



International Round Table

SHAPING JUDICIAL COUNCILS TO MEET CONTEMPORARY CHALLENGES

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First panel: The status of the members of the Judicial Council

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Over the last decade, I have been wearing different hats. I have taken part in the standard setting with respect to Councils for the Judiciary (hereinafter Councils) conducted by the Consultative Council of European judges (hereinafter CCJE), I have also participated in the ongoing revision of Kyiv Recommendations conducted by the OSCE ODIHR. On the other hand, I have had the privilege, as the CCJE expert, to examine whether these standards are applied in practice. In this capacity, on several occasions, I had the opportunity to work with Venice Commission experts, for which I am deeply grateful. I learnt a lot in the exchange of views with my colleagues. I can only hope I have not been a lost cause myself. No man is an island, and I am personally very attached to cooperation with the Venice Commission, including through the involvement of CCJE members in the preparation of country specific opinions. But I digress, so I better return to the subject – the CCJE standards on Councils for the Judiciary.

15 years ago, the future in CoE member states looked bright and sunny. The Councils were a subject of discussions among judges in associations of judges and international community of judges, thus reflecting a rapidly growing interest in judicial self-governance in Europe. The CCJE was particularly active in this area. In 2007, its activity resulted in Opinion No. 10 on the Councils for the Judiciary at the service of society (hereinafter Opinion No. 10).

Since then, the sky has become gloomy and overcast. Judicial self-governance is challenged in several Council of Europe states. It fills the pages of major newspapers; every international body has had a project on the topic. Both international courts have become increasingly interested in the area. In this connection, the question must be asked: Have we made a conceptual error and the establishment of Councils is not the right means to achieve the goal? If this is not the case, what has gone wrong? I believe that the first mistake member states made once the independence of judiciary/judges was enshrined at the constitutional level was to ignore the fact that the relationship between the three powers of state is never a static one. Independence should never be taken for granted. The second mistake: to make principles embedded in law a reality for the judiciary alone cannot win this battle. What this means is that the judiciary and other branches of government, politicians, the media and civil society must all work together to turn rules on paper into a culture of respect for judicial independence, and Councils must do their part.

Why is it important to analyze the recent developments? While most people are watching just a few countries, such as Poland and Hungary, judicial reforms are taking place in other countries, too. Populist political leaders dream about the control of judicial self-governance. If they care, we, judges, must also care if we want to prevent the capture of judicial self-governance by the authoritarian regimes or at least try to limit the damage. For this reason, the CCJE has decided to deliver a new opinion on Councils. The major principles contained in Opinion No. 10 are still valid. They are the starting point for the new Opinion No. 24 on the Evolution of the Councils for the judiciary and their role in independent and impartial judicial systems (hereinafter Opinion No. 24); nevertheless, the recent challenges and developments make it necessary to reaffirm and – if necessary - complement them in the light of political events undermining judicial independence.

I now turn to some of the specific points that are the subject of discussion in this session.

To give you a better understanding of the reasons for the new Opinion, I want to share with you my recent experience as regards the High Council for the Judiciary (hereinafter HCJ) in Georgia. In Georgia, the rules on judges' recruitment and the HCJ have been subject to quite substantial reforms, which introduced the principle of lifetime appointment as well as procedural rules and criteria to be applied when deciding on appointment for life, and detailed regulations on the assessment of judges during the probationary period. Despite these positive changes, significant shortcomings and possibilities for improving the functioning of judiciary remain. Citizens, mainly because of controversial decision-making in the HCJ, continue to mistrust the judiciary more than other institutions. It is an example, far from being the only one, of how structural changes, albeit seemingly complying with major European standards, have had little effect on transparency and accountability of the judicial system and the HCJ itself. This is why **accountability** is one of the central points of the new Opinion and why I have put it on top of my list today.

According to the CCJE, a Council, where it exists, must be organised and composed in a way that it meets certain expectations. It must be independent of the executive and legislature, and it must function as a means to protect, support and develop the role of the judiciary and the independence of individual judges. The problem is that

there is some evidence that self-governance by judges does not necessarily imply freedom from undue influence or control of individual judges, nor ethical or good governance of the judiciary. Hence, the CCJE in the new Opinion devotes a great deal of attention to the accountability which is absolutely necessary to earn the trust and support of the public. It has reaffirmed that the Council should play a role in ensuring that the judiciary works in a transparent and accountable way. The more powers and responsibilities a Council has, the more important it is that it should be accountable for the use of those powers.¹

In Opinion No. 18 on the position of the judiciary and its relation with the other powers of state in a modern democracy, the CCJE developed a unique and carefully-thought-out concept of accountability. It distinguishes between judicial, punitive, and explanatory accountability. The concept relates, as the CCJE has highlighted in the new Opinion, not only to individual judges and the judiciary as a whole but also to Councils.

Without going into details, the Council's judicial accountability is best demonstrated when the legal merit of a Council's decision, e. g. in relation to judges' careers, is reviewed in an independent court. The CCJE has pinpointed that special attention should be paid to the independence and impartiality of any court reviewing the merits of the Council's decisions, including independence from the Council itself.² To illustrate, if a judicial Council member is at the same time a judge at the court reviewing the merits of the Council's decisions, the independence of the court is likely to be seriously compromised which may require the protection of Article 6.

As regards punitive accountability, the Council members must live up to the highest ethical standards and must be held accountable for their actions through appropriate means. It is a well-established standard that Council members should not be immune from prosecution under the general criminal law. Also, it goes without saying 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. Needless to say, controversial practices reportedly applied in Georgia, such as the use of secret votes throughout the process in the Council, fully standardized reasoning lacking substance of Council's decisions, and participation of members in the process despite their conflicts of interest, are not in line with proclaimed standards. Old democracies are not an exception - unacceptable practices, such as associations of judges putting pressure on judges in the selection process of Council members, as repeatedly reported by Italian colleagues, can be found in old democracies, too.

The CCJE takes a step forward from Opinion No. 10 in Opinion No. 24, by proclaiming the need for development of standards of professional and ethical behaviour for Council members, and of internal procedures for investigating shortcomings.³ Council members must act according to those standards and the values of independence, impartiality and integrity. In this context, I am more than pleased to see that the European Network of Councils for the Judiciary's project on drafting guidelines on ethical conduct for Councils is already well underway.

¹ See Opinion No. 24, para. 25.

² See Opinion No. 24, para. 15.

³ See Opinion No. 24, para. 17.

Lastly, every Council must work in a transparent fashion, giving reasons for its decisions and procedures and be accountable in this way. 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.⁴

As for the next point, **irremovability/security of tenure** of Council members deserves to be mentioned. The CCJE has taken note of the worrying initiatives, often justified by the necessary institutional reform of the Council, to replace undesirable judicial and non-judicial Council members whenever the government deems it appropriate. The initiative in Moldova in 2019 to convene the general assembly of judges in order to replace the judge members of the Council with newly elected judges is a case in point. Motions of no confidence are specific to political institutions such as governments which act under parliamentary control. They are not suited for institutions, such as the Judicial Council whose members are elected for a fixed term.

In the light of the foregoing, the CCJE has taken the view that Council members should be selected for a fixed time in office and must enjoy adequate protection for their impartiality and independence. Members must be protected from internal and external pressures. Thus, the security of tenure of all Council members as such is a crucial precondition for the independence of the Council. Judges appointed to the Council should be protected with the same guarantees as those granted to judges exercising jurisdictional functions, including the conditions of service and tenure and the right to a fair hearing in case of discipline, suspension, and removal.⁵ Let me proudly stress that this is the same view as that taken by the ECtHR in a very recent case *Grzeda v. Poland* where it ruled that similar procedural safeguards to those that apply to the dismissal of judges should also be available in the removal of a judicial Council member from her or his position. Non-judicial members, in the CCJE's view, should have equivalent protection.

More specifically, 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 status on the basis of which they were elected or appointed to the Council. If the Council itself is responsible for this decision, the rights of the dismissed member to an appeal and fair trial must be ensured.⁶

That said, the vetting of judges is highly problematic because it can be instrumentalised and misused to eliminate politically "undesirable" Council members. Nevertheless, 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.⁷

Closely linked to the security or the irremovability of Council members are the issues of **continuity and re-election** of Council members:

⁴ See Opinion No. 24, para.18.

⁵ See Opinion No. 24, para. 37.

⁶ See Opinion No. 24, para. 38.

⁷ See Opinion No. 24, para. 13.

The CCJE has taken the view that for the sake of continuity, except in cases of death, retirement or removal from office as a result of disciplinary action, a member's term, should only end upon the lawful election of a successor to ensure that the Council is able to exercise its duties lawfully even if the appointment of new members has failed, because of a deadlock in parliament.⁸

CCJE has drawn attention to the possible impact of re-election on the independence of the members of a Council for the Judiciary. In principle, re-elections of full-time members should be avoided in favour of longer fixed terms to ensure independence - according to member states' responses to the questionnaire the longest term for members of the Council is six years. In this respect, Opinion No. 24 qualifies the view taken in Opinion No. 10. Moreover, continuity and efficiency can be improved if not all terms of office expire simultaneously.⁹

As a final point, let me very briefly mention that the CCJE, in Opinion No. 10, has already made extensive recommendations about **the composition and chairmanship of a Council**. With one exception the principles stemming from Opinion No. 10 remain the same. A typical example of the continuity is ex officio membership – it is not acceptable, except in a very small number of cases (for example the president of the Supreme Court) but should not include representatives of the legislature or the executive.¹⁰ With respect to the status of non-judicial Council members, however, the CCJE has taken a more nuanced view compared to Opinion No. 10. It has recommended that a Council also have non-judicial members possibly including lay persons who are not legal professionals. While judges should always be in the majority, non-judicial members, preferably with voting rights, ensure a diverse representation of society, thus decreasing the risk of corporatism.¹¹

Ladies and gentlemen, whilst recalling the importance of sharing the same values, the CCJE recognises the diversity and respects the differences of Councils. If Councils are understood in the manner of the CCJE, the answer to the rhetorical question in the beginning of my speech is: the Councils for the Judiciary undoubtedly remain not only a valid but for many member states, the best and the only form of judicial self-governance.

⁸ See Opinion No. 24, para. 36.

⁹ See Opinion No. 24, para. 36.

¹⁰ See Opinion No. 24, para. 28.

¹¹ See Opinion No. 24, para. 29.