REFERENCE TEXTS IN THE FIELD OF THE JUDICIARY

Venice Commission
of the Council of Europe

REFERENCE TEXTS IN THE FIELD OF THE JUDICIARY

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ACCESS TO JUSTICE

Access to justice[1] – Section E, the Rule of Law Checklist[2]

1. Independence and impartiality

a. Independence of the judiciary

Are there sufficient constitutional and legal guarantees of judicial independence?

i. Are the basic principles of judicial independence, including objective procedures and criteria for judicial appointments, tenure and discipline and removals, enshrined in the Constitution or ordinary legislation?[3]

ii. Are judges appointed for life time or until retirement age? Are grounds for removal limited to serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform judicial functions? Is the applicable procedure clearly prescribed in law? Are there legal remedies for the individual judge against a dismissal decision?[4]

1. On the issue of access to justice and the Rule of Law, see SG/Inf(2016)3, Challenges for judicial independence and impartiality in the member States of the Council of Europe, Report prepared jointly by the Bureau of the CCJE and the Bureau of the CCPE for the attention of the Secretary General of the Council of Europe as a follow-up to his 2015 report entitled *"State of Democracy, Human Rights and the Rule of Law in Europe – a shared responsibility for democratic security in Europe*.
2. Document CDL-AD(2016)007, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016) and endorsed by the Ministers' Deputies at the 1263th Meeting (6-7 September 2016), by the Congress of Local and Regional Authorities of the Council of Europe at its 31st Session (19-21 October 2016) and by the Parliamentary Assembly of the Council of Europe on 11 October 2017 (Resolution 2187(2017).
3. CDL-AD(2010)004, § 22: "The basic principles ensuring the independence of the judiciary should be set out in the Constitution or equivalent texts".
4. Cf. CM/Rec(2010)12 of the Committee of Ministers to member States on judges: independence, efficiency and responsibilities, § 49ff; CDL-AD(2010)004, § 33ff; for constitutional justice, see "The Composition of Constitutional Courts", Science and Technique of Democracy No. 20, CDL-STD(1997)020, p. 18-19.

iii. Are the grounds for disciplinary measures clearly defined and are sanctions limited to intentional offences and gross negligence?[5]

iv. Is an independent body in charge of such procedures?[6]

v. Is this body not only comprised of judges?

vi. Are the appointment and promotion of judges based on relevant factors, such as ability, integrity and experience?[7] Are these criteria laid down in law?

vii. Under which conditions is it possible to transfer judges to another court? Is the consent of the judge to the transfer required? Can the judge appeal the decision of transfer?

viii. Is there an independent judicial council? Is it grounded in the Constitution or a law on the judiciary?[8] If yes, does it ensure adequate representation of judges as well as lawyers and the public?[9]

ix. May judges appeal to the judicial council for violation of their independence?

x. Is the financial autonomy of the judiciary guaranteed? In particular, are sufficient resources allocated to the courts, and is there a specific article in the budget relating to the judiciary, excluding the possibility of reductions by the executive, except if this is done through a general remuneration measure?[10] Does the judiciary or the judicial council have input into the budgetary process?

xi. Are the tasks of the prosecutors mostly limited to the criminal justice field?[11]

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5. "Judges… should enjoy functional – but only functional – immunity (immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crimes, e.g. taking bribes)": CDL-AD(2010)004, § 61.
6. OSCE Kyiv Recommendations on Judicial Independence, § 9.
7. Cf. CM/Rec(2010)12, § 44.
8. The Venice Commission considers it appropriate to establish a Judicial Council having decisive influence on decisions on the appointment and career of judges: CDL-AD(2010)004, § 32.
9. "A substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself": CDL-AD(2007)028, § 29.
10. CDL-AD(2010)038, Amicus Curiae Brief for the Constitutional Court of the "the former Yugoslav Republic of Macedonia" on amending several laws relating to the system of salaries and remunerations of elected and appointed officials.
11. Recommendation CM/Rec(2012)11 of the Committee of Ministers to member States on the role of public prosecutors outside the criminal justice system; CDL-AD(2010)040, § 81-83; CDL-AD(2013)025, Joint Opinion on the draft law on the public prosecutor's office of Ukraine, § 16-28.

xii. Is the judiciary perceived as independent? What is the public's perception about possible political influences or manipulations in the appointment and promotion of the judges/prosecutors, as well as on their decisions in individual cases? If it exists, does the judicial council effectively defend judges against undue attacks?

xiii. Do the judges systematically follow prosecutors' requests ("prosecutorial bias")?

xiv. Are there fair and sufficient salaries for judges?

74. The judiciary should be independent. Independence means that the judiciary is free from external pressure, and is not subject to political influence or manipulation, in particular by the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. Judges should not be subject to political influence or manipulation.

75. The European Court of Human Rights highlights four elements of judicial independence: manner of appointment, term of office, the existence of guarantees against outside pressure – including in budgetary matters – and whether the judiciary appears as independent and impartial.[12]

76. Limited or renewable terms in office may make judges dependent on the authority which appointed them or has the power to re-appoint them.

77. Legislation on dismissal may encourage disguised sanctions.

78. Offences leading to disciplinary sanctions and their legal consequences should be set out clearly in law. The disciplinary system should fulfil the requirements of procedural fairness by way of a fair hearing and the possibility of appeal(s) (see section II.E.2 below).

79. It is important that the appointment and promotion of judges is not based upon political or personal considerations, and the system should be constantly monitored to ensure that this is so.

80. Though the non-consensual transfer of judges to another court may in some cases be lawfully applied as a sanction, it could also be used as a kind of a politically-motivated tool under the disguise of a sanction.[13] Such transfer is however justified in principle in cases of legitimate institutional reorganisation.

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12. See in particular ECtHR *Campbell and Fell v. the United Kingdom,* 28 June 2014, 7819/77 and 7878/77, § 78.
13. Cf. CDL-AD(2010)004, § 43.

81. "[I]t is an appropriate method for guaranteeing the independence of the judiciary that an independent judicial council have decisive influence on decisions on the appointment and career of judges". Judicial councils "should have a pluralistic composition with a substantial part, if not the majority, of members being judges."[14] That is the most effective way to ensure that decisions concerning the selection and career of judges are independent from the government and administration.[15] There may however be other acceptable ways to appoint an independent judiciary.

82. Conferring a role on the executive is only permissible in States where these powers are restrained by legal culture and traditions, which have grown over a long time, whereas the involvement of Parliament carries a risk of politicisation.[16] Involving only judges carries the risk of raising a perception of self-protection, self-interest and cronyism. As concerns the composition of the judicial council, both politicisation and corporatism must be avoided.[17] An appropriate balance should be found between judges and lay members.[18] The involvement of other branches of government must not pose threats of undue pressure on the members of the Council and the whole judiciary.[19]

83. Sufficient resources are essential to ensuring judicial independence from State institutions, and private parties, so that the judiciary can perform its duties with integrity and efficiency, thereby fostering public confidence in justice and the Rule of Law [20] Executive power to reduce the judiciary's budget

14. CDL-AD(2010)004, § 32.
15. Cf. Recommendation (94)12 of the Committee of Ministers on the Independence, Efficiency and Role of Judges (Principle I.2.a), which reflects a preference for a judicial council but accepts other systems.
16. CDL-AD(2007)028, Report on Judicial Appointments, § 44ff. The trend in Commonwealth countries is away from executive appointments and toward appointment commissions, sometimes known as judicial services commissions. See J. van Zyl Smit (2015), The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice (Report of Research Undertaken by Bingham Centre for the Rule of Law), available at http://www.biicl.org/documents/689_bingham_centre_compendium.pdf.
17. CDL-AD(2002)021, Supplementary Opinion on the Revision of the Constitution of Romania, § 21, 22.
18. See CDL-PI(2015)001, Compilation of Venice Commission Opinions and Reports concerning Courts and Judges, ch. 4.2, and the references.
19. CDL-INF(1999)005, Opinion on the reform of the judiciary in Bulgaria, § 28; see also, *e.g.*, CDL-AD(2007)draft, Report on Judicial Appointments by the Venice Commission, § 33; CDL-AD(2010)026, Joint opinion on the draft law on the judicial system and the status of judges of Ukraine, § 97, concerning the presence of ministers in the judicial council.
20. CM/Rec(2010)12, § 33ff; CDL-AD(2010)004, § 52ff.

is one example of how the resources of the judiciary may be placed under undue pressure.

84. The public prosecutor's office should not be permitted to interfere in judicial cases outside its standard role in the criminal justice system – e.g. under the model of the "Prokuratura". Such power would call into question the work of the judiciary and threaten its independence.[21]

85. Benchmarks xii-xiv deal, first of all, with the perception of the independence of the judiciary. The prosecutorial bias is an example of absence of independence, which may be encouraged by the possibility of sanctions in case of "wrong" judgments. Finally, fair and sufficient salaries are a concrete aspect of financial autonomy of the judiciary. They are a means to prevent corruption, which may endanger the independence of the judiciary not only from other branches of government, but also from individuals.[22]

b. Independence of individual judges

Are there sufficient constitutional and legal guarantees for the independence of individual judges?

i. Are judicial activities subject to the supervision of higher courts – outside the appeal framework –, court presidents, the executive or other public bodies?

ii. Does the Constitution guarantee the right to a competent judge ("natural judge pre-established by law")[23]?

iii. Does the law clearly determine which court is competent? Does it set rules to solve any conflicts of competence?

iv. Does the allocation of cases follow objective and transparent criteria? Is the withdrawal of a judge from a case excluded other than in case a recusal by one of the parties or by the judge him/herself has been declared founded?[24]

21. CDL-AD(2010)040, § 71ff.
22. Cf. CDL-AD(2012)014, Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, § 81.
23. CDL-AD(2010)004, § 78; see *e.g.* European Commission on Human Rights, *Zand v. Austria*, 7360/76, 16 May 1977, D.R. 8, p. 167; ECtHR *Fruni v. Slovakia*, 8014/07, 21 June 2011, § 134ff.
24. On the allocation of cases, see CM/Rec(2010)12, § 24; CDL-AD(2010)004, § 73ff. The OSCE Kyiv Recommendations cite as a good practice either random allocation of cases or allocation based on predetermined, clear and objective criteria (§ 12).

86. The independence of individual judges must be ensured, as also must the independence of the judiciary from the legislative and, especially, executive branches of government.

87. The possibility of appealing judgments to a higher court is a common element in judicial systems and must be the only way of review of judges when applying the law. Judges should not be subject to supervision by their colleague-judges, and a fortiori to any executive hierarchical power, exercised for example by civil servants. Such supervision would contravene their individual independence, and consequently violate the Rule of Law[25].

88. "The guarantee can be understood as having two aspects. One relates to the court as a whole. The other relates to the individual judge or judicial panel dealing with the case. … It is not enough if only the court (or the judicial branch) competent for a certain case is determined in advance. That the order in which the individual judge (or panel of judges) within a court is determined in advance, meaning that it is based on general objective principles, is essential".[26]

c. Impartiality of the judiciary[27]

Are there specific constitutional and legal rules providing for the impartiality of the judiciary?[28]

i. What is the public's perception of the impartiality of the judiciary and of individual judges?

ii. Is there corruption in the judiciary? Are specific measures in place against corruption in the judiciary (e.g. a declaration of assets)? What is the public's perception on this issue?[29]

89. Impartiality of the judiciary must be ensured in practice as well as in the law. The classical formula, as expressed for example by the case-law of

25. CM/Rec(2010)12, § 22ff; CDL-AD(2010)004, § 68ff; CM/Rec(2000)19 of the Committee of Ministers to member States on the role of public prosecution in the criminal justice system, § 19; CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges), § 72.
26. CDL-AD(2010)004, § 79.
27. Article 6.1 ECHR; Article 14.1 ICCPR; Article 8.1 ACHR; Article 7.1.d ACHPR. See also the various aspects of impartiality in the Bangalore principles of judicial conduct, Value 2, including absence of favour, bias or prejudice.
28. See *e.g.* ECtHR *Micallef v. Malta* [GC], 17056/06, 15 October 2009, § 99-100.
29. On corruption, see in general II.F.1.

the European Court of Human Rights, is that "justice must not only be done, it must also be seen to be done".[30] This implies objective as well as subjective impartiality. The public's perception can assist in assessing whether the judiciary is impartial in practice.

90. Declaration of assets is a means of fighting corruption because it can highlight any conflict of interest and possibly lead to scrutiny of any unusual income.[31]

d. The prosecution service: autonomy and control

Is sufficient autonomy of the prosecution service ensured?

i. Does the office of the public prosecution have sufficient autonomy within the State structure? Does it act on the basis of the law rather than of political expediency?[32]

ii. Is it permitted that the executive gives specific instructions to the prosecution office on particular cases? If yes, are they reasoned, in writing, and subject to public scrutiny?[33]

iii. May a senior prosecutor give direct instructions to a lower prosecutor on a particular case? If yes, are they reasoned and in written form?

iv. Is there a mechanism for a junior prosecutor to contest the validity of the instruction on the basis of the illegal character or improper grounds of the instruction?

v. Also, can the prosecutor contesting the validity of the instruction request to be replaced?[34]

vi. Is termination of office permissible only when prosecutors reach the retirement age, or for disciplinary purposes, or, alternatively, are the prosecutors appointed for a relatively long period of time without the possibility of renewal?[35]

30. See *e.g.* ECtHR *De Cubber v. Belgium*, 9186/80, 26 October 1984, § 26: *Micallef v. Malta*, 17056/06, 15 October 2009, § 98; *Oleksandr Volkov v. Ukraine*, 21722/11, 9 January 2013, § 106.
31. CDL-AD(2011)017, Opinion on the introduction of changes to the constitutional law "on the status of judges" of Kyrgyzstan, § 15.
32. See in particular CM/Rec(2000)19, § 11ff; CDL-AD(2010)040, § 23ff.
33. Cf. CDL-AD(2010)040, § 22.
34. Cf. CDL-AD(2010)040, § 53ff.
35. CDL-AD(2010)040, § 34ff, 47ff.

vii. Are these matters and the grounds for dismissal of prosecutors clearly prescribed by law?[36]

viii. Are there legal remedies for the individual prosecutor against a dismissal decision?[37]

ix. Is the appointment, transfer and promotion of prosecutors based on objective factors, in particular ability, integrity and experience, and not on political considerations? Are such principles laid down in law?

x. Are there fair and sufficient salaries for prosecutors?[38]

xi. Is there a perception that prosecutorial policies allow selective enforcement of the law?

xii. Is prosecutorial action subject to judicial control?

91. There is no common standard on the organisation of the prosecution service, especially about the authority required to appoint public prosecutors, or the internal organisation of the public prosecution service. However, sufficient autonomy must be ensured to shield prosecutorial authorities from undue political influence. In conformity with the principle of legality, the public prosecution service must act only on the basis of, and in accordance with, the law.[39] This does not prevent the law from giving prosecutorial authorities some discretion when deciding whether to initiate a criminal procedure or not (opportunity principle).[40]

92. Autonomy must also be ensured inside the prosecution service. Prosecutors must not be submitted to strict hierarchical instructions without any discretion, and should be in a position not to apply instructions contradicting the law.

93. The concerns relating to the judiciary apply, mutatis mutandis, to the prosecution service, including the importance of assessing legal regulations, as well as practice.

94. Here again,[41] sufficient remuneration is an important element of autonomy and a safeguard against corruption.

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36. CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, § 39.
37. CDL-AD(2010)040, § 52.
38. CDL-AD(2010)040, § 69.
39. See II.A.1.
40. CDL-AD(2010)040, § 7, 53ff.
41. See II.E.1.a.xiv for judges.

95. Bias on the part of public prosecution services could lead to improper prosecution, or to selective prosecution, in particular of those in, or close to, power. This would jeopardise the implementation of the legal system and is therefore a danger to the Rule of Law. Public perception is essential in identifying such a bias.

96. As in other fields, the existence of a legal remedy open to individuals whose rights have been affected is essential to ensuring that the Rule of Law is respected.

e. Independence and impartiality of the Bar

Are the independence and impartiality of the Bar ensured?

i. Is there a recognised, organised and independent legal profession (Bar)?[42]

ii. Is there a legal basis for the functioning of the Bar, based on the principles of independence, confidentiality and professional ethics, and the avoidance of conflicts of interests?

iii. Is access to the Bar regulated in an objective and sufficiently open manner, also as remuneration and legal aid are concerned?

iv. Are there effective and fair disciplinary procedures at the Bar?

v. What is the public's perception about the Bar's independence?

97. The Bar plays a fundamental role in assisting the judicial system. It is therefore crucial that it is organised so as to ensure its independence and proper functioning. This implies that legislation provides for the main features of its independence and that access to the Bar is sufficiently open to make the right to legal counsel effective. Effective and fair criminal and disciplinary proceedings are necessary to ensure the independence and impartiality of the lawyers.

98. Professional ethics imply inter alia that "[a] lawyer shall maintain independence and be afforded the protection such independence offers in giving clients unbiased advice and representation"[43]. He or she "shall at all times maintain the highest standards of honesty, integrity and fairness towards the

42. See Recommendation No. R(2000)21 of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer.

43. International Bar Association – International Principles of Conduct for the Legal Profession, 1.1.

lawyer's clients, the court, colleagues and all those with whom the lawyer comes into professional contact",[44] "shall not assume a position in which a client's interest conflict with those of the lawyer"[45] and "shall treat client interest as paramount".[46]

2. Fair trial[47]

a. Access to courts

Do individuals have an effective access to courts?

i. Locus standi (right to bring an action): Does an individual have an easily accessible and effective opportunity to challenge a private or public act that interferes with his/her rights?[48]

ii. Is the right to defence guaranteed, including through effective legal assistance?[49] If yes, what is the legal source of this guarantee?

iii. Is legal aid accessible to parties who do not have sufficient means to pay for legal assistance, when the interests of justice so require?[50]

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44. *Ibid.*, 2.1.
45. *Ibid.*, 3.1.
46. *Ibid.*, 5.1.
47. Article 6 ECHR, Article 14 ICCPR, Article 8 ACHR, Article 7 ACHPR. The right to a fair trial was recognised by the European Court of Justice, as "inspired by Article 6 of the ECHR": C-174/98 P and C-189/98 *P, Netherlands and Van der Wal v Commission*, 11 January 2000, § 17. See now Article 47 of the Charter of Fundamental Rights.
48. "The degree of access afforded by the national legislation must also be sufficient to secure the individual's "right to a court", having regard to the principle of the Rule of Law in a democratic society. For the right of access to be effective, an individual must have a clear, practical opportunity to challenge an act that is an interference with his rights", ECtHR *Bellet v. France*, 23805/94, 4 December 1995, § 36; cf. ECtHR *M.D. and Others v. Malta*, 64791/10, 17 July 2012, § 53.
49. Article 6.3.b-c ECHR, Article 14.3 ICCPR; Article 8.2 ACHR; the right to defence is protected by Article 6.1 ECHR in civil proceedings, see *e.g.* ECtHR *Oferta Plus SRL v. Moldova*, 14385/04, 19 December 2006, § 145. It is recognised in general by Article 7.1.c ACHPR.
50. Article 6.3.c ECHR, Article 14.3.d ICCPR for criminal proceedings; the right to legal aid is provided up to a certain extent by Article 6.1 ECHR for civil proceedings: see *e.g.* ECtHR *A. v. the United Kingdom*, 35373/97, 17 December 2002, § 90ff; for constitutional courts in particular, see CDL-AD(2010)039rev, Study on individual access to constitutional justice, § 113.

iv. Are formal requirements,[51] time-limits[52] and court fees reasonable?[53]

v. Is access to justice easy in practice?[54] What measures are taken to make it easy?

vi. Is suitable information on the functioning of the judiciary available to the public?

99. Individuals are usually not in a position to bring judicial proceedings on their own. Legal assistance is therefore crucial and should be available to everyone. Legal aid should also be provided to those who cannot afford it.

100. This question addresses a number of procedural obstacles which may jeopardise access to justice. Excessive formal requirements may lead to even serious and well-grounded cases being declared inadmissible. Their complexity may further necessitate recourse to a lawyer even in straightforward cases with little financial impact. Simplified standardised forms easily accessible to the public should be available to simplify judicial procedures.

101. Very short time-limits may in practice prevent individuals from exercising their rights. High fees may discourage a number of individuals, especially those with a low income, from bringing their case to court.

102. Responses to the preceding questions concerning procedural obstacles, should enable a preliminary conclusion to be made regarding how access to the court is guaranteed. However, a complete reply should take into account the public's perception on these matters.

103. The judiciary should not be perceived as remote from the public and shrouded in mystery. The availability, in particular on the internet, of clear information regarding how to bring a case to court is one way of guaranteeing effective public engagement with the judicial system. Information should be easily accessible to the whole population, including vulnerable groups and

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51. For constitutional justice, see CDL-AD(2010)039rev, § 125.
52. For constitutional justice, see CDL-AD(2010)039rev, § 112; for time limits for taking the decision, see § 149.
53. On excessive court fees, see *e.g.* ECtHR *Kreuz v. Poland (no. 1)*, 28249/95, 19 June 2001, § 60-67; *Weissman and Others v. Romania*, 63945/00, 24 May 2006, § 32ff; *Scordino v. Italy*, 36813/97, 29 March 2006, § 201; *Sakhnovskiy v. Russia*, 21272/03, 2 November 2010, § 69; on excessive security for costs, see *e.g.* ECtHR *Aït-Mouhoub v. France*, 22924/93, 28 October 1998, § 57-58; *Garcia Manibardo v. Spain*, 38695/97, 15 February 2000, § 38-45; for constitutional justice, see CDL-AD(2010)039rev, § 117.
54. On the need for an effective right of access to court, see *e.g. Golder v. the United Kingdom*, 4451/70, 21 January 1975, § 26ff; *Yagtzilar and Others v. Greece*, 41727/98, 6 December 2001, § 20ff.

also made available in the languages of national minorities and/or migrants. Lower courts should be well-distributed around the country and their court houses easily accessible.

b. Presumption of innocence[55]

Is the presumption of innocence guaranteed?

i. Is the presumption of innocence guaranteed by law?
ii. Are there clear and fair rules on the burden of proof?
iii. Are there legal safeguards which aim at preventing other branches of government from making statements on the guilt of the accused?[56]
iv. Is the right to remain silent and not to incriminate oneself nor members of one's family ensured by law and in practice?[57]
v. Are there guarantees against excessive pre-trial detention?[58]

104. The presumption of innocence is essential in ensuring the right to a fair trial. In order for the presumption of innocence to be guaranteed, the burden of proof must be on the prosecution.[59] Rules and practice concerning the required proof have to be clear and fair. The unintentional or purposeful exercise of influence by other branches of government on the competent judicial authority by prejudging the assessment of the facts must be avoided. The same holds good for certain private sources of opinion like the media. Excessive pre-trial detention may be considered as prejudging the accused's guilt.[60]

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55. Article 6.2 ECHR; Article 15 ICCPR; Article 8.2 ACHR; Article 7.1.b ACHPR.
56. ECtHR *Allenet de Ribemont v. France*, 15175/89, 10 February 1995, § 32ff. On the involvement of authorities not belonging to the judiciary in issues linked to a criminal file, see CDL-AD(2014)013, *Amicus Curiae* Brief in the Case of Rywin v. Poland (Application Nos 6091/06, 4047/07, 4070/07) pending before the European Court of Human Rights (on Parliamentary Committees of Inquiry). The European Court of Human Rights decided on the *Rywin* case on 18 February 2016: see in particular § 200ff. On the issue of the systematic follow-up to prosecutors' requests (prosecutorial bias), see item II.E.1.a.xiii.
57. ECtHR *Saunders v. the United Kingdom*, 19187/91, 17 December 1996, § 68-69; *O'Halloran and Francis v. the United Kingdom*, 5809/02 and 25624/02, 29 June 2007, § 46ff, and the quoted case-law. On the incrimination of members of one's family, see *e.g.* International Criminal Court, Rules of Procedure and Evidence, Rule 75.1.
58. Cf. Article 5.3 ECHR.
59. "The burden of proof is on the prosecution": ECtHR *Barberá, Messegué and Jabardo v. Spain*, 10590/83, 6 December 1988, § 77; *Telfner v. Austria*, 33501/96, 20 March 2001, § 15; cf. *Grande Stevens and Others v. Italy*, 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, 4 March 2014, § 159.
60. Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), IV.

c. Other aspects of the right to a fair trial

Are additional fair trial standards enshrined in law and applied in practice?

i. Is equality of arms guaranteed by law? Is it ensured in practice?[61]

ii. Are there rules excluding unlawfully obtained evidence?[62]

iii. Are proceedings started and judicial decisions made without undue delay?[63] Is there a remedy against undue lengths of proceedings?[64]

iv. Is the right to timely access to court documents and files ensured for litigants?[65]

v. Is the right to be heard guaranteed?[66]

vi. Are judgments well-reasoned?[67]

vii. Are hearings and judgments public except for the cases provided for in Article 6.1 ECHR or for in absentia trials?

viii. Are appeal procedures available, in particular in criminal cases?[68]

ix. Are court notifications delivered properly and promptly?

105. The right to appeal against a judicial decision is expressly guaranteed by Article 2 Protocol 7 ECHR and Article 14.5 ICCPR in the criminal field, and by Article 8.2.h ACHR in general. This is a general principle of the Rule of Law

61. See *e.g. Rowe and Davis v. the United Kingdom*, 28901/95, 16 February 2000, § 60.
62. See *e.g. Jalloh v. Germany*, 54810/00, 17 July 2006, § 94ff, 104; *Göçmen v. Turkey*, 72000/01, 17 October 2006, § 75; *O'Halloran and Francis v. the United Kingdom*, 5809/02 and 25624/02, 29 June 2007, § 60.
63. Article 6.1 ECHR; Article 8.1 ACHR; Article 7.1.d ACHPR (« within reasonable time »).
64. CDL-AD(2010)039rev, § 94. See *e.g.* ECtHR *Panju v. Belgium*, 18393/09, 28 October 2014, § 53, 62 (the absence of an effective remedy in case of excessive length of proceedings goes against Article 13 combined with Article 6.1 ECHR).
65. This right is inferred in criminal matters from Article 6.3.b ECHR (the right to have adequate time and facilities for the preparation of one's defence): see *e.g. Foucher v. France*, 22209/93, 18 March 1993, § 36.
66. Cf. ECtHR *Micallef v. Malta*, 17056/06, 15 October 2009, § 78ff; *Neziraj v. Germany*, 30804/07, 8 November 2012, § 45ff.
67. "Article 6 § 1 (Article 6-1) obliges the courts to give reasons for their judgments": ECtHR *Hiro Balani v. Spain*, 18064/91, 9 September 1994, § 27; *Jokela v. Finland*, 28856/95, 21 May 2002, § 72; see also *Taxquet v. Belgium*, 926/05, 16 November 2010, § 83ff. Under the title "Right to good administration", Article 41.2.c of the Charter of Fundamental Rights of the European Union provides for "the obligation of the administration to give reasons for its decisions".
68. On appeals procedures, see ODIHR Legal Digest of International Fair Trial Rights, p. 227.

often guaranteed at constitutional or legislative level by domestic legislation, in particular in the criminal field. Any court whose decisions cannot be appealed would run the risk of acting arbitrarily.

106. All aspects of the right to a fair trial developed above may be inferred from the right to a fair trial as defined in Article 6 ECHR, as elaborated in the case-law of the European Court of Human Rights. They ensure that legal subjects are properly involved in the whole judicial process.

d. Effectiveness of judicial decisions

Are judicial decisions effective?

i. Are judgments effectively and promptly executed?[69]

ii. Are complaints for non-execution of judgments before national courts and/or the European Court of Human Rights frequent?

iii. What is the perception of the effectiveness of judicial decisions by the public?

107. Judicial decisions are essential to the implementation of the Constitution and of legislation. The right to a fair trial and the Rule of Law in general would be devoid of any substance if judicial decisions were not executed.

3. Constitutional justice (if applicable)

Is constitutional justice ensured in States which provide for constitutional review (by specialised constitutional courts or by supreme courts)?

i. Do individuals have effective access to constitutional justice against general acts, i.e., may individuals request constitutional review of the law by direct action or by constitutional objection in ordinary court proceedings?[70] What "interest to sue" is required on their part?

ii. Do individuals have effective access to constitutional justice against individual acts which affect them, i.e. may individuals request

69. See *e.g. Hirschhorn v. Romania*, 29294/02, 26 July 2007, § 49; *Hornsby v. Greece*, 18357/91, 19 March 1997, § 40; *Burdov v. Russia*, 59498/00, 7 May 2002, § 34ff ; *Gerasimov and Others v. Russia*, 29920/05, 3553/06, 18876/10, 61186/10, 21176/11, 36112/11, 36426/11, 40841/11, 45381/11, 55929/11, 60822/11, 1 July 2014, § 167ff.

70. CDL-AD(2010)039rev, Study on individual access to constitutional justice, § 96.

constitutional review of administrative acts or court decisions through direct action or by constitutional objection?[71]

iii. Are Parliament and the executive obliged, when adopting new legislative or regulatory provisions, to take into account the arguments used by the Constitutional Court or equivalent body? Do they take them into account in practice?

iv. Do Parliament or the executive fill legislative/regulatory gaps identified by the Constitutional Court or equivalent body within a reasonable time?

v. Where judgments of ordinary courts are repealed in constitutional complaint proceedings, are the cases re-opened and settled by the ordinary courts taking into account the arguments used by the Constitutional Court or equivalent body?[72]

vi. If constitutional judges are elected by Parliament, is there a requirement for a qualified majority[73] and other safeguards for a balanced composition?[74]

vii. Is there an ex ante control of constitutionality by the executive and or/legislative branches of government?

108. The Venice Commission usually recommends providing for a constitutional court or equivalent body. What is essential is an effective guarantee of the conformity of governmental action, including legislation, with the Constitution. There may be other ways to ensure such conformity. For example, Finnish law provides at the same time for a priori review of constitutionality by the Constitutional Law Committee and for a posteriori judicial control in case

71. CDL-AD(2010)039rev, § 62, 93, 165.
72. CDL-AD(2010)039rev, § 202; CDL-AD(2002)005 Opinion on the Draft Law on the Constitutional Court of the Republic of Azerbaijan, § 9, 10.
73. CDL-AD(2004)043, Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (introduction of the individual complaint to the constitutional court), § 18, 19; CDL-AD(2008)030, Opinion on the Draft Law on the Constitutional Court of Montenegro, § 19; CDL-AD(2011)040, Opinion on the law on the establishment and rules of procedure of the Constitutional Court of Turkey, § 24.
74. CDL-AD(2011)010, Opinion on the draft amendments to the Constitution of Montenegro, as well as on the draft amendments to the law on courts, the law on the State prosecutor's office and the law on the judicial council of Montenegro, § 27; CDL-AD(2012)024, Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, § 33; CDL-AD(2009)014, Opinion on the Law on the High Constitutional Court of the Palestinian National Authority, § 13; The Composition of Constitutional Courts, Science and Technique of Democracy No. 20, CDL-STD(1997)020, pp. 7, 21.

the application of a statutory provision would lead to an evident conflict with the Constitution. In the specific national context, this has proven sufficient.[75]

109. Full judicial review of constitutionality is indeed the most effective means to ensure respect for the Constitution, and includes a number of aspects which are set out in detail above. First, the question of locus standi is very important: leaving the possibility to ask for a review of constitutionality only to the legislative or executive branch of government may severely limit the number of cases and therefore the scope of the review. Individual access to constitutional jurisdiction has therefore been developed in a vast majority of countries, at least in Europe.[76] Such access may be direct or indirect (by way of an objection raised before an ordinary court, which refers the issue to the constitutional court).[77] Second, there should be no limitation as to the kinds of acts which can be submitted to constitutional review: it must be possible to do so for (general) normative as well as for individual (administrative or judicial) acts. However, an individual interest may be required on the part of a private applicant.

110. The right to a fair trial imposes the implementation of all courts' decisions, including those of the constitutional jurisdiction. The mere cancellation of legislation violating the Constitution is not sufficient to eliminate every effect of a violation, and would at any rate be impossible in cases of unconstitutional legislative omission.

111. This is why this document underlines the importance of Parliament adopting legislation in line with the decision of the Constitutional Court or equivalent body.[78] What was said about the legislator and the executive is also true for courts: they have to remedy the cases where the constitutional jurisdiction found unconstitutionality, on the basis of the latter's arguments.

112. "The legitimacy of a constitutional jurisdiction and society's acceptance of its decisions may depend very heavily on the extent of the court's consideration of the different social values at stake, even though such values are generally superseded in favour of common values. To this end, a balance which ensures respect for different sensibilities must be entrenched in the rules of

75. CDL-AD(2008)010, Opinion on the Constitution of Finland, § 115ff.
76. There is only one (limited) exception in the Council of Europe member States with a constitutional jurisdiction: CDL-AD(2010)039rev, § 1, 52-53.
77. CDL-AD(2010)039rev, § 1ff, 54-55, 56 ff.
78. Cf. CDL-AD(2008)030, Opinion on the Draft Law on the Constitutional Court of Montenegro, § 71.

composition of these jurisdictions".[79] A qualified majority implies a political compromise and is a way to ensure a balanced composition when no party or coalition has such a majority.

113. Even in States where ex post control by a constitutional or supreme court is possible, ex ante control by the executive or legislative branch of government helps preventing unconstitutionalities.

Selected standards

1. Hard Law

ECHR (1950), Article 6

Charter of Fundamental Rights of the EU (2009), Articles 41, 47, 48, 50
http://www.europarl.europa.eu/charter/pdf/text_en.pdf

Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings
http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1455724770445&uri=CELEX:32010L0064

Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings
http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1455724843769&uri=CELEX:32012L0013

Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty
http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1455724901649&uri=CELEX:32013L0048

UN, International Covenant on Civil and Political Rights (1966), Articles 9, 14
http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

79. CDL-STD(1997)020, p. 21.

UN, International Convention on the Elimination of All Forms of Racial Discrimination (1969), Article 6
http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx

UN, Convention on the Rights of the Child (1989), Articles 12(2), 40
http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx

UN, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), Articles 16, 18
http://www2.ohchr.org/english/bodies/cmw/cmw.htm

Rome Statute of the International Criminal Court (1998), Article 55
http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

OAS, American Convention on Human Rights ('Pact of San Jose') (1969), Articles 8, 25
http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm

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http://www.refworld.org/docid/3ae6b38540.html

LAS, The Riyadh Arab Agreement for Judicial Cooperation (1983), Articles 3-4
http://www.refworld.org/docid/3ae6b38d8.html

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a. Council of Europe

Council of Europe Commission for Democracy through Law (Venice Commission), Report on the Independence of the Judicial System Part I: The Independence of Judges, CDL-AD(2010)004
http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)004-e

Venice Commission, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, CDL-AD(2010)040
http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)040-e

Venice Commission, Report on Judicial Appointments, CDL-AD(2007)028
http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282007%29028-e

Venice Commission, Compilation of Venice Commission opinions, reports and studies on Constitutional Justice, CDL-PI(2015)002
http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI%282015%29002-e

Venice Commission, Compilation of Venice Commission Opinions and Reports concerning Prosecutors, CDL-PI(2015)009
http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI%282015%29009-e

Venice Commission, Compilation of Venice Commission Opinions and Reports concerning Courts and Judges**,** CDL-PI(2015)001
http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI%282015%29001-e

Council of Europe, Recommendation CM/Rec(94)12 of the Committee of Ministers to member States on the Independence, Efficiency and Role of Judges (1994)
https://wcd.coe.int/ViewDoc.jsp?id=524871&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383

Council of Europe, Recommendation CM/Rec(2010)12 of the Committee of Ministers to member States on judges: independence, efficiency and responsibilities
https://wcd.coe.int/ViewDoc.jsp?id=1707137

Council of Europe, Recommendation CM/Rec(2000)19 of the Committee of Ministers to member States on the role of public prosecution in the criminal justice system
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https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/CCJE%20Opinion%201_EN.pdf

Council of Europe, Recommendation No. R(2000)21 of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer
https://wcd.coe.int/ViewDoc.jsp?id=380771&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383

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http://www.richtervereinigung.at/international/eurojus1/eurojus15a.htm

c. United Nations

UN, Universal Declaration of Human Rights (1948), Articles 8, 10
http://www.un.org/en/documents/udhr/

UN Human Rights Council Resolution 25/4, Integrity of the judicial system (2014)
http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/25/4

UN Human Rights Council, Resolution 23/6, Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers (2013)
http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/148/94/PDF/G1314894.pdf?OpenElement

UN Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels (2012), para 13
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UN Human Rights Committee, General Comment No. 32 (2007), Article 14: Right to equality before courts and tribunals and to a fair trial
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http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf

UN OHCHR, Principles relating to the Status of National Institutions (The Paris Principles) (1993), section 2 (Composition and guarantees of independence and pluralism)
http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx

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http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx

UN Guidelines on the Role of Prosecutors (welcomed by General Assembly resolution 45/166, 1990)
http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx

UN Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration") (referenced by UN Commission on Human Rights, resolution 1989/32)
http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/03/SR-Independence-of-Judges-and-Lawyers-Draft-universal-declaration-independence-justice-Singhvi-Declaration-instruments-1989-eng.pdf

UN Basic Principles on the Independence of the Judiciary (endorsed by General Assembly resolutions 40/32 and 40/146, 1985)
http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx

United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems
https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf

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http://www.oas.org/dil/1948%20American%20Declaration%20of%20the%20Rights%20and%20Duties%20of%20Man.pdf

OAS, Inter-American Democratic Charter (2001), Articles 2-4
http://www.oas.org/OASpage/eng/Documents/Democractic_Charter.htm

African Union (AU), Constitutive Act (2000), Article 4(m)
http://www.au.int/en/sites/default/files/ConstitutiveAct_EN.pdf

AU, African Charter on Human and People's Rights (Banjul Charter) (1981), Articles 7, 26
http://www.unhcr.org/refworld/pdfid/3ae6b3630.pdf

ASEAN, Human Rights Declaration (2012), para 5
Available at http://aichr.org/documents

SAARC, Charter of Democracy (2011)
http://saarc-sec.org/SAARC-Charter-of-Democracy/88/

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American Bar Association Rule of Law Initiative – Arab Council for Judicial and Legal Studies, Justice Sector Benchmarks – A User's Guide for Civil Society Organizations
http://www.albersconsulting.eu/justicebenchmarks.html

The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice (J. van Zyl Smit, Report of Research Undertaken by Bingham Centre for the Rule of Law) (2015)
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INDEPENDENCE OF THE JUDICIAL SYSTEM

PART I

The independence of judges[80]

Introduction

1. By letter of 11 July 2008, the Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly requested the Venice Commission to give an opinion on "European standards as regards the independence of the judicial system". The Committee is "interested both in a presentation of the existing *acquis* and in proposals for its further development, on the basis of a comparative analysis taking into account the major families of legal systems in Europe".

2. The Commission entrusted the preparation of this report to its Sub-Commission on the Judiciary, which held meetings on this subject in Venice on 16 October 2008, 11 December 2008, 12 March 2009, 10 December 2009 and 11 March 2010.

3. The Sub-Commission decided to prepare two reports on the independence of the Judiciary, one dealing with prosecution and the present report on judges, prepared on the basis of comments by Mr Neppi Modona (CDL-JD(2009)002), Ms Nussberger (CDL-JD(2008)006), Mr Zorkin (CDL-JD(2008)008) and Mr Torfason.

80. Report on the "Independence of the Judicial System, Part I: The Independence of Judges", document CDL-AD(2010)004, adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010).

4. In December 2008, Mr Desch, representing the European Committee on Legal Co-operation (CDCJ) and Ms Laffranque, President of the Consultative Council of European Judges (CCJE) participated in the work of the Commission. Ms Laffranque also provided written comments (CDL-JD(2008)002).

5. The present report was discussed at meetings of the plenary sessions of the Commission on 17-18 October 2008, 12-13 December 2008, 12-13 June 2009, 9-10 October 2010 and 11-12 December 2009 and was adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010).

Preliminary remarks

6. The independence of the judiciary has both an objective component, as an indispensable quality of the Judiciary as such, and a subjective component as the right of an individual to have his/her rights and freedoms determined by an independent judge. Without independent judges there can be no correct and lawful implementation of rights and freedoms. Consequently, the independence of the judiciary is not an end in itself. It is not a personal privilege of the judges but justified by the need to enable judges to fulfil their role of guardians of the rights and freedoms of the people.

7. The independence of the judges and – as a consequence – the reputation of the judiciary in a given society depends on many factors. In addition to the institutional rules guaranteeing independence, the personal character and the professional quality of the individual judge deciding a case are of major importance. The legal culture as a whole is also important.

8. Institutional rules have to be designed in such a way as to guarantee the selection of highly qualified and personally reliable judges and to define settings in which judges can work without being unduly subjected to external influence.

9. The problem of establishing a comprehensive set of standards of judicial independence has been addressed in a considerable number of documents of differing detail, aimed at establishing reference points. These documents whether or not issued by international organisations, official bodies or by independent groups, offer a comprehensive view of what the elements of judicial independence should be: the role and significance of judicial independence in ensuring the rule of law and the kind of challenges it may meet from the executive, the legislature or others.

10. As experience shows in many countries, however, the best institutional rules cannot work without the good will of those responsible for their application and implementation. The implementation of existing standards is therefore at least as important as the identification of new standards needed. Nonetheless, the present report endeavours not only to present an overview of existing standards, but to identify areas where further standards might be required in order to change practices which can be an obstacle to judicial independence.

11. It should be noted that some principles are applicable only to the ordinary judiciary at the national level but not to constitutional courts or international judges, which are outside the scope of the present report.

Existing standards

12. At the European and international level there exist a large number of texts on the independence of the judiciary. It would not be useful to start from scratch with a new attempt to define the standards of judicial independence and therefore the Venice Commission will base itself in this report on the existing texts.

13. At European level, the right to an independent and impartial tribunal is first of all guaranteed by Article 6 of the European Convention on Human Rights *("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. …").* The case-law of the Court sheds light on a number of important aspects of judicial independence but, by its very nature, does not approach the issue in a systematic way.

14. Apart from the European Convention on Human Rights, the most authoritative text on the independence of the judiciary at the European level is Recommendation (94)12 of the Committee of Ministers on the Independence, Efficiency and Role of Judges. This text is currently under review and the Venice Commission hopes that the present report will be useful in the context of this review.

15. Since this text does not go into much detail, a number of attempts were made for a more advanced text on the independence of the Judiciary. Probably, the most comprehensive text is Opinion No. 1 of the Consultative Council of European Judges (CCJE) on standards concerning the independence

of the judiciary and the irremovability of judges. Other Opinions of the CCJE are also relevant in this context, e.g. CCJE Opinions no. 6 on Fair Trial within a Reasonable Time, no. 10 on the "Council for the Judiciary in the Service of Society" and no. 11 on the Quality of Judicial Decisions.

16. Another Council of Europe text is the European Charter on the Statute of Judges, which was approved at a multilateral meeting organised by the Directorate of Legal Affairs of the Council of Europe in Strasbourg in July 1998.

17. The Venice Commission's Report on Judicial Appointments (CDL-AD(2007)028) covers issues of particular importance for judicial independence. Other aspects are dealt with in various Venice Commission opinions.

18. Based on Article 10 of the Universal Declaration of Human Rights *("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"),* there are also a number of UN standards on the independence of the judiciary., in particular the Basic Principles on the Independence of the Judiciary endorsed by the United Nations General Assembly in 1985 and the Bangalore Principles of Judicial Conduct of 2002. These standards often coincide with the Council of Europe standards but usually do not go beyond them.

19. The present report seeks to present the contents of the European standards in a coherent way. It largely follows the structure of Opinion No. 1 of the CCJE.

Specific aspects of judicial independence

The level at which judicial independence is guaranteed

20. Recommendation (94)12 provides (Principle I.2.a): *"The independence of judges should be guaranteed pursuant to the provisions of the Convention 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."*

21. Opinion No. 1 of the CCJE recommends (at 16[81]), following the recommendation of the European Charter, to go further*: "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."*

81 Unless otherwise indicated references to the CCJE relate to its Opinion No. 1.

22. The Venice Commission strongly supports this approach. **The basic principles ensuring the independence of the judiciary should be set out in the Constitution or equivalent texts.**[82]

Basis of appointment or promotion

23. Recommendation (94)12 provides that *"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."*

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82. Examples for constitutional provisions are:
Albania – Article 145 of the Constitution
1. Judges are independent and subject only to the Constitution and the laws. …
Andorra – Article 85 of the Constitution
1. In the name of the Andorran people, justice is solely administered by independent judges, with security of tenure, and while in the performance of their judicial functions, bound only to the Constitution and the laws. …
Austria – Article 87 of the Constitution
(1) Judges are independent in the exercise of their judicial office. …
Czech Republic – Article 81 of the Constitution
The judicial power shall be exercised in the name of the Republic by independent courts.
Georgia – Article 84 of the Constitution
1. A judge shall be independent in his/her activity and shall be subject only to the Constitution and law. Any pressure upon the judge or interference in his/her activity with the view of influencing his/her decision shall be prohibited and punishable by law.
Germany – Article 97 of the Basic Law – Independence of judges
(1) Judges shall be independent and subject only to the law. …
Greece – Article 87 of the Constitution
1. Justice shall be administered by courts composed of regular judges who shall enjoy functional and personal independence. …
Iceland – Article 70 of the Constitution
Everyone is entitled to obtain a determination of his rights and obligations or of any charge against him for criminal conduct by a fair trial within a reasonable time before an independent and impartial court of law. A court hearing shall be held in public unless the judge otherwise decides pursuant to law in order to protect morals, public order, national security or the interests of the parties.
Italy – Article 101.2 of the Constitution "Judges are subject only to the law" and Article 104.1 of the Constitution "The judiciary is an order that is autonomous and independent of all other powers."
Latvia – Article 83 of the Constitution
Judges shall be independent and subject only to the law.
Lithuania – Article 109 of the Constitution
In the Republic of Lithuania, the courts shall have the exclusive right to administer justice.
While administering justice, judges and courts shall be independent.
While investigating cases, judges shall obey only the law.

24. Opinion No. 1 of the CCJE recommends in addition (at 25) *"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"*. Merit is not solely a matter of legal knowledge analytical skills or academic

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The court shall adopt decisions on behalf of the Republic of Lithuania.
Portugal – Article 203 of the Constitution – Independence
The courts are independent and subject only to the law.
Article 216 of the Constitution – Guarantees and disqualifications
1. Judges have security of tenure and may be transferred, suspended, retired or removed from office only as provided by law.
2. Judges may not be held liable for their decisions, except in the circumstances provided for by law.
3. Judges in office may not perform any other functions, whether public or private, other than in unpaid teaching or legal research, as provided by law.
4. Judges in office may not be assigned to perform other functions unrelated to the work of the courts unless authorised by the appropriate superior council.
5. The law may establish other circumstances that are incompatible with performance of the functions of a judge.
Romania – Article 123 of the Constitution – Administration of Justice
(1)Justice shall be rendered in the name of the law.
(2)Judges shall be independent and subject only to the law.
Russian Federation – Article 10 of the Constitution
The state power in the Russian Federation shall be exercised through separation of the legislative, executive and judicial powers. The bodies of the legislative, executive and judicial powers shall be independent.
Article 120 of the Constitution
1. Judges shall be independent and be responsible only to the Constitution of the Russian Federation and the federal law. …
Slovenia – Article 125 of the Constitution – The Independence of the Judges
The Judges shall independently exercise their duties and functions in accordance with this Constitution and with the law.
Turkey – Article 138 of the Constitution
Judges shall be independent in the discharge of their duties; they shall give judgement in accordance with the Constitution, law, and their personal conviction conforming with the law.
No organ, authority, office, or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, or send them circulars, make recommendations or suggestions.
No question shall be asked, debated held, or statement made in the Legislative Assembly relating to the exercise of judicial power concerning a case under trial.
As an example on the level of law, in the United Kingdom, s. 3 of the Constitutional Reform Act 2005 provides that all government ministers with responsibility for matters relating to the judiciary or the administration of justice "must uphold the continued independence of the judiciary".

excellence. It also should include matters of character, judgment, accessibility, communication skills, efficiency to produce judgements, etc.

25. It is essential that a judge have a sense of justice and a sense of fairness. However, in practice, it can be difficult to assess these criteria. Transparent procedures and a coherent practice are required when they are applied.

26. Finally, merit being the primary criterion, diversity within the judiciary will enable the public to trust and accept the judiciary as a whole. While the judiciary is not representative, it should be open and access should be provided to all qualified persons in all sectors of society.[83]

27. **The principle that all decisions concerning appointment and the professional career of judges should be based on merit, applying objective criteria within the framework of the law is indisputable.**

The appointing and consultative bodies

28. Recommendation (94)12 reflects a preference for a judicial council but accepts other systems:

> *"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 itself decides on its procedural rules.*
>
> *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".*

29. The CCJE also argues in favour of the involvement of an independent body (at 45): "*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.*"

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83. See also a similar conclusion relating to judges of constitutional courts, Report on the Composition of Constitutional Courts, Science and Technique of Democracy no. 20, p. 30.

30. Opinion No. 10 of the CCJE on "the Council of the Judiciary in the service of society" further develops the position of the CCJE. It provides (at 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."* and (at 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".*

31. The position of the Venice Commission (CDL-AD(2007)028) is more nuanced:

> *"44. In Europe, a variety of different systems for judicial appointments exist and that there is not a single model that would apply to all countries.*
>
> *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."*

32. To sum up, it is the Venice Commission's view that it is an appropriate method for guaranteeing for the independence of the judiciary that **an independent judicial council have decisive influence on decisions on** the appointment and career of judges. Owing to the richness of legal culture in Europe, which is precious and should be safeguarded, there is no single model which applies to all countries. **While respecting this variety of legal systems, the Venice Commission recommends that states which have not yet done so consider the establishment of an independent judicial council or similar body. In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers.**

Tenure – period of appointment

33. Principle I.3 of Recommendation (94)12 provides: *"Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of the term of office."*

34. Opinion No. 1 of the CCJE adds (at 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."* and (at 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."*

35. This corresponds to the position of the Venice Commission which has, apart from special cases such as constitutional court judges, always favoured tenure until retirement.

36. A special problem in this context are probationary periods for judges. This issue is explicitly addressed in the European Charter at 3.3:

> *"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."*

37. The Venice Commission has dealt extensively with this issue in its Report on Judicial Appointments (CDL-AD(2007)028):

> *"40. 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. […]*
>
> *41. 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".*
>
> *42. 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."*
>
> *43. 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."*

38. To sum up, **the Venice Commission strongly recommends that ordinary judges be appointed permanently until retirement. Probationary periods for judges in office are problematic from the point of view of independence.**

Tenure – irremovability and discipline – transfers

39. The principle of irremovability is implicitly guaranteed by Principle I.3 of the Committee of Minister's Recommendation (94)12 (see above).

40. The CCJE concludes (at 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."

41. The issue of transfers is more specifically addressed in the European Charter at 3.4:

"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."

42. This corresponds to the approach of the Venice Commission when examining national constitutions.

43. **The Venice Commission has consistently supported the principle of irremovability in constitutions. Transfers against the will of the judge may be permissible only in exceptional cases.** As regards disciplinary proceedings, the Commission's Report on Judicial Appointments[84] **favours the power of judicial councils or disciplinary courts to carry out disciplinary proceedings.** In addition, the Commission has consistently argued that **there should be the possibility of an appeal to a court against decisions of disciplinary bodies.**

Remuneration of judges

44. Recommendation (94) 12 provides that judges' remuneration should be guaranteed by law (Principle I.2b.ii) and "commensurate with the dignity of their profession and burden of responsibilities" (Principle III.1.b). The Charter, supported by the CCJE, extends this principle to guaranteed sickness pay and retirement pension.

84. CDL-AD(2007)028, para. 49.

45. The CCJE adds in Opinion No. 1:

> *"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."*

46. The Venice Commission shares the opinion that the remuneration of judges has to correspond to the dignity of the profession and that adequate remuneration is indispensable to protect judges from undue outside interference. The example of the Polish Constitution, which guarantees to judges remuneration consistent with the dignity of their office and the scope of their duties is a commendable approach. The level of remuneration should be determined in the light of the social conditions in the country and compared to the level of remuneration of higher civil servants. The remuneration should be based on a general standard and rely on objective and transparent criteria, not on an assessment of the individual performance of a judge. Bonuses which include an element of discretion should be excluded.

47. In a number of mainly post-socialist countries judges receive also non-financial benefits such as apartments, cars, etc. Such non-monetary remuneration of judges has two main origins: the first lies in the previous socialist system of distribution of goods, which depended on central planning. Some groups, including judges, were privileged in obtaining specific goods, including dwellings. This was a considerable advantage of being a judge.

48. The second origin of this practice lies in the post-socialist period of transition to a market economy. The prices for real property increased exponentially and this made it impossible for State officials, including judges, to purchase adequate housing. Again, one of the advantages of being a judge was the attribution of apartments. Young judges in particular may not easily be able to purchase real estate and, consequently, the system of allocation of housing persists.

49. While the allocation of property is a source of concern, it is not easy to resolve the problem of providing the judiciary with an appropriate living standard, including housing. An argument advanced in favour of such non-financial allocations is that they can be attributed according to individual need whereas salaries are set at the same level for all judges in a given category without the possibility of supporting those in special need. However, this

assessment of social need and the differentiation between judges could too easily permit abuse and the application of subjective criteria.

50. Even if such benefits are defined by law, there will always be scope for discretion when distributing them. They are therefore a potential threat to judicial independence. While it may be difficult immediately abolish such non-financial benefits in some countries since they correspond to a perceived need to achieve social justice, the Venice Commission recommends the phasing out of such benefits and replacing them by an adequate level of financial remuneration.

51. To sum up, **the Venice Commission is of the opinion that for judges a level of remuneration should be guaranteed by law in conformity with the dignity of their office and the scope of their duties. Bonuses and non-financial benefits, the distribution of which involves a discretionary element, should be phased out.**

Budget of the judiciary

52. In order to maintain the independence of the court system in the long and short run, it will be necessary to provide the courts with resources appropriate to enable the courts and judges to live up to the standards laid down in Article 6 of the European Convention on Human Rights and in national constitutions and perform their duties with the integrity and efficiency which are essential to the fostering of public confidence in justice and the rule of law. The adequacy of the financing accordingly should be considered in the broad context of all resources of which the judicial system should be possessed in order to meet these requirements and merit recognition as a separate state power.

53. It is the duty of the state to provide adequate financial resources for the judicial system. Even in times of crisis, the proper functioning and the independence of the Judiciary must not be endangered. Courts should not be financed on the basis of discretionary decisions of official bodies but in a stable way on the basis of objective and transparent criteria.

54. International texts do not provide for a budgetary autonomy of the judiciary but there is a strong case in favour of taking views of the judiciary into account when preparing the budget. Opinion No. 2 of the CCJE on the funding and management of courts provides:

"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 – 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."

55. **Decisions on the allocation of funds to courts must be taken with the strictest respect for the principle of judicial independence and the judiciary should have an opportunity to express its views about the proposed budget to parliament, possibly through the judicial council.**

Freedom from undue external influence

56. Two aspects of judicial independence complement each other. External independence shields the judge from influence by other state powers and is an essential element of the rule of law. Internal independence (see below, chapter 10) ensures that a judges takes decisions only on the basis of the Constitution and laws and not on the basis of instructions given by higher ranking judges.

57. Recommendation (94)12 provides (Principle I.2.d):

"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.

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."

58. The CCJE comments in its Opinion No. 1 (at 63):

"..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."

59. The issue of criminal and civil liability and immunity of judges should be addressed in this context. In its Opinion No. 3 on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, the CCJE concludes:

"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.

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."

60. The Venice Commission has argued in favour of a limited functional immunity of judges:

> *"Magistrates (…)should not benefit from a general immunity as set out in the Bulgarian Constitution. 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)12, para. 15.a).

61. It is indisputable that **judges** have to be protected against undue external influence. To this end they **should enjoy functional – but only functional – immunity** (immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crimes, e.g. taking bribes).

62. Moreover, **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.**

63. Impartiality is also a requirement of Article 6 ECHR and has a similar but distinct connotation from independence. Judges have to recuse themselves when their participation in a case raises a reasonable perception of bias or conflict of interest, irrespective of whether the judge is in practice biased.

64. **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.**

Final character of judicial decisions

65. Recommendation (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*". It should be understood that this principle does not preclude the re-opening of procedures in exceptional cases on the basis of new facts or on other grounds as provided for by law.

66. While the CCJE concludes in its Opinion No. 1 (at 65), on the basis of the replies to its questionnaire, that this principle seems to be generally observed, the experience of the Venice Commission and the case law of the ECHR indicate

that the supervisory powers of the Prokuratura in post-Soviet states often extend to being able to protest judicial decisions no longer subject to an appeal.

67. The Venice Commission underlines the principle that **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.**

Independence within the judiciary

68. The issue of internal independence within the judiciary has received less attention in international texts than the issue of external independence. It seems, however, no less important. In several constitutions it is stated that "judges are subject only to the law". This principle protects judges first of all against undue *external* influence. It is, however, also applicable *within* the judiciary. A hierarchical organisation of the judiciary in the sense of a subordination of the judges to the court presidents or to higher instances in their judicial decision making activity would be a clear violation of this principle.

69. The basic considerations are clearly set forth by the CCJE:

> "*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.*
>
> *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).*"

70. The practice of guidelines adopted by the Supreme Court or another highest court and binding on lower courts which exists in certain post-Soviet countries is problematic in this respect.

71. The Venice Commission has always upheld the principle of the independence of each individual judge:

> "*Lastly, granting the Supreme Court the power to supervise the activities of the general courts (Article 51, paragraph 1) 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 judgments of lower courts, it should not supervise them.*" (CDL-INF(1997)6 at 6).
>
> *"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. The present draft fundamentally departs from this principle. It gives to the Supreme Court (Art. 51.2.6 and 7) and, within narrower terms, to the Plenum of the Supreme Specialised Courts (art. 50.1) 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 in Ukraine but entails the risk that judges behave like civil servants who are subject to orders from their superiors. Another example of the hierarchical approach of the draft is the wide powers of the Chief Judge of the Supreme Court (Art. 59). He seems to exercise these extremely important powers individually, without any need to refer to the Plenum or the Presidium.*" (CDL-INF(2000)5 under the heading "Establishment of a strictly hierarchical system of courts")
>
> *"Judicial independence is not only independence of the judiciary as a whole vis-à-vis the other powers of the State, but it has also an "internal" aspect. Every judge, whatever his place in the court system, is exercising the same authority to judge. In judicial adjudication he or she should therefore be independent also vis-à-vis other judges and also in relation to his/her court president or other (e.g. appellate or superior) courts. There is in fact more and more discussion on the "internal" independence of the judiciary. The best protection for judicial independence, both "internal" and*

"external", can be assured by a High Judicial Council, as it is recognised by the main international documents on the subject of judicial independence." (CDL(2007)003 at 61)

72. To sum up, **the Venice Commission underlines that 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.**

The allocation of cases and the right to a lawful judge

73. As already noted, the issue of internal independence arises not only between judges of the lower and of the higher courts but also between the president or presidium of a court and the other judges of the same court as well as among its judges.

74. In many countries court presidents exercise a strong influence by allocating cases to individual judges. As regards the distribution of cases, Recommendation (94)12 contains principles (Principle I.2.e and f), which may be seen as essential to the notion of judicial independence:

> *"The distribution of cases should not be influenced by the wishes of any party to a case or any person concerned with the results of the case. Such distribution may, for instance, be made by drawing of lots or a system for automatic distribution according to alphabetic order of some similar system."*
>
> *"A case should not be withdrawn from a particular judge without valid reasons, such as cases of serious illness or conflict of interests. 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."*

75. In similar vein, the Venice Commission has stated that *"the procedure of distribution of cases between judges should follow objective criteria"* (CDL-AD(2002)026 at 70.7).

76. The European Convention on Human Rights provides that "everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law" (Article 6 ECHR). According to the Court's case-law, the object of the term "established by law" in Article 6 is to ensure "that the judicial organisation in a democratic society [does] not depend on the discretion of

the Executive, but that it [is] regulated by law emanating from Parliament".[85] Nor, in countries where the law is codified, can the organisation of the judicial system be left to the discretion of the judicial authorities, although this does not mean that the courts do not have some latitude to interpret the relevant national legislation.[86]

77. The main point to be noted, however, is that according to the express words of Article 6, the medium through which access to justice under fair hearing should be ensured must not only be a tribunal established by law, but also one which is both "independent" and "impartial" in general and specific terms. And in its evaluation of these requirements for a fair hearing, the Strasbourg Court has applied the maxim that "justice must not only be done, but also be seen to be done." All of this implies that the judges or judicial panels entrusted with specific cases should not be selected *ad hoc* and/or *ad personam*, but according to objective and transparent criteria.

78. Many European constitutions contain a subjective right to a lawful judge (in doctrine often referred to as "natural judge pre-established by law"). Most frequently, the guarantee to this effect is worded in a negative way, such as in the Constitution of Belgium: *"No one can be separated, unwillingly, from the judge that the law has assigned to him."* (Article 13) or Italy *"No one may be removed from the natural judge predetermined by law"*.[87] Other constitutions state the "right to the lawful judge" in a positive way such as the Constitution of Slovenia: *"Everyone has the right to have any decision regarding his rights,*

85. See Zand v. Austria, application no. 7360/76, Commission report of 12 October 1978, Decisions and Reports (DR) 15, pp. 70 and 80.

86. See Coëme and Others v. Belgium, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 98, ECHR 2000-VII.

87. Article 25.1 of the Constitution. See also § 24 of the Constitution of Estonia: "No one shall be transferred, against his or her free will, from the jurisdiction of the court specified by law to the jurisdiction of another court."; Article 8 of the Constitution of Greece: "No person shall be deprived of the judge assigned to him by law against his will."; Article 33 of the Constitution of Liechtenstein: "Nobody may be deprived of his proper judge; special tribunals may not be instituted."; Article 13 of the Constitution of Luxemburg: "No one may be deprived, against his will, of the Judge assigned to him by the law."; Article 17 of the Constitution of the Netherlands: "No one my be prevented against his will form being heard by the courts to which he is entitled to apply under the law.", Article 83 of the Constitution of Austria: "No one may be deprived of his lawful judge."; Article 32 para. 9 of the Constitution of Portugal: "No case shall be withdrawn from a court that already had jurisdiction under an earlier law.", Article 48 of the Constitution of Slovakia: "No one must be removed from the jurisdiction of his law-assigned judge. The jurisdiction of the court is established by law.", Article 101 of the German Grundgesetz: "No one may be removed from the jurisdiction of his lawful judge."

duties and any charges brought against him made without undue delay by an independent, impartial court constituted by law. Only a judge duly appointed pursuant to rules previously established by law and by judicial regulations may judge such an individual."[88]

79. The guarantee can be understood as having two aspects. One relates to the court as a whole. The other relates to the individual judge or judicial panel dealing with the case. In terms of principle, it is clear that both aspects of the "right to the lawful judge" should be promoted. It is not enough if only the court (or the judicial branch) competent for a certain case is determined in advance. That the order in which the individual judge (or panel of judges) within a court is determined in advance, meaning that it is based on general objective principles**,** is essential. It is desirable to indicate clearly where the ultimate responsibility for proper case allocation is being placed**.** In national legislation, it is sometimes provided that the court presidents should have the power to assign cases among the individual judges. However, this power involves an element of discretion, which could be misused as a means of putting pressure on judges by overburdening them with cases or by assigning them only low-profile cases. It is also possible to direct politically sensitive cases to certain judges and to avoid allocating them to others. This can be a very effective way of influencing the outcome of the process.

80. In order to enhance impartiality and independence of the judiciary it is highly recommended that the order in which judges deal with the cases be determined on the basis of general criteria. This can be done for example on the basis of alphabetical order, on the basis of a computerised system or on the basis of objective criteria such as categories of cases. The general rules (including exceptions) should be formulated by the law or by special regulations on the basis of the law, e.g. in court regulations laid down by the presidium or president. It may not always be possible to establish a fully comprehensive abstract system that operates for all cases, leaving no room to decisions regarding allocation in individual cases. There may be circumstances requiring a need to take into account the workload or the specialisation of judges. Especially complex legal issues may require the participation of judges who are expert in that area. Moreover, it may be prudent to place newly appointed judges in a panel with more experienced members for a certain period of time.

88. See also Article 30 of the Constitution of Switzerland: „ Every person whose case is to be judged in judicial proceedings has the right to a court established by law, with jurisdiction, independence, and impartiality."; Article 24 of the Constitution of Spain "Likewise, all have the right to the ordinary judge predetermined by law …".

Furthermore, it may be prudent when a court has to give a principled ruling on a complex or landmark case, that senior judges will sit on that case. The criteria for taking such decisions by the court president or presidium should, however, be defined in advance. Ideally, this allocation should be subject to review.

81. To sum up, **the Venice Commission strongly recommends that the allocation of cases to individual judges should be based to the maximum extent possible 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.**

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.
3. Rules of incompatibility and for the challenging of judges are an essential element of judicial independence.
4. It is an appropriate method for guaranteeing the independence of the judiciary that an independent judicial council have decisive influence on decisions on the appointment and career of judges. While respecting the variety of legal systems existing, the Venice Commission recommends that states not yet having done so consider the establishment of an independent judicial council. In all cases the council should have a pluralistic composition, with a substantial part if not the majority of the members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers.

5. Ordinary judges should be appointed permanently until retirement. Probationary periods for judges are problematic from the point of view of their independence.

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.

7. A level of remuneration should be guaranteed to judges which corresponds to the dignity of their office and the scope of their duties.

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.

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.

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.

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.

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.

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.

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.

PART II

THE PROSECUTION SERVICE[89]

Introduction

1. By letter of 11 July 2008, the Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly, Ms Däubler-Gmelin, requested the Venice Commission to give an opinion on "European standards as regards the independence of the judicial system". The Committee is "interested both in a presentation of the existing *acquis* and in proposals for its further development, on the basis of a comparative analysis taking into account the major families of legal systems in Europe".

2. When the present report makes recommendations it does so also in reply to the request by the Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly to provide proposals for the further development of European standards.

3. The Commission entrusted the preparation of this report to its Sub-Commission on the Judiciary, which decided to prepare two reports on the independence of the Judiciary, a first one dealing with Judges (CDL-AD(2010)004, adopted at the 82nd plenary session, 12-13 March 2010) and the present one on the Prosecution Service, prepared on the basis of comments by Mr Hamilton (CDL-JD(2009)007), Mr Sørensen (CDL-JD(2008)005) and Ms Suchocka (CDL-JD(2008)004).

89. "Report on the European standards as regards the independence of the judicial system: Part II - the Prosecution Service" – document CDL-AD(2010)040, adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010).

4. Following discussions in the Sub-Commission on the Judiciary on 3 June and 16 December 2010 as well as at the plenary session of 4 June 2010, the present report was adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010).

Relevant texts

5. A number of international documents exist on prosecutors. To cite only a few:

- Recommendation Rec(2000)19 of the Committee of Minister of the Council of Europe on the Role of Public Prosecution in the Criminal Justice System,
- The 1990 United Nations Guidelines on the Role of Prosecutors,
- The 1999 IAP (International Association of Prosecutors) Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors,
- The Bordeaux Declaration of the Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE) on "Judges and Prosecutors in a Democratic Society"
- The European Guidelines on Ethics and Conduct for Public Prosecutors (Council of Europe, "Budapest Guidelines", 2005)

6. In a number of opinions, the Venice Commission had occasion to make recommendations on constitutional provisions and legislation on the prosecution office, see Part II of the Draft Vademecum on the Judiciary (CDL-JD(2008)001).

Variety of models

7. Systems of criminal justice vary throughout Europe and the World. The different systems are rooted in different legal cultures and there is no uniform model for all states. There are, for example, important differences between systems which are adversarial in nature and those which are inquisitorial, between systems where a judicial officer controls the investigation and those where a non-judicial prosecutor or the police control investigations. There are systems where prosecution is mandatory (the legality principle) and others where the prosecutor has discretion not to prosecute where the public interest does not demand it (the opportunity principle). In some systems there is lay participation in the fact-finding and/or law-applying process through

the participation of jurors, assessors or lay judges, with consequences for the rules of criminal procedure and evidence. Some systems allow for private prosecution while others do not do so or recognise the possibility of private prosecution only on a limited basis. Some systems recognise the interests of a victim in the outcome of criminal proceedings as a *"partie civile"* where others recognise only a contest between the prosecutor representing the public or the state and the individual accused.

8. The relationship between police and prosecutor also varies. In many countries the police are in principle subordinate to the prosecutor's instructions, although often in practice enjoying functional independence. In others the police are in principle independent. In a third model the police and the prosecutor's office are integrated.

9. Over the centuries European criminal justice systems have borrowed extensively from each other so that today there are probably no pure systems which have not imported other important elements from outside. For example, the jury which has its origins in the common law has been extensively adopted into other legal cultures. The public prosecutor itself as an institution was unknown to the common law but today has been taken into every common law system to such an extent that its civil law origin is usually forgotten by common lawyers. It is probably true to say that this borrowing across systems has led to a degree of convergence that is not always acknowledged.

Convergence of systems

10. The variety in prosecution systems may appear arbitrary and shapeless but in reality it is shaped by and reflects the variety in criminal justice systems themselves. It is possible to identify features and values which are common to virtually all modern criminal justice systems.

11. In the first place, all states regard criminal prosecution as a core function of the state. A crime is a wrong against society as a whole, although in many cases the same act will also amount to a private wrong against the individual victim. If a wrong has merely a private character it is not a crime. However, the definition of wrongs having merely a private character may differ greatly in different jurisdictions.

12. For this reason most systems provide for a monopoly on criminal prosecutions by the state or an organ of the state. The common law world, which originally allowed for private prosecution, has tended over the years to restrict the right to private prosecution if not to abolish it entirely.

13. Because of the nature of a crime as a wrong against society the penalties attaching to criminal conviction are more severe than the consequences for the perpetrator of a civil wrong. The latter is concerned only with restitution and compensation whereas criminal justice is concerned in addition with other purposes, including punishment, the deterrence of wrongdoing and the incapacitation of the offender. Thus, it is usual that criminal conviction requires stricter proof than is needed in the case of a civil wrong and the stigma attaching to criminal conviction is greater than that where judgment is merely for a civil wrong. Criminal convictions sometimes attract other consequences, such as disqualification from holding certain offices or private sector positions or restrictions on entering other countries.

Qualities of prosecutors

14. The prosecutor, because he or she acts on behalf of society as a whole and because of the serious consequences of criminal conviction, must act to a higher standard than a litigant in a civil matter.

15. The prosecutor must act fairly and impartially. Even in systems which do not regard the prosecutor as part of the judiciary, the prosecutor is expected to act in a judicial manner. It is not the prosecutor's function to secure a conviction at all costs. The prosecutor must put all the credible evidence available before a court and cannot pick and choose what suits. The prosecutor must disclose all relevant evidence to the accused and not merely the evidence which favours the prosecution case. Where evidence tending to favour the accused cannot be disclosed (for example, because to do so would compromise the safety of another person) it may be the duty of the prosecutor to discontinue the prosecution.

16. Because of the serious consequences for the individual of a criminal trial, even one which results in an acquittal, the prosecutor must act fairly in deciding whether to prosecute and for what charges.

17. A prosecutor, like a judge, may not act in a matter where he or she has a personal interest, and may be subject to certain restrictions aiming to safeguard his or her impartiality and integrity.

18. These duties all point to the necessity to employ as prosecutors suitable persons of high standing and good character. The qualities required of a prosecutor are similar to those of a judge, and require that suitable procedures for appointment and promotion are in place. Of necessity, a prosecutor, like

a judge, will have on occasion to take unpopular decisions which may be the subject of criticism in the media and may also become the subject of political controversy. For these reasons it is necessary to secure proper tenure and appropriate arrangements for promotion, discipline and dismissal which will ensure that a prosecutor cannot be victimised on account of having taken an unpopular decision.

19. Of course, where a prosecutor falls short of the required standard, the impartial judge may be able to correct the wrong that is done. However, there is no guarantee of such correction and in any event great damage can be caused. It is evident that a system where both prosecutor and judge act to the highest standards of integrity and impartiality presents a greater protection for human rights than a system which relies on the judge alone.

Dangers of incorrect decisions and of interference

20. Political interference in prosecution is probably as old as society itself. In early societies, indeed, the prosecution power would usually have been entirely in the control of princes who could use it to punish their enemies and reward their friends. History provides many examples of the use of prosecution for improper or political purposes. One need look no further than Tudor England or France both before and during the Revolution and the Soviet system in Eastern Europe. Modern Western Europe may have largely avoided this problem of abusive prosecution in recent times but if this is so it is largely because mechanisms have been adopted to ensure that improper political pressure is not brought to bear in the matter of criminal prosecution. In totalitarian states or in modern dictatorships criminal prosecution has been and continues to be used as a tool of repression and corruption. The existence of systems of democratic control does not give a complete answer to the problem of politically inspired prosecutions. The tyranny of the majority can extend to the use of prosecution as an instrument of oppression. Majorities may be subject to manipulation and democratic politicians may be subject to populist pressures which they fear to resist, especially where these are supported by campaigning in the media.

21. There are two different but related abuses, which can be related to political interference or erroneous prosecutorial decisions. The first is the bringing of prosecutions which ought not to be brought, either because there is no evidence or because a case is based on corrupt or false evidence. A second, more insidious, and probably commoner, is where the prosecutor does not bring a prosecution which ought to be brought. This problem is frequently

associated with corruption but may also be encountered where governments have behaved in a criminal or corrupt manner or when powerful interests bring political pressure to bear. In principle a wrong instruction not to prosecute may be more difficult to counter because it may not be easily made subject to judicial control. Victims' rights to seek judicial review of cases of non-prosecution may need to be developed to overcome this problem. However, the present report will not go into details on this issue.

22. Therefore, the Commission focuses on methods to limit the risk of improper interference, which range from conferring independence on a prosecutor, subject to such powers of review, inspecting or auditing decisions as may be appropriate, to the prohibition of instructions in individual cases, to procedures requiring any such instructions to be given in writing and made public. In this connection the existence of appropriate mechanisms to ensure the consistency and transparency of decision making are of particular importance.

Main models of the organisation of the prosecution service

23. The major reference texts allow for systems where the prosecution system is not independent of the executive, and in relation to such systems concentrate on the necessity for guarantees at the level of the individual case that there will be transparency concerning any instructions which may be given.

24. Nonetheless, for years, the scope or degree of independence which the prosecution office should enjoy has evoked discussion. That stems to a large extent from the fact that European standards allow for two different ways of resolving the position of the prosecution vis-à-vis other state organs:

> *"Legal Europe is divided on this key issue between the systems under which the public prosecutor's office enjoys complete independence from parliament and government and those where it is subordinate to one or other of these authorities while still enjoying some degree of scope for independent action. As a prevailing concept, it can be seen, that in the current situation the very notion of European harmonisation round a single concept of a prosecutor's office seemed premature."*[90]

25. Consequently, Recommendation (2000)19 allows for a plurality of models. Its paragraph 13 contains basic guidelines for those states where the public prosecution is part of or subordinate to the Government.

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90. Recommendation Rec(2000)19, Explanatory Memorandum p.11.

26. Nonetheless, only a few of the countries belonging to the Council of Europe have a prosecutor's office forming part of the executive authority and subordinate to the Ministry of Justice (e.g. Austria, Denmark, Germany, the Netherlands). The Commission notes that there is a widespread tendency to allow for a more independent prosecutor's office, rather than one subordinated or linked to the executive. For example, in Poland recent amendments to the Law on the Prosecutor's Office separated the role of the Ministry of Justice from that of the Prosecutor General. Also, it is important to note that in some countries, subordination of the prosecution service to the executive authority is more a question of principle than reality in the sense that the executive is in fact particularly careful not to intervene in individual cases. Even in such systems, however, the fundamental problem remains as there may be no formal safeguards against such intervention. The appearance of intervention can be as damaging as real interference, as can be seen in the current Austrian debate on the power of the executive to give instructions to the prosecutors.

27. The tendency described above is visible not only among the civil law member states of the Council of Europe but also in the common law world. The federal prosecution service in Canada recently moved from the model of a service as an integral part of the Attorney General/Ministry of Justice to the model of an independent Director of Public Prosecutions (DPP). Northern Ireland has now also established its DPP's Office as independent. England and Wales and Ireland have also all seen the gradual elimination of police powers to prosecute, which was a traditional feature of common law systems, in favour of a public prosecutor.

28. Apart from those tendencies, there is an essential difference as to how the concept of independence or autonomy is perceived when applied to judges as opposed to the prosecutor's office. Even when it is part of the judicial system, the prosecutor's office is not a court. The independence of the judiciary and its separation from the executive authority is a cornerstone of the rule of law, from which there can be no exceptions. Judicial independence has two facets, an institutional one where the judiciary as a whole is independent as well as the independence of individual judges in decision making (including their independence from influence by other judges). However, the independence or autonomy of the prosecutor's office is not as categorical in nature as that of the courts. Even where the prosecutor's office as an institution is independent there may be a hierarchical control of the decisions and activities of prosecutors other than the prosecutor general.

"Internal" and "external" independence

29. A clear distinction has to be made between a possible independence of the prosecutor's office or the Prosecutor General as opposed to the status of prosecutors other than the prosecutor general who are rather 'autonomous' than 'independent'. The prosecutor's offices are often referred to as 'autonomous' and individual prosecutors would be referred to as 'independent'.

30. Any 'independence' of the prosecutor's office by its very essence differs in scope from that of judges. The main element of such "external" independence of the prosecutor's office, or for that of the Prosecutor General, resides in the impermissibility of the executive to give instructions in individual cases to the Prosecutor General (and of course directly to any other prosecutor). General instructions, for example to prosecute certain types of crimes more severely or speedily, seem less problematic. Such instructions may be regarded as an aspect of policy which may appropriately be decided by parliament or government.

31. The independence of the prosecution service as such has to be distinguished from any "internal independence" of prosecutors other than the prosecutor general. In a system of hierarchic subordination, prosecutors are bound by the directives, guidelines and instructions issued by their superiors. Independence, in this narrow sense, can be seen as a system where in the exercise of their legislatively mandated activities prosecutors other than the prosecutor general need not obtain the prior approval of their superiors nor have their action confirmed. Prosecutors other than the prosecutor general often rather enjoy guarantees for non-interference from their hierarchical superior.

32. In order to avoid undue instructions, it is essential to develop a catalogue of such guarantees of non-interference in the prosecutor's activities. Non-interference means ensuring that the prosecutor's activities in trial procedures are free of external pressure as well as from undue or illegal internal pressures from within the prosecution system. Such guarantees should cover appointment, discipline / removal but also specific rules for the management of cases and the decision-making process.

33. In the following chapters of this report, guarantees relating to the Prosecutor General, other prosecutors and some structural elements (Prosecutorial Council, training) will be discussed. As pointed out above, the present report refers both to existing standards and proposals for future ones.

Prosecutor general

Appointment and dismissal

34. The manner in which the Prosecutor General is appointed and recalled plays a significant role in the system guaranteeing the correct functioning of the prosecutor's office. In its opinion on the Regulatory Concept of the Constitution of the Republic of Hungary, the Venice Commission stated:

> "*It is important that the method of selection of the general prosecutor should be such as to gain the confidence of the public and the respect of the judiciary and the legal profession. Therefore* ***professional, non-political expertise should be involved in the selection process****. However, it is reasonable for a Government to wish to have some control over the appointment, because of the importance of the prosecution of crime in the orderly and efficient functioning of the state, and to be unwilling to give some other body, however distinguished, carte blanche in the selection process. It is suggested, therefore, that* ***consideration might be given to the creation of a commission of appointment comprised of persons who would be respected by the public and trusted by the Government."***[91]

35. No single, categorical principle can be formulated as to who – the president or Parliament – should appoint the Prosecutor General in a situation when he is not subordinated to the Government. The matter is variously resolved in different countries. Acceptance of the principle of cooperation amongst state organs seems a good solution as it makes it possible to avoid unilateral political nominations. In such cases, a consensus should be reached. In any case, the right of nominating candidates should be clearly defined. **Advice on the professional qualification of candidates should be taken from relevant persons such as representatives of the legal community (including prosecutors) and of civil society.**

36. In countries where the prosecutor general is elected by Parliament, the obvious danger of a politicisation of the appointment process could also be reduced by **providing for the preparation of the election by a parliamentary committee, which should take into account the advice of experts. The use of a qualified majority for the election of a Prosecutor General could be seen as a mechanism to achieve consensus on such appointments.** However one

91. Emphasis added, CDL(1995)073rev., chapter 11.

would need also to provide for an alternative mechanism where the requisite qualified majority cannot be obtained so as to avoid the risk of a deadlock**.**

37. It is important that the Prosecutor General should not be eligible for re-appointment, at least not by either the legislature or the executive. There is a potential risk that a prosecutor who is seeking re-appointment by a political body will behave in such a manner as to obtain the favour of that body or at least to be perceived as doing so. **A Prosecutor General should be appointed permanently or for a relatively long period without the possibility of renewal at the end of that period. The period of office should not coincide with Parliament's term in office.** That would ensure the greater stability of the prosecutor and make him or her independent of current political change.

38. **If some arrangement for further employment (for example as a judge) after the expiry of the term of office is to be made, this should be made clear before the appointment** so that again no question of attempting to curry favour with politicians arises. . On the other hand, there should be no general ban on the Prosecutor General's possibilities of applying for other public offices during or after his term of office.

39. The law on the prosecutor's office should clearly define the conditions of the Prosecutor's pre-term dismissal. In its Opinion on the Draft Law of Ukraine amending the Constitutional Provisions on the Procuracy, the Commission found that:

> ***'The grounds for such dismissal would have to be prescribed by law.*** *(...) The Venice Commission would prefer to go even further by providing the grounds for a possible dismissal* ***in the Constitution itself****. Moreover, there should be a mandatory requirement that before any decision is taken,* ***an expert body has to give an opinion whether there are sufficient grounds for dismissal****".*[92]

40. In any case, **the Prosecutor General should benefit from a fair hearing in dismissal proceedings, including before Parliament.**

Public accountability of the prosecutor's office

41. Like any state authority, including judges, the prosecutor's office needs to be accountable to the public. A traditional means to assure accountability is control by the executive, which provides indirect democratic legitimacy

92. Emphasis added, CDL-AD(2006)029, paragraph 34.

through the dependence of the executive on the elected Parliament. Another means is control by a prosecutorial council, which cannot be an instrument of pure self-government but derives its own democratic legitimacy from the election of at least a part of its members by Parliament.

42. In many systems there is accountability to Parliament. In countries where the prosecutor general is elected by Parliament, it often also has the power to dismiss him or her. In such a case, a fair hearing is required. Even with such a safeguard, there is a risk of politicisation: *"Not only is there a risk of populist pressure being taken into account in relation to particular cases raised in the Parliament but parliamentary accountability may also put indirect pressure on a prosecutor to avoid taking unpopular decisions and to take decisions which will be known to be popular with the legislature."*[93] Consequently, **accountability to Parliament in individual cases of prosecution or non-prosecution should be ruled out**.

43. It is important to be clear about what aspects of the prosecutor's work do or do not require to be carried out independently. **The crucial element seems to be that the decision whether to prosecute or not should be for the prosecution office alone and not for the executive or the legislature**. However**, the making of prosecution policy** (for example giving priority to certain types of cases, time limits, closer cooperation with other agencies etc.) seems to be **an issue where the Legislature and the Ministry of Justice or Government can properly have a decisive role.**

44. Some **specific instruments of accountability** seem necessary especially in cases where the prosecutor's office is independent. The **submitting of public reports by the Prosecutor General could be one such instrument**. Whether such reports should be submitted to Parliament or the executive authority could depend on the model in force as well as national traditions. When applicable, in such reports the **Prosecutor General should give a transparent account of how any general instruction given by the executive have been implemented**. Guidelines for the exercise of the prosecutorial function and codes of ethics for prosecutors have an important role in standard setting. These may be adopted by the prosecution authorities themselves or may be adopted by Parliament or by Government.

45. The fact that so much of the prosecutor's work is subject to scrutiny by courts of law also provides a form of accountability. In systems where the

93. CDL-AD(2007)011. Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of "the former Yugoslav Republic of Macedonia", para. 25.

prosecutor does not control the investigation, the relationship between the prosecutor and the investigator necessarily creates a degree of accountability. **The biggest problems of accountability (or rather a lack of accountability) arise, when the prosecutors decide not to prosecute. If there is no legal remedy – for instance by individuals as victims of criminal acts – then there is a high risk of non-accountability.**

46. Finally, prosecution offices like other state organs are accountable for public expenditure through whatever public auditing procedures are in place and this would be so in every jurisdiction.

Prosecutors other than the Prosecutor General

Appointment

47. In order to allow them to exercise their functions in accordance with the law, appropriate legal qualifications are indispensable for all levels of prosecutors, including the prosecutor general.

48. In view of the special qualities required for prosecutors, it seems inadvisable to leave the process of their appointment entirely to the prosecutorial hierarchy itself. Various methods can help to remove the danger that within a monolithic prosecution system instructions from above count more than the law. **In order to prepare the appointment of qualified prosecutors expert input will be useful.** This can be done ideally in the framework of an independent body like a democratically legitimised Prosecutorial Council or a board of senior prosecutors, whose experience will allow them to propose appropriate candidates for appointment. Such a body could act upon a recommendation from the Prosecutor General with the body having the right to refuse to appoint a person but only for good reason.[94]

49. In some countries, the career of the prosecutors is regulated by the law, which provides for the progression of the promotions and for the appointment to new offices in the frame of the carrier. In this case, prosecutors have rights and interests which are covered by the law and should be guaranteed through the possibility of challenging before a court decisions which do not comply with the law's provisions.

94. CDL-AD(2008)019 Opinion on the draft law on the Public Prosecutors' service of Moldova, para. 44

50. **Prosecutors should be appointed until retirement.** Appointments for limited periods with the possibility of re-appointment bear the risk that the prosecutor will make his or her decisions not on the basis of the law but with the idea to please those who will re-appoint him or her.

Discipline

51. The system of discipline is closely linked to the issue of the hierarchical organisation of the prosecutor's office. In such a system, disciplinary measures are typically initiated by the superior of the person concerned.

52. **In disciplinary cases,** including of course the removal of prosecutors, **the prosecutor concerned should also have a right to be heard** in adversarial proceedings. In systems where a Prosecutorial Council exists, this council, or a disciplinary committee within it, could handle disciplinary cases. **An appeal to a court against disciplinary sanctions should be available.**

Guarantees of non-interference into the work of prosecutors other than the prosecutor general

53. As pointed out above, the "independence" of prosecutors other than the prosecutor general, unlike that of individual judges, is not an absolute value. There is a tension between the need to decide on the approach to the individual case on the basis of the prosecutor's conscience and the need to ensure consistency of approach and the application of the principles and guidelines which have been established. It is legitimate to have a system of prosecution which is organised on a hierarchical way, and in which a decision of a prosecutor may be overruled by a senior prosecutor when it runs counter to general instructions.

54. A key element in order to determine whether instructions to prosecutors other than the prosecutor general in individual cases are permissible is the question of whether prosecutors have discretion not to prosecute where a prosecution is not in the public interest as in countries where the opportunity principle applies, or alternatively whether the principle of legality applies and prosecutors are obliged to prosecute cases under their competence. While common law countries invariably operate the opportunity principle both the legality principle and the opportunity principle are found in civil law systems.

55. In systems which have the legality principle, instructions not to prosecute can easily be illegal if the conditions for the termination of a case are

not met. This is also the case in systems which have the opportunity principle if the instruction is based upon improper reasons. Conversely, in all systems, instructions to prosecute when the necessary elements (suspicion, proof etc.) are not met would be illegal.

56. In most cases the decision to prosecute will be made simply on the basis of whether there is sufficient evidence to prosecute. In some cases, there may be matters unrelated to the weight of evidence tending to suggest that a prosecution may be undesirable. These may relate to the circumstances of the offender or the victim, or to the damage a prosecution might cause to the interests of a third party. Exceptionally, there may be cases where a prosecution would risk causing damage to wider interests, social, economic or relating to questions of security. Where such public interest questions arise, care should be taken not to violate the rule of law, and while the prosecutor may think it wise to consult with persons having a special expertise, he or she should retain the power to decide whether a prosecution is in fact in the public interest. If the prosecutor can be subject to an instruction in such a case, then that instruction should be reasoned and where possible open to public scrutiny.

57. In a hierarchical prosecution system instructions may be given at the level of an individual case provided certain safeguards are met. Point 10 of Recommendation 2000 (19) reads:

> *"All public prosecutors enjoy the right to request that instructions addressed to him or her be put in writing. Where he or she believes that an instruction is either illegal or runs counter to his or her conscience, an adequate internal procedure should be available which may lead to his or her eventual replacement."*

58. Consequently, where a prosecutor other than the prosecutor general is given an instruction he or she has a right to have the instruction put in writing but **Recommendation 2000 (19) does not prevent the allegedly illegal instruction from being given nonetheless**. The prosecutor is also entitled to initiate a procedure to allow for his or her replacement by another prosecutor where an instruction is believed to be illegal or contrary to his or her conscience. The wording of point 10 also leaves open the possibility of such a procedure being initiated by the hierarchical superior who might have an interest in replacing a prosecutor other than the prosecutor general daring to contest the legality of the instruction given.

59. The Commission is of the opinion that these **safeguards are not adequate and should be further developed**. An allegation that an instruction is illegal

is very serious and should not simply result in removing the case from the prosecutor who has complained. **Any instruction to reverse the view of an inferior prosecutor should be reasoned and in case of an allegation that an instruction is illegal a court or an independent body like a Prosecutorial Council should decide on the legality of the instruction.**

60. A means of influencing a prosecutor is his or her transfer to another prosecutor's office without their consent. Threats of such transfers can be used as an instrument for applying pressure on the prosecutor or a "non obedient" prosecutor can be remove from a delicate case. **Again, an appeal to an independent body like a Prosecutorial Council or similar should be available.**

Immunity, restraint and security

61. **Prosecutors should not benefit from a general immunity**, which could even lead to corruption, but from functional immunity for actions carried out in good faith in pursuance of their duties.

62. There are various standards on the acceptability of involvement of civil servants in political matters. **A prosecutor should not hold other state offices or perform other state functions, which would be found inappropriate for judges. Prosecutors should avoid public activities that would conflict with the principle of their impartiality.**

63. Another practical issue which is important both for prosecutors and for judges is the question of security. Obviously, it is important that prosecutors and judges are not intimidated by anybody and are given the necessary physical protection to enable them to carry out their duties impartially and without favour. The International Association of Prosecutors has recently adopted standards in relation to security for prosecutors.

Prosecutorial Council

64. A Prosecutorial Council is becoming increasingly widespread in the political systems of individual states. A number of countries have established prosecutorial councils[95] but there is no standard to do so.

95. While there are specialised prosecutorial councils for example in Bosnia and Herzegovina, Moldova (CDL(2008)055), Montenegro (CDL(2008)023), Serbia (CDL(2009)103) and "the Former Yugoslav Republic of Macedonia" (CDL(2007)023), France, Italy and Turkey (CDL(2010)125) have judicial councils, which are also competent for prosecutors (however, with a separate chamber for prosecutors in France; see also footnote 7 below).

65. If they are composed in a balanced way, e.g. by prosecutors, lawyers and civil society, and when they are independent from other state bodies, such councils have the advantage of being able to provide valuable expert input in the appointment and disciplinary process and thus to shield them at least to some extent from political influence. Depending on their method of appointment, they can provide democratic legitimacy for the prosecution system. Where they exist, in addition to participating in the appointment of prosecutors, they often also play a role in discipline including the removal of prosecutors.

66. **Where it exists, the composition of a Prosecutorial Council should include prosecutors from all levels but also other actors like lawyers or legal academics. If members of such a council were elected by Parliament, preferably this should be done by qualified majority.** If prosecutorial and judicial councils are a single body, **it should be ensured that judges and prosecutors cannot outvote the other group in each others' appointment and disciplinary proceedings** because due to their daily 'prosecution work' prosecutors may have a different attitude from judges on judicial independence and especially on disciplinary proceedings. In such a case, the Council could be split in two chambers, like in France, where the *Conseil supérieur de la magistrature* sits in two chambers, which are competent for judges and prosecutors respectively[96]**.**

67. The effects of the decisions of prosecutorial councils can vary. Their decisions could have a direct effect on the prosecutors or could be only of advisory nature, thus requiring their implementation by the Ministry of Justice. The former is to be preferred because it takes away discretion from the Ministry and leaves less opportunity for political interference in the prosecutors' careers.

68. It would be difficult to impose a single model of such a council in all the states of the Council of Europe. Moreover, the existence of such a Council cannot be regarded as a uniform standard binding on all European states.

Remuneration and training

69. Like for judges, **remuneration in line with the importance of the tasks performed is essential for an efficient and just criminal justice system**. A

96. Until the entry into force of the amended Article 65 of the Constitution of France on 23 January 2011 (by virtue of the Organic Law n°2010-830 of 22 July 2010), the *Conseil de la Magistrature* has a majority of five judges in the "judge's chamber" and a majority of five prosecutors in the "prosecutor's chamber". The reform adds 6 "qualified personalities" from civil society to each of the chambers.

sufficient remuneration is also necessary to reduce the danger of corruption of prosecutors.

70. Appropriate training should be available for prosecutors throughout their career. The importance of training for prosecutors is certainly of the same level as that for judges. Such training should include legal, including human rights, training as well as managerial training, especially for senior prosecutors. Again, **an expert body like a Prosecutorial Council could play an important role in the definition of training programmes**. For reasons of cost and efficiency, synergies could be found in common training for prosecutors and judges.

Dangers of excessive powers of the prosecutor's office for the independence of the judiciary

71. A distinction needs to be made between the interests of the holders of state power and the public interest. The assumption that the two are the same runs through quite a number of European systems. Ideally the exercise of public interest functions (including criminal prosecution) should not be combined or confused with the function of protecting the interests of the current Government, the interests of other institutions of state or even the interests of a political party. In many countries the function of asserting public interest, outside the field of criminal prosecution, would rest with an ombudsman or with an official such as the Chancellor of Justice in Finland. There are a number of democracies where the two functions of defending state interest and public interest are combined, as in the Attorney General model in some common law countries. The functioning of such a system however depends on legal culture, and especially in younger democracies, where there is a history of abuse of prosecution for political goals, special precautions are needed.

72. In the course of its work on individual countries, the Venice Commission has sometimes been critical of excessive powers of the prosecutor's office. In the Soviet system, the prosecutor's office was a powerful means to control the judiciary and in a few countries remnants of this system linger on. There is a danger that an over-powerful prosecution service becomes a fourth authority without accountability. Avoiding this risk is one of the aims of the present report.

73. This issue is closely linked to the question of what powers the prosecution service should have. There is a very strong argument for confining prosecution services to the powers of criminal prosecution and not giving them the sort of general supervisory powers which were commonly found in *"prokuratura"* type

systems. The question seems very much one of checks and balances within the system. In any case, **prosecutor's actions which affect human rights, like search or detention, have to remain under the control of judges. In some countries a 'prosecutorial bias' seems to lead to a quasi-automatic approval of all such requests from the prosecutors. This is a danger not only for the human rights of the persons concerned but for the independence of the Judiciary as a whole.**

74. While it is of course normal and permissible for prosecution services to control the investigation, in some ways where the prosecutor does not control the investigation this in itself reduces the possibility for an over-powerful prosecution which can abuse that authority. While there are weaknesses in the model whereby the prosecutor and investigator are separate, one advantage of such a system is to reduce the risk of an over-powerful institution abusing its powers. On the other hand, it creates a greater risk that the police will abuse their powers.

75. Already in Part I of the present report on the Independence of Judges the Commission insisted that:

> *"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."*[97]

76. This excludes the Soviet system of *nadzor*, giving the prosecutor a general task to oversee legality and even to re-open cases – including in civil law between private parties – decided in final instance when the prosecutor deems that the law has been applied incorrectly. Of course, the Venice Commission's strong stance against such powers do not exclude a request to a court to re-open proceedings. However, the decision on re-opening a case has to remain with a court, not the prosecutor.

Prosecution powers outside the criminal law field

77. While it does not do so in absolute terms, the Venice Commission has consistently advocated that the **prosecution service should have its primary focus on the criminal law field.**[98] It is not uncommon that prosecutors' offices do exercise other functions. However, where other functions are exercised they

97. CDL-AD(2010)004, paragraph 82.13.

98. CDL-JD(2008)001, for an overview of the European practice on this issue see the report by Mr. András Varga for the CCPE (CCPE-Bu(2008)4rev).

must not be functions which interfere with or supplant the judicial system in any way. Where prosecutors have power to question the decision of a court, they must do so by exercising a power of appeal or a power to seek a review of a decision just as any other litigant might do. It has to be acknowledged that even in private litigation there may be a public interest which requires to be defended or asserted before the court and there is no objection in principle to it being a function of the prosecutor to do so provided that the ultimate say rests with the court.

78. In its Opinion no. 3 (2008) on the Role of Prosecution Services outside the Criminal Law Field, the Consultative Council of European Prosecutors, correctly states that *"[t]here are no common international legal norms and rules regarding tasks, functions and organisation of prosecution service outside the criminal law field".* The opinion goes on insisting that *"it is the sovereign right of the state to define its institutional and legal procedures of realisation of its functions on protection of human rights and public interests …".*[99]

79. While the Venice Commission fully agrees on the key importance of the respect of human rights by prosecutors, Opinion 3 seems to hint that under certain conditions the protection of "women and children"[100] could be a task not only for ombudspersons but also for prosecutors.

80. In its opinion on a draft law on the prosecution Service of Moldova, the Commission had opportunity to comment on the power of the prosecutor to *"initiate civil proceedings to secure the protection of the rights, freedoms and interests of juveniles, elderly or disabled persons, or persons who due to their state of health are unable to take proceedings."* The Commission found that *"[g]iven that the main task of the prosecutor is to represent the interest of the state and general interest, it may also be questioned whether the prosecutor is necessarily the most appropriate person to undertake this function."*[101]

81. Further, in its Opinion on the Draft Law of Ukraine on the Office of the Public Prosecutor, the Venice Commission found that:

> *"In the opinion of [the] Consultative Council of European Prosecutors the constitutional history and legal tradition of a given country may thus justify non penal functions of the prosecutor. This reasoning can, however, only be applied with respect to democratic legal traditions, which are in line with*

99. Paragraph 31.
100. Paragraph 33.
101. CDL-AD(2008)019, paragraph 30.

Council of Europe values. The only historical model existing in Ukraine is the Soviet (and czarist) model of 'prokuratura'. This model reflects a non-democratic past and is not compatible with European standards and Council of Europe values. This is the reason why Ukraine, when joining the Council of Europe, had to enter into the commitment to transform this institution into a body which is in accordance with Council of Europe standards.

17. […] ***The general protection of human rights is not an appropriate sphere of activity for the prosecutor's office. It should be better realised by an ombudsman than by the prosecutor's office.*** *"* [102]

82. This is in line with Recommendation 1604 (2003) on the Role of the Public Prosecutor's Office in a Democratic Society Governed by the Rule of Law of the Parliamentary Assembly of the Council of Europe, which points out that the various non-penal law responsibilities of public prosecutors *"give rise to concern as to their compatibility with the Council of Europe's basic principles"* and that *"it is essential … that the powers and responsibilities of prosecutors are limited to the prosecution of criminal offences and a general role in defending public interest through the criminal justice system, with separate, appropriately located and effective bodies established to discharge any other function"* (paragraph 7).

83. Especially, when the prosecutor has to act against the state, claiming for example social benefits on behalf of such vulnerable persons, he or she would be in a clear situation of conflict of interest between the interest of the state, which the prosecutor represents and the interest of the individual he or she is obliged to defend. This position of the Venice Commission to restrict the task of prosecutors to the criminal field however does not rule out other powers performed by prosecutors, like representing the financial interests of the state where such a conflict of interests cannot be expected. The Committee of Ministers of the Council of Europe and its CDCJ currently work on the preparation of a recommendation to limit such powers.

Conclusion

84. The case for the independence of Judges, discussed in Part I of the present report is a clear cut one. Separation of powers and the right to a fair trial are inconceivable without independent judges. This is less obvious for

102. CDL-AD(2009)048, adopted by the Venice Commission at its 79th Plenary Session (Venice, 12-13 June 2009), emphasis added.

prosecutors, especially in the light of the variety of systems ranging from independence to full integration into the executive power.

85. In view of this diversity, the present Part II of the Report on the Prosecution Service focuses on guarantees for the prosecution service from outside pressures. Especially when there is subordination of the prosecution to the executive, such guarantees are required in order to shield the former from undue political influence by the latter. Among other guarantees discussed in this report, a frequently used tool is the establishment of an independent board of prosecutors or prosecutorial council, dealing with appointments, promotion and discipline.

86. The 'independence' of prosecutors is not of the same nature as the independence of judges. While there is a general tendency to provide for more independence of the prosecution system, there is no common standard that would call for it. Independence or autonomy are not ends in themselves and should be justified in each case by reference to the objectives sought to be attained.

87. In order to provide for guarantees of non-interference, the Venice Commission recommends:

1. In the procedure of appointing a Prosecutor General, advice on the professional qualification of candidates should be taken from relevant persons such as representatives of the legal community (including prosecutors) and of civil society.
2. In countries where the Prosecutor General is elected by Parliament, the danger of a politicisation of the appointment process could be reduced by providing for the preparation of the election by a parliamentary committee
3. The use of a qualified majority for the election of a Prosecutor General could be seen as a mechanism to promote a broad consensus on such appointments.
4. A Prosecutor General should be appointed permanently or for a relatively long period without the possibility of renewal at the end of that period. The period of office of the Prosecutor General should not coincide with Parliament's term in office.
5. If some arrangement for further employment for the Prosecutor General (for example as a judge) after the expiry of the term of office

is to be made, this should be made clear before the appointment. On the other hand, there should be no general ban on the Prosecutor General's possibilities of applying for other public offices during or after his term of office.

6. The grounds for dismissal of the Prosecutor General must be prescribed in law and an expert body should give an opinion whether there are sufficient grounds for dismissal.

7. The Prosecutor General should benefit from a fair hearing in dismissal proceedings, including before Parliament.

8. Accountability of the Prosecutor General to Parliament in individual cases of prosecution or non-prosecution should be ruled out. The decision whether to prosecute or not should be for the prosecution office alone and not for the executive or the legislature. However, the making of prosecution policy seems to be an issue where the Legislature and the Ministry of Justice or Government can properly have a decisive role.

9. As an instrument of accountability the Prosecutor General could be required to submit a public report to Parliament. When applicable, in such reports the Prosecutor General should give a transparent account of how any general instruction given by the executive have been implemented.

10. The biggest problems of accountability (or rather a lack of accountability) arise, when the prosecutors decide not to prosecute. If there is no legal remedy – for instance by individuals as victims of criminal acts – then there is a high risk of non-accountability.

11. In order to prepare the appointment of qualified prosecutors other than the prosecutor general, expert input will be useful.

12. Prosecutors other than the Prosecutor General should be appointed until retirement.

13. In disciplinary cases the prosecutor concerned should have a right to be heard.

14. An appeal to a court against disciplinary sanctions should be available.

15. The safeguard provided for in Recommendation 2000 (19) against allegedly illegal instructions is not appropriate and should be further

developed because it does not prevent an allegedly illegal instruction from being given. Any instruction to reverse the view of an inferior prosecutor should be reasoned and in case of an allegation that an instruction is illegal a court or an independent body like a Prosecutorial Council should decide on the legality of the instruction.

16. Threats of transfers of prosecutors can be used as an instrument for applying pressure on the prosecutor or a "non obedient" prosecutor can be remove from a delicate case. An appeal to an independent body like a Prosecutorial Council or similar should be available.
17. Prosecutors should not benefit from a general immunity,
18. A prosecutor should not hold other state offices or perform other state functions, which would be found inappropriate for judges and prosecutors should avoid public activities that would conflict with the principle of their impartiality
19. Where it exists, the composition of a Prosecutorial Council should include prosecutors from all levels but also other actors like lawyers or legal academics. If members of such a council were elected by Parliament, preferably this should be done by qualified majority.
20. If prosecutorial and judicial councils are a single body, it should be ensured that judges and prosecutors cannot influence each others' appointment and discipline proceedings
21. Remuneration of prosecutors in line with the importance of the tasks performed is essential for an efficient and just criminal justice system.
22. An expert body like a Prosecutorial Council could play an important role in the definition of training programmes.
23. Prosecutor's actions which affect human rights, like search or detention, have to remain under the control of judges.
24. In some countries a 'prosecutorial bias' seems to lead to a quasi-automatic approval of all such requests from the prosecutors. This is a danger not only for the human rights of the persons concerned but for the independence of the Judiciary as a whole.
25. The prosecution service should have its primary focus on the criminal law field.

JUDICIAL APPOINTMENTS

Judicial appointments[103]

1. The Venice Commission adopted the present report at its 70th Plenary session (Venice, 16-17 March 2007) as a contribution to the elaboration of opinion no. 10 of the Consultative Council of European Judges (CCJE) on structure and role of judicial councils, as provided for in the Terms of Reference of the CCJE for 2007 (CCJE (2007) 2, point 4.i), which requests the CCJE to consult on this opinion with the Venice Commission. The Commission presented its report at the meetings of the Working Party of the CCJE (CCJE-GT) in Rome (28-29 March 2007) and in Graz (25-26 June 2007).

Introduction

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.

3. International standards in this respect are more in favour of the extensive depolitisation 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.

103. Report on the "Judicial Appointments", document CDL-AD(2007)028, adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007).

Appointment system

4. 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 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. 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."*

5. 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.

6. 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**.

7. 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.[104]

8. Notwithstanding their particularities appointment rules can be grouped under two main categories.[105]

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104. Due to the special functions of constitutional courts judges and their increased need for democratic legitimacy in order to annul acts of the Parliament, which represents the sovereign people, the procedure for their appointment is often different from the appointment of judges of ordinary courts, to which the present paper refers (see "The Composition of Constitutional Courts", Science and Technique of Democracy, no. 20).
105. The examples given in the present paper exemplify the points made and do not intend to be exhaustive. The information provided is mainly based on constitutional provisions in respect of the organisation of the judiciary.

The elective system

9. 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 (the method is used to elect judges at the Swiss federal level and in Slovenia; in Ukraine, the Verkhovna Rada of Ukraine is entitled to elect all other judges than professional ones). 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.

10. The involvement of parliament in the process may result in the politicisation of judicial appointments. 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"*.[106] Elections by parliament are discretionary acts, therefore even if the proposals are made by a judicial council, it cannot be excluded that an elected parliament will not self-restrain from rejecting candidates. Consequently, political considerations may prevail over the objective criteria.

11. The Venice Commission found that *"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"*.[107]

12. **Appointments of ordinary 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.

Direct appointment system

13. In the *direct appointment system* the appointing body can be the Head of State. This is the case in Albania, upon the proposal of the High Council of Justice; in Armenia, based on the recommendation of the Judicial Council; in the Czech Republic; in Georgia, upon the proposal of the High Council of Justice; in Greece, after prior decision of the Supreme Judicial Council; in Ireland; in Italy upon the proposal of the High Council of the Judiciary[108]; in Lithuania,

106. Recommendation No. R (94)12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and the role of judges.
107. Venice Commission, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, CDL-AD (2002) 26, para. 22.
108. In Italy, the decree by the President of the Republic who is also the President of the Judicial Council is a mere formality.

upon the recommendations submitted by the "special institution of judges provided by law"; in Malta, upon the recommendation of the Prime Minister; in Moldova, upon proposal submitted by the Superior Council of Magistrates; in the Netherlands at the recommendation of the court concerned through the Council for the Judiciary; in Poland on the motion of the National Council of the Judiciary in Romania based on the proposals of the Superior Council of Magistracy; in the Russian Federation judges of ordinary federal courts are appointed by the President upon the nomination of the Chairman of the Supreme Court and of the Chairman of the Higher Arbitration Court respectively – candidates are normally selected on the basis of a recommendation by qualification boards; in Slovakia on the basis of a proposal of the Judiciary Council; in Ukraine, upon the proposal of the High Council of Justice.

14. 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.[109] **As long as the President is bound by a proposal made by an independent judicial council** (see below), the **appointment by the President does not appear to be problematic**.

15. In some countries judges are appointed by the government (in Sweden "appointments to posts in courts of law … shall be made by the Government or by a public authority designated by the Government"). There may be a mixture of appointment by the Head of State and appointment by the Government. Thus, in the Netherlands, the Minister of Justice is politically responsible for the appointments by Royal Decree and, therefore, will also countersign the appointments. 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.

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109. Venice Commission, Opinion on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia, CDL-AD(2005)023, para. 17.

16. Another option is direct appointment (not only a proposal) made by a judicial council. For example in Italy and Portugal the judicial council has the power to appoint, assign, transfer and promote the judges of the courts of law and to exercise disciplinary control over them. In Bulgaria judges, prosecutors and investigating magistrates are appointed by the Supreme Judicial Council. In Croatia judges are appointed and relieved of duty by the State Judicial Council. In Cyprus the appointment, promotion, transfer, termination of appointment, dismissal and disciplinary matters of judicial officers are exclusively within the competence of the Supreme Council of Judicature. In "the Former Yugoslav Republic of Macedonia" judges and court presidents shall be elected and dismissed by the Judicial Council. In Turkey, the Supreme Council of Judges and Public Prosecutors is competent for the appointment of judges, transfers to other posts, their promotion and disciplinary matters. The Hungarian Act on the Organisation and Administration of Courts (Act LXVI of 1997) set up the National Judicial Council exercising the power of court administration including the appointment of judges.

17. 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**.

The role of a judicial council in the appointment procedure

18. According to opinion No 1 (2001) of the CCEJ, *"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."*

19. 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.

20. 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".

21. Regardless of the appointment system used, many European States have introduced a special body (high judicial council) with an exclusive or lesser role in respect of judicial appointments.[110]

22. "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." [111]

23. **The mere existence of a high judicial council can not automatically exclude political considerations in the appointment process**. For example *"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, political considerations may still determine which of rival candidates, all approved by the commission, is*

110. Albania, Andorra, Belgium, Bulgaria, Cyprus, Georgia, Greece, Denmark, Estonia, Finland, France, Iceland, Ireland, Italy, Lithuania, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russia (there are qualification boards, including the Higher Qualification Board, which make recommendations as to the appointment and – in special cases – the dismissal of judges), Slovakia, Slovenia, "the Former Yugoslav Republic of Macedonia", United Kingdom, Ukraine, Turkey.

111. Venice Commission, Opinion on Recent Amendments to the Law on Major Constitutional provisions of the Republic of Albania, CDL-INF(1998)009, para. 5.

or are actually appointed by the Minister of Justice (and the commission has no role in relation to promotions)."[112]

24. The role of the high judicial council can vary to a large extent. For example, the role of such Councils in Germany may be different depending on the level of courts. There are councils for judicial appointments which are purely advisory. In Hungary, the Act on the Organisation and Administration of Courts (Act LXVI of 1997) set up the National Judicial Council exercising the power of court administration including the appointment of judges. In Italy and in Portugal the judicial council has the power to appoint, assign, transfer and promote the judges of the courts of law and to exercise disciplinary control over them. In the Netherlands, the Council for the Judiciary operates as an intermediate only, while the nominations are in the hands of the court concerned.

25. 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.**

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. *"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****."*[113]

Composition of a judicial council

27. 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.

112. CCEJ opinion No 1 (2001) on Standards concerning the Independence of the Judiciary and the Irremovability of Judges, para.20.
113. Venice Commission, Opinion on Recent Amendments to the Law on Major Constitutional provisions of the Republic of Albania, CDL-INF (1998)009, para. 12.

28. According to the Venice Commission, *"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 falls 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 (….)."*[114]

29. As regards the existing practice related to the composition of judicial councils, *"a basic rule appears to be that a large proportion of its membership 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."*[115] Thus, **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**.

30. In general, judicial councils include also members who are not part of the judiciary and represent other branches of power or the academic or professional sectors. Such a composition is justified by the fact that *"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."* [116] Moreover, an over-

114. Venice Commission, Opinion on the Reform of the Judiciary in Bulgaria, CDL-INF(1999)005, para. 28.
115. Venice Commission, Opinion on Recent Amendments to the Law on Major Constitutional provisions of the Republic of Albania, CDL-INF(1998)009, para. 12.
116. Venice Commission, Opinion on Recent Amendments to the Law on Major Constitutional provisions of the Republic of Albania, CDL-INF(1998)009, para. 9.

whelming supremacy of the judicial component may raise concerns related to the risks of "corporatist management".

31. The participation of the legislative branch in the composition of such an authority is characteristic. ***"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."*** [117] In general, the legislative bodies are entitled to elect part of the members of the high judicial councils among legal professionals,[118] however in some systems members of parliament themselves are members of the judicial council.[119] However, there are also systems where the appointment of judges is in the hands of the executive, and Members of Parliament are excluded from membership of the Judicial Council.[120]

32. However, in order to insulate the **judicial council** from politics its **members should not be active members of parliament**. The Venice Commission is also strongly in favour of the **depolitisation** of such bodies **by providing for a qualified majority for the election of its parliamentary component**.[121] 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.

33. Although the presence of the members of the executive power in the judicial councils might raise confidence-related concerns, such practice is quite common. This is the case for example in France (the President of the Republic is the President of the Council, the Minister of Justice is its *ex officio* Vice-President), in Bulgaria (where the meetings of the Supreme Judicial Council are chaired by the Minister of Justice without a right to vote), in Romania (the proceedings for nomination of candidacies for appointment shall be presided over by the Minister of Justice, who shall have no right to vote). In Turkey, the

117. *ibid.*
118. For example in Bulgaria ("practicing lawyers of high professional and moral integrity with at least 15 years of professional experience"), Italy ("among full university professors of law and lawyers after fifteen years of practice") and Slovenia ("Five members shall be elected by the vote of the National Assembly on the nomination of the President of the Republic from amongst practising lawyers, professors of law and other lawyers. Six members shall be elected from amongst judges holding permanent judicial office.")
119. For example in Georgia, Hungary.
120. The Netherlands, with the exception of the appointment of members of the Court of Cassation, which is in the hands of Parliament.
121. Venice Commission, Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, CDL-AD (2002) 015,para. 5.

Minister of Justice and the under-secretary of the Ministry of Justice are *ex-officio* members of the Supreme Council of Judges and Public Prosecutors; the other five members of the Council are elected by the two highest courts (Court of Cassation and the Council of State). 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**.[122]

34. *"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 and prosecutors. The nomination of these judges and prosecutors has been exclusively entrusted to the High Council of Justice, thereby removing these decisions from undue political influence. However, 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."*[123]

Chair of the Council

35. 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.

Appointment basis

36. Due consideration should also be given to the basis of judicial appointments and promotions. In a number of countries judges are appointed based on the results of a competitive examination,[124] in others they are selected

122. Thus, in the Netherlands, members of Government are excluded from membership in the Council for the Judiciary, while disciplinary measures are taken by the judiciary itself.
123. Venice Commission, Opinion on Recent Amendments to the Law on Major Constitutional provisions of the Republic of Albania, CDL-INF (1998)09, para. 16.
124. For example in Italy, where this principle is established in the Constitution (Article 106).

from the experienced practitioners.[125] *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.

37. 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."*

Appointment for a probationary period

38. 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".*

39. 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".*

40. 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: *"A 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*

125. For example in Cyprus, Malta, the United Kingdom. In the Netherlands, both procedures are applied in parallel.

tribunal in Article 6(1) of the European Convention on Human Rights was not satisfied by a criminal trial before a temporary sheriff who was appointed for a period of one year and was subject to 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 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."[126]

41. 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".**[127]

42. 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."***[128]

43. 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.

Conclusions

44. In Europe, a variety of different systems for judicial appointments exist and that there is **not a single model** that would apply to all countries.

126. Venice Commission, Opinion on Draft Constitutional Amendments concerning the Reform of the Judicial System in "the Former Yugoslav Republic of Macedonia", CDL-AD(2005)038, para. 23.
127. *Idem,* para. 30.
128. *Idem.* para. 29.

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.

An increasing share of the work of the Venice Commission as a constitutional advisor of its 61 Member States focuses on the independence and the functioning of the judiciary. Democracy and the protection of human rights cannot prevail without an independent and efficient judiciary, which forms an essential part of the rule of law.

This publication presents the Commission's key reference texts on the judiciary. It starts with an extract of the 2016 Rule of Law Checklist, containing detailed benchmarks to assess the degree of respect for the principle of access to justice, as well as references to the relevant international standards. This is followed by the Commission's two major reports of 2010 on the independence of the judiciary (on judges and on the prosecution service) and the 2007 Report on judicial appointments.

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