



PRÉSIDENCE FRANÇAISE  
FRENCH PRESIDENCY

2019 MAI - NOVEMBRE  
Conseil de l'Europe  
Council of Europe



## 7th Intercultural Workshop on Democracy The High Councils of the Judiciary and the independence of the judiciary Strasbourg, 28 - 29 October 2019

### Concept note

#### 1) Introduction

The European Commission for Democracy through Law (the Venice Commission) launched the programme of intercultural workshops on democracy in 2012 as one of its cooperation projects in the Southern Mediterranean region. This regional project is jointly organised, once a year, by the Venice Commission in collaboration with a host institution from a state that is part of the cooperation project with the Southern Mediterranean countries.

These workshops aim to contribute to the strengthening of the rule of law in the Southern Mediterranean through a better understanding and application of the standards of the Council of Europe and the Venice Commission. By combining scientific work and theoretical developments with practical experience in the field, the workshops represent a unique platform for analysis and exchange of good practices and experiences between state institutions such as ministries, parliaments, constitutional courts and other jurisdictions in Europe and the Arab world.

The 7th workshop focuses on the High Councils of the Judiciary and the independence of the judiciary. It is organised under the aegis of the French Presidency of the Committee of Ministers of the Council of Europe, in cooperation with the European Commission for the Efficiency of Justice (CEPEJ) and the Consultative Council of European Judges (CCJE).

The need to ensure the independence of the judiciary and the proper functioning of the judicial system in the interest of society, continues to be an important source of activity for the Venice Commission since its creation in 1990. The Council of Europe's position on the management of the judiciary is expressed in the Committee of Ministers' Recommendation CM/Rec (2010)12 on judges: independence, efficiency and responsibilities.

The Consultative Council of European Judges (CCJE) also states, in its Opinion No. 10 (2007) on the Council for the Judiciary in the Service of Society, that these Councils aim "*to guarantee both the independence of the judicial system and the independence of each*

Ensuring Sustainable Democratic Governance and Human Rights in the Southern Mediterranean

Funded  
by the European Union  
and the Council of Europe



Implemented  
by the Council of Europe

*judge. Within the rule of law, the existence of an independent and impartial judiciary is a structural requirement of the state."*<sup>1</sup>.

In 2010, the Venice Commission adopted two reports on the most important European standards applicable to the judiciary, which constitute a key reference for the Commission in assessing national legislation governing the judicial system and the guarantees put in place to ensure its independent functioning<sup>2</sup>. In recent years, legislation on judicial councils and similar bodies has been the subject of opinions of the Venice Commission in its member countries (in 2017 - 2019 it intervened on this issue, *inter alia*, in Kazakhstan, Northern Macedonia, the Republic of Moldova and Romania).

Among the recurring issues examined by the Commission in these opinions are the independence and immunity of judges, the appointment and discipline procedures for judges, the composition, mandate and independence of the High Councils of the Judiciary (HCJs) and the appointments to senior positions in the judicial system. Since 2011, issues related to these councils have also been part of the cooperation projects between the Venice Commission, the CEPEJ and the countries of the southern Mediterranean.

The objective of the workshop is to facilitate the exchange between the different participants on four main topics: the constitutional and/or legislative framework for HCJs; the procedure for appointing its members and similar bodies; their powers; and the councils' interactions with the executive and legislative branches.

## **2) The constitutional and/or legislative framework concerning the High Councils of the Judiciary**

The first major area of reflection proposed in this workshop concerns the existing national legal framework in the participating countries.

The choice of the appropriate system to manage the judiciary is one of the main challenges facing new democracies, where concerns about the independence and political impartiality of the judiciary often persist.

There are different models of judicial management bodies in the countries participating in the workshop. For most of these states, the basic principles of these bodies are set at the constitutional level.

On the Council of Europe's position on the management of the judiciary, the Committee of Ministers' Recommendation CM/Rec(2010)12 supports the establishment of a judicial council, but allows for other mechanisms:

*«46. The authority competent for the selection and career of judges should be independent of the executive and legislative branches. To guarantee its independence, at least half of the members of the authority should be judges chosen by their peers.*

---

<sup>1</sup> CCJE Opinion N°10 (2007) adds: *"The independence of judges in a globalised and interdependent society should be seen by every citizen as a guarantee of truth, freedom, respect for human rights and impartial justice not subject to external influence. Judicial independence is not a prerogative or privilege granted in their own interest, but is guaranteed in the interest of the rule of law and those who seek and demand justice. Independence as a condition of the impartiality of judges is, therefore, a guarantee of equality of citizens before the courts.*

<sup>2</sup> The Commission also adopted in 2007 a report on judicial appointments (CDL-AD (2007)028).

47. However, where the constitutional or legislative provisions provide that the Head of State, the Government or the legislature shall take decisions concerning the selection and career of judges, an independent and competent authority, composed of a substantial number of members of the judiciary (subject to the rules applicable to judicial councils set out in Chapter IV) should be empowered to make proposals or issue opinions which the relevant appointing authority shall follow in practice. "»<sup>3</sup>

According to the Venice Commission, "there is no standard model that a democratic state would be required to follow in creating its Supreme Council of the Judiciary as long as the function of this council is to ensure the proper functioning of an independent judiciary within a democratic state. Although there are models where the intervention of other branches of power (the legislative and executive) is apparently excluded or minimised, this intervention is to varying degrees recognised by most legislation and is justified by the social aspect of the functions of the Supreme Council of the Judiciary and the need to have the administrative activities of the judiciary monitored by the other branches of state power. It is clear that the judiciary must be held accountable in accordance with the law provided that adequate and fair procedures are in place and that there can be no dismissal without duly justified reasons. Nevertheless, it is generally presumed that the essential purpose of the very existence of a High Judicial Council is to protect the independence of judges by protecting them from undue pressure from other State powers in areas such as the selection and appointment of judges and the exercise of disciplinary functions (...)"<sup>4</sup>.

The majority of the countries represented at the workshop have recently carried out significant reforms, sometimes at the constitutional level, aimed at restructuring or strengthening the management bodies of the judiciary. The sharing of their experiences, sometimes positive, sometimes less so, is interesting as it will make it possible to assess the ways forward in the preparation of future reforms and to identify areas for deeper cooperation with other countries and international organisations.

### **3) The procedure for appointing members of the HCJ and similar bodies**

An appropriate method to guarantee the independence of the judiciary is to create a judicial council, with constitutional guarantees for its composition, powers and autonomy.

The Venice Commission has always taken the view that it is appropriate for an independent judicial council to play a decisive role in decisions relating to the appointment and career of judges. While respecting the diversity of legal systems, the Venice Commission recommends that States that have not yet done so consider establishing an independent judicial council or similar body. The composition of this council should, in all cases, be pluralistic, with judges representing at least half of its members. With the exception of *ex officio* members, these judges should be elected or appointed by their peers in all bodies<sup>5</sup>.

A balance must be struck between the independence of judges and the management of the judiciary on the one hand, and the accountability of the judiciary on the other, in order to avoid the negative effects of corporatism. In this context, it is essential to ensure that disciplinary proceedings against judges are in accordance with the law and free of any

---

<sup>3</sup> See the text on: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016805cde9f](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805cde9f) .

<sup>4</sup> See CDL-AD(2007)028, Judicial appointments - Report adopted by the Venice Commission at its 70th plenary session (Venice, 16-17 March 2007), para. 28.

<sup>5</sup> The Recommendation of the Committee of Ministers of the Council of Europe CM/Rec(2010) 12 also states that "at least half of the members of these councils should be judges chosen by their peers from all levels of the judiciary and with full respect for pluralism within the judicial system. ».

possibility of corporatist tolerance towards colleagues. One way to achieve this objective is to establish a balanced judicial council.

With regard to current practice in the composition of judicial councils, *"a basic rule seems to be that a large proportion of its members are members of the judiciary and that a fair balance is struck between members of the judiciary and other ex officio or elected members"*<sup>6</sup>. Thus, half of the members of the judicial council should be elected by the judges themselves. In order to ensure the democratic legitimacy of the judicial council, other members should be elected by parliament from among persons with appropriate legal expertise, taking into account possible conflicts of interest, or appointed by users of the judicial system (the Bar, etc.).

In general, judicial councils also include members who are not members of the judiciary and who represent other branches of power or academia or who are appointed as a result of their profession. This composition is justified by the fact that *"the control of the quality and impartiality of justice is a role that goes beyond the interests of individual judges. The way in which the Council carries out this control enhances citizens' confidence in the administration of justice"*.

In several countries participating in this workshop, recent reforms have focused, among other things, on the procedure for appointing members of judicial councils. Some countries, such as Tunisia, have opted for the introduction of the election of council members by the judiciary. Exchanges on the procedures governing the appointment of members of higher judicial councils and similar bodies in the light of standards in this field will make it possible to identify best practices.

#### **4) The powers of the HCJs**

The other theme proposed in this intercultural workshop concerns the different powers of judicial councils, including the appointment of judges, disciplinary measures and appeals against their decisions.

According to the recommendations of the Council of Europe, the high judicial council must have a decisive influence on the appointment, promotion and disciplinary measures against judges.

The Venice Commission considers that it is not desirable to submit the appointment of judges of ordinary (non-constitutional) courts to a vote in Parliament because the risk that political considerations may outweigh a candidate's objective merits cannot be excluded.

In older democracies, the executive branch sometimes has a decisive influence on judicial appointments. Such systems can work well in practice and provide for an independent judiciary, as its powers are limited by the culture and legal traditions that have developed over time.

On the other hand, not all new democracies have had the opportunity to develop such traditions to prevent abuses. Consequently, at least in these countries, explicit constitutional and legal provisions are needed as a safeguard to prevent political abuses in the appointment of judges.

---

<sup>6</sup> Ditto, para 29.

Sanctions against judges and ethical monitoring are, in this context, as many missions entrusted to the HCJ. This power of councils exists to varying degrees in the countries participating in the workshop.

The Venice Commission has consistently defended the inclusion in constitutions of the principle of non-removability. Transfers against the will of the judge may only be authorised in exceptional cases. In addition, the Commission, in its Report on Judicial Appointments, supports the idea that disciplinary proceedings should fall within the jurisdiction of judicial councils or disciplinary courts. The Commission has also consistently argued that it should be possible to appeal decisions of disciplinary bodies in a court of law.

Cooperation between the Council of Europe and the countries of the Southern Mediterranean has been focused on these problems for several years. The reforms carried out in the countries concerned have yielded good results, but much remains to be done. The work of the workshop would identify issues that would be the subject of more focused cooperation in the coming years.

## **5) Interactions between the HCJ and the executive and legislative branches**

Judicial independence has two complementary aspects. External independence protects the judge from the influence of other state powers; it is an essential component of the rule of law. Internal independence ensures that a judge makes decisions based solely on the constitution and legislation, and not on instructions from higher judges in the hierarchy.

Recommendation CM/Rec(2010)12 states that *"judges should be independent in their decision-making and should be able to act without restriction and without undue influence, inducement, pressure, threat or intervention, direct or indirect, by anyone or for any reason whatsoever. The law should provide for sanctions against persons seeking to influence judges in this way. Judges should be absolutely free to decide cases before them impartially, according to their own personal conviction and interpretation of the facts, and in accordance with the rules of law in force. Judges should not be required to report to any person outside the judiciary on the merits of their cases. (Principle 1.2.d)".*

In its Opinion No. 1 (2001) on standards for the independence and non-removability of judges, the CCJE made the following observations: *"It is nevertheless difficult to say what constitutes undue influence and to strike a good balance between, for example, the need to protect judicial proceedings against pressures and distortions of all kinds, whether of political, media or other origin, and the utility of open discussion on matters of public interest in society and in a free press. Judges must accept to be public figures and not be too sensitive or of a fragile constitution. The CCJE considers that no modification of the existing principle seems necessary but that judges in different States could benefit from discussions and exchanges of information on particular situations."* (para. 63).

In this context, the question of criminal and civil liability and immunity of judges should be examined. In its Opinion No. 3 (2002) on the principles and rules governing the professional conduct of judges and in particular ethics, incompatible behaviour and impartiality, the CCJE stated the following position: *"75. With regard to criminal liability, the CCJE is of the opinion that: (i) the judge should be criminally liable under ordinary law for offences committed outside his or her office; (ii) criminal liability should not be incurred against a judge for acts related to his or her office in case of unintentional misconduct on his or her part. With regard to civil liability, the CCJE considers that, taking into account the principle of independence: (i) miscarriages of justice (whether related to jurisdiction, merits or procedure) should be remedied through an adequate system of remedies (with or without the authorisation of the*

*court); (ii) any remedy for other miscarriages of justice (including, for example, excessive delays) is the sole responsibility of the State; (iii) except in cases of wilful misconduct, it is not appropriate for a judge to be exposed to personal liability in the performance of his or her duties, even if it is assumed by the State in the form of compensation." ».*

There is no doubt that judges must be protected from undue external influence. To this end, they should enjoy functional - but exclusively functional - immunity (immunity from prosecution for acts performed in the performance of their duties, with the exception of intentional offences, such as accepting bribes).

The issues discussed at this 7th edition of the intercultural workshop aim at an open and constructive dialogue that would not only provide an overview of the situation in the countries of the MENA region, but also propose a list of recommendations that would promote bilateral and multilateral cooperation in the framework of the cooperation projects developed by the Council of Europe in the southern Mediterranean countries.