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International Round Table

SHAPING JUDICIAL COUNCILS
TO MEET CONTEMPORARY CHALLENGES

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(Hybrid format)

PRESENTATION
by

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Ladies and gentlemen,

Over the last few decades, judicial councils have become a common feature in many legal orders as a mechanism for the governance of the judicial branch[1]. The establishment of such councils is intended to shield the independent judiciary from overly direct influence and control by the executive / from the political domain. Judicial councils have in common that they are responsible for the management of certain aspects of the judiciary. However, beyond that general statement, it is difficult to formulate more specific common features. There exists a wide variation, both in respect of institutional design as well as in respect of the mandate and powers of the various councils. It is worthwhile remembering that not all judicial councils have powers in respect of the career of individual judges such as appointments, transfers, disciplinary measures and dismissals.

In recent years, the Venice Commission has – sometimes within the framework of wider judicial reforms – been asked on numerous occasions to analyse draft laws dealing with the composition and the functioning of judicial councils. Various aspects of that work will be dealt with in greater detail during the panels later today and tomorrow. I have therefore chosen not to give you an overview of the 'acquis' of the Venice Commission in respect of judicial councils, but to highlight some personal observations that may be of interest to you when reflecting on the question whether the current acquis of standards still meets the 'contemporary challenges' mentioned in the title of this conference. I want to make four observations.

My first observation relates to the issue of diversity. If it comes to judicial governance, there is no single 'model' which could ideally comply with the principle of the separation of powers and secure full independence of the judiciary. Whether something 'works' in a particular setting very often depends on a more holistic assessment of the institutional arrangements in a particular judicial council and the 'culture' in which the judicial council operates. There is not only a great diversity on a regulatory level (for example in respect of appointment procedures) but also in respect of 'judicial culture'. Admittedly, there is a common understanding as to the 'basics' – for example corruption. But there's much more difference of opinion on other issues – for example whether a judge should participate in public debate. Ones views on judicial culture obviously influence ones views on the desired role and desired composition of a judicial council. Given this diversity I feel a certain uneasiness applying rigid rules. One example: the Venice Commission stated in its 2010 Report on the Independence of the Judicial System Part I: The Independence of Judges (CDL-AD(2010)004) that *"In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers*". But in more recent opinions, the Commission applied the standard set in this respect by the Committee of Ministers' Recommendation CM/Rec(2010)12), i.e. that *"not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with the respect of pluralism inside the judiciary*". The advantage of applying such a uniform 'hard and fast' rule is that its foreseeability prevents the criticism that the Commission uses 'double standards'. But it does not always do justice to a particular setting.

My second observation relates to the issue of composition. Generally speaking, the Venice Commission is in favour of *'opening up' the composition of a judicial council* involving all court levels in the court system and introducing a non-judicial component in the judicial council. There should be a strong judicial component in the composition of a judicial council[2]. However, this does not mean that the quality of a judicial council necessarily increases if such a council is composed *exclusively* of judges. While the main purpose of the very existence of a judicial council

[1] The French Conseil Supérieur de la Magistrature is often considered to be the first modern judicial council (established in 1946), followed by the Italian Consiglio Superiuore della Magistratura. Nowadays, the European Network of Councils of the Judiciary consists of members from 20 European countries. By decision of the General Assembly of 10 June 2020 the Councils for the Judiciary from the United Kingdom were granted Observer status.

[2] Indeed, Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe on "Judges: independence, efficiency and responsibilities" calls for at least half of the members of judicial councils to be judges.

is the protection of the independence of judges by insulating them from undue pressures from other powers of the State[3], involving *only* judges carries the risk of raising a perception of self-protection, self-interest and cronyism.[4] Corporatism should be counterbalanced by membership of other legal professions, the 'users' of the judicial system, e.g. attorneys, prosecutors, notaries, academics, civil society.[5] This representation is justified since the objectives of a judicial council relate not only to the interests of the members of the judiciary, but especially to general interests.[6] Such non-judicial members in a judicial council may provide democratic legitimacy of the judicial council[7] and a fresh perspective on what is needed to become or be 'a good judge'. Merit is not solely a matter of legal knowledge analytical skills or academic excellence. It also includes matters such as character, judgment, accessibility, communication skills, efficiency to produce judgements, et cetera.[8]

Some more or less specific additional comments on the composition of a council:

- The Commission has in the past (most recently in respect of Serbia[9]) recommended to establish a council with an uneven number of members. Likewise, it has mentioned in the past (most recently in respect of Bulgaria[10]) that a judicial council if it is to be effective should not have too many members.
- A second specific issue relates to the question whether it would be desirable to gradually change the composition of a judicial council so that not all expertise is lost when the mandate of sitting members expires. I have to admit that I am somewhat hesitant in this regard: a staggered election process means that appointing bodies will have to go through the process of public calls etc multiple times. I rather hope they will go through the process thoroughly once every so many years.
- And a last specific issue relates to the inclusion of representatives of the executive in a judicial council. I think it is fair to say that the international community has over time increasingly become more sceptical in that regard. In older documents, the Commission stated that the presence of members of the executive power in a judicial council might raise confidence-related concerns, but that such a presence does not seem, in itself, to impair the independence of the council. It was however stressed that the Minister of Justice should not participate in all the council's decisions, for example, the ones relating to disciplinary measures.[11] In more recent opinions, the Commission has become more critical in this regard. It considered for example the inclusion of an Attorney General as a legal adviser to the executive, not desirable.[12] For the moment, it suffices to say that there is an increasing sensitivity in that regard.

My third observation relates to the issue of <u>selecting and appointing members</u> of a judicial council. Again, I do not intend to provide an exhaustive overview of the Commission's acquis in this regard. Just a few comments:

- With regard to judicial members: I would prefer to leave that as much as possible to the national judiciary concerned. I think the principle of 'broadest representation' provides important guidance in this respect, but how that principle is realized may – in my view –

[3] CDL-INF(1999)005 (Bulgaria), §. 28
[4] CDL-AD(2016)007, Rule of Law Checklist, §. 82
[5] CDL-AD(2018)003 (Moldova), §. 56.
[6] CDL-INF(1998)009 (Albania), §. 9.
[7] CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §. 29.
[8] CDL-AD(2010)004 (Report on the Independence of the Judicial System Part I: The Independence of Judges), §. 24.
[9] "Having an even number of members in the HJC is less usual than having an odd number, which is the current trend in many European states – there are only a few that have an even number of members in their judicial councils. […]" (Venice Commission, CDL-AD(2018)011, Opinion on the draft amendments to the constitutional provisions on the judiciary of Serbia, § 59).
[10] CDL-PI(2020)016, §.46
[11] CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §33.
[12] CDL-AD(2018)028, Malta, §. 61. And CDL-AD(2021)043, Cyprus, §38

be left to the judiciary itself in a given country. As you may notice, I personally would not object to having – at least to some extent – ex officio members in that regard. I think there are good reasons to prefer the participation of key figures of a judiciary in the work of a judicial council, especially if that council has important tasks in respect of the career path of judges.

- With regard to lay members: several jurisdictions have entrusted the task of selecting and appointing lay members to the national parliament. I think there are three key components for any appointing body: (1) a public call for candidates, (2) qualified majority voting in order to reinforce depoliticization, and (3) having in place an adequate anti-deadlock mechanism to avoid stalemates.

And my fourth and final observation relates to the working methods of a judicial council, especially if it is also responsible for decisions on the careers of individual judges. I think it is fair to say that the work of the Commission has in the past focused on securing judicial independence and on offering judicial protection to those affected. Inclusion of fair trial elements in the working methods of a judicial council are still very often lacking at least on a legislative level, i.e. timely access to information for the judge affected, ensuring the adversarial nature of (disciplinary) proceedings before a council, and the possibility of review against decisions of a council. While these notions remain essential, I would like to add two additional viewpoints:

- The *effectiveness* of the work of a judicial council. In that regard rules on voting in the council are important. It is obviously dangerous for decisions taken *against* judges to be taken too easily. At the same time, the authority of a judiciary can only be maintained if (a) the legal system puts in place adequate mechanisms to ensure that candidates are not appointed as a judge if they do not have the required competences or do not meet the highest standards of integrity; and (b) the judiciary is cleansed of those who are found to be incompetent, corrupt or linked to organised crime.[13] This is not only essential in view of the role a judiciary plays in a state governed by the Rule of Law, but also because a judge – once appointed for life – will in principle be irremovable except for limited grounds for dismissal.[14]
- A related issue is the need for *transparency of (the decision-making process in) a judicial council*, esp. given the fact that the 'users' of the judicial system nowadays expect more in this regard. Not only the political arena with a sometimes a very critical rhetoric as regards the judiciary, but also the wider public with a sometimes very low confidence in the integrity of members of the judiciary. Increased transparency has become a key priority in respect of the functioning of various state institutions, but it does not always seem to be the same in respect of the work of a judiciary. I fear that invoking independence is not always appropriate in this regard. We should avoid that the wider public gets the impression that independence is used as a synonym for unaccountability.

Chair, these are just some personal observations when reflecting on the question whether the current acquis of standards still meets the 'contemporary challenges' and to 'get us started'. I look forward to our discussion and thank you for your attention.

[13] Cf. CDL-AD(2016)009: "such measures are not only justified but are necessary […] to protect itself from the scourge of corruption which, if not addressed, could completely destroy its judicial system."

[14] Cf. CDL-AD(2018)034, para. 48: "The judicial branch of the government has various specificities (judges are usually appointed for life, they have to be independent and impartial, they are not directly accountable to the other branches of the government, their position cannot be challenged by the electorate at general elections, their decisions cannot be annulled by anybody outside the judicial system, etc.) which justify a differentiated treatment."