role must be reflected in their status. The regulation of their duties, their legal rights and status must ensure that their dual role is neither abused from outside the judiciary nor from inside the judiciary to infringe the independence of judges. For example, in case of conflicting orders from the judge working on a concrete case and from the court administration, the decision of the judge must be respected.

## 4. Standards of ethical and professional conduct

58. Judicial assistants - especially those who are involved in the drafting process of decisions - undertake important duties within the judiciary. Their conduct can directly influence the confidence of society and parties seeking justice. The CCJE recommends developing standards of ethical and professional conduct for judicial assistants reflecting their role and duties<sup>53</sup>. Notwithstanding the important differences in the role of judges and judicial assistants pointed out before, many principles expressed in the standards concerning ethical and professional conduct of judges have relevance for judicial assistants as well. Judicial assistants must act with integrity, propriety and impartiality. They must perform their duties diligently and with high competence.

## V. Conclusions - Recommendations

1. Decision-making is at the heart of the judge's duties in all legal systems (para 18). Judicial assistants must support judges in their role, not replace them (para 19). Therefore, judicial assistants should not be engaged at the expense of appointing judges in adequate numbers (para 14).
2. Competent judicial assistants can provide valuable support to judges and thereby help to improve the work of courts at all levels (paras 11, 15). In particular, judicial assistants can be an important tool to improve the efficiency of courts (para 13). Member States should reflect carefully whether to employ judicial assistants, and if so, in what instances of courts they should be employed and how to organise their work in order to support the quality and timeliness and thereby the efficiency of the judicial system (para 15).
3. Member States should provide adequate funding to employ qualified court staff including – where they are engaged - judicial assistants (para 13).
4. In order to ensure the rights of the parties under Article 6 of the ECHR, judges must command the law and facts in a way that judicial decisions remain fully theirs (para 18). The closer judicial assistants come to the decision-making process, and the higher the workload of judges is, the more important it is that judicial systems and judges are vigilant in ensuring that judges keep control by closely supervising the work of judicial assistants (paras 14, 22).
5. Member States should consider introducing regulations or guidelines which inform judges and judicial assistants of what kind of work can be delegated to judicial assistants, thereby creating transparency and accountability about an acceptable involvement of judicial assistants in the decision-making process (para 34).
6. Member States should consider the regulation of the status of judicial assistants, taking into consideration their selection, remuneration, evaluation, organisation, training needs and - if applicable - the situation of long-term assistants (paras 41-54).

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<sup>53</sup> See as an example the Model Code of Conduct for Legal Associates and Advisors in Courts and Prosecutor's Offices in Bosnia and Herzegovina.



7. Member States are encouraged to find a balance between the advantages and disadvantages of long and short-term engagements of judicial assistants (para 49). If it is possible in the respective judicial system, judicial assistants of the highest quality should be encouraged and supported on their way to becoming judges (para 48).
8. It should be the judiciary, not the executive, who should be responsible for the selection of judicial assistants in a transparent process based on objective and merit-based criteria (paras 42, 43).
9. The conduct of judicial assistants can directly influence the confidence of society and the parties seeking justice. Therefore, regulations and guidelines should provide guidance on the working relationship of judges and judicial assistants and the professional and ethical conduct of judicial assistants (paras 35-40, 58).
10. Judicial assistants must keep confidential all information they gain in relation to their work (para 56).
11. Judicial assistants have a duty to reveal any conflict of interest. Member States should consider introducing rules on the recusal and challenge of judicial assistants, similar to those that apply to judges (para 55).
12. The proximity of judicial assistants to the judges they support must neither be abused from outside nor from inside the judiciary to infringe the independence of judges (para 57).



# Opinion No. 23 (2020)

of the Consultative Council of European Judges (CCJE)  
to the Committee of Ministers of the Council of Europe

## The role of associations of judges in supporting judicial independence

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### I. Introduction

1. In accordance with the mandate given to it by the Committee of Ministers, the Consultative Council of European Judges (CCJE) has prepared the Opinion on the role of associations of judges in supporting judicial independence.
2. This Opinion has been prepared on the basis of previous CCJE Opinions, the CCJE Magna Carta of Judges (2010) and relevant instruments of the Council of Europe, in particular the European Charter on the Statute for Judges (1998) and Recommendations of the Committee of Ministers CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities and CM/Rec(2007)14 on the Legal Status of Non-Governmental Organisations in Europe, Report of the European Commission for Democracy through Law (Venice Commission) on the Freedom of Expression of Judges (CDL-AD(2015)018), Common Guidelines on the Freedom of Associations of the Venice Commission and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR). It also took into account the UN Basic Principles on the Independence of the Judiciary, the Bangalore Principles of Judicial Conduct, the Universal Charter of the Judge of the International Association of Judges, the first report of the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association of 21 May 2012 (A/HRC/20/27) and the third report of 24 June 2019 of the UN Special Rapporteur on the independence of judges and lawyers, which deals with the exercise of freedom of expression, association and peaceful assembly by judges and prosecutors.
3. The Opinion also takes account of the replies of the CCJE members to the questionnaire on the role of associations of judges in supporting judicial independence, and of the summary of these replies and the preliminary draft prepared by the expert appointed by the Council of Europe, Judge Gerhard REISSNER<sup>1</sup>.

### II. Scope of the Opinion

4. In 12 of the 35 member States, which answered the questionnaire, there is only one association of judges. In the majority of those member States, there is more than one association.
5. The survey of the member States showed that there is a great variety of associations of judges. Their qualifications for membership are different, their objectives diverge, and their size and representativeness vary greatly.
6. Some associations are open to judges of a certain court level only, e.g. Supreme Court judges sometimes have their separate association. Others are composed of judges of a certain specialisation. The most common associations of this type are separate associations of judges of administrative courts. There are also women judges' associations<sup>2</sup>. However, in most cases, associations allow all judges to become members.
7. Membership of all types of associations is voluntary. Therefore, the size of the association as far as the number of members is concerned may be quite different and - what is even more important - the representativity of an association, which is the ratio of the judges who are members of the association compared to all judges who could be members of that association, varies considerably.

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<sup>1</sup> Judge REISSNER was the President of the CCJE in 2012-2013, and a long-standing member of the CCJE Working Group.

<sup>2</sup> The existence of women judges' associations has been reported by Bosnia and Herzegovina, Italy, Slovakia, Ukraine and the United Kingdom.

8. Associations of judges may have legal personality. Most of them are established under a law on civil associations. They can also be constituted as informal groups of judges.
9. All associations of judges provide a network and platform to exchange and communicate between their members. The main objectives of the vast majority of associations are to promote and defend the independence of judges and the rule of law, and to safeguard the status and adequate working conditions of judges. Other important objectives are the training of judges, ethics of judges, and contributing to judicial reforms and to legislation.
10. For the purpose of this Opinion, associations of judges are self-governing non-profit organisations with or without legal personality composed of members who voluntarily apply for membership.
11. In the majority of associations, membership is open to judges including, in most cases, also retired judges. In some associations, trainee judges and judicial assistants could also become members. In some associations, especially if there is a common career for judges and prosecutors, prosecutors can also be members.

### III. International and European framework

12. The Universal Declaration of Human Rights<sup>3</sup>, the International Covenant on Civil and Political Rights (ICCPR)<sup>4</sup> and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)<sup>5</sup> grant everybody the right to associate, that is the right to form and to join associations.
13. As all individuals, judges enjoy these fundamental rights, which are protected by the above-mentioned documents<sup>6</sup>. In exercising their right to freedom of peaceful assembly, judges should bear in mind their responsibilities and avoid situations which could be regarded as being incompatible with the authority of their institution or inconsistent with their duty to be, and to be perceived as, independent and impartial<sup>7</sup>.
14. The right to associate is not only in the interest of a judge personally. As regards judges, this right is in the interest of the whole judiciary as well. The right for judges to associate is explicitly granted in the UN Basic Principles for the Independence of the Judiciary<sup>8</sup>, the Bangalore Principles of Judicial Conduct<sup>9</sup> and the Universal Charter of the Judge<sup>10</sup>.
15. In Europe, the right to form associations of judges was further developed in 1998 by the European Charter on the Statute for Judges<sup>11</sup> and in 2010 by Recommendation (2010) 12 of the Committee of Ministers of the Council of Europe on Judges, Independence, Efficiency and Responsibilities (Recommendation (2010)12)<sup>12</sup> and by the CCJE Magna Carta of Judges (Fundamental Principles)<sup>13</sup>. The European Charter underlines the contribution of associations of judges to the defence of the rights which are conferred on judges by their status, Recommendation (2010)12 echoes this and names the most central element of a judge's status, which is independence, and adds as an additional task the promotion of the rule of law. The Magna Carta of Judges addresses this objective as "defence of the mission of the judiciary in the society". Such developments in terms of broadening the tasks can also be seen when analysing the objectives of associations of judges, where today more and more the focus on the status of judges is accompanied by an equally strong awareness of raising regard for the rule of law.

<sup>3</sup> Universal Declaration of Human Rights adopted by the UN General Assembly on 10 December 1948, Article 20/1.

<sup>4</sup> International Covenant on Civil and Political Rights adopted by the UN General Assembly on 16.12.1966.

<sup>5</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (of 4.11.1950), Article 11 /1.

<sup>6</sup> CCJE Opinion No. 3 (2002) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and partiality, para 27.

<sup>7</sup> Compare also with the third report of the UN Special Rapporteur on the independence of judges and lawyers on the exercise of freedom of expression, association and peaceful assembly by judges and prosecutors, 24 June 2019, Recommendation 107.

<sup>8</sup> United Nations Basic Principles on the Independence of the Judiciary (endorsed by the General Assembly on 29.11.1985) para 9.

<sup>9</sup> Bangalore Principles of Judicial Conduct, Principles 4-6.

<sup>10</sup> Universal Charter of the Judge (adopted by the IAJ on 14.11.2017) Article 3/5.

<sup>11</sup> European Charter on the Statute for Judges: principles 1.7 und 1.8.

<sup>12</sup> Recommendation (2010)12, para 25.

<sup>13</sup> CCJE Magna Carta of Judges (Fundamental Principles) (17.11.2010), para 12.

#### IV. Rationale and objectives of the associations of judges

16. Judges are basic cornerstones within States built on democracy, the rule of law and human rights<sup>14</sup>. It is a logical consequence of this role that the above-mentioned European standard-setting documents envisage, and the statutes of many associations of judges express as central goals, two overriding objectives: 1) establishing and defending the independence of the judiciary; 2) fostering and improving the rule of law. Both objectives foster the effective enjoyment of the fundamental right to a fair trial by an independent and impartial tribunal set forth in Article 6 of the ECHR.
17. The first objective for an association of judges of establishing and defending independence encompasses among other factors defending judges and the judiciary against any infringements of independence, claiming sufficient resources and satisfactory working conditions, aiming for adequate remuneration and social security, rejecting unfair criticism and attacks against the judiciary and individual judges, establishing, promoting and implementing ethical standards, and safeguarding non-discrimination and gender balance.
18. The second objective for an association of judges of fostering and improving the rule of law encompasses among other factors contributing to training, exchanging and sharing knowledge and best practices, contributing to the administration of justice in conjunction with those who are responsible for it, contributing to reforms of the justice system and law making, fostering the knowledge and information of the media and the general public about the role of judges, the judiciary and the rule of law.
19. The objectives mentioned so far are not exclusively objectives of associations of judges. Several other actors within and outside the justice system play a role in reaching them. To succeed, mutual respect, openness, support and co-operation will be helpful.
20. Associations of judges can also facilitate meetings with representatives of civil society who are able to express society's expectations of the justice system and the administration of justice<sup>15</sup>.
21. An obvious objective of an association of judges is the creation of a network among its members. It brings together judges who exercise their tasks on their own or in a panel of judges, having nevertheless common interests and needs. Providing the opportunity of dialogue and critique between judges helps to improve independence by self-criticism from within the judiciary and to develop a strong value-based justice system. Being together in an association leads judges to an exchange of experience and best practices<sup>16</sup>. This is most fruitful in the case when judges of different court levels and jurisdictions come together. Associations of judges may also be the place for deepening the knowledge of specialised judges and in that way contributing to the consistent application of the law. And last, but not least, associations of judges help in developing a common spirit for the independence of the judiciary, human rights and the rule of law.
22. Associations of judges also facilitate transborder co-operation and enable exchanges with associations in other member States. They associate also at European level through a number of European judicial associations and organisations. In this way, national associations of judges open the door for international exchange of experience for their members, and they play an important role in disseminating European standards within the national communities of judges.
23. Based on the above-mentioned important aspects of associations of judges and their significance for supporting the core values of judicial systems in member States, the CCJE considers it highly desirable that in every justice system at least one such association of judges exists.

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<sup>14</sup> Regarding the role of the judiciary, see CCJE Opinion No. 18 (2015) on the position of the judiciary and its relations with the other powers of state in a modern democracy.

<sup>15</sup> CM/Rec(2010)12, para 20.

<sup>16</sup> Like in the case of exchanges among judges of the same court since in many member States, meetings among them are held aiming "to disseminate legal developments in case law and good professional practice", see the CEPEJ report on "Breaking up judges' isolation - Guidelines to improve the judge's skills and competences, strengthen knowledge sharing and collaboration, and move beyond a culture of judicial isolation" of 6 December 2019, CEPEJ(2019)15, p. 8.

## V. How associations of judges may reach their objectives

### A) Within the judiciary

24. In fostering and defending the independence of judges and the judiciary, associations of judges have to carry out a wide range of activities. The independence of an individual judge requires an independent judiciary<sup>17</sup>. Independence precludes not only influence from outside but also from within the judiciary<sup>18</sup>. Associations of judges can often deal with threats, unfair criticism and attacks. But it is much more difficult to counter undue interference in the form of decisions by competent authorities influencing the career of judges (appointment, promotion, transfer, disciplinary and evaluation procedures and so on) or of all kinds of decisions regarding court administration.
25. The competence for such decisions is entrusted to Councils for the Judiciary, court administration bodies, presidents of courts, and sometimes even to the executive power (the Government or the Minister of Justice). To achieve their objectives, associations of judges therefore have to be in contact with, and address, these bodies.
26. Such contacts should be based on openness, mutual respect for their respective roles and jurisdictions and willingness to listen to each other's arguments. Associations of judges should not intervene in career decisions, but they can monitor whether the competent actors follow the correct procedure and apply the correct criteria.
27. Court administrators should be aware that associations of judges not only transmit the position of their members, but they are a melting pot of the experience of their members. Very often, it is practitioners who know best what is needed in practice. The CCJE has recommended that bodies of judges of a court should advise the court president<sup>19</sup>. In a similar way, associations of judges might also play such an advisory role vis-a-vis court administrators or court administration bodies of all levels.
28. Especially at the level of the court administration, which is responsible for adopting various directives and regulations, the involvement of associations of judges as regards strategic objectives and important matters of general application might be fruitful and advisable.
29. In the majority of member States, decisions on the career of judges and/or the administration of courts are entrusted to the Councils for the Judiciary<sup>20</sup>. Their general mission is to safeguard the independence of the judiciary and of individual judges and the rule of law<sup>21</sup>. Thus, the tasks of the Councils for the Judiciary and the overriding objectives of associations of judges coincide. Many times, there will be conformity of views, but different opinions may nevertheless arise between associations of judges and the Councils for the Judiciary, the latter usually having a mixed composition of judges and non-judges. An open exchange of opinions should take place in such situations.
30. In its search for best practices, the CCJE learned that in two member States<sup>22</sup>, there are consultative councils consisting, *inter alia*, of representatives of associations of judges and prosecutors where matters regarding their professional interests, including their status, working conditions, remuneration and other such matters, are discussed and non-binding recommendations on relevant legislative amendments are prepared. The CCJE recommends such initiatives.
31. The CCJE has taken note that in several member States, the association of judges has a certain influence on the selection of members of the Council for the Judiciary either by having the right to forward an opinion on candidates<sup>23</sup>, supporting candidates who need a certain number of colleagues proposing them<sup>24</sup>, having the possibility of nominating judges<sup>25</sup> or a legal duty to nominate candidates<sup>26</sup>, or having a legally based formal position regarding selection<sup>27</sup>, or even electing members themselves<sup>28</sup>.

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<sup>17</sup> CM Recommendation (2010)12, para 4.

<sup>18</sup> ECtHR *Parlov-Tkalcic vs. Croatia*, No. 24810/06, para 86, *Agrokompleks vs. Ukraine*, No. 23465/03, para 137 et alt.

<sup>19</sup> CCJE Opinion No. 19 (2016) on the role of court presidents, para 19.

<sup>20</sup> CCJE Opinion No. 10 (2007) on the Council for the Judiciary at the service of society, para 42.

<sup>21</sup> *Ibid*, paras 8ff and 41f.

<sup>22</sup> Belgium (Conseil consultatif de la magistrature), Bulgaria (Partnership Council).

<sup>23</sup> Bulgaria.

<sup>24</sup> Romania, Spain.

<sup>25</sup> Norway (proposal of judges members of Appointment Board), Slovakia (proposal like every civic association).

<sup>26</sup> Azerbaijan (two nominations for each of seven judges members positions).

32. Provided that it does not infringe the independence of the work of the Council for the Judiciary, such participation in the selection of its members could be welcomed. Care must be taken, however, that such a system does not lead to the politicisation of the election and the following work of the Council. In any case, there should be no discrimination and members of an association of judges should be free to become members of a Council for the Judiciary.
33. Many associations of judges are involved in the training of judges either by organising training or developing training materials and training facilities themselves<sup>29</sup>, by providing experienced trainers or at least by forwarding recommendations to the institution in charge of organising the training. The CCJE, in its Opinion No. 4 (2003) on appropriate initial and in-service training for judges at national and European levels, indicates that the judiciary should play a major role in, or itself to be responsible for, organising training, and that training should not be entrusted to the executive or legislative powers<sup>30</sup>. The involvement of associations of judges, which are close to the needs and practical experience of their members, is therefore very appropriate.
34. Ethical principles of professional conduct should be drawn up by judges themselves<sup>31</sup>. The fact that judges voluntarily associate and that there is a forum for exchange and debate guarantee a strong commitment on the part of the judges to any principles of conduct drawn up by associations of judges<sup>32</sup>, or development of such principles where associations of judges are at least intensively involved<sup>33</sup>.
35. For the same reasons, associations of judges are also well placed to establish a body to advise judges confronted with a problem related to professional ethics or the compatibility of non-judicial activities with their status<sup>34</sup>.
36. In some member States, associations of judges represent judges in disciplinary proceedings if they request representation. There can be no objection to judges' associations representing their members in disciplinary proceedings and contributing to ensuring a fair procedure, especially if such proceedings are abused in order to orchestrate the removal of certain judges. But care must be taken to avoid any appearance that associations of judges are protectors of judges guilty of misconduct. Fostering a credible accountability of judges and of the judiciary is an important task of associations of judges.

## **B) In relation to other powers of state**

37. The CCJE considers that associations of judges should avoid orienting their activities according to the interests of political parties or candidates for political office, and they should not involve themselves in political issues which are outside of their objectives.
38. Associations of judges represent the experience and opinion of judges, and they need ways to forward their considerations and proposals to the other powers of state. The CCJE agrees with the observations in the explanatory memorandum to Article 1.8 of the in the European Charter on the Statute for Judges that "judges should be associated in the determination of the overall judicial budget and the resources earmarked for individual courts, which implies establishing consultation or representation procedures at the national and local levels. This also applies more broadly to the administration of justice and of the courts" and that "consultation of judges by their representatives or

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<sup>27</sup> The Netherlands.

<sup>28</sup> North Macedonia (president and one member and deputies).

<sup>29</sup> Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Germany, Greece, Lithuania, Montenegro, North Macedonia, Poland, Romania, Russian Federation, Slovenia, Spain, Switzerland, Ukraine, United Kingdom.

<sup>30</sup> CCJE Opinion No. 4 (2003) on appropriate initial and in-service training for judges at national and European levels, para 16, see also European Charter on the Statute for Judges, para 2.3.

<sup>31</sup> CCJE Opinion No. 3 (2002) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, paras 48 lit ii and 49 lit iii; see also Recommendation (2010)12, para 73.

<sup>32</sup> There are codes of ethics elaborated by associations of judges in Austria, Bulgaria, Croatia, Denmark, Finland, Iceland, Italy, Malta, The Netherlands, Norway, Slovenia, Spain, Switzerland.

<sup>33</sup> Other involvement of association of judges in establishing ethical standards: Azerbaijan, Belgium, Estonia, Germany, Ireland, Lithuania, Luxemburg, Montenegro, North Macedonia, Romania, Slovakia, Sweden, Turkey, Ukraine, United Kingdom.

<sup>34</sup> CCJE Opinion No. 3 (2002) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, para 49 lit iv and Recommendation (2010)12, para 74.

professional associations on any proposed change in their statute or any change proposed as to the basis on which they are remunerated, or as to their social welfare, including their retirement pension, should ensure that judges are not left out of the decision-making process in these fields”.

39. The Committee of Ministers of the Council of Europe has considered that “participatory democracy, based on the right to seek to determine or to influence the exercise of a public authority’s powers and responsibilities, contributes to representative and direct democracy and that the right to civil participation in political decision-making should be secured to individuals, non-governmental organisations (NGOs) and civil society at large”<sup>35</sup>. In relation to non-governmental organisations, the Committee of Ministers acknowledged “the essential contribution made by non-governmental organisations (NGOs) to the development and realisation of democracy and human rights, in particular through the promotion of public awareness, participation in public life and securing the transparency and accountability of public authorities”<sup>36</sup>. NGOs should be consulted during the drafting of primary and secondary legislation which affects their status, financing or spheres of operation<sup>37</sup>.
40. The CCJE is convinced that these possibilities of participation should also be entrusted to associations of judges, although they are not organisations which represent civil society, but organisations, the members of which are holders of positions within the third power of state. The CCJE, in its Opinion No. 18 (2015) on the position of the judiciary and its relations with the other powers of state in a modern democracy, provides guidance as far as the discussion with other powers of state<sup>38</sup>, the dialogue with the public<sup>39</sup>, and the need for restraint in the relations between the three powers<sup>40</sup> are concerned. This Opinion should in a similar way be used as a source of guidance as regards the relations between judges’ associations on the one hand, and the legislative and executive powers on the other hand.
41. The CCJE endorses the participation of associations of judges in the legislative procedure in the case of draft laws regarding the justice field which are put forward by the executive power. When reform commissions or similar strategic project groups are established, representatives of associations of judges nominated by their association should be involved. More generally, the opinion of associations of judges should be requested and considered by the executive power at all levels in respect of judicial reforms and projects including budgetary issues and the allocation of resources, working conditions and all aspects of the status of judges.
42. In some member States, the formal participation of associations of judges in the procedure of drafting and amending laws is ensured by formal regulation by law or by-law<sup>41</sup>. In several other member States, this is at least steady practice<sup>42</sup>. The CCJE welcomes practice which provides associations of judges with the possibility to consider and comment on intended legislation in matters connected with the status of judges and the administration of courts, for which an appropriate time should be provided and the results of which should be taken seriously into consideration. At the same time, associations of judges should stay out of politically controversial subjects outside their objectives.
43. The CCJE sees it as an essential task of associations of judges to engage responsibly in the search for possibilities of improving further the justice system and strengthening the rule of law.

### **C) In interaction with society at large**

44. Associations of judges are particularly well placed to play a role in informing the media and the general public about the work and priorities of the judiciary, including the duties and powers of judges, and the role of the judiciary and the other powers of state in a democratic state governed by the rule of law.
45. The CCJE notes with satisfaction that many associations of judges contribute in a significant and effective manner to measures aimed at fostering the relations and the understanding between the

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<sup>35</sup> Guidelines for Civil Participation in Political Decision Making, CM (2017) 83, preamble.

<sup>36</sup> Recommendation CM/Rec(2007)14 on the Legal Status of Non-Governmental Organisations in Europe, preamble, para 2.

<sup>37</sup> *Ibid.*, para 77.

<sup>38</sup> CCJE Opinion No 18 (2015) on the position of the judiciary and its relations with the other powers of state in a modern democracy, para 32.

<sup>39</sup> *Ibid.*, para 33.

<sup>40</sup> *Ibid.*, para 40 and paras 53 to 55.

<sup>41</sup> Austria (as regards the ordinary courts), Estonia, Germany, Greece, Iceland, Montenegro, The Netherlands, Romania, Slovakia.

<sup>42</sup> Finland, Italy, Poland, Switzerland.



judiciary and the public, such as court education programmes, information materials, open court events, public debates, presentations, other outreach programs etc.<sup>43</sup> Such measures are most effective if they are exercised by those who work in the system. Associations of judges should therefore involve themselves in these activities. It would also appear to have become more common that associations of judges organise conferences, exercise pro-active media policies and make use of social media in their work, all steps that the CCJE welcomes.

46. Associations of judges sometimes work together with NGOs in the pursuit of certain objectives. This may improve the likelihood of achieving such shared goals, provided that any politicisation is avoided.

## **VI. What is needed for associations of judges to fulfil their tasks**

### **A. General guidelines**

47. In 2014, the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) adopted Joint Guidelines on Freedom of Association<sup>44</sup> (hereafter Guidelines on Freedom of Association), which deal with the fundamental right to form and join associations. The CCJE agrees with these Guidelines. Most of the standards which are laid down in that document can also be applied for associations of judges.

48. In particular, the CCJE recalls the following standards:

- a) everyone is equally entitled to the right to associate<sup>45</sup>;
- b) formation and registration (where applicable) should not be unnecessarily burdensome or discouraging<sup>46</sup>;
- c) the principle of self-government should be respected and enabled<sup>47</sup>, which means among other things that any influence from outside on the objectives and on their implementation, on the internal structure<sup>48</sup> and the selection of the officers of an association of judges<sup>49</sup> should be forbidden;
- d) the possibility to be involved in a transparent law-making process and dialogue<sup>50</sup> and to comment on state reports to international actors should be granted<sup>51</sup>;
- e) a termination or suspension of activities should be possible only in very exceptional limited cases<sup>52</sup> and should be reviewed by an independent tribunal<sup>53</sup>;
- f) the use of new technologies should be allowed as it is for everyone; surveillance measures which specifically aim to observe associations and blocking of websites should be forbidden<sup>54</sup>.

### **B. Special position of judges**

49. Regarding associations of judges, it seems necessary to consider some features stemming from judges' special position and tasks. Judges have to be independent and impartial. They have not only to be independent and impartial but also to be seen as such. Judges form the judiciary, which is one of the three powers of the state, but it is a power which is vested in individual judges or their panels.
50. For the judiciary as a state branch of power, it is not as easy as it is for the executive or the legislative powers, both streamlined by political parties and hierarchies, to constitute a common will and to communicate in a united way with the other powers, the media and society at large.

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<sup>43</sup> CCJE Opinion No. 7 (2005) on justice and society, chapter A: Relations of the courts with the public, paras 10 to 20, and CCJE Opinion No. 6 (2004) on fair trial within a reasonable time and judge's role in trials taking into account alternative means of dispute settlement, chapter A: Access to justice, paras 11 to 18.

<sup>44</sup> Venice Commission and OSCE/ODIHR Joint Guidelines on the Freedom of Association, VC CDL-AD (2014)046 resp. OSCE/ODIHR Legis Nr. GDL-FOASS/263/2014.

<sup>45</sup> *Ibid.*, paras 122 ff.

<sup>46</sup> *Ibid.*, para 151.

<sup>47</sup> *Ibid.*, paras 169 and 171.

<sup>48</sup> *Ibid.*, para 175.

<sup>49</sup> *Ibid.*, para 174.

<sup>50</sup> *Ibid.*, paras 183 and 184.

<sup>51</sup> *Ibid.*, para 186.

<sup>52</sup> *Ibid.*, paras 244, 245, 251.

<sup>53</sup> *Ibid.*, paras 244 and 256.

<sup>54</sup> *Ibid.*, paras 265, 270, 271.

51. Judges also enjoy the fundamental right of freedom of expression<sup>55</sup>, although individual judges are limited by rules of confidentiality regarding their cases and other information when it comes to issuing statements and expressing their thoughts.
52. The impact of the statement of one judge certainly has limited effect. Associations of judges can contribute to remedy these inherent disadvantages in two ways. They can help to find a common position and they can convey this position effectively to outside actors.
53. If there is more than one association of judges within the justice system, associations of judges sometimes have different positions with regard to certain common problems. Although pluralism enriches the democratic debate on justice, the CCJE welcomes putting efforts into finding a common position on important issues in order to have a strong impact on other actors within and outside the justice system.
54. The CCJE recognises the importance and value of associations of judges. They have the potential to significantly contribute to the rule of law in the member States even if the above-mentioned features of associations composed of judges result in special limitations and awareness.
55. The CCJE is convinced that the requirement for associations of judges to be independent and self-governing bodies is an essential element which, on the one hand, is an aspect of the fundamental right to form and join associations, but is also closely linked to the independence of judges and the judiciary and the principle of division and balance of state powers. Although associations of judges are not the bearers of these constitutional rights, in practice, pressure and influence can indirectly be put on judges and the judiciary if influence on associations of judges is exercised.
56. Therefore, it is absolutely necessary that the objectives, internal structure, membership, and selection of officers of associations of judges are free of external influence or control.
57. Membership of an association should not have any influence on the career of judges, and it should offer neither advantages nor disadvantages. Members should not be obliged to disclose their membership<sup>56</sup>, thereby being subjected to an interference in their right to privacy concerning such sensitive data. Considering that associations of judges protect their interests in this regard, membership data must be treated like that of trade unions, for which disclosure is excluded<sup>57</sup>. Even if regulations require judges to declare assets and interests in order to make transparent possible conflicts of interest, that cannot include declaring the membership in associations of judges, because there is no conflict of interest between such membership and the exercise of the judicial functions.

### **C. Resources and governance**

58. Depending on the range of objectives and means foreseen to implement them, associations of judges need resources to different extents. Membership fees are the primary source of income for most associations. The fees should not be discriminatory or prohibitive and thereby risk excluding judges who cannot afford them.
59. Often, additional financial or other equipment will be necessary. The CCJE endorses the demand in the Guidelines on Freedom of Association that “associations shall have the freedom to seek, receive and use financial, material and human resources, whether domestic, foreign or international, for the pursuit of their activities”<sup>58</sup>. Whatever funding is available, it must be transparent and must not impair or give the impression of impairing the independence of associations of judges.
60. Many associations earn some income from publications, training activities, organising seminars, conferences and other events or participating in national or international projects. Others benefit from their assets, from donations, legacies and subsidies. If such additional sources of income are used, utmost care has to be taken that the independence of the association is not infringed and that not even the appearance of influence on the activities of the association arises. This also has to be considered if the support is provided from the state budget and is based on certain conditions.

<sup>55</sup> ECtHR judgments in *Baka v. Hungary*, 23 June 2016; *Harabin v. Slovakia*, 20 November 2012; see also Article 11 of the ECHR.

<sup>56</sup> See CCJE Bureau’s Opinion on the Amendments of 11.8.2017 of the Bulgarian Judicial System Act of 2.11.2017 (CCJE-BU(2017)10), paras 10 to 16.

<sup>57</sup> *Ibid.*, para 13, and International Labour Organisation (ILO) Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth (Revised) Edition, 2006, para. 866.

<sup>58</sup> Joint Guidelines on the Freedom of Association, para 32.

Spending public money out of the state budget results normally in some financial control. Therefore, caution should be observed not only in respect of becoming dependent on such funding but also in respect of the control exercised, which may never include control of the content or priority of activities.

61. Funding the associations of judges should not harm their non-profit character, which means that the generation of income must not be their primary purpose. An association must not distribute among its members any profits arising from its activities but should invest them in the association for the pursuit of its objectives<sup>59</sup>. Associations of judges should have in place strict transparency rules about their funding.

#### **D. Internal structure**

62. Associations of judges claim to act on behalf of their members and to be guided by a common will. This requires a democratic structure within the association and decisions to be taken and activities exercised in a transparent way. This is even more important if associations, due to their high representativeness, intend to speak on behalf of all judges or all judges of a certain jurisdiction.
63. To meet these requirements, the CCJE recommends that officers of the association (president, executive board, others) should be elected in a democratic, non-discriminatory way by their members or delegates elected by their members. Decisions of the board or other executive organs should be transparent and reasoned. An open dialogue between members and officers should be established, giving a fair chance to each group within the association to be heard, without any discrimination.

#### **E. Relations with political parties**

64. Associations of judges and their officers should not be part of, or inclined towards, a political party. Attempts by political parties or groups to influence the politics of the association or the elections of its officers should be clearly rejected. Representatives of the association should not be seen as agents of political groups but as actors who are committed only to the requirements of the justice system. This does not mean that associations of judges do not interact with political parties. In order to convey and fight for the needs and necessary reforms of the justice system, the rule of law and respect for human rights, associations of judges may have to engage, if debates are necessary, in exchanges with political parties having committed themselves to democracy and the rule of law.
65. The CCJE is not in favour of systems where different groups of members within an association are sponsored, designated or supported by different political parties, especially during times of campaigns for the election of officers of the association.

#### **F. Associations of judges and trade unions**

66. Judges' working conditions, their remuneration, pension and security should be safeguarded by the State. Thus, judges face a similar challenge to protect and improve their personal situation as other individuals vis-a-vis their employers, and in this respect, associations of judges have similar interests as trade unions.
67. Judges can also form trade unions and join trade unions<sup>60</sup>. Legislation may impose some restrictions on these rights in respect of judges, but these restrictions must not totally deprive judges of these fundamental rights<sup>61</sup>.
68. The practice of membership of judges in trade unions in member States varies considerably. In some member States, legal and cultural tradition sees such membership as incompatible with the position and the role of a judge. In other member States, some judges are members of trade unions and of associations of judges at the same time. And there are some associations of judges who are recognised as trade unions or see themselves as such<sup>62</sup>. Sometimes, the status as a trade union provides them with additional means.

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<sup>59</sup> Ibid., para 43.

<sup>60</sup> Commentary to Bangalore Principles of Judicial Contact, para 176.

<sup>61</sup> See ECtHR *Matelly v. France*.

<sup>62</sup> Finland, France, Greece, Luxemburg (association is a non-registered subsection of a union for public servants), The Netherlands.

69. These different traditions have to be respected. Nevertheless, the CCJE has to underline that care must be taken that, if trade unions are dominated by party politics, such politicisation does not affect the judges and their image. Otherwise such practice could lead to allegations of bias and lack of impartiality.

## **VII. Status, objectives and role of international associations of judges**

70. During the last decades, Europe very quickly developed a common legal space. On the one hand, more and more instruments for cross-border co-operation between the national judiciaries were created. On the other hand, under the umbrella of the ECHR and the jurisprudence of the European Court of Human Rights, the common European fundamental values have impacted directly on national legal systems and their functioning. In parallel, the development of jurisprudence and the power of standard-setting and of execution of common regulations was partly shifted to actors at European level. These new European institutions were created and filled by way of the influence of members of the national executive or legislative powers.
71. The developments described above have been accompanied by steps by representatives of national judicial powers to become involved also at the European level. Several European associations of judges have been established, some of which are federations of national associations, while others have as their members judges of different countries, and others again provide membership for national associations as well as individual members.
72. For their members, such associations provide an important opportunity to exchange experiences of different legal systems and of the interpretation of common standards and values.
73. Like national associations of judges, the European associations of judges are committed to the objectives of defending and fostering the independence of judges and the judiciary and safeguarding and promoting the rule of law.
74. They try to establish a dialogue with actors at European level, to contribute to standard-setting at this level and to draw the attention of European authorities to problems in the justice systems in member States.
75. European associations of judges observe the developments of justice systems in member States and their conformity with European standards. They are a melting point of vast experience and a platform for exchange between national judiciaries while also working to promote European standards. European associations contribute considerably to informing their members about European developments and new jurisprudence and standard setting, as well as to training on European standards.
76. By their membership in European associations of judges, national associations have a better opportunity to signal problems to the European authorities and they can strengthen their own influence due to the reputation of European associations. In member States themselves, arguments are sometimes taken more seriously if they are put forward by a European actor.
77. The CCJE, which has accepted European associations of judges as observers, is grateful for their fruitful contributions to its reflections. It recommends that other European actors follow this example in order to involve these associations in their work.

## **VIII. How member States should deal with associations of judges**

78. The main objectives of associations of judges - fostering and defending the independence of judges and of the judiciary, the rule of law and human rights - are aligned with the fundamental principles of the Council of Europe and the commitments of its member States. This common interest should lead to common efforts of associations of judges and member States.
79. States must not only refrain from applying unreasonable indirect restrictions on the right to assemble peacefully and to associate and on the right to freedom of expression<sup>63</sup> but must also safeguard these rights<sup>64</sup>.

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<sup>63</sup> See ECtHR *Kudeshkina v. Russia* (26.02.2009).

80. Member States should therefore provide a framework, which makes it possible for judges to freely exercise their right to associate and within which associations of judges can fruitfully work to fulfil their objectives.
81. Associations of judges and member States should engage in an open and transparent dialogue based on trust, on all relevant issues regarding the justice system.
82. Politicians should refrain from trying to influence judges or their associations to support interests of party politics neither by threats, unjustified accusations or media campaigns nor by providing professional promotions or benefits for the officers or the members nor by other means.
83. Member States should use their influence on European institutions and support initiatives to establish and facilitate a dialogue between these institutions and European associations of judges.

## **IX. Conclusions and recommendations**

1. Associations of judges are self-governing non-profit organisations composed of members who voluntarily apply for membership.
2. The CCJE considers it highly desirable that in every justice system, at least one such association of judges exists.
3. Member States have to provide the framework in which the right of judges to associate and the right to freedom of expression can effectively be exercised, and they have to refrain from any interventions which might infringe the independence of the associations of judges.
4. The most important objectives of associations of judges are to establish and defend the independence of judges safeguarding their status and seeking to ensure adequate working conditions for them, and to foster and improve the rule of law.
5. Associations of judges can also play an important role as regards the training and ethics of judges and contribute to judicial reforms.
6. By virtue of their role and work, associations of judges may provide a decisive contribution to the functioning of the justice system and the rule of law. In all cases, such contribution should be important and valuable.
7. It is advisable that associations of judges be provided with a possibility to consider and comment on intended legislation in matters connected with the status of judges and the administration of courts.
8. A dialogue between court administrators and representatives of associations of judges, based on openness and mutual respect for their respective roles will foster the effectiveness of the justice system and its reforms.
9. Associations of judges are well placed to inform the media and the public at large about the role and functioning of the judiciary and judges.
10. Associations of judges should avoid orienting their activities according to the interests of political parties or candidates for political office, and they should not involve themselves in political issues. Their activities should be restricted to the field of their objectives.
11. Associations of judges should be structured in a democratic way. Financing and decision-making should be transparent at least for the members.
12. Judges cannot be obliged to disclose their membership in an association of judges.

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<sup>64</sup> For negative and positive obligations, see ECtHR *Öllinger v. Austria*, para 35 et al; see the Report of the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association of 21 May 2012 (A/HRC/20/27), paras 33-42.

13. Associations of judges facilitate transborder co-operation and enable exchanges with associations in other member States. They associate also at European level through a number of European judicial associations and organisations.
14. The associations of judges at European level play a significant role in promoting and protecting European values and European legal standards in the field of the rule of law and human rights. Therefore, national and international authorities should pay due attention to the work of those associations.
15. The CCJE recommends that European institutions rely on, and make use of, the experience and observations which European associations collect from different member States and judicial systems.
16. CCJE promotes regular exchanges between associations of judges and European stakeholders.

# Opinion No. 24 (2021)

of the Consultative Council of European Judges (CCJE)  
to the Committee of Ministers of the Council of Europe

## The evolution of the councils for the judiciary and their role in independent and impartial judicial systems

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### PART A. Introduction and the Opinion No. 10 (2007) of the CCJE

#### I. Introduction: scope of the present Opinion

1. The judiciary plays an essential role as the third power in a democratic state governed by the rule of law<sup>1</sup>. In order to fulfil its role in the modern state and in an increasingly interconnected Europe, the judiciary must be organised in a way that ensures that individual judges are free to decide cases in complete independence, only bound by law. Even the appearance of outside influence and pressure must be avoided so that the public can trust that judicial decisions are made in such independence<sup>2</sup>.
2. In a democratic state governed by the rule of law, an independent judiciary is a necessity. In many, though not all, member States, the institution responsible for defending the independence of the judiciary is a Council for the Judiciary. In 2007, the CCJE adopted its Opinion No. 10 (2007) on the Council for the Judiciary at the service of society. The Magna Carta of Judges<sup>3</sup> and international standards developed, for example, by the Venice Commission<sup>4</sup>, have also stressed the importance of such Councils<sup>5</sup>. Since then, some member States have introduced or strengthened Councils for the Judiciary<sup>6</sup>. However, developments in recent years have also challenged the principles and standards expressed in these documents<sup>7</sup>. These developments make it important to reaffirm the principles expressed in Opinion No. 10 and – where necessary – to complement them in the light of recent political events undermining judicial institutions and the case law of the European Courts<sup>8</sup>.
3. However, even detailed rules set out in constitutions and international standards alone will not be enough to make these principles a reality and achieve an independent and impartial judiciary operating according to high professional standards<sup>9</sup>. The judiciary and other branches of government, politicians, the media and civil society must all work together in a long term effort to increase professionalism, transparency and ethics within the judiciary to turn rules on paper into a culture of respect for judicial

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<sup>1</sup> See CCJE Opinion No. 18 (2015).

<sup>2</sup> Court of Justice of the European Union (CJEU), *C-83/19 and others*, 18.5.2021, paras 196-197, 205, 207, 212, 231, 236.

<sup>3</sup> CCJE Magna Carta of Judges (2010), para 13.

<sup>4</sup> Venice Commission, Rule Of Law Checklist E. 1 iv-ix; Report on the Independence of the Judicial System, CDL-AD(2010)004 para 32; CDL-AD(2007)028, para 29.

<sup>5</sup> See for scholarly work the Special Issue on Councils for the Judiciary the German Law Journal published in 2018, Jessica Walsh, Judicial Councils and the Removal of Lower Court Judges in Argentina, 2019; Guiseppe Ferrari, Forthcoming in the International Journal for Court Administration; Sanders/von Danwitz German Law Journal 19(2018) 769.

<sup>6</sup> EU: Rule of Law Report 2020, COM(2020) 580 final EN, pp. 8-10.

<sup>7</sup> See about developments in the EU: Rule of Law Report 2020, COM(2020) 580 final EN, pp. 10-12; CCJE Bureau, Report on judicial independence and impartiality in the Council of Europe member States (2019), CCJE-BU(2020)3, paras 20-24.

<sup>8</sup> See about these events the 2020 Report of the Secretary General of the Council of Europe 2021 Chapter 1; see from the case-law of the European Court of Human Rights (ECtHR), *Ramos Nunes de Carvalho e Sá v. Portugal*, 6. 11. 2018, para 144; *Guðmundur Andri Ástráðsson v. Iceland* ([GC], no. 26374/18, 1 12. 2020; *Xero Flor w Polsce v. Poland*, 7.5.2021 – 4907/18, para 243-251; from the case-law of the Court of Justice of the European Union (CJEU), *ASdJP v. Tribunal de Contas* 27.2.2018 – C 64/16, para 42-45; *European Commission v. Poland*, 24.6.2019 – C 619/18, para 71-73; *A.K. v. Krajowa Rada Sadownicta*, 19.11.2019, - C 585/18, C-624/18, C-625/18, para 120-122. CJEU, *European Commission v. Poland*, 24.6.2019 – C 619/18, para 74, 75; CJEU, *A.K. v. Krajowa Rada Sadownicta*, 19.11.2019, - C 585/18, C-624/18, C-625/18, para 123, 133-134; *VQ v. Land Hessen*, 9.7.2020 – C2727/19, para 54; *Republika II-Prim Ministru v. WY*, 20.4.2021 – C-896/19; C-83/19 and others 18.5.2021.

<sup>9</sup> Venice Commission, Urgent Interim Opinion on the draft new constitution, 11 December 2020, Bulgaria, CDL-AD(2020)035 para 37.

independence<sup>10</sup> for the benefit of society. Everybody, not only the judiciary, must be involved in protecting these values as a necessary basis for a democratic state governed by the rule of law. Councils for the Judiciary must do their part to earn public trust through excellent work provided in an accountable<sup>11</sup> and transparent way in the interest of the public.

4. The CCJE notes from the replies to the questionnaire sent to the member States in preparation for this Opinion that there is great diversity among member States not only in relation to the organisation of the judiciary, but also in relation to organisations referred to as Councils for the Judiciary. Such Councils vary in their organisation, composition and responsibilities. Some Councils are responsible for judges and prosecutors alike, some can exercise powers which through the selection and promotion of judges or the composition of a court can have great influence on court decisions. Other decisions of such Councils only have an indirect effect, such as decisions concerning the organisation of courts including maintaining court buildings, budget and ICT<sup>12</sup>. The CCJE welcomes diversity among member States as this reflects different national constitutions, legal cultures and history and does not wish to recommend a specific council model.
5. This Opinion concerns national institutions of member States which are independent of the executive and legislature, or which are autonomous, and which ensure the final responsibility for the support of the judiciary in the independent delivery of justice. Such institutions are referred to in this Opinion as Councils for the Judiciary<sup>13</sup>. Where it exists, a Council for the Judiciary must be organised and composed in a way that meets the above expectations. Moreover, it must function as a means to protect, support and develop the role of the judiciary and the independence of individual judges in relation to the other powers of state.
6. This Opinion has been prepared on the basis of previous CCJE Opinions, especially Opinion No. 10 (2007), the CCJE Magna Carta of Judges (2010), and relevant instruments of the Council of Europe, in particular the European Charter on the Statute for Judges (1998), and Recommendation CM/Rec(2010)12 of the Committee of Ministers on judges: independence, efficiency and responsibilities. The CCJE Working Group has greatly benefitted from the contributions of Ms Nuria Diaz Abad (former president of ENCJ, Council for the Judiciary of Spain) and Mr Kees Sterk (former president of ENCJ, former member of the Council for the Judiciary of the Netherlands) in a joint seminar. The Opinion also takes account of the replies of the CCJE members to the questionnaire on evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems, of the summary of these replies and the preliminary draft prepared by the CCJE Scientific Expert appointed by the Council of Europe, Prof. Dr. Anne Sanders (University of Bielefeld, Germany/University of Bergen, Norway).

## II. The Opinion No. 10 (2007) of the CCJE as the starting point

7. The present Opinion reaffirms and complements Opinion No. 10 (2007). Therefore, the major principles recommended by the Opinion No. 10 (2007) are the starting point for the present Opinion and are therefore cited in full.
8. Thus, in its Opinion No.10 (2007) on the Council for the Judiciary at the service of society, the CCJE recommends that:

### A. In general:

*a) it is important to set up a specific body, such as the Council for the Judiciary, entrusted with the protection of the independence of judges, as an essential element in a state governed by the rule of law and thus respecting the principle of the separation of powers;*

*b) the Council for the Judiciary is to protect the independence of both the judicial system and individual judges and to guarantee at the same time the efficiency and quality of justice as defined in Article 6 of the ECHR in order to reinforce public confidence in the justice system;*

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<sup>10</sup> See Venice Commission, Urgent Interim Opinion on the draft new constitution, 11th of December 2020, Bulgaria, CDL-AD(2020)035 para 37; see also Holmøyvik/Sanders, A Stress Test for Europe's Judiciaries in: European Yearbook of Constitutional Law 2019, 287-310.

<sup>11</sup> CCJE Magna Carta of Judges (2010), para 13.

<sup>12</sup> See CCJE Opinion No. 10 (2010), paras 43-47.

<sup>13</sup> This description is used by the ENCJ: <https://www.encj.eu/index.php/>.



*c) the Council for the Judiciary should be protected from the risk of seeing its autonomy restricted in favour of the legislature or the executive through a mention in a constitutional text or equivalent.*

*B. On the composition of the Council for the Judiciary:*

*a) in order to avoid the perception of self-interest, self-protection and cronyism and to reflect the different viewpoints within society, the Council for the Judiciary should have a mixed composition with a substantial majority of judges, even if certain specific tasks should be held in reserve to an all-judge panel. The Council for the Judiciary may also be exclusively composed of judges;*

*b) prospective members, whether judges or not, shall be appointed on the basis of their competence, experience, understanding of judicial life and culture of independence. Also, they should not be active politicians or members of the executive or the legislature;*

*c) judge members should be elected by their peers, without any interference from political authorities or judicial hierarchies, through methods guaranteeing the widest representation of the judiciary; if direct elections are used for selection, the Council for the Judiciary should issue rules aimed at minimising any jeopardy to public confidence in the justice system;*

*d) appointment of non-judge members, with or without a legal experience, should be entrusted to non-political [authorities]; if they are however elected by the Parliament, they should not be members of the Parliament, should be elected by a qualified majority necessitating significant opposition support, and should be persons affording, in the overall composition of the Council for the Judiciary, a diverse representation of society.*

*C. On the functioning of the Council for the Judiciary:*

*a) terms of office of members could be full-time but limited in number and in time in order to preserve contact with court practice; members (judges and non-judges) should be granted guarantees for their independence and impartiality;*

*b) the Council for the Judiciary should manage its own budget and be financed to allow an optimum and independent functioning;*

*c) some decisions of the Council of the Judiciary shall be reasoned and have binding force, subject to the possibility of a judicial appeal ;*

*d) as an essential element of the public confidence in the justice system, the Council for the Judiciary should act with transparency and be accountable for its activities, in particular through a periodical report suggesting also measures to be taken in order to improve the functioning of the justice system.*

*D. On the powers of the Council for the Judiciary:*

*a) the Council for the Judiciary should have a wide range of tasks aiming at the protection and the promotion of judicial independence and efficiency of justice; it should also ensure that no conflicts of interest arise in the Council for the Judiciary in carrying out its various tasks;*

*b) the Council of the Judiciary should preferably be competent in the selection, appointment and promotion of judges; this should be carried out in absolute independence from the legislature or the executive as well as in absolute transparency as to the criteria of selection of judges;*

*c) the Councils for the Judiciary should be actively involved in the assessment of the quality of justice and in the implementation of techniques ensuring the efficiency of judges' work, but should not substitute itself for the relevant judicial body entrusted with the individual assessment of judges;*

*d) the Council for the Judiciary may be entrusted with ethical issues; it may furthermore address court users' complaints;*

*e) the Council for the Judiciary may be entrusted with organising and supervising the training but the conception and the implementation of training programmes remain the responsibility of a training centre, with which it should cooperate to guarantee the quality of initial and in-service training;*

*f) the Council for the Judiciary may have extended financial competences to negotiate and manage the budget allocated to Justice as well as competences in relation to the administration and management of the various courts for a better quality of justice;*

*g) the Council for the Judiciary may also be the appropriate agency to play a broad role in the field of the promotion and protection of the image of justice;*

h) prior to its deliberation in Parliament, the Council for the Judiciary shall be consulted on all draft legislation likely to have an impact on the judiciary, e.g. the independence of the judiciary, or which might diminish citizens' guarantee of access to justice;

i) co-operation with the different Councils for the Judiciary at the European and international levels should be encouraged.”

## **Part B. Complementing and reaffirming the Opinion No. 10 (2007) of the CCJE**

### **I. Legitimacy and accountability of the Council for the Judiciary**

9. In some member states the legitimacy, functions, composition and accountability of Councils for the Judiciary has been called into question, leading to changes in the law which have affected their powers, composition, competencies and functions. The legitimacy of all Councils is of the utmost importance in upholding the rule of law. Therefore, the CCJE wishes to highlight its sources. The CCJE has explained before that the legitimacy and accountability of judicial power must go hand in hand<sup>14</sup>. The CCJE distinguishes two sources of legitimacy for the power of individual judges and the judiciary. *Formal* or *constitutional legitimacy* is created by the constitution of the respective member state and lawful judicial appointments<sup>15</sup>. *Functional legitimacy* is based on the trust of the public created through excellent work, transparency and accountability<sup>16</sup>. These two sources of legitimacy are also relevant for Councils for the Judiciary.

#### **1. Legitimacy including legal basis and legal remedies**

10. The CCJE reaffirms that the legal basis for a Council and its main elements should be set down in the constitution<sup>17</sup> as a secure legal basis for its responsibilities, independence and legitimacy<sup>18</sup>. These should include the composition and functions of the Council; and the security of tenure of its members, together with a guarantee of its independence from the legislature and executive<sup>19</sup>. Other details may be set out by law.

11. However, vague pledges for a Council's independence even in a constitution do not suffice. Every Council for the Judiciary should also have effective legal remedies at its disposal to safeguard its autonomy and question the legality of public acts affecting it or the judiciary. A good example would be a right to bring procedures to the Constitutional Court or its equivalent. A Council for the Judiciary also requires standing in national and international courts (including the right to submit – where possible - an amicus curiae brief).

#### **2. Accountability**

12. While a regulation in the constitution provides a formal source of legitimacy, this is not enough, but must be complemented with functional legitimacy. Every Council for the Judiciary and the judiciary it represents must earn the trust of the public and its support through excellent, transparent work and accountability. In times of conflict with other powers, the support of the public will depend at least to a large extent on this perceived legitimacy of a Council.

13. The CCJE wishes to reaffirm that the Council for the Judiciary should play a role in ensuring that the judiciary works in a transparent and accountable way<sup>20</sup>. Moreover, the accountability of a Council for the Judiciary is itself an important source of functional legitimacy<sup>21</sup>. The more powers and responsibilities a Council has, the more important it is that it should be accountable for the use of those powers.

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<sup>14</sup> See CCJE Opinion No. 18 (2015), paras 12-38.

<sup>15</sup> See CCJE Opinion No. 18 (2015), paras 13-15.

<sup>16</sup> See CCJE Opinion No. 18 (2015), paras 16-19.

<sup>17</sup> CCJE Opinion No. 10 (2007), para 11; Venice Commission, Report on the Independence of the Judicial System, CDL-AD(2010)004 para 22.

<sup>18</sup> See for the formal legitimacy of judges through appointment CCJE Opinion No. 18 (2015) para 14, 15.

<sup>19</sup> See the Report of the UN Special Rapporteur on the independence of judges and lawyers Diego García-Sayán (2 May 2018), para 42 – available at [https://digitallibrary.un.org/record/1637422/files/A\\_HRC\\_38\\_38-EN.pdf](https://digitallibrary.un.org/record/1637422/files/A_HRC_38_38-EN.pdf).

<sup>20</sup> CCJE Opinion No. 10 (2007), paras 91-96.

<sup>21</sup> In CCJE Opinion No. 18 (2015), para 16, this form of legitimacy was called “functional legitimacy”.

14. The CCJE distinguishes between *judicial, punitive, and explanatory accountability* not only in relation to individual judges and the judiciary as a whole<sup>22</sup> but also in relation to Councils for the Judiciary.

#### **a. Judicial Accountability**

15. Like other bodies of state, no Council for the Judiciary is above the law. Certain decisions of a Council affect rights protected by the ECHR; for example when decisions in relation to judges' careers are made, decisions must be reasoned and judges must have a right to judicial review<sup>23</sup>. When the legal merit of a Council's decision is reviewed in an independent court, the Council is held accountable (*judicial accountability*)<sup>24</sup>. Special attention should be paid to the independence and impartiality of any court reviewing the merits of the Council's decisions, including independence from the Council itself<sup>25</sup>.

#### **b. Punitive accountability**

16. The members of a Council for the Judiciary must live up to the highest ethical standards and must be held accountable for their actions through appropriate means. They should not be immune from prosecution under the general criminal law. Just as in relation to individual judges, who may be held accountable for their actions, this might be termed *punitive accountability*<sup>26</sup>. However, the CCJE wishes to underline that such means must be regulated and applied in a way that does not allow their abuse to infringe the independence and functioning of a Council for the Judiciary.
17. Councils for the Judiciary must develop standards of professional and ethical behaviour for their judicial and lay members<sup>27</sup> and internal procedures for investigating shortcomings. Members must act according to those standards and the values of independence, impartiality and integrity<sup>28</sup>. The disciplinary and criminal liability of members is an important aspect of punitive accountability. Fair trial rights of the members including the right to representation must be respected. Decisions taken in this context must be given with reasons and be open to judicial review.

#### **c. Explanatory accountability**

18. Every Council for the Judiciary must work in a transparent fashion, giving reasons for its decisions and procedures and be accountable this way<sup>29</sup>. This may be called *explanatory accountability*. It must also be open to critical feedback and ready to improve constantly. This form of accountability is of special importance in the dialogue with other powers of state and civil society.

## **II. Tasks, organisation and composition of Councils for the Judiciary**

### **1. The tasks of a Council for the Judiciary**

19. The CCJE accepts that there is not one single model for a Council for the Judiciary. However, every Council should have adequate competences to defend the independence of the judiciary and individual judges<sup>30</sup>, so that individual judges are free to decide cases without undue influence from outside and inside the judiciary<sup>31</sup>. Judicial independence requires special protection in decisions which have an effect on judicial decision making, such as the selection of judges, allocating cases and disciplinary procedures. Where it has such responsibilities, a Council for the Judiciary should ensure that such decisions are made in a way that protects and enhances judicial independence.

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<sup>22</sup> CCJE Opinion No. 18 (2015), paras 26-33.

<sup>23</sup> See VC and DG of Human Rights of the Council of Europe, Urgent Opinion in the draft law on amendments to certain legislative acts concerning the procedure for electing (appointing) members of the High Council of Justice (HCJ) and the activities of disciplinary inspectors of the HCJ (Draft law no. 5068) of 5.5.2021 (CDL-PI(2021)004 (Ukraine) para. 62, 75.

<sup>24</sup> See CCJE Opinion No. 18 (2015), para 26.

<sup>25</sup> See ECtHR *Volkov v. Ukraine* – 21722/11, para 130; *Denisov v. Ukraine* –76639/11- para 79.

<sup>26</sup> See CCJE Opinion No. 18 (2015), para 33.

<sup>27</sup> See for such standards for judges: CCJE Opinion No. 3, paras 8-50.

<sup>28</sup> See on the establishment of an Ethics Council: VC and DG of Human Rights of the Council of Europe, Urgent Opinion in the draft law on amendments to certain legislative acts concerning the procedure for electing (appointing) members of the High Council of Justice (HCJ) and the activities of disciplinary inspectors of the HCJ (Draft law no. 5068) of 5.5.2021 (CDL-PI(2021)004 (Ukraine) para.37-40.

<sup>29</sup> CCJE Opinion No. 10 (2007), para 95.

<sup>30</sup> CCJE Opinion No. 10 (2007), para 14.

<sup>31</sup> CJEU, *ASdJP v. Tribunal de Contas* 27.2.2018 – C 64/16, paras 42-45; *European Commission v. Poland*, 24.6.2019 – C 619/18, paras 71-73; *A.K. v. Krajowa Rada Sadownicta*, 19.11.2019, - C 585/18, C-624/18, C-625/18, paras 120-122.

20. The ECtHR and the CJEU have decided that the appointment of judges is of great importance for an independent judiciary<sup>32</sup>. The CCJE has always taken that view<sup>33</sup>. Consequently, the selection or recommendation of new judges for appointment and promotion based on merit is a crucial task<sup>34</sup>. Where this is a responsibility for the Council for the Judiciary, it must be exercised independently and accountably<sup>35</sup>. Decisions with respect to the career of judges must not be taken because of loyalty to politicians or other judges. Through the selection and promotion of judges or the composition of a court, these decisions have great influence on future court decisions. Therefore, the majority of those who make decisions or recommendations should be judges. However, the CCJE welcomes that lay members are involved in such decisions as a safeguard against cronyism and cloning among judges.
21. Unfortunately, many judges in Europe consider that decisions regarding the selection and promotion of judges are not based on merit alone<sup>36</sup>. Therefore, it is crucial that Councils work on the basis of ethical rules and, so far as possible, specific objective criteria for appointments and promotions and evaluate each candidate in a transparent procedure concluding with a reasoned decision. Judges who think that their rights have been disregarded must have a right to judicial review<sup>37</sup>.
22. The CCJE wishes to underline that the vetting of judges is highly problematic because it can be instrumentalised and misused to eliminate politically “undesirable” judges<sup>38</sup>. If it is undertaken at all in a member state, it must be undertaken by an independent institution. The Councils for the Judiciary should play an important role protecting judicial independence in the process.
23. The CCJE does not exclude the possibility of vetting of the Council itself. But this is a measure of last resort; and where it is done, it should be done by an independent body.
24. The CCJE notes the growing importance of IT for the future of the judiciary and recommends that where they exist, Councils for the Judiciary should have a role in this field to adequately protect judicial independence and secure quality of judges’ work in the future<sup>39</sup>.
25. Opinion No. 10 (2007) of the CCJE and Magna Carta of Judges recommend that Councils for the Judiciary should have broad competences for all questions concerning their status as well as the organisation, the functioning and the image of judicial institutions<sup>40</sup>. The larger the responsibilities and powers conferred to a Council, the more important it is that its independence is respected by other powers of state, has sufficient resources and is accountable for its activities and decisions<sup>41</sup>. While a powerful Council may defend the judiciary and individual judges, many responsibilities make it vulnerable to politicisation from within or outside the judiciary. If the Council has competences on issues of court administration, it should also be committed to increasing the efficiency of the judiciary. If competences or tasks concerning the judiciary are not in the responsibility of the Council for the Judiciary, they should be handled by the judiciary or by an independent body.
26. The CCJE reaffirms its opinion that before deliberation in parliament or legislative action the Council for the Judiciary should be consulted on all policies including proposed or draft legislation likely to have an impact on the judiciary (e.g. the independence of the judiciary) or which might diminish the citizens’ guarantee of access to justice<sup>42</sup>.

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<sup>32</sup> ECtHR, *Ramos Nunes de Carvalho e Sá v. Portugal*, 6. 11. 2018, para 144; *Guðmundur Andri Ástráðsson v. Iceland* ([GC], no. 26374/18, 1 12. 2020; *Xero Flor w Polsce v. Poland*, 7.5.2021 – 4907/18, paras 243-251; CJEU, *European Commission v. Poland*, 24.6.2019 – C 619/18, paras 74, 75; CJEU, *A.K. v. Krajowa Rada Sadownicta*, 19.11.2019, - C 585/18, C-624/18, C-625/18, paras 123, 133-134; *VQ v. Land Hessen*, 9.7.2020 – C2727/19, para 54; *Repubblika Il-Prim Ministru v. WY*, 20.4.2021 – C-896/19 , paras 53, 57: no regression in the protection of judicial independence: paras 61-64.

<sup>33</sup> CCJE Opinion No. 1 (2001), paras 17-45.

<sup>34</sup> CCJE Opinion No. 1 (2001); CCJE Magna Carta of Judges (2010), para 5.

<sup>35</sup> CCJE Opinion No. 10 (2007), paras 48-51, Venice Commission, Report on the Independence of the Judicial System, CDL-AD(2010)004, para 32.

<sup>36</sup> ENCJ 2019 Survey on the independence of judges, pp. 33-34.

<sup>37</sup> See CCJE Opinion No. 17 (2014).

<sup>38</sup> ECtHR *Xhoxhaj v. Albania* no. 15227/19; VC Opinion No.868/2016 of 12. December 2016, Albania, amicus curiae brief for the constitutional court in the law on transitional re-evaluation of judges and prosecutors (vetting law); in CCJE Opinion 21 (2018), para 28, the term “lustration” is used.

<sup>39</sup> CCJE Opinion No. 14 (2011), para 36.

<sup>40</sup> CCJE Magna Carta of Judges (2010), para 13.

<sup>41</sup> CCJE Magna Carta of Judges (2010), para 13.

<sup>42</sup> CCJE Opinion No. 10 (2007) para 87.

## **2. Composition of a Council for the Judiciary**

27. Opinion No. 10 (2007) has already made extensive recommendations about the composition of a Council for the Judiciary and the competences and selection of its members and chair<sup>43</sup>. This Opinion wishes to reaffirm these principles. The members of the Council must be selected in a way that supports the independent and effective functioning of the Council and the judiciary and avoid any perception of political influence, self-interest or cronyism<sup>44</sup>.
28. The CCJE is aware that in some member states, Councils for the Judiciary include ex officio members. Ex officio membership is not acceptable, except in a very small number of cases, for example the president of the supreme court but should not include members or representatives of the legislature or the executive<sup>45</sup>. An ex officio member who is not a judge should not participate in disciplinary decisions.
29. The CCJE recommends that Councils for the Judiciary should be composed of a majority of judges elected by their peers. Other members may be added depending on the functions of the Councils. The CCJE recommends that a Council also have non-judicial members possibly including lay persons who are not legal professionals<sup>46</sup>. While judges should always be in the majority, non-judicial members preferably with voting rights ensure a diverse representation of society, decreasing the risk of corporatism<sup>47</sup>. The participation of lay-persons may increase legitimacy and fight the perception of the judiciary as a “lawyers only affair”. The CCJE takes a more nuanced view in this respect than in Opinion No. 10 (2007).

## **3. Selection of members and chair of a Council for the Judiciary**

30. The CCJE wishes to strongly reaffirm that the majority of members should be judges elected by their peers, guaranteeing the widest possible representation of courts and instances<sup>48</sup>, as well as diversity of gender<sup>49</sup> and regions. Elected judges should be able to participate in the Council’s activities in a way compatible with their workload. Where the Council includes non-judges, they should be able to devote adequate time to participation in the Council’s activities.
31. An election of judge members by parliament or selection by the executive must be avoided<sup>50</sup>. An election by parliament of non-judicial members might, however, be acceptable. As an alternative an election or nomination by institutions such as Bar Associations or nomination by NGOs is a possibility.
32. By whatever means members are selected and appointed<sup>51</sup>, this should not be done for political reasons. However, a requirement that a candidate may not have “political affiliations” may be too vague, so that referring to party memberships or official positions in government and the legislature or other concrete examples may be preferable<sup>52</sup>. Members of the Council for the Judiciary should not be under the authority or influence of others.
33. Where members are elected by parliament, a qualified majority should be required in order to involve the opposition and foster cross-party cooperation<sup>53</sup>. The CCJE realises that such a majority

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<sup>43</sup> CCJE Opinion No. 10 (2007), paras 15-36.

<sup>44</sup> CCJE Opinion No. 10 (2007), paras 15, 16; see about the importance of independent bodies selecting judges: CJEU, *A.K. v. Krajowa Rada Sadownictwa*, 19.11.2019, - C 585/18, C-624/18, C-625/18, para 137-138. C-619/18

<sup>45</sup> CCJE Opinion No. 10 (2007), paras 23, 26.

<sup>46</sup> See CCJE No. 10 (2007), para 22.

<sup>47</sup> CCJE Opinion No. 10 (2007), para 32.

<sup>48</sup> CCJE Opinion No. 10 (2007), paras 18, 25, 26, 27, 30.

<sup>49</sup> Report of the UN Special Rapporteur on the independence of judges and lawyers Diego García-Sayán (2 May 2018), par. 110 – available at [https://digitallibrary.un.org/record/1637422/files/A\\_HRC\\_38\\_38-EN.pdf](https://digitallibrary.un.org/record/1637422/files/A_HRC_38_38-EN.pdf).

<sup>50</sup> CCJE Opinion No. 10 (2007), para 31.

<sup>51</sup> See: Joint Opinion of the Venice Commission and the Directorate General of Human Rights and the Rule of Law on the draft law on amending and supplementing the constitution with respect to the superior council of Magistracy, 20<sup>th</sup> of March 2020 (CDL-AD(2020)001 para 57-60.

<sup>52</sup> CCJE Opinion No. 10 (2007) para. 23, See Joint Opinion of the Venice Commission and the Directorate General of Human Rights and the Rule of Law on the draft law on amending and supplementing the constitution with respect to the superior council of Magistracy, 20<sup>th</sup> of March 2020 (CDL-AD(2020)001 para 54; see for ineligibility criteria: Urgent Opinion on the revised draft amendments to the law of the state prosecution service, 10 May 2021, Montenegro (CDL-PI(2021)008, paras 28-31.

<sup>53</sup> Urgent Opinion on the revised draft amendments to the law of the state prosecution service, 10. May 2021, Montenegro (CDL-PI(2021)008, para 40.

requirement may lead to a deadlock. Therefore, the CCJE recommends that mechanisms are introduced to break such deadlocks<sup>54</sup>. Such mechanisms should avoid lowering the necessary majority as this may reduce any incentive of the majority to reach a compromise. Rather, such a mechanism must ensure an independent selection and might involve the opposition or call for the selection by other institutions from a list of shortlisted candidates. Even though no such model has been brought to the attention of the CCJE yet, judges might be involved in electing candidates to break a deadlock.

34. The selection process including possible campaigns by candidates should be transparent and ensure that the candidates' qualifications, especially their impartiality and integrity<sup>55</sup> are ascertained. Vacancies should be advertised publicly and equal opportunities guaranteed to support a diverse group of independent candidates. Members of the Council should have access to all information relevant to the exercise of their functions.
35. The CCJE would like to reaffirm that the Chair of the Council for the Judiciary must be an impartial person who is not close to political parties. Therefore, in parliamentary systems where the President / Head of State only has formal powers, there is no objection to appointing the Head of State as the chair of the Council for the Judiciary, whereas in other systems the chair should be elected by the Council itself and should be a judge<sup>56</sup>.

#### **4. Security of tenure of members of a Council for the Judiciary**

36. Members should be selected for a fixed time in office and must enjoy adequate protection for their impartiality and independence<sup>57</sup>. Members must be protected from internal and external pressures. However, except, in cases of death, retirement or removal from office, for example as a result of disciplinary action, a member's term should only end upon the lawful election of a successor to ensure that the Council is able to exercise its duties lawfully even if the appointment of new members has failed, because of a deadlock in parliament<sup>58</sup>. CCJE draws attention to the possible impact of re-election on the independence of the members of a Council for the Judiciary. In principle, re-elections of full-time members should be avoided in favour of longer fixed terms<sup>59</sup> to ensure independence. In this respect, this Opinion qualifies the view taken in Opinion No. 10 (2007)<sup>60</sup>. Continuity and efficiency can be improved if not all terms of office expire simultaneously.
37. The CCJE wishes to reaffirm the importance of security of tenure of all Council members as such<sup>61</sup> as a crucial precondition for the independence of the Council. Judges appointed to the Council for the Judiciary should be protected with the same guarantees as those granted to judges exercising jurisdictional functions, including the conditions of service and tenure and the right to a fair hearing in case of discipline, suspension, and removal<sup>62</sup>. Non-judicial members should have equivalent protection. Judges and non-judicial members should enjoy the same immunities as specified in Opinion No. 3 (2002)<sup>63</sup>.

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<sup>54</sup> See Joint Opinion of the Venice Commission and the Directorate General of Human Rights and the Rule of Law on the draft law on amending and supplementing the constitution with respect to the superior council of Magistracy, 20<sup>th</sup> of March 2020 (CDL-AD(2020)001 para 51, 68.; see also Venice Commission, Compilation Venice Commission's Opinions, Reports and Studies on Constitutional Justice (CDL-PI(2020)004 pp. 20-22.

<sup>55</sup> See CCJE Opinion No. 10 (2007), para 21.

<sup>56</sup> CCJE Opinion no. 10 (2007), para 33.

<sup>57</sup> CCJE Opinion no. 10 (2007), para 36.

<sup>58</sup> See Joint Opinion of the Venice Commission and the Directorate General of Human Rights and the Rule of Law on the draft law on draft amendments to the law on the judiciary and the status of judges and certain laws on the activities of the Supreme Court and judicial authorities (draft law 3711) Ukraine, 9<sup>th</sup> of October 2020 (CDL-AD(2020)022, para 49.

<sup>59</sup> According to member States' responses, the longest terms are six years as for example in Slovenia, Romania, North Macedonia, the Netherlands and Hungary.

<sup>60</sup> CCJE Opinion No. 10 (2007), para 34.

<sup>61</sup> CCJE Opinion No. 10 (2007) rec. E I; see also Joint Opinion of the Venice Commission and the Directorate General of Human Rights and the Rule of Law on the draft law on amending and supplementing the constitution with respect to the superior council of Magistracy, 20<sup>th</sup> of March 2020, Moldova (CDL-AD(2020)001 para 55-56; Opinion of the Venice Commission in the draft amendments to the law on the state prosecution service and the draft law on the prosecutor's office for organised crimes and corruption, 22. March 2021, Montenegro (CDL-AD(2021)012 para 45-48; Urgent Opinion on the revised draft amendments to the law of the state prosecution service, 10. May 2021, Montenegro (CDL-PI(2021)008, para 46-49 according to the VC only permissible if new features are introduced which significantly depoliticise the Council.

<sup>62</sup> See Diego García-Sayán, the United Nations Special Rapporteur on the Independence of Judges and Law, intervention the Case of *Grzęda v. Poland*, Application No. 43572/18, para 45-53.

<sup>63</sup> CCJE Opinion No. 3 (2002), paras 51-77.

38. Members may only be removed from office based on proven serious misconduct in a procedure in which their rights to a fair trial are guaranteed. Members may cease to be members in the event of incapacity or loss of the status on the basis of which they were elected or appointed to the Council. If the Council itself or a special body within it are responsible for this decision, the rights of the dismissed member to an appeal must be ensured. The CCJE underlines the importance that procedures which may lead directly or indirectly to termination of office are not misused for political purposes but respect fair trial rights<sup>64</sup>. In this respect, this Opinion amplifies Opinion No. 10 (2007).

### **5. Resources of a Council for the Judiciary**

39. Many member States report a lack of personnel and financial resources of their Councils for the Judiciary. Therefore, the CCJE wishes to reaffirm the responsibility of member States to provide adequate resources for judiciaries including separate financial means and staff for Councils for the Judiciary<sup>65</sup>.

## **III. Councils for the Judiciary in society**

### **1. Relations with other powers of state**

40. Members of parliament and members of the executive must of course respect the law in their dealings with the Council for the Judiciary and not infringe its role and functioning by breaking or circumventing legal rules. Moreover, relations with the Council must be based on a culture of respect for the rule of law and the role of the Council for the Judiciary in their respective member state.
41. Councils for the Judiciary should engage actively in dialogue with other powers of state, especially when they give input about legislative projects. Such dialogue must be conducted in an atmosphere of mutual respect.

### **2. Relations with Associations of judges and civil society**

42. Member States report that they engage with the public through special websites and reports. Some member States even report that some of their plenary meetings are streamed online. The CCJE welcomes such efforts towards greater transparency and accountability. However, it accepts that in many cases, especially including interviews and deliberations concerning judges' careers, there is a legitimate interest in confidential debate.
43. The CCJE recommends that Councils engage in dialogue with Associations of Judges<sup>66</sup>, and also with civil society, including Bar Associations and NGOs. This dialogue provides an important opportunity for accountability. Councils for the Judiciary should be open to external input and criticism and engage in outreach activities including for example satisfaction surveys among court users and complaint procedures. However, a Council must always be aware of its specific independent role and must thus be cautious to avoid lobbying.
44. It is crucial that the public learns about the responsibilities and importance of an independent judiciary<sup>67</sup>. In some legal systems, judicial proceedings are already streamed online, so that hearings may be watched remotely and extensive information is published on the internet. Moreover, individual Courts can engage with the public at the local level. However, the Council for the Judiciary should have a special role in explaining the judicial system and its own role in it.

### **3. Relations with the media**

45. Member States report that they communicate with the media through press offices, press releases and press conferences<sup>68</sup>. For many Councils for the Judiciary in member States, publishing reports and opinions and appealing to the media are important tools to engage with other powers of state. Engaging with the public through the media can be an excellent instrument of accountability and transparency.

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<sup>64</sup> CCJE Opinion No. 3 (2002), paras 58-74; CJEU C-83/19 and others 18.5.2021, paras 196-199, 236.

<sup>65</sup> CCJE Opinion No. 10 (2007), paras 73-75; CCJE Opinion No. 18 (2015), para 51; ENCJ Report 2015/2016 on Funding of the Judiciary.

<sup>66</sup> See CCJE Opinion No. 23 (2020) paras 25, 29-32 recommendation 6.

<sup>67</sup> See CCJE Opinion No. 7 (2005), paras 33-54; No. 10 (2007), paras 80-86.

<sup>68</sup> See the answer to the questionnaire sent out in preparation of this opinion and CCJE Opinion No. 10 (2007), para 95.

46. An important part of any communication with the media, the public and other powers of state must include the explanation that the Council and individual judges must decide cases independently. The Council must counter decisively any attempt to attack or put pressure on individual judges or the judiciary as a whole. To foster adequate relationships between the judiciary and the media, Council for the Judiciary should either serve as mediator between the judiciary and the media or ensure other effective processes are in place to carry out that role.

#### **4. Relations with anti-corruption bodies**

47. Fighting corruption is a crucial task, because corruption undermines the trust of the public and thereby the legitimacy of the judiciary as a whole<sup>69</sup>. On the other hand, an effective fight against corruption and respect for judicial independence and the rule of law must go hand-in-hand. There can be no effective fight against corruption without an independent judiciary and respect for the rule of law<sup>70</sup>. Even in circumstances where a special institution has been introduced to fight corruption as well as where fighting corruption remains the responsibility of the Council for the Judiciary, the Council and its members must be fully committed to take and support all appropriate steps in the fight against corruption within the judiciary and the Council. The Council for the Judiciary must also be vigilant that fighting corruption and disciplinary procedures are not used to attack individual judges for political reasons<sup>71</sup>.

#### **IV. Conclusions and recommendations**

1. In many member States, Councils for the Judiciary are responsible for defending judicial independence. Political developments make it necessary to reaffirm the principles and recommendations expressed in Opinion No. 10 (2007) on Councils for the Judiciary and – where necessary – complement them (paras 2, 7, 8).
2. Constitutions and international standards advocating the introduction and appropriate regulation of Councils for the Judiciary are not enough to build an independent judiciary. The judiciary and other powers of government, politicians, the media and civil society must work together in a long-term effort to increase professionalism, transparency and ethics within the judiciary to turn rules on paper into a culture of respect for judicial independence and the rule of law (para 3).
3. Council for the Judiciary should have effective legal remedies at its disposal to safeguard its autonomy and question the legality of public acts affecting it or the judiciary. Councils for the judiciary should have standing in national and international courts (para 11).
4. The legitimacy of Councils for the Judiciary rests on their legal basis but must be complemented by the trust of the public earned through transparency, accountability and excellent work in the interest of society (paras 10, 12-14).
5. The larger the responsibilities and powers conferred to a Council, the more important it is that its independence is respected by other powers of state, has sufficient resources and is accountable for its activities and decisions (paras 25, 47).
6. All members of a Council for the Judiciary must live up to the highest ethical and professional standards and must be held accountable for their actions through appropriate means (paras 16, 17).
7. Every Council for the Judiciary must work in a transparent fashion, giving reasons for its decisions and procedures and be accountable this way. In appropriate cases, it must be possible to challenge a Council's decisions in court (paras 12, 15, 18).
8. The CCJE accepts that there is not one single model for a Council for the Judiciary. However, every Council should have adequate competences to defend the independence of the judiciary and individual judges, so that individual judges are free to decide cases without undue influence from outside and inside the judiciary (para 19).

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<sup>69</sup> See CCJE Opinion No. 21 (2018).

<sup>70</sup> See President of the Venice Commission Gianni Buquicchio, in a speech at Democracy in Action: Zero Corruption Conference, 7-8.6. 2021.

<sup>71</sup> See for the danger of a "chilling effect" CJEU C-83/19 and others 18.5.2021, para 236.



9. Decisions with respect to the career of judges must not be taken because of loyalty to politicians or other judges, but in a transparent procedure using objective criteria as far possible. Such decisions must be reasoned and based on merit alone. Judges who think that their rights have been disregarded must have a right to judicial review (paras 20-21).
10. The members of the Council must be selected in a transparent procedure that supports the independent and effective functioning of the Council and the judiciary and avoids any perception of political influence, self-interest or cronyism (paras 27, 29, 31, 34).
11. Ex-officio membership is not acceptable, except in a very small number of cases, and should not include members or representatives of the legislature or the executive (para 28).
12. The Chair of the Council for the Judiciary must be an impartial person. In parliamentary systems where the President / Head of State only has formal powers, there is no objection to appointing the Head of State as the chair of the Council for the Judiciary, whereas in other systems the chair should be elected by the Council itself and should be a judge (para 35).
13. If vetting is undertaken at all in a member state, it must be undertaken by an independent institution. The Councils for the Judiciary should play an important role protecting judicial independence. The vetting of the Council itself is a measure of last resort; and where it is done, it should be done by an independent body (paras 22-23).
14. The majority of members should be judges elected by their peers, guaranteeing the widest possible representation of courts and instances, as well as diversity of gender and regions (para 29, 30).
15. The CCJE recommends including non-judicial members including lay persons to ensure a diverse representation of society, decreasing the risk of corporatism (para 29).
16. A selection of judge members by parliament or the executive must be avoided. Where non-judge members are elected by parliament, a qualified majority should be required. Appropriate mechanisms should be introduced to break possible deadlocks (paras 31, 33).
17. Members should be appointed for a fixed time in office and must enjoy adequate protection for their impartiality and independence from internal and external pressure. A member's term should in principle only end upon the lawful election of a successor (para 36).
18. The CCJE wishes to reaffirm the importance of security of tenure of all Council members as a crucial precondition for the independence of the Council. Members may only be removed from office based on proven serious misconduct in a procedure in which their rights to a fair trial are guaranteed (paras 36-38).
19. The CCJE wishes to highlight the responsibility of member States to provide adequate personnel and funding for its Councils for the Judiciary (para 39).
20. Relations between the Council and other powers of state must be based on a culture of respect for the rule of law and understanding of their respective roles in a democratic state (paras 40-41).
21. Councils for the Judiciary should actively engage in open, respectful dialogue with other powers of state, Associations of Judges and civil society including Bar Associations and NGOs and the media (paras 40-44).
22. The Council must counter decisively any attempt to attack or put pressure on individual judges or the judiciary as a whole (paras 45-46).
23. The Council and its members must be fully committed to take and support all appropriate steps in the fight against corruption within the judiciary and the Council in a way that respects the rule of law (para 47).



# Opinion No. 25 (2022)

of the Consultative Council of European Judges (CCJE)  
to the Committee of Ministers of the Council of Europe

## Freedom of expression of judges

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### I. Introduction

1. In accordance with the mandate given to it by the Committee of Ministers, the Consultative Council of European Judges (CCJE) has prepared this Opinion on freedom of expression of judges.
2. The Opinion has been prepared on the basis of previous CCJE Opinions, the CCJE Magna Carta of Judges (2010) and relevant instruments of the Council of Europe, in particular the European Charter on the Statute for Judges (1998) and Recommendation of the Committee of Ministers CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities, the Report of the European Commission for Democracy through Law (Venice Commission) on the Freedom of Expression of Judges (CDLAD(2015)018). It also takes into account the UN Basic Principles on the Independence of the Judiciary, the Bangalore Principles of Judicial Conduct and the Report of the UN Special Rapporteur on the independence of judges and lawyers, which also deals with the exercise of freedom of expression by judges<sup>1</sup>. In addition, the Non-Binding Guidelines on the Use of Social Media by Judges of the United Nations Office on Drugs and Crime (UNODC) and the reports by the European Network of Councils for the Judiciary (ENCJ) are considered. Finally, the Opinion relies on the case law of the European Court of Human Rights (ECtHR).
3. The Opinion also takes account of the replies of CCJE members to the questionnaire on freedom of expression of judges, and of the summary of these replies and the preliminary draft prepared by the expert appointed by the Council of Europe, Ms Jannika Jahn.

### II. Scope and objective of the Opinion

4. The Opinion deals with freedom of expression of judges and discusses the main aspects of judicial expression. It addresses the legal and ethical duty of a judge to speak out in order to safeguard the rule of law and democracy at the domestic, but also at the European and international level. The Opinion considers judicial expression that addresses matters of concern for the judiciary, as well as controversial topics of public interest, and examines the judicial restraint that must be exercised. It covers judicial expression both inside and outside court. The Opinion intends to give general guidance to judges and a broad framework for an ongoing discussion on which parameters to consider when they exercise their right to freedom of expression. This Opinion does not seek to define a minimum scope of freedom of expression of judges.
5. For the purposes of the Opinion, the requirement of judicial restraint is therefore defined as a duty of restraint imposed on the judge either by the judiciary itself or by the legislator. For legal parameters, the Opinion relies on the case law of the European Court of Human Rights (ECtHR). For the views on ethical guidelines and recommendations expressed in this Opinion, the CCJE relies on its findings. Judicial (self-)restraint includes the notion of judicial discretion, reserve or moderation.
6. In addressing freedom of expression of an individual judge, the Opinion takes into account the partly competing and partly complementary interests involved. They include the individual judge's right to freedom of expression; the public's right to be informed about matters of public interest; the right to a fair trial, including an impartial and independent tribunal; and the presumption of innocence. The

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<sup>1</sup> Report of the UN Special Rapporteur on the independence of judges and lawyers, 29 April 2019, A/HRC/41/48.

Opinion also reflects upon the principles underpinning these rights. The principle of separation of powers undergirds the free speech of judges, if a matter of public interest, such as the functioning of the justice system, is concerned. The rule of law ensures the equality of all (whether citizens or state actors) before the law. Its effectiveness depends in part on public trust in the independence and authority of the judiciary. Separation of powers requires both judicial independence and freedom of expression of judges, which results in a tension between the aim of preventing judges from behaving like politicians and, at the same time, supporting their freedom of expression as evidence of judicial independence.

7. The Opinion also covers judges speaking or writing on behalf of judicial associations, courts or the council for the judiciary. It does not extend to retired judges because they enjoy the same right to freedom of expression as all other persons, except for confidential information acquired in the performance of their duties.
8. In circumstances where the public may not always clearly distinguish between a judge acting in a private or professional capacity, the Opinion considers statements made by judges from the perspective of their being holders of public office.
9. The Opinion does not address questions concerning judges' reasoning in their judgments, as this is the performance of a judicial duty and not an exercise of an individual right.
10. For the purposes of this Opinion, the term media encompasses print, broadcast and online media, including audio and video-streaming services<sup>2</sup>.

### **III. Overview of country regulations and practice**

11. The responses of CCJE members to the questionnaire for the preparation of the present Opinion<sup>3</sup> give an overview of the current state of member state regulations and practices.
12. Member States of the Council of Europe guarantee to judges the right to freedom of expression. The scope of protection varies among member States. In many states, it covers extrajudicial statements of opinion made in private or in public in connection with judges' professional capacity, as well as extrajudicial statements made on behalf of the interests of the judiciary. In some countries, judges are immune from suit for anything said in court unless *mala fides* is established.
13. Judges' freedom of expression is limited for the purposes of upholding the confidentiality of proceedings, internal judicial matters and the procedural rights of the parties to the proceedings. In all member States, judges are prohibited from disclosing confidential information acquired in the course of their duties that is relevant for pending proceedings and that might infringe the rights of the parties to the proceedings. They are bound by professional secrecy with regard to their deliberations.
14. In the great majority of member States, judges are subject to a legal and/or ethical duty<sup>4</sup> of restraint that aims to preserve judicial independence and impartiality and public confidence in it as well as the proper administration and dignity of the judiciary. Rules on statements of opinion made by judges vary among the member States.
15. As a general rule or practice, most member States prohibit or call on judges to refrain from commenting on their own and other judges' pending or ongoing proceedings. Some member States extend this rule to decided cases, including those of other judges. However, some make an exception for the discussion of case law as part of judges' academic work, as a law teacher or in a professional

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<sup>2</sup> The CCJE adopts the definition of media as set out in Appendix I to Recommendation CM/Rec(2022)11 of the Committee of Ministers on principles for media and communication governance, para 4.

<sup>3</sup> See at <https://www.coe.int/en/web/ccje/opinion-25-on-the-freedom-of-expression-of-judges>.

<sup>4</sup> To be precise, such limitations are contained in the constitution, statutory provisions, codes of conduct, codes of ethics or long-standing judicial conventions.

environment. In many States, judges are subject to the ethical or conventional obligation not to reply to public criticism of their cases.

16. The extent to which judges may participate in public discussions concerning issues of political or social concern, the law, the judiciary or the administration of justice, and express their views on these issues in the media, varies among the member States. The same holds for the right of judges to have a political mandate or to take part in political demonstrations.
17. In some countries, judges are generally required to refrain from engaging in controversial political debates, including, among others, publicly rebuking other state organs in a hostile manner or interfering in party politics by supporting or criticising particular parties or politicians. In other member States, judges have to make sure that they avoid giving the impression of a firmly held position on a particular issue. A couple of member States allow judges to comment publicly on legislative proposals or the law in general, in particular when an association of judges makes these comments. Even if permitted, member States report that judges rarely make public statements on political matters.
18. In most member States, judges may comment on issues concerning the judiciary, its proper administration and independence or the separation of powers, provided that their critique is based on facts and arguments and that the internal workings of the judiciary are not disclosed. In some member States, public expression under certain circumstances is interpreted as an ethical duty, especially as a response to political attacks on the judiciary. To this end, judges of higher courts are sometimes given greater latitude for freedom of expression. However, in some countries, such behaviour has led to public criticism. It is therefore not uncommon that judges have to exhaust internal mechanisms, if available within the judiciary, before going public or to remain silent when the judiciary intends to issue a formal institutional opinion.
19. Public criticism of fellow judges or the judiciary has been a source of concern. Criticising other judges or other actors in the justice system, such as the prosecutor or defence counsel, is regarded as unethical or a violation of long-standing convention in some member States, especially when expressed in a disrespectful, demeaning and insulting tone or if it conveys a generally negative image of the entire judiciary.
20. In the majority of member States that responded to the questionnaire, judges must not be members of political parties or undertake any political activity, because that is seen as undermining the independence of the judiciary or as negatively affecting public trust in the judiciary. In some cases, the constitutional or statutory rule of incompatibility explicitly extends to the membership in legislative or executive bodies at the European, national or local level. As far as considered incompatible with their judicial office, some countries allow judges to hold political mandates if they go on leave. Of those, some member States subject judges to the ethical duty to preserve the reputation of the judiciary. Some countries allow a judge to engage in political activity in parallel with their judicial office. In that case, they require judges to avoid their political activity interfering with their impartial performance of judicial duties. In several countries, judges are subject to prohibitions against participating in public assemblies, in particular when they are of a political nature.
21. Social media use is a topic of current concern. In several member States, there is an increasing use of social media by judges. However, few codes of conduct provide specific practical guidance in this regard. If they do, they apply the general duty of judicial restraint or call for caution to avoid an infringement of the independence, impartiality or public confidence in the judiciary.
22. Few member States observe an increase in legal or ethical restrictions on judicial freedom of expression. Conversely, in several member States, judicial restraint has been relaxed, which has led to an increased public engagement of judges, especially in social media. Overall, many member States see the need for a discussion on judicial ethics, with the determination of appropriate content and limits of free expression of judges as an important task.

23. Some cases have been reported where judges suffered disciplinary sanctions due to a statement they made. For instance, in-court statements during proceedings that cast doubts on the judge's impartiality, such as racist remarks, have led to disciplinary proceedings. Before imposing a disciplinary measure, the disciplinary authority of most member States considers the nature and severity of the restriction on freedom of expression, including elements such as the specific position of the judge, the content and manner of the statement and the context in which it was made as well as the nature and severity of the disciplinary measure that the authority intends to impose. The removal of a judge may take place only as a last resort.

#### IV. General principles

24. As enshrined in Article 10 ECHR, everyone has the right to freedom of expression. This right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
25. Freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every person<sup>5</sup>. It follows that exceptions to this freedom must be construed strictly and the need for any restrictions must be established convincingly<sup>6</sup>.
26. The CCJE takes a broad view on the personal scope of the right to freedom of expression of judges as an individual right<sup>7</sup>. Accordingly, a judge enjoys the right to freedom of expression like any other citizen. The right to free expression of judges extends to personal opinions expressed in connection with the exercise of their office and entitles judges to make statements out of court as well as in court, both in public and in private, and to engage in public debates and in social life in general.
27. However, the institutional and governmental nature of the judicial office gives an ambivalent character to the freedom of expression of an individual judge. Statements of judges may have an impact on the public image of the justice system, as the public may generally perceive them not only as subjective but also as objective assessments and ascribe them to the entire institution.
28. In their official function, judges have a prominent role in society as guarantors of the rule of law and justice<sup>8</sup>. The very essence of being a judge is the ability to view the subjects of disputes in an objective and impartial manner. It is equally important for judges to be seen as having this ability<sup>9</sup>. This is because they need the public's trust in their independence and impartiality in order to be successful in carrying out their duties<sup>10</sup> and in preserving the authority of the judiciary to resolve legal disputes or to determine a person's guilt or innocence on a criminal charge<sup>11</sup>. It follows that judges have to affirm these values through their conduct<sup>12</sup>. It is therefore legitimate for the state to impose on judges a duty of restraint that pays due regard to their role in society<sup>13</sup>.

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<sup>5</sup> See ECtHR *Handyside v. the United Kingdom*, 07.12.1976, Appl. no. 5493/72, § 49.

<sup>6</sup> See ECtHR *Stoll v. Switzerland* [GC], 10.12.2007, Appl. no. 69698/01 § 101, reiterated in *Morice v. France* [GC], 23.04.2015, Appl. no. 29369/10, § 124.

<sup>7</sup> Cf. ECtHR *Baka v. Hungary* [GC], 23.06.2016, Appl. no. 20261/12; *Wille v. Liechtenstein* [GC], 28.10.1999, Appl. no. 28396/95, § 62. According to the ECtHR, the pure discharge of judicial duties, i.e. statements made in connection with administrative tasks, is not covered by freedom of expression under Article 10 of the ECHR, cf. *Harabin v. Slovakia*, 20.11.2012, Appl. no. 58688/11 § 151.

<sup>8</sup> See the CCJE Magna Carta, para 1; see also ECtHR *Baka v. Hungary* [GC], 23.06.2016, Appl. no. 20261/12, § 164.

<sup>9</sup> Cf. ECtHR *Castillo Algar v. Spain*, 28.10.1998, Appl. no. 28194/95, § 45; and the famous words per Chief Justice Lord Hewart: "Justice must not merely be done but must also be seen to be done", *R. v. Sussex Justices, ex parte McCarthy*, (1924) 1 K.B. 256 at 259.

<sup>10</sup> As also recognised by the ECtHR, see *Baka v. Hungary* [GC], 23.06.2016, Appl. no. 20261/12, § 164; *Kudeshkina v. Russia*, 26.2.2009, Appl. no. 29492/05, § 86, *Morice v. France* [GC], 23.04.2015, Appl. no. 29369/10, § 128-130; *Kyprianou v. Cyprus* [GC], 15.12.2005, Appl. no. 73797/01, § 172.

<sup>11</sup> ECtHR *Morice v. France* [GC], 23.04.2015, Appl. no. 29369/10, § 129; *Di Giovanni v. Italy*, 9.7.2103, Appl. no. 51160/06, § 71.

<sup>12</sup> Cf. Recommendation of the Committee of Ministers CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities, para 21 and para 69 of the explanatory memorandum. See also The Bangalore Principles of Judicial Conduct, paras 1.6, 2.2, 2.4, 3.2, 4.6 ; Basic Principles on the Independence of the Judiciary, principle 8; Art. 4.3

29. Given the above-mentioned premises, the “duties and responsibilities” referred to in Article 10(2) of the European Convention on Human Rights (ECHR) assume a special significance for statements of judges<sup>14</sup>. For legal restrictions on judges’ freedom of expression, this Article provides that these must be prescribed by law and are necessary in a democratic legal order for serving a legitimate purpose. Legitimate aims, as defined in the Article, include preserving the authority and impartiality of the judiciary and the protection of the confidentiality of proceedings. Further, the rights of others, such as the guarantee of the presumption of innocence, serve as legitimate aims for restricting freedom of expression. In the absence of a legitimate aim, a restriction of a judge’s right to free expression may appear as an illegitimate retaliation against the judge for unwanted criticism<sup>15</sup>. In most member States, ethical restraints on free speech of judges are geared towards similar purposes<sup>16</sup>.
30. The restriction of free speech requires justification. In the case law of the European Court of Human Rights (ECtHR), an interference is deemed necessary in a democratic society when it responds to a “pressing social need” and is “proportionate to the legitimate aim pursued”<sup>17</sup>. Proportionality of a measure requires that it is the least restrictive measure<sup>18</sup>.
31. It follows that a balance must be struck between the fundamental right of an individual judge to freedom of expression and the legitimate interest of a democratic society to preserve public confidence in the judiciary<sup>19</sup>. The Bangalore Principles formulate two fundamental considerations in this respect. The first is whether the judge’s involvement could reasonably undermine confidence in his/her impartiality. The second is whether such involvement may unnecessarily expose the judge to political attacks or be inconsistent with the dignity of judicial office. If either is the case, the judge should avoid such involvement<sup>20</sup>. The question to be asked is therefore, whether in a particular social context and in the eyes of a reasonable and informed observer, the judge has engaged in an activity, which could objectively compromise his/her independence or impartiality<sup>21</sup>. Important criteria to be considered are the wording of the statement and circumstances, context and overall background against which a statement was made, including the position of the relevant judge<sup>22</sup>.
32. In arriving at a reasonable balance, the degree to which judges may and should be involved in society requires an adequate consideration<sup>23</sup>. It should be taken into account that public statements by a judge may contribute to the protection of the rule of law and the separation of powers.
33. Corrective measures, such as a judge’s recusal or voluntary withdrawal, should be preferred to a general preventive infringement of judges’ freedom of expression aimed at avoiding such situations.

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European Charter on the Statute for Judges; International Association of Judges, *The Universal Charter of the Judge* (1999, updated 2017), Arts. 3-5, 6-2.

<sup>13</sup> Cf. Venice Commission report on the Freedom of Expression of Judges, CDLAD(2015)018, paras 80–81; ECtHR, see *Baka v. Hungary* [GC], 23.06.2016, Appl. no. 20261/12, § 162, also for the margin of appreciation afforded to states.

<sup>14</sup> Cf. ECtHR *Baka v. Hungary* [GC], 23.06.2016, Appl. no. 20261/12, § 162.

<sup>15</sup> See ECtHR *Miroslava Todorova v. Bulgaria*, 19.10.2021, Appl. no. 40072/13.

<sup>16</sup> Like the Bangalore Principles, some of them refer to the dignity of the judicial office instead of the authority of the judiciary, para 4.6 of the Bangalore Principles. For confidentiality, see para 4.10 of the Bangalore Principles.

<sup>17</sup> See, for example, *ECtHR Baka v. Hungary* [GC], 23.06.2016, Appl. no. 20261/12, para 158.

<sup>18</sup> Cf. ECtHR *Perinçek v. Switzerland* [GC], 15.10.2015, Appl. no. 27510/08, § 273.

<sup>19</sup> See CCJE Opinion No. 3 (2002), paras 27 et seq, especially 28, 33. The balance struck by the ECtHR has also been subject to scholarly attention, see i.a. *Anja Seibert-Fohr*, *Judges’ Freedom of Expression and Their Independence: An Ambivalent Relationship*, 89-110, and with respect to social media use, *Jannika Jahn*, *Social Media Communication by Judges: Assessing Guidelines and New Challenges for Free Speech and Judicial Duties in the Light of the Convention*, 137-153, both in: *Rule of Law in Europe - Recent Challenges and Judicial Responses*, Elósegui/Miron/Motoc (eds.), 2021.

<sup>20</sup> Commentary on the Bangalore Principles, para 134.

<sup>21</sup> CCJE Opinion No. 3 (2002), para 28.

<sup>22</sup> Cf. ECtHR *Baka v. Hungary* [GC], 23.06.2016, Appl. no. 20261/12, § 166; *Wille v. Liechtenstein* [GC], 28.10.1999, Appl. no. 28396/95, § 63.

<sup>23</sup> See CCJE Opinion No. 3 (2002), para 28; European Charter on the statute for judges, para 4.3 (explanatory commentary), states that judges shall not become social or civic outcasts.

34. The definition of the content and rules on freedom of expression and the ethical restrictions on its exercise should be done by judges themselves or judicial associations<sup>24</sup>.
35. When assessing any interference, the proportionality of the sanction or other measure must also be examined. Penalties should not have a “chilling effect” for other judges’ exercise of freedom of expression, i.e. they should not prevent other judges from exercising it in relation to issues concerning the administration of justice and the judiciary<sup>25</sup>. Opinions expressed in line with the recommendations of this Opinion should not be subject to disciplinary measures.

## V. Limitations on the freedom of expression / controversial cases

36. In order to assist judges in striking a balance between their right to freedom of expression and the goal of maintaining public confidence in their impartiality and independence, guidance should be given as regards statements that might lead to their recusal (sections 1 and 2), statements that might adversely affect the authority and reputation of the judiciary (sections 3 and 4) and the exercise of political mandates that might raise separation of powers issues (section 5).

### 1. Statements with a nexus to judicial disputes

37. The CCJE stresses that judges should refrain from making any comment that might affect or be reasonably expected to affect the right to a fair trial of any person or issue pending before them<sup>26</sup>. Statements made by a judge on a pending case, including the tone and the context of the statement, can affect this right, as the ECtHR has held<sup>27</sup>. It stressed that in the exercise of their adjudicatory function, judges must exercise maximum discretion with regard to cases with which they deal, in order to preserve their image of impartiality. Judges should behave in a manner that avoids creating the impression that they hold any personal prejudice or bias in a given case. If a judge publicly implies that he/she has already formed an unfavourable view of the applicant’s case before sitting in the case, his/her statements objectively justify the accused person’s fears about his/her impartiality<sup>28</sup>. It follows that the CCJE supports the requirement set out in the Commentary on the Bangalore Principles that a judge must display a detached, unbiased, impartial, open-minded and balanced attitude in his/her public pronouncements<sup>29</sup>, especially if a potential link exists with pending or ongoing proceedings.
38. The mere fact that a topic or issue is capable of being an issue in a future case is not sufficient to prevent judges from exercising their right to freedom of expression, especially when the likelihood of a judge having to adjudicate in such a specific case in the future is low.
39. Increased vigilance is required in the context of ongoing investigations, especially in criminal investigations with a view to the guarantee of the presumption of innocence enshrined in Article 6(2) of the ECHR<sup>30</sup>. In criminal proceedings, judges must pay particular attention to their choice of words if they want to inform the public about proceedings before a person has been tried and found guilty of a particular criminal offence<sup>31</sup>. Pronouncements on the accused person’s guilt before trial run contrary to Article 6 of the ECHR<sup>32</sup>.

<sup>24</sup> See the Guide on How to Develop and Implement Codes of Judicial Conduct, United Nations Office on Drugs and Crime, Vienna, 2019, p. 14-16.

<sup>25</sup> See ECtHR *Baka v. Hungary* [GC], 23.06.2016, Appl. no. 20261/12, § 167. This was the case in *Kudeshkina v. Russia*, 26.2.2009, Appl. no. 29492/05, where the applicant judge was removed from office after publicly questioning the independence of the judiciary, § 99.

<sup>26</sup> See already in the CCJE Opinion No. 3 (2002), para 40, cf. Bangalore Principles, para 2.4.

<sup>27</sup> See ECtHR *Olujić v. Croatia*, 5.2.2009, Appl. no. 22330/05, §§ 59 et seq; cf. *Buscemi v. Italy*, 16.9.1999, Appl. no. 29569/95, § 68; *Lavents v. Latvia*, 28.11.2002, Appl. no. 58442/00, § 119.

<sup>28</sup> Cf. ECtHR *Lavents v. Latvia*, 28.11.2002, Appl. no. 58442/00, § 119; *Buscemi v. Italy*, 16.9.1999, Appl. no. 29569/95, § 68.

<sup>29</sup> Commentary on the Bangalore Principles, para 136, see also paras 45, 65, 71; Bangalore Principles, paras 2.2, 2.4.

<sup>30</sup> See ECtHR *Poyraz v. Turkey*, 7.12.2010, Appl. no. 15966/06, §§ 76-78; *Fatullayev v. Azerbaijan*, 22.4.2010, Appl. no. 40984/07, §§ 159-162; *Lavents v. Latvia*, 28.11.2002, Appl. no. 58442/00, §§ 126-127.

<sup>31</sup> See also ECtHR *Daktaras v. Lithuania*, 10.10.2000, Appl. no. 42095/98, § 41; *Butkevičius v. Lithuania*, 26.3.2002, Appl. no. 48297/99, § 50.

<sup>32</sup> Cf. ECtHR *Previti v. Italy* (dec.), 8.12.2009, Appl. no. 45291/06, § 253.



40. Judges' comments on decided cases, other than their own, do not necessarily raise an issue on their impartiality. Commenting on case law is directly connected to their professional activity. In their professional activities, judges have the right to make constructive and respectful comments on decided cases.
41. Judges should show circumspection in their relations with the media and refrain from any personal exploitation of any relations with journalists<sup>33</sup>. The public should not get the impression that judges want to influence the outcome of a case through media communication.
42. The CCJE agrees with the European Court of Human Rights (ECtHR) that individual judges should refrain from making use of the media with respect to their own cases, even if provoked<sup>34</sup>. If the media or interested members of the public criticise a decision, a judge should avoid answering such criticism by writing to the press or by responding to journalists' questions<sup>35</sup>. A judge should answer the legitimate expectations of the citizens through clearly reasoned decisions<sup>36</sup>. However, when judges or their judgments are unfairly criticised, the associations of judges, the council for the judiciary and/or the court president have an institutional duty to clarify the facts to preserve the image of an authoritative and independent judiciary also in public debates. In addition and in exceptional cases where a judge is defamed or denigrated, he/she should have the right to defend himself/herself and protect their integrity as any other citizen. Judges should get institutional support in that respect.
43. Confidential information acquired by a judge in his/her official capacity must not be used or disclosed by the judge for any purpose not related to the judge's official duties.
44. Under no circumstances may judges be forced to explain publicly the reasons for their judgments as delivered.

## 2. Statements regarding public debates

45. The principles of democracy, separation of powers and pluralism call for the freedom of judges to participate in debates of public interest<sup>37</sup>. However, the principle of separation of powers requires judges to refrain from acting as politicians themselves when speaking in public. Thus, a reasonable balance needs to be struck between the degree to which judges may be involved in public debates and the need for them to be and to be seen to be independent and impartial in the discharge of their duties<sup>38</sup>. The content and context of a given statement assume special relevance in this regard<sup>39</sup>.
46. Due to their unique position in a democracy based on the rule of law, judges have the expertise and ensuing responsibility to contribute to the improvement of the law, the defence of fundamental rights, the legal system and the administration of justice<sup>40</sup>. Hence, subject to preserving their impartiality and independence, they should be permitted and even encouraged to participate in discussions on the law for informative and educational purposes<sup>41</sup> and to express views and opinions on weaknesses in the application of the law and improving the law, as well as the legal system.

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<sup>33</sup> CCJE Opinion No. 3 (2002), para 40.

<sup>34</sup> For the ECtHR case law, see *Lavents v. Latvia*, 28.11.2002, Appl. no. 58442/00, § 118; *Buscemi v. Italy*, 16.9.1999, Appl. no. 29569/95, § 67.

<sup>35</sup> Cf. Commentary on the Bangalore Principles, para 74.

<sup>36</sup> Cf. Commentary on the Bangalore Principles, para 74.

<sup>37</sup> Cf. ECtHR *Previti v. Italy* (dec.), 8.12.2009, Appl. no. 45291/06; cf. CCJE Opinion No. 18 (2015), para 42.

<sup>38</sup> Cf. CCJE Opinion No. 18 (2015), para 42; CCJE Opinion No. 3 (2002), paras 30 et seq, esp. 33.

<sup>39</sup> See the Report of the UN Special Rapporteur on the independence of judges and lawyers, 29 April 2019, A/HRC/41/48, para 42.

<sup>40</sup> See the Commentary on Bangalore Principles, para 156.

<sup>41</sup> See the Commentary on the Bangalore Principles, para 139.

47. In all public statements on matters of public interest, judges should express themselves with prudence, moderate in tone, balanced and respectful manner. They should refrain from discrimination, political, philosophical or religious proselytising or militancy.

### 3. Statements regarding matters of concern for judiciary as an institution

48. Judges have the right to make comments on matters that concern fundamental human rights, the rule of law, matters of judicial appointment or promotion and the proper functioning of the administration of justice, including the independence of the judiciary and separation of powers<sup>42</sup>. If the matter directly affects the operation of the courts, judges should also be free to comment on politically controversial topics, including legislative proposals or governmental policy<sup>43</sup>. This follows from the fact that the public has a legitimate interest in being informed about these issues as they involve very important matters in a democratic society<sup>44</sup>. Judges in leadership positions or those holding a position in judges' associations or the council for the judiciary are in a prominent position to speak out on behalf of the judiciary.
49. Judges have the right to make demands and comments concerning their status, their working conditions, as well as all other questions regarding their professional interests. Judges' associations play a prominent role on this issue<sup>45</sup>.
50. Judges should exercise restraint<sup>46</sup> to avoid compromising their impartiality or independence. Further, public representations made to the government on matters of concern for the judiciary, must not appear as lobbying the government or as indicating how a judge would rule if particular situations were to come before the court. A high-ranking judge must be particularly cautious in this regard due to his/her prominent position.

### 4. Public criticism of the judiciary / fellow judges

51. As regards the public critique or information of matters concerning the judiciary, including comments on fellow judges, the CCJE follows the European Court of Human Rights (ECtHR) in acknowledging that restraint applies to judges in all cases where the authority and impartiality of the judiciary are likely to be called in question<sup>47</sup>. That is because it is necessary to protect public confidence against damaging attacks, especially in view of the fact that judges who face criticism are subject to a duty of restraint that precludes them from replying<sup>48</sup>.
52. Statements are permissible if they do not go beyond mere criticism from a strictly professional perspective, if they are part of a debate on matters of great public interest and if they are based on substantiated allegations<sup>49</sup>. Moderation and propriety must guide the judge even in the dissemination of accurate information<sup>50</sup>. When criticising other actors in the justice system, a judge must maintain respect. Criticism should not be motivated by personal grievance or hostility or the expectation of personal gain. Generally, judges should avoid expressing themselves in an impulsive, irresponsible and offensive manner.

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<sup>42</sup> Report of the UN Special Rapporteur on the independence of judges and lawyers, 29 April 2019, A/HRC/41/48, para 69; see also Commentary on the Bangalore Principles, para 138; CCJE Opinion No. 3 (2002), paras 33-34.

<sup>43</sup> Commentary on the Bangalore Principles, para 138.

<sup>44</sup> Cf. ECtHR *Baka v. Hungary* [GC], 23.06.2016, Appl. no. 20261/12, § 165.

<sup>45</sup> CCJE Opinion No 23 (2020).

<sup>46</sup> Commentary on the Bangalore Principles of Judicial Conduct, para 138.

<sup>47</sup> Cf. ECtHR *Kudeshkina v. Russia*, 26.2.2009, Appl. no. 29492/05, § 86; *Di Giovanni v. Italy*, 9.7.2103, Appl. no. 51160/06, § 71; *Panioglu v. Romania*, 8.10.2020, Appl. no. 33794/14, § 114.

<sup>48</sup> Cf. ECtHR *Morice v. France* [GC], 23.04.2015, Appl. no. 29369/10, § 128.

<sup>49</sup> Cf. ECtHR *Baka v. Hungary* [GC], 23.06.2016, Appl. no. 20261/12, § 171; *Panioglu v. Romania*, 8.10.2020, Appl. no. 33794/14, § 119; *Kudeshkina v. Russia*, 26.2.2009, Appl. no. 29492/05, § 93.

<sup>50</sup> See ECtHR *Kudeshkina v. Russia*, 26.2.2009, Appl. no. 29492/05, § 93.

53. It is important that the judiciary provides an atmosphere that allows judges to make critical comments, especially in a hierarchically organised judiciary where judges are dependent on higher-ranking colleagues in terms of input into promotions. However, judges should avail themselves first of any existing remedial measures, before going public.

#### **5. Active political mandate / former political mandate**

54. Direct involvement in partisan party politics can raise doubts as to the separation of powers and the independence or impartiality of a judge, which is why many States restrict the political activities of judges. With the aim of guaranteeing to citizens the rights under Article 6 of the ECHR, the European Court of Human Rights (ECtHR) recognises as proportionate for countries to exclude judges from political office<sup>51</sup>. The Commentary on the Bangalore Principles states that judicial duties are incompatible with certain political activities, such as the membership of a national parliament or local council<sup>52</sup>.
55. The CCJE joins the ECtHR in finding that having previously belonged to a political party is not enough to cast a doubt on the impartiality of a judge, particularly if there is no indication that the membership has any link with the substance of the case<sup>53</sup>.
56. However, in order to protect public confidence in the judiciary, basic standards of judicial conduct, such as preserving the reputation of the judiciary, should continue to apply when a judge holds a political mandate<sup>54</sup>. If judges have violated standards of judicial independence and impartiality by making certain statements during their political activity, they must recuse themselves in cases where the respective matters become relevant. In order to keep the possibility of resuming their judicial function after their political mandate, it is imperative that they avoid making statements that make them appear unsuitable for judicial office.
57. In countries where judges may hold a (part-time) political mandate or be a member of a political party in addition to their judicial office, they should show restraint so as not to compromise their independence or impartiality<sup>55</sup>. It is imperative that they avoid taking strictly partisan and firm views on any issues or political matters that raise reasonable doubts as to their overall capacity to rule on such matters in an objective manner.

#### **VI. Defending judicial independence as a legal and / or ethical duty of judges, associations of judges and councils for the judiciary**

58. In line with CCJE Opinions No. 3 (2002)<sup>56</sup> and No. 18 (2015)<sup>57</sup>, the CCJE asserts that each judge is responsible for promoting and protecting judicial independence, which functions not only as a constitutional safeguard for the judge but also imposes on judges an ethical and/or legal duty to preserve it and speak out in defence of the rule of law and judicial independence when those fundamental values come under threat<sup>58</sup>. It extends to both matters of internal and external independence.

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<sup>51</sup> See ECtHR *Briķe v. Latvia*, 29.6.2000, Appl. no. 47135/99.

<sup>52</sup> Commentary on the Bangalore Principles, para 135.

<sup>53</sup> See ECtHR *Otegi Mondragon and Others v. Spain* (dec.), 6.11.2018, Appl. no. 4184/15 (et al).

<sup>54</sup> Cf. ECtHR *Kudeshkina v. Russia*, 26.2.2009, Appl. no. 29492/05, §§ 85 et seq; in this case, the judge was suspended from her judicial function pending the elections in which she was standing as a candidate.

<sup>55</sup> Cf. CCJE Opinion No. 3 (2002), paras 30, 33; see also Report of the UN Special Rapporteur on the independence of judges and lawyers, 29 April 2019, A/HRC/41/48, para 66.

<sup>56</sup> CCJE Opinion No. 3 (2002), para 34.

<sup>57</sup> CCJE Opinion No. 18 (2015), para 41.

<sup>58</sup> ECtHR, *Żurek v. Poland*, 10.10.2022, Appl. no. 39650/18, § 222; Report of the UN Special Rapporteur on the independence of judges and lawyers, 29 April 2019, A/HRC/41/48, para 102; General Assembly of the ENCJ, Sofia Declaration 2013, para vii; Commentary on Bangalore Principles, para 140, cf. also CCJE Magna Carta of Judges, para 3.

59. With a view to European and international cooperation in legal matters and the importance of European and international law in protecting judicial independence, judges may address threats to judicial independence both at national and international level.
60. If judicial independence or the ability of the judicial power to exercise its constitutional role are threatened, or attacked, the judiciary must be resilient and defend its position fearlessly<sup>59</sup>. This duty particularly arises, when democracy is in a malfunctioning state, with its fundamental values disintegrating, and judicial independence is under attack.
61. Since the duty to defend flows from judicial independence, it applies to every judge<sup>60</sup>. When a judge makes such statements not only in his or her personal capacity, but also on behalf of a judicial council, judicial association or other representative body of the judiciary, the protection afforded to that judge will be heightened.<sup>61</sup> Taking this into account and depending on the issue and context, the council for the judiciary<sup>62</sup>, associations of judges<sup>63</sup>, court presidents or other independent bodies may be best placed to address these issues, for example high-level constitutional issues. Judges may also express their views within the framework of an international association of judges.
62. If any of these issues were to arise in the judge's court, however, and if the judge's impartiality might reasonably be questioned, the judge must disqualify him/herself from any proceedings<sup>64</sup>.

## VII. Ethical duty of judges to explain justice to the public

63. Judges should strive to promote and preserve public trust in the judicial activity by enhancing understanding, transparency and by helping to avoid public misrepresentations<sup>65</sup>. The CCJE endorses the position taken in the Bangalore Principles that judges should aim to inform the public about what judicial independence means<sup>66</sup>. Judges should further explain the work of the judiciary, including the duties and powers of judges. They should elucidate the role of the judiciary and their relationship with the other powers of state. Overall, they should illustrate how the values of the justice system work in practice<sup>67</sup>.
64. So far, the CCJE has focused on the educative role of courts and the associations of judges, because they are particularly well placed to assume such a role<sup>68</sup>. The Committee of Ministers of the Council of Europe has encouraged the establishment of courts' spokespersons or media and communication services under the responsibility of the courts, the councils for the judiciary or any other independent body<sup>69</sup>. The European Network of Councils for the Judiciary (ENCJ) notes that individual judges should be reluctant to appear as a spokesperson in the media<sup>70</sup>.
65. The CCJE takes the view that individual judges with appropriate communication skills may also explain the functioning and values of the judiciary<sup>71</sup>. In addition to educational fora<sup>72</sup>, they can use the

<sup>59</sup> CCJE Opinion No. 18 (2005), para 41.

<sup>60</sup> ECtHR *Żurek v. Poland*, 10.10.2022, Appl. no. 39650/18, § 222.

<sup>61</sup> ECtHR *Żurek v. Poland*, 10.10.2022, Appl. no. 39650/18, § 222.

<sup>62</sup> The mission of them is to safeguard the independence of the individual judge and the judiciary and to protect the rule of law, CCJE Opinion No. 23 (2020), para 29; see also CCJE Opinion No. 7 (2005), C.13.

<sup>63</sup> Generally, associations of judges have an important role in defending judicial independence in public debate, see the CCJE Opinion No. 23 (2020), para 17.

<sup>64</sup> Cf. Commentary on Bangalore Principles, para 140.

<sup>65</sup> Cf. CCJE Opinion No. 7 (2005), paras 6-23; see also the ENCJ, Justice Society and the Media, Report of 2011-2012.

<sup>66</sup> Commentary on the Bangalore Principles, para 44.

<sup>67</sup> See also the ENCJ Report on Public Confidence and the Image of Justice (2018-2019), Chapter V, 5.3.

<sup>68</sup> CCJE Opinion No. 23 (2020), paras 44-46; CCJE Opinion No. 18 (2015), para 32; CCJE Opinion No. 7 (2005), paras 6-23.

<sup>69</sup> See Recommendation of the Committee of Ministers CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities, para 19; cf. European Commission for the Efficiency of Justice (CEPEJ), Guide on Communication with the Media and the Public for Courts and Prosecution Authorities, CEPEJ(2018)15 and already CCJE Opinion No. 7 (2005), paras 33 et seq.

<sup>70</sup> ENCJ, Report 2011-2012, para 6.2.6.

<sup>71</sup> Cf. ENCJ Report 2018-2019, Chapter V, 5.3.

media, including social media as an excellent tool for outreach and public education<sup>73</sup>. In such cases, judges should thoroughly prepare in co-operation with judges appointed to take care of media relations or public information officers<sup>74</sup>, and be mindful to observe the duties of judicial restraint, expressing themselves in a neutral and unbiased manner<sup>75</sup>.

## VIII. Use of social media by judges

### 1. Freedom of expression of judges offline and online

66. It is widely accepted that the rights that people have offline are equally protected online, in particular freedom of expression. Subject to the following, judges may use social media like any other citizens<sup>76</sup>.

### 2. Developing guidelines for social media use of judges

#### a) Definition of social media

67. The CCJE recalls the general understanding of the notion of social media as forms of electronic communication (such as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos). Following the Council of Europe Committee of Ministers' Recommendation CM/Rec(2022)11 on principles for media and communication governance, the Opinion uses a broad notion of media and qualifies social platforms as digital services that connect participants in multisided markets, set the rules for such interactions and make use of algorithmic systems to collect and analyse data and personalise their services<sup>77</sup>.

#### b) Applicability of general rule on judicial restraint

68. International instruments do not contain much guidance on how judges should exercise their freedom of expression online. Common ground, which the CCJE endorses, is that the general duty of judicial restraint applies<sup>78</sup>. This means that judges should avoid expressing views or sharing personal information online that can potentially undermine judicial independence and impartiality, the right to fair trial or the dignity of the office and (public confidence in) the authority of the judiciary. For that purpose, judges have to show circumspection in their use of social media<sup>79</sup>. As the UN Special Rapporteur on the independence of judges and lawyers has stated, applying judicial restraint to social media communications does not mean that judges have to retreat from public life happening on social media<sup>80</sup>.

69. Subject to some exceptions, private communication should not be subject to restrictions on freedom of expression. Private communication is understood as taking place bilaterally or in a closed group to which access has to be permitted by the judge, including person-to-person messaging services or closed social platform groups.

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<sup>72</sup> Cf. Commentary on the Bangalore Principles, paras 156-157.

<sup>73</sup> Cf. Report of the UN Special Rapporteur on the independence of judges and lawyers, 29 April 2019, A/HRC/41/48, para 77; UNODC Non-Binding Guidelines on the Use of Social Media by Judges, paras 1, 8; cf. ENCJ Report 2018-2019, Chapter II, 2.1.

<sup>74</sup> See ENCJ, Report 2011-2012, para 6.2.6.

<sup>75</sup> Cf. UNODC Non-Binding Guidelines on the Use of Social Media by Judges, para 1.

<sup>76</sup> For the application of Art. 10 of the ECHR to online communication, see ECtHR *Delfi AS v. Estonia* [GC], 16.6.2015, Appl. no. 64569/09, § 110; *Kozan v. Turkey*, 1.3.2022, Appl. no. 16695/19.

<sup>77</sup> See Appendix to Recommendation CM/Rec(2022)11 of the Committee of Ministers on principles for media and communication governance, para 4.

<sup>78</sup> See also UNODC Non-Binding Guidelines on the Use of Social Media by Judges, paras 1, 15; Report of the UN Special Rapporteur on the independence of judges and lawyers, 29 April 2019, A/HRC/41/48, paras 78, 81; cf. Recommendation of the Committee of Ministers CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities, para 19.

<sup>79</sup> Cf. CCJE Opinion No. 3 (2002), para 40, with respect to relations with the press.

<sup>80</sup> Report of the UN Special Rapporteur on the independence of judges and lawyers, 29 April 2019, A/HRC/41/48, para 79.

### c) Adapting judicial conduct to the specific challenges of social media communication

70. The use of social media raises new challenges and ethical concerns relating to the propriety of the content posted and the demonstration of bias or interest. Social media features a broad accessibility and transmission, which entails greater scrutiny of the content posted. Social media has a permanent storage capacity, which enhances the risk of profiling. It contains personal communication in written form, which increases the risk of private messages being published without permission, as well as the risk of content being distorted in ensuing communication<sup>81</sup>. Communication is fast and pointed, which might induce judges to publish imprudent posts. Actions, such as “liking” or forwarding information presented by others, may appear relatively small and casual, but they qualify as regular expressions of a judge’s opinion<sup>82</sup>. As opposed to traditional media, a gatekeeper is missing in social media, which allows judges to publish anything that comes to their mind.
71. These specific risks require a judge to exercise special caution in his/her social media communication<sup>83</sup>. The CCJE notes a significant risk that sharing personal content may adversely impact upon the reputation of a judge or the entire judiciary<sup>84</sup>. It follows that judges should not engage in exchanges over social media sites or messaging services with parties, their representatives or the general public about cases before or likely to come before them for decision<sup>85</sup>. They should be cautious about the risk of misrepresentation of including statements in closed groups. They should be wary of creating a “profile” through their comments that gives the impression of lacking openness and objectivity regarding certain subject matters. The same holds for social platform groups that they enter or people they follow and comments they “like” or “retweet”, since the more one-sided these are, the more people might perceive these judges not to be independent and impartial<sup>86</sup>. When involved in a discussion on their work as a judge, the protection of the authority and dignity of the office should discourage judges from comments that call into question their propriety in performing their duties.
72. Judges have to make sure that they maintain the authority, integrity, decorum and dignity of their judicial office<sup>87</sup>. They should be mindful that language, outfit, photos and the disclosure of other personal details might infringe the reputation of the judiciary. Allowing judges to share private details, such as lifestyle or family bears some risks in this regard. Whether an expression potentially compromises the reputation of the judge or the judiciary should be assessed in the light of the circumstances of the case.
73. Judges should not engage in social media in a manner that can negatively affect the public perception of judicial integrity, e.g. acting as influencers.
74. Judges should consider whether any inappropriate digital content antedating their appointment to the bench might damage the public confidence in their impartiality or undermine the reputation of the judiciary. If so, they should, if possible, remove this content, following the applicable rules of their jurisdiction<sup>88</sup>.

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<sup>81</sup> Cf. Report of the UN Special Rapporteur on the independence of judges and lawyers, 29 April 2019, A/HRC/41/48, para 81; cf. ENCJ Report 2018-2019, Chapter II, 2.1.

<sup>82</sup> Cf. UNODC Non-Binding Guidelines on the Use of Social Media by Judges, para 6.

<sup>83</sup> Cf. Report of the UN Special Rapporteur on the independence of judges and lawyers, 29 April 2019, A/HRC/41/48, para 81.

<sup>84</sup> Cf. ENCJ Report 2018-2019, Chapter II, 2.1.

<sup>85</sup> See also UNODC Non-Binding Guidelines on the Use of Social Media by Judges, para 17.

<sup>86</sup> Cf. UNODC Non-Binding Guidelines on the Use of Social Media by Judges, para 18.

<sup>87</sup> Cf. UNODC Non-Binding Guidelines on the Use of Social Media by Judges, paras 5 and 18.

<sup>88</sup> Cf. UNODC Non-Binding Guidelines on the Use of Social Media by Judges, para 21.

**d) Suggesting a transparent use of social media (subject to permission)**

75. The duty of judicial restraint applies to social media communication, regardless of whether or not judges disclose their identity<sup>89</sup>. There is no basis to prevent judges from using pseudonyms. However, pseudonyms do not permit unethical behaviour. Furthermore, not mentioning the judicial office or using a pseudonym does not guarantee that the true name or judicial status will not become public. Placing a disclaimer in their social media profiles that all the content or opinions are expressed in their personal capacity does not relieve judges from exercising restraint.

**e) Stressing the importance of training for judges in the use of social media**

76. The CCJE stresses the importance of training all judges on social media applications and the ethical implications of using them in personal and professional contexts<sup>90</sup>.
77. It should help judges to understand what degree of reticence allows them to protect their security and to fulfil their obligations of maintaining independence and impartiality, the dignity of their office and public confidence in the judiciary. Understanding which social media platforms are in use, how the various social media platforms operate, what type of information it may be appropriate to share on various social media platforms and which potential risks and consequences participation in such platform communication might have, would be an appropriate area for training judges. The training should cover technical aspects (such as the different privacy settings of different social platforms), aspects of profiling and data protection.
78. The judiciary should provide training to newly appointed judges and to permanent judges on a continuous basis. Associations of judges may contribute to training, exchanging and sharing knowledge and best practices among judges.

**IX. Recommendations**

1. A judge enjoys the right to freedom of expression like any other citizen. In addition to a judge's individual entitlement, the principles of democracy, separation of powers and pluralism call for the freedom of judges to participate in debates of public interest, especially as regards matters concerning the judiciary.
2. In situations where democracy, the separation of powers or the rule of law are under threat, judges must be resilient and have a duty to speak out in defence of judicial independence, the constitutional order and the restoration of democracy, both at national and international level. This includes views and opinions on issues that are politically sensitive and extends to both internal and external independence of individual judges and the judiciary in general. Judges who speak on behalf of a judicial council, judicial association or other representative body of the judiciary enjoy a wider discretion in this respect.
3. Aside from associations of judges, councils for the judiciary or any other independent body, individual judges have an ethical duty to explain to the public the justice system, the functioning of the judiciary and its values. By enhancing understanding, transparency and by helping to avoid public misrepresentations, judges may help to promote and preserve public trust in the judicial activity.
4. In exercising their freedom of expression, judges should bear in mind their specific responsibilities and duties in society, and exercise restraint in expressing their views and opinions in any circumstance

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<sup>89</sup> See also UNODC Non-Binding Guidelines on the Use of Social Media by Judges, para 16. Provided this does not violate applicable ethical standards or existing rules that prohibit an identification of the judge as a member of the judiciary on social media. Cf. paras 12-13.

<sup>90</sup> See also ENCJ Report 2018-2019, Chapter II, 2.7; ENCJ Report 2011-2012, 6.2.4 ; UNODC Non-Binding Guidelines on the Use of Social Media by Judges, paras 14, 38-40; cf. CCJE Opinion No. 23 (2020), para 18; CCJE Magna Carta, para 18.

where, in the eyes of a reasonable observer, their statement could compromise their independence or impartiality, the dignity of their office, or jeopardise the authority of the judiciary. In particular, they should refrain from comments on the substance of cases they are dealing with. Judges must also preserve the confidentiality of proceedings.

5. As a general principle, judges should avoid becoming involved in public controversies. Even in cases where their membership in a political party or their participation in public debate is allowed, it is necessary for judges to refrain from any political activity that might compromise their independence or impartiality, or the reputation of the judiciary.
6. Judges should be aware of the benefits as well as the risks of media communication. For that purpose, the judiciary should provide training for judges that educates them on the use of media, which can be utilised as an excellent tool for public outreach. At the same time, awareness should be raised that when posting on social media, anything they publish becomes permanent, even after they delete it, and may be freely interpreted or even taken out of context. Pseudonyms do not cover unethical online behaviour. Judges should refrain from posting anything that might compromise public trust in their impartiality or conflict with the dignity of their office or the judiciary.
7. Rules or codes of conduct concerning the extent of judges' freedom of expression and any limitations on its exercise should be drawn up by judges themselves or their judicial associations.



# Opinion No. 26 (2023)

of the Consultative Council of European Judges (CCJE)  
to the Committee of Ministers of the Council of Europe

## Moving forward: the use of assistive technology in the judiciary

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### I. Introduction

1. In accordance with the mandate entrusted to it by the Committee of Ministers, the Consultative Council of European Judges (CCJE) has prepared the present Opinion entitled “Moving forward: the use of assistive technology in the judiciary”.
2. This Opinion has been prepared on the basis of previous CCJE Opinions, in particular of the CCJE Magna Carta of Judges (2010) and Opinion No. 14 (2011) on justice and information technologies (IT). It should be read in conjunction with Opinion No. 14 (2011), bearing in mind that the latter was prepared at a time when the use and nature of technology were in an early stage of development. In addition, relevant instruments of the Council of Europe were taken into account, e.g. European Ethical Charter on the use of artificial intelligence (AI) in judicial systems and their environment (2018) of the European Commission for the Efficiency of Justice (CEPEJ), CEPEJ Guidelines on electronic court filing (e-filing) and digitalisation of courts (2021), CEPEJ Guidelines on videoconferencing in judicial proceedings (2021), Recommendation CM/Rec (2020)<sup>1</sup> of the Committee of Ministers on the human rights impacts of algorithmic systems, Recommendation R (84) 5 of the Committee of Ministers on the principles of civil procedure designed to improve the functioning of justice (Principle 9), Parliamentary Assembly Resolution 2341 (2020) on the need for democratic governance of artificial intelligence, Parliamentary Assembly Report on justice by algorithm – the role of artificial intelligence in policing and criminal justice systems (2020).
3. Consideration has also been given to Digital Technologies for Better Justice – A Toolkit for Action (2020) of the Inter-American Development Bank, the European Union’s Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, and Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).
4. Finally, the Opinion has taken into account the replies of the CCJE members to the questionnaire for the preparation of the CCJE Opinion No. 26 (2023). The replies show a broad range of development and use of technology. All member States use it to some extent. It ranges from audio recording of proceedings to electronic filing systems, electronic case management and videoconferencing, the last having particularly advanced in use as a consequence of the Covid-19 pandemic. Several member States are moving towards 100% use of electronic case files. The availability of electronic or digital versions of judgments and legislation is also a commonly used form of technology. Automated forms of proceedings, where used, are utilised in low value civil proceedings (small claims) and to facilitate judgments and other court decisions in simple procedural matters.
5. The use of artificial intelligence (AI) in the administration of justice remains at a nascent stage of development. While it is not used in a significant number of member States, such possibility is being actively explored by some. Where it is being used, such use tends to focus on administrative tasks, e.g. speech-to-text (dictation) programmes, language translation, and automatic anonymisation of judgments and orders. The replies also stressed the need to ensure that ultimate responsibility for judicial decisions remain with humans; AI should support rather than supersede judges.
6. Finally, the Opinion is based on a preliminary draft prepared by the CCJE Expert appointed by the Council of Europe, Dr. John Sorabji (Associate Professor, University College London).

## II. Purpose and scope of the Opinion

7. The purpose of the Opinion is to examine the advantages and disadvantages of the use of assistive technology in the judiciary. It recognises that societal use of technology will continue to develop. Courts and judiciaries should keep pace with such developments. Additionally, it stresses the importance of developing and using technology in ways that maintain and, where possible, enhance the fundamental principles of the rule of law. It may, for instance, be used to support the work of judges and of parties to judicial processes improving accuracy in decision making. It may also promote speed and efficiency in the administration of justice. It should particularly enhance judicial independence and impartiality both of which are guaranteed internationally by the European Convention on Human Rights (ECHR)<sup>1</sup> as well as by the Universal Declaration of Human Rights<sup>2</sup> and other European and international instruments.<sup>3</sup>
8. To give effect to its purpose, Section III of this Opinion highlights the general use of technology, while Section IV gains an insight into its specific use, Section V deals with the potential benefits of the use of technology and Section VI deals with the challenges and dangers to judicial independence that it poses. In the light of these points, Section VII intends to provide a durable set of principles for the future use of technology in the judiciary. Terms used in the Opinion are defined in the Glossary.
9. The scope of the Opinion is limited to the use of specific forms of modern technologies, including the use of artificial intelligence (AI) to support “human” adjudication that are or may be used by judiciaries including data tools, e-filing and procedures, case tracking and management systems, and audio and videoconferencing. It does not cover web-streaming of proceedings, the use of AI decision-making as a replacement for human decisions or the use of technology by anyone other than the judiciary or the court administration.

## III. General use of technology

10. States are required to secure effective and practical access to justice.<sup>4</sup> Technology is a medium through which they can do so, both in the ordinary course of events and in extraordinary or emergency circumstances. It is thus one of the means through which a democratic state, committed to securing the rule of law, can enable the judicial power of the state to be exercised at all times.<sup>5</sup>
11. A state’s ability to secure access to justice faces numerous challenges. It faces a resource challenge. All states must balance resource allocation across a range of public services, of which the courts and judiciary are one. It faces a justice challenge. The delivery of justice must be done in a fair and timely manner as it is the means by which substantive law is given effect. This applies to all fields of law. It applies to unitary claims, but also where there are increasing numbers of mass claims whether they commence as unitary claims or as class or collective proceedings. It also applies to traditional forms of dispute as well as the increasing number of new forms of dispute arising from development of digital markets, e-commerce and e-crimes.
12. States also face emergent challenges to the delivery of justice and, through that, maintenance of the rule of law. Public and national emergencies, whether they are health-related such as the Covid-19 pandemic or other states of emergency pose significant challenges to the proper administration of justice. Technology, and especially data tools, whether that is e-filing and procedures, case tracking and management systems or the use of videoconferencing or other means, provides the means by which states can deliver justice in the normal course of events, i.e. the delivery of justice according to law. It is also a means through which it can meet these various challenges.
13. More broadly, technology also provides a basis upon which judiciaries could, in principle, develop a wider role than securing justice according to law. It could help judiciaries facilitate preventive justice, i.e. the prevention of disputes through the identification of their causes and the taking of pro-active

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<sup>1</sup> European Convention on Human Rights, Art. 6(1); CCJE Opinion No. 14 (2011), para 32.

<sup>2</sup> Universal Declaration of Human Rights, Art. 10.

<sup>3</sup> EU Charter of Fundamental Rights, Art. 47; Inter-American Convention on Human Rights, Art. 8; Mount Scopus International Standards of Judicial Independence (2008, as amended 2012), principle 1.1.

<sup>4</sup> European Court of Human Rights (ECtHR) *Airey v. Ireland* (1979) 2 EHRR 305; *Tolstoy-Miloslavsky v. The United Kingdom* (1995) 20 EHRR 442 at [59].

<sup>5</sup> CCJE Opinion No. 14 (2011), paras 5, 15, 19, 25 and 27.

steps to reduce the prospect that those causes will arise in future.<sup>6</sup> By way of example, this could be achieved through the extraction of case data from publicly available judgments or anonymised data from settlements to identify general causes of disputes. That data could then be analysed and form the basis of law reform, which could help reduce the prospect that such disputes could arise in future. It could also help them to promote consensual settlement via alternative and/or online dispute resolution.<sup>7</sup> Both of these mechanisms could be facilitated through the use of data tools such as case management systems by judiciaries. The promotion of either or both could, particularly, play an important role in reducing resource pressure on courts and judiciaries by reducing the number of disputes requiring case management and adjudication.<sup>8</sup>

#### **IV. Specific uses of technology**

14. This Section outlines several specific uses of technology: data tools, e-filing and proceedings, case tracking and case management systems, remote and hybrid hearings.

##### **A) Data tools**

15. There is a wide range of data tools used by judiciaries.

##### **(i) Administration and case management**

16. At a basic level, data tools include language or evidence translation, voice dictation and transcription services, digital recording of judicial notes, judgments and orders. They may also facilitate document preparation (including case briefs), the assessment of evidence, the latter through, for instance, e-disclosure technology. These can increase efficient case administration.
17. More broadly, data extraction from case documents may be analysed by data tools to help promote access to justice by providing more accessible information to the public.<sup>9</sup> This can help make the legal system more efficient and accessible, particularly for those who may not have extensive legal knowledge or resources. Judiciaries can use such data to help a Council for the Judiciary and court administrators to identify and analyse the characteristics of parties to litigation. That type of analysis can help identify barriers to accessibility for parties who have specific characteristics<sup>10</sup> or vulnerabilities. It can then be used by judiciaries as a sound evidential basis for procedural redesign and reform, consistent with the principle of non-discrimination and Article 6 of the European Convention on Human Rights (ECHR).
18. Data tools can extract and provide a basis for the analysis of case information to promote the effective triage of cases. They can help judges and court administrators identify proceedings that are potentially suitable for summary or truncated procedures, enabling them to be processed automatically and/or be disposed of via simplified court-decision mechanisms.

##### **(ii) Settlement promotion**

19. Data tools can also help judiciaries promote settlement. Analysis of case characteristics could help judiciaries provide guidance to parties on potentially suitable forms of settlement process.
20. They could also be used to promote settlement through the application of e-negotiation or e-mediation tools. Such processes are capable of being incorporated into judicial procedures or made available through court websites.<sup>11</sup> Settlement, not least via negotiation, could also be promoted through the use of AI to predict the potential outcome of proceedings. This may be capable of being incorporated into case management systems.

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<sup>6</sup> R. Susskind, *Online Courts and the Future of Justice*, (OUP, 2019) at 113-115, where it is referred to in the context of the development of online courts as 'legal health promotion'.

<sup>7</sup> This includes settlement during enforcement proceedings: Recommendation Rec(2003)17 of the Committee of Ministers of the Council of Europe to member States on enforcement.

<sup>8</sup> *Alassini (Environment and consumers)* [2010] 3 CMLR 17 at [64]-[65]; *Menini and Rampanelli (Approximation of laws Consumer protection: Judgment)* [2017] EUJ C-75/16 (14 June 2017) at [61].

<sup>9</sup> This could be facilitated, for instance, through the use of natural language processing (NLP).

<sup>10</sup> Such as those referred to in Article 14 of the ECHR.

<sup>11</sup> The Civil Resolution Tribunal (British Columbia, Canada).

### **(iii) Decision-making**

21. Data tools have the potential to play a wide-ranging role to assist judicial decision-making.
22. At the most basic level, data tools help promote speedier and more cost-effective legal research and judgment and order preparation by judiciaries. They could also help in identifying relevant evidence, as well as providing template court documents through the extraction of information from cases.
23. The use of expert systems or machine learning-based systems (supportive AI) could also assist judicial decision-making. They may be capable of providing judges with merits assessments and/or predicted outcomes of proceedings. By being able to provide judges with merits assessments, they could be a means to help judges evaluate their conclusions.
24. They may be capable of being used to assist judicial decision-making in other ways. The availability of judicial decisions and legislation is a basic form of data tool. They range in application from generic websites that simply contain case law and legislation with basic keyword and text-search functionality to more sophisticated databases that provide effective hypertext links to other case law and legislation. These are generally made available by member States or by private enterprises; the latter tend to provide the more sophisticated tools. Where judiciaries make these available, they both promote effective judicial decision-making, and also help secure the democratic accountability of the judiciary. They secure the latter where they make judgments available to the public.<sup>12</sup>
25. Where such documents are machine readable basic keyword functionality can be built upon. Machine learning-based systems may be capable of providing searches across and within judgments. This could provide judiciaries with access to smart forms of legal research, enhancing their ability to analyse complex legal framework, including statutes and administrative regulations, as well as European, national and comparative jurisprudence, and soft law. This may help development in judicial decision-making.
26. Smart research could provide access to novel or previously unidentified lines of argument. Knowledge of such arguments by the parties may help them to improve the quality and creativity of their submissions, thus contributing to the quality of judicial decision-making.
27. Conversely, such analysis could help judges to identify arguments that are commonly deployed by parties on specific issues and judgments that deal with them. Such assistance may then enhance confidence in, and the legitimacy of, the judiciary through promoting consistency in decision-making.

### **B) E-filing and proceedings**

28. E-filing and proceedings are a basic prerequisite for the effective use of technology in judiciaries. They underpin judicial support systems. Such processes are used widely, whether as part of mixed systems (physical and e-files and procedures) or as part of e-only systems. They also include the use of digital, e-signatures or e-time stamps on documents and processes carried out electronically.
29. This technology can be used at all stages of proceedings. Proceedings can be initiated online through e-filing. Service can be effected electronically either through e-mail, a web-based application (App) or other forms of technology. Case tracking and management systems are facilitated through e-procedures and digital case management files. Enforcement could also be effected through e-procedures, whether carried out by or on behalf of a court or by a third party, such as an enforcement officer.<sup>13</sup> Use of this technology has several benefits.
30. Their use can also promote administrative and procedural standardisation across first-instance and appellate courts and tribunals. Standardisation can lead to the more cost-effective and efficient deployment of administrative staff supporting judiciaries.
31. Their use can also lead to the reappraisal of processes. Unnecessary and inefficient ones can be eliminated, again reducing administrative costs and time. Paper documents will, for instance, no longer need to be filed, retrieved or transported. E-files are available at any time or location. This can

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<sup>12</sup> CCJE Opinion No. 18 (2015), paras 27-28 and 32. Private enterprise may and does also provide access to such information.

<sup>13</sup> Enforcement officers include, for instance, bailiffs and huissiers de justice.

promote more efficient judicial case management. It can also, potentially, promote more flexible working patterns amongst the judiciary.

32. Use of such technology can also result in more cost-effective and efficient access to case documents by parties and their lawyers. It can thus help judiciaries promote greater access to justice. By providing the means to access processes from an office, from home or otherwise, greater procedural equality can, particularly, be secured.

### **C) Case tracking and case management systems**

33. The use of case tracking and case management systems, as part of judicial support systems, serves a range of functions.

#### **(i) Administration**

34. Administrative and judicial management information can be extracted from these systems. This may help facilitate the assessment, by judiciaries, of the use of court and judicial resources. It can provide effective data for the establishment and application of Key Performance Indicators for justice systems, e.g. in terms of efficiency, cost-effectiveness and accessibility.<sup>14</sup>
35. Such measures can promote more informed resource allocation, budget and workflow planning (including effective allocation of work to judges and court administrators) and future resource planning.<sup>15</sup> This may be particularly beneficial where these systems are interoperable across the justice system. It may also facilitate a holistic approach to, and assessment of, resource management across all aspects of the justice system.
36. Where information from case tracking and management systems is made available to the public, e.g. through online public registers, listing schedules and hearing information, judiciaries may also enhance their public accountability.

#### **(ii) Effective timetabling and hearing scheduling**

37. At a basic level these systems can more easily facilitate procedural timetabling by judiciaries. Simply, this can be achieved through providing more ready access to information concerning the status and progress of individual proceedings.
38. At a higher level such systems can optimise timetabling and hearing scheduling. Supportive AI could be used to determine the optimum utilisation of court and judicial time to deal with each set of proceedings for which they have responsibility. This could include providing model procedural timetables or directions for each case.

#### **(iii) Case distribution**

39. Scheduling systems may also provide the possibility of automated case distribution to judges through the application of criteria agreed by judiciaries and which are subject to judicial oversight and decision-making. This can also help facilitate optimal use of court buildings and court rooms.

#### **(iv) Compliance monitoring**

40. Once an optimum procedural timetable has been set, case management systems can promote effective and cost-efficient compliance monitoring.<sup>16</sup> They can provide automated reminders to judges and parties of upcoming procedural deadlines. Such prompts can facilitate effective management. They are also able to prompt compliance. They can also alert judges to documents being filed. In addition to promoting economy and efficiency such measures can promote the timely delivery of justice by judiciaries, which itself can promote both effective adjudication and enforcement.

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<sup>14</sup> Key performance indicators (KPIs) are a means by which performance can be assessed. They are based on quantifiable data. Where the judiciary are concerned KPIs could, for instance, relate to the length of time taken to deliver a judgment following the conclusion of proceedings. See also the Guidelines of the European Commission for the Efficiency of Justice (CEPEJ) on measuring the quality of justice (2016).

<sup>15</sup> Digital Technologies for Better Justice – A Toolkit for Action (2020) of the Inter-American Development Bank at 22-23.

<sup>16</sup> It should be noted that efficiency and economy are not ends in themselves. They are a means to promote access to justice.

41. Automation, particularly where compliance prompts are concerned, and the provision of standardised information to judges, can promote greater consistency in case management. This can consequently promote the legitimacy of, and public confidence in, the judiciary.

#### **(v) Management of mass claims**

42. Case management systems can also promote the identification, grouping and management of test cases and/or mass claims.
43. In the case of a large number of individual claims that raise the same or similar legal or factual issues, case management systems can help reduce resource pressure on courts and judges by identifying and grouping them as a mass claim, which consequently may be transferred, through the framework of procedure, to a single management court and managed as a class, group or representative action.
44. Automated case management of such claims can, consequently, promote their efficient, cost-effective and proportionate management and determination. It can also promote effective mass settlement schemes. Ready identification and grouping of such cases promote consistency of case law, since it reduces the risk that the same or similar factual or legal issues would be determined differently by different judges.
45. Efficient management may also be promoted through the identification of a single claim from amongst a large number of similar claims, which could then move forward to judgment as a test or lead case. This can be facilitated through data tools extracting information from cases filed to identify the most suitable cases to go forward to trial and judgment on such a basis.

#### **(vi) Identification and assessment of issues and evidence**

46. Data tools such as those used in predictive technologies<sup>17</sup> (e-disclosure or e-discovery) within a judicial support system, may be used to identify key pieces of evidence that have been uploaded to the case management system by parties. This can better enable judges to identify and consider factual issues more efficiently.
47. Such technology is particularly important where e-evidence is concerned. This is especially so in criminal proceedings, such as white-collar crime and where analysis of mobile phone data is concerned relating to crimes against the person. Without the use of such technology, the examination and assessment of such evidence is becoming ever more resource and time intensive. Automated case management could then assist judicial fact-finding in such cases. It can thus improve adjudicative accuracy, as well as reducing the cost and time taken to judgment.

#### **(vii) Open justice and accountability**

48. Making case tracking information available to the public and media enables effective scrutiny of the nature and types of disputes that are brought before the courts as well as of judgments and orders. It enables scrutiny of case progress. These systems are thus also a means by which judiciaries can promote transparent procedural accountability<sup>18</sup>.
49. Automated case management systems can also ensure that any necessary derogations from open justice are put in place effectively. They thus can help judiciaries secure compliance with any obligations that arise in this respect from Articles 6 and 8 of the ECHR.

### **D) Hybrid hearings**

50. Audio and videoconferencing are well-established means to conduct hearings irrespective of the subject matter. They make it possible to hold hybrid or remote hearings.
51. The Covid-19 pandemic has, however, significantly expanded the use of this technology. States are either developing and using their own or using commercially available technology to hold such hearings. Their use has several potential benefits.

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<sup>17</sup> Such as predictive coding, which is used by parties in some member States to carry out e-disclosure.

<sup>18</sup> CCJE Opinion No. 18 (2015), paras 27-30.

52. They can reduce the cost and time taken to deal with proceedings. They can facilitate more efficient hearing scheduling, while eliminating travel and waiting times in court buildings. This can promote procedural proportionality. A physical hearing may generate disproportionate financial and temporal costs in short, paper-based, interim, or case management hearings. The same can be said for hearings that only involve legal argument. Their use may thus promote access to justice.
53. Hybrid hearings can also promote effective participation both by judges and parties. Specifically, where judges are concerned they may help promote part-time and flexible working patterns. They may thereby increase job satisfaction and career opportunities amongst the judiciary.
54. Where judges and parties are concerned, they may facilitate attendance at hearings where their personal characteristics, health or other circumstances might otherwise render attendance at a physical hearing problematic. A vulnerable party, particularly in criminal or family proceedings, may, for instance, be able to take part effectively through attending remotely from their home or from another part of the court building. The same holds, more generally, for individuals with disabilities. Hybrid hearings can in this way promote procedural equality as well as access to justice generally.

## V. Challenges arising from the use of technology

55. Article 6 of the ECHR provides, amongst other things, for an independent judiciary.<sup>19</sup> It requires the judiciary to be independent of the executive<sup>20</sup> and the legislative powers. It must also be independent of parties to litigation<sup>21</sup>. The judiciary must also be impartial.<sup>22</sup> In both cases, the judiciary must not only be independent and impartial but also must be seen to be so.<sup>23</sup> Judicial independence, in both its institutional and individual aspects,<sup>24</sup> does not exist for the benefit of the judiciary, nor does impartiality.

### (A) Substantive challenges

#### (i) The judicial independence challenge

56. Implementation of technological reform is, in several member states, the responsibility of the executive. The CCJE has previously recognised that judiciaries ought properly to have a role and responsibility in this respect to secure judicial independence.<sup>25</sup> The potential for technological design to shape access to justice, either consciously or unconsciously, cannot be underestimated. Data tools in the development of key performance indicators could be used to undermine judicial case management through the imposition of efficiency-based targets that are inimical to autonomy in judicial decision-making. Moreover, they could be used to improperly criticise members of the judiciary who failed to meet such targets, undermining both individual and institutional judicial independence. Moreover, the development of technology-based system defaults, prompts or AI may reduce judicial autonomy in decision-making. In extreme cases, they may do so in ways that are contrary to the rule of law.
57. Effective data security and protection measures require effective, independent oversight of technology used by the judiciary, as they do generally in society.<sup>26</sup> Such oversight could pose a significant risk to judicial independence were it to be carried out by the executive or a regulatory body, such as a national Data Protection Supervisor, rather than by a body within the judiciary.

<sup>19</sup> CCJE Opinion No. 3 (2002), para 9; CCJE Magna Carta of Judges (Fundamental Principles) (CCJE (2010)3), paras 2-3.

<sup>20</sup> *Sovtransavto Holding v. Ukraine* [2002] ECtHR 626 at [80].

<sup>21</sup> *Ringeisen v. Austria* [1971] ECtHR 2 at [95].

<sup>22</sup> *Kyprianou v. Cyprus* [2005] ECtHR 873 at [118]; *Piersack v. Belgium* [1982] ECtHR 6 at [30].

<sup>23</sup> *Sramek v. Austria* [1984] ECtHR 12 at [42]; *Kyprianou v. Cyprus* [2005] ECtHR 873 at [121]. And see, in respect of the EU, *Associação Sindical dos Juizes Portugueses* [2018] EUECJ C-64/16 at [44].

<sup>24</sup> Council of Europe, Recommendation (2010) 12 on judges, independence, efficiency and responsibilities, Chapters 2 and 3, where these distinctions are referred to as external and internal independence, respectively.

<sup>25</sup> CCJE Opinion No. 14 (2011), paras 32 and 36.

<sup>26</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation).

58. Turning to AI, it poses several challenges to judicial independence. Algorithmic design may undermine judicial independence where the judiciary do not have informed and effective input and oversight over it. This may particularly be the case where design and implementation are outsourced by member States to private companies, not least as the control of the AI tends to be concentrated in the hands of a small number of companies. This is a discrete, and acute, instance of design risk. It may also, where case management systems use AI to schedule hearings, do so in ways that embed bias into listing hearings that undermine judicial control over this function<sup>27</sup>.
59. The use of AI to assist case management or assist judicial decision-making may lack transparency as to what and how information is used by such technology. Reduced transparency may inhibit explanatory and appellate accountability of the judiciary.<sup>28</sup> This may call into question judicial independence, and the legitimacy of the judiciary, both individually and institutionally.
60. Judicial decision making is a highly skilled activity. It requires significant training and experience. Use of data tools as a replacement for judicial legal research and of supportive AI to help judges reach decisions may undermine an individual judge's ability to research and take decisions. Use of predictive coding may, for instance, undermine a judge's ability to determine what is and what is not relevant evidence and may adversely affect their ability to assess the strength of evidence. While such tools are intended to assist judicial decision-making, they may over time reduce judicial skill and experience.
61. One possible consequence of judges no longer being able to identify and assess the strength of evidence is that they could become dependent upon technological assistance. Were their skills and experience in evidence-taking and identification, and similar areas, to be denuded by reliance on technology such as predicative coding, individual independence, and judicial autonomy, may be reduced. What is intended to be supportive may thus become the *de facto* decision. This may particularly be problematic where such assistance provides individual judges with an assessment of decisional norms based on general trends amongst the judiciary; a problem that would then become self-reinforcing as more judges follow the trend identified by data tools. More broadly, this poses a threat to institutional independence as it would, in effect, place the decision-making process in the hands of those who design the data tools.

**(ii) The fair trial challenge**

62. Technology poses several challenges to the judiciary's ability to secure the parties' right to a fair trial guaranteed by Article 6 of the ECHR.
63. Use of data tools, particularly where they involve supportive AI, may adversely affect the judiciary's ability to secure a fair trial for parties. Data tools, such as Chatbots, may for instance produce false results, e.g. they may create fictitious case law that may result in judicial error. AI use may also undermine the judiciary's control over the allocation of cases.
64. Care does, however, need to be taken where hybrid hearings are concerned. Access to justice gains may not be as readily realisable where trials or final hearings are concerned, particularly where they involve the taking and assessment of witness evidence. In the latter situation, it may, depending on the circumstances, be necessary to hold a physical hearing to take and test evidence and secure a fair trial as that is the properly effective means by which that can be carried out.
65. Hybrid hearings also pose the risk that parties and witnesses may be coached by individuals off-camera, which may corrupt the trial process. Additionally, they also pose the risk that hearings do not secure equality of arms. Differential participation may benefit or disadvantage one type of participant over another, particularly where witness evidence is being assessed, depending on whether they are physically present in court or participating via audio or videoconferencing. In criminal proceedings, where a defendant is taking part via videoconferencing and their lawyer is not present with them in person, questions may arise whether they are able to obtain legal advice on a fully confidential basis during a hearing.<sup>29</sup>

<sup>27</sup> Bias could result in cases not being allocated randomly but according to the parties' characteristics.

<sup>28</sup> CCJE Opinion No. 18 (2015), paras 27-29.

<sup>29</sup> *Sakhnovskiy v. Russia* [2010] ECtHR 1673; *Sakhnovskiy v. Russia* ( [2018] ECtHR 966; *Marcello Viola v. Italy* (No. 45106/04) (5 October 2006) at [67]-[77]; *Gorbunov v. Russia* [2016] ECtHR 231.



66. Audio and videoconferencing also pose a risk to the judiciary's ability to fulfil its duty to secure open justice. Technology may inhibit this if accessibility is not built-in effectively.<sup>30</sup> Conversely, too ready public and media access to hearings held via videoconferencing may create pressure on judges. The nature and quality of constant scrutiny where all hearings are made available online may inhibit judicial decision-making, not least by compromising an essential zone of privacy and reflection that judges need to carry out their responsibilities effectively.
67. A significant move away from physical to hybrid or remote hearings may also undermine the constitutional status of the judicial process, particularly its symbolic nature.<sup>31</sup> Taking part in proceedings from home, in a car, or in a public space may tend to undermine society's understanding of the civic importance of proceedings. The status and legitimacy of the judiciary at an institutional level as a part of the state may thus be harmed. In respect of individual proceedings, this may lead to participants not taking proceedings as seriously as they ought. This may have an adverse impact on the nature and quality of evidence, particularly witness evidence on oath, which may also compromise the judiciary's ability to secure fair trials.

## **(B) Other challenges**

### **(i) Design challenge**

68. Technology could be incorporated into courts and judiciaries in several ways. It could replicate pre-digital processes. The inherent risk is that a status quo bias would embed into future systems any design flaws extant in current practices and procedures. Were automation to be adopted, care needs to be taken to test whether what is presently done ought properly to be replicated technologically. Additionally, some forms of technology, particularly those provided for case tracking and case management decisions, may also require judicial input to ensure appropriate design. Care needs to be taken to ensure such input is provided.
69. Additionally, the use of technology could expand the judiciary's role. This could be done by enabling court systems to incorporate preventive and consensual justice into court processes. The risk here is that the constitutional role of judiciaries may be undermined. The judiciary's constitutional role could be conflated with that of a dispute resolution service, of a consumer service.
70. Technology is also not design-neutral. It carries the inherent risk of discriminatory design, implementation, and use. Design may discriminate against parties on grounds of race, ethnicity, sex, or gender. It may also adversely effect, for instance, the neuro-diverse or individuals with a visual or hearing impairment. This can arise either through discriminatory design or through the use of data in judicial support systems that is itself discriminatory or both. It may also impede access to justice for those who are technologically disadvantaged, where they cannot either use or access technology effectively.
71. The primary challenge is thus to ensure that technological design is consistent with the principle of non-discrimination and Articles 6 and 8 of the ECHR, while maintaining the judiciary's constitutional status.

### **(ii) The implementation challenge**

72. Effective design must be complemented by effective implementation, which requires the active engagement, involvement and subsequent training of judges.
73. If the use of technology is to fully realise economic and efficiency benefits, e-filing and proceedings, case tracking and management systems ought to be interoperable across the whole of the justice system. Lack of interoperability can embed inefficiency into such systems. At worst, it can lead to implementation being abandoned.
74. Implementation can also suffer from overreach. Rather than seeking to implement technological change at a measured pace, steps may be taken to implement wholesale reform to an overambitious timescale. The greater the degree and nature of reform at any one time, the greater the risk that it will fail and, consequently, will either be abandoned or, at best, implemented in part and sub-optimally.

<sup>30</sup> *Micallef v. Malta* [2009] ECtHR 1571.

<sup>31</sup> CCJE Opinion No. 14 (2011), para 6.

### **(iii) The funding challenge**

75. The CCJE has previously emphasised the fundamental importance of adequate funding to enable the judiciary to carry out its function as a part of the state.<sup>32</sup> Increased use of technology should not be seen as a means to reduce state expenditure on the courts and judiciary. Implementing technological change carries with it a range of associated costs that need to be considered carefully and budgeted for effectively.
76. Ongoing secure funding is also required when technology is in a steady state. Technology must be kept up to date. Judges and administrators require regular training. This carries an ongoing cost. Additionally, administrators and IT specialists employed by courts to enable the judiciary to operate, maintain and update technology may particularly require enhanced salaries given their enhanced and IT skills. That will need to be budgeted for, absent which it may not be possible for judiciaries to utilise technology effectively.

### **(iv) The data protection, security and accessibility challenge**

77. Increased use of technology entails large scale data processing, which may interfere with the rights protected under Article 8 of the ECHR, including that of the protection of personal data.<sup>33</sup> In terms of technological design, implementation and use, these rights should be protected. Such measures should also protect against security risks. This is particularly the case where sensitive case data in criminal and family proceedings are concerned. Accidental disclosure or the malign acts of bad actors may compromise data security, and particularly confidentiality of justice data.
78. System failure is a further risk that arises from increased use of technology; particularly of e-filing and procedures and case tracking and management systems. Systems failure could render case data inaccessible. Without adequate and effective technological and/or paper-based back-up systems, there is a real risk to effective and practical access to justice.

### **(v) The well-being challenge**

79. Increased use of technology may pose a threat to the short- and long-term health and well-being of judges and other court users.
80. Widespread use of technology may result in, for instance, fatigue, eye strain, headaches, not least through excess use of technology such as e-filing and procedures and videoconferencing. It may also result in increased stress, anxiety, melancholy, reduced attention-span and cognitive performance.<sup>34</sup> Any such adverse effects may equally adversely affect a judge's ability to secure a fair trial for parties. It may also increase the risk of adjudicative error.

## **VI. Legal and ethical framework for use of technology**

81. To better secure judicial independence and impartiality, the CCJE considers that a clear legal and ethical framework for the development and use of technology by judiciaries is necessary. Such a framework will better enable the judiciary, as one of the powers of state, to uphold the rule of law as it increasingly adopts, and adapts to, the use of technology.<sup>35</sup>
82. Member States should develop such a framework consistently with the requirements of the ECHR. Specifically, technology use must be consistent with judicial independence and impartiality. It must also be consistent with the right to a fair trial, as it applies to court proceedings, under Article 6 of the ECHR. It must also be consistent with the right to privacy, and data protection,<sup>36</sup> provided by Article 8 of the ECHR, and the right to freedom of expression for the public, including the media, provided by Article 10 of the ECHR. Due to the particular risk that the use of technology may be biased or partial in

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<sup>32</sup> CCJE Opinion No. 2 (2001).

<sup>33</sup> Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

<sup>34</sup> UNODC, Exploring Linkages between Judicial Well-Being and Judicial Integrity (2022) at [12]; A. Bullock, A. Colvin, & M. Jackson, *Zoom fatigue in the age of COVID-19*, Journal of Social Work in the Global Community, (2022) 7(1), 1–9.

<sup>35</sup> CCJE Opinion No. 18 (2015), paras 20-22.

<sup>36</sup> See, for instance, *Avilkina v. Russia* [2013] ECtHR 515 at [45]-[46].

its application or effects, technology use must take particular account of the need to guarantee these rights consistently with the principle of non-discrimination.

83. The CCJE recognises that the European Court of Human Rights (ECtHR) has developed, and will continue to develop, its case law in the light of technological developments. By way of example, physical absence from a hearing at one time was understood to amount to a breach of Article 6 of the ECHR. Under certain conditions, and with the development of effective video-conferencing facilities there is now an acceptance that participation at trial via such facilities is equivalent to physical presence and thus not in conflict with Article 6.<sup>37</sup> Similarly, video-conferencing facilities with secure break-out rooms may provide the requisite level of privacy and confidentiality in criminal proceedings for a defendant to obtain legal advice consistently with the requirements of Article 6, where previously technology would not have been able to do so.<sup>38</sup>
84. Within the general framework provided by the ECHR and national protection for fundamental rights, the use of technology by judiciaries should be supported by an appropriate legislative basis.<sup>39</sup> This is particularly important where technology is used in judicial support systems that provide assistance to judicial decision-making. It is equally important where the protection of personal data is concerned.
85. To provide effective data protection and security, and regulation without compromising judicial independence, member states ought to establish, where they do not already exist, national data protection supervisory bodies for the judiciary when acting in a judicial capacity. Such bodies should be created within the judiciary. Legislative provision could also be made allocating responsibility for the security and integrity of technology and data used by the judiciary.
86. Legislation ought also to make provision for the increasing transition to the use of technology by judiciaries. It should particularly make provision for the maintenance of alternative non-technology-based means to access the judiciary and legal proceedings, for those who are unable to access or use technology effectively.
87. It is particularly important for provision to be made for the continuance of non-technology-based hearings. While audio and/or videoconferencing may be appropriate for some hearings, it will not necessarily be appropriate for long hearings, or those which involve the taking and assessment of witness evidence, amongst others.
88. Procedural rules should make provision for when the judiciary, who ought ordinarily to be present in the court room/building during hearings and only exceptionally participate in remote hearings from elsewhere, may exercise discretion to determine that hearings should be held via technology or via traditional means. They should also make provision for when it is necessary for participants in proceedings, including members of the judiciary, to attend a court in person when hearings are otherwise held via audio- or video-technology.
89. Within the general legislative framework procedural rules should make provision for judicial determination of the use of technology for specific purposes. Member states should make available differential rules for different forms of procedure. Any discretion provided in procedural rules, and for that matter in legislation, as to the use of technology in particular proceedings should be exercised judicially rather than administratively.

## **VII. General principles relating to technology in judicial systems**

90. The use of technology must, above all, respect the nature of the judicial process. First, many judicial decisions are discretionary decisions, based on the particular facts of an individual case. Secondly, judges play an essential role in the development of the law. They do not merely apply fixed and immutable rules. Judges must be able to correct or add to the law if it falls short or threatens to derail the law's application in specific cases. Technology must not step into the realm of justice. Technology must not discourage or impede the critical thinking of judges as this can lead to stagnation of legal development and an erosion of the system of legal protection. Technological tools must therefore respect the process of judicial decision-making and the autonomy of judges.

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<sup>37</sup> *Marcello Viola v. Italy* (No. 45106/04) (5 October 2006) at [67]-[77].

<sup>38</sup> *Sakhnovskiy v. Russia* [2010] ECtHR 1673; *Sakhnovskiy v. Russia* ( [2018] ECtHR 966; *Gorbunov v. Russia* [2016] ECtHR 231.

<sup>39</sup> Guidelines on videoconferencing in judicial proceedings (2021) of the CEPEJ at 8.

91. The CCJE considers that the following principles should guide the future design, implementation and use of technology to support judges. They are intended to be consistent with the European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their Environment (2018) and the Guidelines on Electronic Court Filing (e-filing) and Digitalisation of Courts (2021) of the CEPEJ.
92. The CCJE supports the use of technology that assists judges. It does so where such technology fully respects the following principles. The central aim of these principles is therefore to better secure effective and practical access to justice consistent with judicial independence and the rule of law. They are intended to maintain and enhance judicial legitimacy and confidence in the judiciary. The principles are as follows:
- (i) **The rule of law:** technology should only be used to support and enhance the rule of law. It must therefore be designed, implemented and used within and based upon a clear, generally applicable and publicly accessible legal and ethical framework that is consistent with fundamental rights guaranteed by the European Convention on Human Rights (ECHR).
  - (ii) **Judicial independence and impartiality:** technology should support the judiciary in carrying out its constitutional role fairly and efficiently. Its design and operation should be subject to such safeguards, including legislation and/or rules of court, as necessary to secure both institutional and individual judicial independence and impartiality at all stages of legal proceedings. Such safeguards should be tailored to the needs of the proceedings whatever their nature. Technology should, specifically, not be used to predict an individual judge's decision-making.
  - (iii) **Judicial autonomy:** technology may only be used to support and assist courts and the judiciary in the proper management and determination of proceedings. Decision-making must, explicitly and implicitly, only be carried out by judges. It cannot be delegated to or carried out by or through technology. Judicial autonomy must be respected by the use of technology.
  - (iv) **Judicial oversight:** to maintain its consistency with judicial independence, impartiality and autonomy, judges whether through Councils of the Judiciary or otherwise, ought to be involved in the purchase, design and control of technology. They ought also to concur in its introduction and implementation. This is particularly important where the responsibility for court administration rests with Ministries of Justice or is a matter of partnership between the judiciary and the Ministry of Justice. Provision should also be made for judges to be kept up to date with technological innovation to facilitate their effective involvement and, where necessary, concurrence in the use of new and evolving technology.
  - (v) **Accessibility and quality:** technology should enhance and improve effective and practical access to justice for all members of society. It ought to promote access to both adjudicative justice, consistently with article 6 of the European Convention on Human Rights, as well as consensual settlement. Promoting accessibility necessarily requires technology to be of a high quality. Where access to technology is impractical, an appropriate equivalent alternative must be made available.
  - (vi) **Interoperability and continuous improvement:** to fully realise and promote efficiency and effectiveness in access to justice, technology should be interoperable across all parts of the justice system. It should be designed and operated so that it can be subject to continuous improvement. Mechanisms should therefore be implemented to provide for effective user-feedback on its use.
  - (vii) **Piloting:** the effect of technology development cannot always be fully assessed in advance of implementation. To guard against unforeseen consequences and to also allow for a proper evaluation of technological innovation, the use of new technology should be subject to piloting before it is fully implemented.
  - (viii) **Non-discriminatory design and operation:** technology that supports and assists the judiciary should be actively designed and operated so that it is non-discriminatory. It must be consistent with user-centred design and operation. Consideration of the needs of all users, whether judges, lawyers, members of the public, must be taken into account in order to ensure that the design and operation of technology by the judiciary is fair. Design teams must therefore be interdisciplinary.

- (ix) **Transparency and intelligibility:** technological design must be transparent and intelligible to users. This is particularly the case where AI is used and where technology is used to assist case management and judicial decision-making.
- (x) **Accountability:** the nature and use of technology should be subject to appropriate accountability mechanisms. Its design and implementation should be capable of being subject to scrutiny by the state, including legislative scrutiny and authorisation, and civic society. Its use in individual proceedings should be subject to scrutiny by parties to proceedings, consistent with principles of due notice, adversariality and judicial accountability.
- (xi) **Integrity, security and data protection:** technology should be subject to effective organisational and technical measures, consistent with applicable standards required by any applicable data protection law, to maintain the integrity and security of data used by judiciaries so as to maintain confidence in, and the legitimacy of, the judiciary. Such measures should make provision for differential access controls to such data for judges, court administration, parties, legal representatives and the public.
- (xii) **Openness and privacy:** measures to maintain integrity, security and data protection should not compromise the judiciary's ability to secure the publicity principle, including any valid derogation from or limitation upon it to protect privacy or other right or interest, consistent with article 6 of the European Convention on Human Rights.
- (xiii) **Funding:** technology, its introduction, maintenance, use by court administration and judges, and updating should be adequately funded throughout its lifespan. Financing should support its effective design and implementation. It should also be adequate to support its effective maintenance by the court administration and continuous improvement. Mechanisms must therefore be in place to provide for the effective capture of operational data to facilitate the assessment of the operation and effect on the judiciary and court users of technology by judiciaries and those responsible for court administration.
- (xiv) **Training and operability:** to ensure that technology can be used as efficiently and effectively as possible, the judiciary and court administration should be properly informed about and trained in the nature and effective use of technology used by the judiciary.

## Glossary

The following terms are used in the Opinion:

- a. **Artificial intelligence (AI):** the replication of human cognition and decision-making by a machine. Within this Opinion, the main form of AI referred to is that of machine learning. That is a process that uses statistical, mathematical models (algorithms) which enable computers to detect mathematical patterns within large sets of data (information) without explicit instruction. Pattern detection is what is meant by 'learning'. This analysis then forms the basis of, for instance, data classification, data sorting or decision-making.
- b. **Audio-conferencing:** a system that uses technology, whether telephonic or digital via the Internet, to facilitate a meeting, such as a court hearing, via audio.
- c. **Case management systems:** electronic systems that support the administration of justice. They include automated mechanisms that: permit documents and evidence to be uploaded and provided to parties and the judge via e-filing, facilitate timetabling proceedings through scheduling tools, promote procedural compliance, including compliance monitoring; promote efficient allocation and management of court resources, including judicial workload.
- d. **Case tracking systems:** an electronic system that permits its user to obtain information concerning proceedings. Such information includes: the court identification number for each case, the names of parties to proceedings, details of legal representatives for the parties to proceedings; details of documents filed in the proceedings and of any orders or judgments made, and details of hearings listed and case progress.
- e. **Data tools:** electronic means to process and manage information and provide access legislation and judicial decisions (case law). They may be provided by the state or by the private sector.
- f. **E-Disclosure or e-discovery:** the disclosure of electronic documents (e-documents) in court proceedings.
- g. **E-filing and procedures:** an online tool, which permits parties and the lawyers to upload to the court and exchange digital versions of case documents and evidence.
- h. **Expert systems:** a form of AI. An online tool made up of two parts: a knowledge base, which is made up of rules and known facts; and an inference engine. The inference engine applies the rules to the known facts, through the application of deductive reasoning, to arrive at new facts. It is intended to replicate human expert decision-making.
- i. **Hybrid hearing:** a hearing where one or more of the participants (judge, parties, witnesses) take part while they are present in a physical court building. The other participants take part via either or both audio and videoconferencing.
- j. **Judicial support system:** an extension of the case management system, which provides judges with various means to promote the effective and practical management of proceedings, e.g. through assisting with the completion of documents, judgments or orders or through promoting judicial awareness of upcoming procedural time limits. This also includes, for instance, document automation through the use of decision trees.
- k. **Machine readable:** the structuring of information, such as that in a document or, particularly a judgment, which is capable of being processed by a computer programme. The means by which documents can be processed by way of machine learning.
- l. **Predictive coding:** a form of predictive technology, which facilitates the review of documents and e-documents as part of a disclosure or e-disclosure process in court proceedings. The technology is trained to recognise disclosable documents through the use of supervised and reinforcement machine learning.
- m. **Remote hearing:** a hearing that is held via audio or videoconferencing where none of the participants are present in a physical court building during the hearing.

- n. **Supportive (or assistive) AI:** the use of AI to support case management and judicial decision-making.
- o. **Videoconferencing:** a system that uses technology that provides for the simultaneous transmission of audio and of visual images of individuals for the purposes of synchronous communication.

The Consultative Council of European Judges (CCJE) is an advisory body of the Council of Europe established in 2000 on issues relating to the independence, impartiality and competence of judges. The CCJE is the first body in an international organisation composed exclusively of judges. The CCJE provides advice and guidance in the form of opinions. Although the opinions adopted by the CCJE take account of existing national situations, they contain innovative proposals for improving the status of judges and the service provided to members of the public seeking justice.



The website of the Consultative Council of European Judges can be consulted at the following address: [www.coe.int/ccje](http://www.coe.int/ccje)

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The Council of Europe is the continent's leading human rights organisation. It comprises 46 member states, including all members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

