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CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)

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Magna Carta of Judges¹

(Fundamental principles)

Introduction:

On the occasion of its 10th anniversary, the CCJE adopted, during its 11th 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).

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).

¹ 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. 15 (2012)

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

The specialisation of judges

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)¹.
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 Europe².
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 cases³ 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.

¹ 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.

² 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).

³ 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 submissions⁴.
23. Setting up specialist courts in response to public concerns (e.g. anti-terrorist courts)⁵ 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 necessary⁶. 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

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

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

⁶ 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 judges⁷.
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.

⁷ 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 courts⁸. 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 jurisdiction⁹. In other cases the specialist court may be a part of a larger court grouping¹⁰. 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.

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

⁹ See examples listed in footnote 2.

¹⁰ 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”¹¹. 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 apply¹². 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 training¹³ 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.

¹¹ See also CCJE Opinion No. 1, paragraph 61.

¹² See CCJE Opinion No. 1, paragraph 29.

¹³ 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

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 forms¹. 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.

¹ 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 judiciary². 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.

² 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 independence¹ and secondly, ways of maintaining and improving the quality and efficiency of judicial systems². 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 appointment³ or their initial training⁴. Though it touches upon the relationship between disciplinary proceedings and evaluation, the Opinion does not primarily address questions of discipline or criminal responsibility⁵. 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 Report⁶ 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 law⁷. Judges must protect the rights and freedoms of all persons equally. Judges must take steps to provide efficient and affordable dispute resolution⁸ and decide cases in a timely manner and independently and must be

¹ See the CCJE Opinion No. 1(2001).

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

³ See the CCJE Opinion No. 1(2001), paras 17-56.

⁴ See the CCJE Opinion No. 4(2003), paras 23-30.

⁵ See the CCJE Opinion No. 3(2002), para 51-77.

⁶ 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>

⁷ See Recommendation CM/Rec(2010)12, paras 59 – 65.

⁸ See the CCJE Magna Carta of Judges (2010), para 15.

bound only by the law. They must give cogent reasons for their decisions⁹ and must write in a clear and comprehensible manner¹⁰. Moreover, all binding decisions of judges must also be enforced effectively¹¹. 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 citizens¹². 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 trial¹³. 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 justice¹⁴, such as a lack of financial resources¹⁵, problems concerning the initial and in-service training of judges¹⁶, unsatisfactory elements regarding the organisation of the judiciary and also the possible civil and criminal liability of judges¹⁷.
6. Accordingly, the fundamental rule for any individual evaluation of judges must be that it maintains total respect for judicial independence¹⁸. 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 judges¹⁹, 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.

⁹ See the CCJE Opinion No. 11 (2008), para 36.

¹⁰ See the CCJE Opinion No. 11 (2008), para 32.

¹¹ See the CCJE Opinion No. 13(2010), Conclusion A; the CCJE Magna Carta of Judges (2010), para 17.

¹² See the CCJE Opinions No. 1(2001), No. 3(2002), No 4(2003), No. 6(2004) and No. 11(2008).

¹³ 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.

¹⁴ See the CCJE Magna Carta of Judges (2010), paras 3 and 4.

¹⁵ See the CCJE Opinion No. 2(2001), para 2.

¹⁶ See the CCJE Opinion No. 4(2003), paras 4, 8, 14 and 23-37.

¹⁷ See the CCJE Opinion No. 3(2002), para 51.

¹⁸ See the CCJE Opinion No. 1(2001), especially para 45, the CCJE Opinion No. 6(2004), para 34.

¹⁹ 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 goals²⁰. An informal gathering of information about a judge who is a candidate for promotion²¹ 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 performance²², 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 judges²³. Other member states use evaluation to ascertain any elements of remuneration or pension based on the individual performance of a judge²⁴.

(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)²⁵. In some member states, the productivity of a judge is measured against a fixed quota²⁶ or against the average number of decisions handed down by other judges²⁷. 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 process²⁸. In others²⁹, 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

²⁰ See e.g. the system in Finland and the Netherlands.

²¹ As in the United Kingdom.

²² However, stringent safeguards are in place to protect a judge's independence in the process.

²³ Bulgaria, Estonia, Germany, Hungary, Ukraine.

²⁴ 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.

²⁵ 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.

²⁶ Bosnia and Herzegovina, Spain.

²⁷ Germany, Poland,

²⁸ Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, Georgia, Greece, Hungary, Republic of Moldova, Poland, Romania, Spain, "the former Yugoslav Republic of Macedonia", Turkey.

²⁹ 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 lawyers³⁰. Organisational skills, work ethic³¹ or scholarly activities such as publications and lecturing³² 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"³³ or A, B, C³⁴. Some countries refer to the evaluated judge's suitability for promotion in their ratings³⁵. Other member states deny using formal ratings³⁶. 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 judges³⁷. In some states, judges whose work has been studied are ranked from the best to the least good judge according to their evaluation³⁸. 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 assessment³⁹. In some member states, the opinion of bar associations⁴⁰, litigants, colleagues and more senior judges⁴¹ 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 goals⁴². In some cases, the evaluation process starts with a self-assessment of the evaluated judge⁴³. 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 evaluation⁴⁴.
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 work⁴⁵. 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 process⁴⁶.

³⁰ Austria, Germany, Slovenia.

³¹ Germany, Poland, Sweden.

³² Croatia, Germany.

³³ Albania, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, France, Germany, Greece, Italy, Republic of Moldova, Monaco, Romania, Slovenia, "the former Yugoslav Republic of Macedonia".

³⁴ Georgia, Turkey.

³⁵ Hungary, Slovenia.

³⁶ Cyprus (with productivity factor), Estonia, Finland, The Netherlands, Sweden, UK.

³⁷ Bulgaria, Croatia, Estonia, Spain, "the former Yugoslav Republic of Macedonia", Turkey.

³⁸ Croatia.

³⁹ Austria, France, Germany.

⁴⁰ Greece.

⁴¹ Austria, Germany, Hungary, Monaco, United Kingdom.

⁴² Belgium, Finland, France, Monaco, Romania, Switzerland.

⁴³ Belgium, France, Romania.

⁴⁴ Albania, Austria, Bulgaria, Austria, Croatia, Estonia, Italy, Republic of Moldova, Slovenia, "the former Yugoslav Republic of Macedonia", Turkey.

⁴⁵ Germany, Greece, Hungary, The Netherlands.

⁴⁶ 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 courts⁴⁷.

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 informally⁴⁸. 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 tenure⁴⁹. In some member states, evaluation also plays a role in determining performance related salaries and pensions⁵⁰. Moreover, in some member states, poor performance can lead to the initiation of disciplinary procedures⁵¹, pay cuts and even a judge's dismissal from office⁵².

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 independence⁵³ and the trust of the public in the judicial system⁵⁴ 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 criteria⁵⁵ 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.

⁴⁷ Greece uses a roughly comparable system.

⁴⁸ Bosnia and Herzegovina, Finland, Germany, Greece.

⁴⁹ Bulgaria, Estonia, Georgia, Germany, Greece, Ukraine.

⁵⁰ 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.

⁵¹ Belgium, Bulgaria, Croatia, Cyprus, Greece, Hungary, Poland, Slovenia.

⁵² Austria, Estonia, only in rare cases: Greece, Hungary, Italy, Republic of Moldova, Poland, Romania, Slovenia, "the former Yugoslav Republic of Macedonia".

⁵³ "The former Yugoslav Republic of Macedonia".

⁵⁴ Romania.

⁵⁵ 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 encouraged⁵⁶.

H. If there is formal evaluation: how to do it?

(I) 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 CCJE⁵⁷ and the UN⁵⁸ 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 results⁵⁹. 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”⁶⁰. 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

⁵⁶ See the CCJE Opinion No. 11(2008), para 70.

⁵⁷ See the CCJE Opinion No. 1(2001), paras 17 and 29.

⁵⁸ See UN Basic Principles on the Independence of the Judiciary (1985), para 13.

⁵⁹ Spain, Sweden (however, only a very small percentage of the salary is set individually).

⁶⁰ 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 respected⁶¹. 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 law⁶² 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 legislation⁶³. 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 authority⁶⁴. 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 recommendations⁶⁵. These objective standards should be based on merit, having regard to qualifications, integrity, ability and efficiency⁶⁶.
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 judges⁶⁷.
33. The CCJE notes that the Kyiv Recommendations⁶⁸ 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 system⁶⁹. 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 systems⁷⁰. 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 decisions⁷¹. 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

⁶¹ See Recommendation CM/Rec(2010)12, para 49.

⁶² See Recommendation CM/Rec(2010)12, para 50.

⁶³ See the ENCJ Report 2012-2013, sections 4.17-4.18.

⁶⁴ See Recommendation CM/Rec(2010)12, para 58.

⁶⁵ See the CCJE Opinion No. 1(2001), para 24.

⁶⁶ See the CCJE Opinion No. 1(2001), para 25.

⁶⁷ See the ENCJ Report 2012-2013, section 4.8.

⁶⁸ See the Kyiv Recommendations (2010), para 27.

⁶⁹ See the CCJE Opinion No. 6(2004), para 42.

⁷⁰ See Recommendation CM/Rec(2010)12, para 32, and CCJE Opinion No. 2(2001), para 4.

⁷¹ 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 appeal⁷², 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 Recommendations⁷³ and the ENCJ Report⁷⁴ 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 exercise⁷⁵. 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 avoided⁷⁶; 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 reliable⁷⁷. 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 necessary⁷⁸. 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 judge⁷⁹.

(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 promotion⁸⁰. 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 activities⁸¹. 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

⁷² See the CCJE Opinion No. 11(2008), para 74, and CCJE Opinion No. 6(2004), para 36.

⁷³ See the Kyiv Recommendations (2010), para 28.

⁷⁴ See the ENCJ Report 2012-2013, section 4.12.

⁷⁵ See the CCJE Opinion No. 10 (2007), paras 42 and 52-56.

⁷⁶ See the ENCJ Report 2012-2013, sections 4.13-4.15.

⁷⁷ See the ENCJ Report 2012-2013, section 4.16.

⁷⁸ See the ENCJ Report 2012-2013, section 4.19.

⁷⁹ As in Austria or Bulgaria.

⁸⁰ As in Croatia or United Kingdom.

⁸¹ 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 evaluation⁸² 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 resources⁸³ 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 evidence⁸⁴. 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 avoided⁸⁵. Such a process could plainly influence judges' behaviour (to the detriment of the parties in individual cases) and also endanger judicial independence⁸⁶.

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

⁸² As in Albania.

⁸³ See the ENCJ Report 2012-2013, section 4.11.

⁸⁴ See Recommendation CM/Rec(2010)12, paras 49 and 50.

⁸⁵ 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.

⁸⁶ 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 decreased¹. 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 powers². 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 2015³ 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 post⁴. In 2015, the Secretary General of the Council of Europe noted shortcomings in the enforcement of court decisions⁵. 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 judges⁶. 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 judiciary⁷. A lack of legislation or (at the other extreme) rapidly changing legislation may be contrary to the principle of legal certainty⁸. 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

¹ 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.

² Scholars have identified a “global expansion of judicial power”: see Tate and Vallinder (eds), Global Expansion of Judicial Power, New York University Press, 1997.

³ 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)”.

⁴ 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.

⁵ See the CoE Secretary General’s Report (2015), p. 14, 17, 27.

⁶ See the CoE Secretary General’s Report (2015), p. 20-21.

⁷ See for legal aid: the CoE Secretary General’s Report (2015) p. 22-23.

⁸ See the CoE Secretary General’s Report (2015), p. 19.

judiciary in various countries⁹. 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 21st 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 2015¹⁰. The opinion has also

⁹ See the CoE Secretary General’s Report (2014), p. 22; the CoE Secretary General’s Report (2015), p. 27.

¹⁰ 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 2015¹¹.

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 powers¹². The judiciary is one of the three essential but equal pillars of a modern democratic state¹³. 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 state¹⁴. 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 law¹⁵. 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 punishment¹⁶. 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 Union¹⁷.
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 others¹⁸. 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

¹¹ 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 Ingjerd Thune (President of the Norwegian Association of Judges).

¹² See the CCJE Opinion No. 3(2002), para 16.

¹³ See the CCJE Opinion No. 1(2001), para 11; see also the CCJE Magna Charta of Judges (2010), para 1.

¹⁴ 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.

¹⁵ See the CoE Secretary General's Report (2014), p. 22.

¹⁶ 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^e siècle (2013).

¹⁷ See the CCJE Opinion No. 1(2001), para 11.

¹⁸ 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 21st 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 society¹⁹. 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”²⁰. 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 litigations²¹. 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 courts²². Judicial independence is an intrinsic element of its duty to decide cases impartially²³. Only an independent judiciary can implement effectively the rights of all members of society, especially those groups that are vulnerable or unpopular²⁴. Thus, independence is the fundamental requirement that enables the judiciary to safeguard democracy and human rights²⁵.
11. The principle of the separation of powers is itself a guarantee of judicial independence²⁶. 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”²⁷. 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 powers²⁸. 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 state²⁹.

¹⁹ See the CCJE Opinion No. 13(2010) on the role of judges in the enforcement of judicial decisions.

²⁰ See Aharon Barak, “The Judge in a Democracy” (Princeton Press 2008), Ch. 2.

²¹ See the CCJE Opinion No. 1(2001), paras 11, 12.

²² See the CCJE No. 3(2002), para 9.

²³ 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”.

²⁴ 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).

²⁵ See *Volkov v. Ukraine* of 09.1.2013 – 21722/11 – para 199.

²⁶ See also the CoE Secretary General's Report (2014), p. 22.

²⁷ The English poet John Donne in Meditation XVII.

²⁸ 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.

²⁹ 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 powers³⁰. 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 Europe³¹. 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 disadvantages³². 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 legitimacy³³, although those methods of appointment carry with them a risk of

³⁰ See the CCJE Opinion No. 1(2001), para 11; see also the CCJE Magna Charta of Judges (2010), para 1.

³¹ See the CCJE Opinion No. 1(2001), paras 19-23; see also the Venice Commission, Judicial Appointments, 2007, paras 9-17.

³² See the CCJE Opinion No. 1(2001), para 33.

³³ 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 powers³⁴. 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 criteria³⁵.

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 judges³⁶. 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 system³⁷. 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 judges³⁸, fair trial within a reasonable time³⁹, effective application of international and European law⁴⁰, councils for the judiciary at the service of society⁴¹, the quality of judicial decisions⁴², the effective enforcement of judicial decisions⁴³, information technologies⁴⁴, the specialisation of judges⁴⁵, and the evaluation of judges⁴⁶. The CCJE has stated that, in order to provide judicial services of high quality, the judiciary must also work with prosecutors⁴⁷ and lawyers⁴⁸ 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 rules⁴⁹ 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

³⁴ See the CCJE Opinion No. 1(2001), para. 33.

³⁵ See the CCJE Opinion No. 1(2001), para 37.

³⁶ 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.

³⁷ See the CCJE Opinion No. 3(2002), para 22.

³⁸ See the CCJE Opinion No. 4(2003).

³⁹ See the CCJE Opinion No. 6(2004).

⁴⁰ See the CCJE Opinion No. 9(2006).

⁴¹ See the CCJE Opinion No. 10(2007).

⁴² See the CCJE Opinion No. 11(2008).

⁴³ See the CCJE Opinion No. 13(2010).

⁴⁴ See the CCJE Opinion No. 14(2011).

⁴⁵ See the CCJE Opinion No. 15(2012).

⁴⁶ See the CCJE Opinion No. 17(2014).

⁴⁷ See the CCJE Opinion No. 12(2009).

⁴⁸ See the CCJE Opinion No. 16(2013).

⁴⁹ 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 conduct⁵⁰. In its Opinion No. 3 (2002), the CCJE discussed such standards and principles of professional conduct⁵¹. 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 state⁵². It is therefore necessary next 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 life⁵³. 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 public⁵⁴. 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 justice⁵⁵. 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 put⁵⁶. 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 importance⁵⁷. 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 large⁵⁸.
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 systems⁵⁹. It is evident from the responses to the CCJE questionnaire that the administrative and

⁵⁰ See the CCJE Opinion No. 3(2002), para 8.

⁵¹ See also the CoE Secretary General's Report (2015), p. 9.

⁵² 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.

⁵³ 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.

⁵⁴ 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).

⁵⁵ See the CCJE Opinion No. 1(2001), para 11; Opinion No. 10(2007), para 9.

⁵⁶ See the ENCJ Report 2013-2014, p. 13.

⁵⁷ See the CCJE Opinion No. 6(2004), para 1.

⁵⁸ See the CCJE Opinion No. 17(2014), para 23.

⁵⁹ 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 independence⁶⁰.

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 society⁶¹.

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 application⁶². 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 appeal⁶³. 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 large⁶⁴. 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".

⁶⁰ See the CCJE Opinion No. 2(2001), para 14, and Opinion No. 10(2007), para 12.

⁶¹ There is a duty of the other powers of the state to provide adequate funds for the judiciary: CCJE Opinion No. 2 (2001).

⁶² See the CCJE Opinion No. 7(2005), para 7.

⁶³ Contini and Mohr "Reconciling independence and accountability in judicial systems", 3 Utrecht Law Review (2007) 26, 31-32, called this "legal and judicial accountability".

⁶⁴ 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 them⁶⁵. 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 television⁶⁶ 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 importance⁶⁷.
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 before⁶⁸. 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 time⁶⁹, 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 enforced⁷⁰. 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 inspectorates⁷¹ 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

⁶⁵ 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.

⁶⁶ See on the sensitive issue of television in court procedures: the CCJE Opinion No. 7(2005), paras 44-50.

⁶⁷ 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* Vol. 34, No. 2 (2011) 317, 332.

⁶⁸ See about the quality of judicial decisions the CCJE Opinion No. 11(2008); Opinion No. 7(2005), para 56.

⁶⁹ See the CCJE Opinion No. 6(2004).

⁷⁰ See the CCJE Opinion No. 13(2010); see the CoE Secretary General’s Report (2015), p. 14, 17, 27.

⁷¹ See the CCJE Opinion No. 1(2001), paras 27, 69 rec. 10.

judicial system⁷². 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 exchanges⁷³, these discussions will be beneficial to all three powers of the state⁷⁴. 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 system⁷⁵. 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 exchanges⁷⁶. 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 justice⁷⁷. In other member states, however, this is seen as a violation of judicial independence⁷⁸.

(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 judiciary⁷⁹. 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 directly⁸⁰. 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 misunderstandings⁸¹. 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 do⁸².

(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 systems⁸³. 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 lives⁸⁴ 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

⁷² See the CCJE Opinion No. 17(2014).

⁷³ See the ECtHR: *Baka v. Hungary* of 27.5.2015 - 20261/12 – paras 99-102

⁷⁴ Contini and Mohr “Reconciling independence and accountability in judicial systems”, 3 Utrecht Law Review (2007) 26, 41-42, advocated the concept of “cooperative accountability”.

⁷⁵ See the CCJE Opinion no. 3(2002), para 34; Belgium and Montenegro reported exchanges of this kind.

⁷⁶ 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.

⁷⁷ See the CCJE Opinion No. 3(2003), para 36.

⁷⁸ See the Decision of the Constitutional Court of Lithuania of 21.12.1999, IV.9.

⁷⁹ See the CCJE Opinion No. 7(2005).

⁸⁰ See the CCJE Opinion No. 7(2005), C.

⁸¹ See the CCJE Opinion No. 7(2005), paras 7-23.

⁸² See the CCJE Opinion No. 7(2005), para 27.

⁸³ See the CCJE Opinion No. 3(2002), para 49, recommendation iii.

⁸⁴ 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 course⁸⁵. This is particularly so in cases of judicial corruption⁸⁶, which fundamentally undermine public confidence in judicial impartiality and independence. In other cases of judicial misconduct, criminal⁸⁷, civil⁸⁸, or disciplinary liability⁸⁹ 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 property⁹⁰, 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 earned⁹¹. 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-sensitive⁹². Thus, when judges engage with the other powers of the state and society at large, they must take responsibility themselves to safeguard their independence⁹³ 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 judges⁹⁴. 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 state⁹⁵. It is essential that dialogue between the three powers of the state and

⁸⁵ See the CCJE Opinion No. 3(2002), para 51.

⁸⁶ 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.

⁸⁷ See the CCJE Opinion No. 3(2002), paras 52-54.

⁸⁸ See the CCJE Opinion No. 3(2002), paras 55-57.

⁸⁹ See the CCJE Opinion No. 3(2002), paras 58-74; see also Kyiv Recommendations, paras 25-26.

⁹⁰ 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;

⁹¹ See the ENCJ Report 2013-2014, p. 4, 9.

⁹² See the CCJE Opinion No. 1(2001), para 63.

⁹³ 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.

⁹⁴ See Recommendation CM/Rec(2010)12, para 18.

⁹⁵ 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 liability⁹⁶. 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 negligence⁹⁷. 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 judge⁹⁸.
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

⁹⁶ 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.

⁹⁷ 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*).

⁹⁸ 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 reprisals⁹⁹. 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 judiciary¹⁰⁰. 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 remedy¹⁰¹.

(1) Questioning the appointment of judges already selected

44. Decisions which remove basic safeguards of judicial independence are unacceptable even when disguised¹⁰². 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 justice¹⁰³. 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 resources¹⁰⁴. 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

⁹⁹ See ECtHR: *Baka v. Hungary* of 27.5.2015 - 20261/12.

¹⁰⁰ See the Open Letter of the Supreme Court of Ukraine, p. 2.

¹⁰¹ See Recommendation(2010)12, Art. 8.

¹⁰² 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.

¹⁰³ See the CoE Secretary General's Report (2015), p. 17.

¹⁰⁴ 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 proceeding 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 issues¹⁰⁵. 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

¹⁰⁵ 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 judiciary¹⁰⁶. 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.

¹⁰⁶ 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

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 presidents¹, 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.

¹ 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 service²;
- the Bars³;
- 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 independence⁴. 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 proceedings⁵, as well as the preservation of the confidentiality of deliberations.

² See CCJE Opinion No.12(2009), Bordeaux Declaration, paragraph 3.

³ See CCJE Opinion No. 16(2013), paragraph 10.

⁴ See CCJE Opinion No. 18(2015), paragraphs 48 and 49.

⁵ 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 cases⁶. Court presidents, acting as guardians of the court's independence, impartiality and efficiency, should themselves respect the internal independence of judges within their courts⁷.
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 confidentiality⁸.
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 issues⁹.

⁶ 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.

⁷ 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.

⁸ 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.

⁹ 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 procedure¹⁰. 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 review¹¹.
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 whole¹².

C. Managerial role¹³

24. The CCJE recognises that the managerial role of court presidents in member states varies¹⁴. 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 impartiality¹⁵.
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.

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.

¹⁰ See the Council of Europe Plan of Action on strengthening judicial independence and impartiality (CM(2016)36final), Action 2.1.

¹¹ See CCJE Opinion No. 17(2014), conclusion 11, see also CCJE Opinion No. 10(2007), paragraphs 42 and 53.

¹² See CCJE Opinion No. 10(2007), paragraphs 42 and 64.

¹³ See CCJE Opinion No. 6(2004), paragraphs 52-55.

¹⁴ See CCJE Opinion No. 18(2015), paragraph 48.

¹⁵ 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 task¹⁶.
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.

¹⁶ 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 CCJE¹⁷.

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)12¹⁸ 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"¹⁹.

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 respected²⁰.
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 criteria²¹. 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.

¹⁷ See CCJE Opinion No. 10 (2007), paragraph 51.

¹⁸ See Recommendation CM/Rec(2010)12, Chapter VI, paragraphs 44 and 45.

¹⁹ See CCJE Opinion No. 1(2001) on standards concerning the independence of the judiciary and the irremovability of judges, paragraphs 25 and 29.

²⁰ See CCJE Opinion No. 17(2014) on the evaluation of judges' work, the quality of justice and respect for judicial independence.

²¹ 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 Europe²². 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”²³.
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 judge²⁴. 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 budget²⁵;
 - preparing annual reports for the attention of the Parliament on the current state of affairs within the judiciary²⁶.
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.

²² See i.a. Recommendation CM/Rec(2010)12, Chapter 6, paragraphs 49 and 50.

²³ 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.

²⁴ See CCJE Opinion No. 1(2001) on standards concerning the independence of the judiciary and the irremovability of judges.

²⁵ See CCJE Opinion No. 2(2001), paragraph 10.

²⁶ 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

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 Bureau¹, 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 conflicting² 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.³ 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.

¹ 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.

² Please note that in the French version of this Opinion, the term "conflicting" is translated as "contradictoire".

³ 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.⁴ Different courts may thus arrive at divergent but nevertheless rational and reasoned conclusions regarding the same legal issue raised by similar factual circumstances.⁵
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.⁶ 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.⁷ Thus precedents are in principle binding *de jure* and thus considered to be a proper source of law. *Stare decisis*⁸ - 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 law⁹. 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 cassation¹⁰ 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.

⁴ The ECtHR, *Tomić and others v. Montenegro*, 18650/09 and others, 17 April 2012.

⁵ The ECtHR, *Şahin and Şahin v. Turkey*, 13279/05, 20 October 2011.

⁶ *Ibid.*

⁷ See CCJE Opinion No. 11(2008) on the quality of judicial decisions, para 45.

⁸ *Stare decisis* is Latin for “to stand by things decided”.

⁹ See CCJE Opinion No. 11(2008) on the quality of judicial decisions, para 48.

¹⁰ 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 appellate¹¹ 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.¹² 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

¹¹ The term "appellate courts" also refers to the appellate panels.

¹² 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 them¹³. 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) 5¹⁴.

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.¹⁵ 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.

¹³ See CCJE Opinion No. 11 (2008) on the quality of judicial decisions.

¹⁴ 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".

¹⁵ 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 effects¹⁶.

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 countries¹⁷, 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 improvement¹⁸. 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.

¹⁶ The ECtHR, *Sahin and Sahin v Turkey*, 13279/05, 20 October 2011.

¹⁷ 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.

¹⁸ 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 decision¹⁹. 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 violated²⁰.

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 independence²¹.
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.

¹⁹ See CCJE Opinion No. 11(2008) on the quality of judicial decisions, para 49.

²⁰ See the case *Brezovic v. Croatia*, ECtHR.

²¹ 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 public²².
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 circumstances²³.

²² See CCJE Opinion No. 14(2011) on justice and information technologies (IT).

²³ 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 whole²⁴.

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.

²⁴ 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

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 system¹. 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)², the Additional Protocol (2003) to this Convention³, and the Civil Law Convention on Corruption (1999)⁴. 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 7th 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

¹ See the Council of Europe Secretary General's annual reports on "The state of democracy, human rights and the rule of law in Europe".

² 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.

³ ETS 191. The Protocol requires the establishment of criminal offences for active and passive bribery of domestic and foreign arbitrators and jurors.

⁴ 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 HORNUNG⁵.

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 questionnaire⁶, 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.

⁵ 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 4th Evaluation Round.

⁶ 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 judges⁷.

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-based⁸ and taken by essentially non-political bodies⁹ 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 process¹⁰. The general public should have a general insight into the selection and appointment procedure¹¹.
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

⁷ See especially paragraphs 27 et seq. of Opinion N° 3 (2002).

⁸ See CM/Rec(2010)12, paragraph 44.

⁹ See CM/Rec(2010)12, paragraph 46.

¹⁰ See CM/Rec(2010)12, paragraph 48.

¹¹ 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 proportionate¹². Further, judges should always be entitled to appeal disciplinary sanctions rendered against them to a judicial body¹³.

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 size¹⁴. 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 presidents¹⁵. Additionally, the central judicial authorities should offer confidential ethical counselling on request.

¹² As to disciplinary sanctions, see in-depth *infra* sub C.

¹³ 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.

¹⁴ See paragraph 49 iv) of CCJE’s Opinion N° 3 (2002) on ethics and liability of judges.

¹⁵ 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"¹⁶.
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 offences¹⁷. 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 shown¹⁸. 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.

¹⁶ See <https://www.coe.int/en/web/greco/evaluations/round-4>.

¹⁷ Cf. in-depth infra sub C.

¹⁸ 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 manipulated¹⁹.
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 judges²⁰. 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 judiciary²¹.
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 litigants²².

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.

¹⁹ 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.

²⁰ 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.

²¹ GRECO dealt with this issue in its already mentioned 4th 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.

²² 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 judges²³.
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

²³ 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 other²⁴. 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)²⁵.
58. Several mechanisms exist to enhance the prerequisite legitimacy²⁶ 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 system²⁷. 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 treated²⁸. A judge who explains his/her decisions – and in given cases the pathway

²⁴ 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.

²⁵ See ECtHR judgment *Pesa v. Croatia*, No. 40523/08, 8 April 2010.

²⁶ 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.

²⁷ See paragraph 12 of CCJE Opinion No. 19 (2016); see also paragraph 32 of the aforementioned Opinion N°18 (2015).

²⁸ 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 case²⁹.

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 lawyers³⁰.
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 decisions³¹.

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.

²⁹ See CCJE Opinion N° 11(2008) on the quality of judicial decisions.

³⁰ Cf. especially paragraphs 10 to 25.

³¹ 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

I. Introduction

1. The European Convention on Human Rights (ECHR) guarantees the right to an independent and impartial tribunal established by law¹. 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 greffiers².

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.

¹ Article 6 of the ECHR.

² 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 useful³. 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 practice⁴. 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 judge⁵. 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 useful⁶. In yet other countries, where young judges may serve as judicial assistants for a limited time at higher courts, such secondments⁷ 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 issues⁸ 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 backlogs⁹, 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.¹⁰ First and foremost, this requires providing the financial means to appoint

³ For example, in international and European law: CCJE Opinion No. 9 (2006) para 19, Rec. A(e).

⁴ Germany, Slovenia.

⁵ Belgium, Bosnia and Herzegovina, Finland, Georgia, Poland, Republic of Moldova, Slovenia, Sweden, Switzerland.

⁶ Ireland, United Kingdom.

⁷ Albania, Croatia, Germany, Slovenia.

⁸ See Recommendation CM/Rec(2010)12, para 31; for the quality of judicial decisions see CCJE Opinion No. 11 (2008).

⁹ See CCJE Opinion No. 6 (2004) para 65.

¹⁰ 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 necessary¹¹.

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 desirable¹².
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 are¹³. 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. Procedures¹⁴ and substantial guarantees of judicial independence and impartiality aim at protecting the decision-making of the individual judge¹⁵. These guarantees ensure that judges are free to decide cases independently and impartially, in accordance with the law and their interpretation of the facts¹⁶. 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 ECHR¹⁷. 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.

¹¹ See CCJE Opinion No. 11 (2008) para 14; CCJE Opinion No. 2(2001), para 8.

¹² 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).

¹³ Czech Republic, United Kingdom; in Croatia research found that courts with judicial assistants are more productive than courts without such support.

¹⁴ 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.

¹⁵ 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.

¹⁶ Recommendation CM/Rec(2010)12, para 5.

¹⁷ 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 institutions¹⁸.

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 case¹⁹.
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 judge²⁰. 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 decisions²¹. Some member States do not, however, allow the involvement of judicial assistants in the drafting process²². 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

¹⁸ See Model Code of Ethics for Legal Associates and Advisors in Courts and Prosecutor's Offices in Bosnia and Herzegovina p. 4.

¹⁹ About the importance of the professionalism of judges, see CCJE Opinion No. 11 (2008), paras 21-23.

²⁰ In Malta, judicial assistants collect evidence for judges.

²¹ Andorra, Austria, Belgium, Croatia, Finland, Georgia, Latvia, Lithuania, Republic of Moldova, Russian Federation, Sweden, Ukraine.

²² Andorra, Ireland, United Kingdom.

prepares a memo on how a case should be decided²³. 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 cases²⁴. 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 law²⁵ 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 review²⁶. 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 parties²⁷. 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 assistants²⁸. 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).

²³ 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.

²⁴ Such opportunities are open in Bosnia and Herzegovina, Croatia, the Czech Republic, Finland, Iceland, Slovenia and Sweden.

²⁵ For the role of supreme courts in ensuring the uniformity of case law, see CCJE Opinion No. 20 (2017), paras 20-25.

²⁶ Andorra, Austria, Croatia, Czech Republic, Finland, Georgia, Germany, Iceland, Lithuania, Norway, Poland, Romania, Slovenia, Spain.

²⁷ United Kingdom.

²⁸ Andorra, Austria, Belgium, Finland, France, Monaco, Romania, Russian Federation, Sweden, Switzerland.

(iv) Preparing information for the media

32. The CCJE has recognised the importance of providing the media with summaries of court decisions, factual information and information about hearings²⁹. 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 process³⁰. 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.

²⁹ CCJE Opinion No. 7 (2005), para 42.

³⁰ 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 regulations³¹. 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 conflict³².

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 court³³, or only the constitutional court³⁴, or at specialised courts³⁵. Judicial assistants can be civil servants³⁶ or employees³⁷, 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 courts³⁸. 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 practice³⁹, as is the case in some member States⁴⁰, 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 independence⁴¹). Because of the proximity of judicial assistants to the adjudicative process, the independence of the

³¹ In Croatia, judicial assistants are even mentioned in the Constitution.

³² The Model Code of Conduct for Legal Associates and Advisors in Courts and Prosecutor's Offices in Bosnia and Herzegovina provides a helpful example.

³³ 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.

³⁴ Italy.

³⁵ Albania.

³⁶ Andorra, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Denmark, Finland, France, Georgia, Iceland, Lithuania, Luxembourg, Monaco, Romania, Russian Federation, Slovenia, Spain, Sweden, Switzerland.

³⁷ Bosnia and Herzegovina, Czech Republic, France, Latvia, Malta, Republic of Moldova, Norway, Poland, Spain, United Kingdom.

³⁸ Especially in Germany and Spain, but the model exists also - with variations - in Albania, Austria, Croatia and Slovenia.

³⁹ 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.

⁴⁰ 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).

⁴¹ 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)⁴². 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 career⁴³. 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 position⁴⁴. In other countries, serving as a judicial assistant is a short-term position, which also has an educational aspect⁴⁵.
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.

⁴² 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.

⁴³ Andorra, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Cyprus, Georgia, Switzerland, Latvia, Lithuania, Republic of Moldova, Monaco, Norway, Romania.

⁴⁴ Croatia, Slovenia.

⁴⁵ 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 guideline⁴⁶. 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 judges⁴⁷. 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 judge⁴⁸. Judicial assistants might also be assigned to a panel of judges⁴⁹. In a third approach, judicial assistants are organised in a pool and work with different judges⁵⁰. In a rarely used fourth approach, teams of judicial assistants are built for special cases⁵¹.
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 judge⁵². The CCJE recommends that member States consider introducing regulation allowing parties to challenge the participation of a judicial assistant.

⁴⁶ See CCJE Opinion No. 17 (2014).

⁴⁷ See CCJE Opinion No. 4 (2003).

⁴⁸ 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.

⁴⁹ Andorra, Belgium, Switzerland, Czech Republic, Finland, Germany, Iceland, Romania, Slovenia, Sweden.

⁵⁰ 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.

⁵¹ Sometimes Finland; it is also the practice at the International Criminal Court (ICC).

⁵² 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 duties⁵³. 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).

⁵³ 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

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 REISSNER¹.

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' associations². 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.

¹ Judge REISSNER was the President of the CCJE in 2012-2013, and a long-standing member of the CCJE Working Group.

² 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 Rights³, the International Covenant on Civil and Political Rights (ICCPR)⁴ and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)⁵ 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 documents⁶. 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 impartial⁷.
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 Judiciary⁸, the Bangalore Principles of Judicial Conduct⁹ and the Universal Charter of the Judge¹⁰.
15. In Europe, the right to form associations of judges was further developed in 1998 by the European Charter on the Statute for Judges¹¹ 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)¹² and by the CCJE Magna Carta of Judges (Fundamental Principles)¹³. 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.

³ Universal Declaration of Human Rights adopted by the UN General Assembly on 10 December 1948, Article 20/1.

⁴ International Covenant on Civil and Political Rights adopted by the UN General Assembly on 16.12.1966.

⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (of 4.11.1950), Article 11 /1.

⁶ CCJE Opinion No. 3 (2002) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and partiality, para 27.

⁷ 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.

⁸ United Nations Basic Principles on the Independence of the Judiciary (endorsed by the General Assembly on 29.11.1985) para 9.

⁹ Bangalore Principles of Judicial Conduct, Principles 4-6.

¹⁰ Universal Charter of the Judge (adopted by the IAJ on 14.11.2017) Article 3/5.

¹¹ European Charter on the Statute for Judges: principles 1.7 und 1.8.

¹² Recommendation (2010)12, para 25.

¹³ 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 rights¹⁴. 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 justice¹⁵.
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 practices¹⁶. 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.

¹⁴ 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.

¹⁵ CM/Rec(2010)12, para 20.

¹⁶ 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 judiciary¹⁷. Independence precludes not only influence from outside but also from within the judiciary¹⁸. 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 president¹⁹. 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 Judiciary²⁰. Their general mission is to safeguard the independence of the judiciary and of individual judges and the rule of law²¹. 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 States²², 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 candidates²³, supporting candidates who need a certain number of colleagues proposing them²⁴, having the possibility of nominating judges²⁵ or a legal duty to nominate candidates²⁶, or having a legally based formal position regarding selection²⁷, or even electing members themselves²⁸.

¹⁷ CM Recommendation (2010)12, para 4.

¹⁸ ECtHR *Parlov-Tkalcic vs. Croatia*, No. 24810/06, para 86, *Agrokompleks vs. Ukraine*, No. 23465/03, para 137 et alt.

¹⁹ CCJE Opinion No. 19 (2016) on the role of court presidents, para 19.

²⁰ CCJE Opinion No. 10 (2007) on the Council for the Judiciary at the service of society, para 42.

²¹ *Ibid*, paras 8ff and 41f.

²² Belgium (Conseil consultatif de la magistrature), Bulgaria (Partnership Council).

²³ Bulgaria.

²⁴ Romania, Spain.

²⁵ Norway (proposal of judges members of Appointment Board), Slovakia (proposal like every civic association).

²⁶ 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 themselves²⁹, 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 powers³⁰. 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 themselves³¹. 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 judges³², or development of such principles where associations of judges are at least intensively involved³³.
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 status³⁴.
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

²⁷ The Netherlands.

²⁸ North Macedonia (president and one member and deputies).

²⁹ Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Germany, Greece, Lithuania, Montenegro, North Macedonia, Poland, Romania, Russian Federation, Slovenia, Spain, Switzerland, Ukraine, United Kingdom.

³⁰ 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.

³¹ 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.

³² 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.

³³ Other involvement of association of judges in establishing ethical standards: Azerbaijan, Belgium, Estonia, Germany, Ireland, Lithuania, Luxembourg, Montenegro, North Macedonia, Romania, Slovakia, Sweden, Turkey, Ukraine, United Kingdom.

³⁴ 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”³⁵. 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”³⁶. NGOs should be consulted during the drafting of primary and secondary legislation which affects their status, financing or spheres of operation³⁷.
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 state³⁸, the dialogue with the public³⁹, and the need for restraint in the relations between the three powers⁴⁰ 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-law⁴¹. In several other member States, this is at least steady practice⁴². 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

³⁵ Guidelines for Civil Participation in Political Decision Making, CM (2017) 83, preamble.

³⁶ Recommendation CM/Rec(2007)14 on the Legal Status of Non-Governmental Organisations in Europe, preamble, para 2.

³⁷ *Ibid.*, para 77.

³⁸ 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.

³⁹ *Ibid.*, para 33.

⁴⁰ *Ibid.*, para 40 and paras 53 to 55.

⁴¹ Austria (as regards the ordinary courts), Estonia, Germany, Greece, Iceland, Montenegro, The Netherlands, Romania, Slovakia.

⁴² 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.⁴³ 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 Association⁴⁴ (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 associate⁴⁵;
- b) formation and registration (where applicable) should not be unnecessarily burdensome or discouraging⁴⁶;
- c) the principle of self-government should be respected and enabled⁴⁷, which means among other things that any influence from outside on the objectives and on their implementation, on the internal structure⁴⁸ and the selection of the officers of an association of judges⁴⁹ should be forbidden;
- d) the possibility to be involved in a transparent law-making process and dialogue⁵⁰ and to comment on state reports to international actors should be granted⁵¹;
- e) a termination or suspension of activities should be possible only in very exceptional limited cases⁵² and should be reviewed by an independent tribunal⁵³;
- 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 forbidden⁵⁴.

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.

⁴³ 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.

⁴⁴ 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.

⁴⁵ Ibid., paras 122 ff.

⁴⁶ Ibid., para 151.

⁴⁷ Ibid., paras 169 and 171.

⁴⁸ Ibid., para 175.

⁴⁹ Ibid., para 174.

⁵⁰ Ibid., paras 183 and 184.

⁵¹ Ibid., para 186.

⁵² Ibid., paras 244, 245, 251.

⁵³ Ibid., paras 244 and 256.

⁵⁴ Ibid., paras 265, 270, 271.

51. Judges also enjoy the fundamental right of freedom of expression⁵⁵, 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 membership⁵⁶, 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 excluded⁵⁷. 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”⁵⁸. 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.

⁵⁵ ECtHR judgments in *Baka v. Hungary*, 23 June 2016; *Harabin v. Slovakia*, 20 November 2012; see also Article 11 of the ECHR.

⁵⁶ 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.

⁵⁷ 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.

⁵⁸ 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 objectives⁵⁹. 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 unions⁶⁰. Legislation may impose some restrictions on these rights in respect of judges, but these restrictions must not totally deprive judges of these fundamental rights⁶¹.
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 such⁶². Sometimes, the status as a trade union provides them with additional means.

⁵⁹ Ibid., para 43.

⁶⁰ Commentary to Bangalore Principles of Judicial Contact, para 176.

⁶¹ See ECtHR *Matelly v. France*.

⁶² 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 expression⁶³ but must also safeguard these rights⁶⁴.

⁶³ 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.

⁶⁴ 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

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 law¹. 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 independence².
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 Judges³ and international standards developed, for example, by the Venice Commission⁴, have also stressed the importance of such Councils⁵. Since then, some member States have introduced or strengthened Councils for the Judiciary⁶. However, developments in recent years have also challenged the principles and standards expressed in these documents⁷. 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 Courts⁸.
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 standards⁹. 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

¹ See CCJE Opinion No. 18 (2015).

² Court of Justice of the European Union (CJEU), *C-83/19 and others*, 18.5.2021, paras 196-197, 205, 207, 212, 231, 236.

³ CCJE Magna Carta of Judges (2010), para 13.

⁴ 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.

⁵ 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.

⁶ EU: Rule of Law Report 2020, COM(2020) 580 final EN, pp. 8-10.

⁷ 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.

⁸ 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; *Repubblika Il-Prim Ministru v. WY*, 20.4.2021 – C-896/19; C-83/19 and others 18.5.2021.

⁹ Venice Commission, Urgent Interim Opinion on the draft new constitution, 11 December 2020, Bulgaria, CDL-AD(2020)035 para 37.

independence¹⁰ 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 accountable¹¹ 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 ICT¹². 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 Judiciary¹³. 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;

¹⁰ 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.

¹¹ CCJE Magna Carta of Judges (2010), para 13.

¹² See CCJE Opinion No. 10 (2010), paras 43-47.

¹³ 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 hand¹⁴. 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 appointments¹⁵. *Functional legitimacy* is based on the trust of the public created through excellent work, transparency and accountability¹⁶. 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 constitution¹⁷ as a secure legal basis for its responsibilities, independence and legitimacy¹⁸. 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 executive¹⁹. 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 way²⁰. Moreover, the accountability of a Council for the Judiciary is itself an important source of functional legitimacy²¹. The more powers and responsibilities a Council has, the more important it is that it should be accountable for the use of those powers.

¹⁴ See CCJE Opinion No. 18 (2015), paras 12-38.

¹⁵ See CCJE Opinion No. 18 (2015), paras 13-15.

¹⁶ See CCJE Opinion No. 18 (2015), paras 16-19.

¹⁷ CCJE Opinion No. 10 (2007), para 11; Venice Commission, Report on the Independence of the Judicial System, CDL-AD(2010)004 para 22.

¹⁸ See for the formal legitimacy of judges through appointment CCJE Opinion No. 18 (2015) para 14, 15.

¹⁹ 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.

²⁰ CCJE Opinion No. 10 (2007), paras 91-96.

²¹ 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 whole²² 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 review²³. When the legal merit of a Council's decision is reviewed in an independent court, the Council is held accountable (*judicial accountability*)²⁴. 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 itself²⁵.

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*²⁶. 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 members²⁷ and internal procedures for investigating shortcomings. Members must act according to those standards and the values of independence, impartiality and integrity²⁸. 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 way²⁹. 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 judges³⁰, so that individual judges are free to decide cases without undue influence from outside and inside the judiciary³¹. 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.

²² CCJE Opinion No. 18 (2015), paras 26-33.

²³ 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.

²⁴ See CCJE Opinion No. 18 (2015), para 26.

²⁵ See ECtHR *Volkov v. Ukraine* – 21722/11, para 130; *Denisov v. Ukraine* – 76639/11- para 79.

²⁶ See CCJE Opinion No. 18 (2015), para 33.

²⁷ See for such standards for judges: CCJE Opinion No. 3, paras 8-50.

²⁸ 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.

²⁹ CCJE Opinion No. 10 (2007), para 95.

³⁰ CCJE Opinion No. 10 (2007), para 14.

³¹ 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 Sadownictwa*, 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 judiciary³². The CCJE has always taken that view³³. Consequently, the selection or recommendation of new judges for appointment and promotion based on merit is a crucial task³⁴. Where this is a responsibility for the Council for the Judiciary, it must be exercised independently and accountably³⁵. 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 alone³⁶. 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 review³⁷.
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” judges³⁸. 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 future³⁹.
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 institutions⁴⁰. 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 decisions⁴¹. 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 justice⁴².

³² 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.

³³ CCJE Opinion No. 1 (2001), paras 17-45.

³⁴ CCJE Opinion No. 1 (2001); CCJE Magna Carta of Judges (2010), para 5.

³⁵ CCJE Opinion No. 10 (2007), paras 48-51, Venice Commission, Report on the Independence of the Judicial System, CDL-AD(2010)004, para 32.

³⁶ ENCJ 2019 Survey on the independence of judges, pp. 33-34.

³⁷ See CCJE Opinion No. 17 (2014).

³⁸ 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.

³⁹ CCJE Opinion No. 14 (2011), para 36.

⁴⁰ CCJE Magna Carta of Judges (2010), para 13.

⁴¹ CCJE Magna Carta of Judges (2010), para 13.

⁴² 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 chair⁴³. 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 cronyism⁴⁴.
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 executive⁴⁵. 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 professionals⁴⁶. 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 corporatism⁴⁷. 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 instances⁴⁸, as well as diversity of gender⁴⁹ 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 avoided⁵⁰. 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 appointed⁵¹, 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 preferable⁵². 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 cooperation⁵³. The CCJE realises that such a majority

⁴³ CCJE Opinion No. 10 (2007), paras 15-36.

⁴⁴ CCJE Opinion No. 10 (2007), paras 15, 16; see about the importance of independent bodies selecting judges: CJEU, *A.K. v. Krajowa Rada Sadownicta*, 19.11.2019, - C 585/18, C-624/18, C-625/18, para 137-138. C-619/18

⁴⁵ CCJE Opinion No. 10 (2007), paras 23, 26.

⁴⁶ See CCJE No. 10 (2007), para 22.

⁴⁷ CCJE Opinion No. 10 (2007), para 32.

⁴⁸ CCJE Opinion No. 10 (2007), paras 18, 25, 26, 27, 30.

⁴⁹ 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.

⁵⁰ CCJE Opinion No. 10 (2007), para 31.

⁵¹ 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, 20th of March 2020 (CDL-AD(2020)001 para 57-60.

⁵² 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, 20th 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.

⁵³ 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 deadlocks⁵⁴. 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 integrity⁵⁵ 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 judge⁵⁶.

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 independence⁵⁷. 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 parliament⁵⁸. 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 terms⁵⁹ to ensure independence. In this respect, this Opinion qualifies the view taken in Opinion No. 10 (2007)⁶⁰. 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 such⁶¹ 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 removal⁶². Non-judicial members should have equivalent protection. Judges and non-judicial members should enjoy the same immunities as specified in Opinion No. 3 (2002)⁶³.

⁵⁴ 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, 20th 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.

⁵⁵ See CCJE Opinion No. 10 (2007), para 21.

⁵⁶ CCJE Opinion no. 10 (2007), para 33.

⁵⁷ CCJE Opinion no. 10 (2007), para 36.

⁵⁸ 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, 9th of October 2020 (CDL-AD(2020)022, para 49.

⁵⁹ According to member States' responses, the longest terms are six years as for example in Slovenia, Romania, North Macedonia, the Netherlands and Hungary.

⁶⁰ CCJE Opinion No. 10 (2007), para 34.

⁶¹ 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, 20th 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.

⁶² 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.

⁶³ 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 rights⁶⁴. 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 Judiciary⁶⁵.

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 Judges⁶⁶, 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 lobbyism.
44. It is crucial that the public learns about the responsibilities and importance of an independent judiciary⁶⁷. 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 conferences⁶⁸. 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.

⁶⁴ CCJE Opinion No. 3 (2002), paras 58-74; CJEU C-83/19 and others 18.5.2021, paras 196-199, 236.

⁶⁵ CCJE Opinion No. 10 (2007), paras 73-75; CCJE Opinion No. 18 (2015), para 51; ENCJ Report 2015/2016 on Funding of the Judiciary.

⁶⁶ See CCJE Opinion No. 23 (2020) paras 25, 29-32 recommendation 6.

⁶⁷ See CCJE Opinion No. 7 (2005), paras 33-54; No. 10 (2007), paras 80-86.

⁶⁸ 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 whole⁶⁹. 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 law⁷⁰. 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 reasons⁷¹.

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).

⁶⁹ See CCJE Opinion No. 21 (2018).

⁷⁰ See President of the Venice Commission Gianni Buquicchio, in a speech at Democracy in Action: Zero Corruption Conference, 7-8.6. 2021.

⁷¹ 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

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 judges¹. 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

¹ 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 services².

III. Overview of country regulations and practice

11. The responses of CCJE members to the questionnaire for the preparation of the present Opinion³ 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 duty⁴ 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

² 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.

³ See at <https://www.coe.int/en/web/ccje/opinion-25-on-the-freedom-of-expression-of-judges>.

⁴ 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 person⁵. It follows that exceptions to this freedom must be construed strictly and the need for any restrictions must be established convincingly⁶.
26. The CCJE takes a broad view on the personal scope of the right to freedom of expression of judges as an individual right⁷. 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 justice⁸. 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 ability⁹. This is because they need the public's trust in their independence and impartiality in order to be successful in carrying out their duties¹⁰ and in preserving the authority of the judiciary to resolve legal disputes or to determine a person's guilt or innocence on a criminal charge¹¹. It follows that judges have to affirm these values through their conduct¹². It is therefore legitimate for the state to impose on judges a duty of restraint that pays due regard to their role in society¹³.

⁵ See ECtHR *Handyside v. the United Kingdom*, 07.12.1976, Appl. no. 5493/72, § 49.

⁶ 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.

⁷ 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.

⁸ See the CCJE Magna Carta, para 1; see also ECtHR *Baka v. Hungary* [GC], 23.06.2016, Appl. no. 20261/12, § 164.

⁹ 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.

¹⁰ 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.

¹¹ 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.

¹² 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 judges¹⁴. 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 criticism¹⁵. In most member States, ethical restraints on free speech of judges are geared towards similar purposes¹⁶.
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”¹⁷. Proportionality of a measure requires that it is the least restrictive measure¹⁸.
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 judiciary¹⁹. 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 involvement²⁰. 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 impartiality²¹. 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 judge²².
32. In arriving at a reasonable balance, the degree to which judges may and should be involved in society requires an adequate consideration²³. 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.

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.

¹³ 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.

¹⁴ Cf. ECtHR *Baka v. Hungary* [GC], 23.06.2016, Appl. no. 20261/12, § 162.

¹⁵ See ECtHR *Miroslava Todorova v. Bulgaria*, 19.10.2021, Appl. no. 40072/13.

¹⁶ 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.

¹⁷ See, for example, *ECtHR Baka v. Hungary* [GC], 23.06.2016, Appl. no. 20261/12, para 158.

¹⁸ Cf. ECtHR *Perinçek v. Switzerland* [GC], 15.10.2015, Appl. no. 27510/08, § 273.

¹⁹ 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.

²⁰ Commentary on the Bangalore Principles, para 134.

²¹ CCJE Opinion No. 3 (2002), para 28.

²² 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.

²³ 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 associations²⁴.
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 judiciary²⁵. 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 them²⁶. 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 held²⁷. 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 impartiality²⁸. 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 pronouncements²⁹, 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 ECHR³⁰. 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 offence³¹. Pronouncements on the accused person’s guilt before trial run contrary to Article 6 of the ECHR³².

²⁴ 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.

²⁵ 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.

²⁶ See already in the CCJE Opinion No. 3 (2002), para 40, cf. Bangalore Principles, para 2.4.

²⁷ See ECtHR *Olujic 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.

²⁸ Cf. ECtHR *Lavents v. Latvia*, 28.11.2002, Appl. no. 58442/00, § 119; *Buscemi v. Italy*, 16.9.1999, Appl. no. 29569/95, § 68.

²⁹ Commentary on the Bangalore Principles, para 136, see also paras 45, 65, 71; Bangalore Principles, paras 2.2, 2.4.

³⁰ 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.

³¹ See also ECtHR *Daktaras v. Lithuania*, 10.10.2000, Appl. no. 42095/98, § 41; *Butkevicius v. Lithuania*, 26.3.2002, Appl. no. 48297/99, § 50.

³² 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 journalists³³. 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 provoked³⁴. 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' questions³⁵. A judge should answer the legitimate expectations of the citizens through clearly reasoned decisions³⁶. 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 interest³⁷. 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 duties³⁸. The content and context of a given statement assume special relevance in this regard³⁹.
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 justice⁴⁰. 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 purposes⁴¹ and to express views and opinions on weaknesses in the application of the law and improving the law, as well as the legal system.

³³ CCJE Opinion No. 3 (2002), para 40.

³⁴ 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.

³⁵ Cf. Commentary on the Bangalore Principles, para 74.

³⁶ Cf. Commentary on the Bangalore Principles, para 74.

³⁷ Cf. ECtHR *Previti v. Italy* (dec.), 8.12.2009, Appl. no. 45291/06; cf. CCJE Opinion No. 18 (2015), para 42.

³⁸ Cf. CCJE Opinion No. 18 (2015), para 42; CCJE Opinion No. 3 (2002), paras 30 et seq, esp. 33.

³⁹ See the Report of the UN Special Rapporteur on the independence of judges and lawyers, 29 April 2019, A/HRC/41/48, para 42.

⁴⁰ See the Commentary on Bangalore Principles, para 156.

⁴¹ 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 powers⁴². 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 policy⁴³. 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 society⁴⁴. 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 issue⁴⁵.
50. Judges should exercise restraint⁴⁶ 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 question⁴⁷. 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 replying⁴⁸.
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 allegations⁴⁹. Moderation and propriety must guide the judge even in the dissemination of accurate information⁵⁰. 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.

⁴² 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.

⁴³ Commentary on the Bangalore Principles, para 138.

⁴⁴ Cf. ECtHR *Baka v. Hungary* [GC], 23.06.2016, Appl. no. 20261/12, § 165.

⁴⁵ CCJE Opinion No 23 (2020).

⁴⁶ Commentary on the Bangalore Principles of Judicial Conduct, para 138.

⁴⁷ 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.

⁴⁸ Cf. ECtHR *Morice v. France* [GC], 23.04.2015, Appl. no. 29369/10, § 128.

⁴⁹ 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.

⁵⁰ 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 office⁵¹. 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 council⁵².
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 case⁵³.
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 mandate⁵⁴. 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 impartiality⁵⁵. 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)⁵⁶ and No. 18 (2015)⁵⁷, 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 threat⁵⁸. It extends to both matters of internal and external independence.

⁵¹ See ECtHR *Briķe v. Latvia*, 29.6.2000, Appl. no. 47135/99.

⁵² Commentary on the Bangalore Principles, para 135.

⁵³ See ECtHR *Otegi Mondragon and Others v. Spain* (dec.), 6.11.2018, Appl. no. 4184/15 (et al).

⁵⁴ 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.

⁵⁵ 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.

⁵⁶ CCJE Opinion No. 3 (2002), para 34.

⁵⁷ CCJE Opinion No. 18 (2015), para 41.

⁵⁸ 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 fearlessly⁵⁹. 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 judge⁶⁰. 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.⁶¹ Taking this into account and depending on the issue and context, the council for the judiciary⁶², associations of judges⁶³, 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 proceedings⁶⁴.

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 misrepresentations⁶⁵. The CCJE endorses the position taken in the Bangalore Principles that judges should aim to inform the public about what judicial independence means⁶⁶. 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 practice⁶⁷.
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 role⁶⁸. 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 body⁶⁹. The European Network of Councils for the Judiciary (ENCJ) notes that individual judges should be reluctant to appear as a spokesperson in the media⁷⁰.
65. The CCJE takes the view that individual judges with appropriate communication skills may also explain the functioning and values of the judiciary⁷¹. In addition to educational fora⁷², they can use the

⁵⁹ CCJE Opinion No. 18 (2005), para 41.

⁶⁰ ECtHR *Żurek v. Poland*, 10.10.2022, Appl. no. 39650/18, § 222.

⁶¹ ECtHR *Żurek v. Poland*, 10.10.2022, Appl. no. 39650/18, § 222.

⁶² 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.

⁶³ Generally, associations of judges have an important role in defending judicial independence in public debate, see the CCJE Opinion No. 23 (2020), para 17.

⁶⁴ Cf. Commentary on Bangalore Principles, para 140.

⁶⁵ Cf. CCJE Opinion No. 7 (2005), paras 6-23; see also the ENCJ, Justice Society and the Media, Report of 2011-2012.

⁶⁶ Commentary on the Bangalore Principles, para 44.

⁶⁷ See also the ENCJ Report on Public Confidence and the Image of Justice (2018-2019), Chapter V, 5.3.

⁶⁸ CCJE Opinion No. 23 (2020), paras 44-46; CCJE Opinion No. 18 (2015), para 32; CCJE Opinion No. 7 (2005), paras 6-23.

⁶⁹ 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.

⁷⁰ ENCJ, Report 2011-2012, para 6.2.6.

⁷¹ Cf. ENCJ Report 2018-2019, Chapter V, 5.3.

media, including social media as an excellent tool for outreach and public education⁷³. In such cases, judges should thoroughly prepare in co-operation with judges appointed to take care of media relations or public information officers⁷⁴, and be mindful to observe the duties of judicial restraint, expressing themselves in a neutral and unbiased manner⁷⁵.

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 citizens⁷⁶.

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 services⁷⁷.

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 applies⁷⁸. 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 media⁷⁹. 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 media⁸⁰.
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.

⁷² Cf. Commentary on the Bangalore Principles, paras 156-157.

⁷³ 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.

⁷⁴ See ENCJ, Report 2011-2012, para 6.2.6.

⁷⁵ Cf. UNODC Non-Binding Guidelines on the Use of Social Media by Judges, para 1.

⁷⁶ 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.

⁷⁷ See Appendix to Recommendation CM/Rec(2022)11 of the Committee of Ministers on principles for media and communication governance, para 4.

⁷⁸ 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.

⁷⁹ Cf. CCJE Opinion No. 3 (2002), para 40, with respect to relations with the press.

⁸⁰ 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 communication⁸¹. 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 opinion⁸². 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 communication⁸³. The CCJE notes a significant risk that sharing personal content may adversely impact upon the reputation of a judge or the entire judiciary⁸⁴. 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 decision⁸⁵. 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 impartial⁸⁶. 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 office⁸⁷. 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 jurisdiction⁸⁸.

⁸¹ 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.

⁸² Cf. UNODC Non-Binding Guidelines on the Use of Social Media by Judges, para 6.

⁸³ Cf. Report of the UN Special Rapporteur on the independence of judges and lawyers, 29 April 2019, A/HRC/41/48, para 81.

⁸⁴ Cf. ENCJ Report 2018-2019, Chapter II, 2.1.

⁸⁵ See also UNODC Non-Binding Guidelines on the Use of Social Media by Judges, para 17.

⁸⁶ Cf. UNODC Non-Binding Guidelines on the Use of Social Media by Judges, para 18.

⁸⁷ Cf. UNODC Non-Binding Guidelines on the Use of Social Media by Judges, paras 5 and 18.

⁸⁸ 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 identity⁸⁹. 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 contexts⁹⁰.
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

⁸⁹ 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.

⁹⁰ 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

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)1 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)¹ as well as by the Universal Declaration of Human Rights² and other European and international instruments.³
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.⁴ 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.⁵
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

¹ European Convention on Human Rights, Art. 6(1); CCJE Opinion No. 14 (2011), para 32.

² Universal Declaration of Human Rights, Art. 10.

³ 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.

⁴ 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].

⁵ CCJE Opinion No. 14 (2011), paras 5, 15, 19, 25 and 27.

steps to reduce the prospect that those causes will arise in future.⁶ 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.⁷ 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.⁸

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.⁹ 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 characteristics¹⁰ 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.¹¹ 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.

⁶ 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'.

⁷ 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.

⁸ *Alassini (Environment and consumers)* [2010] 3 CMLR 17 at [64]-[65]; *Menini and Rampanelli (Approximation of laws Consumer protection: Judgment)* [2017] EUECJ C-75/16 (14 June 2017) at [61].

⁹ This could be facilitated, for instance, through the use of natural language processing (NLP).

¹⁰ Such as those referred to in Article 14 of the ECHR.

¹¹ 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.¹²
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.¹³ 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

¹² CCJE Opinion No. 18 (2015), paras 27-28 and 32. Private enterprise may and does also provide access to such information.

¹³ 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.¹⁴
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.¹⁵ 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.¹⁶ 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.

¹⁴ 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).

¹⁵ Digital Technologies for Better Justice – A Toolkit for Action (2020) of the Inter-American Development Bank at 22-23.

¹⁶ 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 technologies¹⁷ (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 accountability¹⁸.
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.

¹⁷ Such as predictive coding, which is used by parties in some member States to carry out e-disclosure.

¹⁸ 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.¹⁹ It requires the judiciary to be independent of the executive²⁰ and the legislative powers. It must also be independent of parties to litigation²¹. The judiciary must also be impartial.²² In both cases, the judiciary must not only be independent and impartial but also must be seen to be so.²³ Judicial independence, in both its institutional and individual aspects,²⁴ 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.²⁵ 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.²⁶ 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.

¹⁹ CCJE Opinion No. 3 (2002), para 9; CCJE Magna Carta of Judges (Fundamental Principles) (CCJE (2010)3), paras 2-3.

²⁰ *Sovtransavto Holding v. Ukraine* [2002] ECtHR 626 at [80].

²¹ *Ringeisen v. Austria* [1971] ECtHR 2 at [95].

²² *Kyprianou v. Cyprus* [2005] ECtHR 873 at [118]; *Piersack v. Belgium* [1982] ECtHR 6 at [30].

²³ *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].

²⁴ 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.

²⁵ CCJE Opinion No. 14 (2011), paras 32 and 36.

²⁶ 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 function²⁷.
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.²⁸ 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.²⁹

²⁷ Bias could result in cases not being allocated randomly but according to the parties' characteristics.

²⁸ CCJE Opinion No. 18 (2015), paras 27-29.

²⁹ *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.³⁰ 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.³¹ 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.

³⁰ *Micallef v. Malta* [2009] ECtHR 1571.

³¹ 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.³² 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.³³ 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.³⁴ 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.³⁵
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,³⁶ 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

³² CCJE Opinion No. 2 (2001).

³³ Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

³⁴ 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.

³⁵ CCJE Opinion No. 18 (2015), paras 20-22.

³⁶ 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 6.³⁷ 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.³⁸
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.³⁹ 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.

³⁷ *Marcello Viola v. Italy* (No. 45106/04) (5 October 2006) at [67]-[77].

³⁸ *Sakhnovskiy v. Russia* [2010] ECtHR 1673; *Sakhnovskiy v. Russia* ([2018] ECtHR 966; *Gorbunov v. Russia* [2016] ECtHR 231.

³⁹ 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.

Opinion No. 27 (2024)

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

Disciplinary liability of judges

I. Introduction

1. In accordance with the terms of reference given by the Committee of Ministers, the Consultative Council of European Judges (CCJE) has prepared the present Opinion on the disciplinary liability of judges.
2. Judicial liability is closely related to judicial independence. If the liability of judges is not clearly and adequately regulated, judicial independence is undermined. This arises in circumstances where judges may face potentially detrimental consequences for their security of tenure and / or career prospects in unclear circumstances. Disciplinary liability is important for holding judges accountable to the public for misconduct in office. It is a means by which society can ensure that the judiciary fulfils its function properly, thereby strengthening public trust in the judiciary.
3. The liability of judges has become a topic of great concern in recent years. Several decisions by the European courts have found that the executive has used disciplinary measures to silence or remove judges who did not decide in their favour.¹ In light of such recent developments, it is necessary to reflect on the basis, justification and limits of the disciplinary liability of judges.

II. Purpose and scope of the Opinion

4. The CCJE has already dealt with this issue in Opinion No. 3 on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality. The purpose of this Opinion is to take stock of all developments since the adoption of Opinion No. 3 (2002), to assess, evaluate and develop standards for the disciplinary liability of judges and to consider their impact on judicial independence. It provides a set of core principles and recommendations applicable to all member states and is designed to deal with situations where judicial independence and impartiality may be jeopardised.
5. This Opinion examines the following questions:
 - a. How is the proper application of judicial disciplinary liability delimited?
 - b. What is an adequate legislative framework and organisation of disciplinary proceedings against judges?
 - c. What are admissible grounds for disciplinary liability of judges?
 - d. What are the necessary procedural safeguards for judges in disciplinary proceedings?
6. The Opinion does not address civil or criminal liability of judges, which are sufficiently broad topics on their own.
7. While this Opinion does not address vetting, the CCJE cannot pass over this issue in complete silence. Vetting must not be used as a substitute for disciplinary measures. Nor should vetting be used to address corruption. The CCJE recognises, however, that vetting may be permissible as an extraordinary one-time procedure in the transition from an authoritarian to a democratic government governed by the rule of law.
8. The Opinion has been prepared on the basis of previous CCJE Opinions, particularly Opinions No. 3 (2002) and No. 18 (2015), the CCJE Magna Carta of Judges (2010) and relevant instruments of the Council of Europe, including but not limited to the European Charter on the Statute for Judges, 2023

¹ Cf. Court of Justice of the European Union (CJEU), 15.7.2021, C-791/19 - *Commission v. Poland* (Régime disciplinaire des juges), ECLI:EU:C:2021:596; ECtHR *Grzęda v. Poland* [GC], 15.3.2022, No. 43572/18.

Report of the Secretary General of the Council of Europe on the State of Democracy, Human Rights and the Rule of Law in Europe, 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 Independence of the Judicial System, the Evaluation Report of European Judicial Systems: 2024 Evaluation Cycle of the European Commission for the Efficiency of Justice (CEPEJ), the results of the Fourth Evaluation Round of the Group of States against Corruption (GRECO) in respect of judges, the Review of the Implementation of the Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality of the European Committee on Legal Co-operation (CDCJ) and the case law of the European Court of Human Rights (ECtHR). It also takes into account the UN Basic Principles on the Independence of the Judiciary, the Bangalore Principles of Judicial Conduct, the Report of the European Network of Councils for the Judiciary (ENCJ) on Independence, Accountability and Quality of the Judiciary, the OSCE Recommendations on Judicial Independence and Accountability (Warsaw Recommendations) and other relevant instruments.

9. The Opinion also takes into account the replies of CCJE members to the questionnaire on disciplinary liability of judges and the preliminary draft prepared by the expert appointed by the Council of Europe, Dr Jannika Jahn.

III. Delimiting the proper application of judicial disciplinary liability

10. The powers of a judge are linked to the values of truth, justice, fairness, and freedom.² Judges must perform their duties according to the highest standard of professional conduct in order to fulfil their constitutional role.³ The corollary of society entrusting the judiciary with such extensive powers is that there must be some means of holding judges accountable, and even removing them from office in cases of misconduct so serious as to justify such a course.⁴ This is particularly so in cases of judicial corruption, which fundamentally undermine public confidence in judicial impartiality and independence.⁵ Disciplinary liability is a means of ensuring that judges abide by their duties. It thereby contributes to maintaining public confidence in the administration of justice.
11. All three state powers are accountable to the society which they serve. Disciplinary liability of judges provides for the accountability of the judiciary. This does not mean, however, that the judiciary is subordinate to another power of the state. That would betray the judiciary's constitutional function of being a state power consisting of independent arbiters whose function is to decide cases impartially and according to law.⁶ It would also undermine the very foundation of a state governed by the rule of law that guarantees specific rights and freedoms to its citizens.⁷
12. As a general yardstick, the CCJE underlines that the individual rights of judges and their functional legitimacy, which serves as justification and limitation of their state power, should set the appropriate limits to the disciplinary liability of judges. Disciplinary liability may not interfere with the legitimate exercise of individual rights of judges such as their freedom of expression as enshrined in Article 10 of the European Convention on Human Rights (ECHR), their right to private life under Article 8 of the ECHR or their right to a fair trial pursuant to Article 6 of the ECHR.⁸ Additionally, reasons for judicial disciplinary liability must be inherently linked to the judiciary's constitutional role. This includes the need to ensure that judges act as independent and impartial arbiters, respecting the rule of law, and that they generally contribute to the proper functioning of the administration of justice.
13. Core principles follow from this delimitation of the proper use of judicial disciplinary liability:
 - a. disciplinary liability is necessary to maintain confidence in the judiciary;
 - b. disciplinary liability must not undermine the independence of the judiciary;
 - c. disciplinary liability is important to ensure the proper administration of justice in accordance with the rule of law;
 - d. the scope of disciplinary liability must be clearly defined in order to be consistent with the rule of law;

² CCJE Opinion No. 18 (2015), para 18.

³ In its Opinion No. 3 (2002), the CCJE discussed such standards and principles of professional conduct.

⁴ CCJE Opinion No. 18 (2015), para 33.

⁵ CCJE Opinion No. 18 (2015), para 33.

⁶ CCJE Opinion No. 18 (2015), para 20.

⁷ Cf. ECtHR, *Denisov v. Ukraine* [GC], 25.9.2018, No. 76639/11, paras 83 ff.; *Baka v. Hungary*.

⁸ Cf. ECtHR, *Denisov v. Ukraine* [GC], 25.9.2018, No. 76639/11, paras 83 ff.; *Baka v. Hungary*.

- e. procedural institutions involved in disciplinary proceedings must respect the separation of powers and the proper administration of justice;
- f. the legitimate exercise of a judge's legal rights must not give rise to disciplinary liability;
- g. any disciplinary sanction imposed on a judge must be proportionate.

IV. Legislative framework and organisation of disciplinary proceedings against judges

14. The answers of the CCJE member states to the questionnaire show that there is a legislative framework for disciplinary proceedings against judges in almost all states. In some countries, the respective provisions are enshrined in the constitution; in most countries they are contained in statutory law with or without additional decrees, ordinances or rules. In some, but not all, states judges or judicial associations have participated in the drafting of these laws.
15. The organisation of disciplinary proceedings varies from country to country. Depending on their similarities and differences, the systems of disciplinary organisation can be broadly divided into two categories: the council system and the court system. The council system refers to a system in which a Council for the Judiciary makes the final decision, while in the court system it is a general or disciplinary tribunal. In the court system, it is usually the Ministry of Justice or a prosecutor general who initiates disciplinary proceedings against a judge before the disciplinary tribunal. In the council system, the group of persons and institutions that can initiate proceedings before the judicial council is much larger. It ranges from the Ministry of Justice to court presidents, parties to proceedings, individuals or lawyers. In both systems, complaints or information about judicial misconduct can be submitted formally or informally to the competent institution without personal restrictions.
16. In some council systems, there is an appeal procedure within the Council for the Judiciary; in others, the appeal goes to a higher court, even the constitutional court under certain circumstances. In several countries, court presidents are endowed with the authority to take a disciplinary decision in cases of warnings or more minor reprimands. In a few countries, disciplinary proceedings are handled by a parliamentary committee for judicial discipline, by the Chief Justice, respectively the President of Appeals, or by the Governmental Disciplinary Board for Higher Officials. In a few other cases, Ombudsmen and the Chancellor of Justice may initiate disciplinary proceedings.
17. In the vast majority of countries, there are safeguards to protect the independence and impartiality of the institutions involved in the disciplinary proceedings, particularly the deciding body. In some countries, safeguards are provided to ensure that all institutions are independent after the initiating stage, including the investigative body and the decision-making body. In other countries, some risks for a certain form of politicisation of the proceedings are pointed out. This is the case when the investigating prosecutors are subordinate to the Ministry of Justice, when the same person initiates and decides on the proceedings as a member of the Council for the Judiciary, or when members of the Council for the Judiciary are appointed by Parliament. A similar risk exists if the members of the Council for the Judiciary are appointed by the executive.
18. The CCJE highlights the importance of having robust safeguards at the constitutional or legislative level as regards the disciplinary liability of judges and to implement these safeguards in practice.⁹ It stresses that the independence of judges must be properly safeguarded against arbitrary and improper disciplinary practices being exercised against judges. The material and procedural provisions must be established in law. In the process of the preparation of disciplinary laws for judges, it is essential that there is meaningful consultation with judges, including their associations¹⁰ which should be provided with the opportunity to consider and comment on intended legislation in matters connected with the status of judges.¹¹
19. The body that is responsible for the initiation of a disciplinary procedure and its investigation should not be the same body deciding the disciplinary matter. Once a member of the public has made the complaint, this individual should not have any standing in the subsequent disciplinary proceedings.¹²

⁹ The CDCJ's Review of the Implementation of the Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality, paras 223-224; see also, more generally CCJE Opinion No. 1 (2001) and Opinion No. 6 (2004).

¹⁰ CCJE Opinion No. 18 (2015), para 31.

¹¹ CCJE Opinion No. 23 (2020), Chapter IX, clause 7.

¹² This does not apply to complaint systems in some member states where, for example, a citizen may file a complaint regarding the behaviour of a judge, provided that under the system: (1) the complaint cannot concern the decisions

The CCJE recommends that member states have a specific investigatory body or person with the 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. The investigatory body should be free from any political influence. In some legal systems where the administration of justice is under the authority of the Ministry of Justice, it may pose a real risk in this respect when disciplinary prosecutors are appointed by the government or authorities linked to the government¹³ and when they are systematically subordinated to the executive branch in charge of the administration of justice.

20. Judges facing a disciplinary charge must have the right to access an independent tribunal or authority established by law pursuant to Article 6 of the ECHR.¹⁴ It is highly important that any influence of the executive or parliamentary branch of government on the decision-making body is excluded in such disciplinary proceedings.¹⁵ When the disciplinary body making the decision is not itself a court, then its members should satisfy the general requirements of independence and impartiality. The respective criteria include proper appointment, a fixed term of office, security of tenure, a guarantee against interference, the appearance of independence and the possibility of recusal in case of bias and a substantial representation of judges within such body.¹⁶ Where they exist, Councils for the Judiciary are best placed in this regard.¹⁷
21. As regards the appointment procedure, the CCJE confirms its position that members of disciplinary bodies that are not courts should be appointed by an independent authority that mainly consists of judges who were appointed by other judges.¹⁸
22. In relation to the composition of the deciding body, the CCJE advocates that a Minister of Justice and/or other members of the executive must not be a member of the Council for the Judiciary, when it acts as a disciplinary body, especially if he or she is also authorised to initiate proceedings against a judge.¹⁹ This would not only be a problem for the independence and impartiality of the judiciary, but also for the constitutional principle of separation of powers. Members of the disciplinary body must be excluded from the preliminary inquiry in a disciplinary case, because such a duplication of functions could cast objective doubt on the impartiality of those members.²⁰ Representatives of the prosecution, i.e. the prosecutor general and those delegated by the prosecution authorities, who are responsible at the investigative stage of disciplinary proceedings, should not be included in the composition of the disciplinary body for judges. This would conflate the investigative and accusatory function on the one hand and the judicial function on the other hand.²¹
23. There must be a review body/tribunal with full jurisdiction²² to hear appeals, i.e. it can review both the procedure and the merits of the decision and must be independent and impartial. The review body must have jurisdiction to quash disciplinary decisions and to take any further remedial steps as are appropriate. It is not sufficient if a review body may only declare the previous decision to be unlawful.²³

made by the judge in a case, (2) vexatious and other ill-founded complaints are effectively and expeditiously dismissed, and (3) the rights of the judge are properly safeguarded. For vexatious and other ill-founded complaints, see further in para 32.

¹³ In some member states, even the court president may have a link to the executive.

¹⁴ Cf. ECtHR *Pajak v. Poland*, 24.10.2023, No. 25226/18, 25805/18, 8378/19, 43949/19, paras 167-200, esp. 194-195; ECtHR *Baka v Hungary* [GC], No 20261/12, 23.6.2016, paras 100-106; cf. *Vilho Eskelinen and Others v. Finland*, 19.4.2007, No. 63235/00, para 62; cf. Recommendation CM/Rec(2010) 12, para 69.

¹⁵ Cf. ECtHR *Reczkowicz v. Poland*, 22.7.2021, No. 43447/19; ECtHR *Tuleya v. Poland*, 6.7.2023, Nos. 21181/19, 51751/20, para 340; ECtHR *Miroslava Todorova v. Bulgaria*, 19.10.2021, No. 40072/13. Cf. GRECO's Ad hoc Report on Poland (Rule 34), para 59 (iv); GRECO's Fourth Evaluation Round: corruption prevention in respect of members of parliament, judges and prosecutors, Interim Compliance Report on Poland 2021, para 73.

¹⁶ Cf. ECtHR, *Denisov v. Ukraine* [GC], 25.9.2018, No. 76639/11, paras 60-65.

¹⁷ Venice Commission Report on the Independence of the Judicial System. Part I: The Independence of Judges adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), para 43.

¹⁸ Cf. CCJE Opinion No. 3 (2002), para 77; cf. ECtHR *Denisov v. Ukraine* [GC], 25.9.2018, No. 76639/11, paras 68-72; ECtHR, *Volkov v. Ukraine*, 9.1.2013, No. 21722/11, para 112.

¹⁹ Cf. *Pajak v. Poland*, 24.10.2023, No. 25226/18, 25805/18, 8378/19, 43949/19.

²⁰ Cf. ECtHR *Denisov v. Ukraine* [GC], 25.9.2018, No. 76639/11, paras 68-72; ECtHR *Volkov v. Ukraine*, 9.1.2013, No. 21722/11, para 115. Venice Commission CDL-AD(2015)042, para 73.

²¹ ECtHR *Denisov v. Ukraine* [GC], 25.9.2018, No. 76639/11, paras 68-72; ECtHR *Volkov v. Ukraine*, 9.1.2013, No. 21722/11, para 114.

²² The Opinion refers here to the formulation of the ECtHR in *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], 6.11.2018, 55391/13 57728/13 74041/13, paras 176 et seq.

²³ ECtHR *Denisov v. Ukraine* [GC], 25.9.2018, No. 76639/11, para 74; ECtHR *Volkov v. Ukraine*, 9.1.2013, No. 21722/11, paras 124-129.

It is essential that the review body excludes members who were also members of the body that took the original disciplinary proceedings.²⁴

24. In member states where there are lay members, the majority of the membership should be members of the judiciary.

V. Grounds for disciplinary liability

25. In most CCJE member states, the grounds for disciplinary liability are prescribed in law and cover judicial and extrajudicial misconduct. The content and wording may vary. Due to cultural diversity, which affects the public's expectations of the behaviour of judges, the grounds for disciplinary liability differ, particularly in relation to the private behaviour of judges. While judges may express politically controversial opinions on social media in one country, they may not do so in another country. In some countries, grounds for judicial liability are enumerated in a strictly formulated exhaustive list, in other countries they are enshrined in formulations that are more open-ended.
26. Judges have the right to freedom of expression under Article 10 of the ECHR as further specified in Opinion No. 25 (2022). The legitimate exercise by judges of their rights under Article 10 of the ECHR must not give rise to disciplinary liability.²⁵ The right to freedom of expression includes the right of judges to speak out publicly about disciplinary proceedings against themselves or their colleagues. Grounds for disciplinary liability must not derogate either from a judge's entitlement to private and family life in accordance with Article 8 of the ECHR.
27. In each member state, the law should define expressly²⁶ and as far as possible in specific terms,²⁷ the grounds on which disciplinary proceedings against judges may be initiated. The possibility of introducing *ad hoc* grounds that apply retroactively must be ruled out. Vague provisions (such as the "breach of oath" or "unethical behaviour") lend themselves to an overbroad interpretation and abuse, which may be dangerous for the independence of the judges.²⁸ The regular publication of disciplinary decisions may help further clarify the legislative provisions.²⁹
28. A judge's decision, including the interpretation of the law, assessment of facts or weighing of evidence and/or departing from established case law, must not give rise to disciplinary liability, except in cases of malice, wilful default or serious misconduct.³⁰ Likewise, the submission of a preliminary reference procedure pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU) or the request for an Advisory Opinion of the ECtHR must not give rise to judicial liability. Any act that affects the possibility of resorting to the interpretation of the Court of Justice of the European Union (CJEU) represents a serious attack on the rule of law. Grounds for disciplinary liability of judges must refer to judicial conduct that contradicts one of the basic values enshrined in the Convention: independence, impartiality, propriety, integrity, equality, non-discrimination, competence and diligence.³¹ The CCJE cautions against justifying grounds of disciplinary liability of judges by reference to the reputation of the judiciary, except when it is intended to refer to the authority of and public confidence in the judiciary.
29. The CCJE stresses the importance of a threshold criterion to demarcate misconduct that potentially justifies the imposition of disciplinary sanctions from other forms of misbehaviour.
30. Ethical standards should be clearly distinguished from misconduct that justifies disciplinary sanctions. Since the purpose of a code of ethics is different from that achieved by a disciplinary procedure, a code of ethics should not be used as a tool for disciplining judges. Where ethical standards and professional rules of conduct converge with respect to extrajudicial conduct potentially compromising the public trust in the judiciary the threshold criterion helps distinguish between behaviour that is unethical and behaviour that should be subject to disciplinary liability.

²⁴ ECtHR *Kozan v. Turkey*, 1.3.2022, No. 16695/19, para 79.

²⁵ CCJE Opinion No. 25 (2022), para 35 and recommendations.

²⁶ Venice Commission CDL-AD(2016)009, para 34.

²⁷ CCJE Opinion No. 3 (2002), para 77.

²⁸ Venice Commission CDL-AD(2016)013, paras 24-27; CDL-AD(2018)032, para 78.

²⁹ Venice Commission CDL-AD(2016)013, para 27.

³⁰ Recommendation CM/Rec(2010)12, para 66; CCJE Opinion No. 3 (2002) para 60. Health issues or other particular circumstances should be taken into account when specifying malice, wilful default and serious misconduct.

³¹ Cf. the Bangalore Principles of Judicial Conduct (2002); CCJE Opinion No. 21 (2018). It should be noted that any systemic backlog of cases must not be interpreted as amounting to serious misconduct of a judge.

VI. Procedural safeguards in disciplinary proceedings against judges

31. The procedure can be roughly divided into four phases: the information/complaint phase, the investigation phase, the report/initiation phase and the decision phase. In most countries, judges are informed in the first or second phase of the proceedings. Only some countries have a formalised complaint mechanism. The rest of the proceedings is formally regulated in the majority of member states. In view of the diverse organisation of the proceedings, different bodies are involved in the four phases of the proceedings. In some countries, a Panel of Inquiry convened by the Council for the Judiciary leads the investigation phase which ends with a report that forms the basis for the decision on the disciplinary complaint by the Council for the Judiciary. In other countries investigations by the prosecutor's office end with a specific charge, which is decided by a court. While in some countries disciplinary proceedings follow a civil law procedure, in others they follow a criminal or administrative law procedure. Only in some countries are disciplinary cases decided after a public hearing. In many countries where the final decisions are made public, they are anonymised.
32. It is essential to avoid any abuse of disciplinary proceedings. Therefore, the initiation of disciplinary proceedings has to rest on valid legal grounds. The grounds have to meet the criteria of legality, i.e. they must be clearly defined, precise and foreseeable in their application, so as to allow a judge to foresee to a reasonable degree the disciplinary consequences which a given action may entail.³² Vexatious complaints or those that relate solely to a judge's decision or conduct in proceedings before him or her (i.e. error in judgment, procedure, substantive law) should be rejected as inadmissible and be dismissed expeditiously. Member states should be mindful that allowing complaints as a means of instigating disciplinary proceedings might lead to a backlog of complaints with detrimental effects on the timely resolution of complaints.³³ In such cases, the CCJE advises member states to provide a filtering system for dealing with complaints.
33. The CCJE advocates for clear time limitations in respect of disciplinary proceedings. With respect to the judicial office, this legal certainty supports the independence of a judge.
34. The CCJE highlights that all general procedural guarantees enshrined in Article 6 of the ECHR apply to disciplinary proceedings against judges.³⁴ Member states must prescribe clear procedural rules in law that apply to disciplinary proceedings against judges.
35. The CCJE stresses that judges must have the opportunity to effectively participate in disciplinary proceedings against them. Judges are entitled to be informed and to be heard, and to defend themselves. The CCJE calls on the member states to ensure that equality of arms is established in adversarial proceedings. To this end, a judge must be entitled to legal representation. If witness evidence is permitted in the hearing, witnesses from both sides must be treated equally.³⁵ Furthermore, a judge can only be held liable for disciplinary misconduct if this conduct is proven.
36. The public character of proceedings before judicial bodies protects litigants against the administration of justice in secret in the absence of public scrutiny.³⁶ Hence, the CCJE underlines that whilst the investigations should be confidential, the hearing should be held in public, unless there are reasons prescribed in Art. 6 ECHR for a closed hearing.³⁷ Disciplinary decisions should be properly reasoned, i.e. address all relevant aspects brought forward by the investigatory body and the judge.³⁸ They should be publicly announced and published. When published, names may be anonymised. The decisions should also be complemented with statistics on disciplinary decisions.³⁹ The publicity of proceedings and decisions is important for the transparency of disciplinary proceedings and for strengthening public confidence in the proper administration of justice.

³² ECtHR *Khlaifia and Others v. Italy* [GC], 15.12.2016, 16483/12, para 92; *J.N. v. The United Kingdom*, 19.5.2016, 37289/12, para 77; *Del Río Prada v. Spain* [GC], 21.10.2013, 42750/09, para 125; *Medvedyev and Others v. France* [GC], 29.3.2010, 3394/03, para 80.

³³ Cf. Minimum Judicial Standards V Disciplinary proceedings and liability of judges ENCJ Report 2014-2015, p. 25.

³⁴ Cf. ECtHR *Baka v. Hungary* [GC], 23.6.2016, No. 20261/12, paras 100-106; cf. *Vilho Eskelinen and Others*, cited above, § 62.

³⁵ ECtHR *Ankerl v. Switzerland*, 23.10.1996, No. 17748/91, para 38; by contrast, see *Dombo Beheer B.V. v. the Netherlands*, 27.10.1993, No. 14448/88, para 35.

³⁶ ECtHR *Fazliyski v. Bulgaria*, 1.6.2010, No. 40908/05, para 69.

³⁷ ECtHR *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], 6.11.2018, Nos. 55391/13 57728/13 74041/13, para 208.

³⁸ Cf. *Simić v. Bosnia-Herzegovina* (dec.), 15.11.2016, No. 75255/10, paras 35-36.

³⁹ Cf. CCJE Opinion No. 3 (2002), paras 15 and 23.

37. Member states should conduct the proceedings within a reasonable timeframe. This means that justice should be administered without delays as these might jeopardise its effectiveness and credibility.⁴⁰ The reasonable time depends on the complexity of the case and all relevant circumstances as well as the importance of the matter for the complainant.⁴¹ Disciplinary proceedings initiated against a judge must be brought to a timely conclusion. In the event of excessive delay, a procedure must be available to the judge to bring an application to have the proceedings dismissed.
38. The CCJE reiterates its position that judges should be granted the right to appeal against disciplinary decisions and sanctions.⁴²

VII. Disciplinary sanctions against judges

39. In most states there is an exhaustive list of potential disciplinary sanctions for judges. However, some interpretative leeway remains for the application of sanctions on a case-by-case basis. In all states, the principle of proportionality applies to the determination of the appropriate sanction. Sanctions may include a warning, reprimand, appropriate fine, reassignment, suspension from office, early (compulsory) retirement and dismissal.
40. The CCJE reiterates that disciplinary sanctions should be clearly defined in law, easily accessible and enumerated in an exhaustive list.⁴³ The principle of proportionality must guide the decision.⁴⁴ It requires a balancing exercise between the seriousness of the offence and its consequences on the one hand, and the quality and the amount of the sanction on the other.⁴⁵ The dismissal of a judge should only be ordered as a last resort in exceptionally serious cases.⁴⁶ A transfer and/or redeployment (even on a temporary basis) of a judge, or a demotion can only be justified in cases of serious judicial misconduct.⁴⁷ The CCJE advocates against reduction of salary as a disciplinary sanction because judges must be remunerated equally for like work.
41. All mitigating and aggravating factors of the individual case must be taken into account in order to clearly determine the responsibility of the judge in light of the specific circumstances under which the disciplinary offense was committed.
42. In all cases, the potential “chilling effect” that a certain sanction may have on the individual judge and on other judges must be considered when assessing the adequate sanction.⁴⁸
43. The CCJE stresses that certain measures that are intended to or may have the same effect as disciplinary sanctions should be handled as such with all judicial rights and procedural safeguards applying.⁴⁹ This also applies to any measure whatever its form which is intended to sanction a judge.

⁴⁰ ECtHR *Scordino v. Italy* (no. 1) [GC], 29.3.2006, No. 36813/97, para 224.

⁴¹ ECtHR, *Comingersoll S.A. v. Portugal* [GC], 6.4.2000, No. 35382/97; ECtHR *Frydlender v. France* [GC], 27.6.2000, No. 30979/96, para 43; ECtHR *Sürmeli v. Germany* [GC], 8.6.2006, No. 75529/01, para 128.

⁴² Recommendation CM/Rec(2010)12, para 69; cf. GRECO's Fourth Evaluation Round: corruption prevention in respect of members of parliament, judges and prosecutors: conclusions and trends (2017), p. 18.

⁴³ CCJE Opinion No. 3 (2002), para 77; cf. as regards the application of the principle of proportionality, Recommendation CM/Rec(2010)12, para 69; Venice Commission CDL-AD(2014)039, para 72.

⁴⁴ Ibid.

⁴⁵ Venice Commission CDL-AD(2014)039, para 72.

⁴⁶ Cf. Venice Commission CDL-AD(2015)042, para 113; GRECO's Fourth Evaluation Round: corruption prevention in respect of members of parliament, judges and prosecutors: conclusions and trends (2017), p. 18.

⁴⁷ Cf. CEPEJ Evaluation Report of European Judicial Systems, 2022 Evaluation Cycle (2020 data), p. 50. The irremovability of a judge does not mean that a judge may not be assigned a different task. The irremovability is a key element for upholding judicial independence, ECtHR *Baka v. Hungary* [GC], 23.6.2016, No. 20261/12, para 172; CCJE Opinion No. 1 (2001) paras 57-59.

⁴⁸ Cf. ECtHR *Baka v Hungary* [GC], 23.6.2016, No. 20261/12, para 173; *Żurek v. Poland*, 16.6.2022, [39650/18](#), para 227; *Kozan v. Turkey*, 1.3.2022, No. 16695/19, para 68; *Sarisu Pehlivan v. Türkiye*, 6.6.2023, No. 63029/19, para 48.

⁴⁹ This is the case, for example, when the retirement age for judges is lowered and the Ministry of Justice or a body under its political control is authorised to decide whether the term of office of a judge, for whom a higher retirement age was originally set, is “extended” under the new law until the end of the original term of office. See ECtHR *Pajak v. Poland*, 24.10.2023, No. 25226/18, 25805/18, 8378/19, 43949/19, paras 167-200.

VIII. Recommendations

1. Judges must perform their duties according to the highest standards of professional conduct in order to fulfil their constitutional role. Disciplinary liability is a means of ensuring sure that judges abide by their standards of professional conduct.
2. Disciplinary liability must not undermine the independence of the judiciary.
3. The disciplinary liability of judges is important to ensure the proper administration of justice in accordance with the rule of law and necessary to maintain confidence in the judiciary.
4. Member states must have robust safeguards at the constitutional or legislative level as regards the disciplinary liability of judges and implement these safeguards in practice.
5. Procedural institutions involved in disciplinary proceedings must respect the separation of powers and the proper administration of justice. Judges and their associations must be consulted on disciplinary laws and regulations.
6. The body that is responsible for the initiation of a disciplinary procedure and investigation must not be the same body deciding the disciplinary matter. Member states should have a specific investigatory body or person with the responsibility for receiving complaints, for obtaining the representations of a judge and for considering whether there is a sufficient case against a judge to call for the initiation of such proceedings.
7. Judges facing a disciplinary charge must have the right to access an independent tribunal or authority established by law pursuant to Article 6 of the ECHR.
8. There must be an independent and impartial review body/tribunal which has jurisdiction to quash disciplinary decisions and to take any further steps to remedy the negative effects of such decisions, such as immediate reinstatement.
9. The scope of disciplinary liability must be clearly defined in order to be consistent with the rule of law. The law should define expressly and as far as possible in specific terms, the grounds on which disciplinary proceedings against judges may be initiated.
10. The legitimate exercise of a judge's legal rights must not give rise to disciplinary liability.
11. Reasons for judicial disciplinary liability must be inherently linked to the judiciary's constitutional role. This includes the need to ensure that judges act as independent and impartial arbiters, respecting the rule of law, and that they generally contribute to the proper functioning of the administration of justice.
12. A judge's decision, including the interpretation of the law, assessment of facts or weighing of evidence, must not give rise to disciplinary liability, except in cases of malice, wilful default or serious misconduct. The submission of a preliminary reference procedure pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU) and the request for an Advisory Opinion to the ECtHR must never give rise to judicial liability.
13. A threshold criterion to demarcate misconduct that potentially justifies the imposition of disciplinary sanctions from other forms of misbehaviour should be established.
14. Ethical standards should be clearly distinguished from misconduct that justifies disciplinary sanctions.
15. Member states must prescribe clear procedural rules in law that apply to disciplinary proceedings against judges. A filtering system must be provided for dealing with complaints, ensuring that vexatious or unsubstantiated claims are dismissed expeditiously.
16. In cases of excessive delay, procedures must be available to the judges to bring an application to have the proceedings dismissed.
17. Judges must have the opportunity to participate effectively in disciplinary proceedings against them and to have legal representation.

18. They must have the right to appeal against disciplinary decisions and sanctions.
19. Disciplinary sanctions must be clearly defined in law, easily accessible and enumerated in an exhaustive list.
20. Any disciplinary sanction imposed on a judge must be proportionate.
21. The dismissal of a judge should only be ordered as a last resort in exceptionally serious cases.
22. In all cases, the potential “chilling effect” that a certain sanction may have on the individual judge and on other judges must be considered when assessing the adequate sanction.
23. Vetting must not be used as a substitute for disciplinary measures. Nor should vetting be used to address corruption.

Opinion No. 28 (2025)

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

Importance of judicial well-being for the delivery of justice

II. Introduction: background, motivation, purpose and scope of the Opinion

1. 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 on the importance of judicial well-being for the delivery of justice.
2. A well-functioning, independent, and impartial judiciary is central to the proper functioning of any democratic society. It is a fundamental principle and right guaranteed by Article 6 of the European Convention on Human Rights (ECHR) that everyone is entitled to a fair and public hearing by an independent and impartial tribunal.¹ These core tenets of judicial independence and impartiality underpin the proper administration of justice and the rule of law. Their utmost importance is reflected by the fact that they are protected internationally by the ECHR,² the Universal Declaration of Human Rights,³ the International Covenant on Civil and Political Rights,⁴ and domestic constitutional, statutory and common laws.
3. By virtue of their office, judges serve a vital function in society as guardians of the rule of law. Entrusted to protect fundamental human rights and the proper administration of justice, they also keep vital checks and balances on the executive power, ensuring such power is not exercised arbitrarily or without accountability.
4. In recent years, however, the judiciary has faced acute challenges which threaten the foregoing fundamental principles and rights. The COVID-19 pandemic, growing democratic instability, war and global conflict pose inherent threats to the rule of law, which judges are instrumental in protecting. Lack of respect for judicial independence by government, parliament, the media, and social media is an increasing issue.⁵ A natural consequence of the right to a public hearing guaranteed by Article 6 of the ECHR is that judges are exposed to heightened external scrutiny and challenge. Furthermore, the proliferation of misinformation damages judicial reputation and creates pressure on judicial independence and decision making. Against this backdrop, concerns have arisen regarding judges' well-being, including their personal safety and security. These concerns have direct implications on the quality and efficiency of judicial work and the integrity and proper functioning of the judicial system.
5. Significant internal and external pressures can potentially undermine judicial independence and impartiality, and judges' resilience to withstand such pressures.⁶ Such pressures may also compromise a judge's ability to engage with the impartial assessment of evidence and interpretation of the law required to make well-reasoned judgments.⁷ Too heavy workloads, excessive time pressure, and fatigue can lead to cognitive depletion, potentially impairing the quality of judicial decision making and the ability of judges to manage their workload effectively and maintain efficiency in courtroom proceedings. When judges are well and able to function at their best, the judiciary is seen as competent and fair, which in turn strengthens public trust and confidence in the justice system.⁸

¹ CCJE Opinion No. 3 (2002), para 14; see also CCJE Magna Carta of Judges (Fundamental Principles) of 2010, paras 1-2.

² European Convention on Human Rights, Art. 6.

³ Universal Declaration of Human Rights, Art. 10.

⁴ International Covenant on Civil and Political Rights, Art. 14.

⁵ European Network of Councils for the Judiciary (ENCJ), Survey among judges on the independence of the judiciary (2025), pages 46-48.

⁶ CCJE Opinion No. 25 (2022), para 60.

⁷ CCJE Opinion No. 11 (2008), para 34.

⁸ CCJE Opinion No. 1 (2001), para 12.

6. The Opinion therefore examines how the well-being of judges may be protected and promoted to enhance the quality and efficiency of work and support judicial independence and impartiality as fundamental components of a proper functioning judicial system.⁹
7. The Opinion has been prepared on the basis of previous CCJE Opinions,¹⁰ Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, the documents of the European Commission for Democracy through Law (Venice Commission), European Commission for the Efficiency of Justice (CEPEJ) and European Committee on Legal Co-operation (CDCJ). It also considers the United Nations Basic Principles on the Independence of the Judiciary, the Bangalore Principles of Judicial Conduct, the Nauru Declaration on Judicial Well-Being, and other relevant instruments relating to occupational health and safety.¹¹
8. Finally, the Opinion takes account of member states' responses to the questionnaire on the importance of judicial well-being for the delivery of justice and is based on a preliminary draft prepared by the CCJE expert appointed by the Council of Europe, Ms. Lucinda Soon.

III. Defining judicial well-being

9. For the purposes of this opinion, judicial well-being is defined as a continuous process enabling judges to thrive across all aspects of their professional lives, and at the very least to maintain the physical and psychological health required to fulfil their judicial duties effectively and efficiently, with independence, impartiality and integrity. Judicial well-being is multidimensional, comprising positive facets such as work engagement, motivation, and work satisfaction, as well as negative facets including psychological strain, anxiety, depression, burnout, and work-induced trauma.
10. The stringent demands of judicial work can lead to judges experiencing profound stress, but the degree to which stress is experienced is contingent on the availability of physical, psychological, social or organisational aspects of work that can help them achieve their work goals, reduce work demands, and stimulate personal growth, learning and development.
11. Despite their heavy work demands, judges experience several sources of satisfaction which play a positive role in their well-being. Purpose and meaningful work were most frequently identified in the questionnaire responses of CCJE member states as a positive feature of judicial work. Responses repeatedly acknowledged immense satisfaction arising from the public service nature of judicial work, administering justice and upholding the rule of law.
12. Other prevalent sources of satisfaction for judges include autonomy and independence in decision making, exposure to intellectually stimulating and challenging work, professional growth, career security, recognition and respect, and being part of a judicial community that offers collegiality and support. These sources of satisfaction, or positive features of judicial work, offer vital mechanisms by which judges experience well-being.

IV. The challenges of judicial work

13. Judicial work is inherently complex and demanding, requiring judges to carry out their roles under a multitude of structural, procedural, and societal pressures. This section examines these challenges and their impact on judicial well-being. Considering factors to minimise the experienced challenges of

⁹ European Union Charter of Fundamental Rights, Art. 47; Inter-American Convention on Human Rights, Art. 8; Mount Scopus International Standards of Judicial Independence, Principle 1.1.

¹⁰ In particular the CCJE Magna Carta of Judges (2010); Opinion No. 1 (2001) concerning the independence of the judiciary and the irremovability of judges; Opinion No. 2 (2001) on the funding and management of courts; Opinion No. 3 (2002) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality; Opinion No. 6 (2004) on fair trial within a reasonable time; Opinion No. 11 (2008) on the quality of judicial decisions; CCJE Opinion No. 17 (2014) on the evaluation of judges' work, the quality of justice and respect for judicial independence; Opinion No. 18 (2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy; Opinion No. 25 (2022) on freedom of expression of judges; and Opinion No. 26 (2023) on moving forward: the use of assistive technology in the judiciary.

¹¹ Including the International Labour Organization Occupational Safety and Health Convention, 1981 (No. 155) and the International Labour Organization Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187).

judicial work is particularly important owing to the demanding nature of the work and the typically limited funding available to meet these demands.

(i) Workload and time pressures

14. Heavy workloads, long working hours, and time pressure are significant stressors affecting judges.¹² These demands can compromise the quality of judicial reasoning and decision making if judges do not have adequate time to prepare their decisions.¹³ They are also a major issue affecting judicial independence and the right to a fair hearing within a reasonable time under Article 6 of the ECHR.¹⁴ Independence may be severely diminished if judges lack the time to conduct procedures in the manner they deem necessary for a fair trial.¹⁵
15. Undue pressure to expedite proceedings and reach production targets can influence judicial independence by creating implicit incentives to prioritise efficiency, confusing the quality of justice with an overemphasis on productivity.¹⁶ Under such pressures, judges can experience excessive conflict between the quality and quantity of work.¹⁷
16. In part, these challenges are amplified by the increasing complexity of legal systems. While judicial work inherently requires judges to work in an environment of legal and interpersonal conflict, the escalation of such conflicts in modern society have stimulated a growth in the number of cases requiring judicial intervention, with an increasingly overwhelming volume of documentation to analyse and evaluate. This growing complexity combined with the proliferation of cases appearing before the courts has direct implications on the right to a fair trial within a reasonable time.

(ii) Exposure to traumatic material

17. Exposure to traumatic material in matters including those relating to criminal, family, immigration and asylum law can present a higher risk of judicial stress. These cases typically involve allegations of serious violent crimes, war crimes, sexual abuse and exploitation, fatal tragedies, custody disputes, parental violence, child welfare issues, human trafficking and cruelty. In such matters, where judges are routinely dealing with vulnerable individuals who have undergone enormously traumatic experiences, the vicarious trauma experienced by judges can significantly impair their well-being. The ability to manage heightened emotional demands may be exacerbated by work pressures and time constraints.¹⁸

(iii) The use of artificial intelligence (AI) and other assistive technologies

18. In previous Opinions, the CCJE emphasised the importance of developing and using technology in ways that maintain and enhance judicial autonomy independence, impartiality, and the rule of law.¹⁹
19. Poor judicial well-being can lead to an inappropriate over-reliance on AI and other technologies. This may be particularly pronounced when judges are under extreme stress and pressure such that their emotional and cognitive resources are depleted. In these circumstances, judges may be tempted to resort to relying on technology without applying the necessary decision-making oversight to the

¹² Global Judicial Integrity Network, UNODC. Exploring linkages between judicial well-being and judicial integrity (2022), Geneva.

¹³ CCJE Opinion No. 11 (2008), paras 26, 34.

¹⁴ Global Judicial Integrity Network, UNODC. Exploring linkages between judicial well-being and judicial integrity (2022), Geneva. See also, European Network of Councils for the Judiciary (ENCJ) Survey among judges on the independence of the Judiciary (2025), page 36.

¹⁵ See European Network of Councils for the Judiciary (ENCJ) Survey among judges on the independence of the judiciary (2025), page 34.

¹⁶ CCJE Opinion No. 17 (2014), para 35; CCJE Opinion No. 6 (2004), para 42; European Network of Councils for the Judiciary (ENCJ) Survey among judges on the independence of the judiciary (2025), page 26.

¹⁷ CCJE Opinion No. 17 (2014), para 42. CEPEJ Guidelines on the evaluation of the quality of work of judges (2024), guideline 12, page 15.

¹⁸ Regarding the psychosocial burden on judges caused by certain situations and its impact on impartiality, see CEPEJ document: 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 (2019), paras 101, 102, 104.

¹⁹ CCJE Opinion No. 26 (2023). See also the CEPEJ European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their Environment (2018) and in particular its fifth Principle 'under user control' and the CEPEJ Guidelines on Electronic Court Filing (e-filing) and Digitalisation of Courts (2021).

outputs produced by the technology used and without conducting proper checks to identify potential AI hallucinations they may contain.²⁰ Safeguarding judicial well-being is thus critical to the effective and responsible use of AI and other assistive technology.

20. If assistive technology is not implemented appropriately,²¹ judges can experience a loss of autonomy and control and diminished confidence and self-efficacy. Judges may feel their autonomy is threatened if there is inadequate or inappropriate guidance on the proper use of technology. The widespread use of IT tools and artificial intelligence can also result in a significant increase in procedural documents and an accompanying lack of systematic effort by litigating parties to sufficiently structure, summarise or clarify facts. Inappropriate use of these technologies can thus impact the workload of judges and the quality of work produced by increasing the number of cases which judges are able to handle within a given time frame and the speed with which a case is processed.²²

(iv) Funding challenges

21. Adequate funding of the judiciary²³ is closely linked to judicial independence, access to justice, and the right to a fair hearing within a reasonable time.²⁴ Underfunding and inadequate remuneration for judges²⁵ can lead to judicial vacancies, recruitment and retention issues, staff shortages, and case backlogs, increasing judges' workloads and elevating their levels of stress, which in turn can affect the quality of their decision-making.

(v) Political interference

22. In recent years, political interference in some countries has eroded judicial independence and impartiality, in turn undermining democracy and the rule of law.²⁶ Lack of respect for judicial independence by government, parliament, and the media is an increasing issue across those member states.²⁷ Judges may experience pressure to deliver judgments that align with political expectations at the risk of their impartiality, or they may face accusations of judicial bias when they rule on matters considered unfavourable to political ideologies. Political interference is sometimes disguised as the introduction of reforms which do not have the legitimate aim of improving the quality of the administration of justice but on the contrary have as their goal the changing of personnel and/or lowering the guarantees of judicial independence.²⁸
23. For several years now, there has been a growing tendency in some member states where further pressure may be exerted on judges when executive power fails to comply with or execute judgments rendered against it.
24. In states where democratic backsliding is particularly pronounced, judges may face direct threats to their independence and safety. These can include surveillance, harassment, public vilification, or even physical violence. In extreme cases, judges may be detained, removed from office, or forced into exile for decisions perceived as unfavourable to the ruling authorities. These political influences can create significant judicial stress, which can diminish a judge's ability to exercise due restraint to uphold their independence and impartiality in the face of such pressure.

²⁰ "AI hallucinations" refer to instances where an artificial intelligence system generates information that appears plausible but is factually incorrect, fabricated, or unsupported by verifiable data.

²¹ CCJE Opinion No. 26 (2023).

²² CEPEJ Guidelines on the quality of jurisdictional debate in civil and administrative matters (2025), paras 13-14.

²³ On the percentage of GDP (Gross Domestic Product) allocated to justice, see CEPEJ 2024 Evaluation Report of European Judicial Systems (2022 data), Trends and Conclusions, page 2.

²⁴ CCJE Opinion No. 2 (2001), paras 2-3; see also, CCJE Opinion No. 6 (2004), para 20; CCJE Opinion No. 11 (2008), para 14; CCJE Opinion No. 18 (2015), para 51. See also the CEPEJ 2024 Evaluation Report of European Judicial Systems (2022 data), Part 1: General analyses, page 19.

²⁵ On funding of the judiciary, see CEPEJ 2024 Evaluation Report of European Judicial Systems (2022 data), Part 1: General analyses, page 19 and following. See also European Network of Councils for the Judiciary (ENCJ) Survey among judges on the independence of the judiciary (2025), page 34.

²⁶ 2025 Report of the Secretary General entitled "Towards a New Democratic Pact for Europe", key findings under the section of Functioning of Democratic Institutions, page 35. See also Report of the UN Special Rapporteur on the independence of judges and lawyers, 16 July 2020, A/74/176, para 63.

²⁷ The CDCJ Report to the Secretary General of the Council of Europe on Review of the Implementation of the Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality (2022), para 5. See also European Network of Councils for the Judiciary (ENCJ) Survey among judges on the independence of the judiciary (2025), pages 46-48.

²⁸ "Personnel" includes judges, judicial officers and staff.

25. Pressure on judges to conform to or support political agendas, [whether such pressure originates externally or internally within the judiciary itself], has harmful consequences for judicial integrity and independence, public confidence in the judiciary, and ultimately the rule of law.²⁹ These political influences can create significant judicial stress, which can diminish a judge's ability to exercise due restraint to uphold their independence and impartiality in the face of such pressure.³⁰

(vi) Threats to personal safety and security

26. Article 6 of the ECHR requires court proceedings and judgments to be publicly accessible. The CCJE affirms its support for this fundamental principle which reinforces public confidence in the judicial system but can also expose judges to heightened public scrutiny and personal risk.
27. Concerns regarding threats to the personal safety and security of judges have been reported elsewhere and need to be addressed.³¹ Hostile attacks on judges in the form of verbal abuse and online harassment, intimidation and, in some cases, physical violence, are often fuelled by political polarisation, media misinformation, and public dissatisfaction with judicial decisions, particularly in high-profile cases involving politically controversial or socially sensitive matters.
28. Threats to judges' personal safety and security pose serious implications for judicial integrity and independence.³² When judges are subjected to intimidation or fear for their personal safety, and the safety of their families, there is a risk that their ability to adjudicate impartially may be compromised.³³
29. The rise of social media has amplified these risks, enabling the rapid spread of aggressive rhetoric and the exposure of judges' personal information. In extreme cases, judges may feel increased pressure to explain themselves beyond the formal judgments they deliver. While issues around the actual, or anticipated, actions of the media (e.g. press, television and radio) are ongoing concerns in terms of their inappropriate impact on judicial decisions, the inappropriate impact of social media is increasing.³⁴
30. Persistent threats and security concerns can have severe implications on the well-being of judges, leading to anxiety and feelings of isolation, particularly when judges are forced to alter their routines or restrict their public presence.

(vii) War and global conflict

31. Political repression and threats to personal safety and security are heightened during times of war and global conflict. These conditions often trigger increasing attacks on the rule of law as governments invoke emergency powers, restrict civil liberties, and prioritise national security over individual rights. Judges must adjudicate in an uncertain environment where legal principles may be deliberately circumvented and where their decisions may be directly challenged by political or military interests.
32. In times of war, the physical and psychological toll on judges can be profound. Aside from the actual or anticipated destruction of court buildings and legal infrastructures, significant resource loss can occur through constant exposure to high-stakes cases, threats to personal safety, and the moral weight of decisions affecting lives and liberties. These cumulative losses create a high-stress environment in which judges must continue to perform their duties under immense psychological

²⁹ The Venice Commission's Rule of Law Checklist (2016) provided all basic elements of judicial independence and impartiality. It is being updated in 2025, and will build upon those elements, see Introductory Memorandum: Updating the Venice Commission Rule of Law Checklist: a contribution by the Parliamentary Assembly of the Council of Europe. See also the CDCJ Report to the Secretary General of the Council of Europe on Review of the Implementation of the Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality (2022), para 15.

³⁰ The European Court of Human Rights (ECtHR) has developed vast case law on the independence and impartiality of judges, e.g. *Juszczyszyn v. Poland* (judgment of 30 January 2023), *Eminağaoğlu v. Turkey* (judgment of 9 March 2021), *Guðmundur Andri Ástráðsson v. Iceland* (judgment of 1 December 2020).

³¹ European Network of Councils for the Judiciary (ENCJ), Survey among judges on the independence of the judiciary (2025), page 23.

³² CCJE Bureau Report on judicial independence and impartiality in the Council of Europe member states (2019 edition), paras 41-43.

³³ CCJE Opinion No. 21 (2018).

³⁴ European Network of Councils for the Judiciary (ENCJ), Survey among judges on the independence of the judiciary (2025), page 22.

strain. Without adequate peer and institutional support, judges can experience acute isolation, and their well-being can rapidly deteriorate.

V. Initiatives to protect judicial well-being

33. The judiciary must fully engage with and support initiatives that protect, reinforce and enhance the positive features of judicial work while minimising its negative features. The stigma attached to stress and poor well-being can present a barrier to engage in conversation with peers and others and seek help and support when needed. When stress is incorrectly perceived as a weakness or a form of impairment, rather than as a normal human reaction to situational pressures, participation in any organised well-being initiative is hampered. This applies also for judges who in general are used to solving problems independently and autonomously. Incorporating international standards into judicial governance frameworks aligns with global best practices and affirms the judiciary's commitment to its independence.³⁵

(A) Overarching governance and accountability

34. At the core of any approach to judicial well-being is a robust governance framework that recognises the well-being of judges as an essential prerequisite to judicial independence, impartiality, and quality of judicial work. The judiciary must take ownership of developing and maintaining such governance. Creating internal mechanisms to improve judicial well-being will foster greater independence and resilience within the judiciary, and safeguard initiatives from political interference and abuse.
35. The judiciary should have the necessary power and influence to ensure that proper well-being governance structures are in place, with effective systems, processes, and controls, and that court resources are sufficiently allocated to designing the policies and procedures that would support the well-being of judges. Dedicated well-being committees may be established to ensure that strategies and plans to improve judicial well-being are developed and effectively implemented and co-ordinated. Ideally, well-being strategies should be standardised to apply nationally to all courts in a member state.
36. Dedicated occupational risk prevention units may also be established to organise and prioritise initiatives. The duties of such offices may include conducting periodic psychosocial risk assessments of judges' working conditions, evaluating levels of judicial stress at appropriate intervals, producing well-being policies and procedures, and designing and implementing targeted interventions to mitigate identified risks. Employing or developing partnerships with trained and qualified occupational health and well-being professionals such as organisational psychologists can assist with these tasks.

(B) Prevention

37. Initiatives should focus on preventing excessive judicial stress and ill-being. Such initiatives should be organised with the active participation of judges to ensure that relevant, realistic and practical changes are made. They should raise awareness of the need to ensure that judges' working conditions, such as their workload, physical environment, and remuneration, are reasonable to support their well-being.

(i) Safeguarding personal safety and security

38. In some member states, judges are exposed to targeted acts of violence, intimidation, abuse, and harassment, often driven by ill-informed media coverage and orchestrated political attacks on the judiciary. These hostile attacks seek to weaken judicial independence and impartiality and undermine public trust and confidence in the judiciary.³⁶
39. Safety and security risks can also extend beyond physical threats to include significant vulnerabilities in cybersecurity and data protection. Judges often handle sensitive personal and case-related information, making them potential targets for cyberattacks and data breaches. Exposure of confidential data can compromise not only the integrity of judicial proceedings but also the personal safety of judges and their families.

³⁵ ILO Occupational Safety and Health Convention, 1981 (No. 155); ILO Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187).

³⁶ CCJE Bureau Report on judicial independence and impartiality in the Council of Europe member states (2019 edition), paras 41-43.

40. It is vital that effective systems, processes, and controls are in place in all courts to evaluate and monitor threats to the personal safety and security of judges and ensure that incidents are investigated and appropriate measures are put in place depending on the nature of the threat. Such measures should be continuously reviewed to assess whether they remain appropriate or are still needed. At the very least, court buildings should be installed with adequate levels of security, which may be heightened as needs require when judges preside over particularly high-profile matters or in times of crisis.³⁷ In extreme cases, where a judge's life, safety and security are at high risk, it is the duty of the state under Articles 2 and 3 of the ECHR to investigate and prosecute such criminal acts. Further, and where necessary, the obligation to put in place additional security measures to protect judges and their families may arise.
41. While adverse public comments cannot be avoided,³⁸ the judiciary can implement measures to ensure that judges do not feel isolated and abandoned particularly when deciding on high-profile cases where they are exposed public criticism and abuse. In these situations, the unity and support of colleagues, court presidents and/or councils for the judiciary may provide critical resources to protect the well-being of judges should such personal attacks against them arise.
42. Judicial press offices may address challenges arising from media misinformation and misreporting, providing a formal channel for the public communication of judgment summaries and a process by which to respond to comments arising. The establishment of courts' spokespersons or media and communication offices has been encouraged by the CCJE and Committee of Ministers of the Council of Europe.³⁹ These measures can ease the pressure experienced by judges to defend themselves publicly, avoiding any impression of a lack of impartiality or independence.⁴⁰

(ii) Transparency and destigmatising stress

43. Judges must feel confident to speak up about any concerns they may have regarding their safety, security, and well-being. If judges do not feel free to discuss or raise these concerns, this can lead to increasing feelings of isolation which can compound any experienced levels of stress.
44. The need to combat stigma in the judiciary arises at the systemic level and is crucial to encourage engagement with initiatives that support judges' well-being through training and education. Efforts to implement any organised well-being initiative will be futile if judges do not participate in them. It is therefore essential to nurture a culture which normalises conversations around stress and seeking support.

(iii) Fair and transparent human resource practices

45. Human resources policies and practices regarding performance management, learning and development can be designed to stimulate engagement and reinforce judges' sense of judicial purpose and meaning as regards their role within the legal profession and in society. Transparent human resources policies and processes concerning judicial appointments and promotion may also help to strengthen judges' experiences of career stability and security and encourage feelings of autonomy and of being in control of their professional growth and development. Judicial well-being may further be enhanced through the availability of flexible working arrangements to make it easier for judges to combine their roles with their family responsibilities and recreational interests. Such arrangements may also reinforce feelings of work-life balance, another resource that can reduce or eliminate judges' experiences of stress.

(iv) Fostering positive leadership

46. Judges must have full clarity and certainty on all matters which affect them. Structured conversations between judges in leadership positions and individual judges should be scheduled periodically to discuss specific well-being challenges and document any agreed actions that will be taken to mitigate those challenges. This will not only reinforce the message that judicial well-being is an important

³⁷ CEPEJ Guidelines on the organisation and accessibility of court premises (2014), Section 4.4.1.

³⁸ Noting the fundamental right to freedom of expression, ECHR, Art. 10.

³⁹ Recommendation of the Committee of Ministers CM/Rec (2010) 12 on Judges: Independence, Efficiency and Responsibilities, para 29; see also, CCJE Opinion No. 25 (2022), para 64.

⁴⁰ CCJE Opinion No. 18 (2015), para 53.

matter and is being taken seriously by the judiciary, but it can also enhance judges' feelings of autonomy and career security.

47. Judges in leadership positions can also facilitate a sense of meaningful work among judges, a significant resource to judicial well-being which can be diminished by many of the challenges discussed in this Opinion, for example through political interference, personal attacks against judges, and prolonged exposure to difficult and traumatic cases.

(v) Developing inclusive court cultures and social networks

48. A positive court culture where judges experience supportive relations with their colleagues can foster a sense of belonging and a stronger sense of professional identity.⁴¹ These positive social interactions provide judges with the opportunity to assist, mentor, and support their peers, and may be particularly vital to ensure that judges feel they can seek the guidance of their colleagues when presiding over difficult or traumatic cases.
49. In many countries, the judiciary has established judicial support networks to provide a forum for judges to access peer support and build their professional connections. These networks can also encourage feelings of collegiality, collective purpose, and community, which can all serve as vital resources to safeguard and promote judicial well-being, particularly when judges are exposed to targeted and hostile attacks from the government, Parliament and (social) media. Judges' associations contribute significantly to the collegiality and community spirit among judges. Social events and other activities may also be implemented to foster inclusion and belonging.

(vi) Implementing and maintaining assistive technology

50. The CCJE reiterates the general principles relating to technology in judicial systems previously recommended to mitigate judges' workload and stress.⁴² If assistive technology is not implemented and maintained appropriately, several issues can arise in respect to judicial well-being. Specific measures outlined here concern those principles which would especially assist in protecting and promoting the well-being of judges who use assistive technology.
51. Assistive technology should only be used to support and enhance the rule of law and should not be used to predict or replace an individual judge's decision-making.⁴³ This is not only essential to safeguard judicial independence and impartiality, but it is also necessary to ensure that judges do not experience a loss of judicial autonomy which would otherwise buffer their experiences of stress.
52. Appropriate channels of communication should be established to ensure that judges are properly informed about, and have the opportunities to participate in, the design, development, and improvement of technology.⁴⁴ Lack of involvement of the judiciary in digitalisation processes can negatively impact judges' experiences of working with applications, which can affect their independence.⁴⁵

(C) Training and education

53. Initiatives should provide judges with timely support and training to help them carry out their roles safely, effectively, and in accordance with the rule of law. Such initiatives should aim to upskill judges, offer them confidence and security, and strengthen judges' individual capacities to manage stress.
54. Many judges hold a deeply internalised sense of duty and professional responsibility, often setting extremely high standards for themselves. This can lead to self-imposed perfectionism which, while rooted in a strong commitment to justice, can intensify stress and contribute to burnout. Judges may feel they must always deliver flawless decisions, with expectations that are difficult to sustain in demanding and emotionally charged environments. These internal expectations can compound the

⁴¹ See CEPEJ document: 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 (2019).

⁴² CCJE Opinion No. 26 (2023), para 92.

⁴³ CCJE Opinion No. 26 (2023), para 92, general principles (i), (ii), (iii).

⁴⁴ CCJE Opinion No. 26 (2023), para 92, general principle (viii).

⁴⁵ European Network of Councils for the Judiciary (ENCJ) Survey among judges on the independence of the Judiciary (2025), page 36.

external pressures of judicial work, particularly when resources are lacking or when systemic constraints limit their ability to meet such standards.

55. Training and education should aim to build judges' awareness and understanding of the challenges that can negatively impact their well-being and encourage help-seeking behaviours. These objectives may be achieved through formal judicial training and education programmes provided at national and European level and delivering tailored individual interventions.⁴⁶ Programmes should be available to all judges and offer a range of structured courses on how judges can individually protect their well-being. Cross border exchanges and training organised at European level would allow for the exchange of best practices and create and strengthen European judicial solidarity, thus reducing the feeling of loneliness and isolation of judges. They should cover general matters such as effective stress management as well as more specialised topics such as managing complex cases, responding to vicarious trauma, and dealing with communications with the media and public. While participation should be voluntary, the perceived value of these courses should be encouraged.

(D) Individual support measures

56. Judicial well-being is a shared responsibility, and individual judges must take active steps to maintain their well-being.⁴⁷ Support initiatives delivered to individual judges aim to supplement universally provided training programmes and include digital self-help tools, which can be easily delivered to all judges. Additional training and coaching may be provided to support judges navigate complex or sensitive cases. Measures could also include mentoring programmes and developing tailored and personalised well-being development plans. Creating structured debriefing protocols following difficult and traumatic cases to normalise conversations around challenging emotions can also help to create a safe space for judges to process and make sense of such emotions.
57. Initiatives can also include providing judges with access to a suitably trained and accredited occupational health specialist such as a clinical or occupational psychologist who can guide them on a one-to-one basis on techniques or strategies to help them better manage and cope with particular challenges they may be experiencing. Access to such services should be funded and be available, but voluntary.

(E) Return to judicial duties

58. Where judges have sustained physical or psychological illness or injury that may have resulted in a period of absence from judicial duties, measures should be taken to support their safe return to work. Such measures may include access to psychological services, reasonable accommodations, counselling and therapy. Reasonable accommodations may include giving the judge flexibility to return to office, such as part-time hours or a phased re-entry to work, and regular support meetings with a supervisor to discuss how the court can meet their needs.

VI. Recommendations

59. It is of utmost importance that systematic efforts are made to protect and promote judges' well-being.
60. Accordingly, the CCJE recommends that initiatives to protect, promote and support judicial well-being should respect the following principles:
 - (i) Judicial well-being is essential for the delivery of justice. The judiciary must take ownership of developing and maintaining a robust governance framework that recognises the well-being of judges as an essential prerequisite to judicial independence, impartiality, quality and efficiency, and the rule of law.
 - (ii) The judiciary must fully engage with and support initiatives that protect, reinforce and enhance the positive features of judicial work (for example, purpose and meaningful work, autonomy and independence) while minimising its negative features. Initiatives should raise

⁴⁶ Notably through the European Judicial Training Network (EJTN) and the Council of Europe Programme on Human Rights Education for Legal Professionals (HELP).

⁴⁷ Nauru Declaration on Judicial Well-being, Principle 3.

awareness of the need to ensure that judges' working conditions, such as their workload, physical environment, and remuneration, are reasonable to support their well-being.

- (iii) Initiatives should focus on preventing extreme and unnecessary judicial stress and should be organised with the active participation of judges to ensure that relevant, realistic and practical changes are made.
- (iv) It is vital that effective systems, processes, and monitoring systems are in place in all courts to evaluate and monitor threats to the physical, psychological and digital safety and security of judges. It is the duty of the state to investigate and prosecute criminal acts affecting the safety and security of judges and implement additional measures to protect judges and their families when their safety and security are at high risk.
- (v) Efforts must seek to combat stigma in the judiciary so that judges feel confident to speak up about concerns they may have regarding their safety, security, and well-being.
- (vi) Human resources policies must be fair and transparent to support the recruitment and retention of judicial appointments. Policies and processes must support judges' career progression, professional security, and offer opportunities for learning and development and work-life balance.
- (vii) Positive leadership practices should be fostered and effective channels of communication established so that all judges have full clarity and certainty on all matters which affect them.
- (viii) Inclusive court cultures and social networks should be developed to support collegiality, professional identity, inclusion and belonging among judges, recognising the benefits of such positive social interactions to judicial well-being.
- (ix) Assistive technology should only be used to support and enhance the rule of law and should not be used to predict or replace an individual judge's decision-making.
- (x) Appropriate channels of communication should be established to ensure that judges are properly informed about, and have the opportunities to participate in, the design, development, and improvement of technology.
- (xi) Judges should be provided at the national and European level with timely support and should have access to training to help them carry out their roles safely and effectively. Cross border exchanges and training at European level would allow for the exchange of best practices.
- (xii) Training should cover effective stress management and specialised topics such as managing difficult cases and responding to vicarious trauma. All judges should have access to training and education programmes to support their well-being at all stages of their career.
- (xiii) Individual judges must take active steps to maintain their well-being. To help them do this, judges should have access to individual support measures to supplement universally provided training programmes. Such measures should be personalised to meet individual needs and support judges with any particular challenges they may be experiencing. Access to occupational health services should be funded and available to judges on a voluntary basis.
- (xiv) Where physical or psychological illness or injury has resulted in a period of absence from judicial duties, measures should be taken to accommodate the safe return to office, with appropriate individual support as required.

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 composed exclusively of serving judges. To fulfil its mission, the CCJE provides advice and guidance through its opinions adopted during the plenary meetings of the CCJE. These opinions reflect best European standards and practices and provide relevant recommendations for reinforcing the status of judges and ensuring their independent and impartial work for the benefit of fair justice provided to the public.



The website of the Consultative Council of European Judges can be consulted at the following address: **www.coe.int/ccje**

www.coe.int

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.