Strasbourg, 21 September 2009

CDL(2009)055rev3*
Or. Engl.

Study No. 494 / 2008

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT REPORT
ON THE INDEPENDENCE OF THE JUDICIAL SYSTEM:
PART I: THE INDEPENDENCE OF JUDGES

approved by

the Sub-Commission on the Judiciary
(Venice, 12 March 2009)

with member's proposals for amendments
to be adopted by the Plenary Session

on the basis of comments by
Mr G. NEPPI MODONA (Substitute Member, Italy)
Ms A. NUSSBERGER (Substitute Member, Germany)
Mr H. TORFASON (Member, Iceland)
Mr V. ZORKIN (Member, Russia)

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

Table of contents

INTRODUCTION

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

2. The Commission entrusted the preparation of this report to its Sub-Commission on the Judiciary, which held two meetings on the subject in Venice on 16 October 2008 and 11 December 2008. At the latter meeting participated Mr Desch, representing the European Committee on Legal Co-operation (CDCJ) and Ms Laffranque, President of the Consultative Council of European Judges (CCJE). Ms Laffranque also made comments on the secretariat note on existing standards (CDL-JD(2008)002).

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

4. The present draft report was adopted by the Sub-Commission on the Judiciary (Venice, 12 March 2009). Following further discussion of this report in the Plenary Session of the Commission (Venice, 12-13 June 2009), the members were invited to submit proposals for amendments by 15 September at the latest. The remarks received figure in the appendix to the present document. The proposals for amendments are underlined.

5. The present report was adopted by the Venice Commission at its … Plenary Session (Venice, …).

I. PRELIMINARY REMARKS

6. The independence of the judges and – as a consequence – the reputation of the judiciary in a given society depends on many factors. In addition to the institutional rules guaranteeing independence, the personal character and the professional quality of the individual judge deciding a case are of major importance. The legal culture as a whole is equally decisive. It is formed over long periods of time and is often difficult to change.

7. Institutional rules have to be designed in such a way as to guarantee the selection of highly qualified and personally reliable judges and to define settings in which judges can work without being unduly influenced from outside.

8. The problem of establishing a comprehensive set of standards of judicial independence has been addressed in a considerable number of different documents dealing with these matters and aiming at working out some reference points, more or less detailed. These documents, independently of whether they have been issued either by international organisations and official bodies or by independent scientific groups, offer a comprehensive view of what the elements of judicial independence should be, what is the role and significance of judicial independence in ensuring the rule of law, what kind of challenges it may meet from the part of either the executive or the legislature, etc.

9. But, as experience shows in many countries, the best institutional rules cannot work without the good will of those responsible for their application and implementation. The implementation of existing standards is therefore at least as important as the identification of new standards

needed. Nonetheless, the present report endeavours not only to present an overview of existing standards but to identify areas where further standards might be required in order to change practices which can be an obstacle to judicial independence.

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

II. EXISTING STANDARDS

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

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

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

14. Since this text does not go into much detail, a number of attempts were made for a more advanced text on the independence of the Judiciary. Probably, the most comprehensive text is Opinion No. 1 of the Consultative Council of European Judges (CCJE) on standards concerning the independence of the judiciary and the irremovability of judges. Other Opinions of the CCJE are also relevant in this context, e.g. CCJE Opinions no. 6 on Fair Trial within a Reasonable Time, no. 10 on the "Council for the Judiciary in the Service of Society" and no. 11 on the Quality of Judicial Decisions.

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

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

17. There are also a number of UN standards on the independence of the judiciary, in particular the Basic Principles on the Independence of the Judiciary endorsed by the UNGA in 1985 (link to the Basic Principles) and the Bangalore Principles of Judicial Conduct of 2002 (link to the Bangalore Principles). These standards often coincide with the Council of Europe standards but usually do not go beyond them.

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

III. SPECIFIC ASPECTS OF JUDICIAL INDEPENDENCE

1. The level at which judicial independence is guaranteed

19. Recommendation (94)12 provides (Principle I.2.a): *"The independence of judges should be guaranteed pursuant to the provisions of the Convention and constitutional principles, for example by inserting specific provisions in the constitutions or other legislation or incorporating the provisions of this recommendation in internal law."*

20. Opinion No. 1 of the CCJE recommends (at 16[1]), following the recommendation of the European Charter, to go further*: "the fundamental principles of the statute for judges are set out in internal norms at highest level, and its rules in norms at least at the legislative level."*

21. The Venice Commission strongly supports this approach. **The basic principles relevant for the independence of the judiciary should be set forth in the Constitution**.

2. Basis of appointment or promotion

22. Recommendation (94)12 provides that *"All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency."*

23. Opinion No. 1 of the CCJE recommends in addition (at 25) *"that the authorities responsible in member States for making and advising on appointments and promotions should now introduce, publish and give effect to objective criteria, with the aim of ensuring that the selection and career of judges are "based on merit, having regard to qualifications, integrity, ability and efficiency*". Merit is not solely a matter of analytical skills or academic excellence. It also should include matters of character, judgment, accessibility, communication skills, etc.[2] It is essential that a judge has a sense of justice and a sense of fairness.[3] Finally, while merit should not be diluted, legitimacy of the judiciary is also a factor that needs to be taken into account. And if the judiciary excludes women, or minorities, that legitimacy is often called into question, however "objective" the judges may be in practice.[4]

24. **The principles that all decisions concerning appointment should be based on objective criteria and the professional career of judges should be based on merit only seem indisputable.**

3. The appointing and consultative bodies

25. Recommendation (94)12 reflects a preference for a decisive role of a judicial council but accepts other systems:

> *"The authority taking the decision on the selection and career of judges should be independent of the government and administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority itself decides on its procedural rules.*
> *However, where the constitutional or legal provisions and traditions allow judges to be appointed by the government, there should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that*

[1] Unless otherwise indicated references to the CCJE relate to its Opinion No. 1.
[2] [Amendment proposal by Mr. Jowell.]
[3] [Amendment proposal by Mr. Mifsud Bonnici.]
[4] [Amendment proposal by Mr. Jowell.]

the decisions will not be influenced by any reasons other than those related to the objective criteria mentioned above".

26. The CCJE also argues in favour of the involvement of an independent body (at 45): "*The CCJE considered that the European Charter - in so far as it advocated the intervention (in a sense wide enough to include an opinion, recommendation or proposal as well as an actual decision) of an independent authority with substantial judicial representation chosen democratically by other judges - pointed in a general direction which the CCJE wished to commend. This is particularly important for countries which do not have other long-entrenched and democratically proved systems."*

27. Opinion No. 10 of the CCJE on "the Council of the Judiciary in the service of society" further develops the position of the CCJE. It provides (at 16): *"The Council for the Judiciary can be either composed solely of judges or have a mixed composition of judges and non judges. In both cases, the perception of self-interest, self protection and cronyism must be avoided."* and (at 19) "*In the CCJE's view, such a mixed composition would present the advantages both of avoiding the perception of self-interest, self protection and cronyism and of reflecting the different viewpoints within society, thus providing the judiciary with an additional source of legitimacy. However, even when membership is mixed, the functioning of the Council for the Judiciary shall allow no concession at all to the interplay of parliamentary majorities and pressure from the executive, and be free from any subordination to political party consideration, so that it may safeguard the values and fundamental principles of justice".*

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

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

45. In older democracies, the executive power has sometimes a decisive influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary because these powers are restrained by legal culture and traditions, which have grown over a long time.

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

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

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

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

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

29. To sum up, it is the Venice Commission's view that at least in new democracies it is an indispensable guarantee for the independence of the judiciary that **an independent judicial council has decisive influence on decisions on** the appointment and career of judges . While such an independent body is not accountable in the same way as the executive, the need to ensure independence appears more important than the need to ensure accountability.[5] Owing to the richness of legal culture in Europe, which is precious and should be safeguarded, there is no single model which applies to all countries. While respecting this variety of legal systems, the Venice Commission also recommends that old democracies which have not yet done so consider the establishment of an independent judicial council or similar body. In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges elected by their peers.[6]

4. Tenure - period of appointment

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

31. Opinion No. 1 of the CCJE adds (at 48): *"European practice is generally to make full-time appointments until the legal retirement age. This is the approach least problematic from the viewpoint of independence."* and (at 53) "*The CCJE considered that when tenure is provisional or limited, the body responsible for the objectivity and the transparency of the method of appointment or re-appointment as a full-time judge are of especial importance."*

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

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

> *"3.3. Where the recruitment procedure provides for a trial period, necessarily short, after nomination to the position of judge but before confirmation on a permanent basis, or where recruitment is made for a limited period capable of renewal, the decision not to make a permanent appointment or not to renew, may only be taken by the independent authority referred to at paragraph 1.3 hereof, or on its proposal, or its recommendation or with its agreement or following its opinion. The provisions at point 1.4 hereof are also applicable to an individual subject to a trial period."*

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

> *"40. The Venice Commission considers that* ***setting probationary periods can undermine the independence of judges****, since they might feel under pressure to decide cases in a particular way. […]*
>
> *41. This should not be interpreted as excluding all possibilities for establishing temporary judges. In countries with relatively new judicial systems there might be a practical need to first ascertain whether a judge is really able to carry out his or her functions effectively before permanent appointment. If probationary appointments are considered indispensable,* ***a "refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office"****.*

[5] [This amendment takes up an argument raised by Mr Mifsud Bonnici while maintaining the traditional position of the Commission in favour of Judicial Councils as set out *inter alia* in CDL-AD(2007)028.

[6] See CDL-AD(2009)028 para. 50.

42. The main idea is to exclude the factors that could challenge the impartiality of judges: "despite the laudable aim of ensuring high standards through a system of evaluation, it is ***notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value.****"*

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

35. To sum up, **the Venice Commission strongly recommends to appoint ordinary judges permanently until retirement. Probationary periods for judges are problematic from the point of view of independence and systems of candidate judges without full judicial powers are preferable.**

5. Tenure - irremovability and discipline - transfers

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

37. The CCJE concludes (at 60):

"The CCJE considered

(a) that the irremovability of judges should be an express element of the independence enshrined at the highest internal level (see paragraph 16 above);

(b) that the intervention of an independent authority, with procedures guaranteeing full rights of defence, is of particular importance in matters of discipline; and

(c) that it would be useful to prepare standards defining not just the conduct which may lead to removal from office, but also all conduct which may lead to any disciplinary steps or change of status, including for example a move to a different court or area."

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

"3.4. A judge holding office at a court may not in principle be appointed to another judicial office or assigned elsewhere, even by way of promotion, without having freely consented thereto. An exception to this principle is permitted only in the case where transfer is provided for and has been pronounced by way of a disciplinary sanction, in the case of a lawful alteration of the court system, and in the case of a temporary assignment to reinforce a neighbouring court, the maximum duration of such assignment being strictly limited by the statute, without prejudice to the application of the provisions at paragraph 1.4 hereof."

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

40. **The Venice Commission has consistently supported including the principle of irremovability in Constitutions**. **Transfers against the will of the judge can be permissible only in exceptional cases**. As regards disciplinary proceedings, para. 49 of document CDL-AD(2007)028 **favours the decisive influence of judicial councils in disciplinary proceedings**. In addition, the Commission has consistently argued that **there should be the possibility of an appeal to a court against decisions of disciplinary bodies.**

6. Remuneration of judges

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

42. The CCJE adds in Opinion No. 1:

> "62. *While some systems (e.g. in the Nordic countries) cater for the situation by traditional mechanisms without formal legal provisions, the CCJE considered that it was generally important (and especially so in relation to the new democracies) to make specific legal provision guaranteeing judicial salaries against reduction and to ensure at least de facto provision for salary increases in line with the cost of living."*

43. The Venice Commission shares the opinion that **the remuneration of judges has to correspond to the dignity of the profession and that adequate remuneration is indispensable to protect judges from undue outside interference.** The example of the Polish Constitution, which guarantees to judges remuneration consistent with the dignity of their office and the scope of their duties seems positive. The level of remuneration will have to be determined in the light of the social conditions in each country to the level of remuneration of higher civil servants in other fields. **The remuneration should be based on a general standard and not on an assessment of the individual performance of a judge. Bonuses should be excluded.**

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

45. The second origin of this practice lies in the post-socialist period of transition to a market economy. The prices for real property increased exponentially and this made it impossible for State officials, including judges, to purchase adequate housing. Again, one of the advantages of being a judge was the attribution of apartments. Especially for young judges, it is still difficult to purchase real estate and consequently, the system of allocation of housing persists.

46. While the allocation of such apartments is a source of concern it is not an easy task to resolve the problem of providing the judiciary with an appropriate living standard, including housing. An argument advanced in favour of such non-financial allocations is that they can be attributed according to individual need whereas salaries are set at the same level for all judges in a given category without the possibility to distinguish and to support those in special need. However, this assessment of social need and the differentiation between judges is the possible entry point for abuse and the application of subjective criteria.

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

48. To sum up, **the Venice Commission is of the opinion that for judges a level of remuneration should be guaranteed by law in conformity with the dignity of their office**

and the scope of their duties. Non-financial benefits, the distribution of which involves a discretionary element, should be phased out.

7. Budget of the Judiciary

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

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

> *"5.* ***The CCJE agreed that although the funding of courts is part of the State budget presented to Parliament by the Ministry of Finances, such funding should not be subject to political fluctuations.*** *Although the level of funding a country can afford for its courts is a political decision, care must always be taken, in a system based on the separation of powers, to ensure that neither the executive nor the legislative authorities are able to exert any pressure on the judiciary when setting its budget.* ***Decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence.***
> *10. Although the CCJE cannot ignore the economic disparities between countries, the development of appropriate funding for courts requires greater involvement by the courts themselves in the process of drawing up the budget.* ***The CCJE agreed that it was therefore important that the arrangements for parliamentary adoption of the judicial budget include a procedure that takes into account judicial views.***
> *11. One form which this active judicial involvement in drawing up the budget could take would be to give the independent authority responsible for managing the judiciary – in countries where such an authority exists[1] – a co-ordinating role in preparing requests for court funding, and to make this body Parliament's direct contact for evaluating the needs of the courts. It is desirable for a body representing all the courts to be responsible for submitting budget requests to Parliament or one of its special committees."*

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

8. Freedom from undue external influence

52. Two aspects of judicial independence complement each other. External independence shields the judge from influence by other state powers and is an essential element of the rule of law. Internal independence (see below, chapter 10) ensures that a judges takes decisions only on the basis of the Constitution and laws and not on the basis of instructions given by higher ranking judges.[7]

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

[7] [Amendment proposal on the basis of remarks by Mr Palma (no. 1)].

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

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

"..*The difficulty lies rather in deciding what constitutes undue influence, and in striking an appropriate balance between for example the need to protect the judicial process against distortion and pressure, whether from political, press or other sources, and the interests of open discussion of matters of public interest in public life and in a free press. Judges must accept that they are public figures and must not be too susceptible or of too fragile a constitution.* ***The CCJE agreed that no alteration of the existing principle seems required, but that judges in different States could benefit from discussing together and exchanging information about particular situations."***

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

"*75. As regards criminal liability, the CCJE considers that:*
i) judges should be criminally liable in ordinary law for offences committed outside their judicial office;
ii) criminal liability should not be imposed on judges for unintentional failings in the exercise of their functions.
76. As regards civil liability, the CCJE considers that, bearing in mind the principle of independence:
i) the remedy for judicial errors (whether in respect of jurisdiction, substance or procedure) should lie in an appropriate system of appeals (whether with or without permission of the court);
ii) any remedy for other failings in the administration of justice (including for example excessive delay) lies only against the state;
iii) it is not appropriate for a judge to be exposed, in respect of the purported exercise of judicial functions, to any personal liability, even by way of reimbursement of the state, except in a case of wilful default."

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

"Magistrates (…)should not benefit from a general immunity as set out in the Bulgarian Constitution. According to general standards they indeed needed protection from civil suits for actions done in good faith in the course of their functions. They should not, however, benefit from a general immunity which protected them against prosecution for criminal acts committed by them for which they should be answerable before the courts." (CDL-AD(2003)12, para. 15.a).

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

58. Moreover, judges should not put themselves into a position where their independence or impartiality may be questioned. This justifies national rules on the incompatibility of judicial office with other functions or restrictions on political activities of judges.[8]

9. Final character of judicial decisions

59. Recommendation (94) 12, Principle I(2)(a)(i) provides that "*decisions of judges should not be the subject of any revision outside the appeals procedures as provided for by law*". It should be understood that this principle does not preclude the re-opening of procedures in exceptional cases on the basis of new facts or on other grounds as provided for by law.[9]

60. While the CCJE concludes in its Opinion No. 1 (at 65), on the basis of the replies to its questionnaire, that this principle seems to be generally observed, the experience of the Venice Commission and the case law of the ECHR indicate that the supervisory powers of the Prokuratura in post-Soviet states often extend to being able to protest judicial decisions no longer subject to an appeal.

61. The Venice Commission underlines the principle that **judicial decisions should not be subject of any revision outside the appeals process, in particular not through a protest of the prosecutor or any other state body outside the time limit for an appeal**.

10. Independence within the judiciary

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

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

> "*64. The fundamental point is that a judge is in the performance of his functions no-one's employees; he or she is holder of a State office. He or she is thus servant of, and answerable only to, the law. It is axiomatic that a judge deciding a case does not act on any order or instruction of a third party inside or outside the judiciary.*
>
> *66. The CCJE noted the potential threat to judicial independence that might arise from an internal judicial hierarchy. It recognised that judicial independence depends not only on freedom from undue external influence, but also freedom from undue influence which might in some situations come from the attitude of other judges. "Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law" (Recommendation No. R (94) 12, Principle I (2)(d). This means judges individually. The terms in which it is couched do not exclude doctrines such as that of precedent in common law countries (i.e. the obligation of a lower judge to follow a previous decision of a higher court on a point of law directly arising in the later case)."*

[8] [Amendment proposal on the basis of remarks by Ms Palma (no. 2)]
[9] [Amendment proposal on the basis of the remarks by Mr Bradley (No. 2)]

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

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

> "*Lastly, granting the Supreme Court the power to supervise the activities of the general courts (Article 51, paragraph 1) would seem to be contrary to the principle of the independence of such general courts. While the Supreme Court must have the authority to set aside, or to modify, the judgments of lower courts, it should not supervise them."* (CDL-INF(1997)6 at 6).
>
> *"Under a system of judicial independence the higher courts ensure the consistency of case law throughout the territory of the country through their decisions in the individual cases. Lower courts will, without being in the Civil Law as opposed to the Common Law tradition formally bound by judicial precedents, tend to follow the principles developed in the decisions of the higher courts in order to avoid that their decisions are quashed on appeal. In addition, special procedural rules may ensure consistency between the various judicial branches. The present draft fundamentally departs from this principle. It gives to the Supreme Court (Art. 51.2.6 and 7) and, within narrower terms, to the Plenum of the Supreme Specialised Courts (art. 50.1) the possibility to address to the lower courts "recommendations/explanations" on matters of application of legislation. This system is not likely to foster the emergence of a truly independent judiciary in Ukraine but entails the risk that judges behave like civil servants who are subject to orders from their superiors. Another example of the hierarchical approach of the draft is the wide powers of the Chief Judge of the Supreme Court (Art. 59). He seems to exercise these extremely important powers individually, without any need to refer to the Plenum or the Presidium."* (CDL-INF(2000)5 under the heading "Establishment of a strictly hierarchical system of courts")
>
> *"Judicial independence is not only independence of the judiciary as a whole vis-à-vis the other powers of the State, but it has also an "internal" aspect. Every judge, whatever his place in the court system, is exercising the same authority to judge. In judicial adjudication he or she should therefore be independent also vis-à-vis other judges and also in relation to his/her court president or other (e.g. appellate or superior) courts. There is in fact more and more discussion on the "internal" independence of the judiciary. The best protection for judicial independence, both "internal" and "external", can be assured by a High Judicial Council, as it is recognised by the main international documents on the subject of judicial independence."* (CDL(2007)003 at 61)

66. To sum up, **the Venice Commission underlines that the principle of judicial independence means independence of each individual judge and that a hierarchical organisation of the judiciary is incompatible with judicial independence.**

67. **Higher courts should not influence lower courts by adopting recommendations or guidelines but only through their case-law, when deciding on legal remedies against decisions of the lower courts.** This does not exclude information on existing case-law, including that of the European Court of Human Rights, recommendations on the level of sentencing[10] or giving an opinion on legal questions referred to them by lower courts.[11] The

[10] [Amendment proposal by Mr. Torfason (already part of document CDL(2009)055rev2 distributed in Venice in June).]
[11] [Amendment proposal by Mr. Dutheillet de Lamothe].

situation is of course different if the Constitution of a country provides that the Supreme Court is even obliged to adopt "uniformity resolutions", which become judge-made law [12][13] Indeed, in addition to the independence of the individual judge, the consistency of case law of the judicial body as a whole is also of great importance. This may require some form of coordination and deliberation, always respecting the ultimate power of the respective panel to take the decision they deem right.[14]

11. The allocation of cases and the right to a lawful judge

68. As already noted, the issue of internal independence arises not only between judges of the lower and of the higher courts but also between the presidents of courts and the judges of the pertinent court as well as among its judges. Internal and external independence are indeed closely linked in this respect, since the courts and their presidents may be at times under particular pressure from the executive and/or legislating power.[15]

69. In many countries court presidents exercise a strong influence by allocating cases to individual judges. As regards the distribution of cases, Recommendation (94)12 contains principles (Principle I.2.e and f), which may be seen as essential to the notion of judicial independence:[16]

> *"The distribution of cases should not be influenced by the wishes of any party to a case or any person concerned with the results of the case. Such distribution may, for instance, be made by drawing of lots or a system for automatic distribution according to alphabetic order of some similar system."*
>
> *"A case should not be withdrawn from a particular judge without valid reasons, such as cases of serious illness or conflict of interests. Any such reasons and the procedures for such withdrawal should be provided for by law and may not be influenced by any interest of the government or administration. A decision to withdraw a case from a judge should be taken by an authority which enjoys the same judicial independence as judges."*

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

66. The European Convention on Human Rights provides that "everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law" (Article 6 ECHR). According to the Court's case-law, the object of the term "established by law" in Article 6 is to ensure "that the judicial organisation in a democratic society [does] not depend on the discretion of the Executive, but that it [is] regulated by law emanating from Parliament".[17] Nor, in countries where the law is codified, can the organisation of the judicial system be left to the discretion of the judicial authorities, although this does not mean that the courts do not have some latitude to interpret the relevant national legislation.[18]

---

[12] e.g. Hungary, Decision 42/2005 of the Constitutional Court.
[13] [Amendment on the basis of Ms Palma's (item 4) and Mr Paczolay's remarks.]
[14] [Amendment proposal by Mr. van Dijk.]
[15] [Amendment proposal by Mr. Torfason (already part of document CDL(2009)055rev2 distributed in Venice in June).]
[16] [Amendment proposal by Mr. Torfason (already part of document CDL(2009)055rev2 distributed in Venice in June).]
[17] See *Zand v. Austria*, application no. 7360/76, Commission report of 12 October 1978, Decisions and Reports (DR) 15, pp. 70 and 80.
[18] See *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 98, ECHR 2000-VII.

70. The main point to be noted, however, is that according to the express words of Article 6, the medium through which access to justice under fair hearing should be ensured must not only be a tribunal established by law, but also one which is both "independent" and "impartial" in general and specific terms. And in its evaluation of these requirements for a fair hearing, the Strasbourg Court has applied the maxim that "justice must not only be done, but also seem to be done." All of this does imply that the judges or judicial panels entrusted with specific cases should not be selected *ad hoc* and/or *ad personam*, but according to objective and transparent criteria.[19]

71. Many European constitutions contain a subjective right to a lawful judge. Most frequently, the guarantee to this effect is worded in a negative way, such as in the Constitution of Belgium: *"No one can be separated, unwillingly, from the judge that the law has assigned to him."* (Article 13) or Italy *"No one may be removed from the normal judge predetermined by law"*.[20] Other constitutions state the "right to the lawful judge" in a positive way such as the Constitution of Slovenia: *"Everyone has the right to have any decision regarding his rights, duties and any charges brought against him made without undue delay by an independent, impartial court constituted by law. Only a judge duly appointed pursuant to rules previously established by law and by judicial regulations may judge such an individual*."[21]

72. The guarantee can be understood in two different ways. Either it relates only to the court as a whole or it is related also to the individual judge or judicial panel dealing with the case. In terms of principle, it seems clear that the latter understanding of the "right to the lawful judge" should be promoted. It is not enough if only the court (or the judicial branch) competent for a certain case is fixed in advance. In national legislation, it is frequently provided that the chairperson of a pluralist court should have the power to assign cases among the individual judges, and in any event, it is desirable to indicate clearly where the ultimate responsibility for proper case allocation is being placed.[22] However, this power involves an element of arbitrariness. It can be misused as a means of pressure on judges as they can be overcharged with cases or be assigned only low-profile cases. It is also possible to direct politically sensitive cases to certain judges and to avoid giving them to others. This can be a very effective way of influencing the outcome of the process.

73. In order to enhance impartiality and independence of the judiciary it is highly recommendable to fix the order in which judges deal with the cases in advance. That can be done for example on the basis of the alphabetical order, on the basis of a computerised system

---

[19] [Amendment proposal by Mr. Torfason (already part of document CDL(2009)055rev2 distributed in Venice in June).]

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

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

[22] [Amendment proposal by Mr. Torfason (already part of document CDL(2009)055rev2 distributed in Venice in June).]

or on the basis of objective criteria such as categories of cases. The general rules (including the exceptions) should be fixed by law, whereas the details of the system can be fixed by special regulations on the basis of the law, e.g. in court regulations. Due to objective reasons it may not always possible to establish a fully comprehensive abstract system, leaving no room at all to decisions in individual cases, and there may be a need to take into account the workload or the specialisation of judges. Especially now that domestic courts have to interpret and apply European law in a growing number of cases, the complexity of the legal issues involved may require the participation of members who are expert in that area. Moreover, it may be prudent to place newly appointed judges in a panel with more experienced members for a certain period of time.[23] The criteria for taking such decisions should, however, be clearly defined in advance. Ideally, this allocation should be subject to review.

74. To sum up, **the Venice Commission strongly recommends that the allocation of cases to individual judges should be based to the extent possible on objective and transparent criteria established in advance and not left to the discretion of court presidents.**

IV. Conclusions

75. The independence of the judiciary is more an issue of safeguarding human rights and fundamental freedoms than of the distribution of power between the State's bodies. Without independent judges there can be no correct and lawful implementation of rights and freedoms. The independence of the judiciary is not an end in itself. It is not justified by corporatist interests of the judges but by the need to enable judges to fulfil in full independence their role of guardians of the rights and freedoms orf the people.[24]

76. Consequently, the following standards should be respected by states in order to ensure judicial independence:

1. The basic principles relevant to the independence of the judiciary should be set out in the Constitution. These principles include the judiciary 's independence from other state powers, that judges are subject only to the law, that they are distinguished only by their different functions, as well as the principle of irremovability of the natural or lawful judge pre-established by law.
2. All decisions concerning the professional career of judges should be based on merit only.
3. Rules of incompatibility and for the challenging of judges are an essential element of judicial independence.[25]
4. At least in new democracies it is an indispensable guarantee for the independence of the judiciary that an independent judicial council has decisive influence on decisions on the appointment and career of judges. While respecting the variety of legal systems existing, the Venice Commission recommends also for old democracies not yet having done so to consider the establishment of an independent judicial council. In all cases the council should have a pluralistic composition, with a substantial part if not the majority of the members being judges elected by their peers.
5. Ordinary judges should be appointed permanently until retirement. Probationary periods for judges are problematic from the point of view of their independence and systems of candidate judges without full judicial powers are preferable.
6. Judicial councils, or disciplinary bodies with a similar composition, should have a decisive influence in disciplinary proceedings. The possibility of an appeal to a court against decisions of disciplinary bodies should be provided for.

[23] [Amendment proposal by Mr. van Dijk.]
[24] [Amendment on the basis of the proposal by Mr Bartole.]
[25] [Amendment proposal on the basis of Ms Palma's remarks.]

7. A level of remuneration should be guaranteed to judges, which corresponds to the dignity of their office and the scope of their duties.
8. Non-financial benefits for judges, the distribution of which involves a discretionary element, should be phased out.
9. As regards the budget of the judiciary, decisions on the allocation of funds to courts should be taken with the strictest respect for the principle of judicial independence. Judges should have an opportunity to express their views about the proposed budget to Parliament, possibly through the judicial council.
10. Judges should only enjoy functional immunity.
11. States may provide for the incompatibility of judicial office with other functions and may restrict political activities of judges.[26]
12. Judicial decisions should not be subject to any revision outside the appeals process, in particular not through a protest of the prosecutor outside the time limit for an appeal.
13. The principle of internal judicial independence means the independence of each individual judge within the judiciary. Consequently, a hierarchical organisation of the judiciary in the sense of a subordination of the judges to the court presidents or to higher instances in their judicial activity is incompatible with internal judicial independence. ~~Higher courts should not influence lower courts by adopting recommendations or guidelines. This does not exclude information on existing case-law, including that of the European Court of Human Rights, or recommendations on the level of sentencing.~~ Higher Courts should only influence lower Courts by their Jurisprudence.[27]
14. As an expression of the principle of the natural or lawful judge pre-established by law, the allocation of cases to individual judges should be based to the extent possible on objective and transparent criteria established in advance and not left to the discretion of court presidents.
15. Judges should have the right place in the State Protocol along the Members of the other two Powers of the State. Presidents of Supreme Courts should be in the same position as Presidents of Government and Parliament. Members of Supreme Courts should be in the same position as Members of Government and Parliament.[28]

[26] [Amendment proposal on the basis of Ms Palma's remarks.]
[27] [Amendent proposal by Mr Nicolatos.]
[28] [Amendent proposal by Mr Nicolatos.]

APPENDIX: REMARKS

Remarks by Mr Bartole

I would like to open the conclusions of the report with this statement:

"The independence of the judiciary is more a problem of the safeguard of the human rights and fundamental freedoms than of the distribution of the power between the State's bodies. The independence of the judges is required by the exigency of insuring a correct and lawful implementation of the rules concerning rights and freedoms. It follows that the independence of the judiciary is justified as far as the safeguard of the rights and freedoms is at stake, while the corporatist interests of the judges are completely irrelevant and the extension of their powers has to be proportional to the necessities of the legal protection of the human persons ".

Remarks by Mr Bradley

Para 54 (and conclusion point 9) - I do not find the term 'functional immunity' very clear, although a helpful explanation is given in para 54 of its meaning. But the exception given of corrupt decision-making may involve an examination through criminal process of the way a judge's function has been performed.

Para 57 - the rejection of attempts by the prosecutor to re-open decisions is of course to be supported. But the rather absolute terms of para 57 are in danger of excluding the re-opening of a criminal conviction long after the time for an appeal has expired, when new evidence is obtained by the defence that shows the conviction to have involved a miscarriage of justice. Possibly the answer within para 57 is that in exceptional circumstances of this kind the court could allow a late appeal.

Finally, I understand why Professor Hoffmann-Riem [see below] stresses the point (re para 27) that in some legal systems appointment of judges by the executive may produce good results; and that in this area a formal requirement of independent judicial appointments is not always needed to achieve good appointments. However, in many other legal systems there must be value in supporting a system for appointments that does not simply provide for appointments by the executive.

On Professor Hoffmann-Riem's second point (para 67 and conclusion 11), I do not consider that the draft encourages the judiciary to become legislators. On the contrary, on procedural matters, or on matters involving the discretion of the court in sentencing a convicted person, there is a value in enabling judges, especially at an appellate level, to indicate how they consider judicial discretion should usually be exercised. Guidelines of this kind tend to promote consistency; they should not be rigid or immutable, and they should not exclude individual judges from reaching a decision that reflects the factors that are present in a particular case.

Remarks by Mr van Dijk

(extracted from direct amendments in text)
Add to paragraph 63:
Indeed, in addition to the independence of the individual judge, the consistency of case law of the judicial body as a whole is also of great importance. This may require some form of coordination and deliberation, always respecting the ultimate power of the respective panel to take the decision they deem right.

Add to paragraph 68:
Especially now that domestic courts have to interpret and apply European law in a growing number of cases, the complexity of the legal issues involved may require the participation of members who are expert in that area. Moreover, it may be prudent to place newly appointed judges in a panel with more experienced members for a certain period of time.

Remarks by Mr Dutheillet de Lamothe

Je suis d'accord avec l'ensemble des amendements apportés par Mr Torfason qui me paraissent compatibles avec la pratique Française (et de beaucoup d'autres pays) où les affaires sont attribuées aux juges par le Président de la Cour (qui est lui-même un magistrat indépendant) mais selon des critères objectifs (spécialisation par matière qui n'est pas nécessairement formalisée, en fonction de l'expérience des juges ou de leur charge de travail) , ce qui exclut effectivement la désignation "ad hoc or ad personam", visée au § 67.

Je vous suggère simplement de compléter le § 63 pour ne pas exclure une procédure très utile qui a été introduite en France et dans beaucoup d'autres pays qui permet aux tribunaux de demander à la Cour suprême un avis sur une question de droit nouvelle qui fait l'objet de nombreux contentieux. Ceci impliquerait de compléter la première phrase du §63 par les mots " or giving an opinion on legal questions referred to them by lower courts".

Remarks by Mr Hoffmann-Riem

1. Referring to the discussion at the Plenary meeting, I would like to stress that I do not see a justification for a change of the content or wording of No 27 or No 72 par. 3 of the Draft Report. The wording is well balanced and esp. takes into account different legal traditions.

Since the suggestion to change the content of the Draft Report *inter alia* referred to the situation esp. in Germany, I would like to add that I cannot agree to such a justification of a change of the Draft Report. As a former judge as well as a former (state) minister of Justice (who has always fought in favor of the independence of the judiciary), I am quite familiar with the situation in Germany. The independence of the judicial system is guaranteed by law and practiced vigorously - esp. as a reaction to the Nazi-Dictatorship. I do not know of any independent analysis showing structural deficiencies, esp. of a kind that justifies an intervention of the Venice Commission. The decision on the appointment of judges is important for the independence of the judiciary. But I cannot see that the independence is threatened by the procedure in which German judges are selected and appointed - by the way: in different ways in the different Länder. Even the lobby group of the German judges, the Deutsche Richterbund, has not produced an analysis proving structural deficiencies.

There are different ways to ensure the independence of the judiciary. The success of any option depends - *inter alia* - on the legal traditions and supportive forces in each society. If the Venice Commission decides in favor of just one option, it must show that this option is superior to others notwithstanding special circumstances, or at least that those legal systems implicitly or explicitly referred to in the proposal suffer under structural deficiencies which might be cured by the solution proposed by the VC.

2. I also see no need to change Nos 62,63, No 72 par 11. Courts have to decide individual cases, even high courts. These decisions can also serve as guidelines for other courts. If high courts enact guidelines or recommendations in an abstract way, they act as legislators. This is not their function. Besides this: Recommendations or guidelines by higher courts threaten the responsibility of each judge to find a just decision, taking into account the

special circumstances of each case. Further on: Independence from such guidelines promotes the ability of the judicial system to be able to react on social changes etc., as far as such a change legitimately affects the application of the law in the individual case.

Remarks by Mr Jowell

I think the paper is improved by the amendments although there are one or two typographical issues that I'd be pleased to read before the final draft.

I have had to read it on line, so may have missed one point for which I have been searching, namely, the issue I raised of quality vs. diversity.

On quality, It should be made clear in the paper that the criterion for selection of judges should be merit. The paper makes clear that merit should not encompass political loyalty. But the paper should emphasise more that merit is not solely a matter of analytical skills or academic excellence. It also should include matters of character, judgment, accessibility, communication skills, etc.

It would be wrong not to engage the issue of diversity or representativeness. While merit should not be diluted, legitimacy of the judiciary is also a factor that needs to be taken into account. And if the judiciary excludes women, or minorities, that legitimacy is often called into question, however "objective" the judges may be in practice (again a question of justice being done and being seen (not 'seem' as in Torfason's amendments) to be done.

Remarks by Mr Mifsud Bonnici

1.The first comment concerns the “objective” criteria for the selection of judges. The text mentions (para.21), *qualifications, integrity, ability and efficiency”.* To my mind what is or should be the principal requirement is that the candidate has given proof of a sense of justice. Judges must first of all be “just”. In my experience, as a practicing lawyer for thirty years, I have known judges with strong academic qualifications, personal integrity, possessed of great ability and efficiency, who however had no strong and automatic sense of fairness, fail the ultimate test of being just. Just is not the same as having judgement. Just is having equity guide your judgement and your other baggage of knowledge, *sapientia* and *jurisprudentia.*
So I would suggest adding “sense of justice “ or “sense of fairness” to the objective criteria.

2.My second point concerns appointment of judges, by the Executive, albeit after some reference to the Judicial Council. The report does not make any mention of one great merit of this system: that the Executive’s decisions are subject to criticism and scrutiny by Parliament and public opinion. When appointments are made solely by the High Judicial Council there is no proper forum for debate and criticism. High Judicial Councils are not accountable to the electorate or to the public at large. The Council’s advice is of course very precious, but the responsibility for decisions should rest, in a democracy, with those who are accountable.
So I would suggest that a mention of the question of accountability in the selection of judges, should appear in the report.

3. My third point concerns the Judges conformity to a prescribed Code of Ethics. The suggestion has been made that a decision disciplining a judge made by the High Judicial Council, should be subject to appeal in an ordinary court. In my opinion this runs counter to the whole concept of having a High Judicial Council to deal with all matters appertaining to the judicature, so as to preserve its independence. If this highly representative body on which the component supplied by the judiciary has a majority, can have its decisions overturned by the ordinary courts, thus removing the finality of its decision, than it is denuded of its cloak of authority and of its usefulness. In most countries the competence of the Council is limited to discipline not to removal. Removal in most countries entails impeachment by a required majority (in the case of my country two thirds) of members of Parliament.

Given that a High Judicial Council is functioning it should be given the last word on discipline.

4. My fourth point concerns the allocation of cases to Judges. The Report opts for some sort of allocation either by rote or by the drawing of lots. It is suggested that the President of the Highest Court or the Chief Justice should be excluded from exercising discretion in the allocation of cases to individual judges. To my mind this is too draconian.
The best way would seem to be to have the judges agree on the allocation system, with the Chief Justice being given a casting vote or veto power in some cases.

Remarks by Mr Nicolatos

I propose the following amendments to the conclusions of the Report on Judicial Independence, with the necessary amendments in the body of the Report:

(a) Paragraph 11 should be amended deleting the last sentence "Higher courts should not … level of sentencing" and substituting it with the sentence "Higher Courts should only influence lower Courts by their Jurisprudence."
(b) By adding the following para. 13:
Judges should have the right place in the State Protocol along the Members of the other two Powers of the State. Presidents of Supreme Courts should be in the same position as Presidents of Government and Parliament. Members of Supreme Courts should be in the same position as Members of Government and Parliament.

Remarks by Mr Paczolay

According to Sec 3. of Art. 50 of the Hungarian Constitution
"judges are independent and answer only to the law. Judges may not be members of political parties and may not engage in political activities".

Sec. 2 of Art. 47 adds that
"the Supreme Court shall assure the uniformity of the administration of justice by the courts and its resolutions concerning uniformity shall be binding for all courts".

Deriving from the former, judges answer only to the "law" while deciding the case, they are not about to be subjects of undue influence. Decision-making means both the establishing of the facts and the interpretation of the law on these facts. In these two aspects should judges be independent. The "law" to be applied depends on the facts having been established. Therefore, so-called "law uniformity resolutions" issued by the Supreme Court, as obligatory guidelines defining the content of the norm, can hardly be compared to administrative orders. The main difference between them seems to be that unlike administrative orders, law uniformity resolutions answer only the question of law but not the question of facts.

According to the Constitution two things definitely influence judges in the decision-making: the law, for one, and the law uniformity resolution, for the other.

Without further examination, it is noteworthy that the institution of law uniformity resolution does not root in the soviet-type "conceptual direction" but in the "law uniformity decisions" that were adopted by the Curia (the highest judicial organ) between 1870 and 1946. The present institution attempted to resurrect this latter.

As for the Constitutional Court, it considered law uniformity resolutions as "judge-made laws" that have normative content (Decision 42/2005). The Supreme Court is not only entitled but also obliged to adopt them in the sense of the Constitution.

To sum up, in the field of legal interpretation I find it too general that the hierarchical organisation of the courts conflicts with the “inner” independence of the judiciary in a democratic society. Simultaneously I do not entirely agree that the mere existence of recommendations and of guidelines of higher courts infringes upon the “inner” independence of the judiciary.

Remarks by Ms Palma

1-Le premier c’est une question de structure mais avec influence sur la substance.

Il n’y a pas dans le texte une distinction entre indépendance externe (vers les autres pouvoirs) et une indépendance interne , soit disant vertical ,concernant la relation des tribunaux avec les tribunaux supérieures.
Le fondement de la première c’est l’ État de Droit ; la seconde c’est l’expression du principe que les juges ont seulement le devoir d’obéir à la loi et à la Constitution , étant tout à fait une conséquence de la première.

2-La seconde question c’est encore sur la dimension externe. Dans le texte nous n’avons pas quelque référence à la possibilité des juges d’exercer des autres fonctions provisoirement comme les fonctions politiques. C’est le problème de l’incompatibilité. Je crois que serai importante une position très stricte sur cette possibilité .

3-La troisième question c´est encore sur la dimension externe. Aux conseils supérieures doivent appartenir juges mais aussi d´autres personnalités comme avocats et professeurs universitaires. A mon avis il n’y a pas raison substantiel de légitimité pour que la majorité des membres soient des juges. La présence équilibré des personnalités indépendantes en face de leur curricula, nommés par le Parlement, donnerai une meilleure légitimation démocratique aux décisions de ces conseils.

4-Le dernier remarque concerne la dimension interne. La conclusion 11 du rapport c’est trop limité . Les interprétations de la loi vinculatives dans les cas de conflits de jurisprudence et naturellement les déclarations d’inconstitutionnalité sont encore d’accord avec le principe de la subordination des juges aux lois . Par exemple les arrêts d’uniformisation de l’interprétation de certaines lois peuvent offrir une garantie d’égalité aux citoyens. Par conséquent , je propose qu’on ajoute au fin du paragraphe «recommendations on the level of sentencing , including about interpretation of the law»