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**CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)**

# OPINION No 1 (2001)

# OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)

# FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE

# ON STANDARDS CONCERNING THE INDEPENDENCE OF THE JUDICIARY AND THE IRREMOVABILITY OF JUDGES

# (RECOMMENDATION No. R (94) 12 ON THE INDEPENDENCE, EFFICIENCY AND ROLE OF JUDGES AND THE RELEVANCE OF ITS STANDARDS AND ANY OTHER INTERNATIONAL STANDARDS TO CURRENT PROBLEMS IN THESE FIELDS)

1. The Consultative Council of European Judges (CCJE) has drawn up this opinion on the basis of the responses of States to a questionnaire, texts prepared by the Working Party of the CCJE and texts prepared by the Chair and Vice Chair of the CCJE and the specialist of the CCJE on this topic, Mr Giacomo OBERTO (Italy).

2. The material made available to the CCJE includes a number of statements, more or less official, of principles regarding judicial independence.

3. One may cite as particularly important formal examples:
- UN basic principles on the independence of the judiciary (1985),
- Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe to Member States on the independence, efficiency and role of judges.

4. Less formal developments have been:
- The European Charter on the Statute for Judges adopted by participants from European countries and two judges' international associations meeting in Strasbourg on 8-10 July 1998, supported by the meeting of the Presidents of the Supreme Courts of Central and Eastern European countries in Kyiv on 12-14 October 1998, and again by judges and representatives from Ministries of Justice from 25 European countries meeting in Lisbon on 8-10 April 1999,
- Statements by delegates of High Councils of Judges, or judges' associations, such as those made at a meeting in Warsaw and Slok on 23-26 June 1997.

5. Other material mentioned during the CCJE's discussions includes:
- Beijing Statement on principles of the independence of the judiciary in the Lawasia Region (August 1997), now signed by 32 Chief Justices of that region,
- The Latimer House Guidelines for the Commonwealth (19 June 1998), the outcome of a colloquium attended by representatives of 23 Commonwealth countries or overseas territories and sponsored by Commonwealth judges and lawyers with support from the Commonwealth Secretariat and the Commonwealth Office.

6. **Throughout the CCJE discussions, members of the CCJE emphasised that what is critical is not the perfection of principles and, still less, the harmonisation of institutions; it is the putting into full effect of principles already developed.**

7. The CCJE also considered whether improvements or further developments of existing general principles may be appropriate.

8. The purpose of this opinion is to look in greater detail at a number of the topics discussed and to identify the problems or points concerning the independence of judges that would benefit from attention.

9. It is proposed to take the following topic headings:
- The rationale of judicial independence
- The level at which judicial independence is guaranteed
- Basis of appointment or promotion

- The appointing and consultative bodies
- Tenure - period of appointment
- Tenure - irremovability and discipline
- Remuneration
- Freedom from undue external influence
- Independence within the judiciary
- The judicial role

In the course of looking at these topics, the CCJE has sought to identify certain examples of difficulties regarding or threats to independence which came to its attention. Further, it has identified the importance of the principles under discussion to (in particular) the arrangements and practice regarding the appointment and re-appointment of judges to international courts. This topic is dealt with in paragraphs 52, 54-55).

*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.

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[1]. 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[2]. Independence thus serves as the guarantee of impartiality[3]. This has implications, necessarily, for almost every aspect of a judge's career: from training to appointment and promotion and to disciplining.

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[1] The CCJE will not attempt to precise the extensive literature on the subject of separation of powers, and the text gives only a simplified account, as is aptly demonstrated in The Judiciary and the Separation of Powers by Lopez Guerra (Venice Commission paper for a Conference for Constitutional and Supreme Court Judges from the Southern African Region, February 2000).

[2] For a more sophisticated analysis identifying the impossibility, and it can be said, undesirability, of anyone being completely independent of all influence, e.g. social and cultural parameters, see The Role of Judicial Independence for the Rule of Law, Prof. Henrich (Venice Commission paper for workshop in Kyrgystan, April 1998).

[3] See paragraph 12 below.

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.

13. The rationale of judicial independence, as stated above, provides a key by which to assess its practical implications – that is, the features which are necessary to secure it, and the mean by which it may be secured, at a constitutional or lower legal level[4], as well as in day-to-day practice, in individual states. The focus of this opinion is upon the general institutional framework and guarantees securing judicial independence in society, rather than upon the principle requiring personal impartiality (both in fact and appearance) of the judge in any particular case. Although there is an overlap, it is proposed to address the latter topic in the context of the CCJE's examination of judicial conduct and standards of behaviour.

*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**

[4] see paragraphs 14-16 below.

**less specific provisions of the first sentence of Principle I.2 of Recommendation No. R (94) 12.**

*Basis of appointment or promotion*

17. The UN basic principles state (paragraph 13): "Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience". Recommendation No. R (94) 12 is also unequivocal: "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". Recommendation No. R (94) 12 makes clear that it is applicable to all persons exercising judicial functions, including those dealing with constitutional, criminal, civil, commercial and administrative law matters (as well as in most respects to lay judges and other persons exercising judicial functions). There is, therefore, general acceptance both that appointments should be made "on the merits" based on "objective criteria" and that political considerations *should* be inadmissible.

18. The central problems remain (a) of giving content to general aspirations towards "merits-based" appointments and "objectivity" and (b) of aligning theory and reality. The present topic is also closely linked with the next two topics (*The appointing body* and *Tenure*).

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.

20. Even where a separate authority exists with responsibility for or in the process of judicial appointment or promotion, political considerations are not, in practice, necessarily excluded. Thus, in Croatia, a High Judiciary Council of 11 members (seven judges, two attorneys and two professors) has responsibility for such appointments, *but* the Minister of Justice may propose the 11 members to be elected by the House of Representatives of the Croatian Parliament *and* the High Judiciary Council has to consult with the judiciary committee of the Croatian Parliament, controlled by the party forming the Government for the time being, with regard to any such appointments. Although Article 4 of the amended Croatian Constitution refers to the principle of separation of powers, it also goes on to state that this includes "all forms of mutual co-operation and reciprocal control of power holders", which certainly does not exclude political influence on judicial appointments or promotion. In Ireland, although there is a judicial appointments commission[5], political

[5] See further paragraph 43 below.

considerations may still determine which of rival candidates, all approved by the commission, is or are actually appointed by the Minister of Justice (and the commission has no role in relation to promotions).

21. In other countries, the systems presently in place differ between countries with a career judiciary (most civil law countries) and those where judges are appointed from the ranks of experienced practitioners (e.g. common law countries, like Cyprus, Malta and the UK, and other countries like Denmark).

22. In countries with a career judiciary, the initial appointment of career judges normally depends upon objective success in examination. The important issues seem to be (a) whether competitive examination can suffice - should not personal qualities be assessed and practical skills be taught and examined? (b) whether an authority independent of the executive and legislature should be involved at this stage – in Austria, for example Personalsenates (composed of five judges) have a formal role in recommending promotions, but none in relation to appointments.

23. By contrast, where judges are or may be appointed from the ranks of experienced practitioners, examinations are unlikely to be relevant and practical skills and consultation with other persons having direct experience of the candidate are likely to be the basis of appointment.

24. In all the above situations, it is suggested that objective standards are required not merely to exclude political influence, but for other reasons, such as the risk of favouritism, conservatism and cronyism (or "cloning"), which exist if appointments are made in an unstructured way or on the basis of personal recommendations.

25. Any "objective criteria", seeking to ensure that the selection and career of judges are "based on merit, having regard to qualifications, integrity, ability and efficiency", are bound to be in general terms. Nonetheless, it is their actual content and effect in any particular state that is ultimately critical. **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.

26. The responses to questionnaires indicate a widespread lack of any or any such published criteria. General criteria have been published by the Lord Chancellor in the UK, and the Scottish executive has issued a consultation document. Austrian law defines criteria for promotion. Many countries simply rely on the integrity of independent councils of judges responsible for appointing or recommending appointments, e.g. Cyprus, Estonia. In Finland, the relevant advisory board compares the candidates' merits and its proposal of any appointment *includes the reasons for its decision*. Likewise in Iceland, the Selection Committee[6] provides the Minister for

[6] consisting of three lawyers appointed by the Minister of Justice on the recommendation of the Supreme Court, the Judges Association and the Association of Attorneys, on whose applications and qualifications the Supreme Court also comments.

Justice with a written appraisal of applicants for district judgeships, while the Supreme Court advises on competence for appointment to the Supreme Court. In Germany, at both federal and Land level, councils for judicial appointments may be responsible for delivering written views (without detailed reasons) on the suitability of candidates for judicial appointment and promotion, which do not bind the Minister of Justice, but which may lead to (sometimes public) criticism if he does not follow them. The giving of reasons might be regarded as a healthy discipline and would be likely to give insight to the criteria being applied in practice, but countervailing considerations may also be thought to militate against the giving of reasons in individual cases (e.g. the sensitivity of the judgment between closely comparable candidates and privacy with regard to sources or information).

27. In Lithuania, although no clear criteria governing promotion exist, the performance of district judges is monitored by a series of quantitative *and qualitative* criteria based mainly on statistics (including statistics relating to reversals on appeal), and is made the subject of reports to the Courts Department of the Ministry of Justice. The Minister of Justice has only an indirect role in selection and promotion. But the monitoring system has been "strictly criticised" by the Lithuanian Association of Judges. Statistical data have an important social role in understanding and improving the workings and efficiency of courts. But they are not the same as objective standards for evaluation, whether in respect of appointment to a new post or promotion or otherwise. Great caution is required in any use of statistics as an aid in this context.

28. In Luxembourg, promotion is said to be based normally on the seniority principle. In the Netherlands there are still elements of the early seniority system, and in Belgium and Italy objectively defined criteria of seniority and competence determine promotion. In Austria, in relation to the recommendations for promotion made by the Personalsenates (composed of five judges) to the Minister of Justice, the position by law is that seniority is considered only in case of equal professional ability of candidates.

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[7] 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.

30. In Italy and to some extent Sweden, the status, function and remuneration of judges have been uncoupled. Remuneration follows, almost automatically, from

[7] The CCJE is however aware of some cases, where such a system appears to work successfully, e.g. for the appointment of the Chief Justice in India and Japan.

seniority of experience and does not generally vary according to status or function. Status depends on promotion but does not necessarily involve sitting in any different court. Thus, a judge with appellate status may prefer to continue to sit at first instance. In this way the system aims to increase independence by removing any financial incentive to seek promotion or a different function.

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".

33. The various methods currently used to select judges can all be seen as having advantages and disadvantages: it may be argued that election confers a more direct democratic legitimacy, but it involves a candidate in a campaign, in politics and in the temptation to buy or give favours. Co-option by the existing judiciary may produce technically qualified candidates, but risks conservatism and cronyism (or "cloning")[8] – and would be regarded as positively undemocratic in some constitutional thinking. Appointment by the executive or legislature may also be argued to reinforce legitimacy, but carries a risk of dependence on those other powers. Another method involves nomination by an independent body.

34. There is room for concern that the present diversity of approach may tacitly facilitate the continuation of undue political influence over appointments. The CCJE noted the view of the specialist, Mr Oberto, that informal appointment procedures and overtly political influence on judicial appointments in certain States were not helpful models in other, newer democracies, where it was vital to secure judicial independence by the introduction of strictly non-political appointing bodies.

[8] see paragraph 24 above.

35. The CCJE noted, to take one example of a new democracy, that in the Czech Republic judicial appointments are made by the President of the Republic, on the motion of the Minister of Justice and promotions (i.e. transfer to a higher court or to the position of a presiding or deputy presiding judge) by either the president or the Minister. No Supreme Judiciary Council exists, although judges sit on committees which select candidates for judicial appointment.

36. Recommendation No R (94) 12 presently hedges its position in this area. It starts by assuming an independent appointing body:

"The authority taking the decision on the selection and career of judges should be independent of the government and administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules".

But it then goes on to contemplate and provide for a quite different system:

"However, where the constitutional or legal provisions and traditions allow judges to be appointed by the government, there should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to the objective criteria mentioned above."

The examples which follow of "guarantees" offer even greater scope for relaxation of formal procedures – they start with an special independent body to give advice which the government "follows in practice", include next "the right to appeal against a decision to an independent authority" and end with the bland (and imprecisely expressed) possibility that it is sufficient if "the authority which makes the decision safeguards against undue and improper influences".

37. The background to this formulation is found in conditions in 1994. But the CCJE is concerned now about its somewhat vague and open nature in the context of the wider Europe, where constitutional or legal "traditions" are less relevant and formal procedures are a necessity with which it is dangerous to dispense. **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.**

38. The CCJE recognised that it may not be possible to go further, in view of the diversity of systems at present accepted in European States. The CCJE is, however, an advisory body, with a mandate to consider both possible changes to existing standards and practices and the development of generally acceptable standards. Further, the European Charter on the statute for judges already goes considerably further than Recommendation No. R (94) 12, by providing as follows:

"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."

39. The Explanatory Memorandum explains that the "intervention" of an independent authority was intended in a sense wide enough to cover an opinion, recommendation or proposal as well as an actual decision. The European Charter still goes well beyond current practice in many European States. (Not surprisingly, delegates of High Councils of Judges and judges' associations meeting in Warsaw on 23-26 June 1997 wanted even fuller judicial "control" over judicial appointments and promotion than advocated by the European Charter.)

40. The responses to questionnaires show that most European States have introduced a body independent of the executive and legislature with an exclusive or lesser role in respect of appointments and (where relevant) promotions; examples are Andorra, Belgium, Cyprus, Denmark, Estonia, Finland, France, Iceland, Ireland, Italy, Lithuania, Moldova, Netherlands, Norway, Poland, Romania, Russia, Slovakia, Slovenia, "the Former Yugoslav Republic of Macedonia" and Turkey.

41. The absence of such a body was felt to be a weakness in the Czech Republic. In Malta such a body exists, but the fact that consultation with it by the appointing authority[9] was optional was felt to be a weakness. In Croatia, the extent of potential political influence over the body was identified as a problem[10].

42. The following systems will serve as three examples of a higher judiciary council meeting the suggestions of the European Charter.

i) Under article 104 of the Italian Constitution, such a council consists of the President of the Republic, the First President and Procurator General of the Court of Cassation, 20 judges elected by the judiciary and 10 members elected by Parliament in joint session from among university professors and lawyers of 15 years standing. Under article 105, its responsibility is "to designate, to recruit and transfer, to promote and to take disciplinary measures in respect of judges, in accordance with the rules of the judicial organisation".

ii) The Hungarian Reform Laws on Courts of 1997 set up the National Judicial Council exercising the power of court administration including the appointment of judges. The Council is composed of the President of the Supreme Court (President of the Council), nine judges, the Minister of Justice, the Attorney General, the President of the Bar Association and two deputies of Parliament.

iii) In Turkey a Supreme Council selects and promotes both judges and public prosecutors. It consists of seven members including five judges from either the Court of Cassation and the Council of State. The Minister of Justice chairs it and the Undersecretary of the Minister of Justice is also an ex-officio member of the Council.

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[9] the President on advice from the Prime Minister.

[10] see paragraph 20 above.

43. A common law example is provided by Ireland, where the Judicial Appointments Board was established by Courts and Courts Officers Act 1995, section 13 for the purpose of "identifying persons and informing Government of the suitability of those persons for appointment to judicial office". Its membership of nine persons consists of the Chief Justice, the three Presidents of the High Court, Circuit Court and District Court, the Attorney General, a practicing barrister nominated by the Chairman of the Bar, a practicing solicitor nominated by the Chairman of the Law Society, and up to three persons appointed by the Minister of Justice, engaged in or having knowledge or experience of commerce, finance or administration or with experience as consumers of court services. But it does not exclude all political influence from the process[11].

44. The German model (above) involves councils, whose role may be different depending on whether one is speaking of federal or Land courts and on the level of court. There are councils for judicial appointments whose role is usually purely advisory. In addition, several German Länder provide that judges shall be chosen jointly by the competent Minister and a committee for the selection of judges. This committee usually has a right of veto. It is typically composed of members of parliament, judges elected by their colleagues and a lawyer. The involvement of the Minister of Justice is regarded in Germany as an important democratic element because he is responsible to parliament. It is regarded as constitutionally important that the actual appointing body should not consist of judges alone or have a majority of judges.

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[12] - 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.**

*Tenure - period of appointment*

46. The UN basic principles, Recommendation No. R (94) 12 and the European Charter on the statute for judges all refer to the possibility of appointment for a fixed legal term, rather than until a legal retirement age.

47. The European Charter, paragraph 3.3 also refers to recruitment procedures providing "for a trial period, necessarily short, after nomination to the position of judge but before confirmation on a permanent basis".

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[11] see paragraph 20 above.

[12] See paragraphs 38-39 above.

48. European practice is generally to make full-time appointments until the legal retirement age. This is the approach least problematic from the viewpoint of independence.

49. Many civil law systems involve periods of training or probation for new judges.

50. Certain countries make some appointments for a limited period of years (e.g. in the case of the German Federal Constitutional Court, for 12 years). Judges are commonly also appointed to international courts (e.g. the European Court of Justice and the European Court of Human Rights) for limited periods.

51. Some countries also make extensive use of deputy judges, whose tenure is limited or less well protected than that of full-time judges (e.g. the UK and Denmark).

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).**

54. The CCJE was conscious that its terms of reference make no specific reference to the position of judges at an international level. The CCJE is borne of a recommendation (no. 23) in the Wise Persons' Report of 1998, that direct co-operation with national institutions of the judiciary should be reinforced, and Resolution No. 1 adopted thereafter by the Ministers of Justice at their 22nd Conference meeting in Chisinau on 17-18 June 1999 referred to the CCJE's role as being to assist in carrying out the priorities identified in the global action plan "for the strengthening of the role of judges in Europe and to advise …. whether it is necessary to update the legal instruments of the Council of Europe ….". The global action plan is heavily focused on the internal legal systems of member states. But it should not be forgotten that the criteria for Council of Europe membership include "fulfillment of the obligations resulting from the European Convention on Human Rights" and that in this respect "submission to the jurisdiction of the European Court of Human Rights, binding under international law, is clearly the most important standard of the Council of Europe" (Wise Persons' Report, paragraph 9).

55. The CCJE considered that the ever increasing significance for national legal systems of supranational courts and their decisions made it essential to encourage member States to respect the principles concerning independence, irremovability, appointment and term of office in relation to judges of such supranational courts (see in particular paragraph 52 above).

56. **The CCJE agreed that the importance for national legal systems and judges of the obligations resulting from international treaties such as the European Convention 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.

*Tenure - irremovability and discipline*

57. 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: see the UN basic principles, paragraph 12; Recommendation No. R (94) 12 Principle I(2)(a)(ii) and (3) and Principle VI (1) and (2). The European Charter affirms that this principle extends to appointment or assignment to a different office or location without consent (other than in case of court re-organisation or temporarily), but both it and Recommendation No. R (94) 12 contemplate that transfer to other duties may be ordered by way of disciplinary sanction.

58. The CCJE noted that the Czech Republic has no mandatory retirement age, but "a judge may be recalled by the Minister of Justice from his position after reaching the age of 65".

59. The existence of exceptions to irremovability, particularly those deriving from disciplinary sanctions, leads immediately to consideration of the body and method by which, and basis upon which, judges may be disciplined. Recommendation No. R (94) 12, Principle VI(2) and (3), insists on the need for precise definition of offences for which a judge may be removed from office and for disciplinary procedures complying with the due process requirements of the Convention on Human Rights. Beyond that it says only that "States should consider setting up, by law, 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". The European Charter assigns this role to the independent authority which it suggests should "intervene" in all aspects of the selection and career of every judge.

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[13], 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.**

A detailed opinion on this matter containing draft texts for consideration by the CDCJ could be prepared by the CCJE at the later stage when it deals expressly with standards of conduct, although there is no doubt that they have a strong inter-relationship with the present topic of independence.

*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.

*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[14]. 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

[13] See paragraphs 37 and 45 above.

[14] See also the balance between the general principle of freedom of expression and the exception (where steps are required to maintain the authority and impartiality of the judiciary) in Article 10 of the ECHR.

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.**

*Independence within the judiciary*

64. The fundamental point is that a judge is in the performance of his functions no-one's employees; 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.

65. Recommendation No. R (94) 12, Principle I(2)(a)(i) provides that "decisions of judges should not be the subject of any revision outside the appeals procedures as provided for by law" and Principle I(2)(a)(iv) provides that "with the exception of decisions on amnesty, pardon or similar, the government or the administration should not be able to take any decision which invalidates judicial decisions retroactively". **The CCJE noted that the responses to questionnaires indicated that these principles were generally observed, and no amendment has been suggested.**

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.*

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[15].

70. The CCJE took note in this connection of the modern Italian system of separation of grade, remuneration and office described in paragraph 30 above. The aim of this system is to reinforce independence and it also means that difficult first instance cases (e.g. in Italy, Mafia cases) may be tried by highly capable judges.

*The judicial role*

71. This heading could cover a wide field. Much of this field will arise for detailed consideration when the CCJE considers the topic of standards and is better left until then. That applies to individual topics such as membership of a political party and engagement in political activity.

72. An important topic touched on during the CCJE meeting concerns the inter-changeability in some systems of the posts of judge, public prosecutor and official of the Ministry of Justice. In spite of this inter-changeability, the CCJE decided that the consideration of the role, status and duties of public prosecutors in parallel with that of judges lay outside its terms of reference. However, there remains an important question whether such a system is consistent with judicial independence. This is a subject which is no doubt of considerable importance to the legal systems affected. **The CCJE considered that it could merit further consideration at a later stage, perhaps in connection with the study of rules of conduct for judges, but that it would require further specialist input.**

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 in 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).

(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).

[15] see also paragraph 27 above.

(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).

(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).

(6) The CCJE agreed that the importance for national legal systems and judges of the obligations resulting from international treaties such as the European Convention 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 (paragraph 56).

(7) The CCJE considered that the irremovability of judges should be an express element of the independence enshrined at the highest internal level (paragraph 60).

(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).

(9) The independence of any individual judge in the performance of his or her functions exists notwithstanding any internal court hierarchy (paragraph 64).

(10) The use of statistical data and the court inspection systems shall not serve to prejudice the independence of judges (paragraphs 27 and 69).

(11) The CCJE considered that it would be useful to prepare additional recommendations or to amend Recommendation No. R (94) 12 in the light of this opinion and the further work to be carried out by the CCJE.