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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT *VADEMECUM* ON THE JUDICIARY

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Introduction

This document is a compilation of extracts taken from opinions adopted by the Venice Commission on issues concerning the judicial system (courts and prosecution). The aim of this compilation, known as a *vademecum*, is to give an overview of past opinions of the Venice Commission in the judicial field (excluding constitutional justice, which is presented in the *vademecum* CDL-JU(2007)012). As such, it is intended to serve as a source of reference for drafters of constitutions and of legislations on the judiciary, researchers as well as the Venice Commission's members, who are requested to prepare comments or expertises. It is structured in a thematic manner in order to facilitate access to the general lines adopted by the Venice Commission on various issues in this area. This *vademecum* should not, however, prevent members from introducing new points of view or diverge from earlier ones, if there is a good reason for doing so. They should consider the *vademecum* as merely a frame of reference.

The reader should also be aware that most of the opinions from which extracts are cited in the *vademecum* relate to individual countries and take into account the specific situation there. The citations will therefore not necessarily be applicable in other countries.

The *vademecum* is not a static document and will be regularly updated with extracts of recently adopted opinions by the Venice Commission. The Secretariat will be grateful for suggestions on how to improve this draft vademecum.

Note: When referring to elements contained in this draft vademecum, please cite the original document but not the vademecum as such.

PART I: COURTS AND JUDGES

1. Appointment

Although the independence and impartiality of a judge depends primarily on his or her attitude, and his or her action and inaction, during the handling of the case, during the hearing and in drafting the judgment, there must also be objective guarantees for independence, and any grounds for suspecting a lack of judicial independence on the part of the parties in the case must be avoided. For both aspects, the appointment procedure of judges is of great importance.

> CDL-AD(2002)032 Opinion on the Amendments to the Constitution of Liechtenstein proposed by the Princely House of Liechtenstein para. 29.

In the light of European standards the selection and career of judges should be «based on merit, having regard to qualifications, integrity, ability and efficiency[1]»

[...]
In a number of countries judges are appointed based on the results of a competitive

[1] Recommendation n° R (94) 12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and role of judges.

examination, in others they are selected from the experienced practitioners. *A priori*, both categories of selection can raise questions. It could be argued whether the examination should be the sole grounds for appointment or regard should be given to the candidate's personal qualities and experience as well. As for the selection of judges from a pool of experienced practitioners, it could raise concerns as regards to the objectivity of the selection procedure.

In its opinion No 1 (2001) on Standards concerning the Independence of the Judiciary and the Irremovability of Judges the Consultative Council of European Judges suggests that "the authorities responsible in member States for making and advising on appointments and promotions should now introduce, publish and give effect to objective criteria, with the aim of ensuring that the selection and career of judges are 'based on merit, having regard to qualifications, integrity, ability and efficiency'. Once this is done, those bodies or authorities responsible for any appointment or promotion will be obliged to act accordingly, and it will then at least be possible to scrutinize the content of the criteria adopted and their practical effect."

> CDL-AD(2007)028 Report on Judicial Appointments, para. 10 and 36-37.

The opening of the profession of judge for candidates from outside the judicial system (e.g. lawyers in governmental service and in private practice in fields of work other than mainly court litigation) is to be welcomed.

> CDL-AD(2002)026 Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, para. 49.

Since the appointment of judges is of vital importance for guaranteeing their independence and impartiality, it is recommended to regulate the procedure of appointment […] detail in the Constitution. Special care has to be taken that appointment by the Executive – and possible involvement of Parliament - is always based on a nomination procedure in the hands of an independent and apolitical body. This is even more important if the constitutional review functions of the courts increase.

> CDL- AD(2008)010 Opinion on the Constitution of Finland, para. 112

[…] the composition of both the Supreme Court and the Constitutional Court should include judges with particular expertise in human rights […] especially where a core body of case-law on such issues is being established.

> CDL(1999)078 Opinion on the Reform of Judicial Protection of Human Rights in the Federation of Bosnia and Herzegovina, adopted by the Commission at its 41st Plenary meeting (Venice, 10-11 December 1999), para. 32.

The appointment of retired judges where there are no other applicants seems to be inconsistent with judicial independence since such persons are not irremovable and may therefore be subjected to improper pressure.

> CDL-AD(2002)015 Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, para. 5.k.

There is nothing in the Constitution to require such a two-candidate rule. It would be preferable if the High Judicial Council were to put forward only one candidate for each vacant position. This would go some way to resolve the problem created by the constitutional provision for election of judges in the National Assembly.

[…] However, the two-candidate rule has as a consequence that the final appointment remains in the hands of the parliamentary majority.

> CDL-AD(2008)007 Opinion on the Draft Laws on Judges and the Organisation of Courts of the Republic of Serbia, para. 59 and 60.

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

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

There would seem to be no common opinion yet about the most appropriate procedure. For the legitimacy of the administration of justice a certain involvement of democratically elected bodies like the Diet may be desirable. However, the Prince Regnant is not democratically elected. His involvement in the nomination procedure, other than in a merely formal way, is problematic, especially if this involvement is of a decisive character.

The proposed first paragraph of Article 96 provides that no candidate can be recommended to the Diet for election without the consent of the Prince Regnant. His far-reaching involvement in the election procedure could amount to undue influence and could give rise to doubt about the objective independence and impartiality of the elected judge. […] Therefore, the proposed Article 96 would not sufficiently ensure respect for the guarantees laid down in Article 6 of the European Convention on Human Rights and could therefore create problems with respect to Liechtenstein's obligation under Article 1 of that Convention. This situation is not adequately remedied by the provision in the second paragraph of Article 96 that, if a proposed candidate is not approved by the Diet, the choice between the proposed candidate and any other candidate would be made by referendum, since a choice by the people would also not guarantee the impartiality of the elected candidate.

> CDL-AD(2002)032 Opinion on the Amendments to the Constitution of Liechtenstein proposed by the Princely House of Liechtenstein para. 29-30.

[…] it is in any case ill advised that the President should participate in the nomination of judges.

> CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995, chapter B.1.d.

The European Court of Human Rights has held that the fact that a power to appoint members of a tribunal is conferred on a Government does not, of itself, suffice to give cause to doubt its members independence and impartiality (Same v Austria, 22.10.1984, no. 84 of Series A of the Publications of the Court)

> CDL-INF(1999)005 Opinion on the reform of the judiciary in Bulgaria, para. 34.

Though the recruitment and testing/training of future judges should aim at producing persons fit to assume the burden and responsibility of that career, it should not be pursued with an undue emphasis on having the new judges fit into the same mould as their older colleagues, but also

allow for the preservation of the basic independence and integrity and democratic intuition to be required of each individual judge. Accordingly, there may be reason to consider the possibility of having a contingent of outsiders on this Board, such as persons representing advocates, the legal academic community, or even the executive and legislative power.

> CDL-AD(2002)026 Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, para. 15.

[…] the appointment of judges by [the Parliament] on the basis of proposals by its President is a normal procedure […].

> CDL-INF(1997)006 Opinion on the draft Constitution of the Nakhichevan autonomous republic (Azerbaijan Republic) chapter 6, **«**The independence and functioning of the judiciary ».

[The appointment of judges by the Parliament is] a method for constituting the judiciary which is highly democratic but […] the balance might be tilted much too far towards the legislative power. This is not without its risks from the point of view of judicial independence, inter alia since judicial appointments may over time be more likely than otherwise to become a subject of party politics.

The parliament is undoubtedly much more engrossed in political games and the appointments of judges could result in political bargaining in the parliament in which every member of parliament coming from one district or another will want to have his or her own judge. The right of appointment ought to remain linked with the head of state. Of course, the president also represents a given political tendency but in most cases he/she will demonstrate greater political reserve and neutrality. It therefore seems that entrusting the head of state with the power to nominate judges is a solution that depoliticizes the entire process of nominating a judge to a much greater degree.

[The appointment of judges by the Parliament is] acceptable by European standards, there may be reason to reconsider the possibility of entrusting the President as the appointment authority or by arranging the process of judicial appointments so as to go by submission from the Council of Justice to the President of the Republic (who also is to represent all the people) and from the President[of the Parliament].

> CDL-AD(2002)026 Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, para. 21-23, first phrase of para. 22 cited in CDL-AD(2007)028 eport on Judicial Appointments, para. 11.

As regards the joint power of the President and the Parliament to form the whole judicial corps, and in particular the election of all judges of local courts (district, city, regional, military and arbitrage) upon the approval of each nominee by the [parliament], the Commission is of the view that this politicizes the process of nominating judges too strongly.

> CDL-AD(2002)033 Opinion on the draft amendments to the Constitution of Kyrgyzstan, par. 10.

[In] designating the Parliament as a body entrusted with the task of electing and re-electing judges, the proposed amendments do not provide guarantees that the choices will not be politically biased. Such provision is therefore contrary to the principles of a free and democratic government and to the ECHR.

> CDL-AD(2003)019 Opinion on three Draft Laws proposing Amendments to the Constitution of Ukraine, para. 40 and 76.

The main role in judicial appointments should […] be given to an objective body such as the High Judicial Council provided […] in the Constitution. It should be understood that proposals from this body may be rejected only exceptionally. From an elected parliament such self-restraint cannot be expected and it seems therefore preferable to consider such appointments as a presidential prerogative. Candidatures should be prepared by the High Judicial Council, and the President would not be allowed to appoint a candidate not included on the list submitted by the High Judicial Council.

> CDL-AD(2005)023 Opinion on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia, para. 17, to which reffers to CDL-AD(2007)028 Judicial Appointments (report), para. 14, footnote 6 and correspondent text.

[…] It would be desirable that an expert body like an independent judicial council could give an opinion on the suitability or qualification of candidates for the office of judge.

> CDL-AD(2005)005 Opinion on Draft Constitutional Amendments relating to the Reform of the Judiciary in Georgia, para. 30.d.

The Council of Justice should be the final authority for all aspects of the professional life of judges in particular matters pertaining to their selection, appointment, career (including promotion and transfer), training, dismissal and discipline, and should be responsible for overseeing the training of judges.

> CDL-AD(2004)044 Interim Opinion on Constitutional Reforms in the Republic of Armenia, para. 59.

Choosing the appropriate system for judicial appointments is one of the primary challenges faced by the newly established democracies, where often concerns related to the independence and political impartiality of the judiciary persist. Political involvement in the appointment procedure is endangering the neutrality of the judiciary in these states, while in others, in particular those with democratically proved judicial systems, such methods of appointment are regarded as traditional and effective.

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

[…]

In some older democracies, systems exist in which the executive power has a strong influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary because the executive is restrained by legal culture and traditions, which have grown over a long time.

New democracies, however, did not yet have a chance to develop these traditions, which can prevent abuse. Therefore, at least in new democracies explicit constitutional provisions are needed as a safeguard to prevent political abuse by other state powers in the appointment of judges.

In Europe, methods of appointment vary greatly according to different countries and their legal systems; furthermore they can differ within the same legal system according to the types of judges to be appointed. [2]

Notwithstanding their particularities appointment rules can be grouped under two main categories.[3]

In elective systems, judges are directly elected by the people (this is an extremely rare example and occurs at the Swiss cantonal level) or by the Parliament [...]. This system is sometimes seen as providing greater democratic legitimacy, but it may also lead to involving judges in the political campaign and to the politisation of the process.

[...]
Appointments of ordinary judges [in contrast to constitutional judges] are not an appropriate subject for a vote by Parliament because the danger that political considerations prevail over the objective merits of a candidate cannot be excluded.

In the direct appointment system the appointing body can be the Head of State [...]

In assessing this traditional method, a distinction needs to be made between parliamentary systems where the president (or monarch) has more formal powers and (semi-) presidential systems. In the former system the President is more likely to be withdrawn from party politics and therefore his or her influence constitutes less of a danger for judicial independence. What matters most is the extent to which the head of state is free in deciding on the appointment. It should be ensured that the main role in the process is given to an independent body – the judicial council. The proposals from this council may be rejected only exceptionally, and the President would not be allowed to appoint a candidate not included on the list submitted by it. As long as the President is bound by a proposal made by an independent judicial council […] the appointment by the President does not appear to be problematic.

In some countries judges are appointed by the government […]. There may be a mixture of appointment by the Head of State and appointment by the Government. […] As pointed out above, this method may function in a system of settled judicial traditions but its introduction in new democracies would clearly raise concern.

Another option is direct appointment (not only a proposal) made by a judicial council.

[...]

To the extent that the independence or autonomy of the judicial council is ensured, the direct appointment of judges by the judicial council is clearly a valid model.

CDL-AD(2007)028 Report on Judicial Appointments, para. 2-9, 12-17.

[2] 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).

[3] The elective system and the direct appointment system.

The Venice Commission is of the opinion that a judicial council should have a decisive influence on the appointment […] of judges […].

> CDL-AD(2007)028 Report on Judicial Appointments, para. 25.

The mere existence of a high judicial council can not automatically exclude political considerations in the appointment process.

> CDL-AD(2007)028 Report on Judicial Appointments, para. 23.

[…] the President and the Vice President of the Court of Cassation are elected by Parliament at the proposal of the President, whereas the other members of the Court are elected by the Assembly without any such intervention by the President. This difference of treatment between members of the same court does not appear to be justified […].

> CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995, chapter B.1.d.

[…] the power of the President to appoint the chairmen of all courts without any involvement of the Council of Justice[…] appears to be problematic.

> CDL-AD(2004)044 Interim Opinion on Constitutional Reforms in the Republic of Armenia, para. 60.

[The formulation that] Chief Judges of the various courts with the exception of the Chief Judge of the Supreme Court are […] elected by the [Parliament] is problematic from the point of view of judicial independence. The election of the respective Chief Judge by his peers would be preferable.

> CDL-INF(2000)005 Opinion on the draft law of Ukraine on the judicial system, under rubric «The appointment of judges».

[…]regarding the appointment of senior judges, involving their peers in the appointment process would have been more in keeping with the principle of the independence of the judiciary.

> CDL-INF(1998)015 Opinions on the constitutional regime of Bosnia and Herzegovina, chapter B.I, para. 9.

It would be more prudent to vest [the] authority [to confer senior ranks on judges] in the Supreme Council of the Judiciary [than in the President] to avert any risk of the executive influencing judges.

> CDL(1999)088 Interim report on the constitutional reform In the Republic of Moldova, adopted by the Venice Commission at its 41st Plenary Session (10-11 December 1999), para. 26.

Candidatures [for judicial appointments] should be prepared by the High Judicial Council, and the President would not be allowed to appoint a candidate not included on the list submitted by the High Judicial Council. For court presidents (with the possible exception of the President of the Supreme Court) the procedure should be the same.

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

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

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

2. Judicial Independence

2.1 General Points

It is […] indispensable to provide[…] a constitutional right to have access to independent and impartial tribunals, in accordance with Article 6 of the European Convention of Human Rights.

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

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

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

Under Article 64, the Supreme Court of the Kyrgyz Republic has a right of legislative initiative. The Commission finds that the Supreme Court should not be directly involved in the negotiating efforts to force specific draft legislation through the parliament because this could draw the Supreme Court into the political arena and may thus endanger its independence.

[In the draft amendments to the Constitution], the Supreme Court […] has a right of legislative initiative. The Commission finds that the Supreme Court should not be directly involved in the negotiating efforts to force specific draft legislation through the parliament because this could draw the Supreme Court into the political arena and may thus endanger its independence.[4]

CDL-AD(2002)033 Opinion on the Draft Amendments to the Constitution of Kyrgyzstan, para. 29.

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

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

Choosing the appropriate system for judicial appointments is one of the primary challenges faced by the newly established democracies, where often concerns related to the independence and political impartiality of the judiciary persist. Political involvement in the appointment procedure is endangering the neutrality of the judiciary in these states, while in others, in particular those with democratically proved judicial systems, such methods of appointment are regarded as traditional and effective.

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

CDL-AD(2007)028 Judicial appointments (report), para. 2-3.

Oral hearings are an aspect of transparency, which is a core democratic value. Oral hearings […] serve as a form of democratic control of the judges by public supervision. Oral hearings thereby reinforce the confidence of the citizens that justice is dispensed independently and impartially.

CDL-AD(2004)035 Opinion on the Draft Federal Constitutional Law "on modifications and amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation". para. 4.

2.2 Irrevocability and Dismissal

Any possible renewal of a term of office could adversely affect the independence and impartiality of judges.

CDL-AD(2002)012 Opinion on the Draft Revision of the Romanian Constitution , para. 57.

[…] time-limited appointments as a general rule can be considered a threat to the independence and impartiality of judges. In its Opinion on standards concerning the independence of the judiciary and the irremovability of judges, the Consultative Council of European Judges (hereinafter: CCJE) has stated: «European practice is generally to make full-time appointments until the legal retirement age[5] ».

CDL-AD(2003)019 Opinion on three Draft Laws proposing Amendments to the Constitution of Ukraine , para. 39.

Judicial appointments are to be for a period of no less than ten years and a judge must retire at the age of 70. Appointment for life would give a better guarantee of judicial […].At least, in the

[5] Opinion no. 1(2001) of the CCJE for the attention of the Committee of Ministers of the Council of Europe on Standards concerning the independence of the judiciary and the irremovability of judges (Recommendation no. R (94) 12 on the independence, efficiency and role of judges and the relevance of its standards and any other international standards to current problems in these fields), CCJE (2001) OP no. 1, para. 49.

case of a general time-limit, for instance of 10 years, for the appointment of judges to a specific court, re-appointment for a second term should be excluded

> CDL-AD(2005)003 Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, en collaboration avec OSCE/BIDDH, para. 105.

The term of office of a Supreme Court judge is to be ten years rather than “at least” ten years as at present […]. In line with European standards and in order to ensure the independence of the judges, life tenure – or rather tenure until the age of retirement – would be more appropriate than renewable terms.

> CDL-AD(2005)005 Opinion on Draft Constitutional Amendments relating to the Reform of the Judiciary in Georgia , par. 8.

This article specifies the age limit for judges to stop working (65 years) while it is 70 years for Supreme Court judges. One may doubt whether it is the best solution to allow for applications to extend the period of work beyond the age envisaged by the statute. Experience has shown that the vast majority of judges and prosecutors apply for this extension. This gives some discretionary authority to the Council of Justice. Would it not be better to embrace the opposite principle? That is, raise the age limit in the statute coupled with the statutorily-guaranteed right to take early retirement. Then the law would specify clear criteria without creating yet another right enlarging the Council’s powers.

> CDL-AD(2002)026 Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, para. 57.

The appointment of retired judges where there are no other applicants seems to be inconsistent with judicial independence since such persons are not irremovable and may therefore be subjected to improper pressure.

> CDL-AD(2002)015 Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, para. 5.k.

The term of office of five years for the members of the administrative court […] is a rather short one. From the point of view of independence, appointment of judges for life is to be preferred. It is true that so far the Strasbourg Court has not found comparable provisions concerning terms of office to be in violation of Article 6. However, the greater the political influence on the re-election procedure, the greater the risk that a short term of office may throw a shadow on the independent position of the judge concerned. There again, the facts which were put before the European Court of Human Rights in Wille v. Liechtenstein, judgment of 28 October 1999, show that this is not a theoretical issue.

> CDL-AD(2002)32 Opinion on the Amendments to the Constitution of Liechtenstein proposed by the Princely House of Liechtenstein, para. 31.

The evaluation of judges, prosecutors and investigators during the three-year period before they become irremovable in their office should be restricted to courts of first instance.

> CDL-AD(2002)015 Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, para. 5.e).

At present judges, prosecutors and investigating magistrates become permanent upon completing a third year in office. This will be changed to completion of five years service as a judge and the irremovability will not operate unless the judge has been attested and the Supreme Judicial Council decides that he or she is to become irremovable.

The rule does not specify the conditions in presence of which the Supreme Judicial Council could deny its consent. It would be advisable to offer to that body some criteria or test of judgement to circumscribe its discretion in confirming or denying the permanent status to the concerned officials. These guidelines could refer to the provisions dealing with the revocation of the permanent status, but it might be convenient adding criteria concerning the evaluation of the performance of the concerned officials after their temporary appointment and during the five years of service necessary to qualify for the irremovable status.

In its 2002 Opinion the Commission recommended that the evaluation of judges, prosecutors and investigators during the three-year period before they became irremovable in their office should be restricted to courts of first instance. This would seem to be all the more important if the period during which a judge is to be evaluated is now to be extended to five years.

[…] the discretion of the Supreme Judicial Council in confirming or denying the permanent status to magistrates should be limited by specifying criteria[…]. In any case, this procedure should be restricted to courts of first instance.

> CDL-AD(2003)016 Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria para. 12-14 and 26.

Under this Article, a judge working in a court that will be abolished is allowed to continue to work in a court of the same or of approximately the same type and instance. It is important that the judge not be appointed to a lesser position following the abolition of a court.

CDL-AD(2008)007 Opinion on the Draft Laws on Judges and the Organisation of Courts of the Republic of Serbia, para. 23

The appointment of temporary or probationary judges is a very difficult area. A recent decision of the Appeal Court of the High Court of Justiciary of Scotland(Starr v Ruxton, [2000] H.R.L.R 191; see also Millar v Dickson [2001] H.R.L.R 1401) illustrates the sort of difficulties that can arise. In that case the Scottish court held that the guarantee of trial before an independent tribunal in Article 6.1 ECHR was not satisfied by a criminal trial before a temporary sheriff who was appointed for a period of one year and was subject to a discretion in the executive not to reappoint him. The case does not perhaps go so far as to suggest that a temporary or removable judge could in no circumstances be an independent tribunal within the meaning of the Convention but it certainly points to the desirability, to say the least, of ensuring that a temporary judge is guaranteed permanent appointment except in circumstances which would have justified removal from office in the case of a permanent judge. Otherwise he or she cannot be regarded as truly independent.

[...]
[...]Despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value.

If there is to be a system of evaluation, it is essential that control of the evaluation is in the hands of the Judiciary and not the executive. This criterion appears to be met by the Macedonian law. Secondly, the criteria for evaluation must be clearly defined. It seems that

once a judge is appointed if anything short of misconduct or incompetence can justify dismissal then immediately a mechanism to control a judge and undermine judicial independence is created. A refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office.

> CDL-AD(2005) Opinion on Draft Constitutional Amendments concerning the Reform of the Judicial System in "the former Yugoslav Republic of Macedonia", para. 23 and 29-30, repeated in CDL-AD(2007)028 Judicial Appointments (report), para. 40-42.

The European Charter on the statute for judges states as follows "Clearly the existence of probationary periods or renewal requirements presents difficulties if not dangers from the angle of the independence and impartiality of the judge in question, who is hoping to be established in post or to have his or her contract renewed".
The Universal Declaration on the Independence of Justice, adopted in Montreal in June 1983 by the World Conference on the Independence of Justice states: "The appointment of temporary judges and the appointment of judges for probationary periods is inconsistent with judicial independence. Where such appointments exist, they should be phased out gradually".
The Venice Commission considers that setting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way [...].
This should not be interpreted as excluding all possibilities for establishing temporary judges. In countries with relatively new judicial systems there might be a practical need to first ascertain whether a judge is really able to carry out his or her functions effectively before permanent appointment. If probationary appointments are considered indispensable, a "refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office". [6]
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." [7]
In order to reconcile the need of probation / evaluation with the independence of judges, it should be pointed out that some countries like Austria have established a system whereby candidate judges are being evaluated during a probationary period during which they can assist in the preparation of judgements but they can not yet take judicial decisions which are reserved to permanent judges.

> CDL-AD(2007)028 Report on Judicial Appointments, para. 38-43.

The CCJE […] stressed: "when tenure is provisional or limited, the body responsible for the objectivity and the transparency of the method of appointment or re-appointment as a full-time judge are of especial importance[8] ".

> CDL-AD(2003)019 Opinion on three Draft Laws proposing Amendments to the Constitution of Ukraine , para. 40.

In the Commission's view, there is no justification in principle for treating judges differently in matters of discipline and removal according to whether they are members of superior or inferior

[6] CDL-AD(2005)038 Opinion on Draft Constitutional Amendments concerning the Reform of the Judicial System in "the Former Yugoslav Republic of Macedonia", par. 30.
[7] *Idem*, par. 29.
[8] Opinion no. 1(2001) of the CCJE para. 53.

courts. All judges should enjoy equal guarantees of independence and equal immunities in the exercise of their judicial functions.

> CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995, chapter B.1.e.

[…] the President […] may dismiss by his own initiative the Chairman and the members of the Constitutional Court (even those appointed by the Council of the Republic), the President and the members of the High Economic Court, the Chairman and the members of the Central Board for elections and referenda, the Procurator General, the Chairman of the Committee for State Control, and the Chairman and the members of the Board of the National Bank: even if the grounds for the exercise of these prerogatives shall be provided by law (regrettably they are not defined in the Constitution), it is possible to say that the interference of the President in the sphere of other state bodies could not be stronger.

> CDL-INF(1996)008 Opinion on the amendments and addenda to the Constitution of the Republic of Belarus as proposed by i: the President of the Republic & ii: the Agrarian and Communist groups of parliamentarians, para. 34.

[…] granting the latter the right to propose the dismissal of judges of the Supreme Court and of the Economic Court (Article 52, paragraph 2) is a serious distortion of the principles of judicial independence and of the separation of powers. accorder [au président du Parlement] le droit de proposer [à celui-ci] la révocation des juges de la Cour suprême […] et de la Cour économique […] est une grave entorse au principe de l'indépendance de la justice et de la séparation des pouvoirs.

> CDL-INF(1997)006 Opinion on the draft Constitution of the Nakhichevan autonomous republic (Azerbaijan Republic), chapter 6, «The independence and functioning of the judiciary», al. 1.

[…] the Commission finds that the Supreme Court should not have the power to dismiss cantonal judges, nor the cantonal high court to dismiss municipal judges […].

> CDL-INF(1998)015 Opinions on the constitutional regime of Bosnia and Herzegovina, chapter B.I, para. 9.

[…] the power to make such a finding should rather be entrusted to a judicial body such as the Constitutional Court.
[…] il vaudrait mieux confier la compétence de prendre [la] décision [de révoquer un juge de la Cour de cassation] à une instance judiciaire comme la Cour constitutionnelle.

> CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995, chapter B.1.e.

The Commission observes that decisions as to the removal of judges is left to the Constitutional Court. Although this may be seen as an additional guarantee for judicial independence, the absence of any remedy against such a decision of the Constitutional Court can raise problems. A more adequate solution would be to leave the initial decision as to the removal of a judge to the Council of Justice with the possibility for the judge dismissed to appeal to the Constitutional Court.

The question was further considered whether it should be possible for the Constitutional Court to raise ex officio the question of removing a judge, when the Council of Justice does not take any action. The Commission's Rapporteurs expressed concern about this; it was more appropriate to let the President of the Republic (the ultimate appointing authority) or the Minister of Justice the right to appeal to the Constitutional Court. The Commission is now satisfied that the initiative for the dismissal of a judge belongs to the Minister of Justice […]. Of course the question remains as to the role of the Judicial Council in this matter.

> CDL-INF(2001)017 Report of the Venice Commission on the Revised Constitution of the Republic of Armenia, para. 63.

Any action to remove incompetent or corrupt judges had to live up to the high standards set by the principle of the irremovability of the judges whose independence had to be protected. It was necessary to depoliticise any such move. A means to achieve this could be to have a small expert body composed solely of judges giving an opinion on the capacity or behaviour of the judges concerned before an independent body would make a final decision.

> CDL-AD(2003)012 Memorandum: Reform of the Judicial System in Bulgaria, para. 15c).

The Council of Justice should be the final authority for all aspects of the professional life of judges in particular matters pertaining to their selection, appointment, career (including promotion and transfer), training, dismissal and discipline, and should be responsible for overseeing the training of judges.

> CDL-AD(2004)044 Interim Opinion on Constitutional Reforms in the Republic of Armenia, para. 59.

Principle I.2.c of Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe) states "All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. The authority taking the decision on the selection and career of judges should be independent of the government and the administration."

[...]
In the light of European standards the selection and career of judges should be "based on merit, having regard to qualifications, integrity, ability and efficiency"[9].

[...]
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."

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

[9] Recommendation No. R (94)12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and the role of judges.

Memorandum of the European Charter, the term “intervention” of an independent authority means an opinion, recommendation or proposal as well as an actual decision.

The CCEJ commends the standards set by the European Charter “in so far as it advocated the intervention (in a sense wide enough to include an opinion, recommendation or proposal as well as an actual decision) of an independent authority with substantial judicial representation chosen democratically by other judges”.

[...]

The Venice Commission is of the opinion that a judicial council should have a decisive influence on the [...] promotion of judges and (maybe via a disciplinary board set up within the council) on disciplinary measures against them.
[...]

In its opinion No 1 (2001) on Standards concerning the Independence of the Judiciary and the Irremovability of Judges the Consultative Council of European Judges suggests that “the authorities responsible in member States for making and advising on appointments and promotions should now introduce, publish and give effect to objective criteria, with the aim of ensuring that the selection and career of judges are ‘based on merit, having regard to qualifications, integrity, ability and efficiency’. Once this is done, those bodies or authorities responsible for any appointment or promotion will be obliged to act accordingly, and it will then at least be possible to scrutinize the content of the criteria adopted and their practical effect.”

> CDL-AD(2007)028 Judicial Appointments (report), para. 4, 10, 18-20, 25, 37.

The presence of the Minister of Justice on the Council is of some concern, as regards matters relating to the transfer and disciplinary measures taken in respect of judges at the first level, at the appeal […]. […] It is advisable that the Minister of Justice should not be involved in decisions concerning the transfer of judges and disciplinary measures against judges, as this could lead to inappropriate interference by the Government.

> CDL-INF(1998)009 Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, para. 16, cited in CDL-AD(2007)028 Judicial Appointments (report), para.34.

Although the presence of the members of the executive power in the judicial councils might raise confidence-related concerns, such practice is quite common. [...]Such presence does not seem, in itself, to impair the independence of the council, according to the opinion of the Venice Commission. However, the Minister of Justice should not participate in all the council’s decisions, for example, the ones relating to disciplinary measures.

> CDL-AD(2007)028 Judicial Appointments (report), para. 33.

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

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

The Commission wishes to underline that it is essential that this constitutional law should provide detailed and precise grounds for termination of office of judges and a detailed procedure to be followed, including the possibility for the judges whose mandate is terminated to seek review of this decision by an independent body. In this respect, the Commission refers to the principles contained in Articles 5 and 7 of the European Charter on the Statute for judges.

> CDL-AD(2002)033 Opinion on the draft amendments to the Constitution of Kyrgyzstan, par. 11.

The Article provides that the selection, appointment and dismissal of judges is to be determined by law. […] Guarantees for non-removability [of judges] ought to be provided for in the Constitution. At the least, the Constitutional provisions should determine the minimum conditions under which a judge can be dismissed or suspended. The law also provides for disciplinary liability for judges, suspension from case hearing, removal from the post before the term or transfer to another office according to law. Again, it appears undesirable that ordinary law can provide for such matters without any Constitutional guidance.
La loi porte également sur […] la mutation […]. Encore une fois, [il convient de dire que] il ne paraît pas souhaitable qu'une loi ordinaire puisse porter sur de telles matières sans aucun encadrement constitutionnel.

> CDL-AD(2005)003 Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, en collaboration avec OSCE/BIDDH, para. 105.

The provision that a judge may be removed for systematically failing to perform official responsibilities seems to be a provision which is not inappropriate. The failing to perform the official responsibilities has to be caused by a voluntary choice of the concerned person and not by his or her health problems. A question arises whether the hypothesis is fulfilled only if a person does not de facto perform his or her responsibilities by being absent from office or not dealing with the docket? Or, also, is the revocation possible if his (her) behaviour does not comply with the rules concerning the professional standards of fairness, accuracy and correctness. This last case could be covered by the last part of the sentence ("perform activities that undermine the prestige of the judiciary"), but it is not clear whether this last provision regards the professional aspects of the life of the concerned person, or the social aspects of his or her life. In both the cases it would require a major clarity and a refinement to avoid its evident ambiguity. This provision should either be removed or made more specific so as to specify clearly what sort of conduct is envisaged.

> CDL-AD(2003) Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria , par. 16.

It may be noted that the draft constitutional amendments text provides no right to remove a judge or other official for incapacity or refusal or failure to fulfil functions, nor does it provide a mechanism to determine the issue in question.
Notons que le [projet de loi modificatrice de la Constitution] ne prévoit aucun droit de limoger un juge ou un autre fonctionnaire pour motif d'incapacité ou de refus d'assumer ses fonctions, ni de mécanisme pour déterminer cette question.

> CDL-AD(2005)005 Opinion on Draft Constitutional Amendments relating to the Reform of the Judiciary in Georgia , para. 10.

At any rate, given that [judges of local courts] are appointed for seven years only […], the Commission is of the view that the appropriate constitutional law should set out objective criteria for their reappointment, in order safeguard their independence.

> CDL-AD(2002)033 Opinion on the draft amendments to the Constitution of Kyrgyzstan, para. 10.

the discretion of the Supreme Judicial Council in confirming or denying the permanent status to magistrates should be limited by […] criteria for this decision already at the constitutional level.

> CDL-AD(2003)016 Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria, para. 26.

It would be appropriate to specify the term of the chairs [of the different courts in the Constitution].

> CDL-AD(2005)003 Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, en collaboration avec OSCE/BIDDH, par. 105.

With regard to many questions relating to the status of military judges, in particular their dismissal, the draft law refers to the Law "On Universal Conscription and Military Service". The Commission can only express the hope that this law contains sufficient guarantees to ensure the independence and impartiality of military judges in accordance with the requirements developed in the case law of the European Court of Human Rights.

> CDL-INF(2000)005 Opinion on the draft law of Ukraine on the judicial system, "General Comments", "The military courts", al. 4.

2.3 Financial Independence

2.3.1 Remuneration

[…]the low level of salaries of judges in Albania, relative to other professions and activities though not to comparable positions in the civil service, was repeatedly identified as an objective factor contributing to corruption among judges and to the consequent reduction of public confidence in the courts.

> CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995, chapter B.1.i.

[That] the salaries of judges cannot be reduced during their term of office, […] is a common and desirable guarantee of judicial independence.

> CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995, chapter B.1.i.

The Council of Justice should be the final authority for all aspects of the professional life of judges in particular matters pertaining to their selection, appointment, career (including

promotion and transfer), training, dismissal and discipline, and should be responsible for overseeing the training of judges.

> CDL-AD(2004)044 Interim Opinion on Constitutional Reforms in the Republic of Armenia, para. 59.

Principle I.2.c of Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe) states "All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. The authority taking the decision on the selection and career of judges should be independent of the government and the administration.

> CDL-AD(2007)028 Judicial Appointments (report), para. 4.

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."
The European Charter on the statute for judges adopted in Strasbourg in July 1998 (DAJ/DOC(98)23) states: "In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary." According to the Explanatory Memorandum of the European Charter, the term "intervention" of an independent authority means an opinion, recommendation or proposal as well as an actual decision.
The 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".

> CDL-AD(2007)028 Report on Judicial Appointments, para. 18-20

The Venice Commission is of the opinion that a judicial council should have a decisive influence on the […] promotion of judges […]

> CDL-AD(2007)028 Report on Judicial Appointments, para. 25.

[The questions regarding the application measures of the general principles on the budget of the judiciary and the remuneration of judges] can and should also be addressed by ordinary legislation. In principle, there is no reason why they could not be so addressed in the context of a law on the status of magistrates.

> CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995, chapter B.1.i.

2.3.2 Budgetary autonomy

The practice according to which, contrary to the principle of budgetary autonomy of the magistracy, the Ministry of Justice in fact controls every detail of the courts' operational budgets, contains obvious dangers of undue interference in the independent exercise of their functions.

> CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995, chapter B.1.i.

[The questions regarding the application measures of the general principles on the budget of the judiciary and the remuneration of judges] can and should also be addressed by ordinary legislation. In principle, there is no reason why they could not be so addressed in the context of a law on the status of magistrates.

> CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995, chapter B.1.i.

[…] the parliamentary budget battles […]are undoubtedly of a political nature. […] While wanting to ensure greater independence of judges and courts, and thus to bring about their de-politicization, [by involving the Council of Justice into this battles] it may turn out that they will, quite to the contrary, be engulfed in the political debate.
Without deviating from the principle of having a separate budget for the judiciary and, in order to allow for a de facto judicial independence, these of powers and budgetary struggles could rather be left with Minister of Justice or the Cabinet as a whole which will feel politically responsible for the treatment eventually accorded to the judiciary in the matters of proper funding.

> CDL-AD(2002)026 Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, para. 48.

2.4 Institutional and External Independence

2.4.1 Courts Powers, Establishment, Structuring and Dissolution

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

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

According to the draft amendments to the constitution of Kyrgyzstan, the Supreme Court of the Kyrgyz Republic has a right of legislative initiative. The Commission finds that the Supreme Court should not be directly involved in the negotiating efforts to force specific draft legislation through the parliament because this could draw the Supreme Court into the political arena and may thus endanger its independence.

> CDL-AD(2002)033 Opinion on the draft amendments to the Constitution of Kyrgyzstan, para. 29.

[…]the principle of an uninterrupted chain of democratic legitimacy (developed in German doctrine) […] requires that every state body has to receive its powers – even if indirectly – from

the sovereign people. A completely autonomous self-administration would lack such democratic legitimacy.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[The law provides that Regional Courts shall have a Civil Case Panel and a Criminal Case Panel.]
Ideally there should be the principle of rotation of the judges between panels from time to time. The same applies to the Supreme Court (having Senates,[…]).

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

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

involving civilians and where there seems no need to have recourse to military judges is bound to produce violations of the Convention.

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

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

It is true that military courts exist in other countries and are not objectionable as such. The proposed system nevertheless goes beyond what is acceptable. In a democratic country the military has to be integrated into society and not kept apart. Democracies therefore generally provide for the possibility of appeals from military courts to civilian courts and a final appeal to a panel composed of military officers appears wholly unsatisfactory

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

2.4.2 Council of Justice

2.4.2.1 Functions, Remit and Duties

Many European democracies have incorporated a politically neutral High Council of Justice or an equivalent body into their legal systems - sometimes as an integral part of their Constitution - as an effective instrument to serve as a watchdog of basic democratic principles. These include the autonomy and independence of the judiciary, the role of the judiciary in the safeguarding of fundamental freedoms and rights, and the maintaining of a continuous debate on the role of the judiciary within a democratic system. Its autonomy and independence should be material and real as a concrete affirmation and manifestation of the separation of powers of the State.

> CDL-INF(1998)009 Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, para. 5, reprise in CDL-AD(2007)028 Judicial Appointments (report), para. 22.

The role of the high judicial council can vary to a large extent.

> CDL-AD(2007)028 Judicial Appointments (report), par. 24.

The Council of Justice should be the final authority for all aspects of the professional life of judges in particular matters pertaining to their selection, appointment, career (including promotion and transfer), training, dismissal and discipline, and should be responsible for overseeing the training of judges.

> CDL-AD(2004)044 Interim Opinion on Constitutional Reforms in the Republic of Armenia, para. 59.

Principle I.2.c of Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe) states “All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. The authority taking the decision on the selection and career of judges should be independent of the government and the administration.”

CDL-AD(2007)028 Judicial Appointments (report), para. 4.

The obligation to provide an annual report to the National Assembly seems reasonable.

The information provided to the public on the activities of the Council will also assist in rendering the judges’ work at the Council more transparent. It will notably allow the public to see that there are sanctions against judges that have committed disciplinary offences etc.

CDL-AD(2008)006 Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia. para. 35-36

According to opinion No 1 (2001) of the 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.”

The European Charter on the statute for judges adopted in Strasbourg in July 1998 (DAJ/DOC(98)23) states: “In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.” According to the Explanatory Memorandum of the European Charter, the term “intervention” of an independent authority means an opinion, recommendation or proposal as well as an actual decision.
The 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”.

CDL-AD(2007)028 Judicial Appointments (report), para. 18-20.

A Supreme Council of Justice is provided for to ensure independence and access to judiciary and to support professional self-governance of judges and public accountability. The Supreme Council of Justice should also ensure impartiality.

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

The Venice Commission is of the opinion that a judicial council should have a decisive influence on the appointment and promotion of judges and (maybe via a disciplinary board set up within the council) on disciplinary measures against them.

CDL-AD(2007)028 Judicial Appointments (report), para. 25.

Granting immunity to members of the Council guarantees their independence and allows them to carry out their work without having to constantly defend themselves against, for instance, unfounded and vexatious accusations.

CDL-AD(2008)006 Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia. para. 26

[A legislative measure] establishes that the Minister of Justice shall have the power to authorize leaves of absence of the presidents of district and appellate courts. This provision may be considered to confer on the Executive Power an administrative competence over certain judges that contravenes the principle of independence of the Judiciary. It seems that it would be more coherent with this principle to confer that competence to the Council of the Judiciary.

CDL-INF(1999)005 Opinion on the reform of the judiciary in Bulgaria, para. 39.

In the Commission's view, this provision enables the High Council of Justice to determine its own rules of procedure by adopting an appropriate "statute", but does not allow for important matters governing its powers and affecting the rights and duties of magistrates to be so regulated. These matters should rather be regulated by a law adopted by Parliament.

CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995, chapter B.2.i.

The proposed administration of the judiciary is complicated and involves no less than five agencies: the Council of Justice, the Judicial Administration, the Judges Qualification Board, the Judges Disciplinary Board and the Conference of Judges.

Given the comprehensive powers of the Council of Justice and the broad administrative mandate of the Judicial Administration under its auspices, it does seem desirable to provide also for these other institutions, and their specific roles appear to be logically determined. The problems which may be involved accordingly do not relate to the number of institutions as such but mainly to the question whether the overall power vested in the system may be too great […].

The acceptance of parliamentary control over the disciplinary board is inconsistent. On one hand there is the far-reaching solution concerning the judicial administration and the rights of the Council of Justice while on the other hand there is the far-reaching role to be played by the parliament in staffing issues and judicial oversight. That is, in issues strictly linked to independence and judicial adjudication.

CDL-AD(2002)026 Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, para. 11-12 et 64.

[…]the Commission wishes to recall the European Charter on the Statute for Judges, which stresses the importance of the absolute independence of this body from both the executive and the legislative powers.

CDL-AD(2004)044 Interim Opinion on Constitutional Reforms in the Republic of Armenia , para. 58.

An autonomous Council of Justice that guarantees the independence of the judiciary does not imply that judges may be self-governing. The management of the administrative organisation of the judiciary should not necessarily be entirely in the hands of judges.

CDL-INF(1998)009 Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania para. 9, reprise in CDL-AD(2007)028 Judicial Appointments (report), para. 26.

While the participation of the judicial council in judicial appointments is crucial it need not take over the whole administration of the justice system, which can be left to the Ministry of Justice.

CDL-AD(2007)028 Judicial Appointments (report), para. 26.

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

CDL-AD(2007)028 Judicial Appointments (report), para. 48.

In some countries, the Council (or equivalent bodies) has obtained the power to defend its own budget in front of parliament, which provides further independence from the government.

CDL-AD(2008)006 Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia. para. 17

The Provisions relating to the training of judges and the establishment of a National Institute of Justice […] should be more detailed and should determined the main action of the Institute. The Institute should be controlled by the Supreme Judicial Council rather than the Ministry of Justice.

CDL-AD(2002)015 Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, para. 5.l).

2.4.2.2 Composition

[…] the Commission is of the view that the Albanian model [of composition of the High Council of Justice] creates an undue imbalance in favour of the executive branch[…]. […] It is imperative that a more appropriate balance to the Council's composition be provided for and guaranteed by law, with provision for at least a majority of its members to be members of the judiciary elected by members of the judiciary.

CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995, adopted at the 25th Plenary Meeting of the Commission, December 1995, chapter B.1.h.

Commission welcomes the proposal […] to have the Judicial Council composed of nine judges out of twelve members […].

CDL-AD(2004)044 Interim Opinion on Constitutional Reforms in the Republic of Armenia, para. 57.

The European Charter on the statute for judges adopted in Strasbourg in July 1998 (DAJ/DOC(98)23) states: "In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary." […].
The CCEJ commends the standards set by the European Charter "in so far as it advocated the intervention […]of an independent authority with substantial judicial representation chosen democratically by other judges".

CDL-AD(2007)028 Judicial Appointments (report), para. 19-20.

[…] the representation of courts should be revised to create a fairer representation of all judges in the Council.

CDL-AD(2008)006 Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia. para. 76

the draft Law spells out in detail the exact composition of the Council, which provides for a large majority of judges (six out of eleven members). Such a composition of the Council is necessary in order to avoid the independence of the judiciary being endangered by political manoeuvres
[…]
[…] the problem is not the composition of the Council, but that a majority of its members are appointed by the National Assembly without a qualified majority. This could be problematic.

CDL-AD(2008)006 Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia. para. 19,21

The presence of the Minister of Justice on the Council is of some concern, as regards matters relating to the transfer and disciplinary measures taken in respect of judges at the first level, [and] at the appeal stage […]. […]it is advisable that the Minister of Justice should not be involved in decisions concerning the transfer of judges and disciplinary measures against judges, as this could lead to inappropriate interference by the Government.

CDL-INF(1998)009 Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, para. 16, cited in CDL-AD(2007)028 Judicial Appointments (report), para. 34

The Minister for Justice has been given a new power to address proposals to the Supreme Judicial Council for the purposes of appointing and dismissing the Chairman of the Supreme Court of Cassation, the Chairman of the Supreme Administrative Court and the Chief Prosecutor, for determining the number of judges, prosecutors and investigators and for appointing, promoting, demoting, moving and dismissing all judges, prosecutors and investigators. Formerly, such proposals could only be made by the heads of the different branches of the Judiciary, the prosecution service and the investigation service. The Commission does not consider the conferring of a power to make such a proposal on a Minister of the Government is in itself objectionable as an interference with the independence of the

Judiciary. Again, the doctrine of separation of powers does not require that there can be no involvement by either of the other two branches of power in a decision to appoint or dismiss a judge. The European Court of Human Rights has held that the fact that a power to appoint members of a tribunal is conferred on a Government does not, of itself, suffice to give cause to doubt its members independence and impartiality (Same v Austria, 22.10.1984, no. 84 of Series A of the Publications of the Court).

There is, however, a case to be made that when the [Supreme Judicial] Council is discussing proposals made by the Minister it would be preferable that some person other than the Minister ought to chair it.

> CDL-INF(1999)005 Opinion on the reform of the judiciary in Bulgaria, para. 34-35.

The Minister of Justice as the chairman of the Supreme Council of Justice should not be able to be able to block the discussion of a particular issue within this body. When the Council is discussing proposals made by the Minister it would be preferable that some person other than the Minister ought to chair it.

> CDL-AD(2002)015 Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria Avis, para. 5.a).

In addition, the Commission considers that [the proposed measure], providing that the President chairs the Council of Justice, could prove rather problematic. Having the President as the Chair is not necessarily the best solution (although provided for in a number of European Constitutions) and his or her role as the Chair should be purely formal. In this regard, the Commission wishes to recall the European Charter on the Statute for Judges, which stresses the importance of the absolute independence of this body from both the executive and the legislative powers

> CDL-AD(2004)044 Interim Opinion on Constitutional Reforms in the Republic of Armenia, para. 58.

Although the presence of the members of the executive power in the judicial councils might raise confidence-related concerns, such practice is quite common. [...]Such presence does not seem, in itself, to impair the independence of the council, according to the opinion of the Venice Commission. However, the Minister of Justice should not participate in all the council's decisions, for example, the ones relating to disciplinary measures.

[...]
It is necessary to ensure that the chair of the judicial council is exercised by an impartial person who is not close to party politics. Therefore, in parliamentary systems where the president / head of state has more formal powers there is no objection to attributing the chair of the judicial council to the head of state, whereas in (semi-) presidential systems, the chair of the council could be elected by the Council itself from among the non judicial members of the council. Such a solution could bring about a balance between the necessary independence of the chair and the need to avoid possible corporatist tendencies within the council.

> CDL-AD(2007)028 Judicial Appointments (report), para. 33 and 35

An autonomous Council of Justice that guarantees the independence of the judiciary does not imply that judges may be self-governing. The management of the administrative organisation of the judiciary should not necessarily be entirely in the hands of judges. In fact, as a general rule,

the composition of a Council foresees the presence of members who are not part of the judiciary, who represent other State powers or the academic or professional sectors of society. This representation is justified since a Council's objectives relate not only to the interests of the members of the judiciary, but especially to general interests. The control of quality and impartiality of justice is a role that reaches beyond the interests of a particular judge. The Council's performance of this control will cause citizens' confidence in the administration of justice to be raised. Furthermore, in a system guided by democratic principles, it seems reasonable that the Council of Justice should be linked to the representation of the will of the people, as expressed by Parliament.
[...]

[…] a basic rule appears to be that a large proportion of the membership [of the Supreme Council of Justice] should be made up of members of the judiciary and that a fair balance should be struck between members of the judiciary and other ex officio or elected members. The Commission has underlined the need for such a balance already in its opinion of 4 December 1995 on Chapter VI of the Transitional Constitutional of Albania (documentCDL(95)74 rev.).

> CDL-INF(1998)009 Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania , par. 9 et 12, cited in CDL-AD(2007)028 Judicial Appointments (report), para. 29, 30 et 31.

There is no standard model that a democratic country is bound to follow in setting up its Supreme Judicial Council so long as the function of such a Council fall within the aim to ensure the proper functioning of an independent Judiciary within a democratic State. Though models exist where the involvement of other branches of power (the legislative and the executive) is outwardly excluded or minimised, such involvement is in varying degrees recognised by most statutes and is justified by the social content of the functions of the Supreme Judicial Council and the need to have the administrative activities of the Judiciary monitored by the other branches of power of the State. It is obvious that the Judiciary has to be answerable for its actions according to law provided that proper and fair procedures are provided for and that a removal from office can take place only for reasons that are substantiated. Nevertheless, it is generally assumed that the main purpose of the very existence of a Supreme Council of the Judiciary is the protection of the independence of judges by insulating them from undue pressures from other powers of the State in matters such as the selection and appointment of judges and the exercise of disciplinary functions.

> CDL-INF(1999)005 Opinion on the reform of the judiciary in Bulgaria, para. 28, repeated in CDL-AD(2007)028 Judicial Appointments (report), para. 28

Corporatism can be avoided by ensuring that the members of the Judicial Service Commission, elected by their peers, should not wield decisive influence as a body. They must be usefully counterbalanced by representation of civil society (lawyers, law professors and legal, academic or scientific advisors from all branches).

> CDL-AD(2002)012 Opinion on the Draft Revision of the Romanian Constitution , para. 66.

As regards this body, the Venice Commission repeats its observations on the two obstacles to be avoided: corporatism and politicisation (CDL-AD (2002) 12, paragraph 63 et seq.).

The best safeguard against corporatism is the presence of civil society representatives (whether or not legal specialists) on the Commission […].

CDL-AD(2002)021 Supplementary Opinion on the Revision of the Constitution of Romania, para. 21-22.

The Council of Justice may be dominated by judicial professionalism, primarily in the form of judges. […] the composition of the Council is such that the judiciary and other lawyers close to this body themselves make decisions relating to their own affairs. From a democratic viewpoint, this might be in contradiction to the principle of an uninterrupted chain of democratic legitimacy (developed in German doctrine) which requires that every state body has to receive its powers – even if indirectly – from the sovereign people. A completely autonomous self-administration would lack such democratic legitimacy.

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

The composition of the Supreme Council [of the Judiciary] […] [has] to be representative, to portray public diversity and to include persons who possess different professional experiences.

CDL-AD(2005)003 Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, in cooperation with OSCE/ ODIHR, para. 102.

A balance needs to be struck between judicial independence and self-administration on the one side and the necessary accountability of the judiciary on the other side in order to avoid negative effects of corporatism within the judiciary. In this context, it is necessary to ensure that disciplinary procedures against judges are carried out effectively and are not marred by undue peer restraint. One way to achieve this goal is to establish a judicial council with a balanced composition of its members.
[...]

[...] a substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself. In order to provide for democratic legitimacy of the Judicial Council, other members should be elected by Parliament among persons with appropriate legal qualification taking into account possible conflicts of interest..

[...]Moreover, an overwhelming supremacy of the judicial component may raise concerns related to the risks of “corporatist management”.

[...]
However, in order to insulate the judicial council from politics its members should not be active members of parliament.

CDL-AD(2007)028 Judicial Appointments (report), para. 27, 29-30 and 32.

It is vital that the members of the Council have sufficient practical experience to carry out their work. Therefore, the requirement of seven years’ experience provided […] seems adequate.

CDL-AD(2008)006 Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia. para. 51

Given their crucial role in appointing judges the composition of the Supreme Council [of the Judiciary], as well as their appointment or election, should be defined in the Constitution.

CDL-AD(2005)003 Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, in cooperation with OSCE/ ODIHR, para. 102.

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

CDL-AD(2007)028 Judicial Appointments (report), para. 48

2.4.2.3 Appointment Procedure

Principle I.2.c of Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe) states "[…] In order to safeguard the independence [of the authority taking the decision on the selection and career of judges], rules should ensure that, for instance, its members are selected by the judiciary […]. »

CDL-AD(2007)028 Judicial Appointments (report), para. 4

The European Charter on the statute for judges adopted in Strasbourg in July 1998 (DAJ/DOC(98)23) states: "In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary." [...]

The CCEJ commends the standards set by the European Charter "in so far as it advocated […] an independent authority with substantial judicial representation chosen democratically by other judges".

CDL-AD(2007)028 Judicial Appointments (report), para. 19-20.

The Commission welcomes the proposal […] to have the Judicial Council composed of nine judges out of twelve members, elected by their peers.[…]

CDL-AD(2004)044 Interim Opinion on Constitutional Reforms in the Republic of Armenia, para. 57.

[...]in a system guided by democratic principles, it seems reasonable that the Council of Justice should be linked to the representation of the will of the people, as expressed by Parliament.

[...]
In general, it seems legitimate to give Parliament an important role in designating members of the Council [of Justice].

CDL-INF(1998)009 Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, para. 9 and 19, paragraphe 9 cited in CDL-AD(2007)028 Judicial Appointments (report), para. 31.

The Venice Commission does not consider that there can be, in itself, any objection to the election of a substantial component of the Supreme Judicial Council by the Parliament.

> CDL-INF(1999)005 Opinion on the reform of the judiciary in Bulgaria, para. 29.

The National Assembly should not be given a real choice of candidates and the *"authorised nominators"* should only propose one candidate per vacant position. In this way, the National Assembly will have a right of veto. This seems to be the only solution which would avoid political considerations being taken into account in the nomination of the Council members.

> CDL-AD(2008)006 Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia. para. 48

As regards this body, the Venice Commission repeats its observations on the two obstacles to be avoided: corporatism and politicisation (CDL-AD (2002) 12, paragraph 63 et seq.).

[…]politicisation can be avoided if Parliament is solely required to confirm appointments made by the judges.

> CDL-AD(2002)021 Supplementary Opinion on the Revision of the Constitution of Romania, para. 21-22.

[The Commission] considers however that the non-judge members should rather be elected by Parliament than by the President of the Republic.

> CDL-AD(2004)044 Interim Opinion on Constitutional Reforms in the Republic of Armenia, para. 57.

A solution should therefore be found ensuring that the opposition also has some influence on the composition of the Council. One possibility would be to require a two-thirds (as in Spain) or three-fourths majority for the election of members by Parliament, another to provide that one of the two lawyer members should be designated by the parliamentary opposition. In any case, the presence of members nominated by the opposition but elected by parliament should be ensured while taking procedural safeguards against the risk of a stalemate.

> CDL-INF(1998)009 Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, para. 19.

[...]a substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself. In order to provide for democratic legitimacy of the Judicial Council, other members should be elected by Parliament among persons with appropriate legal qualification taking into account possible conflicts of interest.

> CDL-AD(2007)028 Judicial Appointments (report), para. 29.

It is not necessary to create an electoral register or directory for the judges who are allowed to vote in the Council elections. It is difficult to see how a president of a court could ignore a colleague in the distribution of ballot papers or how an individual who is not a judge would obtain such a ballot.

CDL-AD(2008)006 Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia. para. 51

The composition of the Supreme Council of Justice should be depoliticised by providing for a qualified majority for the election of its members.

CDL-AD(2002)015 Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, para. 5.d), there are also references in CDL-AD(2007)028 Judicial Appointments (report), para. 32, note 18

The delegation reiterated the proposal of the Commission to have the parliamentary component of the Council elected with a qualified majority. This would make sure that this component reflected the composition of the political forces in Parliament and would effectively make it impossible that the majority in Parliament fills all positions with its own candidates as it had been the case in the past.

CDL-AD(2003)012 Memorandum: Reform of the Judicial System in Bulgaria, para. 15e).

A major recommendation of the Venice Commission since 1999 - the depolitisation of the Supreme Judicial Council by providing for a qualified majority for the election of its parliamentary component - might however have been possible even within the framework of the current amendments.

CDL-AD(2003)016 Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria , para. 25.

The Venice Commission is […] strongly in favour of the depolitisation of such bodies by providing for a qualified majority for the election of its parliamentary component.[10][18] This should ensure that a governmental majority cannot fill vacant posts with its followers. A compromise has to be sought with the opposition, which is more likely to bring about a balanced and professional composition.

CDL-AD(2007)028 Judicial Appointments (report), para. 32.

Councillors who are not ex officio members may be elected for a five-year term, with no possibility for re-election. The preclusion from immediate re-election is destined to enhance the guarantees of independence of the […] members [of the High Council of Justice].

Since there is no gradation in the turnover of the Council, the elected members would end their terms simultaneously. Thus the composition of the Council would change almost entirely, with the exception of the ex-officio members. The influence of the ex-officio members within the Council might thereby be unduly strengthened. In addition, a severe lack of continuity in the Council's work might result, due to the fact that the new members would have to familiarise themselves with the tasks of the Council and the transition from one composition to another would cause certain initiatives undertaken by previous councillors to be abandoned or forgotten.

CDL-INF(1998)009 Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, para. 20-21.

Given their crucial role in appointing judges the composition of the Supreme Council [of Justice], as well as their appointment or election, should be defined in the Constitution.

> CDL-AD(2005)003 Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, in cooperation with OSCE/ODIHR, para. 102.

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

> CDL-AD(2007)028 Judicial Appointments (report), para. 48.

2.4.3 Immunities for the Judges and Judicial Proceedings against them

All judges should enjoy equal guarantees of independence and equal immunities in the exercise of their judicial functions.

> CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995, chapter B.1.e.

[…] immunity of judges vis-a-vis criminal prosecution […] is […] excessive. Such a provision goes far beyond the "Basic Principles on the Independence of the Judiciary" promulgated by the United Nations in 1985, and introduces distortions, which can be hard to justify, into the principle of the equality of citizens before the law.

> CDL(1994)011 Opinion on the Constitution of the Russian Federation adopted by popular vote on 12 December 1993, Chapter 7: Justice: Article 118 to Article 129, para.3

Magistrates (judges, prosecutors and investigators) should not benefit from a general immunity […]. According to general standards they indeed needed protection from civil suits for actions done in good faith in the course of their functions. They should not, however, benefit from a general immunity which protected them against prosecution for criminal acts committed by them for which they should be answerable before the courts.

> CDL-AD(2003)012 Memorandum: Reform of the Judicial System in Bulgaria, para. 15a).

magistrates should not benefit from a general immunity but […] the immunity should be confined to protection from civil suits for actions done in good faith in the course of their functions.

> CDL-AD(2003)016 Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria, para. 8.

It is wrong in principle that a judge should be immune from criminal liability although it may be appropriate to limit powers of arrest so as to prevent interference with the work of a judge during the hearing of a case.

CDL-AD(2005)003 Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, in cooperation with OSCE/ODIHR, para. 107.

[…] a limited functional immunity from arrest and detention which would interfere with the workings of the court is one thing but a total immunity from prosecution is difficult to justify.

CDL-AD(2005)005 Opinion on Draft Constitutional Amendments relating to the Reform of the Judiciary in Georgia, para. 11.

A judicial decision should however be required in view of implementing the guarantees provided for by the international treaties in the field of human rights. [dans leur rapport à la détention. Pour emprisonner ou autrement mettre en détention un juge, l]
The permission of the Supreme Council will not be sufficient, because it deals with the interests covered by the judicial immunity, while only the decision of the competent judge insures the consideration of the personal interests of the concerned person that is the judicial official who is criminally prosecuted. The Council authorizes the exercise of the powers of the judge.

[…] une décision judiciaire est nécessaire pour mettre en oeuvre les garanties prévues par les traités internationaux en matière de droits de l'homme'autorisation du Conseil suprême [de la magistrature] ne suffit pas, car celle-ci [ne] porte [que] sur les droits garantis par l'immunité judiciaire […].[11]

CDL-AD(2003)016 Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria, para. 9.

The discharge of a judge should not be the subject of a decision of the Assembly.

CDL-CR-PV(1998)004 Meeting of the Working Group on Albania of the Sub-commission on Constitutional Reform with the Constitutional Commission of Albania, « Parts of the constitution considered for the first time», «Article 130».

It would seem preferable that any such move should, as was recommended in relation to the removal of judges, require to be approved by a small expert body composed solely of judges who would give an opinion in relation to whether immunity should be lifted.
Il serait préférable [que la] démarche [visant à la levée d'une immunité judiciaire] soit approuvée par un comité restreint d'experts composé uniquement de juges qui donneraient un avis sur la nécessité de lever l'immunité, comme cela avait été recommandé à propos de la révocation des juges.

CDL-AD(2003)016 Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria, para. 11.

A judge who is prosecuted should have the same right of defence as any citizen – no more, no less.

CDL-AD(2005)005 Opinion on Draft Constitutional Amendments relating to the Reform of the Judiciary in Georgia, para. 11.

[11] In other words, the decision to lift the judicial immunity against imprisonment does not be confused with that of sending to prison ; in the first case, the council of magistracy <<authorizes the exercising of the judge's powers.

[a legislative measure penalising the fact of] "Imposing a final judicial verdict, recognised and known to be unjust[..]" is so clearly open to abuse [and] it should be repealed as a matter of urgency.

> CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995, chapter B.2.ii.

2.4.4 Evaluation and Disciplinary Control

Principle I.2.c of Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe) states "All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. The authority taking the decision on the selection and career of judges should be independent of the government and the administration.

[...]
In the light of European standards the selection and career of judges should be "based on merit, having regard to qualifications, integrity, ability and efficiency".[12] ».

[...]
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."
The European Charter on the statute for judges adopted in Strasbourg in July 1998 (DAJ/DOC(98)23) states: "In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary." According to the Explanatory Memorandum of the European Charter, the term "intervention" of an independent authority means an opinion, recommendation or proposal as well as an actual decision.
The 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".

[...]
In its opinion No 1 (2001) on Standards concerning the Independence of the Judiciary and the Irremovability of Judges the Consultative Council of European Judges suggests that "the authorities responsible in member States for making and advising on appointments and promotions should now introduce, publish and give effect to objective criteria, with the aim of ensuring that the selection and career of judges are 'based on merit, having regard to qualifications, integrity, ability and efficiency'. Once this is done, those bodies or authorities responsible for any appointment or promotion will be obliged to act accordingly, and it will then at least be possible to scrutinize the content of the criteria adopted and their practical effect.

> CDL-AD(2007)028 Judicial Appointments (report), para. 4, 10, 18-20 and 37.

[12] Recommendation No. R (94)12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and the role of judges.

For the […] reason of independence and impartiality, the grounds for suspension, dismissal or resignation should be laid down in the Constitution, and the competent court should be set out, as well as the right of appeal of the judge concerned.

> CDL-AD(2008)010 Opinion on the Constitution of Finland, para 113

It would not be in accordance with the principles of a society governed by the rule of law to allow the dismissal of serving judges without providing any guarantees.

> CDL-AD(2008)007 Opinion on the Draft Laws on Judges and the Organisation of Courts of the Republic of Serbia, para. 59an 60

The Commission observes […] that decisions as to the removal of judges is left to the Constitutional Court […]. Although this may be seen as an additional guarantee for judicial independence, the absence of any remedy against such a decision of the Constitutional Court can raise problems. A more adequate solution would be to leave the initial decision as to the removal of a judge to the Council of Justice with the possibility for the judge dismissed to appeal to the Constitutional Court.

> CDL-INF(2001)017 Report of the Venice Commission on the Revised Constitution of the Republic of Armenia, para. 63.

Any action to remove incompetent or corrupt judges had to live up to the high standards set by the principle of the irremovability of the judges whose independence had to be protected. It was necessary to depoliticise any such move. A means to achieve this could be to have a small expert body composed solely of judges giving an opinion on the capacity or behaviour of the judges concerned before an independent body would make a final decision.

> CDL-AD(2003)012 Memorandum: Reform of the Judicial System in Bulgaria, par. 15c).

The proposed administration of the judiciary is complicated and involves no less than five agencies: the Council of Justice, the Judicial Administration, the Judges Qualification Board, the Judges Disciplinary Board and the Conference of Judges.

[…]
The acceptance of parliamentary control over the disciplinary board is inconsistent. On one hand there is the far-reaching solution concerning the judicial administration and the rights of the Council of Justice while on the other hand there is the far-reaching role to be played by the parliament in staffing issues and judicial oversight. That is, in issues strictly linked to independence and judicial adjudication.

> CDL-AD(2002)026 Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia para. 11 and 64.

Despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value.

If there is to be a system of evaluation, it is essential that control of the evaluation is in the hands of the Judiciary and not the executive. […] Secondly, the criteria for evaluation must be

clearly defined. It seems that once a judge is appointed if anything short of misconduct or incompetence can justify dismissal then immediately a mechanism to control a judge and undermine judicial independence is created. A refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office.

> CDL-AD(2005)038 Opinion on Draft Constitutional Amendments concerning the Reform of the Judicial System in "the former Yugoslav Republic of Macedonia", para. 29-30, extract of para.29 repeated in CDL-AD(2007)028 Judicial appointments (report), para. 42.

The European Charter on the statute for judges states as follows "Clearly the existence of probationary periods or renewal requirements presents difficulties if not dangers from the angle of the independence and impartiality of the judge in question, who is hoping to be established in post or to have his or her contract renewed".
The Universal Declaration on the Independence of Justice, adopted in Montreal in June 1983 by the World Conference on the Independence of Justice states: "The appointment of temporary judges and the appointment of judges for probationary periods is inconsistent with judicial independence. Where such appointments exist, they should be phased out gradually".
The Venice Commission considers that setting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way [...].

This should not be interpreted as excluding all possibilities for establishing temporary judges. In countries with relatively new judicial systems there might be a practical need to first ascertain whether a judge is really able to carry out his or her functions effectively before permanent appointment. If probationary appointments are considered indispensable, a "refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office[13]".

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."[14[

In order to reconcile the need of probation / evaluation with the independence of judges, it should be pointed out that some countries like Austria have established a system whereby candidate judges are being evaluated during a probationary period during which they can assist in the preparation of judgements but they can not yet take judicial decisions which are reserved to permanent judges.

> CDL-AD(2007)028 Report on Judicial Appointments, para. 38-43.

[…]no person can request a report from a judge on any concrete case.

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

Reporting to the Parliament […]and to the President of the Republic infringes upon the status and independence of the Constitutional Court (such a report is appropriate in the case of an

[13] CDL-AD(2005)038 Opinion on Draft Constitutional Amendments concerning the Reform of the Judicial System in "the Former Yugoslav Republic of Macedonia", para. 23

ombudsman, who is a parliamentary commissioner). The Constitutional Court communicates with other constitutional organs and with the authorities as with the general public through its judgements and decisions, which are to be published in the Official Gazette. In addition, constitutional courts usually also publish the collection of their decisions as another form of official publication.

> CDL-AD(2006)016 Opinion on the Draft Law on the Constitutional Court and Corresponding Amendments of the Constitution of the Republic of Moldova, para. 28.

The Council of Justice should be the final authority for all aspects of the professional life of judges in particular matters pertaining to their selection, appointment, career (including promotion and transfer), training, dismissal and discipline, and should be responsible for overseeing the training of judges.

> CDL-AD(2004)044 Interim Opinion on Constitutional Reforms in the Republic of Armenia, para. 59.

The Venice Commission is of the opinion that a judicial council should have a decisive influence on the […] promotion of judges and (maybe via a disciplinary board set up within the council) on disciplinary measures against them. An appeal against disciplinary measures to an independent court should be available.

> CDL-AD(2007)028 Report on Judicial Appointments, para. 25.

The presence of the Minister of Justice on the Council is of some concern, as regards matters relating to the transfer and disciplinary measures taken in respect of judges at the first level, at the appeal stage[…].[…] it is advisable that the Minister of Justice should not be involved in decisions concerning the transfer of judges and disciplinary measures against judges, as this could lead to inappropriate interference by the Government.

> CDL-INF(1998)009 Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, par. 16, cited in CDL-AD(2007)028 Judicial Appointments (report), par. 34, text correspondent to note 20.

Although the presence of the members of the executive power in the judicial councils might raise confidence-related concerns, such practice is quite common. […] Such presence does not seem, in itself, to impair the independence of the council, according to the opinion of the Venice Commission. However, the Minister of Justice should not participate in all the council's decisions, for example, the ones relating to disciplinary measures.

> CDL-AD(2007)028 Report on Judicial Appointments, para. 33.

Principle I.2.c of Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe) states "[…] In order to safeguard the independence [of the authority taking the decision on the selection and career of judges], rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules."

> CDL-AD(2007)028 Report on Judicial Appointments, para. 4.

The envisaged Code of Ethics should be approved by the Supreme Judicial Council but regulated at the level of law. It should precisely spell out the consequences of a breach of its rules.

> CDL-AD(2002)015 Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, par. 5.g).

The law also provides for disciplinary liability for judges […]. Again, it appears undesirable that ordinary law can provide for such matters without any Constitutional guidance.

> CDL-AD(2005)003 Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, in cooperation with OSCE/ODIHR, para. 105.

In the Commission's view, there is no justification in principle for treating judges differently in matters of discipline and removal according to whether they are members of superior or inferior courts. All judges should enjoy equal guarantees of independence and equal immunities in the exercise of their judicial functions.

> CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995, chapter B.1.e.

2.4.5 Administrative Independence

[…]no person can request a report from a judge on any concrete case.

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

Reporting to the Parliament […] and to the President of the Republic infringes upon the status and independence of the Constitutional Court (such a report is appropriate in the case of an ombudsman, who is a parliamentary commissioner). The Constitutional Court communicates with other constitutional organs and with the authorities as with the general public through its judgements and decisions, which are to be published in the Official Gazette.

> CDL-AD(2006)016 Opinion on the Draft Law on the Constitutional Court and Corresponding Amendments of the Constitution of the Republic of Moldova, para. 28.

The law also provides for […] suspension from case hearing […]. Again, it appears undesirable that ordinary law can provide for such matters without any Constitutional guidance.

> CDL-AD(2005)003 Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, in cooperation with OSCE/ODIHR, para. 105.

It would seem that the territorial organisation of the court system under the draft would be based on the administrative structure of [a country], both as regards the local general courts of first instance and the establishment of […]court[s[of appeal[…]. While the overriding criteria determining the territorial structure of the court system should be the needs of the court system itself and the facility of access by people to the courts, such a system is acceptable in principle.

In a new democracy […] it would however seem preferable to avoid such a link between administrative division and court organisation to make it more difficult for the administration to exert undue influence on the courts.

> CDL-INF(2000)005 Opinion on the draft law of Ukraine on the judicial system, « General Comments»: «Territorial organisation », al. 1.

[…] the power of the President to appoint the chairmen of all courts without any involvement of the Council of Justice […]appears to be problematic.

> CDL-AD(2004)044 Interim Opinion on Constitutional Reforms in the Republic of Armenia, para. 60.

[The draft according to that] Chief Judges of the various courts with the exception of the Chief Judge of the Supreme Court are elected by [the parliament…] is problematic from the point of view of judicial independence. The election of the respective Chief Judge by his peers would be preferable.

> CDL-INF(2000)005 Opinion on the draft law of Ukraine on the judicial system, under rubric «The appointment of judges».

[…]regarding the appointment of senior judges, involving their peers in the appointment process would have been more in keeping with the principle of the independence of the judiciary.

> CDL-INF(1998)015 Opinions on the constitutional regime of Bosnia and Herzegovina, chapter B.I, para. 9.

It would be more prudent to vest [the] authority [to confer senior ranks on judges] in the Supreme Council of the Judiciary [than in the President] to avert any risk of the executive influencing judges.

> CDL(1999)088 Interim report on the constitutional reform In the Republic of Moldova, adopted by the Venice Commission at its 41st Plenary Session (10-11 December 1999), para. 26.

[The practice according to which contrary to the principle of budgetary autonomy] the Ministry [of Justice] in fact controls every detail of the courts' operational budgets, a practice which contains obvious dangers of undue interference in the independent exercise of their functions.

> CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995 , chapter B.1.i.

[The questions of court budgets and judicial salaries] can and should also be addressed by ordinary legislation. In principle, there is no reason why they could not be so addressed in the context of a law on the status of magistrates.

> CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995 , chapter B.1.i.

[…] the parliamentary budget battles […]are undoubtedly of a political nature. […] While wanting to ensure greater independence of judges and courts, and thus to bring about their de-politicization, [by involving the Council of Justice into this battles] it may turn out that they will, quite to the contrary, be engulfed in the political debate. Without deviating from the principle of having a separate budget for the judiciary and, in order to allow for a de facto judicial independence, these of powers and budgetary struggles could rather be left with Minister of Justice or the Cabinet as a whole which will feel politically responsible for the treatment eventually accorded to the judiciary in the matters of proper funding.

> CDL-AD(2002)026 Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, para. 48.

An autonomous Council of Justice that guarantees the independence of the judiciary does not imply that judges may be self-governing. The management of the administrative organisation of the judiciary should not necessarily be entirely in the hands of judges.

> CDL-INF(1998)009 Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, para. 9, repeated in CDL-AD(2007)028 Report on Judicial Appointments, para. 26.

While the participation of the judicial council in judicial appointments is crucial it need not take over the whole administration of the justice system, which can be left to the Ministry of Justice.

> CDL-AD(2007)028 Report on Judicial Appointments, para. 26.

2.5. Individual and Internal Independence

[…] the Commission finds that the Supreme Court should not have the power to dismiss cantonal judges, nor the cantonal high court to dismiss municipal judges (Articles V.11, para.3 and VI.7, para.4).

> CDL-INF(1998)015 Opinions on the constitutional regime of Bosnia and Herzegovina , chapter B.I, para. 9.

The Commission observes […] that decisions as to the removal of judges is left to the Constitutional Court […]. Although this may be seen as an additional guarantee for judicial independence, the absence of any remedy against such a decision of the Constitutional Court can raise problems. A more adequate solution would be to leave the initial decision as to the removal of a judge to the Council of Justice with the possibility for the judge dismissed to appeal to the Constitutional Court.

> CDL-INF(2001)017 Rapport de la Commission de Venise sur la Constitution révisée de la République d'Arménie, par. 63.

The envisaged Code of Ethics should be approved by the Supreme Judicial Council but regulated at the level of law. It should precisely spell out the consequences of a breach of its rules.

CDL-AD(2002)015 Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, para. 5.g).

The law also provides for disciplinary liability for judges […].Again, it appears undesirable that ordinary law can provide for such matters without any Constitutional guidance.

CDL-AD(2005)003 Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, in cooperation with OSCE/ODIHR, para. 105.

The provision that a judge may be removed for systematically failing to perform official responsibilities seems to be a provision which is not inappropriate. The failing to perform the official responsibilities has to be caused by a voluntary choice of the concerned person and not by his or her health problems. A question arises whether the hypothesis is fulfilled only if a person does not de facto perform his or her responsibilities by being absent from office or not dealing with the docket? Or, also, is the revocation possible if his (her) behaviour does not comply with the rules concerning the professional standards of fairness, accuracy and correctness. This last case could be covered by the last part of the sentence ("perform activities that undermine the prestige of the judiciary"), but it is not clear whether this last provision regards the professional aspects of the life of the concerned person, or the social aspects of his or her life. In both the cases it would require a major clarity and a refinement to avoid its evident ambiguity. This provision should either be removed or made more specific so as to specify clearly what sort of conduct is envisaged

CDL-AD(2003)016 Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria, para. 16.

[…] the discretion of the Supreme Judicial Council in confirming or denying the permanent status to magistrates should be limited by specifying criteria for this decision already at the constitutional level. In any case, this procedure should be restricted to courts of first instance.

CDL-AD(2003)016 Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria, para. 26.

At any rate, given that [judges of local courts] are appointed for seven years only […], the Commission is of the view that the appropriate constitutional law should set out objective criteria for their reappointment, in order safeguard their independence.

CDL-AD(2002)033 Opinion on the draft amendments to the Constitution of Kyrgyzstan, para. 10.

[…]the system [established by the statute of the High Council of Justice] of having professional tests following appointment is obviously open to abuses in connection with the confirmation of a magistrate in his or her post. In addition, periodical breaches of discipline, professional incompetence and immoral acts are categories of conduct which are imprecise as legal concepts and capable of giving rise to abuse.

CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995, chapter B.2.i).c), al. 3.

Despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value.

If there is to be a system of evaluation[of Judges] , it is essential that control of the evaluation is in the hands of the Judiciary and not the executive. […] Secondly, the criteria for evaluation must be clearly defined. It seems that once a judge is appointed if anything short of misconduct or incompetence can justify dismissal then immediately a mechanism to control a judge and undermine judicial independence is created. A refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office.

> CDL-AD(2005)038 Opinion on Draft Constitutional Amendments concerning the Reform of the Judicial System in "the former Yugoslav Republic of Macedonia", para. 29-30, para. 29 repeated in CDL-AD(2007)028 Report on Judicial Appointments, para. 42.

The European Charter on the statute for judges states as follows "Clearly the existence of probationary periods or renewal requirements presents difficulties if not dangers from the angle of the independence and impartiality of the judge in question, who is hoping to be established in post or to have his or her contract renewed".
The Universal Declaration on the Independence of Justice, adopted in Montreal in June 1983 by the World Conference on the Independence of Justice states: "The appointment of temporary judges and the appointment of judges for probationary periods is inconsistent with judicial independence. Where such appointments exist, they should be phased out gradually".
The Venice Commission considers that setting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way […].

This should not be interpreted as excluding all possibilities for establishing temporary judges. In countries with relatively new judicial systems there might be a practical need to first ascertain whether a judge is really able to carry out his or her functions effectively before permanent appointment. If probationary appointments are considered indispensable, a "refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office".[15]».

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."[16[

In order to reconcile the need of probation / evaluation with the independence of judges, it should be pointed out that some countries like Austria have established a system whereby candidate judges are being evaluated during a probationary period during which they can assist in the preparation of judgements but they can not yet take judicial decisions which are reserved to permanent judges.

> CDL-AD(2007)028 Report on Judicial Appointments, para. 38-43.

It would be appropriate to specify the term of the chairs [of courts in the constitution].

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[15] CDL-AD(2005)038, Opinion on Draft Constitutional Amendments concerning the Reform of the Judicial System in "the Former Yugoslav Republic of Macedonia", para. 30.

[16] Idem. para. 29.

CDL-AD(2005)003 Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, in cooperation with OSCE/ODIHR, para. 105.

In its opinion No 1 (2001) on Standards concerning the Independence of the Judiciary and the Irremovability of Judges the Consultative Council of European Judges suggests that “the authorities responsible in member States for making and advising on appointments and promotions should now introduce, publish and give effect to objective criteria, with the aim of ensuring that the selection and career of judges are ‘based on merit, having regard to qualifications, integrity, ability and efficiency’. Once this is done, those bodies or authorities responsible for any appointment or promotion will be obliged to act accordingly, and it will then at least be possible to scrutinize the content of the criteria adopted and their practical effect.”

CDL-AD(2007)028 Report on Judicial Appointments, para. 37.

It is […] doubtful whether powers of "supervision" which go beyond jurisdictional control to ex officio control are consistent with the powers usually exercised by a higher court, which hears in the last instance appeals against decisions of the next lower court in the hierarchy. This question should be clarified. Any deviation from the rule of exclusive jurisdictional functions and appellate jurisdiction does not seem to be desirable[…].

CDL(1994)011 Opinion on the Constitution of the Russian Federation adopted by popular vote on 12 December 1993, chapter 7: Justice: article 118-129, par. 6.

Lastly, granting the Supreme Court the power to supervise the activities of the general courts […] would seem to be contrary to the principle of the independence of such general courts. While the Supreme Court must have the authority to set aside, or to modify, the judgements of lower courts, it should not supervise them.

CDL-INF(1997)006 Opinion on the draft Constitution of the Nakhichevan autonomous republic (Azerbaijan Republic) , chapter 6, «The independence and functioning of the judiciary Independence and Functioning of the Judiciary », para 4.

The present draft fundamentally departs from the principle [of judicial independence.] It gives to the Supreme Court […] and, within narrower terms, to the Plenum of the Supreme Specialised Courts […] the possibility to address to the lower courts "recommendations/explanations" on matters of application of legislation. This system is not likely to foster the emergence of a truly independent judiciary […] but entails the risk that judges behave like civil servants who are subject to orders from their superiors.

CDL-INF(2000)005 Opinion on the draft law of Ukraine on the judicial system, «General Comments», « Establishment of a strictly hierarchical system of courts», al. 2.

Court decisions can only be annulled by a court and no person can request a report from a judge on any concrete case.

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

Reporting to […]the High Council of Magistrates […]infringes upon the status and independence of the Constitutional Court […].

CDL-AD(2006)016 Opinion on the Draft Law on the Constitutional Court and Corresponding Amendments of the Constitution of the Republic of Moldova, para. 28.

The procedure of distribution of cases between judges should follow objective criteria.

CDL-AD(2002)026 Avis sur le projet de loi relatif au pouvoir judiciaire et sur les amendements constitutionnels correspondants de la Lettonie, para. 70. 7.

[..] the statute[of the Supreme Council of Justice] provides for secret deliberations and a discretionary power to summons and interrogate affected persons quite contrary to the right to be heard and other procedural rights. The Commission notes in this connection that the practice of the High Council of Justice confirms that affected persons are frequently notified of decisions affecting them only after such decisions have been taken.

Decisions on the transfer of judges[…], also require to be circumscribed by appropriate procedural safeguards.

Finally, on a point of general importance, the Commission has learned that the Constitutional Court has jurisdiction to hear complaints against decisions of the High Council of Justice which allegedly violate the independence of judges, guaranteed by [the constitution], and that it has struck down a decision to transfer a judge in at least one case.
While this is to be welcomed, a future law on the status of magistrates should provide for judicial review of decisions affecting judges and prosecutors more generally, prior to the review exercised by the Constitutional Court.

CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995, chapter B.2.i).c), al. 5-8.

Procedural rules for disciplinary proceedings should guarantee a due process. In particular, a member of the Supreme Judicial Council, who calls for disciplinary action against of a magistrate (or the lifting of immunity) should not be entitled to vote on his or her own proposal.

CDL-AD(2002)015 Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, para. 5.h).

Once the disciplinary panel of the Supreme Judicial Council has found in favour of the judge, this decision should be final.

CDL-AD(2002)015 Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, para. 5.h).

The Venice Commission is of the opinion that a judicial council should have a decisive influence on the appointment and promotion of judges and (maybe via a disciplinary board set up within the council) on disciplinary measures against them. An appeal against disciplinary measures to an independent court should be available.

CDL-AD(2007)028 Judicial Appointments (report), para. 25.

3. Judicial Impartiality

It is […] indispensable to provide […]a constitutional right to have access to independent and impartial tribunals, in accordance with Article 6 of the European Convention of Human Rights.

> CDL-INF(1996)006 Avis sur le projet de Constitution de l'Ukraine, section. VIII, «General Comments», al. 2.

Choosing the appropriate system for judicial appointments is one of the primary challenges faced by the newly established democracies, where often concerns related to the independence and political impartiality of the judiciary persist. Political involvement in the appointment procedure is endangering the neutrality of the judiciary in these states, while in others, in particular those with democratically proved judicial systems, such methods of appointment are regarded as traditional and effective.

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

> CDL-AD(2007)028 Report on Judicial Appointments, para. 2-3.

Oral hearings are an aspect of transparency, which is a core democratic value.
[…] oral hearings serve as a form of democratic control of the judges by public supervision. Oral hearings thereby reinforce the confidence of the citizens that justice is dispensed independently and impartially.

> CDL-AD(2004)035 Opinion on the Draft Federal Constitutional Law "on modifications and amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation" para. 4.

It does not seem necessary to get rid of the inquisitory principle completely but the stress should be put on the adversarial principle.

> CDL-INF(1996)006 Opinion on the draft Constitution of Ukraine, section. VIII, « General Comments», al. 3.

The individual freedom of judges is an item for permanent discussions. The Concept seems to set high standards when it states that "judges ... may not perform political activities, may not be party members ...". Based on past experience, it is easy to understand the concern expressed. It should be added that in some other European states the private life of judges is not restricted in such a way.

> CDL(1995)73rev Opinion on the regulatory concept of the Constitution of the Republic of Hungary, part II, article10, al. 5.

[Judges] may not be members of political parties or participate in political activities.

> CDL-AD(2005)003 Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, in cooperation with OSCE/ODIHR, para. 104.

Judges at present may not engage in any other occupation or remunerative activities except for "pedagogical activities". To that is now to be added "scientific activities", which is positive […]. They may not be members of political parties or engage in political activities. Curiously, similar restrictions do not appear to attach to members of the Constitutional Court under the amended Constitution as it now deals with the Constitutional Court in a separate chapter.

On a strict reading this provision might prevent the appointment of judges to public inquiries or commissions representing the state abroad, membership of charitable institutions or the like. Such an interpretation would seem unduly restrictive.

> CDL-AD(2005)005 Opinion on Draft Constitutional Amendments relating to the Reform of the Judiciary in Georgia, para. 6-7.

The Supreme Council of Justice should also ensure impartiality.

> CDL-AD(2005)003 Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, in cooperation with OSCE/ODIHR, para. 102.

With regard to many questions relating to the status of military judges, in particular their dismissal, the draft law refers to the Law "On Universal Conscription and Military Service". The Commission can only express the hope that this law contains sufficient guarantees to ensure the independence and impartiality of military judges in accordance with the requirements developed in the case law of the European Court of Human Rights.

> CDL-INF(2000)005 Opinion on the draft law of Ukraine on the judicial system, «General comments», «The military courts», al. 4.

PART II: PROSECUTORS

1. General Points

It is not necessary for much organisational detail to be included in the Constitution; an ordinary law of Parliament should be sufficient and would be more flexible.

> CDL(1995)073rev. 'Opinion on the regulatory concept of the Constitution of the Hungarian Republic', adopted at the Commission's 25th Plenary Meeting, Venice, 24-25 November 1995, chapter 12.

While provision for that independence could be made by a legislative act of parliament, it could equally easily be removed by a subsequent act of parliament. Consequently it would be preferable that the guarantee and protection of independence should be contained in the Constitution…
It would not be essential to set out in the Constitution detailed provisions regarding public prosecution. All that would be required would be:

- A guarantee of the independence of the general prosecutor of the Republic in the performance of his functions;
- The method of his appointment;
- The method of his removal.

> CDL(1995)073rev. Opinion on the regulatory concept of the Constitution of the Hungarian Republic, adopted at the Commission's 25th Plenary Meeting, Venice, 24-25 November 1995, chapter 11.

Less fundamental matters can be fixed by laws passed by the Parliament such as the term of office, age of retirement, remuneration and pension of the general prosecutor, and the organisation of the prosecution service and the conditions of employment of its staff. This would be preferable to fixing these matters by regulations or decrees of the government, if public confidence in the independence of the system from the government is to be maintained.

> CDL(1995)073rev. Opinion on the regulatory concept of the Constitution of the Hungarian Republic Republic', adopted at the Commission's 25th Plenary Meeting, Venice, 24-25 November 1995, chapter 11

Any functions conferred on the prosecutor should be referred to in [the law dealing with the prosecutor's office] and should not be contained elsewhere.

> CDL-AD(2008)019 Opinion on the draft law on the Public Prosecutors' service of Moldova , para. 21

It is therefore necessary to be guided by the general democratic principles of a law-governed state. Foremost amongst them is the principle of separation of powers and its consequent principle: the autonomy of individual branches of authority and the principle of balance (equilibrium) of powers. That means prosecution organs should not overstep the bounds of areas reserved for legislative authority, executive power and an independent judiciary. It is therefore necessary to do away with those functions of the prosecutor's office that do not conform to those principles and may actually constitute a threat to their implementation.

> CDL-AD(2005)014. Opinion on the Federal Law on the Prokuratura (Prosecutor's Office) of the Russian Federation. para 13

While provision for that independence could be made by a legislative act of parliament, it could equally easily be removed by a subsequent act of parliament. Consequently it would be preferable that the guarantee and protection of independence should be contained in the Constitution…

> CDL(1995)073rev. Opinion on the regulatory concept of the Constitution of the Hungarian Republic, adopted at the Commission's 25th Plenary Meeting, Venice, 24-25 November 1995, chapter 11.

2. Appointment

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. It might consist of the occupants for the time being of some or all of the following positions:

- The President of each of the courts or of each of the superior courts.

- The Attorney General of the Republic.
- The President of the Faculty of Advocates.
- The civil service head of the state legal service.
- The civil service Secretary to the Government.
- The Deans of the University Law Schools.

A public announcement would be made inviting written applications for the position of general prosecutor and stating the qualifications required for the position; it is suggested that these should be not less than those required for appointment to high judicial office. The Commission would examine the applications and submit to the government (or to Parliament if that is preferred) not more than, say, three names all of whom the Commission considered to be suitable for appointment. The government (or Parliament, as the case might be) would be free to make the selection from those names. In order to emphasise the importance of the position of general prosecutor he might be appointed by the President of the Republic on the nomination of the government (or Parliament) although the President would have no power to reject the nomination. A possible variation of the above proposal is that the selection of nominee that is made by the government should be approved by Parliament before submission to the President. Not all the matters set out need to be stated in the Constitution which might merely say "the general prosecutor of the Republic shall be appointed by the President of the Republic on the nomination of the (government) (with the approval of Parliament) (Parliament)". The other matters would be set out in a law of Parliament.

> CDL(1995)073rev. Opinion on the regulatory concept of the Constitution of the Hungarian Republic, adopted at the Commission's 25th Plenary Meeting, Venice, 24-25 November 1995, chapter 11.

It is necessary that some committee of technically qualified persons should examine whether candidates for this position [as Prosecutor General] have the appropriate qualifications and meet the relevant criteria. […]There are a number of options which could include the Superior Council simply giving an opinion on the suitability of all the candidates or alternatively ranking them in order of preference.

> CDL-AD(2008)019 Opinion on the draft law on the Public Prosecutors' service of Moldova , para. 42

The recommendation for appointment [of inferior prosecutors] should come from the Prosecutor General with the Superior Council having the right to refuse to appoint a person but only for good reason.

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

[…] the ambition should be that as much competence as possible in relation to appointment and removal issues should rest with the Prosecutorial Council rather than the Parliament since this would, on balance, appear at least to limit the practical risks of undue political influence on these matters. Consequently, in the light of the constitutional context, this amendment should be welcomed.

> CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, para. 32

[…] the system of subjecting the prosecution to political control is not in contrast with European standards. […] the appointment of the Supreme State Prosecutor by parliament can be deemed acceptable, but it would have been necessary to require a qualified majority.

It is instead not acceptable to have entrusted the Parliament with the power to appoint all the other state prosecutors. Presumably, these are lawyers who must be selected in view of their technical expertise, and who perform their tasks under the direction of the Supreme State Prosecutor. In fact, they are civil servants, who do not need to be elected and who need to perform their duties without a fixed term.

CDL-AD(2007)047 Opinion on the Constitution of Montenegro, para. 108 and 109.

All prosecutors, and all members of the prosecutorial council, are appointed and dismissed by parliament with no qualified majority. The prosecutorial system is therefore totally under the control of the ruling party or parties: This is not in conformity with European standards.

CDL-AD(2007)047 Opinion on the Constitution of Montenegro, para. 104

[The function of t]he Prosecutorial Council is […] "to ensure the independence of state prosecutorial service and state prosecutors". Its function should also be to oversee that prosecutorial activity be performed according to the principle of legality.

[…] all members of the prosecutorial council [are] elected and dismissed by the parliament. No qualified majority is required. This […] leaves the Council in the hands of the parliament majority; this, coupled with the appointment and dismissal of all prosecutors by parliament with no qualified majority, makes the prosecutorial system […] too vulnerable to political pressure and jeopardises the possibility for the prosecutorial functions to be carried out in an independent manner according to the principle of legality.

CDL-AD(2007)047 Opinion on the Constitution of Montenegro, para. 110-111

It seems that in relation to appointments an expert body, not an elected body, which would assess candidates performance at examinations and interviews is a necessary part of any system in which appointments based on merit are made.

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. 47

There is a need for […] objective transparency in [the] process [of promotion of prosecutors] such as recommendation of suitability by an appropriate board. […] [because] it should not be left to the sole discretion of an immediate superior.

CDL-AD(2008)019 Opinion on the draft law on the Public Prosecutors' service of Moldova , para. 50

The Venice Commission remains convinced that [the absence of the requirement of a qualified majority in Parliament for appointing or dismissing prosecutors as well as for the election the members of the Prosecutorial Council] seriously endanger the independence of the prosecutor's office because they could lead to a politisation of the appointment process and, probably even more dangerously, to the politisation of dismissals.

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, para. 12-14

3. Independence

3.1 Interaction with other State Bodies

While the Constitution subordinate prosecutors should confer independence on the system as well as on the general prosecutor care will have to be taken to maintain a balance between, on the one hand, the protection of subordinate prosecutors from interference by the Government, Parliament, the police or the public and, on the other hand the authority and responsibility of the general prosecutor for ensuring that they carry out their functions properly.

> CDL(1995)073rev. Opinion on the regulatory concept of the Constitution of the Hungarian Republic, adopted at the Commission's 25th Plenary Meeting, Venice, 24-25 November 1995, chapter 11.

Under Council of Europe standards, the public prosecutor's office may either be subordinate to the executive or independent. However, adequate safeguards must be in place to ensure the transparency of any exercise by the Government of prosecution powers. Paragraph 13 of the Committee of Ministers of the Council of Europe's Recommendation Rec (2000) 19[17] sets out certain conditions which should be met where the prosecutor's office is part of or subordinate to the executive.

> CDL-AD(2004)038. Opinion on the Draft Law amending the Law of Ukraine on the Office of the Public Prosecutor, para. 26

The Law on the organisation and procedure of the Office of Procurator should define the procuracy as a system of relatively independent authorities preferably organised in correspondence to the court system. It would be for the higher authority to control the level immediately below. However, the highest authority should not directly control the lowest one. In this way, the system of prosecution would be protected against direct political intervention or influence.

> CDL-INF(1996)006. Opinion on the Draft Constitution of Ukraine

No procedures are set forth as to how the Parliament should arrive at their decision. There are no provisions, for example, entitling the Public Prosecutor […] to make a defence, to call evidence or address the Parliament, nor are the procedures to be adopted by the Parliament on the occasion of such a vote set out.

> 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. 58

It is, of course, legitimate to site the prosecution service either in the judiciary or the executive, and if it is sited in the judiciary then a clear distinction has to be drawn between courts of law and the branch of the judiciary exercising the prosecution power (see in particular paragraphs 17 – 20 of Recommendation Rec 2000 (19) on the Role of Public Prosecution in the Criminal Justice System which deals with the relationship between public prosecutors and court judges).

CDL-AD(2008)019 Opinion on the draft law on the Public Prosecutors' service of Moldova , para. 13

The independent status of the general prosecutor and the public prosecution service does not necessarily preclude the possibility of an annual report to Parliament describing in general terms his work but without commenting on individual cases. However, it does mean that a decision by him to prosecute in a particular case, or not to prosecute, cannot be appealed against, or overturned by any executive or parliamentary authority.

CDL(1995)073rev. Opinion on the regulatory concept of the Constitution of the Hungarian Republic, adopted at the Commission's 25th Plenary Meeting, Venice, 24-25 November 1995, chapter 11.

The ambiguity of the draft with respect to the independence of the procuracy is however not the prime concern with respect to the model of prosecution developed in the draft law. The principle of independence alone is no guarantee of a democratic prosecution model. Indeed, it can lead to the creation of an all-powerful prosecutor's office which is a threat to the democratic functioning of other state organs, including courts of law. It was precisely in communist states that the prosecutor's office became a tool of repression as a result of such separation, its broad scope of authority and its exemption from all supervision.

CDL-AD(2004)038. Opinion on the Draft Law amending the Law of Ukraine on the Office of the Public Prosecutor,. para. 23

The fundamental principle which should govern the system of public prosecution in a state is the complete independence of the system, no administrative or other consideration is as important as that principle. Only where the independence of the system is guaranteed and protected by law will the public have confidence in the system which is essential in any healthy society.

CDL(1995)073rev. Opinion on the regulatory concept of the Constitution of the Hungarian Republic adopted at the Commission's 25th Plenary Meeting, Venice, 24-25 November 1995, chapter 11.

It would, however, be undesirable that a Prosecutor-General should have power to initiate legislation or participate in parliamentary debates. Similarly, the nature of participation in the plenary sessions of courts should be defined so as to make it clear that the Prosecutor-General is not exercising any judicial function, assuming this is in fact the case.

CDL-AD(2004)038. Opinion on the Draft Law amending the Law of Ukraine on the Office of the Public Prosecutor,. para. 24

[…] the draft law provides that where the prosecutor considers it expedient, he or she shall participate in meetings of any commissions, committees and other collective bodies established by the bodies of executive power, representative bodies, local self-government bodies or the President […]. Such rights serve to build the prosecutor's power vis-à-vis other state organs and create a sort of super-authority within the state which is very dangerous to the development of a democratic, law-abiding state.

CDL-AD(2004)038. 'Opinion on the Draft Law amending the Law of Ukraine on the Office of the Public Prosecutor,. para. 25

The prosecutor may, of course, hand down an opinion on a legal act within his scope of interest being dealt with by parliament. Upon a motion of the legislative authorities, he may take part in committee work on the appropriate draft law. He should not, however, be endowed with the formal right of legislative initiative. He may enjoy the right to submit a motion or a request to parliament and to the government, which have the right to initiate legislation. His participation in parliamentary sittings should be possible only at the invitation of parliament or a parliamentary committee. That is required by the rules of the balance of power.

> CDL-AD(2005)014. Opinion on the Federal Law on the Prokuratura (Prosecutor's Office) of the Russian Federation, para. 61

It should be noted that the Constitution defines the prosecution system as part of the "Judicial Authority" (Chapter IX of the Constitution). This has important consequences for the independence of the prosecution from other state bodies including the courts. Recommendation 2000 (19) of the Committee of Ministers of the Council of Europe on the Role of Public Prosecution makes a clear distinction between the prosecution and judicial functions. The explanatory memorandum states that while the task of both public prosecutors and judges is to apply the law or to see that it is applied, judges do this reactively, in response to cases brought before them, whereas the public prosecutor pro-actively, acts in order to the application of the law. The independence of the prosecutors from the Judiciary should be made explicit.

> CDL-AD(2008)019 Opinion on the draft law on the Public Prosecutors' service of Moldova , para. 6

3.2 Protection against Interference

[The provision] sets out the principles upon which the activity of the prosecution service is organised. These are duties to carry out activities in accordance with the law, the duty of transparency, the principle of independence, the principle of the autonomy of the individual prosecutor "which allows them to take decisions by their own with regard to files and cases under their examination" and the principle of internal hierarchical control and judicial control.

> CDL-AD(2008)019 Opinion on the draft law on the Public Prosecutors' service of Moldova , para. 14

The whole question of parliamentary accountability of prosecutors raises a delicate and difficult question. It is certainly reasonable that a prosecutor should be answerable for public expenditure and the efficiency of the office, but there is an obvious danger in making a prosecutor answerable for the decisions in relation to individual prosecutions. 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. It would therefore be important to clarify the extent to which the prosecutor is to be accountable to Parliament and for what matters.

> 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

No procedures are set forth as to how the Parliament should arrive at their decision. There are no provisions, for example, entitling the Public Prosecutor […] to make a defence, to call

evidence or address the Parliament, nor are the procedures to be adopted by the Parliament on the occasion of such a vote set out.

> 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. 58

[…] the draft law, which deals with the independence of the Prosecutor, prohibits "any interference of the […] media […] with the prosecutor's activity". This is a potentially dangerous provision. There exists a justified fear that such a formulation encroaches on media freedom. Care must be taken to protect the media's right to criticize the prosecutor; where this oversteps what is lawful by, for example, causing prejudice to a forthcoming trial, it should be dealt with only by way of a judicial decision.'

> CDL-AD(2004)038. Opinion on the Draft Law amending the Law of Ukraine on the Office of the Public Prosecutor, para.28

It needs to be made very clear in what circumstances the prosecutor's autonomy can be overridden by a senior prosecutor. If the prosecutor's decision is incorrect or illegal […] a superior prosecutor can override it. But what is meant by incorrect? Is it enough for a senior prosecutor to decide that he or she would have made a different decision or must the junior prosecutor have acted outside the scope of his or her authority? The latter alternative is clearly to be preferred […].

> CDL-AD(2008)019 Opinion on the draft law on the Public Prosecutors' service of Moldova , para. 13

[…] the power to give instructions [to a junior prosecutor] extended only to general instructions but not to giving instructions how to deal with particular cases. […] Such a limitation should be clearly spelled out in the Law.

> CDL-AD(2008)019 Opinion on the draft law on the Public Prosecutors' service of Moldova , para. 19

In the case of prosecutors other than the Public Prosecutor of the Republic decisions on dismissal are taken by the Council of Public Prosecutor. Again, there are no provisions relating to the right of a prosecutor to appear before the council and make a defence or to know in advance the case to be made.'

> 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. 61

[An] own budget [for the prosecutor's service] which is to be approved by the Parliament is an appropriate provision and it's a good guarantee for the independence of the prosecutor's service.

> CDL-AD(2008)019 Opinion on the draft law on the Public Prosecutors' service of Moldova , para. 69

3.3 Hierarchy, Discipline, Liability

The hierarchical model is an acceptable model although it is perhaps more common where prosecution services are sited within the judiciary for the individual prosecutor to be independent. The hierarchical model is more commonly found where the prosecution service is regarded as a part of the executive. A hierarchical system will lead to unifying proceedings, nationally and regionally and can thus bring about legal certainty.

> CDL-AD(2008)019 Opinion on the draft law on the Public Prosecutors' service of Moldova , para. 15

[…] there should be personal liability on prosecutors only if they have acted in bad faith or in some very improper manner, such, for example, as taking decisions while under the influence of alcohol or drugs.

> CDL-AD(2008)019 Opinion on the draft law on the Public Prosecutors' service of Moldova , para. 53

An important element in the independence of the general prosecutor is his protection from arbitrary or politically motivated dismissal. If the government were to have the power to dismiss him at will then he could not discharge his function with the absolute independence which is essential. On the other hand to involve Parliament in the decision to dismiss might draw him into the arena of party politics which would be undesirable. The grounds for dismissal should be stated in the Constitution, eg stated misbehaviour or incapacity. A body whose membership would command public trust should investigate allegations of misbehaviour or incapacity and, if it finds the allegation proved, make a recommendation of dismissal if it considers that dismissal is justified. The body, for example, might be of similar composition to the nominating body described in paragraph 5 above or consist of the remaining members of the National Jurisdiction Council. Alternatively the body might consist of three judges appointed by the presidents of their courts. It would be advisable not to involve the Constitutional Court in the investigation or the dismissal procedure because it is not unlikely that there might subsequently be a legal challenge in that court to the affair, whatever its outcome. Whatever body is selected it is probably better that it be comprised of *ex officio* members rather than be appointed *ad hoc*, in order to avoid suggestions that its members have been chosen so as to obtain a particular result.

> CDL(1995)073rev. Opinion on the regulatory concept of the Constitution of the Hungarian Republic, adopted at the Commission's 25th Plenary Meeting, Venice, 24-25 November 1995, chapter 11.

[…] reviews of every prosecutor by a superior officer [should be done,] based on a discussion between the employee and the employer who try to reach agreement on how the employee is performing and what training or further development are required. […]

> CDL-AD(2008)019 Opinion on the draft law on the Public Prosecutors' service of Moldova , para. 46

The issue of secondment always bears in it on the one side the necessity to overcome functional problems by allocating human resources efficiently – sometimes against the will of the concerned persons – in order to insure the fulfilment of the tasks required […] and, on the other side, the legitimate interest of the persons involved and the avoidance of potential abuse.

[…] forced secondment is something to be looked at with care, because it can endanger the independence of the office holder.

> CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, para. 48

It is because of questions of this sort that it is important to specify exactly what is meant by describing the system as hierarchical. The important thing is to specify what exactly is the power of instruction given to anybody within the system, to whom exactly this power is given, what precisely is the scope of authority of individual prosecutors, when they may make decisions on their own initiative, which decisions require to be approved by a more senior prosecutor, which decisions may be reviewed or set aside, and by whom and on what grounds.

> CDL-AD(2008)019 Opinion on the draft law on the Public Prosecutors' service of Moldova , para. 37

4. Impartiality

[The provision] prevents prosecutors from acting as members of Parliament or of local authorities, or being members of political parties or engaging in party political activity or being members of executive or supervision boards of trade associations or other legal associations established in order to gain a benefit. These appear to the writer to be appropriate provisions and not to be in conflict with the provisions of paragraph 6 of Recommendation Rec (2000) 19 of the Committee of Ministers of the Council of Europe.

> 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. 52

The general prosecutor's period of office should not be co-terminus with that of the government since this would tend to lead to the assumption in the public mind of his political allegiance.

> CDL(1995)073rev. Opinion on the regulatory concept of the Constitution of the Hungarian Republic adopted at the Commission's 25th Plenary Meeting, Venice, 24-25 November 1995, chapter 11.

In relation to the commission of a criminal offence conviction for an offence followed by imprisonment for at least six months is grounds for dismissal. This is a clear provision and there is no difficulty implementing it. However, there seems to be a somewhat lenient approach to prison sentences. It should be taken into account that in many states normally any kind of prison sentence means that a prosecutor is no longer qualified as a prosecutor. This is quite important to protect the reputation of the whole prosecution service…

> 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. 56

5. Restriction to prosecution in criminal cases

The direction in which the Venice Commission would recommend to go has been clearly formulated in Recommendation 1604 (2003) of the Parliamentary Assembly, which states: "the

power 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.

> CDL-AD(2005)014. Opinion on the Federal Law on the Prokuratura (Prosecutor's Office) of the Russian Federation, para. 75

[…] the Commission would support a very different approach to the powers of the prosecutor's office which results from a text adopted by the Parliamentary Assembly. While it is not binding on Member States, the Parliamentary Assembly of the Council of Europe, in Recommendation 1604 (2003) on the role of the public prosecutor's office in a democratic society governed by the rule of law, having recited (at paragraph 6) 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" went on to declare its opinion (at paragraph 7):

> "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."
>
> CDL-AD(2005)014. Opinion on the Federal Law on the Prokuratura (Prosecutor's Office) of the Russian Federation,.para. 55

As regards the basic models referred to in the Concept, one could suggest that the function of the general prosecutor and the other public prosecutors should be confined to the prosecution of crime, through the criminal courts, and should not be extended to the protection of the public interest in civil matters and administrative causes.

> CDL(1995)073rev. Opinion on the regulatory concept of the Constitution of the Hungarian Republic, adopted at the Commission's 25th Plenary Meeting, Venice, 24-25 November 1995, chapter 11.

[…] The role of the prosecutor should be limited to make an appeal in cases where he or she is a party to the proceedings.

[…] The prosecutor may also 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.[…] it is important that this should only be subsidiary […]. […] 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, or whether it might not be more appropriately exercised by a body such as an ombudsman.

> CDL-AD(2008)019 Opinion on the draft law on the Public Prosecutors' service of Moldova , para. 29-30

'While some protection of prosecutors from arbitrary or abusive process emanating from another organ such as the police might be desirable, it would be preferable if any limitation on the power to commence a criminal process was subject to judicial control.'

> CDL-AD(2004)038. Opinion on the Draft Law amending the Law of Ukraine on the Office of the Public Prosecutor,. para.27