



International Round Table

SHAPING JUDICIAL COUNCILS TO MEET CONTEMPORARY CHALLENGES

University *La Sapienza*, Rome

21-22 March 2022

The work of the Consultative Council of European Judges (CCJE)

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Dear distinguished speakers, ladies and gentlemen,

It is a great honour for me to speak to you today. I thank you very much for giving me the opportunity to present the work of the CCJE in general and its recent Opinion 24 on „Evolution of the councils for the Judiciary and their role in independent and impartial judicial systems”. It was adopted in the plenary in November 2021.

A. First, I would like to mention that CCJE is very well represented in this International Round Table. This shows its significant importance, especially for the judicial councils.

The Italian Judge at the European Court of Human Rights, Raffaele Sabato, was for a very long-time member and president of the CCJE. It is a great pleasure to see you Raffaele again. I thank you very much for your speech and tremendous work for the Court. I am grateful as well that Nina Betteto, a very long-time member, and previous president of the CCJE as well, participates in the first panel. Under her very experienced guidance the CCJE elaborated the Opinion on judicial councils.

Finally, I am very thankful that Anne Sanders, the expert of our Opinion 24, will give a survey of judicial councils. She is a very well-known professor of law and highly experienced expert of the CCJE.

B. Let me first describe the CCJE's work in general.

CCJE is an advisory body of the Council of Europe. Its work is defined in the context of the implementation of Art. 6 ECHR, in particular the right to an independent and impartial court.

It is the only body within an international organization to be composed exclusively of judges and in this respect, it is unique in Europe.

It was created more than 20 years ago. The CCJE gives advice to the Committee of Ministers on issues relating to the status of judges and the exercise of their duties.

All member states in the Council of Europe are represented in the CCJE.

Every member state appoints a serving judge, with an in-depth knowledge of questions relating to the functioning of the judicial system combined with a high level of personal integrity. The members of the CCJE act in their personal capacity without any binding vote.

With its work, the CCJE specifies the requirements for judicial independence and impartiality. It provides an institutional framework for determining judicial independence.

Every year, the plenary of the CCJE adopts Opinions. In addition to the Magna Carta of 2010 there are already 24 Opinions.

Magna Carta and Opinions are not legally binding. They are a source of law; they are considered as soft law.

The Magna Carta enumerates the guarantees of judicial independence referring to independence itself, the body in charge of guaranteeing independence, the access to justice and transparency, ethics, and responsibility. It also states that the principles shall apply *mutatis mutandis* to judges of all European and international courts.

The Opinions deal with different topics.

One focus is on the nature of the judicial decision-making process with regards to the framework conditions of judicial activity such as working conditions, tenure, training, performance evaluation, remuneration, education, judicial ethos, but also regarding the quality of judicial decisions themselves. Another focus is on the relationship to other state authorities or judicial bodies.

The representatives of the member states always endeavor to ensure that their opinions do not merely reflect a summary of their own legal cultures. When adopting the Opinions, the plenary rather strives to determine its own European standard. This does not necessarily reflect the legal reality of each individual member state.

The plenary of the CCJE selects the respective topics of the Opinion in an autonomous manner. The representatives formulate the requirements for the content of judicial independence. Their adoption is preceded by empirical findings - supported by an expert.

An overview of the respective national legal and factual basis obtained within the framework of these findings enables a partly descriptive, partly program-like

presentation of the topic. Thus, the Opinions are based on empirics and legal dogmatics.

Opinions conclude with a summary and recommendations that form a European overarching standard.

National legislators and administrations may orient themselves to this standard.

The Court regularly and increasingly refers to the Opinions as source of a European standard, especially in all recent cases concerning Poland mentioned by Raffaele Sabato in his presentation.

It is recognized that the work of the CCJE builds the basis for the development of the relevant international standards for measuring the independence and impartiality of the judiciary.

Given the independence and competence of the members of the CCJE, the Opinions have a high degree of legitimacy. This is how national judges influence the creation of these standards on the level of the Court.

C. In 2007, the CCJE's activity resulted in the Opinion No 10 on the „Councils for the Judiciary at the service of society“.

This very detailed Opinion covers all necessary aspects of the council as an essential element in a state governed by the rule of law.

- It stated that Councils should have a mixed composition with a substantial majority of judges
- It stated that the Council should have a wide range of tasks aiming at the protection and promotion of judicial independence and efficiency of justice.
- It stated that the Council should be competent in selection appointment and promotion of judges.
- It stated clearly that the Council should be protected from the risk of seeing its autonomy restricted – in favour of the legislature or the executive - by securing its status in the constitutional text or equivalent.
- It already realised that the Council should not be restricted by other authorities in its autonomy to decide on its own. It provided that the relations between the Council, the Minister of Justice, the head of State and Parliament need to be determined.

In the context of recent decisions of the Court on the rule of law the CCJE's Opinion has gained particular importance. The Court refers in a substantial number of cases to the Opinion 10.

Political background:

For years the judicial self-governance is challenged in several European states by legal reforms concerning the composition, task, and influence of the councils. Governments

try to control the appointment and promotion of judges and influence the judiciary. This endangers the independence and impartiality of judges. We observe a danger of political control over judicial self-governance. Both European Courts have to address the question to what extent the Councils in their composition and in their work comply with European standards.

These developments caused the CCJE to make the councils again the subject of another opinion. In 2021 the CCJE delivered the Opinion 24 on the “Evaluation of the Councils for the Judiciary”.

Due to a politization of the council which has been observed in some member states, the CCJE realised that formal constitutional rules on councils alone are not sufficient. Individual judges are still not independent.

In a way the Opinion is the answer on the present factual situation of Councils in member states as well to a numerous judgments of the European courts dealing with composition and selection of members of the council.

The new Opinion states that the judiciary must be organised in a way that ensures that individual judges are free to decide cases. They should be only bound by law.

It was necessary to reaffirm the Opinion 10. It was necessary to complement the principle and standards in the light of political events undermining judicial institutions and the case law of the European court.

Consequently:

Opinion 24 states that it will be not sufficient to set out detailed rules in constitutions and international standards alone. What is important is a culture of respect for judicial independence.

Therefore, the Opinion states explicitly:

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 independence.

Everybody not only the judiciary must be involved in protecting these values. Councils for the judiciary must do their part to earn public trust through excellent work provided in an accountable and transparent way in the interest of public.

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.

Members of parliament and members of the executive must respect the law in dealings with the council and not infringe its role and functioning by breaking or circumventing legal rules.

To guarantee these rules the Opinion states:

Councils should be composed of a majority of judges selected by their peers.

Councils should have effective legal remedies at its disposal to safeguard its autonomy and question the legality of public acts affecting it or the judiciary. CCJE recommends remedies on the constitutional level.

Councils must counter decisively any attempt to attack or put pressure on individual judges or the judiciary.

What has been called into question in recent times, is the legitimacy and accountability of the Council. Therefore, both aspects are crucial for the independence of the council and consequently for the independence of the judiciary.

The Opinion distinguishes different aspects:

The legitimacy is based on the constitutional legal basis.

Councils should be set down in the constitution. These constitutional provisions 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 the executive.

The accountability is based mainly on its work:

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.

The judicial accountability of the council will be guaranteed if the council's decision is reasoned, and judges have a right to judicial review.

As there is not one single model the CCJE does not recommend a specific council model. But the competences should be adequate to defend the independence of the judiciary and of individual judges.

The CCJE emphasizes:

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, that it has sufficient resources and is accountable for its activities and decisions.

Transparency must be guaranteed. Transparency is an essential factor in the trust that citizens have in the functioning of the judicial system and is a guarantee against the danger of political influence or the perception of self-interest, self-protection, and cronyism within the judiciary

Other cornerstones of the Opinion are the organisation and composition of the Council. A new topic is the security of tenure which will be discussed in the first panel.

In concluding:

The circumvention of rules is a political reality. There is always the risk that judges will be subject to political influence.

I recently presented the new Opinion 24 in Georgia. Technically speaking their High Court of Justice meets the important formal standards required by European law.

But political influence and lack of cooperation and transparency of some members of the Council and the Parliament created a situation of vacancies of non-judge members. In consequence there was a no-lawful members constituency in the Council. Although the Council was operating systematically for months. If in this case the Parliament appoints Supreme Court judges based on the Councils nominations the new standard of Opinion 24 is not fulfilled.

The example reminds us that all judges, all members of a council must live up to the highest ethical and professional standards and must be held accountable for their actions through appropriate means.

To guarantee this standard it is important that judges are trained and that their work is evaluated. The European standard is set up in the CCJE's Opinion 4 (2003) on training of judges and in Opinion 17(2014) on evaluation of judge's work, the quality of justice and respect for judicial independence.

To guarantee this standard it is as well important to guarantee the freedom of expression of judges. This topic will be the subject of the Opinion 25 (2022) of CCJE. We are looking forward to establish a European standard for the scope of that freedom.

I thank you for your attention!