

CEELI INSTITUTE  
PRAGUE

ADVANCING THE RULE OF LAW

# MANUAL ON INDEPENDENCE, IMPARTIALITY AND INTEGRITY OF JUSTICE

A THEMATIC COMPILATION  
OF INTERNATIONAL STANDARDS,  
POLICIES AND BEST PRACTICES

March 2020



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## FOREWORD



The CEELI Institute is now in its eighth year of support for the Central and East European Judicial Exchange Network, which was successfully launched in October 2012. The Network is comprised of some of the best and brightest young judges from eighteen countries in the region who have come together to share best practices on issues of judicial independence, integrity, accountability, and court management. This project has been made possible through the generous support of the Bureau of International Narcotics and Law Enforcement (INL) at the U.S. Department of State.

The judges have been exceptionally committed to the ongoing efforts of the Network, and have largely directed the efforts and focus of the Network themselves. Among their signature projects has been the development of this *Manual on Independence, Impartiality and Integrity of Justice: A Thematic Compilation of International Standards, Policies and Best Practices*. The idea for the Manual was first conceptualized by the Network Advisory Board judges in 2014. The participants then established a uniform methodological approach for their work, and carried through on their project to its completion, researching and referencing over 130 relevant international standards to use as primary resources.

The Manual represents a systematic effort to survey relevant international standards applicable to the judiciary. The judges first undertook a comprehensive review of relevant international documents, and then organized relevant standards according to thematic areas. The Manual provides easily accessible, substantive legal support for issues related to the status, work, rights, and responsibilities of judges. For example, Section II.8 of the Manual assembles all relevant international standards which establish and clarify the principle of judicial independence in the administration of justice. Judges needing to justify their role in administration can quickly access the necessary underlying legal support.

The Manual will constitute an easy-to-use reference tool to facilitate day-to-day work of judges both in the region and worldwide. It is particularly useful in societies still undergoing transitions, and where the judiciaries are still struggling to assert and establish their full independence.

The Manual represents an extraordinary commitment of time and effort by the Network judges who participated in this project. They undertook extensive independent research and editing, coming together periodically at the Institute to coordinate and collaborate on their work. We are deeply indebted to them for their commitment, skill, and insight both in the conceptualization and actualization of this project.

This project reflects the underlying mission of the CEELI Institute, as an independent, not-for-profit organization dedicated to assisting legal professionals committed to a rule of law. This kind of innovative effort demonstrates how we work with judges and other legal professionals to support fair, transparent, and effective judicial systems, strengthen democratic institutions, combat corruption, and build respect for human rights. We remain deeply indebted to the work of the many young judges from across this region who contributed to the drafting of this Manual.

Christopher Lehmann

Executive Director, The CEELI Institute, Prague

## INTRODUCTORY REMARKS

### About Justice and its values

Justice is the cornerstone of the rule of law. Its mission is to protect human rights and to maintain public order. Justice is administrated by judges, with the support of advocates and public prosecutors.

In order for judges to secure the supremacy of law while correctly fulfilling their duties, they need a statute and special safeguards: independence and impartiality. These are rights, but also obligations. The rule of law and the acceptance of its values and principles require confidence in justice. For confidence in the system to exist, professionals from the judiciary must be able to offer credibility. They must have irreproachable behavior and exemplary professional conduct. Thus, there is one other requirement: integrity.

These three “i”-s of justice – independence, impartiality and integrity – are the pillars of a healthy justice system.

**Impartiality** is the supreme value, entailing, both as conditions and safeguards, the two other values. Impartiality is a moral value. It pertains to someone’s inner self and for judges means analysing facts based on the applicable law in a well-balanced manner, without prejudice and predilection regarding the case with which they are dealing, and without acting in any way that would favour the interests of any of the parties involved. The impartiality of judges is guaranteed by rules on incompatibilities, restrictions and conflicts of interests. Even appearance is a stand-alone value: it is not enough for a judge to be impartial, he or she also needs to be seen as impartial by users of justice.

**Independence** is an external characteristic. Relying on the theory of the separation of powers, the independence of justice applies to both justice as an *institution*, as a system, and to the *individual judges* who rule on specific cases. Judges must be capable of discharging their professional duties without being influenced by the executive or legislative branches of government, by their hierarchic superiors, by stakeholders or economic interest groups. It is important to realize that the principle of the independence of the judiciary was not conceived for the personal benefit of the judges themselves, but to protect people from abuses of power. Therefore, the independence is not a privilege of the judge, but a benefit for the public. So, independence is not only a right of judges, but also their duty.

While the independence of the judge is enshrined by his/her professional statute, impartiality is more a personal issue. The former means that there must be no subordination whatsoever, while the latter means the absence of any prejudice, passion, weakness, or personal feeling. The former is to be looked at in relation to a third party, while the latter is analyzed in relation to the judge himself.

**Integrity** is an inner characteristic meaning a person acts in accordance with specific principles and values, making no compromises, neither at work nor in one’s private life. It means an honest, good-faith, correct, and industrious discharging of work duties. In fact, integrity manifests itself in the performance of judicial acts with objectiveness, in full equality, meeting statutory terms, all for the complete legality of the act. In justice, integrity is a lot more than a virtue – it is a necessity. Integrity is analyzed from two different points of view: “rule of law,” where integrity regards the professionalism of the public agent (internal integrity); and “democracy,” where integrity regards the responsibility that the justice system and its institutions have towards the public in order to gain public confidence (integrity from an external point of view). However, it is clear that in the end, both views point to the same thing: individual integrity of the public agent. When values degrade, things deteriorate into what we call “corruption.”

## About standards and our project

Justice is the backbone of a democratic society. Without justice, everything will crash in a moment. Justice is the duty of every man and woman, and it is through justice that we address the people – that is why it must be fast, reliable, and competent.

Regarding the *right to a fair hearing before an independent and impartial court of law* and the requirement of *appropriate behavior* for judges, there is a broad range of international instruments, which belong to an *international judicial Corpus Iuris*. These reflect the concerns of various world or regional inter-government or non-government bodies surrounding strengthening the role of the judiciary. These legal instruments, binding or non-binding, make up the foundation of a set of international legal standards which, in turn, could lead to the consolidation of the judiciary in connection to other powers, to avoid conflicts of interests and to increase the professionalism of judges.

A few years ago, we started to build a new judicial culture at CEELI – the culture of the three “i”-s: Independence, Impartiality and Integrity. We need to understand exactly what this is in order to implement it in our countries. That’s why a year ago, I proposed to collect all relevant conventions, recommendations, resolutions, and declarations and to organize them, taking into consideration specific subjects/key-words. It was an important and difficult activity for a team of 10 judges and experts in the legal field. We shared experiences, we have done our work, and now we have a very important tool: one single place where those who are concerned can find the minimum standards for their legal and juridical national systems.

We have used only public sources. That is why we uploaded the manual on our website and will share all instruments that we found on the internet with the public. Of course, we will update our database whenever necessary. For the next year, we will continue our project, presenting the relevant jurisprudence regarding the three “i”-s.

Judge Cristi Danileț, PhD

Project leader

## ABOUT THE AUTHORS

### **Katica Artuković, Judge, Municipal Court in Ljubuski, Bosnia and Herzegovina**



Katica Artuković was born in Ljubuski, Bosnia and Herzegovina in 1980. She earned her B.A. at Law School in Zagreb, Republic of Croatia in 2003, and passed the judicial service exam in Sarajevo in 2005. She was hired as a judicial intern – a volunteer at the Municipal Court Ljubuski, and became an expert adviser at the same court in 2006, appointed as a judge at the Municipal Court Ljubuski in 2009, is an educator in criminal law at the Center for Education of Judges and Prosecutors in Federation of Bosnia and Herzegovina, co-author of the Manual for judges on intellectual property in BiH, co-author of the book *Security and Legal Protection of the Judicial System in Justice in Bosnia and Herzegovina*, co-author of the several articles published in a magazine for legal

theory and practice in Bosnia and Herzegovina – Law and Justice, member of the expert team for rights of intellectual property - EU IPR Enforcement Project, appointed by the Bosnia and Herzegovina High Judicial and Prosecutorial Council as a member of the Working Group for Security of Judicial Institutions and Judicial Function Holders, and writes doctoral scientific work on the topic of extreme necessity.

### **Anna Bednarek, Judge, Warsaw District Court, Poland**



Anna Bednarek sits as a judge at the District Court of Warsaw. She previously served as a judge in the District Court of Warsaw from June 1998 until 2001 and served again at the same Court from April 2007 until January 2009.

From 2009 until 2011, Judge Badnarek served as a EULEX (European Union Rule Of Law Mission In Kosovo) judge at the Special Chamber of the Supreme Court of Kosovo, having been appointed by the EULEX Head of Mission to be a Member of the EULEX Human Rights Review Panel of which the mandate was to review alleged human rights violations by EULEX Kosovo in the conduct of its executive mandate.

In 2008 Judge Bednarek participated as a trainer with a “Human Trafficking-Training for Judges” Project designed to combat trafficking in human beings and slavery. While in Kosovo, she was also involved in training members of the Kosovo Bar Association.

Judge Bednarek has worked as a Senior Expert in the Office of the Agent of the Polish Government at the European Commission and Court of Human Rights, Human Rights and National Minorities Division, Legal and Treaty Department of the Polish Ministry for Foreign Affairs, and has acted as Project Manager for Amnesty International, leading a project in Poland for the publication of a Human Rights Education Handbook.



### **Cristi Danileț, Judge, Romania**



Cristi Danileț was born in 1975 and has been a judge since 1998. He got his PhD in 2013, in criminal procedure law. From 2005 to 2007, Judge Danileț served as a counsellor of the Romanian minister of justice. Since 2008, he has been a trainer of the National Institute for Judges and Prosecutors in the field of juridical ethics and deontology. From 2011 to 2016, he was a member of the Romanian Superior Council of Magistracy.

He has been a member or the leader of a number of different national and international organizations defending the independence of the justice system and promoting the integrity of judges. He strongly supports civic programmes such as legal education in schools and the role of law for ordinary citizens.

He has been a member of the advisory board of the Central-Eastern European Judicial Exchange Network – CEELI since 2012, and led the project - *Manual on Independence, Impartiality and Integrity of Justice: A Thematic Compilation of International Standards, Policies and Best Practices*.

Numerous analyses on corruption, the independence of the judiciary, and the reform of the justice system can be found on his blog, at <http://cristidanilet.ro/blog>. He maintains continuous contact with the Romanian public and journalists through his Facebook account at [www.facebook.com/cristi.danilet](http://www.facebook.com/cristi.danilet).

### **Davor Dubravica, Judge, Misdemeanor Court of Zadar, Croatia**



Davor Dubravica is judge in Municipal Court of Zadar, Criminal Department, Croatia. He received his legal training at the Law Faculty of University of Zagreb, Croatia. During his career, he has been given many responsible duties in judiciary, governance and international organizations.

From 2008-2012, he was Head of the Independent Anti-Corruption Sector of the Croatian Ministry of Justice where he was responsible for designing Croatian anti-corruption policy, drafting anti-corruption laws, and coordinating and monitoring the implementation of anti-corruption policy and strategic measures.

During Croatian negotiation process for the accession to the EU, he was a member of the working group for the Chapter 23. Judiciary and fundamental rights, coordinating activities of all involved stakeholders in prevention of corruption field.

From 2011 – 2018, he was Chairman of the Regional Anti-Corruption Initiative of Southeast Europe (RAI).

Since 2012, he has worked as OECD and EC peer review expert of anti-corruption and integrity systems in Georgia, Ukraine, Moldova, Montenegro and Armenia. He was working as an expert and trainer in projects in Montenegro, Serbia, Kazakhstan, Georgia, Tunisia, Egypt, Albania, Philippines, Uzbekistan, Morocco, Turkmenistan, Maldives, Turkey and North Macedonia. Mr. Dubravica is a member of Croatian delegation in GRECO.

### **Domagoj Frntić, Judge, Deputy President of the Municipal Labour Court, Croatia**



Domagoj Frntić has been a judge in the civil and labor courts in Croatia since 1999, after receiving legal training at the Law Faculty of the University of Zagreb. He has also served as Deputy Chairman, and later as Chairman of the Labor Court in Croatia's capital city of Zagreb. He is Disciplinary Judge (Panel for public servants/administrative staff) at the Department of Public Administration, and at the Croatian Chamber of Architects.

Judge Frntić is the author/co-author of many written and oral presentations, as well as of a number of textbooks and manuals, and has been a lecturer (at the University of Zagreb Law School/Faculty, Judicial Academy and at the other institutions) and member of various expert groups or committees, in the areas of civil law, labor/civil servant law, civil procedural law and anti-discrimination law.

He participated in a number of international legal and judicial projects (EJTN, ABA/CEELI, ILAC, IVLP, and others, in Central/Eastern Europe, MENA region, Central Asia and elsewhere) concerning international, anti-discrimination and labor law, judicial ethics, rule of law and court administration/organisation.

Since 2014, Judge Frntić has been an honorary citizen of the state of Nebraska, United States of America.

### **Marela Jevtović, Judge, Bosnia and Herzegovina**



Marela Jevtović was born in Banja Luka, Bosnia and Herzegovina in 1973. She has worked at international and non-governmental organizations as well as governmental institutions. She started her career at the ICRC, UNMO, OSCE, IFOR branch offices in Banja Luka, Prnjavor, Doboј, Brčko - working in the detention and protection department; dissemination department; lecturing on Geneva Conventions, International Humanitarian Law, establishing offices of the OSCE for the first after-war elections; briefing the international elections observers; giving lectures on the electoral rules and Code of Conduct. After graduating from Belgrade Law School, she worked as

a lawyer/consultant for various national and international organizations and consulted on protection of civilian victims of war in Bosnia and Hercegovina, drafted Electricity Law and also worked as a defence lawyer at ICTY from 1999 until 2004. She also worked at a Directorate for Privatization of Republic of Srpska, on privatization of strategic enterprises. She was a Head of the department of spatial planning at Čelinac Municipality. She was a Head of the Legal Department at the SERC (State Electricity Regulatory Commission) and represented the Commission in all administrative and judicial proceedings and performed other legal activities within the Commission's jurisdiction.

She has been an appointed judge at Banja Luka Basic Court since 2008.

## **Lazar Nanev, Judge, Basic Court Kavadarci, Associate Professor, FYROM**



Lazar Nanev was born in 1969 in Kavadarci, Macedonia. He graduated at the Law Faculty in Skopje. He got a PhD from the Faculty of Law in Skopje, obtaining a scientific degree of Doctor of Criminal Law. Currently, he works as a judge in the Basic Court Kavadarci, where he was also the president for four years. In 2013, he was elected as an associate professor at the Law Faculty in Stip, where together with his professional engagements, he engages in educational and scientific research activities.

As a professor at the Law Faculty of the University "Goce Delchev" in Stip, he teaches the following subjects: criminal law, criminal procedural law, European criminal law, international criminal procedural law, penology – the first cycle, and penology and comparative criminal procedural law of the second cycle. He has participated in many seminars and workshops as a lecturer on topics related to the independence and integrity of the judicial system. He is one of the authors of the law for justice of children. By decision of the Ministry of Justice he is also a member of the committee for preparation of an Action Plan for the protection of children's rights. He participates in the working group for the adoption of the new Law on Criminal Procedure of the Republic of Macedonia and the Criminal Code. He is a member of the executive board of the Association for Criminal Law and Criminology, the Court Budget Council (2006-2007), the Board of Police Academy (2005 - 2008), the Board of FFM. He is also a member of the working body for standardization of the ACCMIS program in the courts, as well as a member of the committee for preparation of the Court Rules of Procedure.

He has published several scientific papers independently or as co-author: criminal procedural law for children, procedures for dealing with child victims of violence or crime, juvenile delinquency - preventive action plan for Macedonia, analysis of the situation of children and youth in the juvenile justice system, the position of juvenile criminal proceedings, strategy for implementation of alternative measures, penal policy of the courts and its impact on the eradication of crime, penitentiary - legal reform and respect for human rights in the Republic of Macedonia: comparative research on solutions to improve and simplify the criminal procedure, role of the juvenile judge in the juvenile justice system, juvenile justice - from idea to practice, criminology features of the Macedonian economic crime data through the bodies of criminal prosecution, conditional sentence with protective supervision, juvenile justice: restorative justice , the new Macedonian concept of law judges and their role in the criminal procedure, mediation in the system of juvenile justice, international documents for the implementation of juvenile justice - contemporary trends in the treatment of minors, practicum in criminal procedural law, and prevention and repression of violence at the football pitches.

### **Slawomir Palka, Judge, District Court in Olawa, Poland**



He began working as a criminal judge in 2002, and he started working as a criminal judge at the District Court in Olawa in 2009. From 2009-2017, he was the president of the District Court in Olawa and is now the head of the Criminal Division of the given Court.

From 2006-2009, he worked for Polish Ministry of Justice, among others, as the Director of Department of Enforcement of Judgments and Probation. In the years 2014-2018 he was an elected member of the Polish National Council for Judiciary, where he was also a member of the Executive Board of the Council and the deputy spokesperson. He is a member of Iustitia – Association of Polish Judges.

### **Levente Simon, Judge, Gödöllő City Court, Hungary**



With several years of judicial experience gained in the area of civil case law, and in the last three years in the area of international judicial standards, Levente Simon is happy to have the opportunity to use his knowledge and capabilities to help the judiciary to understand and accept its role and responsibility. He believes the success of this project can enhance the judicial cooperation which can contribute to mutual confidence.

Working in the court system for 20 years and having experiences of varying length at almost all levels of the court system – from local court to Supreme Court - provides a daily routine in certain areas of law, but to have a good eye on passing judgements one needs more than that. Judge Simon believes that the content of this handbook can provide an additional theoretical basis.

### **Mindaugas Šimonis, Judge, Kaunas District Court, Lithuania**



Mindaugas Šimonis has been a judge of the Kaunas district court since 2006, and for the past five years, he has served as the Chairman of the Kaunas District Court, Lithuania. Currently, he serves as a Chairman of Civil case division in Kaunas regional court. Prior, he served as a Justice Assistant at the Supreme Court of Lithuania and as an Ombudsman's assistant in the Ombudsmen's office of the Republic of Lithuania. In addition, Judge Šimonis has been a lecturer of law at several universities.

Judge Šimonis served as an expert trainee for Tunisian judges. The course, "Judging in a Democratic Society," topics: independence, impartiality and integrity of courts/judges; Ethical Norms: Bangalore Principles, Recommendation 2010, Council of Europe Ministers, UN Basic Principles (1985); Court administration was put on by the CEELI Institute and the International Legal Association Consortium (LAC) in cooperation with the Tunisian Ministry of Justice in Tunis, in February of 2014.

Judge Šimonis' professional fields of interests are the Independence of courts, Court administration, and Professionalism of judges, as well as civil procedural law. He is the author of several legal publications on medical law and children's rights. Judge Šimonis is an active participant in workshops organized by the Judicial Training Centre of Lithuania and continues to push forward with his professional development whenever possible.

### **Sophio Tsakadze, Council of Europe, Georgia**



Sophio Tsakadze has experience working at both governmental institutions as well as international and non-governmental organizations. She started her career at the Ministry of Justice, Department of Public International Law in Georgia. After 2 years, she moved to the Supreme Court of Georgia and served as a Deputy Head of the Analytical Department.

Sophio gives lectures in international treaty law, international criminal law and legal writing at various universities in Georgia. She has several publications in the field of human rights law. Sophio currently works at the Council of Europe Office in Georgia and is coordinating the project on strengthening the Georgian Bar Association.

## I. THE RATIONALES OF JUDICIAL INDEPENDENCE

### ***BRIJUNI STATEMENT OF THE PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY, Conference of Chief Justices of Central and Eastern Europe, 14 October, 2015***

Independence of the Judiciary

3. Independence of the Judiciary requires that:

a. The judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source;

b. Independence belongs both to the judiciary as an institution and to each individual judge with respect to a case assigned to the judge; and

c. No judge can properly adjudicate a case out of fear or anticipation of favor from any source or due to any improper influence.

4. The maintenance of the independence of the judiciary is essential to the attainment of its objectives and the proper performance of its functions in a free society observing the rule of law.

a. Judges shall exhibit and promote high standards of legal knowledge and judicial conduct in order to reinforce public confidence in the judiciary, which is fundamental to the maintenance of judicial independence;

b. Impartiality and the appearance of impartiality are essential to the proper discharge of the judicial office. They apply not only to the decision itself but also to the process by which the decision is made.

### I. 1. CULTURE OF INDEPENDENCE

#### ***BUILDING AND MAINTAINING CULTURE OF JUDICIAL INDEPENDENCE, Amendment to The Mt Scopus International Standards of Judicial Independence, JIWP, 2008***

1.4 Every society and all international bodies, tribunals and courts shall endeavour to build and maintain a culture of judicial independence that is essential for democracy, liberty, rule of law and human rights in domestic system of government and is a necessary foundation for world peace, orderly world trade, globalised markets and beneficial international investments.

1.4.1 The culture of judicial independence is created on five important and essential aspects: creating institutional structure, establishing constitutional infrastructures, introducing legislative provisions and constitutional safeguards, creating adjudicative arrangements and jurisprudence, and maintaining ethical traditions and code of judicial conduct.

1.4.2 The institutional structures regulate the matters relative to status of the judges and jurisdiction of the courts.

1.4.3 The constitutional infrastructure embodies in the constitution the main provisions of the protection of the judiciary as outlined in these standards.

1.4.4 The legislative provisions offer detailed regulations of the basic constitutional principles of judicial independence and impartiality.

1.4.5 The courts add to the constitutional infrastructure and the legislative provisions complementary interpretations and jurisprudence on different aspects of the conduct of judges operation and courts.

1.4.6 The ethical traditions and code of judicial conduct cover the judge's official and non-official spheres of activities, and shield the judge's substantive independence from dependencies, associations, and even less intensive involvements which might cast doubts on judicial neutrality.

***BEST PRACTICE GUIDE FOR MANAGING SUPREME COURTS, European Union, 2017***

I Introduction

3. Value of Effective Justice Systems

2. Independence

Judicial independence ensures the fairness, predictability and certainty of the legal system and is therefore vital for gaining the trust of citizens and businesses in the legal system. The independence of the judiciary protects citizens against the power of the government of the State. Judicial independence is therefore essential in relation to society in general and in relation to the particular parties to any dispute, on which judges have to adjudicate, and in relation to the legislature and the executive.

It is important to note that formal independence is not sufficient to attain the above-mentioned objectives. The judiciary must also be perceived to be independent by citizens and business in order to gain their trust. Independence is a requirement that influences many, if not all, aspects related to the judiciary. It determines how judges are appointed and withdrawn, how they are trained, how cases are allocated among judges, among other aspects.

***REPORT OF THE SPECIAL RAPPORTEUR ON THE INDEPENDENCE OF JUDGES AND LAWYERS, Human Rights Council, June 2017***

A3. Rule of law, separation of powers and the independence of judges and lawyers

14. Judicial independence is fundamental for the protection of human rights, democracy and the rule of law. In 1985, the General Assembly endorsed the Basic Principles on the Independence of the Judiciary. That independence, as stated by the Basic Principles, shall be guaranteed by the State and enshrined in the Constitution or the law of the country.

***DECLARATION ON JUDICIAL INTEGRITY, UNODC, Global Judicial Integrity Network, 2018***

Strengthen our efforts to protect judges, including by ensuring that they can decide matters before them impartially, on the basis of 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, and the protection of their security of tenure.

Support the creation and the strengthening of oversight, evaluation, disciplinary and other accountability mechanisms, without prejudice to judicial independence.

6. Support initiatives that promote transparency in court process and case management, as well as in the appointment, selection, recruitment, retention, promotion and retirement of heads of courts, judges, magistrates, other judicial office holders and court personnel;

9. Recognizing that the above-mentioned objectives should be pursued at the global level to the benefit of every region, launch the Global Judicial Integrity Network as a platform of mutual learning and support, and welcome the readiness of the United Nations Office on Drugs and Crime to facilitate the Network; and

10. Invite all judges and judiciaries to participate in the Global Judicial Integrity Network.

## **I. 2. OBLIGATION TO GUARANTEE THE INDEPENDENCE OF JUSTICE**

### ***AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS, African Commission on Human and Peoples' Rights, 1981***

Art. 26 State Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

### ***BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, Adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, 1985***

#### **I. Independence of the judiciary**

The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

### ***DOCUMENT OF THE COPENHAGEN MEETING OF THE CONFERENCE ON THE HUMAN DIMENSION OF THE CSCE, 1990***

5. They solemnly declare that among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings are the following:

5.12. - the independence of judges and the impartial operation of the public judicial service will be ensured.

### ***DOCUMENT OF THE MOSCOW MEETING OF THE CONFERENCE ON THE HUMAN DIMENSION OF THE CSCE, 1991***

#### **19. The participating States**

19.1 - will respect the internationally recognized standards that relate to the independence of judges and legal practitioners and the impartial operation of the public judicial service including, inter alia, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights;

19.2 - will, in implementing the relevant standards and commitments, ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice, paying particular attention to the Basic Principles on the Independence of the Judiciary, which, inter alia, provide for

- (i) prohibiting improper influence on judges;
- (ii) preventing revision of judicial decisions by administrative authorities, except for the rights of the competent authorities to mitigate or commute sentences imposed by judges, in conformity with the law;
- (iii) protecting the judiciary's freedom of expression and association, subject only to such restrictions as are consistent with its functions;
- (iv) ensuring that judges are properly qualified, trained and selected on a non-discriminatory basis;
- (v) guaranteeing tenure and appropriate conditions of service, including on the matter of promotion of judges, where applicable;
- (vi) respecting conditions of immunity;



(vii) ensuring that the disciplining, suspension and removal of judges are determined according to law.

### ***JUDGES' CHARTER IN EUROPE, European Association of Judges, 1997***

Fundamental principles

1 The independence of every Judge is unassailable. All national and international authorities must guarantee that independence.

12. The Judges' Charter must be expressly embodied in legislation.

### ***EUROPEAN CHARTER ON THE STATUTE FOR JUDGES AND EXPLANATORY MEMORANDUM, Council of Europe, Strasbourg, 8 - 10 July 1998***

1.2. In each European State, the fundamental principles of the statute for judges are set out in internal norms at the highest level, and its rules in norms at least at the legislative level.

### ***OPINION NO 1 (2001) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF COUNCIL OF EUROPE ON STANDARDS CONCERNING THE INDEPENDENCE OF THE JUDICIARY AND THE IRREMOVABILITY OF JUDGES, Council of Europe, 2001***

The level at which judicial independence is guaranteed

14. The independence of the judiciary should be guaranteed by domestic standards at the highest possible level. Accordingly, States should include the concept of the independence of the judiciary either in their constitutions or among the fundamental principles acknowledged by countries which do not have any written constitution but in which respect for the independence of the judiciary is guaranteed by age-old culture and tradition. This marks the fundamental importance of independence, whilst acknowledging the special position of common law jurisdictions (England and Scotland in particular) with a long tradition of independence, but without written constitutions.

15. The UN basic principles provide for the independence of the judiciary to be "guaranteed by the State and enshrined in the Constitution or the law of the country". Recommendation No. R (94) 12 specifies (in the first sentence of Principle I.2) that "The independence of judges shall be guaranteed pursuant to the provisions of the [European] Convention [on Human Rights] and constitutional principles, for example by inserting specific provisions in the constitutions or other legislation or incorporating the provisions of this recommendation in internal law".

16. The European Charter on the statute for judges provides still more specifically: "In each European State, the fundamental principles of the statute for judges are set out in internal norms at highest level, and its rules in norms at least at the legislative level". This more specific prescription of the European Charter met with the general support of the CCJE. The CCJE recommends its adoption, instead of the less specific provisions of the first sentence of Principle I.2 of Recommendation No. R (94) 12.

Conclusions

73. The CCJE Considered that the critical matter for member States is to put into full effect principles already developed (paragraph 6) and, after examining the standards contained in particular Recommendation No. R (94) 12 on the independence, efficiency and role of judges, it concluded as follows:

(1) The fundamental principles of judicial independence should be set out at the constitutional or highest possible legal level in each member State and its more specific rules at the legislative level (paragraph 16).

***PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA, African Commission on Human and Peoples Rights, 2003***

Q. TRADITIONAL COURTS

c) The independence of traditional courts shall be guaranteed by the laws of the country and respected by the government, its agencies and authorities:

- (i) they shall be independent from the executive branch;
- (ii) there shall not be any inappropriate or unwarranted interference with proceedings before traditional courts.

***INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY, JURORS AND ASSESSORS AND THE INDEPENDENCE OF LAWYERS, UN Commission on Human Rights, Resolution: 2004/33, 2004***

7. *Calls upon* all Governments to respect and uphold the independence of judges and lawyers and, to that end, to take effective legislative, law enforcement and other appropriate measures that will enable them to carry out their professional duties without harassment or intimidation of any kind;

***BUILDING AND MAINTAINING CULTURE OF JUDICIAL INDEPENDENCE, Amendment to The Mt Scopus International Standards of Judicial Independence, JIWP, 2008***

8. SECURING IMPARTIALITY AND INDEPENDENCE

8.4. The state shall ensure that in the decision-making process, judges should be independent and be able to act without any restriction, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. The law should provide for sanctions against persons seeking to influence judges in any such manner. Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law. Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary.

***SELF GOVERNANCE FOR THE JUDICIARY: BALANCING INDEPENDENCE AND ACCOUNTABILITY, General Assembly of the European Network of Councils for the Judiciary (ENCJ), 2008***

3) In states with a written Constitution, the independence of the judiciary should be guaranteed in the Constitution.

***PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO DEVELOPMENT, UN HUMAN RIGHTS COUNCIL, Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, 24 March 2009***

Recommendations

100. With respect to institutional guarantees, the Special Rapporteur recommends that:

- Competencies of the different branches of power be clearly distinguished and enshrined in the Constitution or equivalent.
- The independence of the judiciary be enshrined in the Constitution or be considered as a fundamental principle of law. Both principles must adequately be translated into domestic law.

***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

Chapter I – General aspects

7. The independence of the judge and of the judiciary should be enshrined in the constitution or at the highest possible legal level in member states, with more specific rules provided at the legislative level.

***REPORT ON THE INDEPENDENCE OF THE JUDICIAL SYSTEM PART I: THE INDEPENDENCE OF JUDGES, Venice Commission, Venice, 12-13 March 2010 CDL-AD(2010)004***

IV. Conclusions

82. The following standards should be respected by states in order to ensure internal and external judicial independence:

1. The basic principles relevant to the independence of the judiciary should be set out in the Constitution or equivalent texts. These principles include the judiciary's independence from other state powers, that judges are subject only to the law, that they are distinguished only by their different functions, as well as the principles of the natural or lawful judge pre-established by law and that of his or her irremovability.

***ARAB ANTI-CORRUPTION CONVENTION, League of Arab States, General Secretariat, 2010***

12. Independence of the judiciary and public prosecution

Considering the importance of independence of the judiciary and its decisive role in fighting corruption, each State Party shall, in accordance with its domestic legislation, adopt all that guarantees and strengthens the independence of the judiciary and prosecutors, support their integrity and provide them with the necessary protection.

***BRIJUNI STATEMENT OF THE PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY, Conference of Chief Justices of Central and Eastern Europe, 14 October, 2015***

Independence of the Judiciary

5. The independence of the judiciary and judges shall be guaranteed by the state and enshrined in the Constitution, at the highest legal level in the country. More specific rules should be provided at the legislative level.

6. It is the duty of the institutions of the state to respect and observe the proper objectives and functions of the judiciary.

7. In the decision-making process, the duty of the judge exercising jurisdiction individually or judges acting collectively to pronounce judgment in accordance with Article 3 (a) shall not be subject to interference or influence by any judge not assigned to the case, the council of justice, the ministry of justice, or any other government officer or institution, except that the judgment may be appealed to another court. The judiciary shall exercise its functions in accordance with the Constitution and the

laws. The state should provide procedures and remedies for the protection of judicial independence, including sanctions against those who attempt to influence judges other than through lawful court process.

### ***FUNDING OF THE JUDICIARY, ENCJ REPORT 2015-2016, ENCJ, 2016***

#### Recommendation Ten

Judicial independence is a central pillar of any constitutional system. It is fundamental in any democracy that individual judges and the judiciary as a whole are independent of all external pressures and improper influence from the other branches of government, including funding bodies. The minimum conditions for judicial independence include financial security, i.e. the right to a salary and a pension.

In order to retain and attract the highest quality judges and maintain judicial independence, judicial remuneration must at all times be commensurate with their professional responsibilities, public duties and the dignity of their office. The remuneration must be based on a general standard and rely on objective and transparent criteria, not on an assessment of the individual performance of a judge. Judicial remuneration includes salary, sickness pay, paid maternity/paternity leave and pensions.

The remuneration of judges must be constitutionally guaranteed in law and not altered to the disadvantage of judges after their appointment. Save in times of economic emergency, when there is a general reduction in comparable public service salaries and judges are treated no less favourably than others paid from the public purse, there should be no reduction in judicial remuneration.

There should be an independent body established to make informed recommendations to the government in relation to judicial remuneration, which governments should accept and implement. Where such recommendations are not followed, the reasons should be clearly and publicly explained by the government.

### ***THE WARSAW DECLARATION ON THE FUTURE OF JUSTICE IN EUROPE, The General assembly of European Network of Councils for the Judiciary (ENCJ), 2016***

5. The ENCJ is increasingly concerned that the approach of the Government of Turkey to the transfer, suspension, removal and prosecution of judges is not consistent with the principles of judicial independence. It urges the executive and the Turkish Council for the Judiciary to pay full regard to the principles that judges are irremovable, and that judges should not be transferred or demoted, except in circumstances prescribed by law after transparent proceedings conducted by an independent body whose decisions are subject to challenge or review.

6. In relation to the developing situation in Poland, the ENCJ emphasises the importance of the executive respecting the independence of the judiciary, and only undertaking reforms to the justice system after meaningful consultation with the Council for the Judiciary and the judges themselves.

### ***REPORT OF THE SPECIAL RAPPOREUR ON THE INDEPENDENCE OF JUDGES AND LAWYERS, Human Rights Council, June 2017***

#### C1. Interference in, pressures on and threats against the judiciary

70. The independence of the judiciary is linked to the lack of interference in, pressures on and threats against the judiciary. To ensure the independence of the judicial system, judges, lawyers and prosecutors must be free of any interference, pressure or threat that might affect the impartiality of their judgments and decisions. Otherwise, the independence of the judicial system would be

seriously jeopardized, as its practitioners would not be able to fulfil their tasks in an objective and independent manner.

71. Principles 2 and 4 of the Basic Principles on the Independence of the Judiciary mention the requirement of non-interference in order to guarantee the independence of the judiciary. Such lack of interference implies that no authority, private group or individual may interfere in judicial decisions; they must respect and abide by the decisions of the judiciary. Judges shall decide matters presented before them not only impartially and in accordance with the law, but without threats or interference. The decision-making process can be assured only if there is no inappropriate or unwarranted interference with the judicial process.

72. The Special Rapporteur would like to stress the importance of protecting the judiciary and the legal professions from interference and pressures in order to protect human rights. As stated by Louis Joinet in 1993, fundamental freedoms are all the better safeguarded to the extent that the judiciary and the legal professions are protected from interference and pressure (see E/CN.4/Sub.2/1993/25, para. 1).

### **I. 3. RULE OF LAW AND JUSTICE**

#### ***AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN, 9th International Conference of American States, 1948***

Article XXVI Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

#### ***MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE, International Bar Association (IBA), 1982***

24. The number of the members of the highest court should be rigid and should not be subject to change except by legislation.

#### ***MONTREAL DECLARATION UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE, International Association of Judicial Independence and World Peace (JIWP), 1983***

Art. 2.01 The objectives and functions of the judiciary shall include:

- a) to administer the law impartially between citizen and citizen, and between citizen and state;
- b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights;
- c) to ensure that all peoples are able to live securely under the rule of law.

Art. 2.06 a) No ad hoc tribunals shall be established;

- b) Everyone shall have the right to be tried expeditiously by the established ordinary courts or judicial tribunals under law, subject to review by the courts;
- c) Some derogations may be admitted in times of grave public emergency which threatens the life of the nation but only under conditions prescribed by law, and only to the extent strictly consistent with internationally recognized minimum standards and subject to review by the courts;
- d) in such times of emergency
  - I. Civilians charged with criminal offences of any kind shall be tried by ordinary civilian courts, expanded where necessary by additional competent civilian judges;
  - H. Detention of persons administratively without charge shall be subject to review by ordinary courts by way of habeas corpus or similar procedures, so as to insure that the detention is lawful, as well as to inquire into any allegations of ill-treatment;

#### ***BEST PRINCIPLES ON THE INDEPENDANCE OF THE JUDICIARY, Adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, 1985***

5. Independence of the judiciary

Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

#### ***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE (“Singhvi Declaration”), ECOSOC, 1985***

Objectives and Functions

1. The objectives and functions of the judiciary shall include:

- (a) Administering the law impartially irrespective of parties;

- (b) Promoting, within the proper limits of the judicial function, the observance and the attainment of human rights;
- (c) Ensuring that all peoples are able to live securely under the rule of law.

***PROCEDURES FOR THE EFFECTIVE IMPLEMENTATION OF THE BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, Resolution 1989/60, 15th plenary meeting, ECOSOC, 24 May 1989***

Procedure 1. All States shall adopt and implement in their justice systems the Basic Principles on the Independence of the Judiciary in accordance with their constitutional process and domestic practice.

Procedure 4. States shall ensure that the Basic Principles are widely publicized in at least the main or official language or languages of the respective country. Judges, lawyers, members of the executive, the legislature, and the public in general, shall be informed in the most appropriate manner of the content and the importance of the Basic Principles so that they may promote their application within the framework of the justice system. In particular, States shall make the text of the Basic Principles available to all members of the judiciary.

Procedure 6. States shall promote or encourage seminars and courses at the national and regional levels on the role of the judiciary in society and the necessity for its independence.

***DOCUMENT OF THE COPENHAGEN MEETING OF THE CONFERENCE ON THE HUMAN DIMENSION OF THE CSCE , 1990***

5.5. They solemnly declare that among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings are the following: the activity of the government and the administration as well as that of the judiciary will be exercised in accordance with the system established by law. Respect for that system must be ensured;

***PALERMO DECLARATION, ELEMENTS OF A EUROPEAN STATUTE OF MAGISTRACY, MEDEL, 1993***

1.3. In jurisdictions of every kind and degree, the law is expressed by the magistrates by means of closing speeches for the prosecution, opinions, reports and decisions.

2.1. Magistrates are subject only to legality and to the law. They carry out their functions in complete independence. They control the constitutionality of the laws, directly or through recourse to a constitutional court.

***RESOLUTION ON THE ROLE OF LAWYERS AND JUDGES IN THE INTEGRATION OF THE CHARTER AND THE ENHANCEMENT OF THE COMMISSION'S WORK IN NATIONAL AND SUB-REGIONAL SYSTEMS, Res.22(XIX)96, The African Commission, ACHPR, 1996***

Considering the mandate and judicial competence of judges to base their reasoning and judgements on all relevant human rights instruments, either as applicable authoritative laws or as persuasive aids to interpretation of constitutional and legislative provisions on fundamental rights, freedoms and duties,

Recognising the importance of specialised and continuing training in human and peoples' rights for legal practitioners, judges, magistrates and the commissioners,

Appreciating the initiative of Commonwealth judges to incorporate and further develop human rights instruments and principles in their work:

1. URGES Judges and magistrates to play a greater role in incorporating the Charter and future jurisprudence of the Commission in their judgements thereby promoting and protecting the rights and freedoms guaranteed by the Charter.

***BEIJING STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION, as amended in Manila at 7th Biennial Conferences of Chief Justices of Asia and the Pacific, 1997***

4. The maintenance of the independence of the judiciary is essential to the attainment of its objectives and the proper performance of its functions in a free society observing the rule of law. It is essential that such independence be guaranteed by the State and enshrined in the Constitution or the law.

10. The objectives and functions of the judiciary include the following:

- a) To ensure that all persons are able to live securely under the rule of law;
- b) To promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and
- c) To administer the law impartially among person and between persons and the State.

***THE UNIVERSAL CHARTER OF THE JUDGE, International Association of Judges (IAJ), 1999***

1. Independence Judges shall in all their work ensure the rights of everyone to a fair trial. They shall promote the right of individuals to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, in the determination of their civil rights and obligations or of any criminal charge against them. The independence of the judge is indispensable to impartial justice under the law. It is indivisible. All institutions and authorities, whether national or international, must respect, protect and defend that independence.

***INTER-AMERICAN DEMOCRATIC CHARTER, Organization of American States, 2001***

2. The effective exercise of representative democracy is the basis for the rule of law and of the constitutional regimes of the member states of the Organization of American States. Representative democracy is strengthened and deepened by permanent, ethical, and responsible participation of the citizenry within a legal framework conforming to the respective constitutional order.

3. Essential elements of representative democracy include, *inter alia*, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government.

4. Transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy. The constitutional subordination of all state institutions to the legally constituted civilian authority and respect for the rule of law on the part of all institutions and sectors of society are equally essential to democracy.

***OPINION NO. 1 (2001) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF COUNCIL OF EUROPE ON STANDARDS CONCERNING THE INDEPENDENCE OF THE JUDICIARY AND THE IRREMOVABILITY OF JUDGES, Council of Europe, 2001***



The rationales of judicial independence

10. Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. Judges are “charged with the ultimate decision over life, freedoms, rights, duties and property of citizens” (recital to UN basic principles, echoed in Beijing declaration; and Articles 5 and 6 of the European Convention on Human Rights). Their independence is not a prerogative or privilege in their own interests, but in the interests of the rule of law and of those seeking and expecting justice.

***GUIDELINES OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON HUMAN RIGHTS AND THE FIGHT AGAINST TERRORISM, Council of Europe, 804th meeting of the Ministers’ Deputies, 2002***

IX. Legal proceedings

1. A person accused of terrorist activities has the right to a fair hearing, within a reasonable time, by an independent, impartial tribunal established by law.

***BANGALORE PRINCIPLE ON JUDICIAL CONDUCT, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002***

*Value 1* Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

***GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY, USAID, 2002***

Chapter I.B The Importance of Judicial Independence and Impartiality

Judicial independence is important for precisely the reasons that the judiciary itself is important.

Interference can come from various sources:

- The executive, the legislature, local governments
- Individual government officials or legislators
- Political parties
- Political and economic elites
- The military, paramilitary, and intelligence forces
- Criminal networks
- The judicial hierarchy itself

If a judiciary cannot be relied upon to decide cases impartially, according to the law, and not based on external pressures and influences, its role is distorted and public confidence in government is undermined.

In democratic, market-based societies, independent and impartial judiciaries contribute to the equitable and stable balance of power within the government. They protect individual rights and preserve the security of person and property. They resolve commercial disputes in a predictable and transparent fashion that encourages fair competition and economic growth. They are key to countering public and private corruption, reducing political manipulation, and increasing public confidence in the integrity of government.

Even in stable democracies, the influence of the judiciary has increased enormously over the past several decades. Legislation protecting social and economic rights has expanded in many countries, and with it the court’s role in protecting those rights. The judiciary has growing responsibility for resolving increasingly complex national and international commercial disputes. As criminal activity has also become more complex and international and a critical problem for expanding urban populations, judges play a key role in protecting the security of citizens and nations.

Judiciaries in countries making the transition to democratic governance and market economies face an even greater burden. Many of these judiciaries must change fairly dramatically from being an extension of executive branch, elite, or military domination of the country to their new role as fair and independent institutions. At the same time, the demands on and expectations of these judiciaries are often high, as views about citizens' rights, the role of the executive branch, and market mechanisms are rapidly evolving. The judiciary often finds itself a focal point as political and economic forces struggle to define the shape of the society. These judiciaries also face the serious crime problems that frequently accompany transitions, as well as enormous issues of corruption, both that carried over from old regimes, as well as corruption newly minted under changing conditions.

It would be unrealistic to think that the judiciaries can carry the full burden for resolving these complex problems. At their best, they have played a leadership role. At the very least, they need to complete their own evolutions and begin the task of confronting the multitude of problems before them.

***PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA, African Commission on Human and Peoples Rights, 2003***

**Q. TRADITIONAL COURTS**

d) States shall ensure the impartiality of traditional courts. In particular, members of traditional courts shall decide matters before them without any restrictions, improper influence, inducements, pressure, threats or interference, direct or indirect, from any quarter.

- (i) The impartiality of a traditional court would be undermined when one of its members has:
  1. expressed an opinion which would influence the decision-making;
  2. some connection or involvement with the case or a party to the case;
  3. a pecuniary or other interest linked to the outcome of the case.

(ii) Any party to proceedings before a traditional court shall be entitled to challenge its impartiality on the basis of ascertainable facts that the fairness any of its members or the traditional court appears to be in doubt.

***COMMONWEALTH (LATIMER HOUSE) PRINCIPLES ON THE THREE BRANCHES OF GOVERNMENT with Annex (Parliamentary Supremacy, Judicial Independence), The Commonwealth, 2003***

**IV) Independence of the Judiciary**

An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret and apply national constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country.

***RIGHT TO EQUALITY BEFORE COURTS AND TRIBUNALS AND TO A FAIR TRIAL, General Comment No. 32 Article 14 ICCPR, Human Rights Committee, 2007***

**I. General Remarks**

The right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law. Article 14 of the Covenant

aims at ensuring the proper administration of justice, and to this end guarantees a series of specific rights.

***OPINION NO 8 (2006) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON "THE ROLE OF JUDGES IN THE PROTECTION OF THE RULE OF LAW AND HUMAN RIGHTS IN THE CONTEXT OF TERRORISM", Consultative Council of European Judges (CCJE), 2006***

**A. INTRODUCTION**

14. The CCJE considers that the judge, charged with the dual functions of dealing with transgressions of the law and protecting constitutional rights and freedoms of individuals, must have an essential role in the legal frameworks devised by the states, and must be granted all necessary powers to fruitfully perform such tasks.

15. The CCJE considers that, if terrorism must be regarded as creating a special situation justifying temporary and specific measures which limit certain rights because of the exceptional danger it poses, these measures must be determined by the law, be necessary and proportionate to the aims of a democratic society (see, as regards the right of expression, Article 10 paragraph 2 of the European Convention of Human Rights, and, in general, principle 3 of the Guidelines on human rights and the fight against terrorism), and be subject to scrutiny and control with regard to their legitimacy by those judges that, according the legal traditions of the several states, ordinarily have jurisdiction in the area of the law concerned (civil, criminal or administrative courts – as opposed to tribunaux d'exception operating outside the ordinary legal system - see also paragraphs 26, 33-34 and 42 and following below).

**C. CRIMINAL LAW MEASURES**

b. The role of the judge remains unchanged in terrorist criminal proceedings

40. In the context of criminal law also, judges have a central role in ensuring that a proper balance is struck, as regards both substantive and procedural law, between the need to detect and pursue offences of terrorism and the safeguarding of the human rights of those suspected of and charged with such offences.

41. Having regard to the above mentioned needs, some questions concerning the role of the judge in proceedings in the field of terrorism may be addressed.

**D. THE ROLE OF THE JUDGE IN THE PROTECTION OF FREEDOM OF EXPRESSION AND OTHER RIGHTS AND FREEDOMS**

75. Despite the increase of terrorist activities, the CCJE considers that the national judge should always respect the basic principles of the rule of law, which are essential in democratic society, including the freedom of expression and other individual rights. As the fight against terrorism must never lead to the undermining of the values and freedoms that terrorists intend to destroy, it is vital for democracies that courts remain the guardians of the crucial demarcating line between a democratic society and a society that fights back using methods that themselves unduly curtail freedom of expression or infringe other rights and freedoms, such as the rights of minorities or political freedoms.

82. Judges face difficult and sometimes controversial decisions when determining whether national legislation complies with fundamental rights or freedoms and when determining whether particular conduct constitutes a terrorist offence within the scope of such legislation. The difficulties may be particularly acute when the issue is whether words or conduct amount to illegitimate incitement to commit a terrorist act, or to praising terrorism. Practice also shows that judges, on the basis of present definitions of terrorism at the national and international level, may face difficulties to determine whether certain violent political actions, usually committed or to be committed abroad,

and/or their financing or the training or recruiting in order to commit the same, should be regarded as terrorist acts or should not, as may happen in some cases involving individual or collective self-defence under article 51 of the Charter of the United Nations.

85. The basic message is that the threats to security and the Rule of law posed by terrorism should not give rise to measures which themselves tend to undermine fundamental democratic values, human rights or principles of the Rule of law. This is a message which, if put into effect, reduces the risk that measures taken with a view to countering terrorism will themselves fuel new tensions or even promote terrorism itself. It is a message which needs to be understood and accepted in democracies by the public, politicians, media and courts alike.

***OPINION No.11 (2008) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE QUALITY OF JUDICIAL DECISIONS, Consultative Council of European Judges (CCJE), 2008***

5. This opinion does not aim to challenge the basic principle that the assessment of the intrinsic quality of each judicial decision should only take place through the exercise of rights of recourse established by the law. This principle is a key consequence of the constitutional guarantee of independence of judges, regarded as one of the main features of the Rule of Law in democratic societies.

B The internal environment: professionalism, procedure, hearing and decision  
3 The hearing

29. The hearing should comply with all ECHR requirements, thus ensuring for parties and society at large compliance with the minimum standards of a properly designed and fair trial. The proper development of the hearing will have a direct impact on the parties and society's understanding and acceptance of the final decision . It should also give the judge all the elements necessary for the proper assessment of the case; therefore it has a critical impact on the quality of the judicial decision. A hearing should be held whenever the case law of the ECHR so prescribes.

30. A transparent and open hearing as well as compliance with the adversarial principle and the principle of the equality of arms are necessary prerequisites if the decision is to be accepted by the parties themselves and by the general public.

***SELF GOVERNANCE FOR THE JUDICIARY: BALANCING INDEPENDENCE AND ACCOUNTABILITY, General Assembly of the European Network of Councils for the Judiciary (ENCJ), 2008***

3) in states with a written Constitution, the independence of the judiciary should be guaranteed in the Constitution.

***OPINION N°13 (2010) ON THE ROLE OF JUDGES IN THE ENFORCEMENT OF JUDICIAL DECISIONS, CCJE, 2010***

25. If the rule of law is to be maintained and litigants' trust in the judicial system is to be ensured, enforcement activities must be proportionate, fair and effective. For example, tracing and attachment of the defendants' assets should be made as effective as possible, while taking account of the applicable provisions on human rights, protection of personal data and the need for judicial review.

***MAGNA CARTA OF JUDGES, CCJE, Council of Europe, Strasbourg, 17 November 2010***

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.

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.

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.

***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

Chapter I – General aspects

4. The independence of individual judges is safeguarded by the independence of the judiciary as a whole. As such, it is a fundamental aspect of the rule of law.

Chapter II – External independence

11. The external independence of judges is not a prerogative or privilege granted in judges' own interest but in the interest of the rule of law and of persons seeking and expecting impartial justice. The independence of judges should be regarded as a guarantee of freedom, respect for human rights and impartial application of the law. Judges' impartiality and independence are essential to guarantee the equality of parties before the courts.

Chapter V – Independence, efficiency and resources

30. The efficiency of judges and of judicial systems is a necessary condition for the protection of every person's rights, compliance with the requirements of Article 6 of the Convention, legal certainty and public confidence in the rule of law.

***ABA MODEL CODE OF JUDICIAL CONDUCT (2011 EDITION), adopted by the House of Delegates of the American Bar Association on August 7, 1990 and amended on August 6, 1997, August 10, 1999, August 12, 2003, February 12, 2007 and August 10, 2010***

Preamble

[1] An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law.

***RESOURCE GUIDE ON STRENGTHENING JUDICIAL INTEGRITY AND CAPACITY, UNODC, 2011***

IV. ACCESS TO JUSTICE AND LEGAL SERVICES

10. Conclusions and recommendations

Access to justice concerns the realization of legal and human rights by those who are unable to do this on their own and cannot afford to at their own expense.

The access to justice approach opens the discussion about reforming the judicial mechanisms for providing legal aid and support to the citizens, especially the poor and the underprivileged, so that all persons might be treated according to the law and receive legal protection.

Access to justice is linked to the increasing importance of the human rights-based approach to international development assistance. The focus shifts from the traditional state system, with its often overcharged judiciary, to the various institutions of civil society. In fact, their services often represent the only accessible active support for the poor.

With regard to the problems of states to provide for a capable state system of the judiciary, the new approaches involve the participation of both lawyers and non-lawyers, professionals and non-professionals alike, on a local or national level, financed by the state, by the local communities or by private means.

There exists a great variety of solutions and instruments to support in one way or the other the access of the poor to justice. Their feasibility often depends on financial aspects. Most of them can work alongside the formal judiciary, and therefore the state should support their formation and existence:

- Traditional, community-based courts of the people,
- Alternative dispute resolution (ADR) centres,
- Paralegal programmes with non-jurists, or “one-stop shop” legal aid centres, University-based legal clinics or legal clinics sponsored by the advocacy,
- Pro-bono legal assistance by private lawyers or law firms.

A comprehensive approach to justice and the rule of law should not overlook the possible forms of complementarity to the existing judiciaries of the states. It should also not allow state courts and ministries of justice to impede the creation of new institutions of civil society or hinder the development of the private sector offering services to the poor and underprivileged.

Therefore, as access to justice remains a challenge, the following approaches to a fully fledged legal assistance system could be considered:

- Full disclosure of information to the public as to the official ways to access the legal system that are offered by the state;
- Client orientation and quality customer service by the state courts, transparency and open doors to the public, press service and access to judicial decisions;
- Public defenders in criminal cases and government-financed public defender services;
- State support of advocacy and financial aid services for citizens in order to enable them to choose the private defender of their choice;
- Recognition of (national and international) arbitration procedures and assistance in the enforcement of their decisions;
- State-funded interpreters to resolve language barriers.

## ***REPORT ON THE RULE OF LAW, CDL-AD(2011) 003rev, Venice Commission, 2011***

### II. Historical origins of Rule of Law, Etat de droit and Rechtsstaat

16. The rule of law in its proper sense is an inherent part of any democratic society and the notion of the rule of law requires everyone to be treated by all decision-makers with dignity, equality and rationality and in accordance with the law, and to have the opportunity to challenge decisions before independent and impartial courts for their unlawfulness, where they are accorded fair procedures. The rule of law thus addresses the exercise of power and the relationship between the individual and the state.

### IV. In search of a definition

36. All persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts

37. This short definition, which applies to both public and private bodies, is expanded 8 “ingredients” of the rule of law. These include: (1) Accessibility of the law (that it be intelligible, clear and predictable); (2) Questions of legal right should be normally decided by law and not discretion; (3) Equality before the law ; (4) Power must be exercised lawfully, fairly and reasonably; (5) Human rights must be protected; (6) Means must be provided to resolve disputes without undue cost or delay; (7) Trials must be fair, and (8) Compliance by the state with its obligations in international law as well as in national law .

41 -...consensus can now be found for the necessary elements of the rule of law as well as those of the Rechtsstaat which are not only formal but also substantial or material (materieller Rechtsstaatsbegriff). These are:

- (1) Legality, including a transparent, accountable and democratic process for enacting law
- (2) Legal certainty
- (3) Prohibition of arbitrariness
- (4) Access to justice before independent and impartial courts, including judicial review of administrative acts
- (5) Respect for human rights
- (6) Non-discrimination and equality before the law.

#### VI. Conclusion

67. The notion of rule of law has not been developed in legal texts and practice as much as the other pillars of the Council of Europe, human rights and democracy. Human rights are at the basis of an enormous corpus of constitutional and legal provisions and of case-law, at national as well as at international level. Democracy is implemented through detailed provisions concerning elections and the functioning of institutions, even if they often do not refer to this concept.

68. Legal provisions referring to the rule of law, both at national and at international level, are of a very general character and do not define the concept in much detail.

69. This has led to doubting the very usefulness of addressing the rule of law as a practical legal concept. However, it is increasingly included in national and international legal texts and case-law, especially the case law of the European Court of Human Rights. However, we believe that the rule of law does constitute a fundamental and common European standard to guide and constrain the exercise of democratic power.

70. The aim of the present report has been to find a consensual definition which is outlined above, together with an identification of the core elements of the rule of law. Its object has been that the Council of Europe, the international organisation which has defined the rule of law as one of its three pillars, may contribute, among other organisations and institutions, to the practical implementation of this important principle through its interpretation and application vis-à-vis and in its member states.

### ***MT. SCOPUS APPROVED REVISED INTERNATIONAL STANDARDS OF JUDICIAL INDEPENDENCE, International Association of Judicial Independence and World Peace, 2008, 2011, 2012***

#### 1. The significance of the independence of the judiciary

1.1. An independent and impartial judiciary is an institution of the highest value in every society and an essential pillar of liberty and the rule of law.

1.2. The objectives and functions of the judiciary shall include:

1.2.1.1. To resolve disputes and to administer the law impartially between persons and between persons and public authorities;

1.2.1.2. To promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and

1.2.1.3. To ensure that all people are able to live securely under the rule of law.

***VILAMOURA MANIFEST, JUSTICE IN FRONT OF ECONOMIC CRISIS, MEDEL, 2012***

1. Medel's ambition is inspired by a civil society model: the principle goals of this association are to defend the independence of the judiciary power both with respect to any other power and to any particular interest, to ensure an unconditional respect for the values of democracy and the Rule of Law, to defend minority rights and divergent groups in perspective of social emancipation of the weakest.

2. The effectiveness of these rights depends on the people and institutions responsible for their application.

It is the role of the judiciary in particular to ensure fundamental rights and to prosecute criminal activity. In a crisis, the action of the administrative and financial courts is essential to ensure the legality and regularity of public resource allocation.

9. In Medel's view, the role of judges is considered to be particularly important when it comes to social matters such as the fight against social inequalities and the defence of the poor, because "between the rich and the poor, between the strong and the weak, it is liberty that oppresses and the law that liberates."

***CHARTER OF THE COMMONWEALTH, The Commonwealth, 2013***

VII. Rule of Law

We believe in the rule of law as an essential protection for the people of the Commonwealth and as an assurance of limited and accountable government. In particular we support an independent, impartial, honest and competent judiciary and recognise that an independent, effective and competent legal system is integral to upholding the rule of law, engendering public confidence and dispensing justice.

***SOFIA DECLARATION ON JUDICIAL INDEPENDENCE AND ACCOUNTABILITY, The General assembly of European Network of Councils for the Judiciary (ENCJ), 2013***

(i) An independent and accountable judiciary is essential for the delivery of an efficient and effective system of justice for the benefit of the citizen and is an important feature of the rule of law in democratic societies.

***DOHA DECLARATION ON INTEGRATING CRIME PREVENTION AND CRIMINAL JUSTICE INTO THE WIDER UNITED NATIONS AGENDA TO ADDRESS SOCIAL AND ECONOMIC CHALLENGES AND TO PROMOTE THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS, AND PUBLIC PARTICIPATION, Adopted by the 13<sup>th</sup> United Nations Congress on Crime Prevention and Criminal Justice, Doha, 12-19 April 2015***

3. We recognize the importance of effective, fair, humane and accountable (...) criminal justice systems and the institutions comprising them as a central component of the rule of law.

4. We acknowledge that sustainable development and the rule of law are strongly interrelated and mutually reinforcing (...).



***BRIJUNI STATEMENT OF THE PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY, Conference of Chief Justices of Central and Eastern Europe, 14 October, 2015***

Independence of the Judiciary

4. The maintenance of the independence of the judiciary is essential to the attainment of its objectives and the proper performance of its functions in a free society observing the rule of law.

a. Judges shall exhibit and promote high standards of legal knowledge and judicial conduct in order to reinforce public confidence in the judiciary, which is fundamental to the maintenance of judicial independence;

b. Impartiality and the appearance of impartiality are essential to the proper discharge of the judicial office. They apply not only to the decision itself but also to the process by which the decision is made.

***OPINION NO. 18 (2015) THE POSITION OF THE JUDICIARY AND ITS RELATION WITH THE OTHER POWERS OF STATE IN A MODERN DEMOCRACY, Consultative Council of European Judges (CCJE), 2015***

VIII: Summary of principal points

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).

***REPORT OF THE SPECIAL RAPPORTEUR ON THE INDEPENDENCE OF JUDGES AND LAWYERS, Human Rights Council, June 2017***

A3. Rule of law, separation of powers and the independence of judges and lawyers

15. The Human Rights Council and its predecessor, the Commission on Human Rights, have highlighted in numerous resolutions the importance of an independent and impartial judicial system to uphold the rule of law, democracy and human rights. Rule of law must be understood by virtue of the fact that, in democratic societies, people are equal under the law and no one can be above it.

A2. Guaranteeing judicial independence

111. The rule of law can be upheld only if there is an effective system of separation of powers, where the independence of the judiciary is effectively guaranteed. The Special Rapporteur underscores the need to strengthen norms that can allow for the judiciary to carry out its function independently.

***PARIS DECLARATION ON RESILIENT JUSTICE, ENCJ, 2017***

5. The ENCJ considers that it is important that Councils for the Judiciary should take action to address the issues which have been identified in order to strengthen and maintain the Rule of Law, in particular by providing support for judicial independence, accountability and the quality of the judiciary. They will strive to ensure the maintenance of an open and transparent system of justice for the benefit of all.

6. First, it is essential that judiciaries have appropriate structures of governance in the form of Councils for the Judiciary.
7. Second, Councils for the Judiciary should support any judiciary which is under attack and do all they can to persuade the executive and legislature to support the action which they are taking in this regard.
8. Third, in any democratic state it is essential that there is a proper and informed understanding of the respective roles and responsibilities of each of the branches of the state and the need for them to work together in an effective and mutually respectful manner.
9. Fourth, Councils for the Judiciary should encourage the promotion of high quality performance of all aspects of the work of the judiciary.
10. Fifth, the judiciary should take action to ensure that the general public understands the central importance of justice to democracy and to the wellbeing and prosperity of the state. This can be achieved by education and outreach initiatives.
11. Sixth, the judiciary should adopt a focused communication strategy to engage pro-actively with the media and the public.

***CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) - OPINION N° 20 THE ROLE OF COURTS WITH RESPECT TO THE UNIFORM APPLICATION OF THE LAW, 2017***

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.
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 conflicting<sup>2</sup> 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.<sup>3</sup> Uniform application of the law contributes to public confidence in the courts and enhances the public perception of fairness and justice.

***DECLARATION ON JUDICIAL INTEGRITY, UNODC, Global Judicial Integrity Network, 2018***

Convinced that a judicial system based on the principles of independence, impartiality, integrity, transparency, accountability and professionalism is key to the rule of law, to upholding public trust, and to ensuring the effective delivery of justice.

## **I. 4. THE RIGHT TO A FAIR TRIAL**

### ***THE UNIVERSAL DECLARATION ON HUMAN RIGHTS, UN General Assembly, 1948***

10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

### ***AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN, 9th International Conference of American States, 1948***

Art. XXVI Every accused person is presumed to be innocent until proved guilty. Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

### ***CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, ICRC, 12 August 1949***

3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

### ***INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, UN General Assembly, 1966***

14. 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

### ***AMERICAN CONVENTION ON HUMAN RIGHTS, Organization of American States, 1969***

#### **8. Right to a Fair Trial**

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
  - a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
  - b. prior notification in detail to the accused of the charges against him;
  - c. adequate time and means for the preparation of his defense;
  - d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
  - e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
  - f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
  - g. the right not to be compelled to be a witness against himself or to plead guilty; and
  - h. the right to appeal the judgment to a higher court.
3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.
4. An accused person acquitted by a non appealable judgment shall not be subjected to a new trial for the same cause.
5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

***PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I), ICRC, 8 June 1977***

75. Fundamental guarantees

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.
2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents: (a) violence to the life, health, or physical or mental well-being of persons, in particular: (i) murder; (ii) torture of all kinds, whether physical or mental; (iii) corporal punishment; and (iv) mutilation; (b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault; (c) the taking of hostages; (d) collective punishments; and (e) threats to commit any of the foregoing acts.
3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay soon as the circumstances justifying the arrest, detention or internment have ceased to exist.
4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following: (a) the procedure shall provide for an accused to be informed

without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;(b) no one shall be convicted of an offence except on the basis of individual penal responsibility; (c) no one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby; (d) anyone charged with an offence is presumed innocent until proved guilty according to law; (e) anyone charged with an offence shall have the right to be tried in his presence; (f) no one shall be compelled to testify against himself or to confess guilt; (g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure; (i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and (j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply: (a) persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and (b) any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.

8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1.

***PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL II), ICRC, 8 June 1977***

**Art. 1, Preamble**

The Universal Declaration of Human Rights (Art. 10) and the International Covenant on Civil and Political Rights (Art. 14(1)) proclaim that everyone should be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. An independent judiciary is indispensable for the implementation of this right

**Art. 6. Penal Prosecutions**

1. This Article applies to the prosecution and punishment of criminal offences related to the armed conflict.

2. No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. In particular: (a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence; (b) no one shall be convicted of an offence except on the basis of individual penal responsibility; (c) no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby; (d) anyone charged with an offence is presumed innocent until proved guilty according to law; (e) anyone charged with an offence shall have the right to be tried in his presence; (f) no one shall be compelled to testify against himself or to confess guilt.

3. A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

4. The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children.

5. At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE (“Singhvi Declaration”), ECOSOC, 1985***

5. (c) Everyone shall have the right to be tried with all due expedition and without undue delay by the ordinary courts or judicial tribunals under law subject to review by the courts.

***BEST PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, Adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, 1985***

6. Independence of the judiciary

The principle of the independence of the judiciary entities and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

***INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES, UN General Assembly, 1989***

18. 1. Migrant workers and members of their families shall have the right to equality with nationals of the State concerned before the courts and tribunals. In the determination of any criminal charge against them or of their rights and obligations in a suit of law, they shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

2. Migrant workers and members of their families who are charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.

3. In the determination of any criminal charge against them, migrant workers and members of their families shall be entitled to the following minimum guarantees: (a) To be informed promptly and in detail in a language they understand of the nature and cause of the charge against them; (b) To have adequate time and facilities for the preparation of their defence and to communicate with

counsel of their own choosing; (c) To be tried without undue delay; (d) To be tried in their presence and to defend themselves in person or through legal assistance of their own choosing; to be informed, if they do not have legal assistance, of this right; and to have legal assistance assigned to them, in any case where the interests of justice so require and without payment by them in any such case if they do not have sufficient means to pay; (e) To examine or have examined the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them; (f) To have the free assistance of an interpreter if they cannot understand or speak the language used in court; (g) Not to be compelled to testify against themselves or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Migrant workers and members of their families convicted of a crime shall have the right to their conviction and sentence being reviewed by a higher tribunal according to law.

6. When a migrant worker or a member of his or her family has, by a final decision, been convicted of a criminal offence and when subsequently his or her conviction has been reversed or he or she has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to that person.

7. No migrant worker or member of his or her family shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure of the State concerned.

### ***CONVENTION ON THE RIGHTS OF THE CHILD, UN General Assembly, 1989***

37. States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

### ***DOCUMENT OF THE COPENHAGEN MEETING OF THE CONFERENCE ON THE HUMAN DIMENSION OF THE CSCE, 1990***

(5) They solemnly declare that among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings are the following:

(5.16) --- in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone will be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law;

***PALERMO DECLARATION, ELEMENTS OF A EUROPEAN STATUTE OF MAGISTRACY, MEDEL, 1993***

I. Jurisdiction and the Judiciary

1.1. Any dispute concerning either the constitutional conformity of a norm or a legally protected right or interest must find a jurisdiction pre-established by the Constitution or by the law, fit to judge it according to the imperatives of a fair trial, in the respect of the primacy of law, human rights and fundamental freedoms.

4.1. Each jurisdiction must be organized in such a way as to treat the disputes submitted to it competently and rapidly.

***COMMONWEALTH OF INDEPENDENT STATES CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, Commonwealth of Independent States, 1995***

Article 6

1. All persons shall be equal before the judicial system. In the determination of any charge against him, everyone shall be entitled to a fair and public hearing within a reasonable time by an independent and impartial court.

The decisions of the court or the sentence shall be pronounced publicly, but all or part of the trial may take place in camera for reasons of public order or state secrecy or where the interests of juveniles or the protection of the private life of the parties so require.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence shall have the following minimum rights:

(a) to be informed promptly and in detail, in a language which he understands, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or to have legal assistance assigned to him whenever the interests of justice so require, as well as to be provided with legal assistance free of charge in cases specified in national legislation;

(d) to make applications to the court concerning the examination of witnesses, the carrying out of investigations, the obtaining of documents, the commissioning of expert appraisals and other procedural acts;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(f) not to be forced to testify against himself or plead guilty.

***BEIJING STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION, as amended in Manila at 7th Biennial Conferences of Chief Justices of Asia and the Pacific, 1997***

Value 1, 2. The Universal Declaration of Human Rights (Art. 10) and the International Covenant on Civil and Political Rights (Art. 14(1)) proclaim that everyone should be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. An independent judiciary is indispensable to the implementation of this right.



***DECLARATION ON THE RIGHT AND RESPONSIBILITY OF INDIVIDUALS, GROUPS AND ORGANS OF SOCIETY TO PROMOTE AND PROTECT UNIVERSALLY RECOGNIZED HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, UN General Assembly, 1998***

Article 9

1. In the exercise of human rights and fundamental freedoms, including the promotion and protection of human rights as referred to in the present Declaration, everyone has the right, individually and in association with others, to benefit from an effective remedy and to be protected in the event of the violation of those rights.

2. To this end, everyone whose rights or freedoms are allegedly violated has the right, either in person or through legally authorized representation, to complain to and have that complaint promptly reviewed in a public hearing before an independent, impartial and competent judicial or other authority established by law and to obtain from such an authority a decision, in accordance with law, providing redress, including any compensation due, where there has been a violation of that person's rights or freedoms, as well as enforcement of the eventual decision and award, all without undue delay.

3. To the same end, everyone has the right, individually and in association with others, inter alia:

(a) To complain about the policies and actions of individual officials and governmental bodies with regard to violations of human rights and fundamental freedoms, by petition or other appropriate means, to competent domestic judicial, administrative or legislative authorities or any other competent authority provided for by the legal system of the State, which should render their decision on the complaint without undue delay;

(b) To attend public hearings, proceedings and trials so as to form an opinion on their compliance with national law and applicable international obligations and commitments;

(c) To offer and provide professionally qualified legal assistance or other relevant advice and assistance in defending human rights and fundamental freedoms.

4. To the same end, and in accordance with applicable international instruments and procedures, everyone has the right, individually and in association with others, to unhindered access to and communication with international bodies with general or special competence to receive and consider communications on matters of human rights and fundamental freedoms.

5. The State shall conduct a prompt and impartial investigation or ensure that an inquiry takes place whenever there is reasonable ground to believe that a violation of human rights and fundamental freedoms has occurred in any territory under its jurisdiction.

***THE UNIVERSAL CHARTER OF THE JUDGE, International Association of Judges (IAJ), 1999***

Art. 1. Independence

Judges shall in all their work ensure the rights of everyone to a fair trial. They shall promote the right of individuals to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, in the determination of their civil rights and obligations or of any criminal charge against them.

***CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION, European Union, 2000***

Art. 47. Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

***OPINION NO. 1 (2001) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF COUNCIL OF EUROPE ON STANDARDS CONCERNING THE INDEPENDENCE OF THE JUDICIARY AND THE IRREMOVABILITY OF JUDGES, Council of Europe, 2001***

The rationales of judicial independence

10. Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. Judges are “charged with the ultimate decision over life, freedoms, rights, duties and property of citizens” (recital to UN basic principles, echoed in Beijing declaration; and Articles 5 and 6 of the European Convention on Human Rights). Their independence is not a prerogative or privilege in their own interests, but in the interests of the rule of law and of those seeking and expecting justice.

***OPINION NO. 2 (2001) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE FUNDING AND MANAGEMENT OF COURTS WITH REFERENCE TO THE EFFICIENCY OF THE JUDICIARY AND TO ARTICLE 6 OF EUROPEAN CONVENTION ON HUMAN RIGHTS, Council of Europe, 2001***

3. Moreover, there is an obvious link between, on the one hand, the funding and management of courts and, on the other, the principles of the European Convention on Human Rights: access to justice and the right to fair proceedings are not properly guaranteed if a case cannot be considered within a reasonable time by a court that has appropriate funds and resources at its disposal in order to perform efficiently.

***BANGALORE PRINCIPLE ON JUDICIAL CONDUCT, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002***

Value 1, Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

***GUIDELINES OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON HUMAN RIGHTS AND THE FIGHT AGAINST TERRORISM, Council of Europe, 804th meeting of the Ministers' Deputies, 2002***

Section IX Legal proceedings

1. A person accused of terrorist activities has the right to a fair hearing, within a reasonable time, by an independent, impartial tribunal established by law.
2. A person accused of terrorist activities benefits from the presumption of innocence.
3. The imperatives of the fight against terrorism may nevertheless justify certain restrictions to the right of defence, in particular with regard to:
  - (i) the arrangements for access to and contacts with counsel;
  - (ii) the arrangements for access to the case-file;
  - (iii) the use of anonymous testimony.

4. Such restrictions to the right of defence must be strictly proportionate to their purpose, and compensatory measures to protect the interests of the accused must be taken so as to maintain the fairness of the proceedings and to ensure that procedural rights are not drained of their substance.

***INTEGRITY OF THE JUDICIAL SYSTEM, UN Commission on Human Rights, 2003, resolution 2003/39***

*Convinced* that the integrity of the judicial system is an essential prerequisite for the protection of human rights and for ensuring that there is no discrimination in the administration of justice,  
*Stressing* that the integrity of the judicial system should be observed at all times,

1. *Reiterates* that every person is entitled, in full equality, to a fair and public hearing by an independent and impartial tribunal, in the determination of his/her rights and obligations and of any criminal charge against him/her;

2. *Also reiterates* that everyone has the right to be tried by ordinary courts or tribunals using established legal procedures and that tribunals that do not use such duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals;

3. *Further reiterates* that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law;

4. *Stresses* the importance that everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he/she has had all the guarantees necessary for the defence;

5. *Urges States* to guarantee that all persons brought to trial before courts or tribunals under their authority have the right to be tried in their presence and to defend themselves in person or through legal assistance of their own choosing;

6. *Underlines* that any court trying a person charged with a criminal offence should be based on the principles of independence and impartiality;

7. *Calls upon* States to ensure the principle of equality before the courts and before the law are respected within their judicial systems, inter alia by providing to those being tried the possibility to examine, or to have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them;

8. *Reaffirms* that every convicted person should have the right to have his/her conviction and sentence reviewed by a tribunal according to law.

***PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA, African Commission on Human and Peoples Rights, 2003***

**A. GENERAL PRINCIPLES APPLICABLE TO ALL LEGAL PROCEEDINGS**

1) Fair and Public Hearing

In the determination of any criminal charge against a person, or of a person's rights and obligations, everyone shall be entitled to a fair and public hearing by a legally constituted competent, independent and impartial judicial body.

2) Fair Hearing

The essential elements of a fair hearing include:

- a) equality of arms between the parties to a proceedings, whether they be administrative, civil, criminal, or military;
- b) equality of all persons before any judicial body without any distinction whatsoever as regards race, colour, ethnic origin, sex, gender, age, religion, creed, language, political or other convictions, national or social origin, means, disability, birth, status or other circumstances;
- c) equality of access by women and men to judicial bodies and equality before the law in any legal proceedings;
- d) respect for the inherent dignity of the human persons, especially of women who participate in legal proceedings as complainants, witnesses, victims or accused;
- e) adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence;
- f) an entitlement to consult and be represented by a legal representative or other qualified persons chosen by the party at all stages of the proceedings;
- g) an entitlement to the assistance of an interpreter if he or she cannot understand or speak the language used in or by the judicial body;
- h) an entitlement to have a party's rights and obligations affected only by a decision based solely on evidence presented to the judicial body;
- i) an entitlement to a determination of their rights and obligations without undue delay and with adequate notice of and reasons for the decisions; and
- j) an entitlement to an appeal to a higher judicial body.

#### Q. TRADITIONAL COURTS

- a) Traditional courts, where they exist, are required to respect international standards on the right to a fair trial.
- b) The following provisions shall apply, as a minimum, to all proceedings before traditional courts:
  - (i) equality of persons without any distinction whatsoever as regards race, colour, sex, gender, religion, creed, language, political or other opinion, national or social origin, means, disability, birth, status or other circumstances;
  - (ii) respect for the inherent dignity of human persons, including the right not to be subject to torture, or other cruel, inhuman or degrading punishment or treatment;
  - (iii) respect for the right to liberty and security of every person, in particular the right of every individual not to be subject to arbitrary arrest or detention;
  - (iv) respect for the equality of women and men in all proceedings;
  - (v) respect for the inherent dignity of women, and their right not to be subjected to cruel, inhuman or degrading treatment or punishment;
  - (vi) adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence;
  - (vii) an entitlement to the assistance of an interpreter if he or she cannot understand or speak the language used in or by the traditional court;
  - (viii) an entitlement to seek the assistance of and be represented by a representative of the party's choosing in all proceedings before the traditional court;
  - (ix) an entitlement to have a party's rights and obligations affected only by a decision based solely on evidence presented to the traditional court;
  - (x) an entitlement to a determination of their rights and obligations without undue delay and with adequate notice of and reasons for the decisions;
  - (xi) an entitlement to an appeal to a higher traditional court, administrative authority or a judicial tribunal;
  - (xii) all hearings before traditional courts shall be held in public and its decisions shall be rendered in public, except where the interests of children require or where the proceedings concern matrimonial disputes or the guardianship of children;

#### R. NON-DEGORABILITY CLAUSE

No circumstances whatsoever, whether a threat of war, a state of international or internal armed conflict, internal political instability or any other public emergency, may be invoked to justify derogations from the right to a fair trial.

***OPINION NO. 4 OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON APPROPRIATE INITIAL AND IN-SERVICE TRAINING FOR JUDGES AT NATIONAL AND EUROPEAN LEVELS, Council of Europe, 2003***

1. At a time when we are witnessing an increasing attention being paid to the role and significance of the judiciary, which is seen as the ultimate guarantor of the democratic functioning of institutions at national, European and international levels, the question of the training of prospective judges before they take up their posts and of in-service training is of particular importance.

***GLOBAL BEST PRACTICES: JUDICIAL INTEGRITY STANDARDS AND CONSENSUS PRINCIPLES, IFES, 2004***

a. General Comments on the Right to a Fair Trial

i. Civil, Commercial, Administrative and Criminal Matters

Treaty provisions affirming the right to a fair trial explicitly refer to proceedings related to the disputes related to civil, commercial and administrative rights as well as the determination of criminal charges. More specifically, the right to a fair trial has been understood as applicable to all court proceedings, regardless of their nature.

iii. Right to an Effective Remedy

Human rights tribunals are increasingly looking beyond the basic requirements of the right to a fair trial and ruling that violations of core obligations under the right to a fair trial may also constitute violations of the right to an effective remedy (article 13 of the ECHR) or of the right to judicial guarantees (article 25 of the IACHR) or even of the obligations of the State to guarantee judicial independence (article 26 of the ACHPR). These new obligations provide broader grounds for the defense of judicial independence as they are no longer dependant on the fairness of the proceedings but rather provide broader institutional requirements on the State.

The judiciary has a great responsibility in ensuring the creation and permanence of a mechanism enabling “citizens whose human rights are violated ... are assured justice and redress.” Not only the judiciary but also lawyers can play an important role in furthering the “level of justice for aggrieved citizens who seek redress for the violation of their human rights.” Ultimately, it falls to the State to ensure that the independence and impartiality is guaranteed and protected domestically as well as to respect such independence and impartiality.

The European Court has also been extending its jurisprudence on the length of proceedings by adding to the violation under article 6(1) of the ECHR a violation under article 13 of the ECHR which recognizes the duty of member States to provide, under domestic law, effective remedies for violations of human rights by the State. In *Horvat v. Croatia*, the European Court found that the civil proceedings for repayment of loans had not been concluded within a reasonable time in violation of article 6(1). It went on to find a violation of article 13 “in so far as the applicant has no domestic remedy whereby she could enforce her right to a ‘hearing within a reasonable time’ in either of her cases as guaranteed by Article 6(1).”

Holding that the lack of effective recourse against the violation of rights guaranteed by the IACHR violates the right to judicial protection of article 25, the Inter-American Court noted, in *Ivcher Bronstein v. Peru*, that resources are illusory when they are ineffective in practice and such is the case when the judiciary lacks the necessary independence to take an impartial decision.<sup>39</sup> This ruling was further clarified in the Constitutional Court Case in which the IACHR held that the

requirement of a “simple and prompt recourse” mandates not only that the recourse exist in practice, but also that it be available in practice.

The Inter-American Court has also held that domestic legislation may violate the right to an effective remedy by preventing victims from access to such remedy. Indeed, in the Barrios Altos Case, the Inter-American Court struck down Peruvian amnesty laws as contrary to the right to an effective remedy for violations of the rights and freedoms guaranteed by article 25 of the IACHR. In a similar spirit, the African Commission has held that ousting the jurisdiction of ordinary courts violated the obligation of the States to guarantee the independence of the judiciary and to protect the courts which are the national institutions protecting the rights guaranteed by the African Charter.

***OPINION NO 8 (2006) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON “THE ROLE OF JUDGES IN THE PROTECTION OF THE RULE OF LAW AND HUMAN RIGHTS IN THE CONTEXT OF TERRORISM”, Consultative Council of European Judges (CCJE), 2006***

**B. ADMINISTRATIVE LAW MEASURES**

27. The right to a fair hearing in particular shall be guaranteed (Article 6 of the European Convention on Human Rights). This implies inter alia that there shall be equality of arms between the parties to the proceedings and that the proceedings shall be adversarial in nature.

28. The right to a fair hearing requires that all evidence admitted by the court should in principle be made available to the parties with a view to adversarial arguments. The question arises as to what extent limitations to access to documents, witnesses or other sources of evidence might be admissible, if security reasons are involved. When access to evidence is granted to lawyers and not to the parties personally, because direct disclosure to persons concerned of sources of evidence may jeopardise the public interest, potentially difficult issues arise as to whether it is or not a substantial limitation of effective remedy and of defense . Whatever the solution might be as regards access to evidence by the parties and defence lawyers, the CCJE is of the opinion that no limitations should apply to the possibility for the judge to have direct and personal access to documents, witnesses and other sources of evidence, in order to allow the court to ascertain all relevant facts and thus rule on an effective remedy (Article 13 of the European Convention on Human Rights).

***INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE, UN General Assembly, 2006***

Art. 11 1. The State Party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State Party. In the cases referred to in article 9, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 9, paragraph 1.

3. Any person against whom proceedings are brought in connection with an offence of enforced disappearance shall be guaranteed fair treatment at all stages of the proceedings. Any person tried for an offence of enforced disappearance shall benefit from a fair trial before a competent, independent and impartial court or tribunal established by law.

**GENERAL COMMENT NO. 32, ARTICLE 14, RIGHT TO EQUALITY BEFORE COURTS AND TRIBUNALS AND TO A FAIR TRIAL, UN Human Rights Committee, 2007**

I. General remarks

The right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law

III. Fair and public hearing by a competent, independent and impartial tribunal

The notion of a “tribunal” in article 14, paragraph 1 designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature. Article 14, paragraph 1, second sentence, guarantees access to such tribunals to all who have criminal charges brought against them. This right cannot be limited, and any criminal conviction by a body not constituting a tribunal is incompatible with this provision. Similarly, whenever rights and obligations in a suit at law are determined, this must be done at least at one stage of the proceedings by a tribunal within the meaning of this sentence. The failure of a State party to establish a competent tribunal to determine such rights and obligations or to allow access to such a tribunal in specific cases would amount to a violation of article 14 if such limitations are not based on domestic legislation, are not necessary to pursue legitimate aims such as the proper administration of justice, or are based on exceptions from jurisdiction deriving from international law such, for example, as immunities, or if the access left to an individual would be limited to an extent that would undermine the very essence of the right.

**OPINION No.11 (2008) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE QUALITY OF JUDICIAL DECISIONS, Consultative Council of European Judges (CCJE), 2008**

3. Clear reasoning and analysis are basic requirements in judicial decisions and an important aspect of the right to fair trial. Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR), for example, requires states to establish independent and impartial tribunals and promote the introduction of efficient procedures. The fulfilment of this obligation acquires real meaning when judges are, as a result, enabled to administer justice justly and correctly, in relation to their findings both in law and in fact, for the ultimate benefit of citizens. A high quality judicial decision is one which achieves a correct result - so far as the material available to the judge allows - and does so fairly, speedily, clearly and definitively.

B The internal environment: professionalism, procedure, hearing and decision

3. The hearing

29. The hearing should comply with all ECHR requirements, thus ensuring for parties and society at large compliance with the minimum standards of a properly designed and fair trial. The proper development of the hearing will have a direct impact on the parties and society’s understanding and acceptance of the final decision . It should also give the judge all the elements necessary for the proper assessment of the case; therefore it has a critical impact on the quality of the judicial decision. A hearing should be held whenever the case law of the ECHR so prescribes.

30. A transparent and open hearing as well as compliance with the adversarial principle and the principle of the equality of arms are necessary prerequisites if the decision is to be accepted by the parties themselves and by the general public.

**OPINION NO. 12 (2009) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) AND OPINION NO.4 (2009) OF THE CONSULTATIVE COUNCIL OF EUROPEAN PROSECUTORS (CCPE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE RELATIONS BETWEEN JUDGES AND PROSECUTORS IN A DEMOCRACY SOCIETY, BORDEAUX DECLARATION, CCJE, CCPE, 2009**

1. It is in the interest of society that the rule of law be guaranteed by the fair, impartial and effective administration of justice. Public prosecutors and judges shall ensure, at all stages of the proceedings, that individual rights and freedoms are guaranteed, and public order is protected. This involves the total respect of the rights of the defendants and of the victims. A decision of the prosecutor not to prosecute should be open to judicial review. An option may be to allow the victim to bring the case directly to the court.

2. The fair administration of justice requires that there shall be equality of arms between prosecution and defence, as well as respect for the independence of the court, the principle of separation of powers and the binding force of final court decisions.

**CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, Council of Europe, 2010**

Article 6 - Right to a fair trial

1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3 Everyone charged with a criminal offence has the following minimum rights:

to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

- to have adequate time and facilities for the preparation of his defence;
- to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

**RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010**

Chapter I – General aspects

3. The purpose of independence, as laid down in Article 6 of the Convention, is to guarantee every person the fundamental right to have their case decided in a fair trial, on legal grounds only and without any improper influence.



**OPINION NO. 15 (2012) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)  
ON THE SPECIALISATION OF JUDGES, Council of Europe, 2012**

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.

**VILAMOURA MANIFEST, JUSTICE IN FRONT OF ECONOMIC CRISIS, MEDEL, 2012**

8. Finally, the efficiency of justice could not be linked to the widespread market model. The generally accepted managerial tools focused on performance, productivity and efficiency requirements should not neutralize the basic principles of a fair trial.

**OPINION NO. 16 (2013) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)  
ON THE RELATIONS BETWEEN JUDGES AND LAWYERS, Council of Europe, 2013**

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:

V. Recommendation

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.

**DOHA DECLARATION ON INTEGRATING CRIME PREVENTION AND CRIMINAL JUSTICE INTO THE WIDER UNITED NATIONS AGENDA TO ADDRESS SOCIAL AND ECONOMIC CHALLENGES AND TO PROMOTE THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS, AND PUBLIC PARTICIPATION, Adopted by the 13<sup>th</sup> United Nations Congress on Crime Prevention and Criminal Justice, Doha, 12-19 April 2015**

(b) To ensure the right of everyone to a fair trial without undue delay by a competent, independent and impartial tribunal established by law, to equal access to justice with due process safeguards and, if needed, to access to an attorney and to an interpreter, and to ensure relevant rights under the Vienna Convention on Consular

(f) To mainstream a gender perspective into our criminal justice systems by developing and implementing national strategies and plans to promote the full protection of women and girls from all acts of violence, including gender-related killing of women and girls, in accordance with the obligations of parties under the Convention on the Elimination of all Forms of Discrimination against Women<sup>7</sup> and its Optional Protocol,<sup>8</sup> and taking into account the updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice<sup>9</sup> and General Assembly resolutions on the gender-related killing of women and girls.

***HIGH QUALITY JUSTICE FOR ALL MEMBER STATES OF THE COUNCIL OF EUROPE, The European Commission for the Efficiency of Justice, CEPEJ STUDIES No. 22, 2015***

It is quite a positive trend in some countries on establishment of control and analysis of the length of proceedings. At the same time, the Commission notes that not all States keep records of the duration of cases carried out by the courts that makes its work difficult.

As main guidelines and principles SATURN establishes the following:

- *Transparency and foreseeability*, which imply that all participants in the proceedings must be involved in the time management of judicial proceedings; that the latter must be notified about any action prone to increase the times of proceedings; that the duration of proceedings must be foreseeable as far as possible; that statistics related to the proceedings duration per types of cases must be available to any person.
- *Optimum length of judicial proceedings*, which means that the time it takes to consider a case, must correspond to the complexity of the latter. Put differently, cases must be dealt with within a reasonable time, being not too long and not too short. The SATURN Centre believes that although this principle does not provide to the participants in the proceedings a direct determination of the trials times, it nevertheless ensures that the timeframes are fixed in an objective manner, correspond to the standard terms for each category of cases and do not depart in a significant way from the timing of similar cases. The purpose it is intended for is to keep all parties satisfied about the trial duration.
- *The planning of the duration of court proceedings and data collection* is carried out depending on the type of proceedings. Those principles also imply the participation of all interested parties to the proceedings and the establishment of a system of data collection with regard to the length of proceedings and a monitoring mechanism thereof.
- *Flexibility* in the time management of the judicial process as a principle implies that the trials times must be adapted to the specific features of the case being heard and the needs of the participants in the proceedings. As a consequence, the Commission advises not to resort to strict deadlines under laws and other regulations, and in the countries where they are still existing, to constantly adapt them to the specific peculiarities of the case.
- *Loyal collaboration of all stakeholders* of the proceedings is the principle allowing the achievement of optimal and foreseeable times of proceedings. In other words, this principle implies that both at the legislation level and at the level of the participants in specific proceedings, all measures required for timely case consideration are taken. Therefore, all parties (the government, the judicial bodies, judges and participants in the proceedings) should participate in the process of reduction of times of proceedings. In order to achieve this purpose, the SATURN Centre suggests to develop a negotiated system of framework agreements on proceedings times involving both judges and lawyers.

The SATURN Centre has developed a number of advices in relation to judges themselves. In this respect, judges should be granted sufficient authority for active case management in order to ensure fair trials within reasonable timeframes. In particular, this means that judges should be entitled to set specific terms for the performance of certain procedural actions in each individual case. Here it is also advisable to create special programmes allowing judges to draw up judgements according to

specific schemes in order to save time. Another piece of advice is the introduction of a “Timing Agreement” with the parties and lawyers, which would allow interested parties to participate in the time management of proceedings. In this process, judges are also advised to ensure the cooperation and monitoring of other people involved: experts, witnesses, etc. The SATURN Centre also advises to punish attempts to interfere with the proceedings, i.e. the abuses of the judicial process. The sanctions are determined in relation to specific citizens (both parties in the proceedings and their representatives (lawyers)). As a deterrent, the SATURN Centre also suggests notifying the Bar Association of any transgression committed by a lawyer. And finally, the reasoning founding judgements should be concise, in order to save time.

***DOHA DECLARATION ON INTEGRATING CRIME PREVENTION AND CRIMINAL JUSTICE INTO THE WIDER UNITED NATIONS AGENDA TO ADDRESS SOCIAL AND ECONOMIC CHALLENGES AND TO PROMOTE THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS, AND PUBLIC PARTICIPATION, Adopted by the 13<sup>th</sup> United Nations Congress on Crime Prevention and Criminal Justice, Doha, 12-19 April 2015***

5. We reaffirm our commitment and strong political will in support of effective, fair, humane and accountable criminal justice systems and the institutions comprising them, and encourage the effective participation and inclusion of all sectors of society (...). To that end, we endeavour:

(b) To ensure the right of everyone to a fair trial without undue delay by a competent, independent and impartial tribunal established by law, to equal access to justice with due process safeguards and, if needed, to access to an attorney and to an interpreter (...),

(f) To mainstream a gender perspective into our criminal justice systems by developing and implementing national strategies and plans to promote the full protection of women and girls from all acts of violence, including gender-related killing of women and girls, in accordance with the obligations of parties under the Convention on the Elimination of all Forms of Discrimination against Women (...);

***THE WARSAW DECLARATION ON THE FUTURE OF JUSTICE IN EUROPE, The General assembly of European Network of Councils for the Judiciary (ENCJ), 2016***

The ENCJ recognises that the administration of Europe’s justice systems in the 21st century will change radically as a result of the use of information and communication technology. It looks forward to the use of online dispute resolution and other technologies to deliver justice more effectively and quickly and at lower cost to all European citizens. It will still be essential for the ENCJ and its members and observers to maintain and strengthen the independence and accountability of judiciary for the benefit of European citizens in order to ensure that they have effective access to justice.

***MEASURING THE QUALITY OF JUSTICE, Document prepared by the CEPEJ-GT-QUAL on the basis of the preparatory work of Mr Fabio Bartolomeo (CEPEJ member, Italy), adopted on 7 December 2016, at the 28th plenary meeting of the CEPEJ***

23. Having said that, and taking into account that in a democratic society a fixed level of quality is determined on the basis of a common denominator, which is the applicable rules of the European

Convention on Human Rights and the related case law of the Court, as well as the fundamental principles which stem from States' traditional constitutions, the issue of the quality of proceedings and decisions must be sought in the light of these objectives and institutional constraints. More specifically, in article 6 of the European Convention on Human Rights we can identify all the essential elements of the intrinsic quality of the jurisdiction can be identified:

- i. The fairness of the proceedings
- ii. The reasonable duration of the proceedings
- iii. The publicity of the judgment / decision and transparency of the process
- iv. The protection of minors (and other subjects for whom it is appropriate to provide a form of assistance)
- v. The comprehensibility of the prosecution, the course of the procedure, and of judgments / decisions
- vi. The right to legal assistance and access to justice in general
- vii. The legal aid (when all the conditions are met)

*The Quality Checklist drawn up by the European Commission for the Efficiency of Justice (CEPEJ)*

24. Most of the quality elements mentioned in Article 6 of the European Convention on Human Rights is contained in the "Checklist for Promoting the Quality of Justice", prepared by the CEPEJ-GT-QUAL and reported in full in Appendix 1.

*Abstract from the Checklist for Promoting the Quality of Justice and the courts*

<i>Pillar of quality</i>	<i>Checklist</i>	<i>Yes</i>	<i>No</i>	<i>Remarks</i>
o Fairness	Is there a guarantee at constitutional level (or at the highest level of the hierarchy of norms) to protect the independence of the judiciary vis-à-vis the executive and legislative powers?			
o Publicity and transparency	Does the court management give wide publicity to the mission/vision and strategy among stakeholders, judges and prosecutors and court staff?			
o Publicity and transparency	Does the court management maintain a systematic contact with the internal and external stakeholders?			
o Fairness	Are measures taken to ensure adequacy between the judges' functions and the files entrusted to them (training periods, specialisation, regrouping of cases, "test files", etc.)?			
o Fairness o Publicity and transparency	Are measures taken to ensure transparency in the allocation of files to judges (i.e. initial and public objective criteria)?			

<i>Pillar of quality</i>	<i>Checklist</i>	<i>Yes</i>	<i>No</i>	<i>Remarks</i>
o Reasonable timeframe	Are standards or norms concerning the acceptable length of judicial proceedings defined?			
o Publicity and transparency o Legal assistance	Is there an up-to-date list of court experts, interpreters that can be consulted?			
o Publicity and transparency o Legal assistance	Is there a system of quality control for experts and court interpreters?			
o Publicity and transparency o Reasonable timeframe	Is the length of proceedings systematically recorded and published?			
o Comprehensibility o Publicity and transparency o Legal assistance	Are laws published in such a manner that they are easily accessible?			
o Comprehensibility o Publicity and transparency o Legal assistance	Are court judgments and decisions accessible on court internet sites?			
o Comprehensibility o Publicity and transparency o Legal assistance	Does the court have an information desk for court visitors?			
o Legal assistance o Legal aid	Are litigants without the necessary financial means entitled to free legal consultations or consultations at a reduced price in order to be informed on their (civil) rights and duties? If yes, is this the case in all areas of the law?			
o Legal assistance o Legal aid	Are litigants able to receive free legal representation or legal representation at a reduced price (financed by the governments' legal aid budget) of a lawyer? Is this applicable only to criminal matters or does it apply to all the other areas?			

<i>Pillar of quality</i>	<i>Checklist</i>	<i>Yes</i>	<i>No</i>	<i>Remarks</i>
<ul style="list-style-type: none"> <li>o Publicity and transparency</li> <li>o Legal assistance</li> </ul>	Are the costs/fees for a proceeding transparent?			

29. The table above only covers 15 of the 250 questions of the checklist. They give an idea of the importance of verifying these facts, and to assess in practice the quality of an entire judicial system or part of it. Selecting a certain number of these questions and answering them in an objective manner allows to measure concretely the quality of processes and of the basic conditions leading to decisions of the judicial system.

***CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) - OPINION N° 20 THE ROLE OF COURTS WITH RESPECT TO THE UNIFORM APPLICATION OF THE LAW, CCJE, 2017***

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.<sup>6</sup> 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.

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 decision<sup>19</sup>. 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 violated.

## **I. 5. CONDITIONS OF THE INDEPENDENCE OF JUSTICE**

### ***RESOLUTION ON JUDICIAL ETHICS, European Court of Human Rights, Adopted by the Plenary Court on 23 June 2008***

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.

### ***THE WARSAW DECLARATION ON THE FUTURE OF JUSTICE IN EUROPE, The General assembly of European Network of Councils for the Judiciary (ENCJ), 2016***

5. The ENCJ urges the executive and the Turkish Council for the Judiciary to pay full regard to the principles that judges are irremovable, and that judges should not be transferred or demoted, except in circumstances prescribed by law after transparent proceedings conducted by an independent body whose decisions are subject to challenge or review.

6. In relation to the developing situation in Poland, the ENCJ emphasises the importance of the executive respecting the independence of the judiciary, and only undertaking reforms to the justice system after meaningful consultation with the Council for the Judiciary and the judges themselves.

### ***REPORT OF THE SPECIAL RAPPORTEUR ON THE INDEPENDENCE OF JUDGES AND LAWYERS, Human Rights Council, June 2017***

#### **B1. Judicial Independence**

24. Article 10 of the Universal Declaration of Human Rights protects judicial independence. This is an obligation to be guaranteed and not a privilege that States may grant. The Basic Principles on the Independence of the Judiciary deal with the following subjects: (a) independence of the judiciary; (b) freedom of expression and association; (c) qualifications, selection and training; (d) conditions of service and tenure; (e) professional secrecy and immunity; and (f) discipline, suspension and removal.

### ***PARIS DECLARATION ON RESILIENT JUSTICE, ENCJ, 2017***

4. The 2016/2017 ENCJ survey among judges shows that, on average, judges rated their own independence as being 8.9 out of 10 and the independence of judges generally in their own country as being 8.3. The survey also revealed a number of other important issues. These included: a perception by judges across Europe that judges have been appointed and/or promoted on grounds other than on capacity and experience; a perception that judicial independence is not adequately respected by other state institutions; a perception that judges are under pressure from a media which similarly does not respect their independence; and, finally, a perception on the part of substantial number of judges that their Council lacks appropriate mechanisms and procedures to defend judicial independence effectively.

## I. 6. THE PRINCIPLE OF NATURAL JUDGE

### ***BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, Adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, 1985***

Art. 14 Conditions of service and tenure, The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

### ***PALERMO DECLARATION, ELEMENTS OF A EUROPEAN STATUTE OF MAGISTRACY, MEDEL, 1993***

Art. 4.1 The distribution of cases among chambers and among magistrates respects the principle of the natural judge by having recourse to impersonal and predetermined systems of attribution.

### ***BEIJING STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION, as amended in Manila at 7th Biennial Conferences of Chief Justices of Asia and the Pacific, 1997***

3. Independence of the Judiciary requires that;

- a) The judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source; and
- b) The judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature.

### ***FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF JUDICIARY, VARIOUS SPECIAL MEASURES IMPLEMENTED IN DIFFERENT COUNTRIES TO MANAGE THE INCREASING NUMBER OF CASES COMING BEFORE THE COURTS, International Association of Judges (IAJ), 1998***

It is considered as vital in every jurisdiction to progress the management of the case load and to deploy the available resource to improve the service for the public - important facets of the problem is excessive time taken by the parties in preparing the case and by the courts in processing the case;

Solutions - better case management of individual cases and of standard case flow management by:

- limiting oral and written submissions
- imposing a reasonable timetable, when proceedings are issued, for the steps taken up to the case being ready for decision
- limiting as far as reasonable the requirement for a full and comprehensive reasoned judgement by the trial court of first instance. Several countries adopt different ways of managing this, in the interest of expeditious justice for the parties, in ways considered not to undermine the rights of litigants.
- entry of decision by summary process, subject to the parties retaining the right afterwards to require a reasoned detailed decision.
- summary decision subject to the right of the parties to a reasoned detailed decision upon an appeal from the summary decision
- ex tempore oral decision which may be accepted by the parties and become enforceable; where such a decision is not accepted (and it is accepted in countries where it is available in 75% or 80% of cases) it must be provided in detail in writing
  
- "case appraisal" practice - consists of an impartial assessment and indication of the likely result by a lawyer, a result which the parties may accept and which, if accepted, becomes enforceable; if this appraisal is not accepted and the judicial decision given afterwards is the same, the party who did not accept the appraisal can be ordered to bear the costs of the procedure;



- introduction of the practice of dealing with cases on a "first come first served" (or "first in first out") basis (Conclusions)

**COMMONWEALTH (LATIMER HOUSE) PRINCIPLES ON THE THREE BRANCHES OF GOVERNMENT with Annex (Parliamentary Supremacy, Judicial Independence), The Commonwealth, 2003**

VII) Accountability Mechanisms

(c) Judicial review

Best democratic principles require that the actions of governments are open to scrutiny by the courts, to ensure that decisions taken comply with the Constitution, with relevant statutes and other law, including the law relating to the principles of natural justice.

**RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010**

Chapter III – Internal independence

24. The allocation of cases within a court should follow objective pre-established criteria in order to safeguard the right to an independent and impartial judge. It should not be influenced by the wishes of a party to the case or anyone otherwise interested in the outcome of the case.

## I. 7. SPECIAL COURTS

### ***BEIJING STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION, as amended in Manila at 7th Biennial Conferences of Chief Justices of Asia and the Pacific, 1997***

43. Some derogations from independence of the judiciary may be permitted in times of grave public emergency which threaten the life of the society but only for the period of time strictly required by the exigencies of the situation and under conditions prescribed by law, only to the extent strictly consistent with internationally recognised minimum standards and subject to review by the courts. In such times of emergency, the State shall endeavour to provide that civilians charged with criminal offences of any kind shall be tried by ordinary civilian courts and detention of person administratively without charge shall be subject to review by courts of other independent authority by way of habeus corpus or similar procedures.

44. The jurisdiction of military tribunals must be confined to military offences. There must always be a right of appeal from such tribunals to a legally qualified appellate court of tribunals to a legally qualified appellate court or tribunal or other remedy by way of an application for annulment.

## **I.7.1. MILITARY JUSTICE**

### ***MONTREAL DECLARATION, UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE, International Association of Judicial Independence and World Peace (JIWP), 1983***

Art. 2.06 e) The jurisdiction of military tribunals shall be confined to military offences committed by military personnel. There shall always be right of appeal from such tribunals to a legally qualified appellate court. No power shall be exercised so as to interfere with judicial process.

### ***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE (“Singhvi Declaration”), ECOSOC, 1985***

Independence

5. (f) The jurisdiction of military tribunals shall be confined to military offences. There shall always be a right of appeal from such tribunals to a legally qualified appellate court or tribunal or a remedy by way of an application for annulment.

### ***PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA, African Commission on Human and Peoples Rights, 2003***

#### **A. GENERAL PRINCIPLES APPLICABLE TO ALL LEGAL PROCEEDINGS**

4). Independent tribunal

e) Military or other special tribunals that do not use the duly established procedure of the legal process shall not be created to displace the jurisdiction belonging to the ordinary judicial bodies.

#### **L. RIGHT OF CIVILIANS NOT TO BE TRIED BY MILITARY COURTS.**

- a) The only purpose of Military Courts shall be to determine offences of a purely military nature committed by military personnel.
- b) While exercising this function, Military Courts are required to respect fair trial standards enunciated in the African Charter and in these guidelines.
- c) Military courts should not in any circumstances whatsoever have jurisdiction over civilians. Similarly, Special Tribunals should not try offences which fall within the jurisdiction of regular courts.

### ***INTEGRITY OF THE JUDICIAL SYSTEM, UN Commission on Human Rights, 2003, resolution 2003/39***

9. *Calls upon* States that have military courts for trying criminal offenders to ensure that such courts are an integral part of the general judicial system and use the duly established legal proceedings;

### ***DRAFT PRINCIPLES GOVERNING THE ADMINISTRATION OF JUSTICE THROUGH MILITARY TRIBUNALS, U.N. Doc. E/CN.4/2006/58 at 4, ECOSOC, 2006***

Principle No. 1

Establishment of military tribunals by the constitution or the law

Military tribunals, when they exist, may be established only by the constitution or the law, respecting the principle of the separation of powers. They must be an integral part of the general judicial system.

Principle No. 2

Respect for the standards of international law

Military tribunals must in all circumstances apply standards and procedures internationally recognized as guarantees of a fair trial, including the rules of international humanitarian law.

Principle No. 3

Application of martial law

In times of crisis, recourse to martial law or special regimes should not compromise the guarantees of a fair trial. Any derogations “strictly required by the exigencies of the situation” should be consistent with the principles of the proper administration of justice. In particular, military tribunals should not be substituted for ordinary courts, in derogation from ordinary law.

Principle No. 4

Application of humanitarian law

In time of armed conflict, the principles of humanitarian law, and in particular the provisions of the Geneva Convention relative to the Treatment of Prisoners of War, are fully applicable to military courts.

Principle No. 5

Jurisdiction of military courts to try civilians

Military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts.

Principle No. 6

Conscientious objection to military service

Conscientious objector status should be determined under the supervision of an independent and impartial civil court, providing all the guarantees of a fair trial, irrespective of the stage of military life at which it is invoked.

Principle No. 7

Jurisdiction of military tribunals to try minors under the age of 18

Strict respect for the guarantees provided in the Convention on the Rights of the Child and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) should govern the prosecution and punishment of minors, who fall within the category of vulnerable persons. In no case, therefore, should minors be placed under the jurisdiction of military courts.

Principle No. 8

Functional authority of military courts

The jurisdiction of military courts should be limited to offences of a strictly military nature committed by military personnel. Military courts may try persons treated as military personnel for infractions strictly related to their military status.

Principle No. 9

Trial of persons accused of serious human rights violations

In all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes.

Principle No. 10

Limitations on military secrecy

The rules that make it possible to invoke the secrecy of military information should not be diverted from their original purpose in order to obstruct the course of justice or to violate human rights. Military secrecy may be invoked, under the supervision of independent monitoring bodies, when it is strictly necessary to protect information concerning national defence. Military secrecy may not be invoked:

- (a) Where measures involving deprivation of liberty are concerned, which should not, under any circumstances, be kept secret, whether this involves the identity or the whereabouts of persons deprived of their liberty;
- (b) In order to obstruct the initiation or conduct of inquiries, proceedings or trials, whether they are of a criminal or a disciplinary nature, or to ignore them;
- (c) To deny judges and authorities delegated by law to exercise judicial activities access to documents and areas classified or restricted for reasons of national security;
- (d) To obstruct the publication of court sentences;
- (e) To obstruct the effective exercise of habeas corpus and other similar judicial remedies.

Principle No. 11

Military prison regime

Military prisons must comply with international standards, including the Standard Minimum Rules for the Treatment of Prisoners, the Basic Principles for the Treatment of Prisoners, and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and must be accessible to domestic and international inspection bodies.

Principle No. 12

Guarantee of habeas corpus

In all circumstances, anyone who is deprived of his or her liberty shall be entitled to take proceedings, such as habeas corpus proceedings, before a court, in order that that court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is not lawful. The right to petition for a writ of habeas corpus or other remedy should be considered as a personal right, the guarantee of which should, in all circumstances, fall within the exclusive jurisdiction of the ordinary courts. In all circumstances, the judge must be able to have access to any place where the detainee may be held.

Principle No. 13

Right to a competent, independent and impartial tribunal

The organization and operation of military courts should fully ensure the right of everyone to a competent, independent and impartial tribunal at every stage of legal proceedings from initial investigation to trial. The persons selected to perform the functions of judges in military courts must display integrity and competence and show proof of the necessary legal training and qualifications. Military judges should have a status guaranteeing their independence and impartiality, in particular vis-à-vis the military hierarchy. In no circumstances should military courts be allowed to resort to procedures involving anonymous or “faceless” judges and prosecutors.

Principle No. 14

Public nature of hearings

As in matters of ordinary law, public hearings must be the rule, and the holding of sessions in camera should be altogether exceptional and be authorized by a specific, well-grounded decision the legality of which is subject to review.

Principle No. 15

Guarantee of the rights of the defence and the right to a just and fair trial

The exercise of the rights of the defence must be fully guaranteed in military courts under all circumstances. All judicial proceedings in military courts must offer the following guarantees:

- (a) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law;
- (b) Every accused person must be informed promptly of the details of the offence with which he or she is charged and, before and during the trial, must be guaranteed all the rights and facilities necessary for his or her defence;
- (c) No one shall be punished for an offence except on the basis of individual criminal responsibility;
- (d) Everyone charged with a criminal offence shall have the right to be tried without undue delay and in his or her presence;

- (e) Everyone charged with a criminal offence shall have the right to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
- (f) No one may be compelled to testify against himself or herself or to confess guilt;
- (g) Everyone charged with a criminal offence shall have the right to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
- (h) No statement or item of evidence which is established to have been obtained through torture, cruel, inhuman or degrading treatment or other serious violations of human rights or by illicit means may be invoked as evidence in the proceedings;
- (i) No one may be convicted of a crime on the strength of anonymous testimony or secret evidence;
- (j) Everyone convicted of a crime shall have the right to have his or her conviction and sentence reviewed by a higher tribunal according to law;
- (k) Every person found guilty shall be informed, at the time of conviction, of his or her rights to judicial and other remedies and of the time limits for the exercise of those rights.

#### Principle No. 16

##### Access of victims to proceedings

Without prejudice to the principles relating to the jurisdiction of military courts, such courts should not exclude the victims of crimes or their successors from judicial proceedings, including inquiries. The judicial proceedings of military courts should ensure that the rights of the victims of crimes - or their successors - are effectively respected, by guaranteeing that they:

- (a) Have the right to report criminal acts and bring an action in the military courts so that judicial proceedings can be initiated;
- (b) Have a broad right to intervene in judicial proceedings and are able to participate in such proceedings as a party to the case, e.g. a claimant for criminal indemnification, an amicus curiae or a party bringing a private action;
- (c) Have access to judicial remedies to challenge decisions and rulings by military courts against their rights and interests;
- (d) Are protected against any ill-treatment and any act of intimidation or reprisal that might arise from the complaint or from their participation in the judicial proceedings.

#### Principle No. 17

##### Recourse procedures in the ordinary courts

In all cases where military tribunals exist, their authority should be limited to ruling in first instance. Consequently, recourse procedures, particularly appeals, should be brought before the civil courts. In all situations, disputes concerning legality should be settled by the highest civil court. Conflicts of authority and jurisdiction between military tribunals and ordinary courts must be resolved by a higher judicial body, such as a supreme court or constitutional court, that forms part of the system of ordinary courts and is composed of independent, impartial and competent judges.

#### Principle No. 18

##### Due obedience and responsibility of the superior

Without prejudice to the principles relating to the jurisdiction of military tribunals:

- (a) Due obedience may not be invoked to relieve a member of the military of the individual criminal responsibility that he or she incurs as a result of the commission of serious violations of human rights, such as extrajudicial executions, enforced disappearances and torture, war crimes or crimes against humanity;
- (b) The fact that a serious violation of human rights, such as an extrajudicial execution, an enforced disappearance, torture, a war crime or a crime against humanity has been committed by a subordinate does not relieve his or her superiors of criminal responsibility if they failed to exercise the powers vested in them to prevent or halt their commission, if they were in possession of information that enabled them to know that the crime was being or was about to be committed.

#### Principle No. 19

##### Non-imposition of the death penalty

Codes of military justice should reflect the international trend towards the gradual abolition of the death penalty, in both peacetime and wartime. In no circumstances shall the death penalty be imposed or carried out:

- (a) For offences committed by persons aged under 18;
- (b) On pregnant women or mothers with young children;
- (c) On persons suffering from any mental or intellectual disabilities.

#### Principle No. 20

##### Review of codes of military justice

Codes of military justice should be subject to periodic systematic review, conducted in an independent and transparent manner, so as to ensure that the authority of military tribunals corresponds to strict functional necessity, without encroaching on the jurisdiction that can and should belong to ordinary civil courts.

### ***GLOBAL BEST PRACTICES: JUDICIAL INTEGRITY STANDARDS AND CONSENSUS PRINCIPLES, IFES, 2004***

#### Chapter 4, e. Military, National Security and Other Special Courts

Many cases before the European Court, the Inter-American Court and the African Commission raise the issue of whether special courts, including military and national security courts, meet the test of independence under the right to a fair trial. While the bulk of the cases described here address the issue of the independence of military and national security tribunals, the independence of other special courts and tribunals has been challenged under human rights treaties, as evidenced by some of the case law of the African Commission.

The European Court has repeatedly ruled that the use of military or national security courts to try civilians violated the principle of judicial independence. This continuous case law has been strengthened in recent years by series of cases against Turkey where the government has used national security courts to try civilians under anti-terrorism legislation.

In *Loayza Tamayo v. Peru*, the Inter-American Court held that the use of special military courts to try civilians violated the principle of judicial independence. "Military tribunals, composed of military personnel nominated by the Executive and subject to military discipline who are entrusted with a function which specifically belongs to the Judiciary, given jurisdiction to judge not only military personnel by also civilians, which render decisions, as in the present case without motivation, do not meet the standards of independence and impartiality required by article 8(1) as elements essential to the due process of law."

In *Castillo Petruzzi v. Peru*, the Inter-American Court noted that the use of military courts to try civilians constitutes a transfer of jurisdiction from civilian courts to military courts, precluding the "competent, independent and impartial tribunal previously established by law ... from hearing these cases". Additionally, military courts do not meet "the requirements implicit in the guarantees of independence and impartiality that article 8(1) ... recognizes as essentials of due process of law", essentially because their composition and jurisdiction makes them subordinate to the executive.

The African Commission has had to address the issue of the ousting of the jurisdiction of ordinary courts and its impact on judicial independence in the context of some cases against Nigeria. In *Constitutional Rights Project v. Nigeria*, the African Commission held that the transfer of jurisdiction from ordinary courts to Robbery and Firearms Tribunals mainly composed of members of the executive constituted a violation of the principle of judicial independence. In *Civil Liberties Organization v. Nigeria*, the African Commission came to the same conclusion regarding the disciplinary body of the Bar Association, which was mainly composed of members of the executive. Moreover, in *Civil Liberties Organization v. Nigeria*, the African Commission held that "ousting the

jurisdiction of the courts in Nigeria to adjudicate the legality of any decree threatens the independence of the judiciary.

**GENERAL COMMENT NO. 32, ARTICLE 14, RIGHT TO EQUALITY BEFORE COURTS AND TRIBUNALS AND TO A FAIR TRIAL, UN Human Rights Committee, 2007**

III. Fair and public hearing by a competent, independent and impartial tribunal

The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military. The Committee notes the existence, in many countries, of military or special courts which try civilians. While the Covenant does not prohibit the trial of civilians in military or special courts, it requires that such trials are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned. The Committee also notes that the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned. Therefore, it is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14. Trials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials.

**REPORT OF THE SPECIAL RAPPORTEUR ON THE INDEPENDENCE OF JUDGES AND LAWYERS, Human Rights Council, June 2017**

B4. Military justice and special courts

57. As early as the first report, the Special Rapporteur expressed concerns regarding military courts, revolutionary courts or similar special courts, noting that the criterion of independence was not always assured (see E/CN.4/1995/39, para. 57).

58. The setting up of parallel courts to deal with terrorist-related offences has been mentioned as a matter of concern (see E/CN.4/2003/65, para. 39), since in several circumstances these courts' composition and procedures are often far from complying with the requirements of article 14 of the International Covenant on Civil and Political Rights (see E/CN.4/2004/60, para. 54).

59. The successive mandate holders have focused considerable attention on the question of the military justice system and the establishment of special courts, in particular for the trial of terrorism-related cases, in their reports to the Commission on Human Rights and the Human Rights Council (E/CN.4/2004/60, E/CN.4/2005/60, A/HRC/8/4, A/HRC/11/41 and A/HRC/20/19) and the General Assembly (A/61/384, A/62/207, A/63/271, A/68/285 and A/70/263).

C4. Military courts and the right to a fair trial

100. Military courts tend to be structured within a hierarchical system of command and control. This creates a difficulty in conducting a fair and impartial trial. Military procedures carried out or influenced by corrupt officers create a general distrust in military courts on the part of civilian populations, as stated by Arne Willy Dahl at an expert consultation organized by the Office of the United Nations High Commissioner for Human Rights in 2014 (A/HRC/28/32). Such situations of bias and corruption result in a violation of article 14 of the International Covenant, which stipulates that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

101. The Special Rapporteur calls on States to adopt specific norms that expressly exclude civilians from investigation and prosecution by military tribunals, ensure that their jurisdiction is



limited to military offences committed by active members of the military and protect the rights to fair trial and due process.

## A2. Guaranteeing Judicial Independence

112. Issues relating to the establishment and functioning of military courts lie at the core of the mandate of the Special Rapporteur on the independence of judges and lawyers.

## **I. 7.2. OTHER SPECIAL COURTS**

### ***MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE, International Bar Association (IBA), 1982***

B - Judges and the Legislature, 21

A citizen shall have the right to be tried by the ordinary courts of law, and shall not be tried before *ad hoc* tribunals.

### ***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE (“Singhvi Declaration”), ECOSOC, 1985***

Independence

5. (b) No *ad hoc* tribunals shall be established to displace jurisdiction properly vested in the courts.

### ***PALERMO DECLARATION, ELEMENTS OF A EUROPEAN STATUTE OF MAGISTRACY, MEDEL, 1993***

Art. 1.2 No exceptional jurisdiction may be instituted.

### ***BEIJING STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION, as amended in Manila at 7th Biennial Conferences of Chief Justices of Asia and the Pacific, 1997***

Art. 43 Emergency

Some derogations from independence of the judiciary may be permitted in times of grave public emergency which threaten the life of the society but only for the period of time strictly required by the exigencies of the situation and under conditions prescribed by law, only to the extent strictly consistent with internationally recognised minimum standards and subject to review by the courts. In such times of emergency, the State shall endeavour to provide that civilians charged with criminal offences of any kind shall be tried by ordinary civilian courts and detention of person administratively without charge shall be subject to review by courts of other independent authority by way of habeus corpus or similar procedures.

### ***FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY, FINAL REPORT, THE INDEPENDENCE OF THE INDIVIDUAL JUDGE WITHIN HIS OWN ORGANIZATION, International Association of Judges (IAJ), 2000***

Conclusions

1. Judicial independence is independence from any external influence on a judge's decisions in judicial matters, ensuring the citizens impartial trial according to law. This means that the judge must be protected against the possibility of pressure and other influence by the executive and legislative powers of state as well as by the media, business enterprises, passing popular opinion etc. But it also implies guarantees against influence from within the judiciary itself.

2. The extent to which courts of first instances are bound to follow decisions of Court of higher instance differs from country to country. This is a function of the tradition and evolution of the different legal systems and is not considered to affect the independence of the judge.

3. The proper administration of the Judicial system must create and ensure the conditions necessary for judicial independence. This includes appropriate remuneration and security of office. However,

the judge and the judiciary as a whole have an obligation to ensure the effective handling of the workload and the management of resources. Among the matters which could compromise the independence of the judge are an excessive workload, insufficient resources for the fulfilment of the judge's duties, the arbitrary imposition of quotas and assignment of cases, procedures and criteria for promotion. Where a judge's work is evaluated, it must be done in a manner which does not undermine his independence. For example it may be dangerous to evaluate the work of a judge by reference to the percentage of decisions which were reversed on appeal.

4. It is crucial to judicial independence that changes to a judge's decision may only be made by the judiciary itself, normally by appeal. Administrative measures of quality control, whether from without or within the judiciary, must not take the place of appeal or give that impression. Otherwise the way would be open to influencing the judiciary.

5. As regards the relationship between the judges on the one hand and the presidents of courts, the Superior Councils of Justice where they exist and the ministry of justice, on the other hand, it is essential that such a relationship is properly structured and regulated so as to ensure that the independence of the individual judge is not affected. In this context it should be emphasised that presidents of courts must be judges. Furthermore the administration of the judiciary should always be carried out by the judiciary itself or by an independent authority with substantial representation of the judiciary, at least where there is no other established tradition of handling that administration effectively and without influencing the judicial function.

### ***PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA, African Commission on Human and Peoples Rights, 2003***

#### **A. GENERAL PRINCIPLES APPLICABLE TO ALL LEGAL PROCEEDINGS**

##### **4. Independent tribunal**

e) Military or other special tribunals that do not use the duly established procedure of the legal process shall not be created to displace the jurisdiction belonging to the ordinary judicial bodies.

#### **L. RIGHT OF CIVILIANS NOT TO BE TRIED BY MILITARY COURTS**

a) The only purpose of Military Courts shall be to determine offences of a purely military nature committed by military personnel.

b) While exercising this function, Military Courts are required to respect fair trial standards enunciated in the African Charter and in these guidelines.

c) Military courts should not in any circumstances whatsoever have jurisdiction over civilians. Similarly, Special Tribunals should not try offences which fall within the jurisdiction of regular courts.

### ***OPINION NO 8 (2006) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON "THE ROLE OF JUDGES IN THE PROTECTION OF THE RULE OF LAW AND HUMAN RIGHTS IN THE CONTEXT OF TERRORISM", Consultative Council of European Judges (CCJE), 2015***

#### **A. INTRODUCTION**

14. The CCJE considers that the judge, charged with the dual functions of dealing with transgressions of the law and protecting constitutional rights and freedoms of individuals, must have an essential role in the legal frameworks devised by the states, and must be granted all necessary powers to fruitfully perform such tasks.

15. The CCJE considers that, if terrorism must be regarded as creating a special situation justifying temporary and specific measures which limit certain rights because of the exceptional danger it poses, these measures must be determined by the law, be necessary and proportionate to the aims of a democratic society (see, as regards the right of expression, Article 10 paragraph 2 of the European Convention of Human Rights, and, in general, principle 3 of the Guidelines on human rights and the fight against terrorism), and be subject to scrutiny and control with regard to their legitimacy by those judges that, according the legal traditions of the several states, ordinarily have jurisdiction in the area of the law concerned (civil, criminal or administrative courts – as opposed to tribunaux d'exception operating outside the ordinary legal system - see also paragraphs 26, 33-34 and 42 and following below).

#### C. CRIMINAL LAW MEASURES

b. The role of the judge remains unchanged in terrorist criminal proceedings

40. In the context of criminal law also, judges have a central role in ensuring that a proper balance is struck, as regards both substantive and procedural law, between the need to detect and pursue offences of terrorism and the safeguarding of the human rights of those suspected of and charged with such offences.

41. Having regard to the above mentioned needs, some questions concerning the role of the judge in proceedings in the field of terrorism may be addressed.

#### D. THE ROLE OF THE JUDGE IN THE PROTECTION OF FREEDOM OF EXPRESSION AND OTHER RIGHTS AND FREEDOMS

75. Despite the increase of terrorist activities, the CCJE considers that the national judge should always respect the basic principles of the rule of law, which are essential in democratic society, including the freedom of expression and other individual rights. As the fight against terrorism must never lead to the undermining of the values and freedoms that terrorists intend to destroy, it is vital for democracies that courts remain the guardians of the crucial demarcating line between a democratic society and a society that fights back using methods that themselves unduly curtail freedom of expression or infringe other rights and freedoms, such as the rights of minorities or political freedoms.

82. Judges face difficult and sometimes controversial decisions when determining whether national legislation complies with fundamental rights or freedoms and when determining whether particular conduct constitutes a terrorist offence within the scope of such legislation. The difficulties may be particularly acute when the issue is whether words or conduct amount to illegitimate incitement to commit a terrorist act, or to praising terrorism. Practice also shows that judges, on the basis of present definitions of terrorism at the national and international level, may face difficulties to determine whether certain violent political actions, usually committed or to be committed abroad, and/or their financing or the training or recruiting in order to commit the same, should be regarded as terrorist acts or should not, as may happen in some cases involving individual or collective self-defence under article 51 of the Charter of the United Nations.

85. The basic message is that the threats to security and the Rule of law posed by terrorism should not give rise to measures which themselves tend to undermine fundamental democratic values, human rights or principles of the Rule of law. This is a message which, if put into effect, reduces the risk that measures taken with a view to countering terrorism will themselves fuel new tensions or even promote terrorism itself. It is a message which needs to be understood and accepted in democracies by the public, politicians, media and courts alike.

**GENERAL COMMENT NO. 32, ARTICLE 14, RIGHT TO EQUALITY BEFORE COURTS AND TRIBUNALS AND TO A FAIR TRIAL, UN Human Rights Committee, 2007**

### III. Fair and public hearing by a competent, independent and impartial tribunal

Article 14 is also relevant where a State, in its legal order, recognizes courts based on customary law, or religious courts, to carry out or entrusts them with judicial tasks. It must be ensured that such courts cannot hand down binding judgments recognized by the State, unless the following requirements are met: proceedings before such courts are limited to minor civil and criminal matters, meet the basic requirements of fair trial and other relevant guarantees of the Covenant, and their judgments are validated by State courts in light of the guarantees set out in the Covenant and can be challenged by the parties concerned in a procedure meeting the requirements of article 14 of the Covenant. These principles are notwithstanding the general obligation of the State to protect the rights under the Covenant of any persons affected by the operation of customary and religious courts.

### ***CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) - OPINION N° 20 THE ROLE OF COURTS WITH RESPECT TO THE UNIFORM APPLICATION OF THE LAW, 2017***

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 effects<sup>16</sup>.

## II. INSTITUTIONAL INDEPENDENCE

### II. 1. MEANING AND IMPORTANCE OF THE INDEPENDENCE OF JUSTICE

#### ***THE SIRACUSA DRAFT PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, 1981***

Art. 2, par 1, Definition

Independence of the judiciary means

(1) that every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without any improper influences, inducements, or pressures, direct or indirect, from any quarter or for any reason.

#### ***MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE, International Bar Association (IBA), 1982***

A. Judges and the Executive

1 c. Substantive independence means that in the discharge of his/her judicial function a judge is subject to nothing but the law and the commands of his/her conscience.

#### ***MONTREAL DECLARATION, UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE, International Association of Judicial Independence and World Peace (JIWP), 1983***

Art. 2.02. Independence

Judges individually shall be free, and it shall be their duty, to decide matters before them impartially, in accordance with their assessment of the facts and their understanding of the law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

#### ***FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY, THE STRUCTURES OF THE JUDICIAL ORGANIZATION IN THE MEMBER-COUNTRIES OF IAJ, International Association of Judges (IAJ), 1983***

The Commission concluded that the expression imported two fundamental, and closely linked, principles: first, that the Judiciary derived its powers from the nation and, secondly, that the Judiciary was totally independent; from which it followed:

(1) That it was the function of the Judiciary, to the exclusion of any other "power", to determine disputes between citizens and between citizens and public authorities. In performing that function, judges must be wholly independent and must be seen by public opinion to be so.

(2) That judge must be free of influences of any kind, whether direct or indirect. As to that, in particular, his independence must not be susceptible of being impaired, either in fact or in the eyes of the public, by problems concerning his position in the hierarchy or his promotion.

#### ***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE ("Singhvi Declaration"), ECOSOC, 1985***

Independence

2. Judges individually shall be free, and it shall be their duty, to decide matters before them impartially in accordance with their assessment of the facts and their understanding of law without any

restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

***PALERMO DECLARATION, ELEMENTS OF A EUROPEAN STATUTE OF MAGISTRACY, MEDEL, 1993***

2.1. Magistrates are subject only to legality and to the law. They carry out their functions in complete independence. They control the constitutionality of the laws, directly or through recourse to a constitutional court.

***THE UNIVERSAL CHARTER OF THE JUDGE, International Association of Judges (IAJ), 1999***

**Art. 2 Status**

Judicial independence must be ensured by law creating and protecting judicial office that is genuinely and effectively independent from other state powers. The judge, as holder of judicial office, must be able to exercise judicial powers free from social, economic and political pressure, and independently from other judges and the administration of the judiciary.

***OPINION NO. 1 (2001) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF COUNCIL OF EUROPE ON STANDARDS CONCERNING THE INDEPENDENCE OF THE JUDICIARY AND THE IRREMOVABILITY OF JUDGES, Council of Europe, 2001***

The rationales of judicial independence

11. This independence must exist in relation to society generally and in relation to the particular parties to any dispute on which judges have to adjudicate. The judiciary is one of three basic and equal pillars in the modern democratic state. It has an important role and functions in relation to the other two pillars. It ensures that governments and the administration can be held to account for their actions, and, with regard to the legislature, it is involved in ensuring that duly enacted laws are enforced, and, to a greater or lesser extent, in ensuring that they comply with any relevant constitution or higher law (such as that of the European Union). To fulfil its role in these respects, the judiciary must be independent of these bodies, which involves freedom from inappropriate connections with and influence by these bodies. Independence thus serves as the guarantee of impartiality<sup>3</sup>. This has implications, necessarily, for almost every aspect of a judge's career: from training to appointment and promotion and to disciplining.

***BANGALORE PRINCIPLE ON JUDICIAL CONDUCT, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002***

1.1. A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

***PRINCIPLES AND GUIDELINES ON THE RIGHTS TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA, African Commission on Human and Peoples Rights, 2003***

## A. GENERAL PRINCIPLES APPLICABLE TO ALL LEGAL PROCEEDINGS

### 4) Independent tribunal

f) There shall not be any inappropriate or unwarranted interference with the judicial process nor shall decisions by judicial bodies be subject to revision except through judicial review, or the mitigation or commutation of sentence by competent authorities, in accordance with the law.

### **GLOBAL BEST PRACTICES: JUDICIAL INTEGRITY STANDARDS AND CONSENSUS PRINCIPLES, IFES, 2004**

#### iii. Right to an Effective Remedy

The European Court will look at both the subjective personal independence of the judge and the objective institutional independence of the judiciary. In doing so, the European Court has set a number of criteria for the assessment of the independence of courts. These criteria are now universally accepted standards of judicial independence for purposes of compliance with the requirements of the right to a fair trial. In *Campbell and Fell v. the United Kingdom*, the European Court summarizes the three core criteria of independence: (i) manner of appointment and length of tenure of members, (ii) guarantees against outside pressures and (iii) the appearance of independence.

#### c. Composition of an Independent Tribunal

##### i. Notion of Tribunal

The European Court has defined the notion of tribunal as a “body exercising judicial functions, established by law to determine matters within its competence on the basis of rules of law and in accordance with proceedings conducted in a prescribed manner.” The central requirement is that the tribunal be established by law. The creation of the tribunal by law includes the idea that it has been given a certain number of powers, which in turn is linked to the concept of competence. Indeed, the tribunal must be competent to judge the matter at issue, which requires that its jurisdiction over such matter has been recognized by law.

##### ii. Membership

Challenges to the independence of tribunals have often derived from their composition, and especially the inclusion of members of the executive. For example, the European Court has repeatedly challenged the composition of National Security Courts as a violation of the principle of judicial independence due to the inclusion of members of the executive.

The European Court notes that the independence of each member of a tribunal should be presumed unless there is proof to the contrary. Further, in *Ringeisen v. Austria*, the European Court held that the mixed membership of the tribunal, judges and civil servants, the Chairman of which was a judge, provides clear assurance of the independence and impartiality of the tribunal. The method of election or the professional affiliation of some members of the tribunal is not sufficient in itself to bear out a charge of lack of independence. Similar judgments have been rendered in subsequent cases regarding mixed memberships of judges and members of professional orders.

The Inter-American Court has had to address the issue of whether the composition of the tribunal affects judicial independence primarily in the context of military tribunals, which will be discussed in-depth in a later subsection. In *Cantoral Benavides v. Peru*, the Inter-American Court also ruled that trials run by “faceless judges” in cases of terrorism and treason lack the independence and impartiality required under article 8(1) of the IACHR.

The African Commission has had the opportunity to address the impartiality of tribunals and their composition, mostly indirectly, in a few cases. In *Constitutional Rights Project v. Nigeria*, the African Commission upheld a challenge to the independence of a court mainly composed of members of the executive. It held that the presence of members of the executive on the tribunal created the



appearance, if not the reality, of a lack of independence and impartiality. The appearance of lack of independence in itself constitutes a violation of article 7.

In *Civil Liberties Organization v. Nigeria*, the African Commission reviewed a challenge to the bar association's disciplinary body which was mainly composed of members of the executive. Noting that it violated the freedom of association, the Commission also affirmed that the "interference with the free association of the Nigerian Bar Association is inconsistent with the preamble of the African Charter in conjunction with UN Basic Principles on the Independence of the Judiciary".

#### d. Institutional and Personal Independence

In assessing whether the conditions of independence are met, the European Court focuses on the judiciary's relation with the other State powers, with the politicians, with the mass media and with the parties to the litigation. The institutional independence of the judiciary and the personal independence of the judge in a given case depend on the relationship of the judiciary and specific court with a number of actors, including: (i) the other branches of government, especially the executive; (ii) the parties; and (iii) the media. Similar approaches have been taken by the Inter-American Court and the African Commission.

Regarding the relationship between the judiciary and the executive, in *Beaumartin v. France*, the plaintiff challenged the independence of administrative tribunals based on the exclusive power of the Minister of Foreign Affairs to interpret treaties. The European Court held that the tribunal was not independent because of its obligation to request interpretations of international treaties from the executive.

Regarding the relationship between the judiciary and the media, in *The Sunday Times v. the United Kingdom*, the European Court held certain restrictions on freedom of expression and the freedom of the press may be justified to maintain the authority of the judiciary.

### ***DECLARATION OF MINIMAL PRINCIPLES ABOUT JUDICIARIES AND JUDGES' INDEPENDENCE IN LATIN AMERICA, Campeche, April 2008***

#### III. MINIMAL CONDITIONS FOR THE PROTECTION OF JUDGES' INDEPENDENCE AND IMPARTIALITY

##### 7. GUARANTEES AND INCOMPATIBILITIES

In order to strengthen Independence and impartiality, there are certain guarantees and incompatibilities that have to be stated, such as:

a) The impartiality of the judge, as an indispensable condition for the exercise of the jurisdictional function, has to be real, effective and evident for the citizenship.

b) The judges:

b.1. have to be appointed in a permanent way, and cannot be appointed for a period of time.

b.2. are immovable, making it impossible to be transferred or promoted (with the exception of a voluntary application) or removed, suspended, licensed, disposed of, separated or in any other way retired from the exercise of their functions and the place for which they were appointed, with the exception of cases unequivocally prescribed by the law and by means of a prosecution process of their behavior, in a contradictory process with broad guarantees of self defense.

b.3. shall not be disciplinary prosecuted or held responsible for the content, or sense of their adopted judicial decisions.

## II. 2. FREEDOM FROM UNDUE EXTERNAL INFLUENCE

### ***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE (“Singhvi Declaration”), ECOSOC, 1985***

Independence

5. (g) No power shall be so exercised as to interfere with the judicial process.

### ***OPINION NO. 1 (2001) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF COUNCIL OF EUROPE ON STANDARDS CONCERNING THE INDEPENDENCE OF THE JUDICIARY AND THE IRREMOVABILITY OF JUDGES, Council of Europe, 2001***

Freedom from undue external influence

63. Freedom from undue external influence constitutes a well-recognised general principle: see UN basic principles, paragraph 2; Recommendation No. R (94) 12, Principle I(2)(d), which continues: “The law should provide for sanctions against persons seeking to influence judges in any such manner”. As general principles, freedom from undue influence and the need in extreme cases for sanctions are incontrovertible. Further, the CCJE has no reason to think that they are not appropriately provided for as such in the laws of member States. On the other hand, their operation in practice requires care, scrutiny and in some contexts political restraint. Discussions with and the understanding and support of judges from different States could prove valuable in this connection. The difficulty lies rather in deciding what constitutes undue influence, and in striking an appropriate balance between for example the need to protect the judicial process against distortion and pressure, whether from political, press or other sources, and the interests of open discussion of matters of public interest in public life and in a free press. Judges must accept that they are public figures and must not be too susceptible or of too fragile a constitution. The CCJE agreed that no alteration of the existing principle seems required, but that judges in different States could benefit from discussing together and exchanging information about particular situations.

### ***OPINION NO 8 (2006) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON “THE ROLE OF JUDGES IN THE PROTECTION OF THE RULE OF LAW AND HUMAN RIGHTS IN THE CONTEXT OF TERRORISM”, Consultative Council of European Judges (CCJE), 2006***

84. It is for both politicians and the media to refrain from attempting to apply pressure on or to attack judges, beyond what may be considered legitimate criticism. It is the duty of an appropriate independent body to react to such attacks (see the CCJE's Opinion No. 6, paragraph C.13). The CCJE considers that the judiciary, on its part, should ensure that trials are conducted by well trained professional judges; appropriate training actions should help judges develop their understanding of terrorism and of its historical, political and social context.

### ***DRAFT VADEMECUM ON THE JUDICIARY, EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), 2008***

2.4 Institutional and External Independence

2.4.1 Courts Powers, Establishment, Structuring and Dissolution

[...] Court decisions can only be annulled by a court [...].

CDL-AD(2005)003 Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, in cooperation with OSCE/ODIHR, par. 101.

[...] the principle of an uninterrupted chain of democratic legitimacy (developed in German doctrine) [...] requires that every state body has to receive its powers – even if indirectly – from the sovereign people. A completely autonomous self-administration would lack such democratic legitimacy.

CDL-AD(2002)026 Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, para. 13

While it is obviously appropriate that questions pertaining to appeals and the procedure before the various courts are determined in the various codes of procedure, it may be preferable, under the specific conditions of a country newly establishing a judicial system based on the rule of law, to have one comprehensive text covering all questions pertaining to the composition, organisation, activities and standing of the judiciary.

CDL-INF(2000)005 Opinion on the draft law of Ukraine on the judicial system, “preliminary remarks”, al. 3.

It is a fact that alternative machineries for resolving conflicts are developing in many European states. The relationship between the ordinary courts and these alternative institutions certainly needs to be analysed and even regulated through legal norms. The Constitution is perhaps not the appropriate place to settle such problems, beyond a mere reference to the existence of the problem as such.

It is not necessarily correct that "the Constitution must define the individual elements of the court organisational structure". [...] Only the general framework of the organisation of the court system deserves to be reflected in the Constitution itself.

CDL-INF(1996)002 Opinion on the regulatory concept of the Constitution of the Republic of Hungary, part II, a. 10, «Administration of justice », al. 1-2.

[The Draft Constitution] guarantees everyone the right of appeal to a court against decisions, actions or inactions of the bodies of state power, bodies of local self-government or public officials. It is to be welcomed that in this way the judicial control of administrative authorities is established and a constitutional basis for administrative jurisdiction is provided.

CDL-INF(1996)006 Opinion on the draft Constitution of Ukraine, section VIII, « General Comments », al. 2.

The establishment and jurisdiction of courts, as well as the procedure before the courts, shall be specified by law.

CDL-INF(1998)015 Opinions on the constitutional regime of Bosnia and Herzegovina, chapter B.II, 3.3.2.

It is important that the different types of court are provided for at Constitutional level.

CDL-AD(2005)003 Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, en collaboration avec OSCE/BIDDH, par. 102.

Under a system of judicial independence the higher courts ensure the consistency of case law throughout the territory of the country through their decisions in the individual cases. Lower courts will, without being in the Civil Law as opposed to the Common Law tradition formally bound by judicial

precedents, tend to follow the principles developed in the decisions of the higher courts in order to avoid that their decisions are quashed on appeal. In addition, special procedural rules may ensure consistency between the various judicial branches.

CDL-INF(2000)005 Opinion on the draft law of Ukraine on the judicial system «General comments», « Establishment of a strictly hierarchical system of courts», al. 1.

[...] whether one should opt for a unified system or for specialised courts. Different states in Europe (and elsewhere) have based themselves on different models for the organisation of the court system. The respective states will have different experiences in this area. The answer to these questions cannot be adequately offered until one is more familiar with the socio-political conditions (including the structure and composition of the legal profession) in the present and future society [concerned].

CDL-INF(1996)002 Opinion on the regulatory concept of the Constitution of the Republic of Hungary, chapter II, a. 10, «Administration of justice », al. 3.

In this respect it would seem *inter alia* desirable to state clearly that the general courts have residual jurisdiction, i.e. that they are competent to deal with all justiciable matters which are not specifically referred by law to the specialised courts within the overall system.

CDL-INF(2000)005 Opinion on the draft law of Ukraine on the judicial system, «Preliminary remarks», al. 3.

The chapter [of the Constitution] on judicial institutions is fairly general and does not try to set out the judicial institutions and their functions in detail. I think this is a good decision since the [country], on its way to a market economy, will have to adapt its present judicial institutions to quite different conditions. It seems therefore justified that [the Constitution] leaves it to the law whether specialised courts (one could think of labour or social security tribunals) should be set up. It seems however important to mention one additional category of courts since these are both particularly important for a State based on the rule of law and lacking in the Soviet tradition: the administrative courts.

The need to subject administrative acts to judicial review is one of the fundamental elements of the rule of law. However, as regards the establishment of administrative courts (Article 92), the Commission notes that this is not a necessary element of judicial review of acts of the administration. It may well be envisaged that control over normative acts is carried out by the Constitutional Court (as it is the case under the actual Constitution), whereas judicial review of individual administrative acts is performed by specialised sections or chambers of ordinary courts (usually courts of appeal and courts of cassation), as it is the case in Croatia and Latvia, for example. The Commission refers to the comments by Mr Torfason on the constitutional requirement of judicial review of administrative acts (CDL (2001) 39). There are of course arguments in favour of establishing separate administrative courts and the Commission does not wish to take a definite position on this point. It emphasises however that the court system should not be too complicated. If separate administrative courts are established, this will affect the need for economic and other specialised courts.

Moreover, in the Commission's opinion, the establishment or non-establishment of an administrative judiciary is a solution of such importance that it should be made at constitutional level.

CDL-INF(2001)017 Report on the Revised Constitution of the Republic of Armenia, para. 59.

As regards this novelty, it is of course perfectly compatible with European standards to introduce administrative courts with specific jurisdiction standing beside the ordinary general courts, and this is likely to contribute to the efficiency of judicial handling of administrative law cases, which presumably will constitute a relatively large portion of the judicial case load to be expected in the near future. A system of general courts with universal jurisdiction (in civil, criminal and administrative law cases and with power of constitutional review) may however be the most democratic structure

for the judicial power, and judges preferably should be generalists rather than specialists in the fields of substantive law.

In relatively small countries not having a tradition of administrative courts, it may not necessarily be desirable to establish such separate courts, especially if the countries also have an effective Ombudsman institution. [...] the Supreme Court [as the court of ultimate appeal] is [therefor] extremely important [...]. As a second matter, if the administrative courts are created, it preferably should be possible to organize the judiciary so as to allow for rotation between these courts and the general courts among the judges of first and second instance, in order to promote a broad outlook and experience within the system.

CDL-AD(2002)026 Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia , para. 6-8.

The draft provides for a system of separate economic (arbitration) courts. Such systems exist in various countries and the need for judges to specialise in various areas of commercial law to efficiently deal with commercial disputes justifies dealing with commercial cases separately. It is however more common in Western Europe to use special panels of the ordinary courts for such matters, often providing for the involvement of merchants as lay judges. By contrast, the Ukrainian solution appears problematic since it is a simple continuation of the Soviet model which was based on different legal regulations for individuals and socially owned entities. The conceptual justification for this model does not exist in a market economy in which inter enterprise relations are governed by private law. Under these circumstances the maintenance of the old system appears excessively conservative and the transfer of these cases to economic divisions of the ordinary courts[...].

CDL-INF(2000)005 Opinion on the draft law of Ukraine on the judicial system , «General Comments», «The system of economic (arbitration) courts» al.1-2.

[The law provides that Regional Courts shall have a Civil Case Panel and a Criminal Case Panel.]

Ideally there should be the principle of rotation of the judges between panels from time to time. The same applies to the Supreme Court (having Senates,...).

CDL-AD(2002)026 Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, para. 42.

The extent of jurisdiction of the military courts is not defined in the draft but according to information given to the rapporteurs such courts are competent in cases involving soldiers having no relation with their military duties such as the divorce of a military serviceman. [...] the Commission draws the attention of the authorities [of the country] to the case law of the European Court of Human Rights, in particular the judgment of 9 June 1998 in the case of Incal v. Turkey. According to this case law even the legitimate fear that a military judge may be influenced in a case by undue considerations is sufficient to constitute a violation of the right to an independent and impartial judge. A system of granting jurisdiction to military courts for cases involving civilians and where there seems no need to have recourse to military judges is bound to produce violations of the Convention.

CDL-INF(2000)005 Opinion on the draft law of Ukraine on the judicial system , «General Comments», «The military courts », al. 3.

[Following] the system of military courts established by the draft [there] will be courts martial of garrisons [...], military courts of appeal [...] and a military division of the Supreme Court [...]. Even the judges within the military division of the Supreme Court will have military ranks [...]. Therefore this division of the Supreme Court will also have the character of a military court.

It is true that military courts exist in other countries and are not objectionable as such. The proposed system nevertheless goes beyond what is acceptable. In a democratic country the military has to be

integrated into society and not kept apart. Democracies therefore generally provide for the possibility of appeals from military courts to civilian courts and a final appeal to a panel composed of military officers appears wholly unsatisfactory

CDL-INF(2000)005 Opinion on the draft law of Ukraine on the judicial system , «General Comments», «The military courts », al. 1-2.

***DECLARATION OF MINIMAL PRINCIPLES ABOUT JUDICIARIES AND JUDGES' INDEPENDENCE IN LATIN AMERICA, Campeche, April 2008***

I. GENERAL PRINCIPLES

4. The attacks to judicial Independence should be sanctioned by the law, which must provide the mechanisms through which the judges who feel disturbed or upset in their independence could obtain the support of the superior bodies or the Judiciary government.

***PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO DEVELOPMENT, UN HUMAN RIGHTS COUNCIL, Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, 24 March 2009***

Recommendations

103. To strengthen structures and procedures within the judiciary, he recommends that:

- Member States create a mechanism to allocate court cases in an objective manner.
- Adequate structures within the judiciary and the courts be established to prevent improper interference from within the judiciary.
- Allegations of improper interference be inquired by independent and impartial investigations in a thorough and prompt manner.

***REPORT ON THE INDEPENDENCE OF THE JUDICIAL SYSTEM PART I: THE INDEPENDENCE OF JUDGES, Venice Commission, Venice, 12-13 March 2010 CDL-AD(2010)004***

IV. Conclusions

82. The following standards should be respected by states in order to ensure internal and external judicial independence:

- 3. Rules of incompatibility and for the challenging of judges are an essential element of judicial independence.

***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

Chapter I – General aspects

5. Judges should have unfettered freedom to decide cases impartially, in accordance with the law and their interpretation of the facts.

8. Where judges consider that their independence is threatened, they should be able to have recourse to a council for the judiciary or another independent authority, or they should have effective means of remedy.

## Chapter II – External independence

14. The law should provide for sanctions against persons seeking to influence judges in an improper manner.

18. If commenting on judges' decisions, the executive and legislative powers should avoid criticism that would undermine the independence of or public confidence in the judiciary. They should also avoid actions which may call into question their willingness to abide by judges' decisions, other than stating their intention to appeal.

### ***VILAMOURA MANIFEST, JUSTICE IN FRONT OF ECONOMIC CRISIS, MEDEL, 2012***

3. When justice is being misused by other powers- either political, economic or media - it deteriorates. Its independence is essential for equality of citizens before the law.

### ***OPINION NO. 19 (2016) ON THE ROLE OF COURT PRESIDENTS, Consultative Council of European Judges, Council of Europe, 2016***

1. 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.

3. Court presidents, acting as guardians of the court's independence, impartiality and efficiency, should themselves respect the internal independence of judges within their courts.

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.

### ***REPORT OF THE SPECIAL RAPPORTEUR ON THE INDEPENDENCE OF JUDGES AND LAWYERS, Human Rights Council, June 2017***

B2. Judicial ethics, corruption within the judiciary and judicial accountability

41. In previous reports, the Special Rapporteur has noted that threats to judicial independence came not only from the executive or legislative branches, but also from organized crime, businesses, corporate giants and multinationals (see E/CN.4/1996/37, para. 246). The present mandate holder takes particular note of how organized crime and corruption are increasingly affecting the capacity of many States and the judiciary to fulfil their duties. How these manifest and recommendations to address this growing phenomenon will be an issue of special concern in forthcoming reports.

## II. 3. THE PRINCIPLE OF SEPARATION OF POWERS

### ***THE SIRACUSA DRAFT PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, 1981***

Art. 2, par 2, Definition

Independence of the judiciary means that the judiciary is independent of the executive and legislature, and has jurisdiction, directly or by way of review, over all issues of a judicial nature.

### ***FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY, THE STRUCTURES OF THE JUDICIAL ORGANIZATION IN THE MEMBER-COUNTRIES OF IAJ, International Association of Judges (IAJ), 1983***

(3) ... However that Independence could not be envisaged in the absence of indispensable interaction and indeed co-operation with those other two "powers". Thus, in particular, the supply of money for courts and tribunals necessarily depended on them. Similarly, the execution of judicial decisions depended on the assistance of the Executive. The role of the judge was to apply the law and determine its effect.

### ***FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY, THE RESPONSIBILITY OF THE JUDGE, International Association of Judges (IAJ), 1989***

The Responsibility of the Judge

B. Concerning the relationships between the judicial and the executive branches

While it is unanimously considered that under no circumstances may a government intervene in the adjudication of matters before the courts and tribunals, it is believed that generally there is a possibility for government to influence indirectly the work of judges by the manner in which support services are provided to them for the fulfilment of their duties.

In this respect the problem of budget preparation is crucial.

The discussion had to conclude to the necessity that qualified representatives of the judiciary be involved not only in the preparation of the budget to determine the requirements of the courts, but also in discussing them with members of the Government and of Parliament and thereafter that the expenditure of the funds so obtained be made under the control of representatives of the judiciary.

As regards security of terms, it appears difficult to define a single system by reason of the variety of ways in which the institutions are designed and perceived in different countries.

While in several countries it is considered that the impeachment of a judge for serious reasons must only occur following the decision of a judicial body not subject to any political interference, in other countries it is considered that the procedure of impeachment by joint address of both Houses of Parliament offers adequate guarantees.

In any event, the essential consideration must be that such a serious measure as impeachment or dismissal should not become a means for exerting pressure on a judge, and thereby impinge upon the independence of the judiciary.

### ***OPINION NO. 1 (2001) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF COUNCIL OF EUROPE ON STANDARDS CONCERNING THE INDEPENDENCE OF THE JUDICIARY AND THE IRREMOVABILITY OF JUDGES, Council of Europe, 2001***



## The rationales of judicial independence

11. This independence must exist in relation to society generally and in relation to the particular parties to any dispute on which judges have to adjudicate. The judiciary is one of three basic and equal pillars in the modern democratic state. It has an important role and functions in relation to the other two pillars. It ensures that governments and the administration can be held to account for their actions, and, with regard to the legislature, it is involved in ensuring that duly enacted laws are enforced, and, to a greater or lesser extent, in ensuring that they comply with any relevant constitution or higher law (such as that of the European Union). To fulfil its role in these respects, the judiciary must be independent of these bodies, which involves freedom from inappropriate connections with and influence by these bodies. Independence thus serves as the guarantee of impartiality. This has implications, necessarily, for almost every aspect of a judge's career: from training to appointment and promotion and to disciplining.

### ***OPINION NO. 2 (2001) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE FUNDING AND MANAGEMENT OF COURTS WITH REFERENCE TO THE EFFICIENCY OF THE JUDICIARY AND TO ARTICLE 6 OF EUROPEAN CONVENTION ON HUMAN RIGHTS, Council of Europe, 2001***

5. The CCJE agreed that although the funding of courts is part of the State budget presented to Parliament by the Ministry of Finances, such funding should not be subject to political fluctuations. Although the level of funding a country can afford for its courts is a political decision, care must always be taken, in a system based on the separation of powers, to ensure that neither the executive nor the legislative authorities are able to exert any pressure on the judiciary when setting its budget. Decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence.

### ***GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY, USAID, 2002***

#### 4. Structure of the Judiciary

As we noted in the introduction to the guide, we are primarily interested in the independence of the judiciary from the perspective of the judges' ability to make decisions impartially, not the institution's structural independence from other branches of government. However, as also noted, the structural relationship of the judiciary to the rest of the government inevitably makes judges more or less vulnerable to interference.

As with all the other institutional issues related to the judiciary, there is no universally accepted approach. The two basic models are

- A judiciary which is dependent on an executive department, usually the ministry of justice, for administrative and budgetary functions
- A judiciary which is a separate branch of government and has the same degree of self-government and budgetary control over its operations as the executive branch has over its operations

However, there are many variations on these models, and many countries have tried different approaches at different times. The United States follows the second model, as do a few countries in Western Europe and many in Latin America. The first model has been dominant in Europe, including the United Kingdom.

Although the judiciaries of Europe have achieved high levels of independent decision-making under the first model, the trend around the world, including in Europe, has been for countries to transfer all or some of the responsibility for judicial administration and budget away from the executive. Administrative responsibilities have been vested in either a judicial council, the judiciary itself, or, yet another twist, a council within the judiciary. Both Italy and Spain have transferred substantial

administrative powers from the ministries of justice to judicial councils, and France is considering such reforms. Among common law countries, judges in the United Kingdom and Canada have been gaining increasing support for calls for greater institutional independence from the executive and legislative branches.

Responsibility for management of the judiciary developed along a similar path in the United States. Although Justice usually made decisions in consultation with judicial officials, it could, and sometimes did, deny financial support in retaliation for decisions contrary to the interests of the executive branch.

In response to these concerns, Congress created the Administrative Office of the U.S. Courts, supervised by the Judicial Conference, which now includes representatives of all levels of the federal judiciary. Under this arrangement, the federal judiciary manages its own funds and operations. It also develops its own budget request, which is submitted to the Office of Management and Budget (OMB). By law, OMB must include the judiciary's proposed budget in the submission of the president's budget to Congress without change, although OMB is permitted to comment on it.

Although there are clear examples of independent judicial decision-making under executive branch administration, the trend away from this model demonstrates the concern that power over the budget and administration of the courts, especially when coupled with executive control over appointments, promotions, and discipline, allows inappropriate influence by the executive. This concern can be particularly acute in countries that have a history of executive domination of the judiciary, such as former communist states. Additionally, the relationship of the judiciary to other branches can influence the public's perception and expectations with respect to its independence. For example, Kenya's constitution is one of the few in anglophone Africa that does not clearly establish the judiciary as a separate branch. The Kenyan contributor to this study stressed that this situation has contributed to the perception of the judiciary as a mere appendage of the executive.

While placing administrative and budgetary responsibility with the judiciary creates a framework that encourages substantive independence, it is by no means sufficient. Problems can arise when administrative authority is transferred without first, or simultaneously, developing the interest and capacity of judicial leaders to discharge their increased responsibilities effectively, with attention to the needs of the lower as well as the higher courts. For example, the lack of professional court management in the Basque region in Spain resulted in transfer of administration back to the ministry of justice. Throughout the commonwealth, administrative responsibility for the courts has traditionally rested with the chief justice and senior judicial officers. Where the chief justice has been independent, the responsibility for administration has tended to strengthen this independence. In the absence of such leadership, it is perceived to have been irrelevant.

***COMMONWEALTH (LATIMER HOUSE) PRINCIPLES ON THE THREE BRANCHES OF GOVERNMENT with Annex (Parliamentary Supremacy, Judicial Independence), The Commonwealth, 2003***

**I) The Three Branches of Government**

Each Commonwealth country's Parliaments, Executives and Judiciaries are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability.

***JUDICIAL APPOINTMENTS, Venice Commission, Venice, 16-17 March 2007, CDL-AD(2007)02***

45. In older democracies, the executive power has sometimes a decisive influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary

because these powers are restrained by legal culture and traditions, which have grown over a long time.

46. New democracies, however, did not yet have a chance to develop these traditions, which can prevent abuse, and therefore, at least in these countries, explicit constitutional and legal provisions are needed as a safeguard to prevent political abuse in the appointment of judges.

47. Appointments of judges of ordinary (non-constitutional) courts are not an appropriate subject for a vote by Parliament because the danger that political considerations prevail over the objective merits of a candidate cannot be excluded.

48. An appropriate method for guaranteeing judicial independence is the establishment of a judicial council, which should be endowed with constitutional guarantees for its composition, powers and autonomy.

49. Such a Council should have a decisive influence on the appointment and promotion of judges and disciplinary measures against them.

50. A substantial element or a majority of the members of the judicial council should be elected by the Judiciary itself. In order to provide for democratic legitimacy of the Judicial Council, other members should be elected by Parliament among persons with appropriate legal qualifications.

51. A balance needs to be struck between judicial independence and self-administration on the one side and the necessary accountability of the judiciary on the other side in order to avoid negative effects of corporatism within the judiciary. In this context, it is necessary to ensure that disciplinary procedures against judges are carried out effectively and are not marred by undue peer restraint.

***FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY, THE RELATIONSHIP BETWEEN THE EXECUTIVE AND THE JUDICIARY IN A DEMOCRATIC SOCIETY: THE QUESTION IS - WHO SHOULD BE MASTER?, International Association of Judges (IAJ), 2008***

1.) Although many countries' constitutions or constitutional laws adopt the principle of the "separation of powers", in fact, in a democratic society, it is inevitable that there should be constructive interaction between the executive, legislative and judicial powers of the state.

5.) The structural independence of the judiciary is essential. A lack of such independence may influence the independence of the individual judge and therefore infringe a fundamental right of the people to have a fair resolution of their disputes.

8.) The answer to the question "Who should be master in a democratic society?" is neither - there should be a balance between the executive and the judicial powers, each respecting the power of the other in the respective domains according to law.

***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

Chapter II – External independence

18. If commenting on judges' decisions, the executive and legislative powers should avoid criticism that would undermine the independence of or public confidence in the judiciary. They should also avoid actions which may call into question their willingness to abide by judges' decisions, other than stating their intention to appeal.

***CHARTER OF THE COMMONWEALTH, The Commonwealth, 2013***

VI. Separation of Powers

We recognise the importance of maintaining the integrity of the roles of the Legislature, executive and Judiciary. These are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and adherence to good governance.

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(3) That so much marked the independence of the Judiciary from the Legislature and the Executive. However, that independence could not be envisaged in the absence of indispensable interaction and indeed co-operation with those other two "powers". Thus, in particular, the supply of money for courts and tribunals necessarily depended on them. Similarly, the execution of judicial decisions depended on the assistance of the Executive.

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***FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY, THE RELATIONSHIP BETWEEN THE EXECUTIVE AND THE JUDICIARY IN A DEMOCRATIC SOCIETY: THE QUESTION IS - WHO SHOULD BE MASTER?, International Association of Judges (IAJ), 2008***

1.) Although many countries' constitutions or constitutional laws adopt the principle of the "separation of powers", in fact, in a democratic society, it is inevitable that there should be constructive interaction between the executive, legislative and judicial powers of the state.

5.) The structural independence of the judiciary is essential. A lack of such independence may influence the independence of the individual judge and therefore infringe a fundamental right of the people to have a fair resolution of their disputes.

8.) The answer to the question "Who should be master in a democratic society?" is neither - there should be a balance between the executive and the judicial powers, each respecting the power of the other in the respective domains according to law.

***OPINION NO. 12 (2009) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) AND OPINION NO.4 (2009) OF THE CONSULTATIVE COUNCIL OF EUROPEAN PROSECUTORS (CCPE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE RELATIONS BETWEEN JUDGES AND PROSECUTORS IN A DEMOCRACY SOCIETY, BORDEAUX DECLARATION, CCJE, CCPE, 2009***

2. The fair administration of justice requires that there shall be equality of arms between prosecution and defence, as well as respect for the independence of the court, the principle of separation of powers and the binding force of final court decisions.

***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

Chapter II – External independence

18. If commenting on judges' decisions, the executive and legislative powers should avoid criticism that would undermine the independence of or public confidence in the judiciary. They should also avoid actions which may call into question their willingness to abide by judges' decisions, other than stating their intention to appeal.

***CHARTER OF THE COMMONWEALTH, The Commonwealth, 2013***

VI. Separation of Powers

We recognise the importance of maintaining the integrity of the roles of the Legislature, executive and Judiciary. These are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and adherence to good governance.



**OPINION NO. 18 (2015) THE POSITION OF THE JUDICIARY AND ITS RELATION WITH THE OTHER POWERS OF STATE IN A MODERN DEMOCRACY, Consultative Council of European Judges (CCJE), 2015**

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).

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).

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).

***BEST PRACTICE GUIDE FOR MANAGING SUPREME COURTS, European Union, 2017***

V Communication

C Recommendations and best practices

Establishing a constructive working relationship between the judiciary, the executive and the legislature requires a delicate balance that safeguards the separation of powers.

***CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) - OPINION N° 20 THE ROLE OF COURTS WITH RESPECT TO THE UNIFORM APPLICATION OF THE LAW, 2017***

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 countries<sup>17</sup>, 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.

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.

## II. 4. THE JUDICIARY AND THE EXECUTIVE

### **MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE, *International Bar Association (IBA)*, 1982**

#### A JUDGES AND THE EXECUTIVE

1 a) Individual judges should enjoy personal independence and substantive independence.

b) Personal independence means that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control.

c) Substantive independence means that in the discharge of his/her judicial function a judge is subject to nothing but the law and the commands of his/her conscience.

2 The Judiciary as a whole should enjoy autonomy and collective independence vis-à-vis the Executive

3 a) Participation in judicial appointments and promotions by the executive or legislature is not inconsistent with judicial independence provided that appointments and promotions of judges are vested in a judicial body in which members of judiciary and the legal profession form a majority.

b) Appointments and promotions by a non-judicial body will not be considered inconsistent with judicial independence in countries where, by long historic and democratic tradition, judicial appointments and promotion operate satisfactorily.

4 a) The Executive may participate in the discipline of judges only in referring complaints against judges, or in the initiation of disciplinary proceedings, but not the adjudication of such matters. The power to discipline or remove a judge must be vested in an institution, which is independent of the Executive.

b) The power of removal of a judge should preferably be vested in a judicial tribunal.

c) The Legislature may be vested with the powers of removal of judges, preferably upon a recommendation of a judicial commission.

5 The Executive shall not have control over judicial functions.

6 Rules of procedure and practice shall be made by legislation or by the Judiciary in co-operation with the legal profession subject to parliamentary approval.

7 The State shall have a duty to provide for the executive of judgements of the Court. The Judiciary shall exercise supervision over the execution process.

8 Judicial matters are exclusively within the responsibility of the Judiciary, both in central judicial administration and in court level judicial administration.

9 The central responsibility for judicial administration shall preferably be vested in the Judiciary or jointly in the Judiciary and the Executive.

10 It is the duty of the State to provide adequate financial resources to allow for the due administration of justice.

11 a) Division of work among judges should ordinarily be done under a predetermined plan, which can be changed in certain clearly defined circumstances.

b) In countries where the power of division of judicial work is vested in the Chief Justice, it is not considered inconsistent with judicial independence to accord to the Chief Justice the power to change the predetermined plan for sound reasons, preferably in consultation with the senior judges when practicable.

c) Subject to (a), the exclusive responsibility for case assignment should be vested in a responsible judge, preferably the President of the Court.

12 The power to transfer a judge from one court to another shall be vested in a judicial authority and preferably shall be subject to the judge's consent, such consent not to be unreasonably withheld.

13 Court services should be adequately financed by the relevant government.

14 Judicial salaries and pensions shall be adequate and should be regularly adjusted to account for price increases independent of executive control.

15 a) The position of the judges, their independence, their security, and their adequate remuneration shall be secured by law.

b) Judicial salaries cannot be decreased during the judges' services except as a coherent part of an overall public economic measure.

16 The ministers of the government shall not exercise any form of pressure on judges, whether overt or covert, and shall not make statements which adversely affect the independence of individual judges or of the Judiciary as a whole.

17 The power of pardon shall be exercised cautiously so as to avoid its use as interference

18 a) The Executive shall refrain from any act or omission which pre-empt the judicial resolution of a dispute or frustrates the proper execution of a court judgement.

b) The Executive shall not have the power to close down or suspend the operation of the court system at any level.

***FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY, THE STRUCTURES OF THE JUDICIAL ORGANIZATION IN THE MEMBER-COUNTRIES OF IAJ, International Association of Judges (IAJ), 1983***

(3) That so much marked the independence of the Judiciary from the Legislature and the Executive. However, that independence could not be envisaged in the absence of indispensable interaction and indeed co-operation with those other two "powers". Thus, in particular, the supply of money for courts and tribunals necessarily depended on them. Similarly, the execution of judicial decisions depended on the assistance of the Executive.

***MONTREAL DECLARATION, UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE, International Association of Judicial Independence and World Peace (JIWP), 1983***

Art. 2.04. The judiciary shall be independent of the Executive and Legislative.

Art. 2.06. b) The Executive shall not have control over judicial functions.

c) The Executive shall not have the power to close down or suspend the operation of the courts.

d) The Executive shall refrain from any act or omission which preempts the judicial resolution of a dispute or frustrates the proper execution of a court decision.

Art. 2.08 No legislation or executive decree shall attempt retroactively, to reverse specific court decisions, nor to change the composition of the court to affect its decision-making.

***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE ("Singhvi Declaration"), ECOSOC, 1985***

Independence

4. The Judiciary shall be independent of the Executive and Legislature.

5. (h) The Executive shall not have control over the judicial functions of the courts in the administration of justice.
  - (i) The Executive shall not have the power to close down or suspend the operation of the courts.
  - (j) The Executive shall refrain from any act or omission which preempts the judicial resolution of a dispute or frustrates the proper execution of a court decision.
6. No legislation or executive decree shall attempt retroactively to reverse specific court decisions or to change the composition of the court to affect its decision-making.

***BEIJING STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION, as amended in Manila at 7th Biennial Conferences of Chief Justices of Asia and the Pacific, 1997***

Independence of the judiciary

5. It is the duty of the judiciary to respect and observe the proper objectives and functions of the other institutions of government. It is the duty of those institutions to respect and observe the proper objectives and functions of the judiciary.

Relationship with the Executive

38. Executive powers which may affect judges in their office, their remuneration or conditions or their resources, must not be used so as to threaten or bring pressure upon a particular judge or judges.

39. Inducements or benefits should not be offered to or accepted by judges if they affect, or might affect, the performance of their judicial functions.

40. The Executive authorities must at all times ensure the security and physical protection of judges and their families.

***OPINION NO. 2 (2001) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE FUNDING AND MANAGEMENT OF COURTS WITH REFERENCE TO THE EFFICIENCY OF THE JUDICIARY AND TO ARTICLE 6 OF EUROPEAN CONVENTION ON HUMAN RIGHTS, Council of Europe, 2001***

5. The CCJE agreed that although the funding of courts is part of the State budget presented to Parliament by the Ministry of Finances, such funding should not be subject to political fluctuations. Although the level of funding a country can afford for its courts is a political decision, care must always be taken, in a system based on the separation of powers, to ensure that neither the executive nor the legislative authorities are able to exert any pressure on the judiciary when setting its budget. Decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence.

***OPINION NO. 3 (2002) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE PRINCIPLES AND RULES GOVERNING JUDGES' PROFESSIONAL CONDUCT, IN PARTICULAR ETHICS, INCOMPATIBLE BEHAVIOUR AND IMPARTIALITY, Council of Europe, 2002***

A. STANDARDS OF JUDICIAL CONDUCT

1) What standards of conduct should apply to judges?

b. Impartiality and extra-judicial conduct of judges

36. The question of judges' involvement in a certain governmental activities, such as service in the private offices of a minister (*cabinet ministériel*), poses particular problems. There is nothing to prevent a judge from exercising functions in an administrative department of a ministry (for example a civil or criminal legislation department in the Ministry of Justice); however, the matter is more delicate with regard to a judge who becomes part of the staff of a minister's private office. Ministers are perfectly entitled to appoint whomsoever they wish to work in their private office but, as the minister's close collaborators, such staff participate to a certain extent in the minister's political activities. In such circumstances, before a judge enters into service in a minister's private office, an opinion should ideally be obtained from the independent organ responsible for the appointment of judges, so that this body could set out the rules of conduct applicable in each individual case.

**COMMONWEALTH (LATIMER HOUSE) PRINCIPLES ON THE THREE BRANCHES OF GOVERNMENT with Annex (Parliamentary Supremacy, Judicial Independence), The Commonwealth, 2003**

IV) Independence of the Judiciary

(d) Interaction, if any, between the executive and the judiciary should not compromise judicial independence.

**PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA, African Commission on Human and Peoples Rights, 2003**

A. GENERAL PRINCIPLES APPLICABLE TO ALL LEGAL PROCEEDINGS

4) Independent tribunal

g) All judicial bodies shall be independent from the executive branch.

**JUDICIAL APPOINTMENTS, Venice Commission, Venice, 16-17 March 2007, CDL-AD(2007)02**

45. In older democracies, the executive power has sometimes a decisive influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary because these powers are restrained by legal culture and traditions, which have grown over a long time.

46. New democracies, however, did not yet have a chance to develop these traditions, which can prevent abuse, and therefore, at least in these countries, explicit constitutional and legal provisions are needed as a safeguard to prevent political abuse in the appointment of judges.

**FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY, THE RELATIONSHIP BETWEEN THE EXECUTIVE AND THE JUDICIARY IN A DEMOCRATIC SOCIETY: THE QUESTION IS - WHO SHOULD BE MASTER?, International Association of Judges (IAJ), 2008**

2.) However in a democratic society based on the rule of law there naturally is a tension between the executive, which is controlled by elected politicians and the judiciary, which is (generally) not elected but which, in all cases, rightly guards its independence from political interference.

3.) It is dangerous for either the executive or the judicial power of the state to predominate over the other. In the first case it can directly threaten judicial independence. In the second it may lead for

calls to curb judicial powers and so can indirectly threaten judicial independence and the rule of law. In either case the rights and freedom of the people would be endangered.

4.) Examples of situations where the balance between the executive and the judicial powers is in danger that were cited in discussion were: (a). direct or indirect refusals of the executive to acknowledge and act upon decisions of the judiciary, and (b) a misuse of the media by the executive against the judiciary.

6.) Proof of structural independence of the judiciary requires an examination in the country concerned not only of the relevant legal regulations but also the factual situation. In some countries the strictly legal position is amelioration by current practice. However, principle effectively observed rather than mere practice is a much safer foundation for an enduring balance between the executive and the judicial powers.

***MT. SCOPUS APPROVED REVISED INTERNATIONAL STANDARDS OF JUDICIAL INDEPENDENCE, International Association of Judicial Independence and World Peace, 2008, 2011, 2012***

**1. THE JUDICIARY AND THE EXECUTIVE**

1.1. The Judiciary as a whole shall be independent.

1.2. Each judge shall enjoy both personal independence and substantive independence:

1.2.1. Personal independence means that the terms and conditions of judicial service are adequately secured by law so as to ensure that individual judges are not subject to executive control; and

1.2.2. Substantive independence means that in the discharge of his judicial function, a judge is subject to nothing but the law and the commands of his conscience.

1.3. The Judiciary as a whole shall enjoy collective independence and autonomy vis-à-vis the Executive.

1.4. Judicial appointments and promotions by the Executive are not inconsistent with judicial independence as long as they are in accordance with Principles 4.

1.5. No executive decree shall reverse specific court decisions, or change the composition of the court in order to affect its decision-making.

1.6. The Executive may only participate in the discipline of judges by referring complaints against judges, or by the initiation of disciplinary proceedings, but not by the adjudication of such matters.

1.7. The power to discipline or remove a judge must be vested in an institution which is independent of the Executive.

1.8. The power of removal of a judge shall preferably be vested in a judicial tribunal.

1.9. The Executive shall not have control over judicial functions.

1.10. Rules of procedure and practice shall be made by legislation or by the Judiciary in cooperation with the legal profession, subject to parliamentary approval.

1.11. The state shall have a duty to provide for the execution of judgments of the Court. The Judiciary shall exercise supervision over the execution process.

- 1.12. Judicial matters are exclusively within the responsibility of the Judiciary, both in central judicial administration and in court level judicial administration.
- 1.13. The central responsibility for judicial administration shall preferably be vested in the Judiciary or jointly in the Judiciary and the Executive.
- 1.14. The principle of democratic accountability should be respected and therefore it is legitimate for the legislature to play a role in judicial appointments and central administration of justice provided that due consideration is given to the principle of judicial independence.
- 1.15. The process and standards of judicial selection shall give due consideration to the principle of fair reflection by the judiciary of the society in all its aspects.
- 1.15.1. Taking into consideration the principle of fair reflection by the judiciary of the society in all its aspects, in the selection of judges, there shall be no discrimination on the grounds of race, colour, gender, language, religion, national or social origin, property, birth or status, subject however to citizenship requirements.
- 1.16. Candidates for judicial office shall be individuals of integrity and ability, well-trained in the law. They shall have equality of access to judicial office.
- 1.17. It is the duty of the state to provide adequate financial resources to allow for the due administration of justice.
- 1.18. Division of work among judges should ordinarily be done under a predetermined plan, which can be changed in certain clearly defined circumstances.
- 1.18.1. In countries where the power of division of judicial work is vested in the chief justice, it is not considered inconsistent with judicial independence to accord to the chief justice the power to change the predetermined plan for sound reasons, preferably in consultation with the senior judges when practicable.
- 1.18.2. Subject to 2.18.1, the exclusive responsibility for case assignment should be vested in a responsible judge, preferably the President of the Court.
- 1.19. The power to transfer a judge from one court to another shall be vested in a judicial authority according to grounds provided by law and preferably shall be subject to the judge's consent, such consent not to be unreasonably withheld.
- 1.20. Judicial salaries and pensions shall be adequate at all times, fixed by law, and should be periodically reviewed independently of Executive control
- 1.21. The position of the judges, their independence, their security of tenure, and their adequate remuneration shall be entrenched constitutionally or secured by law.
- 1.22. Judicial salaries, pensions, and benefits cannot be decreased during judges' service except as a coherent part of an overall public economic measure.
- 1.23. The Ministers of the government shall not exercise any form of pressure on judges, whether overt or covert, and shall not make statements which adversely affect the independence of individual judges, or of the Judiciary as a whole.
- 1.24. The power of pardon shall be exercised cautiously so as to avoid its use as an interference with judicial decision.



1.25. The Executive shall refrain from any act or omission which pre-empt the judicial resolution of a dispute, or frustrates the proper execution of a court judgment.

1.26. The Executive shall not have the power to close down, or suspend, or delay, the operation of the court system at any level.

***AMENDMENTS TO THE MT. SCOPUS INTERNATIONAL STANDARDS OF JUDICIAL INDEPENDENCE Approved in Ghent 20 October 2012***

Add Standard 9B, PUBLIC INQUIRIES BY JUDGES

9B. If a serving member of the judiciary accepts appointment as a Commissioner of Inquiry on behalf of Government, he or she does so not in the capacity of a judge but as a public servant in public administration.

9B.1 While a serving judge conducts a public inquiry, in accordance with terms of reference stated by the Government, he must act impartially and independently of any party interested in the substance of the public inquiry.

9B.2 A serving judge who chairs a public inquiry is entitled to insist that all matters of the procedure in the conduct of the inquiry shall be at his complete discretion; in particular he or she may, according to the applicable law or standards, issue a warning letter to any interested party of any complaint that may appear in the Inquiry's report to Government

9B.3 If an interested party responds to any such warning letter from the public inquiry, the judge will consider such response, and if necessary, indicate that it has been considered in the preparation of the final report to Government.

9B.4 Upon receiving a request to chair a commission of inquiry, a judge shall carefully consider all the ramifications of such appointment before giving consent to said appointment

9B.5 Judges who exercise other functions such as in alternative dispute resolution (ADR), in mediation or arbitration, shall act impartially and independently of any party to the relevant procedure.

***BRIJUNI STATEMENT OF THE PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY, Conference of Chief Justices of Central and Eastern Europe, 14 October, 2015***

Relationship with the legislative and executive branches

33. Legislative and executive powers which may affect judges in their office, their remuneration or conditions or their resources, must not be used so as to threaten or bring pressure upon a particular judge, particular judges, or judiciary as a whole.

34. Executive authorities must not offer to judges inducements or benefits, nor should such inducements or benefits be accepted by judges, if such inducements or benefits might affect the performance of their judicial functions.

35. Executive authorities must at all times ensure the security and physical protection of judges and their families. These measures include the protection of the courts and of judges who may become, or are victims of, threats or acts of violence.

## ***BEST PRACTICE GUIDE FOR MANAGING SUPREME COURTS, European Union, 2017***

### V Communication

#### C. Recommendation and best practices

Establishing a constructive working relationship between the judiciary, the executive and the legislature requires a delicate balance that safeguards the separation of powers.

- Consult the Supreme Court regarding proposed legislation that affects the Supreme Court.

With regard to legislation that affects the judiciary, the latter must be able to communicate with the executive and the legislature. The Supreme Court should therefore be consulted by the executive or the legislature when it concerns legislation that affects the Supreme Court. This consultation can be done by sending a draft of the legislation to the Supreme Court, by organising meetings with the stakeholders, etc.

- When consulted, the Supreme Court must refrain from public policy debates or giving political opinions.

To respect the powers of the legislature and the executive, the Supreme Court must be careful not to give an opinion as to the validity of the proposed law.

- In order to make the legislature and the executive aware of problems resulting from certain legislation, Supreme Courts may indicate these problems in their rulings and annual reports.

If Supreme Courts face a problem during the adjudication of cases, they may indicate this in their ruling. Furthermore, they might also point out these problems in the annual report in a general way and not related to a specific case. The organisation of a working group with the aim to analyse the case law and the publication of the report of this meeting on the Court's website, also seems to be an acceptable way of communicating problems to the executive and legislature.

### VI. the Role of Councils for the Judiciary

#### I . Competences concerning legislative acts regarding the judiciary

##### Recommendations and best practices

- The Council may not only provide opinion on the existing legislative framework, but should also have the possibility to express its opinion on the regulation of the judiciary in the future.

## II. 5. THE JUDICIARY AND THE LEGISLATURE

### ***MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE, International Bar Association (IBA), 1982***

#### B - Judges and the Legislature

19. The Legislature shall not pass legislation which retroactively reverses specific court decisions.

20. a) Legislation introducing changes in the terms and conditions of judicial services shall not be applied to judges holding office at the time of passing the legislation unless the changes improve the terms of service.

b) In case of legislation reorganising courts, judges serving in these courts shall not be affected, except for their transfer to another court of the same status.

### ***MONTREAL DECLARATION, UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE, International Association of Judicial Independence and World Peace (JIWP), 1983***

2.04. The judiciary shall be independent of the Executive and Legislative.

2.08 No legislation or executive decree shall attempt retroactively, to reverse specific court decisions, nor to change the composition of the court to affect its decision-making.

### ***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE (“Singhvi Declaration”), ECOSOC, 1985***

#### Independence

4. The Judiciary shall be independent of the Executive and Legislature.

6. No legislation or executive decree shall attempt retroactively to reverse specific court decisions or to change the composition of the court to affect its decision-making.

### ***FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY, HOW TO PROTECT JUDGES FROM EXTERNAL POLITICAL, ECONOMICAL AND SOCIAL INFLUENCES AND FROM VIOLENCE; WITH PARTICULAR REGARD TO THE RESPECT DUE TO THE JUDGEMENTS OF THE COURTS AND TO THE SOCIAL STATUS OF THE JUDGES, International Association of Judges (IAJ), 1990***

In several countries personal insults are directed at some judges. It is to be deplored that in some instances such attacks come even from members of Parliament.

All members were agreed, that a judge who finds himself the target of such attacks is unable personally to defend himself. Moreover, the means available to him, whether the right of reply in the press, a civil action brought in the courts or a criminal action, fail to yield the desired results. Exercise of the right of reply more often than not leads to the making of a further even more disagreeable reply; a civil action is much too slow and sometimes even risky, in that the judge called upon to hand down the decision will hesitate to pass judgement for fear of being accused of partiality.

### ***BEIJING STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION, as amended in Manila at 7th Biennial Conferences of Chief Justices of Asia and the Pacific, 1997***

5. Independence of the judiciary

It is the duty of the judiciary to respect and observe the proper objectives and functions of the other institutions of government. It is the duty of those institutions to respect and observe the proper objectives and functions of the judiciary.

***OPINION NO. 2 (2001) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE FUNDING AND MANAGEMENT OF COURTS WITH REFERENCE TO THE EFFICIENCY OF THE JUDICIARY AND TO ARTICLE 6 OF EUROPEAN CONVENTION ON HUMAN RIGHTS, Council of Europe, 2001***

5. The CCJE agreed that although the funding of courts is part of the State budget presented to Parliament by the Ministry of Finances, such funding should not be subject to political fluctuations. Although the level of funding a country can afford for its courts is a political decision, care must always be taken, in a system based on the separation of powers, to ensure that neither the executive nor the legislative authorities are able to exert any pressure on the judiciary when setting its budget. Decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence.

10. Although the CCJE cannot ignore the economic disparities between countries, the development of appropriate funding for courts requires greater involvement by the courts themselves in the process of drawing up the budget. The CCJE agreed that it was therefore important that the arrangements for parliamentary adoption of the judicial budget include a procedure that takes into account judicial views.

11. One form which this active judicial involvement in drawing up the budget could take would be to give the independent authority responsible for managing the judiciary – in countries where such an authority exists<sup>1</sup> – a co-ordinating role in preparing requests for court funding, and to make this body Parliament's direct contact for evaluating the needs of the courts. It is desirable for a body representing all the courts to be responsible for submitting budget requests to Parliament or one of its special committees.

***OPINION NO. 3 (2002) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE PRINCIPLES AND RULES GOVERNING JUDGES' PROFESSIONAL CONDUCT, IN PARTICULAR ETHICS, INCOMPATIBLE BEHAVIOUR AND IMPARTIALITY, Council of Europe, 2002***

**A. STANDARDS OF JUDICIAL CONDUCT**

1) What standards of conduct should apply to judges?

b. Impartiality and extra-judicial conduct of judges

34. However, judges should be allowed to participate in certain debates concerning national judicial policy. They should be able to be consulted and play an active part in the preparation of legislation concerning their statute and, more generally, the functioning of the judicial system. This subject also raises the question of whether judges should be allowed to join trade unions. Under their freedom of expression and opinion, judges may exercise the right to join trade unions (freedom of association), although restrictions may be placed on the right to strike.

***BANGALORE PRINCIPLE ON JUDICIAL CONDUCT, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002***

1.3. A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.

**COMMONWEALTH (LATIMER HOUSE) PRINCIPLES ON THE THREE BRANCHES OF GOVERNMENT with Annex (Parliamentary Supremacy, Judicial Independence), The Commonwealth, 2003**

II) Parliament and the Judiciary

(a) Relations between parliament and the judiciary should be governed by respect for parliament's primary responsibility for law making on the one hand and for the judiciary's responsibility for the interpretation and application of the law on the other hand.

(b) Judiciaries and parliaments should fulfill their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner.

**JUDICIAL APPOINTMENTS, Venice Commission, Venice, 16-17 March 2007, CDL-AD(2007)02**

47. Appointments of judges of ordinary (non-constitutional) courts are not an appropriate subject for a vote by Parliament because the danger that political considerations prevail over the objective merits of a candidate cannot be excluded.

**MT. SCOPUS APPROVED REVISED INTERNATIONAL STANDARDS OF JUDICIAL INDEPENDENCE, International Association of Judicial Independence and World Peace, 2008, 2011, 2012**

1. THE JUDICIARY AND THE LEGISLATURE

1.1. The Legislature shall not pass legislation which reverses specific court decisions.

1.2. Legislation introducing changes in the terms and conditions of judicial service shall not be applied to judges holding office at the time of passing the legislation unless the changes improve the terms of service and are generally applied.

1.3. In case of legislation reorganising or abolishing courts, judges serving in these courts shall not be affected, except for their transfer to another court of the same or materially comparable status.

1.4. Everyone shall have the right to be tried expeditiously by the established ordinary courts or judicial tribunals under law, subject to review by the courts.

1.5. Part-time judges should be appointed only with proper safeguards secured by law.

1.6. The Legislature may be vested with the powers of removal of judges, upon a recommendation of a judicial commission or pursuant to constitutional provisions or validly enacted legislation.

**BRIJUNI STATEMENT OF THE PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY, Conference of Chief Justices of Central and Eastern Europe, 14 October, 2015**

Resources

37. Judges and judicial authorities should have the right to play an active part in the preparation of legislation concerning their statute and, more generally, the functioning of the judicial system. Any draft legislation concerning the status of judges, the administration of justice and other draft legislation likely to have an impact on the judiciary, independence of the judiciary or guarantees of citizens' access to justice should be considered by the legislative branch only after obtaining the opinion of the competent authority of the judiciary.

### ***PARIS DECLARATION ON RESILIENT JUSTICE, ENCJ, 2017***

1. There is a strong need for resilient justice systems which can withstand external pressure whilst at the same time having the ability to adjust to the changing needs of society.

2. The outcomes of ENCJ's activities and developments across Europe show that these are challenging times for justice systems throughout Europe and, specifically, the judiciaries which operate within those systems. Respect for fair and impartial courts, as the key components of an independent judiciary, is being challenged in a number of countries. The Judiciaries will have to stand together to emphasise the role and position of the Judiciary. Councils for the Judiciary have a pivotal role in this regard.

3. The application of the ENCJ Independence and Accountability indicators show that there is still room for improvement in this field. The perspective of court users is largely lacking, whilst the perception of corruption persists. Funding of the judiciary is generally not well arranged, and judiciaries are dependent on discretionary decisions by governments. Court management is still often in the hands - directly or indirectly - of Ministries of Justice. On a more positive note, judges are generally positive about their independence and in nearly all countries trust in the judiciary is higher than trust in the other state powers.

### ***BEST PRACTICE GUIDE FOR MANAGING SUPREME COURTS, European Union, 2017***

#### V Communication

#### 8. Expressing the Judiciary's opinions to Parliament and the Executive

##### C: Recommendation and best practices

Establishing a constructive working relationship between the judiciary, the executive and the legislature requires a delicate balance that safeguards the separation of powers.

- Consult the Supreme Court regarding proposed legislation that affects the Supreme Court.

With regard to legislation that affects the judiciary, the latter must be able to communicate with the executive and the legislature. The Supreme Court should therefore be consulted by the executive or the legislature when it concerns legislation that affects the Supreme Court. This consultation can be done by sending a draft of the legislation to the Supreme Court, by organising meetings with the stakeholders, etc.

- When consulted, the Supreme Court must refrain from public policy debates or giving political opinions.

To respect the powers of the legislature and the executive, the Supreme Court must be careful not to give an opinion as to the validity of the proposed law.

- In order to make the legislature and the executive aware of problems resulting from certain legislation, Supreme Courts may indicate these problems in their rulings and annual reports.

If Supreme Courts face a problem during the adjudication of cases, they may indicate this in their ruling. Furthermore, they might also point out these problems in the annual report in a general way and not related to a specific case. The organisation of a working group with the aim to analyse the case law and the publication of the report of this meeting on the Court's website, also seems to be an acceptable way of communicating problems to the executive and legislature.

## VI. the Role of Councils for the Judiciary

### I . Competences concerning legislative acts regarding the judiciary

#### Recommendations and best practices

The Council may not only provide opinion on the existing legislative framework, but should also have the possibility to express its opinion on the regulation of the judiciary in the future.

## II. 6. MEDIA AND THE JUDICIARY

### ***MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE, International Bar Association (IBA), 1982***

E - The press, the judiciary and the courts

33. It should be recognised that judicial independence does not render the judges free from public accountability, however, the press and other institutions should be aware of the potential conflict between judicial independence and excessive pressure on judges.

34. The press should show restraint in publications on pending cases where such publication may influence the outcome of the case.

### ***FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY, HOW TO PROTECT JUDGES FROM EXTERNAL POLITICAL, ECONOMICAL AND SOCIAL INFLUENCES AND FROM VIOLENCE; WITH PARTICULAR REGARD TO THE RESPECT DUE TO THE JUDGEMENTS OF THE COURTS AND TO THE SOCIAL STATUS OF THE JUDGES, International Association of Judges (IAJ), 1990***

In several countries personal insults are directed at some judges. It is to be deplored that in some instances such attacks come even from members of Parliament.

All members were agreed, that a judge who finds himself the target of such attacks is unable personally to defend himself. Moreover, the means available to him, whether the right of reply in the press, a civil action brought in the courts or a criminal action, fail to yield the desired results. Exercise of the right of reply more often than not leads to the making of a further even more disagreeable reply; a civil action is much too slow and sometimes even risky, in that the judge called upon to hand down the decision will hesitate to pass judgement for fear of being accused of partiality.

(a) The fears possibly aroused by such behaviour may lead the judges, concerned to refrain from reacting to the perpetrators of such attacks (journalists and others). Such an attitude would amount to the very negation of independence.

(b) If such attacks increase in number, they could jeopardise the confidence which the public must have in its judiciary.

For these reasons, it is vital that such slurs on the honour and reputation of judges should not be allowed to continue without anything being done.

Some members were of the opinion that it was for the associations representing judges to take up the defence of those who are unjustly attacked. In this case those associations must be legally authorised to take action, even to go to court.

Others were of the opinion that the defence of judges was a matter that should be taken care of by the judiciary itself, perhaps even at the highest level, such as the Supreme Court or those vested with the highest responsibilities within this court.

Some other members took the view that it was better to refrain from doing anything and not to draw attention to each passing attack; however, where a continuing campaign by the press was involved, these members felt that defamatory attacks should be made the subject of criminal prosecutions, brought either by the Attorney-General or the Director of Public Prosecutions. What they in particular had in mind was the contempt of court procedure as it existed in the Common law countries and Israel. In conclusion, everyone was agreed as to the indispensability of a reaction, but that such a reaction would have to be tailored to the institutions and customs of each country.



**FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY, PARTICIPATION OF THE JUDICIAL POWER IN THE ADMINISTRATION OF JUSTICE, International Association of Judges (IAJ), 1994**

[..] the independence of the judge should be a reality, thanks to the measures which are being taken in order to permit a full exercise of his function, but also in order to safeguard the appearance of independence in the eyes of the public. This appearance, which must also be a reality, is essential to the confidence of the public in the judiciary.

**THIRD STUDY COMMISSION - CRIMINAL LAW AND PROCEDURE, FINAL REPORT, THE INFLUENCE OF THE PRESS AND OTHER MEDIA UPON THE INTEGRITY AND FREEDOM OF OPINION OF THE MEMBERS OF THE JUDICIARY IN CRIMINAL JUSTICE MATTERS, International Association of Judges (IAJ), 1999**

Conclusions

1. There was a consensus that the best way of reacting to media pressure is to have a strong professional association which has enough independence to ensure that appointments or promotions are made strictly according to personal and professional qualities.

2. In the same vein, most participants agreed that a professional association was better placed than the ministry of justice to defend a judge against unfair treatment by the media even if, (as in France) the judge's legal costs are met by the ministry. A supreme council of judges (in whatever form it is constituted or known) is considered unsuitable because it is too political, too academic or too heavily involved with judicial discipline. Legal action by a professional association would require the consent of the judge concerned and must be used sparingly in the most obvious cases. A group insurance policy may be the most appropriate means of covering the costs, with domestic law amended where necessary to allow such action to be brought by a professional association.

3. Notwithstanding the freedom of the press, we have seen that there are very different approaches within judicial systems. For instance in Sweden the press have access to the case file as soon as a case is committed for trial. In many countries, television cameras are forbidden in courts; in others, permission for them may be given by the judge or judges hearing the case. The majority expressed the wish that an agreement should be reached with the media by which at least the preliminary phase of criminal procedures could be protected from undue personalization of those members of the judiciary who are involved. We are glad to record that there remain countries where the relationship between the courts and the press is still characterized by mutual respect.

**GLOBAL BEST PRACTICES: JUDICIAL INTEGRITY STANDARDS AND CONSENSUS PRINCIPLES, IFES, 2004**

iii. Right to an Effective Remedy

b. Conditions of Independence

Requirement of impartiality and independence means that courts must decide cases exclusively on the basis of facts and in accordance with the law. Moreover, it must refrain from prejudging the case, due to either personal convictions or outside influences. The most problematic pressure group is probably the media. Indeed, through extensive coverage of investigations and criminal trials the media may exceed its informative role. Media justice must be prevented because it undermines principles such as the presumption of innocence or the impartiality of the tribunal, which are at the core of the justice system.

**OPINION NO 8 (2006) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON "THE ROLE OF JUDGES IN THE PROTECTION OF THE RULE OF LAW AND HUMAN**

***RIGHTS IN THE CONTEXT OF TERRORISM”, Consultative Council of European Judges (CCJE), 2006***

84. It is for both politicians and the media to refrain from attempting to apply pressure on or to attack judges, beyond what may be considered legitimate criticism. It is the duty of an appropriate independent body to react to such attacks (see the CCJE's Opinion No. 6, paragraph C.13). The CCJE considers that the judiciary, on its part, should ensure that trials are conducted by well trained professional judges; appropriate training actions should help judges develop their understanding of terrorism and of its historical, political and social context.

***REPORT ON THE INDEPENDENCE OF THE JUDICIAL SYSTEM PART I: THE INDEPENDENCE OF JUDGES, Venice Commission, Venice, 12-13 March 2010 CDL-AD(2010)004***

14. In order to shield the judicial process from undue pressure, one should consider the application of the principle of “sub judice”, which should be carefully defined, so that an appropriate balance is struck between the need to protect the judicial process on the one hand and freedom of the press and open discussion of matters of public interest on the other.

***MT. SCOPUS APPROVED REVISED INTERNATIONAL STANDARDS OF JUDICIAL INDEPENDENCE, International Association of Judicial Independence and World Peace, 2008, 2011, 2012***

**6. THE MEDIA AND THE JUDICIARY**

6.1. It should be recognized that judicial independence does not render judges free from public accountability, however, the media and other institutions should show respect for judicial independence and exercise restraint in criticism of judicial decisions.

6.2. While recognising the general right of freedom of expression of all citizens, a judge should not interview directly with the general media. If a judge needs to respond to the media in regard to a media report or inquiry, it shall be done via a spokesperson assigned by the court or a judge specifically assigned by the court for this purpose. In exceptional circumstances a judge may respond directly to the media if that judge's direct response will prevent an irreparable damage.

6.3. The media should show responsibility and restraint in publications on pending cases where such publication may influence the outcome of the case.

6.4. A judge shall not knowingly, while a proceeding is, or could come before the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.

***BRIJUNI STATEMENT OF THE PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY, Conference of Chief Justices of Central and Eastern Europe, 14 October, 2015***

**Relationship with the media**

39. The media and the judiciary each rely upon the support of the other: just as the courts support the right of the media to investigate and publish information, the media plays an important role in promoting and maintaining public respect for the judiciary. The judiciary recognizes that the public's right to be informed about judicial decisions and public accountability of judges necessitate appropriate media coverage of judicial acts and conduct. To that end judicial processes should be transparent except where confidentiality is required by law.

40. The media should respect and uphold the independence and impartiality of the judiciary and appreciate that public support for the judiciary and judicial decisions is necessary to the judicial function and of great benefit to society.

41. Media criticism of judges, judicial acts and judicial opinions is appropriate, provided that the media does not attempt to persuade a judge or judges to reach a particular conclusion.

42. The media should refrain from unfair and ill-founded criticism of the judiciary. Whenever criticism by the media of a judge or a judge's decision is unfair or ill-founded, a response on behalf of the judge is appropriate. Because a judge is constrained from publicly commenting on the judge's cases, the response should be made by court spokespersons, judges' associations, bar associations and other entities outside the judiciary.

### ***REPORT OF THE SPECIAL RAPPORTEUR ON THE INDEPENDENCE OF JUDGES AND LAWYERS, Human Rights Council, June 2017***

#### **C1. Role of the Media**

73. Freedom of the press constitutes an essential element of freedom of expression, and is enshrined in many international instruments and national constitutions. A free and independent press fosters a better-informed society with the capacity to constructively question government authority, thereby preventing abuses of power. According to the Madrid Principles on the Relationship between the Media and Judicial Independence, both the media and the judiciary have a shared responsibility to guarantee freedom of the media and independence of the judiciary. The judicial system, for its part, has to guarantee the existence of a free and independent media. On the other hand, the media have an obligation to respect the rights of individuals, protected by the International Covenant on Civil and Political Rights, and the independence of the judiciary.

74. From the outset, the Special Rapporteur has relayed increasing concerns about the complex relationships between the media and the judiciary. For instance, the Special Rapporteur worried about the critical issue of how extensive media coverage could affect a fair and impartial trial, an issue that may be even more relevant with the advent of the Internet and social media. He stressed that a fine balance had to be struck between the right of the "consumers" of justice to a fair and impartial trial and the equally important right to freedom of expression and the corresponding right to information (see E/CN.4/1996/37, paras. 83-85).

#### **A2. Guaranteeing Judicial Independence**

113. The media can perform their work in an impartial manner only when certain conditions are met. Such an environment must be assured by the State through the guarantee of the freedom of expression and the respect of a free press. On the other hand, the media must be aware of their responsibility and ensure that the information delivered is accurate, professional, rigorous and respectful of the independence of the judiciary.

### ***BEST PRACTICE GUIDE FOR MANAGING SUPREME COURTS, European Union, 2017***

#### **V Communication**

##### **Recommendations and best practices**

- Issue press releases related to important cases, activities, events, etc.

The practice of providing press releases to the media must be encouraged. Dialogue with the public and correctly informing the public are of crucial importance to improving the knowledge of citizens

about the law and increasing their confidence in the judiciary. The judiciary should therefore actively reach out to the media and the public.

- Make the press division responsible for the preparation of press releases. If the press release relates to a case, the press division should select and prepare the press release in close cooperation with the judges who rendered the decision.
- Host a website which contains general information about the court as well as more practical information and press releases.
- If social media are used, develop a strategy and policy.
- Do not use private channels of communication for Court-related activities

Judges or other legal staff should not use private channels of communication (e.g. Facebook or Twitter) on topics related to the Court's activities, to prevent them being perceived as partial. They are, however, allowed to use social media regarding private matters, taking into account the general ethical codes.

## II. 7. FINAL CHARACTER OF JUDICIAL DECISIONS

### ***MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE, International Bar Association (IBA), 1982***

A Judges and the Executive

7. The State shall have a duty to provide for the executive of judgements of the Court. The Judiciary shall exercise supervision over the execution process.

### ***BEST PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, Adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, 1985***

4. Independence of the judiciary

There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

### ***FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY, FINAL REPORT, THE INDEPENDENCE OF THE INDIVIDUAL JUDGE WITHIN HIS OWN ORGANIZATION, International Association of Judges (IAJ), 2000***

It is crucial to judicial independence that changes to a judge's decision may only be made by the judiciary itself, normally by appeal. Administrative measures of quality control, whether from without or within the judiciary, must not take the place of appeal or give that impression. Otherwise the way would be open to influencing the judiciary.

### ***DECLARATION OF MINIMAL PRINCIPLES ABOUT JUDICIARIES AND JUDGES' INDEPENDENCE IN LATIN AMERICA, Campeche, April 2008***

#### I. GENERAL PRINCIPLES

2. As independence and impartiality of a concrete judge is indispensable for the correct exercise of a jurisdictional function, these qualities shall be preserved in the internal environment of the Judiciaries so that they do not result affected directly or indirectly by the exercise of disciplinary activities, indictment activities or the activities corresponding to the ruling of the same power. Judges shall receive the guarantee that, due to their jurisdictional activity and the way in which they decide the causes trusted to them, they shall not be rewarded or punished, and that those decisions are only going to be subjected to the revision of superior courts as it is indicated by their own internal rights.

### ***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

#### Chapter I – General aspects

6. Judges should have sufficient powers and be able to exercise them in order to carry out their duties and maintain their authority and the dignity of the court. All persons connected with a case, including public bodies or their representatives, should be subject to the authority of the judge.

#### Chapter II – External independence

16. Decisions of judges should not be subject to any revision other than appellate or re-opening proceedings, as provided for by law.

17. With the exception of decisions on amnesty, pardon or similar measures, the executive and legislative powers should not take decisions which invalidate judicial decisions.

## **II. 8. INDEPENDENCE AS TO ADMINISTRATIVE MATTERS**

### ***THE SIRACUSA DRAFT PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, 1981***

#### IV. Posting, Transfer and Promotion Posting

Art. 8 The assignment of a judge to a post within the court to which he is appointed is an internal administrative function to be carried out by the court itself.

### ***MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE, International Bar Association (IBA), 1982***

#### A Judges and the Executive

8. Judicial matters are exclusively within the responsibility of the Judiciary, both in central judicial administration and in court level judicial administration.

9. The central responsibility for judicial administration shall preferably be vested in the Judiciary or jointly in the Judiciary and the Executive.

10. It is the duty of the State to provide adequate financial resources to allow for the due administration of justice.

### ***MONTREAL DECLARATION, UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE, International Association of Judicial Independence and World Peace (JIWP), 1983***

#### Court Administration

2.40 The main responsibility for court administration shall vest in the judiciary.

2.41 It shall be a priority of the highest order, for the state to provide adequate resources to allow for the due administration of justice, including physical facilities appropriate for the maintenance of judicial independence, dignity and efficiency, judicial and administrative personnel, and operating budgets.

2.43 The judiciary shall alone be responsible for assigning cases to individual judges or to sections of a court composed of several judges, in accordance with law or rules of court.

2.44 The head of the court may exercise supervisory powers over judges on administrative matters.

### ***FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY, CONCLUSIONS, CRITERIA FOR THE ASSESSMENT OF THE WORK OF COURTS AND JUDGES, International Association of Judges (IAJ), 1995***

#### Conclusions

It is up to the judiciary itself to identify the rules to be observed in order not only to maximise the number of cases liable to be adjudicated, but also in order to assure that the essential requirements of quality be met. Quality must not be disregarded to the benefit of quantity, in the very interest of the parties to a case.

To this end, the judicial authorities, availing themselves of their experience, ought to establish those rules on a general basis, keeping into account both the scope of the jurisdiction of the various courts, and the complexity of certain types of litigation. In particular, it was suggested to identify certain types of litigation by a coefficient, in order to avoid that, because of the use of too rigorous statistical methods, the above mentioned, particular aspect of the problem be overlooked.

In this way the judiciary fully keeps its independence, and gives to the public opinion full assurance that the public may rely upon the judges' will to perform their duties with the utmost efficiency.

**EUROPEAN CHARTER ON THE STATUTE FOR JUDGES AND EXPLANATORY MEMORANDUM, Council of Europe, Strasbourg, 8 - 10 July 1998**

1.8. Judges are associated through their representatives and their professional organizations in decisions relating to the administration of the courts and as to the determination of their means, and their allocation at a national and local level. They are consulted in the same manner over plans to modify their statute, and over the determination of the terms of their remuneration and of their social welfare.

**DRAFT VADEMECUM ON THE JUDICIARY, EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), 2008**

2.4.5 Administrative Independence

[...] no person can request a report from a judge on any concrete case.

CDL-AD(2005)003 Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, in cooperation with OSCE/ODIHR, para. 101.

Reporting to the Parliament [...] and to the President of the Republic infringes upon the status and independence of the Constitutional Court (such a report is appropriate in the case of an ombudsman, who is a parliamentary commissioner). The Constitutional Court communicates with other constitutional organs and with the authorities as with the general public through its judgements and decisions, which are to be published in the Official Gazette.

CDL-AD(2006)016 Opinion on the Draft Law on the Constitutional Court and Corresponding Amendments of the Constitution of the Republic of Moldova, para. 28.

The law also provides for [...] suspension from case hearing [...]. Again, it appears undesirable that ordinary law can provide for such matters without any Constitutional guidance.

CDL-AD(2005)003 Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, in cooperation with OSCE/ODIHR, para. 105.

It would seem that the territorial organisation of the court system under the draft would be based on the administrative structure of [a country], both as regards the local general courts of first instance and the establishment of [...] courts of appeal[...]. While the overriding criteria determining the territorial structure of the court system should be the needs of the court system itself and the facility of access by people to the courts, such a system is acceptable in principle.

In a new democracy [...] it would however seem preferable to avoid such a link between administrative division and court organisation to make it more difficult for the administration to exert undue influence on the courts.

CDL-INF(2000)005 Opinion on the draft law of Ukraine on the judicial system, « General Comments»: «Territorial organisation », al. 1.

[...] the power of the President to appoint the chairmen of all courts without any involvement of the Council of Justice [...] appears to be problematic.

CDL-AD(2004)044 Interim Opinion on Constitutional Reforms in the Republic of Armenia, para. 60.



[The draft according to that] Chief Judges of the various courts with the exception of the Chief Judge of the Supreme Court are elected by [the parliament...] is problematic from the point of view of judicial independence. The election of the respective Chief Judge by his peers would be preferable.

CDL-INF(2000)005 Opinion on the draft law of Ukraine on the judicial system, under rubric «The appointment of judges».

[...] regarding the appointment of senior judges, involving their peers in the appointment process would have been more in keeping with the principle of the independence of the judiciary.

CDL-INF(1998)015 Opinions on the constitutional regime of Bosnia and Herzegovina, chapter B.I, para. 9.

It would be more prudent to vest [the] authority [to confer senior ranks on judges] in the Supreme Council of the Judiciary [than in the President] to avert any risk of the executive influencing judges.

CDL(1999)088 Interim report on the constitutional reform In the Republic of Moldova, adopted by the Venice Commission at its 41st Plenary Session (10-11 December 1999), para. 26.

[The practice according to which contrary to the principle of budgetary autonomy] the Ministry [of Justice] in fact controls every detail of the courts' operational budgets, a practice which contains obvious dangers of undue interference in the independent exercise of their functions.

CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995 , chapter B.1.i.

[The questions of court budgets and judicial salaries] can and should also be addressed by ordinary legislation. In principle, there is no reason why they could not be so addressed in the context of a law on the status of magistrates.

CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995 , chapter B.1.i.

[...] the parliamentary budget battles [...] are undoubtedly of a political nature. [...] While wanting to ensure greater independence of judges and courts, and thus to bring about their depoliticization, [by involving the Council of Justice into this battles] it may turn out that they will, quite to the contrary, be engulfed in the political debate. Without deviating from the principle of having a separate budget for the judiciary and, in order to allow for a de facto judicial independence, these of powers and budgetary struggles could rather be left with Minister of Justice or the Cabinet as a whole which will feel politically responsible for the treatment eventually accorded to the judiciary in the matters of proper funding.

CDL-AD(2002)026 Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, para. 48.

An autonomous Council of Justice that guarantees the independence of the judiciary does not imply that judges may be self-governing. The management of the administrative organisation of the judiciary should not necessarily be entirely in the hands of judges.

CDL-INF(1998)009 Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, para. 9, repeated in CDL-AD(2007)028 Report on Judicial Appointments, para. 26.

While the participation of the judicial council in judicial appointments is crucial it need not take over the whole administration of the justice system, which can be left to the Ministry of Justice.

CDL-AD(2007)028 Report on Judicial Appointments, para. 26.

***FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY, THE RELATIONSHIP BETWEEN THE EXECUTIVE AND THE JUDICIARY IN A DEMOCRATIC SOCIETY: THE QUESTION IS - WHO SHOULD BE MASTER?, International Association of Judges (IAJ), 2008***

7.) The following aspects of the structural independence of the judiciary (amongst others) have been identified: selection and composition of the Council of the Judiciary, selection and appointment of judges, promotion of judges, selection of presidents of court, physical safety of judges, salaries pensions and other entitlements of judges, distribution of cases, transfer of judges, termination of office of judges, disciplinary procedures against judges, training of judges, drafting and spending the budget of the judiciary, internal management of courts.

These aspects also refer to public prosecutors in countries where they are part of the judicial system.

***THE KYIV RECOMMENDATIONS ON JUDICIAL INDEPENDENCE IN EASTERN EUROPE, SOUTH CAUCASUS AND CENTRAL ASIA, OSCE, 2010***

Part I – Judicial Administration

1. The administration of courts and the judiciary shall enhance independent and impartial adjudication in line with due process rights and the rule of law. Judicial administration must never be used to influence the content of judicial decision making. The process of judicial administration must be transparent.

## II. 9. JURISDICTIONAL COMPETENCE

### ***MONTREAL DECLARATION, UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE, International Association of Judicial Independence and World Peace (JIWP), 1983***

Art. 2.05. The judiciary shall have jurisdiction, directly or by way or review, over all issues of a judicial nature.

### ***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE (“Singhvi Declaration”), ECOSOC, 1985***

5.(a) The judiciary shall have jurisdiction, directly or by way of review, over all issues of a judicial nature, including issues of its own jurisdiction and competence.

(d) Some derogations may be permitted in times of grave public emergency which threatens the life of the nation but only under conditions prescribed by law, only to the extent strictly consistent with internationally recognized minimum standards and subject to review by the courts.

(e) In such times of emergency, the State shall endeavour to provide that civilians charged with criminal offences of any kind shall be tried by ordinary civilian courts, and, detention of persons administratively without charge shall be subject to review by courts or other independent authority by way of habeas corpus or similar procedures so as to ensure that the detention is lawful and to inquire into any allegations of ill-treatment.

### ***BEST PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, Adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, 1985***

#### 3. Independence of the judiciary

The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive as defined by law.

### ***BEIJING STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION, as amended in Manila at 7th Biennial Conferences of Chief Justices of Asia and the Pacific, 1997***

#### Jurisdiction

33. The judiciary must have jurisdiction over all issues of a justiciable nature and exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

34. The jurisdiction of the highest court in a society should not be limited or restricted without the consent of the members of the court.

### ***PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA, African Commission on Human and Peoples Rights, 2003***

#### A. GENERAL PRINCIPLES APPLICABLE TO ALL LEGAL PROCEEDINGS

4) Independent tribunal

- b) Judicial bodies shall be established by law to have adjudicative functions to determine matters within their competence on the basis of the rule of law and in accordance with proceedings conducted in the prescribed manner;
- c) The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for decision is within the competence of a judicial body as defined by law;
- d) A judicial body's jurisdiction may be determined, inter alia, by considering where the events involved in the dispute or offence took place, where the property in dispute is located, the place of residence or domicile of the parties and the consent of the parties;

#### E. LOCUS STANDI

States must ensure, through adoption of national legislation, that in regard to human rights violations, which are matters of public concern, any individual, group of individuals or non-governmental organization is entitled to bring an issue before judicial bodies for determination.

### ***GENERAL REPORT, FIRST STUDY COMMISSION - ECONOMICS, JURISDICTION AND INDEPENDENCE, International Association of Judges (IAJ), 2005***

#### Conclusions

10) There are systems to transfer workload from one judge/court to another according to the development of the workload or to distribute cases considering special abilities or expertise of judges. To avoid an infringement on independence it is essential to know who is in charge of this transfer or distribution, and how independent and uninfluenced this person/body is.

### ***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

#### Chapter I – General aspects

10. Only judges themselves should decide on their own competence in individual cases as defined by law.

### ***DOHA DECLARATION ON INTEGRATING CRIME PREVENTION AND CRIMINAL JUSTICE INTO THE WIDER UNITED NATIONS AGENDA TO ADDRESS SOCIAL AND ECONOMIC CHALLENGES AND TO PROMOTE THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS, AND PUBLIC PARTICIPATION, Adopted by the 13<sup>th</sup> United Nations Congress on Crime Prevention and Criminal Justice, Doha, 12-19 April 2015***

(e) To raise public confidence in criminal justice by preventing corruption and promoting respect for human rights, as well as enhancing professional competence and oversight in all sectors of the criminal justice system, thus ensuring that it is accessible and responsive to the needs and rights of all individuals.

#### II. 10. INSTITUTIONAL ASSESSMENT

### ***OPINION NO. 1 (2001) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF COUNCIL OF EUROPE ON STANDARDS CONCERNING THE INDEPENDENCE OF THE JUDICIARY AND THE IRREMOVABILITY OF JUDGES, Council of Europe, 2001***

#### Independence within the judiciary

69. Court inspection systems, in the countries where they exist, should not concern themselves with the merits or the correctness of decisions and should not lead judges, on grounds of efficiency, to favour productivity over the proper performance of their role, which is to come to a carefully considered decision in keeping with the interests of those seeking justice.

## Conclusions

73. The CCJE Considered that the critical matter for member States is to put into full effect principles already developed (paragraph 6) and, after examining the standards contained in particular Recommendation No. R (94) 12 on the independence, efficiency and role of judges, it concluded as follows:

(10) The use of statistical data and the court inspection systems shall not serve to prejudice the independence of judges (paragraphs 27 and 69).

### ***OPINION NO. 10 (2007) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE COUNCIL FOR JUDICIARY AT THE SERVICE OF THE SOCIETY, Council of Europe, 2010***

#### SUMMARY OF THE RECOMMENDATIONS AND CONCLUSIONS

D. On the powers of the Council for the Judiciary:

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;

### **Report of the Special Rapporteur on the independence of judges and lawyers 2016. UN, Human Rights Council**

61. - there is, today, a fairly complete set of principles and prerequisites regarding the independence of judges, prosecutors and lawyers, which have been recognized in a significant number of international and regional instruments, some of which are binding on States, and have been developed through the jurisprudence of regional courts, treaty bodies, and other interpretative documents, including the thematic and mission reports of former mandate holders;

62., 64., 65 - after the entry into force of the International Covenant on Civil and Political Rights, and after the adoption of the Basic Principles on the Independence of the Judiciary and adoption of the Basic Principles on the Role of Lawyers and the Guidelines on the Role of Prosecutors, it is recognised that the time has come for the independence of judges, prosecutors and lawyers *to be revisited*, since it is a priority that the actors in the justice system, other stakeholders and the international community *be informed of the status and progress of a particular judicial sector*, through a *system of indicators* that make relevant information accessible, dealing with providing consistent and comprehensive information on the actual situation of national judicial systems – need for developing a set of indicators that will provide precise and relevant information on national judicial institutions and the way they comply with international standards of judicial independence

## **II. 11. THE JUDICIARY AND GENDER**

### **1. Developing a gender-sensitive administration of justice**

**(General recommendations for further consideration and action, from Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, 2011., UN, Human Rights Council)**

86. States should effectively promote and protect the human rights and fundamental freedoms of all, in particular those of women, in conformity with the Charter of the United Nations and international human rights law obligations.

87. States that have not yet done so should:

(a) Ratify and incorporate the applicable legal and policy framework on women's human rights and gender equality, including the elimination of discrimination and violence against women, into their national laws, plans, policies and programmes, and their bilateral and regional agreements *regarding the justice sector*;

(b) Review their national and regional laws and policies in order to harmonize them with the international legal framework on the protection of women, with particular attention to the goal of eliminating discrimination against women, and achieving gender equality, including equal representation of women and men in public office;

(c) Include gender considerations in the elaboration and implementation of national development frameworks, poverty reduction strategies, human rights action plans and programmes and strategies for human rights education and the advancement of women's rights;

(d) Adopt and develop programmes and policies to address significant gaps on women's protection in social policies and other areas;

(e) Promote the participation of women (and men) from various segments of society, as key actors within the justice sector in their roles as judges, prosecutors, lawyers, legal counsel and court administrators;

(f) Develop procedures, policies and practices that are gender-tailored to promote equal access to justice for all, in formal, informal and alternative justice systems, as well as in transitional justice mechanisms and other mechanisms to adjudicate rights.

88. The Special Rapporteur encourages States to avail themselves of the expertise of relevant special procedures of the Human Rights Council and the technical cooperation and assistance of the United Nations Office of the High Commissioner for Human Rights, and other relevant agencies to complement ongoing efforts to:

(a) Assist in conducting a comprehensive gender assessment of the justice system to identify challenges, gaps and opportunities and determine further areas of technical assistance and cooperation;

(b) Assist in the design of gender-sensitive interventions (including capacitybuilding efforts) in the justice sector to integrate gender considerations in both civil and criminal justice systems;

(c) Assist in the development of indicators and the determination of baselines for gender mainstreaming across the justice sector.

89. The Special Rapporteur encourages international and regional organizations, technical cooperation agencies and bilateral and multilateral donors to continue contributing to build the capacities of Governments, and other stakeholders, to identify *gender-specific barriers* for the full enjoyment of human rights and tailor gender-sensitive responses to discrimination and violence against women, including effective remedies and mechanisms for reparation and redress.

90. The Special Rapporteur encourages civil society organizations and national human rights institutions, and other stakeholders to establish partnerships with States to help them in addressing

gender-specific barriers to the access of justice and develop a gender-sensitive administration of justice.

## **2. Developing a gender-sensitive judiciary**

**(General recommendations for further consideration and action, from Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, 2011., UN, Human Rights Council)**

91. The judiciary and the bodies in charge of their administration and oversight should:

(a) Incorporate gender considerations in the day-to-day operations and overall planning of the judicial sector;

(b) Collect and use sex-disaggregated data in the planning and building of sectorial strategies;

(c) Use and promote the use of gender-neutral language whenever possible in the rulings, minutes and briefing notes, so as to avoid reproducing and promoting a male centred vision of the world;

(d) Redouble efforts to ensure that women are not only considered as victims or clients within the judiciary, but also as key actors in the administration of justice, as legal professionals with strengths and capacities to contribute to the integrity of the justice system;

(e) Include knowledge of women's human rights and demonstrated commitment to the goal of gender equality as requirements in the selection and appointment of judges and justices at all levels. Proposed lists of judicial candidates for appointments and promotions should ensure adequate representation of women and minorities at all levels within the judicial system;

(f) Create equal conditions based on merit for appointment of judges to any kind of courts, not only family and children courts;

(g) Create the conditions necessary for the mainstreaming of gender in the judiciary, for example through raising awareness among judges and court officials on women's human rights and the prohibition of non-discrimination and carrying out a mapping of major issues affecting women as users of the judiciary (e.g. as victims in the civil and criminal jurisdictions; as witnesses, particularly in cases of SGBV; and as offenders);

(h) Take all necessary steps to ensure a systematic gender analysis of the judicial sector, and the incorporation of a gender perspective in the administration of justice.

92. National courts and tribunals should resort more actively to the use of comparative law and the tools available at the international level, including international customary law, international treaties, treaty bodies' jurisprudence, the conclusions and recommendations stemming from the universal periodic review (UPR) mechanism and expert analysis and advice contained in reports of thematic or country-specific special procedures of the Human Rights Council.

93. Judges and all judicial affairs staff should be adequately trained and sensitized on gender equality and women's human rights and on strategies to avoid gender stereotyping.

## **3. Other recommendations**

**(General recommendations for further consideration and action, from Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, 2011. UN, Human Rights Council)**

94. The Special Rapporteur encourages the Office of the United Nations High Commissioner for Human Rights and the United Nations, in collaboration with all United Nations Agencies when appropriate, to:

(a) Compile the legal analysis and doctrinal positions by the Special Procedures of the Human Rights Council together with the recommendations adopted within the framework of the universal periodic review mechanism and the practice of treaty bodies, in contributing to make the human rights principles of equality and non-discrimination a reality in women's daily lives, with a view to making them available to judiciaries across countries and regions;

(b) Compile, in collaboration with all United Nations Agencies, the legal analysis and doctrinal positions developed by the United Nations system, with a view to making them available to the judiciaries across countries and regions



### III. PERSONAL INDEPENDENCE

#### III. 1. INDEPENDENCE AS TO DECISION MAKING

***BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, Adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, 1985***

2. The judiciary shall decide matters before them impartially, on the basis of 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.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

***BEIJING STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION, as amended in Manila at 7th Biennial Conferences of Chief Justices of Asia and the Pacific, 1997***

3. a) Independence of the judiciary

The judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source.

6. Independence of the judiciary

In the decision-making process, any hierarchical organisation of the judiciary and any difference in grade or rank shall in no way interfere with the duty of the judge exercising jurisdiction individually or judges acting collectively to pronounce judgement in accordance with Article 3 (a). The judiciary, on its part, individually and collectively, shall exercise its functions in accordance with the Constitution and the law..

***THE UNIVERSAL CHARTER OF THE JUDGE, International Association of Judges (IAJ), 1999***

Art. 3 Submission to the law

In the performance of the judicial duties the judge is subject only to the law and must consider only the law..

Art. 4 Personal Autonomy

No one must give or attempt to give the judge orders or instructions of any kind, that may influence the judicial decisions of the judge, except, where applicable, the opinion in a particular case given on appeal by the higher courts.

***BANGALORE PRINCIPLE ON JUDICIAL CONDUCT, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002***

1.1. A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

**SELF GOVERNANCE FOR THE JUDICIARY: BALANCING INDEPENDENCE AND ACCOUNTABILITY, General Assembly of the European Network of Councils for the Judiciary (ENCJ), 2008**

10) the accountability of the judiciary can in no way call into question the independence of the judge when making judicial decisions.

**DECLARATION OF MINIMAL PRINCIPLES ABOUT JUDICIARIES AND JUDGES' INDEPENDENCE IN LATIN AMERICA, Campeche, April 2008**

I. GENERAL PRINCIPLES

3. In their exercise of jurisdiction, judges are not subjected to any superior judicial authorities, without prejudice of the power that the same authorities have to revise the jurisdictional decisions through legally established resources.

**SELF GOVERNANCE FOR THE JUDICIARY: BALANCING INDEPENDENCE AND ACCOUNTABILITY, General Assembly of the European Network of Councils for the Judiciary (ENCJ), 2008**

10) The accountability of the judiciary can in no way call into question the independence of the judge when making judicial decisions.

**OPINION No.11 (2008) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE QUALITY OF JUDICIAL DECISIONS, Consultative Council of European Judges (CCJE), 2008**

4. With this in mind, the CCJE has already pointed out that judicial independence must be regarded as a citizens' right; it stated in its Opinion No. 1 (2001) that the independence of the judiciary "is not a prerogative or privilege in their own interests, but in the interests of the rule of law and of those seeking and expecting justice". The CCJE has, in its opinions since 2001, put forward a number of suggestions as to how each system may not only guarantee that court users have a right of access to the courts, but also ensure, through the quality of the decisions given, that they can have confidence in the outcome of the judicial process.

**REPORT ON THE INDEPENDENCE OF THE JUDICIAL SYSTEM PART I: THE INDEPENDENCE OF JUDGES, Venice Commission, Venice, 12-13 March 2010 CDL-AD(2010)004, 2010**

13. Judicial decisions should not be subject to any revision outside the appeals process, in particular not through a protest of the prosecutor or any other state body outside the time limit for an appeal.

15. The principle of internal judicial independence means that the independence of each individual judge is incompatible with a relationship of subordination of judges in their judicial decision making activity.

**RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010**

Chapter I – General aspects

5. Judges should have unfettered freedom to decide cases impartially, in accordance with the law and their interpretation of the facts.

***THE KYIV RECOMMENDATIONS ON JUDICIAL INDEPENDENCE IN EASTERN EUROPE, SOUTH CAUCASUS AND CENTRAL ASIA, OSCE, 2010***

Internal Independence

35. The issuing by high courts of directives, explanations, or resolutions shall be discouraged, but as long as they exist, they must not be binding on lower court judges. Otherwise, they represent infringements of the individual independence of judges. In addition, exemplary decisions of high courts and decisions specifically designated as precedents by these courts shall have the status of recommendations and not be binding on lower court judges in other cases. They must not be used in order to restrict the freedom of lower courts in their decision-making and responsibility. Uniformity of interpretation of the law shall be encouraged through studies of judicial practice that also have no binding force.

***MT. SCOPUS APPROVED REVISED INTERNATIONAL STANDARDS OF JUDICIAL INDEPENDENCE, International Association of Judicial Independence and World Peace, 2008, 2011, 2012***

9. THE INTERNAL INDEPENDENCE OF THE JUDICIARY

9.1 In the decision-making process, a judge must be independent vis-à-vis his judicial colleagues and superiors.

9.2 Any hierarchical organization of the judiciary and any difference in grade or rank shall in no way interfere with the right of judges to pronounce their judgments freely.

***FIRST STUDY COMMISSION REPORT - NOMINATION OF JUDGES, International Association of Judges (IAJ), 2013***

Recommendation on the improper attempt to influence judge's decisions

There be a law or constitutional provision that prohibits any improper attempt to influence a judge's judicial decision making process;

- Judicial remuneration must be recognized as a factor strongly related to the independence of the judiciary;
- No compensation should be delayed or reduced more for the judges than for civil servants in the case of a general reduction of salaries;
- Salaries must be adequate to provide an acceptable living standard;
- Salaries should be protected by law or the constitution.

***CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) - OPINION N° 20 THE ROLE OF COURTS WITH RESPECT TO THE UNIFORM APPLICATION OF THE LAW, 2017***

11. In common law countries, decisions of higher courts that settle a legal issue serve as binding precedents in identical disputes thereafter.<sup>7</sup> Thus precedents are in principle binding de jure and thus considered to be a proper source of law. Stare decisis<sup>8</sup> - 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 law<sup>9</sup>. 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 cassation<sup>10</sup> 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).

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.

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 independence<sup>21</sup>.

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.

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.

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.

### **III. 2. JUDGES AND OTHER JUDGES OR ADMINISTRATION OF JUSTICE SYSTEM**

#### ***THE SIRACUSA DRAFT PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, 1981***

##### Organisation of the Judiciary

Art. 18 Any hierarchical organisation of the judiciary and any difference in grade or rank should in no way interfere with the right of the individual judge to pronounce freely in accordance with his appreciation of the facts and his interpretation of the law.

#### ***MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE, International Bar Association (IBA), 1982***

##### C - Terms and Nature of Judicial Appointments

32. The head of the court may legitimately have supervisory powers to control judges on administrative matters.

##### H - The Internal Independence of the Judiciary

46. In the decision-making process, a judge must be independent vis-à-vis his judicial colleagues and supporters.

#### ***MONTREAL DECLARATION UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE, International Association of Judicial Independence and World Peace (JIWP), 1983***

Art. 2.03. In the decision-making process, judges shall be independent vis-a-vis their judicial colleagues and superiors. Any hierarchical organization of the judiciary and any difference in grade or rank shall in no way interfere with the right of the judge to pronounce his judgment freely.

#### ***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE (“Singhvi Declaration”), ECOSOC, 1985***

##### Independence

3. In the decision-making process, judges shall be independent vis à-vis their judicial colleagues and superiors. Any hierarchical organization of the judiciary and any difference in grade or rank shall, in no way, interfere with the right of the judge to pronounce his judgment freely. Judges, on their part, individually and collectively, shall exercise their functions with full responsibility of the discipline of law in their legal system.

#### ***PALERMO DECLARATION, ELEMENTS OF A EUROPEAN STATUTE OF MAGISTRACY, MEDEL, 1993***

4.1. Collegial courts are chaired in turn by the judges who compose it.

5.1. There is no hierarchy and no grading in a magistrate's condition, whatever function he exercises and whatever the jurisdiction within which such a function is exercised.

#### ***THE UNIVERSAL CHARTER OF THE JUDGE, International Association of Judges (IAJ), 1999***

##### Art. 2 Status

Judicial independence must be ensured by law creating and protecting judicial office that is genuinely and effectively independent from other state powers. The judge, as holder of judicial office, must be

able to exercise judicial powers free from social, economic and political pressure, and independently from other judges and the administration of the judiciary.

**OPINION NO. 1 (2001) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF COUNCIL OF EUROPE ON STANDARDS CONCERNING THE INDEPENDENCE OF THE JUDICIARY AND THE IRREMOVABILITY OF JUDGES, Council of Europe, 2001**

Independence within the judiciary

64. The fundamental point is that a judge is in the performance of his functions no-one's employee; he or she is holder of a State office. He or she is thus servant of, and answerable only to, the law. It is axiomatic that a judge deciding a case does not act on any order or instruction of a third party inside or outside the judiciary.

66. The CCJE noted the potential threat to judicial independence that might arise from an internal judicial hierarchy. It recognised that judicial independence depends not only on freedom from undue external influence, but also freedom from undue influence which might in some situations come from the attitude of other judges. "Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law" (Recommendation No. R (94) 12, Principle I (2)(d)). This means judges individually. The terms in which it is couched do not exclude doctrines such as that of precedent in common law countries (i.e. the obligation of a lower judge to follow a previous decision of a higher court on a point of law directly arising in the later case).

67. Principle I (2)(d) continues: "Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary". This is, on any view, obscure. "Reporting" on the merits of cases, even to other members of the judiciary, appears on the face of it inconsistent with individual independence. If a decision were to be so incompetent as to amount to a disciplinary offence, that might be different, but, in that very remote case, the judge would not be "reporting" at all, but answering a charge.

68. The hierarchical power conferred in many legal systems on superior courts might in practice undermine individual judicial independence. One solution would be to transfer of all relevant powers to a Higher Judicial Council, which would then protect independence inside and outside of the judiciary. This brings one back to the recommendation of the European Charter on the statute for judges, to which attention has already been invited under the heading of *The appointing and consultative bodies*.

Conclusions

73. The CCJE Considered that the critical matter for member States is to put into full effect principles already developed (paragraph 6) and, after examining the standards contained in particular Recommendation No. R (94) 12 on the independence, efficiency and role of judges, it concluded as follows:

(9) The independence of any individual judge in the performance of his or her functions exists notwithstanding any internal court hierarchy.

**DRAFT VADEMECUM ON THE JUDICIARY, EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), 2008**

2.2 Irrevocability and Dismissal

Memorandum of the European Charter, the term “intervention” of an independent authority means an opinion, recommendation or proposal as well as an actual decision.

The CCEJ commends the standards set by the European Charter “in so far as it advocated the intervention (in a sense wide enough to include an opinion, recommendation or proposal as well as an actual decision) of an independent authority with substantial judicial representation chosen democratically by other judges”.

[...] The Venice Commission is of the opinion that a judicial council should have a decisive influence on the [...] promotion of judges and (maybe via a disciplinary board set up within the council) on disciplinary measures against them.

[...] In its opinion No 1 (2001) on Standards concerning the Independence of the Judiciary and the irremovability of Judges the Consultative Council of European Judges suggests that “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’. Once this is done, those bodies or authorities responsible for any appointment or promotion will be obliged to act accordingly, and it will then at least be possible to scrutinize the content of the criteria adopted and their practical effect.”

## 2.5. Individual and Internal Independence

[...] the Commission finds that the Supreme Court should not have the power to dismiss cantonal judges, nor the cantonal high court to dismiss municipal judges (Articles V.11, para.3 and VI.7, para.4).

CDL-INF(1998)015 Opinions on the constitutional regime of Bosnia and Herzegovina , chapter B.I, para. 9.

The Commission observes [...] that decisions as to the removal of judges is left to the Constitutional Court [...]. Although this may be seen as an additional guarantee for judicial independence, the absence of any remedy against such a decision of the Constitutional Court can raise problems. A more adequate solution would be to leave the initial decision as to the removal of a judge to the Council of Justice with the possibility for the judge dismissed to appeal to the Constitutional Court.

CDL-INF(2001)017 Rapport de la Commission de Venise sur la Constitution révisée de la République d’Arménie, par. 63.

The envisaged Code of Ethics should be approved by the Supreme Judicial Council but regulated at the level of law. It should precisely spell out the consequences of a breach of its rules.

CDL-AD(2002)015 Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, para. 5.g).

The law also provides for disciplinary liability for judges [...]. Again, it appears undesirable that ordinary law can provide for such matters without any Constitutional guidance.

CDL-AD(2005)003 Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, in cooperation with OSCE/ODIHR, para. 105.

The provision that a judge may be removed for systematically failing to perform official responsibilities seems to be a provision which is not inappropriate. The failing to perform the official responsibilities has to be caused by a voluntary choice of the concerned person and not by his or her health problems. A question arises whether the hypothesis is fulfilled only if a person does not de facto perform his or her responsibilities by being absent from office or not dealing with the docket? Or,

also, is the revocation possible if his (her) behaviour does not comply with the rules concerning the professional standards of fairness, accuracy and correctness. This last case could be covered by the last part of the sentence ("perform activities that undermine the prestige of the judiciary"), but it is not clear whether this last provision regards the professional aspects of the life of the concerned person, or the social aspects of his or her life. In both the cases it would require a major clarity and a refinement to avoid its evident ambiguity. This provision should either be removed or made more specific so as to specify clearly what sort of conduct is envisaged

CDL-AD(2003)016 Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria, para. 16.

[...] the discretion of the Supreme Judicial Council in confirming or denying the permanent status to magistrates should be limited by specifying criteria for this decision already at the constitutional level. In any case, this procedure should be restricted to courts of first instance.

CDL-AD(2003)016 Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria, para. 26.

At any rate, given that [judges of local courts] are appointed for seven years only [...], the Commission is of the view that the appropriate constitutional law should set out objective criteria for their reappointment, in order safeguard their independence.

CDL-AD(2002)033 Opinion on the draft amendments to the Constitution of Kyrgyzstan, para. 10.

[...] the system [established by the statute of the High Council of Justice] of having professional tests following appointment is obviously open to abuses in connection with the confirmation of a magistrate in his or her post. In addition, periodical breaches of discipline, professional incompetence and immoral acts are categories of conduct which are imprecise as legal concepts and capable of giving rise to abuse.

CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995, chapter B.2.i.c), al. 3.

Despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value.

If there is to be a system of evaluation [of Judges] , it is essential that control of the evaluation is in the hands of the Judiciary and not the executive. [...] Secondly, the criteria for evaluation must be clearly defined. It seems that once a judge is appointed if anything short of misconduct or incompetence can justify dismissal then immediately a mechanism to control a judge and undermine judicial independence is created. A refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office.

CDL-AD(2005)038 Opinion on Draft Constitutional Amendments concerning the Reform of the Judicial System in "the former Yugoslav Republic of Macedonia", para. 29-30, para. 29 repeated in CDL-AD(2007)028 Report on Judicial Appointments, para. 42.

The European Charter on the statute for judges states as follows "Clearly the existence of probationary periods or renewal requirements presents difficulties if not dangers from the angle of the independence and impartiality of the judge in question, who is hoping to be established in post or to have his or her contract renewed".



The Universal Declaration on the Independence of Justice, adopted in Montreal in June 1983 by the World Conference on the Independence of Justice states: "The appointment of temporary judges and the appointment of judges for probationary periods is inconsistent with judicial independence. Where such appointments exist, they should be phased out gradually". The Venice Commission considers that setting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way [...].

This should not be interpreted as excluding all possibilities for establishing temporary judges. In countries with relatively new judicial systems there might be a practical need to first ascertain whether a judge is really able to carry out his or her functions effectively before permanent appointment. If probationary appointments are considered indispensable, a "refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office".

The main idea is to exclude the factors that could challenge the impartiality of judges: "despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value."

In order to reconcile the need of probation / evaluation with the independence of judges, it should be pointed out that some countries like Austria have established a system whereby candidate judges are being evaluated during a probationary period during which they can assist in the preparation of judgements but they can not yet take judicial decisions which are reserved to permanent judges.

CDL-AD(2007)028 Report on Judicial Appointments, para. 38-43.

It would be appropriate to specify the term of the chairs [of courts in the constitution].

CDL-AD(2005)003 Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, in cooperation with OSCE/ODIHR, para. 105.

In its opinion No 1 (2001) on Standards concerning the Independence of the Judiciary and the Irremovability of Judges the Consultative Council of European Judges suggests that "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'. Once this is done, those bodies or authorities responsible for any appointment or promotion will be obliged to act accordingly, and it will then at least be possible to scrutinize the content of the criteria adopted and their practical effect."

CDL-AD(2007)028 Report on Judicial Appointments, para. 37.

It is [...] doubtful whether powers of "supervision" which go beyond jurisdictional control to ex officio control are consistent with the powers usually exercised by a higher court, which hears in the last instance appeals against decisions of the next lower court in the hierarchy. This question should be clarified. Any deviation from the rule of exclusive jurisdictional functions and appellate jurisdiction does not seem to be desirable[...].

CDL(1994)011 Opinion on the Constitution of the Russian Federation adopted by popular vote on 12 December 1993, chapter 7: Justice: article 118-129, par. 6.

Lastly, granting the Supreme Court the power to supervise the activities of the general courts [...] would seem to be contrary to the principle of the independence of such general courts. While the Supreme Court must have the authority to set aside, or to modify, the judgements of lower courts, it should not supervise them.

CDL-INF(1997)006 Opinion on the draft Constitution of the Nakhichevan autonomous republic (Azerbaijan Republic) , chapter 6, «The independence and functioning of the judiciary Independence and Functioning of the Judiciary », para 4.

The present draft fundamentally departs from the principle [of judicial independence.] It gives to the Supreme Court [...] and, within narrower terms, to the Plenum of the Supreme Specialised Courts [...] the possibility to address to the lower courts "recommendations/explanations" on matters of application of legislation. This system is not likely to foster the emergence of a truly independent judiciary [...] but entails the risk that judges behave like civil servants who are subject to orders from their superiors.

CDL-INF(2000)005 Opinion on the draft law of Ukraine on the judicial system, «General Comments», « Establishment of a strictly hierarchical system of courts», al. 2.

Court decisions can only be annulled by a court and no person can request a report from a judge on any concrete case.

CDL-AD(2005)003 Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, in cooperation with OSCE/ODIHR, para. 101.

Reporting to [...]the High Council of Magistrates [...]infringes upon the status and independence of the Constitutional Court [...].

CDL-AD(2006)016 Opinion on the Draft Law on the Constitutional Court and Corresponding Amendments of the Constitution of the Republic of Moldova, para. 28.

The procedure of distribution of cases between judges should follow objective criteria.

CDL-AD(2002)026 Avis sur le projet de loi relatif au pouvoir judiciaire et sur les amendements constitutionnels correspondants de la Lettonie, para. 70. 7.

[.] the statute of the Supreme Council of Justice] provides for secret deliberations and a discretionary power to summons and interrogate affected persons quite contrary to the right to be heard and other procedural rights. The Commission notes in this connection that the practice of the High Council of Justice confirms that affected persons are frequently notified of decisions affecting them only after such decisions have been taken.

Decisions on the transfer of judges[...], also require to be circumscribed by appropriate procedural safeguards.

Finally, on a point of general importance, the Commission has learned that the Constitutional Court has jurisdiction to hear complaints against decisions of the High Council of Justice which allegedly violate the independence of judges, guaranteed by [the constitution], and that it has struck down a decision to transfer a judge in at least one case. While this is to be welcomed, a future law on the status of magistrates should provide for judicial review of decisions affecting judges and prosecutors more generally, prior to the review exercised by the Constitutional Court.

CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995, chapter B.2.i).c), al. 5-8.

Procedural rules for disciplinary proceedings should guarantee a due process. In particular, a member of the Supreme Judicial Council, who calls for disciplinary action against of a magistrate (or the lifting of immunity) should not be entitled to vote on his or her own proposal.

CDL-AD(2002)015 Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, para. 5.h).

Once the disciplinary panel of the Supreme Judicial Council has found in favour of the judge, this decision should be final.

CDL-AD(2002)015 Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, para. 5.h).

The Venice Commission is of the opinion that a judicial council should have a decisive influence on the appointment and promotion of judges and (maybe via a disciplinary board set up within the council) on disciplinary measures against them. An appeal against disciplinary measures to an independent court should be available.

CDL-AD(2007)028 Judicial Appointments (report), para. 25.

***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

Chapter III – Internal independence

22. The principle of judicial independence means the independence of each individual judge in the exercise of adjudicating functions. In their decision making judges should be independent and impartial and able to act without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority, including authorities internal to the judiciary. Hierarchical judicial organisation should not undermine individual independence.

23. Superior courts should not address instructions to judges about the way they should decide individual cases, except in preliminary rulings or when deciding on legal remedies according to the law.

Chapter V – Independence, efficiency and resource

34. Judges should be provided with the information they require to enable them to take pertinent procedural decisions where such decisions have financial implications. The power of a judge to make a decision in a particular case should not be solely limited by a requirement to make the most efficient use of resources.

***THE KYIV RECOMMENDATIONS ON JUDICIAL INDEPENDENCE IN EASTERN EUROPE, SOUTH CAUCASUS AND CENTRAL ASIA, OSCE, 2010***

The Role of Court Chairpersons

11. The role of court chairpersons should be strictly limited in the following sense: they may only assume judicial functions which are equivalent to those exercised by other members of the court. Court chairpersons must not interfere with the adjudication by other judges and shall not be involved in judicial selection. Neither shall they have a say on remuneration. They may have representative and administrative functions, including the control over non-judicial staff. Administrative functions require training in management capacities. Court chairpersons must not misuse their competence to distribute court facilities to exercise influence on the judges.

***FIRST STUDY COMMISSION REPORT - NOMINATION OF JUDGES, International Association of Judges (IAJ), 2013***

Recommendation on the administrative authority of chief judges

- Chief judges not have the power to assign a judge in order to affect the outcome of a case;
- The assignment of judges to hear cases be based on objective criteria.

***LAW CLERKS IN SWITZERLAND – A SOLUTION TO COPE WITH THE CASELOAD, Peter Bieri, International Journal for Court Administration, 2016***

Although the advantages of more support for judges are widely recognised, some literature also warns of certain risks. Courts should be careful not to allow research assistants to make the decision, since this would compromise the right to a lawful judge, as provided in Article 6 ECHR. Another issue is judicial independence. Like judges, law clerks should be independent from the litigants. The research assistant could in certain circumstance also jeopardise the independence of the judge. The judge must be independent from the research assistant, who prepares the proposal for the judgment. (S)he must be able to take a decision independently after considering the arguments advanced by the research assistant. Decision-making requires time and effort. Therefore, it is problematic if a judge does not have sufficient time for a critical examination of the matter. Although research assistants can help the judges, the latter should not supervise too many assistants, as this could lead to an over concentration on management tasks and insufficient care being taken concerning decision-making

### III. 3. SELECTION AND CAREER

#### ***MONTREAL DECLARATION, UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE, International Association of Judicial Independence and World Peace (JIWP), 1983***

Qualifications, Selections and Training,

Art. 2.14. a) There is no single proper method of judicial selection provided it safeguards against judicial appointments for improper motives.

b) Participation in judicial appointments by the Executive or Legislature is consistent with judicial independence, so long as appointments of judges are made in consultation with members of the judiciary and the legal profession or by a body in which members of the judiciary and the legal profession participate.

#### ***BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, Adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, 1985***

10. Qualifications, selection and training

Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

#### ***FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF JUDICIARY, CONCLUSIONS, RECRUITMENT AND TRAINING OF JUDGES IN A MODERN SOCIETY, International Association of Judges (IAJ), 1996***

Conclusions

1. One can identify 2 main basic approaches to selection:

A. the recruitment for a purpose of a first and only career as a judge, aimed at relatively young candidates, and which, in general, offer the possibility of promotion.

B. the recruitment for a second career for candidates who have already acquired both maturity and extensive professional experience before appointment to the Bench.

#### ***THE UNIVERSAL CHARTER OF THE JUDGE, International Association of Judges (IAJ), 1999***

Art. 9 Appointment

The selection and each appointment of a judge must be carried out according to objective and transparent criteria based on proper professional qualification. Where this is not ensured in other ways, that are rooted in established and proven tradition, selection should be carried out by an independent body, that include substantial judicial representation.

#### ***GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY, USAID, 2002***

1. Selection and Appointment of Judges

In many countries, problems with judicial independence begin at the point a judge is selected. Frequently, the process is politicized or dominated by the executive, a majority party in the legislature, or the judicial hierarchy, and it is designed to ensure the responsiveness of the judiciary to those either formally or informally responsible for the appointments. It is often essential, therefore, to revise the appointment process as a necessary step in strengthening judicial independence.

#### a. Common selection processes

Common law and civil law countries have traditionally followed distinct selection practices. In common law countries, lower court judges are usually selected from among experienced, practicing lawyers for specific judicial positions. They may be appointed by some combination of executive and legislative action or (less frequently) elected. Judges of higher courts are selected both from among practicing attorneys and judges of lower courts, but, in either case, the selection is by separate appointment or election rather than promotion.

Civil law countries have traditionally employed a career system. Recent law school graduates are selected through a merit-based process. They are usually required to take an exam, but the process may also include a review of their education, subsequent training, and practical experience. As with other civil servants, judges enter at the lowest ranks and are promoted as they gain experience.

However, there are many country-specific divergences from these two models. For example, in France, 20 percent of judges (generally at the higher levels) are recruited from among experienced lawyers and law professors. Recruitment from the private bar is also common in Spain. Many of Spain's former colonies in Latin America borrowed freely from other systems early in their development and did not follow classic civil law traditions for selection of judges.

Frequently, different procedures are used to select the judges of the lower courts and the judges of the highest courts (constitutional courts and supreme courts). Selection at the higher levels may be by legislative or executive appointment, while the lower levels enter through the traditional system of exams. These differences are generally perceived to be appropriate. Given that the highest courts exercise certain political functions, consideration of criteria other than objective merit such as leadership, governance capacity, judicial philosophy, and political ideology is reasonable, provided that a diversity of values is represented.

#### d. Which selection process works best?

There was no consensus on which specific selection process works best. There are simply too many variations: the success of each is influenced by the history, culture, and political context of a country, and the immediate problem that is being addressed. What works in one place may not in another. Recognizing this, the best approach to assisting a country in reforming its judicial selection process is to help those engaged in the reforms to understand, analyze, and vet the possibilities, through the host of mechanisms available to do this—study tours outside the country, technical experts brought into the country, workshops led by civil society groups, etc.

Although there is no right answer to the question of the most appropriate judicial selection process, there are some principles to guide the process:

(1) Transparency. All the experts consulted for this study agreed overwhelmingly that the most important step that can be taken in reforming a judicial selection process is to build in transparency at every point possible. Some ways to accomplish this are

- Advertise judicial vacancies widely
  - Publicize candidates' names, their backgrounds, and selection process and criteria
  - Invite public comment on candidates' qualifications
  - Divide responsibility for the process between two separate bodies, one that nominates, and a second that selects and appoints. (To be effective, the bodies must be truly independent from each other and the nominating body's recommendations must be given substantial weight, as when, for example, three or fewer candidates are nominated for each position and the appointing authority is limited to choosing from among those candidates.

(2) Composition of judicial councils. Judicial councils can be effective by introducing additional actors into the process and thus diluting the influence of any one political entity. There is often a great deal of focus on trying to get the composition of the council right in order to achieve this objective. The consensus of our experts was that the transparency of the process the council uses is more important

than the composition of the council. Nevertheless, there was general agreement on a few ways in which the membership of a judicial council can enhance its operations:

Participation of the general public on the council, particularly lawyers and law professors, can help to (a) safeguard transparency, (b) reduce the risk of executive, partisan, or supreme court control, and (c) enhance the quality of candidate selection.

Inclusion of lower-level judges, along with senior judges, can reduce excessive influence by the judicial leadership, which is often inclined to preserve the status quo.

Allowing representative members, especially judges, lawyers, and other members of the public, to be chosen by the sector they represent will increase the likelihood that they will have greater accountability to their own group and autonomy from other actors. In much of Europe and Latin America, this is the process followed. In anglophone Africa, the opposite is true—most council members are appointed by the president.

There was no clear consensus on whether members of the legislature should be included on the council. Many Western, Central, and Eastern European countries do include members of the legislature on their councils, whereas only a few countries in Latin America do.

(3) Merit-based selection. Although merit should be a significant element in the selection of judges at any level, in civil law systems the term is generally understood to apply to the process of selecting entry or lower-level judges by evaluating them against specific criteria, often by means of an exam. This is a common approach in civil law countries.

Use of a more objective, merit-based process can be an important step forward when compared to traditional political or personal processes. However, there is little consensus about how to test for the qualities relevant to being a fair and impartial judge. Most entrance examinations at best test only intelligence and knowledge of the law. There have been many efforts to develop tests for other traits, such as professional integrity, willingness to work hard, and deliberative decision-making, but no agreement on their success.

A few countries have developed a multi-step process with a training component. In Chile, as a result of 1994 reforms, a recruitment campaign encourages lawyers to apply for vacant positions. Candidates are evaluated based on their backgrounds and tests of their knowledge, abilities, and psychological fitness, then interviewed. Those selected attend a six-month course at the judicial academy, and the graduates then receive preference over external competitors for openings.

(4) Diversity. Although diversity is rarely taken into account in judicial selection, many experts agree that it is important. A judiciary that reflects the diversity of its country is more likely to garner public confidence, important for a judiciary's credibility.

***PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO DEVELOPMENT, UN HUMAN RIGHTS COUNCIL, Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, 24 March 2009***

Recommendations

97. With respect to selection, appointment and promotion of judges, he recommends that:

- Member States consider establishing an independent body in charge of the selection of judges, which should have a plural and balanced composition, and avoid politicization by giving judges a substantial say.
- Member States adopt legislation enshrining objective criteria to be applied in the selection of judges, ensuring that selection of judges be based on merit only.

- Member States consider the possibility of selecting judges by competitive exams conducted at least partly in a written and anonymous manner.
- Selection and appointment procedures be transparent and public access to relevant records be ensured.
- Clear procedures and objective criteria for the promotion of judges be established by law. Final decisions on promotions be preferably taken by the independent body in charge of the selection of judges.



### **III. 3.1. BASIS OF APPOINTMENT OR PROMOTION**

#### ***THE SIRACUSA DRAFT PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, 1981***

##### III. Qualification. Selection and Training of Judges

Art. 3 Applicants for judicial office should be individuals of integrity and ability, well-trained in the law and its application.

Art. 4 Applicants qualified as set out in Art. 3 above should have equality of access to judicial office.

Art. 5 Selection for the appointment of judges should be made without distinction of any kind such as race, colour, sex, language or religion, political or other opinion, national or social origin, property, birth or status.

Art. 6 These principles apply whatever the method of selection and appointment of judges..

Art. 10 Promotion should be based on an objective assessment of the candidate's integrity and independence of judgment, professional competence, experience, humanity and commitment to uphold the rule of law.

Art. 11 An independent commission composed entirely or in its majority of judges should be established with responsibility for deciding upon promotions or for recommending candidates for promotion to the appropriate authority.

#### ***MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE, International Bar Association (IBA), 1982***

25 Part-time judges should be appointed only with proper safeguards.

26 Selection of judges shall be based on merit.

27 The proceedings for discipline and removal of judges should ensure fairness to the judge and adequate opportunity for hearing.

#### ***MONTREAL DECLARATION, UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE, International Association of Judicial Independence and World Peace (JIWP), 1983***

##### Qualifications, Selections and Training

2.11 Candidates for judicial office shall be individuals of integrity and ability, well-trained in the law. They shall have equality of access to judicial office.

2.12 In the selection of judges, there shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status, subject however to citizenship requirements.

2.13 The process and standards of judicial selection shall give due consideration to ensuring a fair reflection by the judiciary of the society in all its aspects.

2.14 a) There is no single proper method of judicial selection provided it safeguards against judicial appointments for improper motives.

b) Participation in judicial appointments by the Executive or Legislature is consistent with judicial independence, so long as appointments of judges are made in consultation with members of the judiciary and the legal profession or by a body in which members of the judiciary and the legal profession participate.

Posting, Promotion and Transfer

2.17 Promotion of a judge shall be based on an objective assessment of the candidate's integrity and independence of judgment, professional competence, experience, humanity and commitment to uphold the rule of law. Article 2.14 shall apply to promotions.

***BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, Adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, 1985***

13. Conditions of service and tenure

Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE (“Singhvi Declaration”), ECOSOC, 1985***

Qualifications, Selection and Training

9. Candidates chosen for judicial office shall be individuals of integrity and ability. They shall have equality of access to judicial office; except in case of lay judges, they should be well-trained in the law.

10. In the selection of judges, there shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national, linguistic or social origin, property, income, birth or status, but it may however be subject to citizenship requirements and consideration of suitability for judicial office.

11. a) The process and standards of judicial selection shall give due consideration to ensuring a fair reflection by the judiciary of the society in all its aspects.  
(b) Any methods of judicial selection shall scrupulously safeguard against judicial appointments for improper motives.  
(c) Participation in judicial appointments by the Executive or the Legislature or the general electorate is consistent with judicial independence so far as such participation is not vitiated by and is scrupulously safeguarded against improper motives and methods. To secure the most suitable appointments from the point of view of professional ability and integrity and to safeguard individual independence, integrity and endeavour shall be made, in so far as possible, to provide for consultation with members of the judiciary and the legal profession in making judicial appointments or to provide appointments or recommendations for appointments to be made by a body in which members of the judiciary and the legal profession participate effectively.

Posting, Promotion and Transfer

14. Promotion of a judge shall be based on an objective assessment of the judge's integrity, independence, professional competence, experience, humanity and commitment to uphold the rule of law. No promotions shall be made from an improper motive.

***FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY, CONCLUSIONS, THE APPOINTMENT AND THE SOCIAL STATUS OF JUDGES, International Association of Judges (IAJ), 1988***

The question was whether one could accept the possibility that a person who had been so convicted could obtain a nomination to be a member of the Judiciary. If the act committed by the convicted person was very serious then even after rehabilitation one could not entertain the idea that such a person should be the subject of a nomination to the Judiciary. But if the act had been one of little gravity or was the consequence of some youthful mistake long since forgotten one should not attach too much importance to it.

The principle which should govern the evaluation of this criterion should be how it affects the credibility of the judge that is to say the confidence which a judge ought to inspire in the litigants. The whole emphasis should be upon the question of whether this confidence would be imperilled. It is therefore necessary in every case to evaluate the importance of the question on the bases of this principle.

In reality when the nomination is in the hands of the Government the influence of party politics is often, but not always, predominant. That system carries within it the drawback that the nomination is exclusively influenced by political considerations without having regard to the particular qualities of the various candidates. It is nevertheless necessary to recognise the advantage that exists in such systems in that in the result one is assured of a certain pluralism in the Judiciary. This pluralism could also doubtless be provided by competition but on the other hand that does not permit to take into account the human and psychological qualities of the candidates. In this case it is essential that the nomination should not be made until after a training period has provided an opportunity to discover or reveal these qualities.

***PALERMO DECLARATION, ELEMENTS OF A EUROPEAN STATUTE OF MAGISTRACY, MEDEL, 1993***

2.2. The legal statute determines the procedure and the criteria for the recruitment of magistrates according to the principles of equality of access to public office, without discrimination of race, sex, religious, philosophical or political convictions.

***BEIJING STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION, as amended in Manila at 7th Biennial Conferences of Chief Justices of Asia and the Pacific, 1997***

Appointment of judges

11. To enable the judiciary to achieve its objectives and perform its functions, it is essential that judges be chosen on the basis of proven competence, integrity and independence.

12. The mode of appointment of judges must be such as will ensure the appointment of persons who are best qualified for judicial office. It must provide safeguards against improper influences being taken into account so that only persons of competence, integrity and independence are appointed.

13. In the selection of judges there must no discrimination against a person on the basis of race, colour, gender, religion, political or other opinion, national or social origin, marital status, sexual orientation, property, birth or status, except that a requirement that a candidate for judicial office must be a national of the country concerned shall not be considered discriminatory.

14. The structure of the legal profession, and the sources from which judges are drawn within the legal profession, differ in different societies. In some societies, the judiciary is a career service; in others, judges are chosen from the practising profession. Therefore, it is accepted that in different societies, difference procedures and safeguards may be adopted to ensure the proper appointment of judges.

17. Promotion of judges must be based on an objective assessment of factors such as competence, integrity, independence and experience.

***EUROPEAN CHARTER ON THE STATUTE FOR JUDGES AND EXPLANATORY MEMORANDUM, Council of Europe, Strasbourg, 8 - 10 July 1998***

2.1. The rules of the statute relating to the selection and recruitment of judges by an independent body or panel, base the choice of candidates on their ability to assess freely and impartially the legal matters which will be referred to them, and to apply the law to them with respect for individual dignity. The statute excludes any candidate being ruled out by reason only of their sex, or ethnic or social origin, or by reason of their philosophical and political opinions or religious convictions.

2.2. The statute makes provision for the conditions which guarantee, by requirements linked to educational qualifications or previous experience, the ability specifically to discharge judicial duties.

3.2. The statute establishes the circumstances in which a candidate's previous activities, or those engaged in by his or her close relations, may, by reason of the legitimate and objective doubts to which they give rise as to the impartiality and independence of the candidate concerned, constitute an impediment to his or her appointment to a court.

4.1. When it is not based on seniority, a system of promotion is based exclusively on the qualities and merits observed in the performance of duties entrusted to the judge, by means of objective appraisals performed by one or several judges and discussed with the judge concerned. Decisions as to promotion are then pronounced by the authority referred to at paragraph 1.3 hereof or on its proposal, or with its agreement. Judges who are not proposed with a view to promotion must be entitled to lodge a complaint before this authority.

***OPINION NO. 1 (2001) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF COUNCIL OF EUROPE ON STANDARDS CONCERNING THE INDEPENDENCE OF THE JUDICIARY AND THE IRREMOVABILITY OF JUDGES, Council of Europe, 2001***

Basis of appointment or promotion

25. The CCJE recommended that 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”. Once this is done, those bodies or authorities responsible for any appointment or promotion will be obliged to act accordingly, and it will then at least be possible to scrutinize the content of the criteria adopted and their practical effect.

29. The European Charter on the statute for judges addresses systems for promotion “when it is not based on seniority” (paragraph 4.1.), and the Explanatory Memorandum notes that this is “a system which the Charter did not in any way exclude because it is deemed to provide very effective protection for independence”. Although adequate experience is a relevant pre-condition to promotion, the CCJE considered that seniority, in the modern world, is no longer generally acceptable as the governing principle determining promotion. The public has a strong interest not just in the independence, but also in the quality of its judiciary, and, especially in times of change, in the quality of the leaders of its judiciary. There is a potential sacrifice in dynamism in a system of promotion based entirely on seniority, which may not be justified by any real gain in independence. The CCJE considered however that seniority requirements based on years of professional experience can assist to support independence.

31. The CCJE considered the question of equality between women and men. The Latimer House Guidelines state: “Appointments to all levels of the judiciary should have, as an objective, the achievement of equality between women and men”. In England, the Lord Chancellor’s “guiding principles” provide for appointment strictly on merit “regardless of gender, ethnic origin, marital status, sexual orientation...”, but the Lord Chancellor has made clear his wish to encourage applications for judicial appointment from both women and ethnic minorities. These are both clearly appropriate aims. The Austrian delegate reported that in Austria, where there were two equally

qualified candidates, it was specifically provided that the candidate from the under-represented sex should be appointed. Even on the assumption that this limited positive reaction to the problem of under-representation would pose no legal problems, the CCJE identified as practical difficulties, first, that it singles out one area of potential under-representation (gender) and, secondly, that there could be argument about what, in the circumstances of any particular country, constitutes under-representation, for relevant discriminatory reasons, in such an area. The CCJE does not propose a provision like the Austrian as a general international standard, but does underline the need to achieve equality through “guiding principles” like those referred to in the third sentence above.

The appointing and consultative bodies

32. The CCJE noted the large diversity of methods by which judges are appointed. There is evident unanimity that appointments should be “merit-based”.

37. Therefore, the CCJE considered 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 criteria.

Conclusions

73. The CCJE Considered that the critical matter for member States is to put into full effect principles already developed (paragraph 6) and, after examining the standards contained in particular Recommendation No. R (94) 12 on the independence, efficiency and role of judges, it concluded as follows:

(2) The authorities responsible in each member State 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 qualification, integrity, ability and efficiency (paragraph 25).

(3) Seniority should not be the governing principle determining promotion. Adequate professional experience is however relevant, and pre-conditions related to years of experience may assist to support independence (paragraph 29).

***COMMONWEALTH (LATIMER HOUSE) PRINCIPLES ON THE THREE BRANCHES OF GOVERNMENT with Annex (Parliamentary Supremacy, Judicial Independence), The Commonwealth, 2003***

IV) Independence of the Judiciary

(a) Judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process. The process should ensure:

equality of opportunity for all who are eligible for judicial office;

appointment on merit; and

that appropriate consideration is given to the need for the progressive attainment of gender equity and the removal of other historic factors of discrimination.

***PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA, African Commission on Human and Peoples Rights, 2003***

A. GENERAL PRINCIPLES APPLICABLE TO ALL LEGAL PROCEEDINGS

4) Independent tribunal

- i) The sole criteria for appointment to judicial office shall be the suitability of a candidate for such office by reason of integrity, appropriate training or learning and ability.
- j) Any person who meets the criteria shall be entitled to be considered for judicial office without discrimination on any grounds such as race, colour, ethnic origin, language, sex, gender, political or other opinion, religion, creed, disability, national or social origin, birth, economic or other status. However, it shall not be discriminatory for states to:
  - (i) prescribe a minimum age or experience for candidates for judicial office;
  - (ii) prescribe a maximum or retirement age or duration of service for judicial officers;
  - (iii) prescribe that such maximum or retirement age or duration of service may vary with different level of judges, magistrates or other officers in the judiciary;
  - (iv) require that only nationals of the state concerned shall be eligible for appointment to judicial office.
- k) No person shall be appointed to judicial office unless they have the appropriate training or learning that enables them to adequately fulfil their functions.

***OPINION NO 5 OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS ON THE LAW AND PRACTICE OF JUDICIAL APPOINTMENT TO THE EUROPEAN COURT OF HUMAN RIGHTS, CCJE, 2003***

2. The CCJE welcomes the conclusions and recommendations proposed by the report. It regards them as an important step towards implementing the recommendations contained in its Opinion No. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges, which the CCJE wishes to affirm, concerning:

(a) the appointment process for judges on international courts, in particular paragraph 56 of that Opinion stating:

“The CCJE agreed that the importance for national legal systems and judges of the obligations resulting from international treaties such as the European Convention on Human Rights and also the European Union treaties makes it vital that the appointment and re-appointment of judges to the courts interpreting such treaties should command the same confidence and respect the same principles as national legal systems. The CCJE further considered that involvement by the independent authority referred in the paragraphs 37 and 45 should be encouraged in relation to appointment and re-appointment to international courts. The Council of Europe and its institutions are in short founded on belief in common values superior to those of any single member State, and that belief has already achieved significant practical effect. It would undermine those values and the progress that has been made to develop and apply them, if their application was not insisted upon at the international level.”

Paragraphs 37 and 45 advocate the intervention of an independent authority with substantial judicial representation in relation to all judicial appointments.

(b) the tenure of office, in particular paragraphs 57 and 52 stating:

“It is a fundamental tenet of judicial independence that tenure is guaranteed until a mandatory retirement age or the expiry of a fixed term of office.”

“The CCJE considered that where, exceptionally, a full-time judicial appointment is for a limited period, it should not be renewable unless procedures exist ensuring that:

- i. the judge, if he or she wishes, is considered for re-appointment by the appointing body and
- ii. the decision regarding re-appointment is made entirely objectively and on merit and without taking into account political considerations.”

3. The objective criteria for appointment as a judge to the European Court of Human Rights are fixed in Article 21 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which states:

“The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence.”

**THE BURGH HOUSE PRINCIPLES ON THE INDEPENDENCE OF THE INTERNATIONAL JUDICIARY, The Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals, 2004**

2. Nomination, election and appointment

2.1 In accordance with the governing instruments, judges shall be chosen from among persons of high moral character, integrity and conscientiousness who possess the appropriate professional qualifications, competence and experience required for the court concerned.

2.2 While procedures for nomination, election and appointment should consider fair representation of different geographic regions and the principal legal systems, as appropriate, as well as of female and male judges, appropriate personal and professional qualifications must be the overriding consideration in the nomination, election and appointment of judges.

2.3 Procedures for the nomination, election and appointment of judges should be transparent and provide appropriate safeguards against nominations, elections and appointments motivated by improper considerations.

2.4 Information regarding the nomination, election and appointment process and information about candidates for judicial office should be made public, in due time and in an effective manner, by the international organisation or other body responsible for the nomination, election and appointment process.

2.5 Where the governing instruments of the court concerned permits the re-election of judges, the principles and criteria set out above for the nomination, election and appointment of judges shall apply *mutatis mutandis* to their re-election.

**DECLARATION OF MINIMAL PRINCIPLES ABOUT JUDICIARIES AND JUDGES' INDEPENDENCE IN LATIN AMERICA, Campeche, April 2008**

II. MINIMAL CONDITIONS FOR THE PROTECTION OF THE JUDICIARY'S INDEPENDENCE

5. The signing States must ensure the following points for a better protection of the general objectives:

a) That the judge of the highest courts are selected using criteria that would protect their absolute Independence, especially as regards the rest of the other State powers and the political forces. The most preferable and main selection criterion should be a proven knowledge of the Law in the exercise of their judgeship, the legal profession, the legal teaching or any other similar activity, and their compromise with the assurance of fundamental rights and legal sureties.

III. MINIMAL CONDITIONS FOR THE PROTECTION OF JUDGES' INDEPENDENCE AND IMPARTIALITY

6. JUDICIAL STUDIES

Admission to the judiciary and judicial studies should be adjusted to the following governing regulations:

- a) Selection and promotion of judges should be ruled by public and transparent proceedings based on the weighting criteria and training, background and professional eligibility.
- b) Selection must be ensured by an independent body integrated by a substantive and representative number of judges.
- c) Ordinary judges (or of an equivalent category) should be selected in public tests open to Lawyers or Bachelors in Law. If possible and as a condition for their application, in every case, previous to the performance of the position, there shall be a training course or period administered by the judiciary.
- d) Promotion of judges should be ruled by public and transparent proceedings, based on weighting criteria of seniority, professional eligibility and merit.

**FIRST STUDY COMMISSION - GENERAL REPORT, HOW CAN THE APPOINTMENT AND ASSESSMENT (QUALITATIVE AND QUANTITATIVE) OF JUDGES BE MADE CONSISTENT WITH THE PRINCIPLE OF JUDICIAL INDEPENDENCE, International Association of Judges (IAJ), 2006**

Conclusions

3) Given such security of tenure, it is imperative that there is an entirely objective selection process which will select the most able candidates from amongst those who apply for the position of judge. Only those who have demonstrated that they have the soundest knowledge of the law and the other skills that a judge must use (such as the ability to act decisively, to communicate, to organise his/her professional life and so on) should be selected to become judges.

4) Likewise, it is imperative that the question of which judge should be selected for another position/post should be based only on the merits and abilities of the candidates. However, in this situation, the results of assessments of the judge in his/her existing post can play a significant part in the selection process.

5) Any involvement of the other powers of state in the assessment of judges for another position/post should be strictly forbidden. It is in conflict with the principles of the separation of powers and judicial independence.

**OPINION NO. 10 (2007) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE COUNCIL FOR THE JUDICIARY AT THE SERVICE OF SOCIETY, CCJE, 2007**

V. A. Selection, appointment and promotion of judges

50. Although this appointment and promotion system is essential, it is not sufficient. There must be total transparency in the conditions for the selection of candidates, so that judges and society itself are able to ascertain that an appointment is made exclusively on a candidate's merit and based on his/her qualifications, abilities, integrity, sense of independence, impartiality and efficiency. Therefore, it is essential that, in conformity with the practice in certain States, the appointment and selection criteria be made accessible to the general public by every Council for the Judiciary. The Council for the Judiciary shall also ensure, in fulfilling its role in relation to the court administration and training in particular, that procedures for judicial appointment and promotion based on merit are opened to a pool of candidates as diverse and reflective of society as a whole as possible.

VI. THE COUNCIL FOR THE JUDICIARY IN SERVICE OF ACCOUNTABILITY AND TRANSPARENCY OF THE JUDICIARY

93. As it has already been mentioned, transparency, in the appointment and promotion of judges, will be ensured by publicising the appointment criteria and disseminating the post descriptions. Any interested party should be able to look into the choices made and check that the Council for the Judiciary applied the rules and criteria based on merits in relation to appointments and promotions.



## SUMMARY OF THE RECOMMENDATIONS AND CONCLUSIONS

### D. On the powers of the Council for the Judiciary:

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;

## ***DRAFT VADEMECUM ON THE JUDICIARY, EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), 2008***

### PART I: COURTS AND JUDGES

#### 1. Appointment

Although the independence and impartiality of a judge depends primarily on his or her attitude, and his or her action and inaction, during the handling of the case, during the hearing and in drafting the judgment, there must also be objective guarantees for independence, and any grounds for suspecting a lack of judicial independence on the part of the parties in the case must be avoided. For both aspects, the appointment procedure of judges is of great importance.

CDL-AD(2002)032 Opinion on the Amendments to the Constitution of Liechtenstein proposed by the Princely House of Liechtenstein para. 29.

In the light of European standards the selection and career of judges should be «based on merit, having regard to qualifications, integrity, ability and efficiency»

[...] In a number of countries judges are appointed based on the results of a competitive examination, in others they are selected from the experienced practitioners. A priori, both categories of selection can raise questions. It could be argued whether the examination should be the sole grounds for appointment or regard should be given to the candidate's personal qualities and experience as well. As for the selection of judges from a pool of experienced practitioners, it could raise concerns as regards to the objectivity of the selection procedure.

In its opinion No 1 (2001) on Standards concerning the Independence of the Judiciary and the Irremovability of Judges the Consultative Council of European Judges suggests that "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'. Once this is done, those bodies or authorities responsible for any appointment or promotion will be obliged to act accordingly, and it will then at least be possible to scrutinize the content of the criteria adopted and their practical effect."

CDL-AD(2007)028 Report on Judicial Appointments, para. 10 and 36-37.

The opening of the profession of judge for candidates from outside the judicial system (e.g. lawyers in governmental service and in private practice in fields of work other than mainly court litigation) is to be welcomed.

CDL-AD(2002)026 Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, para. 49.

Since the appointment of judges is of vital importance for guaranteeing their independence and impartiality, it is recommended to regulate the procedure of appointment [...] detail in the Constitution. Special care has to be taken that appointment by the Executive – and possible

involvement of Parliament - is always based on a nomination procedure in the hands of an independent and apolitical body. This is even more important if the constitutional review functions of the courts increase.

CDL- AD(2008)010 Opinion on the Constitution of Finland, para. 112

[...] the composition of both the Supreme Court and the Constitutional Court should include judges with particular expertise in human rights [...] especially where a core body of case-law on such issues is being established.

CDL(1999)078 Opinion on the Reform of Judicial Protection of Human Rights in the Federation of Bosnia and Herzegovina, adopted by the Commission at its 41st Plenary meeting (Venice, 10-11 December 1999), para. 32.

The appointment of retired judges where there are no other applicants seems to be inconsistent with judicial independence since such persons are not irremovable and may therefore be subjected to improper pressure.

CDL-AD(2002)015 Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, para. 5.k.

There is nothing in the Constitution to require such a two-candidate rule. It would be preferable if the High Judicial Council were to put forward only one candidate for each vacant position. This would go some way to resolve the problem created by the constitutional provision for election of judges in the National Assembly.

[...] However, the two-candidate rule has as a consequence that the final appointment remains in the hands of the parliamentary majority.

CDL-AD(2008)007 Opinion on the Draft Laws on Judges and the Organisation of Courts of the Republic of Serbia, para. 59 and 60.

[...] the principle of an uninterrupted chain of democratic legitimacy (developed in German doctrine) [...] requires that every state body has to receive its powers – even if indirectly – from the sovereign people. A completely autonomous self-administration would lack such democratic legitimacy.

CDL-AD(2002)026 Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, para. 13

There would seem to be no common opinion yet about the most appropriate procedure. For the legitimacy of the administration of justice a certain involvement of democratically elected bodies like the Diet may be desirable. However, the Prince Regnant is not democratically elected. His involvement in the nomination procedure, other than in a merely formal way, is problematic, especially if this involvement is of a decisive character.

The proposed first paragraph of Article 96 provides that no candidate can be recommended to the Diet for election without the consent of the Prince Regnant. His far-reaching involvement in the election procedure could amount to undue influence and could give rise to doubt about the objective independence and impartiality of the elected judge. [...] Therefore, the proposed Article 96 would not sufficiently ensure respect for the guarantees laid down in Article 6 of the European Convention on Human Rights and could therefore create problems with respect to Liechtenstein's obligation under Article 1 of that Convention. This situation is not adequately remedied by the provision in the second paragraph of Article 96 that, if a proposed candidate is not approved by the Diet, the choice between the proposed candidate and any other candidate would be made by referendum, since a choice by the people would also not guarantee the impartiality of the elected candidate.

CDL-AD(2002)032 Opinion on the Amendments to the Constitution of Liechtenstein proposed by the Princely House of Liechtenstein para. 29-30.

[...] it is in any case ill advised that the President should participate in the nomination of judges.

CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995, chapter B.1.d.

The European Court of Human Rights has held that the fact that a power to appoint members of a tribunal is conferred on a Government does not, of itself, suffice to give cause to doubt its members independence and impartiality (Same v Austria, 22.10.1984, no. 84 of Series A of the Publications of the Court)

CDL-INF(1999)005 Opinion on the reform of the judiciary in Bulgaria, para. 34.

Though the recruitment and testing/training of future judges should aim at producing persons fit to assume the burden and responsibility of that career, it should not be pursued with an undue emphasis on having the new judges fit into the same mould as their older colleagues, but also allow for the preservation of the basic independence and integrity and democratic intuition to be required of each individual judge. Accordingly, there may be reason to consider the possibility of having a contingent of outsiders on this Board, such as persons representing advocates, the legal academic community, or even the executive and legislative power.

CDL-AD(2002)026 Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, para. 15.

[...] the appointment of judges by [the Parliament] on the basis of proposals by its President is a normal procedure [...].

CDL-INF(1997)006 Opinion on the draft Constitution of the Nakhichevan autonomous republic (Azerbaijan Republic) chapter 6, «The independence and functioning of the judiciary ».

[The appointment of judges by the Parliament is] a method for constituting the judiciary which is highly democratic but [...] the balance might be tilted much too far towards the legislative power. This is not without its risks from the point of view of judicial independence, inter alia since judicial appointments may over time be more likely than otherwise to become a subject of party politics.

The parliament is undoubtedly much more engrossed in political games and the appointments of judges could result in political bargaining in the parliament in which every member of parliament coming from one district or another will want to have his or her own judge. The right of appointment ought to remain linked with the head of state. Of course, the president also represents a given political tendency but in most cases he/she will demonstrate greater political reserve and neutrality. It therefore seems that entrusting the head of state with the power to nominate judges is a solution that depoliticizes the entire process of nominating a judge to a much greater degree.

[The appointment of judges by the Parliament is] acceptable by European standards, there may be reason to reconsider the possibility of entrusting the President as the appointment authority or by arranging the process of judicial appointments so as to go by submission from the Council of Justice to the President of the Republic (who also is to represent all the people) and from the President[of the Parliament].

CDL-AD(2002)026 Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, para. 21-23, first phrase of para. 22 cited in CDL-AD(2007)028 report on Judicial Appointments, para. 11.

As regards the joint power of the President and the Parliament to form the whole judicial corps, and in particular the election of all judges of local courts (district, city, regional, military and arbitration) upon the approval of each nominee by the [parliament], the Commission is of the view that this politicizes the process of nominating judges too strongly.

CDL-AD(2002)033 Opinion on the draft amendments to the Constitution of Kyrgyzstan, par. 10.

[In] designating the Parliament as a body entrusted with the task of electing and re-electing judges, the proposed amendments do not provide guarantees that the choices will not be politically biased. Such provision is therefore contrary to the principles of a free and democratic government and to the ECHR.

CDL-AD(2003)019 Opinion on three Draft Laws proposing Amendments to the Constitution of Ukraine, para. 40 and 76.

The main role in judicial appointments should [...] be given to an objective body such as the High Judicial Council provided [...] in the Constitution. It should be understood that proposals from this body may be rejected only exceptionally. From an elected parliament such self-restraint cannot be expected and it seems therefore preferable to consider such appointments as a presidential prerogative. Candidatures should be prepared by the High Judicial Council, and the President would not be allowed to appoint a candidate not included on the list submitted by the High Judicial Council.

CDL-AD(2005)023 Opinion on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia, para. 17, to which refers to CDL-AD(2007)028 Judicial Appointments (report), para. 14, footnote 6 and correspondent text.

[...] It would be desirable that an expert body like an independent judicial council could give an opinion on the suitability or qualification of candidates for the office of judge. CDL-AD(2005)005 Opinion on Draft Constitutional Amendments relating to the Reform of the Judiciary in Georgia, para. 30.d.

The Council of Justice should be the final authority for all aspects of the professional life of judges in particular matters pertaining to their selection, appointment, career (including promotion and transfer), training, dismissal and discipline, and should be responsible for overseeing the training of judges.

CDL-AD(2004)044 Interim Opinion on Constitutional Reforms in the Republic of Armenia, para. 59.

Choosing the appropriate system for judicial appointments is one of the primary challenges faced by the newly established democracies, where often concerns related to the independence and political impartiality of the judiciary persist. Political involvement in the appointment procedure is endangering the neutrality of the judiciary in these states, while in others, in particular those with democratically proved judicial systems, such methods of appointment are regarded as traditional and effective.

International standards in this respect are more in favour of the extensive depoliticisation of the process. However no single non-political "model" of appointment system exists, which could ideally comply with the principle of the separation of powers and secure full independence of the judiciary.

[...] In some older democracies, systems exist in which the executive power has a strong influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary because the executive is restrained by legal culture and traditions, which have grown over a long time.

New democracies, however, did not yet have a chance to develop these traditions, which can prevent abuse. Therefore, at least in new democracies explicit constitutional provisions are needed as a safeguard to prevent political abuse by other state powers in the appointment of judges.

In Europe, methods of appointment vary greatly according to different countries and their legal systems; furthermore they can differ within the same legal system according to the types of judges to be appointed.

Notwithstanding their particularities appointment rules can be grouped under two main categories.

In elective systems, judges are directly elected by the people (this is an extremely rare example and occurs at the Swiss cantonal level) or by the Parliament [...]. This system is sometimes seen as providing greater democratic legitimacy, but it may also lead to involving judges in the political campaign and to the politisation of the process.

[...] Appointments of ordinary judges [in contrast to constitutional judges] are not an appropriate subject for a vote by Parliament because the danger that political considerations prevail over the objective merits of a candidate cannot be excluded.

In the direct appointment system the appointing body can be the Head of State [...]

In assessing this traditional method, a distinction needs to be made between parliamentary systems where the president (or monarch) has more formal powers and (semi-) presidential systems. In the former system the President is more likely to be withdrawn from party politics and therefore his or her influence constitutes less of a danger for judicial independence. What matters most is the extent to which the head of state is free in deciding on the appointment. It should be ensured that the main role in the process is given to an independent body – the judicial council. The proposals from this council may be rejected only exceptionally, and the President would not be allowed to appoint a candidate not included on the list submitted by it. As long as the President is bound by a proposal made by an independent judicial council [...] the appointment by the President does not appear to be problematic.

In some countries judges are appointed by the government [...]. There may be a mixture of appointment by the Head of State and appointment by the Government. [...] As pointed out above, this method may function in a system of settled judicial traditions but its introduction in new democracies would clearly raise concern.

Another option is direct appointment (not only a proposal) made by a judicial council.

[...] To the extent that the independence or autonomy of the judicial council is ensured, the direct appointment of judges by the judicial council is clearly a valid model.

CDL-AD(2007)028 Report on Judicial Appointments, para. 2-9, 12-17.

The Venice Commission is of the opinion that a judicial council should have a decisive influence on the appointment [...] of judges [...].

CDL-AD(2007)028 Report on Judicial Appointments, para. 25.

The mere existence of a high judicial council can not automatically exclude political considerations in the appointment process.

CDL-AD(2007)028 Report on Judicial Appointments, para. 23.

[...] the President and the Vice President of the Court of Cassation are elected by Parliament at the proposal of the President, whereas the other members of the Court are elected by the Assembly

without any such intervention by the President. This difference of treatment between members of the same court does not appear to be justified [...].

CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995, chapter B.1.d.

[...] the power of the President to appoint the chairmen of all courts without any involvement of the Council of Justice[...] appears to be problematic.

CDL-AD(2004)044 Interim Opinion on Constitutional Reforms in the Republic of Armenia, para. 60.

[The formulation that] Chief Judges of the various courts with the exception of the Chief Judge of the Supreme Court are [...] elected by the [Parliament] is problematic from the point of view of judicial independence. The election of the respective Chief Judge by his peers would be preferable.

CDL-INF(2000)005 Opinion on the draft law of Ukraine on the judicial system, under rubric «The appointment of judges».

[...]regarding the appointment of senior judges, involving their peers in the appointment process would have been more in keeping with the principle of the independence of the judiciary.

CDL-INF(1998)015 Opinions on the constitutional regime of Bosnia and Herzegovina, chapter B.I, para. 9.

It would be more prudent to vest [the] authority [to confer senior ranks on judges] in the Supreme Council of the Judiciary [than in the President] to avert any risk of the executive influencing judges.

CDL(1999)088 Interim report on the constitutional reform In the Republic of Moldova, adopted by the Venice Commission at its 41st Plenary Session (10-11 December 1999), para. 26.

Candidatures [for judicial appointments] should be prepared by the High Judicial Council, and the President would not be allowed to appoint a candidate not included on the list submitted by the High Judicial Council. For court presidents (with the possible exception of the President of the Supreme Court) the procedure should be the same.

CDL-AD(2005)023 Opinion on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia, para. 17.

While it is obviously appropriate that questions pertaining to appeals and the procedure before the various courts are determined in the various codes of procedure, it may be preferable, under the specific conditions of a country newly establishing a judicial system based on the rule of law, to have one comprehensive text covering all questions pertaining to the composition, organisation, activities and standing of the judiciary.

CDL-INF(2000)005 Opinion on the draft law of Ukraine on the judicial system, «preliminary remarks», para 3.

## 2.2 Irrevocability and Dismissal

Any possible renewal of a term of office could adversely affect the independence and impartiality of judges.

CDL-AD(2002)012 Opinion on the Draft Revision of the Romanian Constitution , para. 57.

[...] time-limited appointments as a general rule can be considered a threat to the independence and impartiality of judges. In its Opinion on standards concerning the independence of the judiciary and the irremovability of judges, the Consultative Council of European Judges (hereinafter: CCJE) has stated: «European practice is generally to make fulltime appointments until the legal retirement age5 ».

CDL-AD(2003)019 Opinion on three Draft Laws proposing Amendments to the Constitution of Ukraine , para. 39.

Judicial appointments are to be for a period of no less than ten years and a judge must retire at the age of 70. Appointment for life would give a better guarantee of judicial [...].At least, in the case of a general time-limit, for instance of 10 years, for the appointment of judges to a specific court, re-appointment for a second term should be excluded

CDL-AD(2005)003 Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, en collaboration avec OSCE/BIDDH, para. 105.

The term of office of a Supreme Court judge is to be ten years rather than “at least” ten years as at present [...]. In line with European standards and in order to ensure the independence of the judges, life tenure – or rather tenure until the age of retirement – would be more appropriate than renewable terms.

CDL-AD(2005)005 Opinion on Draft Constitutional Amendments relating to the Reform of the Judiciary in Georgia , par. 8.

This article specifies the age limit for judges to stop working (65 years) while it is 70 years for Supreme Court judges. One may doubt whether it is the best solution to allow for applications to extend the period of work beyond the age envisaged by the statute. Experience has shown that the vast majority of judges and prosecutors apply for this extension. This gives some discretionary authority to the Council of Justice. Would it not be better to embrace the opposite principle? That is, raise the age limit in the statute coupled with the statutorily-guaranteed right to take early retirement. Then the law would specify clear criteria without creating yet another right enlarging the Council’s powers.

CDL-AD(2002)026 Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, para. 57.

The appointment of retired judges where there are no other applicants seems to be inconsistent with judicial independence since such persons are not irremovable and may therefore be subjected to improper pressure.

CDL-AD(2002)015 Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, para. 5.k.

The term of office of five years for the members of the administrative court [...] is a rather short one. From the point of view of independence, appointment of judges for life is to be preferred. It is true that so far the Strasbourg Court has not found comparable provisions concerning terms of office to be in violation of Article 6. However, the greater the political influence on the reelection procedure, the greater the risk that a short term of office may throw a shadow on the independent position of the judge concerned. There again, the facts which were put before the European Court of Human Rights in *Wille v. Liechtenstein*, judgment of 28 October 1999, show that this is not a theoretical issue.

CDL-AD(2002)32 Opinion on the Amendments to the Constitution of Liechtenstein proposed by the Princely House of Liechtenstein, para. 31.

The evaluation of judges, prosecutors and investigators during the three-year period before they become irremovable in their office should be restricted to courts of first instance.

CDL-AD(2002)015 Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, para. 5.e).

At present judges, prosecutors and investigating magistrates become permanent upon completing a third year in office. This will be changed to completion of five years service as a judge and the irremovability will not operate unless the judge has been attested and the Supreme Judicial Council decides that he or she is to become irremovable.

The rule does not specify the conditions in presence of which the Supreme Judicial Council could deny its consent. It would be advisable to offer to that body some criteria or test of judgement to circumscribe its discretion in confirming or denying the permanent status to the concerned officials. These guidelines could refer to the provisions dealing with the revocation of the permanent status, but it might be convenient adding criteria concerning the evaluation of the performance of the concerned officials after their temporary appointment and during the five years of service necessary to qualify for the irremovable status.

In its 2002 Opinion the Commission recommended that the evaluation of judges, prosecutors and investigators during the three-year period before they became irremovable in their office should be restricted to courts of first instance. This would seem to be all the more important if the period during which a judge is to be evaluated is now to be extended to five years.

[...] the discretion of the Supreme Judicial Council in confirming or denying the permanent status to magistrates should be limited by specifying criteria[...]. In any case, this procedure should be restricted to courts of first instance.

CDL-AD(2003)016 Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria para. 12-14 and 26.

Under this Article, a judge working in a court that will be abolished is allowed to continue to work in a court of the same or of approximately the same type and instance. It is important that the judge not be appointed to a lesser position following the abolition of a court.

CDL-AD(2008)007 Opinion on the Draft Laws on Judges and the Organisation of Courts of the Republic of Serbia, para. 23

The appointment of temporary or probationary judges is a very difficult area. A recent decision of the Appeal Court of the High Court of Justiciary of Scotland (*Starr v Ruxton*, [2000] H.R.L.R 191; see also *Millar v Dickson* [2001] H.R.L.R 1401) illustrates the sort of difficulties that can arise. In that case the Scottish court held that the guarantee of trial before an independent tribunal in Article 6.1 ECHR was not satisfied by a criminal trial before a temporary sheriff who was appointed for a period of one year and was subject to a discretion in the executive not to reappoint him. The case does not perhaps go so far as to suggest that a temporary or removable judge could in no circumstances be an independent tribunal within the meaning of the Convention but it certainly points to the desirability, to say the least, of ensuring that a temporary judge is guaranteed permanent appointment except in circumstances which would have justified removal from office in the case of a permanent judge. Otherwise he or she cannot be regarded as truly independent.

[...]Despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value.



If there is to be a system of evaluation, it is essential that control of the evaluation is in the hands of the Judiciary and not the executive. This criterion appears to be met by the Macedonian law. Secondly, the criteria for evaluation must be clearly defined. It seems that once a judge is appointed if anything short of misconduct or incompetence can justify dismissal then immediately a mechanism to control a judge and undermine judicial independence is created. A refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office.

CDL-AD(2005) Opinion on Draft Constitutional Amendments concerning the Reform of the Judicial System in “the former Yugoslav Republic of Macedonia”, para. 23 and 29-30, repeated in CDL-AD(2007)028 Judicial Appointments (report), para. 40-42.

The European Charter on the statute for judges states as follows “Clearly the existence of probationary periods or renewal requirements presents difficulties if not dangers from the angle of the independence and impartiality of the judge in question, who is hoping to be established in post or to have his or her contract renewed”.

The Universal Declaration on the Independence of Justice, adopted in Montreal in June 1983 by the World Conference on the Independence of Justice states: “The appointment of temporary judges and the appointment of judges for probationary periods is inconsistent with judicial independence. Where such appointments exist, they should be phased out gradually”. The Venice Commission considers that setting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way [...].

This should not be interpreted as excluding all possibilities for establishing temporary judges. In countries with relatively new judicial systems there might be a practical need to first ascertain whether a judge is really able to carry out his or her functions effectively before permanent appointment. If probationary appointments are considered indispensable, a “refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office”.

The main idea is to exclude the factors that could challenge the impartiality of judges: “despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value.”

In order to reconcile the need of probation / evaluation with the independence of judges, it should be pointed out that some countries like Austria have established a system whereby candidate judges are being evaluated during a probationary period during which they can assist in the preparation of judgements but they can not yet take judicial decisions which are reserved to permanent judges.

CDL-AD(2007)028 Report on Judicial Appointments, para. 38-43.

The CCJE [...] stressed: “when tenure is provisional or limited, the body responsible for the objectivity and the transparency of the method of appointment or re-appointment as a full-time judge are of especial importance<sup>8</sup>”.

CDL-AD(2003)019 Opinion on three Draft Laws proposing Amendments to the Constitution of Ukraine , para. 40.

In the Commission's view, there is no justification in principle for treating judges differently in matters of discipline and removal according to whether they are members of superior or inferior courts. All judges should enjoy equal guarantees of independence and equal immunities in the exercise of their judicial functions.

CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995, chapter B.1.e.

[...] the President [...] may dismiss by his own initiative the Chairman and the members of the Constitutional Court (even those appointed by the Council of the Republic), the President and the members of the High Economic Court, the Chairman and the members of the Central Board for elections and referenda, the Procurator General, the Chairman of the Committee for State Control, and the Chairman and the members of the Board of the National Bank: even if the grounds for the exercise of these prerogatives shall be provided by law (regrettably they are not defined in the Constitution), it is possible to say that the interference of the President in the sphere of other state bodies could not be stronger.

CDL-INF(1996)008 Opinion on the amendments and addenda to the Constitution of the Republic of Belarus as proposed by i: the President of the Republic & ii: the Agrarian and Communist groups of parliamentarians, para. 34.

[...] granting the latter the right to propose the dismissal of judges of the Supreme Court and of the Economic Court (Article 52, paragraph 2) is a serious distortion of the principles of judicial independence and of the separation of powers. accorder [au président du Parlement] le droit de proposer [à celui-ci] la révocation des juges de la Cour suprême [...] et de la Cour économique[...] est une grave entorse au principe de l'indépendance de la justice et de la séparation des pouvoirs.

CDL-INF(1997)006 Opinion on the draft Constitution of the Nakhichevan autonomous republic (Azerbaijan Republic), chapter 6, «The independence and functioning of the judiciary», al. 1.

[...] the Commission finds that the Supreme Court should not have the power to dismiss cantonal judges, nor the cantonal high court to dismiss municipal judges [...].

CDL-INF(1998)015 Opinions on the constitutional regime of Bosnia and Herzegovina, chapter B.I, para. 9.

[...] the power to make such a finding should rather be entrusted to a judicial body such as the Constitutional Court.

[...] The Commission observes that decisions as to the removal of judges is left to the Constitutional Court. Although this may be seen as an additional guarantee for judicial independence, the absence of any remedy against such a decision of the Constitutional Court can raise problems. A more adequate solution would be to leave the initial decision as to the removal of a judge to the Council of Justice with the possibility for the judge dismissed to appeal to the Constitutional Court.

The question was further considered whether it should be possible for the Constitutional Court to raise ex officio the question of removing a judge, when the Council of Justice does not take any action. The Commission's Rapporteurs expressed concern about this; it was more appropriate to let the President of the Republic (the ultimate appointing authority) or the Minister of Justice the right to appeal to the Constitutional Court.

The Commission is now satisfied that the initiative for the dismissal of a judge belongs to the Minister of Justice [...]. Of course the question remains as to the role of the Judicial Council in this matter.

CDL-INF(2001)017 Report of the Venice Commission on the Revised Constitution of the Republic of Armenia, para. 63.

Any action to remove incompetent or corrupt judges had to live up to the high standards set by the principle of the irremovability of the judges whose independence had to be protected. It was

necessary to depoliticise any such move. A means to achieve this could be to have a small expert body composed solely of judges giving an opinion on the capacity or behaviour of the judges concerned before an independent body would make a final decision.

CDL-AD(2003)012 Memorandum: Reform of the Judicial System in Bulgaria, para. 15c).

The Council of Justice should be the final authority for all aspects of the professional life of judges in particular matters pertaining to their selection, appointment, career (including promotion and transfer), training, dismissal and discipline, and should be responsible for overseeing the training of judges.

CDL-AD(2004)044 Interim Opinion on Constitutional Reforms in the Republic of Armenia, para.59.

Principle I.2.c of Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe) states “All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. The authority taking the decision on the selection and career of judges should be independent of the government and the administration.”

[...] In the light of European standards the selection and career of judges should be “based on merit, having regard to qualifications, integrity, ability and efficiency”<sup>9</sup>.

[...] According to opinion No 1 (2001) of the CCJE, “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 criteria.”

The European Charter on the statute for judges adopted in Strasbourg in July 1998 (DAJ/DOC(98)23) states: “In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.” According to the Explanatory Memorandum of the European Charter, the term “intervention” of an independent authority means an opinion, recommendation or proposal as well as an actual decision.

The CCJE commends the standards set by the European Charter “in so far as it advocated the intervention (in a sense wide enough to include an opinion, recommendation or proposal as well as an actual decision) of an independent authority with substantial judicial representation chosen democratically by other judges”.

[...] The Venice Commission is of the opinion that a judicial council should have a decisive influence on the [...] promotion of judges and (maybe via a disciplinary board set up within the council) on disciplinary measures against them.

[...] In its opinion No 1 (2001) on Standards concerning the Independence of the Judiciary and the Irremovability of Judges the Consultative Council of European Judges suggests that “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’”. Once this is done, those bodies or authorities responsible for any appointment or promotion will be obliged to act accordingly, and it will then at least be possible to scrutinize the content of the criteria adopted and their practical effect.”

CDL-AD(2007)028 Judicial Appointments (report), para. 4, 10, 18-20, 25, 37.

The presence of the Minister of Justice on the Council is of some concern, as regards matters relating to the transfer and disciplinary measures taken in respect of judges at the first level, at the appeal [...]. [...] It is advisable that the Minister of Justice should not be involved in decisions concerning the transfer of judges and disciplinary measures against judges, as this could lead to inappropriate interference by the Government.

CDL-INF(1998)009 Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, para. 16, cited in CDL-AD(2007)028 Judicial Appointments (report), para.34.

Although the presence of the members of the executive power in the judicial councils might raise confidence-related concerns, such practice is quite common. [...]Such presence does not seem, in itself, to impair the independence of the council, according to the opinion of the Venice Commission. However, the Minister of Justice should not participate in all the council's decisions, for example, the ones relating to disciplinary measures.

CDL-AD(2007)028 Judicial Appointments (report), para. 33.

While it is obviously appropriate that questions pertaining to appeals and the procedure before the various courts are determined in the various codes of procedure, it may be preferable, under the specific conditions of a country newly establishing a judicial system based on the rule of law, to have one comprehensive text covering all questions pertaining to the composition, organisation, activities and standing of the judiciary.

CDL-INF(2000)005 Opinion on the draft law of Ukraine on the judicial system «preliminary remarks», al. 3.

The Commission wishes to underline that it is essential that this constitutional law should provide detailed and precise grounds for termination of office of judges and a detailed procedure to be followed, including the possibility for the judges whose mandate is terminated to seek review of this decision by an independent body. In this respect, the Commission refers to the principles contained in Articles 5 and 7 of the European Charter on the Statute for judges.

CDL-AD(2002)033 Opinion on the draft amendments to the Constitution of Kyrgyzstan, par. 11.

The Article provides that the selection, appointment and dismissal of judges is to be determined by law. [...] Guarantees for non-removability [of judges] ought to be provided for in the Constitution. At the least, the Constitutional provisions should determine the minimum conditions under which a judge can be dismissed or suspended. The law also provides for disciplinary liability for judges, suspension from case hearing, removal from the post before the term or transfer to another office according to law. Again, it appears undesirable that ordinary law can provide for such matters without any Constitutional guidance.

La loi porte également sur [...] la mutation [...]. Encore une fois, [il convient de dire que] il ne paraît pas souhaitable qu'une loi ordinaire puisse porter sur de telles matières sans aucun encadrement constitutionnel.

CDL-AD(2005)003 Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, en collaboration avec OSCE/BIDDH, para. 105.

The provision that a judge may be removed for systematically failing to perform official responsibilities seems to be a provision which is not inappropriate. The failing to perform the official responsibilities has to be caused by a voluntary choice of the concerned person and not by his or her health problems. A question arises whether the hypothesis is fulfilled only if a person does not de facto perform his or her responsibilities by being absent from office or not dealing with the docket?

Or, also, is the revocation possible if his (her) behaviour does not comply with the rules concerning the professional standards of fairness, accuracy and correctness. This last case could be covered by the last part of the sentence ("perform activities that undermine the prestige of the judiciary"), but it is not clear whether this last provision regards the professional aspects of the life of the concerned person, or the social aspects of his or her life. In both the cases it would require a major clarity and a refinement to avoid its evident ambiguity. This provision should either be removed or made more specific so as to specify clearly what sort of conduct is envisaged.

CDL-AD(2003) Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria , par. 16.

It may be noted that the draft constitutional amendments text provides no right to remove a judge or other official for incapacity or refusal or failure to fulfil functions, nor does it provide a mechanism to determine the issue in question.

Notons que le [projet de loi modificatrice de la Constitution] ne prévoit aucun droit de limoger un juge ou un autre fonctionnaire pour motif d'incapacité ou de refus d'assumer ses fonctions, ni de mécanisme pour déterminer cette question.

CDL-AD(2005)005 Opinion on Draft Constitutional Amendments relating to the Reform of the Judiciary in Georgia , para. 10.

At any rate, given that [judges of local courts] are appointed for seven years only [...], the Commission is of the view that the appropriate constitutional law should set out objective criteria for their reappointment, in order safeguard their independence.

CDL-AD(2002)033 Opinion on the draft amendments to the Constitution of Kyrgyzstan, para. 10.

the discretion of the Supreme Judicial Council in confirming or denying the permanent status to magistrates should be limited by [...] criteria for this decision already at the constitutional level.

CDL-AD(2003)016 Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria, para. 26.

It would be appropriate to specify the term of the chairs [of the different courts in the Constitution].

CDL-AD(2005)003 Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, en collaboration avec OSCE/BIDDH, par. 105.

With regard to many questions relating to the status of military judges, in particular their dismissal, the draft law refers to the Law "On Universal Conscription and Military Service". The Commission can only express the hope that this law contains sufficient guarantees to ensure the independence and impartiality of military judges in accordance with the requirements developed in the case law of the European Court of Human Rights.

CDL-INF(2000)005 Opinion on the draft law of Ukraine on the judicial system, "General Comments", "The military courts", al. 4.

#### 2.4.2.3 Appointment Procedure

Principle I.2.c of Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe) states "[...] In order to safeguard the independence [of the authority taking the decision on the selection and career of judges], rules should ensure that, for instance, its members are selected by the judiciary [...]. »

CDL-AD(2007)028 Judicial Appointments (report), para. 4

The European Charter on the statute for judges adopted in Strasbourg in July 1998 (DAJ/DOC(98)23) states: “In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.” [...]

The CCJE commends the standards set by the European Charter “in so far as it advocated [...] an independent authority with substantial judicial representation chosen democratically by other judges”.

CDL-AD(2007)028 Judicial Appointments (report), para. 19-20.

The Commission welcomes the proposal [...] to have the Judicial Council composed of nine judges out of twelve members, elected by their peers.[...]

CDL-AD(2004)044 Interim Opinion on Constitutional Reforms in the Republic of Armenia, para. 57.

[...]in a system guided by democratic principles, it seems reasonable that the Council of Justice should be linked to the representation of the will of the people, as expressed by Parliament.

[...] In general, it seems legitimate to give Parliament an important role in designating members of the Council [of Justice].

CDL-INF(1998)009 Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, para. 9 and 19, paragraphe 9 cited in CDL-AD(2007)028 Judicial Appointments (report), para. 31.

The Venice Commission does not consider that there can be, in itself, any objection to the election of a substantial component of the Supreme Judicial Council by the Parliament.

CDL-INF(1999)005 Opinion on the reform of the judiciary in Bulgaria, para. 29.

The National Assembly should not be given a real choice of candidates and the “authorised nominators” should only propose one candidate per vacant position. In this way, the National Assembly will have a right of veto. This seems to be the only solution which would avoid political considerations being taken into account in the nomination of the Council members.

CDL-AD(2008)006 Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia. para. 48

As regards this body, the Venice Commission repeats its observations on the two obstacles to be avoided: corporatism and politicisation (CDL-AD (2002) 12, paragraph 63 et seq.).

[...]politicisation can be avoided if Parliament is solely required to confirm appointments made by the judges.

CDL-AD(2002)021 Supplementary Opinion on the Revision of the Constitution of Romania, para. 21-22.

[The Commission] considers however that the non-judge members should rather be elected by Parliament than by the President of the Republic.

CDL-AD(2004)044 Interim Opinion on Constitutional Reforms in the Republic of Armenia, para. 57.

A solution should therefore be found ensuring that the opposition also has some influence on the composition of the Council. One possibility would be to require a two-thirds (as in Spain) or three-fourths majority for the election of members by Parliament, another to provide that one of the two lawyer members should be designated by the parliamentary opposition. In any case, the presence of members nominated by the opposition but elected by parliament should be ensured while taking procedural safeguards against the risk of a stalemate.

CDL-INF(1998)009 Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, para. 19.

[...] a substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself. In order to provide for democratic legitimacy of the Judicial Council, other members should be elected by Parliament among persons with appropriate legal qualification taking into account possible conflicts of interest.

CDL-AD(2007)028 Judicial Appointments (report), para. 29.

It is not necessary to create an electoral register or directory for the judges who are allowed to vote in the Council elections. It is difficult to see how a president of a court could ignore a colleague in the distribution of ballot papers or how an individual who is not a judge would obtain Such a ballot.

CDL-AD(2008)006 Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia. para. 51

The composition of the Supreme Council of Justice should be depoliticised by providing for a qualified majority for the election of its members.

CDL-AD(2002)015 Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, para. 5.d), there are also references in CDL-AD(2007)028 Judicial Appointments (report), para. 32, note 18

The delegation reiterated the proposal of the Commission to have the parliamentary component of the Council elected with a qualified majority. This would make sure that this component reflected the composition of the political forces in Parliament and would effectively make it impossible that the majority in Parliament fills all positions with its own candidates as it had been the case in the past.

CDL-AD(2003)012 Memorandum: Reform of the Judicial System in Bulgaria, para. 15e).

A major recommendation of the Venice Commission since 1999 - the depolitisation of the Supreme Judicial Council by providing for a qualified majority for the election of its parliamentary component - might however have been possible even within the framework of the current amendments.

CDL-AD(2003)016 Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria , para. 25.

The Venice Commission is [...] strongly in favour of the depolitisation of such bodies by providing for a qualified majority for the election of its parliamentary component. This should ensure that a governmental majority cannot fill vacant posts with its followers. A compromise has to be sought with the opposition, which is more likely to bring about a balanced and professional composition.

CDL-AD(2007)028 Judicial Appointments (report), para. 32.

Councillors who are not ex officio members may be elected for a five-year term, with no possibility for re-election. The preclusion from immediate re-election is destined to enhance the guarantees of independence of the [...] members [of the High Council of Justice].

Since there is no gradation in the turnover of the Council, the elected members would end their terms simultaneously. Thus the composition of the Council would change almost entirely, with the exception of the ex-officio members. The influence of the ex-officio members within the Council might thereby be unduly strengthened. In addition, a severe lack of continuity in the Council's work might result, due to the fact that the new members would have to familiarise themselves with the tasks of the Council and the transition from one composition to another would cause certain initiatives undertaken by previous councillors to be abandoned or forgotten.

Given their crucial role in appointing judges the composition of the Supreme Council [of Justice], as well as their appointment or election, should be defined in the Constitution.

CDL-AD(2005)003 Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, in cooperation with OSCE/ODIHR, para. 102.

An appropriate method for guaranteeing judicial independence is the establishment of a judicial council, which should be endowed with constitutional guarantees for its composition [...].

CDL-AD(2007)028 Judicial Appointments (report), para. 48.

***REPORT ON THE INDEPENDENCE OF THE JUDICIAL SYSTEM PART I: THE INDEPENDENCE OF JUDGES, Venice Commission, Venice, 12-13 March 2010 CDL-AD(2010)004***

IV. Conclusions

82. The following standards should be respected by states in order to ensure internal and external judicial independence:

2. All decisions concerning appointment and the professional career of judges should be based on merit applying objective criteria within the framework of the law.

***THE KYIV RECOMMENDATIONS ON JUDICIAL INDEPENDENCE IN EASTERN EUROPE, SOUTH CAUCASUS AND CENTRAL ASIA, OSCE, 2010***

Transparent and Independent Selection of Court Chairpersons

16. The selection of court chairpersons should be transparent. Vacancies for the post of court chairpersons shall be published. All judges with the necessary seniority/experience may apply. The body competent to select may interview the candidates. A good option is to have the judges of the particular court elect the court chairperson. In case of executive appointment, an advisory body - such as a Judicial Council or Qualification Commission - taking also into consideration views from the local bench, should be entitled to make a recommendation which the executive may only reject by reasoned decision. In this case the advisory body may recommend a different candidate. Additionally, in order to protect against excessive executive influence, the advisory body should be able to override the executive veto by qualified majority vote.

Diversity of Access to Judicial Profession

17. Access to the judicial profession should be given not only to young jurists with special training but also to jurists with significant experience working in the legal profession (that is, through mid-career entry into the judiciary). The degree to which experience gained in the relevant profession can qualify candidates for judicial posts must be carefully assessed.

Improvement of Legal Education



18. Access to the judicial profession should be limited to those candidates with a higher law degree. In the university curriculum more attention should be given to the training of analytical skills. Elements such as case studies, practical experience, law clinics and moot courts should be integrated. The same level of education should be guaranteed in State and private universities, including distant learning programmes. External evaluation of the university curricula may positively contribute to their improvement.

***ABA MODEL CODE OF JUDICIAL CONDUCT (2011 EDITION), adopted by the House of Delegates of the American Bar Association on August 7, 1990 and amended on August 6, 1997, August 10, 1999, August 12, 2003, February 12, 2007 and August 10, 2010***

## CANON 2

### Rule 2.13: Administrative Appointments

(A) In making administrative appointments, a judge:

(1) shall exercise the power of appointment impartially\* and on the basis of merit; and

(2) shall avoid nepotism, favoritism, and unnecessary appointments.

(B) A judge shall not appoint a lawyer to a position if the judge either knows\* that the lawyer, or the lawyer's spouse or domestic partner,\* has contributed more than \$[insert amount] within the prior [insert number] year[s] to the judge's election campaign, or learns of such a contribution\* by means of a timely motion by a party or other person properly interested in the matter, unless:

(1) the position is substantially uncompensated;

(2) the lawyer has been selected in rotation from a list of qualified and available lawyers compiled without regard to their having made political contributions; or

(3) the judge or another presiding or administrative judge affirmatively finds that no other lawyer is willing, competent, and able to accept the position.

(C) A judge shall not approve compensation of appointees beyond the fair value of services rendered.

## CANON 4

### Rule 4.3: Activities of Candidates for Appointive Judicial Office

A candidate for appointment to judicial office may:

(A) communicate with the appointing or confirming authority, including any selection, screening, or nominating commission or similar agency; and

(B) seek endorsements for the appointment from any person or organization other than a partisan political organization.

***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

## Chapter VI – Status of the judge

44. Decisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities. Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity.

45. There should be no discrimination against judges or candidates for judicial office on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, disability, birth, sexual orientation or other status. A requirement that a judge or a candidate for judicial office must be a national of the state concerned should not be considered discriminatory.

**RESOURCE GUIDE ON STRENGTHENING JUDICIAL INTEGRITY AND CAPACITY, UNODC, 2011**

I. RECRUITMENT, PROFESSIONAL EVALUATION AND TRAINING OF JUDGES

8. Conclusions and recommendations

- When recruitment takes place by nominal appointment, the procedure through which the nominations and appointments are decided should be fully transparent, to guarantee both the professional qualifications and the non-political nature of the choice.
- In case that the judges are elected, the election should be prepared by collecting enough information on all candidates concerning their professional behaviour in order to ensure that the elections will not be of a purely political nature.
- Measures should be adopted in the recruitment process to make the judicial corps representative of the social structure of the country, and avoid discrimination on the basis of race or gender.

**DUBLIN DECLARATION ON STANDARDS FOR THE RECRUITMENT AND APPOINTMENT OF MEMBERS OF THE JUDICIARY, The General assembly of European Network of Councils for the Judiciary (ENCJ), 2012**

I. Indicators of minimum standards regarding the recruitment, selection, appointment and (where relevant) the promotion of members of the judiciary

1. Judicial appointments should only be based on merit and capability.

There requires to be a clearly-defined and published set of selection competencies against which candidates for judicial appointment should be assessed at all stages of the appointment process.

2. Selection competencies should include intellectual and personal skills of a high quality, as well as a proper work ethic and the ability of the candidates to express themselves.

3. The intellectual requirement should comprise the adequate cultural and legal knowledge, analytical capacities and the ability independently to make judgments.

4. There should be personal skills of a high quality, such as the ability to assume responsibility in the performance of his/her duties as well as qualities of equanimity, independence, persuasiveness, sensibility, sociability, integrity, unflappability and the ability to co-operate.

7. Whilst the selection of judges must always be based on merit, anyone appointed to judicial office must be of good character and a candidate for judicial office should not have a criminal record, unless it concerns minor misdemeanours committed more than a certain number of years ago.

8. Diversity in the range of persons available for selection for appointment should be encouraged, avoiding all kinds of discrimination, although that does not necessarily imply the setting of quotas *per se*, adding that any attempt to achieve diversity in the selection and appointment of judges should not be made at the expense of the basic criterion of merit.

12. Where promotion of members of the judiciary is based on the periodical assessments of professional performance the assessment process must be conducted according to the same criteria and with the same guarantees as those provided for the initial selection and appointment process (i.e. it should be independent, fair, open and transparent, and on the basis of merit and capability) and should be based on the judge's past performance.

II. Indicators of minimum standards in relation to the competent body to decide on the recruitment, selection, appointment and (where relevant) the promotion of members of the judiciary

9. The body in charge of judicial selection and appointment must create a sufficient record in relation to each applicant to ensure that there is a verifiable independent, open, fair and transparent process and to guarantee the effectiveness of the independent complaints or challenge process to which any unsuccessful applicant is entitled if he or she believes that s/he was unfairly treated in the appointments' process.

10. The body in charge of judicial selection and appointment should guarantee the effectiveness of the independent complaints or challenge process to which any unsuccessful applicant is entitled if he or she believes that s/he was unfairly treated in the appointments' process.

***MT. SCOPUS APPROVED REVISED INTERNATIONAL STANDARDS OF JUDICIAL INDEPENDENCE, International Association of Judicial Independence and World Peace, 2008, 2011, 2012***

4.4. Promotion of judges shall be based on objective factors, in particular merit, integrity and experience.

4.5. Judicial appointments and promotions shall be based on transparency of the procedures and standards and shall be based on professional qualifications, integrity, ability and efficiency.

***FIRST STUDY COMMISSION REPORT - NOMINATION OF JUDGES, International Association of Judges (IAJ), 2013***

Recommendation on the nomination of judges

- Each country have objective criteria to secure the selection of the most qualified judges;
- Employ a process that must be transparent;
- In principle, judicial nominations be made by an independent body the membership of which is substantially composed of judges, and nominations should be based on objective criteria.

***BRIJUNI STATEMENT OF THE PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY, Conference of Chief Justices of Central and Eastern Europe, 14 October, 2015***

Appointment of judges

12. To enable the judiciary to achieve its objectives and perform its functions it is essential that judges be chosen by merit on the basis of proven competence, integrity and independence.

13. The method of appointment of judges must be such as will ensure the appointment of persons who are best qualified for judicial office. It must provide safeguards against improper influences being taken into account so that only persons of competence, integrity and independence are appointed.

14. In the selection of judges there must be no discrimination against a person on the basis of race, color, gender, religion, political or other opinion, national or social origin, marital status, sexual orientation, property, birth or status, except that a requirement that a candidate for judicial office must be a national of the country concerned shall not be considered discriminatory

15. Promotion of judges must be based on an objective assessment of factors such as competence, integrity, independence and experience.

16. The process for the selection, appointment, and promotion of judges must be transparent. In order to ensure the transparency of the selection process, the law should clearly define the procedures and objective criteria for the selection of judges.

**OPINION NO. 19 (2016) ON THE ROLE OF COURT PRESIDENTS, Consultative Council of European Judges, Council of Europe, 2016**

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.

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. 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.

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.

**LILONGWE PRINCIPLES AND GUIDELINES ON THE SELECTION AND APPOINTMENT OF JUDICIAL OFFICERS, Adopted at the Southern African Chief Justices' Forum Conference and Annual General Meeting , Lilongwe , 30 October 2018**

Underlying Principles for the Selection and Appointment of Judicial Officers:

- i) The principle of transparency should permeate every stage of the selection and appointment process.
- ii) The selection and appointment authority should be independent and impartial.
- iii) The process for the selection and appointment of judicial officers shall be fair.
- iv) Judicial appointees should exceed minimum standards of competency, diligence and ethics.
- v) Appointments of candidates should be made according to merit.
- vi) The appointment process should ensure stakeholder engagement at all relevant stages of the process.
- vii) Objective criteria for the selection of judicial officers should be pre-set by the selection and appointment authority, publicly advertised, and should not be altered during that process.
- viii) The judicial bench should reflect the diversity of society in all respects, and selection and appointment authorities may actively prioritise the recruitment of appointable candidates who enhance the diversity of the bench.
- ix) Candidates shall be sourced according to a consistent and transparent process.
- x) The shortlisting of candidates shall be credible, fair and transparent.
- xi) Candidates shortlisted for interview shall be vetted and stakeholders invited to comment on the candidate's suitability for appointment prior to interview.
- xii) Interviews should be held for the selection of candidates for appointment to judicial office.

xiii) The final selection (decision) to recommend for appointment shall be fair, objective and based on weighing the suitability of the candidate for appointment against the criteria set for that appointment.

xiv) Formal appointment shall be made constitutionally and lawfully.

xv) Provision shall be made for judicial officers to assume office timeously once appointed.

## Guidelines for the Selection and Appointment of Judicial Officers

### 3.1 Overall framework

#### 3.1.1. Transparency

Principle (i): The principle of transparency should permeate every stage of the selection and appointment process.

Guideline: Appropriate records of each stage of the process shall be kept by the selection and appointment authority and available to interested parties.

Transparency is a principle which should be encouraged throughout the selection and appointment process to enhance the integrity of the process. As far as possible, processes which encourage record keeping and transparency should be favoured in the development of legislation, policy and practice.

Transparency as a principle should permeate all levels of the selection and appointment process:

a) the public should be made aware of the persons and bodies involved in the various stages of the process;

b) vacancies should be widely advertised with reasonable time provided for candidates to be nominated, recommended, or to apply. That procedure should pay due regard to achieving the substantive objects and purposes of the selection and appointment process, rather than heed to administrative and procedural technicalities;

c) the criteria for the appointment, shortlisting, selection and decision-making process should be pre-determined and publicly available. They should not be amended during the selection process;

d) subject to national laws, all records generated by the process should be documented and kept by the selection and appointment body, and be available to interested parties; and

e) the nomination of persons, appointment and assumption of office by a judicial officer should be publicised in order to ensure the integrity of the process.

#### 3.1.2. Independence of selection and appointment authority

Principle (ii): The selection and appointment authority should be independent and impartial.

Guideline: The Chief Justice should represent the Judiciary on the selection and appointment authority.

The selection and appointment authority should be independent and impartial, not subject to the direction or control of any person, ministry, body or organisation. The Chief Justice should be represented on that body and best practice is for broad involvement from a wide range of representatives. International best practice instruments recommend that a broad-based selection and appointment body, comprising around 33% judicial officers, as well as members of the legal profession, teachers of law, and lay persons.

To secure the fairness of the administration of the process, there may be need to separate the administration of the selection and appointment authority from any factors which may affect the integrity of the process. Best practice may be to ensure that the administration should be in separate offices or premises from other structures within the judiciary, or any other organ of state.

### 3.1.3. Fairness

Principle (iii): The process for the selection and appointment of Judicial Officers shall be fair.

There should be fairness at all levels of the selection and appointment process including measures designed to guard against abuse of discretion, arbitrary interference, and unconscious bias. There should be substantively equal treatment of similarly placed candidates.

### 3.1.4. Appointment on merit

Principle (iv): Judicial appointees should exceed minimum standards of competency, diligence and ethics.

Principle (v): Appointments of candidates should be made according to merit.

Appointments should primarily be made according to merit. There is an overarching need to ensure that judicial appointees exceed the minimum standards of competency, diligence and ethics through rigorous interviewing and vetting processes in order to ensure effective and just decision-making, and the integrity of the judiciary. Meritorious appointments increase public confidence in the judiciary.

Seniority on the bench may be a relevant criterion for the purpose of continuity and judicial promotion, but should not equate to automatic promotion.

A candidate's professional performance may be a key component of assessment of eligibility for appointment or promotion.

### 3.1.5. Stakeholder engagement

Principle (vi): The appointment process should ensure stakeholder engagement at all relevant stages of the process. In order to ensure the legitimacy and accountability of the process, meaningful engagement and participation from all relevant stakeholders should be sought at all applicable stages of the process.

## 3.2. Criteria

Principle (vii): Objective criteria for the selection of judicial officers should be preset by the selection and appointment authority, publicly advertised, and should not be altered during that selection process.

Guideline: In order to be appointable, judicial officers should, at a minimum:

- (a) hold a recognised law degree;
- (b) hold an appropriate level of post-qualification experience;
- (c) be a fit and proper person;
- (d) be competent to perform the functions of a judicial officer;
- (e) possess good written and communication skills;
- (f) be able to diligently render a reasoned decision;
- (g) not have any criminal convictions, other than for minor offences;
- (h) not have any ongoing political affiliation after appointment.

Principle (viii): The judicial bench should reflect the diversity of society in all respects and selection and appointment authorities may actively prioritise the recruitment of appointable candidates who enhance the diversity of the bench.

The principles of fairness and transparency are reinforced by the publication of criteria for the selection of judicial officers. These criteria should be pre-set by the selection and appointment authority, advertised at the opening of the recruitment process, and should not be altered during the process, in line with the rule of law. Established criteria act as a guide to candidates and provide objective standards to bind the actions of the selection and appointment authority.

#### 3.2.1. Minimum requirements

Criteria should cover the minimum requirements candidates are expected to meet, and should include:

- a) academic qualifications, including, at minimum, a recognised law degree;
- b) a specified minimum level of post-qualification experience;
- c) ethical (fit and proper) standards;
- d) competence to perform the functions of a judicial officer including the appropriate personal skills, adequate cultural and legal knowledge, and analytical capabilities;
- e) good written and communication skills, and
- f) an ability to make reasoned decisions, and to do so diligently.

#### 3.2.2. Fit and Proper standards

Candidates shall be fit and proper persons to hold judicial office. The fit and proper requirement shall take into account the ability to uphold the provisions of the applicable Constitution and Judicial Code of Ethics. It is guided by the requirements in the Bangalore Principles of Judicial Conduct.

Immediately following appointment, candidates shall divest themselves of all interests which may affect their ability to carry out their judicial duties. At a minimum, appointees shall not hold political office or have any active political affiliations or membership.

Subject to domestic laws, candidates should not have any previous criminal convictions besides minor offences.

#### 3.2.3. Diversity

In appointing candidates, the selection and appointment authority should ensure that the judicial bench reflects society in all respects, and may actively prioritise the recruitment of appointable candidates who enhance the diversity of the bench.

Appropriate grounds include:

- a) diversity of academic, personal, social, and professional background;
- b) gender;
- c) race;
- d) culture;
- e) ethnicity;
- f) disability;
- g) geographical and regional representation;

- h) religion;
- i) language; and
- j) people who have worked with those groups and are thereby aware of specific issues or challenges experienced by the groups.

Diversity of age groups on the bench may be considered in order to ensure continuity and progressive retirement.

### 3.3. Sourcing of candidates

Principle (ix): Candidates shall be sourced according to a consistent and transparent process.

Guideline (1): Candidates for appointment may be sourced through applications, nominations, proposals, direct searches or invitation to express interest and apply.

Guideline (2): Regardless of how candidates are sourced, no distinction may be drawn between candidates in the selection and appointment process once their names are sourced.

The selection and appointment authority may choose to source candidates through calls for application or nomination, or through directly inviting certain applicants or classes of applicants to apply. This may be done, for example, to specifically address diversity gaps.

This should be through a standardised, transparent process. Where nominations are accepted, a standardised process should protect against interference with the independence of the candidates. However the candidates are sourced, they should be subjected to the same process and complete the same documentation.

The required documentation should include a curriculum vitae, and contain sufficient detail on the following:

- a) health status;
- b) publications;
- c) employment history;
- d) business interests;
- e) previous political involvement including membership of political parties;
- f) potential conflicts of interest; and
- g) disclosure of anything which if discovered after appointment may cause the judiciary embarrassment or bring the judiciary into disrepute.

Records of all candidates shall be kept by the selection and appointment authority and made available.

### 3.4. Shortlisting

Principle (x): The shortlisting of candidates shall be credible, fair, and transparent.

Guideline (1): Objective criteria should be developed to guide the process for the shortlisting of appointable candidates.

Guideline (2): These criteria should be agreed and publicised before the shortlisting process.

Guideline (3): The body responsible for shortlisting should be made known to stakeholders and the candidates.



The selection and appointment authority shall develop guidelines to enable it to create a shortlist of appointable candidates who meet the minimum criteria for the available positions.

Shortlisting criteria, including how and by whom the shortlisting is done, shall be known prior to the sourcing of candidates.

The selection and appointment authority should ensure that a sufficient number of applicants are shortlisted to ensure a meaningful appointment process.

The selection and appointment authority may decide to make the names on the shortlist public.

### 3.5. Vetting and stakeholder engagement

Principle (xi): Candidates shortlisted for interview shall be vetted and stakeholders invited to comment on the candidate's suitability for appointment prior to interview.

Post-shortlisting, prior to interviewing, candidates shall be vetted and stakeholder comments shall be actively encouraged. Where the selection and appointment authority does not undertake the vetting process it shall not abdicate its function, but shall have the final say on the weight to be attached to findings about the suitability of candidates.

Financial interests, criminal records, wealth declarations and reference checks shall be carried out to ensure veracity of disclosure.

Vetting procedures shall be objective, factual and fair.

Stakeholder comment shall be encouraged as best practice. Comments shall be solicited from core groups, including the bar, academia, the judiciary and civil society. The shortlisted names should be made available to the general public.

Anonymous comments on candidates' suitability may be entertained where the comments have some foundation taking into account the gravity of the complaint, the credibility of the source, and the reasons for confidentiality.

Candidates shall be made aware of adverse comments arising out of the vetting process and stakeholder comment. Candidates may be given the opportunity to respond appropriately at, or prior to, the interview stage.

### 3.6. Interviews and selection

Principle (xii): Interviews should be held for the selection of candidates for appointment to Judicial Office.

Guideline (1): Interview processes should be equal, fair, rigorous, respectful and permit candidates the opportunity to choose to respond to adverse comments made against the candidate.

Guideline (2): Records of interviews shall be made, kept, and available.

Best practice is that interviews are held for the selection of candidates.

The interview process should ensure substantive equality in the treatment of candidates.

The interview may be supplemented by a written assessment.

Questions which may be put to candidates should be agreed in advance by the members of the selection and appointment authority, taking into account the need for flexibility in assessing persons from different backgrounds. Substantively similar questions shall be put to each candidate. Questions should be relevant to measuring the competencies and attributes of the candidate against the criteria for the appointment.

The tone of the interview should be non-confrontational and ensure that candidates are treated with dignity and respect. However, the selection and appointment authority may engage in robust but respectful questioning in appropriate cases. Interview questions should not seek to serve alternative agendas or take candidates by surprise.

Candidates should have the opportunity to respond adequately to adverse comments during the interview. The selection and appointment authority should enable candidates to elect to answer certain personal questions in private or in public. Candidates should also be able to withdraw from the process.

Records of the interview process shall be maintained by the selection and appointment authority, and made available.

### 3.7. Decision making

Principle (xiii): The final selection (decision) to recommend for appointment shall be fair, objective, and based on weighing the suitability of the candidate for appointment against the criteria set for that appointment.

After interviews, the decision-making process shall be fair, objective, and based on a weighing of the pre-set criteria.

Emerging best practice is for the development of a ranking and scoring process for assessing candidates. The selection and appointment authority is encouraged to meet before the interview process to decide mathematical weightings of the various criteria according to the needs of the position for appointment, and the needs of the judiciary as a whole. This creates substantive reasons for their recommendations.

Members of the selection and appointment authority should attempt to reach consensus, and may resolve deadlock by vote as a final resort.

Records of the decision-making process shall be kept by the selection and appointment authority.

Subject to constitutional and national legislation, the selection and appointing authority may choose to make its recommendations public for transparency purposes.

### 3.8. Appointment

Principle (xiv): Formal appointment shall be made constitutionally and lawfully.

The appointment of judicial officers is made according to constitutional and national legislative provisions. Best practice is that this is made timeously.

### 3.9. Post appointment

Principle (xv): Provision shall be made for judicial officers to assume office timeously once appointed.

Guideline (1): Appointed candidates shall assume office timeously, preferably within six months of appointment.

Guideline (2): Appointees shall have adequate time to complete cases, close legal practices, and divest themselves of potential conflicts of interest.

Guideline (3): Arrangements shall be made for appropriate induction to the appointment position and ongoing skill and legal development.

Following appointment, the appointing authority and the judiciary should coordinate to ensure that the appointee assumes office within a reasonable time, allowing a maximum period of six months

for the appointee to wrap up their practice, or finish judgments and to take appropriate steps to resign from conflicting interests.

Furthermore, the judiciary is responsible for ensuring that appointees are appropriately inducted. A compulsory period of training immediately post appointment is best practice, and requirements for ongoing legal and skills development should be encouraged.

### 3.10. Applicability

Guideline (1): The principles underlying these guidelines should be followed in the appointment of all judicial officers

Guideline (2): These guidelines should be applied as far as possible in the appointment of all judicial officers

As far as practicable these principles and guidelines for appointment should be applied to all judicial appointments, including short-term acting and contractual appointments, subject to variations in the constitutional and legislative frameworks governing such appointments. It is acknowledged that in some jurisdictions the appointment of judges on contract remains an important supplement to the bench, and measures should be taken to ensure that such candidates are appointed through the same process as permanent appointees.

Where abridged appointment processes take place for the appointment of acting judges, the same principles of merit, fairness, transparency and rationality of the appointment shall apply.

Link to full document:

[https://www.unodc.org/res/ji/import/regional\\_standard/sacjf\\_final/sacjf\\_final.pdf](https://www.unodc.org/res/ji/import/regional_standard/sacjf_final/sacjf_final.pdf)

### III. 3.2. THE APPOINTING AND CONSULTATIVE BODIES

#### ***MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE, International Bar Association (IBA), 1982***

A Judges and the Executive, 3 a) and b)

Participation in judicial appointments and promotions by the executive or legislature is not inconsistent with judicial independence provided that appointments and promotions of judges are vested in a judicial body in which members of judiciary and the legal profession form a majority.

#### ***CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) - OPINION N° 20 THE ROLE OF COURTS WITH RESPECT TO THE UNIFORM APPLICATION OF THE LAW, 2017***

Appointments and promotions by a non-judicial body will not be considered inconsistent with judicial independence in countries where, by long historic and democratic tradition, judicial appointments and promotion operate satisfactorily.

#### ***FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY, CONCLUSIONS, THE APPOINTMENT AND THE SOCIAL STATUS OF JUDGES, International Association of Judges (IAJ), 1988***

Part 2

[...] In so far as the question of the appointment of a judge who has already been acting as such to other judicial functions apart from nominations made directly by the Government, there are also countries where these appointments are made by special organs composed entirely or partially of judges appointed or elected by their peers for that purpose. While this solution has the advantage of withdrawing from the Government the direct appointment by the political parties and allowing for a consideration of the characteristics which is essential to the discharge of the judicial function nevertheless one may object that in certain cases this could lead to a certain conservatism harmful to the exercise of the judicial function. One solution which appears to be satisfactory would consist of permitting the Judiciary whether directly or by the intervention of an independent organ composed of judges, or having a majority of judges, to give an advisory opinion but leaving the actual decision to the Government authority and placing upon the latter the obligation to give reasons for a specific decision when that has been taken in spite of an unfavourable opinion by the body of the Judiciary

#### ***BEIJING STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION, as amended in Manila at 7th Biennial Conferences of Chief Justices of Asia and the Pacific, 1997***

Appoitment of Judges

11. To enable the judiciary to achieve its objectives and perform its functions, it is essential that judges be chosen on the basis of proven competence, integrity and independence.

12. The mode of appointment of judges must be such as will ensure the appointment of persons who are best qualified for judicial office. It must provide safeguards against improper influences being taken into account so that only persons of competence, integrity and independence are appointed.

13. In the selection of judges there must no discrimination against a person on the basis of race, colour, gender, religion, political or other opinion, national or social origin, marital status, sexual

orientation, property, birth or status, expect that a requirement that a candidate for judicial office must be a national of the country concerned shall not be considered discriminatory.

14. The structure of the legal profession, and the sources from which judges are drawn within the legal profession, differ in different societies. In some societies, the judiciary is a career service; in others, judges are chosen from the practising profession. Therefore, it is accepted that in different societies, difference procedures and safeguards may be adopted to ensure the proper appointment of judges.

15. In some societies, the appointment of judges, by, with the consent of, or after consultation with a Judicial Services Commission has been seen as a means of ensuring that those chosen judges are appropriate for the purpose. Where a Judicial Services Commission is adopted, it should include representatives the higher Judiciary and the independent legal profession as a means of ensuring that judicial competence, integrity and independence are maintained.

16. In the absence of a Judicial Services Commission, the procedures for appointment of judges should be clearly defined and formalised and information about them should be available to the public.

17. Promotion of judges must be based on an objective assessment of factors such as competence, integrity, independence and experience

***EUROPEAN CHARTER ON THE STATUTE FOR JUDGES AND EXPLANATORY MEMORANDUM, Council of Europe, Strasbourg, 8 - 10 July 1998***

**3. Appoitment and irremovability**

3.1. The decision to appoint a selected candidate as a judge, and to assign him or her to a tribunal, are taken by the independent authority referred to at paragraph 1.3 hereof or on its proposal, or its recommendation or with its agreement or following its opinion.

***OPINION NO. 1 (2001) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES CCJE) FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF COUNCIL OF EUROPE ON STANDARDS CONCERNING THE INDEPENDENCE OF THE JUDICIARY AND THE IRREMOVABILITY OF JUDGES, Council of Europe, 2001***

**The appointing and consultative bodies**

37. Therefore, the CCJE considered 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 criteria.

45. Even in legal systems where good standards have been observed by force of tradition and informal self-discipline, customarily under the scrutiny of a free media, there has been increasing recognition in recent years of a need for more objective and formal safeguards. In other states, particularly those of former communist countries, the need is pressing. The CCJE considered that the European Charter - in so far as it advocated the intervention (in a sense wide enough to include an opinion, recommendation or proposal as well as an actual decision) of an independent authority with substantial judicial representation chosen democratically by other judges<sup>12</sup> - pointed in a general direction which the CCJE wished to commend. This is particularly important for countries which do not have other long-entrenched and democratically proved systems.

***PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA, African Commission on Human and Peoples Rights, 2003***

**A. GENERAL PRINCIPLES APPLICABLE TO ALL LEGAL PROCEEDINGS**

4) Independent tribunal

h) The process for appointments to judicial bodies shall be transparent and accountable and the establishment of an independent body for this purpose is encouraged. Any method of judicial selection shall safeguard the independence and impartiality of the judiciary.

***THE KYIV RECOMMENDATIONS ON JUDICIAL INDEPENDENCE IN EASTERN EUROPE, SOUTH CAUCASUS AND CENTRAL ASIA, OSCE, 2010***

**Membership of Bodies Deciding on Judicial Selection**

8. Members of special commissions for judicial selection should be appointed by the Judicial Council from the ranks of the legal profession, including members of the judiciary. Where Judicial Councils, Qualification Commissions or Qualification Collegia are responsible directly for judicial selection, the members should be appointed to fixed terms of office. Apart from a substantial number of judicial members in this selection body, the inclusion of other professional groups is desirable (law professors, advocates) and should be decided on the basis of the relevant legal culture and experience. Its composition shall ensure that political considerations do not prevail over the qualifications of a candidate for judicial office.

**Recruitment Process**

21. In order to ensure transparency in the selection process, the procedure and criteria for judicial selection must be clearly defined by law. The vacancy note, as well as the terms and conditions, should be publicly announced and widely disseminated. A list of all candidates applying (or at least a short list) should be publicly available. The selection body should be independent, representative and responsible towards the public. It should conduct an interview at least with the candidates who have reached the final round, provided that both the topic of the interview and its weight in the process of selection is predetermined.

22. If there are background checks, they should be handled with utmost care and strictly on the basis of the rule of law. The selecting authority can request a standard check for a criminal record and any other disqualifying grounds from the police. The results from this check should be made available to the applicant, who should be entitled to appeal them in court. No other background checks should be performed by any security services. The decision to refuse a candidate based on background checks needs to be reasoned.

23. Where the final appointment of a judge is with the State President, the discretion to appoint should be limited to the candidates nominated by the selection body (e.g. Judicial Council, Qualification Commission or Expert Commission). Refusal to appoint such a candidate may be based on procedural grounds only and must be reasoned. In this case the selection body should re-examine its decision. One option would be to give the selection body the power to overrule a presidential veto by a qualified majority vote. All decisions have to be taken within short time limits as defined by law

**Representation of Minorities within the Judiciary**

24. Generally it would be desirable that the composition of the judiciary reflects the composition of the population as a whole. In order to increase the representation of minorities in the judiciary, underrepresented groups should be encouraged to acquire the necessary qualifications for being a judge. Nobody must be excluded because they are a member of a certain minority group.

**RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010**

Chapter VI – Status of the judge

46. The authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers.

47. However, where the constitutional or other legal provisions prescribe that the head of state, the government or the legislative power take decisions concerning the selection and career of judges, an independent and competent authority drawn in substantial part from the judiciary (without prejudice to the rules applicable to councils for the judiciary contained in Chapter IV) should be authorised to make recommendations or express opinions which the relevant appointing authority follows in practice.

48. The membership of the independent authorities referred to in paragraphs 46 and 47 should ensure the widest possible representation. Their procedures should be transparent with reasons for decisions being made available to applicants on request. An unsuccessful candidate should have the right to challenge the decision, or at least the procedure under which the decision was made.

**RESOURCE GUIDE ON STRENGTHENING JUDICIAL INTEGRITY AND CAPACITY, UNODC, 2011**

**I. RECRUITMENT, PROFESSIONAL EVALUATION AND TRAINING OF JUDGES**

**8. Conclusions and recommendations**

- When recruitment takes place by means of written exams, the exams should be organized by the state in order to establish common standards and transparent procedures which guarantee impartial assessments of the individual performance of the candidates. Candidates should participate anonymously in the exams. If representatives of other legal professions are members of the examining board they should not prevail over the representatives of the judges.

**DUBLIN DECLARATION ON STANDARDS FOR THE RECRUITMENT AND APPOINTMENT OF MEMBERS OF THE JUDICIARY, The General assembly of European Network of Councils for the Judiciary (ENCJ), 2012**

I. Indicators of Minimum Standards regarding the Recruitment, Selection, Appointment and (where relevant) the Promotion of Members of the Judiciary.

5. Whether the appointment process involves formal examination or examinations or the assessment and interview of candidates, the selection process should be conducted by an independent judicial appointment body.

6. Where the appointment process includes assessment based on reports and comments from legal professionals (such as practising judges, Bar Associations, Law Societies etc) any such consultation must remain wholly open, fair and transparent, adding that the views of any serving judge or Bar Association should be based on the relevant competencies, should be recorded in writing, available for scrutiny and not based on personal prejudice.

9. The entire appointment and selection process must be open to public scrutiny, since the public has a right to know how its judges are selected.

11. If the Government or the Head of State plays a role in the ultimate appointment of members of the judiciary, the involvement of a Minister or the Head of State does not in itself contend against the principles of independence, fairness, openness and transparency if their role in the appointment is clearly defined and their decision-making processes clearly documented, and the involvement of the Government or the Head of State does not impact upon those principles if they give recognition to decisions taken in the context of an independent selection process. Besides, it was also defined as a Standard in this field that where whoever is responsible for making the ultimate appointment (the Government or Head of State) has the right to refuse to implement the appointment or recommendation made in the context of an independent selection process and is not prepared to implement the appointment or recommendation it should make known such a decision and state clearly the reason for the decision.

12. The procedures for the recruitment, selection or (where relevant) promotion of members of the judiciary ought to be placed in the hands of a body or bodies independent of government in which a relevant number of members of the judiciary are directly involved and that the membership of this body should comprise a majority of individuals independent of government influence.

II. Indicators of Minimum Standards in Relation to the Competent Body to Decide on the Recruitment, Selection, Appointment and (where relevant) the Promotion of Members of the Judiciary



2. The judiciary must not necessarily have an absolute majority membership on such a selection and appointment body, since in some of the countries of the Project Team there is a perception that a selection body on which the existing judiciary have a majority membership leaves itself open to the criticism that it is a self-serving body merely recruiting those prospective judges whom it favours and promoting favoured judges from within its own ranks.
3. The body in charge of selecting and appointing judges must provide the utmost guarantee of autonomy and independence when making proposals for appointment.
4. It must be guaranteed that decisions made by the body are free from any influences other than the serious and in-depth examination of the candidate's competencies against which the candidate is to be assessed.
5. The body in charge of judicial appointments should comprise a substantial participation of legal professionals or experts (including experienced judges, academics, lawyers, prosecutors and other professionals) and could also include independent lay members representing civil society, appointed from among well known persons of high moral standing on account of their skill and experience in matters such as human resources.
7. The body in charge of the selection and appointment of judges must be provided with the adequate resources to a level commensurate with the programme of work it is expected to undertake each year and must have independent control over its own budget, subject to the usual requirements as to audit.
8. The body in charge of judicial selection and appointment must also have adequate procedures in place to guarantee the confidentiality of its deliberations.
9. The body in charge of judicial selection and appointment must create a sufficient record in relation to each applicant to ensure that there is a verifiable independent, open, fair and transparent process and to guarantee the effectiveness of the independent complaints or challenge process to which any unsuccessful applicant is entitled if he or she believes that s/he was unfairly treated in the appointments' process.
10. The body in charge of judicial selection and appointment should guarantee the effectiveness of the independent complaints or challenge process to which any unsuccessful applicant is entitled if he or she believes that s/he was unfairly treated in the appointments' process.

**MT. SCOPUS APPROVED REVISED INTERNATIONAL STANDARDS OF JUDICIAL INDEPENDENCE, International Association of Judicial Independence and World Peace, 2008, 2011, 2012**

**4. TERMS AND NATURE OF JUDICIAL APPOINTMENTS**

4.1. The method of judicial selection shall safeguard against judicial appointments for improper motives and shall not threaten judicial independence.

4.2. a) The principle of democratic accountability should be respected and therefore it is legitimate for the Executive and the Legislature to play a role in judicial appointments provided that due consideration is given to the principle of Judicial Independence.

b) The recent trend of establishing judicial selection boards or commissions in which members or representatives of the Legislature, the Executive, the Judiciary and the legal profession take part, should be viewed favorably, provided that a proper balance is maintained in the composition of such boards or commissions of each of the branches of government.

### III. 3.3. THE ROLE OF A JUDICIAL COUNCIL IN THE APPOINTMENT PROCEDURE

#### ***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE (“Singhvi Declaration”), ECOSOC, 1985***

Posting, Promotion and Transfer

13. Where the law provides for the discretionary assignment of a judge to a post on his appointment or election to judicial office such assignment shall be carried out by the judiciary or by a superior council of the judiciary where such bodies exist.

#### ***JUDGES’ CHARTER IN EUROPE, European Association of Judges, 1997***

Fundamental principles

4. The selection of Judges must be based exclusively on objective criteria designed to ensure professional competence. Selection must be performed by an independent body which represents the Judges. No outside influence and, in particular, no political influence, must play any part in the appointment of Judges.

5. Judicial promotion, decided by the above mentioned independent body, must equally depend upon the same principles of objectivity, professional ability and independence.

#### ***OPINION NO. 1 (2001) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF COUNCIL OF EUROPE ON STANDARDS CONCERNING THE INDEPENDENCE OF THE JUDICIARY AND THE IRREMOVABILITY OF JUDGES, Council of Europe, 2001***

Appointing and consultative bodies

45. Even in legal systems where good standards have been observed by force of tradition and informal self-discipline, customarily under the scrutiny of a free media, there has been increasing recognition in recent years of a need for more objective and formal safeguards. In other states, particularly those of former communist countries, the need is pressing. The CCJE considered that the European Charter - in so far as it advocated the intervention (in a sense wide enough to include an opinion, recommendation or proposal as well as an actual decision) of an independent authority with substantial judicial representation chosen democratically by other judges - pointed in a general direction which the CCJE wished to commend. This is particularly important for countries which do not have other long-entrenched and democratically proved systems.

Conclusions

73. The CCJE Considered that the critical matter for member States is to put into full effect principles already developed (paragraph 6) and, after examining the standards contained in particular Recommendation No. R (94) 12 on the independence, efficiency and role of judges, it concluded as follows:

(3) Seniority should not be the governing principle determining promotion. Adequate professional experience is however relevant, and pre-conditions related to years of experience may assist to support independence (paragraph 29).

(4) The CCJE considered that the European Charter on the statute for judges – in so far as it advocated the intervention of an independent authority with substantial judicial representation chosen democratically by other judges – pointed in a general direction which the CCJE wished to commend (paragraph 45).

## ***GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY, USAID, 2002***

### **c. Judicial councils**

In many countries, judicial councils or commissions have been established to improve the process of judicial selection. Although judicial councils exist in both civil and common law countries, they are a particularly prominent feature of legal cultures with a civil law tradition. The specific role that judicial councils play varies from one country to the next. In many, it goes beyond the selection process; in others, it may not include it. Nevertheless, since judicial councils often are important participants in judicial selection and have been adopted as part of reforms of the selection process in many countries, we include a discussion of their role, development, and operations in this sub-section.

Although protection of judicial independence is a common goal for most judicial councils, the specific problems councils are designed to address are often quite different. In many countries, the problem is executive, legislative, or political party domination of the judiciary. In others, the supreme court is perceived to have excessive control over lower court judges. Some countries are primarily concerned with the amount of time judges spend on administrative matters and want to improve the effectiveness and efficiency of the courts by transferring the managerial function to another body.

Given the differences in specific objectives as well as the contexts in which changes are taking place, judicial councils differ greatly with respect to three basic variables: (1) the role of the council, (2) the composition of the council, and (3) the manner in which the council members are appointed.

Some judicial councils have oversight or even primary responsibility for the full range of issues related to the judiciary, including administration of the court system. Others are focused primarily on appointment, evaluation, training, and/or discipline of judges, and they do not take on administration. Some councils are involved in the selection of judges of one level only—higher or lower. Others participate in the selection of all judges, although their role may differ with respect to higher or lower courts.

The membership of judicial councils often includes representatives of several different institutions, in order to provide an effective check on outside influence over the judiciary or to reduce supreme court control over the rest of the judiciary. The judiciary itself frequently has one or more representatives. In some cases, judges have become the dominant actors on councils. Often the executive has its own members. In some countries the legislature, private bar, and law schools may be included.

The power to appoint council members is often shared, further increasing the checks built into the system. In many cases, at least the legislature and the executive participate. In some countries, professional bodies (bar associations and law schools) nominate their own members to serve on the council. (It should be noted that in Latin America the role of the executive in judicial councils is much less prominent. In general, Latin American countries did not follow the French model of close executive oversight of the judiciary. Judicial councils in that region are, therefore, developing under somewhat different circumstances than in other parts of the world.)

## ***OPINION NO. 10 (2007) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE COUNCIL FOR THE JUDICIARY AT THE SERVICE OF SOCIETY, CCJE, 2007***

### **V. A. Selection, appointment and promotion of judges**

48. It is essential for the maintenance of the independence of the judiciary that the appointment and promotion of judges are independent and are not made by the legislature or the executive but are preferably made by the Council for the Judiciary.

49. While it is widely accepted that appointment or promotion can be made by an official act of the Head of State, yet given the importance of judges in society and in order to emphasise the fundamental nature of their function, Heads of States must be bound by the proposal from the Council for the Judiciary. This body cannot just be consulted for an opinion on an appointment proposal prepared in advance by the executive, since the very fact that the proposal stems from a political authority may have a negative impact on the judge's image of independence, irrespective of the personal qualities of the candidate proposed.

***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

Chapter VI – Status of the judge

46. The authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers.

48. The membership of the independent authorities referred to in paragraphs 46 and 47 should ensure the widest possible representation. Their procedures should be transparent with reasons for decisions being made available to applicants on request. An unsuccessful candidate should have the right to challenge the decision, or at least the procedure under which the decision was made.

***MAGNA CARTA OF JUDGES, CCJE, Council of Europe, Strasbourg, 17 November 2010***

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.

***DUBLIN DECLARATION ON STANDARDS FOR THE RECRUITMENT AND APPOINTMENT OF MEMBERS OF THE JUDICIARY, The General assembly of European Network of Councils for the Judiciary (ENCJ), 2012***

II. Indicators of Minimum Standards in Relation to the Competent Body to Decide on the Recruitment, Selection, Appointment and (where relevant) the Promotion of Members of the Judiciary.

5. The body in charge of judicial appointments should comprise a substantial participation of legal professionals or experts (including experienced judges, academics, lawyers, prosecutors and other professionals) and could also include independent lay members representing civil society, appointed from among well known persons of high moral standing on account of their skill and experience in matters such as human resources.

### III. 3.4. ELECTION BY POPULAR VOTE

#### ***OPINION NO. 1 (2001) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF COUNCIL OF EUROPE ON STANDARDS CONCERNING THE INDEPENDENCE OF THE JUDICIARY AND THE IRREMOVABILITY OF JUDGES, Council of Europe, 2001***

Basis of appointment or promotion

19. In some countries there is, constitutionally, a direct political input into the appointment of judges. Where judges are elected (either by the people as at the Swiss cantonal level, or by Parliament as at the Swiss federal level, in Slovenia and “the Former Yugoslav Republic of Macedonia” and in the case of the German Federal Constitutional Court and part of the members of the Italian Constitutional Court), the aim is no doubt to give the judiciary in the exercise of its functions a certain direct democratic underpinning. It cannot be to submit the appointment or promotion of judges to narrow party political considerations. Where there is any risk that it is being, or would be used, in such a way, the method may be more dangerous than advantageous.

#### ***OPINION NO 5 OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS ON THE LAW AND PRACTICE OF JUDICIAL APPOINTMENT TO THE EUROPEAN COURT OF HUMAN RIGHTS, CCJE, 2003***

2. The CCJE welcomes the conclusions and recommendations proposed by the report. It regards them as an important step towards implementing the recommendations contained in its Opinion No. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges, which the CCJE wishes to affirm, concerning:

(a) the appointment process for judges on international courts, in particular paragraph 56 of that Opinion stating:

“The CCJE agreed that the importance for national legal systems and judges of the obligations resulting from international treaties such as the European Convention on Human Rights and also the European Union treaties makes it vital that the appointment and re-appointment of judges to the courts interpreting such treaties should command the same confidence and respect the same principles as national legal systems. The CCJE further considered that involvement by the independent authority referred in the paragraphs 37 and 45 should be encouraged in relation to appointment and re-appointment to international courts. The Council of Europe and its institutions are in short founded on belief in common values superior to those of any single member State, and that belief has already achieved significant practical effect. It would undermine those values and the progress that has been made to develop and apply them, if their application was not insisted upon at the international level.”

Paragraphs 37 and 45 advocate the intervention of an independent authority with substantial judicial representation in relation to all judicial appointments.

(b) the tenure of office, in particular paragraphs 57 and 52 stating:

“It is a fundamental tenet of judicial independence that tenure is guaranteed until a mandatory retirement age or the expiry of a fixed term of office.”

“The CCJE considered that where, exceptionally, a full-time judicial appointment is for a limited period, it should not be renewable unless procedures exist ensuring that:

i. the judge, if he or she wishes, is considered for re-appointment by the appointing body and

ii. the decision regarding re-appointment is made entirely objectively and on merit and without taking into account political considerations.”

3. The objective criteria for appointment as a judge to the European Court of Human Rights are fixed in Article 21 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which states:

“The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurists of recognized competence.”

***BEST PRACTICES IN COMBATING CORRUPTION - CHAPTER: CHAPTER 16: THE JUDICIAL SYSTEM - JUDGES AND LAWYERS, OSCE, 2004***

Chapter 16: The judicial system - judges and lawyers, SHOULD JUDGES BE ELECTED?

The election of judges by the people is superficially attractive.<sup>8</sup> It was introduced in the United States during the 19th century as a way of trying to combat corruption in the judiciary by removing the power of appointment from corrupt politicians and placing it in the hands of the electors.

As one scholar has observed: “Concerns about the penetration of partisanship into the appointive judicial selection process reinforced worries about administrative efficiency and the status of the bench and bar. By the mid-1840s the second American party system thrived as part of a robust political culture in which the spoils of public office belonged to the victors. Judgeships were important items of patronage, but delegates from across the ideological spectrum criticized the party-directed distribution of these offices whether by the executive or the legislative branch. Radicals adopted a strong antiparty position. They believed popular election would prevent party leaders from dictating the composition of the bench.”

For a long period, this system seemed to work satisfactorily. However, in recent times, judicial elections have become a battlefield for special interest groups, each determined to get judges elected who will favor their particular position. This risks jeopardizing qualified candidates who will administer the law fearlessly, fairly and without favor. These special interest groups often act without the consent of the candidate they are supporting. This development has given rise to projects designed to promote reforms, which would reduce the excesses of the present.

There is a paradox in the idea of the public electing judges. Voters will need information that will allow them to assess how each candidate is likely to perform in office. Candidates for election to the executive branch of government and legislature typically make promises as to what they will do in office, but in the case of judges, voters want courts that are fair and impartial. Judges cannot be unbiased if they have previously made commitments about how they would act in specific types of case if elected to the bench. The United States has rules to try to resolve the paradox; meaningful information is needed, but candidates should not impair their impartiality as judges (e.g. by expressing political views which might suggest that they had prejudged issues before they heard legal arguments). As judicial candidates and third parties now increasingly turn to “vicious and often misleading rhetoric”<sup>10</sup> to make their points, there needs to be a thoughtful reexamination of the present rules, particularly as the issue of judicial candidates’ speech is now before the US Supreme Court.

Discussions among non-American, senior common law judges have come down firmly against the practice of electing judges.

***ABA MODEL CODE OF JUDICIAL CONDUCT (2011 EDITION), adopted by the House of Delegates of the American Bar Association on August 7, 1990 and amended on August 6, 1997, August 10, 1999, August 12, 2003, February 12, 2007 and August 10, 2010***

## CANON 4

### Rule 4.4: Campaign Committees

(A) A judicial candidate\* subject to public election\* may establish a campaign committee to manage and conduct a campaign for the candidate, subject to the provisions of this Code. The candidate is responsible for ensuring that his or her campaign committee complies with applicable provisions of this Code and other applicable law.\*

(B) A judicial candidate subject to public election shall direct his or her campaign committee:

(1) to solicit and accept only such campaign contributions\* as are reasonable, in any event not to exceed, in the aggregate,\* \$[insert amount] from any individual or \$[insert amount] from any entity or organization;

(2) not to solicit or accept contributions for a candidate's current campaign more than [insert amount of time] before the applicable primary election, caucus, or general or retention election, nor more than [insert number] days after the last election in which the candidate participated; and

(3) to comply with all applicable statutory requirements for disclosure and divestiture of campaign contributions, and to file with [name of appropriate regulatory authority] a report stating the name, address, occupation, and employer of each person who has made campaign contributions to the committee in an aggregate value exceeding \$[insert amount]. The report must be filed within [insert number] days following an election, or within such other period as is provided by law.



### III. 3.5. APPOINTMENT FOR A PROBATIONARY PERIOD

#### ***MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE, International Bar Association (IBA), 1982***

##### C - Terms and Nature of Judicial Appointments

22 Judicial appointments should generally be for life, subject to removal for cause and compulsory retirement at an age fixed by law at the date of appointment.

23 a) Judges should not be appointed for probationary periods except for legal systems in which appointments of judges do not depend on having practical experience in the profession as a condition of the appointment.

b) The institution of temporary judges should be avoided as far as possible except where there exists a long historic democratic tradition.

25. Part-time judges should be appointed only with proper safeguards.

#### ***MONTREAL DECLARATION, UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE, International Association of Judicial Independence and World Peace (JIWP), 1983***

##### Tenure

2.20 The appointment of temporary judges and the appointment of judges for probationary periods is inconsistent with judicial independence. Where such appointments exist, they shall be phased out gradually.

#### ***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE (“Singhvi Declaration”), ECOSOC, 1985***

##### Tenure

17. There may be probationary periods for judges following their initial appointment but in such cases the probationary tenure and the conferment of permanent tenure shall be substantially under the control of the judiciary or a superior council of the judiciary.

#### ***EUROPEAN CHARTER ON THE STATUTE FOR JUDGES AND EXPLANATORY MEMORANDUM, Council of Europe, Strasbourg, 8 - 10 July 1998***

##### 3. Appointment and Irremovability

3.3. Where the recruitment procedure provides for a trial period, necessarily short, after nomination to the position of judge but before confirmation on a permanent basis, or where recruitment is made for a limited period capable of renewal, the decision not to make a permanent appointment or not to renew, may only be taken by the independent authority referred to at paragraph 1.3 hereof, or on its proposal, or its recommendation or with its agreement or following its opinion. The provisions at point 1.4 hereof are also applicable to an individual subject to a trial period.

#### ***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

##### Chapter VI – Status of the judge

51. Where recruitment is made for a probationary period or fixed term, the decision on whether to confirm or renew such an appointment should only be taken in accordance with paragraph 44 so as to ensure that the independence of the judiciary is fully respected.

53. The principal rules of the system of remuneration for professional judges should be laid down by law.

54. Judges' remuneration should be commensurate with their profession and responsibilities, and be sufficient to shield them from inducements aimed at influencing their decisions. Guarantees should exist for maintaining a reasonable remuneration in case of illness, maternity or paternity leave, as well as for the payment of a retirement pension, which should be in a reasonable relationship to their level of remuneration when working. Specific legal provisions should be introduced as a safeguard against a reduction in remuneration aimed specifically at judges.

55. Systems making judges' core remuneration dependent on performance should be avoided as they could create difficulties for the independence of judges.

***MT. SCOPUS APPROVED REVISED INTERNATIONAL STANDARDS OF JUDICIAL INDEPENDENCE, International Association of Judicial Independence and World Peace, 2008, 2011, 2012***

**4. TERMS AND NATURE OF JUDICIAL APPOINTMENTS**

4.6. Judges should not be appointed for probationary periods except in legal systems in which appointments of judges do not depend on having practical experience in the profession as a condition of appointment, and provided that permanent appointment will be granted on merit.

4.7 The institution of temporary judges should be avoided as far as possible except where there exists a long historic democratic tradition.

4.8 Part-time judges should be appointed only with proper safeguards secured by law.

4.9 The number of the members of the highest court should be fixed, with the exception of courts modeled after the courts of cassation, and in the case of all courts, should not be altered for improper motives.

### III. 3.6. JUDICIAL TRANSFER

#### ***THE SIRACUSA DRAFT PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, 1981***

##### Transfer

Art. 9 Except pursuant to a system of regular rotation, judges shall not be transferred from one jurisdiction or function to another without their freely given consent.

#### ***MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE, International Bar Association (IBA), 1982***

##### A Judges and the Executive

12 The power to transfer a judge from one court to another shall be vested in a judicial authority and preferably shall be subject to the judge's consent, such consent not to be unreasonably withheld.

#### ***MONTREAL DECLARATION, UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE, International Association of Judicial Independence and World Peace (JIWP), 1983***

##### Posting, Promotion and Transfer

2.16 The assignment of a judge, to a post within the court to which he is appointed is an internal administrative function to be carried out by the judiciary.

2.18 Except pursuant to a system of regular rotation, judges shall not be transferred from one jurisdiction or function to another without their consent, but such consent shall not be unreasonably withheld.

#### ***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE ("Singhvi Declaration"), ECOSOC, 1985***

##### Posting, Promotion and Transfer

15. Except pursuant to a system of regular rotation or promotion, judges shall not be transferred from one jurisdiction or function to another without their consent, but when such transfer is in pursuance of a uniform policy formulated after due consideration by the judiciary, such consent shall not be unreasonably withheld by any individual judge.

##### Discipline and Removal

31. In the event a court is abolished, judges serving on that court, except those who are elected for a specified term, shall not be affected, but they may be transferred to another court of the same status.

#### ***PALERMO DECLARATION, ELEMENTS OF A EUROPEAN STATUTE OF MAGISTRACY, MEDEL, 1993***

### V. THE MAGISTRATES' STATUTE

5.3. The law organizes the mobility of magistrates between jurisdictions of a different nature and between different degrees of jurisdiction. This mobility makes it possible to accede to the function of second instance from the moment of appointment just as, inversely, it allows for passage from appeal courts or courts of cassation to the lower courts.

**BEIJING STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION, as amended at Manila at 7th Biennial Conferences of Chief Justices of Asia and the Pacific, 1997**

Tenure

29. The abolition of the court of which a judge is a member must not be accepted as a reason or an occasion for the removal of a judge. Where a court is abolished or restructured, all existing members of the court must be reappointed to its replacement or appointed to another judicial office of equivalent status and tenure. Members of the court for whom no alternative position can be found must be fully compensated.

30. Judges must not be transferred by the Executive from one jurisdiction or function to another without their consent, but when a transfer is in pursuance of a uniform policy formulated by the Executive after due consultation with the judiciary, such consent shall not be unreasonably withheld by an individual judge.

**EUROPEAN CHARTER ON THE STATUTE FOR JUDGES AND EXPLANATORY MEMORANDUM, Council of Europe, Strasbourg, 8 - 10 July 1998**

3. Appoitment and Irremovability

3.4. A judge holding office at a court may not in principle be appointed to another judicial office or assigned elsewhere, even by way of promotion, without having freely consented thereto. An exception to this principle is permitted only in the case where transfer is provided for and has been pronounced by way of a disciplinary sanction, in the case of a lawful alteration of the court system, and in the case of a temporary assignment to reinforce a neighbouring court, the maximum duration of such assignment being strictly limited by the statute, without prejudice to the application of the provisions at paragraph 1.4 hereof.

**THE UNIVERSAL CHARTER OF THE JUDGE, International Association of Judges (IAJ), 1999**

Art.8 Security of office

A judge cannot be transferred, suspended or removed from office unless it is provided for by law and then only by decision in the proper disciplinary procedure.

A judge must be appointed for life or for such other period and conditions, that the judicial independence is not endangered. Any change to the judicial obligatory retirement age must not have retroactive effect.

**RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010**

Chapter VI – Status of the judge

52. A judge should not receive a new appointment or be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions or reform of the organisation of the judicial system.

**REPORT ON THE INDEPENDENCE OF THE JUDICIAL SYSTEM PART I: THE INDEPENDENCE OF JUDGES, Venice Commission, Venice, 12-13 March 2010 CDL-AD(2010)004**

#### IV. Conclusions

82. The following standards should be respected by states in order to ensure internal and external judicial independence:

1. The basic principles relevant to the independence of the judiciary should be set out in the Constitution or equivalent texts. These principles include the judiciary's independence from other state powers, that judges are subject only to the law, that they are distinguished only by their different functions, as well as the principles of the natural or lawful judge pre-established by law and that of his or her irremovability.
2. All decisions concerning appointment and the professional career of judges should be based on merit applying objective criteria within the framework of the law.

***BRIJUNI STATEMENT OF THE PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY,  
Conference of Chief Justices of Central and Eastern Europe, 14 October, 2015***

#### Tenure

25. Except for the purposes of ensuring the proper and timely adjudication of cases, no judge should be transferred by competent bodies responsible for the administration of judicial service from one jurisdiction or function to another without the consent of the judge.

### III. 3.7. EVALUATION OF JUDGES

#### ***PALERMO DECLARATION, ELEMENTS OF A EUROPEAN STATUTE OF MAGISTRACY, MEDEL, 1993***

#### IV. THE JUDICIARY FUNCTIONS

4.4. The statute of the judiciary may make provision for the Supreme Council of the Judiciary to periodically submit each magistrate to an objective personal evaluation tending to define each person's competences and develop his/her qualities, in order to improve the service. The process of evaluation allows for contradictory.

#### ***OPINION NO. 1 (2001) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF COUNCIL OF EUROPE ON STANDARDS CONCERNING THE INDEPENDENCE OF THE JUDICIARY AND THE IRREMOVABILITY OF JUDGES, Council of Europe, 2001***

Independence within the judiciary

69. Court inspection systems, in the countries where they exist, should not concern themselves with the merits or the correctness of decisions and should not lead judges, on grounds of efficiency, to favour productivity over the proper performance of their role, which is to come to a carefully considered decision in keeping with the interests of those seeking justice.

Conclusions

73. The CCJE Considered that the critical matter for member States is to put into full effect principles already developed (paragraph 6) and, after examining the standards contained in particular Recommendation No. R (94) 12 on the independence, efficiency and role of judges, it concluded as follows:

(10) The use of statistical data and the court inspection systems shall not serve to prejudice the independence of judges (paragraphs 27 and 69).

#### ***GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY, USAID, 2002***

a. Performance evaluation, promotion, and disciplinary procedures

Appropriate promotion and disciplinary procedures that exist not only on the books but are adhered to in practice are the primary mechanisms through which security of tenure is protected. Many of the basic lessons that apply to appointment of judges also apply to promotion and discipline:

- Transparency is once again the overriding factor. The criteria for decisions should be published. Opportunities for promotion should be advertised and judges should be able to compete in a transparent process.
- To reduce the potential for abuse, decisions with respect to both promotions and discipline should be based on the most objective criteria possible. (However, establishing objective criteria is extremely difficult, as discussed below.)
- If the executive and/or legislative branches are involved in the process, they should not have excessive influence.
- Comments should be solicited from the public, lawyers, and law professors.
- Although not yet commonly used, a two-step process can increase transparency and reliance on objective criteria. One authority evaluates performance, and a separate authority makes the final decisions regarding promotion or discipline.

Performance evaluations and promotion. Performance evaluation procedures that are inadequate or that are not followed in practice can result in improper internal or external influences affecting promotion decisions. Although everyone agrees that a fair evaluation process is an important element for protecting judicial independence, actually establishing appropriate criteria for advancement is very difficult. Virtually no consensus exists on how relevant factors—seniority, efficiency, quality of decision-making, and courtroom comportment—should be assessed or weighed.

A certain level of efficiency is always required of courts and becomes even more important as judiciaries experience dramatic increases in caseloads. Quantitative indicators are, therefore, often used, and warranted, but need to be given careful thought. For example, the number of cases decided during a given period of time can sometimes be misleading and encourage poor performance, such as neglect of difficult cases, attention to speed rather than justice, falsification of records, and manipulation of statistics. The number of decisions reversed on appeal can be a valuable indicator, but its utility can vary depending on the circumstances, such as access to laws and the decisions of appeals courts. More sophisticated information systems can overcome some of these problems, and automated systems allow generation of data (e.g., average time for disposition of a range of cases) that is often more useful.

Qualitative indicators are also necessary in an evaluation process, but open the door to those who are senior in the judicial hierarchy and responsible for evaluations exerting influence on junior judges. This is especially true when those who evaluate also have the power to give promotions or impose discipline.

Because of these problems, some reformers favor abolishing evaluations. However, as has occurred in Italy, the failure to evaluate performance or make promotions based on merit poses the risk of sacrificing professional standards in the name of judicial independence.<sup>7</sup> Developing performance evaluations in consultation with the judges to be evaluated may help to mitigate some of the inherent problems.

***FIRST STUDY COMMISSION - GENERAL REPORT, HOW CAN THE APPOINTMENT AND ASSESSMENT (QUALITATIVE AND QUANTITATIVE) OF JUDGES BE MADE CONSISTENT WITH THE PRINCIPLE OF JUDICIAL INDEPENDENCE, International Association of Judges (IAJ), 2006***

Conclusions

7) In order to avoid the possibility of bias and also to exclude internal or external influence which might infringe the independence and impartiality of any assessment, all assessments should be conducted by means of a transparent procedure. This procedure should apply clear criteria which have been previously defined. The procedure should result in a decision together with reasons and the result and reasons should be given to the judge concerned. The decision should be appeal able by the judge concerned. Some evaluation systems rely too much on subjective elements which give the evaluator/the evaluating body extended discretionary powers. Again this might lead some judges simply to please their evaluators in order to get "good marks".

8) The merits of the decisions of the judge should not form any part of an assessment of a judge, unless it is clear from the assessment that the judge appears to arrive at incorrect conclusions of law in an unacceptably high number of cases. The merits of judicial decisions should only be considered by a superior court.

9) Great care must be taken not to draw the wrong inference from the fact that the decisions of a particular judge have been reversed or varied by a superior court. That does not necessarily mean that he/she is a poor judge.

10) If productivity and "managerial efficiency" are key parameters for an assessment, a skilful judge who works more slowly but more safely than others might become a victim of his caution. Moreover if fulfilment of such parameters/goals is linked to the budget for the courts or judiciary, this will increase the pressure on courts to comply with "targets" that are set. Such demands would place improper demands on individual judges and would threaten judicial independence.

11) To be effective and efficient in disposing of cases a judge should aim to use the minimum time necessary to arrive at what the judge regards as the correct solution and to give adequate reasons for the case in hand. Therefore the duration of particular cases or procedures should not, as such, be significant criteria for assessment of judges, except in extreme cases. Any commentary on this aspect of a judge's work is complex. Frequently, the number of cases handled in a certain period of time will only be a preliminary indication of a judge's performance. Statistics therefore have to be used carefully.

12) The outcome of an assessment should never influence the remuneration of the judge.<sup>3</sup> This is because if a judge has to be assessed, even by his/her peers, in order to receive a higher salary or a bonus, he/she might be induced to please the superior judge (or chief justice) even with regard to judicial decisions that are made.

13) Within the limitations set out above, a procedure for the assessment of a judge in the course of his/her work may be a valuable means to promote self – awareness amongst judges, to indicate possible improvements in the performance of individual judges and to be of assistance in ascertaining the best candidate for promotion.

14) By this means, judicial assessment (within the bounds discussed above), may help to strengthen trust and confidence in the judiciary in democratic societies.

***OPINION No.11 (2008) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE QUALITY OF JUDICIAL DECISIONS, Consultative Council of European Judges (CCJE), 2008***

5. This opinion does not aim to challenge the basic principle that the assessment of the intrinsic quality of each judicial decision should only take place through the exercise of rights of recourse established by the law. This principle is a key consequence of the constitutional guarantee of independence of judges, regarded as one of the main features of the Rule of Law in democratic societies.

***OPINION NO. 10 (2007) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE COUNCIL FOR JUDICIARY AT THE SERVICE OF THE SOCIETY, Council of Europe, 2010***

V. B. Professional evaluation of judges

52. The issues relating to the professional assessment of judges are twofold: firstly, the assessment of the quality of the judicial system and, secondly, the professional ability of judges.

53. The question of the quality assessment of the judicial system was touched upon by the CCJE in Opinion No. 6 (2004). As far as the present Opinion is concerned, it is very important that, in each member State, the Council for the Judiciary holds a vital role in the determination of the criteria and standards of quality of the judicial service on the one hand, and in the implementation and monitoring of the qualitative data provided by the different jurisdictions on the other.



54. Quality of justice can of course be measured by objective data, such as the conditions of access to justice and the way in which the public is received within the courts, the ease with which available procedures are implemented and the timeframes in which cases are determined and decisions are enforced. However, it also implies a more subjective appreciation of the value of the decisions given and the way these decisions are perceived by the general public. It should take into account information of a more political nature, such as the portion of the State budget allocated to justice and the way in which the independence of the judiciary is perceived by other branches of the government. All these considerations justify the active participation of Councils for the Judiciary in the assessment of the quality of justice and in the implementation of techniques ensuring the efficiency of judges' work.

55. Where applicable, the question of the professional assessment of judges depends on whether a judge is recruited at the beginning of his/her career from among other candidates who have no previous professional experience or after many years of practice of a legal profession from among the most experienced and deserving practitioners. In the former case the candidate's professional qualities need to be assessed in order to determine his/her previously undisclosed abilities, while there is also utility in such an assessment in the latter case, having regard to the nature of the judicial role and the constant evolution of legal practice and the competencies it involves.

56. It is important to note that the assessment should not only consist of an examination of the legal expertise and the general professional abilities of judges, but also of more personal information, such as their personal qualities and their communication skills. If the practice of judicial functions presupposes great technical and personal qualities, it would be desirable to come to some common agreement at the European level concerning their identification. In this respect, the Council for the Judiciary should play a fundamental role in the identification of the general assessment criteria. However, the Council for the Judiciary should not substitute itself for the relevant judicial body entrusted with the individual assessment of judges.

#### ***DRAFT VADEMECUM ON THE JUDICIARY, EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), 2008***

##### 2.4.4 Evaluation and Disciplinary Control

Principle I.2.c of Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe) states "All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. The authority taking the decision on the selection and career of judges should be independent of the government and the administration.

[...]

In the light of European standards the selection and career of judges should be "based on merit, having regard to qualifications, integrity, ability and efficiency".

[...]

According to opinion No 1 (2001) of the CCJE, "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 criteria."

The European Charter on the statute for judges adopted in Strasbourg in July 1998 (DAJ/DOC(98)23) states: "In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary." According to the Explanatory Memorandum of the European Charter, the term "intervention" of an independent authority means an opinion, recommendation or proposal as well as an actual decision.

The CCJE commends the standards set by the European Charter “in so far as it advocated the intervention (in a sense wide enough to include an opinion, recommendation or proposal as well as an actual decision) of an independent authority with substantial judicial representation chosen democratically by other judges”.

[...]

In its opinion No 1 (2001) on Standards concerning the Independence of the Judiciary and the Irremovability of Judges the Consultative Council of European Judges suggests that “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’”. Once this is done, those bodies or authorities responsible for any appointment or promotion will be obliged to act accordingly, and it will then at least be possible to scrutinize the content of the criteria adopted and their practical effect.

CDL-AD(2007)028 Judicial Appointments (report), para. 4, 10, 18-20 and 37.

For the [...] reason of independence and impartiality, the grounds for suspension, dismissal or resignation should be laid down in the Constitution, and the competent court should be set out, as well as the right of appeal of the judge concerned.

CDL-AD(2008)010 Opinion on the Constitution of Finland, para 113

It would not be in accordance with the principles of a society governed by the rule of law to allow the dismissal of serving judges without providing any guarantees.

CDL-AD(2008)007 Opinion on the Draft Laws on Judges and the Organisation of Courts of the Republic of Serbia, para. 59an 60

The Commission observes [...] that decisions as to the removal of judges is left to the Constitutional Court [...]. Although this may be seen as an additional guarantee for judicial independence, the absence of any remedy against such a decision of the Constitutional Court can raise problems. A more adequate solution would be to leave the initial decision as to the removal of a judge to the Council of Justice with the possibility for the judge dismissed to appeal to the Constitutional Court.

CDL-INF(2001)017 Report of the Venice Commission on the Revised Constitution of the Republic of Armenia, para. 63.

Any action to remove incompetent or corrupt judges had to live up to the high standards set by the principle of the irremovability of the judges whose independence had to be protected. It was necessary to depoliticise any such move. A means to achieve this could be to have a small expert body composed solely of judges giving an opinion on the capacity or behaviour of the judges concerned before an independent body would make a final decision.

CDL-AD(2003)012 Memorandum: Reform of the Judicial System in Bulgaria, par. 15c).

The proposed administration of the judiciary is complicated and involves no less than five agencies: the Council of Justice, the Judicial Administration, the Judges Qualification Board, the Judges Disciplinary Board and the Conference of Judges.

[...]

The acceptance of parliamentary control over the disciplinary board is inconsistent. On one hand there is the far-reaching solution concerning the judicial administration and the rights of the Council of Justice while on the other hand there is the far-reaching role to be played by the parliament in staffing issues and judicial oversight. That is, in issues strictly linked to independence and judicial adjudication.

CDL-AD(2002)026 Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia para. 11 and 64.

Despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value.

If there is to be a system of evaluation, it is essential that control of the evaluation is in the hands of the Judiciary and not the executive. [...] Secondly, the criteria for evaluation must be clearly defined. It seems that once a judge is appointed if anything short of misconduct or incompetence can justify dismissal then immediately a mechanism to control a judge and undermine judicial independence is created. A refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office.

CDL-AD(2005)038 Opinion on Draft Constitutional Amendments concerning the Reform of the Judicial System in “the former Yugoslav Republic of Macedonia”, para. 29-30, extract of para.29 repeated in CDL-AD(2007)028 Judicial appointments (report), para. 42.

The European Charter on the statute for judges states as follows “Clearly the existence of probationary periods or renewal requirements presents difficulties if not dangers from the angle of the independence and impartiality of the judge in question, who is hoping to be established in post or to have his or her contract renewed”.

The Universal Declaration on the Independence of Justice, adopted in Montreal in June 1983 by the World Conference on the Independence of Justice states: “The appointment of temporary judges and the appointment of judges for probationary periods is inconsistent with judicial independence. Where such appointments exist, they should be phased out gradually”. The Venice Commission considers that setting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way [...].

This should not be interpreted as excluding all possibilities for establishing temporary judges. In countries with relatively new judicial systems there might be a practical need to first ascertain whether a judge is really able to carry out his or her functions effectively before permanent appointment. If probationary appointments are considered indispensable, a “refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office”.

The main idea is to exclude the factors that could challenge the impartiality of judges: “despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value.”

In order to reconcile the need of probation / evaluation with the independence of judges, it should be pointed out that some countries like Austria have established a system whereby candidate judges are being evaluated during a probationary period during which they can assist in the preparation of judgements but they can not yet take judicial decisions which are reserved to permanent judges.

CDL-AD(2007)028 Report on Judicial Appointments, para. 38-43.

[...]no person can request a report from a judge on any concrete case.

CDL-AD(2005)003 Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, in cooperation with OSCE/ODIHR, para. 101.

Reporting to the Parliament [...]and to the President of the Republic infringes upon the status and independence of the Constitutional Court (such a report is appropriate in the case of an ombudsman,

who is a parliamentary commissioner). The Constitutional Court communicates with other constitutional organs and with the authorities as with the general public through its judgements and decisions, which are to be published in the Official Gazette. In addition, constitutional courts usually also publish the collection of their decisions as another form of official publication.

CDL-AD(2006)016 Opinion on the Draft Law on the Constitutional Court and Corresponding Amendments of the Constitution of the Republic of Moldova, para. 28.

The Council of Justice should be the final authority for all aspects of the professional life of judges in particular matters pertaining to their selection, appointment, career (including promotion and transfer), training, dismissal and discipline, and should be responsible for overseeing the training of judges.

CDL-AD(2004)044 Interim Opinion on Constitutional Reforms in the Republic of Armenia, para. 59.

The Venice Commission is of the opinion that a judicial council should have a decisive influence on the [...] promotion of judges and (maybe via a disciplinary board set up within the council) on disciplinary measures against them. An appeal against disciplinary measures to an independent court should be available.

CDL-AD(2007)028 Report on Judicial Appointments, para. 25.

The presence of the Minister of Justice on the Council is of some concern, as regards matters relating to the transfer and disciplinary measures taken in respect of judges at the first level, at the appeal stage[...][...] it is advisable that the Minister of Justice should not be involved in decisions concerning the transfer of judges and disciplinary measures against judges, as this could lead to inappropriate interference by the Government.

CDL-INF(1998)009 Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, par. 16, cited in CDL-AD(2007)028 Judicial Appointments (report), par. 34, text correspondent to note 20.

Although the presence of the members of the executive power in the judicial councils might raise confidence-related concerns, such practice is quite common. [...] Such presence does not seem, in itself, to impair the independence of the council, according to the opinion of the Venice Commission. However, the Minister of Justice should not participate in all the council's decisions, for example, the ones relating to disciplinary measures.

CDL-AD(2007)028 Report on Judicial Appointments, para. 33.

Principle I.2.c of Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe) states “[...] In order to safeguard the independence [of the authority taking the decision on the selection and career of judges], rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules.”

CDL-AD(2007)028 Report on Judicial Appointments, para. 4.

The envisaged Code of Ethics should be approved by the Supreme Judicial Council but regulated at the level of law. It should precisely spell out the consequences of a breach of its rules.

CDL-AD(2002)015 Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, par. 5.g).

The law also provides for disciplinary liability for judges [...]. Again, it appears undesirable that ordinary law can provide for such matters without any Constitutional guidance.

CDL-AD(2005)003 Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, in cooperation with OSCE/ODIHR, para. 105.

In the Commission's view, there is no justification in principle for treating judges differently in matters of discipline and removal according to whether they are members of superior or inferior courts. All judges should enjoy equal guarantees of independence and equal immunities in the exercise of their judicial functions.

CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995, chapter B.1.e.

## 2.5. Individual and Internal Independence

[...] the Commission finds that the Supreme Court should not have the power to dismiss cantonal judges, nor the cantonal high court to dismiss municipal judges (Articles V.11, para.3 and VI.7, para.4).

### ***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

#### Chapter V – Independence, efficiency and resources

42. With a view to contributing to the efficiency of the administration of justice and continuing improvement of its quality, member states may introduce systems for the assessment of judges by judicial authorities, in accordance with paragraph 58.

#### Chapter VI – Status of the judge

58. Where judicial authorities establish systems for the assessment of judges, such systems should be based on objective criteria. These should be published by the competent judicial authority. The procedure should enable judges to express their view on their own activities and on the assessment of these activities, as well as to challenge assessments before an independent authority or a court.

### ***THE KYIV RECOMMENDATIONS ON JUDICIAL INDEPENDENCE IN EASTERN EUROPE, SOUTH CAUCASUS AND CENTRAL ASIA, OSCE, 2010***

#### Professional Evaluation of Judges

27. Where professional evaluations of judges are performed, they must not be used to harm independent adjudication. The evaluation of judges' performance shall be primarily qualitative and focus upon their skills, including professional competence (knowledge of law, ability to conduct trials, capacity to write reasoned decisions), personal competence (ability to cope with the work load, ability to decide, openness to new technologies), social competence (ability to mediate, respect for the parties) and, for possible promotion to an administrative position, competence to lead. These same skills should be cultivated in judicial training programmes, as well as on the job.

28. Judges shall not be evaluated under any circumstances for the content of their decisions or verdicts (either directly or through the calculation of rates of reversal). How a judge decides a case must never serve as the basis for a sanction. Statistics on the efficiency of court operations shall be used mainly for administrative purposes and serve as only one of the factors in the evaluation of

judges. Evaluations of judges may be used to help judges identify aspects of their work on which they might want to improve and for purposes of possible promotion. Periodic exams for judges (attestations) that may lead to dismissal or other sanctions are not appropriate for judges with life tenure.

29. The criteria for professional evaluation should be clearly spelled out, transparent and uniform. Basic criteria should be provided for in the law. The precise criteria used in periodic evaluations shall be set out further in regulations, along with the timing and mechanisms of performing evaluations.

#### Independent Evaluations

30. While a Judicial Council may play a role in specifying the criteria and the procedure, professional evaluations should be conducted at the local level. Evaluations shall be conducted mainly by other judges. Court chairpersons should not have the exclusive competence to evaluate judges, but their role should be complemented by a group of judges from the same and other courts. That group should consider also the opinions of outsiders who regularly deal with the judge (such as lawyers) and law professors, with respect to the diligence, respect for the parties and rules of procedure by a judge.

31. Evaluations should include review of the judge's written decisions and observation of how he or she conducts trials. Evaluations shall be transparent. Judges should be heard and informed about the outcome of the evaluation, with opportunities for review on appeal.

#### Independent Criminal Adjudication

34. The accusatory bias of justice systems in most countries of Eastern Europe, South Caucasus and Central Asia requires remedies. Acquittals are still considered a black mark or failure. To diminish pressure on judges to avoid acquittals, a change in the system of their professional evaluation (and if appropriate, considering changes in the assessment of prosecutors and investigators as well) is strongly recommended. The number of acquittals should never be an indicator for the evaluation of judges. Judges need to gain real discretion in reviewing requests for approval of pre-trial detention. Appellate review of acquittals shall be limited to the most exceptional circumstances.

### **RESOURCE GUIDE ON STRENGTHENING JUDICIAL INTEGRITY AND CAPACITY, UNODC, 2011**

#### I. RECRUITMENT, PROFESSIONAL EVALUATION AND TRAINING OF JUDGES

##### 8. Conclusions and recommendations

- The evaluation of the judges' work should not interfere with their decision making in single cases. The number of successful appeals against the decisions/judgments of a single judge should not be the criteria for the assessment of the quality of his work.

### **DUBLIN DECLARATION ON STANDARDS FOR THE RECRUITMENT AND APPOINTMENT OF MEMBERS OF THE JUDICIARY, The General assembly of European Network of Councils for the Judiciary (ENCJ), 2012**

#### I. Indicators of Minimum Standards regarding the Recruitment, Selection, Appoitment and (where relevant) the Promotion of Members of the Judiciary

12. Where promotion of members of the judiciary is based on the periodical assessments of professional performance the assessment process must be conducted according to the same criteria and with the same guarantees as those provided for the initial selection and appointment process

(i.e. it should be independent, fair, open and transparent, and on the basis of merit and capability) and should be based on the judge's past performance.

***OPINION NO. 15 (2012) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) ON THE SPECIALISATION OF JUDGES, Council of Europe, 2012***

D. Specialisation and status of the judge

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 (2002) 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.

***OPINION NO. 17 (2014) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) ON THE EVALUATION OF JUDGES' WORK, THE QUALITY OF JUSTICE AND RESPECT FOR JUDICIAL INDEPENDENCE, Council of Europe, 2014***

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).

### ***HIGH QUALITY JUSTICE FOR ALL MEMBER STATES OF THE COUNCIL OF EUROPE, The European Commission for the Efficiency of Justice, CEPEJ STUDIES No. 22, 2015***

The evaluation process of judicial systems of the Council of Europe' Members States with the aim to provide the exchange of knowledge on their functioning, identify the best practices and assist these countries in improving their systems on comparative basis. The scope of comparison of the judicial systems is broader than 'just' efficiency in a narrow sense: it also emphasizes the quality and the effectiveness of justice.

### ***COMPILATION OF CEPEJ GUIDELINES, European Commission for the Efficiency of Justice (CEPEJ), 2015***

Evaluation of European judicial systems



14. Data collection should be organised taking into account as far as possible the CEPEJ Evaluation Scheme so that answers can be provided recurrently to questions put as part of the process of evaluating European judicial systems. Attention should also be paid to the guidance in the Explanatory Note so as to ensure homogeneity of the concepts considered and measurement methods used.

15. In particular each member state should make the necessary arrangements that would allow to provide annual input to the corpus of key data of justice in Europe as defined by the CEPEJ (see Appendix II).

***OPINION NO. 19 (2016) ON THE ROLE OF COURT PRESIDENTS, Consultative Council of European Judges, Council of Europe, 2016***

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.

***CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) - OPINION N° 20 THE ROLE OF COURTS WITH RESPECT TO THE UNIFORM APPLICATION OF THE LAW, 2017***

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.

***MEASURING THE QUALITY OF JUSTICE, Document prepared by the CEPEJ-GT-QUAL on the basis of the preparatory work of Mr Fabio Bartolomeo, (CEPEJ member, Italy), adopted on 7 December 2016, at the 28th plenary meeting of the CEPEJ***

4. Measuring the performance of the judicial services

30. Measuring the performance of the judicial services is of particular importance for the various judicial services as it constitutes a source of information of major interest for society as a whole. In particular, interest for statistics concerning judicial performance comes from the following elements:

- ✓ they are a source of information for the various aspects of judicial services, assessed according to a scientific and analytical method;
- ✓ they are of high social and economic use, given the importance that judicial procedures have in the lives of people, families and businesses and in their relationships;
- ✓ they are one of the instruments used by international bodies to assess systemic efficiency of a country, which ensure the effective implementation of reforms and, in particular, to provide an objective measure of the level of respect for human rights;
- ✓ they constitute a fundamental instrument for judicial organisation - as the analysis of the number of civil and criminal proceedings is used – and should be used even more to optimise organisational choices relating to means and resources.

37. Systems in which a large number of pending cases are not accumulated at the end of the period are considered to be of good quality.

**Clearance Rate (CR):** the ratio between the number of resolved cases (R) and the number of incoming cases (I).[9]

38. This indicator, which is derived from logistics, measures the level of turnover of products transiting through a store. In relation to justice, the indicator measures the capacity of the measured unit, such as a division of a court, a court in its entirety or an entire national judicial system, to resolve the cases submitted for judgment compared with the number of cases presented within a given period of time.

$$\text{Clearance Rate (\%)} = \frac{\text{Resolved cases in a period}}{\text{Incoming cases in a period}} \times 100$$

#### **Case Turnover ratio:**

40. This ratio measures the relation between the number of resolved cases and the number of unresolved cases at the end of period. It measures the frequency with which a judicial system or a court replaces the number of received cases.

$$\text{Case Turnover Ratio} = \frac{\text{Number of resolved cases in a period}}{\text{Number of unresolved cases at the end of a period}}$$

#### **Duration of proceedings**

41. The duration of proceedings is the most important and significant indicator for measuring the performance of judicial systems and their components.

42. There are two important indicators concerning the duration of judicial proceedings (both for civil cases and for criminal or administrative cases):

A) Actual duration

B) Prospective duration

43. The actual duration measures the laps of time between the date on which a new case is initiated and the date where a judgment is issued. In this regard, the completion of a case or trial may be regarded as the time when the operative part is read by the court (where such a procedure is provided for), or alternatively the later date on which the details of the judgment are filed. Both points in time have a statistical significance, as the reading of the operative part is useful for the purposes of the practical consequences for the parties, who at that time become aware of the outcome of their dispute, i.e. become officially aware of who has won and who has lost the case. With regard to criminal trials, it is the time when the defendant becomes aware of whether he or she has been found innocent or guilty. The second point in time is significant, in particular with respect to the activity of the judiciary and of court registries as the legal and administrative requirements relating to a procedure are all completed with the drafting and filing of the judgment.

46. **Disposition Time (DT)** indicator determines the number of days necessary for a pending case to be solved in court and provides further insight into how a judicial system manages its flow of cases. This indicator compares the number of resolved cases during the observed period and the number of unresolved cases at the end of the observed period. 365 is divided by the number of resolved cases divided by the number of unresolved cases at the end, so as to be able to express it in number of days.

$$\text{Calculated Disposition Time} = \frac{365}{\text{Case Turnover Ratio}}$$

47. The result of the operation indicates the average prospective duration[12] in days. DT can also be calculated as the ratio between the sets of proceedings pending at the end of the period [PE] and the sets of proceedings resolved during the reference period [R]. This formula corresponds to an intuitive logic. Where 100 cases are pending at the end of a given year and 50 cases are resolved during that year, it follows that the pending cases will be solved within two years.

**Rate of resolved cases within the established *timeframes*:** percentage of completed cases within a certain period of time. The period of time is the period regarded as the desirable, reasonable length of proceedings, or which is stipulated as such by law.

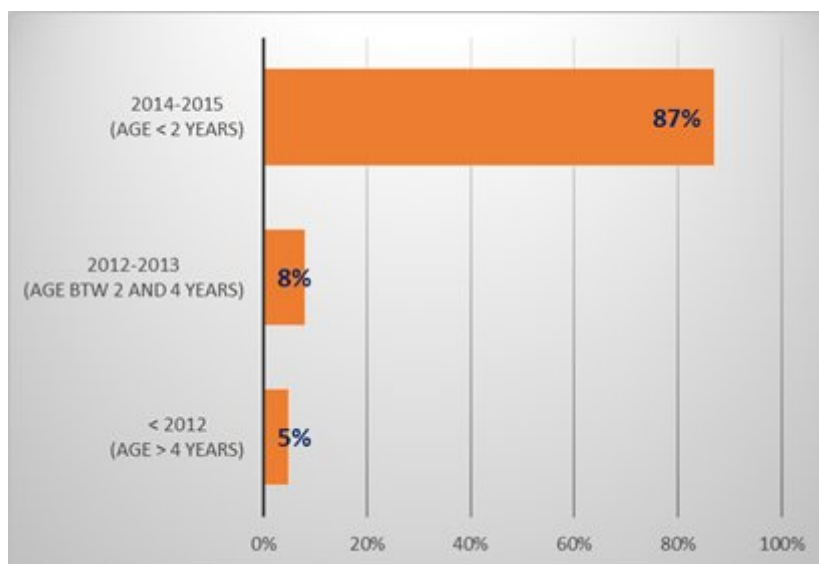
Percentage of cases resolved:	%
Within 12 months	90%
Between 12 and 18 months	5%
More than 18 months	5%

49. A judicial system, or an element thereof, provides a service of quality if most cases are handled within a reasonable time, which may be established by law or by practice; a very limited proportion of cases with a longer duration is permitted as a tolerance category including only a few number of cases which, for imponderable reasons, cannot be processed within the pre-determined time limits.

**Age of pending proceedings:** number of cases that are pending on a given date, grouped according to the year in which they started. Alternatively, the percentage of pending cases that have been open for longer than a set time limit (for example, percentage of cases pending for more than three years).

50. Since they are undifferentiated, the problem of global figures is to make individual units appear identical. In fact, a correct statistical analysis of the figures in question will reveal increasingly detailed information. Let us consider the civil or criminal backlog of a court or a judicial system as a whole. The backlog has a varied and anomalous structure, which differs from court to court; it is particularly pronounced for courts with an insufficient number of judges and registry staff. It is possible to take into consideration the different types of cases included in this stock by introducing specific legal subject matters (going beyond the simple difference between “litigious cases” and “non litigious cases”).

51. For example, the following table is an illustrative example of how the backlog of cases (pending at 31 December 2016) within a court or entire system may be graphically represented.



52. In contrast to the previous indicator - which is closely related to this one - measuring the duration of proceedings that have already been resolved, this indicator measures the period of time for which proceedings that are still pending have been on-going, and therefore enables the general duration of cases to be assessed, distinguishing between structurally normal pending proceedings (for instance, in the case above it would be the class of up to 2 years) and structurally abnormal pending proceedings (the sum total of proceedings that have been pending for more than two years).

**Number of adjournments during the proceedings:** number of adjournments decided prior to the solving of the case.

53. This indicator may be calculated as the simple average of the adjournments recorded for each case.

54. There can be many reasons for adjournments. If we examine them all it is clear that responsibility may be, to varying degrees, equally shared between all participants in the trial. These range from service errors committed by registries to absences of judges, which are not always justified and mean that panels cannot be convened by using the agreements of counsels - which are necessary in some cases although, in others, result merely from delaying tactics. Obviously, there is also no lack of cases in which witnesses or the accused themselves fail to appear.

55. The adjournment of a hearing is not merely an intrinsic element of inefficiency within a judicial system. It is also a shortcoming which causes harm to users. There is a large number of cases in which witnesses have to appear at hearings which are held hundreds of kilometres from where they live, and only find out about the adjournment upon arrival. The number of lawyers who spend time and money in order to reach the location of the trial only to see their efforts thwarted due to an adjournment is even greater.

**Efficiency rate (ER indicator):** relation between the number of personnel used in a court in a year and the output of cases from the same court at the end of the year. Typically, this indicator is applied to homogeneous categories of activity such as civil justice, criminal sector, administrative tasks, etc.

**Output (decisions, proceedings, etc.)**

**ER = -----**

**Nr. of People (who produced that output)**

56. ER measures the quantity of output produced by a productive unit over a unit of time. The most productive of the two divisions of a court dealing with similar matters and with the same number of judges and administrative staff will be the division that resolves the greater number of cases within the specified period.

57. The implementation of the concept of efficiency and productivity in the judicial sector requires, however, several considerations.

58. The result of the activity of the judiciary is not the production of bolts or other consumer goods that are, to a greater or lesser extent, non-essential. Within the civil sector, the activity of the judiciary relates to the protection and exercise of the rights of individuals. In the criminal sector, it involves investigation and trial with the aim of establishing the guilt or innocence of a defendant accused of an offence.

59. Any reasoning concerning the concept of productivity in justice, as for any other concept derived from business that is aimed at ensuring an efficient judicial service, must at all times take account the difficulty of the task assigned of the judiciary and the importance of protecting human rights.

60. However, this does not alter the fact that justice may be considered as a service provided to citizens, and that as such is comparable with a large number of other services provided by the public administration, which are no less important or essential for living in a community. It is therefore from the service perspective that the efficiency of justice can and should be measured.

61. The efficiency of the judiciary must relate to measurable acts within homogeneous categories and without considering the underlying activity which makes up the routine work of the profession.

62. The main indicator used at the international level focuses on the number of pending cases which were solved, in general without considering the composition of any intermediate acts or decisions. It is consequently the number of decisions (judgment or other definitive act) made by an individual judge, division or court within the reference period that is significant for the purposes of productivity.

### III. 4. TENURE AND IRREMOVABILITY

#### ***THE SIRACUSA DRAFT PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, 1981***

##### Removal

Art. 16. A judge should not be subject to removal unless, by reason of a criminal act or through gross or repeated neglect or physical or mental incapacity, he has shown himself manifestly unfit to hold the position of judge.

#### ***MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE, International Bar Association (IBA), 1982***

##### C - Terms and Nature of Judicial Appointments

29. a) The grounds for removal of judges shall be fixed by law and shall be clearly defined.  
b) All disciplinary actions shall be based upon standards of judicial conduct promulgated by law or in established rules of court.

30. A judge shall not be subject to removal unless by reason of a criminal act or through gross or repeated neglect or physical or mental incapacity he/she has shown himself/herself manifestly unfit to hold the position of judge.

31. In systems where the power to discipline and remove judges is vested in an institution other than the Legislature the tribunal for discipline and removal of judges shall be permanent and be composed predominantly of members of the Judiciary.

#### ***MONTREAL DECLARATION UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE, International Association of Judicial Independence and World Peace (JIWP), 1983***

##### Tenure

Art. 2.19 a) The term of office of the judges, their independence, security, adequate remuneration and conditions of service shall be secured by law and shall not be altered to their detriment.  
b) Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or expiry of their term of office, where such exists.

2.22 Retirement age shall not be altered for judges in office without their consent.

##### Discipline and Removal

2.32 A complaint against a judge shall be processed expeditiously and fairly under an appropriate practice, and the judge shall have the opportunity to comment on the complaint at the initial stage. The examination of the complaint at its initial stage shall be kept confidential, unless otherwise requested by the judge.

2.33 a) The proceedings for judicial removal or discipline, when such are initiated, shall be held before a court or a board predominantly composed of members of the judiciary and selected- by. the judiciary.

b) However, the power of removal may be vested in the Legislature by Impeachment or joint address, preferably upon a recommendation of a court or board as referred to in 2.33(a).

2.34 All disciplinary action shall be based upon established standards of judicial conduct.

2.35 The proceedings for discipline of judges shall ensure fairness to the judge and the opportunity of a full hearing. discipline and removal shall be held in camera. The judge may, however, request that the hearing be held in public, subject to a final and reasoned disposition of this request by the

disciplinary Tribunal. Judgments in disciplinary proceedings, whether held in camera or in public, may be published.

2.37 With the exception of proceedings before the Legislature or in connection with them, the decision of a disciplinary Tribunal shall be subject to appeal to a court.

2.38 A judge shall not be subject to removal except on proved grounds of incapacity or misbehaviour, rendering him unfit to continue in office.

2.39 In the event that a court is abolished, judges serving in this court shall not be affected, except for their transfer to another court of the same status.

***BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, Adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, 1985***

Conditions of service and tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

Discipline, suspension and removal

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE ("Singhvi Declaration"), ECOSOC, 1985***

Tenure

16. (a) The term of office of the judges, their independence, security, adequate remuneration and conditions of service shall be secured by law and shall not be altered to their disadvantage.  
(b) Subject to the provisions relating to discipline and removal set forth herein, judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or expiry of their legal term of office.

Discipline and Removal

30. A judge shall not be subject to removal except on proved grounds of incapacity or misbehaviour rendering him unfit to continue in office.

***FIRST STUDY COMMISSION, JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY, MEETING IN MACAO, 23 - 27 October 1989, The RESPONSIBILITY OF THE JUDGE, IAJ, 1989***

B. Concerning the relationships between the judicial and the executive branches

[...] In any event, the essential consideration must be that serious measure as impeachment or dismissal should not become a means for exerting pressure on a judge, and thereby impinge upon the independence of the judiciary.

**PALERMO DECLARATION, ELEMENTS OF A EUROPEAN STATUTE OF MAGISTRACY, MEDEL, 1993**

II. THE MAGISTRATES

2.1. Magistrates are irremovable. They cannot be transferred, suspended, retired or dismissed, or be the object of any other modification of their professional situation, except in cases and through procedures disciplined by law.

**NINTH ANNUAL ACTIVITY REPORT OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS - 1995/96**

The African Commission on Human and Peoples' Rights at its 19th Ordinary Session held from 26th to 4th April 1996 at Ouagadougou, Burkina Faso calls upon African countries to incorporate in their legal systems universal principles establishing the independence of the Judiciary, especially with regard to security of tenure.

**BEIJING STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION, as amended in Manila at 7th Biennial Conferences of Chief Justices of Asia and the Pacific, 1997**

Tenure

18. Judges must have security of tenure.

19. It is recognised that, in some countries, the tenure of judges is subject to confirmation from time to time by vote of the people or other formal procedures.

20. However, it is recommended that all judges exercising the same jurisdiction be appointed for a period to expire upon the attainment of a particular age.

21. A judge's tenure must not be altered to the disadvantage of the judge during his or her term of office.

22. Judges should be subject to removal from office only for proved incapacity, conviction of a crime, or conduct that makes the judge unfit to be a judge.

23. It is recognised that, by reason of differences in history and culture, the procedures adopted for the removal of judges may differ in different societies. Removal by parliamentary procedures has traditionally been adopted in some societies. In other societies, that procedure is unsuitable; it is not appropriate for dealing with some grounds for removal; it is rarely, if ever, used; and its use other than for the most serious of reasons is apt to lead to misuse.

24. Where parliamentary procedures or procedures for the removal of a judge by vote of the people do not apply, procedures for the removal of judges must be under the control of the judiciary.

25. Where parliamentary procedures or procedures for the removal of a judge by vote of the people do not apply and it is proposed to take steps to secure the removal of a judge, there should, in the first instance, be an examination of the reasons suggested for the removal, for the purpose of determining whether formal proceedings should be commenced only if the preliminary examination indicates that there are adequate reasons for taking them.

26. In any event, the judge who is sought to be removed must have the right to a fair hearing.

27. All disciplinary, suspension or removal proceedings must be determined in accordance with established standards of judicial conduct.

28. Judgements in disciplinary proceedings, whether held in camera or in public, should be published.

29. The abolition of the court of which a judge is a member must not be accepted as a reason or an occasion for the removal of a judge. Where a court is abolished or restructured, all existing members of the court must be reappointed to its replacement or appointed to another judicial office of equivalent status and tenure. Members of the court for whom no alternative position can be found must be fully compensated.

***EUROPEAN CHARTER ON THE STATUTE FOR JUDGES AND EXPLANATORY MEMORANDUM, Council of Europe, Strasbourg, 8 - 10 July 1998***

3. Appointment and Irremovability

3.3. Where the recruitment procedure provides for a trial period, necessarily short, after nomination to the position of judge but before confirmation on a permanent basis, or where recruitment is made for a limited period capable of renewal, the decision not to make a permanent appointment or not to renew, may only be taken by the independent authority referred to at paragraph 1.3 hereof, or on its proposal, or its recommendation or with its agreement or following its opinion. The provisions at point 1.4 hereof are also applicable to an individual subject to a trial period.

3.4. A judge holding office at a court may not in principle be appointed to another judicial office or assigned elsewhere, even by way of promotion, without having freely consented thereto. An exception to this principle is permitted only in the case where transfer is provided for and has been pronounced by way of a disciplinary sanction, in the case of a lawful alteration of the court system, and in the case of a temporary assignment to reinforce a neighbouring court, the maximum duration of such assignment being strictly limited by the statute, without prejudice to the application of the provisions at paragraph 1.4 hereof.

***THE UNIVERSAL CHARTER OF THE JUDGE, International Association of Judges (IAJ), 1999***

Security of office

Art. 8. A judge must be appointed for life or for such other period and conditions, that the judicial independence is not endangered. Any change to the judicial obligatory retirement age must not have retroactive effect.

***OPINION NO. 1 (2001) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF COUNCIL OF EUROPE ON STANDARDS CONCERNING THE INDEPENDENCE OF THE JUDICIARY AND THE IRREMOVABILITY OF JUDGES, Council of Europe, 2001***

Tenure – period of appointment

52. The CCJE considered that where, exceptionally, a full-time judicial appointment is for a limited period, it should not be renewable unless procedures exist ensuring that:

- i. the judge, if he or she wishes, is considered for re-appointment by the appointing body and
- ii. the decision regarding re-appointment is made entirely objectively and on merit and without taking into account political considerations.

53. The CCJE considered that when tenure is provisional or limited, the body responsible for the objectivity and the transparency of the method of appointment or re-appointment as a full-time judge are of especial importance (see also paragraph 3.3 of the European Charter).



## Tenure – irremovability and discipline

60. The CCJE considered

- (a) that the irremovability of judges should be an express element of the independence enshrined at the highest internal level (see paragraph 16 above);
- (b) that the intervention of an independent authority, with procedures guaranteeing full rights of defence, is of particular importance in matters of discipline; and
- (c) that it would be useful to prepare standards defining not just the conduct which may lead to removal from office, but also all conduct which may lead to any disciplinary steps or change of status, including for example a move to a different court or area.

## Conclusions

73.(5) The CCJE considered that when tenure is provisional or limited, the body responsible for the objectivity and the transparency of the method of appointment or re-appointment as a full-time judge are of especial importance (see also paragraph 3.3 of the European Charter) (paragraph 53).

## ***GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY, USAID, 2002***

### **2. Security of Tenure**

Security of tenure means that a judge cannot be removed from his or her position during a term of office, except for good cause (e.g., an ethical breach or unfitness) pursuant to formal proceedings with procedural protections. Security of tenure is basic to judicial independence. It is universally accepted that when judges can be easily or arbitrarily removed, they are much more vulnerable to internal or external pressures in their consideration of cases.

In France, security of tenure (*inamovabilité*), introduced in the 19th century, also includes protection against transfers or even promotions without consent—a concept particularly relevant to civil code countries with career judiciaries. The French model was subsequently introduced (although not rigorously observed) in Latin America and, in the 1990s, in countries of Central and Eastern Europe.

#### **b. Additional issues related to security of tenure**

Although most problems related to tenure are common to a variety of systems and circumstances, a few issues arise under more specific contexts and are worth noting:

In some countries it is customary for the entire judiciary to be changed when the president of the country changes, even when the lower courts may have a career system with stated protections against removal. In these cases, problems with respect to security of tenure are usually part of broader systemic problems permitting executive domination or politicization of the judiciary.

- In several countries, especially in anglophone Africa, the president is authorized to employ judges for temporary periods, in order to take care of severe backlogs or when some action, such as elections, requires that a large number of cases be disposed of rapidly. However, the practice has been used by the presidents in some countries to control the judiciaries, since these judges serve at their whim. The House Guidelines, adopted by judges and lawyers from 20 commonwealth countries, recommend that temporary appointees also be subject to appropriate measures to provide security of tenure.
- In several countries of Central and Eastern Europe, judges begin service with a probationary term (generally three to five years), and only if their appointment is confirmed do they receive life tenure. Although a probationary period is reasonable, it does make judges vulnerable to those who can influence the confirmation process. To build in protection for judges subject to probation, the confirmation process should be transparent and based on merit. Additionally, the probationary period should be as short as possible, and probationary judges should not be assigned controversial cases.

### **3. Length of Tenure**

Closely related to the issue of security of tenure is the length of a judge's term. As judges near the end of their tenures in office, they become more vulnerable to the influence of those who may affect their employment prospects. Additionally, judges looking ahead to their next jobs may shape their opinions accordingly, even absent overt external pressure.

There are two general approaches to judicial terms: life tenure and fixed terms. In the United Kingdom, Canada, and the U.S. federal system, judges serve for life, unless removed for cause. The same is true for France and most of Western Europe, and life tenure is increasingly becoming the standard in Central and Eastern Europe. (Some court systems have life tenure, but with mandatory retirement (e.g., age 60 or 70). Fixed terms are common in other countries and in many state and local courts in the United States.

As with selection procedures, the factors favoring fixed or life terms may be different for higher and lower courts. Although most European and Latin American countries now have life tenure (at least in law) for lower-level judges, they have often opted to continue fixed terms for judges of the supreme and constitutional courts. This needs to be understood within the context of the French civil code

model. In keeping with historically based restrictions on letting judges make law in France, the judiciary originally had no authority to review the constitutionality of laws or executive acts. This restriction eased over the years, and special constitutional courts were created in France to exercise these powers. However, the review process was still considered quasi-legislative and political in nature. A fixed term (along with legislative confirmation of the court) was seen to enhance the likelihood that the court would command the trust of a wide band of the political spectrum and stay in touch with changing values.

In order to increase judicial independence, terms must be long enough to reduce the vulnerability of judges. Whether the solution is life tenure or fixed terms tends to depend on the historic and cultural origins of a judiciary. We are not advocating one over the other. Fixed terms may present problems in terms of protecting judges from inappropriate influences, which should be recognized and taken into account. However, life tenure can also have its problems, including its perceived lessening of judicial accountability.

Several examples exist for what may be considered an adequately long term. In Guatemala, a review by the U.N. Special Rapporteur on the Independence of Judges and Lawyers concluded that the five-year terms of the Guatemala Supreme Court were too short to provide the requisite security of tenure and recommended that they be increased to 10.<sup>11</sup> Terms of 10 and 12 years are common in Western and Central Europe.

Three arguments are generally advanced against increasing the length of tenure of judges: (1) shorter terms are necessary to weed out judges who are sub-standard; (2) shorter terms are necessary to ensure that the judiciary reflects the will of the people; and (3) long or life terms protect judges who are in someone's pocket.

In general, these issues can be dealt with by establishing other protections consistent with judicial independence. The problem of sub-standard judges can be addressed by having more rigorous selection processes, probationary terms for new entrants, and procedures for removing judges who fall below certain clearly articulated standards. Even judiciaries with life tenure change over time as a result of retirements and new entries, thereby maintaining some currency with evolving social norms. With respect to the third argument, the experience has been that short terms are more likely than longer terms to result in judges vulnerable to inappropriate influences. However, if a court has been politicized or subject to domination of the executive, it may be advisable to work towards a more comprehensive package of reforms, including changes in the selection process, rather than changes in tenure alone.

Two problems related to term of office are

- Fixed terms are often set to coincide with election of the president and legislature. In those cases, the problem with respect to terms is usually part of a larger basket of structural issues, including the selection process, that are intended to permit the executive and/or political parties to retain influence over the judiciary. Lengthening judicial terms can help to address this problem, since presidents nearly always have relatively short terms of office. Staggering the terms can further help to depoliticize the process. El Salvador, for example, established staggered nine-year terms for its supreme court as part of reforms introduced during the peace negotiations.
- When fixed terms are renewable (or permanent appointments are subject to periodic review and renewal), judges may feel constrained during their first term not to offend those who can influence their reappointment.

**COMMONWEALTH (LATIMER HOUSE) PRINCIPLES ON THE THREE BRANCHES OF GOVERNMENT with Annex (Parliamentary Supremacy, Judicial Independence), The Commonwealth, 2003**

IV) Independence of the Judiciary

(b) Arrangements for appropriate security of tenure and protection of levels of remuneration must be in place.

Judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties.

***PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA, African Commission on Human and Peoples Rights, 2003***

**A. GENERAL PRINCIPLES APPLICABLE TO ALL LEGAL PROCEEDINGS**

4) Independent tribunal

n) Judicial officers shall not be:

(ii) removed from office or subject to other disciplinary or administrative procedures by reason only that their decision has been overturned on appeal or review by a higher judicial body.

p) Judicial officials may only be removed or suspended from office for gross misconduct incompatible with judicial office, or for physical or mental incapacity that prevents them from undertaking their judicial duties.

***THE BURGH HOUSE PRINCIPLES ON THE INDEPENDENCE OF THE INTERNATIONAL JUDICIARY, The Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals, 2004***

3. Security of tenure

3.1 Judges shall have security of tenure in relation to their term of office. They may only be removed from office upon specified grounds and in accordance with appropriate procedures specified in advance.

3.2 The governing instruments of each court should provide for judges to be appointed for a minimum term to enable them to exercise their judicial functions in an independent manner.

***BEST PRACTICES IN COMBATING CORRUPTION - CHAPTER: CHAPTER 16: THE JUDICIAL SYSTEM - JUDGES AND LAWYERS, OSCE, 2004***

Chapter 16: The judicial system - judges and lawyers

**DISCIPLINING JUDGES**

Constitutional guarantees exist against arbitrary removals of judges. These guarantees require that only a special process usually involving the legislature can result in the removal of a member of the higher judiciary. And even then, only after due process has been provided. Similarly, salaries and benefits for judges cannot be reduced to prevent a government from pressurizing judges through threats to cut their incomes, etc. The judiciary is further protected by its very actions – it sits in public, it gives reasons for its decisions and, for the most part, its decisions are subject to appeal to higher courts. Some countries are also establishing “court user committees” where representatives of user groups meet with local judges to find appropriate remedies for any problems experienced. This establishes de facto accountability at the grass roots level.

The most important element is probably security of tenure. If a judge, once appointed, can only be removed for grave and serious misconduct, then the judge is freed from the need to court popularity

– whether among the public or politicians – in order to be re-appointed. Experience in the United States has shown that even judges carefully chosen by conservative administrations can become progressive reformers once on the bench.

***FIRST STUDY COMMISSION - GENERAL REPORT, HOW CAN THE APPOINTMENT AND ASSESSMENT (QUALITATIVE AND QUANTITATIVE) OF JUDGES BE MADE CONSISTENT WITH THE PRINCIPLE OF JUDICIAL INDEPENDENCE, International Association of Judges (IAJ), 2006***

Conclusions

2) Judges who have achieved a permanent position or who have been appointed to a fixed term position should only be capable of being dismissed if found guilty of a serious disciplinary offence or if found incapable of discharging their judicial functions, in accordance with the established law and legally determined procedures.

6) There is a risk that such assessments could be used as the basis for removing a judge from his or her position/post. Therefore, the issue of removal from office (for lack of competence) must be kept independent from normal assessments.

***DRAFT VADEMECUM ON THE JUDICIARY, EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), 2008***

2.2 Irrevocability and Dismissal

Any possible renewal of a term of office could adversely affect the independence and impartiality of judges.

***PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO DEVELOPMENT, UN HUMAN RIGHTS COUNCIL, Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, 24 March 2009***

Recommendations

98. As regards tenure, irremovability, disciplinary measures and immunity, the Special Rapporteur recommends that:

- Member States consider the progressive introduction of life tenures for judges.
- Reviews of judges' appointments by the executive be abolished.
- Specific safeguards be established to ensure that probationary appointments of judges do not put the independence of the judiciary at stake. Probationary judges be automatically granted life appointment or fixed tenure unless they were dismissed as a consequence of disciplinary measures or the decision of an independent body following a specialized procedure that determined that a certain individual is not capable of fulfilling the role of a judge.
- Member States give paramount attention to upholding the key principle of irremovability.
- Member States establish an independent body in charge of disciplining judges.
- Member States adopt legislation giving detailed guidance on the infractions by judges triggering disciplinary measures, including the gravity of the infraction which determines the kind of disciplinary measure. Disciplinary measures must be proportional to the gravity of the infraction.
- Decisions related to disciplinary measures be made public.
- Adequate civil and criminal immunity for judges be guaranteed by the Constitution or equivalent, and that detailed procedures for lifting immunity be inscribed in law, reinforcing the independence of the judiciary.

**THE KYIV RECOMMENDATIONS ON JUDICIAL INDEPENDENCE IN EASTERN EUROPE, SOUTH CAUCASUS AND CENTRAL ASIA, OSCE, 2010**

Limited Term of Office

15. Court chairpersons should be appointed for a limited number of years with the option of only one renewal. In case of executive appointment, the term should be short without possibility of renewal.

**RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010**

Chapter VI – Status of the judge

49. Security of tenure and irremovability are key elements of the independence of judges. Accordingly, judges should have guaranteed tenure until a mandatory retirement age, where such exists.

50. The terms of office of judges should be established by law. A permanent appointment should only be terminated in cases of serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform judicial functions. Early retirement should be possible only at the request of the judge concerned or on medical grounds.

52. A judge should not receive a new appointment or be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions or reform of the organisation of the judicial system.

**MT. SCOPUS APPROVED REVISED INTERNATIONAL STANDARDS OF JUDICIAL INDEPENDENCE, International Association of Judicial Independence and World Peace, 2008, 2011, 2012**

4.3. Judicial appointments should generally be for life, subject to removal for cause and compulsory retirement at an age fixed by law at the date of appointment.

4.3.1 Retirement age shall not be reduced for existing judges.

**5. JUDICIAL REMOVAL AND DISCIPLINE**

5.1. The proceedings for discipline and removal of judges shall be processed expeditiously and fairly and shall ensure fairness to the judge including adequate opportunity for hearing.

5.2. With the exception of proceedings before the Legislature, the procedure for discipline should be held *in camera*. The judge may however request that the hearing be held in public and such request should be respected, subject to expeditious, final and reasoned disposition of this request by the disciplinary tribunal. Judgments in disciplinary proceedings, whether held *in camera* or in public, may be published.

5.3. All of the grounds for the discipline, suspension and removal of judges shall be entrenched constitutionally or fixed by law and shall be clearly defined.

5.4. All disciplinary, suspension and removal actions shall be based upon established standards of judicial conduct.

5.5. A judge shall not be subject to removal, unless by reason of a criminal act or through gross or repeated neglect or serious infringements of disciplinary rules or physical or mental incapacity he has shown himself manifestly unfit to hold the position of judge. The grounds for removal shall be limited to reasons of medical incapacity or behaviour that renders the judge unfit to discharge their duties.

5.6. In systems where the power to discipline and remove judges is vested in an institution other than the Legislature, the tribunal for discipline and removal of judges shall be permanent, and be composed predominantly of members of the Judiciary.

5.7. The head of the court may legitimately have supervisory powers to control judges on administrative matters.

***FIRST STUDY COMMISSION REPORT - NOMINATION OF JUDGES, International Association of Judges (IAJ), 2013***

Recommendation on the security of tenure in office

- There be guarantees provided in law that the retirement age for judges cannot be changed for political reasons;
- If there is any change, it should not apply retrospectively;
- If there is a range or age span during which retirement must occur, i.e. 65 to 70, the judge should make the decision when to retire.

***BRIJUNI STATEMENT OF THE PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY, Conference of Chief Justices of Central and Eastern Europe, 14 October, 2015***

Tenure

17. Judges must have security of tenure. The terms of office of judges shall be adequately secured by law. The use of a probationary period in the appointment process is not preferred, however where it exists, it should be restricted as much as possible. A judge on probation is entitled to the same protections, privileges, immunities, and individual independence as a judge who is not on probation.

18. It is recommended that all judges exercising the same jurisdiction be appointed for a period to expire upon the attainment of a particular age.

19. Judges should be subject to early resignation only at their own request and subject to removal from office only for proved incapacity, conviction of a crime, or other serious misconduct that renders the judge unfit to be a judge. The adjudication of a case on the merits in good faith based upon the judge's application of the law should not result in removal even though the judge's decision may be mistaken, unpopular or disfavored by government officers or institutions. The appropriate recourse for those dissatisfied with the judgment is to pursue an appeal in accordance with law.

20. Judges who are presidents of chambers should not be removed as president based on an adjudication by the judge or by other judges within the chamber that is deemed to be mistaken, unpopular, or disfavored.

21. Where procedures for the removal of a judge by vote of the people do not apply, procedures for the removal of judges must be under the control of the judiciary.

22. Whenever a judge is sought to be removed, the judge must have the right to adequate notice and to a full and fair hearing. No judge should be disciplined or removed for judicial acts except for gross negligence or intentional disregard of the law.

23 .If the law provides for the evaluation of the professional performance of judges, such evaluation must respect judicial independence. Judges may be evaluated to identify areas in which they should improve and to determine who should be promoted. Evaluations must not be abused or used as a pretext to dismiss a judge.

24. All disciplinary, suspension or removal proceedings must be determined in accordance with previously established standards of judicial conduct and be transparent.

25. Except for the purposes of ensuring the proper and timely adjudication of cases, no judge should be transferred by competent bodies responsible for the administration of judicial service from one jurisdiction or function to another without the consent of the judge.

26. If the competent body responsible for the administration of judicial service is a judicial council, a council of justice, or a comparable body, such council or body should be comprised of a majority who are Judges

***OPINION NO. 19 (2016) ON THE ROLE OF COURT PRESIDENTS, Consultative Council of European Judges, Council of Europe, 2016***

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. 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.

11. The termination of the term of office of a court president should in principle not affect his/her position as a judge.



### **III. 5. REMUNERATION OF JUDGES AND FINANCIAL SECURITY**

#### ***THE SIRACUSA DRAFT PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, 1981***

##### V. Retirement. Discipline. Removal and Immunity Retirement

Art. 12 All judges, whether selected by appointment or elected, should have guaranteed tenure until a mandatory retirement age, subject only to removal for incapacity or serious illness.

#### ***MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE, International Bar Association (IBA), 1982***

##### A Judges and the Executive

14. Judicial salaries and pensions shall be adequate and should be regularly adjusted to account for price increases independent of executive control.

#### ***MONTREAL DECLARATION, UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE, International Association of Judicial Independence and World Peace (JIWP), 1983***

Art. 2.21 a) During their terms of office, judges shall receive salaries and after retirement, they shall receive pensions.

b) The salaries and pensions of judges shall be adequate, commensurate with the status, dignity and responsibility of their office, and be regularly adjusted to account fully for price increases.

c) Judicial salaries shall not be decreased during the judges' term of office, except as a coherent part of an overall public economic measure

#### ***BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, Adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, 1985***

##### 11. Conditions of service and tenure

The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

#### ***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE ("Singhvi Declaration"), ECOSOC, 1985***

##### Tenure

16. (a) The term of office of the judges, their independence, security, adequate remuneration and conditions of service shall be secured by law and shall not be altered to their disadvantage.

18. (a) During their terms of office, judges shall receive salaries and after retirement, they shall receive pensions.

(b) The salaries and pensions of judges shall be adequate, commensurate with the status, dignity and responsibility of their office, and shall be periodically reviewed to overcome or minimize the effect of inflation.

(c) Retirement age shall not be altered for judges in office without their consent.

#### ***PROCEDURES FOR THE EFFECTIVE IMPLEMENTATION OF THE BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, Resolution 1989/60, 15th plenary meeting, ECOSOC, 24 May 1989***

##### Procedure 5

In implementing principles 8 and 12 of the Basic Principles, States shall pay particular attention to the need for adequate resources for the functioning of the judicial system, including appointing a sufficient number of judges in relation to case-loads, providing the courts with necessary support staff and equipment, and offering judges appropriate personal security, remuneration and emoluments.

***PALERMO DECLARATION, ELEMENTS OF A EUROPEAN STATUTE OF MAGISTRACY, MEDEL, 1993***

V. THE MAGISTRATES' STATUTE

5.2. The level of a magistrate's remuneration ensures his economic independence. The remuneration evolves according to the criterion of years of service.

***BEIJING STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION, as amended in Manila at 7th Biennial Conferences of Chief Justices of Asia and the Pacific, 1997***

JUDICIAL CONDITIONS

31. Judges must receive adequate remuneration and be given appropriate terms and conditions of service. The remuneration and conditions of service of judges should not be altered to their disadvantage during their term of office, except as part of a uniform public economic measure to which the judges of a relevant court, or a majority of them, have agreed.

32. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

JUDICIAL ADMINISTRATION

37. The budget of the courts should be prepared by the courts or a competent authority in collaboration with the courts having regard to the needs of the independence of the judiciary and its administration. The amount allotted should be sufficient to enable each court to function without an excessive workload.

***JUDGES' CHARTER IN EUROPE, European Association of Judges, 1997***

Fundamental principles

8. Judicial salaries must be adequate, to ensure that the Judge has true economic independence and must not be cut at any stage of a Judge's service

***EUROPEAN CHARTER ON THE STATUTE FOR JUDGES AND EXPLANATORY MEMORANDUM, Council of Europe, Strasbourg, 8 - 10 July 1998***

1. GENERAL PRINCIPLES

1.8. Judges are associated through their representatives and their professional organizations in decisions relating to the administration of the courts and as to the determination of their means, and their allocation at a national and local level. They are consulted in the same manner over plans to modify their statute, and over the determination of the terms of their remuneration and of their social welfare.

4. CAREER DEVELOPMENT

4.2. Judges freely carry out activities outside their judicial mandate including those which are the embodiment of their rights as citizens. This freedom may not be limited except in so far as such

outside activities are incompatible with confidence in, or the impartiality or the independence of a judge, or his or her required availability to deal attentively and within a reasonable period with the matters put before him or her. The exercise of an outside activity, other than literary or artistic, giving rise to remuneration, must be the object of a prior authorization on conditions laid down by the statute.

## 6. REMUNERATION AND SOCIAL WELFARE

6.1. Judges exercising judicial functions in a professional capacity are entitled to remuneration, the level of which is fixed so as to shield them from pressures aimed at influencing their decisions and more generally their behaviour within their jurisdiction, thereby impairing their independence and impartiality.

6.2. Remuneration may vary depending on length of service, the nature of the duties which judges are assigned to discharge in a professional capacity, and the importance of the tasks which are imposed on them, assessed under transparent conditions.

6.3. The statute provides a guarantee for judges acting in a professional capacity against social risks linked with illness, maternity, invalidity, old age and death.

6.4. In particular the statute ensures that judges who have reached the legal age of judicial retirement, having performed their judicial duties for a fixed period, are paid a retirement pension, the level of which must be as close as possible to the level of their final salary as a judge.

### ***THE UNIVERSAL CHARTER OF THE JUDGE, International Association of Judges (IAJ), 1999***

#### Remuneration and retirement

Art. 13 The judge must receive sufficient remuneration to secure true economic independence. The remuneration must not depend on the results of the judges work and must not be reduced during his or her judicial service. The judge has a right to retirement with an annuity or pension in accordance with his or her professional category. After retirement a judge must not be prevented from exercising another legal profession solely because he or she has been a judge.

### ***OPINION NO. 1 (2001) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF COUNCIL OF EUROPE ON STANDARDS CONCERNING THE INDEPENDENCE OF THE JUDICIARY AND THE IRREMOVABILITY OF JUDGES, Council of Europe, 2001***

#### Remuneration

61. Recommendation No. R (94) 12 provides that judges' "remuneration should be guaranteed by law" and "commensurate with the dignity of their profession and burden of responsibilities" (Principles I(2)(a)(ii) and III(1)(b)). The European Charter contains an important, hard-headed and realistic recognition of the role of adequate remuneration in shielding "from pressures aimed at influencing their decisions and more generally their behaviour ...", and of the importance of guaranteed sickness pay and adequate retirement pensions (paragraph 6). The CCJE fully approved the European Charter's statement.

62. While some systems (e.g. in the Nordic countries) cater for the situation by traditional mechanisms without formal legal provisions, the CCJE considered that it was generally important (and especially so in relation to the new democracies) to make specific legal provision guaranteeing judicial salaries against reduction and to ensure at least de facto provision for salary increases in line with the cost of living.

#### Conclusions

73. The CCJE Considered that the critical matter for member States is to put into full effect principles already developed (paragraph 6) and, after examining the standards contained in particular Recommendation No. R (94) 12 on the independence, efficiency and role of judges, it concluded as follows:

(8) Judges' remuneration should be commensurate with their role and responsibilities and should provide appropriately for sickness pay and retirement pay. It should be guaranteed by specific legal provision against reduction and there should be provision for increases in line with the cost of living (paragraphs 61-62).

**COMMONWEALTH (LATIMER HOUSE) PRINCIPLES ON THE THREE BRANCHES OF GOVERNMENT with Annex (Parliamentary Supremacy, Judicial Independence), The Commonwealth, 2003**

IV) Independence of the Judiciary

(b) Arrangements for appropriate security of tenure and protection of levels of remuneration must be in place.

**GENERAL REPORT, FIRST STUDY COMMISSION - ECONOMICS, JURISDICTION AND INDEPENDENCE, International Association of Judges (IAJ), 2005**

Conclusions

7) Monetary Incentives of some kind, such as bonus related salaries for judges, workload norms for judges and bonus related salary systems, could seriously jeopardize judicial independence. At the least such incentives might give an appearance of jeopardizing judicial independence since the parties might have the perception that the financial interest of judges would prevail over the principle of giving an impartial decision.<sup>78</sup>

**FIRST STUDY COMMISSION - GENERAL REPORT, HOW CAN THE APPOINTMENT AND ASSESSMENT (QUALITATIVE AND QUANTITATIVE) OF JUDGES BE MADE CONSISTENT WITH THE PRINCIPLE OF JUDICIAL INDEPENDENCE, International Association of Judges (IAJ), 2006**

Conclusions

12) The outcome of an assessment should never influence the remuneration of the judge.<sup>3</sup> This is because if a judge has to be assessed, even by his/her peers, in order to receive a higher salary or a bonus, he/she might be induced to please the superior judge (or chief justice) even with regard to judicial decisions that are made.

**DRAFT VADEMECUM ON THE JUDICIARY, EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), 2008**

2.3 Financial Independence

2.3.1 Remuneration

[...]the low level of salaries of judges in Albania, relative to other professions and activities though not to comparable positions in the civil service, was repeatedly identified as an objective factor contributing to corruption among judges and to the consequent reduction of public confidence in the courts.

CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995, chapter B.1.i.

[That] the salaries of judges cannot be reduced during their term of office, [...] is a common and desirable guarantee of judicial independence.

CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995, chapter B.1.i.

The Council of Justice should be the final authority for all aspects of the professional life of judges in particular matters pertaining to their selection, appointment, career, promotion and transfer), training, dismissal and discipline, and should be responsible for overseeing the training of judges.

CDL-AD(2004)044 Interim Opinion on Constitutional Reforms in the Republic of Armenia, para. 59.

Principle I.2.c of Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe) states “All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. The authority taking the decision on the selection and career of judges should be independent of the government and the administration.

CDL-AD(2007)028 Judicial Appointments (report), para. 4.

According to opinion No 1 (2001) of the CCJE, “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 criteria.” The European Charter on the statute for judges adopted in Strasbourg in July 1998 (DAJ/DOC(98)23) states: “In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.” According to the Explanatory Memorandum of the European Charter, the term “intervention” of an independent authority means an opinion, recommendation or proposal as well as an actual decision.

The CCJE commends the standards set by the European Charter “in so far as it advocated the intervention (in a sense wide enough to include an opinion, recommendation or proposal as well as an actual decision) of an independent authority with substantial judicial representation chosen democratically by other judges”.

CDL-AD(2007)028 Report on Judicial Appointments, para. 18-20

The Venice Commission is of the opinion that a judicial council should have a decisive influence on the [...] promotion of judges [...]

CDL-AD(2007)028 Report on Judicial Appointments, para. 25.

[The questions regarding the application measures of the general principles on the budget of the judiciary and the remuneration of judges] can and should also be addressed by ordinary legislation. In principle, there is no reason why they could not be so addressed in the context of a law on the status of magistrates.

CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995, chapter B.1.i.

### 2.3.2 Budgetary autonomy

The practice according to which, contrary to the principle of budgetary autonomy of the magistracy, the Ministry of Justice in fact controls every detail of the courts' operational budgets, contains obvious dangers of undue interference in the independent exercise of their functions.

CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995, chapter B.1.i.

[The questions regarding the application measures of the general principles on the budget of the judiciary and the remuneration of judges] can and should also be addressed by ordinary legislation. In principle, there is no reason why they could not be so addressed in the context of a law on the status of magistrates.

CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995, chapter B.1.i.

[...] the parliamentary budget battles [...] are undoubtedly of a political nature. [...] While wanting to ensure greater independence of judges and courts, and thus to bring about their depoliticization, [by involving the Council of Justice into this battles] it may turn out that they will, quite to the contrary, be engulfed in the political debate.

Without deviating from the principle of having a separate budget for the judiciary and, in order to allow for a de facto judicial independence, these powers and budgetary struggles could rather be left with Minister of Justice or the Cabinet as a whole which will feel politically responsible for the treatment eventually accorded to the judiciary in the matters of proper funding.

CDL-AD(2002)026 Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, para. 48.

## ***MAGNA CARTA OF JUDGES, CCJE, Council of Europe, Strasbourg, 17 November 2010***

### 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.

## ***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

### Chapter VI – Status of the judge

53. The principal rules of the system of remuneration for professional judges should be laid down by law.

54. Judges' remuneration should be commensurate with their profession and responsibilities, and be sufficient to shield them from inducements aimed at influencing their decisions. Guarantees should exist for maintaining a reasonable remuneration in case of illness, maternity or paternity

leave, as well as for the payment of a retirement pension, which should be in a reasonable relationship to their level of remuneration when working. Specific legal provisions should be introduced as a safeguard against a reduction in remuneration aimed specifically at judges.

55. Systems making judges' core remuneration dependent on performance should be avoided as they could create difficulties for the independence of judges.

## **RESOURCE GUIDE ON STRENGTHENING JUDICIAL INTEGRITY AND CAPACITY, UNODC, 2011**

### **I. RECRUITMENT, PROFESSIONAL EVALUATION AND TRAINING OF JUDGES**

#### **8. Conclusions and recommendations**

- Salaries of judges should be such as to relieve them from economic hardship. Salary increases should be anchored to objective criteria and decided in a fully transparent manner.

### **THE CENTRAL COUNCIL OF INTERNATIONAL ASSOCIATION OF JUDGES convened in Washington D.C. (USA) from 11 to 15 of November 2012, concerned for the independence of Justice**

Calls Governments, worldwide, to respect the international principles which ensure the independence of the judiciary and Reminds the principles of the United Nations upon the independence of the Judiciary(1985– principle no 11) and the International Charter of the Judge (IAJ, 1999) which stipulates in its article 13 that “The judge must receive sufficient remuneration to secure true economic independence. The remuneration must not depend on the results of the judges work and must not be reduced during his or her judicial service”. The Council also Notes that the reduction of the judges' and prosecutors' salaries was judged unconstitutional by the Constitutional Courts of several countries.

### **OPINION NO. 15 (2012) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) ON THE SPECIALISATION OF JUDGES, Council of Europe, 2012**

#### **D. Specialisation and status of the judge**

##### **1. Status of the specialised judge**

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”. 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.



**VILAMOURA MANIFEST, JUSTICE IN FRONT OF ECONOMIC CRISIS, MEDEL, 2012**

7. To carry out their missions, the magistrates must have the appropriate resources and conditions provided by the state. The remuneration of magistrates must be of sufficient level to make them free from pressure. In this regard, the work of the CEPEJ highlights the worrying disparity in resources available to the judicial systems of European states.

**FIRST STUDY COMMISSION REPORT - NOMINATION OF JUDGES, International Association of Judges (IAJ), 2013**

Recommendation on the improper attempt to influence judge's decisions

- There be a law or constitutional provision that prohibits any improper attempt to influence a judge's judicial decision making process;
- Judicial remuneration must be recognized as a factor strongly related to the independence of the judiciary;
- No compensation should be delayed or reduced more for the judges than for civil servants in the case of a general reduction of salaries;
- Salaries must be adequate to provide an acceptable living standard;
- Salaries should be protected by law or the constitution.

### III. 6. TRAINING AND EDUCATION

#### ***HIGH QUALITY JUSTICE FOR ALL MEMBER STATES OF THE COUNCIL OF EUROPE, The European Commission for the Efficiency of Justice, CEPEJ STUDIES No. 22, 2015***

In order to increase the quality and efficiency of the training, the CEPEJ experts offer the following pieces of advice:

- the introduction of the comprehensive analysis of the educational needs in the preparation of training programmes, and to take into account the feedbacks of the judges of courts of different instances and other information, including public opinion, reports on various countries, analytical papers, researches, etc;
- in order to improve the quality of the professional advancement it is recommended to introduce the evaluation on a continuous basis as a means to improve training and to determine future needs.

#### ***DECLARATION OF JUDICIAL TRAINING PRINCIPLES, International Organization for Judicial Training (IOJT), 8th November 2017,***

1. Judicial training is essential to ensure high standards of competence and performance. Judicial training is fundamental to judicial independence, the rule of law, and the protection of the rights of all people.

#### ***DECLARATION ON JUDICIAL INTEGRITY, UNODC, Global Judicial Integrity Network, 2018***

Promote peer-learning and the exchange of good practices in strengthening and upholding judicial integrity.

7. Without prejudice to judicial independence, support initiatives that promote continuous judicial education and in particular training on effectively complying with relevant standards of conduct and on gender-related topics, such as sextortion and sexual harassment, recognizing that judicial training is essential for objective, impartial and competent performance of judicial functions and for securing public trust and confidence.

### III. 6.1. GENERAL REMARKS

#### ***MONTREAL DECLARATION, UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE, International Association of Judicial Independence and World Peace (JIWP), 1983***

Qualifications, Selections and Training

Art. 2.15. Continuing education shall be available to judges.

#### ***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE (“Singhvi Declaration”), ECOSOC, 1985***

Qualifications, Selection and Training

12. Continuing education shall be available to judges

**FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF JUDICIARY, CONCLUSIONS, RECRUITMENT AND TRAINING OF JUDGES IN A MODERN SOCIETY, International Association of Judges (IAJ), 1996**

Conclusions

The need for special training for judges both before or immediately after appointment and while in office (life-long-learning).

The judge has to have special skills which one acquires neither in university nor in another profession.

Therefore three aspects of a judges' education have been stressed out:

- the legal education
- the specialised skills
- the social issues-awareness.

The appointment of the judges should be made by the most objective standards so that it is only open to those best suited to exercise the practice of a judge. The constitutional principle of judges being irremovable, as recognised in many countries, can be regarded as a price society ought to pay for an independent judiciary. Good management of resources requires that through an objective and comprehensive selection process this price is kept as modest as possible. The best guarantee for obtaining this goal is to give this process to an independent body which at least includes sufficient representatives of the judiciary and which has at his disposal the necessary know-how and technical support. Therefore, the education has to be organised by the Judiciary itself or, at least, under its control or with its consent.

**BEIJING STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION, as amended in Manila at 7th Biennial Conferences of Chief Justices of Asia and the Pacific, 1997**

Independence of the judiciary

9. Judges shall be free, subject to any applicable law, to form and join an association of judges to represent their interests and promote their professional training and to take such other action to protect their independence as may be appropriate.

**EUROPEAN CHARTER ON THE STATUTE FOR JUDGES AND EXPLANATORY MEMORANDUM, Council of Europe, Strasbourg, 8 - 10 July 1998**

2 SELECTION, RECRUITMENT, INITIAL TRAINING

2.3. The statute ensures by means of appropriate training at the expense of the State, the preparation of the chosen candidates for the effective exercise of judicial duties. The authority referred to at paragraph 1.3 hereof, ensures the appropriateness of training programmes and of the organization which implements them, in the light of the requirements of open-mindedness, competence and impartiality which are bound up with the exercise of judicial duties.

**GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY, USAID, 2002**

1. Training Programs

a. Continuing judicial education

Many judges in transitional democracies choose to conform with the expectations of their superiors because they lack training about what the law requires, or they are accustomed to accepting direction from senior executive branch or judicial branch officials. A variety of education programs can be appropriate. Many countries have permanent judicial schools or judicial training centers that are responsible for the training of entry-level judges as well as the continuing education of more senior judges, following the European model. USAID has often supported these centers.

A common issue with respect to judicial schools is sustainability, not surprisingly, given the restricted budgets of many judiciaries. Many Latin American countries have adopted a less costly model (pioneered by Costa Rica) in which the school has a very limited permanent staff. Most of the organizational work is done by committees of judges and members of the legal community, such as law professors. The training is carried out by members of the group themselves or by contract. By incorporating judges in the process, including curriculum design, this model also assures that the training is relevant and judges buy into it.

A second issue with respect to continuing judicial education is content and orientation. European judicial schools have leaned toward approaches emphasizing legal theory. U.S. judicial training is generally very practical in nature, including advice in techniques for managing cases efficiently. In part, this is explained by the differing systems. In an adversarial system, the judge relies more on the lawyers to develop the legal theory of a case. In a non-adversarial civil law system, the judge is expected to master more fields of substantive law; most judges appreciate the impact that practical training can have on their ability to perform their jobs.

A third issue is who receives the training. Many initial donor-supported training programs are held in the capital city and, in some cases, are offered primarily to the judicial leadership. However, most of the population comes in contact only with the lower courts. For this reason, several contributors recommended that more programs should be offered to lower courts, especially outside the capital, where the courts have less access to training, materials, and modern approaches, and thus even more need for training. Of course, programs offered to lower court judges may face an even greater challenge of sustainability than those offered to the leadership, and it is important to reach those who can influence policy and help implement reforms. All of these factors should be considered in the design of judicial training programs. The long-term objective should be an indigenous capacity to provide practical training to entry-level and sitting judges at all levels, as well as court personnel, on a sustainable basis.

#### c) International law and human rights

Training in international law can play a role in helping judiciaries exercise their independence from the executive and legislative branches and provide checks on abuses of authority by those branches. For example, judges in Argentina who attended seminars on international and regional law took Argentina's international legal duties into account in decisions limiting the application of amnesty laws.<sup>15</sup> The top courts of several anglophone African countries have invalidated laws and challenged executive actions on the basis of international law.<sup>16</sup> Statements of principles concerning judicial independence adopted by international conferences of senior jurists have also been influential, especially in the commonwealth. Specific, practical advice on how to apply international law in the national courts will usually enhance the effectiveness of such training.

#### d. Study tours

Study tours outside the country allow judges to escape an outlook shaped by their own culture and can be particularly effective in generating a new vision of how a judiciary can operate independently. To achieve their objectives, they must be carefully planned to demonstrate specific issues and should include regular opportunities for participants to discuss their observations and impressions. Study tours are even more beneficial if follow-up communication is planned, through periodic meetings that foster the development of a collegial or mentor relationship or an exchange of materials. Study tours can also play an important role in encouraging courageous reformers to continue their efforts.

#### e. Governance capacity of the judiciary

A judicial system that executes its normal functions in an orderly manner builds public confidence and respect that, in turn, may lead to executive and legislative branch support for greater autonomy and resources. Training programs directed at the management and operational skills of judicial employees can, therefore, contribute in an important way to judicial independence. Training in leadership skills will often be a critical element of such capacity building.

#### f. University legal education

USAID and other donors have often been reluctant to include law school activities as major components in their rule of law programs. In part, university education has been viewed as too long-term and indirect an approach to rule of law problems, particularly for donors who are looking for demonstrable results within a limited timeframe. Additionally, public universities can be difficult partners. Many are uninterested or opposed to making reforms in curricula or teaching methods. Problems within the law school may be only a small manifestation of much larger issues with respect to the overall administration of the university.

However, there was emphatic consensus among the contributors to this guide that deficient university law training is one of the most serious obstacles to the development of a truly independent judiciary. Each of the regional experts and many individual country contributors identified weaknesses in law school education as significantly contributing to problems of judicial independence. The significant substantive and procedural legal reforms that have taken place in many countries in recent years have also created new needs for curriculum reform in law schools. As a consequence, both donors and universities have increased their interest in international cooperation.

At the most basic level, inadequate law school education may result in a deficient pool of applicants for entry-level judicial positions. Although training for judges can be a valid approach to improving their capacity, it usually cannot make up entirely for poor law school training. Moreover, to the extent that judicial training programs have to try doing so, they are incurring costs that should not be theirs, further stretching limited judicial budgets.

In addition to learning skills, law students should be acquiring the values and ethical attitudes they will carry with them throughout their careers. U.S. and other universities include specific ethics courses in their curricula and place a great deal of emphasis in other courses and activities on developing ethical attitudes and respect for the rule of law. Such courses are equally important in most countries where donors are financing rule of law programs.

Another method that has proven successful in transforming attitudes (as well as developing substantive legal skills) is clinical legal education. Students provide legal services in actual cases to people who would not otherwise have access to counsel, and they receive training in lawyering skills in a parallel classroom component. Clinical education allows students to experience first hand the crucial importance of impartial and dedicated judges. It also gives them the opportunity to work closely with disadvantaged groups who are often otherwise outside their range of experience. These skills and experiences can be critical to shaping future generations of judges and lawyers who are equipped to develop, respect, and work with a strong, independent judiciary. Donors have supported dozens of clinical legal education programs throughout Europe and Eurasia at relatively low costs. Many of the participants in those programs have joined or started public interest law NGOs; several have become judges.

#### 2. Access to Legal Materials

In order to base decisions on legal reasoning, judges need to have access to laws, the decisions of higher courts, and other jurisprudence. Knowledge of judicial decisions, in particular, can be important to the perception of impartiality. Judges need to reach similar decisions in similar cases if they are to be regarded as fair and impartial. This is true in both civil code and common law countries. Even though case decisions of higher courts may not be binding on lower courts in civil code jurisdictions, they do inform lower court decision-making and, therefore, are important to promoting consistency and the appearance of fairness. Widespread use of telecommunications technology often enables legal materials of all kinds to be more readily available at low cost.

***OPINION NO. 4 (2003) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON APPROPRIATE INITIAL AND IN-SERVICE TRAINING FOR JUDGES AT NATIONAL AND EUROPEAN LEVELS, Council of Europe, 2003***

## Introduction

2. The independence of the judiciary confers rights on judges of all levels and jurisdictions, but also imposes ethical duties. The latter include the duty to perform judicial work professionally and diligently, which implies that they should have great professional ability, acquired, maintained and enhanced by the training which they have a duty, as well as a right, to undergo.

8. The importance of the training of judges is recognised in international instruments such as the UN Basic Principles on the Independence of the Judiciary, adopted in 1985, and Council of Europe texts adopted in 1994 (Recommendation No. R (94) 12 on the independence, efficiency and role of judges) and 1998 (European Charter on the Statute for Judges) and was referred to in paragraph 11 of the CCJE's Opinion No. 1.

I. The right to training and the legal level at which this right should be guaranteed

9. Constitutional principles should guarantee the independence and impartiality on which the legitimacy of judges depends, and judges for their part should ensure that they maintain a high degree of professional competence (see paragraph 50 (ix) of the CCJE Opinion No. 3).

10. In many countries the training of judges is governed by special regulations. The essential point is to include the need for training in the rules governing the status of judges; legal regulations should not detail the precise content of training, but entrust this task to a special body responsible for drawing up the curriculum, providing the training and supervising its provision.

11. The State has a duty to provide the judiciary or other independent body responsible for organising and supervising training with the necessary means, and to meet the costs incurred by judges and others involved.

12. The CCJE therefore recommends that, in each country, the legislation on the status of judges should provide for the training of judges.

### ***OPINION No.11 (2008) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE QUALITY OF JUDICIAL DECISIONS, Consultative Council of European Judges (CCJE), 2008***

B. The internal environment: professionalism, procedure, hearing and decision

1. The professionalism of the judge

21. Judges' professionalism is the primary guarantee of a high quality judicial decision. This involves a high level legal training of judges in accordance with the principles defined by the CCJE in its Opinions N° 4 (2003) and N° 9 (2006), as well as the development of a culture of independence, ethics and deontology in accordance with Opinions No. 1 (2001) and 3 (2002)

### ***DECLARATION OF MINIMAL PRINCIPLES ABOUT JUDICIARIES AND JUDGES' INDEPENDENCE IN LATIN AMERICA, Campeche, April 2008***

III. MINIMAL CONDITIONS FOR THE PROTECTION OF JUDGES' INDEPENDENCE AND IMPARTIALITY

8. TRAINING

The dynamic evolution of the legal system and the new realities and challenges that have to be faced in the judicial activity stipulated the need of judge training, as a right as well as a liability, having to ensure that:

- a) The right of professional training has to be recognized for everyone without any discrimination.
- b) The free determination of judges for the selection of their training options has to be respected, both as regards its content and in relation to academic offers

***MAGNA CARTA OF JUDGES, CCJE, Council of Europe, Strasbourg, 17 November 2010***

Guarantees of independence

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.

***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

Chapter VI – Status of the judge

56. Judges should be provided with theoretical and practical initial and in-service training, entirely funded by the state. This should include economic, social and cultural issues related to the exercise of judicial functions. The intensity and duration of such training should be determined in the light of previous professional experience.

***ANNUAL REPORTS TO THE HUMAN RIGHTS COUNCIL, UN, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Carina Knaul de Albuquerque e Silva\*, 9 April 2010,***

Recommendations

99. The Special Rapporteur submits to the Human Rights Council the following recommendations:
- (a) The Office of the United Nations High Commissioner for Human Rights (OHCHR), in cooperation with the Special Rapporteur on independence of judges and lawyers, should support initiatives whereby the education and continuing education of judges, prosecutors, public defenders and lawyers on international human rights law will be strengthened. Such initiatives should ensure the integration of human rights principles, norms and standards in their efforts to strengthening national justice systems and institutions;
  - (b) The development of human rights education programmes for judges, prosecutors, public defenders and lawyers is crucial to ensuring a solid foundation for democracy and the rule of law. International cooperation, including that provided by OHCHR, should be encouraged and supported;
  - (c) Continuing learning on international case law and national case law relevant to human rights should be supported. An international database should be created so as to give States access not only to technical assistance, but also to best practices and case law on which they can base their programmes;
  - (d) Strategic partnerships with international, regional and national judges' associations and bar associations are critical to the work of the Special Rapporteur. The Special Rapporteur may play a role in stimulating the establishment of a network for an exchange of judicial experiences, particularly between countries from the North and from the South; and from the East and the West;
  - (e) States should give priority to strengthening judicial systems, particularly through continuous education in international human rights law for judges, prosecutors, public defenders and lawyers;

- (f) International human rights law should be included in the curricula of all law faculties and law schools, and in the curricula of schools for the judiciary and the academic programmes of bar associations;
- (g) Particular attention should be given to the different levels and categories of judges. Education programmes should be designed taking into account the expectations, responsibilities and interests of each level and category;
- (h) The need to enhance the education of judicial staff (such as court secretaries, assistants, law clerks and registrars) should also be studied;
- (i) Legal education for judges, prosecutors and lawyers should be delivered using the latest training methodologies, including interactive sessions, seminars and workshops. Collaboration with professionals from the education and technological sectors to establish modern methodologies and tools should be examined;
- (j) States should undertake an assessment of the resources currently available and needed to establish the programmes of continuing international human rights law education, including infrastructure, human resources and financial requirements;
- (k) Judicial human rights education, including continuous learning, should be designed in the broader context of judicial development strategies;
- (l) An effective partnership between the judiciary and the executive power should be developed to obtain adequate and sustainable resourcing while always preserving judicial independence;
- (m) Universities and law faculties should operate within an approved and harmonized national curriculum, which should particularly include international human rights law education;
- (n) Bar associations and associations of magistrates have a crucial role to play in the effective training of judges and lawyers and their support to the Special Rapporteur and OHCHR is particularly important;
- (o) The introduction of a mandatory human rights training period prior to being admitted to the bar is of paramount importance to ensuring the independence, integrity and effectiveness of professional legal counsel provided by lawyers;
- (p) Initial education initiatives for judges should particularly cover basic education on the country's international obligations with an emphasis on human rights. Incoming judges should also be acquainted with the impact of decisions of international or regional judicial or quasi-judicial bodies on domestic law.

100. The Special Rapporteur should be apprised, on a regular basis, of requests made for advisory services and technical assistance to OHCHR in the area of administration of justice, in particular with regard to the independence and impartiality of the judiciary and to the continuing human rights education of judges, prosecutors, public defenders and lawyers.

101. In order to enhance the continuing education of judges, prosecutors, public defenders and lawyers in international human rights law, an international conference should be convened with the participation of State representatives, judiciary authorities and the public prosecutor's offices, representatives of the magistrates and bar associations and members of the civil society. The objectives of the international conference would be, inter alia, to:

- (a) Identify the internal and structural features of judicial systems that affect their capacities to implement international and regional standards on human rights;
- (b) Identify means of improving the continuing human rights education of judges in order to improve the work of courts to vindicate human rights and provide justice;
- (c) Enquire of judiciaries and judges as to what they are doing and what they might do to address and provide redress in relation to deeper patterns of human rights violations that persist year after year in their States;
- (d) Explore how the advances in international human rights law can be used more effectively by judges and national courts at all levels;
- (e) Exchange information on how to better promote and use international human rights jurisprudence and precedents of deliberative bodies;
- (f) Review challenges to the implementation of civil and political rights and economic, social and cultural rights.



**OPINION NO. 15 (2012) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)  
ON THE SPECIALISATION OF JUDGES, Council of Europe, 2012**

D. Specialisation and the status of the judge

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 training 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.

Conclusions

vii. Specialisation must not dilute the quality of justice, either in "generalist" courts or in specialist courts.

**RESOLUTION ON TRAINING OF JUDGES AND PUBLIC PROSECUTORS, MEDEL, 2014**

For training in the spirit of European judicial culture

[...] Emerging of a single European judicial space implies new demands in training requirements. Strengthening mutual legal aid implies professionalism. However, a truly effective cooperation implies also a single, shared judicial culture: the unity of action, thoughts and values, common thinking, meetings without which there can be no mutual trust.

[...] Comparisons between different laws and practices, the knowledge of the European jurisprudence should encourage critical views that are indispensable for building a living law based on social and humanitarian values [...].

For a joint training of judges and prosecutors

Defence of fundamental freedoms does not refer only to trials, but also to investigations where prosecutors have an important role to play. A single culture, shared jointly by judges and prosecutors is the best security against abuse of the repressive apparatus, for better protection of the law and civil liberties of individuals.

[...] Therefore, judges must acquire experience that would allow them to understand and evaluate investigative techniques, as well as available knowledge. This is a precondition for judge's independence from all other actors in the proceedings.



***BRIJUNI STATEMENT OF THE PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY, Conference of Chief Justices of Central and Eastern Europe, 14 October, 2015***

Independence of the judiciary

10. Judges shall be free, subject to any applicable law, to form and join an association of judges to represent their interests and promote their professional training and to take such other action to protect their independence as may be appropriate.

***FUNDING OF THE JUDICIARY, ENCJ REPORT 2015-2016, ENCJ, 2016***

Recommendation Eleven

To guarantee the quality of justice, adequate funding must be made available to ensure that judges are appropriately trained, initially and continuously throughout their career.

Recommendation Twelve

If members of the judiciary are given responsibility for the administration of the courts, they should receive appropriate training and have the necessary resources in order to perform that function. Such judges should therefore be trained in relevant accounting and budgetary procedures.

***DECLARATION OF JUDICIAL TRAINING PRINCIPLES, International Organization for Judicial Training (IOJT), 8th November 2017***

TRAINING AS PART OF THE JUDICIAL ROLE

6. It is the right and the responsibility of all members of the judiciary to undertake training. Each member of the judiciary should have time to be involved in training as part of their judicial work.

PROPER FINANCING OF TRAININGS

4. All states should: (i) Provide their institutions responsible for judicial training with sufficient funding and other resources to achieve their aims and objectives; and (ii) Establish systems to ensure that all members of the judiciary are enabled to undertake training.

5. Any support provided to judicial training should be utilized in accordance with these principles, and in coordination with institutions responsible for judicial training.

CONDUCTING TRAININGS BY JUDGES

9. Training should be judge-led and delivered primarily by members of the judiciary who have been trained for this purpose. Training delivery may involve non-judicial experts where appropriate.

BEST PRACTICES AND UP-TO-DATE METHODOLOGIES

10. Judicial training should reflect best practices in professional and adult training program design. It should employ a wide range of up-to-date methodologies.

### III. 6.2. THE AUTHORITY RESPONSIBLE FOR TRAINING

#### ***PALERMO DECLARATION, ELEMENTS OF A EUROPEAN STATUTE OF MAGISTRACY, MEDEL, 1993***

#### II. THE MAGISTRATES

2.3. It is the duty of the State to provide the judiciary with sufficient means to ensure the orderly performance of its functions, and especially those necessary for the initial and permanent training of magistrates.

#### ***OPINION NO. 4 (2003) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON APPROPRIATE INITIAL AND IN-SERVICE TRAINING FOR JUDGES AT NATIONAL AND EUROPEAN LEVELS, Council of Europe, 2003***

#### Introduction

6. There are great differences among European countries with respect to the initial and in-service training of judges. These differences can in part be related to particular features of the different judicial systems, but in some respects do not seem to be inevitable or necessary. Some countries offer lengthy formal training in specialised establishments, followed by intensive further training. Others provide a sort of apprenticeship under the supervision of an experienced judge, who imparts knowledge and professional advice on the basis of concrete examples, showing what approach to take and avoiding any kind of didacticism. Common law countries rely heavily on a lengthy professional experience, commonly as advocates. Between these possibilities, there is a whole range of countries where training is to varying degrees organised and compulsory.

#### II. The authority responsible for training

13. The European Charter on the Statute for Judges (paragraph 2.3) states that any authority responsible for supervising the quality of the training programme should be independent of the Executive and the Legislature and that at least half its members should be judges. The Explanatory Memorandum also indicates that the training of judges should not be limited to technical legal training, but should also take into account that the nature of the judicial office often requires the judge to intervene in complex and difficult situations.

14. This highlights the key importance attaching to the independence and composition of the authority responsible for training and its content. This is a corollary of the general principle of judicial independence.

15. Training is a matter of public interest, and the independence of the authority responsible for drawing up syllabuses and deciding what training should be provided must be preserved.

16. The judiciary should play a major role in or itself be responsible for organising and supervising training. Accordingly, and in keeping with the recommendations of the European Charter on the Statute for Judges, the CCJE advocates that these responsibilities should, in each country, be entrusted, not to the Ministry of Justice or any other authority answerable to the Legislature or the Executive, but to the judiciary itself or another independent body (including a Judicial Service Commission). Judges' associations can also play a valuable role in encouraging and facilitating training, working in conjunction with the judicial or other body which has direct responsibility.

17. In order to ensure a proper separation of roles, the same authority should not be directly responsible for both training and disciplining judges. The CCJE therefore recommends that, under the authority of the judiciary or other independent body, training should be entrusted to a special

autonomous establishment with its own budget, which is thus able, in consultation with judges, to devise training programmes and ensure their implementation.

18. Those responsible for training should not also be directly responsible for appointing or promoting judges. If the body (i.e. a judicial service commission) referred to in the CCJE's Opinion No. 1, paragraphs 73 (3), 37, and 45, is competent for training and appointment or promotion, a clear separation should be provided between its branches responsible for these tasks.

19. In order to shield the establishment from inappropriate outside influence, the CCJE recommends that the managerial staff and trainers of the establishment should be appointed by the judiciary or other independent body responsible for organising and supervising training.

20. It is important that the training is carried out by judges and by experts in each discipline. Trainers should be chosen from among the best in their profession and carefully selected by the body responsible for training, taking into account their knowledge of the subjects being taught and their teaching skills.

21. When judges are in charge of training activities, it is important that these judges preserve contact with court practice.

22. Training methods should be determined and reviewed by the training authority, and there should be regular meetings for trainers to enable them to share their experiences and enhance their approach.

#### V. Assessment of training

38. In order continuously to improve the quality of judicial training, the organs responsible for training should conduct frequent assessments of programmes and methods. An important role in this process should be played by opinions expressed by all participants to training initiatives, which may be encouraged through appropriate means (answers to questionnaires, interviews).

39. While there is no doubt that performance of trainers should be monitored, the evaluation of the performance of participants in judicial training initiatives is more questionable. The in-service training of judges may be truly fruitful if their free interaction is not influenced by career considerations.

40. In countries that train judges at the start of their professional career, the CCJE considers evaluation of the results of initial training to be necessary in order to ensure the best appointments to the judiciary. In contrast, in countries that choose judges from the ranks of experienced lawyers, objective evaluation methods are applied before appointment, with training occurring only after candidates have been selected, so that in those countries evaluation during initial training is not appropriate.

41. It is nevertheless important, in the case of candidates subject to an appraisal, that they should enjoy legal safeguards that protect them against arbitrariness in the appraisal of their work. In addition, in the case of States arranging for the provisional appointment of judges, the removal of these from office at the end of the training period should take place with due regard for the safeguards applicable to judges when their removal from office is envisaged.

42. In view of the above, the CCJE recommends:

- i. that training programmes and methods should be subject to frequent assessments by the organs responsible for judicial training;
- ii. that, in principle, participation in judges' training initiatives should not be subject to qualitative assessment; their participation in itself, objectively considered, may however be taken into account for professional evaluation of judges;

iii. that quality of performance of trainees should nonetheless be evaluated, if such evaluation is made necessary by the fact that, in some systems, initial training is a phase of the recruitment process.

***OPINION NO. 10 (2007) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE COUNCIL FOR JUDICIARY AT THE SERVICE OF THE SOCIETY, Council of Europe, 2010***

V. D. Training of judges

65. The responsibility for organising and supervising judicial training should in each country be entrusted not to the ministry of justice or any other authority answerable to the legislature or the executive, but to the judiciary itself or preferably to the Council for the Judiciary; judges' associations can also play a valuable role in that respect. Furthermore, the conception of training programmes and their implementation should be entrusted, under the authority of the judiciary or preferably the Council for the Judiciary, to a special autonomous body (e.g. a training academy) with its own budget and which should work in consultation with judges. A clear division of functions should be encouraged between the Council for the Judiciary and the training academy, when it exists.

66. The CCJE is of the opinion that, if the Council for the Judiciary has competence in training and appointment or promotion, a clear separation should be provided between its branches responsible for these tasks and ties should be avoided either with the ministry of justice (appointment of the trainers, budget allocation etc.), or with the ministry of education (accreditation, recognition of diplomas etc.).

67. The Council for the Judiciary should cooperate with the training body, during the initial and in-service training, to ensure an efficient and high quality training, and to guarantee that judges are selected based on objective and measurable criteria, a merit based system and proper training.

SUMMARY OF THE RECOMMENDATIONS AND CONCLUSIONS

*D. On the powers of the Council for the Judiciary:*

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 center, with which it should cooperate to guarantee the quality of initial and in-service training;

***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

Chapter VI – Status of the judge

57. An independent authority should ensure, in full compliance with educational autonomy, that initial and in-service training programmes meet the requirements of openness, competence and impartiality inherent in judicial office.

***RESOURCE GUIDE ON STRENGTHENING JUDICIAL INTEGRITY AND CAPACITY, UNODC, 2011***

I. RECRUITMENT, PROFESSIONAL EVALUATION AND TRAINING OF JUDGES

8. Conclusions and recommendations

- The activities of initial and continuing education can effectively be conducted by the establishment of judicial training institutes. Such institutes should serve the educational needs of both judges and court staff.
- The judicial training institutes should have research facilities that allow for both educational programmes that meet the functional needs of the courts and the evaluation of their effectiveness at the operational level." The judicial training institutes should adopt a variety of educational programmes and techniques in order to maximize effectiveness and reach all the stakeholders, including: in-person programmes, self-taught programmes, and interactive programmes supported by adequate technological equipment. Special attention should be given to the activation of educational programmes for judges and court staff intended to promote organizational and technological modernization of courts.

***DECLARATION OF JUDICIAL TRAINING PRINCIPLES, International Organization for Judicial Training (IOJT), 8th November 2017***

2. To preserve judicial independence, the judiciary and judicial training institutions should be responsible for the design, content, and delivery of judicial training.
3. Judicial leaders and the senior judiciary should support judicial training.

### III. 6.3. INITIAL TRAINING

#### ***PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA, African Commission on Human and Peoples Rights, 2003***

##### B. JUDICIAL TRAINING

- a) States shall ensure that judicial officials have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of accused persons, victims and other litigants and of human rights and fundamental freedoms recognized by national and international law.
- b) States shall establish, where they do not exist, specialised institutions for the education and training of judicial officials and encourage collaboration amongst such institutions in countries in the region and throughout Africa.
- c) States shall ensure that judicial officials receive continuous training and education throughout their career including, where appropriate, in racial, cultural and gender sensitisation.

#### ***OPINION NO. 4 (2003) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON APPROPRIATE INITIAL AND IN-SERVICE TRAINING FOR JUDGES AT NATIONAL AND EUROPEAN LEVELS, Council of Europe, 2003***

##### Introduction

1. At a time when we are witnessing an increasing attention being paid to the role and significance of the judiciary, which is seen as the ultimate guarantor of the democratic functioning of institutions at national, European and international levels, the question of the training of prospective judges before they take up their posts and of in-service training is of particular importance (see Opinion of the CCJE No. 1 (2001), paragraphs 10-13 and Opinion No. 3 (2002), paragraphs 25 and 50.ix).
3. It is essential that judges, selected after having done full legal studies, receive detailed, in-depth, diversified training so that they are able to perform their duties satisfactorily.
4. Such training is also a guarantee of their independence and impartiality, in accordance with the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms.

##### III. Initial training

###### a. Should training be mandatory?

23. While it is obvious that judges who are recruited at the start of their professional career need to be trained, the question arises whether this is necessary where judges are selected from among the best lawyers, who are experienced, as (for instance) in Common Law countries.
24. In the CCJE's opinion, both groups should receive initial training: the performance of judicial duties is a new profession for both, and involves a particular approach in many areas, notably with respect to the professional ethics of judges, procedure, and relations with all persons involved in court proceedings.
25. On the other hand, it is important to take the specific features of recruitment methods into account so as to target and adapt the training programmes appropriately: experienced lawyers need to be trained only in what is required for their new profession. In some small countries with a very small judiciary, local training opportunities may be more limited and informal, but such countries in particular may benefit from shared training opportunities with other countries.



26. The CCJE therefore recommends mandatory initial training by programmes appropriate to appointees' professional experience.

b. The initial training programme

27. The initial training syllabus and the intensiveness of the training will differ greatly according to the chosen method of recruiting judges. Training should not consist only of instruction in the techniques involved in the handling of cases by judges, but should also take into consideration the need for social awareness and an extensive understanding of different subjects reflecting the complexity of life in society. In addition, the opening up of borders means that future judges need to be aware that they are European judges and be more aware of European issues.

28. In view of the diversity of the systems for training judges in Europe, the CCJE recommends:

- i. that all appointees to judicial posts should have or acquire, before they take up their duties, extensive knowledge of substantive national and international law and procedure;
- ii. that training programmes more specific to the exercise of the profession of judge should be decided on by the establishment responsible for training, and by the trainers and judges themselves;
- iii. that these theoretical and practical programmes should not be limited to techniques in the purely legal fields but should also include training in ethics and an introduction to other fields relevant to judicial activity, such as management of cases and administration of courts, information technology, foreign languages, social sciences and alternative dispute resolution (ADR);
- iv. that the training should be pluralist in order to guarantee and strengthen the open-mindedness of the judge;
- v. that, depending upon the existence and length of previous professional experience, training should be of significant length in order to avoid its being purely a matter of form.

29. The CCJE recommends the practice of providing for a period of training common to the various legal and judicial professions (for instance, lawyers and prosecutors in countries where they perform duties separate from those of judges). This practice is likely to foster better knowledge and reciprocal understanding between judges and other professions.

30. The CCJE has also noted that many countries make access to judicial posts conditional upon prior professional experience. While it does not seem possible to impose such a model everywhere, and while the adoption of a system combining various types of recruitment may also have the advantage of diversifying judges' backgrounds, it is important that the period of initial training should include, in the case of candidates who have come straight from university, substantial training periods in a professional environment (lawyers' practices, companies, etc).

***OPINION NO. 10 (2007) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE COUNCIL FOR JUDICIARY AT THE SERVICE OF THE SOCIETY, Council of Europe, 2010***

V. D. 1. Initial training

68. In order for candidates for appointment as judges to receive quality training, the CCJE recommends that the Council for the Judiciary should participate directly or in other ways cooperate with training institutions in the creation and the development of the programme for initial training, through which candidates will develop and deepen not only their legal knowledge of the national and international substantive and procedural law and practice, but also develop complementary skills, e.g. knowledge of foreign languages, ethics, alternative dispute resolution, so that society may be served by judges capable of applying the law correctly, and of critical and independent thinking, social sensitivity and open-mindedness.

69. In addition, the Council for the Judiciary should provide external evaluation of the initial training, in the sense that by following the professional development and success in everyday work of judges in the early years after appointment, it will evaluate the effectiveness of initial training and will be able to make suggestions for its improvement.

***THE KYIV RECOMMENDATIONS ON JUDICIAL INDEPENDENCE IN EASTERN EUROPE, SOUTH CAUCASUS AND CENTRAL ASIA, OSCE, 2010***

Improvement of Special Training of Judges

19. Where schools for judges are part of the selection procedures, they have to be independent from the executive power. Training programmes should focus on what is needed in the judicial service and complement university education. They should include aspects of ethics, communication skills, the ability to settle disputes, management skills and legal drafting skills. Where a Judicial Council exists, it may adopt recommendations for the legal education of judges. This includes the specification of relevant skills and advice on the continuing education of judges.

20. Special training as referred to in para 19 should also be provided for representatives of other legal professions joining the judiciary.

***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

Chapter VI – Status of the judge

56. Judges should be provided with theoretical and practical initial and in-service training, entirely funded by the state. This should include economic, social and cultural issues related to the exercise of judicial functions. The intensity and duration of such training should be determined in the light of previous professional experience.

***RESOURCE GUIDE ON STRENGTHENING JUDICIAL INTEGRITY AND CAPACITY, UNODC, 2011***

I. RECRUITMENT, PROFESSIONAL EVALUATION AND TRAINING OF JUDGES

8. Conclusions and recommendations

- The legal education of judges and lawyers should include case studies, practical and methodical training, skills needed to organize one's work effectively (such as principles of docket and case management), and social skills.
- After university training, there should be practical training programmes designed for the preparation of professional work (special subjects of material law, procedural law and practical and methodical skills).

***RESOLUTION ON TRAINING OF JUDGES AND PUBLIC PROSECUTORS, MEDEL, 2014***

For a deontological and practical training

[...] Training should prepare judges to become an enlightened interpreters of the law.

Therefore, the initial training must introduce the prospective judges to procedural and social context in which they will need to hand down their decisions. Thus, in terms of deontology, the training shall have to be focused on deliberations about the role and function of a judge in a modern society. It

should be also based on specific examples and endeavour to motivate deliberations and discussions on judge's behaviour in conducting the proceedings, his relationship with the lawyers, officials, witnesses, expert witnesses, and parties in the proceedings.

For a joint training of judges and prosecutors

Defence of fundamental freedoms does not refer only to trials, but also to investigations where prosecutors have an important role to play.

[..] A joint training should also educate judges how to create other options, apart from those offered by the law enforcement or the prosecutor's office, thus enabling an effective rule of the law, without any detrimental effect on the quality of investigations. Therefore, judges must acquire experience that would allow them to understand and evaluate investigative techniques, as well as available knowledge. This is a precondition for judge's independence from all other actors in the proceedings.

***DECLARATION OF JUDICIAL TRAINING PRINCIPLES, International Organization for Judicial Training (IOJT), 8th November 2017***

7. All members of the judiciary should receive training before or upon their appointment, and should also receive regular training throughout their careers.

8. Acknowledging the complexity of the judicial role, judicial training should be multidisciplinary and include training in law, non-legal knowledge, skills, social context, values and ethics.

### **III. 6.4. IN-SERVICE TRAINING**

#### ***THE SIRACUSA DRAFT PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, 1981***

##### **III. Qualification. Selection and Training of Judges**

Art. 7. In-service training should be made available to keep judges informed of important developments, including developing social trends, new technologies and their legal consequences, studies into the causes of crime and sentencing policies and their effects.

#### ***FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY, CONTINUING EDUCATION OF JUDGES, International Association of Judges (IAJ), 1982***

1. - Whereas in some countries each judge is provided with the law books (i.e. the texts of legislation, law reports, text-books and commentaries) that he needs for his daily work, in others that is not so, and judges have to acquire such books at their own expense. Generally speaking, such books are fairly costly, and they have continuously to be kept up to date. Yet they are for the judge essential tools. Each judge should accordingly be provided with them, at no cost to himself, either at his place of work or so that he can use them at home. It is also necessary that each judge should have access to a library where he can obtain such other books as he may need.

2. - As was said by the President of the I.A.J., Mr. Hedi Saied, a judge cannot shut himself up in an ivory tower. He must forever keep in touch with changes in institutions by which the law is fundamentally affected. [...]

Exchanges of information and contacts between judges of different countries are always desirable, in particular between countries that have permanent institutions for judicial studies. In no case should a judge's participation in such conferences, etc., prejudice his independence.

#### ***EUROPEAN CHARTER ON THE STATUTE FOR JUDGES AND EXPLANATORY MEMORANDUM, Council of Europe, Strasbourg, 8 - 10 July 1998***

##### **4. CAREER DEVELOPMENT**

4.4. The statute guarantees to judges the maintenance and broadening of their knowledge, technical as well as social and cultural, needed to perform their duties, through regular access to training which the State pays for, and ensures its organization whilst respecting the conditions set out at paragraph 2.3 hereof.

#### ***OPINION NO. 2 (2001) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE FUNDING AND MANAGEMENT OF COURTS WITH REFERENCE TO THE EFFICIENCY OF THE JUDICIARY AND TO ARTICLE 6 OF EUROPEAN CONVENTION ON HUMAN RIGHTS, Council of Europe, 2001***

13. If judges are given responsibility for the administration of the courts, they should receive appropriate training and have the necessary support in order to carry out the task. In any event, it is important that judges are responsible for all administrative decisions which directly affect performance of the courts' functions.

#### ***OPINION NO. 4 (2003) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON APPROPRIATE INITIAL AND IN-SERVICE TRAINING FOR JUDGES AT NATIONAL AND EUROPEAN LEVELS, Council of Europe, 2003***

## Introduction

5. Lastly, training is a prerequisite if the judiciary is to be respected and worthy of respect. The trust citizens place in the judicial system will be strengthened if judges have a depth and diversity of knowledge which extend beyond the technical field of law to areas of important social concern, as well as courtroom and personal skills and understanding enabling them to manage cases and deal with all persons involved appropriately and sensitively. Training is in short essential for the objective, impartial and competent performance of judicial functions, and to protect judges from inappropriate influences.

7. Regardless of the diversity of national institutional systems and the problems arising in certain countries, training should be seen as essential in view of the need to improve not only the skills of those in the judicial public service but also the very functioning of that service.

### IV. In-service training

31. Quite apart from the basic knowledge they need to acquire before they take up their posts, judges are “condemned to perpetual study and learning” (see report of R. Jansen “How to prepare judges to become well-qualified judges in 2003”, doc. CCJE-GT (2003) 3).

32. Such training is made indispensable not only by changes in the law, technology and the knowledge required to perform judicial duties but also by the possibility in many countries that judges will acquire new responsibilities when they take up new posts. In-service programmes should therefore offer the possibility of training in the event of career changes, such as a move between criminal and civil courts; the assumption of specialist jurisdiction (e.g. in a family, juvenile or social court) and the assumption of a post such as the presidency of a chamber or court. Such a move or the assumption of such a responsibility may be made conditional upon attendance on a relevant training programme.

33. While it is essential to organise in-service training, since society has the right to benefit from a well trained judge, it is also necessary to disseminate a culture of training in the judiciary.

34. It is unrealistic to make in-service training mandatory in every case. The fear is that it would then become bureaucratic and simply a matter of form. The suggested training must be attractive enough to induce judges to take part in it, as participation on a voluntary basis is the best guarantee for the effectiveness of the training. This should also be facilitated by ensuring that every judge is conscious that there is an ethical duty to maintain and update his or her knowledge.

35. The CCJE also encourages in the context of continuous training collaboration with other legal professional bodies responsible for continuous training in relation to matters of common interest (e.g. new legislation).

36. It further stresses the desirability of arranging continuous judicial training in a way which embraces all levels of the judiciary. Whenever feasible, the different levels should all be represented at the same sessions, giving the opportunity for exchange of views between them. This assists to break-down hierarchical tendencies, keeps all levels of the judiciary informed of each other’s problems and concerns, and promotes a more cohesive and consistent approach throughout the judiciary.

37. The CCJE therefore recommends:

- i. that the in-service training should normally be based on the voluntary participation of judges;
- ii. that there may be mandatory in-service training only in exceptional cases; examples might (if the judicial or other body responsible so decided) include when a judge takes up a new post or a different type of work or functions or in the event of fundamental changes in legislation;
- iii. that training programmes should be drawn up under the authority of the judicial or other body responsible for initial and in-service training and by trainers and judges themselves;

- iv. that those programmes, implemented under the same authority, should focus on legal and other issues relating to the functions performed by judges and correspond to their needs (see paragraph 27 above);
- v. that the courts themselves should encourage their members to attend in-service training courses;
- vi. that the programmes should take place in and encourage an environment, in which members of different branches and levels of the judiciary may meet and exchange their experiences and achieve common insights;
- vii. that, while training is an ethical duty for judges, member states also have a duty to make available to judges the financial resources, time and other means necessary for in-service training.

***OPINION NO. 7 (2005) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS ON “JUSTICE AND SOCIETY”, Council of Europe, 2005***

**A. THE RELATIONS OF THE COURTS WITH THE PUBLIC WITH SPECIAL REFERENCE TO THE ROLE OF THE COURTS IN A DEMOCRACY**

20. In the CCJE's opinion, in order to develop the above programmes judges should be given the opportunity to receive specific training as to relations with the public. Courts should also have the possibility to employ staff specifically in charge of liaising with educational agencies (public relations offices, as mentioned above, could also be given this task).

**B. THE RELATIONS OF THE COURTS WITH PARTICIPANTS IN COURT PROCEEDINGS**

**a) ethical training of judges, court staff, lawyers, etc**

29. Some training programmes are intended to ensure that courts are seen, under all aspects of their behaviour, to be treating all parties in the same way, i.e. impartially and without any discrimination based on race, sex, religion, ethnic origin or social status. Judges and court staff are trained to recognise situations in which individuals may feel that a biased approach is, or seems to be, being taken, and to deal with such situations in a way that enhances confidence in and respect for the courts. Lawyers organise and are given special ethical training to prevent them from contributing, whether intentionally or not, to mistrust of the justice system.

**SUMMARY OF THE RECOMMENDATIONS AND CONCLUSIONS**

**A. The relations of the courts with the public with special reference to the role of the courts in a democracy**

A.5. Judges should be given the opportunity to receive specific training as to relations with the public and courts should also have the possibility to employ staff specifically in charge of liaising with educational agencies (see paragraph 20 above).

***OPINION NO. 10 (2007) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE COUNCIL FOR JUDICIARY AT THE SERVICE OF THE SOCIETY, Council of Europe, 2010***

**V. D. 2. Continuous training**

70. The Council for the Judiciary should promote participation of judges in all training activities, as a significant part of their professional activity. The legal and ethical duty and right of judges is to work on their own professional development through participation in the continuous training which should be understood as a life long learning process. Judges, during the performance of their duties, should,

in particular, follow changes in national and international legislation and practice, be in touch with social trends and become acquainted with alternative dispute resolution methods. The CCJE recommends that the Council for the Judiciary should take into account judges' participation in training programmes when considering their promotion.

71. The reports and statistics for the evaluation of the work of the judges and the courts, annually prepared by the Council for the Judiciary, should contain data about the critical issues on which training should be focused, such as case management, time management, budgeting, improvement of working techniques, public relations skills, communication techniques, legal research etc.

72. More generally, the Council for the Judiciary should be widely consulted in the process of selection of the topics which will be included in the yearly training programmes; the Council for the Judiciary should also monitor the way the programme is carried out and evaluate its effects on the quality of the performance of the judiciary.

***OPINION N°13 (2010) ON THE ROLE OF JUDGES IN THE ENFORCEMENT OF JUDICIAL DECISIONS, CCJE, 2010***

47. It is also necessary to ensure that judges, responsible for executing sentences, have specific training allowing them to clearly understand any legal, technical, social and human dimensions of this matter. Such training must be devised and led in interaction with all the authorities or services involved in the process of implementation including judges, prosecutors, ministerial officials, prison staff and administration, directors of penal institutions, as well as social workers, lawyers and others.

***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

Chapter VI – Status of the judge

56. Judges should be provided with theoretical and practical initial and in-service training, entirely funded by the state. This should include economic, social and cultural issues related to the exercise of judicial functions. The intensity and duration of such training should be determined in the light of previous professional experience.

***RESOURCE GUIDE ON STRENGTHENING JUDICIAL INTEGRITY AND CAPACITY, UNODC, 2011***

I. RECRUITMENT, PROFESSIONAL EVALUATION AND TRAINING OF JUDGES

8. Conclusions and recommendations

- Initial training should be followed by regular continuing education. The further training of practising judges should be considered to be obligatory or, at least, effectively encouraged.
- The continued professional training of judges must be accessible for all judges, regardless of their position and place of work.

***OPINION NO. 11 (2008) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE QUALITY OF JUDICIAL DECISIONS, Council of Europe, 2008***

## Part I. Quality Factors of Judicial Decisions

10. The quality of a judicial decision depends not only on the individual judge involved, but also on a number of variables external to the process of administering justice such as the quality of legislation, the adequacy of the resources provided to the judicial system and the quality of legal training.

### ***DOHA DECLARATION ON INTEGRATING CRIME PREVENTION AND CRIMINAL JUSTICE INTO THE WIDER UNITED NATIONS AGENDA TO ADDRESS SOCIAL AND ECONOMIC CHALLENGES AND TO PROMOTE THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS, AND PUBLIC PARTICIPATION, Adopted by the 13<sup>th</sup> United Nations Congress on Crime Prevention and Criminal Justice, Doha, 12-19 April 2015***

5. We reaffirm our commitment and strong political will in support of effective, fair, humane and accountable criminal justice systems and the institutions comprising them, and encourage the effective participation and inclusion of all sectors of society (...). To that end, we endeavour:

(...) to ensure appropriate training of officials entrusted with upholding the rule of law and the protection of human rights and fundamental freedoms;

(q) To consider providing specialized training to criminal justice professionals to enhance capacities for recognizing, understanding, suppressing and investigating hate crimes motivated by discrimination of any kind (...);

8. We endeavour to strengthen international cooperation as a cornerstone of our efforts to (...) ensure that our criminal justice systems are effective, fair, humane and accountable (...). We therefore strive:

(a) To promote and strengthen international and regional cooperation to further develop the capacity of national criminal justice systems, including (...) joint training and upgrading of the skills of our criminal justice officials (...).

11. As we continue our efforts to achieve the objectives set forth in this Declaration, (...) to uphold the rule of law and to ensure that our (...) criminal justice systems are effective, fair, humane and accountable, we reaffirm the importance of adequate, long-term, sustainable and effective technical assistance and capacity-building policies and programmes.

### ***OPINION NO. 15 (2012) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) on the role of national judges in ensuring an effective application of international and European law, 2016***

The CCJE also underlines the role of the research and documentation units in helping national judges to ensure the effective application of international and European law. National legal systems increasingly have to deal with legal issues of an international nature, as a result of both globalisation and an increasing focus of international and European law on relations between persons rather than States. The CCJE believes that these developments necessitate changes in judicial training, practice and even culture. In addition, we would like to add to this that all regulations are becoming increasingly complex. Logically, information on international and European law, including the decisions of international and European courts, should be made readily available. Furthermore, the CCJE recommends that with the cooperation of court documentation services, libraries and judicial assistants, judges gain access to information that is properly indexed and annotated.

Monitoring of EU and international law is thus a task that should be assigned to a research and documentation unit. In the context of EU and international law, it is also important for judges to



know how these rules have been applied by other national judges. In this respect, the judge will often be confronted with a language barrier. The CCJE, therefore, notes that appropriate measures should be taken to ensure that judges gain full proficiency in foreign languages and that courts should have quality translation and interpretation services available in addition to the ordinary cost of the functioning of courts.

### ***BEST PRACTICE GUIDE FOR MANAGING SUPREME COURTS, European Union, 2017***

#### II. Research and Documentation Work within the Supreme Court

##### 3. Cooperation with Academia

###### A. General observations

One of the underlying aims of this cooperation is, of course, to safeguard the quality of justice by exchanging knowledge and experience.

In our opinion, such collaboration could, for example, take the form of seminars organised in cooperation with the bar association regarding judicial reform, but also cooperation with academia in the form of attending/co-organising a seminar with a university or requesting a study on a certain topic.

#### II. Research and Documentation Work within the Supreme Court

##### 3. Cooperation with Academia

###### B. Survey results

Organising, facilitating or participating in conferences seems to be the most common way for the Supreme Court to cooperate with academia. Another way in which academia is involved with judges of the Supreme Court is the organisation of training given by academics. Supreme Court judges are also often lecturers at law schools.

###### Traineeships

Another form of cooperation with academia may take the form of a traineeship at the Supreme Court for doctoral students. This form of cooperation can be found at the Curia of Hungary, which believes that this cooperation, creating a link between practice and theory, contributes to both an increased level of legal training and to an increased effectiveness of the Court's work. Therefore, a cooperation agreement was concluded with the doctoral school of the law faculties aiming to launch and implement a traineeship programme. PhD students can apply for a traineeship position at the Court for a renewable term of one year. The main tasks of the trainees are to:

- draft preparatory materials which are used in passing uniformity decisions;
- examine the conformity with EU law and international law of a decision to be adopted;
- participate in the performance of the Curia's international tasks;
- compare and contrast national court decisions with the case law of foreign states;
- examine compliance of national court decisions with the case law of the Court of Justice of the European Union;
- draft analyses about theoretical legal issues arising before the Curia;
- participate in the preparation, organisation and execution of Curia conferences and other events;
- monitor, analyse and summarise the Constitutional Court's decisions in connection with a given case or a given jurisprudence analysis or the issuance of a guideline on principles;
- carry out comparative studies and draft summaries in connection with certain proposed legislation;

- participate in judges' meetings and attend Court hearings and other events organised by the department to which the trainee is assigned.

#### C. Recommendations and best practices

Supreme Courts should offer positions for trainees, given the mutual benefits for both parties. The trainees gain additional legal knowledge and professional experience, while the Supreme Courts receive extra support for their judges. When the trainees are recently graduated law students, the Supreme Court also becomes involved in the education of new legal professionals.

The core activities of these trainees should include:

- prepare analyses of case law and legislation;
- compare national case law with international and foreign case law;
- assist in preparing summaries of the judgments for publication online.

#### ***DECLARATION OF JUDICIAL TRAINING PRINCIPLES, International Organization for Judicial Training (IOJT), 8th November 2017***

7. All members of the judiciary should receive training before or upon their appointment, and should also receive regular training throughout their careers.

8. Acknowledging the complexity of the judicial role, judicial training should be multidisciplinary and include training in law, non-legal knowledge, skills, social context, values and ethics.

#### ***CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) - OPINION N° 20 THE ROLE OF COURTS WITH RESPECT TO THE UNIFORM APPLICATION OF THE LAW, 2017***

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.

### III. 6.5. SPECIALISATION OF JUDGES

#### ***THE SIRACUSA DRAFT PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, 1981***

##### Specialisation of Judges and Tribunals

Art. 20 Considering the increase in the volume and diversity of judicial matters, the creation of specialised courts contributes to efficiency and the effective administration of justice, which in turn enhances the independence of the judiciary. Nevertheless, specialisation should not preclude the periodic rotation of judges, assisted by appropriate in-service training.

#### ***OPINION NO. 15 (2012) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) ON THE SPECIALISATION OF JUDGES, Council of Europe, 2012***

##### 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)).

###### 2. Evaluation and promotion

62. With regard to promotion, similar considerations apply. In the CCJE's view to grant earlier promotions to specialist judges just because of their specialisation is not justifiable.

##### 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.

***REPORT OF THE FIRST STUDY COMMISSION - JUDICIAL SPECIALIZATION, International Association of Judges (IAJ), 2012***

**Conclusions**

Specialized judges should remain part of a single judiciary, subject to the same general procedural rules and ethical standards applicable to all judges. The trend toward specialized judges should proceed carefully so that specialization does not inhibit the independence of the judiciary.

Specialized judges should be paid at the same rate as their counterparts.

In areas such as intellectual property, it will regularly be necessary that there be experts or witnesses participating as experts in the cases. These persons can be those brought in by the parties. They can also be those appointed by the judge handling the case. There are differing views as to whether the expert judge should be allowed to use her expertise to fill in facts that are not present in the case or whether the expertise merely guides the judge as the judge considers the evidence that has been presented. We also recognize the problems that may occur if an expert or witness participating as an expert is allowed to dictate the outcome of a case as opposed to merely conveying facts and opinions that the judge may consider. 2

Care must be taken that the development of specialized courts and judges with specializations is not used by the legislative bodies to limit resources or as a point of criticism for overall problems that must be addressed with adequate resources.

Care must also be taken that when judges become specialized, the fact that they work in a specialized area is not used as a mechanism to limit the judge's career possibilities.

Finally, while the topic is too broad to yield any present recommendations, particularly in the area of intellectual property, the members of the Commission note that the increasingly global nature of intellectual property issues may benefit from a more global judicial approach, including perhaps, a specialized international court with jurisdiction in this area. This, of course, would be subject to various treaty relations and development of applicable procedures, concerning which we make no specific recommendations. The idea is worthy of further consideration and development, however.

***CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) - OPINION N° 20 THE ROLE OF COURTS WITH RESPECT TO THE UNIFORM APPLICATION OF THE LAW, 2017***

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 effects<sup>16</sup>.

### III. 6.6. THE TRAINING OF JUDGES IN INTERNATIONAL AND EUROPEAN STANDARDS

#### ***OPINION NO. 4 (2003) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON APPROPRIATE INITIAL AND IN-SERVICE TRAINING FOR JUDGES AT NATIONAL AND EUROPEAN LEVELS, Council of Europe, 2003***

#### III. Initial training

##### b. The initial training programme

27. The initial training syllabus and the intensiveness of the training will differ greatly according to the chosen method of recruiting judges. Training should not consist only of instruction in the techniques involved in the handling of cases by judges, but should also take into consideration the need for social awareness and an extensive understanding of different subjects reflecting the complexity of life in society. In addition, the opening up of borders means that future judges need to be aware that they are European judges and be more aware of European issues.

#### VI. The European training of judges

43. Whatever the nature of their duties, no judge can ignore European law, be it the European Convention on Human Rights or other Council of Europe Conventions, or if appropriate, the Treaty of the European Union and the legislation deriving from it, because they are required to apply it directly to the cases that come before them.

44. In order to promote this essential facet of judges' duties, the CCJE considers that member states, after strengthening the study of European law in universities, should also promote its inclusion in the initial and in-service training programmes proposed for judges, with particular reference to its practical applications in day-to-day work.

45. It also recommends reinforcing the European network for the exchange of information between persons and entities in charge of the training of judges (Lisbon Network), which promotes training on matters of common interest and comparative law, and that this training should cater for trainers as well as the judges themselves. The functioning of this Network can be effective only if every member state supports it, notably by establishing a body responsible for the training of judges, as set out in section II above, and by pan-European co-operation in this field.

46. Furthermore, the CCJE considers that the co-operation within other initiatives aiming at bringing together the judicial training institutions in Europe, in particular within the European Judicial Training Network, can effectively contribute to the greater coordination and harmonisation of the programmes and the methods of training of judges on the whole continent.

#### ***ANNUAL REPORTS TO THE COMMISSION ON HUMAN RIGHTS, UN, CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONS OF INDEPENDENCE OF THE JUDICIARY, ADMINISTRATION OF JUSTICE, IMPUNITY, Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, 20 January 2005***

#### Recommendations

##### Training of judges and lawyers

69. The content of this report shows how far proper administration of justice requires judges, lawyers and prosecutors having a solid legal training, including in-service training, that takes account of the most recent developments in law and national jurisprudence and covers inter alia (i) international human rights standards and principles, including those in preparation and those relating to justice, international humanitarian law and international law on refugees, (ii) international criminal law, and (ii) the principles of national and international professional ethics.

70. This training must include international jurisprudence covering the circumstances in which sex crimes, particularly rape, may be classed as international crimes and, in general, awareness-raising regarding gender issues so as, inter alia, to facilitate women's access to judicial functions on an equal footing with men. Such equality is far from the rule, and not only in countries where "crimes of honour" continue to be perpetrated.

***REPORT OF THE FIRST STUDY COMMISSION - JUDICIAL SPECIALIZATION, International Association of Judges (IAJ), 2012***

**Conclusions**

Specialized judges should remain part of a single judiciary, subject to the same general procedural rules and ethical standards applicable to all judges. The trend toward specialized judges should proceed carefully so that specialization does not inhibit the independence of the judiciary. Specialized judges should be paid at the same rate as their counterparts.

In areas such as intellectual property, it will regularly be necessary that there be experts or witnesses participating as experts in the cases. These persons can be those brought in by the parties. They can also be those appointed by the judge handling the case. There are differing views as to whether the expert judge should be allowed to use her expertise to fill in facts that are not present in the case or whether the expertise merely guides the judge as the judge considers the evidence that has been presented. We also recognize the problems that may occur if an expert or witness participating as an expert is allowed to dictate the outcome of a case as opposed to merely conveying facts and opinions that the judge may consider.

Care must be taken that the development of specialized courts and judges with specializations is not used by the legislative bodies to limit resources or as a point of criticism for overall problems that must be addressed with adequate resources.

Care must also be taken that when judges become specialized, the fact that they work in a specialized area is not used as a mechanism to limit the judge's career possibilities.

Finally, while the topic is too broad to yield any present recommendations, particularly in the area of intellectual property, the members of the Commission note that the increasingly global nature of intellectual property issues may benefit from a more global judicial approach, including perhaps, a specialized international court with jurisdiction in this area. This, of course, would be subject to various treaty relations and development of applicable procedures, concerning which we make no specific recommendations. The idea is worthy of further consideration and development, however.

***RESOLUTION ON TRAINING OF JUDGES AND PUBLIC PROSECUTORS, MEDEL, 2014***

European judges must be trained in order to become free and independent interpreters of the common values defined in the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Through their involvement in developing the training curriculum in schools or through an initiative of their own, the NGOs of judges and prosecutors shall reinforce a pluralistic character of training, making it possible for different opinions to be heard: this is an opportunity for judges and prosecutors to acquire awareness on the plurality of possible solutions, about the margin of appreciation they have at their disposal in decision-making, about the imperative to keep explaining and presenting their own reasoning on the points of law. This is a way to acquire a healthy reflex for critical views of the law and the manner of its application.

### **III. 7. FREEDOM OF EXPRESSION AND ASSOCIATION**

#### ***CONVENTION CONCERNING FREEDOM OF ASSOCIATION AND PROTECTION OF THE RIGHT TO ORGANISE, International Labour organization, 1948***

##### Article 2

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

##### Article 8

1. In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land.

2. The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.

##### Article 9

1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

2. In accordance with the principle set forth in paragraph 8 of Article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.

##### Article 10

In this Convention the term *organisation* means any organisation of workers or of employers for furthering and defending the interests of workers or of employers.

#### ***MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE, International Bar Association (IBA), 1982***

##### F - Standards of Conduct

41. Judges may be organised in associations designed for judges, for furthering their rights and interests as judges.

42. Judges may take collective action to protect their judicial independence and to uphold their position.

#### ***BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, Adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, 1985***

##### 8. Freedom of expression and association

In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE (“Singhvi Declaration”), ECOSOC, 1985***

Independence

7. Judges shall be entitled to take collective action to protect their judicial independence.

8. Judges shall always conduct themselves in such a manner as to preserve the dignity and responsibilities of their office and the impartiality and independence of the judiciary. Subject to this principle, judges shall be entitled to freedom of thought, belief, speech, expression, professional association, assembly and movement.

***DOCUMENT OF THE MOSCOW MEETING OF THE CONFERENCE ON THE HUMAN DIMENSION OF THE CSCE, 1991***

Art. 20 For the promotion of the independence of the judiciary, the participating States will:

20.1 - recognize the important function national and international associations of judges and lawyers can perform in strengthening respect for the independence of their members and in providing education and training on the role of the judiciary and the legal profession in society;

20.2 - promote and facilitate dialogue, exchanges and co-operation among national associations and other groups interested in ensuring respect for the independence of the judiciary and the protection of lawyers;

20.3 - co-operate among themselves through, inter alia, dialogue, contacts and exchanges in order to identify where problem areas exist concerning the protection of the independence of judges and legal practitioners and to develop ways and means to address and resolve such problems;

20.4 - co-operate on an ongoing basis in such areas as the education and training of judges and legal practitioners, as well as the preparation and enactment of legislation intended to strengthen respect for their independence and the impartial operation of the public judicial service.

***PALERMO DECLARATION, ELEMENTS OF A EUROPEAN STATUTE OF MAGISTRACY, MEDEL, 1993***

**VII. THE FREEDOMS OF MAGISTRATES**

7.1. Like other citizens, magistrates enjoy freedom of expression, belief, association and assembly. They have the right to strike. The exercise of this right must not undermine the fundamental right to justice of persons.

7.2. Magistrates are free to constitute and be affiliated to associations and trade unions of magistrates or other associations, notably to defend the fundamental rights, the service of justice and their own interests, to promote their professional training and to protect the independence of the judiciary.

The Supreme Council of Magistrates fosters, without discrimination, the action of the associations of magistrates. Those responsible for the associations may on request be dispensed from service for the duration of their mandate, by decision of the Supreme Council of Magistrates.

***BEIJING STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION, as amended in Manila at 7th Biennial Conferences of Chief Justices of Asia and the Pacific, 1997***



Independence of the judiciary

8. To the extent consistent with their duties as members of the judiciary, judges, like other citizens, are entitled to freedom of expression, belief, association and assembly.

9. Judges shall be free, subject to any applicable law, to form and join an association of judges to represent their interests and promote their professional training and to take such other action to protect their independence as may be appropriate.

***EUROPEAN CHARTER ON THE STATUTE FOR JUDGES AND EXPLANATORY MEMORANDUM, Council of Europe, Strasbourg, 8 - 10 July 1998***

1. GENERAL PRINCIPLES

1.7. Professional organizations set up by judges, and to which all judges may freely adhere, contribute notably to the defence of those rights which are conferred on them by their statute, in particular in relation to authorities and bodies which are involved in decisions regarding them.

***FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY, FINAL RESOLUTION, TO REVALORIZE THE RELATIONS BETWEEN THE JUDICIARY AND THE OTHER POWERS OF STATE FOR A BETTER WORKING OF JUSTICE, International Association of Judges (IAJ), 1999***

Independence should not only exist theoretically on the grounds of a constitutional statement or principle, but has to rely in practice on the good faith of the men and women who participate in the legislative and executive Powers. [...] it is the commission's opinion that, true independence can best be achieved by a self governing Judiciary.

2) The evolution, which concerns the Judiciary as an institutional entity, must leave untouched the right of the individual judges (and for that reason, other "workers" within), to organise themselves in associations that care for their interests as individuals and as a group. To forbid or to impede judges' associations is unacceptable and a violation of the judicial independence.

[...] Therefore the best way to improve the relations between the Judiciary and the other Powers of State, is the mutual acceptance of this evolution that will give each and every step in judicial reform a common goal towards an independent and accountable Judiciary in the best interest of the nation and the public service.

***THE UNIVERSAL CHARTER OF THE JUDGE, International Association of Judges (IAJ), 1999***

Art. 12 Associations

The right of a judge to belong to a professional association must be recognized in order to permit the judges to be consulted, especially concerning the application of their statutes, ethical and otherwise, and the means of justice, and in order to permit them to defend their legitimate interests.

***BANGALORE PRINCIPLE ON JUDICIAL CONDUCT, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002***

Value 4: Propriety

4.6. A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but, in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.

4.13. A judge may form or join associations of judges or participate in other organizations representing the interests of judges.

### ***GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY, USAID, 2002***

#### **5. Judges Associations**

Judges associations in many countries have primarily been employee unions, established to lobby for better benefits. In those cases, they have rarely been agents for reform. In other countries, however, they have been key players. At their best, judges associations can contribute to transforming judicial attitudes by

- Enhancing a sense of professionalism, collegiality, and self-esteem among judges, which is particularly important in countries where the profession has been held in low regard
- Developing and being persuasive advocates for a code of ethics (They can adopt their own informal codes and other mechanisms of self-regulation, and heighten awareness of ethical issues, including through publications and continuing legal education.)
- Sustaining training efforts, by providing an institutional base and by developing and disseminating training materials and other publications
- Developing judicial leadership and advocating for reforms encouraged support for this type of academic research and stressed its long-term potential
- Media scrutiny of courts can also play a positive role, but is somewhat more difficult to approach. Investigative journalism projects have not always been successful. Even when journalists are well trained and media is independent from government control, the owners, with their own biases and connections, often control content. Additionally, media outlets may simply be unwilling or unable to commit the funds necessary to investigate stories.

As an alternative, support was given in the Philippines to an organization whose specific goal was to document and expose cases of corruption, including within the judiciary. Careful research by this group, the Philippine Center for Investigative Journalism, led in one case to the resignation of a supreme court justice. However, donors need to keep in mind that under some circumstances, donor support, especially when it is a single donor, may taint the credibility of research and lead to claims that it was motivated by a foreign agenda.

### ***OPINION NO. 3 (2002) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE PRINCIPLES AND RULES GOVERNING JUDGES' PROFESSIONAL CONDUCT, IN PARTICULAR ETHICS, INCOMPATIBLE BEHAVIOUR AND IMPARTIALITY, Council of Europe, 2002***

#### **A. STANDARDS OF JUDICIAL CONDUCT**

1) What standards of conduct should apply to judges?

b. Impartiality and extra-judicial conduct of judges

27. Judges should not be isolated from the society in which they live, since the judicial system can only function properly if judges are in touch with reality. Moreover, as citizens, judges enjoy the fundamental rights and freedoms protected, in particular, by the European Convention on Human Rights (freedom of opinion, religious freedom, etc). They should therefore remain generally free to engage in the extra-professional activities of their choice.

33. The discussions within the CCJE have shown the need to strike a balance between the judges' freedom of opinion and expression and the requirement of neutrality. It is therefore necessary for judges, even though their membership of a political party or their participation in public debate on

the major problems of society cannot be proscribed, to refrain at least from any political activity liable to compromise their independence or jeopardise the appearance of impartiality.

34. However, judges should be allowed to participate in certain debates concerning national judicial policy. They should be able to be consulted and play an active part in the preparation of legislation concerning their statute and, more generally, the functioning of the judicial system. This subject also raises the question of whether judges should be allowed to join trade unions. Under their freedom of expression and opinion, judges may exercise the right to join trade unions (freedom of association), although restrictions may be placed on the right to strike.

39. The CCJE considers that rules of professional conduct should require judges to avoid any activities liable to compromise the dignity of their office and to maintain public confidence in the judicial system by minimising the risk of conflicts of interest. To this end, they should refrain from any supplementary professional activity that would restrict their independence and jeopardise their impartiality. In this context, the CCJE endorses the provision of the European Charter on the Statute for Judges under which judges' freedom to carry out activities outside their judicial mandate "may not be limited except in so far as such outside activities are incompatible with confidence in, or the impartiality or the independence of a judge, or his or her required availability to deal attentively and within a reasonable period with the matters put before him or her" (para. 4.2). The European Charter also recognises the right of judges to join professional organisations and a right of expression (para. 1.7) in order to avoid "excessive rigidity" which might set up barriers between society and the judges themselves (para. 4.3). It is however essential that judges continue to devote the most of their working time to their role as judges, including associated activities, and not be tempted to devote excessive attention to extra-judicial activities. There is obviously a heightened risk of excessive attention being devoted to such activities, if they are permitted for reward. The precise line between what is permitted and not permitted has however to be drawn on a country by country basis, and there is a role here also for such a body or person as recommended in paragraph 29 above.

### ***PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA, African Commission on Human and Peoples Rights, 2003***

#### **A. GENERAL PRINCIPLES APPLICABLE TO ALL LEGAL PROCEEDINGS**

##### **4) Independent tribunal**

s) Judicial officers are entitled to freedom of expression, belief, association and assembly. In exercising these rights, they shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession.

t) Judicial officers shall be free to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status.

### ***THE BURGH HOUSE PRINCIPLES ON THE INDEPENDENCE OF THE INTERNATIONAL JUDICIARY, The Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals, 2004***

#### **7. Freedom of expression and association**

7.1 Judges shall enjoy freedom of expression and association while in office. These freedoms must be exercised in a manner that is compatible with the judicial function and that may not affect or reasonably appear to affect judicial independence or impartiality.

7.2 Judges shall maintain the confidentiality of deliberations, and shall not comment extrajudicially upon pending cases.

7.3 Judges shall exercise appropriate restraint in commenting extrajudicially upon judgments and procedures of their own and other courts and upon any legislation, drafts, proposals or subject-matter likely to come before their court.

***OPINION NO 8 (2006) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON "THE ROLE OF JUDGES IN THE PROTECTION OF THE RULE OF LAW AND HUMAN RIGHTS IN THE CONTEXT OF TERRORISM", Consultative Council of European Judges (CCJE), 2006***

**D. THE ROLE OF THE JUDGE IN THE PROTECTION OF FREEDOM OF EXPRESSION AND OTHER RIGHTS AND FREEDOMS**

75. Despite the increase of terrorist activities, the CCJE considers that the national judge should always respect the basic principles of the rule of law, which are essential in democratic society, including the freedom of expression and other individual rights. As the fight against terrorism must never lead to the undermining of the values and freedoms that terrorists intend to destroy, it is vital for democracies that courts remain the guardians of the crucial demarcating line between a democratic society and a society that fights back using methods that themselves unduly curtail freedom of expression or infringe other rights and freedoms, such as the rights of minorities or political freedoms.

***DECLARATION OF MINIMAL PRINCIPLES ABOUT JUDICIARIES AND JUDGES' INDEPENDENCE IN LATIN AMERICA, Campeche, April 2008***

**III. MINIMAL CONDITIONS FOR THE PROTECTION OF JUDGES' INDEPENDENCE AND IMPARTIALITY**

**13. RIGHT OF ASSOCIATION**

The professional right of association of judges shall be fully recognized, in order to allow them to determine their statutory and ethical regulations as well as any other type of rules and to ensure the defence of their legitimate interests.

***PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO DEVELOPMENT, UN HUMAN RIGHTS COUNCIL, Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, 24 March 2009***

**Recommendations**

102. To strengthen freedom of expression and association of judges, the Special Rapporteur recommends that:

- Freedom of expression and association of judges be effectively guaranteed by law and practice.
- The establishment of a Judges' Association be supported by Member States on account of its importance as a guarantor of an independent judiciary.

***MAGNA CARTA OF JUDGES, CCJE, Council of Europe, Strasbourg, 17 November 2010***

**Guarantees of independence**

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.

**RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010**

Chapter III – Internal independence

25. Judges should be free to form and join professional organisations whose objectives are to safeguard their independence, protect their interests and promote the rule of law.

**ABA MODEL CODE OF JUDICIAL CONDUCT (2011 EDITION), adopted by the House of Delegates of the American Bar Association on August 7, 1990 and amended on August 6, 1997, August 10, 1999, August 12, 2003, February 12, 2007 and August 10, 2010**

CANON 3

Rule 3.6: Affiliation with Discriminatory Organizations

(A) A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.

(B) A judge shall not use the benefits or facilities of an organization if the judge knows or should know that the organization practices invidious discrimination on one or more of the bases identified in paragraph (A). A judge's attendance at an event in a facility of an organization that the judge is not permitted to join is not a violation of this Rule when the judge's attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization's practices.

**OPINION NO. 15 (2012) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) ON THE SPECIALISATION OF JUDGES, Council of Europe, 2012**

Introduction

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.

**BRIJUNI STATEMENT OF THE PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY, Conference of Chief Justices of Central and Eastern Europe, 14 October, 2015**

9. To the extent consistent with their duties as members of the judiciary, judges, like other citizens, are entitled to freedom of expression, belief, association and assembly, except that a judge should refrain from political activity.

**ANNUAL REPORTS TO THE HUMAN RIGHTS COUNCIL, UN, Report of the Special Rapporteur on the independence of judges and lawyers - freedom of expression, association and peaceful assembly of judges and prosecutors, 2019.**

## Development and implementation of national standards

93. National legislation on the organization and functioning of the judiciary and the public prosecution should include specific provisions recognizing that judges and prosecutors are entitled to exercise the right to freedom of expression, belief, association and assembly, as well as political rights, on an equal basis with others, and that the exercise of these rights can only be subject to those restrictions that appear necessary in a democratic society to maintain the authority of the judiciary or the public prosecution, as well as the independence and impartiality of individual judges and prosecutors.

94. Professional associations of judges and prosecutors should include specific provisions in codes of conduct, where these exist, or otherwise develop specific guidelines on the exercise of fundamental freedoms by judges and prosecutors. Such standards should serve as self-regulatory standards that help judges and prosecutors to make their own decisions on how to exercise their human rights and fundamental freedoms in a manner consistent with the dignity of their office and the independence and impartiality of the judiciary or the prosecution service. As such, these principles should remain separate from the disciplinary rules applicable to judges and prosecutors, in the sense that failure to observe such principles should not automatically constitute a disciplinary infringement.

95. The Special Rapporteur considers that judges and prosecutors themselves are best placed to determine the scope and content of legal and ethical norms on the exercise of their fundamental freedoms and political rights. Accordingly, national legislation and ethical standards should be developed through an open and transparent process involving judges, prosecutors and their representative organizations. Existing international standards relating to the exercise of fundamental freedoms and the jurisprudence of regional human rights courts and mechanisms should be taken into account in the development and implementation of such principles.

96. Judges and prosecutors should receive adequate training on ethical principles relating to the exercise of their fundamental freedoms, both in relation to their profession and with regard to outside activities. Such training should include, in particular, practical guidance on the use of social media.

97. The Special Rapporteur encourages professional associations of judges and prosecutors to establish consultative and advisory bodies that advise judges and prosecutors whenever they have uncertainties as to whether a given activity in the private sphere is compatible with their responsibilities and duties as civil servants. Such advisory bodies should be separate from the bodies responsible for imposing disciplinary sanctions.

98. Any charge or complaint against judges or prosecutors relating to the exercise of their fundamental freedoms should be brought before an independent authority, such as a judicial or prosecutorial council, or a court. Disciplinary proceedings should be determined in accordance with the law, the code of professional conduct and other established standards and ethics.

99. Removal from office should only be imposed in the most serious cases of misconduct, as provided in the professional code of conduct, and only after a due process hearing granting all guarantees to the accused.

100. Decisions in disciplinary proceedings should be subject to an independent review.

### Freedom of expression

101. In exercising their freedom of expression, judges and prosecutors should bear in mind their responsibilities and duties as civil servants, and exercise restraint in expressing their views and opinions in any circumstance when, in the eyes of a reasonable observer, their statement could objectively compromise their office or their independence or impartiality.

102. As a general principle, judges and prosecutors should not be involved in public controversies. However, in limited circumstances they may express their views and opinions on issues that are politically sensitive, for example when they participate in public debates concerning legislation and policies that may affect the judiciary or the prosecution service. In situations where democracy and

the rule of law are under threat, judges have a duty to speak out in defence of the constitutional order and the restoration of democracy.

103. Judges and prosecutors should show circumspection in their relations with the press. They should always refrain from comments on the cases they are dealing with, and avoid any unjustified comments that may call their impartiality into question.

104. Judges and prosecutors should be cautious when using social media. When posting on social media, they should take into account that anything they publish becomes permanent, even after they delete it, and may be freely interpreted or even taken out of context. When making anonymous comments on the Internet, judges should always be mindful that there are various ways to identify the person who posted the comment.

105. Any personal information or photograph shared on social media should be modest and decent. Judges and prosecutors should always refrain from making partisan political comments, and never post anything that may conflict with the dignity of their office or otherwise affect the judiciary or the prosecution service as an institution.

106. Judges and prosecutors may use Twitter; however, since a Twitter account identifies them as a judge or a prosecutor, it should only be used for informational and educational purposes and for activities connected with their work.

Freedom of assembly and association

107. Judges and prosecutors have the right to freedom of peaceful assembly. In exercising this right, they should bear in mind their responsibilities and duties as civil servants, and exercise restraint whenever their participation in a peaceful demonstration 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 impartial.

108. Judges and prosecutors have the right to form and join professional organizations to protect their professional interests. They can also be members of other organizations, provided that their membership of these associations does not compromise the dignity of their office or their independence and impartiality.

Political rights

109. The Special Rapporteur acknowledges that there is no general international consensus on whether judges and, to a lesser extent, prosecutors should be free to participate in politics or not.

110. As citizens, judges and prosecutors are entitled to exercise their political rights on an equal basis with other citizens. However, judges and prosecutors should show restraint in the exercise of public political activity, in order to preserve the independence of the judiciary and the separation of powers.

111. Even in cases where their membership of a political party or their participation in public debate is not expressly prohibited, it is necessary for judges and prosecutors to refrain from any political activity that might compromise their independence or jeopardize the appearance of impartiality.

112. With regard to direct involvement in politics, the Special Rapporteur is of the view that judges and prosecutors should avoid any partisan political activity that may undermine their impartiality or be inconsistent with the principle of the separation of powers.

### **III. 8. PHYSICAL SECURITY AND PROTECTION OF JUDGES**

#### ***THE SIRACUSA DRAFT PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, 1981***

Physical protection

Art. 27. It is the responsibility of the executive authorities to ensure the security and physical protection of members of the judiciary and their families, especially in the event of threats being made against them.

***MONTREAL DECLARATION, UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE, International Association of Judicial Independence and World Peace (JIWP), 1983***

Posting, Promotion and Transfer

2.23 The executive authorities shall, at all times, ensure the security and physical protection of judges and their families.

***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE (“Singhvi Declaration”), ECOSOC, 1985***

Tenure

19. The executive authorities shall at all times ensure the security and physical protection of judges and their families.

***PROCEDURES FOR THE EFFECTIVE IMPLEMENTATION OF THE BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, Resolution 1989/60, 15th plenary meeting, ECOSOC, 24 May 1989***

Procedure 5

In implementing principles 8 and 12 of the Basic Principles, States shall pay particular attention to the need for adequate resources for the functioning of the judicial system, including appointing a sufficient number of judges in relation to case-loads, providing the courts with necessary support staff and equipment, and offering judges appropriate personal security, remuneration and emoluments.

***BEIJING STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION, as amended in Manila at 7th Biennial Conferences of Chief Justices of Asia and the Pacific, 1997***

40. Relationship with the Executive

The Executive authorities must at all times ensure the security and physical protection of judges and their families.



**FIRST STUDY COMMISSION - "THE PHYSICAL, STRUCTURAL AND ECONOMIC CONDITIONS OF JUDICIAL INDEPENDENCE", International Association of Judges (IAJ), 2001**

General Conclusions, Security in the courthouses

In the last decade, security has become a main issue in many countries. Most court buildings have increased security for entrance into the buildings. Most countries have also implemented personal security for the judiciary if required. This is done on a case by case basis. Court and judicial security is generally adequate, but some countries feel there should be increased security compared to what they have. For example, in some rural courts there is no security at all. Also, in particular situations there is inadequate security for judges and their families at times those particular judges are involved in cases where they need special protection. We realize that there are some situations which we cannot guard against, and that no security system is perfect, but judges and users of the courts have the right to be effectively protected. All agreed that the increased security measures did not harm the relationship between the judiciary and its users.

**RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010**

Chapter V – Independence, efficiency and resources

38. All necessary measures should be taken to ensure the safety of judges. These measures may involve protection of the courts and of judges who may become, or are victims of, threats or acts of violence.

## IV. COUNCILS FOR THE JUDICIARY

### IV. 1. GENERAL MISSION

***PALERMO DECLARATION, ELEMENTS OF A EUROPEAN STATUTE OF MAGISTRACY, MEDEL, 1993***

#### III. THE SUPREME COUNCIL OF MAGISTRATES

3.1. The Supreme Council of Magistrates is entrusted with the administration and discipline of the judiciary. It guarantees the independence of magistrates.

***JUDGES' CHARTER IN EUROPE, European Association of Judges, 1997***

Fundamental principles

6. The administration of the judiciary must be carried out by a body which is representative of the Judges and independent of any other authority.

***FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY, FINAL RESOLUTION, TO REVALORIZE THE RELATIONS BETWEEN THE JUDICIARY AND THE OTHER POWERS OF STATE FOR A BETTER WORKING OF JUSTICE, International Association of Judges (IAJ), 1999***

Independence should not only exist theoretically on the grounds of a constitutional statement or principle, but has to rely in practice on the good faith of the men and women who participate in the legislative and executive Powers. [...] it is the commission's opinion that, true independence can best be achieved by a self governing Judiciary.

For that matter however, the commission wants to make two important remarks:

1) As to the ultimate managing body of this self governing judiciary, be it in the shape of a high council of the judiciary or in any other shape, it is clear to the great majority of the commission that, to ensure the independence, this body must be composed in majority by members coming from within the judicial organisation itself.

***FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY, CONCLUSIONS, THE ROLE AND FUNCTION OF THE HIGH COUNCIL OF JUSTICE OR ANALOGOUS BODIES IN THE ORGANISATION AND MANAGEMENT OF THE NATIONAL JUDICIAL SYSTEM, International Association of Judges (IAJ), 2003***

A High Council of Justice may be a means of strengthening the independence of the judiciary and the judges in carrying out their judicial functions; therefore it is important that a High Council or analogous body enjoys a strong degree of independence or autonomy from other governmental powers.

Where a High Council of Justice or analogous body is not structured in such a way that promotes and protects the independence of the judiciary there is always a danger that it may undermine that independence.

It is essential that a High Council of Justice or analogous body has a majority of judges among its members. Such judges should be elected by their peers or be members by virtue of their specific judicial office but not be selected by the government or parliament.

In any case, such a body should be a means by which a buffer is placed between the judiciary and the other powers of government so that it can protect the judiciary from undue influence from those powers rather than be an instrument of it.

A High Council of Justice or an analogous body or the judiciary should play a major role in the appointment, promotion, discipline or training of judges.

The independence of the judiciary is also dependent on adequate budgetary allocations for the administration of justice and the proper use of those resources. This can be best achieved by an independent body which has responsibility for the allocation of those resources.

***OPINION NO. 7 (2005) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS ON "JUSTICE AND SOCIETY", Council of Europe, 2005***

**A. THE RELATIONS OF THE COURTS WITH THE PUBLIC WITH SPECIAL REFERENCE TO THE ROLE OF THE COURTS IN A DEMOCRACY**

21. It seems to the CCJE that a role co-ordinating the various local initiatives, as well as promoting nation-wide "outreach programmes", should be given to the independent body mentioned in paragraphs 37 and 45 of its Opinion No. 1 (2001). This independent body may also, by incorporating the use of professionals with prepared resources, satisfy more sophisticated information needs issuing from policy makers, academics, public interest groups.

**SUMMARY OF THE RECOMMENDATIONS AND CONCLUSIONS**

A. The relations of the courts with the public with special reference to the role of the courts in a democracy

A.6. A role co-ordinating the various local initiatives, as well as promoting nation-wide "outreach programmes", should be given to the independent body mentioned in paragraphs 37 and 45 of its Opinion No. 1 (2001) (see paragraph 21 above).

C. The relations of the courts with the media

C.13. When a judge or a court is challenged or attacked by the media for reasons connected with the administration of justice, the CCJE considers that in the view of the duty of judicial self-restraint, the judge involved should refrain from reactions through the same channels. Bearing in mind the fact that the courts can rectify erroneous information diffused in the press, the CCJE believes it would be desirable that the national judiciaries benefit from the support of persons or a body (e.g. the Higher Council for the Judiciary or judges' associations) able and ready to respond promptly and efficiently to such challenges (see paragraph 55 above).

***JUDICIAL APPOINTMENTS, Venice Commission, Venice, 16-17 March 2007, CDL-AD(2007)02***

**Conclusions**

48. An appropriate method for guaranteeing judicial independence is the establishment of a judicial council, which should be endowed with constitutional guarantees for its composition, powers and autonomy.

49. Such a Council should have a decisive influence on the appointment and promotion of judges and disciplinary measures against them.

50. A substantial element or a majority of the members of the judicial council should be elected by the Judiciary itself. In order to provide for democratic legitimacy of the Judicial Council, other members should be elected by Parliament among persons with appropriate legal qualifications.

***OPINION NO. 10 (2007) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE COUNCIL FOR THE JUDICIARY AT THE SERVICE OF SOCIETY, CCJE, 2007***

**II. GENERAL MISSION: TO SAFEGUARD THE INDEPENDENCE OF THE JUDICIARY AND THE RULE OF LAW**

8. The Council for the Judiciary is intended to safeguard both the independence of the judicial system and the independence of individual judges. The existence of independent and impartial courts is a structural requirement of a state governed by the rule of law.

9. The independence of judges, in a globalised and interdependent society, should be regarded by every citizen as a guarantee of truth, freedom, respect for human rights, and impartial justice free from external influence. 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 anyone seeking and expecting justice. Independence as a condition of judges' impartiality therefore offers a guarantee of citizens' equality before the courts.

10. The CCJE also takes the view that the Council for the Judiciary should promote the efficiency and quality of justice, so assisting to ensure that Article 6 of the European Convention on Human Rights is fully implemented, and to reinforce public confidence in the justice system. In this context, the Council for the Judiciary has the task to set up the necessary tools to evaluate the justice system, to report on the state of services, and to ask the relevant authorities to take the necessary steps to improve the administration of justice.

11. The CCJE recommends that the Council for the Judiciary be positioned at the constitutional level in those countries having a written Constitution, or in the equivalent basic law or constitutional instrument for other countries. Provisions should be made for the setting up of such body, for the definition of its functions and of the sectors from which members may be drawn and for the establishment of criteria for membership and selection methods<sup>7</sup>.

12. Beyond its management and administrative role vis-à-vis the judiciary, the Council for the Judiciary should also embody the autonomous government of the judicial power, enabling individual judges to exercise their functions outside any control of the executive and the legislature, and without improper pressure from within the judiciary.

13. In this perspective, the CCJE considers that it would be inappropriate for the Council for the Judiciary to be restricted by other authorities in its autonomy to decide on its own operating methods and on subjects for discussion. The relations between the Council for the Judiciary and the Minister of Justice, the Head of State and Parliament need to be determined. Furthermore, considering that the Council for the Judiciary does not belong to the hierarchy of the court system and cannot as such

decide on the merits of the cases, relations with the courts, and especially with judges, need careful handling.

14. The Council for the Judiciary is also obliged to safeguard from any external pressure or prejudice of a political, ideological or cultural nature, the unfettered freedom of judges to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in accordance with the prevailing rules of the law

## SUMMARY OF THE RECOMMENDATIONS AND CONCLUSIONS

### 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 a 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;

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.

## ***DRAFT VADEMECUM ON THE JUDICIARY, EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), 2008***

### 2.4.2 Council of Justice

#### 2.4.2.1 Functions, Remit and Duties

Many European democracies have incorporated a politically neutral High Council of Justice or an equivalent body into their legal systems - sometimes as an integral part of their Constitution - as an effective instrument to serve as a watchdog of basic democratic principles. These include the autonomy and independence of the judiciary, the role of the judiciary in the safeguarding of fundamental freedoms and rights, and the maintaining of a continuous debate on the role of the judiciary within a democratic system. Its autonomy and independence should be material and real as a concrete affirmation and manifestation of the separation of powers of the State.

CDL-INF(1998)009 Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, para. 5, reprise in CDL-AD(2007)028 Judicial Appointments (report), para. 22.

The role of the high judicial council can vary to a large extent.

CDL-AD(2007)028 Judicial Appointments (report), par. 24.

The Council of Justice should be the final authority for all aspects of the professional life of judges in particular matters pertaining to their selection, appointment, career (including promotion and transfer), training, dismissal and discipline, and should be responsible for overseeing the training of judges.

CDL-AD(2004)044 Interim Opinion on Constitutional Reforms in the Republic of Armenia, para.59.

[...] Principle I.2.c of Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe) states “All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. The authority taking the decision on the selection and career of judges should be independent of the government and the administration.”

CDL-AD(2007)028 Judicial Appointments (report), para. 4.

The obligation to provide an annual report to the National Assembly seems reasonable.

The information provided to the public on the activities of the Council will also assist in rendering the judges’ work at the Council more transparent. It will notably allow the public to see that there are sanctions against judges that have committed disciplinary offences etc.

CDL-AD(2008)006 Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia. para. 35-36

According to opinion No 1 (2001) of the CCJE, “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 criteria.”

The European Charter on the statute for judges adopted in Strasbourg in July 1998 (DAJ/DOC(98)23) states: “In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.” According to the Explanatory Memorandum of the European Charter, the term “intervention” of an independent authority means an opinion, recommendation or proposal as well as an actual decision. The CCJE commends the standards set by the European Charter “in so far as it advocated the intervention (in a sense wide enough to include an opinion, recommendation or proposal as well as an actual decision) of an independent authority with substantial judicial representation chosen democratically by other judges”.

CDL-AD(2007)028 Judicial Appointments (report), para. 18-20.

A Supreme Council of Justice is provided for to ensure independence and access to judiciary and to support professional self-governance of judges and public accountability. The Supreme Council of Justice should also ensure impartiality.

CDL-AD(2005)003 Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, en collaboration avec OSCE/BIDDH, para. 102.

The Venice Commission is of the opinion that a judicial council should have a decisive influence on the appointment and promotion of judges and (maybe via a disciplinary board set up within the council) on disciplinary measures against them.

CDL-AD(2007)028 Judicial Appointments (report), para. 25.

Granting immunity to members of the Council guarantees their independence and allows them to carry out their work without having to constantly defend themselves against, for instance, unfounded and vexatious accusations.

CDL-AD(2008)006 Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia. para. 26

[A legislative measure] establishes that the Minister of Justice shall have the power to authorize leaves of absence of the presidents of district and appellate courts. This provision may be considered to confer on the Executive Power an administrative competence over certain judges that contravenes the principle of independence of the Judiciary. It seems that it would be more coherent with this principle to confer that competence to the Council of the Judiciary.

CDL-INF(1999)005 Opinion on the reform of the judiciary in Bulgaria, para. 39.

In the Commission's view, this provision enables the High Council of Justice to determine its own rules of procedure by adopting an appropriate "statute", but does not allow for important matters governing its powers and affecting the rights and duties of magistrates to be so regulated. These matters should rather be regulated by a law adopted by Parliament.

CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995, chapter B.2.i.

The proposed administration of the judiciary is complicated and involves no less than five agencies: the Council of Justice, the Judicial Administration, the Judges Qualification Board, the Judges Disciplinary Board and the Conference of Judges.

Given the comprehensive powers of the Council of Justice and the broad administrative mandate of the Judicial Administration under its auspices, it does seem desirable to provide also for these other institutions, and their specific roles appear to be logically determined. The problems which may be involved accordingly do not relate to the number of institutions as such but mainly to the question whether the overall power vested in the system may be too great [...].

The acceptance of parliamentary control over the disciplinary board is inconsistent. On one hand there is the far-reaching solution concerning the judicial administration and the rights of the Council of Justice while on the other hand there is the far-reaching role to be played by the parliament in staffing issues and judicial oversight. That is, in issues strictly linked to independence and judicial adjudication.

CDL-AD(2002)026 Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, para. 11-12 et 64.

[...] the Commission wishes to recall the European Charter on the Statute for Judges, which stresses the importance of the absolute independence of this body from both the executive and the legislative powers.

CDL-AD(2004)044 Interim Opinion on Constitutional Reforms in the Republic of Armenia, para. 58.

An autonomous Council of Justice that guarantees the independence of the judiciary does not imply that judges may be self-governing. The management of the administrative organisation of the judiciary should not necessarily be entirely in the hands of judges.

CDL-INF(1998)009 Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania para. 9, reprise in CDL-AD(2007)028 Judicial Appointments (report), para. 26.

While the participation of the judicial council in judicial appointments is crucial it need not take over the whole administration of the justice system, which can be left to the Ministry of Justice.

CDL-AD(2007)028 Judicial Appointments (report), para. 26.

An appropriate method for guaranteeing judicial independence is the establishment of a judicial council, which should be endowed with constitutional guarantees for its [...] powers and autonomy.

CDL-AD(2007)028 Judicial Appointments (report), para. 48.

In some countries, the Council (or equivalent bodies) has obtained the power to defend its own budget in front of parliament, which provides further independence from the government.

CDL-AD(2008)006 Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia. para. 17

The Provisions relating to the training of judges and the establishment of a National Institute of Justice [...] should be more detailed and should determine the main action of the Institute. The Institute should be controlled by the Supreme Judicial Council rather than the Ministry of Justice.

CDL-AD(2002)015 Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, para. 5.l).



***SELF GOVERNANCE FOR THE JUDICIARY: BALANCING INDEPENDENCE AND ACCOUNTABILITY, General Assembly of the European Network of Councils for the Judiciary (ENCJ), 2008***

CONSIDERING THAT:

- 1) In most European States there is a Council for the Judiciary or a similar institution which is independent or autonomous institution distinct from the legislative and executive powers of the State and responsible for the independent delivery of justice;
- 2) several Councils for the Judiciary are constitutionally established to guarantee and defend the independence of the judiciary ;
- 3) other Councils or autonomous Courts Administrations have particular responsibility for the administrative management of the Courts, including financial management, human resources, organisation and information technology ;
- 4) each Council for the Judiciary has its origin in the development of its legal system, which is deeply rooted in a historical, cultural and social context ;
- 5) all Councils nevertheless share common experiences and challenges and are governed by the same general principles.

APPROVES THE FOLLOWING RESOLUTION:

- 1) self governance of the judiciary guarantees and contributes to strengthening the independence of the judiciary and the efficient administration of justice ;
- 2) all or part of the following tasks should fall under the authority of a Council for the Judiciary or of one or more independent and autonomous bodies: - the appointment and the promotion of judges
  - the training
  - the discipline and judicial ethics
  - the administration of the courts
  - the finances of the judiciary
  - the performance management of the judiciary
  - the processing on of complaints from litigants
  - the protection of the image of justice
  - the formulation of opinions on judicial policies of the State
  - setting up a system for evaluating the judicial system
  - drafting or proposing legislation concerning the judiciary and/or courts
- 3) in states with a written Constitution, the independence of the judiciary should be guaranteed in the Constitution,
- 5) the Council for the Judiciary must manage its budget independently of the executive power;
- 6) judicial self governance calls for the professionalization of judicial administration
- 7) self governance of the judiciary should be realistic, modern and participatory
- 8) A necessary consequence of its independence is that the Council for the Judiciary or other autonomous body should be accountable for its activities by submitting periodic and public reports.
- 9) the Council for the Judiciary should promote the efficiency and quality of justice

10) the accountability of the judiciary can in no way call into question the independence of the judge when making judicial decisions.

***RESOLUTION ON TRANSPARENCY AND ACCESS TO JUSTICE, European Network of Councils for the Judiciary (ENCJ), 2009***

Councils for the Judiciary or similar independent bodies, in order to maintain the rule of law, must do all they can to ensure the maintenance of an open and transparent system of justice.

***MAGNA CARTA OF JUDGES, CCJE, Council of Europe, Strasbourg, 17 November 2010***

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.

***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

Chapter II – External independence

20. Judges, who are part of the society they serve, cannot effectively administer justice without public confidence. They should inform themselves of society's expectations of the judicial system and of complaints about its functioning. Permanent mechanisms to obtain such feedback set up by councils for the judiciary or other independent authorities would contribute to this.

Chapter IV – Councils for the judiciary

26. Councils for the judiciary are independent bodies, established by law or under the constitution, that seek to safeguard the independence of the judiciary and of individual judges and thereby to promote the efficient functioning of the judicial system.

***THE KYIV RECOMMENDATIONS ON JUDICIAL INDEPENDENCE IN EASTERN EUROPE, SOUTH CAUCASUS AND CENTRAL ASIA, OSCE, 2010***

Division of Competences in Judicial Administration

2. Judicial Councils are bodies entrusted with specific tasks of judicial administration and independent competences in order to guarantee judicial independence. In order to avoid excessive concentration of power in one judicial body and perceptions of corporatism it is recommended to distinguish among and separate different competences, such as selection, promotion and training of judges, discipline, professional evaluation and budget. A good option is to establish different independent bodies competent for specific aspects of judicial administration without subjecting them to the control of a single institution or authority. The composition of these bodies should each reflect their particular task. Their work should be regulated by statutory law rather than executive decree.

***FIRST STUDY COMMISSION REPORT - NOMINATION OF JUDGES, International Association of Judges (IAJ), 2013***

Resolution

High Council for the Judiciary will enjoy a proper degree of independence where the substantial majority of its members are judges elected by their peers representing all judicial levels

Reminds that the High Council for the Judiciary also serves as a buffer between the judiciary and the other pillars of the state. Emphasises that it should protect judges and the judiciary from undue external or internal pressure rather than being an instrument of such influence. Notes that the High Council for the Judiciary should, in all cases, not be a politicized institution in particular as it relates to its composition and activities

***SOFIA DECLARATION ON JUDICIAL INDEPENDENCE AND ACCOUNTABILITY, The General assembly of European Network of Councils for the Judiciary (ENCJ), 2013***

(v) The protection of judicial independence can appropriately be achieved by a properly functioning council for the judiciary or a similar independent body to consider and determine or to make recommendations to government on all matters relevant to judicial remuneration and conditions.

(vi) It is the essential task of the ENCJ and all Councils for the Judiciary to maintain and strengthen the independence of the Judiciary, especially when it is threatened.

***PARIS DECLARATION ON RESILIENT JUSTICE, ENCJ, 2017***

1. There is a strong need for resilient justice systems which can withstand external pressure whilst at the same time having the ability to adjust to the changing needs of society.

2. The outcomes of ENCJ's activities and developments across Europe show that these are challenging times for justice systems throughout Europe and, specifically, the judiciaries which operate within those systems. Respect for fair and impartial courts, as the key components of an independent judiciary, is being challenged in a number of countries. The Judiciaries will have to stand together to emphasise the role and position of the Judiciary. Councils for the Judiciary have a pivotal role in this regard.

3. The application of the ENCJ Independence and Accountability indicators show that there is still room for improvement in this field. The perspective of court users is largely lacking, whilst the perception of corruption persists. Funding of the judiciary is generally not well arranged, and judiciaries are dependent on discretionary decisions by governments. Court management is still often in the hands - directly or indirectly - of Ministries of Justice. On a more positive note, judges are generally positive about their independence and in nearly all countries trust in the judiciary is higher than trust in the other state powers.

5. The ENCJ considers that it is important that Councils for the Judiciary should take action to address the issues which have been identified in order to strengthen and maintain the Rule of Law, in particular by providing support for judicial independence, accountability and the quality of the judiciary. They will strive to ensure the maintenance of an open and transparent system of justice for the benefit of all.

6. First, it is essential that judiciaries have appropriate structures of governance in the form of Councils for the Judiciary.

7. Second, Councils for the Judiciary should support any judiciary which is under attack and do all they can to persuade the executive and legislature to support the action which they are taking in this regard.

8. Third, in any democratic state it is essential that there is a proper and informed understanding of the respective roles and responsibilities of each of the branches of the state and the need for them to work together in an effective and mutually respectful manner.

9. Fourth, Councils for the Judiciary should encourage the promotion of high quality performance of all aspects of the work of the judiciary.
10. Fifth, the judiciary should take action to ensure that the general public understands the central importance of justice to democracy and to the wellbeing and prosperity of the state. This can be achieved by education and outreach initiatives.
11. Sixth, the judiciary should adopt a focused communication strategy to engage pro-actively with the media and the public.

## **IV. 2. COMPOSITION OF A JUDICIAL COUNCIL**

### ***PALERMO DECLARATION, ELEMENTS OF A EUROPEAN STATUTE OF MAGISTRACY, MEDEL, 1993***

#### **III. THE SUPREME COUNCIL OF MAGISTRATES**

3.2. At least half of the Supreme Council of Magistrates is composed of magistrates elected by their peers according to the rule of proportional representation. It comprises, besides, personalities appointed by parliament. Its members are appointed for a definite period of time.

### ***EUROPEAN CHARTER ON THE STATUTE FOR JUDGES AND EXPLANATORY MEMORANDUM, Council of Europe, Strasbourg, 8 - 10 July 1998***

#### **1. GENERAL PRINCIPLES**

1.3. In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.

### ***GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY, USAID, 2002***

1. Selection and Appointment of Judges, d. Which selection process works best?

(2) Composition of judicial councils. Judicial councils can be effective by introducing additional actors into the process and thus diluting the influence of any one political entity. There is often a great deal of focus on trying to get the composition of the council right in order to achieve this objective. The consensus of our experts was that the transparency of the process the council uses is more important than the composition of the council. Nevertheless, there was general agreement on a few ways in which the membership of a judicial council can enhance its operations:

- Participation of the general public on the council, particularly lawyers and law professors, can help to (a) safeguard transparency, (b) reduce the risk of executive, partisan, or supreme court control, and (c) enhance the quality of candidate selection.
- Inclusion of lower-level judges, along with senior judges, can reduce excessive influence by the judicial leadership, which is often inclined to preserve the status quo.<sup>4</sup>
- Allowing representative members, especially judges, lawyers, and other members of the public, to be chosen by the sector they represent will increase the likelihood that they will have greater accountability to their own group and autonomy from other actors. In much of Europe and Latin America, this is the process followed. In anglophone Africa, the opposite is true—most council members are appointed by the president.

**OPINION NO. 10 (2007) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE COUNCIL FOR THE JUDICIARY AT THE SERVICE OF SOCIETY, CCJE, 2007**

III. A. A Council for the Judiciary composed by a majority of judges

15. The composition of the Council for the Judiciary shall be such as to guarantee its independence and to enable it to carry out its functions effectively.

16. The Council for the Judiciary can be either composed solely of judges or have a mixed composition of judges and non judges. In both cases, the perception of self-interest, self protection and cronyism must be avoided.

17. When the Council for the Judiciary is composed solely of judges, the CCJE is of the opinion that these should be judges elected by their peers.

18. When there is a mixed composition (judges and non judges), the CCJE considers that, in order to prevent any manipulation or undue pressure, a substantial majority of the members should be judges elected by their peers<sup>9</sup>.

19. In the CCJE's view, such a mixed composition would present the advantages both of avoiding the perception of self-interest, self protection and cronyism and of reflecting the different viewpoints within society, thus providing the judiciary with an additional source of legitimacy. However, even when membership is mixed, the functioning of the Council for the Judiciary shall allow no concession at all to the interplay of parliamentary majorities and pressure from the executive, and be free from any subordination to political party consideration, so that it may safeguard the values and fundamental principles of justice.

20. When there is a mixed composition in the Council for the Judiciary, the CCJE is of the opinion that some of its tasks may be reserved to the Council for the Judiciary sitting in an all-judge panel.

III.B. Qualifications of members

21. Members, whether judges or not, must be selected on the basis of their competence, experience, understanding of judicial life, capacity for discussion and culture of independence.

22. The non-judge members may be selected among other outstanding jurists, university professors, with a certain length of professional service, or citizens of acknowledged status. Modern management of the judiciary might also require wider contributions from members experienced in areas outside the legal field (e.g. in management, finances, IT, social sciences).

23. Prospective members of the Council for the Judiciary, whether judges or non judges, should not be active politicians, members of parliament, the executive or the administration. This means that neither the Head of the State, if he/she is the head of the government, nor any minister can be a member of the Council for the Judiciary. Each state should enact specific legal rules in this area.

24. The CCJE considers that the composition of the Council for the Judiciary should reflect as far as possible the diversity in the society.

III.C. Selection methods

III. C. 1. Selection of judge members

25. In order to guarantee the independence of the authority responsible for the selection and career of judges, there should be rules ensuring that the judge members are selected by the judiciary.

26. The selection can be done through election or, for a limited number of members (such as the presidents of Supreme Court or Courts of appeal), ex officio.

27. Without imposing a specific election method, the CCJE considers that judges sitting on the Council for the Judiciary should be elected by their peers following methods guaranteeing the widest representation of the judiciary at all levels.

28. Although the roles and tasks of professional associations of judges and of the Council for the Judiciary differ, it is independence of the judiciary that underpins the interests of both. Sometimes professional organisations are in the best position to contribute to discussions about judicial policy. In many states, however, the great majority of judges are not members of associations. The participation of both categories of judges (members and non members of associations) in a pluralist formation of the Council for the Judiciary would be more representative of the courts. Therefore, judges' associations must be allowed to put forward judge candidates (or a list of candidates) for election, and the same arrangement should be available to judges who are not members of such associations. It is for states to design an appropriate electoral system including these arrangements.

29. In order to meet citizens' expectations that the Council for the Judiciary should be "depoliticised", the CCJE shares the view that competition for elections should comply with the rules set out by the Council for the Judiciary itself so as to minimise any jeopardy to public confidence in the judicial system.

30. The CCJE would have no objection to the development by states of methods, other than direct elections, guaranteeing the widest representation of the judiciary in the Council for the Judiciary. A method guaranteeing diverse and territorial representation could be adopted from some countries' experiences in forming court panels, i.e. drawing by lot members on the basis of one or more territorial lists including eligible candidates upon nominations by a sufficient number of peers.

31. The CCJE does not advocate systems that involve political authorities such as the Parliament or the executive at any stage of the selection process. All interference of the judicial hierarchies in the process should be avoided. All forms of appointment by authorities internal or external to the judiciary should be excluded.

### III. C. 2. Selection of non-judge members

32. Non-judge members should not be appointed by the executive. Although it is for each state to strike a balance between conflicting needs, the CCJE would commend a system that entrusts appointments of non-judges to non political authorities. If in any state any non judge members are 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.

### III. C. 3. Selection of the Chair

33. It is necessary to ensure that the Chair of the Council for the Judiciary is held by 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 judge.

### III. D. Number of members and duration of their mandate

34. The CCJE considers that the membership of the Council for the Judiciary should reflect the size of the judiciary and, consequently, the volume of tasks to be fulfilled. Although it is for the states to decide whether the members of the Council for the Judiciary should sit as full-time or part time members, the CCJE points out that full-time attendance means a more effective work and a better safeguard of independence. However, there is a need to ensure that judges sitting on the Council for the Judiciary are not absent for too long from their judicial work, so that, whenever possible,

contact with court practice should be preserved. Terms of office which entail exclusive sitting on the Council for the Judiciary should be limited in number and time.

35. The CCJE recommends that, in order to guarantee the continuity of the Council's activities, members of the Council for the Judiciary should not all be replaced at the same time.

### III. E. Status of members

36. Members of the Council for the Judiciary (both judges and non-judges) should be granted guarantees for their independence and impartiality. The remuneration of the members of the Council for the Judiciary should be commensurate to their position and the workload within the Council.

## SUMMARY OF THE RECOMMENDATIONS AND CONCLUSIONS

### 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 ; 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.

### ***SELF GOVERNANCE FOR THE JUDICIARY: BALANCING INDEPENDENCE AND ACCOUNTABILITY, General Assembly of the European Network of Councils for the Judiciary (ENCJ), 2008***

#### 4) As to the composition of the Councils for the Judiciary:

- a. the Council can be composed either exclusively of members of the judiciary or members and non members of the judiciary;
- b. when the composition is mixed, the Council should be composed of a majority of members of the judiciaries, but not less than 50 %;
- c. in any case ( whether there is a mixed composition or not) the judicial members of the Council (however appointed) must act as the representatives of the entire judiciary.

### ***DRAFT VADEMECUM ON THE JUDICIARY, EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), 2008***

#### 2.4.2.2 Composition



[...] the Commission is of the view that the Albanian model [of composition of the High Council of Justice] creates an undue imbalance in favour of the executive branch[...]. [...] It is imperative that a more appropriate balance to the Council's composition be provided for and guaranteed by law, with provision for at least a majority of its members to be members of the judiciary elected by members of the judiciary.

CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995, adopted at the 25th Plenary Meeting of the Commission, December 1995, chapter B.1.h.

Commission welcomes the proposal [...] to have the Judicial Council composed of nine judges out of twelve members [...].

CDL-AD(2004)044 Interim Opinion on Constitutional Reforms in the Republic of Armenia, para. 57.

The European Charter on the statute for judges adopted in Strasbourg in July 1998 (DAJ/DOC(98)23) states: "In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary." [...].

The CCJE commends the standards set by the European Charter "in so far as it advocated the intervention [...]of an independent authority with substantial judicial representation chosen democratically by other judges".

CDL-AD(2007)028 Judicial Appointments (report), para. 19-20.

[...] the representation of courts should be revised to create a fairer representation of all judges in the Council.

CDL-AD(2008)006 Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia. para. 76

the draft Law spells out in detail the exact composition of the Council, which provides for a large majority of judges (six out of eleven members). Such a composition of the Council is necessary in order to avoid the independence of the judiciary being endangered by political manoeuvres

[...] the problem is not the composition of the Council, but that a majority of its members are appointed by the National Assembly without a qualified majority. This could be problematic.

CDL-AD(2008)006 Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia. para. 19,21

The presence of the Minister of Justice on the Council is of some concern, as regards matters relating to the transfer and disciplinary measures taken in respect of judges at the first level, [and] at the appeal stage [...]. [...]it is advisable that the Minister of Justice should not be involved in decisions concerning the transfer of judges and disciplinary measures against judges, as this could lead to inappropriate interference by the Government.

CDL-INF(1998)009 Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, para. 16, cited in CDL-AD(2007)028 Judicial Appointments (report), para. 34

The Minister for Justice has been given a new power to address proposals to the Supreme Judicial Council for the purposes of appointing and dismissing the Chairman of the Supreme Court of

Cassation, the Chairman of the Supreme Administrative Court and the Chief Prosecutor, for determining the number of judges, prosecutors and investigators and for appointing, promoting, demoting, moving and dismissing all judges, prosecutors and investigators. Formerly, such proposals could only be made by the heads of the different branches of the Judiciary, the prosecution service and the investigation service. The Commission does not consider the conferring of a power to make such a proposal on a Minister of the Government is in itself objectionable as an interference with the independence of the Judiciary. Again, the doctrine of separation of powers does not require that there can be no involvement by either of the other two branches of power in a decision to appoint or dismiss a judge. The European Court of Human Rights has held that the fact that a power to appoint members of a tribunal is conferred on a Government does not, of itself, suffice to give cause to doubt its members independence and impartiality (Same v Austria, 22.10.1984, no. 84 of Series A of the Publications of the Court).

There is, however, a case to be made that when the [Supreme Judicial] Council is discussing proposals made by the Minister it would be preferable that some person other than the Minister ought to chair it.

CDL-INF(1999)005 Opinion on the reform of the judiciary in Bulgaria, para. 34-35.

The Minister of Justice as the chairman of the Supreme Council of Justice should not be able to be able to block the discussion of a particular issue within this body. When the Council is discussing proposals made by the Minister it would be preferable that some person other than the Minister ought to chair it.

CDL-AD(2002)015 Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria Avis, para. 5.a).

In addition, the Commission considers that [the proposed measure], providing that the President chairs the Council of Justice, could prove rather problematic. Having the President as the Chair is not necessarily the best solution (although provided for in a number of European Constitutions) and his or her role as the Chair should be purely formal. In this regard, the Commission wishes to recall the European Charter on the Statute for Judges, which stresses the importance of the absolute independence of this body from both the executive and the legislative powers.

CDL-AD(2004)044 Interim Opinion on Constitutional Reforms in the Republic of Armenia, para. 58.

Although the presence of the members of the executive power in the judicial councils might raise confidence-related concerns, such practice is quite common. [...]Such presence does not seem, in itself, to impair the independence of the council, according to the opinion of the Venice Commission. However, the Minister of Justice should not participate in all the council's decisions, for example, the ones relating to disciplinary measures.

[...]

It is necessary to ensure that the chair of the judicial council is exercised by an impartial person who is not close to party politics. Therefore, in parliamentary systems where the president / head of state has more formal powers there is no objection to attributing the chair of the judicial council to the head of state, whereas in (semi-) presidential systems, the chair of the council could be elected by the Council itself from among the non judicial members of the council. Such a solution could bring about a balance between the necessary independence of the chair and the need to avoid possible corporatist tendencies within the council.

CDL-AD(2007)028 Judicial Appointments (report), para. 33 and 35

An autonomous Council of Justice that guarantees the independence of the judiciary does not imply that judges may be self-governing. The management of the administrative organisation of the

judiciary should not necessarily be entirely in the hands of judges. In fact, as a general rule, the composition of a Council foresees the presence of members who are not part of the judiciary, who represent other State powers or the academic or professional sectors of society. This representation is justified since a Council's objectives relate not only to the interests of the members of the judiciary, but especially to general interests. The control of quality and impartiality of justice is a role that reaches beyond the interests of a particular judge. The Council's performance of this control will cause citizens' confidence in the administration of justice to be raised. Furthermore, in a system guided by democratic principles, it seems reasonable that the Council of Justice should be linked to the representation of the will of the people, as expressed by Parliament.

[...] a basic rule appears to be that a large proportion of the membership [of the Supreme Council of Justice] should be made up of members of the judiciary and that a fair balance should be struck between members of the judiciary and other ex officio or elected members. The Commission has underlined the need for such a balance already in its opinion of 4 December 1995 on Chapter VI of the Transitional Constitution of Albania (document CDL(95)74 rev.).

CDL-INF(1998)009 Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania , par. 9 et 12, cited in CDL-AD(2007)028 Judicial Appointments (report), para. 29, 30 et 31.

There is no standard model that a democratic country is bound to follow in setting up its Supreme Judicial Council so long as the function of such a Council fall within the aim to ensure the proper functioning of an independent Judiciary within a democratic State. Though models exist where the involvement of other branches of power (the legislative and the executive) is outwardly excluded or minimised, such involvement is in varying degrees recognised by most statutes and is justified by the social content of the functions of the Supreme Judicial Council and the need to have the administrative activities of the Judiciary monitored by the other branches of power of the State. It is obvious that the Judiciary has to be answerable for its actions according to law provided that proper and fair procedures are provided for and that a removal from office can take place only for reasons that are substantiated. Nevertheless, it is generally assumed that the main purpose of the very existence of a Supreme Council of the Judiciary is the protection of the independence of judges by insulating them from undue pressures from other powers of the State in matters such as the selection and appointment of judges and the exercise of disciplinary functions.

CDL-INF(1999)005 Opinion on the reform of the judiciary in Bulgaria, para. 28, repeated in CDLAD(2007)028 Judicial Appointments (report), para. 28

Corporatism can be avoided by ensuring that the members of the Judicial Service Commission, elected by their peers, should not wield decisive influence as a body. They must be usefully counterbalanced by representation of civil society (lawyers, law professors and legal, academic or scientific advisors from all branches).

CDL-AD(2002)012 Opinion on the Draft Revision of the Romanian Constitution , para. 66.

As regards this body, the Venice Commission repeats its observations on the two obstacles to be avoided: corporatism and politicisation (CDL-AD (2002) 12, paragraph 63 et seq.).

The best safeguard against corporatism is the presence of civil society representatives (whether or not legal specialists) on the Commission [...].

CDL-AD(2002)021 Supplementary Opinion on the Revision of the Constitution of Romania, para. 21-22.

The Council of Justice may be dominated by judicial professionalism, primarily in the form of judges. [...] the composition of the Council is such that the judiciary and other lawyers close to this body themselves make decisions relating to their own affairs. From a democratic viewpoint, this might be

in contradiction to the principle of an uninterrupted chain of democratic legitimacy (developed in German doctrine) which requires that every state body has to receive its powers – even if indirectly – from the sovereign people. A completely autonomous self-administration would lack such democratic legitimacy.

CDL-AD(2002)026 Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, para. 13.

The composition of the Supreme Council [of the Judiciary] [...] [has] to be representative, to portray public diversity and to include persons who possess different professional experiences.

CDL-AD(2005)003 Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, in cooperation with OSCE/ ODIHR, para. 102.

A balance needs to be struck between judicial independence and self-administration on the one side and the necessary accountability of the judiciary on the other side in order to avoid negative effects of corporatism within the judiciary. In this context, it is necessary to ensure that disciplinary procedures against judges are carried out effectively and are not marred by undue peer restraint. One way to achieve this goal is to establish a judicial council with a balanced composition of its members.

[...] a substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself. In order to provide for democratic legitimacy of the Judicial Council, other members should be elected by Parliament among persons with appropriate legal qualification taking into account possible conflicts of interest.

[...] Moreover, an overwhelming supremacy of the judicial component may raise concerns related to the risks of “corporatist management”.

[...] However, in order to insulate the judicial council from politics its members should not be active members of parliament.

CDL-AD(2007)028 Judicial Appointments (report), para. 27, 29-30 and 32.

It is vital that the members of the Council have sufficient practical experience to carry out their work. Therefore, the requirement of seven years' experience provided [...] seems adequate.

CDL-AD(2008)006 Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia. para. 51

Given their crucial role in appointing judges the composition of the Supreme Council [of the Judiciary], as well as their appointment or election, should be defined in the Constitution.

CDL-AD(2005)003 Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, in cooperation with OSCE/ ODIHR, para. 102.

An appropriate method for guaranteeing judicial independence is the establishment of a judicial council, which should be endowed with constitutional guarantees for its composition [...].

CDL-AD(2007)028 Judicial Appointments (report), para. 48

***SELF GOVERNANCE FOR THE JUDICIARY: BALANCING INDEPENDENCE AND ACCOUNTABILITY, General Assembly of the European Network of Councils for the Judiciary (ENCJ), 2008***

4) As to the composition of the Councils for the Judiciary:

- a. the Council can be composed either exclusively of members of the judiciary or members and non members of the judiciary;
- b. when the composition is mixed, the Council should be composed of a majority of members of the judiciaries, but not less than 50 %;
- c. in any case ( whether there is a mixed composition or not) the judicial members of the Council (however appointed) must act as the representatives of the entire judiciary.

***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

Chapter IV – Councils for the judiciary

27. Not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary.

***THE KYIV RECOMMENDATIONS ON JUDICIAL INDEPENDENCE IN EASTERN EUROPE, SOUTH CAUCASUS AND CENTRAL ASIA, OSCE, 2010***

Composition of Judicial Councils

7. Where a Judicial Council is established, its judge members shall be elected by their peers and represent the judiciary at large, including judges from first level courts. Judicial Councils shall not be dominated by appellate court judges. Where the chairperson of a court is appointed to the Council, he or she must resign from his or her position as court chairperson. Apart from a substantial number of judicial members elected by the judges, the Judicial Council should comprise law professors and preferably a member of the bar, to promote greater inclusiveness and transparency. Prosecutors should be excluded where prosecutors do not belong to the same judicial corps as the judges. Other representatives of the law enforcement agencies should also be barred from participation. Neither the State President nor the Minister of Justice should preside over the Council. The president of the Judicial Council should be elected by majority vote from among its members. The work of the Judicial Council shall not be dominated by representatives of the executive and legislative branch.

***STANDARDS ON NON-JUDICIAL MEMBERS IN JUDICIAL COUNCIL, ENCJ, June 2016***

1. Composition of Judicial Councils and other relevant bodies with regard to non-judicial members

1.1 The composition of Judicial Councils and other relevant bodies should include non-judicial members.

1.2 The composition of such bodies should reflect the diversity of the society, including gender diversity.

1.3 The exact number and proportions of judicial and non-judicial members depends on the type of body. In particular:

- In Judicial Councils, judges should constitute a majority, but not more than 2/3 of members. Therefore, non-judicial members should constitute at least 1/3 of members.

- In other relevant bodies, non-judicial members should participate in any selection procedure regarding the appointment and promotion of judges (and prosecutors if applicable) at all levels of seniority.

## 2. Process of selection and appointment of non-judicial members

2.1 The process of selection, election or appointment of non-judicial members should be merit based and transparent.

2.2 Civil society should be involved in one or more of the abovementioned stages (selection, election or appointment), including the possibility to propose appropriate candidates for consideration.

2.3 Where non-judicial members are appointed by parliamentary bodies, it is desirable that their selection be subject to the achievement of particular qualified majorities in order to avoid political influence.

## 3. Personal qualities, competences and political relationships of non-judicial Members

3.1 Non-judicial members should be persons of high moral standing who bring to Judicial Governance acknowledged skills and experience from outside the judiciary. Their conduct is expected to meet the high standards, like for instance standards set by the Seven Principles of Public Life [1995], guidance established by the United Kingdom's Committee on Standards in Public Life ('the Nolan Principles'). The Seven Principles are: selflessness, integrity, objectivity, accountability, openness, honesty and leadership. Non-judicial members must be appointed in accordance with the standards set out in the Dublin Declaration on Standards for the Recruitment and Appointment of Members of the Judiciary (2012). At paragraph II.5 we read: The body in charge of judicial appointments should comprise a substantial participation of legal professionals or experts (including experienced judges, academics, lawyers, prosecutors and other professionals) and could also include independent lay members representing civil society, appointed from among well-known persons of high moral standing on account of their skill and experience in matters such as human resources.

### 3.2

It follows that persons with a range of backgrounds and experience should be considered for appointment as non-judicial members. Possible categories of non-judicial members include: lawyers, academics, and other professionals like sociologists, psychologists, economists, specialists in human resources and representatives of Civil Society Organizations.

### 3.3

In order to secure the voice of civil society, non-judicial members should not be politicians or persons with political affiliations.

### 3.4

In order to respect the separation of powers, the Minister of Justice should not be a member of the Judicial Council or other relevant body.

### 3.5

Additionally, non-judicial members of Judicial Councils and other relevant bodies should not be involved in politics for a reasonable period of time before and after their mandate as member of a Judicial Council or other relevant body.

### 3.6

Certain persons should always be ineligible for appointment as non-judicial members. In particular:

- Judges, even if retired,
- Persons who have been convicted of criminal offences, who are or have been bankrupt, or who are otherwise disqualified from public office,

- Members of Parliament (including former Members), and
- Members of governments (including previous governments).

#### 4. Status of non-judicial members

4.1 Non-judicial members should have the same rights and obligations as judicial members.

4.2 Judicial and non-judicial members should be involved in the decision making process. In order to ensure effective participation of non-judicial members it is recommended that adequate quorum for the composition of the bodies and voting procedures (majorities for adoption of decisions) be adopted to give effect to this aspiration.

4.3 Non-judicial members must have the same voting rights and should be involved in the work of all relevant bodies, including presiding committees, working groups and subcommittees created by Judicial Councils. For that reason, they should have the same access as judicial members to support staff and technical assistance, to documents and resources.

4.4 Non-judicial members should receive the same remuneration/per diem as judicial members for their activities on Judicial Councils and other relevant bodies.

#### 5. Conduct

5.1 Non-judicial members during their service on Judicial Councils and other relevant bodies should be bound by any rules of conduct applicable to judicial members of such bodies.

5.2 In drafting rules of conduct for Judicial Councils and other relevant bodies, account should be taken of the presence on such bodies of non-judicial members.

5.3 In particular the rules of conduct developed should deal with the following matters (depending on the competences of the particular body): confidentiality in respect of all matters; honesty; objectivity and impartiality; obligation to attend meetings; obligation to fulfil tasks; and obligation to recuse oneself in the case of conflict of interest.

5.4 In default of such rules of conduct, the conduct of non-judicial members may be guided by reference to the “Seven Principles of Public Life” or other similar rules.

### ***THE WARSAW DECLARATION ON THE FUTURE OF JUSTICE IN EUROPE, The General assembly of European Network of Councils for the Judiciary (ENCJ), 2016***

2. Concerning the composition of the Councils with respect to non-judicial members:

- the composition of Councils for the Judiciary and equivalent bodies should include non-judicial members, reflecting the diversity of society;
- non-judicial members should meet the same standards of integrity, independence and impartiality as judges, but non-judicial members should not be politicians or include the Minister of Justice;
- non-judicial members should have the same status and voting rights as judicial members.

### ***BEST PRACTICE GUIDE FOR MANAGING SUPREME COURTS, European Union, 2017***

## VI. The Role of Councils for the Judiciary

Recommendation and best practices

- Mixed composition of the Council might present several important advantages. It could include judges representing all the courts and non-judge members elected or appointed on their outstanding merit.
- Judge members could represent a majority of Council's members, but they might not necessarily have a qualified majority.
- Non-judge members in the Council may increase democratic legitimacy and transparency of the judiciary.
- The Supreme Court could have their representatives in the Council elected among Supreme Court judges themselves.

## VI. The Role of Councils for the Judiciary

### 6. Functioning of Councils for the Judiciary

#### C. Quorum and voting

##### Recommendation and best practices

- Significant decisions of the Council could be adopted by the qualified majority, making it necessary that members attend Council's sessions and that sufficient consensus is achieved between judge and non-judge members.

## VI. The Role of Councils for the Judiciary

### 6. Functioning of Councils for the Judiciary

#### D. Financing of the Councils for the Judiciary

- The Council should have the appropriate means to operate as well as the power and capacity to negotiate and organize its budget effectively.



#### **IV. 3. CHAIR OF THE COUNCIL**

##### ***OPINION NO. 10 (2007) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE COUNCIL FOR THE JUDICIARY AT THE SERVICE OF SOCIETY, CCJE, 2007***

#### III. C. 3. Selection of the Chair

33. It is necessary to ensure that the Chair of the Council for the Judiciary is held by 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 judge.

#### **IV. 4. FUNCTIONING**

##### ***PALERMO DECLARATION, ELEMENTS OF A EUROPEAN STATUTE OF MAGISTRACY, MEDEL, 1993***

#### **III. THE SUPREME COUNCIL OF MAGISTRATES**

3.4. The plenary meetings of the Supreme Council of Magistrates are public, except when in camera as provided for in article 8 par. 2. The minutes, decisions, reports, opinions and recommendations, as well as the budget and accounts, are the object of appropriate publicity. The decisions concerning the recruitment, assignment and discipline of magistrates are motivated and subject to control of their legality by a supreme court.

Each year, the Supreme Council of Magistrates provides Parliament with a report on its activities and on the state of justice.

##### ***OPINION NO. 10 (2007) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE COUNCIL FOR THE JUDICIARY AT THE SERVICE OF SOCIETY, CCJE, 2007***

#### **IV. A. Budget and staff**

37. The CCJE stresses the importance of ensuring that the Council for the Judiciary is financed in such a way that it is enabled to function properly. It should have appropriate means to operate independently and autonomously as well as power and capacity to negotiate and organise its own budget effectively.

38. The Council for the Judiciary should have its own premises, a secretariat, computing resources and freedom to organise itself, without being answerable for its activities to any political or other authority. It should be free to organise its sittings and set the agenda for its meetings, as well as have the right to communicate directly with the courts in order to carry out its functions. The Council for the Judiciary should have its own staff according to its needs, and each member should have staff in accordance with the tasks assigned to him or her.

#### **IV. B. Decisions of the Council for the Judiciary**

39. Some decisions of the Council for the Judiciary in relation to the management and administration of the justice system, as well as the decisions in relation to the appointment, mobility, promotion, discipline and dismissal of judges (if it has any of these powers) should contain an explanation of their grounds, have binding force, subject to the possibility of a judicial review. Indeed, the independence of the Council for the Judiciary does not mean that it is outside the law and exempt from judicial supervision.

#### **IV. C. Technical expertise**

40. The Council for the Judiciary may request the expertise of other professionals on specific issues. Of course, these experts are not members of the Council and cannot take part in the decision process.

#### **SUMMARY OF THE RECOMMENDATIONS AND CONCLUSIONS**

##### **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.

***SELF GOVERNANCE FOR THE JUDICIARY: BALANCING INDEPENDENCE AND ACCOUNTABILITY, General Assembly of the European Network of Councils for the Judiciary (ENCJ), 2008***

Approves the Following Resolution>

- 5) The Council for the Judiciary must manage its budget independently of the executive power.
- 6) Judicial self governance calls for the professionalization of judicial administration.
- 7) Self governance of the judiciary should be realistic, modern and participatory.
- 8) A necessary consequence of its independence is that the Council for the Judiciary or other autonomous body should be accountable for its activities by submitting periodic and public reports.
- 9) The Council for the Judiciary should promote the efficiency and quality of justice.
- 10) The accountability of the judiciary can in no way call into question the independence of the judge when making judicial decisions.

***RESOLUTION ON TRANSPARENCY AND ACCESS TO JUSTICE, European Network of Councils for the Judiciary (ENCJ), 2009***

- 3. Councils for the Judiciary or similar independent bodies should in discharging their responsibilities:
  - (i) Ensure transparency in the way in which the Council discharges all its functions.
  - (ii) Provide sufficient information to the public and the media, to ensure the accurate perception of the administration of justice by the public.
  - (iii) Report regularly on how it has discharged its functions.

***THE KYIV RECOMMENDATIONS ON JUDICIAL INDEPENDENCE IN EASTERN EUROPE, SOUTH CAUCASUS AND CENTRAL ASIA, OSCE, 2010***

Transparency of Judicial Administration

- 10. The Judicial Council shall meet regularly so that it can fulfil its tasks. Public access to the deliberations of the Judicial Council and publication of its decisions shall be guaranteed in law and in practice.

***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

## Chapter IV – Councils for the judiciary

28. Councils for the judiciary should demonstrate the highest degree of transparency towards judges and society by developing pre-established procedures and reasoned decisions.

29. In exercising their functions, councils for the judiciary should not interfere with the independence of individual judges.

### ***SOFIA DECLARATION ON JUDICIAL INDEPENDENCE AND ACCOUNTABILITY, The General assembly of European Network of Councils for the Judiciary (ENCJ), 2013***

(vii) The prudent convention that judges should remain silent on matters of political controversy should not apply when the integrity and independence of the judiciary is threatened. There is now a collective duty on the European judiciary to state clearly and cogently its opposition to proposals from government which tend to undermine the independence of individual judges or Councils for the Judiciary.

### ***THE WARSAW DECLARATION ON THE FUTURE OF JUSTICE IN EUROPE, The General assembly of European Network of Councils for the Judiciary (ENCJ), 2016***

1. A Council for the Judiciary or equivalent governance body should participate in the process of evaluating the quality of justice by:

- defining a quality framework which sets out indicators including criteria for the assessment and evaluation of the quality of justice;
- defining methods by which the quality of the judicial decision-making process can be evaluated, maintained and improved;
- identifying and implementing good practices which increase the confidence of citizens in the judicial system; and
- ensuring that these systems do not interfere with the independence of the judiciary, individually or collectively, or the judicial system.

3. With regard to the budget for the justice system:

- the Council for the Judiciary or equivalent body should be closely involved at all stages in the budgetary process, and courts must be resourced to a level which provides an effective and efficient justice system.

### ***BEST PRACTICE GUIDE FOR MANAGING SUPREME COURTS, European Union, 2017***

## VI. The Role of Councils for the Judiciary

### 3. COMPETENCES OF COUNCILS FOR THE JUDICIARY

#### H. Competences regarding the financing of the Courts

One of the major issues of independence of the judiciary is its financing. Close involvement of a Council or equivalent body at all stages of the budgetary procedure is necessary to ensure due respect for the opinion of judiciary regarding the financial resources required for effective and efficient justice system.

### 4. COUNCIL FOR THE JUDICIARY AND ADMINISTRATION OF THE SUPREME COURT

B. Involvement of Supreme Courts in administering the work of the Councils for the Judiciary There is a delicate balance between the Council and the Supreme Court. The Council may be considered as part of the state judicial branch of government, but could at the same time be independent from it, including independence from substantive decision-making of the Supreme Court.

5. COUNCIL FOR THE JUDICIARY AS PROVIDER OF THE INFORMATION TO THE SOCIETY In order to safeguard the independence and transparency of the functioning of the courts, the Council itself might need to have an open and transparent relation with the general public.

## 6. FUNCTIONING OF COUNCILS FOR THE JUDICIARY

### B. Professional role

In order that the Council's members have sufficient time for the quality performance of their work, they could have a full-time position in the Council or part-time position with the preservation of court practice or other non-judicial function (of non-judges) at the same time.

### C. Quorum and voting

Recommendations and best practices

Significant decisions of the Council could be adopted by the qualified majority, making it necessary that members attend Council's sessions and that sufficient consensus is achieved between judge and non-judge members.

## **IV. 5. POWERS**

### ***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE (“Singhvi Declaration”), ECOSOC, 1985***

#### Posting, Promotion and Transfer

13. Where the law provides for the discretionary assignment of a judge to a post on his appointment or election to judicial office such assignment shall be carried out by the judiciary or by a superior council of the judiciary where such bodies exist.

#### Tenure

17. There may be probationary periods for judges following their initial appointment but in such cases the probationary tenure and the conferment of permanent tenure shall be substantially under the control of the judiciary or a superior council of the judiciary.

### ***PALERMO DECLARATION, ELEMENTS OF A EUROPEAN STATUTE OF MAGISTRACY, MEDEL, 1993***

#### III. THE SUPREME COUNCIL OF MAGISTRATES

3.1. It provides for recruitment, decides the assignment of magistrates and organizes professional training. On its own initiative, or at the request of other powers, the Supreme Council of Magistrates addresses opinions and recommendations concerning judicial policy to the Parliament or to the Government.

#### IV. THE JUDICIARY FUNCTIONS

4.3. The Supreme Council of Magistrates provides for the administration and supervision of jurisdictions. It settles disputes which arise from the organization of the service. Any interested person or institution may submit a dispute of this kind to it.

### ***EUROPEAN CHARTER ON THE STATUTE FOR JUDGES AND EXPLANATORY MEMORANDUM, Council of Europe, Strasbourg, 8 - 10 July 1998***

#### 1. GENERAL PRINCIPLES

1.3. In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.

1.4. The statute gives to every judge who considers that his or her rights under the statute, or more generally his or her independence, or that of the legal process, are threatened or ignored in any way whatsoever, the possibility of making a reference to such an independent authority, with effective means available to it of remedying or proposing a remedy.

#### 2. SELECTION, RECRUITMENT, INITIAL TRAINING

2.3. The statute ensures by means of appropriate training at the expense of the State, the preparation of the chosen candidates for the effective exercise of judicial duties. The authority referred to at paragraph 1.3 hereof, ensures the appropriateness of training programmes and of the organization which implements them, in the light of the requirements of open-mindedness, competence and impartiality which are bound up with the exercise of judicial duties.

#### 3. APPOINTMENT AND IRREMOVABILITY

3.1. The decision to appoint a selected candidate as a judge, and to assign him or her to a tribunal, are taken by the independent authority referred to at paragraph 1.3 hereof or on its proposal, or its recommendation or with its agreement or following its opinion.

3.3. Where the recruitment procedure provides for a trial period, necessarily short, after nomination to the position of judge but before confirmation on a permanent basis, or where recruitment is made for a limited period capable of renewal, the decision not to make a permanent appointment or not to renew, may only be taken by the independent authority referred to at paragraph 1.3 hereof, or on its proposal, or its recommendation or with its agreement or following its opinion. The provisions at point 1.4 hereof are also applicable to an individual subject to a trial period.

3.4. A judge holding office at a court may not in principle be appointed to another judicial office or assigned elsewhere, even by way of promotion, without having freely consented thereto. An exception to this principle is permitted only in the case where transfer is provided for and has been pronounced by way of a disciplinary sanction, in the case of a lawful alteration of the court system, and in the case of a temporary assignment to reinforce a neighbouring court, the maximum duration of such assignment being strictly limited by the statute, without prejudice to the application of the provisions at paragraph 1.4 hereof.

#### 4. CAREER DEVELOPMENT

4.1. When it is not based on seniority, a system of promotion is based exclusively on the qualities and merits observed in the performance of duties entrusted to the judge, by means of objective appraisals performed by one or several judges and discussed with the judge concerned. Decisions as to promotion are then pronounced by the authority referred to at paragraph 1.3 hereof or on its proposal, or with its agreement. Judges who are not proposed with a view to promotion must be entitled to lodge a complaint before this authority.

#### 5. LIABILITY

5.2. Compensation for harm wrongfully suffered as a result of the decision or the behaviour of a judge in the exercise of his or her duties is guaranteed by the State. The statute may provide that the State has the possibility of applying, within a fixed limit, for reimbursement from the judge by way of legal proceedings in the case of a gross and inexcusable breach of the rules governing the performance of judicial duties. The submission of the claim to the competent court must form the subject of prior agreement with the authority referred to at paragraph 1.3 hereof.

#### 7. TERMINATION OF OFFICE

7.2. The occurrence of one of the causes envisaged at paragraph 7.1 hereof, other than reaching the age limit or the expiry of a fixed term of office, must be verified by the authority referred to at paragraph 1.3 hereof.

**OPINION NO. 1 (2001) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF COUNCIL OF EUROPE ON STANDARDS CONCERNING THE INDEPENDENCE OF THE JUDICIARY AND THE IRREMOVABILITY OF JUDGES, Council of Europe, 2001**

Independence within the judiciary

68. The hierarchical power conferred in many legal systems on superior courts might in practice undermine individual judicial independence. One solution would be to transfer of all relevant powers to a Higher Judicial Council, which would then protect independence inside and outside of the judiciary. This brings one back to the recommendation of the European Charter on the statute for judges, to which attention has already been invited under the heading of The appointing and consultative bodies.

Conclusions

73. The CCJE Considered that the critical matter for member States is to put into full effect principles already developed (paragraph 6) and, after examining the standards contained in particular Recommendation No. R (94) 12 on the independence, efficiency and role of judges, it concluded as follows:

(4) The CCJE considered that the European Charter on the statute for judges – in so far as it advocated the intervention of an independent authority with substantial judicial representation chosen democratically by other judges – pointed in a general direction which the CCJE wished to commend (paragraph 45).

**OPINION NO. 3 OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE PRINCIPLES AND RULES GOVERNING JUDGES' PROFESSIONAL CONDUCT, IN PARTICULAR ETHICS, INCOMPATIBLE BEHAVIOUR AND IMPARTIALITY, Council of Europe , 2002**

B. CRIMINAL, CIVIL AND DISCIPLINARY LIABILITY OF JUDGES

b. Civil liability

57. The European Charter on the statute for judges contemplates the possibility of recourse proceedings of this nature in paragraph 5.2 of its text - with the safeguard that prior agreement should be obtained from an independent authority with substantial judicial representation, such as that commended in paragraph 43 of the CCJE's Opinion No. 1 (2001). The commentary to the Charter emphasises in its paragraph 5.2 the need to restrict judges' civil liability to (a) reimbursing the state for (b) "gross and inexcusable negligence" by way of (c) legal proceedings (d) requiring the prior agreement of such an independent authority. The CCJE endorses all these points, and goes further. The application of concepts such as gross or inexcusable negligence is often difficult. If there was any potential for a recourse action by the state, the judge would be bound to have to become closely concerned at the stage when a claim was made against the state. The CCJE's conclusion is that 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.

**OPINION NO. 10 (2007) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE COUNCIL FOR THE JUDICIARY AT THE SERVICE OF SOCIETY, CCJE, 2007**

V. EXTENSIVE POWERS IN ORDER TO GUARANTEE THE INDEPENDENCE AND THE EFFICIENCY OF JUSTICE



41. Overall the Council for the Judiciary should have a wide role in respect of competences which are interrelated, in order that it can better protect and promote judicial independence and the efficiency of justice.

42. The CCJE recommends that the Council for the Judiciary ensures that the following tasks, to be performed preferably by the Council itself, or in cooperation with other bodies, are fulfilled in an independent manner:

- the selection and appointment of judges (see point V.A);
- the promotion of judges (see point V.A);
- the evaluation of judges (see point V.B);
- disciplinary and ethical matters (see point V.C);
- the training of judges (see point V.D);
- the control and management of a separate budget (see point V.E);
- the administration and management of courts (see point V.F);
- the protection of the image of judges (see point V.G);
- the provision of opinions to other powers of the State (see point V.H);
- the co-operation with other relevant bodies on national, European and international level (see point V.I).
- the responsibility towards the public: transparency, accountability, reporting (see point VI).

43. One must be aware of and take into account the fact that there might be conflicts between different functions of the Council for the Judiciary, such as between appointing and training of judges, or between training and disciplinary matters, as well as between training and evaluation of judges. One way of avoiding such conflict is to separate the different tasks between various branches of the Council for the Judiciary.

44. The CCJE emphasises that the various tasks of the Council for the Judiciary are closely linked to the constitutional role of the Council for the Judiciary and that therefore the tasks should be set out in the Constitution, basic law or constitutional instrument. In order to ensure the best discharge of the Council's responsibilities, the problems with possible external and internal pressure (e.g. pressure of the legislature/executive) should be prevented by defining the type of tasks and the way they should be carried out.

45. Also there should be a close connection between the composition and the competences of the Council for the Judiciary. Namely, the composition should result from the tasks of the Council for the Judiciary. Certain functions of the Council for the Judiciary may require for example members of the legal professions, professors of law or even representatives of civil society.

46. Among Councils for the Judiciary, a distinction can also be made between Councils performing traditional functions (e.g. in the so-called "Southern European model" with competences for appointment of judges and evaluation of the judiciary) and Councils performing new functions (e.g. in the so-called "Northern European model" with competences for management and budget matters). The CCJE encourages attributing both traditional and new functions to the Council.

47. Furthermore, the competences of the Council for the Judiciary may be related to the functions of other similar bodies, such as a Council for prosecutors or in some countries a separate Council for administrative judges. It is also one of the responsibilities of the Council for the Judiciary to develop relations with these different bodies as well as to expand European and international contacts/co-operation.

V. A. Selection, appointment and promotion of judges

48. It is essential for the maintenance of the independence of the judiciary that the appointment and promotion of judges are independent and are not made by the legislature or the executive but are preferably made by the Council for the Judiciary.

49. While it is widely accepted that appointment or promotion can be made by an official act of the Head of State, yet given the importance of judges in society and in order to emphasise the fundamental nature of their function, Heads of States must be bound by the proposal from the Council for the Judiciary. This body cannot just be consulted for an opinion on an appointment proposal prepared in advance by the executive, since the very fact that the proposal stems from a political authority may have a negative impact on the judge's image of independence, irrespective of the personal qualities of the candidate proposed.

50. Although this appointment and promotion system is essential, it is not sufficient. There must be total transparency in the conditions for the selection of candidates, so that judges and society itself are able to ascertain that an appointment is made exclusively on a candidate's merit and based on his/her qualifications, abilities, integrity, sense of independence, impartiality and efficiency. Therefore, it is essential that, in conformity with the practice in certain States, the appointment and selection criteria be made accessible to the general public by every Council for the Judiciary. The Council for the Judiciary shall also ensure, in fulfilling its role in relation to the court administration and training in particular, that procedures for judicial appointment and promotion based on merit are opened to a pool of candidates as diverse and reflective of society as a whole as possible.

51. In addition, where more senior posts are concerned, particularly that of a head of jurisdiction, general profiles containing the specificities of the posts concerned and the qualities required from candidates should be officially disseminated by the Council for the Judiciary in order to provide transparency and accountability over the choice made by the appointing authority. This choice should be based exclusively on a candidate's merits rather than on more subjective reasons, such as personal, political or an association/trade union interests.

#### V. B. Professional evaluation of judges

52. The issues relating to the professional assessment of judges are twofold: firstly, the assessment of the quality of the judicial system and, secondly, the professional ability of judges.

53. The question of the quality assessment of the judicial system was touched upon by the CCJE in Opinion No. 6. As far as the present Opinion is concerned, it is very important that, in each member State, the Council for the Judiciary holds a vital role in the determination of the criteria and standards of quality of the judicial service on the one hand, and in the implementation and monitoring of the qualitative data provided by the different jurisdictions on the other.

54. Quality of justice can of course be measured by objective data, such as the conditions of access to justice and the way in which the public is received within the courts, the ease with which available procedures are implemented and the timeframes in which cases are determined and decisions are enforced. However, it also implies a more subjective appreciation of the value of the decisions given and the way these decisions are perceived by the general public. It should take into account information of a more political nature, such as the portion of the State budget allocated to justice and the way in which the independence of the judiciary is perceived by other branches of the government. All these considerations justify the active participation of Councils for the Judiciary in the assessment of the quality of justice and in the implementation of techniques ensuring the efficiency of judges' work..

55. Where applicable, the question of the professional assessment of judges depends on whether a judge is recruited at the beginning of his/her career from among other candidates who have no previous professional experience or after many years of practice of a legal profession from among the most experienced and deserving practitioners. In the former case the candidate's professional qualities need to be assessed in order to determine his/her previously undisclosed abilities, while

there is also utility in such an assessment in the latter case, having regard to the nature of the judicial role and the constant evolution of legal practice and the competencies it involves.

56. It is important to note that the assessment should not only consist of an examination of the legal expertise and the general professional abilities of judges, but also of more personal information, such as their personal qualities and their communication skills. If the practice of judicial functions presupposes great technical and personal qualities, it would be desirable to come to some common agreement at the European level concerning their identification. In this respect, the Council for the Judiciary should play a fundamental role in the identification of the general assessment criteria. However, the Council for the Judiciary should not substitute itself for the relevant judicial body entrusted with the individual assessment of judges.

## V. C. Ethics and discipline of judges

### V. C. 1. Ethics

57. The CCJE, when dealing with the questions of ethics and discipline in its Opinion No. 3 (2002), has pinpointed the need to clearly distinguish between these two matters.

58. The distinction between discipline and professional ethics brings about the need to provide judges with a collection of principles of professional ethics, which should be conceived as a working tool in judicial training and the everyday practice. The dissemination of case law on matters of discipline by the disciplinary authority marks a great improvement in the information available to judges; it allows them to engage in discussions on their practices, creating a “think tank” for these discussions. However, this is not sufficient in itself: the disciplinary decisions do not cover the entire scope of the rules of professional ethics, nor constitute the guide to good practices needed by judges.

59. The collection of principles of professional ethics should contain a synthesis of these good practices, with examples and comments; this should not amount to a code, the rigidity and falsely exhaustive nature of which being criticised. This guide of good practices should be the work of the judges themselves as it would be inappropriate for third parties, and in particular for other branches of government, to impose any principle on them.

60. Given the distinction between professional ethics and discipline drawn up by the CCJE, the drafting of this collection of principles should be done by a body other than the one responsible for judges’ discipline. There are several solutions for determining the competent body which should be responsible for judicial ethics:

(i) to entrust this activity to the Council for the Judiciary, if this Council does not have a disciplinary function or has a special body for disciplinary matters with a separate composition within the Council for the Judiciary (see paragraph 64 below);

(ii) or to create, alongside the Council for the Judiciary, an ethics committee whose only function would be the drafting and monitoring of rules of professional ethics. Problems with the latter choice may arise from the criteria of selection of the committee members and the risk of conflict or disagreement between this committee and the Council for the Judiciary.

The body entrusted with ethics could also, as the CCJE suggested in Opinion No. 3, advise judges on matters of professional ethics with which they are likely to be faced throughout their career.

61. In addition, the CCJE considers that associating persons external to the judiciary (lawyers, academics, representatives of the society, other governmental authorities) in the process of development of ethical principles is justified in order to prevent possible perception of self-interest and self protection, while making sure that judges are not deprived of the power to determine their own professional ethics.

## V. C. 2. Discipline

62. The question of a judge's responsibility was examined by the CCJE in Opinion No. 3 (2002). The recent experiences of some States show the need to protect judges from the temptation to broaden the scope of their responsibility in purely jurisdictional matters. The role of the Council for the Judiciary is to show that a judge cannot bear the same responsibilities as a member of another profession: he/she performs a public function and cannot refuse to adjudicate on disputes. Furthermore, if the judge is exposed to legal and disciplinary sanctions against his/her decisions, neither judicial independence nor the democratic balance of powers can be maintained. The Council for the Judiciary should, therefore, unequivocally condemn political projects designed to limit the judges' freedom of decision-making. This does not diminish judges' duty to respect the law.

63. A judge who neglects his/her cases through indolence or who is blatantly incompetent when dealing with them should face disciplinary sanctions. Even in such cases, as indicated by CCJE Opinion No. 3 (2002), it is important that judges enjoy the protection of a disciplinary proceeding guaranteeing the respect of the principle of independence of the judiciary and carried out before a body free from any political influence, on the basis of clearly defined disciplinary faults: a Head of State, Minister of Justice or any other representative of political authorities cannot take part in the disciplinary body.

64. The Council for the Judiciary is entrusted with ethical issues; it may furthermore address court users' complaints. In order to avoid conflicts of interest, disciplinary procedures in first instance, when not addressed within the jurisdiction of a disciplinary court, should preferably be dealt with by a disciplinary commission composed of a substantial representation of judges elected by their peers, different from the members of the Council for the Judiciary, with provision of an appeal before a superior court.

## V. D. Training of judges

65. The responsibility for organising and supervising judicial training should in each country be entrusted not to the ministry of justice or any other authority answerable to the legislature or the executive, but to the judiciary itself or preferably to the Council for the Judiciary; judges' associations can also play a valuable role in that respect. Furthermore, the conception of training programmes and their implementation should be entrusted, under the authority of the judiciary or preferably the Council for the Judiciary, to a special autonomous body (e.g. a training academy) with its own budget and which should work in consultation with judges. A clear division of functions should be encouraged between the Council for the Judiciary and the training academy, when it exists.

66. The CCJE is of the opinion that, if the Council for the Judiciary has competence in training and appointment or promotion, a clear separation should be provided between its branches responsible for these tasks and ties should be avoided either with the ministry of justice (appointment of the trainers, budget allocation etc.), or with the ministry of education (accreditation, recognition of diplomas etc.).

67. The Council for the Judiciary should cooperate with the training body, during the initial and in-service training, to ensure an efficient and high quality training, and to guarantee that judges are selected based on objective and measurable criteria, a merit based system and proper training.

### V. D. 1. Initial training

68. In order for candidates for appointment as judges to receive quality training, the CCJE recommends that the Council for the Judiciary should participate directly or in other ways cooperate with training institutions in the creation and the development of the programme for initial training, through which candidates will develop and deepen not only their legal knowledge of the national and international substantive and procedural law and practice, but also develop complementary skills,

e.g. knowledge of foreign languages, ethics, alternative dispute resolution, so that society may be served by judges capable of applying the law correctly, and of critical and independent thinking, social sensitivity and open-mindedness.

69. In addition, the Council for the Judiciary should provide external evaluation of the initial training, in the sense that by following the professional development and success in everyday work of judges in the early years after appointment, it will evaluate the effectiveness of initial training and will be able to make suggestions for its improvement.

#### V. D. 2. Continuous training

70. The Council for the Judiciary should promote participation of judges in all training activities, as a significant part of their professional activity. The legal and ethical duty and right of judges is to work on their own professional development through participation in the continuous training which should be understood as a life long learning process. Judges, during the performance of their duties, should, in particular, follow changes in national and international legislation and practice, be in touch with social trends and become acquainted with alternative dispute resolution methods. The CCJE recommends that the Council for the Judiciary should take into account judges' participation in training programmes when considering their promotion.

71. The reports and statistics for the evaluation of the work of the judges and the courts, annually prepared by the Council for the Judiciary, should contain data about the critical issues on which training should be focused, such as case management, time management, budgeting, improvement of working techniques, public relations skills, communication techniques, legal research etc.

72. More generally, the Council for the Judiciary should be widely consulted in the process of selection of the topics which will be included in the yearly training programmes; the Council for the Judiciary should also monitor the way the programme is carried out and evaluate its effects on the quality of the performance of the judiciary.

#### V. E. Budget of the Judiciary

73. Although the funding of courts is part of the State budget, such funding should not be subject to political fluctuations. Decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence. The arrangements for parliamentary adoption of the judicial budget should include a procedure that takes into account the opinions of the judiciary. If the Council for the Judiciary does not have a role of administration and management of the courts, it should at least be in a position to issue opinions regarding the allocation of the minimal budget which is necessary for the operation of justice, and to clarify its needs in order to justify its amount.

74. The CCJE is of the opinion that the courts can only be properly independent if they are provided with a separate budget and administered by a body independent of the executive and legislature, whether it is a Council for the Judiciary or an independent agency.

75. Although it is advocated by some States that the ministry of justice is better placed to negotiate the court budget vis-à-vis other powers, especially the ministry of finances, the CCJE is of the opinion that a system in which the Council for the Judiciary has extended financial competences requires serious consideration in those countries where such is not the case at present. It must be stressed that extended financial powers for the Council for the Judiciary imply its accountability not only vis-à-vis the executive and the legislature, but also vis-à-vis the courts and the public.

#### V. F. Court administration and management

76. The determination of the conditions for the allocation of the budget to the various courts and the decision as to the body which should examine and report on the efficiency of the courts are sensitive issues. The CCJE considers that the Council for the Judiciary should have competence in this respect.

77. The Council for the Judiciary should not have competence in respect of performance management of individual judges.

78. The CCJE is of the opinion that the Council for the Judiciary can make a positive contribution to the promotion of quality of justice. Apart from developing policy in this respect, sufficient funding of the courts shall be provided to enable them to fulfil their obligations in this respect. In some countries systems have been set up to account for and measure the quality of justice; it is important to inquire into the results of such developments. As to developing policy measuring quality, it is important that the Council for the Judiciary can obtain from the courts relevant data and statistics.

79. The Council for the Judiciary should supervise the organisation of the inspection service so that inspection is compatible with judicial independence. This is particularly important where inspection services belong to the executive.

#### V. G. Protection of the image of justice

80. In its Opinion No. 7 (2005), the CCJE recommended the setting up of programmes, to be generally supported by the European judiciaries and states, aimed at going beyond the scope of giving general information to the public in the area of justice, and at helping to provide the correct perception of the judge's role in society. The CCJE considered that courts themselves should be recognised as a proper agency to organise programmes having the goal of improving the understanding and confidence of society with regard to its system of justice. In parallel, a role of co-ordinating the various local initiatives as well as promoting nation-wide "outreach programmes" should be given to the Council for the Judiciary which, with the assistance of professionals, may also provide more sophisticated information.

81. Again in its Opinion No. 7 (2005), the CCJE pointed out the role of an independent body – which could well be identified in the Council for the Judiciary or in one of its committees, if necessary with the participation of media professionals – in dealing with problems caused by media accounts of court cases, or difficulties encountered by journalists in carrying out their work.

82. Finally, in its above mentioned Opinion, the CCJE – dealing with the issue of judges or courts challenged or attacked by the media or by political or social figures through the media – considered that, while the judge or court involved should refrain from reacting through the same channels, the Council for the Judiciary or a judicial body should be able and ready to respond promptly and efficiently to such challenges or attacks in appropriate cases.

83. The Council for the Judiciary should have the power not only to disclose its views publicly but should also take all necessary steps before the public, the political authorities and, where appropriate, the courts to defend the reputation of the judicial institution and/or its members.

84. The Council for the Judiciary may also be the appropriate body to play a broader role in the field of the promotion and protection of the image of justice, as the performance of such a function often requires striking a balance between conflicting freedom of individuals, social and political actors, and the media, on the one hand, and the public interest in an independent and efficiently functioning justice system, on the other hand.

85. In this framework, the Council for the Judiciary could also address court users' complaints (See also paragraph 64 above).

86. The CCJE recommends that the Council for the Judiciary can perform such a function by availing itself of the help of the necessary professional assistance, as its staff in this area should not be restricted to lawyers but should also include journalists, social scientists, statisticians, etc.

#### V. H. Possibility to provide opinions to other powers of state

87. All draft texts relating to the status of judges, the administration of justice, procedural law and more generally, all draft legislation likely to have an impact on the judiciary, e.g. the independence of the judiciary, or which might diminish citizens' (including judges' own) guarantee of access to justice, should require the opinion of the Council for the Judiciary before deliberation by Parliament. This consultative function should be recognised by all States and affirmed by the Council of Europe as a recommendation.

#### V. I. Co-operation activities with other bodies on national, European and international level

88. The CCJE notes that in some States the responsibilities of the Council for the Judiciary are subdivided between several agencies. The resulting variety of national arrangements is further complicated by the fact that in some areas (e.g., training) a single institution may be competent, when in other areas competences are divided. It is not for the CCJE, at this stage, to take a stand with respect to an optimal scheme for the relations between separate agencies. Aware of the importance of national legal traditions as to the way in which such bodies have developed, the CCJE considers nonetheless the need to recommend that co-operation frameworks, under the leadership of the Council for the Judiciary, be set up, so that, when several agencies share the Council's tasks, smooth achievement of these tasks may be ensured. Such a process is also likely to favour institutional evolution in the sense of progressive unification of agencies (e.g. in the area of training). This also concerns co-operation with the Councils for the administrative judiciary. Cooperation with the Councils for the prosecutors, if such separate bodies exist, may also be appropriate.

89. The CCJE also stresses the importance of co-operation at the European and international levels between Councils for the Judiciary with respect to all areas in which Councils are active at the national level.

90. The CCJE acknowledges that the work of the European Network of the Councils for the Judiciary (which plays a general co-operative role between the councils for the judiciary) and the activities of the Lisbon Network and of the European Judicial Training Network (which are competent in the area of judicial training) deserve recognition and support. These Networks have been fruitful interlocutors for the CCJE.

#### VI. THE COUNCIL FOR THE JUDICIARY IN SERVICE OF ACCOUNTABILITY AND TRANSPARENCY OF THE JUDICIARY

91. Given the prospect of considerable involvement of the Council for the Judiciary in the administration of the judiciary, transparency in the actions undertaken by this Council 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.

92. All decisions by the Council for the Judiciary on appointment, promotion, evaluation, discipline and any other decisions regarding judges' careers must be reasoned (see also paragraph 39 above).

93. As it has already been mentioned, transparency, in the appointment and promotion of judges, will be ensured by publicising the appointment criteria and disseminating the post descriptions. Any interested party should be able to look into the choices made and check that the Council for the Judiciary applied the rules and criteria based on merits in relation to appointments and promotions.

94. When the Council for the Judiciary has budgetary powers, it is only logical that it should be accountable for the use of the funds in question to the Parliamentary assembly which adopted the budget. The portion of the budget allocated to the judicial system should be controlled by the Audit Office in charge of supervising the use of public money, when it exists.

95. When the Council for the Judiciary has disciplinary powers, judges who are the subject of disciplinary proceedings shall be fully informed of the grounds of the decision so that they can evaluate if they should contemplate appealing against the decision (see paragraph 39 above). In addition, the Council for the Judiciary could consider the publication of decisions taken which are both formal and final, in order to inform, not only the whole of the judiciary, but also the general public of the way in which the proceedings have been conducted and to show that the judiciary does not seek to cover up reprehensible actions of its members.

96. The Council for the Judiciary should periodically publish a report of its activities, the aim of which being, on the one hand, to describe what the Council for the Judiciary has done and the difficulties encountered and, on the other, to suggest measures to be taken in order to improve the functioning of the justice system in the interest of the general public. The publication of this report may be accompanied by press conferences with journalists, meetings with judges and spokespersons of judicial institutions, to improve on the dissemination of information and on the interactions within the judicial institutions.

## SUMMARY OF THE RECOMMENDATIONS AND CONCLUSIONS

### 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 arises 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 center, 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.

**OPINION No.11 (2008) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)  
TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON**



***THE QUALITY OF JUDICIAL DECISIONS, Consultative Council of European Judges (CCJE), 2008***

B. The evaluation methods (including bodies entrusted with the evaluation of the quality of judicial decisions)

3. The role of the Council for the judiciary

75. National or international bodies in charge of the evaluation of judicial decisions should be composed of members who are fully independent of the executive power. In order to avoid any pressure, in the states where a Council for the Judiciary exists, this Council should be entrusted with the evaluation of the quality of decisions. Within the Council, data processing and quality evaluation should be undertaken by departments other than those responsible for judicial discipline. For the same reason, where there is no Council for the Judiciary, the evaluation of the quality of decisions should be undertaken by a specific body having the same guarantees for the independence of judges as those possessed by a Council for the Judiciary.

***SELF GOVERNANCE FOR THE JUDICIARY: BALANCING INDEPENDENCE AND ACCOUNTABILITY, General Assembly of the European Network of Councils for the Judiciary (ENCJ), 2008***

1) self governance of the judiciary guarantees and contributes to strengthening the independence of the judiciary and the efficient administration of justice ;

2) all or part of the following tasks should fall under the authority of a Council for the Judiciary or of one or more independent and autonomous bodies:

- the appointment and the promotion of judges
- the training
- the discipline and judicial ethics
- the administration of the courts
- the finances of the judiciary
- the performance management of the judiciary
- the processing on of complaints from litigants
- the protection of the image of justice
- the formulation of opinions on judicial policies of the State
- setting up a system for evaluating the judicial system
- drafting or proposing legislation concerning the judiciary and/or courts.

## **THE KYIV RECOMMENDATIONS ON JUDICIAL INDEPENDENCE IN EASTERN EUROPE, SOUTH CAUCASUS AND CENTRAL ASIA, OSCE, 2010**

### Division of Competences in Judicial Administration

2. Judicial Councils are bodies entrusted with specific tasks of judicial administration and independent competences in order to guarantee judicial independence. In order to avoid excessive concentration of power in one judicial body and perceptions of corporatism it is recommended to distinguish among and separate different competences, such as selection, promotion and training of judges, discipline, professional evaluation and budget. A good option is to establish different independent bodies competent for specific aspects of judicial administration without subjecting them to the control of a single institution or authority. The composition of these bodies should each reflect their particular task. Their work should be regulated by statutory law rather than executive decree.

### Judicial Selection

3. Unless there is another independent body entrusted with this task, a separate expert commission should be established to conduct written and oral examinations in the process of judicial selection . In this case the competence of the Judicial Council should be restricted to verifying that the correct procedures have been followed and to either appoint the candidates selected by the commission or recommend them to the appointing authority.

4. Alternatively, Judicial Councils or Qualification Commissions or Qualification Collegia may be responsible directly for the selection and training of judges. In this case it is vital that these bodies are not under executive control and that they operate independently from regional governments.

### Discipline

5. In order to prevent allegations of corporatism and guarantee a fair disciplinary procedure, Judicial Councils shall not be competent both to a) receive complaints and conduct disciplinary investigations and at the same time b) hear a case and make a decision on disciplinary measures. Disciplinary decisions shall be subject to appellate oversight by a competent court.

### Budgetary Advice

6. Without prejudice to existing responsibilities of the government for proposing the judicial budget and of parliament for adopting the budget, it would be advisable for a body representing the interests of the judiciary, such as a Judicial Council, to present to the government the budgetary needs of the justice system in order to facilitate informed decision making. This body should also be heard by parliament in the deliberations on the budget. Judicial Councils may play a role also in the distribution of the budget within the judiciary.

**RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010**

Chapter I – General aspects

8. Where judges consider that their independence is threatened, they should be able to have recourse to a council for the judiciary or another independent authority, or they should have effective means of remedy.

**OPINION NO. 15 (2012) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) ON THE SPECIALISATION OF JUDGES, Council of Europe, 2012**

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.

Conclusions

x. The powers and responsibilities of a council of the judiciary or similar body should apply equally to generalist and specialist judges.

**REPORT ON THE INDEPENDENCE OF THE JUDICIAL SYSTEM PART I: THE INDEPENDENCE OF JUDGES, Venice Commission, Venice, 12-13 March 2010 CDL-AD(2010)004**

6. Judicial councils, or disciplinary courts, should have a decisive influence in disciplinary proceedings. The possibility of an appeal to a court against decisions of disciplinary bodies should be provided for.

**SOFIA DECLARATION ON JUDICIAL INDEPENDENCE AND ACCOUNTABILITY, The General assembly of European Network of Councils for the Judiciary (ENCJ), 2013**

(vii) The prudent convention that judges should remain silent on matters of political controversy should not apply when the integrity and independence of the judiciary is threatened. There is now a collective duty on the European judiciary to state clearly and cogently its opposition to proposals from government which tend to undermine the independence of individual judges or Councils for the Judiciary.

## VI THE ROLE OF COUNCILS FOR THE JUDICIARY

### 3. COMPETENCES OF COUNCILS FOR THE JUDICIARY

#### Recommendations and best practices

The Council should play an important role in the process of electing or appointing judges. This could be done either by proposing candidates, providing opinion on them or even consenting to the proposed candidates.

Composition of the Council influences its competences. The more it is involved in the process of selecting the judges, the fewer judges could be represented in the Council in order to avoid self-appointment of judges. A qualified majority for adopting decisions or opinions in this respect might be considered.

#### D. Investigative and disciplinary competences

The Council could have a role in the disciplinary proceedings against judges and in the process of their dismissal. This can be done by adopting relevant decisions or by instigating the proceedings.

#### E. Competences in training of judges or their qualification

The Council can contribute to a more efficient and better quality administration of justice by participating in judicial education and training. At the very least, the Council could participate in the process of adopting the training program for judges.

#### F. Protection of independence of judges

The Council may also contribute to the independence of the judiciary by communicating with the media on these matters.

#### I. Competences concerning legislative acts regarding the judiciary

The Council may not only provide opinion on the existing legislative framework, but should also have the possibility to express its opinion on the regulation of the judiciary in the future.

## V. RESOURCES, EFFICIENCY AND INDEPENDENCE

### V. 1. GENERAL ASPECTS OF RESOURCES

***FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY, Administration of the Courts in the Context of the Independence of the Judge, International Association of Judges (IAJ), 1981***

1. the number of judges and the staff ought to be established by law or by statutory regulation, according to the opinion of the judicial authorities based on uniform criteria, it being understood that, when a vacancy occurs, it ought to be filled within the best possible delay;
2. the preparation of the budget intended to provide for the functioning of the courts, should be preceded by consultation with the relevant judicial authorities, in such a manner as the legislator which appropriates the funds will be placed in a position to know the needs of the proper functioning of the courts;
3. the expenditure of the funds allotted for the functioning of the courts ought to be under the control of the judiciary in conformity with criteria laid down in advance.

***THE SIRACUSA DRAFT PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, 1981***

Financial provisions

Art. 24. To ensure its independence the judiciary should be provided with the means and resources necessary for the proper fulfillment of its judicial functions.

***MONTREAL DECLARATION, UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE, International Association of Judicial Independence and World Peace (JIWP), 1983***

Court Administration

2.41 It shall be a priority of the highest order, for the state to provide adequate resources to allow for the due administration of justice, including physical facilities appropriate for the maintenance of judicial independence, dignity and efficiency, judicial and administrative personnel, and operating budgets.

***BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, Adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, 1985***

Independence of the judiciary

Art. 7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE (“Singhvi Declaration”), ECOSOC, 1985***

Court Administration

34. The budget of the courts shall be prepared by the competent authority in collaboration with the judiciary having regard to the needs and requirements of judicial administration.

***PROCEDURES FOR THE EFFECTIVE IMPLEMENTATION OF THE BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, Resolution 1989/60, 15th plenary meeting, ECOSOC, 24 May 1989***

Procedure 5, PROCEDURES FOR THE EFFECTIVE IMPLEMENTATION OF THE BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY

In implementing principles 8 and 12 of the Basic Principles, States shall pay particular attention to the need for adequate resources for the functioning of the judicial system, including appointing a sufficient number of judges in relation to case-loads, providing the courts with necessary support staff and equipment, and offering judges appropriate personal security, remuneration and emoluments.

***PALERMO DECLARATION, ELEMENTS OF A EUROPEAN STATUTE OF MAGISTRACY, MEDEL, 1993***

II. THE MAGISTRATES

2.3. It is the duty of the State to provide the judiciary with sufficient means to ensure the orderly performance of its functions, and especially those necessary for the initial and permanent training of magistrates.

III. THE SUPREME COUNCIL OF MAGISTRATES

3.3. The parliament votes the budget for justice according to the proposals of the Supreme Council of Magistrates and the Government. The Supreme Council of Magistrates has a budget to carry out its tasks.

***FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY, PARTICIPATION OF THE JUDICIAL POWER IN THE ADMINISTRATION OF JUSTICE, International Association of Judges (IAJ), 1994***

Conclusions

1. Problem of the preparation of the budgets and the allocation of funds may very seriously influence the independence of the judges.

***BEIJING STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION, as amended in Manila at 7th Biennial Conferences of Chief Justices of Asia and the Pacific, 1997***

Judicial Administration

37. The budget of the courts should be prepared by the courts or a competent authority in collaboration with the courts having regard to the needs of the independence of the judiciary and its administration. The amount allotted should be sufficient to enable each court to function without an excessive workload.

Resources

41. It is essential that judges be provided with the resources necessary to enable them to perform their functions.

42. Where economic constraints make it difficult to allocate to the court system facilities and resources which judges consider adequate to enable them to perform their functions, the essential maintenance of the rule of law and the protection of human rights nevertheless require that the needs of the judiciary and the court system be accorded a high level of priority in the allocation of resources.

***JUDGES' CHARTER IN EUROPE, European Association of Judges, 1997***

Fundamental principles

7. The other organs of the State have an obligation to give the judiciary all necessary means to perform their function, including adequate manpower and facilities. The judiciary must participate in decisions taken in relation to these matters.

***EUROPEAN CHARTER ON THE STATUTE FOR JUDGES AND EXPLANATORY MEMORANDUM, Council of Europe, Strasbourg, 8 - 10 July 1998***

1. GENERAL PRINCIPLES

1.6. The State has the duty of ensuring that judges have the means necessary to accomplish their tasks properly, and in particular to deal with cases within a reasonable period.

***FIRST STUDY COMMISSION - "THE PHYSICAL, STRUCTURAL AND ECONOMIC CONDITIONS OF JUDICIAL INDEPENDENCE", International Association of Judges (IAJ), 2001***

3. General Conclusions, Economic Considerations

It was agreed that the judges must participate in the efforts made to solve the economic crisis that some countries are experiencing at the present time. This solidarity must be shared with the community, and we should do this primarily by finding ways to manage more efficiently the judiciary budgets and by trying to do more with fewer resources. In considering cutting expenses in the budget, however, the executive and legislative powers, which have the final decision in these matters, must decide beforehand on the quality of the respective system of justice they wish to maintain and also decide how far they are willing to go to risk diminished performance of the judiciary. Where the constitution or a specific law of a country protects the salary of judges, there should be no reduction in salary imposed in violation of the constitution or the law. In the final analysis, a firm line must be drawn to prevent endangering the independence of the judiciary. Where budgets are already limited, it may be impossible for the judiciary to absorb any additional cuts without seriously affecting judicial independence. We must also be vigilant to guard against any kind of negative discrimination towards the judicial power that affects the judiciary to a greater degree than the other State powers are affected. In short, we support balanced solidarity.

***OPINION NO. 2 (2001) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE FUNDING AND MANAGEMENT OF COURTS WITH REFERENCE TO THE EFFICIENCY OF THE JUDICIARY AND TO ARTICLE 6 OF EUROPEAN CONVENTION ON HUMAN RIGHTS, Council of Europe, 2001***

3. Moreover, there is an obvious link between, on the one hand, the funding and management of courts and, on the other, the principles of the European Convention on Human Rights: access to justice and the right to fair proceedings are not properly guaranteed if a case cannot be considered within a reasonable time by a court that has appropriate funds and resources at its disposal in order to perform efficiently.

5. The CCJE agreed that although the funding of courts is part of the State budget presented to Parliament by the Ministry of Finances, such funding should not be subject to political fluctuations. Although the level of funding a country can afford for its courts is a political decision, care must always be taken, in a system based on the separation of powers, to ensure that neither the executive nor the legislative authorities are able to exert any pressure on the judiciary when setting its budget. Decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence.

11. One form which this active judicial involvement in drawing up the budget could take would be to give the independent authority responsible for managing the judiciary – in countries where such an authority exists<sup>1</sup> – a co-ordinating role in preparing requests for court funding, and to make this body Parliament's direct contact for evaluating the needs of the courts. It is desirable for a body representing all the courts to be responsible for submitting budget requests to Parliament or one of its special committees.

14. The CCJE considered that States should reconsider existing arrangements for the funding and management of courts in the light of this opinion. The CCJE in particular further draws attention to the need to allocate sufficient resources to courts to enable them to function in accordance with the standards laid down in Article 6 of the European Convention on Human Rights.

### ***GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY, USAID, 2002***

#### **Structure of Judiciary, a . Adequate budget**

It is generally difficult to make a direct causal link between an adequate judicial budget and judicial independence, but there are substantial indirect linkages. Severe under-funding nearly always has an impact on the judiciary, which is seen to affect its independence. Judiciaries with inadequate resources usually cannot offer the salaries, benefits, and pensions needed to attract and retain qualified candidates, and, in some cases, to diminish the likelihood of corruption. Judges in such judiciaries often lack access to basic legal materials laws, judgments of higher courts, and commentaries needed for consistent and well-founded decision-making. They may lack adequate methods for correctly recording oral proceedings, undermining the appeal process and transparency and accountability. Limited budgets result in inadequate physical working conditions that undermine respect for the judiciary both in the judges' own eyes and in the eyes of the public, and may inhibit a judiciary's ability to provide the security needed to stem intimidation. The capacity and attitude of judges, the security of judges, and the attitude of the general public toward the judiciary all of which are dependent to a high degree on an adequate budget are perceived to be essential elements in building judicial independence, as described more fully below.

The linkage between the judiciary's budget and independence is more direct when entities outside the judiciary supplement an inadequate budget. In several countries, local governments and even businesses provide judges such necessities and benefits as office space, discounts on education for their children, transportation, and housing. In return, these benefactors expect, at the least, sympathetic consideration of their cases.

Allocation of the budget within the judiciary can pose as much of a problem as the absolute size. Independence of lower court judges from their superiors is compromised when the distribution of resources within the judiciary is arbitrary, lacks transparency, or is used to punish lower courts that do not follow the instructions of their superiors. Presiding judges are often the ones to dispense the perks conferred by local authorities or businesses, thus increasing the dependence of judges on their court presidents.

Assuming that an adequate budget is an essential ingredient of judicial independence, what is adequate? Once again, there is no easy recipe for making this determination. What is adequate varies from country to country and is based, among other things, on the resources available to the



government, the stage of development of the legal system, the size of the population, the number of judges per capita and of organizational units included within the judiciary's budget (i.e., judges, judicial council, prosecutors, police, public defenders, military courts, labor courts, and electoral courts), and the extent to which courts are being used, or would likely be used if they were perceived to be fair and effective.

Because of all these variables, comparisons among countries are virtually impossible. However, some examples can give a ballpark picture of current realities. In the Philippines, slightly over 1 percent of the budget is allocated to the judiciary. In Pakistan, the figure is .2 percent of the national budget and .8 percent of provincial budgets. Romania allocated 1.73 percent of its 2000 total budget to the judiciary. In Costa Rica, the government is required by the constitution to allocate 6 percent of its total budget to the judiciary; however, the judicial budget includes the judicial police, prosecutors, and other services. When these elements are removed, the figure for judges and courts is closer to 1.5 percent. In most of anglophone Africa, governments devote less than 1 percent of their budgets to the courts.

The judiciaries of several countries, as in Costa Rica, receive constitutionally mandated percentages of the national budget. This model presents some positive features: it attempts to protect the judicial budget from political intervention; it has an educational value in suggesting what adequate support for the judiciary is; and it can provide a level of predictability. However, the practice also raises several concerns. First, several countries that have such legislatively required percentages simply do not comply with them, sometimes through manipulation. Unless the percentage is fully grounded in the budgetary realities of the country and has the full support of legislators responsible for the budget, it may be only symbolic. Second, once a minimum is fixed, it quickly becomes a maximum; it is often difficult to increase the amount when warranted. Third, fixed percentages can actually undermine transparency, efficiency, and consultative process with lower courts because the judiciary no longer needs to justify to the legislature what it does or how it spends its funds.

If a judiciary's budget is inadequate to meet its needs, funds generated by the judiciary can provide an alternative to augment those resources. The United States provides an example of this practice. Trial courts in the United States were at one time insufficiently funded through state and local governments. Facing popular resistance to increasing direct support to the judiciary, the courts, with legislative approval, instead instituted users fees. Potential measures for generating additional funds within the judiciary include raising filing fees, allowing earnings on court deposits to accrue to the judiciary, allowing awards of court costs to go to the judiciary, and allowing penalties and fines assessed by the court to go to its budget. However, all of these practices are controversial, and the latter can raise conflict of interest issues.

It is very common to hear complaints that a judiciary's budget is inadequate, and in many cases it is true. Nevertheless, claims about the need for increased resources should not be taken at face value. Increased budgets have not always resulted in improved performance or greater independence. There can be a variety of reasons for this. It is important for donors and their local counterparts to carefully analyze a court's budget and how it is used, as well as overall court operations, before becoming advocates for increased resources. Local public finance experts can often undertake such an analysis.

A common problem is poor allocation of resources within the judiciary, rather than or in addition to an overall lack of resources. High courts often have sumptuous physical facilities, high salaries, large staffs, and generous travel budgets while the lower courts lack paper and pencils. In those circumstances, it may be inappropriate to support increased budgets until allocations are defensible.

Frequently the institution and its resources are not well managed. Assistance to help the judiciary develop its management capacity may prove very useful. An important element involves helping the judiciary learn how to plan its operations over a reasonable time period, determine its financial needs, and develop responsible budgets. The judiciary's ability to present its financial needs in a professional and comprehensive manner enhances the likelihood that it will acquire necessary

resources. The concept of having a professional administrator assume some management functions previously performed by judges is gaining acceptance in many countries.

**COMMONWEALTH (LATIMER HOUSE) PRINCIPLES ON THE THREE BRANCHES OF GOVERNMENT with Annex (Parliamentary Supremacy, Judicial Independence), The Commonwealth, 2003**

IV) Independence of the Judiciary

(c) Adequate resources should be provided for the judicial system to operate effectively without any undue constraints which may hamper the independence sought.

**GLOBAL BEST PRACTICES: JUDICIAL INTEGRITY STANDARDS AND CONSENSUS PRINCIPLES, IFES, 2004**

ii. Reasonable Time

In assessing the reasonableness of the length of proceedings, human rights tribunals rely on a carefully-crafted balancing test that takes into account the circumstances of the case by looking into three main elements: (i) the complexity of the cases; (ii) the conduct of the plaintiff; and (iii) the conduct of the competent authorities. While the European Court was the first to set the criteria to assess the reasonableness of the length of proceedings, both the Inter-American Court and the African Commission follow similar criteria.

The requirement of “reasonable time” applies to all proceedings, regardless of their nature. Moreover, human rights tribunals have ruled that the assessment of the reasonableness of the length of proceedings must be undertaken by looking at proceedings as a whole. In *Neumeister v. Austria*, the European Court held that in criminal cases, the date of departure of the proceedings for the purpose of the assessment of the reasonableness of their length may start running prior to the seisin of the court.<sup>32</sup> Similarly, in *Golder v. the United Kingdom*, the European Court has upheld this analysis in civil cases.<sup>33</sup> As for the end of the proceedings, the European Court has repeatedly held that the enforcement phase is an integral part of the proceedings for purposes of the assessment of the reasonableness of their length. The European Court has generally held that enforcement proceedings did not present any particular complexity that could justify the delays under review in the specific cases.

As a general matter, the more serious the proceedings are, the more diligence is required in complying with the requirement of “reasonable time”. In that regard, the European Court has held that, while only delays attributable to the State may justify a failure to comply with the “reasonable time” requirement, the conduct of the relevant authorities, and especially delays and court inertia, may primarily contribute to the excessive length of the proceedings. Conversely, it has ruled that the inertia of the plaintiff, in countries in which the impulse of the enforcement process is given by the plaintiff, may free the State of some, if not all, of its responsibility.

**OPINION NO. 7 (2005) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS ON “JUSTICE AND SOCIETY”, Council of Europe, 2005**

A. THE RELATIONS OF THE COURTS WITH THE PUBLIC WITH SPECIAL REFERENCE TO THE ROLE OF COURTS IN A DEMOCRACY

20. In the CCJE's opinion, in order to develop the above programmes judges should be given the opportunity to receive specific training as to relations with the public. Courts should also have the

possibility to employ staff specifically in charge of liaising with educational agencies (public relations offices, as mentioned above, could also be given this task).

## SUMMARY OF THE RECOMMENDATIONS AND CONCLUSIONS

A. The relations of the courts with the public with social reference to the role of the courts in a democracy

A.5. Judges should be given the opportunity to receive specific training as to relations with the public and courts should also have the possibility to employ staff specifically in charge of liaising with educational agencies (see paragraph 20 above).

### **GENERAL REPORT, FIRST STUDY COMMISSION - ECONOMICS, JURISDICTION AND INDEPENDENCE, International Association of Judges (IAJ), 2005**

#### Conclusions

Art. 1 An independent judicial system needs a secure economic basis. It is up to the state to provide sufficient means to the judicial power so as to be able to avoid every pressure; be it by the legislative or by the executive power. Even if states suffer from lack of financial means, the judiciary and the courts being a fundamental part of the state, should receive their part of available finances as far as possible.

### **OPINION NO. 10 (2007) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE COUNCIL FOR THE JUDICIARY AT THE SERVICE OF SOCIETY, CCJE, 2007**

#### V. E. Budget of the Judiciary

73. Although the funding of courts is part of the State budget, such funding should not be subject to political fluctuations. Decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence. The arrangements for parliamentary adoption of the judicial budget should include a procedure that takes into account the opinions of the judiciary. If the Council for the Judiciary does not have a role of administration and management of the courts, it should at least be in a position to issue opinions regarding the allocation of the minimal budget which is necessary for the operation of justice, and to clarify its needs in order to justify its amount.

74. The CCJE is of the opinion that the courts can only be properly independent if they are provided with a separate budget and administered by a body independent of the executive and legislature, whether it is a Council for the Judiciary or an independent agency.

75. Although it is advocated by some States that the ministry of justice is better placed to negotiate the court budget vis-à-vis other powers, especially the ministry of finances, the CCJE is of the opinion that a system in which the Council for the Judiciary has extended financial competences requires serious consideration in those countries where such is not the case at present. It must be stressed that extended financial powers for the Council for the Judiciary imply its accountability not only vis-à-vis the executive and the legislature, but also vis-à-vis the courts and the public.

#### VI. THE COUNCIL FOR THE JUDICIARY IN SERVICE OF ACCOUNTABILITY AND TRANSPARENCY OF THE JUDICIARY

94. When the Council for the Judiciary has budgetary powers, it is only logical that it should be accountable for the use of the funds in question to the Parliamentary assembly which adopted the budget. The portion of the budget allocated to the judicial system should be controlled by the Audit Office in charge of supervising the use of public money, when it exists.

## SUMMARY OF THE RECOMMENDATIONS AND CONCLUSIONS

D. On the powers of the Council for the Judiciary:

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 ;

***DECLARATION OF MINIMAL PRINCIPLES ABOUT JUDICIARIES AND JUDGES' INDEPENDENCE IN LATIN AMERICA, Campeche, April 2008***

**III. MINIMAL CONDITIONS FOR THE PROTECTION OF JUDGES' INDEPENDENCE AND IMPARTIALITY**

**9. REMUNERATIONS AND RETIREMENT PENSION PLAN**

The remunerations established for judges as well as their retirement pension plans must allow them to comply with the execution of their duties, exclusively and free from all conditionings, without the implementation of damaging or beneficial measures as regards interference in their independence and impartiality. As a consequence, the following has to be established:

- a) Judges must receive a remuneration that is sufficient to ensure their economic independence conforming to the proper requirements imposed by the dignity of their jobs. The compensation has to be sufficient to cover all their needs as well as the needs of their direct family group so that it is unnecessary to resort to additional incomes.
- b) Remuneration cannot depend on appreciations or assessments of the judges' activities and cannot be reduced, for any reason, as long as they continue in the job.
- c) Judges have the right of retirement receiving a remuneration that corresponds with their level of responsibility, maintaining a reasonable relation with the salary corresponding to their position before retirement.
- d) After retirement, judges cannot be forbidden to exercise any other legal activity due to the fact of having previously occupied a legal post.
- e) Any changes as regards age or other essential conditions in the retirement plan, either if they restrict or expand the access to retirement, cannot have a retroactive effect, except with the willing acceptance of the person affected.

**14. MATERIAL RESOURCES**

It is the duty of other State public authorities to provide the judiciary with the necessary resources for its independent, efficient and swift performance.

***OPINION NO. 12 (2009) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) AND OPINION NO.4 (2009) OF THE CONSULTATIVE COUNCIL OF EUROPEAN PROSECUTORS (CCPE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE RELATIONS BETWEEN JUDGES AND PROSECUTORS IN A DEMOCRACY SOCIETY, BORDEAUX DECLARATION, CCJE, CCPE, 2009***

4. Adequate organisational, financial, material and human resources should be put at the disposal of justice.

***MAGNA CARTA OF JUDGES, CCJE, Council of Europe, Strasbourg, 17 November 2010***

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.

***ABA MODEL CODE OF JUDICIAL CONDUCT (2011 EDITION), adopted by the House of Delegates of the American Bar Association on August 7, 1990 and amended on August 6, 1997, August 10, 1999, August 12, 2003, February 12, 2007 and August 10, 2010***

### CANON 3

#### Rule 3.14: Reimbursement of Expenses and Waivers of Fees or Charges

(A) Unless otherwise prohibited by Rules 3.1 and 3.13(A) or other law,\* a judge may accept reimbursement of necessary and reasonable expenses for travel, food, lodging, or other incidental expenses, or a waiver or partial waiver of fees or charges for registration, tuition, and similar items, from sources other than the judge's employing entity, if the expenses or charges are associated with the judge's participation in extrajudicial activities permitted by this Code.

(B) Reimbursement of expenses for necessary travel, food, lodging, or other incidental expenses shall be limited to the actual costs reasonably incurred by the judge and, when appropriate to the occasion, by the judge's spouse, domestic partner,\* or guest.

(C) A judge who accepts reimbursement of expenses or waivers or partial waivers of fees or charges on behalf of the judge or the judge's spouse, domestic partner, or guest shall publicly report such acceptance as required by Rule 3.15.

#### Rule 3.15: Reporting Requirements

(A) A judge shall publicly report the amount or value of:

- (1) compensation received for extrajudicial activities as permitted by Rule 3.12;
- (2) gifts and other things of value as permitted by Rule 3.13(C), unless the value of such items, alone or in the aggregate with other items received from the same source in the same calendar year, does not exceed \$[insert amount]; and
- (3) reimbursement of expenses and waiver of fees or charges permitted by Rule 3.14(A), unless the amount of reimbursement or waiver, alone or in the aggregate with other reimbursements or waivers received from the same source in the same calendar year, does not exceed \$[insert amount].

***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

### Chapter V – Independence, efficiency and resources

33. Each state should allocate adequate resources, facilities and equipment to the courts to enable them to function in accordance with the standards laid down in Article 6 of the Convention and to enable judges to work efficiently.

***RESOURCE GUIDE ON STRENGTHENING JUDICIAL INTEGRITY AND CAPACITY, UNODC, 2011***

### III. CASE AND COURT MANAGEMENT

#### 8. Conclusions and recommendations

- Courts should actively monitor and control the progress of cases, from initiation through trial or other initial disposition to the completion of all post-disposition court work.

- The effective use of case management techniques and practices improves the efficiency in the use of justice systems resources, hence reducing the costs of justice operation.
- Judges and court staff should play an active role in managing the flow of judicial proceedings.
- The successful adoption of case management techniques requires difficult changes related with the professional identity of judges and lawyers and thus articulated change management strategies.
- The court control over cases entails the implementation of two basic principles: early court intervention and continuous court control of case progress.
- ICT can support case management systems techniques, but case management can be performed also with more traditional instruments.
- Courts should consider to adopt differentiated case management systems so as to have several procedural tracks based on criteria such as:
  - (a) Amount of attention they need from judges and lawyers,
  - (b) Value of the case,
  - (c) Characteristics of the procedure, and
  - (d) Legal issues involved.
- When adopting a case management approach, judges must be prepared to preside and take appropriate actions to ensure that:
  - (a) All parties are prepared to proceed,
  - (b) The trial commences as scheduled,
  - (c) All parties have a fair opportunity to present evidence, and
  - (d) The trial proceeds to conclusions without unnecessary interruptions.
- The setting of timeframes of proceedings is a necessary condition to start measuring and comparing case processing delays.
- Case management systems have to be supported by well-designed training programmes.
- A practice of collaboration among the different agencies and stakeholders is useful for designing and implementing case management because:
  - (a) It helps to build commitment among all the key players,
  - (b) It creates a proper environment for the development of innovative policies, and
  - (c) It points out that the responsibility for timely case processing is not just in the court operations but also includes other players.
- Technology offers opportunities for reconfiguring the functioning of justice that cannot be grasped without complex changes at the procedural, organizational and cultural levels.
- The introduction of ICT in courts bears the risks of large investments with little impact.
- Judicial officials who contemplate ICT programmes are advised to engage in a careful feasibility and cost/benefit analysis with the assistance of experts.
- Court information systems must provide large amount of information, rapidly and economically, to a broad range of users.
- Information and court records must be kept up to date, accurate, prompt and easily accessible.
- ICT development requires:
  - (a) A sound ICT governance structure,
  - (b) Robust technological infrastructure,
  - (c) Focused legal and procedural changes,
  - (d) Enduring commitment and long-term investment,
  - (e) Strong judicial leadership,
  - (f) Maintenance, updates and cyclical replacement of hardware and software,
  - (g) Initial and continuous training,

## VI. ASSESSMENT AND EVALUATION OF COURTS AND COURT PERFORMANCE

### 9. Conclusions and recommendations

As discussed above, the traditional way of evaluating court performance is essentially based on the control of legality in the processing of single cases. In this framework, a court is performing well if it

follows the prescribed rules. The new managerial approaches to performance evaluation introduced a radically different mechanism for performance evaluation. Such approaches, as we have seen, are mainly based on statistical, economic or financial methods and the evaluation is conceived as the measure of the gap between the measured results and the goals. As clearly shown by the cases we have considered, consequences are relevant at the organizational level (budget, human resource allocation, etc.) or at the policy level (implementation of new projects, etc.). The process of analysis is based on aggregate data, often of a quantitative nature and hence based on statistical and mathematical elaborations.

Given the distance between the managerial approaches to evaluation, and the traditional ones, it should not be surprising that judges and staff may have problems in understanding and accepting as valid these new approaches and the information they provide. As a result, the evaluation of court performance is a difficult challenge. Sometimes the implementation of court performance evaluation may raise problems related to a perceived reduction of judicial independence, or generate doubts concerning the capacity of the system to measure the real complexity of court operation. As empirical studies show,<sup>114</sup> these and other problems must be assessed on a case-by-case basis and cannot find clear and valid recommendations.

In this framework, and on the basis of the positive experiences documented in this chapter, it seems advisable to treat the data produced by the managerial systems as a “foundation for discussion in a collaborative process,” rather than a “final judgment.” This approach is reasonable, also considering the difficulty of correctly interpreting the meaning of specific data or of all the information collected by these systems. Once the legitimacy and the usefulness of managerial methods for the evaluation of court performance are recognized, it becomes appropriate to open a forum in which to discuss the results of the performance evaluation. What is clear, indeed, is that court performance should be assessed and improved from multiple perspectives, and that the legitimacy of courts will take advantage of these assessments. This approach also offers opportunities of avoiding the risk that a given value (whether of a managerial or legal nature) may prevail to the neglect of the other values which must be protected in the judicial process. In addition, it must be emphasized that while a lot can be learned from other jurisdictions, it is important for each jurisdiction to determine its own goals and appropriate mechanisms for performance evaluation also adopting participatory processes. These include:

- Performance assessments must serve the fulfillment of the justice system mission.
- Performance assessments must be designed to support and not hamper key judicial values such as judicial independence and impartiality.
- Institutional and organizational goals should be set up, and actual performance measured against such goals.
- Set up performance indicators as simply as possible and keep the complexity of the performance assessment system related to the capacity (know-how and financial availability) of the courts.
- Performance assessment systems should be developed through an incremental strategy.
- Goals should be SMART (and more):
  - (a) Specific
  - (b) Meaningful
  - (c) Ambitious
  - (d) Realistic
  - (e) Time bound
  - (f) Defined through a participative process
  - (g) Independent from personal judgments
  - (h) Accepted from employees
  - (i) Supported by a strong leadership’s commitment
- Indicators should be:
  - (a) Feasible
  - (b) Sustainable in the mid-long term
  - (c) Valid and reliable (e.g. correspond to the performances they represent)

- (d) Balanced and comprehensive
- Keep the richness and precision of indicators balanced with their complexity and the costs so to assure the long-term sustainability of the performance evaluation.
- Indicators must be developed considering the available data, the data that can be collected and the cost of data collection.
- Data should be:
  - (a) Concrete
  - (b) Collectable at reasonable cost
  - (c) Comparable between courts of the same kind
  - (d) Comparable over time for each court
  - (e) Both quantitative and qualitative
- The quality of the data must always be verified and data dictionaries should be endorsed so to improve data consistency.
- Try to develop partnerships with research institutions and consultants to improve the available know-how required for performance evaluation.
- ICT and automated case management may increase data availability and data collection, but it is not a prerequisite for setting up a performance assessment system.
- Exploit the data already collected by courts.
- The voice of citizens and court users should be listened to improve the quality of the services delivered by the court.
- Court users' surveys should be carried out with the support of specialized competences. If this is not possible, opinions can be collected with simple cards self-completed by court users.
- Performance evaluation is not an end in itself and must have consequences at individual, organizational or policymaking level, such as:
  - (a) Public reporting
  - (b) Improved accountability
  - (c) Improved users' orientation
  - (d) Identification and promotion of good practices
  - (e) Organizational learning
  - (f) Identification of training needs
  - (g) Reward organizational performance
  - (h) Reward individual performance
  - (i) Resources allocation
  - (j) Strategic planning
  - (k) Resource competition
- Judicial inspectorates and other supervisory bodies such as court of accounts and court services should be regularly involved in different areas of performance evaluation.
- Supervisory bodies should be empowered to give advice to courts about how to improve their performances.
- Performance evaluation of justice is a prerequisite to any judicial reform initiative.

***OPINION NO. 15 (2012) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) ON THE SPECIALISATION OF JUDGES, Council of Europe, 2012***

C Certain aspects of specialisation, 4. Human, material and financial resources

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.

***A EUROPE OF JUSTICE THAT FOSTERS DEMOCRACY AND FREEDOM AS A RESPONSE TO CRISIS, MEDEL, 2013***

The rights of all citizens to effective recourse cannot prosper amidst reduction of resources intended for justice.

Each country should allocate adequate resources, equipment and facilities in order to allow tribunals to operate in observance of requirements set forth in Article 6 of the Convention on the Defense of Human Rights and Fundamental Freedoms and to enable the effective work of judges.

Judges should be able to procure the information that they require for competent procedural decisions, whenever such decisions may affect expenses. The power of a judge to rule a case should not be strictly limited to the obligation of efficient use of resources.

***DOHA DECLARATION ON INTEGRATING CRIME PREVENTION AND CRIMINAL JUSTICE INTO THE WIDER UNITED NATIONS AGENDA TO ADDRESS SOCIAL AND ECONOMIC CHALLENGES AND TO PROMOTE THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS, AND PUBLIC PARTICIPATION, Adopted by the 13<sup>th</sup> United Nations Congress on Crime Prevention and Criminal Justice, Doha, 12-19 April 2015***

9. We endeavour to ensure that the benefits of economic, social and technological advancements become a positive force to enhance our efforts in preventing and countering new and emerging forms of crime (...). Therefore, we strive:

(f) To ensure that our (...) criminal justice institutions have the expertise and technical capacities to adequately address these new and emerging forms of crime, in close cooperation and coordination with one another, and to provide those institutions with the necessary financial and structural support;

11. As we continue our efforts to achieve the objectives set forth in this Declaration (...), to uphold the rule of law and to ensure that our (...) criminal justice systems are effective, fair, humane and accountable, we reaffirm the importance of adequate, long-term, sustainable and effective technical assistance and capacity-building policies and programmes.

***BRIJUNI STATEMENT OF THE PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY, Conference of Chief Justices of Central and Eastern Europe, 14 October, 2015***

Relationship with the legislative and executive branches

33. Legislative and executive powers which may affect judges in their office, their remuneration or conditions or their resources, must not be used so as to threaten or bring pressure upon a particular judge, particular judges, or judiciary as a whole.

Resources

36. The legislative and executive branches should respect the authority of the judicial branch and, if commenting on judges' decisions, should avoid criticism that would undermine the independence or public confidence in the judiciary. The legislative and executive branches are obliged to respect judges' decisions and should avoid actions which may call into question their willingness to abide by judges' decisions, other than stating their intention to appeal.

37. Judges and judicial authorities should have the right to play an active part in the preparation of legislation concerning their statute and, more generally, the functioning of the judicial system. Any

draft legislation concerning the status of judges, the administration of justice and other draft legislation likely to have an impact on the judiciary, independence of the judiciary or guarantees of citizens' access to justice should be considered by the legislative branch only after obtaining the opinion of the competent authority of the judiciary.

38. It is essential that judges be provided with the resources necessary to enable them to perform their functions. The state is obliged to provide the judiciary with such resources.

***OPINION NO. 18 (2015) THE POSITION OF THE JUDICIARY AND ITS RELATION WITH THE OTHER POWERS OF STATE IN A MODERN DEMOCRACY, Consultative Council of European Judges (CCJE),***

VIII: Summary of principal points

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).

***COMPILATION OF CEPEJ GUIDELINES, European Commission for the Efficiency of Justice (CEPEJ), 2015***

Resources

1. The judicial system needs to have sufficient resources to cope with its regular workload in due time. The resources have to be distributed according to the needs and must be used efficiently.

2. There should be resources that can be utilised in case of unexpected changes in the workload or the inability of the system to process the cases promptly.

3. The decisions on the utilisation of resources for the functioning of the judiciary should be made in a way that stimulates effective time management. If it is necessary, it should be possible to reallocate the resources in a fast and effective way in order to avoid delays and backlogs.

Organisation

1. The judicial bodies should be organised in a way that encourages effective time management.

2. Within the organisation, the responsibility for time management or judicial processes has to be clearly determined. There should be a unit that permanently analyses the length of proceedings with a view to identify trends, anticipate changes and prevent problems related to the length of proceedings.

3. All organisational changes that affect the judiciary should be studied as regards the possible impact on the time management of judicial proceedings.

## V. 2. BUDGET OF THE JUDICIARY

### ***FIRST STUDY COMMISSION JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY MEETING IN VIENNA, CONCLUSION ADMINISTRATION OF THE COURTS IN THE CONTEXT OF THE INDEPENDENCE OF THE JUDGE 11 - 13 November 1981***

2. the preparation of the budget intended to provide for the functioning of the courts, should be preceded by consultation with the relevant judicial authorities, in such a manner as the legislator which appropriates the funds will be placed in a position to know the needs of the proper functioning of the courts;
3. the expenditure of the funds allotted for the functioning of the courts ought to be under the control of the judiciary in conformity with criteria laid down in advance.

### ***THE SIRACUSA DRAFT PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, 1981***

#### Financial provisions

Art. 24. To ensure its independence the judiciary should be provided with the means and resources necessary for the proper fulfillment of its judicial functions.

Art. 25. The budget of the judiciary should be established by the competent authority in collaboration with the judiciary. The amount allotted should be sufficient to enable each court to function without an excessive workload. The judiciary should be able to submit their estimate of their budgetary requirements to the appropriate authority.

### ***MONTREAL DECLARATION, UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE, International Association of Judicial Independence and World Peace (JIWP), 1983***

#### Court Administration

2.40 The main responsibility for court administration shall vest in the judiciary.

2.41 It shall be a priority of the highest order, for the state to provide adequate resources to allow for the due administration of justice, including physical facilities appropriate for the maintenance of judicial independence, dignity and efficiency, judicial and administrative personnel, and operating budgets.

### ***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE (“Singhvi Declaration”), ECOSOC, 1985***

#### Tenure

16. (a) The term of office of the judges, their independence, security, adequate remuneration and conditions of service shall be secured by law and shall not be altered to their disadvantage.

### ***BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, Adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, 1985***

#### Conditions of service and tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

**PROCEDURES FOR THE EFFECTIVE IMPLEMENTATION OF THE BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, Resolution 1989/60, 15th plenary meeting, ECOSOC, 24 May 1989**

Procedure 5, PROCEDURES FOR THE EFFECTIVE IMPLEMENTATION OF THE BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY

In implementing principles 8 and 12 of the Basic Principles, States shall pay particular attention to the need for adequate resources for the functioning of the judicial system, including appointing a sufficient number of judges in relation to case-loads, providing the courts with necessary support staff and equipment, and offering judges appropriate personal security, remuneration and emoluments.

**FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY, PARTICIPATION OF THE JUDICIAL POWER IN THE ADMINISTRATION OF JUSTICE, International Association of Judges (IAJ), 1994**

Conclusions

1. Problem of the preparation of the budgets and the allocation of funds may very seriously influence the independence of the judges

2. The independence of the judge should be a reality, thanks to the measures which are being taken in order to permit a full exercise of his function, but also in order to safeguard the appearance of independence in the eyes of the public. This appearance, which must also be a reality, is essential to the confidence of the public in the judiciary.

37. The budget of the courts should be prepared by the courts or a competent authority in collaboration with the courts having regard to the needs of the independence of the judiciary and its administration. The amount allotted should be sufficient to enable each court to function without an excessive workload.

**FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF JUDICIARY, VARIOUS SPECIAL MEASURES IMPLEMENTED IN DIFFERENT COUNTRIES TO MANAGE THE INCREASING NUMBER OF CASES COMING BEFORE THE COURTS, International Association of Judges (IAJ), 1997**

Conclusions

Whereas it is incontestable that all members of the judiciary must do the best they can to carry out their work to the limits of their ability, it is also necessary and essential that the *other branches of government* provide the judiciary with the resources necessary to carry out their work properly.

**BEIJING STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION, as amended in Manila at 7th Biennial Conferences of Chief Justices of Asia and the Pacific, 1997**

Judicial Administration

37 The budget of the courts should be prepared by the courts or a competent authority in collaboration with the courts having regard to the needs of the independence of the judiciary and its administration. The amount allotted should be sufficient to enable each court to function without an excessive workload.

**EUROPEAN CHARTER ON THE STATUTE FOR JUDGES AND EXPLANATORY MEMORANDUM, Council of Europe, Strasbourg, 8 - 10 July 1998**

## 1. GENERAL PRINCIPLES

1.6. The State has the duty of ensuring that judges have the means necessary to accomplish their tasks properly, and in particular to deal with cases within a reasonable period.

### ***OPINION NO. 2 (2001) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE FUNDING AND MANAGEMENT OF COURTS WITH REFERENCE TO THE EFFICIENCY OF THE JUDICIARY AND TO ARTICLE 6 OF EUROPEAN CONVENTION ON HUMAN RIGHTS, Council of Europe, 2001***

2. The CCJE recognised that the funding of courts is closely linked to the issue of the independence of judges in that it determines the conditions in which the courts perform their functions.

5. The CCJE agreed that although the funding of courts is part of the State budget presented to Parliament by the Ministry of Finances, such funding should not be subject to political fluctuations. Although the level of funding a country can afford for its courts is a political decision, care must always be taken, in a system based on the separation of powers, to ensure that neither the executive nor the legislative authorities are able to exert any pressure on the judiciary when setting its budget. Decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence.

9. One problem which may arise is that the judiciary, which is not always seen as a special branch of the power of the State, has specific needs in order to carry out its tasks and remain independent. Unfortunately economic aspects may dominate discussions concerning important structural changes of the judiciary and its efficiency. While no country can ignore its overall financial capability in deciding what level of services it can support, the judiciary and the courts as one essential arm of the State have a strong claim on resources.

10. Although the CCJE cannot ignore the economic disparities between countries, the development of appropriate funding for courts requires greater involvement by the courts themselves in the process of drawing up the budget. The CCJE agreed that it was therefore important that the arrangements for parliamentary adoption of the judicial budget include a procedure that takes into account judicial views.

### ***FIRST STUDY COMMISSION, JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY Meeting in Madrid, CONCLUSIONS THE APPOINTMENT AND ROLE OF PRESIDENTS OF COURTS, 23 - 27 September 2001***

Budgetary matters and the allocation of resources for the functioning of the judicial system should be sufficient to enable the judiciary to fully exercise its functions, but in particular, should not be a means by which pressure is placed on judges which could affect their independence. Presidents of courts should at least be consulted as to the budgetary and other resources required by the courts to carry out their judicial functions.

### ***PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA, African Commission on Human and Peoples Rights, 2003***

#### A. GENERAL PRINCIPLES APPLICABLE TO ALL LEGAL PROCEEDINGS

4) Independent tribunal

v) States shall endow judicial bodies with adequate resources for the performance of its their functions. The judiciary shall be consulted regarding the preparation of budget and its implementation.

***FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY, CONCLUSIONS, THE ROLE AND FUNCTION OF THE HIGH COUNCIL OF JUSTICE OR ANALOGOUS BODIES IN THE ORGANISATION AND MANAGEMENT OF THE NATIONAL JUDICIAL SYSTEM, International Association of Judges (IAJ), 2003***

The independence of the judiciary is also dependent on adequate budgetary allocations for the administration of justice and the proper use of those resources. This can be best achieved by an independent body which has responsibility for the allocation of those resources.

***THE BURGH HOUSE PRINCIPLES ON THE INDEPENDENCE OF THE INTERNATIONAL JUDICIARY, The Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals, 2004***

1. Independence and freedom from interference

1.3 The court shall be free to determine the conditions for its internal administration, including staff recruitment policy, information systems and allocation of budgetary expenditure.

1.4 Deliberations of the court shall remain confidential.

6. Budget

States parties and international organisations shall provide adequate resources, including facilities and levels of staffing, to enable courts and the judges to perform their functions effectively.

***GENERAL REPORT, FIRST STUDY COMMISSION - ECONOMICS, JURISDICTION AND INDEPENDENCE, International Association of Judges (IAJ), 2005***

B. Conclusions

4) The judiciary (high judicial council, single courts) should be involved in the process of budget drafting and in the allocation of given resources.

5) Nevertheless the practice of providing for budgets for individual judges and/or panels of judges should be avoided, because that practice could constitute a danger to judicial independence. That is because the judge would be forced to keep in mind the effects of his decision on his personal budget (or the budget of the panel).

6) Cost of lawsuits (witnesses, experts, interpreter) must no be subjected to a strict budget as these resources have to be available sufficiently and without restrictions. (Conclusions, Article 4.,5.,6.)

***OPINION NO. 7 (2005) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS ON "JUSTICE AND SOCIETY", Council of Europe, 2005***

A. THE RELATIONS OF THE COURTS WITH THE PUBLIC WITH SPECIAL REFERENCE TO THE ROLE OF THE COURTS IN A DEMOCRACY

22. The CCJE has already advised that appropriate funding, not subject to political fluctuations, should be provided for judicial activities and that judicial bodies should be involved in decisions

concerning budget allocations by legislatures, e.g. through a co-ordination role of the above mentioned independent body (see Opinion No. 2 (2001), paragraphs 5, 10 and 11). The CCJE recommends that adequate funding should also be provided for activities explaining and making transparent the judicial system and the principles of justice in society by the court system itself, according to the principles stated in its Opinion No. 2 (2001). Expenses related to "outreach programmes" should be covered by a special budget item, so that they are not charged to the operating budget of courts.

## SUMMARY OF THE RECOMMENDATIONS AND CONCLUSIONS

A. The relations of the courts with the public with special reference to the role of the courts in a democracy

A.7. Adequate funding, not charged to the operating budget of courts, should be provided to the courts for activities explaining and making transparent the principles and the mechanisms of justice in society as well as for expenses related to "outreach programmes" (see paragraph 22 above).

### ***DECLARATION OF MINIMAL PRINCIPLES ABOUT JUDICIARIES AND JUDGES' INDEPENDENCE IN LATIN AMERICA, Campeche, April 2008***

## II. MINIMAL CONDITIONS FOR THE PROTECTION OF THE JUDICIARY'S INDEPENDENCE

5. The signing States must ensure the following points for a better protection of the general objectives:

c) That for the compliance of their constitutional duties, the Judiciaries are the ones to fix the judicial politics, having all the necessary resources that would allow them to act with independence, swiftness and efficacy. For that purpose, it is necessary to recognize the power of the judiciary to elaborate its own budget and participate in all the decisions related to the material means for their acting.

d) That the management of the budgetary resources should be exercised by each Judiciary, in an autonomous way.

e) As regards attacks to the Independence of the judiciaries, or of the judges, the political powers shall assume, within the framework of their respective competences and in the exercise of their own authority, all those determinations and actions necessary to ensure that independence.

### ***OPINION NO. 10 (2007) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE COUNCIL FOR THE JUDICIARY AT THE SERVICE OF SOCIETY, CCJE, 2007***

## V. E. Budget of the Judiciary

73. Although the funding of courts is part of the State budget, such funding should not be subject to political fluctuations. Decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence. The arrangements for parliamentary adoption of the judicial budget should include a procedure that takes into account the opinions of the judiciary. If the Council for the Judiciary does not have a role of administration and management of the courts, it should at least be in a position to issue opinions regarding the allocation of the minimal budget which is necessary for the operation of justice, and to clarify its needs in order to justify its amount.

74. The CCJE is of the opinion that the courts can only be properly independent if they are provided with a separate budget and administered by a body independent of the executive and legislature, whether it is a Council for the Judiciary or an independent agency.

75. Although it is advocated by some States that the ministry of justice is better placed to negotiate the court budget vis-à-vis other powers, especially the ministry of finances, the CCJE is of the opinion that a system in which the Council for the Judiciary has extended financial competences requires serious consideration in those countries where such is not the case at present. It must be stressed that extended financial powers for the Council for the Judiciary imply its accountability not only vis-à-vis the executive and the legislature, but also vis-à-vis the courts and the public.

## VI. THE COUNCIL FOR THE JUDICIARY IN SERVICE OF ACCOUNTABILITY AND TRANSPARENCY OF THE JUDICIARY

94. When the Council for the Judiciary has budgetary powers, it is only logical that it should be accountable for the use of the funds in question to the Parliamentary assembly which adopted the budget. The portion of the budget allocated to the judicial system should be controlled by the Audit Office in charge of supervising the use of public money, when it exists.

### SUMMARY OF THE RECOMMENDATIONS AND CONCLUSIONS

D. On the powers of the Council for the Judiciary:

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;

#### ***SELF GOVERNANCE FOR THE JUDICIARY: BALANCING INDEPENDENCE AND ACCOUNTABILITY, General Assembly of the European Network of Councils for the Judiciary (ENCJ), 2008***

Approves the following resolution:

5) The Council for the Judiciary must manage its budget independently of the executive power.

#### ***PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO DEVELOPMENT, UN HUMAN RIGHTS COUNCIL, Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, 24 March 2009***

B. Recommendations

101. As regards the judicial budget, he recommends that:

- A minimum fixed percentage of gross domestic product (GDP) be allocated to the judiciary by the Constitution or by law. Under important domestic economic constraints, the needs of the judiciary and the court system be accorded a high level of priority in the allocation of resources.
- The judiciary be given active involvement in the preparation of its budget.
- The administration of funds allocated to the court system be entrusted directly to the judiciary or an independent body responsible for the judiciary.

#### ***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

Chapter V – Independence, efficiency and resources



33. Each state should allocate adequate resources, facilities and equipment to the courts to enable them to function in accordance with the standards laid down in Article 6 of the Convention and to enable judges to work efficiently.

40. Councils for the judiciary, where existing, or other independent authorities with responsibility for the administration of courts, the courts themselves and/or judges' professional organisations may be consulted when the judicial system's budget is being prepared.

***VILNIUS DECLARATION ON CHALLENGES AND OPPORTUNITIES FOR THE JUDICIARY IN THE CURRENT ECONOMIC CLIMATE, The European Network of Councils for the Judiciary (ENCJ), 2011***

Recommends

2. The available data suggests that European societies are not just facing a transitory crisis but are entering into a new economic landscape. It is necessary therefore to design and implement long term policies for the Judiciary adequate to this emerging situation.

10. The independence of the Judiciary and of every single judge is to be preserved as a prerequisite for the delivery of a fair and impartial justice in protecting human rights and fundamental freedoms. No necessity for cost cutting can be allowed to undermine judicial independence. It is the essential task of Councils for the Judiciary to maintain and strengthen the independence of the judiciary.

***RESOLUTION ON SALARIES, International Association of Judges (IAJ), 2012***

- Reminds that the reduction of the judges' salaries, even in the context of a serious economic crisis, must remain exceptional, minimal and proportionate;  
- [...] still, no reduction of their remuneration can be accepted if this reduction is higher than the reduction imposed to public servants, or if it leads to an inadequate remuneration with regard to their functions.

***VILAMOURA MANIFEST, JUSTICE IN FRONT OF ECONOMIC CRISIS, MEDEL, 2012***

7. To carry out their missions, the magistrates must have the appropriate resources and conditions provided by the state. The remuneration of magistrates must be of sufficient level to make them free from pressure. In this regard, the work of the CEPEJ highlights the worrying disparity in resources available to the judicial systems of European states.

***A EUROPE OF JUSTICE THAT FOSTERS DEMOCRACY AND FREEDOM AS A RESPONSE TO CRISIS, MEDEL, 2013***

Judicial systems must be more efficient in order to be able to respond in due time to the demands of parties involved in court procedures. Efficiency, however, does not imply subjecting the judiciary to a market model that relies only on the production of rulings and a culture centered on statistical results. MEDEL underlines that there can be no justice in Europe without the necessary means to ensure regular judicial functioning.

***SOFIA DECLARATION ON JUDICIAL INDEPENDENCE AND ACCOUNTABILITY, The General assembly of European Network of Councils for the Judiciary (ENCJ), 2013***

(iii) Reductions in government expenditure cannot be allowed to undermine judicial independence.

(iv) Financial stability, security of tenure and administrative independence are necessary safeguards for an independent and impartial judiciary.

(v) The protection of judicial independence can appropriately be achieved by a properly functioning council for the judiciary or a similar independent body to consider and determine or to make recommendations to government on all matters relevant to judicial remuneration and conditions.

***BRIJUNI STATEMENT OF THE PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY, Conference of Chief Justices of Central and Eastern Europe, 14 October, 2015***

Judicial administration

32. The budget of the courts should be prepared by the courts, or a competent authority in collaboration with the courts or judicial authorities, having regard to the needs of the independence of the judiciary and its administration. The amount allotted should be sufficient to enable each court to function without imposing a workload on individual judges that impairs the prompt and effective administration of justice.

***OPINION NO. 18 (2015) THE POSITION OF THE JUDICIARY AND ITS RELATION WITH THE OTHER POWERS OF STATE IN A MODERN DEMOCRACY, Consultative Council of European Judges (CCJE), 2015***

VIII: Summary of principal points

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).

***FUNDING OF THE JUDICIARY, ENCJ REPORT 2015-2016, ENCJ, 2016***

Recommendation One

Budgets will always be subject to Parliamentary scrutiny as they involve the expenditure of public resources. However, the creation of the budget should be systemically and practically free from inappropriate political interference. Courts should not be financed on the basis of discretionary decisions of official bodies but on the basis of objective and transparent criteria.

Recommendation Two

To ensure and strengthen the separation of powers, the Council for the Judiciary, or a body on which the Judiciary is represented, should be closely involved and fully informed at all stages in the budgetary process and should have an opportunity to express its views about the proposed budget to Parliament.

Recommendation Three

The preparation of the budget for the judiciary, including the administration of courts and the training of judges, should be wholly or at least partly under the control of a Council for the Judiciary or of equivalent independent and autonomous bodies. If a Council does not exist, judges should still have a decisive influence on the budgetary process.

Recommendation Four

Courts must be resourced to a level which enables them to discharge their obligation to provide an effective and efficient system for the delivery of justice. Each State should therefore allocate adequate resources, facilities and equipment to the courts to enable them to function in accordance with the standards laid down in Article 6 of the European Convention on Human Rights and to enable judges and court staff to work efficiently.

Recommendation Five

The maintenance of the rule of law ("Etat de droit") requires long-term financial stability in the funding of the judiciary.

Courts should not be funded on an annual basis but should have the certainty of longer-term financial budgets. Funding of courts should be protected from fluctuations caused by political instability.

Budgetary constraints affect the efficient functioning of justice at the risk of denying or delaying access to justice for potential litigants. This can take the form of budgetary restrictions but can also be the result of budgetary stagnation in the face of adverse influences such as an increase in caseload. Moreover, the structure of budgets can be quite different from one State to another which makes it difficult to compare.

There exists throughout Europe a great diversity in methods of funding the judiciary. It is a subject in itself. Whilst most budgets, for instance, include the cost of judicial salaries and judicial pensions, some budgets include the cost of judicial training whereas others do not. A minority of judicial budgets includes the cost of the penal system; some include the cost of court security. In some countries, caseload is an essential factor in allocating resources; other countries place greater emphasis on the budget agreed for past years. In most countries, the budget for the judiciary is separate to that of the prosecutors. It is therefore not possible to list comprehensively all those items which ought to be included in the budget for the funding of the judiciary.

Budgetary constraints should not have consequences for the quality and delivery of Justice.

#### Recommendation Six

Budgetary constraints may lead to the necessity for prioritization in the allocation of resources. Any prioritization must be determined by the judicial authority itself. These budgetary priorities must be defined in collaboration with the relevant judiciary according to transparent criteria such as caseload and the number of judges.

Budget transparency involves the extent to which citizens and members of the judiciary or other public groups can access information about and provide and/or obtain feedback on government revenues, allocations and expenditure. Therefore we distinguished: transparency around the sources of data and information used to frame decisions on revenue priorities and expenditure allocations, and transparency in the budget process.

#### Recommendation Seven

To meet the present and future legitimate expectations of society, the judicial system must have the resources to innovate and modernize such as information and communication technology.

#### Recommendation Eight

Budgetary constraints, which obviously must be taken into account, must not by themselves dictate the procedures to be followed. It is therefore necessary to make sure that budgetary constraints must not be the determining factor in:

- the case management of trials and the rules governing the right of appeal,
- the promotion of alternative dispute resolutions,
- any attempt to diminish the role of the judge in the determination of disputes (for example, by the introduction of fixed awards or penalties by non-judicial procedures).

#### Recommendation Nine

An increase of judges' workload can lead to the inability of judges to satisfy all the requirements of how cases should be properly handled. Prioritization of litigation should be avoided. Nevertheless, if the resources of the Judiciary require it, such prioritization should only be effected after consultation with all relevant stakeholders. Any prioritization policy should be open and transparent.

#### Recommendation Ten

Judicial independence is a central pillar of any constitutional system. It is fundamental in any democracy that individual judges and the judiciary as a whole are independent of all external pressures and improper influence from the other branches of government, including funding bodies. The minimum conditions for judicial independence include financial security, i.e. the right to a salary and a pension.

In order to retain and attract the highest quality judges and maintain judicial independence, judicial remuneration must at all times be commensurate with their professional responsibilities, public duties and the dignity of their office. The remuneration must be based on a general standard and rely on objective and transparent criteria, not on an assessment of the individual performance of a judge. Judicial remuneration includes salary, sickness pay, paid maternity/paternity leave and pensions.

The remuneration of judges must be constitutionally guaranteed in law and not altered to the disadvantage of judges after their appointment. Save in times of economic emergency, when there is a general reduction in comparable public service salaries and judges are treated no less favourably than others paid from the public purse, there should be no reduction in judicial remuneration.

There should be an independent body established to make informed recommendations to the government in relation to judicial remuneration, which governments should accept and implement. Where such recommendations are not followed, the reasons should be clearly and publicly explained by the government.

#### Recommendation Eleven

To guarantee the quality of justice, adequate funding must be made available to ensure that judges are appropriately trained, initially and continuously throughout their career.

#### Recommendation Twelve

If members of the judiciary are given responsibility for the administration of the courts, they should receive appropriate training and have the necessary resources in order to perform that function. Such judges should therefore be trained in relevant accounting and budgetary procedures.

### ***HIGH QUALITY JUSTICE FOR ALL MEMBER STATES OF THE COUNCIL OF EUROPE, The European Commission for the Efficiency of Justice, CEPEJ STUDIES No. 22, 2015***

The ratio of salaries of judges with salaries of other persons in the same State allows us to conclude that in almost all Member States of the Council of Europe judicial salaries are above the average wage, which indicates the relatively high social status of judges.

The CEPEJ recalls the importance of providing the judicial system with sufficient funds corresponding to the courts caseload and allowing them to cope with it in due time. Put differently, the funds and resources must be distributed within the court in compliance with its needs, and must be efficiently used. The distribution of resources for the court must be carried out in such a way as to stimulate effective time management, and the redistribution of the funds, if necessary, must be done promptly and in an effective way, in order to avoid delays and backlogs.

### ***THE WARSAW DECLARATION ON THE FUTURE OF JUSTICE IN EUROPE, The General assembly of European Network of Councils for the Judiciary (ENCJ), 2016***

#### 3. With regard to the budget for the justice system:

- the creation of the budget should be systemically and practically free from inappropriate political interference, so that courts are financed on the basis of objective and transparent criteria;
- the Council for the Judiciary or equivalent body should be closely involved at all stages in the budgetary process, and courts must be resourced to a level which provides an effective and efficient justice system;
- budgetary priorities must be defined in collaboration with the relevant judiciary according to transparent criteria, and must not themselves dictate the court procedures to be followed.

**COMPILATION OF CEPEJ GUIDELINES, European Commission for the Efficiency of Justice (CEPEJ), 2015**

Justice budgets

16. So that state efforts to develop the judicial system can be evaluated, statistical collection and processing should also be organised in such a way as to separate out the budgets for: salaries, legal aid, computerisation (equipment, investment and maintenance), justice expenses, investment in new buildings, building maintenance, operation and costs, training and education for judges as well as for prosecutors.

17. Judicial data should be collected and processed, as far as possible, in a manner that allows the budgets for operating the courts to be distinguished from those for operating the prosecution service. If the judicial system is organised in such a way that no such differentiation is possible, figures for the number of judges and the number of prosecutors could allow weighting of the statistical results or a system enabling to estimate the budget dedicated to the prosecution system should be set up.

18. The statistical information should cover both the budgets as approved and the budgets as executed.

### V. 3. WORKING CONDITIONS

#### ***PROCEDURES FOR THE EFFECTIVE IMPLEMENTATION OF THE BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, Resolution 1989/60, 15th plenary meeting, ECOSOC, 24 May 1989***

##### Procedure 5, PROCEDURES FOR THE EFFECTIVE IMPLEMENTATION OF THE BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY

In implementing principles 8 and 12 of the Basic Principles, States shall pay particular attention to the need for adequate resources for the functioning of the judicial system, including appointing a sufficient number of judges in relation to case-loads, providing the courts with necessary support staff and equipment, and offering judges appropriate personal security, remuneration and emoluments.

#### ***NINTH ANNUAL ACTIVITY REPORT OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS - 1995/96***

The African Commission on Human and Peoples' Rights at its 19th Ordinary Session held from 26th to 4th April 1996 at Ouagadougou, Burkina Faso calls upon African countries to provide judges with decent living and working conditions to enable them maintain their independence and realize their full potential and provide, with the assistance of the international community, the Judiciary with sufficient resources in order to enable the legal system fulfill its function.

#### ***BEIJING STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION, as amended in Manila at 7th Biennial Conferences of Chief Justices of Asia and the Pacific, 1997***

##### Judicial Conditions

31. Judges must receive adequate remuneration and be given appropriate terms and conditions of service. The remuneration and conditions of service of judges should not be altered to their disadvantage during their term of office, except as part of a uniform public economic measure to which the judges of a relevant court, or a majority of them, have agreed.

#### ***FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF JUDICIARY, VARIOUS SPECIAL MEASURES IMPLEMENTED IN DIFFERENT COUNTRIES TO MANAGE THE INCREASING NUMBER OF CASES COMING BEFORE THE COURTS, International Association of Judges (IAJ), 1997***

##### Conclusions

The implication for judicial power is that it must show an open mind to the reforms necessary for its modernisation while safeguarding at the same time the principles of the good administration of justice. It would be indeed counterproductive to oppose any reform in the name of those principles when one is compelled to recognise that these same principles are being eroded by the incapacity of the classic judicial system to deal with the cases coming before the courts in a reasonable time, due to the fact that the system as it exists today cannot cope with the ever increasing number and complexity of the disputes which must be resolved. It is necessary to develop new measures to find a new balance between the requirements of a modern justice system and the necessity of preserving the above mentioned principles.

The noted issues, chosen from a management point of view are:

- 1) steps to limit the number of cases coming before the courts (limiting the input)
- 2) increase the number of cases dealt with (increase the output)
- 3) speed up the process of dealing with the cases (diminish handling time)

Whereas it is incontestable that all members of the judiciary must do the best they can to carry out their work to the limits of their ability, it is also necessary and essential that the other branches of government provide the judiciary with the resources necessary to carry out their work properly.

**EUROPEAN CHARTER ON THE STATUTE FOR JUDGES AND EXPLANATORY MEMORANDUM, Council of Europe, Strasbourg, 8 - 10 July 1998**

1. GENERAL PRINCIPLES

1.8. Judges are associated through their representatives and their professional organizations in decisions relating to the administration of the courts and as to the determination of their means, and their allocation at a national and local level. They are consulted in the same manner over plans to modify their statute, and over the determination of the terms of their remuneration and of their social welfare.

**THE UNIVERSAL CHARTER OF THE JUDGE, International Association of Judges (IAJ), 1999**

Art. 14 Support

The other powers of the State must provide the judiciary with the means necessary to equip itself properly to perform its function. The judiciary must have the opportunity to take part in or to be heard on decisions taken in respect to this matter.

**PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA, African Commission on Human and Peoples Rights, 2003**

A. GENERAL PRINCIPLES APPLICABLE TO ALL LEGAL PROCEEDINGS

4) Independent tribunal

m) The tenure, adequate remuneration, pension, housing, transport, conditions of physical and social security, age of retirement, disciplinary and recourse mechanisms and other conditions of service of judicial officers shall be prescribed and guaranteed by law.

**THE BURGH HOUSE PRINCIPLES ON THE INDEPENDENCE OF THE INTERNATIONAL JUDICIARY, The Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals, 2004**

4. Service and remuneration

4.1 Judges' essential conditions of service shall be enumerated in legally binding instruments.

4.2 No adverse changes shall be introduced with regard to judges' remuneration and other essential conditions of service during their terms of office.

4.3 Judges should receive adequate remuneration which should be periodically adjusted in line with any increases in the cost of living at the seat of the court.

4.4 Conditions of service should include adequate pension arrangements.

**GENERAL REPORT, FIRST STUDY COMMISSION - ECONOMICS, JURISDICTION AND INDEPENDENCE, International Association of Judges (IAJ), 2005**



## B. Conclusions

11) The analysis of procedures is one of the main focuses in reform projects of judicial systems. A simplification of some steps or even a reduction of some steps or formalities can save time and money.

But these benefits may be jeopardized by a simultaneous reduction of staff which can often be observed in the course of these reforms. It is essential to keep in mind that the changes proposed do not affect the right to a fair trial and an impartial (and hopefully correct) decision. This question especially arises when remedies are reduced or limited or when panels of judges are substituted by single judges.

### ***PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO DEVELOPMENT, UN HUMAN RIGHTS COUNCIL, Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, 24 March 2009***

99. Regarding conditions of service, he recommends that:

- Judges be remunerated adequately, with due regard for the responsibilities and the nature of their office and without delay.
- Adequate human and material resources be allocated to ensure the proper functioning of justice.
- Special attention be paid to ensuring the security of judges, in particular the adoption of preventive security measures for increased protection of judges handling cases of large-scale corruption, organized crime, terrorism, crimes against humanity, or any other cases exposing them to higher risk.
- Besides pre-service and initial training, focused attention be paid to continuing legal education of sitting judges.

### ***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

#### Chapter V – Independence, efficiency and resources

32. The authorities responsible for the organisation and functioning of the judicial system are obliged to provide judges with conditions enabling them to fulfil their mission and should achieve efficiency while protecting and respecting judges' independence and impartiality.

35. A sufficient number of judges and appropriately qualified support staff should be allocated to the courts.

36. To prevent and reduce excessive workload in the courts, measures consistent with judicial independence should be taken to assign non-judicial tasks to other suitably qualified persons.

37. The use of electronic case management systems and information communication technologies should be promoted by both authorities and judges, and their generalised use in courts should be similarly encouraged.

#### Chapter VI – Status of the judge

53. The principal rules of the system of remuneration for professional judges should be laid down by law.

54. Judges' remuneration should be commensurate with their profession and responsibilities, and be sufficient to shield them from inducements aimed at influencing their decisions. Guarantees should exist for maintaining a reasonable remuneration in case of illness, maternity or paternity leave, as well as for the payment of a retirement pension, which should be in a reasonable relationship to their level of remuneration when working. Specific legal provisions should be introduced as a safeguard against a reduction in remuneration aimed specifically at judges.

55. Systems making judges' core remuneration dependent on performance should be avoided as they could create difficulties for the independence of judges.

***REPORT ON THE INDEPENDENCE OF THE JUDICIAL SYSTEM PART I: THE INDEPENDENCE OF JUDGES, Venice Commission, Venice, 12-13 March 2010 CDL-AD(2010)004***

IV. Conclusions

82. The following standards should be respected by states in order to ensure internal and external judicial independence

- 8. Bonuses and non-financial benefits for judges, the distribution of which involves a discretionary element, should be phased out.
- 9. As regards the budget of the judiciary, decisions on the allocation of funds to courts should be taken with the strictest respect for the principle of judicial independence. The judiciary should have the opportunity to express its views about the proposed budget to Parliament, possibly through the judicial council.

***RESOURCE GUIDE ON STRENGTHENING JUDICIAL INTEGRITY AND CAPACITY, UNODC, 2011***

II. COURT PERSONNEL: FUNCTION AND MANAGEMENT

9. Conclusions and recommendations

From this chapter, a few recommendations can be made:

- Efforts to strengthen judicial integrity and capacity should include measures to ensure and sustain the quality, motivation and continuity of skilled court personnel.
- Personnel management initiatives should be adopted to address issues such as transparent and merit-based selection and appointment systems, remuneration, career development and continuing training programmes, routine staff performance evaluations, merit systems and codes of conduct.
- Ensure that training programmes are developed in the context of the conduct of a training needs assessment and an operational analysis of the infrastructure of the court system.
- It is important that training programmes are not only relevant to court personnel, but can also be adjusted to fit the learning style of the trainees.
- A judicial reform programme that will result in new personnel or increased professionalization of court personnel needs to be supported by budgetary allocations that provide adequate salaries, benefits and workplace resources.
- In order to be credible, any incentives system for judicial personnel and court employees must be governed by a clear and transparent set of rules.
- Developing a specific code of conduct for court personnel can help to reinforce ethical standards and to create a culture of integrity in the court system.
- Any code of conduct for court personnel should reflect the needs of the judiciary, and not consist simply of a set of new rules, but rather the fostering and development of an ethical, efficient and impartial court staff.

- Developing a system where court personnel can be held accountable for violation of court rules, policies, codes of conduct or general unprofessional behaviour is an important element in creating accountability and encouraging professionalism.
- The creation of national professional associations of court administrators or court clerks can be one means of building collegiality among court staff.

***VILNIUS DECLARATION ON CHALLENGES AND OPPORTUNITIES FOR THE JUDICIARY IN THE CURRENT ECONOMIC CLIMATE, The European Network of Councils for the Judiciary (ENCJ), 2011***

Recommends

1. Special measures should be considered prevent and reduce the impact of the economic crisis on courts workload by the redistribution of human resources, the transitory reinforcement of the most affected courts and organisational remedies.

9. Those who are responsible for preparing draft legislation should be encouraged to promote clear and unambiguous laws to achieve greater legal certainty and to prevent avoidable legal disputes which increase the workload of the courts.

***OPINION NO. 15 (2012) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) ON THE SPECIALISATION OF JUDGES, Council of Europe, 2012***

A. Possible advantages and disadvantages of specialisation

b. Possible limitis and dangers of specialisation

23. Setting up specialist courts in response to public concerns (e.g. anti-terrorist courts)<sup>5</sup> 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

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.

C. Certain aspects of specialisation

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.

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.

***A EUROPE OF JUSTICE THAT FOSTERS DEMOCRACY AND FREEDOM AS A RESPONSE TO CRISIS, MEDEL, 2013***

Courts should be entitled to a sufficient number of judges and support personnel with appropriate qualifications. Judges' salaries should be sufficient to protect them from any form of pressure aimed at influencing their decisions.

***BRIJUNI STATEMENT OF THE PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY,  
Conference of Chief Justices of Central and Eastern Europe, 14 October, 2015***

Judicial conditions

27. Judges must receive compensation commensurate with their profession and responsibilities and be given appropriate terms and conditions of service. Judges must be provided with adequate training. Judges must also be provided with adequate facilities in which to work that reflect the importance of the rule of law in society. The courts should be provided with a sufficient number of judges and appropriately qualified support staff. The compensation of judges must be protected from reduction by specific legislation. Guarantees should exist for maintaining a reasonable remuneration of judges in case of disability, as well as for the payment of a retirement pension, which should be in a reasonable relationship to their level of remuneration when working. The compensation and conditions of service of judges should not be altered to the disadvantage of judges during their term of office, except in the case of an economic or budgetary emergency.

28. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State in accordance with national law, judges should enjoy personal immunity from civil suits and immunity from paying indemnification, based on allegations of improper acts or omissions in the exercise of their judicial functions. No judge should be subjected to criminal proceedings for criminal conduct without the withdrawal or waiver of the judge's immunity. However, because no judge is above the law, whenever a judge engages in criminal conduct, the waiver of his immunity should be forthcoming.

***BEST PRACTICE GUIDE FOR MANAGING SUPREME COURTS, European Union 2017***

**2. INSTITUTIONAL SETUP OF THE RESEARCH AND DOCUMENTATION UNITS WITHIN SUPREME COURTS**

**A. General observations**

Tasks related to research and documentation work that can be delegated by a judge to a separate research and documentation unit are:

- ✓ research and analysis of legislation and case law;
- ✓ drafting of simple or standardized documents;
- ✓ monitoring international/EU legislation and case law.

**C. Recommendations and best practices**

To ensure high-quality judicial decisions without undue delays, judges must be supported in their research work, meaning that they should be assisted in analysing national case law and legislation, in preparing draft decisions and in monitoring international as well as EU legislation and case law.

In an ideal scenario, judges would not only be supported by a research and documentation unit, but also by a research assistant. A separate research and documentation unit that assists all the judges avoids the need for every judge's research assistant to monitor the national and international case law and legislation. In addition, the research and documentation unit should also conduct research on broader topics, not related to a specific case. In this way, cases can be dealt with as efficiently as possible, since the judge has a general and broader information system on which to rely. Such broader research may also be published on the Court's website to inform the general public as well.

However, research assistants are better placed to prepare a draft decision.

Given the growing importance of EU law, EU legislation and the case law of the EU Court of Justice must be monitored continuously by the research and documentation unit so that judges are well informed of recent developments. The Supreme Court of Lithuania considers the constant monitoring of EU case law an advantage, improving their efficiency.

## V. 4. ALTERNATIVE DISPUTE RESOLUTION

### ***GENERAL REPORT, FIRST STUDY COMMISSION - ECONOMICS, JURISDICTION AND INDEPENDENCE, International Association of Judges (IAJ), 2005***

#### Conclusions

9) Alternative Dispute Resolution (ADR) could be an efficient means of finding solutions in conflicts. ADR might be better accepted by all parties involved. In some cases the aspect of reducing the workload of courts might also play a role. If ADR is mandatory before the litigation can be brought before the court, it is essential that parties can afford it, otherwise access to justice is denied.

### ***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

#### Chapter V – Independence, efficiency and resources

39. Alternative dispute resolution mechanisms should be promoted.

### ***MAGNA CARTA OF JUDGES, CCJE, Council of Europe, Strasbourg, 17 November 2010***

#### Access to justice and transparency

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.

### ***VILNIUS DECLARATION ON CHALLENGES AND OPPORTUNITIES FOR THE JUDICIARY IN THE CURRENT ECONOMIC CLIMATE, The European Network of Councils for the Judiciary (ENCJ), 2011***

#### Recommends

8. Systems of alternative dispute resolution can offer citizens a viable alternative method of achieving a peaceful and more comprehensive solution to their conflicts. Legislative measures to strengthen to role of mediation and conciliation and the establishment of adequate public services and an active role of courts in supporting and promoting these kind of alternatives is to be encouraged.

### ***HIGH QUALITY JUSTICE FOR ALL MEMBER STATES OF THE COUNCIL OF EUROPE, The European Commission for the Efficiency of Justice, CEPEJ STUDIES No. 22, 2015***

Following the results of the analysis of the implementation of the Council of Europe recommendations on family mediation, the Working Group has developed the following pieces of advice:

- publicising the alternative means of dispute resolution both among citizens and among judges;
- the enhancement of the financial support in order to prevent the financial imbalances of the parties;
- a more serious consideration of the interests of children;
- the elaboration of a mediators' Code of practice;
- the standardisation of mediator training within the whole of Europe;
- rectification of the status of mediated agreements in the national legislation;
- the creation of procedures for International family mediation for the “conjoints” or citizens of different States;

- the obligation on judges to notify citizens about the availability of alternative means of family dispute resolution;
- the standardisation of the principle of confidentiality and the determination of the sanctions in case of violation of this principle;
- increasing State expenses for the financial support of alternative means of family dispute resolution;
- the elaboration of specific rules concerning the access to the mediator status;
- rectification of the terms for participation of children in alternative dispute resolution proceedings;
- establishing the terms for the fulfilment of obligations stemming from the mediated agreement.

Analysis of the implementation of this recommendation allowed the Working Group to develop several pieces of advice:

- to take steps for increasing the public confidence in mediation in penal matters;
- to specify the competence of the courts in respect of the transfer of cases for mediation procedure;
- to specify the guarantees of the rights of people under the legal age participating in the mediation procedure;
- to establish the guarantees of the rights of representatives of vulnerable social groups participating in the mediation procedure;
- to create the necessary conditions for ensuring the independence of mediators;
- to specify the rules for the professional qualification of mediators;
- to improve the rules of confidentiality;
- to specify the sources of financial support for mediation.

Thus, the Working Group above all addressed the issue of the availability and the quality of mediation procedures in Member States and, in particular, the issue of their availability over the whole territory of a given State. Therefore, the Working Group advises:

- to increase the financial and staffing support;
- to encourage judges to raise awareness of the parties in the proceedings of the possibility to resort to alternative means of dispute resolution;
- to define within the Bar Codes of Conduct the obligation of lawyers to offer alternative means of dispute resolution to their clients;
- to introduce a detailed statutory regulation about the confidentiality principle; to make it mandatory for any stage of the proceedings and to establish sanctions with regard to the violations of this principle;
- to improve the statutory regulation of issues concerning mediators' training and qualification;
- to consider the interests of children (under the family mediation procedure);
- to create codified acts regulating the mediation activity in family and civil matters;
- to create disciplinary procedures engaging the liability of mediators in case of violation of the Code provisions regulating their activity.

In the light of the necessity for increasing the level of public awareness of the possibilities of these procedures, the Working Group developed the following advices:

- information on the advantages of alternative means of dispute resolution advantages and the specific way of using this means should be made available for all citizens (this advice relates not only to the Members States, but also to the CEPEJ itself, since the Working Group offers to create the special page on the CEPEJ web-site dedicated to this topic);
- it should be fixed by statute that the law enforcement authority should inform the victims and the criminals about the application of alternative means of dispute resolution;

- the awareness of law enforcement officers of mediation procedures in the penal matters should be improved;
- the judicial officers' awareness of applying the alternative means of dispute resolution in penal matters should be increased and the communication between judges and mediators should be stimulated;
- the level of lawyers' awareness of the use of alternative means dispute resolution using should be increased;
- non-government organizations and social workers should be involved in the development of the process of alternative means of dispute resolution.

## V. 5. COURTS' ADMINISTRATION

### ***FIRST STUDY COMMISSION JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY MEETING IN VIENNA, CONCLUSION ADMINISTRATION OF THE COURTS IN THE CONTEXT OF THE INDEPENDENCE OF THE JUDGE 11 - 13 November 1981***

1. The number of judges and the staff ought to be established by law or by statutory regulation, according to the opinion of the judicial authorities based on uniform criteria, it being understood that, when a vacancy occurs, it ought to be filled within the best possible delay.

Firstly, In so far as the assignment of judges is concerned: in some countries the matter is decided by the President of the court, whether done at the beginning of the year or during the course of the year. In other countries the assignments arise by nomination to the particular post concerned, i.e. in the division where the predecessor being replaced used to sit.

Secondly, so far as the distribution of cases is concerned, this is carried out by the President of the court or some other judicial organ, or by drawing of lots or in accordance with predetermined criteria settled down by law or by regulation. The Commission thinks that, whatever is the system adopted, it must on the one hand guarantee the independence of the judge and on the other hand prevent arbitrariness.

### ***MONTREAL DECLARATION, UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE, International Association of Judicial Independence and World Peace (JIWP), 1983***

#### Court Administration

2.40 The main responsibility for court administration shall vest in the judiciary.

2.41 It shall be a priority of the highest order, for the state to provide adequate resources to allow for the due administration of justice, including physical facilities appropriate for the maintenance of judicial independence, dignity and efficiency, judicial and administrative personnel, and operating budgets.

2.43 The judiciary shall alone be responsible for assigning cases to individual judges or to sections of a court composed of several judges, in accordance with law or rules of court.

2.44 The head of the court may exercise supervisory powers over judges on administrative matters.

### ***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE ("Singhvi Declaration"), ECOSOC, 1985***

#### Court Administration

32. The main responsibility for court administration including supervision and disciplinary control of administration personnel and support staff shall vest in the judiciary, or in a body in which the judiciary is represented and has an effective role.

33. It shall be a priority of the highest order for the State to provide adequate resources to allow for the due administration of justice, including physical facilities appropriate for the maintenance of judicial independence, dignity and efficiency; judicial and administrative personnel; and operating budgets.

36. The head of the court may exercise supervisory powers over judges only in administrative matters.



**PALERMO DECLARATION, ELEMENTS OF A EUROPEAN STATUTE OF MAGISTRACY, MEDEL, 1993**

IV. The Judiciary Functions

4.2. The general assembly of the magistrates of the jurisdiction elects, among its members, for a determined period, those who will have the responsibility of the administration of the jurisdiction. This competence can also be assigned to the Supreme Council of Magistrates.

**BEIJING STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION, as amended in Manila at 7th Biennial Conferences of Chief Justices of Asia and the Pacific, 1997**

Judicial Administration

35. The assignment of cases to judges is a matter of judicial administration over which ultimate control must belong to the chief judicial officer of the relevant court.

36. The principal responsibility for court administration, including appointment, supervision and disciplinary control of administrative personnel and support staff must vest in the judiciary, or in a body in which the judiciary is represented and has an effective role.

**FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF JUDICIARY, VARIOUS SPECIAL MEASURES IMPLEMENTED IN DIFFERENT COUNTRIES TO MANAGE THE INCREASING NUMBER OF CASES COMING BEFORE THE COURTS, International Association of Judges (IAJ), 1997**

Summary of the suggestions which would lead to an increase of the output by efficient management of resources.

- Mobile judges
- Judges sitting alone dealing with matters in which they have experience (or else limited jurisdiction).
- More attention given to the length of time and the cost in relation to the importance of the case,
- Deviation from the principle that parties have total control of the process,
- The judge must identify the issues which require proof,
- A filter-system on the appellate level, based on objective criteria in order to exclude cases which are brought only for delay or are abusive or vexatious,
- greater staffing levels to assist the judges,
- more computerised assistance.

It is the commission's view that before any steps in order to improve case-load management can be taken, they must be evaluated having regard to their real effects on case-load and their compatibility with the principles of justice.

**EUROPEAN CHARTER ON THE STATUTE FOR JUDGES AND EXPLANATORY MEMORANDUM, Council of Europe, Strasbourg, 8 - 10 July 1998**

1.8. Judges are associated through their representatives and their professional organizations in decisions relating to the administration of the courts and as to the determination of their means, and their allocation at a national and local level. They are consulted in the same manner over plans to modify their statute, and over the determination of the terms of their remuneration and of their social welfare.

**OPINION NO. 1 (2001) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)  
FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF COUNCIL OF EUROPE ON  
STANDARDS CONCERNING THE INDEPENDENCE OF THE JUDICIARY AND THE  
IRREMOVABILITY OF JUDGES, Council of Europe, 2001**

Independence within the judiciary

69. Court inspection systems, in the countries where they exist, should not concern themselves with the merits or the correctness of decisions and should not lead judges, on grounds of efficiency, to favour productivity over the proper performance of their role, which is to come to a carefully considered decision in keeping with the interests of those seeking justice.

Conclusions

73. The CCJE Considered that the critical matter for member States is to put into full effect principles already developed (paragraph 6) and, after examining the standards contained in particular Recommendation No. R (94) 12 on the independence, efficiency and role of judges, it concluded as follows:

(10) The use of statistical data and the court inspection systems shall not serve to prejudice the independence of judges (paragraphs 27 and 69).

**OPINION NO. 2 (2001) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)  
FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE  
ON THE FUNDING AND MANAGEMENT OF COURTS WITH REFERENCE TO THE EFFICIENCY  
OF THE JUDICIARY AND TO ARTICLE 6 OF EUROPEAN CONVENTION ON HUMAN RIGHTS,  
Council of Europe, 2001**

13. If judges are given responsibility for the administration of the courts, they should receive appropriate training and have the necessary support in order to carry out the task. In any event, it is important that judges are responsible for all administrative decisions which directly affect performance of the courts' functions.

**FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY, FINAL REPORT, THE INDEPENDENCE OF THE INDIVIDUAL JUDGE WITHIN HIS OWN ORGANIZATION, International Association of Judges (IAJ), 2000**

Conclusions

5. As regards the relationship between the judges on the one hand and the presidents of courts, the Superior Councils of Justice where they exist and the ministry of justice, on the other hand, it is essential that such a relationship is properly structured and regulated so as to ensure that the independence of the individual judge is not affected. In this context it should be emphasised that presidents of courts must be judges. Furthermore the administration of the judiciary should always be carried out by the judiciary itself or by an independent authority with substantial representation of the judiciary, at least where there is no other established tradition of handling that administration effectively and without influencing the judicial function.

**FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY, CONCLUSIONS, THE APPOINTMENT AND THE ROLE OF PRESIDENTS OF COURTS, International Association of Judges (IAJ), 2000**

Conclusions

1 The organisation and administration of the judicial system should be structured in such a way as to avoid or eliminate not only direct but indirect influence by public authorities or any other outside interest on the exercise of judicial functions by the judiciary.

2 The president of a court must be a judge. Presidents of courts should in principle be chosen from persons who have already held judicial office. Their functions and areas of competence should be objectively defined by regulation or other means so that they can act in full independence of outside interests. The independence of a president of a court in the exercise of his administrative functions should enjoy the same protection as judges do in the exercise of their judicial functions. Therefore he should not be removed from office before the expiry of his term.

3 The presidents of courts should not exercise their administrative functions in a manner which could compromise the independence of other judges or unduly influence them in the exercise of their judicial functions. The primacy of president of courts in administrative matters should not be transposed and used to influence judicial hearings or judicial decisions. Practices and procedures should guarantee, particularly in courts where more than one judge presides, that the president of the court does not exercise undue influence on other judges.

4 The judiciary as a whole, but in particular presidents of courts, should be consulted before proposals, by way of legislation or otherwise, are adopted to alter the structure or organisation of the courts.

5 As regards budgetary matters and the allocation of resources for the functioning of the judicial system, this should be sufficient to enable the judiciary to fully exercise its functions, but in particular, should not be a means by which pressure is placed on judges which could affect their independence. Presidents of courts should at least be consulted as to the budgetary and other resources required by the courts to carry out their judicial functions

**FIRST STUDY COMMISSION, JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY Meeting in Madrid, CONCLUSIONS THE APPOINTMENT AND ROLE OF PRESIDENTS OF COURTS, 23 - 27 September 2001**

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interests. The independence of a president of a court in the exercise of his administrative functions should enjoy the same protection as judges do in the exercise of their judicial functions. Therefore he should not be removed from office before the expiry of his term.

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5 [...] Presidents of courts should at least be consulted as to the budgetary and other resources required by the courts to carry out their judicial functions.

***THE BURGH HOUSE PRINCIPLES ON THE INDEPENDENCE OF THE INTERNATIONAL JUDICIARY, The Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals, 2004***

1. Independence and freedom from interference

1.1 The court and the judges shall exercise their functions free from direct or indirect interference or influence by any person or entity.

1.2 Where a court is established as an organ or under the auspices of an international organisation, the court and judges shall exercise their judicial functions free from interference from other organs or authorities of that organisation. This freedom shall apply both to the judicial process in pending cases, including the assignment of cases to particular judges, and to the operation of the court and its registry.

1.3 The court shall be free to determine the conditions for its internal administration, including staff recruitment policy, information systems and allocation of budgetary expenditure.

1.4 Deliberations of the court shall remain confidential.

17. Misconduct

17.1 Each court shall establish rules of procedure to address a specific complaint of misconduct or breach of duty on the part of a judge that may affect independence or impartiality.

17.2 Such a complaint may, if clearly unfounded, be resolved on a summary basis. In any case where the court determines that fuller investigation is required, the rules shall establish adequate safeguards to protect the judges' rights and interests and to ensure appropriate confidentiality of the proceedings.

17.3 The governing instruments of the court shall provide for appropriate measures, including the removal from office of a judge.

17.4 The outcome of any complaint shall be communicated to the complainant.

**GENERAL REPORT, FIRST STUDY COMMISSION - ECONOMICS, JURISDICTION AND INDEPENDENCE, International Association of Judges (IAJ), 2005**

B. Conclusions

2) New Public Management (NPM) is not applicable to the jurisdiction of courts and judges to determine the law and apply the rights of people according to law. However that will not prevent an exchange of opinions about how to employ best practice to court procedures, so long as that exchange does not infringe the judge's right to follow procedures without the threat of adverse consequences to him/her personally.

3) NPM can be used for the management of the courts. But even here care must be taken not to infringe the independence of the judiciary in an indirect way. A lack of resources (number of judges, staff) could put judges under pressure to act in a certain way in proceedings.

**DECLARATION OF MINIMAL PRINCIPLES ABOUT JUDICIARIES AND JUDGES' INDEPENDENCE IN LATIN AMERICA, Campeche, April 2008**

II. MINIMAL CONDITIONS FOR THE PROTECTION OF THE JUDICIARY'S

5. The signing States must ensure the following points for a better protection of the general objectives:

b) That everything related to the administrative and disciplinary management of the members of the judiciary is the responsibility of the judiciary proper, who shall organize it by means of politically independent bodies with delegated self-governing powers with the force of law, integrated by a substantial and representative group of constitutionally appointed judges, preferably with a judicial career, with an organization and a way of acting that would ensure an autonomous ruling of the judiciary and an independent and impartial acting of judges and courts.

**OPINION NO. 10 (2007) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE COUNCIL FOR THE JUDICIARY AT THE SERVICE OF SOCIETY, CCJE, 2007**

V. F. Court administration and management

76. The determination of the conditions for the allocation of the budget to the various courts and the decision as to the body which should examine and report on the efficiency of the courts are sensitive issues. The CCJE considers that the Council for the Judiciary should have competence in this respect.

77. The Council for the Judiciary should not have competence in respect of performance management of individual judges.

78. The CCJE is of the opinion that the Council for the Judiciary can make a positive contribution to the promotion of quality of justice. Apart from developing policy in this respect, sufficient funding of the courts shall be provided to enable them to fulfil their obligations in this respect. In some countries systems have been set up to account for and measure the quality of justice; it is important to inquire into the results of such developments. As to developing policy measuring quality, it is important that the Council for the Judiciary can obtain from the courts relevant data and statistics.

79. The Council for the Judiciary should supervise the organisation of the inspection service so that inspection is compatible with judicial independence. This is particularly important where inspection services belong to the executive.

**SELF GOVERNANCE FOR THE JUDICIARY: BALANCING INDEPENDENCE AND ACCOUNTABILITY, General Assembly of the European Network of Councils for the Judiciary (ENCJ), 2008**

6) Judicial self governance calls for the professionalization of judicial administration.

**THE KYIV RECOMMENDATIONS ON JUDICIAL INDEPENDENCE IN EASTERN EUROPE, SOUTH CAUCASUS AND CENTRAL ASIA, OSCE, 2010**

Transparent and Independent Selection of Court Chairpersons

16. The selection of court chairpersons should be transparent. Vacancies for the post of court chairpersons shall be published. All judges with the necessary seniority/experience may apply. The body competent to select may interview the candidates. A good option is to have the judges of the particular court elect the court chairperson. In case of executive appointment, an advisory body - such as a Judicial Council or Qualification Commission - taking also into consideration views from the local bench, should be entitled to make a recommendation which the executive may only reject by reasoned decision. In this case the advisory body may recommend a different candidate. Additionally, in order to protect against excessive executive influence, the advisory body should be able to override the executive veto by qualified majority vote.

**MAGNA CARTA OF JUDGES, CCJE, Council of Europe, Strasbourg, 17 November 2010**

Guarantees of independence

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.

**RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010**

Chapter II – External independence

12. 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 professionals whose tasks are related to the work of judges in order to facilitate an effective and efficient administration of justice.

Chapter V – Independence, efficiency and resources

40. Councils for the judiciary, where existing, or other independent authorities with responsibility for the administration of courts, the courts themselves and/or judges' professional organisations may be consulted when the judicial system's budget is being prepared.

41. Judges should be encouraged to be involved in courts' administration.

**VILNIUS DECLARATION ON CHALLENGES AND OPPORTUNITIES FOR THE JUDICIARY IN THE CURRENT ECONOMIC CLIMATE, The European Network of Councils for the Judiciary (ENCJ), 2011**

## Recommends

3. The new landscape necessitates taking the opportunity to undertake measures aimed at improving the efficiency of the Courts, a situation not necessarily perceived and dealt with in better times to rethink the judicial map, to introduce and reform the procedures and the internal organisation of the courts and the integration of the innovative information and communication technologies which are essential features to increase this efficiency of the court system.

4. Investment in administration of justice and modern technologies and the strengthening of human resources in courts should be encouraged in order to make judiciary more resilient to future challenges.

5. Judiciaries and judges should be involved in the necessary reforms.

6. Councils for the Judiciary or autonomous Courts' Administrations should assume a significant role always taking into account and respecting the competences of the other powers of State.

### ***OPINION NO. 15 (2012) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) ON THE SPECIALISATION OF JUDGES, Council of Europe, 2012***

#### C. Certain aspects of specialisation

##### 4. Human, material and financial resources

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.

### ***BEIJING STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION, as amended in Manila at 7th Biennial Conferences of Chief Justices of Asia and the Pacific, 1997***

#### Judicial Administration

35. The assignment of cases to judges is a matter of judicial administration over which ultimate control must belong to the chief judicial officer of the relevant court.

36. The principal responsibility for court administration, including appointment, supervision and disciplinary control of administrative personnel and support staff must vest in the judiciary, or in a body in which the judiciary is represented and has an effective role.

37. The budget of the courts should be prepared by the courts or a competent authority in collaboration with the courts having regard to the needs of the independence of the judiciary and its administration. The amount allotted should be sufficient to enable each court to function without an excessive workload.

### ***BRIJUNI STATEMENT OF THE PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY, Conference of Chief Justices of Central and Eastern Europe, 14 October, 2015***

#### JUDICIAL ADMINISTRATION

30. The court presidents or chairpersons should not have the exclusive competence to make administrative decisions that can affect substantive adjudication of particular cases. The assignment of cases to judges should be random or on the basis of clear, objective and transparent criteria predetermined by a board of judges of the court.

31. The principal responsibility for court administration, including appointment, supervision and disciplinary control of administrative personnel and support staff must vest in the judiciary or in a competent body in which the judiciary has a majority representation or otherwise has an effective role.

32. The budget of the courts should be prepared by the courts, or a competent authority in collaboration with the courts or judicial authorities, having regard to the needs of the independence of the judiciary and its administration. The amount allotted should be sufficient to enable each court to function without imposing a workload on individual judges that impairs the prompt and effective administration of justice.

**OPINION NO. 19 (2016) ON THE ROLE OF COURT PRESIDENTS, Consultative Council of European Judges, Council of Europe, 2016**

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. 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.

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.

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. Court presidents, acting as guardians of the court's independence, impartiality and efficiency, should themselves respect the internal independence of judges within their courts.

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.

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 .

6. The role of court presidents in the allocation of budgetary means to the court should be significant, if not decisive, and they should have the power to manage the budget within their courts.

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.

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. 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.

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.



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. 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.

11. The termination of the term of office of a court president should in principle not affect his/her position as a judge.

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.

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.

## ***BEST PRACTICE GUIDE FOR MANAGING SUPREME COURTS, European Union 2017***

### I. Introduction

#### 4. BASIC PRINCIPLES FOR COURT MANAGEMENT

Running a court is becoming similar to running a business and traditional management insights have also found their way into institutions in the public sector. Aspects related to effective court management:

- culture;
- structures;
- processes;
- instruments;
- competences.

*Culture.* In order for court management to be successful and attain the desired goals, all members of the organisation should share and internalise the same norms and values. The organisation's culture is therefore an important aspect of the success or failure of court management. Culture refers to the shared norms, values and implicit assumptions held by the members of an organisation. These norms, values and assumptions will influence how they perceive their environment and how they will act within the organisation. Such shared values are especially important when introducing changes into the organisation. It is essential that the court staff and judges are committed to the changes, as well as the changes being supported by other stakeholders such as lawyers. A shared vision provides a source of motivation and helps all to remain focused. For example, if a court wants to introduce timeframes for the different types of proceedings, it is important to involve stakeholders to determine these timeframes and to explain to all persons involved (court staff, judges, lawyers, etc.) why they are so important for the efficient functioning of the court. Good communication with everyone affected is therefore essential when introducing changes.

Effective leadership is highly relevant to effective court management. Leaders must ensure that the organisation's norms and values are protected and developed. They determine the culture of their organisation. If a court wants to introduce changes in its functioning, the leader (the president of the court, but also other key judges) must motivate others to be dedicated to the proposed changes.

*Structures.* Structure, the second aspect of successful court management, refers to the allocation of competences, tasks and responsibilities. One person should be appointed responsible for every task. For example, if a court wants to publish press releases to communicate certain events or decisions, the court should identify who is responsible for drafting the press release, for approval of the content of the press release and for the actual publication of the press release. If the person responsible for a task is not identified, it will most likely not be performed.

*Processes.* The third aspect of effective court management that we will discuss are processes. Processes refer to the succession of activities. Proceduralisation of activities makes these activities a natural step to follow in the workings of the court. Practices will become more useful if they are

embedded in the routines or daily practice of the court. For example, information on the length of proceedings is available in almost every country. However, it is only when the length of proceedings is monitored continuously and in real-time that this increases the efficiency of the justice system. There should thus be routine monitoring of the length of proceedings from the moment the case arrives at the court until it is definitively handled (including administrative obligations such as filing, etc.), preferably in a system that automatically gives an early warning.

*Instruments.* Instruments are practical tools that should be used when managing the court. They include, for example, guidelines on how cases will be allocated, guidelines on how the court will interact with the media, training modules on the electronic case management system, and documents that record the agreed timeframes. These guidelines can either be laid down in internal documents or in legislation.

*Competences.* Competences refers to the knowledge, expertise and skills of the different court actors that are necessary to fulfil their tasks. Competences should be developed and utilised. Therefore, a clear organisation chart is a minimum requirement. Defining the tasks and assigning each to specific staff members is not only important for getting things done (as already demonstrated in our discussion of structures above), it is also important to identify the target groups for training and forums in which to exchange experiences and good practices. Supreme Courts should therefore attempt to develop the competences of their staff to the fullest potential. Press judges and communication advisors should, for example, build their expertise by participating in specific media training and by attending meetings with others who fulfil the same function in order to share experiences and learn from each other.

*Conclusion.* The court leaders should ensure, above all, that this practice is embedded in the shared values of the organisation. In this context, it helps to involve all stakeholders in the process of introducing these changes and to communicate clearly about the objectives of the proposed changes and how they fit into the organisation's vision. In order for the practice to be successful, it is also important that everyone knows their role and that the tasks are clearly distributed. Furthermore, the practices should become embedded in the routines of the Supreme Court. It is convenient if people can refer to guidelines or other instruments when carrying out their tasks. Finally, court personnel and judges should be given the opportunity to further develop their competences by participating in ongoing training and attending meetings, etc.

#### IV Administration of Supreme Courts: focus on the allocation of cases and length of proceedings

##### C. Recommendation and best practices

Implement a(n) (electronic) system to control the length of proceedings through the use of timeframes and the continuous and real-time monitoring of these timeframes.

Publish the agreed timeframes as well as statistics about the length of proceedings per type of case (at least annually).

Judges should show proactive case management.

Implement an electronic document management system and the use of electronic communication.

Provide procedural sanctions against parties causing delay and exhibiting vexatious behaviour.

Provide a flexible case assignment system, as well as the reallocation of judges as an *ultimum remedium*.

## V. 6. INTERNATIONAL DIMENSION

### ***OPINION NO. 10 (2007) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE COUNCIL FOR THE JUDICIARY AT THE SERVICE OF SOCIETY, CCJE, 2007***

#### V. I. Co-operation activities with other bodies on national, European and international level

88. The CCJE notes that in some States the responsibilities of the Council for the Judiciary are subdivided between several agencies. The resulting variety of national arrangements is further complicated by the fact that in some areas (e.g., training) a single institution may be competent, when in other areas competences are divided. It is not for the CCJE, at this stage, to take a stand with respect to an optimal scheme for the relations between separate agencies. Aware of the importance of national legal traditions as to the way in which such bodies have developed, the CCJE considers nonetheless the need to recommend that co-operation frameworks, under the leadership of the Council for the Judiciary, be set up, so that, when several agencies share the Council's tasks, smooth achievement of these tasks may be ensured. Such a process is also likely to favour institutional evolution in the sense of progressive unification of agencies (e.g. in the area of training). This also concerns co-operation with the Councils for the administrative judiciary. Cooperation with the Councils for the prosecutors, if such separate bodies exist, may also be appropriate.

89. The CCJE also stresses the importance of co-operation at the European and international levels between Councils for the Judiciary with respect to all areas in which Councils are active at the national level.

90. The CCJE acknowledges that the work of the European Network of the Councils for the Judiciary (which plays a general co-operative role between the councils for the judiciary) and the activities of the Lisbon Network and of the European Judicial Training Network (which are competent in the area of judicial training) deserve recognition and support. These Networks have been fruitful interlocutors for the CCJE.

#### SUMMARY OF THE RECOMMENDATIONS AND CONCLUSIONS

##### D. On the powers of the Council for the Judiciary:

i) co-operation with the different Councils for the Judiciary at the European and international levels should be encouraged.

### ***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

#### Chapter V – Independence, efficiency and resources

43. States should provide courts with the appropriate means to enable judges to fulfil their functions efficiently in cases involving foreign or international elements and to support international co-operation and relations between judges.

## V. 7. CASE SELECTION AND ALLOCATION

### ***THE SIRACUSA DRAFT PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, 1981***

Assignment of cases

Art. 19. The court itself should be responsible for assigning cases to individual judges or to sections of a court composed of several judges, in accordance with law or rules of court.

### ***MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE, International Bar Association (IBA), 1982***

A Judges and the Executive

11 a) Division of work among judges should ordinarily be done under a predetermined plan, which can be changed in certain clearly defined circumstances.

b) In countries where the power of division of judicial work is vested in the Chief Justice, it is not considered inconsistent with judicial independence to accord to the Chief Justice the power to change the predetermined plan for sound reasons, preferably in consultation with the senior judges when practicable.

c) Subject to (a), the exclusive responsibility for case assignment should be vested in a responsible judge, preferably the President of the Court.

### ***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE (“Singhvi Declaration”), ECOSOC, 1985***

Court Administration

35. The judiciary shall alone be responsible for assigning cases to individual judges or to sections of a court composed of several judges, in accordance with law or rules of court.

### ***BEIJING STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION, as amended in Manila at 7th Biennial Conferences of Chief Justices of Asia and the Pacific, 1997***

Judicial Administration

35. The assignment of cases to judges is a matter of judicial administration over which ultimate control must belong to the chief judicial officer of the relevant court.

### ***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

Chapter V – Independence, efficiency and resources

37. The use of electronic case management systems and information communication technologies should be promoted by both authorities and judges, and their generalised use in courts should be similarly encouraged.

### ***RESOURCE GUIDE ON STRENGTHENING JUDICIAL INTEGRITY AND CAPACITY, UNODC, 2011***

III. CASE AND COURT MANAGEMENT

## 8. Conclusions and recommendations

- Justice systems may gain an important advantage by adopting case and court management principles and techniques.
- Judicial information systems (such as dockets, files, case tracking and management systems) must be:
  - (a) Well organized,
  - (b) Adequately secured by court officials,
  - (c) Accessible by those who have the right to do it, and
  - (d) Able to collect consistent, standardized and up-to-date data.
- All judicial officers should have ready access to judgments (case-law) either in manual or electronic form both at national and international level.
- The main rules and guidelines for case and court management are the same with both traditional and electronic enhanced systems.
- Case assignment systems can be:
  - (a) Random or deliberate,
  - (b) Automated or managed by operators,
  - (c) Informal or formal, or
  - (d) Rigid or flexible.
- A random case assignment system is advisable in judiciaries affected by problems of corruption and low level of public trust.
- A flexible case assignment system helps the court to better adapt to unforeseen changes in the caseload.
- In any case it is important to achieve a high degree of internal and external transparency in case assignment.
- The involvement of lawyers, bar associations and public prosecutor offices can help the design and the monitoring of case assignment systems.
- Strategies should be designed to face unforeseen changes in the caseload (consider flying brigades, or flexible territorial jurisdiction).
- Courts should actively monitor and control the progress of cases, from initiation through trial or other initial disposition to the completion of all post-disposition court work.
- The effective use of case management techniques and practices improves the efficiency in the use of justice systems resources, hence reducing the costs of justice operation.
- Judges and court staff should play an active role in managing the flow of judicial proceedings.
- The successful adoption of case management techniques requires difficult changes related with the professional identity of judges and lawyers and thus articulated change management strategies.
- The court control over cases entails the implementation of two basic principles: early court intervention and continuous court control of case progress.
- ICT can support case management systems techniques, but case management can be performed also with more traditional instruments.
- Courts should consider to adopt differentiated case management systems so as to have several procedural tracks based on criteria such as:
  - (a) Amount of attention they need from judges and lawyers,
  - (b) Value of the case,
  - (c) Characteristics of the procedure, and
  - (d) Legal issues involved.
- When adopting a case management approach, judges must be prepared to preside and take appropriate actions to ensure that:
  - (a) All parties are prepared to proceed,
  - (b) The trial commences as scheduled,
  - (c) All parties have a fair opportunity to present evidence, and
  - (d) The trial proceeds to conclusions without unnecessary interruptions.
- The setting of timeframes of proceedings is a necessary condition to start measuring and comparing case processing delays.

- Case management systems have to be supported by well-designed training programmes.
- A practice of collaboration among the different agencies and stakeholders is useful for designing and implementing case management because:
  - (a) It helps to build commitment among all the key players,
  - (b) It creates a proper environment for the development of innovative policies, and
  - (c) It points out that the responsibility for timely case processing is not just in the court operations but also includes other players.
- Technology offers opportunities for reconfiguring the functioning of justice that cannot be grasped without complex changes at the procedural, organizational and cultural levels.
- The introduction of ICT in courts bears the risks of large investments with little impact.
- Judicial officials who contemplate ICT programmes are advised to engage in a careful feasibility and cost/benefit analysis with the assistance of experts.
- Court information systems must provide large amount of information, rapidly and economically, to a broad range of users.
- Information and court records must be kept up to date, accurate, prompt and easily accessible.
- ICT development requires:
  - (a) A sound ICT governance structure,
  - (b) Robust technological infrastructure,
  - (c) Focused legal and procedural changes,
  - (d) Enduring commitment and long-term investment,
  - (e) Strong judicial leadership,
  - (f) Maintenance, updates and cyclical replacement of hardware and software,
  - (g) Initial and continuous training

***MT. SCOPUS APPROVED REVISED INTERNATIONAL STANDARDS OF JUDICIAL INDEPENDENCE, International Association of Judicial Independence and World Peace, 2008, 2011, 2012***

**7. STANDARDS OF CONDUCT[41]**

7.10 A case should not be withdrawn from a particular judge without valid reasons, such as cases of serious illness or conflict of interest. Any such reasons and the procedures for such withdrawal should be provided for by law and may not be influenced by any interest of the government or administration. A decision to withdraw a case from a judge should be taken by an authority which enjoys the same judicial independence as judges.

***FIRST STUDY COMMISSION REPORT - NOMINATION OF JUDGES, International Association of Judges (IAJ), 2013***

Recommendation on the administrative authority of chief judges

- Chief judges not have the power to assign a judge in order to affect the outcome of a case;
- The assignment of judges to hear cases be based on objective criteria.

***HIGH QUALITY JUSTICE FOR ALL MEMBER STATES OF THE COUNCIL OF EUROPE, The European Commission for the Efficiency of Justice, CEPEJ STUDIES No. 22, 2015***

The SATURN Guidelines also address the activity of authorities responsible of the administration of courts (in particular, the Member States' Ministries of Justice). In this respect, the SATURN Centre advises the division of labour between all courts and participants in the proceedings in order to stimulate their activity in the direction of good time management. Another direction is the monitoring of statistical data, which above all is the duty of government authorities responsible for the performance of courts. In particular, the SATURN Centre suggests the establishment of a monitoring

system including a national database in compliance with the European Uniform Guidelines for Monitoring of Judicial Timeframes<sup>57</sup>. The Member States are also invited to undertake specific interventions, aimed at the reduction of timeframes of proceedings. Special attention must be paid by government authorities to cases, which undue trial times risk to give rise to the finding of the violation of the human right to a trial within reasonable time. Another SATURN advice to Member States is to use new technologies to reduce the times of proceedings (in particular, videoconferencing, remote access to documents, interaction with the participants in the proceedings, via e-mail *etc.*). Finally, the officers responsible for the courts performance should establish the accountability of persons who cause delays and adversely affect the observance of set standards and targets in the time management.

Besides legislators and local authorities, the SATURN Centre formulates a series of advices in respect of court managers. For example, the latter should carry out the collection of information on the length of proceedings and delays in the delivery of justice, and should act in compliance with the Time management Checklist developed by the Commission. The information collected in such a way is subject to continuing analysis in order to increase the efficiency of the judiciary and guarantee an effective safeguard of the right to a fair trial within reasonable time. It must be published online in the form of reports on the judicial bodies' activity accessible to everyone.

Besides the definition of goals and specific standards at national level, the SATURN Centre also suggests that targets should be established at the level of individual courts. These targets must be the subject of continuous revision, and become the basis for the evaluation of the performance of specific courts. Finally, the individual courts are invited to develop means of crisis management (combating serious delays in the delivery of justice and deviations from the times established by the court for the consideration of specific cases).

**COMPILATION OF CEPEJ GUIDELINES, European Commission for the Efficiency of Justice (CEPEJ), 2015**

General data on courts and court proceedings

System of monitoring should have available and public information on the general design of the judicial system, with special attention to the information relevant for the time management of the proceedings.

The information on the general level should include accurate information on:

- the number and types of courts and their jurisdiction;
- the number and types of proceedings in the courts;
- the proceedings designated as priority (urgent) cases;

The data on judicial system should be regularly updated, and be available at least on the annual level (start/end of the calendar year).

The following data on the number of proceedings in the courts should be available:

- total number of proceedings pending at the beginning of the monitored period (e.g. calendar year);
- new proceedings (proceedings initiated within the monitored period, e.g. in the calendar year);
- resolved cases (proceedings finalized within the monitored period either through a decision on the merit, a withdrawal of the case, a friendly settlement, etc...);
- total number of proceedings pending at the end of the monitored period

**BEST PRACTICE GUIDE FOR MANAGING SUPREME COURTS, European Union 2017**

IV Administration of Supreme Courts: focus on the allocation of cases and length of proceedings

5. Safeguards for uniform case law

C Recommendation and best practices

The allocation criteria include the independence and impartiality of the judge and the judiciary, the competence, experience and specialism of the judge and the weighted workload of the judge.

V Communication

4. Information provided to public

Recommendations and best practices

Make the case allocation rules publicly available. Make the agenda of the hearings publicly available.

**VI. DUTIES AND RESPONSIBILITIES (ACCOUNTABILITY)**

**VI. 1. GENERAL REMARKS**



**COMMONWEALTH (LATIMER HOUSE) PRINCIPLES ON THE THREE BRANCHES OF GOVERNMENT with Annex (Parliamentary Supremacy, Judicial Independence), The Commonwealth, 2003**

VII) Accountability Mechanisms

(b) Judicial Accountability

Judges are accountable to the Constitution and to the law which they must apply honestly, independently and with integrity. The principles of judicial accountability and independence underpin public confidence in the judicial system and the importance of the judiciary as one of the three pillars upon which a responsible government relies.

**RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010**

Chapter I – General aspects

9. A case should not be withdrawn from a particular judge without valid reasons. A decision to withdraw a case from a judge should be taken on the basis of objective, pre-established criteria and following a transparent procedure by an authority within the judiciary.

**REPORT ON THE INDEPENDENCE OF THE JUDICIAL SYSTEM PART I: THE INDEPENDENCE OF JUDGES, Venice Commission, Venice, 12-13 March 2010 CDL-AD(2010)004**

IV. Conclusions

16. As an expression of the principle of the natural or lawful judge pre-established by law, the allocation of cases to individual judges should be based on objective and transparent criteria established in advance by the law or by special regulations on the basis of the law, e.g. in court regulations. Exceptions should be motivated.

**ANNUAL REPORTS TO THE HUMAN RIGHTS COUNCIL, UN, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, 28 April 2014,**

VI. Recommendations

Legal framework on judicial accountability

110. States should cooperate to develop and adopt international standards for judicial accountability.

111. States should consider enacting specific legislation at the domestic level establishing a comprehensive system of judicial accountability that is effective, objective, transparent and in line with their international human rights obligations.

Forms of judicial accountability

112. A clear set of standards should be established on how to exercise supervisory powers of accountability, so that justice operators and the judicial institution are not held to account arbitrarily.

113. The relationship between the individual to be held accountable and the forum, body or institution to which he or she must respond also needs to be clearly defined.

114. States should also develop international guidelines on the application of judicial immunity. In accordance with those guidelines, States should establish domestic norms on judicial immunity in order to avoid abuses.

#### Individual accountability

115. Individual accountability should be applied to all justice operators, that is, judges, prosecutors and lawyers at all levels of their respective careers.

116. Specific individual accountability mechanisms should include, but are not limited to, the obligation to write individual reasoned judgments or opinions in a language that is understandable to the beneficiaries of justice; the possibility of explaining personal views on the law and the constitution to the general public; and disclosing one's financial and other assets through an official registration system.

117. Individual accountability should also encompass extrajudicial conduct, other permitted professional activities and the private lives of justice operators.

118. Justice operators must be provided with clear rules of conduct and ethics in order to ensure that they behave in accordance with accepted standards that are appropriate to their professional functions.

119. The justice system in its entirety should be submitted to accountability mechanisms to ensure that it is functioning with independence, competence, objectivity and impartiality.

120. A code of ethics and conduct should be established for all justice operators, with the participation of their respective associations and representatives. Such codes should be applied in a consistent and transparent manner, with full respect for the fundamental guarantees of fair trial and due process.

121. States should improve the transparency of the justice system. Hearings and decision-making should be made public so as to permit public scrutiny of the work of justice operators. Decisions should be rendered in written form, be reasoned and be published on databases and websites in order to make them truly accessible and free of charge.

122. The transparency of the justice system should also encompass mechanisms relating to other State powers, civil society, the media, the police, public prosecutors and human rights commissions, among others.

#### Accountability mechanisms and proceedings

123. Accountability mechanisms and proceedings should respect the fundamental guarantees of fair trial and due process and should be implemented by an independent and impartial body. Accountability procedures should be limited to instances of professional misconduct that are gross and inexcusable and that also bring the judiciary into disrepute.

124. All justice operators should be provided with training and education on their respective codes of ethics and conduct, rules of procedure and the consequences if those norms are breached.

#### Institutions and bodies in charge of overseeing the accountability of the justice system

125. Judicial accountability should be undertaken through an independent body. That body should have the role of protecting judicial independence and promoting judicial accountability.

126. Regarding the judiciary, the independent body should preferably be composed entirely of judges, retired or sitting, although some representation of the legal profession or academia could be advisable. No political representation should be permitted. In addition, the independent body should manage its own budget, have enough human and financial resources to carry out its mandate and be accountable for its activities.

127. Independent bodies in charge of the accountability of prosecutors could follow a similar structure to those for judges.

128. An independent professional organization should be established to represent the interests of lawyers, oversee the process of admitting candidates to the profession, promote their continuing education and training, protect their professional integrity and enforce disciplinary proceedings in a fair and consistent manner.

129. The right to have disciplinary decisions reviewed by a higher judicial tribunal should be guaranteed for judges, prosecutors and lawyers alike.

State responsibility and the right to a remedy

130. The judiciary and the justice system as a whole engage the responsibility of the State. States should therefore provide effective remedies to individuals who have suffered damage owing to wrongful convictions or any other miscarriage of justice.

***OPINION NO. 18 (2015) THE POSITION OF THE JUDICIARY AND ITS RELATION WITH THE OTHER POWERS OF STATE IN A MODERN DEMOCRACY, Consultative Council of European Judges (CCJE), 2015***

VIII: Summary of principal points

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).

***THE HAGUE DECLARATION ON PROMOTING EFFECTIVE JUSTICE SYSTEMS, The General Assembly Of The European Network Of Councils For The Judiciary (ENCJ), 2015***

1. Independent and accountable judiciaries are an essential component of high quality, effective and efficient justice systems, and a prerequisite for a well-functioning EU area of justice.

***JUDICIAL ACCOUNTABILITY - INTERNATIONAL STANDARDS ON ACCOUNTABILITY MECHANISMS FOR JUDICIAL CORRUPTION AND JUDICIAL INVOLVEMENT IN HUMAN RIGHTS VIOLATIONS, Practitioners Guide No. 13, International Commission of Jurists, 2016***

### **Accountable to whom?**

In considering different forms of accountability mechanisms and procedures it is useful to consider the persons to whom the judiciary as a whole, and individual judges, should ultimately be accountable. At the broadest level, the judiciary as an institution should be accountable to the society it serves. However, in a democratic society ruled by law the obligation that the judiciary owes to society is limited to applying the law in an independent and impartial way, with integrity and free of corruption. The judiciary is emphatically not bound to adopt only those decisions with which a majority of society may agree, nor should individual judges be at any risk of removal simply because a majority of society may disagree with particular judgments. In this sense, the judiciary's accountability to society is made operative first and foremost by ensuring that judges are accountable to the law: that they explain their decisions based on the application of legal rules, through legal reasoning and findings of fact that are based on evidence and analysis, and that their decisions can be reviewed and if necessary corrected by the judicial hierarchy through a system of appeals. Societal opinions are relevant to the accountability of the judiciary only to the extent that such opinions are expressed through duly adopted laws that are compliant with the constitution of the State and international legal obligations.

The judiciary as an institution is accountable to society to ensure that all judicial decisions are in fact made independently and impartially, with integrity and free of corruption, and to this end society reasonably expects the judiciary to take action against individual judges who engage in misconduct that compromises these values. Individuals who are affected by particular judicial misconduct should also be able to expect that the judge will be held accountable for the wrongdoing and that the any damage will be remedied. Such persons should have access to complaints procedures capable of resulting in disciplinary proceedings for judicial misconduct. However, given the need to ensure judicial independence and impartiality, individuals who have the right to a remedy aimed at achieving accountability may not always have the right to directly pursue certain kinds of remedy or punishment against individual judges: it is common for the right to seek civil compensation, for instance, to be available only against the State as a whole and not the individual judge, and in this case it is the State that is accountable for the acts or omissions of the individual judge; and while individuals should be able to file complaints, usually it is an independent and impartial body that actually decides whether to open disciplinary proceedings against an individual judge. While States may adopt different modalities of delivering accountability to individual victims of judicial misconduct in order to respect judicial independence, such victims must in all cases have access to an effective remedy and reparation, if not from the individual judge then from the State as a whole. Under international law, the judiciary like other organs of the State is not only responsible for applying internal law of the State, but also for upholding internationally protected human rights and international humanitarian law. This is an obligation for which the judiciary is effectively accountable to the population of the State of which it is a part, to individuals and other entities affected by any exercise of jurisdiction beyond the ordinary territory of its State, and through the State's responsibility to other States under international law. The judiciary is accountable to the other branches of government - legislative or executive - in the same sense as it is accountable to society more generally: as an institution, it must be able to demonstrate that judicial decisions are based on legal rules and reasoning, and fact-finding based in evidence, in an independent and impartial way free from corruption and other improper influences. The principle of judicial independence precludes, on the other hand, any claim that the judiciary should be accountable to the executive or legislature in the sense of "responsible" or "subordinate" to those branches of government.

***REPORT OF THE SPECIAL RAPPOREUR ON THE INDEPENDENCE OF JUDGES AND LAWYERS, Human Rights Council, June 2017***

## B2. Judicial integrity and accountability

42. The formulation of judicial codes of ethics and the establishment of judicial complaints mechanisms composed only of sitting and/or retired judges has been mentioned as a process to be promoted (see E/CN.4/2002/72, para. 37). The Bangalore Principles of Judicial Conduct were annexed to the annual report of the Special Rapporteur in 2003 (E/CN.4/2003/65) to stress this approach. The issues of judicial integrity and judicial accountability were also addressed by the Special Rapporteur in two reports (A/67/305 and A/HRC/26/32). In the latter, she noted that judicial accountability must never be used to arbitrarily undermine the independence of judges and, for that reason, any accountability mechanisms must follow procedures that are in line with international standards of due process of law and fair trial.

## **VI. 2. THE JUDICIAL ROLE - THE ROLE OF THE COURTS IN A DEMOCRACY**

### ***MONTREAL DECLARATION, UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE, International Association of Judicial Independence and World Peace (JIWP), 1983***

#### IL National Judges, Objectives and Functions

2.01 The objectives and functions of the judiciary shall include: a) to administer the law impartially between citizen and citizen, and between citizen and state; b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; c) ensure that all peoples are able to live securely under the rule of law.

### ***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE (“Singhvi Declaration”), ECOSOC, 1985***

#### Independence

5. (a) The judiciary shall have jurisdiction, directly or by way of review, over all issues of a judicial nature, including issues of its own jurisdiction and competence.

### ***BEIJING STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION, as amended in Manila at 7th Biennial Conferences of Chief Justices of Asia and the Pacific, 1997***

#### Objectives of Judiciary

5. It is the duty of the judiciary to respect and observe the proper objectives and functions of the other institutions of government. It is the duty of those institutions to respect and observe the proper objectives and functions of the judiciary.

10. The objectives and functions of the judiciary include the following: a) To ensure that all persons are able to live securely under the rule of law; b) To promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and c) To administer the law impartially among person and between persons and the State.” (10. a), b) and c) Objectives of the judiciary).

#### Jurisdiction

33. The judiciary must have jurisdiction over all issues of a justiciable nature and exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

34. The jurisdiction of the highest court in a society should not be limited or restricted without the consent of the members of the court.

**OPINION NO. 7 (2005) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS ON “JUSTICE AND SOCIETY”, Council of Europe, 2005**

**A. THE RELATIONS OF THE COURTS WITH THE PUBLIC WITH SPECIAL REFERENCE TO THE ROLE OF THE COURTS IN A DEMOCRACY**

6. The development of democracy in European states means that the citizens should receive appropriate information on the organisation of public authorities and the conditions in which the laws are drafted. Furthermore, it is just as important for citizens to know how judicial institutions function.

7. Justice is an essential component of democratic societies. It aims to resolve disputes concerning parties and, by the decisions which it delivers, to fulfil both a “normative” and an “educative” role, providing citizens with relevant guidance, information and assurance as to the law and to its practical application.

8. Courts are, and are accepted by the public at large as being, the proper forum for the ascertainment of legal rights and obligations and the settlement of disputes relative thereto; the public at large have respect for and confidence in the courts' capacity to fulfil that function. However, the understanding of the role of the judiciary in democracies - especially, the understanding that the judge's duty is to apply the law in a fair and even-handed manner, with no regard to contingent social or political pressures – varies considerably in different countries and socio-economic settings in Europe. The levels of confidence in the courts' activity are consequently not uniform. Adequate information about the functions of the judiciary and its role, in full independence from other state powers, can therefore effectively contribute toward an increased understanding of the courts as the cornerstone of democratic constitutional systems, as well as of the limits of their activity.

**SOFIA DECLARATION ON JUDICIAL INDEPENDENCE AND ACCOUNTABILITY, The General assembly of European Network of Councils for the Judiciary (ENCJ), 2013**

(i) An independent and accountable judiciary is essential for the delivery of an efficient and effective system of justice for the benefit of the citizen and is an important feature of the rule of law in democratic societies.

(ii) The judiciary must be accountable, comply with ethical guidelines and be subject to an impartial disciplinary system.

**BRIJUNI STATEMENT OF THE PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY, Conference of Chief Justices of Central and Eastern Europe, 14 October, 2015**

**OBJECTIVES OF THE JUDICIARY**

11. The objectives and functions of the judiciary include the following:

a. To ensure, within the proper limits of the judicial function, that all persons are able to live securely under the rule of law within a society that is ordered by law;

b. To promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and

c. To administer the law impartially among persons and legal entities and between persons and legal entities and the State.

**JUDICIAL ACCOUNTABILITY - INTERNATIONAL STANDARDS ON ACCOUNTABILITY MECHANISMS FOR JUDICIAL CORRUPTION AND JUDICIAL INVOLVEMENT IN HUMAN RIGHTS VIOLATIONS, Practitioners Guide No. 13, International Commission of Jurists, 2016**

Judges are therefore as capable as any other kind of public official of perpetrating or being complicit in violations of international human rights. Furthermore, the State is responsible for all judicially perpetrated or judicially complicit human rights violations, and this is true even if the judge's conduct was "lawful" under the State's domestic law. Typical examples include: arbitrarily sentencing persons to imprisonment or death, or ordering or authorizing their arbitrary detention, including as a result of their having exercised their protected rights to freedom of thought, conscience and religion, opinion and expression, association and peaceful assembly; convicting persons of criminal offences or imposing other penalties or restrictions after trials that have substantially failed to satisfy fundamental guarantees of fairness; enforcing domestic laws that discriminate on prohibited grounds or are otherwise inconsistent with international human rights; exercising or failing to exercise their authority in ways that seek to conceal violations perpetrated by military, para-military, or law enforcement agents, such as torture, extra-judicial execution, and enforced disappearance, or to protect the perpetrators from punishment, or to deprive victims of an effective remedy; authorizing arbitrary or unlawful interference with individuals' privacy, family, home or correspondence. Many such violations would constitute "gross violations of human rights". "Gross" violations can be understood to include, among other things: genocide; slavery and slaverylike practices; summary or arbitrary executions; torture and other cruel, inhuman or degrading treatment or punishment; enforced disappearance; prolonged arbitrary detention; unlawful deportations or forcible transfers of population; and violations of economic, social and cultural rights of a particularly serious scale or severity of impact.



### VI. 3. DUTIES

#### **PALERMO DECLARATION, ELEMENTS OF A EUROPEAN STATUTE OF MAGISTRACY, MEDEL, 1993**

#### VI. THE DUTIES OF MAGISTRATES

6.1. Magistrates settle the cases submitted to them diligently and impartially, according to the facts and in conformity with the law. The law may authorize the expression of minority opinions in collegial decisions.

#### **BANGALORE PRINCIPLE ON JUDICIAL CONDUCT, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002**

1.5. A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.

#### **OPINION NO. 7 (2005) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS ON "JUSTICE AND SOCIETY", Council of Europe, 2005**

#### D. ACCESSIBILITY, SIMPLIFICATION AND CLARITY OF THE LANGUAGE USED BY THE COURTS IN PROCEEDINGS AND DECISIONS

56. The language used by the courts in their procedures and decisions is not only a powerful tool available to them to fulfil their educational role (see paragraph 6 above), but it is obviously, and more directly, the "law in practice" for the specific litigants of the case. Accessibility, simplicity and clarity of the language of courts are therefore desirable.

57. The CCJE notes that in some European countries, judges believe that very short judgments reinforce the authority of the judgment; in some other countries, judges feel obliged, or are obliged by the law or practice, to explain extensively in writing all aspects of their decisions.

58. Without having the aim to deal in depth with a subject which is heavily influenced by national legal styles, the CCJE considers that a simple and clear judicial language is beneficial as it makes the rule of law accessible and foreseeable by the citizens, if necessary with the assistance of a legal expert, as the case-law of the European Court of Human Rights suggests.

59. The CCJE considers that judicial language should be concise and plain, avoiding - if unnecessary - Latin or other wordings that are difficult to understand for the general public. Legal concepts and rules of law may be quite sufficiently explained by citing legislation or judicial precedents.

60. Clarity and concision, however, should not be an absolute goal, as it is also necessary for judges to preserve in their decisions precision and completeness of reasoning. In the CCJE's opinion, legislation or judicial practice concerning reasoning of judgments should provide that some form of reasoning always exists, and that sufficient discretion is left to the judge in choosing whether to give, where permissible, an oral judgment (which may be transcribed from a recording upon request or in case of need) and/or a short written reasoned judgment (e.g. in the form of the "*attendu*" style decision adopted in some countries) or an extensive written reasoned judgment, in all those cases in which reference to established precedents is not possible and/or the factual reasoning so requires. Simplified forms of reasoning may apply to orders, writs, decrees and other decisions that have a procedural value and do not concern the substantive rights of the parties.

#### SUMMARY OF THE RECOMMENDATIONS AND CONCLUSIONS

D. Accessibility, simplification and clarity of the language used by the courts in proceedings and decisions

D.1. The CCJE considers that accessibility, simplicity and clarity of the language of courts are desirable (see paragraphs 56 to 58 above).

D.2. The CCJE considers that judicial language should be concise and plain, avoiding - if unnecessary - Latin or other wordings that are difficult to understand for the general public. Legal concepts and rules of law may be quite sufficiently explained by citing legislation or judicial precedents (see paragraph 59 above).

D.3. In the CCJE's opinion, judicial reasoning should always be precise and complete, though simplified reasoning may be appropriate in procedural matters, and judges may, where permissible, give their reasoning orally (subscription to later transcription if required) rather than in writing (see paragraph 60 above).

D.4. The CCJE recommends that at least all Supreme Court and other important court decisions be accessible through Internet sites at no expense, as well as in print upon reimbursement of the cost of reproduction only; however appropriate measures should be taken in disseminating court decisions, to protect privacy of interested persons, especially parties and witnesses (see paragraph 61 above).

***ABA MODEL CODE OF JUDICIAL CONDUCT (2011 EDITION), adopted by the House of Delegates of the American Bar Association on August 7, 1990 and amended on August 6, 1997, August 10, 1999, August 12, 2003, February 12, 2007 and August 10, 2010***

#### CANON 1

A judge shall uphold and promote the, independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

##### Rule 1.1: Compliance with the Law

A judge shall comply with the law, including the Code of Judicial Conduct.

##### Rule 1.2: Promoting Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

##### Rule 1.3: Avoiding Abuse of the Prestige of Judicial Office

A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.

#### CANON 2

A judge shall perform the duties of judicial office impartially, competently, and diligently.

##### Rule 2.1: Giving Precedence to the Duties of Judicial Office

The duties of judicial office, as prescribed by law, shall take precedence over all of a judge's personal and extrajudicial activities.

##### Rule 2.2: Impartiality and Fairness

A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

### Rule 2.3: Bias, Prejudice, and Harassment

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

(C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

(D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

### Rule 2.4: External Influences on Judicial Conduct

(A) A judge shall not be swayed by public clamor or fear of criticism.

(B) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.

(C) A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.

### Rule 2.5: Competence, Diligence, and Cooperation

(A) A judge shall perform judicial and administrative duties, competently and diligently.

(B) A judge shall cooperate with other judges and court officials in the administration of court business.

### Rule 2.6: Ensuring the Right to Be Heard

(A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.

(B) A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

### Rule 2.7: Responsibility to Decide

A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law.

### Rule 2.8: Decorum, Demeanor, and Communication with Jurors

(A) A judge shall require order and decorum in proceedings before the court.

(B) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.

(C) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding.

### Rule 2.9: Ex Parte Communications

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending\* or impending matter, except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

(2) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

(4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.

(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law\* to do so.

(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

(C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

#### Rule 2.10: Judicial Statements on Pending and Impending Cases

(A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending\* or impending\* in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.

(B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial\* performance of the adjudicative duties of judicial office.

(C) A judge shall require court staff, court officials, and others subject to the judge's direction and control to refrain from making statements that the judge would be prohibited from making by paragraphs (A) and (B).

(D) Notwithstanding the restrictions in paragraph (A), a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity.

(E) Subject to the requirements of paragraph (A), a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct i

#### Rule 2.12: Supervisory Duties

(A) A judge shall require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this Code.

(B) A judge with supervisory authority for the performance of other judges shall take reasonable measures to ensure that those judges properly discharge their judicial responsibilities, including the prompt disposition of matters before them.

#### Rule 2.14: Disability and Impairment

A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.

#### Rule 2.15: Responding to Judicial and Lawyer Misconduct

(A) A judge having knowledge\* that another judge has committed a violation of this Code that raises a substantial question regarding the judge's honesty, trustworthiness, or fitness as a judge in other respects shall inform the appropriate authority.

(B) A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.

(C) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code shall take appropriate action.

(D) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action.

**Rule 2.16: Cooperation with Disciplinary Authorities**

(A) A judge shall cooperate and be candid and honest with judicial and lawyer disciplinary agencies.

(B) A judge shall not retaliate, directly or indirectly, against a person known\* or suspected to have assisted or cooperated with an investigation of a judge or a lawyer.

**Rule 3.5: Use of Nonpublic Information**

A judge shall not intentionally disclose or use nonpublic information\* acquired in a judicial capacity for any purpose unrelated to the judge's judicial duties.

***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

Chapter VII – Duties and responsibilities

59. Judges should protect the rights and freedoms of all persons equally, respecting their dignity in the conduct of court proceedings.

60. Judges should act independently and impartially in all cases, ensuring that a fair hearing is given to all parties and, where necessary, explaining procedural matters. Judges should act and be seen to act without any improper external influence on the judicial proceedings.

#### **VI. 4. LIABILITY OF JUDGES**

##### ***THE UNIVERSAL CHARTER OF THE JUDGE, International Association of Judges (IAJ), 1999***

###### **Art.6 Efficiency**

The judge must diligently and efficiently perform his or her duties without any undue delays.

###### **Art.10 Civil and penal responsibility**

Civil action, in countries where this is permissible, and criminal action, including arrest, against a judge must only be allowed under circumstances ensuring that his or her independence cannot be influenced.

###### **Art.11 Administration and disciplinary action**

The administration of the judiciary and disciplinary action towards judges must be organized in such a way, that it does not compromise the judges genuine independence, and that attention is only paid to considerations both objective and relevant. Where this is not ensured in other ways that are rooted in established and proven tradition, judicial administration and disciplinary action should be carried out by independent bodies, that include substantial judicial representation. Disciplinary action against a judge can only be taken when provided for by pre-existing law and in compliance with predetermined rules of procedure.

## VI. 4.1. JUDICIAL IMMUNITY

### ***MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE, International Bar Association (IBA), 1982***

#### G - Securing Impartiality and Independence

43 A judge shall enjoy immunity from legal actions and the obligation to testify concerning matters arising in the exercise of his official functions.

### ***MONTREAL DECLARATION, UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE, International Association of Judicial Independence and World Peace (JIWP), 1983***

#### Immunities and Privileges

2.24 Judges shall enjoy immunity from suit, or harassment, for acts and omissions in their official capacity.

### ***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE ("Singhvi Declaration"), ECOSOC, 1985***

#### Immunities and Privileges

20. Judges shall be protected from the harassment of personal litigation against them in respect of their judicial functions and shall not be sued or prosecuted except under an authorization of an appropriate judicial authority.

### ***BEIJING STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION, as amended in Manila at 7th Biennial Conferences of Chief Justices of Asia and the Pacific, 1997***

#### Judicial Conditions

32. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

### ***OPINION NO. 3 OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE PRINCIPLES AND RULES GOVERNING JUDGES' PROFESSIONAL CONDUCT, IN PARTICULAR ETHICS, INCOMPATIBLE BEHAVIOUR AND IMPARTIALITY, Council of Europe, 2002***

## B. CRIMINAL, CIVIL AND DISCIPLINARY LIABILITY OF JUDGES

4) What criminal, civil and disciplinary liability should apply to judges?

### a. Criminal liability

52. Judges who in the conduct of their office commit what would in any circumstances be regarded as crimes (e.g. accept bribes) cannot claim immunity from ordinary criminal process. The answers to questionnaire show that in some countries even well-intentioned judicial failings could constitute crimes. Thus, in Sweden and Austria judges (being assimilated to other public functionaries) can be punished (e.g. by fine) in some cases of gross negligence (e.g. involving putting or keeping someone in prison for too long).



53. Nevertheless, while current practice does not therefore entirely exclude criminal liability on the part of judges for unintentional failings in the exercise of their functions, the CCJE does not regard the introduction of such liability as either generally acceptable or to be encouraged. A judge should not have to operate under the threat of a financial penalty, still less imprisonment, the presence of which may, however sub-consciously, affect his judgment.

54. The vexatious pursuit of criminal proceedings against a judge whom a litigant dislikes has become common in some European states. The CCJE considers that in countries where a criminal investigation or proceedings can be started at the instigation of a private individual, there should be a mechanism for preventing or stopping such investigation or proceedings against a judge relating to the purported performance of his or her office where there is no proper case for suggesting that any criminal liability exists on the part of the judge.

#### b. Civil liability

55. Similar considerations to those identified in paragraph 53 apply to the imposition on judges personally of civil liability for the consequences of their wrong decisions or for other failings (e.g. excessive delay). As a general principle, judges personally should enjoy absolute freedom from liability in respect of claims made directly against them relating to their exercise in good faith of their functions. Judicial errors, whether in respect of jurisdiction or procedure, in ascertaining or applying the law or in evaluating evidence, should be dealt with by an appeal; other judicial failings which cannot be rectified in this way (including e.g. excessive delay) should, at most, lead to a claim by the dissatisfied litigant against the State. That the state may, in some circumstances, be liable under the European Convention of Human Rights, to compensate a litigant, is a different matter, with which this opinion is not directly concerned.

56. There are however European countries, in which judges may incur civil liability for grossly wrong decisions or other gross failings, particularly at the instance of the state, after the dissatisfied litigant has established a right to compensation against the state. Thus, for example, in the Czech Republic the state may be held liable for damages caused by a judge's illegal decision or incorrect judicial action, but may claim recourse from the judge if and after the judge's misconduct has been established in criminal or disciplinary proceedings. In Italy, the state may, under certain conditions, claim to be reimbursed by a judge who has rendered it liable by either wilful deceit or "gross negligence", subject in the latter case to a potential limitation of liability.

57. The European Charter on the statute for judges contemplates the possibility of recourse proceedings of this nature in paragraph 5.2 of its text - with the safeguard that prior agreement should be obtained from an independent authority with substantial judicial representation, such as that commended in paragraph 43 of the CCJE's Opinion No. 1 (2001). The commentary to the Charter emphasises in its paragraph 5.2 the need to restrict judges' civil liability to (a) reimbursing the state for (b) "gross and inexcusable negligence" by way of (c) legal proceedings (d) requiring the prior agreement of such an independent authority. The CCJE endorses all these points, and goes further. The application of concepts such as gross or inexcusable negligence is often difficult. If there was any potential for a recourse action by the state, the judge would be bound to have to become closely concerned at the stage when a claim was made against the state. The CCJE's conclusion is that 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.

### ***SECOND STUDY COMMISSION - CIVIL LAW AND PROCEDURE, CIVIL LIABILITY OF JUDGES, International Association of Judges (IAJ), 2003***

#### Conclusions

Civil liability of judges should be distinguished from disciplinary proceedings against them since the aim and effects of each are quite different in nature.

Having regard to the Basic Principles of the Independence of the Judiciary (UNO, 1985), the European Charter on the Statute of the Judges (Council of Europe, 1998) and the Universal Statute of the Judge (IAJ, 1999), the rules about civil liability of judges should ensure that a judge performing judicial duties may be liable only in exceptional cases, which may not include any instance in which the judge is acting in good faith. In any event those rules must not jeopardise judicial independence.

***THE BURGH HOUSE PRINCIPLES ON THE INDEPENDENCE OF THE INTERNATIONAL JUDICIARY, The Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals, 2004***

5. Privileges and immunities

5.1 Judges shall enjoy immunities equivalent to full diplomatic immunities, and in particular shall enjoy immunities from all claims arising from the exercise of their judicial function.

5.2 The court alone shall be competent to waive the immunity of judges; it should waive immunity in any case where, in its opinion, the immunity would impede the course of justice and can be waived without prejudice to the exercise of the judicial function.

5.3 Documents and papers of the court, judges and registry, in so far as they relate to the business of the court, shall be inviolable.

5.4 The state in which an international court has its seat shall take the necessary measures to protect the security of the judges and their families, and to protect them from adverse measures related to the exercise of their judicial function.

***DECLARATION OF MINIMAL PRINCIPLES ABOUT JUDICIARIES AND JUDGES' INDEPENDENCE IN LATIN AMERICA, Campeche, April 2008***

I. GENERAL PRINCIPLES

2. As independence and impartiality of a concrete judge is indispensable for the correct exercise of a jurisdictional function, these qualities shall be preserved in the internal environment of the Judiciaries so that they do not result affected directly or indirectly by the exercise of disciplinary activities, indictment activities or the activities corresponding to the ruling of the same power. Judges shall receive the guarantee that, due to their jurisdictional activity and the way in which they decide the causes trusted to them, they shall not be rewarded or punished, and that those decisions are only going to be subjected to the revision of superior courts as it is indicated by their own internal rights.

II. MINIMAL CONDITIONS FOR THE PROTECTION OF THE JUDICIARY'S INDEPENDENCE

12. IMMUNITIES

There should be no judicial immunities that could signify a privilege for judges; however, they shall have a special regime especially directed to protect them so that the proceedings of legal actions against themselves cannot be used to make them functionally dependent on any other State Power or of society itself or to hinder arbitrary retaliations or the blockage of the execution of their duties. Thus, judges shall have their own code of laws and limitations to their anticipated arrest or prison, except in the cases of flagrant crimes, with immediate presentation before the corresponding Court.

**DRAFT VADEMECUM ON THE JUDICIARY, EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), 2008**

2.4.3 Immunities for the Judges and Judicial Proceedings against them

All judges should enjoy equal guarantees of independence and equal immunities in the exercise of their judicial functions.

CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995, chapter B.1.e.

[...] immunity of judges vis-a-vis criminal prosecution [...] is [...] excessive. Such a provision goes far beyond the "Basic Principles on the Independence of the Judiciary" promulgated by the United Nations in 1985, and introduces distortions, which can be hard to justify, into the principle of the equality of citizens before the law.

CDL(1994)011 Opinion on the Constitution of the Russian Federation adopted by popular vote on 12 December 1993, Chapter 7: Justice: Article 118 to Article 129, para.3

Magistrates (judges, prosecutors and investigators) should not benefit from a general immunity [...]. According to general standards they indeed needed protection from civil suits for actions done in good faith in the course of their functions. They should not, however, benefit from a general immunity which protected them against prosecution for criminal acts committed by them for which they should be answerable before the courts.

CDL-AD(2003)012 Memorandum: Reform of the Judicial System in Bulgaria, para. 15a).

magistrates should not benefit from a general immunity but [...] the immunity should be confined to protection from civil suits for actions done in good faith in the course of their functions.

CDL-AD(2003)016 Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria, para. 8.

It is wrong in principle that a judge should be immune from criminal liability although it may be appropriate to limit powers of arrest so as to prevent interference with the work of a judge during the hearing of a case.

CDL-AD(2005)003 Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, in cooperation with OSCE/ODIHR, para. 107.

[...] a limited functional immunity from arrest and detention which would interfere with the workings of the court is one thing but a total immunity from prosecution is difficult to justify.

CDL-AD(2005)005 Opinion on Draft Constitutional Amendments relating to the Reform of the Judiciary in Georgia, para. 11.

A judicial decision should however be required in view of implementing the guarantees provided for by the international treaties in the field of human rights.

The permission of the Supreme Council will not be sufficient, because it deals with the interests covered by the judicial immunity, while only the decision of the competent judge insures the consideration of the personal interests of the concerned person that is the judicial official who is criminally prosecuted. The Council authorizes the exercise of the powers of the judge.

[...] une décision judiciaire est nécessaire pour mettre en oeuvre les garanties prévues par les traités internationaux en matière de droits de l'homme autorisation du Conseil suprême [de la magistrature] ne suffit pas, car celle-ci [ne] porte [que] sur les droits garantis par l'immunité judiciaire [...].

CDL-AD(2003)016 Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria, para. 9.

The discharge of a judge should not be the subject of a decision of the Assembly.

DL-CR-PV(1998)004 Meeting of the Working Group on Albania of the Sub-commission on Constitutional Reform with the Constitutional Commission of Albania, « Parts of the constitution considered for the first time», «Article 130».

It would seem preferable that any such move should, as was recommended in relation to the removal of judges, require to be approved by a small expert body composed solely of judges who would give an opinion in relation to whether immunity should be lifted. Il serait préférable [que la] démarche [visant à la levée d'une immunité judiciaire] soit approuvée par un comité restreint d'experts composé uniquement de juges qui donneraient un avis sur la nécessité de lever l'immunité, comme cela avait été recommandé à propos de la révocation des juges.

CDL-AD(2003)016 Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria, para. 11.

A judge who is prosecuted should have the same right of defence as any citizen – no more, no less.

CDL-AD(2005)005 Opinion on Draft Constitutional Amendments relating to the Reform of the Judiciary in Georgia, para. 11.

[a legislative measure penalising the fact of ] “Imposing a final judicial verdict, recognised and known to be unjust[.]” is so clearly open to abuse [and] it should be repealed as a matter of urgency.

CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995, chapter B.2.ii.

## ***BUILDING AND MAINTAINING CULTURE OF JUDICIAL INDEPENDENCE, Amendment to The Mt Scopus International Standards of Judicial Independence, JIWP, 2008***

### **8. SECURING IMPARTIALITY AND INDEPENDENCE**

8.1. A judge shall enjoy immunity from legal actions in the exercise of official functions.

## ***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

### Chapter VII – Duties and responsibilities

66. The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence.

71. When not exercising judicial functions, judges are liable under civil, criminal and administrative law in the same way as any other citizen.

***BRIJUNI STATEMENT OF THE PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY,  
Conference of Chief Justices of Central and Eastern Europe, 14 October, 2015***

Judicial conditions

28. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State in accordance with national law, judges should enjoy personal immunity from civil suits and immunity from paying indemnification, based on allegations of improper acts or omissions in the exercise of their judicial functions. No judge should be subjected to criminal proceedings for criminal conduct without the withdrawal or waiver of the judge's immunity. However, because no judge is above the law, whenever a judge engages in criminal conduct, the waiver of his immunity should be forthcoming.

## **VI. 4.2. CRIMINAL LIABILITY**

### ***THE UNIVERSAL CHARTER OF THE JUDGE, International Association of Judges (IAJ), 1999***

Art. 10 Civil and penal responsibility

Civil action, in countries where this is permissible, and criminal action, including arrest, against a judge must only be allowed under circumstances ensuring that his or her independence cannot be influenced.

### ***OPINION NO. 3 OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE PRINCIPLES AND RULES GOVERNING JUDGES' PROFESSIONAL CONDUCT, IN PARTICULAR ETHICS, INCOMPATIBLE BEHAVIOUR AND IMPARTIALITY, Council of Europe, 2002***

#### **B. CRIMINAL, CIVIL AND DISCIPLINARY LIABILITY OF JUDGES**

4) What criminal, civil and disciplinary liability should apply to judges?

##### **a. Criminal liability**

52. Judges who in the conduct of their office commit what would in any circumstances be regarded as crimes (e.g. accept bribes) cannot claim immunity from ordinary criminal process. The answers to questionnaire show that in some countries even well-intentioned judicial failings could constitute crimes. Thus, in Sweden and Austria judges (being assimilated to other public functionaries) can be punished (e.g. by fine) in some cases of gross negligence (e.g. involving putting or keeping someone in prison for too long).

53. Nevertheless, while current practice does not therefore entirely exclude criminal liability on the part of judges for unintentional failings in the exercise of their functions, the CCJE does not regard the introduction of such liability as either generally acceptable or to be encouraged. A judge should not have to operate under the threat of a financial penalty, still less imprisonment, the presence of which may, however sub-consciously, affect his judgment.

54. The vexatious pursuit of criminal proceedings against a judge whom a litigant dislikes has become common in some European states. The CCJE considers that in countries where a criminal investigation or proceedings can be started at the instigation of a private individual, there should be a mechanism for preventing or stopping such investigation or proceedings against a judge relating to the purported performance of his or her office where there is no proper case for suggesting that any criminal liability exists on the part of the judge.

##### **5) Conclusions on liability**

75. As regards criminal liability, the CCJE considers that:

- i) judges should be criminally liable in ordinary law for offences committed outside their judicial office;
- ii) criminal liability should not be imposed on judges for unintentional failings in the exercise of their functions.

### ***PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA, African Commission on Human and Peoples Rights, 2003***

#### **A. GENERAL PRINCIPLES APPLICABLE TO ALL LEGAL PROCEEDINGS**

4) Independent tribunal

n) Judicial officers shall not be:

(i) liable in civil or criminal proceedings for improper acts or omissions in the exercise of their judicial functions.

***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

Chapter VII – Duties and responsibilities

68. The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to criminal liability, except in cases of malice.

71. When not exercising judicial functions, judges are liable under civil, criminal and administrative law in the same way as any other citizen.

***MAGNA CARTA OF JUDGES, CCJE, Council of Europe, Strasbourg, 17 November 2010***

Ethics and responsibility

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.

#### **VI. 4.3. CIVIL LIABILITY**

##### ***FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY, The Liability of Judges, International Association of Judges (IAJ), 1980***

[...] There could be no question of holding a judge liable for his decisions whenever these result from mistake of fact or law.

The only cases in which he could be held liable would be cases of gross negligence or cases of grave misconduct, i.e. wrongful acts or omissions which could not arise in relation to judges who carry out their duties in a normal and reasonable manner.

If it is to be admitted that acts or omissions of judges can lead to claims for compensation by the victims, against whom should they make their claims?

Several solutions were considered:

1. Against the State alone which provides the service in principle and which ought to accept the consequential risks.
2. Against the judge alone, and not against the State.
3. Against the State, which in appropriate cases can have recourse against the judge.
4. Simultaneously against the State and the judge.

In any event, however, any civil liability on the part of judges must never be allowed to impair their independence or lead to the retrial of the dispute between the parties, except in cases where a retrial is ordered expressly in the ordinary course of the law.

##### ***THE SIRACUSA DRAFT PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, 1981***

Immunity

Art. 17. Judges should have immunity from civil suit for acts done in their official capacity.

##### ***BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, Adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, 1985***

Professional secrecy and immunity

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

##### ***PALERMO DECLARATION, ELEMENTS OF A EUROPEAN STATUTE OF MAGISTRACY, MEDEL, 1993***

#### **VI. THE DUTIES OF MAGISTRATES**

6.2. Breaches of professional duty on the part of magistrates are not open to direct civil action. The injured party has the right to be indemnified by the State. Recourse to the State against a magistrate must be authorized by the Supreme Council of Magistrates, after hearing the parties concerned.

##### ***JUDGES' CHARTER IN EUROPE, European Association of Judges, 1997***

Fundamental principles

10. No Judge shall be directly liable to a civil suit in respect of the performance of his professional duties.



**EUROPEAN CHARTER ON THE STATUTE FOR JUDGES AND EXPLANATORY MEMORANDUM, Council of Europe, Strasbourg, 8 - 10 July 1998**

5. LIABILITY

5.2. Compensation for harm wrongfully suffered as a result of the decision or the behaviour of a judge in the exercise of his or her duties is guaranteed by the State. The statute may provide that the State has the possibility of applying, within a fixed limit, for reimbursement from the judge by way of legal proceedings in the case of a gross and inexcusable breach of the rules governing the performance of judicial duties. The submission of the claim to the competent court must form the subject of prior agreement with the authority referred to at paragraph 1.3 hereof.

**THE UNIVERSAL CHARTER OF THE JUDGE, International Association of Judges (IAJ), 1999**

Art. 10 Civil and penal responsibility

Civil action, in countries where this is permissible, and criminal action, including arrest, against a judge must only be allowed under circumstances ensuring that his or her independence cannot be influenced.

**OPINION NO. 3 (2002) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE PRINCIPLES AND RULES GOVERNING JUDGES' PROFESSIONAL CONDUCT, IN PARTICULAR ETHICS, INCOMPATIBLE BEHAVIOUR AND IMPARTIALITY, Council of Europe, 2002**

B. CRIMINAL, CIVIL AND DISCIPLINARY LIABILITY OF JUDGES

4) What criminal, civil and disciplinary liability should apply to judges?

b. Civil liability

55. Similar considerations to those identified in paragraph 53 apply to the imposition on judges personally of civil liability for the consequences of their wrong decisions or for other failings (e.g. excessive delay). As a general principle, judges personally should enjoy absolute freedom from liability in respect of claims made directly against them relating to their exercise in good faith of their functions. Judicial errors, whether in respect of jurisdiction or procedure, in ascertaining or applying the law or in evaluating evidence, should be dealt with by an appeal; other judicial failings which cannot be rectified in this way (including e.g. excessive delay) should, at most, lead to a claim by the dissatisfied litigant against the State. That the state may, in some circumstances, be liable under the European Convention of Human Rights, to compensate a litigant, is a different matter, with which this opinion is not directly concerned.

56. There are however European countries, in which judges may incur civil liability for grossly wrong decisions or other gross failings<sup>7</sup>, particularly at the instance of the state, after the dissatisfied litigant has established a right to compensation against the state. Thus, for example, in the Czech Republic the state may be held liable for damages caused by a judge's illegal decision or incorrect judicial action, but may claim recourse from the judge if and after the judge's misconduct has been established in criminal or disciplinary proceedings. In Italy, the state may, under certain conditions, claim to be reimbursed by a judge who has rendered it liable by either wilful deceit or "gross negligence", subject in the latter case to a potential limitation of liability.

57. The European Charter on the statute for judges contemplates the possibility of recourse proceedings of this nature in paragraph 5.2 of its text - with the safeguard that prior agreement should be obtained from an independent authority with substantial judicial representation, such as that commended in paragraph 43 of the CCJE's Opinion No. 1 (2001). The commentary to the Charter

emphasises in its paragraph 5.2 the need to restrict judges' civil liability to (a) reimbursing the state for (b) "gross and inexcusable negligence" by way of (c) legal proceedings (d) requiring the prior agreement of such an independent authority. The CCJE endorses all these points, and goes further. The application of concepts such as gross or inexcusable negligence is often difficult. If there was any potential for a recourse action by the state, the judge would be bound to have to become closely concerned at the stage when a claim was made against the state. The CCJE's conclusion is that 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.

#### 5) Conclusions on liability

76. As regards civil liability, the CCJE considers that, bearing in mind the principle of independence:

i) the remedy for judicial errors (whether in respect of jurisdiction, substance or procedure) should lie in an appropriate system of appeals (whether with or without permission of the court);

ii) any remedy for other failings in the administration of justice (including for example excessive delay) lies only against the state;

iii) 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.

### ***PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA, African Commission on Human and Peoples Rights, 2003***

#### A. GENERAL PRINCIPLES APPLICABLE TO ALL LEGAL PROCEEDINGS

#### 4) Independent tribunal

n) Judicial officers shall not be:

(i) liable in civil or criminal proceedings for improper acts or omissions in the exercise of their judicial functions.

### ***SECOND STUDY COMMISSION - CIVIL LAW AND PROCEDURE, CIVIL LIABILITY OF JUDGES, International Association of Judges (IAJ), 2003***

#### Conclusions

Civil liability of judges should be distinguished from disciplinary proceedings against them since the aim and effects of each are quite different in nature.

Having regard to the Basic Principles of the Independence of the Judiciary (UNO, 1985), the European Charter on the Statute of the Judges (Council of Europe, 1998) and the Universal Statute of the Judge (IAJ, 1999), the rules about civil liability of judges should ensure that a judge performing judicial duties may be liable only in exceptional cases, which may not include any instance in which the judge is acting in good faith; in any event those rules must not jeopardise judicial independence.

### ***DECLARATION OF MINIMAL PRINCIPLES ABOUT JUDICIARIES AND JUDGES' INDEPENDENCE IN LATIN AMERICA, Campeche, April 2008***

#### III. MINIMAL CONDITIONS FOR THE PROTECTION OF JUDGES' INDEPENDENCE AND IMPARTIALITY

#### 11. CIVIL AND CRIMINAL RESPONSIBILITY

Given the special nature of their conflict resolving function, ordinarily exercised in situations of interests in conflict and recognizing that the growth in judicial litigation in the region constitutes a structural problem for the Judiciary, the following is set forth:

- a) As a general rule, that judges are not legally liable in a personal way for their decisions, with the only exception of cases of willful misconduct and/or fraud.
- b) In cases of repeated omission or excessive and unjustified delay that could be attributed to the judge, they shall be only disciplinarily accused of negligence.
- c) In cases of civil responsibility, it can only be demanded after having exhausted all possibilities of procedural and appeal claims and only by the legally aggrieved party.
- d) Both the civil action, when admitted, and the criminal action directed against judges, and the case of their arrest, shall be exercised according to conditions that cannot have as an objective an influence on their jurisdictional activity.

***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

Chapter VII – Duties and responsibilities

67. Only the state may seek to establish the civil liability of a judge through court action in the event that it has had to award compensation.

71. When not exercising judicial functions, judges are liable under civil, criminal and administrative law in the same way as any other citizen.

***REPORT ON THE INDEPENDENCE OF THE JUDICIAL SYSTEM PART I: THE INDEPENDENCE OF JUDGES, Venice Commission, Venice, 12-13 March 2010 CDL-AD(2010)004***

IV. Conclusions

82. The following standards should be respected by states in order to ensure internal and external judicial independence:

10. Judges should enjoy functional – but only functional – immunity.

11. Judges should not put themselves into a position where their independence or impartiality may be questioned. This justifies national rules on the incompatibility of judicial office with other functions and is also a reason why many states restrict political activities of judges.

***MAGNA CARTA OF JUDGES, CCJE, Council of Europe, Strasbourg, 17 November 2010***

Ethics and responsibility

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.

#### **VI. 4.4. DISCIPLINARY LIABILITY**

##### ***THE SIRACUSA DRAFT PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, 1981***

###### Discipline

Art. 13. Any disciplinary proceedings concerning judges should be before a court or a board composed of and selected by members of the judiciary.

Art. 14. All disciplinary action should be based upon standards of judicial conduct promulgated by law or in established rules of court.

##### ***BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, Adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, 1985***

###### Discipline, suspension and removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

##### ***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE (“Singhvi Declaration”), ECOSOC, 1985***

###### Discipline and Removal

26. (a) A complaint against a judge shall be processed expeditiously and fairly under an appropriate practice and the judge shall have the opportunity to comment on the complaint at the initial stage. The examination of the complaint at its initial stage shall be kept confidential, unless otherwise requested by the judge.

(b) The proceedings for judicial removal or discipline when such are initiated shall be held before a Court or a Board predominantly composed of members of the judiciary. The power of removal may, however, be vested in the Legislature by impeachment or joint address, preferably upon a recommendation of such a Court or Board.

27. All disciplinary action shall be based upon established standards of judicial conduct.

28. The proceedings for discipline of judges shall ensure fairness to the judge and the opportunity of a full hearing.

29. Judgments in disciplinary proceedings instituted against judges, whether held in camera or in public, shall be published.

##### ***PALERMO DECLARATION, ELEMENTS OF A EUROPEAN STATUTE OF MAGISTRACY, MEDEL, 1993***

8.1. The Supreme Council of Magistrates handles disciplinary complaints against magistrates without delay and equitably, according to a procedure set down by the law.

8.2. The investigation and the debate allow for contradictory. The debates are public except for motivated *in camera* proceedings, notably when the private life of the magistrate or of a third party needs to be protected. The decision is always pronounced publicly. It is motivated. It receives appropriate publicity.

8.3 The decision is subject to invalidation by a Supreme Court for violation of the law.

**EUROPEAN CHARTER ON THE STATUTE FOR JUDGES AND EXPLANATORY MEMORANDUM, Council of Europe, Strasbourg, 8 - 10 July 1998**

**5. LIABILITY**

5.1. The dereliction by a judge of one of the duties expressly defined by the statute, may only give rise to a sanction upon the decision, following the proposal, the recommendation, or with the agreement of a tribunal or authority composed at least as to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation. The scale of sanctions which may be imposed is set out in the statute, and their imposition is subject to the principle of proportionality. The decision of an executive authority, of a tribunal, or of an authority pronouncing a sanction, as envisaged herein, is open to an appeal to a higher judicial authority.

5.3. Each individual must have the possibility of submitting without specific formality a complaint relating to the miscarriage of justice in a given case to an independent body. This body has the power, if a careful and close examination makes a dereliction on the part of a judge indisputably appear, such as envisaged at paragraph 5.1 hereof, to refer the matter to the disciplinary authority, or at the very least to recommend such referral to an authority normally competent in accordance with the statute, to make such a reference.

**7. TERMINATION OF OFFICE**

7.1. A judge permanently ceases to exercise office through resignation, medical certification of physical unfitness, reaching the age limit, the expiry of a fixed legal term, or dismissal pronounced within the framework of a procedure such as envisaged at paragraph 5.1 hereof.

***THE UNIVERSAL CHARTER OF THE JUDGE, International Association of Judges (IAJ), 1999***

**Art. 11 Administration and disciplinary action**

The administration of the judiciary and disciplinary action towards judges must be organized in such a way, that it does not compromise the judges genuine independence, and that attention is only paid to considerations both objective and relevant. Where this is not ensured in other ways that are rooted in established and proven tradition, judicial administration and disciplinary action should be carried out by independent bodies, that include substantial judicial representation. Disciplinary action against a judge can only be taken when provided for by pre-existing law and in compliance with predetermined rules of procedure.

**OPINION NO. 3 (2002) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE PRINCIPLES AND RULES GOVERNING JUDGES' PROFESSIONAL CONDUCT, IN PARTICULAR ETHICS, INCOMPATIBLE BEHAVIOUR AND IMPARTIALITY, *Council of Europe, 2002***

**B. CRIMINAL, CIVIL AND DISCIPLINARY LIABILITY OF JUDGES**

4) What criminal, civil and disciplinary liability should apply to judges?

c. Disciplinary liability

58. All legal systems need some form of disciplinary system, although it is evident from the answers given by different member states to the questionnaires that the need is much more directly felt in some, as opposed to other, member states. There is in this connection a basic distinction between common-law countries, with smaller professional judiciaries appointed from the ranks of experienced practitioners, and civil law countries with larger and on average younger, career judiciaries.

59. The questions which arise are:

i) What conduct is it that should render a judge liable to disciplinary proceedings?

ii) By whom and how should such proceedings be initiated?

iii) By whom and how should they be determined?

iv) What sanctions should be available for misconduct established in disciplinary proceedings?

60. As to question (i), the first point which the CCJE identifies (repeating in substance a point made earlier in this opinion) is that it is incorrect to correlate breaches of proper professional standards with misconduct giving rise potentially to disciplinary sanctions. Professional standards, which have been the subject of the first part of this opinion, represent best practice, which all judges should aim to develop and towards which all judges should aspire. It would discourage the future development of such standards and misunderstand their purpose to equate them with misconduct justifying disciplinary proceedings. In order to justify disciplinary proceedings, misconduct must be serious and flagrant, in a way which cannot be posited simply because there has been a failure to observe professional standards set out in guidelines such as those discussed in the first part of this opinion.

61. This is not to say that breach of the professional standards identified in this opinion may not be of considerable relevance, where it is alleged that there has been misconduct sufficient to justify and require disciplinary sanction. Some of the answers to questionnaires recognise this explicitly: for example, professional standards are described as having "a certain authority" in disciplinary proceedings in Lithuania and as constituting a way "of helping the judge hearing disciplinary proceedings by illuminating the provisions of the law on judges" in Estonia. They have also been used in disciplinary proceedings in Moldova. (On the other hand, the Ukrainian and Slovakian answers deny that there is any relationship between the two).

62. In some countries, separate systems have even been established to try to regulate or enforce professional standards. In Slovenia, failure to observe such standards may attract a sanction before a "Court of Honour" within the Judges' Association, and not before the judges' disciplinary body. In the Czech Republic, in a particularly serious situation of non-observance of the rules of professional conduct, a judge may be excluded from the "Judges' Union", which is the source of these principles.

63. The second point which the CCJE identifies is that it is for each State to specify by law what conduct may give rise to disciplinary action. The CCJE notes that in some countries attempts have been made to specify in detail all conduct that might give grounds for disciplinary proceedings

leading to some form of sanction. Thus, the Turkish law on Judges and Prosecutors specifies gradations of offence (including for example staying away from work without excuse for various lengths of period) with matching gradations of sanction, ranging from a warning, through condemnation [i.e. reprimand], various effects on promotion to transfer and finally dismissal. Similarly, a recent 2002 law in Slovenia seeks to give effect to the general principle *nulla poena sine lege* by specifying 27 categories of disciplinary offence. It is, however, very noticeable in all such attempts that, ultimately, they all resort to general “catch-all” formulations which raise questions of judgment and degree. The CCJE does not itself consider that it is necessary (either by virtue of the principle *nulla poena sine lege* or on any other basis) or even possible to seek to specify in precise or detailed terms at a European level the nature of all misconduct that could lead to disciplinary proceedings and sanctions. The essence of disciplinary proceedings lies in conduct fundamentally contrary to that to be expected of a professional in the position of the person who has allegedly misconducted him or herself.

64. At first sight, Principle VI.2 of Recommendation No. R (94) 12 might be thought to suggest that precise grounds for disciplinary proceedings should always “be defined” in advance “in precise terms by the law”. The CCJE fully accepts that precise reasons must be given for any disciplinary action, as and when it is proposed to be or is brought. But, as it has said, it does not conceive it to be necessary or even possible at the European level to seek to define all such potential reasons in advance in other terms than the general formulations currently adopted in most European countries. In that respect therefore, the CCJE has concluded that the aim stated in paragraph 60 c) of its Opinion No. 1 (2001) cannot be pursued at a European level.

65. Further definition by individual member States by law of the precise reasons for disciplinary action as recommended by Recommended No. R (94) 12 appears, however, to be desirable. At present, the grounds for disciplinary action are usually stated in terms of great generality.

66. The CCJE next considers question (ii): by whom and how should disciplinary proceedings be initiated? Disciplinary proceedings are in some countries brought by the Ministry of Justice, in others they are instigated by or in conjunction with certain judges or councils of judges or prosecutors, such as the First President of the Court of Appeal in France or the General Public Prosecutor in Italy. In England, the initiator is the Lord Chancellor, but he has agreed only to initiate disciplinary action with the concurrence of the Lord Chief Justice.

67. An important question is what if any steps can be taken by persons alleging that they have suffered by reason of a judge's professional error. Such persons must have the right to bring any complaint they have to the person or body responsible for initiating disciplinary action. But they cannot have a right themselves to initiate or insist upon disciplinary action. There must be a filter, or judges could often find themselves facing disciplinary proceedings, brought at the instance of disappointed litigants.

68. The CCJE considers that the procedures leading to the initiation of disciplinary action need greater formalisation. It proposes that countries should envisage introducing a specific body or person in each country with responsibility for receiving complaints, for obtaining the representations of the judge concerned upon them and for deciding in their light whether or not there is a sufficient case against the judge to call for the initiation of disciplinary action, in which case it would pass the matter to the disciplinary authority.

## 5) Conclusions on liability

77. As regards disciplinary liability, the CCJE considers that:

i) in each country the statute or fundamental charter applicable to judges should define, as far as possible in specific terms, the failings that may give rise to disciplinary sanctions as well as the procedures to be followed;

- ii) as regard the institution of disciplinary proceedings, countries should envisage introducing a specific body or person with 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;
- iii) any disciplinary proceedings initiated should be determined by an independent authority or tribunal, operating a procedure guaranteeing full rights of defence;
- iv) when such authority or tribunal is not itself a court, then its members should be appointed by the independent authority (with substantial judicial representation chosen democratically by other judges) advocated by the CCJE in paragraph 46 of its Opinion N° 1 (2001);
- v) the arrangements regarding disciplinary proceedings in each country should be such as to allow an appeal from the initial disciplinary body (whether that is itself an authority, tribunal or court) to a court;
- vi) the sanctions available to such authority in a case of a proven misconduct should be defined, as far as possible in specific terms, by the statute or fundamental charter of judges, and should be applied in a proportionate manner.

### ***GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY, USAID, 2002***

Disciplinary procedures.

When disciplinary processes work correctly, they protect the integrity of the judiciary and its independence. However, disciplinary proceedings may be brought for political reasons or to punish judges who render decisions contrary to the views of their superiors. Substantive differences that should be resolved by appealing cases to a higher court may instead form the basis for disciplinary actions. Not uncommonly, disciplinary processes are bypassed entirely in removing judges from office.

A well-structured disciplinary procedure reduces the vulnerability to abuses that affects judicial independence. Judges subject to discipline should be afforded due process protections. Penalties should be proportionate to the offense. Judges should be removed from office only for official incapacity or misconduct that is serious and clearly specified (e.g., in law or in the oath of office).

The entity that has authority to discipline should be structured to exclude improper influences. Some experts recommend that it include substantial representation from the judiciary itself.<sup>8</sup> Others recommend an independent body in addition to the judiciary, such as an ombudsman's office. Retired judges and others of proven integrity often make good members.<sup>9</sup> Disciplinary bodies that regularly publish the number and bases of complaints received and their disposition, as many U.S. organizations do, enhance the transparency of the process.

Participants in this study warned that some caution needs to be exercised when a country first tries to crack down on judicial misconduct. Often judges have been punished for failing to comply with new codes of ethics when they were not adequately familiar with the codes or how they were to be applied. Codes need to be well publicized and discussed before they are used to discipline judges.

Members of the public should be able to file complaints against judges for official misconduct. However, steps need to be taken to guard against unhappy litigants using the process to harass judges who decided against them. The primary method for accomplishing this is to exclude complaints about the merits of decisions. Judicial conduct organizations operating in several U.S. states provide good examples of effective citizen complaint mechanisms, many of which incorporate public representatives into the process.



***PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA, African Commission on Human and Peoples Rights, 2003***

Q. TRADITIONAL COURTS

e) The procedures for complaints against and discipline of members of traditional courts shall be prescribed by law. Complaints against members of traditional courts shall be processed promptly and expeditiously, and with all the guarantees of a fair hearing, including the right to be represented by a legal representative of choice and to an independent review of decisions of disciplinary, suspension or removal proceedings.

***DECLARATION OF MINIMAL PRINCIPLES ABOUT JUDICIARIES AND JUDGES' INDEPENDENCE IN LATIN AMERICA, Campeche, April 2008***

III. MINIMAL CONDITIONS FOR THE PROTECTION OF JUDGES' INDEPENDENCE AND IMPARTIALITY

10. DISCIPLINARY SYSTEM

The disciplinary system shall be imposed according to the principles of legal standards and non-retroactivity as regards a contradictory proceeding and with respect for the right to defense. The judicial guarantees provided for ordinary criminal processes shall be applied. In this regard:

- a) The law shall classify, in the most concrete possible way the facts that constitute a disciplinary infringement/violation for Judges. Sanctions cannot be adopted if the motives were not previously foreseen by the law and they should observe predetermined procedural regulations.
- b) The entity with disciplinary competence shall exclusively be part of the same Judiciary.
- c) The disciplinary procedure could be requested by any individual or legal entity. It shall be organized in a contradictory way and with the highest respect for the right of defense.
- d) The most severe disciplinary sanctions can only be adopted by a qualified majority.

***OPINION NO. 10 (2007) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE COUNCIL FOR THE JUDICIARY AT THE SERVICE OF SOCIETY, CCJE, 2007***

V. C. 2. Discipline

62. The question of a judge's responsibility was examined by the CCJE in Opinion No. 3 (2002). The recent experiences of some States show the need to protect judges from the temptation to broaden the scope of their responsibility in purely jurisdictional matters. The role of the Council for the Judiciary is to show that a judge cannot bear the same responsibilities as a member of another profession: he/she performs a public function and cannot refuse to adjudicate on disputes. Furthermore, if the judge is exposed to legal and disciplinary sanctions against his/her decisions, neither judicial independence nor the democratic balance of powers can be maintained. The Council for the Judiciary should, therefore, unequivocally condemn political projects designed to limit the judges' freedom of decision-making. This does not diminish judges' duty to respect the law.

63. A judge who neglects his/her cases through indolence or who is blatantly incompetent when dealing with them should face disciplinary sanctions. Even in such cases, as indicated by CCJE Opinion No. 3 (2002), it is important that judges enjoy the protection of a disciplinary proceeding guaranteeing the respect of the principle of independence of the judiciary and carried out before a body free from any political influence, on the basis of clearly defined disciplinary faults: a Head of State, Minister of Justice or any other representative of political authorities cannot take part in the disciplinary body.

64. The Council for the Judiciary is entrusted with ethical issues; it may furthermore address court users' complaints. In order to avoid conflicts of interest, disciplinary procedures in first instance, when not addressed within the jurisdiction of a disciplinary court, should preferably be dealt with by a disciplinary commission composed of a substantial representation of judges elected by their peers, different from the members of the Council for the Judiciary, with provision of an appeal before a superior court.

#### VI. THE COUNCIL FOR THE JUDICIARY IN SERVICE OF ACCOUNTABILITY AND TRANSPARENCY OF THE JUDICIARY

95. When the Council for the Judiciary has disciplinary powers, judges who are the subject of disciplinary proceedings shall be fully informed of the grounds of the decision so that they can evaluate if they should contemplate appealing against the decision (see paragraph 39 above). In addition, the Council for the Judiciary could consider the publication of decisions taken which are both formal and final, in order to inform, not only the whole of the judiciary, but also the general public of the way in which the proceedings have been conducted and to show that the judiciary does not seek to cover up reprehensible actions of its members.

***JUDICIAL APPOINTMENTS, Venice Commission, Venice, 16-17 March 2007, CDL-AD(2007)02***

Conclusions

51. A balance needs to be struck between judicial independence and self-administration on the one side and the necessary accountability of the judiciary on the other side in order to avoid negative effects of corporatism within the judiciary. In this context, it is necessary to ensure that disciplinary procedures against judges are carried out effectively and are not marred by undue peer restraint.

***THE KYIV RECOMMENDATIONS ON JUDICIAL INDEPENDENCE IN EASTERN EUROPE, SOUTH CAUCASUS AND CENTRAL ASIA, OSCE, 2010***

Membership of Bodies Deciding on Discipline

9. Bodies competent to hear a disciplinary case and to take a decision on disciplinary measures shall not exclusively be composed of judges, but require representation including members from outside the judicial profession. Judicial members during their time of office shall not perform other functions relating to judges or the judicial community, such as administration, budgeting, or judicial selection. Bodies deciding on cases of judicial discipline must not be controlled by the executive branch nor shall there be any political influence pertaining to discipline. Any kind of control by the executive branch over Judicial Councils or bodies entrusted with discipline is to be avoided

Disciplinary Proceedings

25. Disciplinary proceedings against judges shall deal with alleged instances of professional misconduct that are gross and inexcusable and that also bring the judiciary into disrepute. Disciplinary responsibility of judges shall not extend to the content of their rulings or verdicts, including differences in legal interpretation among courts; or to examples of judicial mistakes; or to criticism of the courts.

Independent Body Deciding on Discipline

26. There shall be a special independent body (court, commission or council) to adjudicate cases of judicial discipline. The bodies that adjudicate cases of judicial discipline may not also initiate them or have as members persons who can initiate them. These bodies shall provide the accused judge with procedural safeguards, including the right to present a defence and also the right to appeal to a competent court. Transparency shall be the rule for disciplinary hearings of judges. Such hearings shall be open, unless the judge who is accused requests that they be closed. In this case a court shall decide whether the request is justified. The decisions regarding judicial discipline shall provide reasons. Final decisions on disciplinary measures shall be published.

**RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010**

Chapter VI – Status of the judge

52. A judge should not receive a new appointment or be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions or reform of the organisation of the judicial system.

Chapter VII – Duties and responsibilities

69. Disciplinary proceedings may follow where judges fail to carry out their duties in an efficient and proper manner. Such proceedings should be conducted by an independent authority or a court with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction. Disciplinary sanctions should be proportionate.

70. Judges should not be personally accountable where their decision is overruled or modified on appeal.

**MAGNA CARTA OF JUDGES, CCJE, Council of Europe, Strasbourg, 17 November 2010**

Ethics and responsibility

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.

**MINIMUM JUDICIAL STANDARDS V - DISCIPLINARY PROCEEDINGS AND LIABILITY OF JUDGES, ENCJ REPORT 2014 -2015, ENCJ, 2015**

The international sources summarised:

1. Judges should not be liable to civil or disciplinary liability in respect of their interpretation of the law, their assessment of facts or their weighing of evidence in determining a case, although some liability may arise in cases where there has been malice or gross negligence.
2. Judges should be guided by principles of ethical conduct, and disciplinary procedures should be based upon established standards of ethical conduct.
3. When a judge is not exercising his or her judicial functions s/he is as liable as any other person.
4. Judges should be guided by ethical principles of professional conduct, including duties that may be sanctioned by disciplinary measures. Disciplinary procedures should be based upon established standards of judicial conduct.
5. Conduct that may lead to disciplinary proceedings resulting in a change of status or removal should be clearly established. This should be done at national rather than European level.

A judge has a right to a private life but should act with the highest degree of integrity in both his/her professional and private life. Conduct which is capable of bringing the Judiciary into disrepute should be capable of disciplinary action.

**CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) - OPINION N° 20 THE ROLE OF COURTS WITH RESPECT TO THE UNIFORM APPLICATION OF THE LAW, 2017**

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. 4.5. DUE PROCESS AND APPELLATE REVIEWS IN DISCIPLINARY PROCEEDINGS**

### ***THE SIRACUSA DRAFT PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, 1981***

#### Discipline

Art. 15 The decision of a disciplinary board should be subject to appeal to a court.

### ***MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE, International Bar Association (IBA), 1982***

#### A Judges and the Executive

4 The Executive may participate in the discipline of judges only in referring complaints against judges, or in the initiation of disciplinary proceedings, but not the adjudication of such matters. The power to discipline or remove a judge must be vested in an institution, which is independent of the Executive. The power of removal of a judge should preferably be vested in a judicial tribunal. The Legislature may be vested with the powers of removal of judges, preferably upon a recommendation of a judicial commission.

#### C - Terms and Nature of Judicial Appointments

27 The proceedings for discipline and removal of judges should ensure fairness to the judge and adequate opportunity for hearing.

28 The procedure for discipline should be held *in camera*. The judge may however request that the hearing be held in public, subject to final and reasoned disposition of this request by the disciplinary tribunal. Judgements in disciplinary proceedings, whether held *in camera* or in public, may be published.

### ***BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, Adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, 1985***

#### Discipline, suspension and removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

### ***JUDGES' CHARTER IN EUROPE, European Association of Judges, 1997***

#### Fundamental principles

9. Disciplinary sanctions for judicial misconduct must be entrusted to a body made up of members of the judiciary in accordance with fixed procedural rules.

### ***EUROPEAN CHARTER ON THE STATUTE FOR JUDGES AND EXPLANATORY MEMORANDUM, Council of Europe, Strasbourg, 8 - 10 July 1998***

## 5. LIABILITY

5.1. The dereliction by a judge of one of the duties expressly defined by the statute, may only give rise to a sanction upon the decision, following the proposal, the recommendation, or with the agreement of a tribunal or authority composed at least as to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation. The scale of sanctions which may be imposed is set out in the statute, and their imposition is subject to the principle of proportionality. The decision of an executive authority, of a tribunal, or of an authority pronouncing a sanction, as envisaged herein, is open to an appeal to a higher judicial authority.

### ***OPINION NO. 3 (2002) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE PRINCIPLES AND RULES GOVERNING JUDGES' PROFESSIONAL CONDUCT, IN PARTICULAR ETHICS, INCOMPATIBLE BEHAVIOUR AND IMPARTIALITY, Council of Europe, 2002***

## B. CRIMINAL, CIVIL AND DISCIPLINARY LIABILITY OF JUDGES

4) What criminal, civil and disciplinary liability should apply to judges?

### c. Disciplinary liability

69. The next question (iii) is: by whom and how should disciplinary proceedings be determined? A whole section of the United Nations Basic Principles is devoted to discipline, suspension and removal. Article 17 recognises judges' "right to a fair hearing". Under Article 19, "all disciplinary (...) proceedings shall be determined in accordance with established standards of judicial conduct". Finally, Article 20 sets out the principle that "decisions in disciplinary, suspension or removal proceedings should be subject to an independent review". At the European level, guidance is provided in Principle VI of Recommendation No. R (94) 12, which recommends that disciplinary measures should be dealt with by "a special competent body which has as its task to apply any disciplinary sanctions and measures, where they are not dealt with by a court, and whose decisions shall be controlled by a superior judicial organ, or which is a superior judicial organ itself" and that judges should in this connection benefit, at the least, by protections equivalent to those afforded under Article 6.1 of the Convention on Human Rights. Further, the CCJE emphasises in this context that disciplinary measures include any measures adversely affecting a judge's status or career, including transfer of court, loss of promotion rights or pay.

70. The replies to the questionnaire show that, in some countries, discipline is ensured by courts specialising in cases of this type: the disciplinary committee of the Supreme Court (Estonia, Slovenia - where each level is represented). In Ukraine, there is a committee including judges of the same level of jurisdiction as the judge concerned. In Slovakia, there are now two tiers of committee, one of three judges, the second of five Supreme Court judges. In Lithuania, there is a committee of judges from the various tiers of general jurisdiction and administrative courts. In some countries, judgment is given by a Judicial Council, sitting as a disciplinary court (Moldova, France, Portugal).<sup>9</sup>

71. The CCJE has already expressed the view that disciplinary proceedings against any judge should only be determined by an independent authority (or "tribunal") operating procedures which guarantee full rights of defence - see para. 60(b) of CCJE Opinion No. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges. It also considers that the body responsible for appointing such a tribunal can and should be the independent body (with substantial judicial representation chosen democratically by other judges) which, as the CCJE advocated in paragraph 46 of its first Opinion, should generally be responsible for appointing judges. That in no way excludes the inclusion in the membership of a disciplinary tribunal of persons other than judges (thus averting the risk of corporatism), always provided that such other persons are not members of the legislature, government or administration.

72. In some countries, the initial disciplinary body is the highest judicial body (the Supreme Court). The CCJE considers that the arrangements regarding disciplinary proceedings in each country should be such as to allow an appeal from the initial disciplinary body (whether that is itself an authority, tribunal or court) to a court.

73. The final question (iv) is: what sanctions should be available for misconduct established in disciplinary proceedings? The answers to questionnaire reveal wide differences, no doubt reflecting the different legal systems and exigencies. In common law systems, with small, homogeneous judiciaries composed of senior and experienced practitioners, the only formal sanction evidently found to be necessary (and then only as a remote back-up possibility) is the extreme measure of removal, but informal warnings or contact can prove very effective. In other countries, with larger, much more disparate and in some cases less experienced judiciaries, a gradation of formally expressed sanctions is found appropriate, sometimes even including financial penalties.

74. The European Charter on the Statute for Judges (Article 5.1) states that "the scale of sanctions which may be imposed is set out in the statute and must be subject to the principle of proportionality". Some examples of possible sanctions appear in Recommendation No. R (94) 12 (Principle VI.1). The CCJE endorses the need for each jurisdiction to identify the sanctions permissible under its own disciplinary system, and for such sanctions to be, both in principle and in application, proportionate. But it does not consider that any definitive list can or should be attempted at the European level.

#### 5) Conclusions on liability

77. As regards disciplinary liability, the CCJE considers that:

i) in each country the statute or fundamental charter applicable to judges should define, as far as possible in specific terms, the failings that may give rise to disciplinary sanctions as well as the procedures to be followed;

ii) as regard the institution of disciplinary proceedings, countries should envisage introducing a specific body or person with 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;

iii) any disciplinary proceedings initiated should be determined by an independent authority or tribunal, operating a procedure guaranteeing full rights of defence;

iv) when such authority or tribunal is not itself a court, then its members should be appointed by the independent authority (with substantial judicial representation chosen democratically by other judges) advocated by the CCJE in paragraph 46 of its Opinion N° 1 (2001);

v) the arrangements regarding disciplinary proceedings in each country should be such as to allow an appeal from the initial disciplinary body (whether that is itself an authority, tribunal or court) to a court;

vi) the sanctions available to such authority in a case of a proven misconduct should be defined, as far as possible in specific terms, by the statute or fundamental charter of judges, and should be applied in a proportionate manner.

***COMMONWEALTH (LATIMER HOUSE) PRINCIPLES ON THE THREE BRANCHES OF GOVERNMENT with Annex (Parliamentary Supremacy, Judicial Independence), The Commonwealth, 2003***

#### VII) Accountability Mechanisms



(b) Judicial Accountability

In addition to providing proper procedures for the removal of judges on grounds of incapacity or misbehaviour that are required to support the principle of independence of the judiciary, any disciplinary procedures should be fairly and objectively administered. Disciplinary proceedings which might lead to the removal of a judicial officer should include appropriate safeguards to ensure fairness.

***PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA, African Commission on Human and Peoples Rights, 2003***

A. GENERAL PRINCIPLES APPLICABLE TO ALL LEGAL PROCEEDINGS

4) Independent tribunal

q) Judicial officials facing disciplinary, suspension or removal proceedings shall be entitled to guarantees of a fair hearing including the right to be represented by a legal representative of their choice and to an independent review of decisions of disciplinary, suspension or removal proceedings.

r) The procedures for complaints against and discipline of judicial officials shall be prescribed by law. Complaints against judicial officers shall be processed promptly, expeditiously and fairly.

***TECHNICAL GUIDE TO THE UNITED NATIONS CONVENTION AGAINST CORRUPTION, UNODC, 2009***

Article 8: Codes of conduct for public officials, V. Disciplinary measures

It is important that all States Parties have clearly stated and unambiguous procedures to deal with breaches of the code. These will depend on their own institutional and legal systems but will need to consider who or which agency should be responsible for receipt, verification and investigation of allegations concerning assets, gifts or hospitality, bearing in mind the possible volume of work and ease of access to relevant information. They will also have to decide who or which agency will be responsible for adjudicating on identified breaches of the requirements. Legislation, rules, or terms and conditions of service relating to the rights and duties of public officials should provide for appropriate and effective disciplinary measures. All public bodies' personnel and management systems should therefore address procedures and penalties for deterring, detecting and dealing with incidents of professional misconduct. The code should provide the foundation of a unified disciplinary and grievance framework to protect the integrity of the service and of each individual public official. The framework should provide a crucial mechanism in deterring and dealing with incidents of administrative corruption or misconduct by outlining clear and unambiguous responses and sanctions. The grievance framework provides a safeguard to a public official maliciously and falsely accused of corruption as well as other forms of misconduct but should also outline procedures for the actions and protection of public officials that report corrupt practices going on around them.

***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

Chapter VII – Duties and responsibilities

69. Disciplinary proceedings may follow where judges fail to carry out their duties in an efficient and proper manner. Such proceedings should be conducted by an independent authority or a court with

all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction. Disciplinary sanctions should be proportionate.

70. Judges should not be personally accountable where their decision is overruled or modified on appeal.

***FIRST STUDY COMMISSION REPORT - NOMINATION OF JUDGES, International Association of Judges (IAJ), 2013***

Recommendation on disciplinary measures

- Disciplinary measures against judges only be decided by the judiciary or bodies composed substantially of judges;
- No disciplinary body should comment upon judicial decisions.

***MINIMUM JUDICIAL STANDARDS V - DISCIPLINARY PROCEEDINGS AND LIABILITY OF JUDGES, ENCJ REPORT 2014 -2015, ENCJ, 2015***

2.1.- Availability of the procedure

This sub-indicator describes whether or not the Judiciary has a complaints procedure and a method of lodging a complaint.

2.2.- Scope of the procedure

This describes the scope of the procedure by enumerating the admissible grounds for the complaint such as the behaviour of the judge, timeliness and administrative mistakes.

2.3.- External participation in the complaints procedure

This sub-indicator relates to procedures that allow for participation by independent representatives to ensure the Judiciary is accountable.

2.4.- Responsibility for the procedure

This relates to the persons or bodies who are to implement the procedure.

2.5.- An appeal against a decision on a complaint

This sub-indicator describes whether a decision on a complaint can be appealed.

2.6.- The number of the complaints

This sub-indicator points out the number of complaints against the Judiciary which can be used to identify the confidence of society in the Judiciary.

2.7.- The number of complaints which result in investigation and/or sanction

2.8.- The timeliness of the procedure

This deals with the timescale for the initiation of the proceedings and the adjudication thereon.

**ANONYMOUS DISCIPLINARY COMPLAINTS AND PROCEDURE**

It is recommended that, whether or not a complainant is identified, if a complaint can be made by anyone, there needs to be a mechanism or summary procedure by which the complaint can be dismissed or a decision can be taken that the complaint should not be progressed. The procedure

should be in the control of a Judge, or a body of Judges, or a person directly answerable to the Judiciary. The purpose of this mechanism or summary procedure in the control of a person or body directly answerable to the Judiciary is to ensure that vexatious claims or claims with no substance can be dismissed expeditiously, consistently with the international sources.

#### BODY TO DEAL WITH THE DISCIPLINARY COMPLAINTS

In principle, there should be separate bodies: (i) to investigate and decide whether there is a prima facie case and (ii) to adjudicate on the disciplinary proceedings, although established national traditions should also be taken account of. There should be a separate body responsible for receiving complaints and the administration of them, independent of the Ministry of Justice and answerable only to the Judiciary. This body or person should be independent and could consist of a judge, a body or panel of judges, or a person directly answerable to the judiciary or the relevant Council for the Judiciary. There should be a person or body responsible to the Judiciary who has power to investigate the complaint and that the investigation should include the possibility of receiving written and/or oral evidence.

Such a person or a body should be fully independent from the other branches of State power (the Executive and the Legislature), and (if it is a collegiate body) should include a majority of Judges, and a Judge expert in the jurisdiction and senior to the Judge being investigated. In those jurisdictions where a Council for the Judiciary has been established the body in charge of judicial discipline could be the appropriate national Council for the Judiciary (or a specific committee or department within the Council for the Judiciary), given the position of Councils for the Judiciary as independent institutions which provide protection for the Judiciary and play a major role in guaranteeing the independence of the Judiciary, assuming powers in the fields of judicial appointments, management of judicial career and judicial discipline.

#### SUSPENSION AS A TEMPORARY AND PRECAUTIONARY MEASURE IN DISCIPLINARY PROCEEDINGS

A judge should only be suspended in the most serious and exceptional cases, and where it is necessary for the administration of Justice. A judge if suspended should remain on full salary during the investigation, unless the Judge causes significant delay or does not co-operate with the investigation or in other exceptional circumstances. Any salary withheld during the investigation should be repaid if the Judge is not disciplined or later found not to have committed the acts alleged.

#### JUDGES BASIC RIGHTS DURING DISCIPLINARY PROCEEDINGS

The following rights should be accorded to the judge subject to disciplinary procedure:

1. to be fully informed of the case against him/her
2. to representation
3. to costs upon acquittal
4. to appear before any hearing and be heard, and call evidence either in writing or orally.
5. to be informed promptly if a complaint is to be investigated.
6. to be given a timetable for the investigation of the complaint, and the making of the decision.
7. to be given reasons for any decision made.
8. to appeal.

#### PUBLISHING THE NAME OF A JUDGE DURING DISCIPLINARY PROCEEDINGS

It is undesirable to publish the name of the judge prior to any sanction being imposed. Where a sanction is imposed, the judgment may or may not be published (with or without naming the judge).

#### TIME LIMIT OF DISCIPLINARY PROCEEDINGS

There should be a time limit for the bringing of a complaint which should only be extended in exceptional circumstances. There should be a time limit for the concluding of the investigation, the making of a decision, and the imposition of any sanction. The imposition of any sanction should be immediately after the decision on the merits of the case, and in any event without undue delay. These limits should be capable of being extended only in exceptional circumstances, such as the complexity of the investigation, illness of the judge or a criminal investigation.

## VI. 5. WHISTLEBLOWER POLICY

***ANTI-CORRUPTION TOOLKIT, Prepared by the United Nations Global Programme against Corruption (GPAC), Centre for International Crime Prevention, Office of Drug Control and Crime Prevention, United Nations Office at Vienna, Version 4, last edited 11 November 2002***

### Tool 37 -Whistleblower Protection

#### Purpose

The purpose of whistleblower protection is to encourage people to report crime, civil offences (including negligence, breach of contract, breach of administrative law), miscarriages of justice and health and environmental threats by safeguarding them against victimization, dismissal, and other forms of reprisal.

#### Description

The culture of inertia, secrecy and silence breeds corruption. People are often aware of forms of misconduct but are frightened to report them. Recent public inquiries into major disasters and scandals have shown that this culture in the workplace has cost hundreds of lives, damaged thousands of livelihoods, caused tens of thousands of jobs to be lost and undermined public confidence in major institutions. In some of these cases, victims may have been compensated but no one was held accountable for what happened. This culture persists because it is almost certain that the person who “blows the whistle” would be victimized. Therefore, to overcome this and to promote a culture of transparency and accountability, a clear and simple framework must be established that encourages “whistle-blowing” and protects such “whistleblowers” from victimization or retaliation.

#### A Law to Protect Whistleblowers.

The main purpose of whistleblower laws is to provide protection for those who, in good faith, report cases of mal-administration, corruption and other illicit behavior inside their organization. Some whistleblower laws are only applicable to public officials, while others provide a wider field of protection including private sector organizations and companies. Experience shows that the existence of a law alone is not sufficient to instill trust in potential whistleblowers. The law must provide for a mechanism that allows the institution to deal with the content of the message and not the messenger. In other words, the disclosure must be treated objectively and even if it proves to be false, the law must apply as long as the whistleblower acted in “good faith”. It must also apply irrespective of whether or not the information disclosed was confidential and the whistleblower therefore might have breached the law by blowing the whistle.

**Prevention.** The first aim of any whistleblower act is to prevent the person making the disclosure from being victimized, dismissed or treated unfairly in any other way, for having revealed the information. The best way to do this is to keep the identity of the whistleblower and the content of the disclosure confidential for as long as possible.

**Deterrence.** Furthermore, the law should establish an offence for employers to take detrimental action against whistleblowers if they made the disclosures in accordance with the law.

**Compensation.** The law should oblige the recipient of the disclosure to treat its content and the identity of the whistleblower with confidentiality. It should also contain rules providing for compensation or reinstatement in case whistleblowers suffer victimization or retaliation for disclosing the information. In the case of dismissal, it might not always be acceptable for whistleblowers to be reinstated in their position. The law should therefore provide for alternative solutions by obliging employers either to provide for a job in another branch or organization of the same institution, or to pay financial compensation.

**Co-ordination with the Legal Framework.** The part of the whistleblower law that seeks to protect whistleblowers from unfair dismissal must be coordinated with the labour laws of single countries. In

particular, where the “employment-at-will” doctrine or similar legal principles allow employers to dismiss employees without reason, the law must create exceptions from this guiding principle. Protections for an employer should guarantee that “blowing the whistle” does not become an easy way to avoid dismissal or to avoid other form of disciplinary action.

Who to Turn To. Generally, the law should provide for at least two levels of institutions to which whistleblowers can report their suspicions or offer evidence. The first level should include entities within the organization for which the whistleblower works, such as supervisors, heads of the organization or internal or external oversight bodies created specifically to deal with maladministration. If the whistleblower is a public servant he or she should be enabled to report to bodies such as an Ombudsman, an anti-corruption agency or an Auditor General.

Whistleblowers should be allowed to turn to a second level of institutions if their disclosures to one of the first level institutions have not produced appropriate results, and in particular if the person or institution to which the information was disclosed.

- Decided not to investigate;
- Did not complete the investigation within a reasonable time;
- Took no action regardless of the positive results of the investigation; or
- Did not report back to the whistleblower within a certain time.

Whistleblowers should also be given the possibility to directly address the second level institutions if they:

- Have reason to believe that they would be victimised if they raise the matter internally or with a prescribed external body; or
- Reasonably fear a cover-up.

Second level institutions could be designated members of the parliament, the government or the media.

Implementation. Experience shows that whistleblower laws alone will not encourage people to come forward. In a survey carried out among public officials in New South Wales, Australia, regarding the effectiveness of the protection of the Whistleblower Act 1992, 85% of the interviewees were unsure about either the willingness or the desire of their employers to protect them. 50% stated that they would refuse to make a disclosure for fear of reprisal. The ICAC New South Wales concluded that, in order to help the Whistleblower Act work:

- There must be a real commitment within the organisation to act upon disclosures and to protect those making them; and
- An effective internal reporting system must be established and widely publicized in the organization.

A Law to Protect against False Allegations.

Since whistle blowing can be a double-edged sword, it is necessary to protect the rights and reputations of persons against frivolous, vexatious and malicious allegations. The events in postwar U.S.A., and the phenomenon of the “informer” in authoritarian states, underscores this danger. Whistleblower legislation should therefore include clear rules to restore damage caused by false allegations. In particular, the law should contain minimum measures to restore a damaged reputation. Criminal codes normally do contain provisions sanctioning those who knowingly come forward with false allegations. It should be made clear to whistleblowers that these rules apply also to them if their allegations are not made in good faith.

Dealing with Whistleblowers and Managing their Expectations. In order to ensure effective implementation of whistleblower legislation, those people or institutions that receive the disclosures must be trained in dealing with whistleblowers. Whistleblowers often invest a lot of their time and energy on the allegations they are about to make. They suffer from a high level of stress. If their expectations are not managed properly, it might prove fatal for the investigation and damage trust in the investigating body. In particular, the investigation process and the expected outcome (criminal charges, disciplinary action, etc.) must be explained to the whistleblowers, as well as the likelihood

of producing sufficient evidence to take action, and the duration and difficulties of investigation. Whistleblowers should also be informed that the further the investigation proceeds, the more likely it would become for their identity to be revealed and for them to be subjected to various forms of reprisal.

Make the Whistleblower “Last the Distance”. During the investigation, whistleblowers must be kept updated about progress made. Concern about the effectiveness of protection must be acknowledged. The law will never be able to provide full protection and whistleblowers must be made aware of this. It is therefore essential for the investigating body to make every effort to ensure that whistleblowers “last the distance” by informing them about all of the steps taken and to be taken and the implications for the continued anonymity of the whistleblowers, reactions they might encounter as well as other factors which may impact a whistle-blowers willingness to continue providing information to authorities. In addition, they should be given legal advice and counseling.

Avoid Leakage of Information. The most effective way to protect whistleblowers is to maintain confidentiality regarding their identity and the content of their disclosures. However, some country experiences show that the recipients of disclosures do not pay enough attention to this important factor. Quite often, information is leaked, rumours spread, and whistleblowers suffer from reprisals. It is not enough to sanction the leakage of information. Instead, it might be more effective to train the recipients of disclosures on how to conduct investigations while protecting the identity of the whistleblower for as long as possible.

#### *Preconditions and Risks*

Perception of Lacking Commitment. If whistleblowers are not convinced that the investigating body is committed, they will turn away and probably not take any further steps.

Credible Investigating Body. If there are no external independent bodies to which whistleblowers can directly turn, many potential whistleblowers will not voice their concern.

Clarity of the Law. Since the law must instill trust and the targeted audience often may have modest educational backgrounds, it must be drafted in an easily understandable way.

**COMMONWEALTH (LATIMER HOUSE) PRINCIPLES ON THE THREE BRANCHES OF GOVERNMENT with Annex (Parliamentary Supremacy, Judicial Independence), The Commonwealth, 2003**

VII) Accountability Mechanisms

(b) Judicial Accountability

The criminal law and contempt proceedings should not be used to restrict legitimate criticism of the performance of judicial functions.

**STATE OF DEMOCRACY, HUMAN RIGHTS AND RULE OF LAW IN EUROPE Council of Europe, Secretary General, 2014**

Chapter B: Corruption

- Corruption in public administration [..]. Member States must ensure transparency by protecting those who report wrongdoing (whistle-blowers), helping to manage conflicts of interest and providing those who fight against corruption with the requisite independence and resources. Civil society and the media must also fulfil their watchdog role without undue influence from the state.



## VI. 6. TRANSPARENCY

### ***THE MADRID PRINCIPLES ON THE RELATIONSHIP BETWEEN THE MEDIA AND JUDICIAL INDEPENDENCE , ECOSOC, 1994***

#### Preamble

Freedom of the media, which is an integral part of freedom of expression is essential in a democratic society governed by the Rule of Law. It is the responsibility of judges to recognise and give effect to freedom of the media by applying a basic presumption in their favour and by permitting only such restrictions on freedom of the media as are authorised by the International Covenant on Civil and Political Rights ("International Covenant") and are specified in precise laws.

The media have an obligation to respect the rights of individuals, protected by the International Covenant, and the independence of the judiciary.

These principles are drafted as minimum standards and may not be used to detract from existing higher standards of protection of the freedom of expression.

#### The Basic Principle

1. Freedom of expression 1/ (including freedom of the media) constitutes one of the essential foundations of every society which claims to be democratic. It is the function and right of the media to gather and convey information to the public and to comment on the administration of justice, including cases before, during and after trial, without violating the presumption of innocence.

2. This principle can only be departed from in the circumstances envisaged in the International Covenant on Civil and Political Rights, as interpreted by the 1984 Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (E/CN.4/1985/4).

3. The right to comment on the administration of justice shall not be subject to any special restrictions.

#### Scope of the Basic Principle

4. The Basic Principle does not exclude the preservation by law of secrecy during the investigation of crime even where investigation forms part of the judicial process. Secrecy in such circumstances must be regarded as being mainly for the benefit of persons who are suspected or accused and to preserve the presumption of innocence. It shall not restrict the right of any such person to communicate to the press information about the investigation or the circumstances being investigated.

5. The Basic Principle does not include the holding in camera of proceedings intended to achieve conciliation or settlement of private causes.

6. The Basic Principle does not require a right to broadcast live or recorded court proceedings. Where this is permitted, the Basic Principle shall remain applicable.

#### Restrictions

7. Any restriction of the Basic Principle must be strictly prescribed by law. Where any such law confers a discretion or power, that discretion or power must be exercised only by a judge.

8. Where a judge has a power to restrict the Basic Principle and is contemplating the exercise of that power, the media (as well as any other person affected) shall have the right to be heard for the purpose of objecting to the exercise of that power and, if exercised, a right of appeal.

9. Laws may authorise restrictions of the Basic Principle to the extent necessary in a democratic society for the protection of minors and of members of other groups in need of special protection.

10. Laws may restrict the Basic Principle in relation to criminal proceedings in the interest of the administration of justice to the extent necessary in a democratic society  
(a) for the prevention of serious prejudice to a defendant;  
(b) for the prevention of serious harm to or improper pressure being placed upon a witness, a member of a jury, or a victim.

11. Where a restriction of the Basic Principle is sought on the grounds of national security 2/ this should not jeopardise the rights of the parties, including the rights of the defence. The defence and the media shall have the right, to the greatest extent possible, to know the grounds on which the restriction is sought (subject, if necessary, to a duty of confidentiality if the restriction is imposed) and shall have the right to contest this restriction.

12. In civil proceedings, restrictions of the Basic Principle may be imposed if authorised by law to the extent necessary in a democratic society to prevent serious harm to the legitimate interests of a private party.

13. No restriction shall be imposed in an arbitrary or discriminatory manner.

14. No restriction shall be imposed except strictly to the minimum extent and for the minimum time necessary to achieve its purpose, and no restriction shall be imposed if a more limited restriction would be likely to achieve that purpose. The burden of proof shall rest on the party requesting the restriction. Moreover, the order to restrict shall be subject to review by a judge.

#### Annex I

##### STRATEGIES FOR IMPLEMENTATION

1. Judges should receive guidance in dealing with the press. Judges should be encouraged to assist the press by providing summaries of long or complex judgements of matters of public interest and by other appropriate measures.

2. Judges shall not be forbidden to answer questions from the press relating to the administration of justice, though reasonable guidelines as to dealing with such questions may be formulated by the judiciary, which may regulate discussion of identifiable proceedings.

3. The balance between independence of the judiciary, freedom of the press and respect of the rights of the individual - particularly of minors and other persons in need of special protection - is difficult to achieve.

Consequently, it is indispensable that one or more of the following measures are placed at the disposal of affected persons or groups: legal recourse, press council, Ombudsman for the press, with the understanding that such circumstances can be avoided to a large extent by establishing a Code of Ethics for the media which should be elaborated by the profession itself.

#### ***FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY, PARTICIPATION OF THE JUDICIAL POWER IN THE ADMINISTRATION OF JUSTICE, International Association of Judges (IAJ), 1994***

As a conclusion [...], it should be stressed that the independence of the judge should be a reality, thanks to the measures which are being taken in order to permit a full exercise of his function, but also in order to safeguard the appearance of independence in the eyes of the public. This appearance, which must also be a reality, is essential to the confidence of the public in the judiciary.

#### ***FIRST STUDY COMMISSION - "THE PHYSICAL, STRUCTURAL AND ECONOMIC CONDITIONS OF JUDICIAL INDEPENDENCE", International Association of Judges (IAJ), 2001***

General Conclusions, Criticism of the judiciary

All agreed that the judiciary was coming under unfounded criticism and in some cases concerted attacks. Attack from the media generally, from politicians and from individual citizens (e.g., blogs). Also, it was generally agreed that the judiciary needed to exercise self-restraint in responding to such criticisms. Criticisms of initial decisions will almost always be addressed in appeals. When the criticism is of the court generally, the courts may appoint a spokesperson or seek assistance from the judges' association or the bar associations to address the criticism in the media. Although experience indicates that such spokespersons are not necessarily appreciated by the media, the Commission supports the solution as an appropriate method of addressing such criticism. Some courts provide the media a spokesperson who help explain complex decisions when they are being handed down by the court.

***OPINION NO. 3 (2002) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE PRINCIPLES AND RULES GOVERNING JUDGES' PROFESSIONAL CONDUCT, IN PARTICULAR ETHICS, INCOMPATIBLE BEHAVIOUR AND IMPARTIALITY, Council of Europe, 2002***

**A. STANDARDS OF JUDICIAL CONDUCT**

1) What standards of conduct should apply to judges?

d. Impartiality and judges' relations with the media

40. There has been a general trend towards greater media attention focused on judicial matters, especially in the criminal law field, and in particular in certain west European countries. Bearing in mind the links which may be forged between judges and the media, there is a danger that the way judges conduct themselves could be influenced by journalists. The CCJE points out in this connection that in its Opinion No. 1 (2001) it stated that, while the freedom of the press was a pre-eminent principle, the judicial process had to be protected from undue external influence. Accordingly, judges have to show circumspection in their relations with the press and be able to maintain their independence and impartiality, refraining from any personal exploitation of any relations with journalists and any unjustified comments on the cases they are dealing with. The right of the public to information is nevertheless a fundamental principle resulting from Article 10 of the European Convention on Human Rights. It implies that the judge answers the legitimate expectations of the citizens by clearly motivated decisions. Judges should also be free to prepare a summary or communiqué setting up the tenor or clarifying the significance of their judgements for the public. Besides, for the countries where the judges are involved in criminal investigations, it is advisable for them to reconcile the necessary restraint relating to the cases they are dealing with, with the right to information. Only under such conditions can judges freely fulfil their role, without fear of media pressure. The CCJE has noted with interest the practice in force in certain countries of appointing a judge with communication responsibilities or a spokesperson to deal with the press on subjects of interest to the public.

***GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY, USAID, 2002***

**E. Promoting Societal Respect for the Role of an Impartial Judiciary**

Thus far in the guide, we have discussed several concrete measures for enhancing judicial independence and impartiality. All are important. However, one long-time observer of courts around the world points to a less tangible factor as the most important one affecting judicial independence: the expectations of society. If a society expects and demands an honest judiciary, it will probably get one. If expectations are low, the likelihood that the judiciary will operate fairly is equally low.

All the reforms discussed in this guide can help the judiciary develop public respect and reinforce changing expectations. We discuss below four additional issues that are particularly relevant to building respect for an independent judiciary.

### 1. The Power of Constitutional Review

The power of constitutional review is the authority of courts to declare laws and executive actions unconstitutional. Although judiciaries in most countries exercise some degree of constitutional review, specific arrangements vary. In most common law countries, including the United States, all ordinary courts have the authority to declare laws or acts unconstitutional, but they may rule on constitutional issues only as they arise in specific cases. Most civil law countries concentrate review power in a single constitutional court, but many allow laws and issues to be reviewed in the abstract. There is also variation in who can ask for constitutional review—individuals, ombudsmen, officials, legislators, or the court itself.

In many countries making a transition to constitutional democracy, the judiciary has long been seen as a tool of the state and continues to be viewed with skepticism, if not disdain. Constitutional cases are often high profile cases that pit one political faction against another. If in these cases a judiciary is able to rule effectively to uphold constitutional principles, it can send a powerful signal to society. Judiciaries have gained enormous respect with such rulings, as seen in Central and Eastern Europe in the 1990s.

Bulgaria provides a good example. After the 1994 electoral victory of the Bulgarian Socialist Party, the constitutional court ruled against attempts by Parliament to roll back the reintroduction of private property and freedom of the press. The non-communist political forces as well as the general public came to perceive the court as the last institutional barrier capable of stemming the tide of neo-communism. The court gained in stature and, in large part owing to the public's support, was able to fend off attempts to cut back its power.

However, in several countries, governments have refused to comply with decisions of the constitutional court (e.g., Slovakia and Belarus) and substantially reduced the court's power (e.g., Kazakhstan and Russia). This illustrates the dilemma constitutional courts often face: Should they make the legally correct decision and face the prospect of non-compliance and attacks on their own powers, or should they make a decision that avoids controversy, protects them, and possibly enables them to have an impact in subsequent cases? Bold moves by constitutional courts can be instrumental in building democracy and respect for the courts themselves. However, the local political environment will determine the ability of the courts to exercise independent authority in these high stakes situations.

*As a final cautionary note, the establishment of a constitutional court has not always contributed to strengthened judicial independence. In Zimbabwe, a proposal to establish such a court was clearly intended to interfere with judicial independence. The proposal would have removed the power of constitutional review from the supreme court and transferred it to a new constitutional court whose composition would have been open to considerable political manipulation. As with all aspects of the judiciary, constitutional courts are open to abuse.*

**COMMONWEALTH (LATIMER HOUSE) PRINCIPLES ON THE THREE BRANCHES OF GOVERNMENT with Annex (Parliamentary Supremacy, Judicial Independence), The Commonwealth, 2003**

#### IV) Independence of the Judiciary

Court proceedings should, unless the law or overriding public interest otherwise dictates, be open to the public. Superior Court decisions should be published and accessible to the public and be given in a timely manner.

***PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA, African Commission on Human and Peoples Rights, 2003***

**D. COURT RECORDS AND PUBLIC ACCESS:**

- a) All information regarding judicial proceedings shall be accessible to the public, except information or documents that have been specifically determined by judicial officials not to be made public.
- b) States must ensure that proper systems exist for recording all proceedings before judicial bodies, storing such information and making it accessible to the public.
- c) All decisions of judicial bodies must be published and available to everyone throughout the country.
- d) The cost to the public of obtaining records of judicial proceedings or decisions should be kept to a minimum and should not be so high as to amount to a denial of access.

***COMMONWEALTH (LATIMER HOUSE) PRINCIPLES ON THE THREE BRANCHES OF GOVERNMENT with Annex (Parliamentary Supremacy, Judicial Independence), The Commonwealth, 2003***

**IX) Oversight of Government**

Steps which may be taken to encourage public sector accountability include:

- (a) The establishment of scrutiny bodies and mechanisms to oversee Government, enhances public confidence in the integrity and acceptability of government's activities. Independent bodies such as Public Accounts Committees, Ombudsmen, Human Rights Commissions, Auditors-General, Anti-corruption commissions, Information Commissioners and similar oversight institutions can play a key role in enhancing public awareness of good governance and rule of law issues. Governments are encouraged to establish or enhance appropriate oversight bodies in accordance with national circumstances.
- (b) Government's transparency and accountability is promoted by an independent and vibrant media which is responsible, objective and impartial and which is protected by law in its freedom to report and comment upon public affairs.

**X. Civil Society**

Parliaments and governments should recognise the role that civil society plays in the implementation of the Commonwealth's fundamental values and should strive for a constructive relationship with civil society to ensure that there is broader opportunity for lawful participation in the democratic process.

***PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA, African Commission on Human and Peoples Rights, 2003***

**A. GENERAL PRINCIPLES APPLICABLE TO ALL LEGAL PROCEEDINGS**

**3) Public hearing**

- a) All the necessary information about the sittings of judicial bodies shall be made available to the public by the judicial body;
- b) A permanent venue for proceedings by judicial bodies shall be established by the State and widely publicised. In the case of ad-hoc judicial bodies, the venue designated for the duration of their proceedings should be made public.

- c) Adequate facilities shall be provided for attendance by interested members of the public;
- d) No limitations shall be placed by the judicial body on the category of people allowed to attend its hearings where the merits of a case are being examined;
- e) Representatives of the media shall be entitled to be present at and report on judicial proceedings except that a judge may restrict or limit the use of cameras during the hearings;
- f) The public and the media may not be excluded from hearings before judicial bodies except if it is determined to be
  - (i) in the interest of justice for the protection of children, witnesses or the identity of victims of sexual violence
  - (ii) for reasons of public order or national security in an open and democratic society that respects human rights and the rule of law.
- g) Judicial bodies may take steps or order measures to be taken to protect the identity and dignity of victims of sexual violence, and the identity of witnesses and complainants who may be put at risk by reason of their participation in judicial proceedings.
- h) Judicial bodies may take steps to protect the identity of accused persons, witnesses or complainants where it is in the best interest of a child.
- i) Nothing in these Guidelines shall permit the use of anonymous witnesses, where the judge and the defence is unaware of the witness' identity at trial.
- j) Any judgement rendered in legal proceedings, whether civil or criminal, shall be pronounced in public.

#### 4. Independent tribunal

u) States may establish independent or administrative mechanisms for monitoring the performance of judicial officers and public reaction to the justice delivery processes of judicial bodies. Such mechanisms, which shall be constituted in equal part of members the judiciary and representatives of the Ministry responsible for judicial affairs, may include processes for judicial bodies receiving and processing complaints against its officers.

### ***OPINION NO. 7 (2005) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS ON "JUSTICE AND SOCIETY", Council of Europe, 2005***

#### **A. THE RELATIONS OF THE COURTS WITH THE PUBLIC WITH SPECIAL REFERENCE TO THE ROLE OF THE COURTS IN A DEMOCRACY**

19. The CCJE recommends a general support from the European judiciaries and the states, at the national and international levels, for judicial "outreach programmes" as described above; they should become a common practice. The CCJE considers that such programmes go beyond the scope of general information to the public. They aim at shaping a correct perception of the judge's role in society. In this context, the CCJE considers that – while it is for the Ministries of Justice and Education to provide for general information on the functioning of justice and to define school and university teaching syllabi - courts themselves, in conformity with the principle of judicial independence, should be recognised as a proper agency to establish "outreach programmes" and to hold regular initiatives consisting in conducting surveys, arranging focus groups, employing lawyers and academics for public fora, etc. In fact, such programmes have the goal of improving the understanding and confidence of society with regard to its system of justice and, more generally, of strengthening judicial independence.

### ***GENERAL REPORT, FIRST STUDY COMMISSION - ECONOMICS, JURISDICTION AND INDEPENDENCE, International Association of Judges (IAJ), 2005***

#### Conclusions

8) Customer orientation is an aspect of NPM, which is essential and should be supported by all actors of the judicial system. One of the main tasks should be to make courts and their work more understandable, better known and more accepted.

***OPINION NO. 7 (2005) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS ON “JUSTICE AND SOCIETY”, Council of Europe, 2005***

**A. THE RELATIONS OF THE COURTS WITH THE PUBLIC WITH SPECIAL REFERENCE TO THE ROLE OF COURTS IN A DEMOCRACY**

9. Most citizens' experience of their court system is limited to any participation they might have had as litigants, witnesses, or jurors. The role of the media is essential in broadcasting information to the public on the role and the activities of the courts (see section C below); but, aside from communication through the media, the CCJE's discussions have highlighted the importance of creating direct relations between the courts and the public at large. Integrating justice into society requires the judicial system to open up and learn to make itself known. The idea is not to turn the courts into a media circus but to contribute to the transparency of the judicial process. Admittedly, full transparency is impossible, particularly on account of the need to protect the effectiveness of investigations and the interests of the persons involved, but an understanding of how the judicial system works is undoubtedly of educational value and should help to boost public confidence in the functioning of the courts.

10. The first way to make judicial institutions more accessible is to introduce general measures to inform the public about courts' activities.

**C. THE RELATION OF THE COURTS WITH THE MEDIA**

33. The media have access to judicial information and hearings, according to modalities and with limitations of established by national laws (see, e.g. Recommendation Rec(2003)13 on the provision of information through the media in relation to criminal proceedings). Media professionals are entirely free to decide what stories should be brought to the public's attention and how they are to be treated. There should be no attempt to prevent the media from criticising the organisation or the functioning of the justice system. The justice system should accept the role of the media which, as outside observers, can highlight shortcomings and make a constructive contribution to improving courts' methods and the quality of the services they offer to users.

34. Judges express themselves above all through their decisions and should not explain them in the press or more generally make public statements in the press on cases of which they are in charge. Nevertheless it would be useful to improve contacts between the courts and the media:

- i) to strengthen understanding of their respective roles;
- ii) to inform the public of the nature, the scope, the limitations and the complexities of judicial work;
- iii) to rectify possible factual errors in reports on certain cases.

35. Judges should have a supervisory role over court spokespersons or staff responsible for communicating with the media.

36. The CCJE would refer to the conclusions of the 2<sup>nd</sup> European Conference of Judges (see paragraph 3 above) in which the Council of Europe was asked both to facilitate the holding of regular meetings between representatives of the judiciary and the media and to consider drafting a European declaration on relations between justice and the media complementing Recommendation Rec(2003)13 on the provision of information through the media in relation to criminal proceedings.

37. States should encourage exchanges, in particular by round tables, on the rules and practices of each profession, in order to highlight and explain the problems they face. The CCJE considers that the Council of Europe could usefully establish or promote such contacts at European level, so as to bring about greater consistency in European attitudes.

38. Schools of journalism should be encouraged to set up courses on judicial institutions and procedures.

39. The CCJE considers that each profession (judges and journalists) should draw up a code of practice on its relations with representatives of the other profession and on the reporting of court cases. As the experience of states which already have such a system shows, the judiciary would define the conditions in which statements may be made to the media concerning court cases, while journalists would produce their own guidelines on reporting of current cases, on the publicising of the names (or pictures) of persons involved in litigation (parties, victims, witnesses, public prosecutor, investigating judge, trial judge, etc.), and on the reporting of judgments in cases which attracted major public interest. In conformity with its Opinion No. 3 (2002), paragraph 40, the CCJE recommends that national judiciaries take steps along these lines.

40. The CCJE recommends that an efficient mechanism, which could take the form of an independent body, be set up to deal with problems caused by media accounts of a court case, or difficulties encountered by a journalist in the accomplishment of his/her information task. This mechanism would make general recommendations intended to prevent the recurrence of any problems observed.

41. It is also necessary to encourage the setting up of reception and information services in courts, not only, as mentioned above, to welcome the public and assist users of judicial services, but also to help the media to get to understand the workings of the justice system better.

42. These services, over which judges should have a supervisory role, could pursue the following aims:

- to communicate summaries of court decisions to the media;
- to provide the media with factual information about court decisions;
- to liaise with the media in relation to hearings in cases of particular public interest.
- to provide factual clarification or correction with regard to cases reported in the media (see also paragraph 34, iii above). The court reception services or spokesperson could alert the media to the issues involved and the legal difficulties raised in the case in question, organise the logistics of the hearings and make the appropriate practical arrangements, particularly with a view to protecting the people taking part as parties, jurors or witnesses.

43. All information provided to the media by the courts should be communicated in a transparent and non-discriminatory manner.

44. The question of whether TV cameras should be allowed into courtrooms for other than purely procedural purposes has been the subject of wide-ranging discussions, both at the 2<sup>nd</sup> Conference of European Judges (see paragraph 3 above) and at meetings of the CCJE. Some members of the CCJE have expressed serious reservations about this new form of public exposure of the work of the courts.

45. The public nature of court hearings is one of the fundamental procedural guarantees in democratic societies. While international law and national legislation allow exceptions to the principle that judicial proceedings should be conducted in public, it is important that these exceptions should be restricted to those permitted under article 6.1. of the ECHR.

46. The principle of public proceedings implies that citizens and media professionals should be allowed access to the courtrooms in which trials take place, but the latest audiovisual reporting



equipment gives the events related such a broad impact that they entirely transform the notion of public hearings. This may have advantages in terms of raising public awareness of how judicial proceedings are conducted and improving the image of the justice system, but there is also a risk that the presence of TV cameras in court may disturb the proceedings and alter the behaviour of those involved in the trial (judges, prosecutors, lawyers, parties, witnesses, etc.).

47. Where television recording of judicial hearings occurs, fixed cameras should be used and it should be possible for the presiding judge both to decide on filming conditions and to interrupt filming broadcasting at any time. These and any other necessary measures should protect the rights of the persons involved and ensure that the hearing is properly conducted.

48. The opinion of the persons involved in the proceedings should also be taken into account, in particular for certain types of trial concerning people's private affairs.

49. In view of the particularly strong impact of television broadcasts and the risk of a tendency towards unhealthy curiosity, the CCJE encourages the media to develop their own professional codes of conduct aimed at ensuring balanced coverage of the proceedings they are filming, so that their account is objective.

50. There may be overriding reasons justifying the filming of hearings for specific cases which are strictly defined, for example for educational purposes or to preserve a record on film of a hearing of particular historical importance for future use. In these cases, the CCJE emphasises the need to protect the persons involved in the trial, particularly by ensuring that filming methods do not disrupt the proper conduct of the hearing.

51. While the media plays a crucial role in securing the public's right to information, and acts, in the words of the European Court of Human Rights, as "democracy's watchdog", the media can sometimes intrude on people's privacy, damaging their reputation or undermining the presumption of their innocence, acts for which individuals can legitimately seek redress in court. The quest for sensational stories and commercial competition between the media carry a risk of excess and error. In criminal cases, defendants are sometimes publicly described or assumed by the media as guilty of offences before the court has established their guilt. In the event of a subsequent acquittal, the media reports may already have caused irremediable harm to their reputation, and this will not be erased by the judgment.

52. Courts need therefore to accomplish their duty, according to the case-law of the European Court of Human Rights, to strike a balance between conflicting values of protection of human dignity, privacy, reputation and the presumption of innocence on the one hand, and freedom of information on the other.

53. As stated in the conclusions of the 2<sup>nd</sup> European Conference of Judges (see paragraph 3 above), criminal-law responses to violations of personality rights (such as reputation, dignity or privacy) should be limited to quite exceptional cases. However, the courts do have a duty to ensure that civil damages are awarded, taking account not just of the damage incurred by the victim, but also the seriousness of the infringements suffered and the scale of the publication concerned.

54. The courts should be entitled, in exceptional cases that are strictly defined in order to avoid any accusation of censorship, to take urgent measures to put an immediate stop to the most serious infringements of people's personality rights (such as reputation, dignity or privacy), through the confiscation of publications or through broadcasting bans. 55. When a judge or a court is challenged or attacked by the media (or by political or other social actors by way of the media) for reasons connected with the administration of justice, the CCJE considers that, in view of the duty of judicial self-restraint, the judge involved should refrain from reactions through the same channels. Bearing in mind the fact that the courts can rectify erroneous information diffused in the press, the CCJE believes it would be desirable that the national judiciaries benefit from the support of persons or a

body (e.g. the Higher Council for the Judiciary or judges' associations) able and ready to respond promptly and efficiently to such challenges or attacks in appropriate cases.

#### D. ACCESSIBILITY, SIMPLIFICATION AND CLARITY OF THE LANGUAGE USED BY THE COURTS IN PROCEEDINGS AND DECISIONS

61. An important aspect of accessibility of law, as enshrined in judicial decisions, is represented by their ready availability to the general public. In view of this goal, the CCJE recommends that at least all Supreme Court and other important court decisions be accessible through Internet sites at no expense, as well as in print upon reimbursement of the cost of reproduction only; appropriate measures should be taken, in disseminating court decisions, to protect privacy of interested persons, especially parties and witnesses.

#### SUMMARY OF THE RECOMMENDATIONS AND CONCLUSIONS

##### B. The relations of the courts with participants in court proceedings

B.1. The CCJE considers that, in order to foster better understanding of the role of the judiciary, an effort is required to ensure in so far as possible that the ideas that the public has about the justice system are accurate and reflect the efforts made by judges and court officials to gain their respect and trust concerning courts' ability to perform their function. This action will have to show clearly the limits of what the justice system can do (see paragraphs 24 to 27 above).

B.2. The CCJE supports all the steps aiming at strengthening the public perception of impartiality of judges and enabling justice to be carried out (see paragraphs 28 to 32 above).

B.3. Such initiatives may include (see paragraphs 28 to 32 above):

- training programmes in non-discrimination and equal treatment organised by courts for judges and court staff (in addition to the similar programmes organised by lawyers or for lawyers);
- court facilities and arrangements designed to avoid any impression of inequality of arms;
- procedures designed to avoid giving unintended offence and to ease the involvement of all concerned in judicial proceedings.

##### C. The relations of the courts with the media

C.1. The CCJE considers that it would be useful to improve contacts between the courts and the media (see paragraph 34 above):

- to strengthen understanding of their respective roles;
- to inform the public of the nature, the scope, the limitations and the complexities of judicial work;
- to rectify possible factual errors in reports on certain cases.

C.2 Judges should have a supervisory role over court spokespersons or staff responsible for communicating with the media (see paragraph 35 above).

C.3. The CCJE considers that states should encourage exchanges, in particular by round tables, on the rules and practices of each profession and that the Council of Europe could usefully establish or promote such contacts at European level, so as to bring about greater consistency in European attitudes (see paragraph 36 and 37 above).

C.4. Schools of journalism should be encouraged to set up courses on judicial institutions and procedures (see paragraph 38 above).

C.5. The CCJE considers that each profession (judges and journalists) should, draw up a code of practice on its relations with representatives of the other profession and on the reporting of court cases (see paragraph 39 above).

C.6. The CCJE recommends that an efficient mechanism be set up, which could take the form of an independent body to deal with problems caused by media accounts of a court case or difficulties encountered by a journalist in the accomplishment of his/her information task, to make general recommendations intended to prevent the recurrence of any problems observed (see paragraph 40 above).

C.7. It is also necessary to encourage the setting up of reception and information services in courts under the supervision of the judges in order to help the media to get to understand the workings of the justice system better by (see paragraphs 41 and 42 above):

- communicating summaries of court decisions to the media;
- providing the media with factual information about court decisions;
- liaising with the media in relation to hearings in cases of particular public interest;
- providing factual clarification or correction with regard to cases reported in the media.

C.8. The CCJE considers that all information provided to the media by the courts should be communicated in a transparent and non-discriminatory manner (see paragraph 43 above).

C.9. The CCJE considers, that where television recording of judicial hearings occurs, fixed cameras should be used and it should be possible for the presiding judge both to decide on filming conditions and to interrupt filming broadcasting at any time. These and any other necessary measures should protect the rights of the persons involved and ensure that the hearing is properly conducted. Furthermore, the opinion of the persons involved in the proceedings should also be taken into account, in particular for certain types of trial concerning people's private affairs (see paragraphs 44 to 48 above).

C.10. The CCJE encourages the media to develop their own professional codes of conduct aimed at ensuring balanced coverage of the proceedings they are filming, so that their account is objective (see paragraph 49 above).

C.11. The CCJE considers that there may be overriding reasons justifying the filming of hearings for restricted use specified by the court (for example for educational purposes or to preserve a record on film of a hearing of particular historical importance for future use), in these cases, it is necessary to protect the persons involved in the trial, particularly by ensuring that filming methods do not disrupt the proper conduct of the hearing (see paragraph 50 above).

C.12. The CCJE considers that criminal-law responses to violations of personality rights should be limited to quite exceptional cases. However, the judges do have a duty to ensure that civil damages are awarded, taking account not just of the damage sustained by the victim, but also the seriousness of the infringements suffered and the scale of the publication concerned. The courts should be entitled, in exceptional cases, to take urgent measures to put an immediate stop to the most serious infringements of people's personality rights through the confiscation of publications or through broadcasting bans (see paragraphs 51 to 54 above).

C.13. When a judge or a court is challenged or attacked by the media for reasons connected with the administration of justice, the CCJE considers that in the view of the duty of judicial self-restraint, the judge involved should refrain from reactions through the same channels. Bearing in mind the fact that the courts can rectify erroneous information diffused in the press, the CCJE believes it would be desirable that the national judiciaries benefit from the support of persons or a body (e.g. the Higher Council for the Judiciary or judges' associations) able and ready to respond promptly and efficiently to such challenges (see paragraph 55 above).

D. Accessibility, simplification and clarity of the language used by the courts in proceedings and decisions

D.4. The CCJE recommends that at least all Supreme Court and other important court decisions be accessible through Internet sites at no expense, as well as in print upon reimbursement of the cost

of reproduction only; however appropriate measures should be taken in disseminating court decisions, to protect privacy of interested persons, especially parties and witnesses (see paragraph 61 above).

***FIRST STUDY COMMISSION - GENERAL REPORT, HOW CAN THE APPOINTMENT AND ASSESSMENT (QUALITATIVE AND QUANTITATIVE) OF JUDGES BE MADE CONSISTENT WITH THE PRINCIPLE OF JUDICIAL INDEPENDENCE, International Association of Judges (IAJ), 2006***

Conclusions

14) By this means, judicial assessment (within the bounds discussed above), may help to strengthen trust and confidence in the judiciary in democratic societies.

***OPINION NO. 10 (2007) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE COUNCIL FOR THE JUDICIARY AT THE SERVICE OF SOCIETY, CCJE, 2007***

V. G. Protection of the image of justice

81. Again in its Opinion No. 7 (2005), the CCJE pointed out the role of an independent body – which could well be identified in the Council for the Judiciary or in one of its committees, if necessary with the participation of media professionals – in dealing with problems caused by media accounts of court cases, or difficulties encountered by journalists in carrying out their work.

82. Finally, in its above mentioned Opinion, the CCJE – dealing with the issue of judges or courts challenged or attacked by the media or by political or social figures through the media – considered that, while the judge or court involved should refrain from reacting through the same channels, the Council for the Judiciary or a judicial body should be able and ready to respond promptly and efficiently to such challenges or attacks in appropriate cases.

VI. THE COUNCIL FOR THE JUDICIARY IN SERVICE OF ACCOUNTABILITY AND TRANSPARENCY OF THE JUDICIARY

91. Given the prospect of considerable involvement of the Council for the Judiciary in the administration of the judiciary, transparency in the actions undertaken by this Council 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.

92. All decisions by the Council for the Judiciary on appointment, promotion, evaluation, discipline and any other decisions regarding judges' careers must be reasoned (see also paragraph 39 above).

93. As it has already been mentioned, transparency, in the appointment and promotion of judges, will be ensured by publicising the appointment criteria and disseminating the post descriptions. Any interested party should be able to look into the choices made and check that the Council for the Judiciary applied the rules and criteria based on merits in relation to appointments and promotions.

96. The Council for the Judiciary should periodically publish a report of its activities, the aim of which being, on the one hand, to describe what the Council for the Judiciary has done and the difficulties encountered and, on the other, to suggest measures to be taken in order to improve the functioning of the justice system in the interest of the general public. The publication of this report may be accompanied by press conferences with journalists, meetings with judges and spokespersons of judicial institutions, to improve on the dissemination of information and on the interactions within the judicial institutions.

**RESOLUTION ON TRANSPARENCY AND ACCESS TO JUSTICE, European Network of Councils for the Judiciary (ENCJ), 2009**

2. An open and transparent system of justice is a system where:

a. Each person, whatever his background or abilities, has access to justice or to a system of alternative dispute resolution, financially affordable and at accessible locations, so that all proceedings can be easily brought against any person whether public or private, natural or legal.

b. Legislation, including EU legislation, is accessible and can easily be understood

c. All proceedings are dealt with by the competent jurisdictions within a reasonable time, at the lowest reasonable cost, consistent with the principles of justice. Standard time periods can be established for different categories of cases taking into account quality standards.

d. Judicial decisions are clearly reasoned and made public. Publication takes into account data protection, privacy, personal security and confidentiality.

e. The well-founded interests of all those involved in judicial proceedings (such as parties, victims and witnesses) are taken into account and all are treated with consideration and fairness.

f. The Executive and/or Legislative Powers have a duty to provide sufficient funds for the judicial system.

The budget must be prepared in a transparent manner and duly implemented.

**RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010**

Chapter II – External independence

15. Judgments should be reasoned and pronounced publicly. Judges should not otherwise be obliged to justify the reasons for their judgments.

19. Judicial proceedings and matters concerning the administration of justice are of public interest. The right to information about judicial matters should, however, be exercised having regard to the limits imposed by judicial independence. The establishment of courts' spokespersons or press and communication services under the responsibility of the courts or under councils for the judiciary or other independent authorities is encouraged. Judges should exercise restraint in their relations with the media.

20. Judges, who are part of the society they serve, cannot effectively administer justice without public confidence. They should inform themselves of society's expectations of the judicial system and of complaints about its functioning. Permanent mechanisms to obtain such feedback set up by councils for the judiciary or other independent authorities would contribute to this.

**THE KYIV RECOMMENDATIONS ON JUDICIAL INDEPENDENCE IN EASTERN EUROPE, SOUTH CAUCASUS AND CENTRAL ASIA, OSCE, 2010**

Professional Accountability through Transparency

32. Transparency shall be the rule for trials. To provide evidence of the conduct of judges in the courtroom, as well as accurate trial records, hearings shall be recorded by electronic devices

providing full reproduction. Written protocols and stenographic reports are insufficient. To enhance the professional and public accountability of judges, decisions shall be published in databases and on websites in ways that make them truly accessible and free of charge. Decisions must be indexed according to subject matter, legal issues raised, and the names of the judges who wrote them. Decisions of bodies deciding on discipline shall also be published.

33. To facilitate public trust in the courts, authorities should encourage the access of journalists to the courts, and establish positions of press secretary or media officer. There shall be no barriers or obstacles to journalists attending trials.

## **RESOURCE GUIDE ON STRENGTHENING JUDICIAL INTEGRITY AND CAPACITY, UNODC, 2011**

### **V. COURT TRANSPARENCY**

#### **7. Conclusions and recommendations**

The transparency of the courts is a precondition for the growing acceptance of their work among the population. Transparent court procedures are also a precondition for the access to justice (see chapter 5). Transparency serves the legal protection of the citizens. It is necessary to know the legal remedies for defence and recovery, to know about the right to appeal against a judgment, to be familiar with the basic procedural rights of the parties. Taking into account the frequent absence of lawyers and attorneys, the court system should be accessible and understandable to the common people.

More importantly, transparent decision-making is a precondition for the development of the legal system and the judiciary itself. Be it in a country of common law or civil law, be it a binding precedent or an example for the legal practice and the point of view of the higher courts, the judgments are as important as the law they apply, since they substantiate the law in the books. Therefore, a reasonable number of judgments should regularly be published. They can be published anonymously in order to make sure that the privacy of the parties will not be violated. But they should be commented and collected in a way that they can be searched for in similar cases.

Main participants of the information process:

Legal professions ← Parties—Lawyers ← Court/Judges → Press/Mass Media → Public/ Civil society organizations

Thus, the transparency of the courts means that the system will be accessible and comprehensible, that it will be open to the legal professions working on behalf of the citizens, and that it will be open to the public by accommodating journalists, offering press releases and informing about ongoing trials in a professional way.

Transparency of the courts arises from a set of preconditions, traditions and customs which, if absent, can only be developed step by step. The following elements of publicity are crucial for the development of transparency (and authority) of the courts:

- Granting physical access to court sessions;
- Offering full and understandable information about court procedures and their availability and distribution to all citizens;
- Assistance in starting proceedings, standard forms and blanks which are easy to use, booklets and brochures, etc.;
- Communication with the lawyers and attorneys, granting the inspection of the records, protocols of court sessions, etc.;

- Regular publication of court decisions for the legal professions and for the public (newspaper articles, court bulletins, websites, databases, volumes with collections of judgments, legal commentaries, etc.);
- Inviting journalists to press conferences and press releases, preparing press speakers of the courts; and
- Organizing conferences and seminars of judges, inviting representatives of society, of the business community, journalists and experts on the discussed subjects.

***VILNIUS DECLARATION ON CHALLENGES AND OPPORTUNITIES FOR THE JUDICIARY IN THE CURRENT ECONOMIC CLIMATE, The European Network of Councils for the Judiciary (ENCJ), 2011***

Recommends

7. Judiciaries should take all necessary steps to promote the public confidence in the courts. Openness, transparency, accountability, respect for the citizen, empathy with their situation, the development of courts' activity, the delivery of judgements and other judicial decisions in a clear and comprehensible language are essential features to achieve that purpose. Access to justice must be ensured including appropriate measures to assist and facilitate access to courts for persons of special vulnerability.

***COMPILATION OF CEPEJ GUIDELINES, European Commission for the Efficiency of Justice (CEPEJ), 2015***

Court Processes

9. Member states should take measures to ensure that information is available on the enforcement process and there is transparency of the activities of the court and those of the enforcement agent at all stages of the process, provided that the rights of the parties are safeguarded.

10. Notwithstanding the role of the court in the enforcement process, there should be effective communication between the court, the enforcement agent, the claimant, and the defendant. All the stakeholders should have access to information on the ongoing procedures and their progress.

11. Member states should provide the potential parties to enforcement procedures with information on the efficiency of the enforcement services and procedures, by establishing performance indicators against specified targets and by indicating the time different procedures might take.

12. Each authority should provide for the adequate supervision (having regard to any relevant case law of the EctHR) of the enforcement process and should bear responsibility for the effectiveness of the service. Accountability may be achieved by management reports and/or customer feedback. Any reports should allow for verification that the judgment has been executed or (if not) that genuine efforts have been made within a reasonable time whilst respecting the equality of the parties.

***DOHA DECLARATION ON INTEGRATING CRIME PREVENTION AND CRIMINAL JUSTICE INTO THE WIDER UNITED NATIONS AGENDA TO ADDRESS SOCIAL AND ECONOMIC CHALLENGES AND TO PROMOTE THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS, AND PUBLIC PARTICIPATION, Adopted by the 13<sup>th</sup> United Nations Congress on Crime Prevention and Criminal Justice, Doha, 12-19 April 2015***

10. We support the development and implementation of consultative and participatory processes in (...) criminal justice in order to (...) galvanize public trust and confidence in criminal justice systems (...) Therefore, we endeavour:

(e) To raise public confidence in criminal justice by preventing corruption and promoting respect for human rights, as well as enhancing professional competence and oversight in all sectors of the criminal justice system, thus ensuring that it is accessible and responsive to the needs and rights of all individuals;

(i) To ensure that the content of the law is accessible to the public, and to promote, as appropriate, the transparency of criminal trials;

### ***BEST PRACTICE GUIDE FOR MANAGING SUPREME COURTS, European Union 2017***

#### III. Transparency of the judiciary: focus on access to case law

##### 1. Introduction

##### A. Transparency of the justice system

This demand for information can encompass different elements of the justice system: it can include information on a court's resources and how they are managed, information on how judges are appointed, information on statistics about aspects such as the length of proceedings, etc.

##### B. Why is transparency important?

Access to justice is an important aspect of quality in the judicial system and thus plays a pivotal role in safeguarding an effective justice system. In other words, transparency leads to better access to justice and therefore to a more effective justice system.

Safeguarding the right to access to an effective justice system thus requires that citizens, lawyers and judges have access to the legislation as well as the case law.

##### C: Recommendations and best practice

As discussed in the theoretical framework, access to justice also requires access to relevant case law. Modern technologies currently make it possible to publish all Supreme Court judgments. The survey results suggest that the majority of the Supreme Courts already publish most if not all of their decisions online. Given this common practice and the fact that this contributes to full transparency and to legal research, Supreme Courts should publish all their judgments online in a database that is accessible to the public free of charge. This responsibility can be assigned to the research and documentation unit.

Paradoxically, the publication of all judgments may lead to a less informed public, due to an overload of information. This is a risk that the Supreme Court of Latvia expressly pointed out in the survey. The mere publication of all case law is not sufficient for the purpose of research and for the uniform application of case law. To ensure transparency, the Supreme Court considers it its task to disseminate the case law in such a way that it allows a reasonably well-informed user to find the relevant case law.

In other words, Supreme Courts should provide search facilities that make it easy for the interested parties to find the case law that is relevant to them. These search facilities should include a keyword search function, providing references to similar cases, etc. To facilitate the search for foreign case law, the legislator should introduce the use of the European Case Law Identifier.

A summary of the case should also be provided to efficiently narrow down the search results to the most relevant case law (preferably prepared by the research and documentation unit of the court or by a judicial assistant, in cooperation with the judges who rendered the decision).

#### III. Transparency of the judiciary: focus on access to case law



### 3. Centralised Case Law Database

#### C: Recommendations and best practices

States must provide a central case law database. In addition to all the Supreme Court decisions, the database should contain a selection of the decisions of the lower courts and also contain the case law from the European Court of Justice and the European Court of Human Rights. Many Supreme Courts specified that they consider it a great advantage that all their rulings are accessible to the public.

This central case law database has the advantage that people can find all relevant case law in one integrated database and do not have to search the databases of each separate court. By facilitating access to justice, a central case law database contributes to an effective justice system. It also allows judges to search for the relevant case law more efficiently and thus increases the efficiency of the adjudication of cases and the quality of judgments.

#### V Communication

##### 7. Educational Activities

#### C: Recommendations and best practices

Organise round-table discussions with other legal practitioners whose opinion or expertise may be relevant to the topic in question.

Organise educational activities tailored to society.

Arrange press briefings to explain judicial procedures and terms.

#### VI The role of Councils for the Judiciary

##### 2 Composition of Councils for the Judiciary

###### A Overview

Non-judge members in the Council may increase democratic legitimacy and transparency of the judiciary.

#### VI The role of Councils for the Judiciary

##### 5. Council for the Judiciary as Provider of the Information to the Society

In order to safeguard the independence and transparency of the functioning of the courts, the Council itself might need to have an open and transparent relation with the general public.

## VI. 7. INFORMING AND EDUCATING THE PUBLIC

### ***PROCEDURES FOR THE EFFECTIVE IMPLEMENTATION OF THE BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, Resolution 1989/60, 15th plenary meeting, ECOSOC, 24 May 1989***

#### Procedure 6

States shall promote or encourage seminars and courses at the national and regional levels on the role of the judiciary in society and the necessity for its independence.

### ***FIRST STUDY COMMISSION - "THE PHYSICAL, STRUCTURAL AND ECONOMIC CONDITIONS OF JUDICIAL INDEPENDENCE", International Association of Judges (IAJ), 2001***

#### General Conclusions, Criticism of the judiciary

All agreed that the judiciary was coming under unfounded criticism and in some cases concerted attacks. Attack from the media generally, from politicians and from individual citizens (e.g., blogs). Also, it was generally agreed that the judiciary needed to exercise self-restraint in responding to such criticisms. Criticisms of initial decisions will almost always be addressed in appeals. When the criticism is of the court generally, the courts may appoint a spokesperson or seek assistance from the judges' association or the bar associations to address the criticism in the media. Although experience indicates that such spokespersons are not necessarily appreciated by the media, the Commission supports the solution as an appropriate method of addressing such criticism. Some courts provide the media a spokesperson who help explain complex decisions when they are being handed down by the court.

### ***OPINION NO. 3 (2002) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE PRINCIPLES AND RULES GOVERNING JUDGES' PROFESSIONAL CONDUCT, IN PARTICULAR ETHICS, INCOMPATIBLE BEHAVIOUR AND IMPARTIALITY, Council of Europe, 2002***

#### A. STANDARDS OF JUDICIAL CONDUCT

##### 1) What standards of conduct should apply to judges?

##### d. Impartiality and judges' relations with the media

40. There has been a general trend towards greater media attention focused on judicial matters, especially in the criminal law field, and in particular in certain west European countries. Bearing in mind the links which may be forged between judges and the media, there is a danger that the way judges conduct themselves could be influenced by journalists. The CCJE points out in this connection that in its Opinion No. 1 (2001) it stated that, while the freedom of the press was a pre-eminent principle, the judicial process had to be protected from undue external influence. Accordingly, judges have to show circumspection in their relations with the press and be able to maintain their independence and impartiality, refraining from any personal exploitation of any relations with journalists and any unjustified comments on the cases they are dealing with. The right of the public to information is nevertheless a fundamental principle resulting from Article 10 of the European Convention on Human Rights. It implies that the judge answers the legitimate expectations of the citizens by clearly motivated decisions. Judges should also be free to prepare a summary or communiqué setting up the tenor or clarifying the significance of their judgements for the public. Besides, for the countries where the judges are involved in criminal investigations, it is advisable for them to reconcile the necessary restraint relating to the cases they are dealing with, with the right to information. Only under such conditions can judges freely fulfil their role, without fear of media pressure. The CCJE has noted with interest the practice in force in certain countries of appointing a

judge with communication responsibilities or a spokesperson to deal with the press on subjects of interest to the public.

**GENERAL REPORT, FIRST STUDY COMMISSION - ECONOMICS, JURISDICTION AND INDEPENDENCE, International Association of Judges (IAJ), 2005**

Conclusions,

8) Customer orientation is an aspect of NPM, which is essential and should be supported by all actors of the judicial system. One of the main tasks should be to make courts and their work more understandable, better known and more accepted.

**OPINION NO. 7 (2005) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS ON "JUSTICE AND SOCIETY", Council of Europe, 2005**

**A. THE RELATIONS OF THE COURTS WITH THE PUBLIC WITH SPECIAL REFERENCE TO THE ROLE OF THE COURTS IN A DEMOCRACY**

11. In this connection, the CCJE would refer to its recommendations in Opinion No. 6 (2004) regarding the educative work of courts and the need to organise visits for schoolchildren and students or any other group with an interest in judicial activities. This does not alter the fact that it is also the state's important duty to provide everyone, while at school or university, with civic instruction in which a significant amount of attention is given to the justice system.

12. This form of communication is more effective if those who work in the system are directly involved. Relevant school and university education programmes (not confined to law faculties) should include a description of the judicial system (including classroom appearances by judges), visits to courts, and active teaching of judicial procedures (role playing, attending hearings, etc.). Courts and associations of judges can in this respect co-operate with schools, universities, and other educational agencies, making the judge's specific insight available in teaching programmes and public debate.

13. The CCJE has already stated in general terms that courts themselves should participate in disseminating information concerning access to justice (by way of periodic reports, printed citizen's guides, Internet facilities, information offices, etc.) ; the CCJE has also already recommended the developing of educational programmes aiming at providing specific information (e.g., as to the nature of proceedings available; average length of proceedings in the various courts; court costs; alternative means of settling disputes offered to parties; landmark decisions delivered by the courts) (see paragraphs 12-15 of the CCJE's Opinion No. 6 (2004)).

14. Courts should take part in general framework programmes arranged by other state institutions (Ministries of Justice and Education, Universities, etc.). But, in the CCJE's opinion, courts should also take their own initiatives in this respect.

15. Whereas relations with individual justice users have traditionally been dealt with by the courts, albeit in an unstructured way, courts have been reluctant in the past to have direct relations with the members of the general public who are not involved in proceedings. Publicity of hearings in the sense enshrined in Art. 6 of the European Convention on Human Rights (ECHR) has been traditionally viewed as the only contact between courts and the general public, making the mass media the sole interlocutors for courts. Such an attitude is rapidly changing. The duties of impartiality and discretion which are the responsibility of judges are not to be considered today as an obstacle to courts playing an active role in informing the public, since this role is a genuine guarantee of judicial independence. The CCJE considers that member states should encourage the judiciaries to take such an active role along these lines, by widening and improving the scope of their "educative

role" as described in paragraphs 9-12 above. This is no longer to be limited to delivering decisions; courts should act as "communicators" and "facilitators". The CCJE considers that, while courts have to date simply agreed to participate in educational programmes when invited, it is now necessary that courts also become promoters of such programmes.

16. The CCJE considered direct initiatives of the courts with the public, not depending on the activity of the media and/or actions for which other institutions are responsible. The following measures were considered and recommended:

- creation of offices in courts in charge of reception and information services;
- distribution of printed materials, opening of Internet sites under the responsibility of courts;
- organisation by courts of a calendar of educational fora and/or regular meetings open in particular to citizens, public interest organisations, policy makers, students ("outreach programmes").

17. A specific discussion was devoted by the CCJE to these "outreach programmes". The CCJE notes with interest that in some countries courts have been known to organise, often with the support of other social actors, educational initiatives that bring teachers, students, parents, lawyers, community leaders and the media into the courts to interact with judges and the justice system. Such programmes usually incorporate the use of professionals with prepared resources and provide a network for teachers' professional development.

18. Some actions are tailored for individuals who, because of their socio-economical and cultural conditions, are not completely aware of their rights and obligations, so that they do not exert their rights or, worse still, find themselves involved in legal proceedings due to not carrying out their obligations. The image of justice in the neediest social groups is therefore dealt with through programmes that are closely linked to arrangements for "access to justice", including but not limited to legal aid, public information services, free legal counsel, direct access to the judge for small claims, etc. (see section A of the CCJE's Opinion No. 6 (2004)).

### C. THE RELATION OF THE COURTS WITH THE MEDIA

41. It is also necessary to encourage the setting up of reception and information services in courts, not only, as mentioned above, to welcome the public and assist users of judicial services, but also to help the media to get to understand the workings of the justice system better.

### D. ACCESSIBILITY, SIMPLIFICATION AND CLARITY OF THE LANGUAGE USED BY THE COURTS IN PROCEEDINGS AND DECISIONS

61. An important aspect of accessibility of law, as enshrined in judicial decisions, is represented by their ready availability to the general public. In view of this goal, the CCJE recommends that at least all Supreme Court and other important court decisions be accessible through Internet sites at no expense, as well as in print upon reimbursement of the cost of reproduction only; appropriate measures should be taken, in disseminating court decisions, to protect privacy of interested persons, especially parties and witnesses.

## SUMMARY OF THE RECOMMENDATIONS AND CONCLUSIONS

A. The relations of the courts with the public with special reference to the role of the courts in a democracy

A.1. It is the state's important duty to provide everyone, while at school or university, with civic instruction in which a significant amount of attention is given to the justice system (see paragraph 11 above).

A.2. Relevant school and university education programmes should include a description of the judicial system, visits to courts, and active teaching of judicial procedures. Courts and associations of judges can in this respect co-operate with schools, universities, and other educational agencies,

making the judge's specific insight available in teaching programmes and public debate (see paragraph 12 above). A.3. Courts should take part in general framework programmes arranged by other state institutions and take an active role in providing information to the public (see paragraphs 14 and 15 above).

A.4. The following measures are thus recommended (see paragraphs 16 to 19 above):

- creation of offices in courts in charge of reception and information services;
- distribution of printed materials, opening of Internet sites under the responsibility of courts;
- organisation by courts of a calendar of educational fora and/or regular meetings open to citizens, public interest organisations, policy makers, students, etc.;
- "outreach programmes" and programmes for access to justice.

B. The relations of the courts with participants in court proceedings

B.1. The CCJE considers that, in order to foster better understanding of the role of the judiciary, an effort is required to ensure in so far as possible that the ideas that the public has about the justice system are accurate and reflect the efforts made by judges and court officials to gain their respect and trust concerning courts' ability to perform their function. This action will have to show clearly the limits of what the justice system can do (see paragraphs 24 to 27 above).

***OPINION NO. 10 (2007) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE COUNCIL FOR THE JUDICIARY AT THE SERVICE OF SOCIETY, CCJE, 2007***

V. G. Protection of the image of justice

80. In its Opinion No. 7 (2005), the CCJE recommended the setting up of programmes, to be generally supported by the European judiciaries and states, aimed at going beyond the scope of giving general information to the public in the area of justice, and at helping to provide the correct perception of the judge's role in society. The CCJE considered that courts themselves should be recognised as a proper agency to organise programmes having the goal of improving the understanding and confidence of society with regard to its system of justice. In parallel, a role of co-ordinating the various local initiatives as well as promoting nation-wide "outreach programmes" should be given to the Council for the Judiciary which, with the assistance of professionals, may also provide more sophisticated information.

**SUMMARY OF THE RECOMMENDATIONS AND CONCLUSIONS**

D. On the powers of the Council for the Judiciary:

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;

***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

Chapter II – External independence

15. Judgments should be reasoned and pronounced publicly. Judges should not otherwise be obliged to justify the reasons for their judgments.

***THE KYIV RECOMMENDATIONS ON JUDICIAL INDEPENDENCE IN EASTERN EUROPE, SOUTH CAUCASUS AND CENTRAL ASIA, OSCE, 2010***

## Case Assignment

12. Administrative decisions which may affect substantive adjudication should not be within the exclusive competence of court chairpersons. One example is case assignment, which should be either random or on the basis of predetermined, clear and objective criteria determined by a board of judges of the court. Once adopted, a distribution mechanism may not be interfered with.

### ***OPINION NO. 19 (2016) ON THE ROLE OF COURT PRESIDENTS, Consultative Council of European Judges, Council of Europe, 2016***

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. Court presidents, acting as guardians of the court's independence, impartiality and efficiency, should themselves respect the internal independence of judges within their courts.

## **VII. ETHICS OF JUDGES – HOW STANDARDS OF JUDGES SHOULD BE FORMULATED**

### **VII. 1. THE VALUES/MERITS**

#### ***BOLOGNA MILANO GLOBAL CODE OF JUDICIAL ETHICS, 2015, Approved at the International Conference of Judicial independence held at the University of Bologna and at Bocconi University of Milano June 2015***

##### 1. Basic Principles

1.1 The Global Code of Judicial Conduct reflects and expresses fundamental values and morals which constitute the basis of the acts of judicature and the behaviour and conduct of a judge.

The rules of the code are a crystallization of essential guiding principles which draw from ancient tradition and adapt themselves to contemporary times and place.

A judge shall direct his ways according to the law and in accordance with these rules, and shall at all times place before his eyes the need to maintain the confidence of the public in the judicial branch.

1.2 A judge shall be seen as having breached a rule of the Code of Judicial Conduct in a way allowing submittal of a complaint to the Disciplinary Authority if his conduct constitutes intentional or gross violation of the code reaching the extent of improper conduct in fulfilling his role or conduct which does not befit the status of a judge.

1.2.1 The procedure of disciplinary measures shall be conducted in full transparency including the final judgement.

1.3 Every jurisdiction should establish citizens' complaints procedure to allow citizens to submit complaints against misconduct or improper conduct of judges. The panel of the review body of the complaints must include lay-people who are not judges or former judges; they shall be the majority of the panel.

1.4 To assist in the implementation and interpretation of the code it is strongly recommended that each jurisdiction shall establish advisory committee on ethics which shall receive enquiries from judges and other professional authorities regarding questions of ethics and conduct

### **VII. 1.1. CODE OF CONDUCT**

#### ***MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE, International Bar Association (IBA), 1982***

##### F – Standards of Conduct

35 Judges may not, during their term of office, serve in executive functions, such as ministers of the government, nor may they serve as members of the Legislature or of municipal councils, unless by long historical traditions these functions are combined.

36 Judges may serve as chairmen of committees of inquiry in cases where the process requires skill of fact-finding and evidence-taking.

37 Judges shall not hold positions in political parties.

38 A judge, other than a temporary judge, may not practice law during his term of office.

39 A judge should refrain from business activities, except his personal investments, or ownership of property.

***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE (“Singhvi Declaration”), ECOSOC, 1985***

Independence

8. Judges shall always conduct themselves in such a manner as to preserve the dignity and responsibilities of their office and the impartiality and independence of the judiciary. Subject to this principle, judges shall be entitled to freedom of thought, belief, speech, expression, professional association, assembly and movement.

Disqualifications

22. Judges may not serve in a non-judicial capacity which compromises their judicial independence.

***ANTI-CORRUPTION TOOLKIT, Prepared by the United Nations Global Programme against Corruption (GPAC), Centre for International Crime Prevention, Office of Drug Control and Crime Prevention, United Nations Office at Vienna, Version 4, last edited 11 November 2002***

Tool 8 – Codes and standards of Conduct

Purpose

The setting of concrete standards of conduct serves several basic purposes.

- It clearly establishes what is expected of a specific employee or group of employees, helping to instil fundamental values which curb corruption.
- It forms the basis for the training of employees and the discussion and where necessary, modification of standards.
- It forms the basis of disciplinary action, including dismissal, in cases where an employee breaches or fails to meet a prescribed standard. In many cases, codes include both descriptions of conduct which is expected or prohibited and procedural rules and penalties for dealing with breaches of the code.
- Codification, in which all of the applicable standards are assembled into a comprehensive code for a specified group of employees, makes it difficult to abuse the disciplinary process for corrupt or other improper purposes. Employees are entitled to know in advance what the standards are, making it impossible to fabricate disciplinary matters as a way of improperly intimidating or removing employees.

Codes of conduct may be used to set any standard relevant to the duties and functions of the employees to which they apply. This often includes anti-corruption elements, but basic performance standards governing areas such as fairness, impartiality, independence, integrity, loyalty towards the organization, diligence, propriety of personal conduct, transparency, accountability, responsible use of the organization’s resources and, where appropriate, standards of conduct towards the public are also common. Countries developing codes of conduct exclusively for anti-corruption purposes should consider the possibility of integrating these within more general public service reforms, and vice-versa.

Codes that support disciplinary structures may also set out procedures and sanctions for noncompliance. Codes may be developed for the entire public service, specific sectors of the public service, or in the private sector, for specific companies or professional bodies such as those governing doctors, lawyers or public accountants. Several models have been developed to assist those developing such codes.

Description



One of the many challenges setting standards or establishing codes of conduct is to address the legal, behavioural, administrative and managerial aspects consistent with basic principles of justice, impartiality, independence, integrity, loyalty towards the organization, diligence, propriety of personal conduct, transparency, accountability, and responsible use of the organization's resources

### *Means of setting standards or establishing codes of conduct*

Standards of conduct for officials and other employees are generally governed by several sources.

- Legislation, usually criminal and/or administrative law, is used to set general standards which apply to everyone or to large categories of people. The criminal offence of bribery, for example, applies to anyone who commits the offence, and generally covers either all bribery or all bribery which involves a public interest or public official. In some countries, more specific legislation is used to set additional standards which apply to all public officials, or in some cases even private-sector workers.
- Delegated legislation or regulations, in which the legislature delegates the power to create specific technical rules, may also be used for this purpose. Regulations may be used to set standards for specific categories of officials such as prosecutors, members of the legislature or officials responsible for financial accounting or contracting matters.
- Contract law. This is the other major source of standards. Using the contracts which govern employment or the delivery of goods or services, standards may be set for a specific employee or contractor as part of his or her individual contract. Alternatively, an agency or department may set general standards for all of its employees or contractors, to which they are required to agree as a condition of employment, or use some combination of both.

Generally, higher standards can be set for smaller, more specific groups based on what is reasonable to expect of that group. Private citizens are only subject to basic criminal offences such as bribery, for example, whereas judges can reasonably be prohibited from accepting gifts of any kind or having any financial or property interests which might conflict with their neutrality.

The source of a particular standard has procedural implications. Breaches of criminal law standards result in prosecution and punishment, which requires a high standard of proof and a narrow range of prohibited conduct. Breaches of an employment contract, on the other hand, generally lead to disciplinary measures or dismissal subject to a lower standard of proof. Employees could be dismissed for failing to declare conflicting interests or accepting gifts, for example, even if bribery could not be proved.

More than one standard or code of conduct will often apply to a particular official or employee. A prosecutor, for example, may be required to meet specific standards for prosecutors, professional standards set by the bar association or professional governing body for lawyers, general standards applicable to all public servants, and ultimately, standards set by the criminal law. One key issue which must often be dealt with in setting specific standards is ensuring that these are not inconsistent with more general standards which already apply, unless an exception is intended. The concept of "double jeopardy" usually does not apply to disciplinary proceedings. A prosecutor convicted of accepting a bribe would generally be subject to separate proceedings leading to a criminal penalty, professional disbarment, and dismissal for breach of contractual standards, for example.

### *Elements of Codes of Conduct*

#### General content and format

Codes of conduct usually establish general standards of behavior consistent with basic ethical principles of justice, impartiality, independence, integrity, loyalty towards the organization, diligence, propriety of personal conduct, transparency, accountability, and responsible use of the

organization's resources. They may then contain more specific standards applicable to specific (and clearly-defined) groups of employees, as well as procedures and sanctions to be applied in cases of non-compliance. Compliance mechanisms should also include less-drastic options to reduce the use of disciplinary measures. One common way of administering ethical standards is to establish a consultant individual or body, so that individuals can inquire whether a particular activity would be in breach of the rules before engaging in it. Judicial councils or committees could be consulted by a judge uncertain as to whether he or she should hear a particular case, for example, and public servants can inquire whether a proposed gift can be accepted or must be refused. This approach reduces the costs and harm caused by disciplinary actions, and since no liability is involved, allows the application of standards which might otherwise be too general to enforce.

Specific standards may include both positive obligations, such as requirements to disclose assets or potentially conflicting private interests, and prohibitions, such as bans on accepting gifts. Standards which apply to the public sector usually prohibit not only conduct which is seen as inconsistent with the office involved, but also conduct which would give outsiders the perception of impropriety or damage the credibility or legitimacy of that office. Clarity is advisable to ensure that the rules will be understood and to support enforcement, but rules set by employment contracts are not criminal law, which allows the setting of more general standards. Codes, or in some cases the parent legislation or regulations, may also contain self-implementing elements, such as requirements that employees be trained or that codes be read and understood prior to hiring.

Codes of conduct may be used in both the public and private sectors, but there are several key distinctions.

- Public sector codes can be established either by legislative or contractual means, or some combination of the two. In most cases, private sector codes do not raise sufficient public interest to warrant legislation and are implemented exclusively by contract.
- Public sector codes pursue only the public interest, and generally involve provisions which balance the public interest against the rights of the officials to whom they apply. Disclosure requirements must balance the public interest in transparency with individual privacy rights, for example. Private sector codes on the other hand often protect the private interests of the employer, which may or may not coincide with the public interest. Confidentiality may take precedence over transparency, for example. Private sector organizations will sometimes find it necessary or desirable to include elements of the public interest. Codes for medical doctors and lawyers are intended to protect patients and clients, for example, because this is seen as essential to the delivery of the services involved and to the credibility of the profession. In many cases private sector organizations will try to protect the public interest to preserve self-regulation in preference to being regulated by the State.

### *Elements of codes of conduct for public officials*

#### General elements

Anti-corruption elements can and should be supported by more general standards of ethics and conduct which promote high standards of public service, good relations between public officials and those they serve, productivity, motivation and morale. These can promote a culture of professionalisation within the public service, while at the same time fostering the expectation of high standards among the general population. Specific elements could include the following.

- Rules setting standards for the treatment of members of the public which promote respect and courtesy.
- Rules setting standards of competence which ensure that public servants are able to actively assist those who require assistance, such as knowledge of relevant laws, procedures and related areas to which members of the public may have to be referred.
- Rules establishing performance criteria and assessment procedures which take into consideration both productivity and the quality of service or assistance rendered.

- Rules requiring managers to promote and implement service-oriented values and practices and requiring that their success in doing so be taken into account when assessing their performance.

### Impartiality and Conflicts of Interest

Impartiality in discharging public duties is essential both to the correct and consistent performance of the duties themselves and to ensuring popular confidence that this will be done. Such requirements will generally apply to any public official who makes decisions, with higher or more specific standards applicable to more powerful or influential decision-makers such as senior public servants, judges and holders of legislative or executive office. Essentially, impartiality requires that decisions be made exclusively based on whatever factors are prescribed and that extraneous considerations which would influence the outcome are avoided. Extraneous considerations can arise from individual characteristics of the official involved, such as ethnic custom or religious beliefs or they can arise from external circumstances in which some private interest of the official comes into conflict with his or her public duty. Codes of conduct should seek to deal with the problem at both of these levels. They should contain requirements such as the disclosure and avoidance of conflicts of interest, for example, but they should also prohibit officials from taking into account extraneous factors where they cannot be prevented from arising in the first place. Specific requirements could include the following.

- General requirements to make decisions based exclusively on whatever considerations are prescribed for making the decision in question. In some circumstances these could be accompanied by specific rules prohibiting the consideration of specified factors, such as measures to prevent discrimination based on characteristics such as race, ethnicity, gender, religion, or political affiliation.
- Requirements that senior officials charged with setting the criteria for decision-making limit the criteria to those relevant to the decision in question, and that all criteria be set out in writing and made available to those affected by the decision.
- Requirements that written reasons be given for decisions, to permit subsequent review.
- Requirements that specified officials avoid conflicts of interest by avoiding activities seen as likely to bring them into conflict. Senior public servants may be precluded from playing active roles in partisan politics, for example. Those responsible for decisions which affect financial markets are often precluded from having investments, or are required to place them in “blind trusts” in such a way that the official has no way of knowing whether a decision will affect his or her personal interests, or if so, how.
- Requirements that officials avoid conflicts by altering their duties. A judge who represented a particular individual prior to his appointment as a judge should not later hear a case involving the former client, for example. Such cases can be dealt with simply by disclosing the conflict and having the case assigned to another judge. Officials on public boards or commissions are often precluded from debating or voting on specific issues which could affect their personal interests but not from participating in other business.
- Requirements that officials declare interests which may raise conflicts. Such requirements often include provisions for general disclosure at the time of employment and at regular intervals thereafter, as well as provisions which require the official to disclose any specific interest which does raise a conflict as soon as this becomes apparent. This ensures basic transparency, and alerts those involved that some action may have to be taken to eliminate the conflict.
- Requirements that officials not accept gifts, favours or other benefits. Where a direct link between a benefit and a decision can be proved, offences related to bribery may apply, but in many cases the link, if any is more general. To prevent this and ensure that there is no perception of bias, rules can either prohibit the acceptance of benefits entirely, or from those affected by, or likely to be affected by any past or future decision of the official involved. Depending on custom or the nature of the office, exceptions may be made for very small gifts. Where officials are allowed to accept gifts under some circumstances, the rules can also require the disclosure of information about the nature and value of the gift and the identity of the donor so that appropriateness can be judged independently.

## Rules for the Administration of Public Resources

Officials responsible for administering public resources may be subjected to specific rules intended to maximize the public benefit from expenditures, minimize waste and inefficiency and combat corruption. Such officials represent a relatively high risk of corruption because they generally have the power to confer financial or economic benefits and to subvert mechanisms intended to prevent or detect improper dealings in public funds or assets. Generally, these will include officials who make decisions governing the expenditure of funds, contracting for goods or services, dealings in property or other assets and similar matters, as well as those responsible for the auditing or oversight of such officials. Specific rules could include the following.

- Rules requiring all decisions to be made in the best interest of the public, with such interests expressed in terms of maximizing the benefits of any expenditures while minimising costs, waste or inefficiencies.
- Rules requiring the avoidance and disclosure of actual or potential conflicts of interest similar to those for public officials in general (above). In application, these rules might require an official awarding a government contract to make full disclosure and step aside if
- one of the applicants proved to be a friend, relative or former associate, for example.
- Rules requiring that proper accounting procedures be followed at all times and appropriate records be kept to permit subsequent review of decisions.
- Rules requiring officials to disclose information about decisions. Winning bidders may be required to connect to the disclosure of the terms of the bid to permit review by the losers, for example.
- Rules requiring officials to disclose assets and income in order to permit scrutiny of sources and amounts not derived from public employment.

## Confidentiality rules

Public officials frequently have access to a wide range of sensitive information and are usually subject to rules prohibiting and regulating disclosure. These may range from criminal offences for offences such as espionage and the disclosure of official secrets to lesser sanctions for the disclosure of information such as trade secrets or personal information about citizens. They commonly combine positive obligations to keep secrets and take precautions to avoid the loss or disclosure of information with sanctions for intentional disclosure and in some cases, negligence. Secrecy requirements can be used to shield official wrongdoing from disclosure, and modern legislative and administrative codes have begun to include provisions to protect “whistleblowers” in cases where the public interest ultimately proves to have favoured disclosure and not retention of the information.

Specific rules could include the following.

- Secrecy oaths requiring that information gained in confidence are kept confidential unless official duty requires otherwise.
- Classification systems to assist officials in determining what information should be kept confidential or secret and what degree of secrecy or protection is appropriate for each category of information. Information which could, if disclosed, endanger lives or safety, national security or the ability of major public agencies to function is usually subject to a relatively high standard, for example.
- Rules prohibiting officials from profiting from the disclosure of confidential information. In some countries, such rules include civil liability for such profits as appearance fees or book publication royalties if generated in part by inside information.
- Rules prohibiting the use of inside or confidential information to gain financial or other benefits. Insiders with advance access to government budgets are usually prohibited from making investment deals that would constitute “insider trading” in the private sector, for example. Such rules should be broad enough to preclude direct use of the information as

well as the disclosure of the information, or advice based on the information to others who may then profit.

- Rules prohibiting the disclosure or use of confidential information for an appropriate period after leaving the public service. The period will generally depend on the sensitivity of the information and how quickly it becomes obsolete. Obligations regarding inside knowledge of pending policy statements or legislation generally expire when these are made public, whereas obligations relating to some national-security interests may well be permanent. Officials with broad inside knowledge may be entirely prohibited from taking any employment, in which that information could be used, possibly with some provision for compensation. In drafting requirements for post-employment cases, care should be taken to distinguish between the use of skills and expertise gained in the public service, which may be used freely, and confidential information, which may not.

### Rules for Judicial Officers

As noted in the segment dealing with building judicial institutions (above), judges should be subject to many of the same rules as other public servants, with two significant differences. The compliance with basic standards of conduct is more important for judges because of the high degree of authority and discretion which their work entails, and the formulation and application of codes of conduct for judges must take into consideration the importance of basic judicial independence. The senior and critical function of judicial officers will often mean that they will be the focus of anti-corruption efforts at an early stage of anti-corruption strategies. This means that the measures developed for judges and the reaction of judges to those measures will serve as a significant precedent for the success or failure of elements applied to other officials. Possible rules include the following.

- Rules intended to ensure both neutrality and the appearance of neutrality. These may include restrictions on participation in some activities, such as partisan politics, taken for granted by other segments of the population, as well as some restrictions on the public expression of views or opinions. Such restrictions may depend on the level of the judicial office held, and the subject matter which may reasonably be expected to come before a particular judge. Generally, these restrictions must be balanced against the basic rights of free expression and free association, and such limitations as are imposed on judges must be reasonable and justified by the nature of their employment. Judges may also be restricted in their ability to deal in assets or property, particularly if their jurisdiction frequently raises the possibility of conflicting interests. Where such conflicts are less likely, a more practicable approach may be that of disclosure and avoidance.
- Rules intended to set standards for general propriety of conduct. Judges are generally expected to adopt high moral and ethical standards, and conduct which does not meet such standards may call the fitness of a judge into reasonable question even if not crime or clear breach of a legal standard. Conduct seen as inappropriate may vary with cultural or national characteristics, and it is important that reasonably clear guidelines, standards or examples is set out. Usually judges will do this themselves. Examples of inappropriate conduct may include such things as serious addiction or substance-abuse problems, public behaviour which displays a lack of judgment or appreciation of the role of judges, indications of bias or prejudice based on race, religion, gender, culture or other irrelevant characteristics, or patterns of association with inappropriate individuals, such as members of organized criminal groups or persons engaged in corrupt activities.
- Rules which prohibit association with interested parties. The integrity of legal proceedings depends on the basic principle that all elements of a case be laid out in open court, ensuring basic transparency and the fact that all interested parties are given an opportunity to understand all elements of a case and to respond to those with which they may disagree. The appearance of such integrity is also critical. Judges are therefore usually prohibited from having contact with any interested party under any other circumstances, with any exceptions set out in detail in procedural rules. Judges should also be prohibited from discussing matters

before them and required to take measures to ensure that others do not discuss them in their presence. Rules governing other public servants, and especially those in high professional or political offices, should also prevent them from contacting judges or discussing matters before the courts.

- Rules which govern public appearances or statements. Judges are often called upon to make public comment on the court system or contemporary legal or policy issues. The integrity of proceedings and any case law which results depends on the inclusion of all judicial interpretation and reasoning in a judgment, and rules should generally prohibit a judge from commenting publicly on any matter which has come before him or her in the past or is likely to do so in the future. Rules may also require judges to consult or seek the approval of judicial colleagues or a judicial council prior to making any comment, particularly if they are the holders of senior judicial office and therefore likely to hear a wide range of cases.
- Rules which limit or prohibit other employment. Codes of judicial conduct often either prohibit alternative employment entirely, limit the nature and scope of such employment, or require disclosure and consultations with chief judges or judicial councils before other employment is taken up. Both the nature of the employment and the remuneration paid can give rise to conflicts of interest, and such limitations prohibitions usually extend to unpaid (pro bono) work.
- Rules requiring disclosure and disqualification. Rules which are intended to prevent conflicts of interest are often supplemented by rules which require judges to identify and disclose potential conflicts, and to refrain from hearing cases in which such conflicts may arise. Rules should also provide a mechanism whereby a judge can alert colleagues to an unforeseen conflict which arises while a case is ongoing. These may require disclosure and consultation with the parties, and in extreme cases, self-disqualification, and termination of the proceedings and their re-commencement before another judge. Mechanisms should also be in place for parties, witnesses other participants or any other member of the public to identify possible conflicts of interest in judicial matters, and for the discipline of any judge who fails to disclose a known conflict.

More generally, rules should require judges to disqualify themselves in proceedings in any circumstance in which their impartiality might reasonably be questioned. Examples include:

- The presence of a personal bias or prejudice concerning a party or issue in contention;
- Personal knowledge of any facts in contention or likely to be in contention;
- The involvement of personal friends, associates or former associates or former clients; or,
- The existence of a significant material financial or other personal interest on the part of the judge or a close friend or relative which could be substantially affected by the outcome.

## Preconditions and Risks

### *The Implementation of Codes of Conduct*

Examples of cases in which excellent codes of conduct have been drafted and then implemented ineffectively, if at all, abound. It is essential that codes be formulated with a view to effective implementation, that there be an effective plan for implementation and that there be a strong commitment to ensure that the plan is actually carried out. Implementation strategies should include a balance of “soft” and “hard” measures: elements which ensure awareness of the code, which encourage and monitor compliance and clear procedures and sanctions to be applied when the code is breached.

Effective implementation may require the following elements.

- Drafting and formulation of the code so that it is easily understood both by the insiders who are expected to comply with it and the outsiders who are served by them.

- Wide dissemination and promotion of the code, both within the public service or sector affected and among the general population or segment of the population with which the sector deals.
- Employees should receive regular training on issues of integrity and on what each employee can do to ensure compliance by colleagues. Peer pressure and peer reviews could be encouraged.
- Managers should be trained and encouraged to provide leadership, advice on elements of the code, and in the administration of compliance (monitoring and enforcement)
- mechanisms.
- The establishment of monitoring and enforcement mechanisms. These can range from criminal law enforcement to such things as occupational performance assessment and research techniques.
- The establishment and use of transparent disciplinary procedures and outcomes. Transparency is important both to ensure fairness to the employees involved and to assure both insiders and the general public that the code is being applied, and that this is being done effectively and fairly.
- The effective use of a full range of incentives and accountability structures. Using deterrence measures such as the use of extensive monitoring and threats of disciplinary action are an effective means of ensuring compliance with the code, but not always the most efficient option. Those made subject to the code should also be provided with as many positive incentives as possible. These could include such things as education and information programmes to instil professional pride and self-esteem linked to the code, compensation which reflects the higher degree of professionalism expected, and the inclusion of elements of the code in the assessment of employees. Front-line employees should be assessed on their compliance with the code, and managers on their promotion and application of the code in dealing with subordinates.
- The establishment of mechanisms to permit feedback from both employees and outsiders, anonymously if necessary, on the administration of the code, possible areas for expansion or amendment.
- The establishment of mechanisms to permit reports of non-compliance, anonymously if necessary.
- The establishment of mechanisms which enable employees who are uncertain as to the application of elements of the code to their duties in general or in a particular situation to consult prior to making decisions. Those facing conflicting obligations to keep information confidential and to ensure transparency in decision-making might consult with respect to what information should be disclosed, to whom, and in what circumstances, for example.

#### Related tools

Tools which may be required before codes of conduct can be successfully implemented include:

- Tools which raise awareness of the code and establish appropriate expectations on the part of populations, particularly those directly affected by the actions of those subject to the code, such as publicity campaigns and the development and promotion of “Citizens’ Charters” and similar documents;
- The establishment an independent and credible complaints mechanisms to deal with complaints that the prescribed standards have not been met;
- The establishment of appropriate disciplinary procedures, including tribunals and other bodies to investigate complaints, adjudicate cases and impose and enforce appropriate remedies or other outcomes;

Tools which may be needed in conjunction with codes of conduct include:

- Tools which involve the training and awareness-raising of officials subject to each code of conduct to ensure adherence and identify problems with the code itself;

- The conduct of regular, independent and comprehensive assessments of institutions and where necessary, of individuals, to measure performance against the prescribed standards;
- The enforcement of the code of conduct by investigating and dealing with complaints, as well as more proactive measures such as “integrity testing”; and,
- The linking of procedures to enforce the code of conduct with other measures which may identify corruption, such as more general assessments of performance and the comparison of disclosed assets with known incomes

Codes of conduct can be used with most other tools, but areas of overlap and possible inconsistency may be a concern and should be taken into account when formulating specific provisions. This is particularly true of other rules which may apply to those bound by a particular code. Codes should not be at variance with criminal offences, for example, and in some systems it may be advisable to reconcile other legal requirements by simply requiring those bound by the code to obey the law, effectively incorporating all applicable legislative requirements and automatically reflecting any future statutory or regulatory amendments as they occur, for example. Care should also be taken to ensure that codes are consistent with other applicable codes of conduct, or that if an inconsistency or variance is intended, this is clearly specified.

***BANGALORE PRINCIPLE ON JUDICIAL CONDUCT, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002***

Application:

1.6. A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary, which is fundamental to the maintenance of judicial independence.

***GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY, USAID, 2002***

3. Codes of Ethics

Many countries have adopted codes of ethics as part of a judicial reform process. Codes of ethics are valuable to the extent that they stimulate discussion and understanding among judges, as well as the general public, on what constitutes acceptable and unacceptable conduct. They may also inspire public confidence that concrete steps are being taken to improve the integrity of the judiciary.

Because debate and discussion of ethical issues are among the most important results of a code of ethics, the process of developing a code can be as important as the final product. Ideally, a code should be drafted by the judiciary or a judges association, with extensive input from lawyers, civil society leaders, and others who have experience with the courts. If there is a national judicial commission in a country, it may be an appropriate task for that organization. Judicial ethics codes should not be drafted by the legislature or the executive branch.

Guidance in drafting can be sought from several models (e.g., the European Judges Charter and the American Bar Association’s Model Code.) However, as with all issues discussed in this paper, the specifics of judicial ethics will be determined by local context. What appears to be clearly ethical or unethical in one country may be murky in another. For example, the apparent freedom of many European judges to engage in politics or the system of judicial elections in a number of U.S. states, would be unacceptable in other countries.

Most civil code countries already have laws that define crimes that are applicable to judicial performance. The judiciary’s organic laws and regulations also define parameters of behavior. If an ethics code is introduced, the issue of how it fits within the existing legal framework must be addressed.



Additionally, the judiciary will need a mechanism to interpret the code and to keep a record of those interpretations that will be available to others seeking guidance. Judges should not be left solely responsible to determine how the general words of a code apply in particular situations. Enforcement will also need to be addressed. Most of the experts we surveyed did not believe that codes were being effectively enforced in the countries that already have them.

Although codes are meant to have a positive effect on judicial independence, contributors to the guide flagged some potential abuses. First, codes have at times been used to punish judges who did not yet fully understand the details of the code and what behaviors were prohibited. Second, they have also been used to punish judges considered too independent. Both problems occurred most often when a code was adopted without extensive discussion among judges and the public at large. Accordingly, contributors urged that ethics codes not be used as the basis for discipline until they are widely known and understood. This generally does not leave a vacuum with respect to discipline, since the judges oath of office is usually adequate to support disciplinary proceedings.

***OPINION NO. 3 (2002) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE PRINCIPLES AND RULES GOVERNING JUDGES' PROFESSIONAL CONDUCT, IN PARTICULAR ETHICS, INCOMPATIBLE BEHAVIOUR AND IMPARTIALITY, Council of Europe, 2002***

A. STANDARDS OF JUDICIAL CONDUCT

2) How should standards of conduct be formulated?

47. The CCJE considers that the preparation of such statements is to be encouraged in each country, even though they are not the only way of disseminating rules of professional conduct, since:

- appropriate basic and further training should play a part in the preparation and dissemination of rules of professional conduct;
- in States where they exist, judicial inspectorates, on the basis of their observations of judges' behaviour, could contribute to the development of ethical thinking; their views could be made known through their annual reports;
- through its decisions, the independent authority described in the European Charter on the Statute for Judges, if it is involved in disciplinary proceedings, outlines judges' duties and obligations; if these decisions were published in an appropriate form, awareness of the values underlying them could be raised more effectively;
- high-level groups, consisting of representatives of different interests involved in the administration of justice, could be set up to consider ethical issues and their conclusions disseminated;
- professional associations should act as forums for the discussion of judges' responsibilities and deontology; they should provide wide dissemination of rules of conduct within judicial circles.

48. The CCJE would like to stress that, in order to provide the necessary protection of judges' independence, any statement of standards of professional conduct should be based on two fundamental principles:

i) firstly, it should address basic principles of professional conduct. It should recognise the general impossibility of compiling complete lists of pre-determined activities which judges are forbidden from pursuing; the principles set out should serve as self-regulatory instruments for judges, i.e. general rules that guide their activities. Further, although there is both an overlap and an interplay, principles of conduct should remain independent of the disciplinary rules applicable to judges in the sense that

failure to observe one of such principles should not of itself constitute a disciplinary infringement or a civil or criminal offence;

ii) secondly, principles of professional conduct should be drawn up by the judges themselves. They should be self-regulatory instruments generated by the judiciary itself, enabling the judicial authority to acquire legitimacy by operating within a framework of generally accepted ethical standards. Broad consultation should be organised, possibly under the aegis of a person or body as stated in paragraph 29, which could also be responsible for explaining and interpreting the statement of standards of professional conduct.

### 3) Conclusions of the standards of conduct

49. The CCJE is of the opinion that:

i) judges should be guided in their activities by principles of professional conduct,

ii) such principles should offer judges guidelines on how to proceed, thereby enabling them to overcome the difficulties they are faced with as regards their independence and impartiality,

iii) the said principles should be drawn up by the judges themselves and be totally separate from the judges' disciplinary system,

iv) it is desirable to establish in each country one or more bodies or persons within the judiciary to advise judges confronted with a problem related to professional ethics or compatibility of non judicial activities with their status.

50. As regards the rules of conduct of every judge, the CCJE is of the opinion that:

i) each individual judge should do everything to uphold judicial independence at both the institutional and the individual level,

ii) judges should behave with integrity in office and in their private lives,

iii) they should at all times adopt an approach which both is and appears impartial,

iv) they should discharge their duties without favouritism and without actual or apparent prejudice or bias,

v) their decisions should be reached by taking into account all considerations material to the application of the relevant rules of law, and excluding from account all immaterial considerations,

vi) they should show the consideration due to all persons taking part in the judicial proceedings or affected by these proceedings,

vii) they should discharge their duties with due respect for the equal treatment of parties, by avoiding any bias and any discrimination, maintaining a balance between the parties and ensuring each a fair hearing,

viii) they should show circumspection in their relations with the media, maintain their independence and impartiality by refraining from any personal exploitation of any relations with the media and from making any unjustified comments on the cases they are dealing with,

ix) they should ensure they maintain a high degree of professional competence,

x) they should have a high degree of professional awareness and be subject to an obligation of diligence in order to comply with the requirement to deliver their judgments in a reasonable time,

xi) they should devote the most of their working time to their judicial functions, including associated activities,

xii) they should refrain from any political activity which could compromise their independence and cause detriment to their image of impartiality.

**COMMONWEALTH (LATIMER HOUSE) PRINCIPLES ON THE THREE BRANCHES OF GOVERNMENT with Annex (Parliamentary Supremacy, Judicial Independence), The Commonwealth, 2003**

VI.) Ethical Governance

Ministers, Members of Parliament, judicial officers and public office holders in each jurisdiction should respectively develop, adopt and periodically review appropriate guidelines for ethical conduct. These should address the issue of conflict of interest, whether actual or perceived, with a view to enhancing transparency, accountability and public confidence.

**BEST PRACTICES IN COMBATING CORRUPTION - CHAPTER: CHAPTER 16: THE JUDICIAL SYSTEM - JUDGES AND LAWYERS, OSCE, 2004**

The Judiciary, Disciplining judges

Judicial independence is for the benefit of the institution, not the individual judge. But judges' independence does not place them beyond the reach of accountability.

However, judicial independence is best served by other judges assuming responsibility for the accountability of an individual judge; at least up to the point where impeachment by the legislature may come into play. Individual judges must be both appointed and held directly accountable in ways that do not compromise the institution's independence. Disciplinary tribunals should have a majority from the judiciary and can be rendered more legitimate by the inclusion of non-lawyers, but never politicians.

The chief justices who drafted the Bangalore Principles (above) believed that the senior judiciary should accept the task of building and sustaining judicial integrity for itself. The most potent tool would seem to be an appropriate code of conduct. This should be developed by the judges themselves, who should provide both for its enforcement and for advice to be given to individual judges when they are in doubt as to whether a particular provision in the code applies to a particular situation.

Judicial codes of conduct have been used to reverse such unacceptable practices as when the sons and daughters of judges appear as lawyers to argue cases before their parents. In a country where there is considerable trust in the judiciary, such an appearance might not cause any concern, but in a country where there is widespread suspicion that there is corruption in the judiciary, such a practice takes on an altogether different appearance.

**FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF JUDICIARY, CONCLUSIONS, RULES FOR THE ETHICAL CONDUCT OF JUDGES, THEIR APPLICATION AND OBSERVANCE, International Association of Judges (IAJ), 2004**

1. Primary responsibility for good conduct and observance of ethical standards lies with the judge, himself or herself, so that his or her conduct, both public and private, is always seen to be consistent with judicial independence, impartiality and integrity.

2. In contemporary society, written ethical principles (including principles of conduct/ behaviour) constitute a useful means of giving helpful guidance to members of the judiciary. They are also useful in maintaining public confidence in the judicial system.

3 In some countries these ethical principles are laid down in legislation. In other countries they are set out in non-legislative codes prepared and adopted by judicial councils, judges' associations or other professional bodies.

4. Judges accept that if their independence is to be maintained, as a corollary they must abide by ethical principles, thereby protecting judicial independence from outside forces, both governmental and non- governmental. Such acceptance will also promote public confidence in an independent judiciary.

5. Any written ethical principles may advise against or even prohibit conduct or activities which are, in fact, lawful. Those principles do so in order to ensure that judges should be above any suspicion, and to encourage the observation of the highest standards.

6. It is essential not to confuse ethical principles with disciplinary matters. On the contrary, one must recognise that ethical principles derive from the professional experience of all judges and are laid down in order to advance justice generally and to contribute to the understanding of the work of judges. Ethical principles must also assist the development of a judicial culture which itself will contribute to social cohesion.

7. In principle any written ethical principles should be prepared and/or adopted by the judiciary. However judges may take account of statements by the international community concerning judicial ethics and also the concerns of their own national society.

8. The form and content of any written ethical principles should be a matter for each country or judicial system to decide in accordance with its own tradition and experiences. Codes of ethics or ethical guidelines which have been adopted by various countries may be a model or source of inspiration for other countries considering the introduction of a code of ethics or ethical guidelines. (In this regard we note among others the terms of the Charter of the Judges, adopted by the IAJ, at its meeting in Taiwan 1999 and the Bangalore Principles of Judicial Conduct 2002).

### ***DECLARATION OF MINIMAL PRINCIPLES ABOUT JUDICIARIES AND JUDGES' INDEPENDENCE IN LATIN AMERICA, Campeche, April 2008***

#### **III. MINIMAL CONDITIONS FOR THE PROTECTION OF JUDGES' INDEPENDENCE AND IMPARTIALITY**

##### **15. JUDICIAL ETHICS**

In the exercise of their jurisdictional function, judges have the duty of trying to enforce the law and administer justice in conditions of efficiency, quality, accessibility and transparency, with respect for the dignity of the individuals that appear demanding the service, stating at all times the Independence and impartiality of their performance.

### ***STRENGTHENING BASIC PRINCIPAL OF JUDICIAL CONDUCT, ECOSOC, Resolution 2006/23, 2006***

1. *Invites* Member States, consistent with their domestic legal systems, to encourage their judiciaries to take into consideration the Bangalore Principles of Judicial Conduct, annexed to the present

resolution, when reviewing or developing rules with respect to the professional and ethical conduct of members of the judiciary.

***STRENGTHENING BASIC PRINCIPLES OF JUDICIAL CONDUCT, ECOSOC Resolution 2007/22, 2007***

2. Invites Member States, consistent with their domestic legal systems, to continue to encourage their judiciaries to take into consideration the Bangalore Principles of Judicial Conduct when reviewing or developing rules with respect to the professional and ethical conduct of members of the judiciary.

***OPINION NO. 10 (2007) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE COUNCIL FOR THE JUDICIARY AT THE SERVICE OF SOCIETY, CCJE, 2007***

V. C. 1. Ethics

57. The CCJE, when dealing with the questions of ethics and discipline in its Opinion No. 3 (2002), has pinpointed the need to clearly distinguish between these two matters.

58. The distinction between discipline and professional ethics brings about the need to provide judges with a collection of principles of professional ethics, which should be conceived as a working tool in judicial training and the everyday practice. The dissemination of case law on matters of discipline by the disciplinary authority marks a great improvement in the information available to judges; it allows them to engage in discussions on their practices, creating a “think tank” for these discussions. However, this is not sufficient in itself: the disciplinary decisions do not cover the entire scope of the rules of professional ethics, nor constitute the guide to good practices needed by judges.

59. The collection of principles of professional ethics should contain a synthesis of these good practices, with examples and comments; this should not amount to a code, the rigidity and falsely exhaustive nature of which being criticised. This guide of good practices should be the work of the judges themselves as it would be inappropriate for third parties, and in particular for other branches of government, to impose any principle on them.

60. Given the distinction between professional ethics and discipline drawn up by the CCJE, the drafting of this collection of principles should be done by a body other than the one responsible for judges’ discipline. There are several solutions for determining the competent body which should be responsible for judicial ethics:

(i) to entrust this activity to the Council for the Judiciary, if this Council does not have a disciplinary function or has a special body for disciplinary matters with a separate composition within the Council for the Judiciary (see paragraph 64 below);

(ii) or to create, alongside the Council for the Judiciary, an ethics committee whose only function would be the drafting and monitoring of rules of professional ethics. Problems with the latter choice may arise from the criteria of selection of the committee members and the risk of conflict or disagreement between this committee and the Council for the Judiciary.

The body entrusted with ethics could also, as the CCJE suggested in Opinion No. 3 (2002), advise judges on matters of professional ethics with which they are likely to be faced throughout their career.

61. In addition, the CCJE considers that associating persons external to the judiciary (lawyers, academics, representatives of the society, other governmental authorities) in the process of

development of ethical principles is justified in order to prevent possible perception of self-interest and self protection, while making sure that judges are not deprived of the power to determine their own professional ethics.

## SUMMARY OF THE RECOMMENDATIONS AND CONCLUSIONS

### *D. On the powers of the Council for the Judiciary:*

d) the Council for the Judiciary may be entrusted with ethical issues; it may furthermore address court users' complaints;

## **TECHNICAL GUIDE TO THE UNITED NATIONS CONVENTION AGAINST CORRUPTION, UNODC, 2009**

### Article 8: Code of conduct for public officials

1. In order to fight corruption, each State Party shall promote, inter alia, integrity, honesty and responsibility among its public officials, in accordance with the fundamental principles of its legal system.

2. In particular, each State Party shall endeavour to apply, within its own institutional and legal systems, codes or standards of conduct for the correct, honourable and proper performance of public functions.

3. For the purposes of implementing the provisions of this article, each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, take note of the relevant initiatives of regional, interregional and multilateral organizations, such as the International Code of Conduct for Public Officials contained in the annex to General Assembly resolution 51/59 of 12 December 1996.

4. Each State Party shall also consider, in accordance with the fundamental principles of its domestic law, establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.

5. Each State Party shall endeavour, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.

6. Each State Party shall consider taking, in accordance with the fundamental principles of its domestic law, disciplinary or other measures against public officials who violate the codes or standards established in accordance with this article.

### Article 8., I. Overview

States Parties are required to actively promote personal standards – integrity, honesty and responsibility – and professional responsibilities – correct, impartial, honourable and proper performance of public functions – among all public officials. To achieve this, States Parties must provide guidance on how public officials should conduct themselves in relation to those standards and how they may be held accountable for their actions and decisions. Specifically the article indicates that all States Parties provide public reporting legislation, conflict-of-interest rules and procedures, a code of conduct, and disciplinary requirements for public officials.

Most States Parties use a code of conduct or equivalent public statement. This has a number of purposes. It establishes clearly what is expected of a specific public official or group of officials, thus

helping to instil fundamental standards of behaviour that curb corruption. It should form the basis for employee training, thus ensuring that all public officials know the standards by which they should perform their official duties. The standards should include: fairness, impartiality, non-discrimination, independence, honesty and integrity, loyalty towards the organization, diligence, propriety of personal conduct, transparency, accountability, responsible use of organizational resources and appropriate conduct towards the public.

Conversely the code or equivalent public statement, together with the training, warns of the consequences of failing to act ethically, thus providing the basis of disciplinary action, including dismissal, in cases where an employee breaches or fails to meet a prescribed standard (in many cases, codes include descriptions of conduct that is expected or prohibited as well as procedural rules and penalties for dealing with breaches of the code).

Public officials are thus not only aware of the standards relevant to their official duties and functions but it becomes difficult, where all of the applicable standards, procedures and practices are assembled into a comprehensive code, to claim ignorance of what is expected of holders of public office. Conversely, public officials are entitled to know in advance what the standards are and how they should conduct themselves, making it impossible for others to fabricate disciplinary action as a way of improperly intimidating or removing them.

How States Parties promulgate a code of conduct or equivalent public statement will depend on their specific institutional and legal systems. In some countries, specific legislation is used to set standards applicable to all public officials. The second means is the use of delegated authority, by which the legislature may develop a generic code but delegates the power to another body to create specific technical rules, or set standards for specific categories of officials, such as prosecutors, members of the legislature or officials responsible for financial accounting or procurement. Finally contract law, and associated employment terms and conditions, may set requirements to abide by a code of conduct for a specific employee as part of his or her individual contract of employment. Alternatively, an agency or department may set general standards to which all employees or contractors are required to agree as a condition of employment.

In all aspects of devising a code, States Parties are invited to take note of the relevant initiatives of regional, interregional and multilateral organizations, such as the International Code of Conduct for Public Officials contained in the annex to General Assembly resolution 51/59 of 12 December 1996, the Council of Europe Recommendation No. R (2000) 10 on Codes of Conduct for Public Officials, which contains, as an appendix, a model code of conduct for public officials, and the OECD's Recommendation of the Council on Improving Ethical Conduct in the Public Service Including Principles for Managing Ethics in the Public Service (1998-C(98)70/FINAL).

## II.2. Standards of behaviour and codes of conduct

Standards emphasize the importance of roles undertaken by officials. They should encourage public officials' sense of professional commitment, service to the public, and responsibility to the powers and resources of their office. Standards should set out core values of behaviour expected of those in public life, including lawful conduct, honesty, integrity, non-partisanship, due process, fairness, probity and professionalism. Reforms in many countries have focused on improving management competency and making public sectors better equipped to perform their tasks. This calls for public officials to be imbued with a wider range of values than before – values mainly concerned with being efficient, purposeful and accountable.

Standards often include high level values to use as a basis for making wellreasoned decisions and judgments. There are general statements that can be applied to help with specific decisions, especially where public officials have to use their discretion and make choices. For example, they may include:

- Serving the public interest;

- Serving with competence, efficiency, respect for the law, objectivity, transparency, confidentiality and impartiality, and striving for excellence;
- Acting at all times in such a way as to uphold the public trust;
- Demonstrating respect, fairness and courtesy in their dealings with both citizens and fellow public officials.

Codes will state the standards of behaviour of public officials and translate them into specific and clear expectations and requirements of conduct. These identify the boundaries between desirable and undesirable behaviour and would often be grouped in a variety of ways, e.g., according to the boundaries of key relationships, or according to groups to whom responsibilities are owed.

Thus codes should address issues of public service (e.g., procedures to ensure fairness and transparency in providing public services and information) and political activities (e.g., placing restrictions on political activities and ensuring that political activities do not influence or conflict with public office duties). They will state clearly the requirements relating to both financial conflicts of interest (e.g., where a public official is working on matters in his official capacity that would affect his personal financial interest or the financial interests of those close to him) and conflicts of interest based on non-financial concerns (e.g., where a public official is working on matters that affect persons or entities with whom he has close personal, ethnic, religious or political affiliations). Codes should include clear and unambiguous provisions on acceptance or rejection of gifts, hospitality, and other benefits, especially addressing restrictions on acceptance of gifts from persons or entities that have business with the organization, any outside employment (e.g., ensuring that outside work does not conflict with official work) and the use of government resources (e.g., using Government resources only for Government purposes, or protecting non-public information). Finally codes should deal with postresignation and post-employment restrictions (e.g., restrictions on former public officials representing a new employer before their former agency or taking confidential information to new employers).

### II.3. Applicability

In addition to basic tenets, effective compliance with the requirements of article 8 of the Convention may entail a set of codes for the various categories of public officials. It may also entail codes designed for and applicable to those doing business with government, such as contractors, or those private sector or non-governmental bodies disbursing public funds.

For implementation, the first issue is whether the code should have legal status. Many of the activities covered by the code relate to the impartial and transparent performance of an official's responsibilities. Given the number of officials who may be covered by such a code, the implications of the legal enforcement of all aspects of a code should be considered carefully.

The second issue is whether a State Party wishes to differentiate between those parts of the code that relate primarily to the performance of the functions of office and those parts that deal with conflict of interest and other areas where the purpose of the code is to distinguish between proper and improper influences on an official's actions and decisions. Here States Parties may wish to take a more formal or legal approach to those aspects of a code that cover the declaration of assets, gifts, secondary employment, post-employment, hospitality or other benefits from which a conflict of interest may arise.

The third issue concerns avoiding the development and implementation of a code that follows the "develop and file" approach. This involves codes that are developed but then filed away in an induction manual, or are prepared without staff involvement. This approach risks the possibility of staff becoming cynical about the codes' usefulness or even regarding it as irrelevant because staff may feel it was imposed on them.

For a code to be effective, States Parties should ensure that:

- Senior public officials support the code and lead by example;



- Staff are involved in all stages of code development and implementation;
- Support mechanisms are in place to encourage the use of the code;
- Compliance with the code may be taken into account in relation to career progression etc.;
- Compliance with the code is monitored regularly through appropriate verification means;
- Code of conduct (and general corruption-awareness) training is regular and comprehensive;
- The organization continually promotes its ethical culture (a code of conduct is an important but not the only tool for this);
- The code is enforced through disciplinary action when necessary;
- The code is regularly reviewed for currency, relevance and accessibility;
- The code is devised with a style and structure that meets the particular needs of their organization;
- The code becomes an integral aspect for influencing decisions, actions and attitudes in the workplace (see article 10).

The fourth issue is what template should be used for a code or its contents. There is no single approach. The range could include the following topics: standards of public office and values of the organization; conflicts of interest; gifts and benefits; bribes; discrimination and harassment; fairness and equity in dealing with the public; handling confidential information; personal use of resources – facilities, equipment (including e-mail, Internet, PCs, fax etc.); secondary employment; political involvement; involvement in community organizations and volunteer work; reporting corrupt conduct, maladministration and serious waste; post-employment; and disciplinary procedures and sanctions.

The fifth issue concerns the context or framework within which States Parties develop a code. Writing a code alone is not enough. Therefore, States Parties will need to give consideration to ways of making the code effective in terms of its status and impact.

Thus States Parties can give the code general legitimacy and authority through laws and regulations and individual relevance by making employment offers to officials conditional upon their acceptance of the code (e.g., via a collective or individual acceptance or oath of office, or an employment agreement/contract). States Parties can ensure that accountability for implementing a code rests with senior management in individual departments which should develop their own code and more detailed policies, based on the general code, tailored to the roles and functions they are expected to carry out and to suit their particular requirements and circumstances. This gives the values and standards more operational relevance and enables them to be built into management systems.

Individual departments should complement a code with policies, rules, training, and procedures that spell out in more detail what is expected and what is prohibited. They will require specific clauses for officials in positions with a high risk of corruption. Compliance should be supported by ease of access to and understanding of a code. Specific requirements, such as asset disclosure, should be assisted by readily available asset declaration forms. Senior management may wish to consider assessment of compliance with any code as part of staff appraisal and performance management systems, as well as ensuring that the consequences for breaches, including disciplinary procedures and possible referral to justice, are known.

States Parties should publish the code to clearly communicate to the media and general public the standards expected of officials so that they know what are acceptable and unacceptable practices for public officials. There should be guidance on how the public may report breaches, and to whom, as well as the ability of the media to report in good faith on any breaches, without fear of retribution or retaliation.

Finally, States Parties should ensure that there is an oversight body, such as that designated under article 6, to scrutinize and monitor the implementation of a code – including regular reviews and surveys of public officials to find out from them their knowledge of the code and its implementation as well as what are the challenges and pressures they are facing – and to publish annual reports on whether entities are fulfilling their obligations with regard to the code.

### III. Reporting by public officials of acts of corruption

An important means of breaking the collusion and silence that often surrounds breaches of a code is to introduce an effective system for reporting suspicions of breaches in general, and corruption in particular (often termed “whistle-blowing” but also described as public interest disclosure, public reporting or professional standards reporting). States Parties are required to establish adequate rules and procedures facilitating officials to make such reports. These are intended to: encourage an official to report, to know to whom to report, and to be protected from possible retaliation for such reporting by superiors.

Part of the purpose of a code is to impress on public officials, including through training, the responsibilities and professional nature of their work and responsibilities and thus their duty to report lapses or breaches of those standards by other public officials and members of the public. There should be the creation of specific reporting procedures and means of reporting in private such as through specified mail boxes, telephone hotlines or designated third-party agencies. Close attention must be paid to the security and confidentiality of any reporting through the establishment of systems to ensure those who report suspicions of corruption and malpractice in good faith are fully protected against open or disguised reprisals. Further protection is necessary to protect the officials concerned from any form of “disguised” discrimination and damage to their careers at any time in the future as a result of having made allegations of corruption or other infringements in public administration. States Parties are invited to take note of specific developments on this issue in GRECO’s 2006 activity report at [http://www.coe.int/t/dg1/greco/documents/2007/Greco\(2007\)1\\_act.rep06\\_EN.pdf](http://www.coe.int/t/dg1/greco/documents/2007/Greco(2007)1_act.rep06_EN.pdf) and the website of the NGO Public Concern at Work at <http://www.pcaw.co.uk/>.

States Parties will therefore need to consider legislation and procedures intended to make clear to whom allegations will be made; in what format (for example, in written form, or anonymously); by which media (by telephone, by e-mail or by letter); with procedural safeguards to protect the source; how allegations are investigated; and means to avoid retaliation or retribution.

Article 11: Measures relating to the judiciary and prosecution services,

#### II.3. Codes and standards

A number of measures may be taken to promote the integrity of the judicial process.

An important such measure is ensuring that the high level of legal education is required for entry in the judiciary and that the level remains high through continuing professional development. States Parties should consider supporting continuing training programmes for judges on a regular basis. Those responsible for judicial and legal education should also consider providing more general legal instruction to judges in such areas as international law, including international human rights and humanitarian law, environmental law, and legal philosophy. Judicial education should include instruction concerning judicial bias (actual and apparent) and judicial obligations to disqualify oneself for actual or perceived partiality.

Another measure is the adoption of, and compliance with, a national code of judicial conduct that reflects contemporary international standards. The code should at the least impose an obligation on all judges publicly to declare the assets and liabilities and these of their family members. It should also reflect the guidance provided in article 8 relating to the disclosure of more general conflicts of interests. Such declarations should be regularly updated. They should be inspected after appointment and monitored from time to time by an independent official as part of the work of a judicial oversight body or the body or bodies established under article 6.

A code of conduct will be effective only if its application is regularly monitored, and a credible mechanism is established, to receive, investigate and determine complaints against judges and court personnel, fairly and expeditiously. Appropriate provision for due process in the case of a judge under investigation should be established bearing in mind the vulnerability of judges to false and malicious allegations of corruption by disappointed litigants and others.

A code of judicial conduct may be supplemented with a code of conduct for court personnel.

Yet another measure concerns the responsibility of Bar Associations or Law Societies to promote professional standards. Such bodies have an obligation to report to the appropriate authorities instances of corruption which are reasonably suspected. They also have the obligation to explain to clients and the public the principles and procedures for handling complaints against judges and court personnel. Such bodies also have a duty to institute effective means to discipline their own members who are alleged to have been engaged in corruption of the judiciary or court personnel. In the event of proof of the involvement of a member of the legal profession in corruption, whether of a judge or of court personnel or of each other, appropriate means should be in place for investigation and, where proved, disbarment of the persons concerned.

Finally, recognizing the fundamental importance of access to justice to ensure true equality before the law, the costs of private legal representation and the typical limits on the availability of public legal aid, consideration should be given, in accordance with any legal provisions that may apply and in cooperation with the legal profession, to various initiatives to encourage accessibility to justice and standards in the judicial process through, for example, the encouragement of pro bono representation by the legal profession of selected litigants.

Judges should take appropriate opportunities to emphasize the importance of access to justice, given that such access is essential to true respect for constitutionalism and the rule of law. States should also consider providing specialist training on corruption matters to judges in view of the complex nature of corruption cases.

## ***RESOURCE GUIDE ON STRENGTHENING JUDICIAL INTEGRITY AND CAPACITY, UNODC, 2011***

### VII. Codes of Conduct and Disciplinary Mechanisms

#### 4. Conclusions and recommendations

- The development of codes of conduct should be pursued with a participatory approach, taking into account that the principles of ethical conduct need to reflect the ethical standards, content and challenges provided by the environment. Compliance and ownership of the code are closely interrelated, thus the more ownership through consultation can be achieved, the more likely compliance with the code will be achieved as well.
- Participatory approach in the development process of the codes of conduct should also include external stakeholders so as to ensure that ethical principles reflect the “clients’ perspective” (e.g. bar, academia, relevant civil society, police and business associations).
- Initial content guidance for the judicial code can primarily be drawn from the Bangalore Principles of Judicial Conduct as well as similar regional standards.
- The code should be considered as a living document and be reviewed from time to time in light of ethical challenges that have been emerging and the efficacy of the codes in addressing those challenges.
- Establish a system of dissemination of the code and ensure that all judicial officers obtain a copy.
- Establish a professional ethics programme for the judiciary.
- Establish an advisory function where judges can obtain concrete behavioural guidance.
- Communicate the principles to the court users at large.

- Create a public feedback system to ensure that those who feel that a judge in his/ her conduct did not comply with the requirements can readily bring forward their complaints to a competent authority. In addition, ensure that the complainants are informed as to the final outcome of their complaints.

**RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010**

Chapter VIII – Ethics of judges

72. Judges should be guided in their activities by ethical principles of professional conduct. These principles not only include duties that may be sanctioned by disciplinary measures, but offer guidance to judges on how to conduct themselves.

73. These principles should be laid down in codes of judicial ethics which should inspire public confidence in judges and the judiciary. Judges should play a leading role in the development of such codes.

74. Judges should be able to seek advice on ethics from a body within the judiciary.

**MAGNA CARTA OF JUDGES, CCJE, Council of Europe, Strasbourg, 17 November 2010**

*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.

**ABA MODEL CODE OF JUDICIAL CONDUCT (2011 EDITION), adopted by the House of Delegates of the American Bar Association on August 7, 1990 and amended on August 6, 1997, August 10, 1999, August 12, 2003, February 12, 2007 and August 10, 2010**

Preamble

[1] The judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.

CANON 2

Rule 2.15: Responding to Judicial and Lawyer Misconduct

(A) A judge having knowledge\* that another judge has committed a violation of this Code that raises a substantial question regarding the judge's honesty, trustworthiness, or fitness as a judge in other respects shall inform the appropriate authority.\*

(B) A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.

(C) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code shall take appropriate action.

(D) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action.

Rule 2.16: Cooperation with Disciplinary Authorities

(A) A judge shall cooperate and be candid and honest with judicial and lawyer disciplinary agencies.

(B) A judge shall not retaliate, directly or indirectly, against a person known\* or suspected to have assisted or cooperated with an investigation of a judge or a lawyer.

**OPINION NO. 15 (2012) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)  
ON THE SPECIALISATION OF JUDGES, Council of Europe, 2012**

Conclusions

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.

**BOLOGNA MILANO GLOBAL CODE OF JUDICIAL ETHICS, 2015, Approved at the  
International Conference of Judicial independence held at the University of Bologna  
and at Bocconi University of Milano June 2015**

3. General Ethical Standards

3.1 Judges may not serve in Executive or Legislative functions, including as:

3.1.1 Ministers of the government; or as

3.1.2 Members of the Legislature or of municipal councils.

3.2 Judges shall not hold positions in political parties

3.3 A judge, other than a temporary or part-time judge, may not practise law.

3.4 A judge should refrain from business activities and should avoid engaging in other remunerative activity that can affect the exercise of judicial functions or the image of the judge, except in respect of that judge's personal investments, ownership of property, the business activities or ownership of property of family members or that judge's teaching at a university or a college.

3.5 A judge should always behave in such a manner as to preserve the dignity of the office and the impartiality, integrity and independence of the Judiciary.

3.6 Judges may be organized in associations designed for judges, for furthering their rights and interests as judges.

3.7 Judge may take appropriate action to protect their judicial independence.

3.8 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially.

3.9 Such proceedings include, but are not limited to, instances where

a) The judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

b) The judge previously served as a lawyer or was a material witness in the matter in controversy;  
or

c) The judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy:

3.9.1 Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

3.10 A case should not be withdrawn from a particular judge without valid reasons, such as cases of serious illness or conflict of interest. Any such reasons and the procedures for such withdrawal should be provided for by law and may not be influenced by any interest of the government or administration. A decision to withdraw a case from a judge should be taken by an authority which enjoys the same judicial independence as judges.

3.11 Judges shall discourage ex parte communications from parties and except as provided by the rules of the court such communications shall be disclosed to the court and to the other party.

3.12 Except in cases of legitimate consultations a judge shall not approach other judges not sitting with him on the same panel on pending cases.

## 6. Conduct in Court

6.1 Conduct of hearings: It is important for judges to maintain a standard of behaviour in court that is consistent with the status of judicial office and does not diminish the confidence of litigants in particular, and the public in general, in the ability, the integrity, the impartiality and the independence of the judge.

6.1.1 It is the duty of a judge to display such personal attributes as punctuality, courtesy, patience, tolerance and good humour.

6.1.2 A judge must be firm but fair in the maintenance of decorum, and above all be even-handed in the conduct of the trial.

6.1.3 A judge must be strict in the observance of the principles of natural justice, and in the protection of a party or witness from any display of racial, sexual or religious bias or prejudice.

6.1.4 A judge must not convey an impression that the judge and counsel are treating the proceedings as if they were an activity of an exclusive group.

6.2 Participation in the trial: It is common and often necessary for a judge to question a witness or engage in debate with counsel, but the judge should keep the proper level of such intervention to a moderate measure.

6.2.1 A judge must be careful not to descend into the arena and thereby appear to be taking sides or to have reached a premature conclusion.

6.3 Private communications: The principle that, save in the most exceptional circumstances, there should be no communication or association between the judge and one of the parties (or the legal advisers or witnesses of a party) otherwise than in the presence of, or with the previous knowledge and consent of, the other party (or parties) once a case is under way is, of course, very well known.

6.3.1 An approach to a judge in chambers by the lawyers for one party should not be made without the presence, or the knowledge and consent of, the lawyers for the other party.

6.4 Criminal trials before a jury: The nature or extent of judicial intervention in the course of evidence or argument in a jury trial must not convey to the jury a judicial view of guilt or innocence.

## 6.5 Revision of oral judgments

6.5.1 Oral judgments: A judge may not alter the substance of reasons for decision given orally.

6.5.1.1 Subject to that basic principle, a judge may revise the oral reasons for judgment where, because of a slip, the reasons as expressed do not reflect what the judge meant to say, or where there is some infelicity of expression. Errors of grammar or syntax may be corrected. References to cases may be added, as may be citations for cases referred to in the transcript.

6.5.2 Summing up to a jury: Apart from errors of spelling or punctuation which may alter the meaning if uncorrected, there should be no change to the transcript of a summing up unless it does not correctly record what the judge actually said.

6.5.2.1 Where time and opportunity permit, a judge must prepare written notes of the intended charge to the jury, particularly with respect to directions on the law, which may help to validate any proposed change to the transcript of the summing up. If the transcript is corrected, and a fresh transcript of the summing up incorporating the corrections is to be prepared, the original transcript should be retained on the court file.

6.5.3 It is the duty of a judge to insure accurate accounts of the protocol of the proceedings .

6.6 Reserved judgment: A judge should aim to prepare and deliver a reserved judgment as soon as possible. In case of a delay, a judge should speak to the head of the jurisdiction about the situation before it becomes a problem.

6.7 The judge as a mediator: Many judges consider that the role of a mediator is so different from that of a judge that a judge must not act as a mediator.



## VII. 1.2. INDEPENDENCE AS CONDUCT

***FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY, HOW TO PROTECT JUDGES FROM EXTERNAL POLITICAL, ECONOMICAL AND SOCIAL INFLUENCES AND FROM VIOLENCE; WITH PARTICULAR REGARD TO THE RESPECT DUE TO THE JUDGEMENTS OF THE COURTS AND TO THE SOCIAL STATUS OF THE JUDGES, International Association of Judges (IAJ), 1990***

As regards membership [...] judges should lead a normal social life, but at the same time avoid relations capable of compromising their respectability. If it is not possible for them to live in isolation, they should nevertheless show prudence in their relations. While there can be no doubt that their involvement in charitable associations is to be encouraged, there should equally be no question of them carrying out duties that involve financial responsibilities (in particular, as treasurers).

***JUDGES' CHARTER IN EUROPE, European Association of Judges, 1997***

Fundamental principles

2. The Judge is only accountable to the law. He pays no heed to political parties or pressure groups. He performs his professional duties free from outside influence and without undue delay.

***BANGALORE PRINCIPLE ON JUDICIAL CONDUCT, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002***

1.2. A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute that the judge has to adjudicate.

***GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY, USAID, 2002***

A Building Support for Reforms

- Judges are natural and essential allies in building support for judicial independence. Conversely, judges who are not brought into the process or who are made to feel personally attacked by reform campaigns can become effective opponents. Judges at all levels should be sought out and involved in the reform efforts. Their ownership and commitment will be essential to effective implementation. Suspicions they might have about the effects of changes need to be addressed at the outset. Once engaged, judges can improve the design of programs, since they are the ones who best understand how the challenges to impartiality can be addressed. The formation of judges associations can be an effective mechanism for involving judges in the process. While traditional judges associations have not tended to focus on promoting judicial independence, many of the newly formed groups, such as the Slovakian Judges Association, have a committed membership that has been at the forefront of reforms.

**OPINION NO. 3 (2002) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE PRINCIPLES AND RULES GOVERNING JUDGES' PROFESSIONAL CONDUCT, IN PARTICULAR ETHICS, INCOMPATIBLE BEHAVIOUR AND IMPARTIALITY, Council of Europe, 2002**

**A. STANDARDS OF JUDICIAL CONDUCT**

1) What standards of conduct should apply to judges?

16. Independence of the judge is an essential principle and is the right of the citizens of each State, including its judges. It has both an institutional and an individual aspect. The modern democratic State should be founded on the separation of powers. Each individual judge should do everything to uphold judicial independence at both the institutional and the individual level. The rationale of such independence has been discussed in detail in the Opinion N° 1 (2001) of the CCJE, paragraphs 10-13. It is, as there stated, inextricably complemented by and the pre-condition of the impartiality of the judge, which is essential to the credibility of the judicial system and the confidence that it should inspire in a democratic society.

3) Conclusions of the standards of conduct

50. As regards the rules of conduct of every judge, the CCJE is of the opinion that:

i) each individual judge should do everything to uphold judicial independence at both the institutional and the individual level,

ii) judges should behave with integrity in office and in their private lives,

iii) they should at all times adopt an approach which both is and appears impartial,

iv) they should discharge their duties without favouritism and without actual or apparent prejudice or bias,

v) their decisions should be reached by taking into account all considerations material to the application of the relevant rules of law, and excluding from account all immaterial considerations,

vi) they should show the consideration due to all persons taking part in the judicial proceedings or affected by these proceedings,

vii) they should discharge their duties with due respect for the equal treatment of parties, by avoiding any bias and any discrimination, maintaining a balance between the parties and ensuring each a fair hearing,

viii) they should show circumspection in their relations with the media, maintain their independence and impartiality by refraining from any personal exploitation of any relations with the media and from making any unjustified comments on the cases they are dealing with,

ix) they should ensure they maintain a high degree of professional competence,

x) they should have a high degree of professional awareness and be subject to an obligation of diligence in order to comply with the requirement to deliver their judgments in a reasonable time,

xi) they should devote the most of their working time to their judicial functions, including associated activities,

xii) they should refrain from any political activity which could compromise their independence and cause detriment to their image of impartiality.

***OPINION No.11 (2008) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE QUALITY OF JUDICIAL DECISIONS, Consultative Council of European Judges (CCJE), 2008***

4. With this in mind, the CCJE has already pointed out that judicial independence must be regarded as a citizens' right; it stated in its Opinion No. 1 (2001) that the independence of the judiciary "is not a prerogative or privilege in their own interests, but in the interests of the rule of law and of those seeking and expecting justice". The CCJE has, in its opinions since 2001, put forward a number of suggestions as to how each system may not only guarantee that court users have a right of access to the courts, but also ensure, through the quality of the decisions given, that they can have confidence in the outcome of the judicial process.

***RESOLUTION ON JUDICIAL ETHICS, European Court of Human Rights, Adopted by the Plenary Court on 23 June 2008***

I. Independence

In the exercise of their judicial functions, judges shall be independent of all external authority or influence. They shall refrain from any activity or membership of an association, and avoid any situation, that may affect confidence in their independence.

***MAGNA CARTA OF JUDGES, CCJE, Council of Europe, Strasbourg, 17 November 2010***

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.

**ABA MODEL CODE OF JUDICIAL CONDUCT (2011 EDITION), adopted by the House of Delegates of the American Bar Association on August 7, 1990 and amended on August 6, 1997, August 10, 1999, August 12, 2003, February 12, 2007 and August 10, 2010**

### CANON 3

#### Rule 3.6: Affiliation with Discriminatory Organizations

(A) A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.

(B) A judge shall not use the benefits or facilities of an organization if the judge knows\* or should know that the organization practices invidious discrimination on one or more of the bases identified in paragraph (A). A judge's attendance at an event in a facility of an organization that the judge is not permitted to join is not a violation of this Rule when the judge's attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization's practices.

**REPORT "JUDICIAL ETHICS – PRINCIPLES, VALUES AND QUALITIES", The General Assembly of ENCJ, 2010**

### INDEPENDENCE

Independence is not a privilege granted for the benefit of Judges.

Independence is the right of every citizen in a democratic society to benefit from a judiciary which is, (and is seen to be), independent of the legislative and executive branches of government, and which is established to safeguard the freedom and the rights of the citizen under the rule of law.

It is up to each judge to respect and to work to maintain the independence of the judiciary, both in its individual aspects and in its institutional aspects.

This independence leads him to apply the law to the matters which are placed before him in a specific case, without fearing to please or to displease all forms of power, executive, legislative, political, hierarchical, economic, of the media or public opinion.

A judge also takes care to remain independent of his colleagues and all pressure groups,

**MT. SCOPUS APPROVED REVISED INTERNATIONAL STANDARDS OF JUDICIAL INDEPENDENCE, International Association of Judicial Independence and World Peace, 2008, 2011, 2012**

### 7. STANDARDS OF CONDUCT

7.7. Judges may take appropriate action to protect their judicial independence.

**OPINION NO. 16 (2013) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) ON THE RELATIONS BETWEEN JUDGES AND LAWYERS, Council of Europe, 2013**

#### V. Recommendations

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.

**SITUATION REPORT ON THE JUDICIARY AND JUDGES IN THE COUNCIL OF EUROPE MEMBER STATES, Council of Europe, CCJE, 2013**

III. Conclusions

The CCJE expresses concern that there appear to have been trends which have the potential to jeopardise both the independence and also the appearance of independence of the judiciary, with the consequence that the trust that society will have in the machinery of justice is likely to be undermined.

**BOLOGNA MILANO GLOBAL CODE OF JUDICIAL ETHICS, 2015, Approved at the International Conference of Judicial independence held at the University of Bologna and at Bocconi University of Milano June 2015**

2. Judicial Independence

2.1. Judicial independence is sometimes mistakenly perceived as a privilege enjoyed by judges, whereas it is in fact a cornerstone of the system of government in a democratic society and a safeguard of the freedom and rights of the citizen under the rule of law. The judiciary, whether viewed as an entity as a judicial branch or by its individual membership, is and must be seen to be, independent of the legislative and executive branches of government.

2.2 The relationship between the judiciary and the other branches should be one of mutual respect, each recognising the proper role of the others. Judges should always take care that their conduct, official or private, does not undermine their institutional or individual independence, or the public appearance of independence.

2.3 The judicial oath normally provides (as in the text in the UK): "I will do right to all manner of people after the laws and usages of this Realm, without fear or favour, affection or ill-will." In taking that oath, the judge has acknowledged that he or she is primarily accountable to the law which he or she must administer.

2.4 The oath plainly involves a requirement to be alert to, and wary of, subtle and sometimes not so subtle attempts to influence judges or to curry favour. Moreover, in the proper discharge of duties, the judge must be immune to the effects of publicity, whether favourable or unfavourable. That does not of course mean being immune to an awareness of the profound effect judicial decisions may have, not only on the lives of people before the court, but sometimes upon issues of great concern to the public, concerns which may be expressed in the media.

2.5 Consultation with colleagues when points of difficulty arise is important in the maintenance of standards. In performing judicial duties, however, the judge shall be independent of judicial colleagues and solely responsible for his or her decisions.

## VII. 1.3. IMPARTIALITY

### VII. 1.3.1. GENERAL ASPECTS OF IMPARTIALITY

#### ***THE SIRACUSA DRAFT PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, 1981***

##### Freedom of Association and Expression

Art. 22. In accordance with the Universal Declaration of Human Rights, members of the judiciary like any other citizens are entitled to freedom of expression, association and assembly. However, judges should refrain from expressing public criticism or approval of the government, or from commenting on controversial political issues, in order to avoid any impression of partisanship.

##### VII. The Role of the Judiciary in a Changing Society,

Art. 28. In societies in which radical changes are being made serious tensions sometimes arise between the judiciary and the executive or legislature. In these circumstances judges often have a difficult role to fulfil, calling for the highest judicial qualities. On the one hand they should understand and give due weight to the goals and policies of the changing society when construing legislation or reviewing administrative decisions. On the other hand they must uphold the human rights of individuals and groups which are laid down in the constitution, laws and, where applicable, international instruments, or which reflect the lasting values of the society.

As in the other situations, justice requires judges to adjudicate impartially between the conflicting rights and interests and apply the law according to their understanding of its meaning.

#### ***MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE, International Bar Association (IBA), 1982***

##### G SECURING IMPARTIALITY AND INDEPENDENCE

43 A judge shall enjoy immunity from legal actions and the obligation to testify concerning matters arising in the exercise of his official functions.

44 A judge shall not sit in a case where there is a reasonable suspicion of bias or potential bias.

45 A judge shall avoid any course of conduct which might give rise to an appearance of *partiality*.  
International Bar Association

#### ***THE UNIVERSAL CHARTER OF THE JUDGE, International Association of Judges (IAJ), 1999***

##### Art.5 Impartiality and restraint

In the performance of the judicial duties the judge must be impartial and must so be seen.

The judge must perform his or her duties with restraint and attention to the dignity of the court and of all persons involved.

**POLICY FRAMEWORK FOR PREVENTING AND ELIMINATING CORRUPTION AND ENSURING THE IMPARTIALITY OF THE JUDICIAL SYSTEM, Centre for the Independence of Judges and Lawyers of the International Commission of Jurists, 2000**

Finally, it should be recalled that the common form of judicial oath requires judges to exercise the judicial power without fear or favour, affection or illwill. That guarantee of judicial impartiality is the universal expectation of all persons who access or appear before a court. Without it there will be no rule of law and the democratic quality of society will fail. Therefore it is essential that the above policy be widely supported and implemented.

**OPINION NO. 1 (2001) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF COUNCIL OF EUROPE ON STANDARDS CONCERNING THE INDEPENDENCE OF THE JUDICIARY AND THE IRREMOVABILITY OF JUDGES, Council of Europe, 2001**

The rationales of judicial independence

12. Judicial independence presupposes total impartiality on the part of judges. When adjudicating between any parties, judges must be impartial, that is free from any connection, inclination or bias, which affects - or may be seen as affecting - their ability to adjudicate independently. In this regard, judicial independence is an elaboration of the fundamental principle that "no man may be judge in his own cause". This principle also has significance well beyond that affecting the particular parties to any dispute. Not merely the parties to any particular dispute, but society as a whole must be able to trust the judiciary. A judge must thus not merely be free in fact from any inappropriate connection, bias or influence, he or she must also appear to a reasonable observer be free therefrom. Otherwise, confidence in the independence of the judiciary may be undermined.

**BANGALORE PRINCIPLE ON JUDICIAL CONDUCT, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002**

Application:

1.3. A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.

**OPINION NO. 3 (2002) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE PRINCIPLES AND RULES GOVERNING JUDGES' PROFESSIONAL CONDUCT, IN PARTICULAR ETHICS, INCOMPATIBLE BEHAVIOUR AND IMPARTIALITY, Council of Europe, 2002**

A. STANDARDS OF JUDICIAL CONDUCT

1) What standards of conduct should apply to judges?

20. Impartiality is determined by the European Court both according to a *subjective* approach, which takes into account the personal conviction or interest of a particular judge in a given case, and according to an *objective* test, ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect.

21. Judges should, in all circumstances, act impartially, to ensure that there can be no legitimate reason for citizens to suspect any partiality. In this regard, impartiality should be apparent in the exercise of both the judge's judicial functions and his or her other activities.

***PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA, African Commission on Human and Peoples Rights, 2003***

**A. GENERAL PRINCIPLES APPLICABLE TO ALL LEGAL PROCEEDINGS**

**5) Impartial Tribunal**

b) Any party to proceedings before a judicial body shall be entitled to challenge its impartiality on the basis of ascertainable facts that the fairness of the judge or judicial body appears to be in doubt.

c) The impartiality of a judicial body could be determined on the basis of three relevant facts:

(i) that the position of the judicial officer allows him or her to play a crucial role in the proceedings

(ii) the judicial officer may have expressed an opinion which would influence the decision-making

(iii) the judicial official would have to rule on an action taken in a prior capacity.

***GENERAL COMMENT NO. 32, ARTICLE 14, RIGHT TO EQUALITY BEFORE COURTS AND TRIBUNALS AND TO A FAIR TRIAL, UN Human Rights Committee, 2007***

**III. Fair and public hearing by a competent, independent and impartial tribunal**

20. Judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary. The same is true, for instance, for the dismissal by the executive of judges alleged to be corrupt, without following any of the procedures provided for by the law.

21. The requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial.



**RESOLUTION ON JUDICIAL ETHICS, European Court of Human Rights, Adopted by the Plenary Court on 23 June 2008**

II. Impartiality

Judges shall exercise their function impartially and ensure the appearance of impartiality. They shall take care to avoid conflicts of interest as well as situations that may be reasonably perceived as giving rise to a conflict of interest.

**DRAFT VADEMECUM ON THE JUDICIARY, EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), 2008**

3. Judicial Impartiality

It is [...] indispensable to provide [...] a constitutional right to have access to independent and impartial tribunals, in accordance with Article 6 of the European Convention of Human Rights.

CDL-INF(1996)006 Avis sur le projet de Constitution de l'Ukraine, section. VIII, «General Comments», al. 2.

Choosing the appropriate system for judicial appointments is one of the primary challenges faced by the newly established democracies, where often concerns related to the independence and political impartiality of the judiciary persist. Political involvement in the appointment procedure is endangering the neutrality of the judiciary in these states, while in others, in particular those with democratically proved judicial systems, such methods of appointment are regarded as traditional and effective.

International standards in this respect are more in favour of the extensive depoliticisation of the process. However no single non-political "model" of appointment system exists, which could ideally comply with the principle of the separation of powers and secure full independence of the judiciary.

CDL-AD(2007)028 Report on Judicial Appointments, para. 2-3.

Oral hearings are an aspect of transparency, which is a core democratic value.[...] oral hearings serve as a form of democratic control of the judges by public supervision. Oral hearings thereby reinforce the confidence of the citizens that justice is dispensed independently and impartially.

CDL-AD(2004)035 Opinion on the Draft Federal Constitutional Law "on modifications and amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation" para. 4.

It does not seem necessary to get rid of the inquisitory principle completely but the stress should be put on the adversarial principle.

CDL-INF(1996)006 Opinion on the draft Constitution of Ukraine, section. VIII, « General Comments», al. 3.

The individual freedom of judges is an item for permanent discussions. The Concept seems to set high standards when it states that "judges ... may not perform political activities, may not be party members ...". Based on past experience, it is easy to understand the concern expressed. It should be added that in some other European states the private life of judges is not restricted in such a way.

CDL(1995)73rev Opinion on the regulatory concept of the Constitution of the Republic of Hungary, part II, article 10, al. 5.

[Judges] may not be members of political parties or participate in political activities.

CDL-AD(2005)003 Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, in cooperation with OSCE/ODIHR, para. 104.

Judges at present may not engage in any other occupation or remunerative activities except for “pedagogical activities”. To that is now to be added “scientific activities”, which is positive [...]. They may not be members of political parties or engage in political activities. Curiously, similar restrictions do not appear to attach to members of the Constitutional Court under the amended Constitution as it now deals with the Constitutional Court in a separate chapter.

On a strict reading this provision might prevent the appointment of judges to public inquiries or commissions representing the state abroad, membership of charitable institutions or the like. Such an interpretation would seem unduly restrictive.

CDL-AD(2005)005 Opinion on Draft Constitutional Amendments relating to the Reform of the Judiciary in Georgia, para. 6-7.

The Supreme Council of Justice should also ensure impartiality.

CDL-AD(2005)003 Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, in cooperation with OSCE/ODIHR, para. 102.

With regard to many questions relating to the status of military judges, in particular their dismissal, the draft law refers to the Law "On Universal Conscription and Military Service". The Commission can only express the hope that this law contains sufficient guarantees to ensure the independence and impartiality of military judges in accordance with the requirements developed in the case law of the European Court of Human Rights.

CDL-INF(2000)005 Opinion on the draft law of Ukraine on the judicial system, «General comments», «The military courts», al. 4.

## ***REPORT “JUDICIAL ETHICS – PRINCIPLES, VALUES AND QUALITIES”, The General Assembly of ENCJ, 2010***

### **IMPARTIALITY**

Impartiality and people’s perception of impartiality are, with independence, essential to a fair trial. The impartiality of the judge represents the absence of any prejudice or preconceived idea when exercising judgment, as well as in the procedures adopted prior to the delivery of the judgment.

The judge is aware of the possibility of his own prejudices.

To guarantee impartiality, the judge:

- Fulfils his judicial duties without fear, favouritism or prejudice;
- Adopts, both in the exercise of his functions and in his personal life, a conduct which sustains confidence in judicial impartiality and minimises the situations which might lead to a recusal ;
- Recuses himself from cases when:
  - he cannot judge the case in an impartial manner in the eyes of an objective observer ;
  - he has a connection with one of the parties or has personal knowledge of the facts, has represented, assisted or acted against one of the parties, or there is another situation which, subjectively, would affect his impartiality;
  - he or a member of his family has an interest in the outcome of the trial. A judge has a duty of care to prevent conflicts of interest between his judicial duties and his social life.

If he is a source of actual or potential conflicts of interest, the judge does not take on, or withdraws immediately from, the case, to avoid his impartiality being called into question.

A judge ensures that his private life does not affect the public image of the impartiality of his judicial work.

Impartiality does not prevent a judge from taking part in social life in order to carry on his professional activity.

He is entitled to complete freedom of opinion but must be measured in expressing his opinions, even in countries in which a judge is allowed to be a member of a political organisation. In any event, this freedom of opinion cannot be manifested in the exercise of his judicial duties.

***OPINION NO. 15 (2012) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)  
ON THE SPECIALISATION OF JUDGES, Council of Europe, 2012***

A. Possible advantages and disadvantages of specialisation, b. Possible limits and dangers of specialisation

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.

***BOLOGNA MILANO GLOBAL CODE OF JUDICIAL ETHICS, 2015, Approved at the International Conference of Judicial Independence held at the University of Bologna and at Bocconi University of Milano June 2015***

4. Securing Impartiality and Independence

4.1 A judge shall enjoy immunity from legal actions, except for intentional or gross violations, in the exercise of official functions.

4.2 A judge shall not sit in a case where there is a reasonable suspicion of bias or potential bias.

4.3 A judge shall avoid any course of conduct which might give rise to an appearance of partiality.

4.4 The state shall ensure that in the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

4.5 The law should provide for sanctions against persons seeking to influence judges in any such manner, judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law. Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary.

4.6 Ensuring impartiality of chairpersons and members of commissions and committees of inquiry and other quasi-judicial institutions.

4.6.1 All officers exercising judicial and quasi-judicial and investigative and auditing functions are subject to the duty of fairness and impartiality. This includes commissions of inquiry, mediation, arbitration, state auditing and internal auditing. All such officers and Members or chairpersons of commission or committee of inquiry shall maintain impartiality and demonstrate independence in conduction inquiries and in making fact-finding and recommendations.

4.6.2 The general rules applicable to national judges in case of circumstances requiring disqualification of judges, shall also apply to administrative adjudicators and members of commissions of inquiry and to quasi-judicial institutions.

4.6.3 The general rules applicable to national judges in case of circumstances requiring disqualification of judges shall also apply to internal auditors and state auditors.

4.6.4 Impartiality: a judge shall treat the parties equally, shall neither be partial to the poor nor defer to the rich and powerful, shall not be gracious to one party and ungracious to another, and shall judge with an open mind, with no prejudice or partiality.

4.7 Public Inquiries by judges: if a serving member of the judiciary accepts appointment as a Commissioner of Inquiry on behalf of Government, he or she does so not in capacity of a judge but as a public servant in public administration.

4.7.1 While a serving judge conducts a public inquiry, in accordance with terms of reference stated by Government, he must act impartially and independently of any party interested in the substance of the public inquiry.

4.7.2 A serving judge who chairs a public inquiry is entitled to insist that all matters of the of the procedure in the conduct of the inquiry shall be at his complete discretion; in particular he or she may, according to the applicable law or standards, issue a warning letter to any interested party of any complaint that may appear in the Inquiry's report to Government.

4.7.3 If an interested party responds to any such warning letter from the public inquiry, the judge will consider such response, and if necessary, indicate that it has been considered in the preparation of the final report to Government.

4.7.4 Upon receiving a request to chair a commission of inquiry, a judge shall carefully consider all the ramifications of such appointment before giving consent to said appointment.

4.7.5 Judges who exercise other functions such as in alternative dispute resolution (ADR), in mediation or arbitration, shall act impartially and independently of any party to the relevant procedure.

## VII. 1.3.2. IMPARTIALITY AND CONDUCT OF JUDGES IN THE EXERCISE OF THEIR JUDICIAL FUNCTIONS

### ***THE UNIVERSAL CHARTER OF THE JUDGE, International Association of Judges (IAJ), 1999***

#### Art. 5 Impartiality and restraint

In the performance of the judicial duties the judge must be impartial and must so be seen.

The judge must perform his or her duties with restraint and attention to the dignity of the court and of all persons involved.

### ***BANGALORE PRINCIPLE ON JUDICIAL CONDUCT, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002***

#### Principle:

Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

#### Application:

2.1. A judge shall perform his or her judicial duties without favour, bias or prejudice.

### ***OPINION NO. 3 (2002) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE PRINCIPLES AND RULES GOVERNING JUDGES' PROFESSIONAL CONDUCT, IN PARTICULAR ETHICS, INCOMPATIBLE BEHAVIOUR AND IMPARTIALITY, Council of Europe, 2002***

#### A. STANDARDS OF JUDICIAL CONDUCT

1) What standards of conduct should apply to judges?

a. Impartiality and conduct of judges in the exercise of their judicial functions

23. Judges should therefore discharge their duties without any favouritism, display of prejudice or bias. They should not reach their decisions by taking into consideration anything which falls outside the application of the rules of law. As long as they are dealing with a case or could be required to do so, they should not consciously make any observations which could reasonably suggest some degree of pre-judgment of the resolution of the dispute or which could influence the fairness of the proceedings. They should show the consideration due to all persons (parties, witnesses, counsel, for example) with no distinction based on unlawful grounds or incompatible with the appropriate discharge of their functions. They should also ensure that their professional competence is evident in the discharge of their duties.

### **VII. 1.3.3. IMPARTIALITY AND EXTRA-JUDICIAL CONDUCT OF JUDGES**

#### ***MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE, International Bar Association (IBA), 1982***

##### **F STANDARDS OF CONDUCT**

35 Judges may not, during their term of office, serve in executive functions, such as ministers of the government, nor may they serve as members of the Legislature or of municipal councils, unless by long historical traditions these functions are combined.

36 Judges may serve as chairmen of committees of inquiry in cases where the process requires skill of fact-finding and evidence-taking.

37 Judges shall not hold positions in political parties.

38 A judge, other than a temporary judge, may not practice law during his term of office.

39 A judge should refrain from business activities, except his personal investments, or ownership of property.

40 A judge should always behave in such a manner as to preserve the dignity of his office and the impartiality and independence of the Judiciary.

41 Judges may be organised in associations designed for judges, for furthering their rights and interests as judges.

42 Judges may take collective action to protect their judicial independence and to uphold their position.

#### ***JUDGES' CHARTER IN EUROPE, European Association of Judges, 1997***

##### **Fundamental principles**

3. Not only must the Judge be impartial, he must be seen by all to be impartial.

#### ***THE UNIVERSAL CHARTER OF THE JUDGE, International Association of Judges (IAJ), 1999***

##### **Art.7 Outside activity**

The judge must not carry out any other function, whether public or private, paid or unpaid, that is not fully compatible with the duties and status of a judge. The judge must not be subject to outside appointments without his or her consent.

***BANGALORE PRINCIPLE ON JUDICIAL CONDUCT, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002***

Value 2: Impartiality

2.2. A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

2.3. A judge shall, as far as is reasonable, so conduct himself or herself as to minimize the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.

Value 4: Property

4.5. A judge shall not allow the use of the judge's residence by a member of the legal profession to receive clients or other members of the legal profession.

***OPINION NO. 3 (2002) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE PRINCIPLES AND RULES GOVERNING JUDGES' PROFESSIONAL CONDUCT, IN PARTICULAR ETHICS, INCOMPATIBLE BEHAVIOUR AND IMPARTIALITY, Council of Europe, 2002***

**A. STANDARDS OF JUDICIAL CONDUCT**

1) What standards of conduct should apply to judges?

a. Impartiality and conduct of judges in the exercise of their judicial functions

22. Public confidence in and respect for the judiciary are the guarantees of the effectiveness of the judicial system: the conduct of judges in their professional activities is understandably seen by members of the public as essential to the credibility of the courts.

23. Judges should therefore discharge their duties without any favouritism, display of prejudice or bias. They should not reach their decisions by taking into consideration anything which falls outside the application of the rules of law. As long as they are dealing with a case or could be required to do so, they should not consciously make any observations which could reasonably suggest some degree of pre-judgment of the resolution of the dispute or which could influence the fairness of the proceedings. They should show the consideration due to all persons (parties, witnesses, counsel, for example) with no distinction based on unlawful grounds or incompatible with the appropriate discharge of their functions. They should also ensure that their professional competence is evident in the discharge of their duties.

24. Judges should also discharge their functions with due respect for the principle of equal treatment of parties, by avoiding any bias and any discrimination, maintaining a balance between the parties and ensuring that each receives a fair hearing.



**PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE  
IN AFRICA, African Commission on Human and Peoples Rights, 2003**

**A. GENERAL PRINCIPLES APPLICABLE TO ALL LEGAL PROCEEDINGS**

5) Impartial Tribunal

e) A judicial official may not consult a higher official authority before rendering a decision in order to ensure that his or her decision will be upheld.

**ABA MODEL CODE OF JUDICIAL CONDUCT (2011 EDITION), adopted by the House of Delegates of the American Bar Association on August 7, 1990 and amended on August 6, 1997, August 10, 1999, August 12, 2003, February 12, 2007 and August 10, 2010**

**CANON 2**

**Rule 2.11: Disqualification**

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge\* of facts that are in dispute in the proceeding.

(2) The judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:

(a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

(b) acting as a lawyer in the proceeding;

(c) a person who has more than a de minimis\* interest that could be substantially affected by the proceeding; or

(d) likely to be a material witness in the proceeding.

(3) The judge knows that he or she, individually or as a fiduciary,\* or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household,\* has an economic interest\* in the subject matter in controversy or in a party to the proceeding.

(4) The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous years made aggregate contributions to the judge's campaign in an amount that is greater than \$[insert amount] for an individual or \$[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity].

(5) The judge, while a judge or a judicial candidate,\* has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(6) The judge:

(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;

(c) was a material witness concerning the matter; or

(d) previously presided as a judge over the matter in another court.

(B) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household.

(C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without

participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

### CANON 3

A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.

#### Rule 3.1: Extrajudicial Activities in General

A judge may engage in extrajudicial activities, except as prohibited by law\* or this Code. However, when engaging in extrajudicial activities, a judge shall not:

- (A) participate in activities that will interfere with the proper performance of the judge's judicial duties;
- (B) participate in activities that will lead to frequent disqualification of the judge;
- (C) participate in activities that would appear to a reasonable person to undermine the judge's independence,\* integrity,\* or impartiality;\*
- (D) engage in conduct that would appear to a reasonable person to be coercive; or
- (E) make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law.

#### Rule 3.2: Appearances before Governmental Bodies and Consultation with Government Officials

A judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official, except:

- (A) in connection with matters concerning the law, the legal system, or the administration of justice;
- (B) in connection with matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties; or
- (C) when the judge is acting pro se in a matter involving the judge's legal or economic interests, or when the judge is acting in a fiduciary capacity.

#### Rule 3.7: Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities

(A) Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:

- (1) assisting such an organization or entity in planning related to fund-raising, and participating in the management and investment of the organization's or entity's funds;
  - (2) soliciting\* contributions\* for such an organization or entity, but only from members of the judge's family,\* or from judges over whom the judge does not exercise supervisory or appellate authority;
  - (3) soliciting membership for such an organization or entity, even though the membership dues or fees generated may be used to support the objectives of the organization or entity, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice;
  - (4) appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such an organization or entity, but if the event serves a fund-raising purpose, the judge may participate only if the event concerns the law, the legal system, or the administration of justice;
  - (5) making recommendations to such a public or private fund-granting organization or entity in connection with its programs and activities, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice; and
  - (6) serving as an officer, director, trustee, or nonlegal advisor of such an organization or entity, unless it is likely that the organization or entity:
    - (a) will be engaged in proceedings that would ordinarily come before the judge; or
    - (b) will frequently be engaged in adversary proceedings in the court of which the judge is a member, or in any court subject to the appellate jurisdiction of the court of which the judge is a member.
- (B) A judge may encourage lawyers to provide pro bono publico legal services.

#### Rule 3.8: Appointments to Fiduciary Positions

(A) A judge shall not accept appointment to serve in a fiduciary\* position, such as executor, administrator, trustee, guardian, attorney in fact, or other personal representative, except for the estate, trust, or person of a member of the judge's family,\* and then only if such service will not interfere with the proper performance of judicial duties.

(B) A judge shall not serve in a fiduciary position if the judge as fiduciary will likely be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves, or one under its appellate jurisdiction.

(C) A judge acting in a fiduciary capacity shall be subject to the same restrictions on engaging in financial activities that apply to a judge personally.

(D) If a person who is serving in a fiduciary position becomes a judge, he or she must comply with this Rule as soon as reasonably practicable, but in no event later than [one year] after becoming a judge.

#### Rule 3.9: Service as Arbitrator or Mediator

A judge shall not act as an arbitrator or a mediator or perform other judicial functions apart from the judge's official duties unless expressly authorized by law.

#### Rule 3.10: Practice of Law

A judge shall not practice law. A judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family,\* but is prohibited from serving as the family member's lawyer in any forum.

#### Rule 3.11: Financial, Business, or Remunerative Activities

(A) A judge may hold and manage investments of the judge and members of the judge's family.\*

(B) A judge shall not serve as an officer, director, manager, general partner, advisor, or employee of any business entity except that a judge may manage or participate in:

(1) a business closely held by the judge or members of the judge's family; or

(2) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.

(C) A judge shall not engage in financial activities permitted under paragraphs (A) and (B) if they will:

(1) interfere with the proper performance of judicial duties;

(2) lead to frequent disqualification of the judge;

(3) involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves; or

(4) result in violation of other provisions of this Code.

#### Rule 3.12: Compensation for Extrajudicial Activities

A judge may accept reasonable compensation for extrajudicial activities permitted by this Code or other law unless such acceptance would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.

#### Rule 3.14: Reimbursement of Expenses and Waivers of Fees or Charges

(A) Unless otherwise prohibited by Rules 3.1 and 3.13(A) or other law, a judge may accept reimbursement of necessary and reasonable expenses for travel, food, lodging, or other incidental expenses, or a waiver or partial waiver of fees or charges for registration, tuition, and similar items, from sources other than the judge's employing entity, if the expenses or charges are associated with the judge's participation in extrajudicial activities permitted by this Code.

(B) Reimbursement of expenses for necessary travel, food, lodging, or other incidental expenses shall be limited to the actual costs reasonably incurred by the judge and, when appropriate to the occasion, by the judge's spouse, domestic partner, or guest.

(C) A judge who accepts reimbursement of expenses or waivers or partial waivers of fees or charges on behalf of the judge or the judge's spouse, domestic partner, or guest shall publicly report such acceptance as required by Rule 3.15.

## VII. 1.3.4. IMPARTIALITY AND OTHER PROFESSIONAL ACTIVITIES OF JUDGES

### ***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE (“Singhvi Declaration”), ECOSOC, 1985***

Disqualifications

23. Judges and courts shall not render advisory opinions except under an express constitutional or statutory provision.

24. Judges shall refrain from business activities, except as incidental to their personal investments or their ownership of property. Judges shall not engage in law practice.

### ***EUROPEAN CHARTER ON THE STATUTE FOR JUDGES AND EXPLANATORY MEMORANDUM, Council of Europe, Strasbourg, 8 - 10 July 1998***

#### 4. CAREER DEVELOPMENT

4.2. Judges freely carry out activities outside their judicial mandate including those which are the embodiment of their rights as citizens. This freedom may not be limited except in so far as such outside activities are incompatible with confidence in, or the impartiality or the independence of a judge, or his or her required availability to deal attentively and within a reasonable period with the matters put before him or her. The exercise of an outside activity, other than literary or artistic, giving rise to remuneration, must be the object of a prior authorization on conditions laid down by the statute.

### ***THE UNIVERSAL CHARTER OF THE JUDGE, International Association of Judges (IAJ), 1999***

Art. 7 Outside activity

The judge must not carry out any other function, whether public or private, paid or unpaid, that is not fully compatible with the duties and status of a judge. The judge must not be subject to outside appointments without his or her consent.

### ***BANGALORE PRINCIPLE ON JUDICIAL CONDUCT, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002***

4.11. Subject to the proper performance of judicial duties, a judge may:

- (a) Write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters;
- (b) Appear at a public hearing before an official body concerned with matters relating to the law, the legal system, the administration of justice or related matters;
- (c) Serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge; or
- (d) Engage in other activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.

### ***OPINION NO. 3 (2002) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE PRINCIPLES AND RULES GOVERNING JUDGES’ PROFESSIONAL CONDUCT, IN PARTICULAR ETHICS, INCOMPATIBLE BEHAVIOUR AND IMPARTIALITY, Council of Europe, 2002***

#### A. STANDARDS OF JUDICIAL CONDUCT

1) What standards of conduct should apply to judges?

b. Impartiality and extra-judicial conduct of judges

27. Judges should not be isolated from the society in which they live, since the judicial system can only function properly if judges are in touch with reality. Moreover, as citizens, judges enjoy the fundamental rights and freedoms protected, in particular, by the European Convention on Human Rights (freedom of opinion, religious freedom, etc). They should therefore remain generally free to engage in the extra-professional activities of their choice.

28. However, such activities may jeopardise their impartiality or sometimes even their independence. A reasonable balance therefore needs to be struck between the degree to which judges may be involved in society and the need for them to be and to be seen as independent and impartial in the discharge of their duties. In the last analysis, the question must always be asked whether, in the particular social context and in the eyes of a reasonable, informed observer, the judge has engaged in an activity which could objectively compromise his or her independence or impartiality.

35. Working in a different field offers judges an opportunity to broaden their horizons and gives them an awareness of problems in society which supplements the knowledge acquired from the exercise of their profession. In contrast, it entails some not inconsiderable risks: it could be viewed as contrary to the separation of powers, and could also weaken the public view of the independence and impartiality of judges.

36. The question of judges' involvement in a certain governmental activities, such as service in the private offices of a minister (*cabinet ministériel*), poses particular problems. There is nothing to prevent a judge from exercising functions in an administrative department of a ministry (for example a civil or criminal legislation department in the Ministry of Justice); however, the matter is more delicate with regard to a judge who becomes part of the staff of a minister's private office. Ministers are perfectly entitled to appoint whomsoever they wish to work in their private office but, as the minister's close collaborators, such staff participate to a certain extent in the minister's political activities. In such circumstances, before a judge enters into service in a minister's private office, an opinion should ideally be obtained from the independent organ responsible for the appointment of judges, so that this body could set out the rules of conduct applicable in each individual case.

***THE BURGH HOUSE PRINCIPLES ON THE INDEPENDENCE OF THE INTERNATIONAL JUDICIARY, The Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals, 2004***

8. Extra-judicial activity

8.1 Judges shall not engage in any extra-judicial activity that is incompatible with their judicial function or the efficient and timely functioning of the court of which they are members, or that may affect or may reasonably appear to affect their independence or impartiality.

8.2 Judges shall not exercise any political function.

8.3 Each court should establish an appropriate mechanism to give guidance to judges in relation to extra-judicial activities, and to ensure that appropriate means exist for parties to proceedings to raise any concerns.

***RESOLUTION ON JUDICIAL ETHICS, European Court of Human Rights, Adopted by the Plenary Court on 23 June 2008***

VII. Additional activity

Judges may not engage in any additional activity except insofar as this is compatible with independence, impartiality and the demands of their full-time office. They shall declare any additional activity to the President of the Court, as provided for in Rule 4 of the Rules of Court.

VIII. Favours and advantages

Judges shall not accept any gift, favour or advantage that could call their independence or impartiality into question.

***ABA MODEL CODE OF JUDICIAL CONDUCT (2011 EDITION), adopted by the House of Delegates of the American Bar Association on August 7, 1990 and amended on August 6, 1997, August 10, 1999, August 12, 2003, February 12, 2007 and August 10, 2010***

CANON 3

A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.

Rule 3.1: Extrajudicial Activities in General

A judge may engage in extrajudicial activities, except as prohibited by law\* or this Code. However, when engaging in extrajudicial activities, a judge shall not:

- (A) participate in activities that will interfere with the proper performance of the judge's judicial duties;
- (B) participate in activities that will lead to frequent disqualification of the judge;
- (C) participate in activities that would appear to a reasonable person to undermine the judge's independence,\* integrity,\* or impartiality;\*
- (D) engage in conduct that would appear to a reasonable person to be coercive; or
- (E) make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law.

Rule 3.2: Appearances before Governmental Bodies and Consultation with Government Officials

A judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official, except:

- (A) in connection with matters concerning the law, the legal system, or the administration of justice;

(B) in connection with matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties; or  
(C) when the judge is acting pro se in a matter involving the judge's legal or economic interests, or when the judge is acting in a fiduciary\* capacity.

**Rule 3.3: Testifying as a Character Witness**

A judge shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned.

***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

**Chapter VII – Duties and responsibilities**

71. When not exercising judicial functions, judges are liable under civil, criminal and administrative law in the same way as any other citizen.

## VII. 1.3.5. APPEARANCE OF IMPARTIALITY

### ***MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE, International Bar Association (IBA), 1982***

G - Securing Impartiality and Independence

45 A judge shall avoid any course of conduct which might give rise to an appearance of partiality.

### ***FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY, HOW TO PROTECT JUDGES FROM EXTERNAL POLITICAL, ECONOMICAL AND SOCIAL INFLUENCES AND FROM VIOLENCE; WITH PARTICULAR REGARD TO THE RESPECT DUE TO THE JUDGEMENTS OF THE COURTS AND TO THE SOCIAL STATUS OF THE JUDGES, International Association of Judges (IAJ), 1990***

The members of the commission [...], membership of a political party entails following a specific political line and, moreover, a political party will always seek to hold its members to this line, necessarily compromising that independence and impartiality which is the very corollary of independence.

Admittedly, independence and total impartiality are very difficult to achieve, but everything must still be done with the view to achieving this objective. It must be borne in mind that in the eyes of the public it is not sufficient that the judge be impartial; he must also be seen to be impartial.

Besides, there can be no hiding the fact that this requirement may be seen differently depending on the country and even on the period involved. It has in particular been stated that in those countries with very marked differences between political parties, which is sometimes the case with developing countries, public opinion tend to look even more unfavourably on a judge being a member of a political party.

It is thus very difficult to deduce a general rule. As regards membership of cultural, sporting or other associations, the Commission took the view that judges should lead a normal social life, but at the same time avoid relations capable of compromising their respectability. If it is not possible for them to live in isolation, they should nevertheless show prudence in their relations. While there can be no doubt that their involvement in charitable associations is to be encouraged, there should equally be no question of them carrying out duties that involve financial responsibilities (in particular, as treasurers).

### ***BANGALORE PRINCIPLE ON JUDICIAL CONDUCT, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002***

Application:

1.3. A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.



**OPINION NO. 3 (2002) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE PRINCIPLES AND RULES GOVERNING JUDGES' PROFESSIONAL CONDUCT, IN PARTICULAR ETHICS, INCOMPATIBLE BEHAVIOUR AND IMPARTIALITY, Council of Europe, 2002**

A. STANDARDS OF JUDICIAL CONDUCT

1) What standards of conduct should apply to judges?

c. Impartiality and other professional activities of judges

37. The specific nature of the judicial function and the need to maintain the dignity of the office and protect judges from all kinds of pressures mean that judges should behave in such a way as to avoid conflicts of interest or abuses of power. This requires judges to refrain from any professional activity that might divert them from their judicial responsibilities or cause them to exercise those responsibilities in a partial manner. In some States, incompatibilities with the function of judge are clearly defined by the judges' statute and members of the judiciary are forbidden from carrying out any professional or paid activity. Exceptions are made for educational, research, scientific, literary or artistic activities.

## VII. 1.3.6. THE JUDICIAL DUTY TO EXCUSE ONESELF

### ***MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE, International Bar Association (IBA), 1982***

G - Securing Impartiality and Independence

44 A judge shall not sit in a case where there is a reasonable suspicion of bias or potential bias.

### ***BANGALORE PRINCIPLE ON JUDICIAL CONDUCT, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002***

Value 2: Impartiality

2.5. A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where:

2.5.1 The judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

2.5.2 The judge previously served as a lawyer or was a material witness in the matter in controversy; or

2.5.3 The judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy:

Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

### ***OPINION NO. 3 (2002) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE PRINCIPLES AND RULES GOVERNING JUDGES' PROFESSIONAL CONDUCT, IN PARTICULAR ETHICS, INCOMPATIBLE BEHAVIOUR AND IMPARTIALITY, Council of Europe, 2002***

#### A. STANDARDS OF JUDICIAL CONDUCT

1) What standards of conduct should apply to judges?

b. Impartiality and extra-judicial conduct of judges

28. However, such activities may jeopardise their impartiality or sometimes even their independence. A reasonable balance therefore needs to be struck between the degree to which judges may be involved in society and the need for them to be and to be seen as independent and impartial in the discharge of their duties. In the last analysis, the question must always be asked whether, in the particular social context and in the eyes of a reasonable, informed observer, the judge has engaged in an activity which could objectively compromise his or her independence or impartiality.

### ***BUILDING AND MAINTAINING CULTURE OF JUDICIAL INDEPENDENCE, Amendment to The Mt Scopus International Standards of Judicial Independence, JIWP, 2008***

## 8. SECURING IMPARTIALITY AND INDEPENDENCE

8.2. A judge shall not sit in a case where there is a reasonable suspicion of bias or potential bias.

8.3. A judge shall avoid any course of conduct which might give rise to an appearance of partiality.

## VII. 1.3.7. CONFLICT OF INTEREST

### ***THE SIRACUSA DRAFT PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, 1981***

Disqualification from hearing particular cases

23 Judges can and should decline to sit in cases where their independence may properly be called into question, whether or not so requested by one of the parties. In doubtful situations the court or the Chief Justice or President of the Supreme Court should decide upon request by the judge concerned.

### ***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE (“Singhvi Declaration”), ECOSOC, 1985***

Disqualifications

25. A judge shall not sit in a case where a reasonable apprehension of bias on his part or conflict of interest or incompatibility of functions may arise.

### ***BANGALORE PRINCIPLE ON JUDICIAL CONDUCT, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002***

Value 4: Propriety

4.4. A judge shall not participate in the determination of a case in which any member of the judge's family represents a litigant or is associated in any manner with the case.

### ***ANTI-CORRUPTION TOOLKIT, Prepared by the United Nations Global Programme against Corruption (GPAC), Centre for International Crime Prevention, Office of Drug Control and Crime Prevention, United Nations Office at Vienna, Version 4, last edited 11 November 2002***

III. Situation Prevention, Key areas for institutional reform

#### *The elimination of conflicting interests*

While it is desirable to have public officials who are completely independent of the decisions they are called upon to make, this is not always possible. Officials must live in society. Their children attend schools, they invest their wages, buy and sell personal property, use health-care systems and many other services which can create interests which conflict with independent decision-making. Having a personal interest which conflicts is not corrupt or improper, per se; the impropriety lies in having a conflict of interest which is not disclosed or in which the private interest is allowed to unduly influence the exercise of the public interest. To address this, many governments have adopted systems which require officials to identify personal interests which may conflict and ensure that some action be taken to eliminate the conflict. This can be done at either side of the conflict. Requiring the official to divest or dispose of it, either as a conflict arises, or more proactively, as a condition of employment could eliminate the private interest. Alternatively, removing the official who has a conflict from any position of influence could protect the public interest.

Divestment or mechanisms such as “blind trusts”, in which decisions are made by a trustee so that the public official has no knowledge of what assets he or she owns, are often used in cases where the nature of the public office involved is likely to raise conflicts too frequently to be dealt with on a case-by-case basis. Finance ministers and other senior public officials responsible for setting fiscal or monetary policies, or who make policy or enforcement decisions with respect to stock-trading, might be completely prohibited from owning or trading in stocks as a condition of employment, for example. Similarly, employees whose duties routinely involve handling “inside knowledge” of a company's financial status and affairs might be prohibited from any trading in that company's stock

as a precaution against “insider trading”. Excluding the official involved from any position of conflict, on the other hand, is often used for more routine conflicts of interest, or in cases where requiring divestment or non-ownership is impracticable or unfair to the official. For example, officials cannot be prohibited from owning houses or other real property, but an official may be required to abstain from participating in or voting on municipal decisions which could increase or decrease the value of specific property the individual owns.

The management of conflicts of interest in this way also requires organisational structures that are sufficiently decentralised to ensure that if some officials are excluded, enough independent officials will remain to make the necessary decisions in a manner which is consistent with the public interest and visibly free of corruption. Monitoring and other precautions are also needed to ensure that corrupt officials are not able to conceal their true interests, that the ultimate decision-maker is kept independent of any colleagues who may have conflicts, and that inside information is not simply transferred to a third party for corrupt use to the indirect benefit of the official. Many codes of conduct or employment contracts may specify that information not be disclosed and extend other anti-conflict measures to third parties close to the official, such as former employers or business associates or close family members.

Taking proactive measures against conflicts of interest clearly prevent corruption by routinely removing the temptation or opportunity to engage in it. They also protect officials by removing any basis for suspicion, and instil trust and confidence in the integrity of public administration. Such measures also increase deterrence and the effectiveness of criminal justice measures by creating records which make it easier to prosecute or discipline corrupt officials. In some cases, corrupt officials can be identified and dismissed based only on their failure to comply with disclosure requirements, which avoids the need for more costly and complex criminal proceedings, and removes the official before any significant harm can be caused by actual corruption.

***PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA, African Commission on Human and Peoples Rights, 2003***

**A. GENERAL PRINCIPLES APPLICABLE TO ALL LEGAL PROCEEDINGS**

**5) Impartial Tribunal**

d) The impartiality of a judicial body would be undermined when:

- (i) a former public prosecutor or legal representative sits as a judicial officer in a case in which he or she prosecuted or represented a party;
- (ii) a judicial official secretly participated in the investigation of a case;
- (iii) a judicial official has some connection with the case or a party to the case;
- (iv) a judicial official sits as member of an appeal tribunal in a case which he or she decided or participated in a lower judicial body.

In any of these circumstances, a judicial official would be under an obligation to step down.

***THE BURGH HOUSE PRINCIPLES ON THE INDEPENDENCE OF THE INTERNATIONAL JUDICIARY, The Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals, 2004***

**9. Past links to a case**

9.1 Judges shall not serve in a case in which they have previously served as agent, counsel, adviser, advocate, expert or in any other capacity for one of the parties, or as a member of a national or international court or other dispute settlement body which has considered the subject matter of the dispute.

9.2 Judges shall not serve in a case with the subject-matter of which they have had any other form of association that may affect or may reasonably appear to affect their independence or impartiality.

#### 10. Past links to a party

Judges shall not sit in any case involving a party for whom they have served as agent, counsel, adviser, advocate or expert within the previous three years or such other period as the court may establish within its rules; or with whom they have had any other significant professional or personal link within the previous three years or such other period as the court may establish within its rules.

#### 11. Interest in the outcome of a case

11.1 Judges shall not sit in any case in the outcome of which they hold any material personal, professional or financial interest.

11.2 Judges shall not sit in any case in the outcome of which other persons or entities closely related to them hold a material personal, professional or financial interest.

11.3 Judges must not accept any undisclosed payment from a party to the proceedings or any payment whatsoever on account of the judge's participation in the proceedings.

#### 12. Contacts with a party

12.1 Judges shall exercise appropriate caution in their personal contacts with parties, agents, counsel, advocates, advisers and other persons and entities associated with a pending case. Any such contacts should be conducted in a manner that is compatible with their judicial function and that may not affect or reasonably appear to affect their independence and impartiality.

12.2 Judges shall discourage *ex parte* communications from parties, and except as provided by the rules of the court such communications shall be disclosed to the court and the other party.

#### 13. Post-service limitations

13.1 Judges shall not seek or accept, while they are in office, any future employment, appointment or benefit, from a party to a case on which they sat or from any entity related to such a party, that may affect or may reasonably appear to affect their independence or impartiality.

13.2 Former judges shall not, except as permitted by rules of the court, act in any capacity in relation to any case on which they sat while serving on the court.

13.3 Former judges shall not act as agent, counsel, adviser or advocate in any proceedings before the court on which they previously served for a period of three years after they have left office or such other period as the court may establish and publish.

13.4 Former judges should exercise appropriate caution as regards the acceptance of any employment, appointment or benefit, in particular from a party to a case on which they sat or from any entity related to such a party

#### 16. Withdrawal or disqualification

Each court shall establish rules of procedure to enable the determination whether judges are prevented from sitting in a particular case as a result of the application of these Principles or for reasons of incapacity. Such procedures shall be available to a judge, the court, or any party to the proceedings.

**TECHNICAL GUIDE TO THE UNITED NATIONS CONVENTION AGAINST CORRUPTION,  
UNODC, 2009**

Article 8., IV.

States Parties are required to introduce general provisions on conflict of interest, incompatibilities and associated activities.

As a general principle, public bodies also need to create a climate where the public service provision is transparent and impartial, where it is known that the offering and acceptance of gifts and hospitality is not encouraged and where personal or other interests should not appear to influence official actions and decisions. This can be done in a number of ways, including general publicity on the provision of public services (see article 10) and the publishing of anti-fraud and corruption policies and codes of conduct. It can also be done by targeted publicity, particularly in the areas of tendering and contract documentation and by notices in public buildings or on the Internet.

In general terms conflict-of-interest regulations should cover major types of conflict of interest, which have been the source of concern in a given country. Appropriate procedures need to exist for action when a conflict of interest is likely to occur or is already detected. In situations where conflicts of interest cannot be avoided (e.g., in small communities), there must be procedures which safeguard the public interest without paralyzing the work of the agency in question. Public officials who are subject to the regulations should be aware of, understand and accept the concept of conflict of interest and of applicable regulations. Information and consultations should be available for public officials on how to act in case of doubt about their possible conflict of interest. It would be useful to put in place an informal consultation process or mechanism of which public officials can readily avail themselves to seek clarifications and advice in particular situations. A body/bodies should be assigned to investigate and obtain all necessary information regarding possible conflicts of interest. Legislation, delegated authority and/or contracts of employment should provide appropriate penalties for failure to comply with conflict-of-interest regulations. Information about the conflict-of-interest requirements for public officials should be available to the public.

Specifically, the requirements on the disclosure and registration of assets and interests should ensure that:

- Disclosure covers all substantial types of incomes and assets of officials (all or from a certain level of appointment or sector and/or their relatives);
- Disclosure forms allow for year-on-year comparisons of officials' financial position;
- Disclosure procedures preclude possibilities to conceal officials' assets through other means or, to the extent possible, held by those against whom a State Party may have no access (such as overseas or held by a nonresident);
- A reliable system for income and asset control exists for all physical and legal persons – such as within tax administration – to access in relation to persons or legal entities associated with public officials;
- Officials have a strong duty to substantiate/prove the sources of their income;
- To the extent possible, officials are precluded from declaring non-existent assets, which can later be used as justification for otherwise unexplained wealth;
- Oversight agencies have sufficient manpower, expertise, technical capacity and legal authority for meaningful controls;
- Appropriate deterrent penalties exist for the violations of these requirements. In devising appropriate and relevant conflict-of-interest requirements, States Parties should pay particular attention to:
  - What posts or activities are considered incompatible with a particular public office?
  - What interests and assets should people declare (including liabilities and debts)?
  - Do different posts have different types of conflict-of-interest requirements?
  - What level and detail of information should be declared (thresholds)?
  - What form should the declaration be in?
  - Who verifies the information disclosed?
  - Who should have access to the information?
  - How far should records of indirect interests (such as family) go?
  - Who should have the obligation to declare (for example, depending on the risk of, or exposure to, corruption; depending on the institutional capacities to verify the declarations)?

- To which extent and in which way should the declarations be published (with due consideration of privacy issues and institutional capacity)?
- How will compliance to the obligation to declare be enforced and by whom?

All States Parties should also have stated policies and procedures relating to gifts and hospitality. These should address:

- Permission to receive a gift, invitation or hospitality;
- Information required for a register;
- Access to the register;
- Ownership of any gift;
- Verification of information;
- Means of investigating breaches or allegations;
- Sanctions.

Registers of gifts and hospitality should record both offers made and hospitality and gifts accepted. Guidance should also be given to public officials about when and how they should make entries in the record (having a formal system and following the guidance also protects public officials against malicious allegations). Good practice guidelines will set a minimum value level at which declarations are required to be made. It should also set a value level at which the official must seek prior approval from a senior official before accepting the offer. The guidance will also stress that disclosures must be made promptly and will set out procedures for and monitoring of the records by senior management and internal audit.

All States Parties should seek to have in place institutional means for revising codes, monitoring implementation and related issues such as training and reviews; States Parties may look to the body or bodies established under article 6 to undertake these functions.

***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

Chapter VII – Duties and responsibilities

61. Judges should adjudicate on cases which are referred to them. They should withdraw from a case or decline to act where there are valid reasons defined by law, and not otherwise.

***MT. SCOPUS APPROVED REVISED INTERNATIONAL STANDARDS OF JUDICIAL INDEPENDENCE, International Association of Judicial Independence and World Peace, 2008, 2011, 2012***

7. STANDARDS OF CONDUCT

7.8 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially.

7.9 Such proceedings include, but are not limited to, instances where

- a) the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;
- b) the judge previously served as a lawyer or was a material witness in the matter in controversy; or
- c) the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy:



Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

## VII. 1.3.8. JUDICIAL ASSET DISCLOSURE

### ***GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY, USAID, 2002***

#### 5. Disclosure of Judges' Assets, Income, Benefits, and Membership in Associations

Although judges often balk at the invasion of privacy that disclosure of their private finances entails, it is almost uniformly considered to be an effective means of discouraging corruption, conflicts of interest, and misuse of public funds. Applicable laws generally require disclosure of judges' assets and liabilities when they are appointed and annually thereafter, so that unexplained acquisitions of wealth or potential conflicts can be challenged. Here again, civil society groups and the media play a key role in ensuring that these laws are enforced and the information disclosed is accurate, timely, and comprehensive.

### ***ANTI-CORRUPTION TOOLKIT, Prepared by the United Nations Global Programme against Corruption (GPAC), Centre for International Crime Prevention, Office of Drug Control and Crime Prevention, United Nations Office at Vienna, Version 4, last edited 11 November 2002***

#### III. Situational Prevention, Key areas for institutional reform

##### *Disclosure of Assets*

Requiring officials, and in particular those in senior positions, to disclose their assets, either publicly or to internal government anti-corruption agencies, prevents corruption in two major ways. The identification and disclosure of assets and interests assists both the official concerned and the government in determining whether conflicting interests exist which may require either divestment of the private interest or the reassignment of the public interest to another official not in a conflict position. More generally, requiring officials to fully disclose their wealth and specific assets at various stages of their careers provides a base line and means for comparison in order to identify assets which may have been acquired through corruption. An official who has acquired significant wealth while in office might reasonably be required to explain where the wealth came from.

To support the first function, public officials may be required to list their major interests and assets upon assuming office, and to ensure that the list is kept up to date while in office. This permits others to consider whether a conflict of interest exists and if so, to call for appropriate action. Some systems go further, placing the onus on the official involved to formally indicate that a conflict of interest may exist whenever this appears to be the case. To support the second function the listing of assets must take place at an absolute minimum when the official assumes and leaves office, but most systems require more regular assessments, in order to identify corrupt officials before they leave office. While such systems may be based on self-reporting, corrupt officials will not incriminate themselves. This requires formal and independent reviews and record-keeping functions, accompanied by sanctions for officials who fail to report or misrepresent information. Such sanctions could be of a criminal, monetary or disciplinary nature, but should be serious enough to provide an adequate deterrent. As with the disqualification of officials, the vigorous application of such sanctions can be a powerful instrument against corruption, since officials can be removed simply for failing to meet reporting obligations, even if actual corruption cannot be proven.

## VII. 1.4. INTEGRITY

### VII.1.4.1. PROBITY, DIGNITY, HONOUR

#### ***MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE, International Bar Association (IBA), 1982***

F - Standards of Conduct

40 A judge should always behave in such a manner as to preserve the dignity of his office and the impartiality and independence of the Judiciary.

#### ***BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985***

8. Freedom of expression and association

In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

#### ***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE (“Singhvi Declaration”), ECOSOC, 1985***

Independence

8. Judges shall always conduct themselves in such a manner as to preserve the dignity and responsibilities of their office and the impartiality and independence of the judiciary. Subject to this principle, judges shall be entitled to freedom of thought, belief, speech, expression, professional association, assembly and movement.

#### ***BEIJING STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION, as amended in Manila at 7th Biennial Conferences of Chief Justices of Asia and the Pacific, 1997***

Independence of the Judiciary

1. The Judiciary is an institution of the highest value in every society.

7. Judges shall uphold the integrity and independence of the judiciary by avoiding impropriety and the appearance of impropriety in all their activities.

***BANGALORE PRINCIPLE ON JUDICIAL CONDUCT, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002***

Principle

Integrity is essential to the proper discharge of the judicial office.

3.1. A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.

3.2. The behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.

4.8. A judge shall not allow the judge's family, social or other relationships improperly to influence the judge's judicial conduct and judgement as a judge.

***GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY, USAID, 2002***

4. The Status of Judges

A theme echoed by this guide's contributors was that a judicial career is poorly regarded in many countries. The low status of judges is almost invariably reflected in low salaries and poor working conditions. Under these circumstances, it is more difficult for judges to maintain a sense of professional dignity. Although the relationship among self-respect, independence, and impartiality of decision-making is somewhat intangible, the general perception is that judges who do not respect themselves as professionals are less likely to withstand corruption and other outside pressures.

The question is: How to increase the self-respect of judges? Clearly, part of the answer lies outside the individual judge with the attitude of the general public toward the judiciary. That issue is discussed more fully below.

In terms of affecting the attitude of the judges themselves, salaries and benefits are key factors. The relationship of salaries to judicial independence is not as straightforward as one might expect. There seemed to be a clear consensus among the judges participating in this study that respectable salaries are a necessary element of judicial independence. At the most basic level, it is difficult to reduce petty corruption among judges unless they are able to support the essential needs of their families. Increasing salaries where they were previously extremely low also seems to be the fastest way to improve the status of the judiciary, increase judges' self-respect, and attract a broader pool of qualified applicants who are assumed to be more inclined and equipped to uphold the integrity of the office. Several countries have increased salaries in the past few years and made judicial positions more attractive, including Bulgaria, Georgia, Guatemala, Kyrgyzstan, Romania, and Uganda.

However, it is unclear whether increased salaries decrease the temptation to accept bribes, especially among judges who are already steeped in a culture of corruption and who may have taken the job in the first place because of its potential for exploitation.<sup>18</sup> A recent World Bank study (not specifically on judiciaries) concluded that there was no evidence that increasing salaries without taking other measures leads to significant reductions in corruption. Rather, reducing corruption appears to be much more closely linked to increasing transparency and meritocracy in hiring, promotions, and discipline.<sup>19</sup> It may be important, therefore, to make salary increases part of a package that includes these other aspects of reform.

Pensions are an equally important component of a benefits package. A comfortable pension (if coupled with life tenure) increases the likelihood that judges will remain on the bench until the end of their careers. This in turn increases the incentives to resist bribes, assuming there is a credible risk of detection and discipline. When money is allocated to increase judicial salaries, consideration

should be given to paying the largest increases to judges who have served for many years or to increasing pensions.

Other incentives can also be important to building self-respect among judges, such as adequate physical conditions, increased opportunities for continuing education, and decreased administrative responsibilities.

### ***UNITED NATION CONVENTION AGAINST CORRUPTION, General Assembly, 2003: Article 11***

Measures relating to the judiciary and prosecution services

1. Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.

2. Measures to the same effect as those taken pursuant to paragraph 1 of this article may be introduced and applied within the prosecution service in those States Parties where it does not form part of the judiciary but enjoys independence similar to that of the judicial service.

### ***RESOLUTION ON JUDICIAL ETHICS, European Court of Human Rights, Adopted by the Plenary Court on 23 June 2008***

#### III. Integrity

Judges' conduct must be consistent with the high moral character that is a criterion for judicial office. They should be mindful at all times of their duty to uphold the standing and reputation of the Court.

### ***REPORT "JUDICIAL ETHICS – PRINCIPLES, VALUES AND QUALITIES", The General Assembly of ENCJ, 2010***

#### INTEGRITY

The judge fulfils his role with integrity, in the interests of justice and society. He has the same duty of integrity in his public life and in his personal life. Two duties can result from this principle of integrity: the duty of probity and the duty of dignity or honour.

##### 2.1. Probity

Probity leads the judge to refrain from any tactless or indelicate behaviour, and not just behaviour which is contrary to law.

The judge exercises his judicial functions without favouritism.

He dedicates the main part of his working time to his court activities.

He ensures the correct use of resources conferred upon him for the administration of justice and does not abuse those resources or use them inappropriately.

He does not seek unwarranted interventions in order to achieve any transfer, appointment or personal promotion, nor act to seek to procure an advantage for himself or for others.

He refuses to accept any gifts or advantages for himself or for those close to him while exercising his functions as judge.

## 2.2. Dignity and honour

The judge exercises his functions by applying loyally the rules of procedure, by showing concern for the dignity of individuals and by acting within the framework of the law.

Courtesy and intellectual probity govern his relations with all the professionals within the justice system, the secretariat, clerks, advocates and other lawyers, magistrates, the parties involved in cases and the press.

Honour requires to a judge to ensure, through his professional practice and person, that he does not jeopardise the public image of the judge, the court and the justice system.

### ***BRIJUNI STATEMENT OF THE PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY, Conference of Chief Justices of Central and Eastern Europe, 14 October, 2015***

Independence of the judiciary

8. Judges shall uphold the integrity and independence of the judiciary and gain the trust of the people by avoiding impropriety and the appearance of impropriety in all their official and private activities.

## VII. 1.4.2. FAVOURS AND ADVANTAGES

### ***BEIJING STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION, as amended in Manila at 7th Biennial Conferences of Chief Justices of Asia and the Pacific, 1997***

#### Relationship with the Executive

39. Inducements or benefits should not be offered to or accepted by judges if they affect, or might affect, the performance of their judicial functions.

### ***OPINION NO. 3 (2002) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE PRINCIPLES AND RULES GOVERNING JUDGES' PROFESSIONAL CONDUCT, IN PARTICULAR ETHICS, INCOMPATIBLE BEHAVIOUR AND IMPARTIALITY, Council of Europe, 2002***

#### A. STANDARDS OF JUDICIAL CONDUCT

1) What standards of conduct should apply to judges?

##### c. Impartiality and other professional activities of judges

39. The CCJE considers that rules of professional conduct should require judges to avoid any activities liable to compromise the dignity of their office and to maintain public confidence in the judicial system by minimising the risk of conflicts of interest. To this end, they should refrain from any supplementary professional activity that would restrict their independence and jeopardise their impartiality. In this context, the CCJE endorses the provision of the European Charter on the Statute for Judges under which judges' freedom to carry out activities outside their judicial mandate "may not be limited except in so far as such outside activities are incompatible with confidence in, or the impartiality or the independence of a judge, or his or her required availability to deal attentively and within a reasonable period with the matters put before him or her" (para. 4.2). The European Charter also recognises the right of judges to join professional organisations and a right of expression (para. 1.7) in order to avoid "excessive rigidity" which might set up barriers between society and the judges themselves (para. 4.3). It is however essential that judges continue to devote the most of their working time to their role as judges, including associated activities, and not be tempted to devote excessive attention to extra-judicial activities. There is obviously a heightened risk of excessive attention being devoted to such activities, if they are permitted for reward. The precise line between what is permitted and not permitted has however to be drawn on a country by country basis, and there is a role here also for such a body or person as recommended in paragraph 29 above.

### ***TECHNICAL GUIDE TO THE UNITED NATIONS CONVENTION AGAINST CORRUPTION, UNODC, 2009***

#### Article 8. II.1 Promotion of integrity, honesty and responsibility among public officials

States Parties should ensure that the promotion of integrity, honesty and responsibility among public officials is addressed from both positive and negative aspects. In relation to the former, States Parties should provide guidance for public officials to be supported and rewarded for ethical conduct: appropriate training in the conduct expected of public officials, both on recruitment and during their careers. All public officials should receive appropriate training in the delivery of public services. All States Parties must provide rules and means for public officials to disclose financial or family interests, gifts and hospitality. States Parties should undertake to ensure that public officials may report or discuss concerns not only about the conduct of other public officials but also pressure and undue influence that might be applied to them by colleagues or by others; reassurance must be given that reporting will be treated confidentially and will not adversely affect their careers. States

Parties should carry out risk assessments of post or activities vulnerable to corruption, and hold discussions with office holders on how to protect both them and the activities from corruption. More generally, there should be regular surveys of public officials about the risks, threats and vulnerabilities of their work.

***BANGALORE PRINCIPLE ON JUDICIAL CONDUCT, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002***

Value 4: Propriety

4.9. A judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge's family or of anyone else, nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties.

4.14. A judge and members of the judge's family shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties.

4.15. A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or authority to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions.

4.16. Subject to law and to any legal requirements of public disclosure, a judge may receive a token gift, award or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit might not reasonably be perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of partiality.

***RESOLUTION ON JUDICIAL ETHICS, European Court of Human Rights, Adopted by the Plenary Court on 23 June 2008***

IX. Decorations and honours

Judges may accept decorations and honours only where such acceptance does not give rise to a reasonable doubt as to their independence or impartiality. They should inform the President of the Court beforehand.



**THE KYIV RECOMMENDATIONS ON JUDICIAL INDEPENDENCE IN EASTERN EUROPE, SOUTH CAUCASUS AND CENTRAL ASIA, OSCE, 2010**

Individual Bonuses and Privileges

13. On a long term basis, bonuses and privileges should be abolished and salaries raised to an adequate level which satisfy the needs of judges for an appropriate standard of living and adequately reflect the responsibility of their profession. As long as bonuses and privileges exist, they should be awarded on the basis of predetermined criteria and a transparent procedure. Court chairs shall not have a say on bonuses or privileges. Limited Role in Disciplining Judges

Limited Role in Disciplining Judges

14. Court chairpersons may file a complaint to the body which is competent to receive complaints and conduct disciplinary investigations. In order to ensure an independent and objective review of the complaint, court chairpersons should not have the power to either initiate or adopt a disciplinary measure.

***ABA MODEL CODE OF JUDICIAL CONDUCT (2011 EDITION), adopted by the House of Delegates of the American Bar Association on August 7, 1990 and amended on August 6, 1997, August 10, 1999, August 12, 2003, February 12, 2007 and August 10, 2010***

CANON 3

Rule 3.13: Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, or Other Things of Value  
(A) A judge shall not accept any gifts, loans, bequests, benefits, or other things of value, if acceptance is prohibited by law or would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.

(B) Unless otherwise prohibited by law, or by paragraph (A), a judge may accept the following without publicly reporting such acceptance:

- (1) items with little intrinsic value, such as plaques, certificates, trophies, and greeting cards;
- (2) gifts, loans, bequests, benefits, or other things of value from friends, relatives, or other persons, including lawyers, whose appearance or interest in a proceeding pending\* or impending\* before the judge would in any event require disqualification of the judge under Rule 2.11;
- (3) ordinary social hospitality;
- (4) commercial or financial opportunities and benefits, including special pricing and discounts, and loans from lending institutions in their regular course of business, if the same opportunities and benefits or loans are made available on the same terms to similarly situated persons who are not judges;
- (5) rewards and prizes given to competitors or participants in random drawings, contests, or other events that are open to persons who are not judges;
- (6) scholarships, fellowships, and similar benefits or awards, if they are available to similarly situated persons who are not judges, based upon the same terms and criteria;
- (7) books, magazines, journals, audiovisual materials, and other resource materials supplied by publishers on a complimentary basis for official use; or
- (8) gifts, awards, or benefits associated with the business, profession, or other separate activity of a spouse, a domestic partner,\* or other family member of a judge residing in the judge's household,\* but that incidentally benefit the judge.

(C) Unless otherwise prohibited by law or by paragraph (A), a judge may accept the following items, and must report such acceptance to the extent required by Rule 3.15:

- (1) gifts incident to a public testimonial;
- (2) invitations to the judge and the judge's spouse, domestic partner, or guest to attend without charge:
  - (a) an event associated with a bar-related function or other activity relating to the law, the legal system, or the administration of justice; or

- (b) an event associated with any of the judge's educational, religious, charitable, fraternal or civic activities permitted by this Code, if the same invitation is offered to nonjudges who are engaged in similar ways in the activity as is the judge; and
- (3) gifts, loans, bequests, benefits, or other things of value, if the source is a party or other person, including a lawyer, who has come or is likely to come before the judge, or whose interests have come or are likely to come before the judge.

***MT. SCOPUS APPROVED REVISED INTERNATIONAL STANDARDS OF JUDICIAL INDEPENDENCE, International Association of Judicial Independence and World Peace, 2008, 2011, 2012***

7.11 Judges shall discourage *ex parte* communications from parties and except as provided by the rules of the court such communications shall be disclosed to the court and to the other party.

## VII. 1.5. PROPRIETY

### ***BEIJING STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION, as amended in Manila at 7th Biennial Conferences of Chief Justices of Asia and the Pacific, 1997***

Independence of the judiciary

7. Judges shall uphold the integrity and independence of the judiciary by avoiding impropriety and the appearance of impropriety in all their activities.

### ***BANGALORE PRINCIPLE ON JUDICIAL CONDUCT, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002***

Value 4: Propriety

4.1. A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

4.2. As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.

4.3. A judge shall, in his or her personal relations with individual members of the legal profession who practise regularly in the judge's court, avoid situations that might reasonably give rise to the suspicion or appearance of favouritism or partiality.

4.7. A judge shall inform himself or herself about the judge's personal and fiduciary financial interests and shall make reasonable efforts to be informed about the financial interests of members of the judge's family.

### ***BOLOGNA MILANO GLOBAL CODE OF JUDICIAL ETHICS, 2015, Approved at the International Conference of Judicial independence held at the University of Bologna and at Bocconi University of Milano June 2015***

5. Integrity, Propriety and Equality

5.1 Integrity: Integrity is essential to the proper discharge of the judicial office.

5.1.1 A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.

5.1.2 The behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.

5.2 Propriety: Propriety and the appearance of propriety are essential to the performance of all of the activities of a judge.

5.2.1 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

5.2.2 As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.

5.2.3 A judge shall, in his or her personal relations with individual members of the legal profession who practise regularly in the judge's court, avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality.

5.2.4 A judge shall not participate in the determination of a case in which any member of the judge's family represents a litigant or is associated in any manner with the case.

5.2.5 A judge shall not allow the use of the judge's residence by a member of the legal profession to receive clients or other members of the legal profession.

5.2.6 A judge, as any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.

5.26a A judge should not cast aspersions on the bona fides of other judges except when filing an appropriate grievance.

5.2.7 A judge shall inform himself or herself about the judge's personal and fiduciary financial interests and shall make reasonable efforts to be informed about the financial interests of members of the judge's family.

5.2.8 A judge shall not allow the judge's family, social or other relationships improperly to influence the judge's judicial conduct and judgment as a judge.

5.2.9 A judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge's family or of anyone else, nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties.

5.2.10 Confidential information acquired by a judge in the judge's judicial capacity shall not be used or disclosed by the judge for any other purpose not related to the judge's judicial duties.

5.2.11 Subject to the proper performance of judicial duties, a judge may:

5.2.11.1 write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters;

5.2.11.2 appear at a public hearing before an official body concerned with matters relating to the law, the legal system, the administration of justice or related matters;

5.2.11.3 serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge; or

5.2.11.4 engage in other activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.

5.2.12 A judge shall not practise law whilst the holder of judicial office.

5.2.13 A judge may form or join associations of judges or participate in other organisations representing the interests of judges.

5.2.14 A judge and members of the judge's family, shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties.

5.2.15 A judge shall take steps to prevent court staff or others subject to the judge's influence, direction or authority, to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions.

5.2.16 Subject to law and to any legal requirements of public disclosure, a judge may receive a token gift, award or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit might not reasonably be perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of partiality.

5.3 Equality: Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

5.3.1 A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").

5.3.2 A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.

5.4.3 A judge shall carry out 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.

5.3.4 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or control to differentiate between persons concerned, in a matter before the judge, on any irrelevant ground.

5.3.5 A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.

## 9. Post-Judicial Activities

9.1 Professional and commercial activities: Judges may avoid the sometimes difficult and controversial decisions that have to be taken by those who seek a more active and remunerative role.[59]

9.2 A judge may receive a judicial pension.

### 9.3 Professional legal activities

9.3.1 Practice at the Bar: A judge contemplating retirement should consult the local Bar Association or Law Society for relevant rulings.

9.3.2 Practice as a solicitor: A judge may have active association with a firm of solicitors, whether as a partner, consultant, or in some other capacity.

9.3.2.1 Preferably this will not be sooner than a year or so after retirement.

9.3.3 Alternative dispute resolution – mediation and arbitration: Judges may be appointed or offer their services as mediators or arbitrators.

9.3.4 Appointment as an acting or auxiliary judge: A retired judge who sits from time to time as an acting or auxiliary judge must consider carefully the appropriateness of other activities that the retired judge might be undertaking.

9.3.4.1 The exercise of the judicial office on a part-time basis may require the observance of, or at least consideration of, some of the restrictions identified in this publication.

9.3.4.2 A judge must take particular care in relation to activities undertaken concurrently with part-time judicial work.

9.4 Commercial activities: A retired judge may engage in commercial activities.

9.4.1 A retired judge must consider whether his or her activities might harm the standing of the judiciary, because of a continuing association in the public mind with that institution.

9.5 Political activity: A retired judge may have involvement with politics.

9.5.1 A retired judge should consider whether the particular activity undertaken might reflect adversely on the judiciary.

9.6 Participation in public debate: A retired judge may engage in public debate, and in many cases is well qualified to do so, particularly in matters touching the administration of justice generally.

9.6.1 A retired judge should not act in such a way as to create the impression that he or she is speaking with judicial authority.

9.6.2 A retired judge should not use the former title "Justice" or "Judge" in connection with activities of a political nature.

9.7 Community and social activities: A retired judge may engage in chosen recreational and other community and social activities.

9.7.1 Any activity that might tarnish the reputation of the judiciary should be avoided.

## VII. 1.6. RESERVE AND DISCRETION

**REPORT “JUDICIAL ETHICS – PRINCIPLES, VALUES AND QUALITIES”, The General Assembly of ENCJ, 2010**

### RESERVE AND DISCRETION

A judge avoids any conduct likely to promote the belief that his decisions are driven by motives other than the fair and reasoned application of the law. At the same time, a judge is himself a citizen and entitled, as such, outside the exercise of his judicial functions to freedom of expression recognised by all international conventions protecting human rights.

A judge makes every effort not to offend, in exercising his functions and in his private life, the trust that individuals hold in him.

The judge’s reserve and discretion involve a balance between the rights of the judge as a citizen and the constraints linked to his function.

**FIRST STUDY COMMISSION - JUDICIAL ADMINISTRATION AND STATUS OF THE JUDICIARY, OR BEHAVIOURS OF THE JUDGES, CONCEPT; WHO SUPERVISES RIGHT TO DEFENCE (AND HUMAN RIGHTS); INDEPENDENCE OF THE JUDGES, International Association of Judges (IAJ), 1987**

The conclusion can be [...] the behaviour of a judge in his private life is relevant where it is such as to undermine the confidence that the public, i.e. those amenable to his jurisdiction, need to have in him. Any conduct that undermines the credit of a judge is reprehensible.

Some do not [...] that, even where a judge's participation in behaviour life is allowed, it must take such a form as to be compatible with his continued enjoyment of the confidence of his fellow citizens.

In a word, he who accepts to become a judge must also accept the restraints pertaining to that office.

The members of the Commission [...] the members favour commissions comprising, in addition to a majority of judges, others, for instance eminent people, the choice of whom would differ from country to country.

9. To the extent consistent with their duties as members of the judiciary, judges, like other citizens, are entitled to freedom of expression, belief, association and assembly, except that a judge should refrain from political activity.

## VII. 1.6.1. IN PUBLIC LIFE

### **EUROPEAN CHARTER ON THE STATUTE FOR JUDGES AND EXPLANATORY MEMORANDUM, Council of Europe, Strasbourg, 8 - 10 July 1998**

#### 4. CAREER DEVELOPMENT

4.2. Judges freely carry out activities outside their judicial mandate including those which are the embodiment of their rights as citizens. This freedom may not be limited except in so far as such outside activities are incompatible with confidence in, or the impartiality or the independence of a judge, or his or her required availability to deal attentively and within a reasonable period with the matters put before him or her. The exercise of an outside activity, other than literary or artistic, giving rise to remuneration, must be the object of a prior authorization on conditions laid down by the statute.

4.3. Judges must refrain from any behaviour, action or expression of a kind effectively to affect confidence in their impartiality and their independence.

### **OPINION NO. 3 (2002) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE PRINCIPLES AND RULES GOVERNING JUDGES' PROFESSIONAL CONDUCT, IN PARTICULAR ETHICS, INCOMPATIBLE BEHAVIOUR AND IMPARTIALITY, Council of Europe, 2002**

#### A. STANDARDS OF JUDICIAL CONDUCT

1) What standards of conduct should apply to judges?

b. Impartiality and extra-judicial conduct of judges

30. Judges' participation in political activities poses some major problems. Of course, judges remain citizens and should be allowed to exercise the political rights enjoyed by all citizens. However, in view of the right to a fair trial and legitimate public expectations, judges should show restraint in the exercise of public political activity. Some States have included this principle in their disciplinary rules and sanction any conduct which conflicts with the obligation of judges to exercise reserve. They have also expressly stated that a judge's duties are incompatible with certain political mandates (in the national parliament, European Parliament or local council), sometimes even prohibiting judges' spouses from taking up such positions.

31. More generally, it is necessary to consider the participation of judges in public debates of a political nature. In order to preserve public confidence in the judicial system, judges should not expose themselves to political attacks that are incompatible with the neutrality required by the judiciary.

33. The discussions within the CCJE have shown the need to strike a balance between the judges' freedom of opinion and expression and the requirement of neutrality. It is therefore necessary for judges, even though their membership of a political party or their participation in public debate on the major problems of society cannot be proscribed, to refrain at least from any political activity liable to compromise their independence or jeopardise the appearance of impartiality.

34. However, judges should be allowed to participate in certain debates concerning national judicial policy. They should be able to be consulted and play an active part in the preparation of legislation concerning their statute and, more generally, the functioning of the judicial system. This subject also raises the question of whether judges should be allowed to join trade unions. Under their freedom of expression and opinion, judges may exercise the right to join trade unions (freedom of association), although restrictions may be placed on the right to strike.



35. Working in a different field offers judges an opportunity to broaden their horizons and gives them an awareness of problems in society which supplements the knowledge acquired from the exercise of their profession. In contrast, it entails some not inconsiderable risks: it could be viewed as contrary to the separation of powers, and could also weaken the public view of the independence and impartiality of judges.

**REPORT “JUDICIAL ETHICS – PRINCIPLES, VALUES AND QUALITIES”, The General Assembly of ENCJ, 2010**

RESERVE AND DISCRETION

In public life

In politics, a judge, like any citizen, has the right to have a political opinion. His task, by showing this reserve, is to ensure that individuals can have every confidence in justice, without worrying about the opinions of the judge.

A judge exercises the same reserve in his dealings with the media. He cannot, in the name of freedom of expression, appear to be partial or in favour of one party. In facing criticism or attacks, a judge exercises the same caution.

A judge will refrain from commenting on his decisions, even if they are criticised by the media or by academic commentators and even if they are overturned on appeal. The way in which he expresses his opinion is in the reasoning of his decisions.

At the same time, the obligation of reserve cannot provide a judge with an excuse for inactivity. While he should not speak on cases with which he deals personally, the judge is nonetheless ideally placed to explain the legal rules and their application. The judge has an educational role to play in support of the law, together with other institutions which have the same mission.

When democracy and fundamental freedoms are in peril, a judge’s reserve may yield to the duty to speak out.

**ABA MODEL CODE OF JUDICIAL CONDUCT (2011 EDITION), adopted by the House of Delegates of the American Bar Association on August 7, 1990 and amended on August 6, 1997, August 10, 1999, August 12, 2003, February 12, 2007 and August 10, 2010**

CANON 3

A judge shall conduct the judge’s personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.

Rule 3.1: Extrajudicial Activities in General

A judge may engage in extrajudicial activities, except as prohibited by law\* or this Code. However, when engaging in extrajudicial activities, a judge shall not:

- (A) participate in activities that will interfere with the proper performance of the judge’s judicial duties;
- (B) participate in activities that will lead to frequent disqualification of the judge;
- (C) participate in activities that would appear to a reasonable person to undermine the judge’s independence,\* integrity,\* or impartiality;\*
- (D) engage in conduct that would appear to a reasonable person to be coercive; or
- (E) make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law.

**Rule 3.2: Appearances before Governmental Bodies and Consultation with Government Officials**

A judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official, except:

- (A) in connection with matters concerning the law, the legal system, or the administration of justice;
- (B) in connection with matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties; or
- (C) when the judge is acting pro se in a matter involving the judge's legal or economic interests, or when the judge is acting in a fiduciary\* capacity.

**Rule 3.7: Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities**

(A) Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:

- (1) assisting such an organization or entity in planning related to fund-raising, and participating in the management and investment of the organization's or entity's funds;
  - (2) soliciting\* contributions\* for such an organization or entity, but only from members of the judge's family,\* or from judges over whom the judge does not exercise supervisory or appellate authority;
  - (3) soliciting membership for such an organization or entity, even though the membership dues or fees generated may be used to support the objectives of the organization or entity, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice;
  - (4) appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such an organization or entity, but if the event serves a fund-raising purpose, the judge may participate only if the event concerns the law, the legal system, or the administration of justice;
  - (5) making recommendations to such a public or private fund-granting organization or entity in connection with its programs and activities, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice; and
  - (6) serving as an officer, director, trustee, or nonlegal advisor of such an organization or entity, unless it is likely that the organization or entity:
    - (a) will be engaged in proceedings that would ordinarily come before the judge; or
    - (b) will frequently be engaged in adversary proceedings in the court of which the judge is a member, or in any court subject to the appellate jurisdiction of the court of which the judge is a member.
- (B) A judge may encourage lawyers to provide pro bono publico legal services.

**Rule 3.8: Appointments to Fiduciary Positions**

(A) A judge shall not accept appointment to serve in a fiduciary\* position, such as executor, administrator, trustee, guardian, attorney in fact, or other personal representative, except for the estate, trust, or person of a member of the judge's family,\* and then only if such service will not interfere with the proper performance of judicial duties.

(B) A judge shall not serve in a fiduciary position if the judge as fiduciary will likely be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves, or one under its appellate jurisdiction.

(C) A judge acting in a fiduciary capacity shall be subject to the same restrictions on engaging in financial activities that apply to a judge personally.

(D) If a person who is serving in a fiduciary position becomes a judge, he or she must comply with this Rule as soon as reasonably practicable, but in no event later than [one year] after becoming a judge.

**Rule 3.9: Service as Arbitrator or Mediator**

A judge shall not act as an arbitrator or a mediator or perform other judicial functions apart from the judge's official duties unless expressly authorized by law.\*

#### Rule 3.10: Practice of Law

A judge shall not practice law. A judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family,\* but is prohibited from serving as the family member's lawyer in any forum.

#### Rule 3.11: Financial, Business, or Remunerative Activities

(A) A judge may hold and manage investments of the judge and members of the judge's family.\*

(B) A judge shall not serve as an officer, director, manager, general partner, advisor, or employee of any business entity except that a judge may manage or participate in:

(1) a business closely held by the judge or members of the judge's family; or

(2) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.

(C) A judge shall not engage in financial activities permitted under paragraphs (A) and (B) if they will:

(1) interfere with the proper performance of judicial duties;

(2) lead to frequent disqualification of the judge;

(3) involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves; or

(4) result in violation of other provisions of this Code.

#### Rule 3.12: Compensation for Extrajudicial Activities

A judge may accept reasonable compensation for extrajudicial activities permitted by this Code or other law\* unless such acceptance would appear to a reasonable person to undermine the judge's independence,\* integrity,\* or impartiality.\*

### CANON 4

A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the , integrity, or impartiality of the judiciary.

#### Rule 4.1: Political and Campaign Activities of Judges and Judicial Candidates in General

(A) Except as permitted by law,\* or by Rules 4.2, 4.3, and 4.4, a judge or a judicial candidate\* shall not:

(1) act as a leader in, or hold an office in, a political organization;\*

(2) make speeches on behalf of a political organization;

(3) publicly endorse or oppose a candidate for any public office;

(4) solicit funds for, pay an assessment to, or make a contribution\* to a political organization or a candidate for public office;

(5) attend or purchase tickets for dinners or other events sponsored by a political organization or a candidate for public office;

(6) publicly identify himself or herself as a candidate of a political organization;

(7) seek, accept, or use endorsements from a political organization;

(8) personally solicit\* or accept campaign contributions other than through a campaign committee authorized by Rule 4.4;

(9) use or permit the use of campaign contributions for the private benefit of the judge, the candidate, or others;

(10) use court staff, facilities, or other court resources in a campaign for judicial office;

(11) knowingly, or with reckless disregard for the truth, make any false or misleading statement;

(12) make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court; or

(13) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial\* performance of the adjudicative duties of judicial office.

(B) A judge or judicial candidate shall take reasonable measures to ensure that other persons do not undertake, on behalf of the candidate, any activities prohibited under paragraph (A).

***MT. SCOPUS APPROVED REVISED INTERNATIONAL STANDARDS OF JUDICIAL INDEPENDENCE, International Association of Judicial Independence and World Peace, 2008, 2011, 2012***

**7. STANDARDS OF CONDUCT**

7.4 A judge should refrain from business activities and should avoid from engaging in other remunerative activity, that can affect the exercise of judicial functions or the image of the judge, except in respect of that judge's personal investments, ownership of property, the business activities or ownership of property of family members, or that judge's teaching at a university or a college.

7.5 A judge should always behave in such a manner as to preserve the dignity of the office and the impartiality, integrity and independence of the Judiciary.

7.6 Judges may be organized in associations designed for judges, for furthering their rights and interests as judges.

***SOFIA DECLARATION ON JUDICIAL INDEPENDENCE AND ACCOUNTABILITY, The General assembly of European Network of Councils for the Judiciary (ENCJ), 2013***

(vii) The prudent convention that judges should remain silent on matters of political controversy should not apply when the integrity and independence of the judiciary is threatened. There is now a collective duty on the European judiciary to state clearly and cogently its opposition to proposals from government which tend to undermine the independence of individual judges or Councils for the Judiciary.

***BOLOGNA MILANO GLOBAL CODE OF JUDICIAL ETHICS, 2015, Approved at the International Conference of Judicial independence held at the University of Bologna and at Bocconi University of Milano June 2015***

8. Social Networking and Blogging

8.1 A judge may use social networking, or use social media.

8.1.1 Judges must follow the guidance that the relevant authority in his or her jurisdiction has issued on the security aspects of this medium.

8.2 A judge should follow the following suggested rules:

8.2.1 A judge must ensure that information about his or her personal life and home address is not available online.

8.2.2 A judge must be wary of publishing more personal information than is necessary

8.2.3 A judge must not post information that could put personal safety at risk.

8.2.4 A judge must check privacy settings and restrict access to their profile to ensure information is kept to a restricted group.

8.2.5 A judge must check the terms and conditions of any sites to which he or she signs up and ensure they are aware of who owns data posted on the site and what the owners of the site can do with their data.

8.2.6 A judge may blog.

8.2.6.1 Judicial office-holders who blog (or who post comments on other people's blogs) must not identify themselves as members of the judiciary.

8.2.6.2 A judge must not express an opinion, were it to become known that they hold judicial office, could damage public confidence in their own impartiality or in the judiciary in general. This also applies to blogs which purport to be anonymous.

8.2.7 Failure to adhere to the guidance could ultimately result in disciplinary action.

## VII. 1.6.2. IN PRIVATE LIFE

### ***EUROPEAN CHARTER ON THE STATUTE FOR JUDGES AND EXPLANATORY MEMORANDUM, Council of Europe, Strasbourg, 8 - 10 July 1998***

#### 4. CAREER DEVELOPMENT

4.2. Judges freely carry out activities outside their judicial mandate including those which are the embodiment of their rights as citizens. This freedom may not be limited except in so far as such outside activities are incompatible with confidence in, or the impartiality or the independence of a judge, or his or her required availability to deal attentively and within a reasonable period with the matters put before him or her. The exercise of an outside activity, other than literary or artistic, giving rise to remuneration, must be the object of a prior authorization on conditions laid down by the statute.

4.3. Judges must refrain from any behaviour, action or expression of a kind effectively to affect confidence in their impartiality and their independence.

### ***BANGALORE PRINCIPLE ON JUDICIAL CONDUCT, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002***

Value 4: Propriety

4.10. Confidential information acquired by a judge in the judge's judicial capacity shall not be used or disclosed by the judge for any other purpose not related to the judge's judicial duties.

### **OPINION NO. 3 (2002) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE PRINCIPLES AND RULES GOVERNING JUDGES' PROFESSIONAL CONDUCT, IN PARTICULAR ETHICS, INCOMPATIBLE BEHAVIOUR AND IMPARTIALITY, Council of Europe, 2002**

#### A. STANDARDS OF JUDICIAL CONDUCT

1) What standards of conduct should apply to judges?

b. Impartiality and extra-judicial conduct of judges

29. Judges should conduct themselves in a respectable way in their private life. In view of the cultural diversity of the member states of the Council of Europe and the constant evolution in moral values, the standards applying to judges' behaviour in their private lives cannot be laid down too precisely. The CCJE encourages the establishment within the judiciary of one or more bodies or persons having a consultative and advisory role and available to judges whenever they have some uncertainty as to whether a given activity in the private sphere is compatible with their status of judge. The presence of such bodies or persons could encourage discussion within the judiciary on the content and significance of ethical rules. To take just two possibilities, such bodies or persons could be established under the aegis of the Supreme Court or judges' associations. They should in any event be separate from and pursue different objectives to existing bodies responsible for imposing disciplinary sanctions.

### ***REPORT "JUDICIAL ETHICS – PRINCIPLES, VALUES AND QUALITIES", The General Assembly of ENCJ, 2010***

RESERVE AND DISCRETION

In his private life

Apart from carrying out his duties, a judge refrains from asserting his status as a judge in his dealings with third parties. He does not give the impression of wanting to put pressure on third parties or cause them to think that a judge is entitled, on a personal level, to exercise powers that the law vests in him in the course of his judicial activities.

Like any person, a judge has the right to his private life. His duty of reserve does not preclude him from having a normal social life: it is enough if he takes some common sense precautions in order to avoid undermining the dignity of his office or his ability to exercise it.

### **VII. 1.6.3. RESTRICTIONS ON THE ACTIVITIES OF THE JUDICIARY AND THE LEGAL PROFESSION**

#### ***JUDGES' CHARTER IN EUROPE, European Association of Judges, 1997***

Fundamental principles

11. The Judge, after leaving his office, shall have the opportunity to practice another legal profession.

#### ***BANGALORE PRINCIPLE ON JUDICIAL CONDUCT, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002***

Value 4: Propriety

4.12. A judge shall not practise law while the holder of judicial office.

#### ***OPINION NO. 3 (2002) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE PRINCIPLES AND RULES GOVERNING JUDGES' PROFESSIONAL CONDUCT, IN PARTICULAR ETHICS, INCOMPATIBLE BEHAVIOUR AND IMPARTIALITY, Council of Europe, 2002***

##### **A. STANDARDS OF JUDICIAL CONDUCT**

1) What standards of conduct should apply to judges?

b. Impartiality and extra-judicial conduct of judges

36. The question of judges' involvement in a certain governmental activities, such as service in the private offices of a minister (*cabinet ministériel*), poses particular problems. There is nothing to prevent a judge from exercising functions in an administrative department of a ministry (for example a civil or criminal legislation department in the Ministry of Justice); however, the matter is more delicate with regard to a judge who becomes part of the staff of a minister's private office. Ministers are perfectly entitled to appoint whomsoever they wish to work in their private office but, as the minister's close collaborators, such staff participate to a certain extent in the minister's political activities. In such circumstances, before a judge enters into service in a minister's private office, an opinion should ideally be obtained from the independent organ responsible for the appointment of judges, so that this body could set out the rules of conduct applicable in each individual case.

c. Impartiality and other professional activities of judges

37. The specific nature of the judicial function and the need to maintain the dignity of the office and protect judges from all kinds of pressures mean that judges should behave in such a way as to avoid conflicts of interest or abuses of power. This requires judges to refrain from any professional activity that might divert them from their judicial responsibilities or cause them to exercise those responsibilities in a partial manner. In some States, incompatibilities with the function of judge are clearly defined by the judges' statute and members of the judiciary are forbidden from carrying out any professional or paid activity. Exceptions are made for educational, research, scientific, literary or artistic activities.

#### ***DECLARATION OF MINIMAL PRINCIPLES ABOUT JUDICIARIES AND JUDGES' INDEPENDENCE IN LATIN AMERICA, Campeche, April 2008***



### III. MINIMAL CONDITIONS FOR THE PROTECTION OF JUDGES' INDEPENDENCE AND IMPARTIALITY

#### 7. GUARANTEES AND INCOMPATIBILITIES

In order to strengthen Independence and impartiality, there are certain guarantees and incompatibilities that have to be states, such as:

b) The judges:

b.4. shall not be able to perform any other public or private service, remunerated or not, with the exception of teaching, social sciences researching, or their participation in non-profit entities for public welfare, activities which could be performed with the proper arrangement of the determined hourly incompatibility.

b.5. cannot be appointed for service commissions extraneous to the judiciary without an express consent and to the extent that those activities do not violate the general rules of incompatibility.

b.6. cannot join political parties, nor perform political party activities, nor act in the capacity of a politician, with the exception of those expressly authorized or imposed by the Constitution or the Legislation of each country as an obligation owed to the government.

#### ***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

##### Chapter II – External independence

21. Judges may engage in activities outside their official functions. To avoid actual or perceived conflicts of interest, their participation should be restricted to activities compatible with their impartiality and independence.

#### ***REPORT ON THE INDEPENDENCE OF THE JUDICIAL SYSTEM PART I: THE INDEPENDENCE OF JUDGES, Venice Commission, Venice, 12-13 March 2010 CDL-AD(2010)004***

##### IV. Conclusion

12. States may provide for the incompatibility of the judicial office with other functions. Judges shall not exercise executive functions. Political activity that could interfere with impartiality of judicial powers shall not be authorised.

#### ***ABA MODEL CODE OF JUDICIAL CONDUCT (2011 EDITION), adopted by the House of Delegates of the American Bar Association on August 7, 1990 and amended on August 6, 1997, August 10, 1999, August 12, 2003, February 12, 2007 and August 10, 2010***

##### CANON 3

###### Rule 3.4: Appointments to Governmental Positions

A judge shall not accept appointment to a governmental committee, board, commission, or other governmental position, unless it is one that concerns the law, the legal system, or the administration of justice.

##### CANON 4

A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the , integrity, or impartiality of the judiciary.

Rule 4.1: Political and Campaign Activities of Judges and Judicial Candidates in General

(A) Except as permitted by law,\* or by Rules 4.2, 4.3, and 4.4, a judge or a judicial candidate\* shall not:

- (1) act as a leader in, or hold an office in, a political organization;\*
- (2) make speeches on behalf of a political organization;
- (3) publicly endorse or oppose a candidate for any public office;
- (4) solicit funds for, pay an assessment to, or make a contribution\* to a political organization or a candidate for public office;
- (5) attend or purchase tickets for dinners or other events sponsored by a political organization or a candidate for public office;
- (6) publicly identify himself or herself as a candidate of a political organization;
- (7) seek, accept, or use endorsements from a political organization;
- (8) personally solicit\* or accept campaign contributions other than through a campaign committee authorized by Rule 4.4;
- (9) use or permit the use of campaign contributions for the private benefit of the judge, the candidate, or others;
- (10) use court staff, facilities, or other court resources in a campaign for judicial office;
- (11) knowingly,\* or with reckless disregard for the truth, make any false or misleading statement;
- (12) make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending\* or impending\* in any court; or
- (13) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial\* performance of the adjudicative duties of judicial office.

(B) A judge or judicial candidate shall take reasonable measures to ensure that other persons do not undertake, on behalf of the candidate, any activities prohibited under paragraph (A).

Rule 4.5: Activities of Judges Who Become Candidates for Nonjudicial Office

(A) Upon becoming a candidate for a nonjudicial elective office, a judge shall resign from judicial office, unless permitted by law\* to continue to hold judicial office.

(B) Upon becoming a candidate for a nonjudicial appointive office, a judge is not required to resign from judicial office, provided that the judge complies with the other provisions of this Code.

***MT. SCOPUS APPROVED REVISED INTERNATIONAL STANDARDS OF JUDICIAL INDEPENDENCE, International Association of Judicial Independence and World Peace, 2008, 2011, 2012***

7. STANDARDS OF CONDUCT

7.1. Judges may not serve in Executive or Legislative functions, including as:

7.1.1. Ministers of the government; or as

7.1.2. Members of the Legislature or of municipal councils.

7.2. Judges shall not hold positions in political parties.

7.3. A judge, other than a temporary or part-time judge, may not practice law.

***OPINION NO. 15 (2012) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) ON THE SPECIALISATION OF JUDGES, Council of Europe, 2012***

A. Possible advantages and disadvantages of specialisation

## b. Possible limits and dangers of specialisation

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.

### ***BOLOGNA MILANO GLOBAL CODE OF JUDICIAL ETHICS, 2015, Approved at the International Conference of Judicial Independence held at the University of Bologna and at Bocconi University of Milano June 2015***

## 7. Activities Outside the Court and Extrajudicial Activities

### 7.1 The Media

7.1.1 Judges should exercise their freedom to comment in the media, with ‘the greatest circumspection.’ A judge should refrain from answering public criticism of a judgment or decision, whether from the bench or otherwise. Judges should not air disagreements over judicial decisions in the press.

7.1.2 Judges must be careful when they are factually misrepresented or where the judges are aware, particularly when sentencing in a criminal case.

### 7.2 Participation in Public Debate

7.2.1 There is no objection to such participation in public debate provided the issue directly affects the operation of the courts, the independence of the judiciary or aspects of the administration of justice.

7.2.2 A judge must take care to not cause the public to associate the judge with a particular organization, group or cause. The participation should not be in circumstances which may give rise to a perception of partiality towards the organization (including a set of chambers or firm of solicitors), group or cause involved or to a lack of even handedness.

7.2.3 Dialogue may not take the form, and the judge cannot expect to assume the role, which the judge would consider appropriate in court proceedings. The judge cannot expect to join in and leave the debate on the judge’s terms.

7.2.4 A judge must consult with Heads of Division, the presiding, resident or designated judge, as the case may be (the “head of the appropriate jurisdiction”). A judge must also consider the risk of expressing views that will give rise to issues of bias or pre-judgment in cases that later come before the judge must also be considered.

7.2.5 A judge must consider the dignity of judicial office before participation in public protests and demonstrations.

### 7.3 Commercial Activities

7.3.1 There must be requirements of office clearly in place with severe restraints upon the permissible scope of a judge’s involvement with commercial enterprises.

7.3.2. The risks, including the risk of litigation, associated with the office of trustee, even of a family trust, should not be overlooked and the factors involved need to be weighed carefully before office is accepted.

### 7.4 Involvement in Community Organisations

7.4.1 Care must be taken with involvement in community organisations to not compromise judicial independence or put at risk the status or integrity of judicial office. Such activities should not be so onerous or time consuming as to interfere with the judge’s performance of his or her duties and the judge’s role should not involve active business management.

7.4.2 Judges generally should not be involved in fund raising .Care should be taken in considering whether, and if so to what extent, a judge’s name and title should be associated with an appeal for funds, even for a charitable organization.

7.4.3 It is necessary to limit and regulate the nature and extent of personal involvement in contentious situations. Any conflict of interest in a litigious situation must be declared.

## 7.5 References

7.5.1 A judge may give references for character or professional competence for persons who are well known to the judge.

7.5.2 A judge may give character evidence in court or otherwise.

7.5.2.1 This task should be undertaken only exceptionally and for a limited purpose.

7.5.2.2 A judge must consult with the head of the appropriate jurisdiction advisable before taking a decision to give evidence.

7.6 Remuneration: Judges holding full-time appointments are barred from legal practice. In addition to a judicial salary, a full-time judge should not receive any remuneration except for fees and royalties earned as an author or editor. A judge may of course receive money from investments or property.

7.6.1 Lectures, and teaching in an institution: It is possible to allow a judge to engage in legal lectures, and the remuneration for the teaching is subject to two standards, which both must be met:

7.6.1.1 The level of remuneration shall not exceed the level practised in that institution for similar work.

7.6.1.2 The payment received by the judge shall not exceed the equivalent of maximum 25% of his judicial salary .

7.6.2 The acceptance by the judge of delivering a single lecture or teaching position in a higher educational institution or giving a lecture is subject to the grant of permission by a proper judicial authority.

## 7.7 Business cards .

7.7.1 A judge should be very cautious in describing his position in business cards or letterheads.

## 7.8 Gifts, Hospitality and Social Activities

7.8.1 Gifts and Hospitality. A judge must be cautious when accepting any gift or hospitality that may be offered.

7.8.2 The acceptance of a gift or hospitality of modest value, as a token of appreciation, may be unobjectionable, depending on the circumstances. For example a judge who makes a speech or participates in some public or private function may accept a small token of appreciation.

7.8.3 A judge may accept invitations to lunches and dinners by legal and other professional and public bodies or officials

7.8.4 Caution should be exercised when invited to take part in what may be legitimate marketing or promotional activities, for example by barristers' chambers or solicitors' firms, or professional associations.

7.8.5 A judge must not exploit the status and prestige of judicial office to obtain personal favours or benefits.

7.8.6 A judge should seek the advice of the head of the appropriate jurisdiction when in doubt as to the propriety of accepting any gift or hospitality.

7.8.7 Contact with the Profession. A judge must avoid direct association with individual members of the profession who are engaged in current or pending cases before the judge.

7.8.8 Other Social Activities. A judge is under the duty to maintain the dignity of the office and not to permit associations which may affect adversely the judge's ability to discharge his or her duties.

7.8.9 A judge should be very careful to avoid a situation of suspicion of bias in case of close social relations with a lawyer or a witness or party in the case, which could become grounds for disqualification.

7.9 Use of Equipment: A judge should not use equipment, including IT equipment, provided by the Court Service for his or her use as a judge. Detailed guidance upon the use of IT equipment, including the importance of not compromising its security should be detailed in the relevant rules

7.10 Judicial Office-holders' duty to notify legal proceedings and other matters relating to conduct

7.10.1 All judicial office-holders have an obligation to notify the appropriate senior judicial officer if they are aware of any matters relating to conduct which may affect their position or may reflect on the standing and reputation of the judiciary at large.

#### 7.11 Criminal proceedings (including minor offences)

7.11.1 Without prejudice to the generality of the above, they must also notify the Lord Chief Justice or the Senior President if they are cautioned for, or charged with, any criminal offence other than a parking or minor traffic offence without aggravating circumstances.

7.11.2 Special rules should apply in respect of minor offences.

7.11.3 Office-holders should advise the Senior Judicial Officer on court proceedings relating to a charge against them. This is to ensure that full and timely consideration can be given to the listing of the case and whether or not it would be appropriate for the office-holder to continue sitting while court proceedings are pending.

#### 7.12 Civil proceedings

7.12.1 All judicial office-holders have an obligation to report to the senior judicial officer their involvement in legal proceedings which are coming to court. This includes all civil proceedings (including family proceedings) and is to ensure that the senior judicial officer can give full and timely consideration to the listing of the case and whether or not it would be appropriate for the office-holder to continue sitting in that area or jurisdiction whilst proceedings are ongoing.

#### 7.13 Other proceedings

7.13.1 Judicial office-holders must also notify the appropriate senior judicial officer if they are the subject of any complaint or disciplinary proceedings by any professional body to which they belong; or if they get into serious financial difficulties particularly where legal proceedings are or are likely to be initiated.

7.13.2 Failure to report proceedings as set out above could result in disciplinary action.

7.14 It is the duty of a judge to engage in continued judicial education.

## VII. 1.7 DILIGENCE

### ***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE (“Singhvi Declaration”), ECOSOC, 1985***

Miscellaneous

37. A judge shall ensure the fair conduct of the trial and inquire fully into any allegations made of a violation of the rights of a party or of a witness, including allegations of ill-treatment.

40. Judges shall keep themselves informed about international conventions and other instruments establishing human rights norms, and shall seek to implement them as far as feasible, within the limits set by their national constitutions and laws.

### ***THE UNIVERSAL CHARTER OF THE JUDGE, International Association of Judges (IAJ), 1999***

Art. 6 Efficiency

The judge must diligently and efficiently perform his or her duties without any undue delays.

### ***BANGALORE PRINCIPLE ON JUDICIAL CONDUCT, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002***

Principle 6

Competence and diligence are prerequisites to the due performance of judicial office.

6.1. The judicial duties of a judge take precedence over all other activities.

6.2. A judge shall devote the judge’s professional activity to judicial duties, which include not only the performance of judicial functions and responsibilities in court and the making of decisions, but also other tasks relevant to the judicial office or the court’s operations.

6.5. A judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness.

6.7. A judge shall not engage in conduct incompatible with the diligent discharge of judicial duties.

### ***OPINION NO. 3 (2002) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE PRINCIPLES AND RULES GOVERNING JUDGES’ PROFESSIONAL CONDUCT, IN PARTICULAR ETHICS, INCOMPATIBLE BEHAVIOUR AND IMPARTIALITY, Council of Europe, 2002***

#### A. STANDARDS OF JUDICIAL CONDUCT

1) What standards of conduct should apply to judges?

a. Impartiality and conduct of judges in the exercise of their judicial functions

26. Judges must also fulfil their functions with diligence and reasonable despatch. For this, it is of course necessary that they should be provided with proper facilities, equipment and assistance. So provided, judges should both be mindful of and be able to perform their obligations under Article 6.1 of the European Convention on Human Rights to deliver judgment within a reasonable time.

**RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010**

Chapter VII – Duties and responsibilities

62. Judges should manage each case with due diligence and within a reasonable time.

**REPORT “JUDICIAL ETHICS – PRINCIPLES, VALUES AND QUALITIES”, The General Assembly of ENCJ, 2010**

DILIGENCE

Diligence is necessary to obtain and increase public confidence in justice. The judge is diligent in handling cases.

That means that they are dealt with and judged within a reasonable period appropriate to the subject matter, while ensuring the quality of the decision.

The promptness of legal proceedings is influenced not only by legislation and the resources made available to the justice system but also by the attitude and work of the judge.

The judge

- improves his training in order to avoid any delay in the proceedings caused by a nonprofessional approach.
- maintains throughout his life the highest level of professional competence
- uses all the legal tools that he learns.

In each procedure, he ensures that reasonable deadlines are set for the parties and for himself.

The judge makes every effort to conduct proceedings efficiently and to make his decisions without delay.

**OPINION NO. 15 (2012) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) ON THE SPECIALISATION OF JUDGES, Council of Europe, 2012**

B. General principles – respect for fundamental rights and principles: position of the CCJE

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.

## **VII. 1.8. RESPECT AND THE ABILITY TO LISTEN**

### ***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE (“Singhvi Declaration”), ECOSOC, 1985***

Miscellaneous

38. Judges shall accord respect to the members of the Bar, as well as to assessors, procurators, public prosecutors and jurors as the case may be.

### ***EUROPEAN CHARTER ON THE STATUTE FOR JUDGES AND EXPLANATORY MEMORANDUM, Council of Europe, Strasbourg, 8 - 10 July 1998***

#### **1. GENERAL PRINCIPLES**

1.5. Judges must show, in discharging their duties, availability, respect for individuals, and vigilance in maintaining the high level of competence which the decision of cases requires on every occasion - decisions on which depend the guarantee of individual rights and in preserving the secrecy of information which is entrusted to them in the course of proceedings.

### ***REPORT “JUDICIAL ETHICS – PRINCIPLES, VALUES AND QUALITIES”, The General Assembly of ENCJ, 2010***

#### **RESPECT AND THE ABILITY TO LISTEN**

Society and its members expect a judge in the exercise of his functions to respect them and hear them.

Respect may be thought of as the judge’s aptitude to show due consideration to people’s position and their dignity.

Listening should be viewed as the judge’s aptitude to pay attention to the exposition of facts and technical reasoning put forward by the parties and their counsel.

The judge in his dealings with the public, lawyers, his colleagues and administrative staff behaves in a manner which is dignified, correct and receptive.

In his organisation of work, a judge takes into account and gives care and attention to the requirements of all those affected by the case.

He creates a serene atmosphere in his court, listening with the same attention to all parties at the trial and their representatives.

He conducts himself in a way which is respectful of the administrative staff, and of their autonomous sphere of duty and competence.

He maintains relations with colleagues which are both proper and respectful of their autonomy and independence.

The judge, individually or collectively or in the performance of his managerial duties, ensures that the values of respect and listening are shared and respected by all.



## VII. 1.9 EQUALITY OF TREATMENT

### **GENEVA CONVENTION, ICRC, 1949**

Art. 3, para 1

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

### ***BANGALORE PRINCIPLE ON JUDICIAL CONDUCT, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002***

Value 5: Equality

Principle:

Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

### ***OPINION NO. 3 (2002) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE PRINCIPLES AND RULES GOVERNING JUDGES' PROFESSIONAL CONDUCT, IN PARTICULAR ETHICS, INCOMPATIBLE BEHAVIOUR AND IMPARTIALITY, Council of Europe, 2002***

#### A. STANDARDS OF JUDICIAL CONDUCT

1) What standards of conduct should apply to judges?

a. Impartiality and conduct of judges in the exercise of their judicial functions

24. Judges should also discharge their functions with due respect for the principle of equal treatment of parties, by avoiding any bias and any discrimination, maintaining a balance between the parties and ensuring that each receives a fair hearing.

**PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA, African Commission on Human and Peoples Rights, 2003**

**K. ACCESS TO JUDICIAL SERVICES**

- a) States shall ensure that judicial bodies are accessible to everyone within their territory and jurisdiction, without distinction of any kind, such as discrimination based on race, colour, disability, ethnic origin, sex, gender, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.
- b) States must take special measures to ensure that rural communities and women have access to judicial services. States must ensure that law enforcement and judicial officials are adequately trained to deal sensitively and professionally with the special needs and requirements of women.
- c) In countries where there exist groups, communities or regions whose needs for judicial services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, States shall take special measures to ensure that adequate judicial services are accessible to them.
- d) States shall ensure that access to judicial services is not impeded including by the distance to the location of judicial institutions, the lack of information about the judicial system, the imposition of unaffordable or excessive court fees and the lack of assistance to understand the procedures and to complete formalities.

**OPINION NO. 7 (2005) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS ON “JUSTICE AND SOCIETY”, Council of Europe, 2005**

**B. THE RELATIONS OF THE COURTS WITH PARTICIPANTS IN COURT PROCEEDINGS**

a) ethical training of judges, court staff, lawyers, etc

29. Some training programmes are intended to ensure that courts are seen, under all aspects of their behaviour, to be treating all parties in the same way, i.e. impartially and without any discrimination based on race, sex, religion, ethnic origin or social status. Judges and court staff are trained to recognise situations in which individuals may feel that a biased approach is, or seems to be, being taken, and to deal with such situations in a way that enhances confidence in and respect for the courts. Lawyers organise and are given special ethical training to prevent them from contributing, whether intentionally or not, to mistrust of the justice system.

b) court facilities

30. Some programmes tackle the causes of potential mistrust vis-à-vis the courts that lie in their internal organisation. For instance, moving the public prosecutor's chair away from the bench and placing it at the same level as the defence will reinforce the impression of equality of arms which a court is supposed to convey. Likewise, the removal from court premises of any visual allusion, for example to a specific religion or political authority, may help to dispel fears of unwarranted bias or a lack of independence of judges. Allowing the accused to appear without handcuffs in court even if he or she has been detained pending trial – save in cases where there is a security risk – and replacing enclosures in courtrooms with other security measures can help to give a clearer impression that the presumption of innocence which defendants enjoy is effectively guaranteed by the courts. A mention should also be made of the benefits, in terms of improving courts' transparency, of setting up court reception services to provide the users of judicial services with information about the conduct of proceedings or the progress made in a particular case, to help users with formalities and, if the layout of the buildings so requires, to accompany them to the office or the courtroom they are looking for.

c) judicial proceedings

31. Some measures are intended to do away with those parts of the proceedings which may cause offence (compulsory religious references in oaths, forms of address, etc.). Others are intended to introduce procedures which ensure for example that, before appearing in court, parties, jurors or witnesses are received, on their own or in group, by court staff who describe to them, either orally or using audiovisual material produced in collaboration with social scientists, what their court experience is expected to be like. The aim of these presentations is to dispel any misconceptions about what actually happens in courts.

## SUMMARY OF THE RECOMMENDATIONS AND CONCLUSIONS

### B. The relations of the courts with participants in court proceedings

B.2. The CCJE supports all the steps aiming at strengthening the public perception of impartiality of judges and enabling justice to be carried out (see paragraphs 28 to 32 above).

### C. The relations of the courts with the media

C.8. The CCJE considers that all information provided to the media by the courts should be communicated in a transparent and non-discriminatory manner (see paragraph 43 above).

## ***REPORT “JUDICIAL ETHICS – PRINCIPLES, VALUES AND QUALITIES”, The General Assembly of ENCJ, 2010***

### EQUALITY OF TREATMENT

Equality of treatment requires the judge to give everyone that to which he is entitled, both in the process and in the result of any case, through recognising the uniqueness of each individual.

The judge has consideration for all persons who appear before him and makes sure to treat them equally.

He is aware of the objective differences between different categories of people and works to ensure that each party is heard, understood and respected.

He ensures that nobody can say that he has been ignored, or patronised, or despised.

When the Constitution, national laws or international rules provide for it, a judge may apply positive discrimination; in other cases he ensures that equality of treatment prevails.

**VILAMOURA MANIFEST, JUSTICE IN FRONT OF ECONOMIC CRISIS, MEDEL, 2012**

20. The solution is not in the abandonment of rights, but in the mobilization for their defence. All European judges should mobilize the imaginative forces of law to emerge across Europe in order to create and safeguard the community of values based on freedom and equality of all in dignity and rights.

**STANDARDS ON NON-JUDICIAL MEMBERS IN JUDICIAL COUNCIL, ENCJ, June 2016**

5. Conduct

5.1 Non-judicial members during their service on Judicial Councils and other relevant bodies should be bound by any rules of conduct applicable to judicial members of such bodies.

5.2 In drafting rules of conduct for Judicial Councils and other relevant bodies, account should be taken of the presence on such bodies of non-judicial members.

5.3 In particular the rules of conduct developed should deal with the following matters (depending on the competences of the particular body): confidentiality in respect of all matters; honesty; objectivity and impartiality; obligation to attend meetings; obligation to fulfil tasks; and obligation to recuse oneself in the case of conflict of interest.

5.4 In default of such rules of conduct, the conduct of non-judicial members may be guided by reference to the "Seven Principles of Public Life" or other similar rules.

## VII. 1.10. COMPETENCE

### **EUROPEAN CHARTER ON THE STATUTE FOR JUDGES AND EXPLANATORY MEMORANDUM, Council of Europe, Strasbourg, 8 - 10 July 1998**

#### 1. GENERAL PRINCIPLES

1.5. Judges must show, in discharging their duties, availability, respect for individuals, and vigilance in maintaining the high level of competence which the decision of cases requires on every occasion - decisions on which depend the guarantee of individual rights and in preserving the secrecy of information which is entrusted to them in the course of proceedings.

### **BANGALORE PRINCIPLE ON JUDICIAL CONDUCT, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002**

#### Value 6: COMPETENCE AND DILIGENCE

Principle:

Competence and diligence are prerequisites to the due performance of judicial office.

6.3. A judge shall take reasonable steps to maintain and enhance the judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for that purpose of the training and other facilities that should be made available, under judicial control, to judges.

6.4. A judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms.

### **OPINION NO. 3 (2002) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE PRINCIPLES AND RULES GOVERNING JUDGES' PROFESSIONAL CONDUCT, IN PARTICULAR ETHICS, INCOMPATIBLE BEHAVIOUR AND IMPARTIALITY, Council of Europe, 2002**

#### A. STANDARDS OF JUDICIAL CONDUCT

1) What standards of conduct should apply to judges?

a. Impartiality and conduct of judges in the exercise of their judicial functions

23. Judges should therefore discharge their duties without any favouritism, display of prejudice or bias. They should not reach their decisions by taking into consideration anything which falls outside the application of the rules of law. As long as they are dealing with a case or could be required to do so, they should not consciously make any observations which could reasonably suggest some degree of pre-judgment of the resolution of the dispute or which could influence the fairness of the proceedings. They should show the consideration due to all persons (parties, witnesses, counsel, for example) with no distinction based on unlawful grounds or incompatible with the appropriate discharge of their functions. They should also ensure that their professional competence is evident in the discharge of their duties.

25. The effectiveness of the judicial system also requires judges to have a high degree of professional awareness. They should ensure that they maintain a high degree of professional competence through basic and further training, providing them with the appropriate qualifications.

**OPINION NO. 4 (2003) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON APPROPRIATE INITIAL AND IN-SERVICE TRAINING FOR JUDGES AT NATIONAL AND EUROPEAN LEVELS, Council of Europe, 2003**

I. The right to training and the legal level at which this right should be guaranteed

9. Constitutional principles should guarantee the independence and impartiality on which the legitimacy of judges depends, and judges for their part should ensure that they maintain a high degree of professional competence (see paragraph 50 (ix) of the CCJE Opinion N° 3).

**RESOLUTION ON JUDICIAL ETHICS, European Court of Human Rights, Adopted by the Plenary Court on 23 June 2008**

IV. Diligence and competence

Judges shall perform the duties of their office diligently. In order to maintain a high level of competence, they shall continue to develop their professional skills.

**REPORT "JUDICIAL ETHICS – PRINCIPLES, VALUES AND QUALITIES", The General Assembly of ENCJ, 2010**

COMPETENCE

Society is entitled to a competent judge with a broad professional ability.

The judge adapts quickly to new developments.

A judge has a methodical approach to his work. He takes into account the particularities of each case, including new and unknown aspects and manages the case within an appropriate time.

A judge also uses persuasiveness, where it is appropriate, to resolve conflicts.

A judge is part of a working community; He is able to work in teams with colleagues and staff members

**RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010**

Chapter VII – Duties and responsibilities

65. Judges should regularly update and develop their proficiency.

## VII. 1.11. TRANSPARENCY

### **RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010**

Chapter VII – Duties and responsibilities

63. Judges should give clear reasons for their judgments in language which is clear and comprehensible.

### **REPORT “JUDICIAL ETHICS – PRINCIPLES, VALUES AND QUALITIES”, The General Assembly of ENCJ, 2010**

#### TRANSPARENCY

Information on the functioning of justice and the presence of the public at judicial proceedings contribute to their social acceptance. Equal access of individuals involved in claims or defence to civil and criminal proceedings promotes transparency and enhances public confidence.

The judge sees to it that the public are given information on the functioning of justice.

He ensures transparency through public hearings and by giving reasons for his decisions while maintaining the confidentiality required to respect privacy or because of the need for public order.

He maintains a careful balance between the need for transparency and the prohibition of voyeurism or exhibitionism so as to ensure that justice does not become a spectacle.

In media relations, institutional information must prevail. Information on individual cases can be given only within the legal framework.

In his private life and in society, the judge is always vigilant to avoid any conflict of interest. By doing so, he ensures transparency regarding his impartiality.

### **COMPILATION OF CEPEJ GUIDELINES, European Commission for the Efficiency of Justice (CEPEJ), 2015**

Transparency and accountability of data

9. Professionalism and ethics of the persons entrusted with data processing and their independence vis-à-vis other political or administrative bodies or organs as well as private bodies guarantee the accountability of the data. The states should ensure that these persons have the appropriate skills and should guarantee the adequate level of independence so that an accountable and high quality scientific work can be delivered.

10. All data collection and analysis should be undertaken in a transparent way. The main results should not only be delivered to all direct stakeholders of justice administration but also to all persons involved in the functioning of the judicial system. The opinions of researchers could be taken into account to improve this mechanism.

11. Data and their analysis should not be personalised. They should be presented so as to be easily comprehensible in order to contribute to the transparency and acceptance of the whole system by all the persons concerned, and guarantee the fairness in the information presented. Complex formula should be avoided as far as possible.

12. Public availability of data collected at national level should be ensured, namely through publication on Internet.

13. Appropriate steps should be taken by the bodies responsible for collecting and processing judicial statistics in the member states to ensure dialogue with the organisations representing the legal and judicial professions, researchers and, as appropriate, other organisations with an interest in the matter so as to guarantee a broad consensus on the information collected and communicated.

#### Transparency and foreseeability

1. The users of the justice system should be involved in the time management of judicial proceedings.
2. The users should be informed and, where appropriate, consulted regarding every relevant aspect that influences the length of proceedings.
3. The length of proceedings should be foreseeable as far as possible.
4. The general statistical and other data regarding the length of proceedings, in particular per types of cases, should be available to the general public.



## VII. 1.12. SECRECY

***BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985***

Professional secrecy and immunity

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

***DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE (“Singhvi Declaration”), ECOSOC, 1985***

Immunities and Privileges

21. Judges shall be bound by professional secrecy in relation to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings. Judges shall not be required to testify on such matters.

***EUROPEAN CHARTER ON THE STATUTE FOR JUDGES AND EXPLANATORY MEMORANDUM, Council of Europe, Strasbourg, 8 - 10 July 1998***

### 1. GENERAL PRINCIPLES

1.5. Judges must show, in discharging their duties, availability, respect for individuals, and vigilance in maintaining the high level of competence which the decision of cases requires on every occasion - decisions on which depend the guarantee of individual rights and in preserving the secrecy of information which is entrusted to them in the course of proceedings.

***BANGALORE PRINCIPLE ON JUDICIAL CONDUCT, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002***

Value 2: Impartiality

2.4. A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process, nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.

**OPINION NO. 3 (2002) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE PRINCIPLES AND RULES GOVERNING JUDGES' PROFESSIONAL CONDUCT, IN PARTICULAR ETHICS, INCOMPATIBLE BEHAVIOUR AND IMPARTIALITY, Council of Europe, 2002**

A. STANDARDS OF JUDICIAL CONDUCT

1) What standards of conduct should apply to judges?

d. Impartiality and judges' relations with the media

40. There has been a general trend towards greater media attention focused on judicial matters, especially in the criminal law field, and in particular in certain west European countries. Bearing in mind the links which may be forged between judges and the media, there is a danger that the way judges conduct themselves could be influenced by journalists. The CCJE points out in this connection that in its Opinion No. 1 (2001) it stated that, while the freedom of the press was a pre-eminent principle, the judicial process had to be protected from undue external influence. Accordingly, judges have to show circumspection in their relations with the press and be able to maintain their independence and impartiality, refraining from any personal exploitation of any relations with journalists and any unjustified comments on the cases they are dealing with. The right of the public to information is nevertheless a fundamental principle resulting from Article 10 of the European Convention on Human Rights. It implies that the judge answers the legitimate expectations of the citizens by clearly motivated decisions. Judges should also be free to prepare a summary or communiqué setting up the tenor or clarifying the significance of their judgements for the public. Besides, for the countries where the judges are involved in criminal investigations, it is advisable for them to reconcile the necessary restraint relating to the cases they are dealing with, with the right to information. Only under such conditions can judges freely fulfil their role, without fear of media pressure. The CCJE has noted with interest the practice in force in certain countries of appointing a judge with communication responsibilities or a spokesperson to deal with the press on subjects of interest to the public.

## VII. 2. THE QUALITIES OR VIRTUES OF A JUDGE

### VII. 2.1. WISDOM

***REPORT “JUDICIAL ETHICS – PRINCIPLES, VALUES AND QUALITIES”, The General Assembly of ENCJ, 2010***

Part II: The qualities or virtues of a judge

#### WISDOM

Through his knowledge of the realities and of the law, and by his reasonable, fair and prudent behaviour, a judge shows his wisdom.

By behaving in this way, he removes excess and extravagance in the exercise of his functions while at the same time not showing signs of timidity or paralysis that would lead to conformity. He is creative in applying the law to determine cases, including those which are not settled by existing law. Since law does not evolve at the same pace as society does, he shows wisdom in using techniques of interpretation.

This virtue enables him to be calm and prudent when dealing with disputes, and allows him to discern and distance himself from the parties and the facts that he judges.

## VII. 2.2. LOYALTY

### ***REPORT “JUDICIAL ETHICS – PRINCIPLES, VALUES AND QUALITIES”, The General Assembly of ENCJ, 2010***

Part II: The qualities or virtues of a judge

#### LOYALTY

A judge is loyal.

This loyalty, together with independence, means that when the judge takes an oath, whatever its formula, this symbolic promise of loyalty binds him to the rule of law in the State.

In Europe, this commitment involves loyalty to the Constitution of each country, to its democratic institutions, to fundamental rights, to law and to procedure, and finally to the rules of the organisation of the judicial system.

A judge loyally meets two requirements: not to exceed the powers entrusted in him and to exercise them.

This loyalty cannot be demanded of a judge when democracy and fundamental freedoms are in peril.

In countries which allow a judge to be a member of a political party or to be a candidate in political elections, national rules on incompatibilities can regulate political expression and candidature in order to ensure that everyone has access to an independent and impartial judge.

## VII. 2.3. HUMANITY

### ***REPORT “JUDICIAL ETHICS – PRINCIPLES, VALUES AND QUALITIES”, The General Assembly of ENCJ, 2010***

Part II: The qualities or virtues of a judge

#### HUMANITY

A judge’s sense of humanity is manifested by his respect for persons and their dignity in all circumstances of his professional and private life.

His conduct is based on respect for human beings having regard to the totality of their characteristics whether physical, cultural, intellectual, or social, as well as the race and gender of the person.

A judge shows respect in dealing not only with the people whom he judges but also with those who are part of his working environment such as lawyers, administrative staff etc.

This humanity, which encompasses a sensitivity to situations he faces, enables him to take into account the human dimension in his decisions. In his assessment of facts and decisions he finds a measure between empathy, compassion, kindness, discipline and severity, so that his application of law is perceived as legitimate and fair.

## VII. 2.4. COURAGE

### ***REPORT “JUDICIAL ETHICS – PRINCIPLES, VALUES AND QUALITIES”, The General Assembly of ENCJ, 2010***

Part II: The qualities or virtues of a judge

#### COURAGE

A judge shows courage in order to execute his duties as a judge and to respond to those seeking justice.

This courage combined with independence can also lead to unpopularity and loneliness.

The evolution of contemporary society means that the judge must show courage, both physical and moral:

- in order to conduct certain procedures,
- to cope with various pressures, political, social, and of public opinion, as well as from the media and vested interests.
- to meet the challenges of modern society.

This virtue, like all other qualities, is exercised in a reasonable manner.

## **VII. 2.5. SERIOUSNESS AND PRUDENCE**

***REPORT “JUDICIAL ETHICS – PRINCIPLES, VALUES AND QUALITIES”, The General Assembly of ENCJ, 2010***

### **SERIOUSNESS AND PRUDENCE**

Part II: The qualities or virtues of a judge

The essence of the seriousness and prudence of a judge consists in his behaving appropriately.

Seriousness requires behaving respectfully during legal proceedings, being courteous, without excessive solemnity, and without inappropriate humour. However, maintaining a professional practice of prudence does not exempt from the practice of humanity which governs the relationships of any community.

A prudent judge combines his knowledge of the law and of the particular circumstances of the case in a reasoned way while maintaining his practical common sense.

Prudence guides the judge in both his professional and private lives in order to maintain public confidence in the judiciary and the courts.

## VII. 2.6 WORK

### ***OPINION No.11 (2008) OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) TO THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON THE QUALITY OF JUDICIAL DECISIONS, Consultative Council of European Judges (CCJE), 2008***

3. Clear reasoning and analysis are basic requirements in judicial decisions and an important aspect of the right to fair trial. Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR), for example, requires states to establish independent and impartial tribunals and promote the introduction of efficient procedures. The fulfilment of this obligation acquires real meaning when judges are, as a result, enabled to administer justice justly and correctly, in relation to their findings both in law and in fact, for the ultimate benefit of citizens. A high quality judicial decision is one which achieves a correct result - so far as the material available to the judge allows - and does so fairly, speedily, clearly and definitively.

### ***REPORT "JUDICIAL ETHICS – PRINCIPLES, VALUES AND QUALITIES", The General Assembly of ENCJ, 2010***

Part II: The qualities or virtues of a judge

#### WORK

Judicial office involves sustained hard work and persistent intellectual effort.

The judge's capacity for work and his determination to use this capacity are needed both to develop his judicial skills and to maintain the high quality of work that a litigant is entitled to expect from him.

Thus a judge organises his work efficiently. He demonstrates self discipline in coping with stress and frustration. If he works in team, he pays attention to the views of his colleagues and cultivates the skills of teamwork.

Finally, a judge involved in the management of the court develops his management skills.

### ***RECOMMENDATION CM/Rec(2010)12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, Council of Europe, 2010***

Chapter V – Independence, efficiency and resources

31. Efficiency is the delivery of quality decisions within a reasonable time following fair consideration of the issues. Individual judges are obliged to ensure the efficient management of cases for which they are responsible, including the enforcement of decisions the execution of which falls within their jurisdiction.



## VII. 2.7. LISTENING AND COMMUNICATION

### ***REPORT “JUDICIAL ETHICS – PRINCIPLES, VALUES AND QUALITIES”, The General Assembly of ENCJ, 2010***

Part II: The qualities or virtues of a judge

#### LISTENING AND COMMUNICATION

The judge is expected to listen carefully to the parties at all stages of the proceedings.

Listening implies absence of bias and of prejudice. This quality implies not only real open-mindedness and receptiveness but also the ability to call into question oneself. This listening remains neutral, distant but without being condescending or scornful, humane but dispassionate.

Listening skills and attention to others are not innate qualities; they are something which can be worked on and which are part of the training of judges.

A judge ensures that he is able to communicate with others. He expresses himself in a measured way, with respect, in a non-discriminatory manner and with serenity. He refrains from using expressions which are ambiguous, disrespectful, condescending, ironic, humiliating or hurtful.

Good communication is also present in his judgments (written or oral). A judge ensures that his judgments are intelligible. He gives reasons for his decision so that everyone involved can understand the logic on which the judge based his decision.

## VIII. JUDICIAL ANTI-CORRUPTION

### VIII.1. GENERAL REMARKS

#### ***RESOLUTION (97) 24 ON THE TWENTY GUIDING PRINCIPLES FOR THE FIGHT AGAINST CORRUPTION, Adopted by the Council of Europe Committee of Ministers at the 101st session of the Committee of Ministers, 1997***

Aware that corruption represents a serious threat to the basic principles and values of the Council of Europe, undermines the confidence of citizens in democracy, erodes the rule of law, constitutes a denial of human rights and hinders social and economic development (...).

#### ***CRIMINAL LAW CONVENTION ON CORRUPTION, The member States of the Council of Europe, Strasbourg, 1999***

Convinced of the need to pursue, as a matter of priority, a common criminal policy aimed at the protection of society against corruption, including the adoption of appropriate legislation and preventive measures (...).

Chapter II – Measures to be taken at national level  
Article 2 – Active bribery of domestic public officials

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, offering or giving by any person, directly or indirectly, of any undue advantage to any of its public officials, for himself or herself or for anyone else, for him or her to act or refrain from acting in the exercise of his or her functions.

Article 3 – Passive bribery of domestic public officials

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the request or receipt by any of its public officials, directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in the exercise of his or her functions.

Article 11 – Bribery of judges and officials of international courts

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Articles 2 and 3 involving any holders of judicial office or officials of any international court whose jurisdiction is accepted by the Party.

***POLICY FRAMEWORK FOR PREVENTING AND ELIMINATING CORRUPTION AND ENSURING THE IMPARTIALITY OF THE JUDICIAL SYSTEM, Centre for the Independence of Judges and Lawyers of the International Commission of Jurists, 2000***

Acts Constituting Corruption of the Judicial System

The judicial system is corrupted when any act or omission results or is intended to result in the loss of impartiality of the judiciary.

Specifically, corruption occurs whenever a judge or court officer seeks or receives a benefit of any kind or promise of a benefit of any kind in respect of an exercise of power or other action. Such acts usually constitute criminal offences under national law. Examples of corrupt criminal conduct are:

- bribery;
- fraud;
- utilisation of public resources for private gain;
- deliberate loss of court records; and
- deliberate alteration of court records.

Corruption also occurs when instead of procedures being determined on the basis of evidence and the law, they are decided on the basis of improper influences, inducements, pressures, threats, or interferences, directly or indirectly, from any quarter or for any reason including those arising from:

- a conflict of interest;
- nepotism;
- favouritism to friends;
- consideration of promotional prospects;
- consideration of post retirement placements;
- improper socialisation with members of the legal profession, the executive, or the legislature;
- socialisation with litigants, or prospective litigants;
- predetermination of an issue involved in the litigation;
- prejudice;
- having regard to the power of government or political parties.

These acts may be the subject of various sanctions ranging from criminal law, to law relating to conflict of interest, bias, discrimination, abuse of power, judicial review or may be governed by codes of ethics.

For judicial corruption to occur, it is not necessary to establish that the judicial decision was made on the basis of a corrupting act. It is sufficient that an independent, reasonable, fair minded and informed observer is likely to perceive the judicial act as having been determined by the corrupting act.

***ANTI-CORRUPTION TOOLKIT, Prepared by the United Nations Global Programme against Corruption (GPAC), Centre for International Crime Prevention, Office of Drug Control and Crime Prevention, United Nations Office at Vienna, Version 4, last edited 11 November 2002***

Tool 6 - Strengthening Judicial Institutions

Purpose

The competence, professionalism and integrity of judges are critical to the success of anticorruption. In general, the judiciary as an institution is essential to the rule of law, which in turn influences efforts to control and eradicate corruption in many ways. Judicial decisions which are fair, consistent with one another, and based on law support an environment in which legitimate economic activities can flourish and in which corruption can be detected, deterred and punished. The high status and independence accorded judges in most societies makes them a powerful example for the conduct of others. Judges will be called upon to adjudicate corruption cases, establishing case-law and punishing offenders, and will themselves become targets of corruption, particularly where efforts to corrupt lesser criminal justice officials have failed. In some cases, judges may be called upon to perform other critical functions, such as reviewing the appointments or status of anti-corruption officials or passing judgment on governance matters such as the validity of elections or the constitutionality of laws or procedures.

The independence of judges and their functions makes them a powerful anti-corruption force, but it also represents unique challenges. Training in areas such as integrity must be done in a way, which does not compromise independence. Accountability structures must be able to monitor judicial activities, detect and deal with corruption and other conduct inconsistent with judicial office, while at the same time incorporating safeguards which ensure that they cannot be used to threaten or intimidate judges or otherwise influence judicial decision-making.

#### Description

##### *Measures affecting judges*

The major focus of anti-corruption efforts should be on efforts to strengthen basic integrity, educate judges about the nature and extent of corruption, and establish adequate accountability structures. This could include the following activities or factors.

**Assessment of the problem.** As with other anti-corruption measures, efforts to combat judicial corruption should be based on an assessment of the nature and scope of the problem. Since many of the measures which apply to judges must be developed, maintained and applied by the judges themselves, the assessment should also consider the capacity of the judiciary to play such a role. An objective assessment of the full range of forms of corruption and the level and locations of courts in which they occur should be examined. Those involved should also be asked about possible remedies (see consultation, below). Data should be assembled and recorded in an appropriate format and made widely available for research, analysis and response.

**Consultations.** Judicial independence precludes imposing reforms from without, which means that any proposals for judicial training and accountability must be developed in consultation with judges, or even developed by the judges themselves, with whatever assistance they may require. In addition, consultations with other key groups, such as the bar associations, prosecutors, justice ministries, legislatures, and court users are recommended. Lawyers, for example, are a source of information about problems which judges may not be aware of, and in many countries, future judges are drawn from the ranks of the legal profession, as well as in consultation with the practicing bar. In some cases bringing together different groups to discuss issues informally may prove productive. Based on the consultation process, a specific plan of action could be drafted to set out the proposed reforms in detail, set priorities and implementation sequence, and set targets for full implementation.

**Judicially-established measures.** To protect judicial independence, self-regulation structures should be developed wherever possible. This requires that, based on consultations and other sources of information, judges should be encouraged and assisted in the development and maintenance of their own accountability structures. This requires the establishment of bodies such as judicial councils, in which judges themselves hear complaints and impose disciplinary measures and remedies and develop preventive policies. Views about the extent to which training can be required without compromising judicial independence vary, but it is also preferable that training

programmes in anti-corruption and other areas be developed by, or in consultation with, judges to the greatest extent possible. This avoids the debate about independence and is likely to increase the effectiveness of the training.

**Judicial training.** The subject-matter of judicial training should be directed both at assisting judges in maintaining a high degree of professional competence as judges and a high degree of integrity. Possible subject-matter could include the review of codes of conduct for judges and lawyers, particularly if these have been revised or re-interpreted, and a review of statute and case law in key areas such as judicial bias, judicial discipline, the substantive and procedural rights of litigants and corruption-related criminal offences. Less-structured options, such as informal discussions, could be used to explore difficult ethical issues among judges.

**A judicial code of conduct.** Codes of conduct for judges could be developed and applied. Judicial independence does not require that such codes be developed by judges themselves, provided that specific provisions do not compromise independence. Judicial participation is important both to the development of suitable provisions and the subsequent adherence of judges to them, however. The application of a judicial code of conduct to individual judges alleged to have breached its provisions does raise independence concerns, however, and the power to apply such codes should be vested in the judges themselves. For this reason, key provisions of such codes would include that judges connected in any way with a complaint or the judge(s) involved not participate in any disciplinary or related proceedings. Once a code is established, judges should be trained on its provisions at the time they are appointed, and if necessary, at regular intervals thereafter. Transparency and the publication of a code are also important, to ensure that those who appear before judges, the mass-media and the general population is educated about the standards of conduct they are entitled to expect from their judges. As part of the consultation process, representatives of bar associations, prosecutors, justice ministries, legislatures and civil society in general should be involved in setting standards. Those involved in court proceedings also play an important role in identifying complaints and assisting the adjudication of those complaints.

**The quality of judicial appointments.** The objective in selecting new judges should be to ensure a high standard of integrity, fairness and competence in the law, and processes should focus on selecting for these characteristics. Several measures can assist in ensuring that the best possible candidates are elevated to the Bench. Transparency with respect to the nomination and appointment process and to the qualifications of proposed candidates will allow close scrutiny and make improper procedures difficult. Consultations with the practicing bar can be used to assess competence and integrity where the candidates are lawyers. The appointment process should be isolated from partisan politics or other extrinsic factors such as ethnicity or religion as much as possible. As a group, judges should generally represent the population at large, which means that appointments to senior or national courts may have to take into account factors such as ethnicity or geographic background, but these should not be allowed to interfere with the search for integrity and competence.

**The assignment of cases and judges.** Experience with judicial corruption has shown that, to improperly influence the outcomes of court cases, offenders must ensure not only that judges are corrupted in some way, but that the corrupt judge is assigned the case in which the outcome has been fixed. To combat this problem, procedures should be established to make it difficult for outsiders to predict or influence decisions about which judges will hear which cases. Features such as randomness and transparency can be incorporated into the assignment process can be used to ensure that it is not corrupt, although this will inform outsiders which judge will hear which case. This also occurs on major or appeal cases, where judges may hear preliminary matters or be asked to review written evidence and arguments well in advance of hearing the case.

The establishment of local or regional courts or judicial districts and the regular rotation or reassignment of judges among these courts or districts can also be used to help prevent corrupt relationships from developing. Factors such as gender, race, tribe, religion, minority involvement and other features of the judicial office-holder may also have to be considered in such cases.

**Transparency of legal proceedings.** Wherever possible, legal proceedings should be conducted in open court, a forum to which not only the interested parties, but also the mass-media, elements of civil society, have access. Public commentary on matters such as the efficacy, integrity and fairness of proceedings and outcomes is important and should not be unduly restricted by legislation, judicial orders or the application of contempt-of-court offences. The exclusion of the media or constraints on their commentary should be limited to matters on which this is demonstrably justifiable, for example the protection of vulnerable litigants, such as children, from undue public attention, and only to the extent that this interest is served. Media might be permitted to attend proceedings and report on the facts and outcome of a case, but not to identify those involved, for example. Ex parte proceedings, which exclude one or more of the litigants, should only be permitted where such secrecy is essential, and should always be a matter of record. Neither litigants nor legal counsel should have any communication with a judge unless representatives of all parties are present.

**The review of judicial decisions.** The primary forum for reviewing judicial decisions are the appellate courts, and appeal judges should have the power to comment on decisions which depart from legislation or case law so radically as to suggest bias or corruption. They should also be able to refer such cases to judicial councils or other disciplinary bodies where appropriate. Such bodies should also have the power to review (but not overturn) judgements where a complaint is made, or on their own initiative (e.g., where concerns are raised through other channels such as media reports).

**Transparency and the disclosure of assets and incomes.** As with other key officials, the potential corruption of judges can be approached on the basis of unaccounted-for enrichment while in office, using requirements that relevant information be disclosed and providing for investigations and disciplinary measures where impropriety is discovered. Powers to audit or investigate judges affect judicial independence if they are specific to a particular judge or inquiry. This means that, while other officials could perform routine or random audits, provided that true randomness can be assured, any follow-up investigations should generally be a matter for fellow judges.

**Judicial immunity.** By virtue of the nature of their offices, judges generally enjoy some degree of legal immunity. This should not extend to any form of immunity from criminal investigations or proceedings, but at the same time, improper criminal proceedings or even the threat of criminal charges can be used to compromise the independence of individual judges. Where criminal suspicions or allegations emerge, it may be advisable to ensure that these are reviewed, not only by independent prosecutors, but also by judicial councils or similar bodies. Where an investigation or criminal proceedings are underway, the judge concerned should be suspended until the matter has been resolved. A criminal acquittal should not necessarily lead to reinstatement as a judge, particularly where the burden of proof is higher in criminal proceedings than disciplinary ones. A judge might be dismissed where there was substantial evidence of wrongdoing, but not enough for a criminal conviction, for example, or in a case where misconduct was established which was not a crime but which was inconsistent with continued office as a judge (e.g., the failure to disclose income or conflicting interests).

**The protection of judges.** Experience suggests that, as judges become more resistant to positive corruption incentives such as bribe offers, they are more likely to be the targets of negative incentives such as threats, intimidation or attacks. To resist such incentives protection of judges and members of their families may be necessary, particularly in cases involving corruption by organized criminal groups, senior officials or other powerful and well-resourced interests.

**Dealing with judicial resistance to reforms.** Resistance from judges can arise from several factors. Legitimate concerns about judicial independence can – and should – make judges resistant to reforms which are imposed from non-judicial sources. In such cases, there is the risk that efforts to combat judicial corruption, even if successful, may set precedents which reduce independence and erode basic rule of law safeguards. Resistance of this nature can best be addressed by ensuring

that reforms are developed and implemented from within the judicial community, and that judges themselves are made aware of this fact and of the need to support reform efforts. Resistance may also come from judges who are corrupt, and fear the loss of income or other benefits, such as professional status, which derive from corruption or the influence it enables them to exert. Those involved in past acts of corruption may also face criminal liability if this is exposed. The benefits of reform to such judges, if any, tend to be longterm and indirect and therefore not seen as compensation for the shorter-term costs of ceasing corrupt activity and embracing reforms. To redress this imbalance, it may be possible in some cases to ensure that early stages of judicial reform programmes incorporate elements which provide positive incentives for the judges involved. For example, reforms which promote transparency, and accountability in judicial functions can be accompanied by improvements in training, professional status and compensation and tangible incentives such as early retirement packages, promotions for judges and support staff, new buildings, and expanded budgets. Another factor which may diminish judicial resistance is the public perception of the judiciary and resulting pressure on courts and judges. Where corruption is too pervasive, the basic utility of the courts tends to be eroded, leading members of the public to seek other means of resolving disputes, and the popular credibility and status of judges diminishes. Crises of this nature can graphically demonstrate the extent of corruption and the harm it causes, reduce institutional resistance, and generally provide a catalyst for reforms.

### *The reform of courts and judicial administration*

Court reforms intended to address corruption problems will often coincide with more general measures intended to promote the rule of law and general efficiency and effectiveness.

**Adequate resources and salaries.** Ensuring that courts are adequately staffed with judges and other personnel can help to reduce the potential for corruption. Officials who are adequately paid are less susceptible to bribery and other undue influences, and systems which deal with cases treatment or charge “speed money”.

**Court management structures.** Management structures can set standards for performance, and ensure transparency and accountability through means such as the keeping of proper records and tracking of cases through the system. Where feasible, computerization or the use of other information technologies may provide cost-effective means to implement such reforms.

**Statistical analysis of cases.** The analysis of statistical patterns with respect to how cases arise, how they are managed and assigned to judges and the outcomes of cases can help to establish norms or averages, and to identify unusual patterns which may be indicative of corruption or other biases. Where misconduct is suspected, the records of specific judges could be subjected to the same analysis.

**Public awareness and education.** Efforts should be made to educate the public about the proper functioning of judges and courts to raise awareness of the standards to be expected. This usually generates other benefits such as increasing the credibility and legitimacy of the courts and increasing the willingness of outsiders to participate in or cooperate with judicial proceedings.

**Alternative dispute resolution.** Alternatives such as mediation between litigants can be used to divert cases from the courts. This may allow litigants to avoid a forum suspected of corruption, although the alternative means may be just as vulnerable if not more so. These options do reduce court workloads and conserve resources, and are often available for impoverished litigants or small cases where a judicial trial is out of reach.

### **Preconditions and Risks**

#### *Implementation issues*

In taking actions to strengthen judicial institutions, measures directed at the judges themselves should generally be implemented first, for several reasons.

- Many other anti-corruption measures require an effective rule of law framework, which in turn requires competent and independent judges.
- Criminal court judges will be called upon to deal with corruption cases as a national anticorruption programme is applied. Early cases will set important precedents in areas such as the definition of corruption or acts of corruption and in deterring corruption.
- As corruption-related cases increase, judges themselves will become targets of corruption. If they succumb, many other elements of the strategy will fail.
- The judiciary is usually the most senior and respected element of the justice system, and the extent to which it pursues and achieves a high standard of integrity will set a precedent for other officials and institutions.
- The judiciary is also likely to be the smallest criminal justice system institution, which makes it relatively accessible by early, small-scale efforts.
- The independence of the judiciary imposes exceptional requirements which do not apply to the reform of other institutions and which may take time to achieve. Judges will require time to develop their own codes of conduct, for example.
- Judges exercise the widest discretion and have the most powerful positions in both civil and criminal justice systems. While reforms to other institutions such as the legal profession, prosecution services and law enforcement agencies are also critical, it is at the judicial level that corruption does the greatest harm, and where reforms have the greatest potential to improve the situation.
- To ensure lasting anticorruption reforms, short-term benefits must be channeled through permanent institutional mechanisms capable of sustaining reform. The best institutional scenario is one in which public sector reforms are the by-product of a consensus involving the legislatures, the judiciary, bar associations, and civil society.

#### *Related tools*

Tools which may be required before initiating the strengthening judicial institutions include:

- An independent and comprehensive assessment of the judiciary (usually on the request of the Chief Justice)
- The development, and establishment of a Code of Conduct for the Judiciary;
- The establishment of an independent and credible complaints mechanism for judicial matters; and,
- The establishment of a judicial council or similar body with the capacity to investigate complaints and enforce disciplinary action when necessary

Tools which may be needed in conjunction with anti-corruption agencies include:

- An integrity and action planning meeting among all key judicial players to agree on an action plan (usually on initiative of Chief Justice);
- The agreement of measurable performance indicators for the judiciary;
- The conduct of an independent comprehensive assessment of judicial capacity, efficiency and integrity, and of the degree of public confidence and trust in judges and judicial institutions; and,
- The dissemination and enforcement of a Code of Conduct for the Judiciary.

Due to the need for judicial independence, measures against judicial corruption are generally isolated from other elements of the national anti-corruption strategy. For this reason, there are no other tools which are inconsistent with judicial anti-corruption measures. For reasons of confidence and credibility in both judicial institutions and anti-corruption efforts, however, some degree of coordination may be advisable, so that judicial efforts are seen as part of a broader national anti-corruption effort where possible.

#### ***Implementation of the tool***



### *Who are the users of the tools*

The typical user of this tool will be the Chief Justice and or the Judiciary Service Commission. Having launched a reform programme at the national level, one would expect the Chief Justice to delegate the implementation of the reform to the Chief Judges at the state/district level.

### *Resources needed*

To assure the successful implementation of the reform of the judiciary, it is critical that the necessary resources are in place. Specific resources will vary according to the scope and duration of judicial reform programmes and cost factors associated with specific elements. Generally, costs may arise from elements associated with training, the support of judicial councils and specialized anti-corruption bodies better compensation, facilities and equipment, and the costs of retiring judges.

### *Timeline*

Most judicial reforms will be medium to long term in nature.

### *Impact and/or monitoring indicators*

## ***UNITED NATIONS CONVENTION AGAINST CORRUPTION, Article 11, Measures relating to the judiciary and prosecution services, UN, 2003***

### **Article 11. Measures relating to the judiciary and prosecution services**

Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.

## ***COMMONWEALTH (LATIMER HOUSE) PRINCIPLES ON THE THREE BRANCHES OF GOVERNMENT with Annex (Parliamentary Supremacy, Judicial Independence), The Commonwealth, 2003***

### **IX) Oversight of Government**

The promotion of zero-tolerance for corruption is vital to good governance. A transparent and accountable government, together with freedom of expression, encourages the full participation of its citizens in the democratic process.

## ***STRENGTHENING BASIC PRINCIPAL OF JUDICIAL CONDUCT, ECOSOC, Resolution 2006/23, 2006***

*Convinced* that corruption of members of the judiciary undermines the rule of law and affects public confidence in the judicial system,

*Convinced also* that the integrity, independence and impartiality of the judiciary are essential prerequisites for the effective protection of human rights and economic development,

## ***COMBATING CORRUPTION IN JUDICIAL SYSTEMS - ADVOCACY TOOLKIT, Transparency International, 2007***

### 3. Judicial Corruption and the Global Corruption Report 2007

#### Defining judicial corruption

TI defines corruption as ‘the abuse of entrusted power for private gain’. This means both financial or material gain and non-material gain, such as the furtherance of political or professional ambitions. Judicial corruption includes any inappropriate influence on the impartiality of the judicial process by any actor within the court system.

For example, a judge may allow or exclude evidence with the aim of justifying the acquittal of a guilty defendant of high political or social status. Judges or court staff may manipulate court dates to favour one party or another. In countries where there are no verbatim transcripts, judges may inaccurately summarise court proceedings or distort witness testimony before delivering a verdict that has been purchased by one of the parties in the case. Junior court personnel may ‘lose’ a file – for a price.

Other parts of the justice system may influence judicial corruption. Criminal cases can be corrupted before they reach the courts if police tamper with evidence that supports a criminal indictment, or prosecutors fail to apply uniform criteria to evidence generated by the police. In countries where the prosecution has a monopoly on bringing prosecutions before the courts, a corrupt prosecutor can effectively block off any avenue for legal redress.

Judicial corruption includes the misuse of the scarce public funds that most governments are willing to allocate to justice, which is rarely a high priority in political terms. For example, judges may hire family members to staff their courts or offices, and manipulate contracts for court buildings and equipment. Judicial corruption extends from pre-trial activities through the trial proceedings and settlement to the ultimate enforcement of decisions by court bailiffs.

The appeals process, ostensibly an important avenue for redress in cases of faulty verdicts, presents further opportunities for judicial corruption. When dominant political forces control the appointment of senior judges, the concept of appealing to a less partial authority may be no more than a mirage. Even when appointments are appropriate, the effectiveness of the appeals process is dented if the screening of requests for hearings is not transparent, or when the backlog of cases means years spent waiting to be heard. Appeals tend to favour the party with the deepest pockets, meaning that a party with limited resources, but a legitimate complaint, may not be able to pursue their case beyond the first instance.

#### The scope of judicial corruption

An important distinction exists between judicial systems that are relatively free of corruption and those that suffer from systemic manipulation. Indicators of judicial corruption map neatly onto broader measures of corruption: judiciaries that suffer from systemic corruption are generally found in societies where corruption is rampant across the public sector. There is also a correlation between levels of judicial corruption and levels of economic growth since the expectation that contracts will be honoured and disputes resolved fairly is vital to investors, and underpins sound business development and growth. An independent and impartial judiciary has important consequences for trade, investment and financial markets, as countries as diverse as China and Nigeria have learned.

The goals of corrupt behaviour in the judicial sector vary. Some corruption distorts the judicial process to produce an unjust outcome. But there are many more people who bribe to navigate or hasten the judicial process towards what may well be a just outcome. Ultimately neither is acceptable since the victim in each case is the court user. In the worst judicial environments, however, both are tolerated activities, and are even encouraged by those who work around the courthouse. TI’s Global Corruption Barometer 2006 polled 59,661 people in 62 countries and found that in one third of these countries more than 10 per cent of respondents who had interacted with the judicial system claimed that they or a member of their household had paid a bribe to obtain a ‘fair’ outcome in a judicial case.

#### Types of judicial corruption

There are two types of corruption that most affect judiciaries: political interference in judicial processes by either the executive or legislative branches of government, and bribery.

#### A. Political interference in judicial processes

A dispiriting finding of this volume is that despite several decades of reform efforts and international instruments protecting judicial independence, judges and court personnel around the world continue to face pressure to rule in favour of powerful political or economic entities, rather than according to the law. Backsliding on international standards is evident in some countries. Political powers have increased their influence over the judiciary, for instance, in Russia and Argentina.

A pliable judiciary provides 'legal' protection to those in power for dubious or illegal strategies such as embezzlement, nepotism, crony privatisations or political decisions that might otherwise encounter resistance in the legislature or from the media. In November 2006, for example, an Argentine judge appointed by former president Carlos Menem ruled that excess campaign expenditures by the ruling party had not violated the 2002 campaign financing law because parties were not responsible for financing of which 'they were unaware.'

Political interference comes about by threat, intimidation and simple bribery of judges, but also by the manipulation of judicial appointments, salaries and conditions of service. In Algeria judges who are thought 'too' independent are penalised and transferred to distant locations. In Kenya judges were pressured to step down without being informed of the allegations against them in an anti-corruption campaign that was widely seen as politically expedient. Judges perceived as problematic by the powerful can be reassigned from sensitive positions or have control of sensitive cases transferred to more pliable judges. This was a tactic used in Peru by former president Alberto Fujimori and which also occurs in Sri Lanka.

Key to preventing this type of corruption are constitutional and legal mechanisms that shield judges from sudden dismissal or transfer without the benefit of an impartial inquiry. This protection goes much of the way toward ensuring that courts, judges and their judgments are independent of outside influences.

But it can be equally problematic if judges are permitted to shelter behind outdated immunity provisions, draconian contempt laws or notions of collegiality, as in Turkey, Pakistan and Nepal respectively. What is required is a careful balance of independence and accountability, and much more transparency than most governments or judiciaries have been willing to introduce.

Judicial independence is founded on public confidence. The perceived integrity of the institution is of particular importance, since it underpins trust in the institution. Until recently, the head of the British judiciary was simultaneously speaker of the UK upper house of parliament and a member of the executive, which presented problems of conflict of interest. In the United States, judicial elections are marred by concerns that donations to judges' election campaigns will inevitably influence judicial decision making.

Judicial and political corruption are mutually reinforcing. Where the justice system is corrupt, sanctions on people who use bribes and threats to suborn politicians are unlikely to be enforced. The ramifications of this dynamic are deep as they deter more honest and unfettered candidates from entering or succeeding in politics or public service.

#### B. Bribery

Bribery can occur at every point of interaction in the judicial system: court officials may extort money for work they should do anyway; lawyers may charge additional 'fees' to expedite or delay cases, or to direct clients to judges known to take bribes for favourable decisions. For their part, judges may accept bribes to delay or accelerate cases, accept or deny appeals, influence other judges or simply

decide a case in a certain way. Studies in this volume from India and Bangladesh detail how lengthy adjournments force people to pay bribes to speed up their cases.

When defendants or litigants already have a low opinion of the honesty of judges and the judicial process, they are far more likely to resort to bribing court officials, lawyers and judges to achieve their ends.

It is important to remember that formal judiciaries handle only a fraction of disputes in the developing world; traditional legal systems or state-run administrative justice processes account for an estimated 90 per cent of non-legal cases in many parts of the globe. Most research on customary systems has emphasised their importance as the only alternative to the sluggish, costly and graft-ridden government processes, but they also contain elements of corruption and other forms of bias. For instance in Bangladesh fees are extorted from complainants by 'touts' who claim to be able to sway the decisions of a shalish panel of local figures called to resolve community disputes and impose sanctions on them. Furthermore, women are unlikely to have equal access to justice in a customary context that downplays their human and economic rights.

### ***THE PARLIAMENTARY ASSEMBLY: RESOLUTION 1703 - JUDICIAL CORRUPTION, COE, 2010***

1. The Parliamentary Assembly observes that a corrupt judicial system undermines the rule of law, which is the backbone of a pluralist democracy; calls into question equal treatment before the law as well as the right to a fair trial, and erodes the legitimacy of all the public authorities.

2. Judicial corruption favours impunity, the eradication of which the Assembly demanded as a priority in its Resolution 1675 (2009) on the state of human rights in Europe: the need to eradicate impunity.

3. Judicial corruption and corruption of other public institutions, as well as of the private sector, nurture and reinforce each other. Eradication of corruption, once it becomes entrenched, is much harder than its prevention, hence the importance of combating the first signs of corruption, especially in the countries unaffected by this scourge.

### ***VILAMOURA MANIFEST, JUSTICE IN FRONT OF ECONOMIC CRISIS, MEDEL, 2012***

Fight against corruption.

15. Plundering of the resources of the European Union and the Member states justifies the intensification of the fight against corruption. It is essential, in particular, to give full effect to the UN Convention against Corruption (Mérida Convention), Conventions of the Council of Europe against corruption in criminal and civil matters and the Brussels Convention regarding the fight against corruption involving officials of the European Union or Member States.

### ***REPORT ON JUDICIAL CORRUPTION AND COMBATTING CORRUPTION THROUGH THE JUDICIAL SYSTEM, UN Doc A/67/305 (13 August 2012), United Nation Special Rapporteur on the independence of judges and lawyers***

16. Transparency International defines corruption as "the abuse of entrusted power for private gain". Such a definition therefore includes both financial or material gain and non-material gain. In addition, a distinction is made between grand and petty corruption. Grand corruption involves large sums of money and implies the participation or complicity of highly placed officials. Grand-scale corruption can affect or even jeopardize the entire economy of a particular State. Petty corruption refers to smaller amounts of money, usually involving actors attempting to supplement their low salaries.

108. Corruption undermines the rule of law, democracy, social and economic development and the protection of human rights. Member States may wish to consider classifying large-scale corruption as a serious crime and be actively engaged in concrete actions for preventing and combating corruption. The judicial system plays a very important role in this context. It is of paramount importance that a clear message be sent: corrupt behaviour is not acceptable and will lead to appropriate disciplinary measures or, where appropriate, criminal proceedings against those who have engaged in it.

109. Judicial corruption erodes the principles of independence, impartiality and integrity of the judiciary; infringes on the right to a fair trial; creates obstacles to the effective and efficient administration of justice; and undermines the credibility of the entire justice system.

**General recommendations** (a) States and other stakeholders should place the independence of judges, prosecutors and lawyers at the centre of their policies aimed at preventing and combating corruption and strengthening the rule of law and human rights; (b) States should acknowledge that, because of its attributes, the judicial system is in an ideal position to initiate and reinforce the fight against corruption, as well as achieve results, and therefore deserves particular attention in States' anti-corruption policies; (c) All State authorities should monitor the performance of public functions, including those implementing anti-corruption measures; (d) States should formulate their anti-corruption reforms bearing in mind the context of their specific legal, social, cultural, economic and political environments.

### ***AMICUS CURIAE BRIEF ON THE IMMUNITY OF JUDGES FOR THE CONSTITUTIONAL COURT OF MOLDOVA, Venice Commission, 2013***

#### II. International Standards, D. The Venice Commission

19. In sum, judges should enjoy only functional immunity, that is to say immunity from prosecution only for lawful acts performed in carrying out their functions. In this regard, it seems obvious that passive corruption, traffic of influence, bribery, and similar offences cannot be considered as acts committed in the lawful exercise of judicial functions.

#### V. Conclusions

50. The central issue is whether the complete removal of corruption offences from the scope of judicial immunity contradicts judicial independence, taking into account the weak position of the judiciary in Eastern Europe, including in Moldova.

54. While functional safeguards are needed to guarantee judicial independence against undue external influence, broad immunity is not. Judicial independence does not depend on wide immunity and judges should answer for any alleged crimes on the presumption that normal procedures of defence, appeal and other elements of the rule of law are at their full disposal.

### ***STATE OF DEMOCRACY, HUMAN RIGHTS AND RULE OF LAW IN EUROPE Council of Europe, Secretary General, 2014***

#### Chapter A, Set-up and function of the judiciary

- In 2010, the Parliamentary Assembly reported deeply embedded judicial corruption in many member States and, in some states, the justice system is completely corrupt. The Global Corruption Barometer published by Transparency International in 2013 shows that, in nearly one quarter of all member States of the Council of Europe the judiciary was perceived to be among the institutions most affected by corruption.

#### Chapter B, Corruption

- Corruption in public [...]. Member States must ensure transparency by protecting those who report wrongdoing (whistle-blowers), helping to manage conflicts of interest and providing those who fight against corruption with the requisite independence and resources. Civil society and the media must also fulfil their watchdog role without undue influence from the state.

**DOHA DECLARATION ON INTEGRATING CRIME PREVENTION AND CRIMINAL JUSTICE INTO THE WIDER UNITED NATIONS AGENDA TO ADDRESS SOCIAL AND ECONOMIC CHALLENGES AND TO PROMOTE THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS, AND PUBLIC PARTICIPATION, Adopted by the 13<sup>th</sup> United Nations Congress on Crime Prevention and Criminal Justice, Doha, 12-19 April 2015**

5. We reaffirm our commitment and strong political will in support of effective, fair, humane and accountable criminal justice systems and the institutions comprising them, and encourage the effective participation and inclusion of all sectors of society (...). To that end, we endeavour:

(d) To make every effort to prevent and counter corruption, and to implement measures aimed at enhancing transparency in public administration and promoting the integrity and accountability of our criminal justice systems, in accordance with the United Nations Convention against Corruption;

**THE INTERNATIONAL BAR ASSOCIATION, JUDICIAL INTEGRITY INITIATIVE: JUDICIAL SYSTEM CORRUPTION, May 2016**

Some forms of corrupt behaviour can be identified across judicial systems affecting all the judicial professions, to varying extents and at different stages of the judicial process. These are as follows:

1. bribery;
2. undue political influence over the outcome of, or political interference in, a judicial process;
3. extortion of judicial professions, victims and witnesses; and
4. misuse of public funds and resources.

**1. Bribery**

The literature suggests that bribes may be accepted, demanded or paid across judicial professions or throughout judicial systems. External actors might seek to interfere in a case, for instance, by bribing:

- a judge to influence his or her decision-making;
- a lawyer to advise his or her client in a specific way; or
- court staff to tamper with evidence.

**(i) Patterns of bribery**

The literature review shows that the incidence and forms of bribery can vary from one country to another. In our research, we have sought to distinguish specific patterns of bribery across the Study Countries as follows.

**Endemic bribery**

Some countries purportedly have high levels of corruption permeating all pillars of the state, which impacts on all levels of political, government and judicial activity and where petty corruption is believed to be rampant. In this context, the survey findings suggest that perceived bribery in the judiciary, as in all sectors, is the norm. In some cases, according to one interviewee, it is indispensable when obtaining any kind of service.

**Limited bribery**

Recourse to bribing is regarded as common but not widespread:

- it could be limited to an ability to pay, generating unequal access to the judicial process along socio-economic lines; and

- it could be more prevalent in certain specialised courts or associated with specific types of cases, whereas other spheres in the judiciary remain essentially corruption-free.

There are also reported differences between perceived prevalence of bribing between subnational and national level judicial systems.

### Intimidatory and targeted bribery

In some countries the political and government systems reportedly are heavily influenced, if not captured, by organised criminal networks. In these cases, the most prominent reported form of corruption is heavy-handed bribery or extortion, often accompanied by threats of violence for non-compliance.

#### (ii) Judicial Professionals involved

##### Judges

Individual judges may accept or demand bribes from political actors, lawyers, one of the parties – especially where economic interests of a company are at stake – or other external actors, to tamper with a case or grant access to legal services otherwise not granted.

According to survey responses, judges were reportedly involved in bribery relatively frequently in the Study Countries of Mexico (27 per cent), Nigeria (15 per cent), the Philippines (22 per cent), Russia (28 per cent) and Ukraine (26 per cent), with the highest incidence, 40 per cent, being reported for Uganda. In terms of drivers of corrupt behaviours on the part of judges, remuneration issues (ie, insufficient salaries) were mentioned during in-country consultations to generate corruption risks. Respondents from several of the Study Countries (Brazil, Mexico, the Philippines and Russia) believed that obtaining material benefits was the strongest motivation for judges to engage in corrupt behaviours. In the Philippines, it was said that judges allegedly depend heavily on private benefactors and subnational government units, whose discretionary allowances sometimes amount to up to 30–40 per cent of the judge's salary. Other reported potential drivers of corruption referred to include lack of adequate resources, heavy workloads and pressures to decide cases within short timeframes.

##### Prosecutors

Our study findings suggest that prosecutors may ask for bribes or possibly face external pressure to delay or accelerate the judicial process. Reportedly, bribes are also being paid to prosecutors to tamper with evidence, such as police records and reports, to lose documents, inappropriately accept/deny plea offers or interfere with the investigation process. This was confirmed by a study conducted in the US, which showed that the most common offence was to hide relevant evidence. Bribery of prosecutors is also often intended to delay cases until they reach the statutory limit. Survey results indicate that bribery was perceived among survey respondents to happen very frequently or frequently among prosecutors in the Study Countries of Mexico (36 per cent) the Philippines (30 per cent), Russia (26 per cent), Uganda (53 per cent) and Ukraine (30 per cent).

##### Court personnel

According to the literature, court administrative and support staff serve key roles in ensuring a smooth judicial process, while also keeping a low profile. They can also play a key role in engaging in irregularities in the judicial process. Several risks may arise that are characteristic of court personnel: clerks and paralegals often have direct and largely uncontrolled access to relevant documents, such as evidence, reports, judgments and so on. Court personnel are often poorly paid or at least paid significantly less than judges or lawyers, which potentially increases incentives for unethical behaviour.

Corruption opportunities of court personnel can be linked to legal proceedings and case administration. For example, many have the opportunity to tamper with the judicial process by accepting kick-backs to deliberately lose or alter files, influence case management or give access to judicial decisions before they are officially released. They may also solicit bribes to manipulate minutes as well as forging figures or favouring particular insurance firms in association with the filing of bonds.

Some published case studies suggest that court personnel can further serve as middlemen for judges and/or lawyers and request, or pretend to request, bribes on their behalf. With a view to individual benefits, they might be tempted to charge unauthorised fees for court services or inflate existing administrative fees, and might extort money for work they should do anyway. For example, a case has been uncovered in Benin where treasury employees and court clerks overcharged legal fees allegedly amounting to around 2bn CFA francs over a three-year period. Such actions often take advantage of a lack of understanding of court procedures among the population.

The literature suggests that those members of judicial systems who interact with or are conduits for parties from outside the judicial system, such as court personnel, are the most vulnerable to corruption, particularly bribery. For example, in some countries, filing clerks constantly interact with litigants. It may be that litigants offer illicit payments to ensure their matter is expedited or filing clerks may insist on being paid an illicit payment before agreeing to file a litigant's matter. By contrast, in some countries, court stenographers have limited exposure to external parties, which means they have less opportunity to request or be offered inappropriate or illicit payments.

According to the survey data, however, the assumption that court personnel serve a key role when it comes to bribery in the judicial system was only distinctively reported by the respondents from the Study Countries of Brazil (28 per cent), Nigeria (21 per cent), the Philippines (30 per cent), Turkey (40 per cent) and Uganda (47 per cent).

## 2. Undue influence and other forms of interference

### (i) Patterns of undue influence and interference

Based on the literature and our analysis of the survey results, it is important to distinguish between undue influence on the one hand and more direct interference, political and otherwise, exerted on judicial professions on the other.

Undue influence, or interference, of some form, but particularly of a political nature, was believed to be significant to respondents in most of the Study Countries. Furthermore, the diversity of the countries represented in the 'very high' prevalence for undue influence or interference would appear to suggest that risks for undue influence or interference are more prevalent regardless of other macro-level determinants, such as income level, population, political regime and type of judicial system. Rather, undue influence or interference purportedly seems to be exerted in countries that otherwise have stable institutions and where the rule of law is generally respected.

#### Undue influence

a) Undue influence through closed informal networks representing particular economic or political interests: In most countries, there exist informal social networks that may be based on kinship, ethnicity or other types of particular connections, such as where one was educated. Informal networks can span public and private sectors and operate across government, business, politics and judicial systems.

Informal networks are not inherently corrupt. However, their existence means there is a risk that individuals of influence can, through their networks, penetrate judicial systems with the intention of selectively influencing the outcomes of cases. Or it may be that the membership of an informal network means one judicial professional is treated more leniently or granted more flexibility than another who is not a member. For example, a judge may be more prepared to accept a particular line of reasoning if it is presented by a lawyer with whom that judge went to university.

#### Undue political influence

b) Undue political influence through appointments on an openly partisan basis: In some jurisdictions, where judges are appointed by popular vote or where the government controls the appointment process, they rely on political parties for their nomination. In many countries where this occurs, the nomination and election or selection processes tend to be transparent. However, there is always the risk that a legitimate process of this type can be subverted for improper purposes. This could manifest in a number of ways. For example, a judge may purposely compromise his or her approach to judicial decision-making to retain political support.



c) Undue political influence through manipulation of budget allocations: Budgetary control by either the legislative or executive branch can play an important role in subverting the independence of the judiciary. This view was supported by several in-country consultations participants. Governments may seek to manipulate judicial decisions by threatening to minimise or significantly reduce budgets allocated to the judiciary if judicial professionals are not compliant with the government agenda.

d) Undue political influence exercised through closed informal networks: In addition to the findings set out under the heading 'Undue influence', our study indicates that informal networks can be manipulated for political reasons. The manner in which this is done is by strategically appointing regime insiders, including to high positions in the judiciary, knowing they will perform a gatekeeper-like function to guarantee protection and impunity of the ruling elite. Other examples include the Filipino patronage or padrino system.

#### Political and other types of interference

e) *Interference through closed informal networks representing particular economic or political interests*: The influence of informal networks can extend beyond undue influence and undue political influence to direct interference. Where such informal networks are particularly strong, members of those networks may seek to directly intervene in the judicial selection process or in judicial decision-making to ensure particular interests – political, commercial or social – remain protected. Although this pattern may take different specific forms, where political and economic power is concentrated and monopolised by informal networks, it is often the case that strategic appointments embed individuals in the judiciary who perform a function as 'gatekeepers' to those in power. For example, informal networks of political and business interests may work together to deliberately manipulate political, business and legal structures and appointments to preclude any potential opposition from securing access to positions of power and influence. As with undue political influence, this can be done by strategically appointing regime insiders, including to high positions in the judiciary, but in this case with the expectation that they can be and will be directed to make decisions that will guarantee protection and impunity of those in power.

f) *Political interference through appointments based on particular but transparent criteria*: Key appointments are controlled, either directly or indirectly, by powerful actors and openly reflect practices of nepotism or other forms of favouritism. In such cases, accountability tends to be weak and therefore, although such instances may be openly identifiable and their impact on judicial performance evident, there are limited mechanisms to circumscribe this type of political interference. Examples of such practices would be found where a politician may exert pressure on a judge who is due to be re-elected, encouraging the judge to make unduly favourable decisions on matters that have political resonance, or in highly autocratic regimes where high-level nepotism is the norm (eg, members of the president's family are openly appointed into high-level positions in government) and key state institutions, such as the prosecutorial agencies, are openly and effectively captured by private interests.

g) *Interference by organised crime groups*: Undue interference in the judiciary may also be of a violent nature, as in cases where organised crime is involved. The goal is to ensure specific outcomes, that particular cases be dropped or to ensure acquittal of some individuals, and is often accompanied by threats and/or extortion. This category is different from the previous ones in that the interference of such networks is exercised selectively on judicial professionals on a case-by-case basis, without regard for the manner in which they have been appointed. Because of its informal and non-transparent nature, it is extremely difficult to monitor its impact on the overall performance of the judiciary.

#### Judicial Professionals involved

##### Judges, prosecutors and investigators

The literature notes that independence and accountability of judges are fundamental to an impartial judicial process. As a consequence, judges' protection from undue influence or interference is a key concern and various principles and standards for judicial independence have been introduced by different bodies. At the same time, cases where judges have used their margin of discretion to make biased decisions have evinced the need for more accountability and oversight. This is of particular

importance with regard to the criminal justice chain: because of the need for security and confidentiality, the degree of discretion is extremely high, combined with limited external oversight.

In fact, undue political influence on the appointment and promotion of judges, their tenure and working conditions have been highlighted in the literature as one of the biggest risks at the institutional level. Impartial decision-making is compromised where judges face potential reprisals, such as threats to be dismissed or appointed to a remote area if they issue an unpopular judgment.

Our survey findings show that respondents from the Study Countries considered undue political influence or political interference to be directed not only at judges, but also prosecutors and investigators. The highest perceived incidences for these professions were reported in Turkey (between 25 and 58 per cent) and Russia (between 43 and 46 per cent).

### 3. Extortion, misuse of funds and other forms of corrupt behaviour

The literature review reveals that extortion of judges or lawyers is another means by which political actors, businesses or influential persons may seek to interfere with a judicial process. Organised crime groups pose another risk: as a Europol investigation has shown, they frequently make use of corrupt practices, such as bribery and extortion, to avoid investigation and detection.

In the survey, of the Study Countries, only in one case – Uganda – was the incidence of extortion perceived to be very high by a majority of respondents. Seventy-three per cent of the respondents in Uganda perceived significant incidences of extortion within the judiciary. In terms of specific legal professionals being targeted with extortion, survey respondents from Uganda reported the highest levels (common or very common) of high extortion levels perceived to occur involving prosecutors (40 per cent); investigators, lawyers and court personnel (33 per cent); judges, regulatory authorities, civil status disputes litigants and defendants in criminal prosecutions (27 per cent); and expert witnesses and public defenders (20 per cent). By contrast, respondents perceived extortion to occur less frequently in Nigeria, Mexico and Ukraine. Other legal professionals that respondents suggested were involved in extortion included prosecutors (Ukraine 16 per cent and Argentina 15 per cent), and regulatory authorities (Brazil 17 per cent and Argentina 15 per cent).

Another form of judicial corruption consists of the misuse of the scarce public funds. For example, judges may hire family members to staff their courts or of ces, or contracts for court buildings and equipment may be manipulated. In some cases, as was highlighted by one interviewee, this is made evident by the bad condition of premises as well as the lack of minimum equipment and materials courts need to operate.

Reported perceptions about the misuse of funds in the survey suggest that this is a problem severely affecting the judiciary in some of the Study Countries. For instance, 53 per cent of the respondents from Uganda believed that judicial personnel misused funds within the judiciary. Similarly, 45 per cent of the respondents from Mexico also perceived a high incidence of misuse of funds within the judiciary, while 44 per cent and 40 per cent of the respondents from Brazil and Nigeria, respectively, shared the same view. The survey results further reveal that 27 per cent, 25 per cent, 22 per cent and 13 per cent of the respondents from India, Turkey, Costa Rica and Italy, respectively, believed that there was a significant incidence of misuse of funds within the judiciary in their respective countries.

### 4. Other forms of corruption identified

In addition to the aforementioned categories, survey respondents from Study Countries as diverse as Australia, Belgium, France, India, New Zealand, Nigeria, South Korea, Spain, and the Philippines believe that nepotism and favouritism are prevalent manifestations of corruption. As a result, it is possible that unqualified individuals may occupy key positions in the judiciary, which in turn may have repercussions on the guarantee of a fair trial.

A related form of corrupt behaviour that was frequently referred to is influence peddling. This was reported by respondents from Argentina, Costa Rica, England, India, the Netherlands and Nigeria. According to them, such conduct was most frequently initiated by influential persons, both from the

private and public sectors, as well as ordinary persons relying on political or family ties, or alumni networks, as well as between members of the judiciary.

Other sources of corrupt conduct that respondents believed occurs includes conflict of interests (Belgium and the Philippines), money laundering (Russia) and collusion between the political branches of power (Chile, Argentina and Spain).

Uganda was the only Study Country where respondents perceived corruption to be 'very high' for all four types of corruption identified. The two other Study Countries where high levels of misuse of funds are believed to occur are middle-income Latin American countries.

#### 4.3 Corruption in interaction between different professions

##### 1. Judges' interactions with other judicial professionals

TI's Global Corruption Report 2007 identified three key problems of corruption with regard to unethical behaviour among and between judges. These are linked to: (1) judicial appointments (vulnerability of judges to bribery due to the limited terms and insecure working conditions, including unfair processes for promotion and transfer); (2) accountability and discipline (unfair or ineffective processes for the discipline and removal of corrupt judges can often lead to the removal of independent judges for reasons of political expediency); and (3) a lack of transparency of court processes, preventing the media and civil society from monitoring court activity and exposing judicial corruption.

Our survey data for the Study Countries suggests that judges, in general, are perceived to conduct their work independently and impartially, with either very low or no incidences of corrupt conduct initiated by judges reported. Nonetheless, judges are not immune to corruption: respondents were of the view that corrupt behaviour was frequently initiated by judges with other judicial professions in Ukraine, Russia, Nigeria, Argentina, the Philippines, Uganda and Mexico. According to the survey data, judges reportedly most frequently approach lawyers, with the highest incidence reported in Mexico (27 per cent), Argentina (25 per cent) and Uganda (20 per cent). In Ukraine, Russia, Argentina and Mexico, respondents were of the view that judges frequently approach other judges to initiate corrupt behaviour. It stands out that Uganda is the only country where 40 per cent of the respondents believed that judges approach court personnel to engage in corrupt behaviour.

In addition to judges' active roles, in ten of the Study Countries at least ten per cent of the respondents perceived judges as being involved in corrupt behaviour initiated by other judicial professionals, and about half of those respondents claimed to have actual knowledge of such cases. Judges were most frequently perceived to have been complicit in corrupt conduct in Argentina, Brazil, India, Mexico, Nigeria, the Philippines, Russia, Turkey, Uganda and Ukraine. Whereas, according to the survey data, judges in Brazil and India are perceived most likely to be approached by lawyers, in Uganda and Mexico, 18–36 per cent of the respondents reported that judges reportedly were frequently approached by colleagues representing all the judicial professions.

Some participants in the in-country consultations were of the opinion that judges are the key figures when it comes to corrupt behaviour in the judiciary because the power of conviction or acquittal ultimately lies with them. However, information from some Study Countries, and in particular from others involved in the in-country consultations, also indicates the difficulties that can occur when seeking to bring corrupt judges to account. In the Philippines, for instance, participants in the in-country consultation explained how the Bar depends on judges to endorse admissions and exercise disciplinary measures. This may make it difficult for lawyers to raise concerns about corrupt judges for fear of repercussions. In the experience of some participants, when a lawyer makes a complaint against a judge, it is frequently met with a disbarment counterclaim.

Some participants in the in-country consultations raised several issues that may make judges vulnerable to corruption. These included judicial discretion in general and evaluation criteria for judges in particular: a participant in an in-country consultation noted that in Mexico, judges are evaluated by the number of cases ruled only rather than taking into account the number of reversals made by the courts of appeal. Judges' discretion was also perceived to open the door to abuse of power and compromised rulings, even more so where magistrates coming from administrative or

political careers are appointed, or in cases where judges do not discuss cases in the presence of both parties.

Overall, our survey findings suggest that judges are perceived most frequently to engage in corrupt conduct in their interactions with lawyers and other judges, which indicates that such behaviour is predominantly focused on internal interactions within the judicial system as opposed to third parties.

#### 4.4 Prevalence of corruption across types of cases and phases in the judicial process

The literature suggests that different risks arise and different actors are most at risk of corruption at different stages of the process: before a case reaches the court, lawyers, prosecutors and police officers are most at risk as they build up the case. Risks include political influence or bribery in order to tamper with evidence and the charges brought before the court. During court proceedings, judges, lawyers and clerks might be approached to influence the outcome of the case, to delay or accelerate it, drop charges or sway the judge's final verdict. Once a judgment has been pronounced, lawyers might be bribed not to appeal it.

Results from the survey, as analysed in the Study Countries, indicate that the types of cases where corrupt behaviours are most often perceived to occur are criminal cases, followed by general civil status cases. Other cases mentioned were commercial cases, labour law and social security cases, property cases, family cases and enforcement procedures. The reportedly high incidence of corruption in criminal cases may be attributable to the high sanctions that are at stake for defendants in criminal prosecutions and, to an even higher extent, in cases related to organised crime. In Mexico, for instance, participants in the in-country consultation were of the opinion that the incidence of organised crime is highest in relation to criminal matters, followed by commercial cases associated to money laundering activities. While corrupt behaviour was perceived to be prevalent across all types of cases, the lowest incidence was reported for constitutional cases.

In-country consultations also highlighted a number of interesting patterns of reported corrupt behaviour arising to circumvent existing policies and regulations. For instance, according to some participants in the Philippines consultation, bribery was believed to be extraordinarily high in marriage annulment cases, given that divorce is not legal and annulment cases may take a long time.

The information derived from the survey data from the Study Countries is inconclusive as to the prevalence of corrupt behaviour at the different stages of the judicial process: our findings suggest that this may vary significantly from one country to another. Russia stands out to the extent that respondents consider that corruption occurs in all stages of the process, whereas in Mexico and Uganda, respondents mentioned the enforcement of sanctions as a key concern. In fact, in Mexico, participants in the in-country consultation even indicated that the enforcement of sanctions was where most of the corrupt transactions occur.

## VIII. 2. PREVENTION POLICIES

### ***POLICY FRAMEWORK FOR PREVENTING AND ELIMINATING CORRUPTION AND ENSURING THE IMPARTIALITY OF THE JUDICIAL SYSTEM, Centre for the Independence of Judges and Lawyers of the International Commission of Jurists, 2000***

*Facilitating Public Awareness* Public participation in reporting and criticising corruption of the judicial system is a vital element in combating corruption. This requires the public to be informed concerning the deleterious effects that corruption and loss of impartiality in the judicial system have on them. Civil society coalitions, by a synergy of effort, have the potential to effectively combat and eliminate instances of corruption of, and loss of impartiality in, the judicial system. The judicial system should therefore assume the responsibility, together with other arms of government where possible, of keeping the public informed in a way which enables it to identify and expose corruption. The role of an independent and responsible media in increasing awareness is vital. The judiciary should therefore formulate proposals for keeping the public, including the media, informed and educated concerning the operation of the judicial system.

#### *Indicators of Corruption of the Judicial System*

Public perceptions of the existence of corruption and loss of impartiality in the judicial system are important as indicators of a serious condition requiring attention. Firstly, they are damaging to the whole judicial system even if formed only in respect of particular persons. Secondly, they may suggest good reason to investigate the extent of alleged corrupt conduct. Social science provides some methodologies to investigate that conduct and identify appropriate indicators. Such methodologies may not yield exact measurement of the dimension of corrupt conduct and may not yield measurement according to legal standards of proof. Nevertheless, as indicators of public perception they can be important in motivating governments and judicial systems to reform. They can also be important in developing and mobilising public opinion against corruption of the judicial system.

#### *National and International Legislation*

International and regional recognition of the need for states to criminalise or discipline all forms of corruption of the judicial system will encourage the prevention and elimination of such acts. This could be achieved through ensuring that multilateral treaties addressing corruption in relation to the legislative and executive branches of government also cover corruption in the judiciary. International recognition could also be achieved by initiatives through the United Nations system. National legislation should:

- criminalise conventional acts of corruption;
- require the disclosure of assets and liabilities of judges and other officers in the judicial system which is then independently monitored;
- provide for disciplinary or other proceedings against judges, in respect of a breach of a code of ethics, carried out by the judicial system; and
- provide for disciplinary or other proceedings against court officers consistent with any laws relating to their service.

The CIJL will examine present national legislative provisions with a view to identify acts beyond traditional criminal acts of corruption which have been criminalised.

#### *Eliminating Contributing Causes To Corruption*

Creating the proper framework and conditions for an impartial judicial system is an essential factor for preventing and eliminating corruption of the system. This requires that the selection and promotion of judges is based on merit and protects against appointments or promotion for extraneous reasons or improper motives. This necessitates that the independence of the judiciary be strengthened. Improving the overall conditions of service in the judicial system will also help to bring change in individual conduct. The judicial system requires adequate funding by each state. Such funding must be determined following consultation with the judiciary and be a matter of budget priority. It should take the form of an overall amount allocated directly to the judicial system, which shall be responsible for its internal allocation and administration.

### *Statements of Judicial Ethics*

A statement of judicial ethics, such as in the form of a code, can play an essential part in preventing or eliminating corruption of the judicial system. Such a code may explain the ethical aspects of appropriate conduct to judges and court officers, encourage informed public understanding of the judicial system, and inspire public confidence in the integrity of the judicial institution. Consistently with the need for independence in the judicial system as a means of protecting impartiality in decision making, a code of judicial ethics should not be drafted by the legislature or executive. It should be drafted and revised by the judiciary with such advice as may be appropriate. In some countries it may be appropriate that the task be assumed by an independent national judicial commission which includes lay representation. The imposition of sanctions for conduct in breach of a code may require legislative authority. This is particularly the case where the sanction requires the removal of a judge from office. It will then be appropriate for the imposition of the sanction to take place in accordance with any constitutional or legislative provision for such removal. In the case of non-judicial persons in the judicial system, the imposition of any sanction will need to be consistent with the laws relating to their service. Any breach or failure to act in accordance with such laws should be sanctioned as well. The development of domestic codes of judicial ethics could be assisted by the development of an international best practice model based on a survey of existing codes, a project that the CIJL will undertake.

### *Legal Education*

Legal education plays an important role in creating an understanding of the ethical dimensions of the law and the judicial system. Basic legal training should include the teaching of ethics. Orientation and continuing legal education for judges and court officers should include ethical issues relating to the judicial system. It is equally vital that associations of lawyers as well as academic institutions discuss and address ethical issues through measures including publications and continuing legal education.

## **COMMONWEALTH JUDICIAL COLLOQUIUM ON COMBATTING CORRUPTION WITHIN THE JUDICIARY, LIMASSOL CONCLUSIONS, 2002**

8. The Colloquium conclusions and recommendations cover a number of subjects and areas. Those considered by the Colloquium to be of paramount importance are the following:

The Colloquium -

- i. recommends the adoption of guidelines on judicial ethics as a means of underpinning the integrity of the judiciary and promoting better public awareness of the requisite ethical standards. Such guidelines should be formulated by judicial officers and kept under constant review by them. Judicial officers should take responsibility for ensuring compliance with those guidelines.
- ii. urges all national and international legal professional organisations within the Commonwealth to promote anti-corruption programmes for the legal profession;
- iii. encourages the formulation of national strategies aimed at eliminating conflicts of interest and corrupt practices within the judiciary;
- iv. recognising that transparency assists in combating corruption, encourages judicial officers and their court staff to foster greater public awareness of the court's operations, role and function;
- v. places on record its support in principle for the Latimer House Guidelines and their footnotes as they relate to the judiciary; and
- vi. notes that traditional or customary courts and other tribunals recognised in some national constitutions make a positive contribution to the administration of justice. The public that is served by such bodies should continue to expect and receive fair and just resolution of their disputes.

9. In considering action within the courts, the Colloquium expresses the view that –

- vii. judicial training programmes should be available and should include training on ethical and corruption issues. For newly appointed judicial officers the practice of mentoring should be encouraged; and

viii. there should be greater interaction between judicial officers at all levels nationally, regionally and internationally in order to promote the best judicial practice.

10. The Colloquium recommends for consideration by law ministers and governments the following:  
ix. recognising the interdependence of an efficient, impartial and accessible machinery of justice and the process of good governance and development, that governments should allocate sufficient resources to the courts to ensure their ability to provide that efficient, impartial and accessible service;

x. The process of appointment and promotion of judges should respect the principle of separation of powers and reflect principles of transparency, competitiveness and merit;

xi. to promote the recruitment and retention of persons of the requisite integrity and competence, Governments should ensure at all times that the remuneration of judicial officers is fixed at a level that will ensure that they enjoy financial security during their tenure of office and that upon retirement they continue to enjoy such security.

xii. Governments, in the light of threats to the personal safety of judicial officers, should provide adequate personal protection for all judicial officers particularly those who are regularly required to adjudicate on serious criminal offences.

11. In order to strengthen judicial independence and integrity the Colloquium requests the Commonwealth Secretariat to facilitate the carrying out a comprehensive survey of the methods of determining conditions of service of judicial officers throughout the Commonwealth so as to provide guidelines on prevailing best practices. The Colloquium notes the practice adopted in some jurisdictions of determination of judicial salaries and terms and conditions by an independent commission.

12. In dealing with the issue of judicial accountability, the Colloquium

xiii. notes with approval that in some jurisdictions the judiciary publishes periodic reports of its activities. The Colloquium considers that this is a desirable practice for purposes of accountability and promoting greater understanding of its role.

xiv. expresses its view that there should be a greater degree of judicial awareness of the work of the court staff and liaison with the said staff should be encouraged in order to ensure the smooth operation of the judicial system.

xv. in order to maintain public confidence in the judicial system, recommends that the Courts should at all times ensure that their rules and procedures are simplified and that, except for good cause, cases should be heard in public.

xvi. recommends that judicial officers should ensure that their judgments are well reasoned and delivered within a reasonable time; and

xvii. notes that a pro-active leadership role of Heads of Judiciary is essential in promoting an impartial and independent, competent, efficient and effective judiciary.

#### ***ANNEX A, THE LIMASSOL COLLOQUIUM, RECOMMENDATIONS OF THE COLLOQUIUM FOR JUDICIAL EDUCATION ON ISSUES RELATING TO CORRUPTION AND JUDICIAL INTEGRITY, 2002***

1. All judicial officers should be given training on anti corruption issues and on the promotion of professionalism and integrity both on appointment and at regular intervals during their tenure.

2. Such training shall include:

i. the promotion of awareness of the guidelines for judicial behaviour applicable in the judicial officer's jurisdiction and the consequence of any breaches of those guidelines

ii. the promotion of the Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence, and awareness of the tensions that arise between judicial independence and judicial accountability;

iii. the training of judicial mentors;

- iv. the promotion of systems of mentoring for newly appointed judicial officers. Where possible such mentors should be of similar judicial rank;
- v. the writing of judgments;
- vi. the management of time, in particular with a view to ensuring reserved judgments are handed down with the minimum delay;
- vii. the handling of relations between the judicial officer, members of the general public, and local organisations, including members of the legal profession.;
- viii. where possible and appropriate, the use of information technology and computers;
- ix. where they exercise a judicial role, the training of traditional leaders in ethical and anti-corruption issues;
- x. the consideration of differences between ethical issues and criminality;
- xi. the relationship of the judicial officer with members of the court staff;
- xii. awareness of the disguised nature of corrupt approaches and the broader effect of corrupt activity both on the judiciary as a body and upon society generally;
- xiii. where they exist, an awareness of agreed procedures for reporting corrupt approaches and information relating to corrupt activities, together the disciplinary consequences of a failure to follow those procedures;

3. The planning and running of such judicial training programmes should be the responsibility of judicial officers under the direction of a senior judge and should include contributions from judicial officers of all levels.

4. Time should be made available for preparation for and attendance of judicial officers at training programmes.

5. For the promotion of collegiality amongst members of the Bench, it is considered best practice for such training to be carried out in groups of judicial officers of differing ranks.

6. It is the recommendation of the Colloquium that training programmes in this area comprise a significant element of group discussion of practical problems.”(Article 1-6)



## **UNITED NATION CONVENTION AGAINST CORRUPTION, UN General Assembly, 2003**

Article 11, Measures relating to the judiciary and prosecution services

1. Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary. 2. Measures to the same effect as those taken pursuant to paragraph 1 of this article may be introduced and applied within the prosecution service in those States Parties where it does not form part of the judiciary but enjoys independence similar to that of the judicial service.

## **IFES RULE OF LAW TOOLS: JUDICIAL INTEGRITY PRINCIPLES, JIP, 2004**

JIP.1 Guarantee of judicial independence, the right to a fair trial, equality under the law and access to justice

JIP.2 Institutional and personal/decisional independence of judges

JIP.3 Clear and effective jurisdiction of ordinary courts and judicial review powers

JIP.4 Adequate judicial resources and salaries

JIP.5 Adequate training and continuing legal education

JIP.6 Security of tenure

JIP.7 Fair and effective enforcement of judgments

JIP.8 Judicial freedom of expression and association

JIP.9 Adequate qualification and objective and transparent selection and appointment process

JIP.10 Objective and transparent processes of the judicial career (promotion and transfer processes)

JIP.11 Objective, transparent, fair and effective disciplinary process

JIP.12 Objective and transparent court administration and judicial processes

JIP.13 Judicial access to legal and judicial information

JIP.14 Public access to legal and judicial information

JIP.15 Limited judicial immunity from civil and criminal suit

JIP.16 Conflict of interest rules

JIP.17 Income and asset disclosure

JIP.18 High standards of judicial conduct and rules of judicial ethics

## **BEST PRACTICES IN COMBATING CORRUPTION - CHAPTER: CHAPTER 16: THE JUDICIAL SYSTEM - JUDGES AND LAWYERS, OSCE, 2004**

Judicial integrity is best built and sustained by the judiciary itself as the “third arm” of the state (together with the executive and the legislature). This can be achieved through clear, well-publicized and enforced codes of conduct and through judges providing examples of high personal standards. Leadership has to be asserted from the top, and instances of judicial malpractice disciplined. Courts should be inspected and judgments examined for their consistency. Court staff should be properly supervised, and effective complaint mechanisms established for the public. Adequate personal security, facilities, salaries and status are also important. Subjecting the lower judiciary, in particular, to examinations has proved a success in weeding out incompetent judges in some countries in the former Soviet Union and is now being used elsewhere in the world.

### **INDEPENDENCE AND JUDICIAL COUNCILS**

Like any public organization, the judiciary must be well-managed if it is to deliver its services swiftly and efficiently. But the product of the judiciary is the just resolution of disputes, which demands that it be independent and operate without pressure from other branches of government. The mechanism for the appointment of judges is often a matter of controversy. Together with guarantees of judicial independence, it is frequently provided for in a country’s constitution. Many believe that politicians are only interested in appointing judges who will do their bidding. Politicians can feel able to

challenge the legitimacy of judges sitting in judgment on elected officials when the judges themselves have not been elected. Ideally, there should be a process that involves consultation with other senior judges and with practicing judges. To prevent judicial appointments and management from becoming a means for compromising judicial independence, many countries have created judicial councils. These are bodies separate from other government branches and are entrusted with selecting and promoting judges, and otherwise managing the court system. The senior judiciary is frequently appointed by a judicial council, which can also be responsible for discipline. Such councils are usually provided for in a country's constitution, but can generally also be created by legislation. Although these councils differ from country to country, their success depends on how well policymakers address questions related to their composition, the selection of their members, their responsibilities, and their accountability. Spain's experience with its Consejo General del Poder Judicial shows how one nation has dealt with these issues and reveals the factors that must be taken into account when addressing them.

### ***COMBATING CORRUPTION IN JUDICIAL SYSTEMS - ADVOCACY TOOLKIT, Transparency International, 2007***

#### Tackling judicial corruption

Our review of 32 countries illustrates that judicial corruption takes many forms and is influenced by many factors, whether legal, social, cultural, economic or political. Beneath these apparent complexities lie commonalities that point the way forward to reform. The problems most commonly identified in the country studies are:

1. **Judicial appointments** Failure to appoint judges on merit can lead to the selection of pliant, corruptible judges.
2. **Terms and conditions** Poor salaries and insecure working conditions, including unfair processes for promotion and transfer, as well as a lack of continuous training for judges, lead to judges and other court personnel being vulnerable to bribery.
3. **Accountability and discipline** Unfair or ineffective processes for the discipline and removal of corrupt judges can often lead to the removal of independent judges for reasons of political expediency.
4. **Transparency** Opaque court processes prevent the media and civil society from monitoring court activity and exposing judicial corruption. These points have been conspicuously absent from many judicial reform programmes over the past two decades, which have tended to focus on court administration and capacity building, ignoring problems related to judicial independence and accountability. Much money has been spent training judges without addressing expectations and incentives for judges to act with integrity. Money has also been spent automating the courts or otherwise trying to reduce court workloads and streamline case management which, if unaccompanied by increased accountability, risks making corrupt courts more efficiently corrupt. In Central and Eastern Europe, failure to take full account of the societal context, particularly in countries where informal networks allow people to circumvent formal judicial processes, has rendered virtually meaningless some very sophisticated changes to formal institutions.

#### Recommendations

The following recommendations reflect best practice in preventing corruption in judicial systems and encapsulate the conclusions drawn from the analysis made throughout this volume. They address the four key problem areas identified above: judicial appointments, terms and conditions, accountability and discipline, and transparency.

#### Judicial appointments

1. **Independent judicial appointments body** An objective and transparent process for the appointment of judges ensures that only the highest quality candidates are selected, and that they do not feel indebted to the particular politician or senior judge who appointed them. At the heart of the process is an appointments body acting independently of the executive and the legislature, whose members have been appointed in an objective and transparent process. Representatives from the executive and legislative branches should not form a majority on the appointments body.

2. Merit-based judicial appointments Election criteria should be clear and well publicised, allowing candidates, selectors and others to have a clear understanding of where the bar for selection lies; candidates should be required to demonstrate a record of competence and integrity.
3. Civil society participation Civil society groups, including professional associations linked to judicial activities, should be consulted on the merits of candidates.

#### Terms and conditions

4. Judicial salaries Salaries must be commensurate with judges' position, experience, performance and professional development for the entirety of their tenure; fair pensions should be provided on retirement.
5. Judicial protections Laws should safeguard judicial salaries and working conditions so that they cannot be manipulated by the executive and the legislature to punish independent judges and/or reward those who rule in favour of government.
6. Judicial transfers Objective criteria that determine the assignment of judges to particular court locations ensure that independent or non-corrupted judges are not punished by being dispatched to remote jurisdictions. Judges should not be assigned to a court in an area where they have close ties or loyalties with local politicians.
7. Case assignment and judicial management Case assignment that is based on clear and objective criteria, administered by judges and regularly assessed protects against the allocation of cases to pro-government or pro-business judges.
8. Access to information and training Judges must have easy access to legislation, cases and court procedures, and receive initial training prior to or upon appointment, as well as continuing training throughout their careers. This includes training in legal analysis, the explanation of decisions, judgment writing and case management, as well as ethical and anti-corruption training.
9. Security of tenure Security of tenure for judges should be guaranteed for around 10 years, not subject to renewal, since judges tend to tailor their judgments and conduct towards the end of the term in anticipation of renewal.

#### Accountability and discipline

10. Immunity Limited immunity for actions relating to judicial duties allows judges to make decisions free from fear of civil suit; immunity does not apply in corruption or other criminal cases.
11. Disciplinary procedures Disciplinary rules ensure that the judiciary carries out initial rigorous investigation of all allegations. An independent body must investigate complaints against judges and give reasons for its decisions.
12. Transparent and fair removal process Strict and exacting standards apply to the removal of a judge. Removal mechanisms for judges must be clear, transparent and fair, and reasons need to be given for decisions. If there is a finding of corruption, a judge is liable to prosecution.
13. Due process and appellate reviews A judge has the right to a fair hearing, legal representation and an appeal in any disciplinary matter.
14. Code of conduct A code of judicial conduct provides a guide and measure of judicial conduct, and should be developed and implemented by the judiciary. Breaches must be investigated and sanctioned by a judicial body.
15. Whistleblower policy A confidential and rigorous formal complaints procedure is vital so that lawyers, court users, prosecutors, police, media and civil society can report suspected or actual breaches of the code of conduct, or corruption by judges, court administrators or lawyers.
16. Strong and independent judges' association An independent judges' association should represent its members in all interactions with the state and its offices. It should be an elected body; accessible to all judges; support individual judges on ethical matters; and provide a safe point of reference for judges who fear they may have been compromised.

#### Transparency

17. Transparent organisation The judiciary must publish annual reports of its activities and spending, and provide the public with reliable information about its governance and organisation.
18. Transparent work The public needs reliable access to information pertaining to laws, proposed changes in legislation, court procedures, judgments, judicial vacancies, recruitment criteria, judicial selection procedures and reasons for judicial appointments.

19. **Transparent prosecution service** The prosecution must conduct judicial proceedings in public (with limited exceptions, for example concerning children); publish reasons for decisions; and produce publicly accessible prosecution guidelines to direct and assist decision makers during the conduct of prosecutions.

20. **Judicial asset disclosure** Judges should make periodic asset disclosures especially where other public officials are required to do so.

21. **Judicial conflicts of interest disclosure** Judges must declare conflicts of interest as soon as they become apparent and disqualify themselves when they are (or might appear to be) biased or prejudiced towards a party to a case; when they have previously served as lawyers or material witnesses in the case; or if they have an economic interest in the outcome.

22. **Widely publicised due process rights** Formal judicial institutional mechanisms ensure that parties using the courts are legally advised on the nature, scale and scope of their rights and procedures before, during and after court proceedings.

23. **Freedom of expression** Journalists must be able to comment fairly on legal proceedings and report suspected or actual corruption or bias. Laws that criminalise defamation or give judges discretion to award crippling compensation in libel cases inhibit the media from investigating and reporting suspected criminality, and should be reformed.

24. **Quality of commentary** Journalists and editors should be better trained in reporting what happens in courts and in presenting legal issues to the general public in an understandable form. Academics should be encouraged to comment on court judgments in legal journals, if not in the media.

25. **Civil society engagement, research, monitoring and reporting** Civil society organisations can contribute to understanding the issues related to judicial corruption by monitoring the incidence of corruption, as well as potential indicators of corruption, such as delays and the quality of decisions.

26. **Donor integrity and transparency** Judicial reform programmes should address the problem of judicial corruption. Donors should share knowledge of diagnostics, evaluation of court processes and efficiency; and engage openly with partner countries.

These recommendations complement a number of international standards on judicial integrity and independence, as well as various monitoring and reporting models that have been developed by NGOs and governmental entities. They highlight a gap in the international legal framework on judicial accountability mechanisms. TI draws particular attention to the Bangalore Principles of Judicial Conduct, a code for judges that has been adopted by a number of national judiciaries and was endorsed by the UN Economic and Social Council in 2006. The Bangalore Principles go some way towards filling this gap, though they remain voluntary. In addition, the UN Basic Principles on the Independence of the Judiciary should be reviewed in the light of widespread concern that has emerged in the last decade over the need for greater judicial accountability. There is no magic set of structures and practices that will reduce corruption in all situations. The country reports in part two of this volume highlight the wide variety of recommendations for judicial reform that are context-specific and therefore not applicable in a general way. Differing situations may require measures that would not be helpful elsewhere. Nevertheless, the recommendations serve as a guide for reform efforts to promote judicial independence and accountability, and encourage more effective, efficient and fair enforcement. As this volume demonstrates, multi-faceted, holistic reform of the judiciary is a crucial step toward enhancing justice and curbing the corruption that degrades legal systems and ruins lives the world over.

## ***TECHNICAL GUIDE TO THE UNITED NATIONS CONVENTION AGAINST CORRUPTION, UNODC, 2009***

### Article 11

#### I. Overview

The article requires measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary, which may include measures to regulate the conduct of the members of the judiciary. Such requirements have also been made applicable to prosecution services. For the purposes of this Guide, much of the guidance is applicable to both the judiciary and the prosecution services. In relation to the judiciary, the guidance is also intended to be applicable

to all court personnel. States Parties would also draw inspiration from existing guidance, including The Bangalore Principles of Judicial Conduct 2002, Report of the Fourth Meeting of the Judicial Integrity Group, UNODC, 2005, the United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators, 2005, the UN Guidelines on the Role of Prosecutors, 1990, and the 1999 International Association of Prosecutors' Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors. The overall framework of implementation is the independence of the judiciary and that should be taken into account at all times in designing, promulgating and implementing relevant measures.

## II.1. Measures to strengthen integrity of judges

For the purposes of implementing this article, the concept of judicial integrity may be defined broadly to include:

- The ability to act free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason;
- Impartiality (i.e. the ability to act without favour, bias or prejudice);
- Personal conduct which is above reproach in the view of a reasonable observer;
- Propriety and the appearance of propriety in the manner in which the member of the judiciary conducts his or her activities, both personal and professional;
- An awareness, understanding and recognition of diversity in society and respect for such diversity;
- Competence;
- Diligence and discipline.

“Judicial independence” also refers to the institutional and operational arrangements defining the relationship between the judiciary and other branches of government and ensuring the integrity of the judicial process. The arrangements are intended to guarantee the judiciary the collective or institutional independence required to exercise jurisdiction fairly and impartially over all issues of a judicial nature. There are three essential conditions for judicial independence.

The first concerns security of tenure for all judicial appointments, i.e. a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner. Secondly, those holding judicial appointments require financial security, including the right to salary and pension which is established by law and which is not subject to arbitrary interference by the Executive in a manner that could affect judicial independence. Thirdly and finally, States Parties must ensure institutional independence with respect to matters of administration that relate directly to the exercise of the judicial function, including the management of funds allocated to the judicial system. An external force must not be in a position to interfere in matters that are directly and immediately relevant to the adjudicative function, for example, assignment of judges, sittings of the court and court lists. Although there must of necessity be some institutional relations between the judiciary and Executive, such relations must not interfere with the judiciary's duty to adjudicate individual disputes and uphold the law and values of the Constitution.

Judicial independence does not require that judges should enjoy immunity from the application of laws, except to the extent that a judge may enjoy personal immunity from civil suits for alleged improper acts or omissions in the exercise of judicial functions. In many countries, judges, like other citizens, are subject to the criminal law. They have, and should have, no immunity from obedience to the general law. Where reasonable cause exists to warrant investigation by police and other public bodies of suspected criminal offences on the part of judges and court personnel, such investigations should take their ordinary course, according to law.

Other countries provide immunities from prosecution for judges. Where such immunities are provided, the preferred approach, in order to limit the potential for judges to avoid prosecution for corruption and so as not to undermine the credibility of the judiciary, is a “functional” approach, so that judges are only immune from prosecution for offences that take place in the course of carrying out their judicial duties. In order to ensure that the “functional” approach cannot be misused to avoid

criminal liability, it is also essential to provide a process for lifting the immunity in appropriate circumstances, along with safeguards for ensuring that the process is transparent, fair and consistently applied.

## II.2. Measures to prevent opportunities for corruption in the judiciary

There are two aspects to preventing corruption in the judiciary. These concern the appointment and promotion of judges, and the work for which they are responsible.

First, there is a need to institute transparent procedures for judicial appointments and promotions. Judicial appointments should be on merit, subject to established criteria which should not derogate from those applicable to other public officials in general terms, but should of course reflect the specialized professional competence required for the performance of the respective duties. A process to ensure appropriate screening of past conduct prior to appointment would also be useful. In many countries, entry in the judiciary is subject to competitive examinations and subsequent mandatory training in a specialized institution such as a judicial academy. Further, in many countries, the system of appointment, including the administration of entry examinations and training, is administered by institutional mechanisms of the judiciary itself, such as supreme councils of the judiciary or judicial commissions. Under the direction of senior judges, the institutional mechanisms are responsible for the recruitment, appointment, promotion, training, conduct and supervision of judges during their tenure of office. Such mechanisms are designed to safeguard the independence of judicial decisions which should not be subject to political interference through attempts to move, failure to promote or dismissal of judges. Rules are also required for the removal of judges which in many countries is the responsibility of the mechanisms governing the judiciary mentioned above and is a measure applied only for proven misconduct or incapacity according to stated criteria and agreed, transparent procedures.

Second, States Parties should help strengthen the integrity of the judiciary by ensuring that the judicial process is open and accessible. Barring exceptional circumstances, which should be determined by law, judicial proceedings should be open to the public. Judges should be obliged by law to give reasons for their decisions. To ensure the integrity of the judiciary, including the availability of an effective appeals process, the reasons for judges' decisions should also be recorded.

The daily administration of the judicial process is an important component in preventing corruption. Elements of effective administration of court

- The prominent display of notices (in at least court buildings) describing procedures and proceedings;
- Efficient systems to maintain and manage court records, including registries of court decisions;
- The introduction of computerization of court records, including of the court hearing schedule, and computerized case management systems;
- The introduction of fixed deadlines for legal steps that must be taken in the preparation of a case for hearing; and
- The prompt and effective response by the court system to public complaints. Judges must take responsibility for reducing delay in the conduct and conclusion of court proceedings and discourage undue delay. Judges should institute transparent mechanisms to allow the legal profession and litigants to know the status of court proceedings. (One possible method is the monthly circulation among judges of a list of pending judgments.) Where no legal requirements already exist, standards should be adopted by the judges themselves and publicly announced in order to ensure due diligence in the administration of justice.

The judiciary must take necessary steps to prevent court records from disappearing or being withheld. Such steps may include the computerization of court records. They should also institute systems for the investigation of the loss and disappearance of court files. Where wrongdoing is suspected, they should ensure the investigation of the loss of files, which is always to be regarded as a serious breach of the judicial process. In the case of lost files, they should institute action to reconstruct the record and institute procedures to avoid future losses.

The judiciary should adopt a transparent and publicly known procedure for the assignment of cases to particular judges to combat the actuality or perception of litigant control over the decision maker. Procedures should be adopted within judicial systems, as appropriate, to ensure regular change of the assignments of judges having regard to appropriate factors including gender, race, tribe, religion, minority involvement and other features of the judge. Such rotation should be adopted to avoid the appearance of partiality. Where they do not already exist and within any applicable law, the judiciary should introduce means of reducing unjustifiable variations in criminal sentences. Where sentences may not be prescribed in law, this could be achieved through the introduction of sentencing guidelines and like procedures. Other methods of promoting consistency in sentencing include availability of sentencing statistics and data and judicial education, including the introduction of a judicial handbook concerning sentencing standards and principles.

#### Article 11, II. Practical challenges and solutions

States Parties must give due consideration to the types and levels of corruption, and to the weaknesses or vulnerabilities of the existing judicial system that need review and attention.

Whatever the institutional arrangements that a State Party may have for such a review, States Parties should assess the nature and extent of corruption in the judicial system to identify weaknesses in the system that provide opportunities for “gatekeepers” (whether judges, lawyers or court personnel). The reviews should address not only the important issues of the procedures for judicial appointment, tenure and other career-related issues, but also more minor details, such as the issuing of summonses, the service of summonses, securing evidence, the obtaining of bail, the provision of certified copies of a judgment, expedition of cases and the delay of cases.

This in turn would lead to measures to minimize opportunity through systemic reforms designed to limit the situations in which corruption can occur, including focus group consultations conducted by the judiciary with court users, civic leaders, lawyers, police, prison officers and other actors in the judicial system; national workshops of stakeholders; and judges’ conferences. Responsibility for monitoring and reviewing progress may be the responsibility of an institution such as the Supreme Court of the Judiciary, a Judicial Services Commission, or equivalent agency, or the Ministry of Justice. Such an institution may wish to consider the desirability and feasibility of establishing an inspectorate or equivalent independent guardian in order to inspect, and report upon, any systems or procedures that are observed which may endanger the actuality or appearance of integrity and also to report upon complaints of corruption or identify the reasons for any perceptions of corruption in the judiciary.

#### ***THE PARLIAMENTARY ASSEMBLY: RESOLUTION 1703 - JUDICIAL CORRUPTION, COE, 2010***

4. Corruption in general is to be fought by eradicating it in the courts. The courts are responsible for imposing sanctions on all corrupt individuals equally and objectively, and for protecting the whistle-blowers who are indispensable for an effective drive against all forms of corruption.

5. The Assembly stresses the importance of real political resolve, to be expressed by tangible, energetic measures and not just by speeches and largely token laws. An unsullied, independent justice system fosters a political climate in which corruption and cronyism become less frequent because they are riskier for everyone involved.

6. The Assembly deplores the fact that judicial corruption is deeply embedded in many Council of Europe member states which are also beset with serious problems of corruption in other public and private institutions. According to the 2009 Global Corruption Barometer published by Transparency International, some of these countries— Armenia, Bulgaria, Croatia, Georgia and “the former Yugoslav Republic of Macedonia” – distinguish themselves very alarmingly in that it is the justice

system itself which is perceived by their population as the most corrupt institution. This also applies to Kosovo, which is not a member state of the Council of Europe.

7. The Assembly urges the authorities of all the states mentioned above to take stringent exceptional measures to restore the public's confidence in the judicial system.

8. The Assembly is preoccupied by a tendency in some states to deny outright that any judicial corruption exists within them. As no state is fully immune from corruption, particularly at the present time of economic crisis, the Assembly invites all Council of Europe member states to be self-critical and to undertake – as in Germany– an in-depth study of the level of corruption in their judicial systems and to take preventive and remedial measures at the first sign of danger.

9. With respect to prevention, the Assembly encourages all member states to establish a framework minimising the risks of judicial corruption by:

9.1. ensuring that judges, prosecutors and all agents of the justice process – especially the representatives of the law-enforcement agencies – are aware of the importance and dignity of their role, by guaranteeing commensurate remuneration and by providing them with adequate human and material resources;

9.2. developing professional and ethical standards for judges and prosecutors, together with effective monitoring machinery;

9.3. reviewing the private assets and income of judges and prosecutors through a mechanism which is suited to the situation in each country and must honour the independence and dignity of justice officials;

9.4. ensuring that the procedures for recruiting, promoting and dismissing judges and prosecutors are clear and transparent, founded solely on qualification and merit, having regard to the European Charter on the Statute for Judges and the recommendation by the European Commission for Democracy through Law (Venice Commission) that all member states should have independent judicial councils comprising members elected principally by the members of the judiciary;

9.5. ensuring that judges' and prosecutors' terms of office are of sufficient length and are not linked with an external appraisal of their decisions;

9.6. giving all judges and prosecutors specific training in matters of corruption and ethics;

9.7. conducting public campaigns and/or programmes aimed at increasing general respect for the judiciary and improving citizens' understanding of the importance and implications of judicial independence and the separation of powers.

***REPORT ON JUDICIAL CORRUPTION AND COMBATTING CORRUPTION THROUGH THE JUDICIAL SYSTEM, UN Doc A/67/305 (13 August 2012), United Nation Special Rapporteur on the independence of judges and lawyers, 2012***

Recommendations to address corruption in the judiciary

(e) States should strengthen safeguards for the independence of the judicial system and safeguards against judicial corruption in order to ensure the accountability of judges and prosecutors;

(f) Judges, prosecutors and lawyers should discharge their functions with integrity and impartiality and preserve the dignity of their profession;

(g) States, judges, prosecutors, lawyers and other public and private actors should recognize that the requirement of independence and impartiality of the judicial and legal professions does not exist for the benefit of the members of the profession themselves, but rather for the users of the justice system, as part of their inalienable right to a fair trial;



- (h) States should support professional organizations of lawyers, such as bar associations, without exercising any pressure or influence on them. Such organizations and associations should play the main role in regulating admission to the legal profession;
- (i) Special attention should be paid, and concrete measures taken, to ensure efficient protection of judges, prosecutors, lawyers, witnesses, victims, whistleblowers and other stakeholders involved in processing and judging cases of corruption, especially large-scale corruption or corruption cases related to organized and white-collar crime. Development and implementation of a national plan of security for judges, prosecutors and lawyers should be considered;
- (j) The processes for appointing and selecting judges and prosecutors should be guided by objective criteria, based on merit, and clear and transparent procedures, and take place through a public competitive selection process, free from political or economic influences or other external interference;
- (k) States should establish a judicial oversight body, the majority of members of which should be judges, independent from the executive and legislative branches to oversee the appointment, selection, promotion and transfer of judges; (l) The appointment and selection of prosecutors should be based on objective criteria and be done through a public competitive selection process;
- (m) The terms and conditions of service of both the judiciary and prosecution services, including job security, adequate remuneration, promotion, working conditions and status, should be safeguarded by law;
- (n) Good governance and the rule of law within the judiciary should be promoted. Courts at all levels, prosecutorial services and judicial and prosecutorial councils should be furnished with adequate budgets to discharge their functions and be empowered to manage their own budgets autonomously and independently of any external interference;
- (o) States should consider creating court administrators in order to make the administrative functions of courts more professional, enabling judges to focus more on their judicial functions;
- (p) A clear and objective electronic system for case allocation, administered by judges and assessed regularly, should be established on the basis of automatic random distribution or an objective system based on specialization;
- (q) Judges, prosecutors and lawyers should receive good-quality, appropriate and continual training on international human rights norms and standards, particularly in combating corruption in the public and private sectors;
- (r) Codes of conduct and guidelines should be established for judges, prosecutors and lawyers and their enforcement should be independently monitored and accounted for;
- (s) Judges, prosecutors and lawyers should be accountable in the discharge of their functions. All disciplinary and other proceedings should be transparent, to the extent possible, and carried out in full conformity with international standards related to the right to a fair and impartial trial and due process;
- (t) Confidential complaint mechanisms should be put into place, with the participation of the actors in the justice system, and include protection for whistleblowers, as well as due process guarantees for those accused;
- (u) Allegations of corruption and failure to improve accountability should never be used by the legislative or executive branches as a pretext and premise for endangering the independence of the judiciary;
- (v) As the systematic use of long pretrial detention may open the door to corruption, pretrial detention should be used only when no reasonable alternative can address risks of flight or danger to the society.

**DOHA DECLARATION ON INTEGRATING CRIME PREVENTION AND CRIMINAL JUSTICE INTO THE WIDER UNITED NATIONS AGENDA TO ADDRESS SOCIAL AND ECONOMIC CHALLENGES AND TO PROMOTE THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS, AND PUBLIC PARTICIPATION, Adopted by the 13<sup>th</sup> United Nations Congress on Crime Prevention and Criminal Justice, Doha, 12-19 April 2015**

10. We support the development and implementation of consultative and participatory processes in (...) criminal justice in order to (...) galvanize public trust and confidence in criminal justice systems (...). Therefore, we endeavour:

(e) To raise public confidence in criminal justice by preventing corruption and promoting respect for human rights, as well as enhancing professional competence and oversight in all sectors of the criminal justice system, thus ensuring that it is accessible and responsive to the needs and rights of all individuals;

### VIII. 3. COMBATING POLICIES

#### ***RESOLUTION (97) 24 ON THE TWENTY GUIDING PRINCIPLES FOR THE FIGHT AGAINST CORRUPTION, Adopted by the Council of Europe Committee of Ministers at the 101st session of the Committee of Ministers, 1997***

3. to ensure that those in charge of the prevention, investigation, prosecution and adjudication of corruption offences enjoy the independence and autonomy appropriate to their functions, are free from improper influence and have effective means for gathering evidence, protecting the persons who help the authorities in combating corruption and preserving the confidentiality of investigations;

#### ***CIVIL LAW CONVENTION ON CORRUPTION, Council of Europe (COE), 1999***

##### Chapter I – Measures to be taken at national level

###### Article 1 – Purpose

Each Party shall provide in its internal law for effective remedies for persons who have suffered damage as a result of acts of corruption, to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage.

###### Article 2 – Definition of corruption

For the purpose of this Convention, "corruption" means requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof.

###### Article 3 – Compensation for damage

1 Each Party shall provide in its internal law for persons who have suffered damage as a result of corruption to have the right to initiate an action in order to obtain full compensation for such damage.  
2 Such compensation may cover material damage, loss of profits and non-pecuniary loss.

###### Article 4 – Liability

1 Each Party shall provide in its internal law for the following conditions to be fulfilled in order for the damage to be compensated:  
i the defendant has committed or authorised the act of corruption, or failed to take reasonable steps to prevent the act of corruption;  
ii the plaintiff has suffered damage; and  
iii there is a causal link between the act of corruption and the damage.  
2 Each Party shall provide in its internal law that, if several defendants are liable for damage for the same corrupt activity, they shall be jointly and severally liable.

###### Article 5 – State responsibility

Each Party shall provide in its internal law for appropriate procedures for persons who have suffered damage as a result of an act of corruption by its public officials in the exercise of their functions to claim for compensation from the State or, in the case of a non-state Party, from that Party's appropriate authorities.

###### Article 6 – Contributory negligence

Each Party shall provide in its internal law for the compensation to be reduced or disallowed having regard to all the circumstances, if the plaintiff has by his or her own fault contributed to the damage or to its aggravation.

###### Article 7 – Limitation periods

1 Each Party shall provide in its internal law for proceedings for the recovery of damages to be subject to a limitation period of not less than three years from the day the person who has suffered

damage became aware or should reasonably have been aware, that damage has occurred or that an act of corruption has taken place, and of the identity of the responsible person. However, such proceedings shall not be commenced after the end of a limitation period of not less than ten years from the date of the act of corruption.

2 The laws of the Parties regulating suspension or interruption of limitation periods shall, if appropriate, apply to the periods prescribed in paragraph 1.

#### Article 9 – Protection of employees

Each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities.

#### Article 19 – Sanctions and measures

1 Having regard to the serious nature of the criminal offences established in accordance with this Convention, each Party shall provide, in respect of those criminal offences established in accordance with Articles 2 to 14, effective, proportionate and dissuasive sanctions and measures, including, when committed by natural persons, penalties involving deprivation of liberty which can give rise to extradition.

2 Each Party shall ensure that legal persons held liable in accordance with Article 18, paragraphs 1 and 2, shall be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

3 Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate or otherwise deprive the instrumentalities and proceeds of criminal offences established in accordance with this Convention, or property the value of which corresponds to such proceeds.

### ***POLICY FRAMEWORK FOR PREVENTING AND ELIMINATING CORRUPTION AND ENSURING THE IMPARTIALITY OF THE JUDICIAL SYSTEM, Centre for the Independence of Judges and Lawyers of the International Commission of Jurists, 2000***

#### Investigation

Complaints of corruption against individual judges or court officers should, consistently with the rule of law, identify the person concerned and specify the alleged conduct. However, complaints based on allegations of a persistent reputation of corruption should warrant investigation, even if specific incidents of corruption are not identified. Such complaints must be dealt with in accordance with due process.

Allegations of widespread corruption of the judicial system should be investigated, but not be dealt with by ad hoc measures such as wholesale dismissals of judges or court officers. Consistently with the rule of law, each case should be investigated individually and should be dealt with according to due process of law.

Where there is no existing independent mechanism or body to investigate complaints, an independent judicial commission of general jurisdiction in relation to judges, dealing with other matters such as selection, appointment, promotion and education, may be utilised. The commission should be supported with necessary resources, means and powers to enable it properly to investigate complaints. Most importantly it should have the power to ensure informants, complainants and witnesses are not victimised. For the purposes of the determination of a complaint, the commission or commission panel considering the complaint may include retired judges of good standing and proven integrity. It should also include lay members of standing.

The law should require disclosure of assets and liabilities of judges and other officers in the judicial system upon their appointment and annually thereafter so that unexplained acquisitions of wealth could shift the burden of proof in investigation and at the hearing of the complaint.

## V. ENFORCEMENT

### Introduction

One key problem faced by those investigating corruption is that, unlike many traditional crimes such as robbery or murder, there is no clear victim to complain or overt occurrence likely to be reported by witnesses. In corruption cases, those with direct knowledge of the offence generally profit in some way, making them unlikely to report it. Corruption is not a “victimless” crime, but the only victim in many cases is the general public interest, which is not aware of the crime or in a position to report or complain about it. For this reason, any anti-corruption strategy should include elements intended to bring to light the presence of corruption. These include elements intended to encourage those who witness or are aware of corruption incidents to report them and incentives to complain about sub-standard public services which may be due to corruption, supported by more general education about corruption, the harm it causes and basic standards that should be expected in the administration of public affairs. Also included are elements that generate information and evidence of corruption in other ways, such as audit and inspection requirements. In some cases, there are relatively direct victims of corruption, such as the unsuccessful participants in a corrupt competition for a public contract or employment position, and strategies should also encourage these victims to be aware of the possibility of corruption and report it when suspected.

In encouraging those aware of corruption to report it, the greatest challenge is often the fact that those who are victimised directly are often vulnerable to intimidation or retaliation from the offenders, either because they belong to vulnerable groups, or because of the relationship to the offenders which made them aware of the corruption in the first place. Those who deal with officials in circumstances of physical or social isolation, such as new immigrants or residents of rural areas might be the subject of information campaigns about what standards to expect from officials and given the means to lodge complaints if the standards are not met, for example. Government agencies can set up channels that permit corruption to be reported internally.

### Tool 28 - Guidelines for Successful Investigations into Corruption

#### Purpose

The following guidelines are meant to give members of the law enforcement community some general directions for investigating corruption.

#### Description

There are no universal rules for investigating corruption, but some the following elements, if incorporated into national strategies, will help to develop investigative structures which can detect corruption and conduct effective investigations that produce information which can be used to develop and apply effective responses. Investigative results should be capable of supporting not only criminal prosecutions and other responses directed at those involved as individuals, but also measures intended to restructure or reorganise public or private administration to make it more resistant to corruption. The autonomy and security of investigations is important, both to encourage and protect those who report corruption or assist in other ways, and to ensure that the results of investigations – whether they find corruption or not – are both valid and credible.

#### *Education about corruption*

Before corruption can be reported, it must first be identified. This requires that the general population and specific target groups be educated about what constitutes corruption, the full range of forms of corruption, its true costs and consequences, and more generally about reasonable expectations for standards of integrity in public administration and private business practices. Many people have a very narrow appreciation of corruption and may not understand that behaviour they witness or engage in is harmful. Others may understand the harm, but lack motivation to take any action because the problem is seen as pervasive and unchangeable. In environments where corruption has become institutionalised and accepted, considerable educational efforts may be needed to change the popular perception that corruption is a natural or inevitable phenomenon and ensure that it is perceived as socially harmful, morally wrong, and in most cases, a crime. In many countries, similar efforts have proven successful in the past with respect to other forms of crime such as impaired driving, “white-collar” crime, and environmental crime.

#### *Opportunities to report corruption*

Those who have knowledge of corruption must be placed in a position where they are able to report it. This requires having officials charged with the responsibility for dealing with corruption, ensuring that they are properly trained in dealing with cases, that they are easily available to potential complainants or witnesses, and that those who might report corruption are aware of the existence of such officials and can readily contact them with information.

#### *Security against retribution*

Victims and witnesses will not come forward if they fear retribution, and precautions against this are commonly incorporated into instruments dealing with corruption and organized crime, where the problem is particularly acute. This is particularly true in cases of official corruption, where those who have information are usually relatively close to a corrupt official, and the status of the official affords him or her opportunities to retaliate. Measures are usually formulated not only to protect the informant, but also the integrity and confidentiality of the investigation. Common precautions against this include guarantees of anonymity for the informant, assurances that officials accused of corruption will not have any access to investigative personnel, files or records, and powers to transfer or remove an official during the course of an investigation to prevent intimidation or other tampering with the investigation or evidence.

In cases where the informant is an “insider”, additional precautions may be taken because of his or her employment in close proximity to the offenders and because in some cases there may be additional legal liabilities for disclosing the information involved. Many countries have adopted “whistleblower” laws and procedures that protect insiders who come forward with information. These protections may apply to inside informants from both the public and private sectors. Additional protections in such cases may include shielding the informant from civil litigation in areas such as breach of confidentiality agreements and libel or slander, and in the case of public officials, from criminal liability for the disclosure of government or official secrets. Such protections may extend to cases where the information was incorrect, provided that it was disclosed in good faith.

Safeguards against abuses by the informants themselves may also be needed, particularly in cases where they are permitted to remain anonymous or are broadly shielded from legal liability. To balance the interests involved, legislation may limit legal protections to cases of bona fide good faith disclosures or create civil or criminal liability for cases where the informant cannot establish good faith or that the belief that malfeasance had occurred was not based on reasonable grounds.

In cases where the informant’s information proves valid and triggers official action, his or her anonymity often cannot be maintained, making retribution possible even after changes have been made to address the complaint. In such cases, legislation may provide for compensation, transfers to other agencies or employment removed from those involved in the case, or in extreme cases where the informer is in more serious danger, relocation and a new identity unknown to the offenders.

## Independence and credibility of investigators and prosecutors

Independence from those under investigation is critical to the protection of victims, witnesses and informants, but it is also important that officials or bodies responsible for investigating corruption be independent or autonomous for other reasons. Functional independence ensures that investigations will be effective in identifying corruption by reducing the potential for tampering with investigations by corrupt officials, and ensuring that evidence obtained will be credible when used in criminal or disciplinary proceedings. It is also important as a means of instilling confidence in both the investigators and in the bureaucracies or agencies they investigate. Where the investigation is independent, populations have some assurance that if corruption exists it will be identified and eliminated, and that if investigators conclude that corruption does not exist or has been eliminated, the bureaucracy can be trusted.

The mechanics of functional independence vary from one country or justice system to another. Most systems incorporate elements of judicial independence to ensure the integrity of court proceedings, but the means of securing autonomy for the prosecutorial and investigative functions differ. In systems where criminal investigations are carried out by magistrates or other judicial officials, these functions also fall within the ambit of judicial independence. Where investigations and prosecutions are carried out by non-judicial personnel, judicial oversight may still play a role, but as this only applies to cases which come before the courts in such systems, other methods must be found to review or monitor key functions such as the conduct of investigations and the decisions which determine who is investigated and whether a prosecution is brought before the courts in each case.

The problem of *quis custodiet ipsos custodes?* Also arises in developing structures which separate anti-corruption investigations from other elements of government. The agencies involved must be sufficiently independent to protect their functions against undue interference, but must also be subject to sufficient oversight to prevent abuses and to identify corruption on the part of investigators and prosecutors should it occur. These are common problems in establishing law enforcement and prosecutorial agencies in any system, but are arguably more critical in dedicated anti-corruption agencies because those involved will almost certainly be the subject of attempts at bribery, coercion or other undue influences, often by very sophisticated and well-resourced corrupt officials or organized criminal groups. It is essential that investigators be subject to overall regulation and accountability for their activities, but that such oversight does not extend to interference with operational decisions such as whether a particular individual should be investigated, what methods should be used, or whether a case should be the subject of further action, such as criminal prosecution, once the investigation has concluded.

## Adequate training and resources for investigators

Adequate training and resources are necessary both to ensure that reported cases will be dealt with effectively, and to encourage those aware of corruption to come forward with information. Informants will only assume the risk of reporting if they are confident that effective action against corruption will be the result. This confidence requires not only assurances that investigations will themselves be independent and free of corruption, but also that investigators are actually capable of detecting it, gathering evidence against offenders, and taking whatever measures are needed to eliminate it. The commitment of significant resources also sends a powerful signal that the highest levels of government are strongly committed to the prevention and elimination of corruption, which both deters offenders and encourages informants.

The wide range of forms of corruption requires a wide range of specific skills and knowledge on the part of investigators, but most will find frequent need for legal and accounting skills in order to identify, preserve and present evidence, whether in criminal proceedings, disciplinary proceedings or other fora. Adequate capabilities also depend to a large degree on the presence of adequate resources to ensure that sufficient numbers of investigators are present and that they have the necessary skills and training to work effectively. Apart from personnel and funding, other resources, such as systems for the creation, retention and analysis of records, can also be important. Often the strongest

evidence of high-level corruption will be a long-term pattern in complaints about lesser abuses, for example.

#### Liaison with other investigative agencies

Given the need for autonomy and independence and the extreme sensitivity of many corruption cases, a careful balance should be struck when establishing the relationship between anticorruption investigators and other agencies. In environments where corruption is believed to be relatively pervasive and widespread, complete autonomy is advisable. Establishing an anticorruption unit in a police force may not be advisable, for example, if there is a significant likelihood that the police themselves may be investigated or if they are suspected of corruption. On the other hand, it will be important that anti-corruption investigators interact effectively with other agencies. Information from tax authorities or agencies investigating money-laundering or other economic crimes may uncover evidence of corruption or of unexplained wealth which may have been derived from corruption, for example, and audits of government agencies may uncover inefficiency or malfeasance which is not due to corruption, but which warrants further investigation or reform by other agencies.

#### *Other means of detecting corruption*

While encouraging those who witness corruption to report it is clearly a major means of detection, other methods should not be overlooked. Many of these can also be considered as preventive in nature and are discussed in the previous part of this Manual. Others are examined in more detail in the following segments.

#### Disclosure and reporting requirements

Requiring that public officials make periodic disclosure of their assets both deters unjust enrichment and provides investigators and auditors with a powerful instrument to detect corruption by detecting the existence of unexplained wealth. Similarly, non-compliance with requirements to disclose actual or potential conflicts of interest may alert auditors or investigators to the possibility that the official intends to corruptly exploit undetected or undisclosed conflicts. Such measures may be effective even if the official is not honest in complying with the reporting requirements, since gaps and inconsistencies may well trigger more thorough investigations, and the official may ultimately be held liable not only for corruption per se, but for non-compliance with the reporting requirements themselves.

Sanctions against non-disclosure or false reporting should be approximately as severe as those against the underlying corruption, to prevent offenders from avoiding liability for corruption by committing the lesser disclosure and reporting offences. They should also always permit at least the possibility of dismissal or removal from office to ensure that corrupt behaviour can be ended even in cases where the inadequate disclosure is successful in concealing unjust enrichment and the underlying corruption. As noted in the previous Part, regular periodic disclosure is also preferable to requiring disclosure only on entering and leaving office, as this will detect corruption while it is still ongoing, reducing the harm caused to the public interest.

#### Audits and inspections

Audits of records, physical inspections of premises or items, or interviews with potential victims, witnesses or others who may have relevant information can be used both proactively as a means of monitoring the quality and integrity of public administration and identifying possible abuses, and reactively as a means of investigating those already suspected of corruption or other malfeasance. Audits may be conducted on an internal or local basis, but overall anti-corruption strategies should provide for a central, national audit agency. Such agencies require adequate resources and expertise, and in order to audit senior levels of government, they must enjoy a substantial degree of autonomy approaching if not equal to judicial independence. This independence should extend to decisions about which officials, sectors or functions should be audited, how audits should be carried



out, the drawing and formulation of conclusions about the results of audits, and to some degree the publication or release of such conclusions.

Auditors and their investigative staffs should have the power to conduct regular or random audits to ensure overall deterrence and surveillance, as well as specific targeted audits directed at individuals or agencies suspected of malfeasance. In many countries, the mandate goes beyond suspected malfeasance, as auditors are also responsible for identifying and addressing cases of waste or inefficiency deriving from problems other than crime or corruption. Where problems are identified, auditors generally have the power to recommend administrative or legal reforms to address institutional or structural problems, and can refer cases to law enforcement agencies or criminal prosecutors if criminal wrongdoing is suspected.

Auditors should be supported by legal powers such as requirements that compel individuals or agencies being audited to cooperate, but auditors should not be allowed to become law enforcement agencies. In most countries, once criminal offences are suspected, higher standards of procedural safeguards are applied to protect the human rights of those involved, but once the procedural requirements have been met, criminal investigators are authorised to use much more intrusive powers to detain suspects and gather evidence. Maintaining the distinction between auditors or inspectors and criminal investigators ensures that the former retain the legal powers needed to monitor relatively broad areas of public administration in order to identify corruption and inefficiencies and to propose systemic or structural solutions. When individual malfeasance is uncovered as a result, it can then be referred to other agencies, which have the necessary powers, resources and expertise to conduct criminal investigations and prosecutions.

“Sting” or “integrity testing” operations

A more controversial – but also unquestionably effective – means of identifying corrupt officials is the use of decoys or other integrity-testing tactics. These involve undercover agents who offer officials opportunities to engage in corruption in circumstances where evidence of their reaction can be easily and credibly gathered. Depending on local policy or legal constraints, officials may be targeted at random or on the basis of evidence or reason for specific suspicion of corruption.

The criticisms of these tactics are substantial. Arguably, even the most honest official might yield to temptation if the offer is sufficiently convincing, and the willingness to do so when approached may not necessarily establish that he or she is inherently corrupt or that similar transgressions have occurred in the past. This problem underlies restrictions intended to prevent “entrapment” in some countries. Usually in such countries, undercover agents are permitted to create opportunities for a suspect to commit an offence, but not to offer any actual encouragement to do so. Police officers might be occasionally exposed to undercover agents in circumstances where a corrupt officer would normally solicit a bribe to see if this occurs, for example, but the undercover agents would be prohibited from actually offering bribes.

These tactics represent a powerful instrument for both deterring corruption and detecting and investigating offenders. As they do not necessarily require any inside information or assistance, they can be used quickly against any official at virtually any level who is suspected of corruption. If the suspect is corrupt, they quickly provide highly-credible evidence, usually in the form of audio- or videotapes, photographs and the personal testimony of the investigators involved, which may form the basis of a criminal prosecution or serve as the justification for other investigative methods such as electronic surveillance or the search of financial records. If the suspect is not corrupt, his or her refusal also tends to reliably establish, provided that adequate confidentiality precautions are taken to ensure that investigative targets are not warned beforehand and that undercover agents are well-trained and competent.

Electronic surveillance, search and seizure and other investigative methods

Techniques such as wiretapping or the monitoring of electronic communications and search and seizure have limited use in the initial detection of corruption in many countries because human rights safeguards usually prohibit their use unless there is already substantial evidence that a crime has been, or is about to be, committed. As noted in (b) above, procedural protections and questions relating to the competence of investigators and control over the use of intrusive investigative methods will usually also restrict the use of such methods to criminal law enforcement agencies, as opposed to more general surveillance agencies such as auditors, inspectors or ombudsmen.

Where evidence of criminal wrongdoing justifies their use, however, these are well-established and proven methods of gathering the evidence necessary to identify and link offenders and establish criminality in criminal prosecutions. Electronic communications using telephones, fax machines, e-mail and other technologies may be intercepted and recorded as evidence, and physical premises, computers, bank or financial records, files and other sources of evidence may be physically or electronically searched. Searches may target virtually any location at which there is a reasonable expectation of finding evidence, including locations associated with the suspected offender or third parties. Thus, search warrants or similar documents could be obtained to search not only the bank accounts of persons suspected of taking bribes for example, but also those suspected of paying them. Similarly, they may be used for any offence, including not only initial corruption offences, but also related crimes such as the concealment or laundering of the proceeds of corruption.

In some cases, intrusive investigative methods being used to investigate other crimes may also uncover previously unsuspected corruption, particularly in organized crime cases, where offenders often try to corrupt officials or obstruct justice in order to shield their other criminal operations from detection or criminal liability. Corruption and the obstruction of justice are both offences for which international cooperation can be sought between countries that are parties to the United Nations Convention against Transnational Organized Crime.

Other forms of electronic surveillance, such as the use of video or audio recordings may also be used as evidence in corruption cases. Procedural safeguards and restrictions based on privacy rights may not apply where these are used in circumstances where there is no privacy to protect, such as public places or communications channels which are open broadcasts or where participants are warned that conversations may be monitored. Depending on national laws, it may be possible to routinely or randomly monitor communications between public officials and those they serve, if such a warning can be given and if this is not inconsistent with the public function being performed.

If this is feasible from a standpoint of human rights, technical and cost considerations, it will create a powerful deterrent, since corrupt officials always face the possibility that their conversations may be recorded and used as evidence if corrupt transactions take place. Where resources limit the extent of monitoring, a system of universal notification combined with occasional random monitoring may still provide an effective deterrent.

The detection of fraud and other forms of economic corruption may also be accomplished or assisted using forensic accounting techniques. These generally consist of examining financial records for patterns that are unusual or at variance with the patterns or norms established by other records. Such things as abnormally high balances in accounts used for discretionary spending, abnormal fluctuations in balances, payments which are unusually high or unusually frequent, records kept in formats which make them difficult to read or interpret, or any other pattern of spending or record keeping which cannot be attributed to operational requirements may suggest the presence of corruption or other economic crime. Basic forensic tests may be applied by auditors as part of the process of screening for evidence of corruption, or by criminal investigators who suspect particular individuals or agencies and are gathering evidence.

The time-honoured practice of interviewing suspects and possible witnesses also remains a major investigative tool, once corruption is suspected. The investigative skills needed are similar to those for other forms of criminal investigation, although specialised knowledge of corrupt practices and related matters will generally be an advantage. Given the concerns about retribution against witnesses or informants, it will also generally be important that investigators interview contacts in a

secure, confidential environment, take steps to protect any information gained and the identity of the source from disclosure, and be able to conduct interviews in a manner which will reassure informants.

### *Choice when disposing corruption cases*

Cases where corruption on the part of individuals is identified can be dealt with in several ways:

- By criminal or administrative prosecutions, which lead to incarceration, fines, restitution requirements or other punishments;
- By disciplinary actions, which lead to employment-related measures such as dismissal or demotion;
- By bringing or encouraging civil proceedings, in which those directly affected, or in some cases the State, seek to recover the proceeds of corruption or civil damages; and, • Remedial actions such as the retraining of individuals or restructuring of operations in ways which reduce or eliminate opportunities for corruption.

Generally, the same detection techniques, investigative procedures and evidentiary requirements will apply regardless of the process chosen, although criminal prosecutions usually entail higher standards of reliability and probative value for evidence because of the serious penal consequences for offenders. The decision about whether to apply criminal sanctions or to seek less- drastic remedies can be exceedingly difficult, balancing moral and ethical considerations against pragmatic costs and benefits, and is itself susceptible to corruption in systems which embody relatively broad prosecutorial discretion.

Criminal prosecutions may not be desirable or possible in the following circumstances:

The conduct may not be a crime

In some cases, behaviour might be considered as “corrupt” for the purposes of a national anticorruption programme or the internal programmes of a company or government agency, but not be the subject of a criminal offence. Alternatively, it may be conduct which has been overlooked in the development of the criminal law, or conduct such as purely private-sector malfeasance which is seen as corrupt, but which does not sufficiently harm the public interest to warrant criminalisation.

Available evidence may not support prosecution

As noted above, the evidence and burden of proof in criminal prosecutions involve relatively high standards because of the penal consequences involved. In some cases, there may be sufficient evidence to justify lesser corrective measures, but not to support a criminal prosecution. Where this occurs, authorities must generally decide whether the circumstances warrant the additional delay, effort and expense needed to gather sufficient evidence to proceed, or whether measures such as disciplinary or remedial action should be pursued instead. One cost factor in such cases is the cost of leaving a corrupt official in place long enough to complete a full criminal investigation. Another consideration is the possibility that evidence of past corruption has been lost, making prosecution impossible.

Prosecution may not be in the public interest

In some cases the conduct may amount to a crime, but official discretion may be exercised not to prosecute the offender on the basis that the public interest is better served by some other course of action. Where large numbers of officials are involved, for example, the costs of prosecution include not only litigation costs, but also the costs of incarceration or other punishment, and the loss of expertise and costs of replacing the convicted officials. Discretionary decisions on this basis can be extremely problematic. On one hand, officials may face high costs of prosecuting offenders on a case by case basis, but if a decision is made not to prosecute, it may create the impression that the justice system itself is corrupt, which encourages corruption in other sectors and seriously erodes

any deterrence value in criminal justice measures. Where such a decision is made, it is important that it be well documented and made in the most transparent way possible to prevent actual corruption and dispel any public perception of corruption.

Criminal prosecutions and punishments effectively remove corrupt officials from any position where they can commit further offences, and deter both the individuals involved and others in similar positions. Since most corruption is economic in nature and is pre-planned rather than spontaneous, general deterrence is likely to form a significant part of the criminal justice component of anti-corruption strategies. The high financial and human costs impose practical limits on the extent of such prosecutions, however, and attempting large numbers of prosecutions as part of an anti-corruption drive may pressure investigators or prosecutors to engage in improprieties that effectively distort or corrupt the criminal justice system itself.

In formulating anti-corruption strategies, it is important that criminal prosecution and punishment be seen as only one of a number of options, and that other possibilities, ranging from preventive measures such as education or training and the incorporation of security measures to administrative or disciplinary sanctions which remove offenders at a lesser cost to them and society also be considered, and where appropriate, applied.

### *Case management*

#### Managing investigations

Corruption investigations tend to be large, complex and expensive, however, and to ensure the efficient use of resources and a successful outcome the elements and personnel involved must also be managed effectively. Such management should be seen not only as a matter of administrative necessity, but also part of the overall strategy of protecting the integrity of the investigation and ensuring public confidence in its outcome. As part of an ongoing anticorruption strategy, some management issues may be dealt with as matters of standing practice or procedure, while others will require attention or review on a case-by-case basis.

Teams working on specific cases will generally require expertise in the use of investigative techniques ranging from financial audits or other inspections to intrusive techniques. If legal proceedings are not excluded as an outcome from the outset, experience in assembling such cases and legal expertise in areas such as the law of evidence and the human rights constraints on such things as search and seizure may also be needed. In large, complex investigations, teams of investigators may be assigned to specific target individuals or aspects of the case. One group might be engaged in the tracing of proceeds, for example, while others interview witnesses or maintain surveillance of suspects.

It is essential that all of these functions be conducted in accordance with an agreed strategy and coordinated under the supervision of an investigative manager or lead investigator who receives timely information about the progress of investigators on a regular and frequent basis. The interviewing of witnesses or conduct of search and seizure operations will generally disclose the existence of an investigation and to some degree its purpose, and should not be undertaken until other measures which are only effective if conducted without alerting the targets have been concluded. On the other hand, such procedures may become urgent, if it appears that proceeds will be moved out of the jurisdiction or evidence destroyed unless rapid steps are taken. Coordinating these factors in order to maximise effectiveness require competent and wellinformed senior investigators. Given the magnitude of many investigations, human and financial resources will also often become a concern, and lead investigators will often have to seek out the necessary resources and allocate scarce resources to areas of the investigation where they will be most effectively used.

Investigative management must be flexible, capable of quickly adapting both strategy and tactics to take account of experiences and information as they accumulate. While investigators usually develop theories about what individual pieces of information mean and how they fit together, these theories

often require amendment as investigations proceed, and investigators must always be open to alternative possibilities and information or evidence which does not appear to be consistent with the theory being pursued at any given time. Investigations initiated into particular incidents of corruption will often turn up evidence of other, hitherto unsuspected corruption, or other forms of improper or criminal activity.

### *Management of information*

#### Internal information

This flexibility should be supported by effective information management, in which information is made available to those who require it as quickly as possible, and then retained in a format which is cross-referenced and quickly accessible so that it can be reviewed as needed and so that links to other relevant information are made apparent. Assessment of the relative sensitivity or confidentiality for each piece of information should also be done and linked to the information itself. This sensitivity may not be obvious to those not familiar with the information. Disclosure of facts that may seem insignificant in the context of an ongoing investigation, for example, may inadvertently disclose or help identify a source or informant who had been promised anonymity, for example, reducing the credibility of investigators and their ability to obtain similar information in future cases.

#### Media relations

Another critical element of information-management is media-relations. Ensuring that information is passed to the public media is important to ensuring transparency and the credibility of investigations. More fundamentally, media scrutiny and publicity is essential to raising public expectations, public awareness of the presence of corruption or substandard practices, and to generating political pressure for measures against corruption. Public awareness of the existence of anti-corruption investigators is also an important means of encouraging and assisting those who witness or suspect corruption to report it and provide evidence. Ensuring that the media have access to accurate and authoritative information may also be important as a means of reducing the tendency to report information that may be incorrect or harmful to the investigation or persons or agencies being investigated.

Measures should be taken to ensure that any information released for publication has been carefully reviewed, both to ensure accuracy, and to eliminate disclosures that could be harmful to the investigation. It is also important to ensure that only specified individuals release such information or participate in press conferences and similar activities to ensure that information is properly reviewed and that all information given the media is consistent. Those in contact with the media must also be competent, both in media-relations and in the subject matter they will discuss, and should not comment on matters which are beyond their expertise.

### *Managing the security of investigations and investigators*

The management of security is also a critical function. As noted in the previous segment, protecting the confidentiality of informant and other sources is often the only way to ensure cooperation, and the leakage of sensitive information may warn targets, allowing them to modify their behaviour, conceal or destroy evidence, or make attempts to corrupt or disrupt the investigative process. Maintaining effective security requires an assessment of the full range of attempts that might be made to penetrate or disrupt anti-corruption investigators, both in general and in the context of specific investigations. Attempts may be directed at obtaining information or denying information to investigators by disrupting, distorting or destroying it, or at the intimidation or even murder of the investigators themselves. The following areas should be assessed.

#### Physical premises

The premises where investigators base their work and store information should be chosen with a view to the ability to control entry, exit and access to exclude unauthorised persons, and resistance to attempts using force or stealth to gain entry when unoccupied. Where premises are part of larger law-enforcement or other government establishments, they should also be isolated from the remainder of the establishment in which they are located. Threats to destroy information or evidence by destroying the premises themselves using methods such as arson or explosives may also require consideration. Also important is security against various forms of electronic surveillance in the form of concealed microphones, transmitters and similar apparatus. This entails both premises that reduce the possibility of such surveillance and regular inspections or “sweeps” to detect devices that may have been installed since the last inspection.

### Personnel Security

Personnel security consists of two major threats. The physical safety and security of personnel must be assessed and protected in order to ensure that competent investigators can be employed and to frustrate any attempts to disrupt investigations by threatening, intimidating or actually harming personnel. Investigations may also be disrupted if key personnel are corrupted or intimidated or if corrupt individuals succeed in gaining employment for that purpose. Generally, employees should be screened by examining their past history, family ties or other relationships to identify factors that suggest vulnerability to corruption. Threats to physical safety should be regularly assessed and when identified, vigorously pursued by other law enforcement agencies. Other protective measures may include advice with respect to security precautions, anonymity, and arming investigators.

### Information, documents and communications

Most of the security concerns raised by investigations revolve around the possibility that critical information will fall into the hands of investigative targets, frustrating attempts to obtain evidence against them. Addressing these concerns requires management of each investigation so that steps which generate public attention are not taken prematurely, that documents are used, stored and transported in secure conditions, that access to copying equipment is limited and monitored, and that channels of electronic communication including wire- and wireless telephones, fax machines, radios, electronic mail and other media are made resistant to unauthorised interception or monitoring. Where the physical security of channels cannot be ensured, this will often entail the use of encryption or similar technologies to ensure that those who can receive data cannot decipher and read them.

### Relationships with other agencies

Anti-corruption agencies must still ultimately be accountable for their activities, which requires some degree of timely disclosure of information to political or judicial bodies responsible for their oversight. When such disclosure should be made may vary and can be a difficult issue. As a general principle, investigations should only be externally reviewed after they have concluded, but this will not prevent some harm from occurring if abuses occur sooner, and in some cases this may include irreversible consequences. In such cases, it may be appropriate to permit investigators to consult more senior officials such as judges for advice or direction, and many systems make some provision for this.

### Threat assessment

Threats to the security of investigators and investigations should be assessed both in general terms and in the context of each specific investigation. Relevant factors will include the numbers of individuals suspected, whether they are organised or not, the sophistication of the corruption suspected, the sophistication of the individuals or group targeted, the magnitude and scope of the corruption and its proceeds, whether the targets are involved in crimes other than corruption, and whether there is any specific history of violence or attempts to obstruct investigations or prosecutions.

### *Managing transnational or “grand corruption” cases*

Cases which involve “grand corruption” or which have significant transnational aspects raise additional management issues. For example, cases where very senior officials are suspected raise exceptional concerns about integrity and security and are likely to attract extensive media attention. Large-scale and sophisticated corruption is well-resourced and well-connected, making it more likely that conventional sources of information will either not have the necessary information or evidence, or that they will be afraid to cooperate. Senior officials may be in a position to interfere with investigations. The magnitude of proceeds in grand corruption cases make it more likely that part of the overall case strategy is the tracing and forfeiture of the proceeds, and where they have been transferred abroad, obtaining their return. Allegations that senior officials are corrupt may also be extremely damaging in personal and political terms if they become public and later turn out to be unsubstantiated or false.

Transnational elements are more likely to arise in grand corruption cases. Senior officials realise while in office that there is no domestic shelter for the proceeds which will not be located once they are out of office, and generally transfer very large sums abroad, where they are invested or concealed. In many cases, the corruption itself has foreign elements, such as the bribery of officials by foreign companies seeking government contracts or the avoidance of costly domestic legal standards in areas such as employment or environmental protection. The offenders themselves also often maintain foreign residences and flee there once an investigation becomes apparent.

Generally, transnational or multi-national investigations require much the same coordination as do major domestic cases, but the coordination and management must be accomplished among law enforcement agencies that report to sovereign governments with a potentially wide range of political and criminal justice agendas. This will generally involve liaison between officials at more senior levels with their foreign counterparts to set overall priorities and agendas, and more direct cooperation between investigators within the criteria set out for them. From a substantive standpoint, investigative teams in such cases will generally be much larger and will involve additional areas of specialisation such as extradition, mutual legal assistance and international money laundering.

### *Case Selection Strategies and Techniques*

Given the extent of corruption, the range of cases likely to exist, the range of possible outcomes, and the limits imposed by human and financial resource constraints, most national anti corruption programmes will find it necessary to make priority choices about which cases to pursue, and what outcomes to seek. This involves the exercise of considerable discretion that should be carefully managed to ensure consistency, transparency and the credibility of both the decision-making process and its outcomes. A major element of this process is the setting and, where appropriate, publication of criteria for case-selection. These will ensure that like cases are dealt with similarly, and reassure those who make complaints and members of the general public that decisions not to pursue reported cases are based on objective criteria and not on improper or corrupt motives.

The interaction of criteria will vary from case to case, but criteria that should generally be considered include the following.

#### Seriousness and prelevance of the other corruption alleged

Assuming that the fundamental objective of a national anti-corruption strategy is to reduce overall corruption as quickly as possible, priority may be given to cases that involve the most common forms of corruption. Where large numbers of individuals are involved, these will often lead to proactive outcomes such as the setting of new ethical standards and training of officials, rather than criminal prosecutions and punishments.

#### Legal nature of the alleged corruption

Broadly speaking, corruption could be categorised as including criminal or administrative corruption offences such as bribery, related criminal offences such as money-laundering or obstruction of justice, and non-criminal corruption. As previously discussed, the legal nature will often affect both the availability and choice of outcomes. Conduct that is not a crime cannot be punished as such for example. This same nature will often determine which agency deals with it and how it is prioritised.

#### Cases which set precedents

Cases that raise social, political or legal issues that, once resolved in the context of an initial “test” case, can be applicable to many other cases to follow, may be given priority. Examples of this include dealing publicly with common conduct which has not been perceived as corruption in order to change public perceptions, and cases which test the extent of criminal corruption offences, either setting a useful legal precedent or establishing the need for legislation to close a legal gap or correct a problem. In the case of legal precedents, time-consuming appeals may be required which is another reason for starting the process as soon as a case that raises the necessary issues is identified.

#### Viability or probability of satisfactory outcome

Cases may be downgraded or deferred if an initial review establishes that no satisfactory outcome can be achieved. Examples of this include cases in which the only desirable outcome is a criminal prosecution, but the suspect is deceased or unavailable, or essential evidence has been lost. Part of the assessment of such cases should include a review of possible outcomes to see if other appropriate remedies might be achievable.

#### Availability of financial, human and technical resources

The overall availability of resources is always a concern in determining how many cases can be dealt with at the same time or within a given period, and the tendency for cases to change as investigations proceed require periodic reassessment of case-loads. Generally this will not be related to the setting of priorities with respect to the type of case taken up or the priority of individual cases, but there are exceptions. A single major case, if pursued, may result in the effective deferral of larger numbers of more minor cases, for example, and unavailability of specialised human expertise may make specific cases temporarily impossible. This makes the assessment of costs and benefits important, before any decisions are made. “Grand corruption” and other transnational cases raise substantial costs in areas such as travel and foreign legal services, but may also raise the need to make examples of corrupt senior officials for reasons of deterrence and credibility, and to recover large proceeds hidden both at home and abroad.

#### Criminal intelligence criteria

As national anti-corruption programmes gain overall expertise and knowledge and deal with numbers of individual cases, intelligence information should be gathered and assessed. This will usually include open research and assessment of overall corruption patterns, leading to conclusions about which are the most prevalent or which cause the most social or economic harm. It will also include the gathering of confidential information about patterns and links between specific offenders or organised criminal groups. Both of these will assist in identifying cases in which the allocation of high priorities and significant resources will end the activities of criminal groups or bring about other far-reaching improvements. In some cases, investigations may also be given priority in areas where intelligence is needed, in order to develop sources and gather information.

#### *Investigative Techniques*

Some of the following techniques have proven highly efficient in the investigation of widespread large-scale corruption. In particular, various types of financial investigations into suspected corrupt individuals are often the most direct and successful method of proving criminal acts.



**Focus Investigations.** If the results of a corruption investigation suggest that corruption and bribery in a certain public service is widespread, it is advisable to concentrate on the systematic checking of the assets of all possible bribe takers (See Financial Investigations & Monitoring of Assets). However, this exercise may not yield enough information to warrant further investigation. For example, certain government functions are prone to inviting widespread corruption in terms of the number of officials receiving the bribes but in relatively small money amounts. Branches involved in licensing and permitting are good examples. A high volume of potential bribe-givers, the public in this case, visits these branches on a daily basis. Quite often, the frustrations of applying for a drivers license, or getting permission to construct a new home, or requesting copies of documents or just about any other service to the public becomes a quagmire of government 'red tape' and delay. This sort of environment breeds bribery as a means to quickly solving the frustration and delay of 'red tape'. In such cases, an investigation into the working files of the branch will be more effective and efficient than investigating financial records of employees. Before devoting efforts in any investigation, it is important to evaluate the most cost-effective means of deploying staff and focusing investigative energies.

**Terms of Reference.** Before starting investigations, clear and comprehensive terms of reference (TOR) should be drafted. They should contain a comprehensive list of all the resources needed (human, financial, equipment) to conduct the investigations. Particular consideration should be given to the possible need of additional resources to maintain the secrecy of the investigation. The suspect corrupt civil servant might have connections to other civil servants who might alert them to investigations or they might even be members of the criminal justice system and thus have access to restricted information. It is therefore essential at the outset to evaluate methods to ensure the confidentiality of the investigation. Steps taken to protect the secrecy of the investigations could include:

- Renting non-police or undercover locations and making them secure;
- Use of fictitious names to purchase or rent equipment; and
- Use of stand-alone computer systems not tied into any other governmental operation.

**Policy Document.** In addition to the TOR, a policy and procedures document must be created containing a clear description of the facts giving rise to the investigation, all decisions rendered during the investigation with their justifications and reasons for the involvement / noninvolvement of the senior management of the institution for which the suspect works. It should be noted that there can be hidden costs involved with the investigation such as loss of morale within the target institution and their potential loss of public trust. Every investigation must be evaluated on a case-by-case basis with regard to its cost and benefit to the government and the public.

**Selection of the Investigative Team.** The selection of an effective team will be crucial to the success of an investigation. Its members should possess the specific investigative skills needed, should have proven integrity and high ethical standards and be willing to undertake the work. Their backgrounds should be thoroughly checked, including their social and family ties and lifestyle. The team must be made aware of the personal implications of the investigation, in particular when undercover work needs to be conducted. Skills that are typically needed to conduct large-scale corruption investigations include financial investigative skills, undercover and surveillance skills, information technology skills, interviewing and witness preparation abilities, excellent report writing skills and the ability to analyse intelligence.

**Intelligence and Analysis.** Both are vital in corruption investigation. During the course of investigation, fragments of information, or intelligence, is collected. This intelligence must be analysed in order for the investigator to piece together fragments of information in order to have a clear picture of the relationships and events that taken together can constitute proof of criminal activity. Unlike other crimes such as theft or murder, where a complainant with some interest in uncovering the crime comes forward, crimes of corruption and bribery are committed in the shadows with both parties benefiting from the crime. This unique relationship, since neither party believes they are victims of any crime, prevents authorities from knowing that a crime has taken place. It is unlikely that either party is going to report the crime. For this reason, corruption investigation is especially challenging

and difficult. Intelligence gathering and analysis is therefore critical in uncovering corruption. In addition, a constant analysis of the results will help to redirect and adjust efforts and will serve to help allocate resources efficiently.

**Proactive Integrity Testing.** Although this activity might initially require considerable preparation and resources, it can produce rapid results that serve as an excellent deterrent. Close monitoring and strict guidelines are essential to avoid the danger of entrapping a target. Any decision to use integrity testing must have a sound and defensible basis. The test itself must be fair to the target so that can be defended in court as reasonable and fair (see Integrity Testing). All integrity testing should be electronically recorded in the interest of fairness to the target and for accurate evaluation of criminal responsibility by judge and jury. Conviction's resulting from integrity testing must be based clearly on the necessary mens rea, or criminal intent, on the part of the accused. The government must not engage in convincing anyone to commit a crime they are not predisposed to commit. More than in any other area of policing, the public must be protected from false accusations or behavior tending to entrap an individual into committing an offence he or she would not have otherwise committed but for the encouragement of the police.

**Multi-faceted Approach.** Rather than following only one investigative path, it is advisable to pursue reasonable leads that might prove useful. It is not unusual that seemingly insignificant information becomes vital in proving criminal activity. This also applies to statements and documents. They should be carefully analysed and cross-referenced using the names, places and all other information that can help to provide information and may serve to confirm the validity of evidence gathered.

**Identify Middleman and Facilitators.** Middlemen are often involved in committing corruption on behalf of others. For example, politicians often provide the necessary link between bribe givers and bribe takers, and international businessmen facilitate the creation of slush funds, commit the actual bribe transaction and help to launder the proceeds of corruption.

**Financial Investigation.** One of the most successful ways to produce evidence against corrupt public officials is to conduct financial investigations to prove that they spend or possess assets beyond the means of their income (see Financial Investigations and Monitoring of Assets). This will help to produce a preponderance of evidence of corruption, and can identify those illegal assets that might later be confiscated. However, suspects are unlikely to place the bounty from a bribe into their daily bank accounts and instead may transform the proceeds into other forms of property. Therefore, financial investigations should also concentrate on the lifestyles, expenditures and property of the suspected persons. In this respect, it might be extremely helpful to look not only at what has actually been spent, but also to compare the amounts of money deposited into the bank accounts of suspects with deposits from previous years. Efforts should also be focused on identifying whether the suspected corrupt person maintains foreign accounts. The existence of such an account can be suspicious alone and indicate that funds are being hidden. In order to be effective, financial investigations should be extended to the suspected persons' family members and those living in the same household: experience shows that they are often used as conduits for corruption proceeds.

**Identification of Slush Funds.** In order to avoid paying bribes directly out of the corporate bank account, it is common practice for larger organisations to create so-called slush funds, i.e. funds that do not appear in official corporate accounts and records. Money needed to pay bribes can be taken from these funds as needed. The methods adopted to create these funds are very similar to techniques used to launder money. One common method is where the costs of services or goods are falsified and funds used to pay for these alleged services or goods are transferred into the slush fund account. It is usually extremely difficult to prove the actual receipt of this money as, for example, in the case where consultants are hired and schemes enacted where monies paid are actually returned to the slush fund in cash.

**Investigation into the Slush Fund.** Once a slush fund has been identified, the investigation should be broadened to include all payments made out of this fund. All individuals with access to the funds

should be identified. Companies and private persons that have ongoing business with the state and are found paying a bribe on one occasion are most likely to have done so on several occasions.

**Court Orders.** If court orders are needed to carry out specific covert evidence gathering activities, particular care should be given to the particular judge receiving the request. It is not unusual that politically and socially connected suspects and other suspects having connections to the criminal justice system might have contacts with the judge issuing the order.

**Suspension.** During the period of investigation, a decision might be made to suspend suspects from their official duties. In particular, if they are involved in making important decisions and a subsequent conviction may negatively influence the validity of their decisions, actual or perceived, it may become necessary to remove them from any approval processes. When the suspect is employed by an institution of the criminal justice system, measures should be taken to prevent him from “networking” after any suspension. Colleagues of the suspected persons should be given strong warnings about relating information to the suspended colleague who should be authorized to contact only one specific supervisor within their organisation.

**Witnesses.** A comprehensive interviewing strategy should be designed. It should include measures to overcome obstructive lawyers, witness protection, ensuring the credibility of the witness and to avoid suspected illegal managing of witnesses. Witnesses often have a criminal background themselves and therefore might not be very credible. It is essential that witnesses admit their involvement in prior criminal acts, particularly if they are involved in the acts of corruption for which the suspects are being investigated. Nothing is more damaging to a prosecutor’s case than for an important witness to be exposed to the jury as a criminal. The personal background of the criminal witness must be offered to the jury as soon as possible in the proceedings. Witnesses must be protected against threats. The most cost-effective means to do this is to protect the identity of witnesses for as long as possible. The best way to avoid allegations of illegal enquiry methods or promises made to witnesses by the investigating team is to electronically record all interviews.

**Preparation of Court Presentation.** It is essential that as many facts as possible are corroborated. In particular, if witnesses are used, it is important to obtain secondary evidence, where possible, to support their credibility. In those systems where the police are not required by law to conduct investigations under the direct supervision of a public prosecutor, it is crucial to involve the Prosecutor’s Office at a very early stage.

**Media Strategy.** During investigations and court proceedings, a clear media strategy should be elaborated that assigns one person to interface with and report to the media. All other personnel and investigators involved should be made aware of the potential damage that may be caused to the successful outcome of the investigation and prosecution if they make comments to the media. This also applies to the witnesses. In the case where a public official is accused, the senior managers of the institution in which the accused works should be informed of the risks of commenting to the media.

**International Focus.** Cases of grand corruption often include international aspects. For example, the bribe giver may be a foreign investor, the slush fund might be located in a country other than that where the bribe is paid, or the bribe might be transferred directly into a recipient’s foreign bank account. Investigators and prosecutors should therefore be trained on mutual legal assistance and exchange of information procedures at the international level.

#### Preconditions and Risks

*The following factors contribute to successful investigations:*

Independence of the Prosecutor, both Internally and Externally. Especially in cases of investigations into high-level corruption, political interference can interfere with investigations and prevent prosecution if executive branches of government directly control the Prosecutor’s Office. The judicial police should report directly to the prosecutor in order to integrate investigation and prosecution, to

ensure mutual loyalty and to protect the investigations from being jeopardised by undue political interference in the work of the investigating police team.

Secrecy of the First Stages of the Investigation. There should be no obligation to inform the suspect about the investigation during its early stage. When a suspect has knowledge of an investigation prior to the time the police can secure sufficient evidence, the suspect might destroy evidence and warn other targeted persons to do the same.

Strong Investigative Powers. Strong investigative powers are fundamental for successful investigation. In particular, the ability to order searches and seizures without court authorisation, ability to remove banking secrecy during investigations and the ability to request preventive detention and telephone interception have proved extremely helpful.

Plea-Bargaining and Summary Proceedings. The possibility of making recourse to plea bargaining and summary proceedings have been extremely helpful in increasing efficiency during what are normally long and complex proceedings. Plea-bargaining has also been successfully used to help identify other criminal activity as reported by suspects wishing to reduce the severity of a potential conviction.

Seeking the Support of the Media and General Public Support. Several factors are likely to place investigation and prosecution of corruption at risk. These include:

- Statutes of Limitation. Given the complexity of investigations into “victimless” crimes such as corruption, statutes of limitation often expire before the accused is charged with a crime. Therefore, an extension or exception to a statute of limitation should be considered especially in those cases where the lengthiness of the investigation is due to factors beyond the control of the government.
- Inefficient International Cooperation. Requests for information and for mutual legal assistance should be submitted as soon as possible since experience shows that even well meaning collaborating jurisdictions normally give the lowest priority to requests for assistance.

A likely related tools could be:

- Establish, disseminate, discuss and enforce a Code of Conduct for public servants
- Establish and disseminate, discuss and enforce a Citizen Charter
- Establish an independent and credible complaints mechanism where the public and other parts of the criminal justice system can file complaints
- Establish a Disciplinary Mechanism with the capability to investigate complaints and enforce disciplinary action when necessary
- Conduct an independent comprehensive assessment of the governments levels, cost, coverage and quality of service delivery, including the perceived trust level between the public service and the public
- Simplifying procedures of complaining,
- Raising public awareness where and how to complain (e.g. by campaigns telling to public what telephone number to call), and
- Introducing a computerized complaints system allowing the institutions to record and analyse all complaints and monitor actions taken to deal with the complaints.

### ***THE PARLIAMENTARY ASSEMBLY: RESOLUTION 1703 - JUDICIAL CORRUPTION, COE, 2010***

10. In order to be effective the fight against corruption must comprise investigations, prosecution and ultimately convictions. Accordingly, the Assembly invites the member states to:

- 10.1. devise specific machinery to ensure the accountability, criminal accountability included, of judges and prosecutors without impairing their independence and impartiality;

- 10.2. ensure that the immunities of members of the judiciary do not impede effective proceedings against them;
- 10.3. provide specialised investigators with proper training and adequate resources.

**REPORT ON JUDICIAL CORRUPTION AND COMBATTING CORRUPTION THROUGH THE JUDICIAL SYSTEM, UN Doc A/67/305 (13 August 2012), United Nation Special Rapporteur on the independence of judges and lawyers**

**Recommendations to combat corruption by the justice system** (w) States should consider creating and implementing specialized units or courts to enhance the investigation, processing and judging of corruption cases by providing them with well-trained professionals, modern information technology resources and adequate working conditions that could enable them to obtain the necessary evidence in corruption cases; (x) States where such a system still exists should consider abolishing the prerogative of “special guarantees” for some officials; (y) The international community should strengthen its assistance to States in combating corruption, which would help strengthen the rule of law and democracy and reinforce the role of judges, prosecutors and lawyers in the promotion and protection of human rights.

## ANNEXES 1: LIST OF INTERNATIONAL STANDARDS - SOURCES

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[Best Practices in Combating Corruption, Chapter Sixteen: The Judicial System: Judges and Lawyers](#), OSCE, 2004

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[Resource Guide on Strengthening Judicial Integrity and Capacity](#), UNODC, 2011

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[Resolution \(97\) 24 on the Twenty Guiding Principles for the Fight Against Corruption](#), Council of Europe, 1997

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### **C. Commonwealth**

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## **ADDENDUM TO MANUAL ON INDEPENDENCE, IMPARTIALITY AND INTEGRITY OF THE JUDICIARY**