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Safeguarding judicial independence and the rule of law

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Introduction

It is a pleasure to be again in this circle of distinguished members. I feel particularly honoured to be able to attend this celebration of the 60th Anniversary of the CDCJ. I worked with this Committee for 17 years from 1997 to the end of 2014. I am also delighted to see my successor in the Ministry of Justice of Germany now in the chair of the CDCJ.

The Secretariat suggested that I speak in particular on the Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities.

The CDCJ did not only elaborate numerous significant conventions, but also important recommendations as well as guidelines in its areas of competence, such as civil law, family law, procedural law, data protection, nationality, administrative law. The Recommendations play a special role within the Council of Europe and its intergovernmental co-operation. They are part of the standard setting of the Council of Europe.

The recommendations deal with topical issues and thus give guidance to national policy and legislation. They can go much more into detail as a convention could do. They do not seek necessarily harmonisation. They sum up principles, good practice and sometimes pioneering ideas to give inspiration to master old and new challenges we meet in society.

Concerning the working methods, the text is elaborated and prepared in smaller expert groups and after a lot of work and discussion submitted to the CDCJ which adopts the recommendation and sends it to the Committee of Ministers for final approval. The CDCJ is also entitled to watch over the implementation of its recommendations. One part of that monitoring work led to guidelines to help with the implementation.

The recommendations are not only used in the member states of the Council of Europe. Other international organisations as well as associations found them useful and helpful. The European Union used a lot of recommendations of the Council of Europe in their neighbourhood policy. A good example is the Recommendation on judges. It was, and perhaps I may say, is used worldwide. To mention inter alia, one of the observers of the CDCJ, the International Union of bailiffs *Huissiers de justice*, reported about that worldwide use.

In that way the recommendations of the Council of Europe give support for everyday life. They are rarely spectacular and suitable for the headlines, nevertheless indispensable for good

governance. I always felt that this standard setting part of the work of the Council of Europe was underestimated and not appreciated and recognised as it deserved to be.

Rule of Law

I found the nice sentence: the rule of law serves to cultivate democracy. Even more, it is destined to protect against all forms of despotism. It emphasises governance based on law as essential and gives absolute precedence to law over other standards or justifications for sovereign action. Thus, it has become a cornerstone of Western democratic systems, and the term is found in Western constitutions, but also beyond the Western area.

In the understanding of the Council of Europe rule of law does not mean only to be bound by positive law, but to get orientation by universal principles. In particular, all what is enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms is a guiding star for guaranteeing human dignity and a fair society. It is the basis for all the work of the Council of Europe and its intergovernmental co-operation.

The rule of law is at the heart of all the work done by the CDCJ. All the consequences flowing from the rule of law are applied by the CDCJ to the various areas of its competences which were already mentioned by former speakers. The binding of law and statute to international and constitutional standards legitimises the actions of a government, legislature or administration and protects against arbitrary state action. The principle of the rule of law thus aims at moderation in all state action, but at the same time helps to realise state goals set within the framework of the constitution. With this restriction, the state constitution opens up the freedom of the individual to use his or her scope of action guaranteed by the fundamental rights. The aim here is to guarantee justice in the relationship between citizens because they are united under a general law of freedom.

The Recommendation of 2010

The CDCJ had elaborated Recommendation No. R (94) 12 on the independence, efficiency and role of judges. It has been considered necessary to undertake a substantial revision and updating of this Recommendation. Account has been taken of the significant changes that have occurred since 1994, and it is interesting to look at them for a moment, since they are still valid.

- The consciousness has deepened that judges have a duty to enforce the substantial values for the respect of human dignity and a fair society effectively. The role of the judge has therefore been enhanced and the function of enforcing the law has become more complex.
- The awareness of individuals of their rights increased – together with an increase in recourse to litigation. That has created major increases in workloads for the administration of justice which has the potential to reduce the effectiveness of these rights.
- One of the most significant changes has been the reinforced emphasis on efficiency in justice systems. Information technology has also greatly expanded. It is no longer sufficient to judge in an independent and impartial system. It is also necessary that justice produces quality decisions within a reasonable time to meet individuals' legitimate expectations. This has resulted in the Council of Europe promoting the independence of judges and quality and efficiency of justice by the creation of the Consultative Council of European Judges (CCJE) and the European Commission for the Efficiency of Justice (CEPEJ) whose work has been taken into consideration in the revision of the Recommendation.

- In addition, judges now have to perform their functions in an increasingly global society where international judicial co-operation is essential. Efficiency of justice with international elements requires facilitating information on other legal systems and improving mutual confidence. Exchanges among judges and judicial authorities should be promoted. This should not involve altering the diversity of legal systems, constitutional positions and approaches to the separation of powers in member states. Rather it seeks to identify and expand the already existing common grounds.

The Recommendation, similar to the 1994 Recommendation, does not seek harmonisation of legislation of member states. It outlines in greater detail the measures which should be taken in order to reinforce or, in some member states, further strengthen, the role of individual judges and of the judiciary as a whole.

One of the innovations of the Recommendation consists in extending independence to the internal relations within the judiciary.

The Recommendation contains eight chapters and is structured as follows:

- Chapter I - general aspects;
- Chapter II - external independence: judges' independence in the context of government, parliament, media and civil society;
- Chapter III - internal independence: hierarchy, internal organisation, distribution of the cases and professional organisations;
- Chapter IV - councils for the judiciary;
- Chapter V - independence, efficiency and resources: judicial efficiency and its relationship with judicial independence;
- Chapter VI - status of the judge: selection and career, tenure and irremovability, remuneration, training and assessment;
- Chapter VII – responsibilities: civil and criminal liability, disciplinary proceedings and duties; and
- Chapter VIII – ethics of judges.

There is no need or time to go into details. But I would like to mention two points. The first concerns independent authorities and non-executive bodies whom the CCJE refers to as “councils for the judiciary”, have been established. Their objective is to protect and safeguard the independence of the judiciary. They are involved to a greater or lesser extent in, *inter alia*, the selection, career, professional training of judges, disciplinary matters and court management. In the light of the various experiences observed, it was considered necessary to recommend guidelines for the organisation, composition and functioning of such councils. It should be added that some legal systems traditionally adhere to the alternative which consists of securing the independence of each individual judge in the decision-making process while entrusting executive bodies with certain administrative matters. Since both approaches to judicial independence are accepted within the standards of the Council of Europe, no part of the Recommendation should be read as preferring one of these traditional models over the other. While councils for the judiciary have proved to be helpful in preserving judicial independence their mere existence does not, in itself, guarantee it. Therefore it was seen to be necessary to regulate their composition, appointment of members, respect for pluralism, e.g. to reach a gender balance, transparency and reasoning of their decisions and to ensure that they are free from political or corporate influences.

The second point refers to the ethics of judges. Since Recommendation No. R (94) 12, codes of judicial ethics have been adopted in some member states. This has also been dealt with at a

European and international level. These texts highlight independence and impartiality as standards of judicial ethics but also refer to clear reasoning of the judgments, institutional responsibility, diligence, active listening, integrity, courtesy to the parties and transparency, all of them narrowly related to the principles that have informed the Recommendation of 2010. Public confidence in the administration of justice is one of the essential components of a democracy. This also relies on the quality of the individual behaviour of judges. Respect by judges of ethical requirements is a duty which comes with their powers. Judicial independence is a judicial virtue, a standard of judicial ethics. The important aspect, which was rather new when the recommendation was elaborated, is that we should not only focus on liability and sanctions, but start with a positive image what it means to be a good judge. Such an approach is called in French *déontologie*.

Concluding remark

When I worked in the CEPEJ I perceived how much the trust in the good functioning of the justice system is a key issue for the stability of a state and the economical system. Investors from inside and outside the country look upon it and orientate their decisions accordingly. Equally important is the confidence of the citizens in the judges and their independence as well confidence in the whole justice system.

Justice as a value and a virtue means to seek balance, equilibrium of forces, to establish a just and beneficial order for the benefit of all. Working for such an aim was always a main concern of the CDCJ. I wish the best for the future of the CDCJ that it may continue its great work.