



DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



**Workshop on
Judicial Training
SESSION II
Improving Mutual Trust**

COMPILATION OF BRIEFING NOTES





DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS
CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

THE TRAINING OF LEGAL PRACTITIONERS: TEACHING EU LAW AND JUDGECRAFT

Session II **Improving Mutual Trust**

COMPILATION OF BRIEFING NOTES

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LIST OF ABBREVIATIONS

CCJE Consultative Council of European Judges

CoE Council of Europe

RECJ/ENCJ Réseau Européen des Conseils de la Justice / European Network of Councils for the Judiciary

UDHR Universal Declaration of Human Rights

Venice Commission European Commission for Democracy through Law

TEACHING JUDGECRAFT

John PHILLIPS

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ABSTRACT

The real feature that unifies European judges is the similarity of the judicial skills they require to do the job. Common training in judicial skills (or 'judgecraft') will not only improve their individual abilities but also help to build mutual confidence and trust among European judges and to foster a genuine European judicial culture.

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EXECUTIVE SUMMARY

All judges are required to know the law but equally (if not more) important are the judicial skills they need to deal with the situations they meet and the people they judge. The paper defines these skills and gives them the generic title 'judgecraft'.

Judicial skills are universal and they cross borders.

Research carried out by the Judicial College shows that English and Welsh judges attach more importance to training in judicial skills than in substantive law.

The College has responded to the research by making a culture change in judicial education. It focuses more on training in judicial skills and less on training in substantive law.

The seminar called the 'Business of Judging' is the best example of the College's new approach and it is described here.

The real feature that unifies European judges is the similarity (or identity) of the judicial skills they require to do the job. Common training in judicial skills (or 'judgecraft') will not only improve their individual abilities but also help to build mutual confidence and trust among European judges and to foster a genuine European judicial culture.

Such an approach is consistent with the Strategic Plan of the European Judicial Training Network, which should design, deliver and evaluate a short series of pilot seminars devoted to common European training in judgecraft.

1. JUDICIAL COLLEGE

1.1 The Judicial College was founded in April 2011. Until then judges who sat in courts had been trained by one organisation, whilst judges who sat in administrative tribunals had been trained by a number of different organisations. All these organisations merged to become the Judicial College and the result is that any person who exercises a judicial function in England and Wales is trained by a single institution. This applies to both induction training and continuing education.

1.2 There are 36,000 judicial office holders in England and Wales. Of these about 7,000 are professional judges and 29,000 are lay magistrates and lay tribunal members, all of whom are non-professional judges. This paper is about the training of professional judges.

1.3 One of the factors underlying the establishment of a single training institution in April 2011 was the principle that all judges, in whatever jurisdiction they sit, require the same basic judicial skills and can be trained together in those skills for the benefit of all. That principle also underlies this paper.

2. COMMON LAW SYSTEM

2.1 Of course, the judicial system in England and Wales is different from that of most European countries in that judges are not required to pass an examination before appointment. Instead most judges will have practised as a barrister or solicitor for many years. In the first instance a judicial appointment is likely to be part-time and fee-paid. After several years as a part-time, fee-paid judge some practitioners will be appointed as full-

time, salaried judges. This is unlikely to happen before the age of 40 and many full-time, salaried judges are appointed in their 50s.

2.2 Since in my view the essential qualities required of any judge are similar whatever his or her age, the fact that England and Wales operates a common law system is irrelevant.

3. SKILLS REQUIRED OF A JUDGE INCLUDING 'JUDGECRAFT'

3.1 Almost all countries attempt to define the skills required of a judge in a formal way. In England and Wales those skills are defined in a document called 'Framework of Judicial Abilities and Qualities', the product of detailed discussion with over 500 judges drawn from all levels of the judiciary. The document sets out what judges should expect of themselves and what the public expects of judges.¹

3.2 The Framework is divided into six 'headline' abilities (and their associated qualities):

- Knowledge and technical skill (conscientiousness, commitment to high standards)
- Communication and authority (firmness without arrogance, courtesy, patience, tolerance, fairness, sensitivity, compassion, self-discipline)
- Decision making (decisiveness, confidence, moral courage, independence, impartiality)
- Professionalism and integrity (sense of ethics, patience, tolerance, consideration for others, personal responsibility)
- Efficiency (commitment to public service, commitment to efficient administration, self-discipline)
- Leadership and management (responsibility, imagination, integrity, fairness, commitment to efficient administration).

3.3 I suggest that these abilities and qualities are universal. Only the first, knowledge and technical skill, is about knowing the law. The remaining five concern other abilities and in England and Wales these abilities are known generically as 'judgecraft'.

3.4 In my view the risk is that judicial training concentrates on the first ability at the expense of the other five. I do not think this should happen if a judge is to possess all the qualities necessary to do the job.

¹ Published in October 2008 and available at www.judiciary.gov.uk/publicationsandreports/judicialcollege

4. JUDGES' VIEWS ON THE NEED FOR TRAINING IN JUDGECRAFT

4.1 Formal documents like the Framework are sometimes ignored. However, research carried out by the College shows that judges themselves attach substantial importance to training in judgecraft. In other words the research reinforces what the Framework says.

4.2 The research consisted of a Learning Needs Analysis among judges of all levels, from those trying small cases in small courts right up to judges of the High Court. The main method used was group discussions with a cross-section of judges, or 'focus groups'. Groups of around 8-10 judges, who were attending existing College courses, were asked a series of questions by a facilitator in order to prompt exchanges of views within the group. The total number of judges participating in this research was about 300.

4.3 The questions asked were these:

- What are the greatest challenges you face in performing your role in and out of court?
- What skills do you need to develop, so as to perform more effectively?
- What are your preferred methods of developing those skills?
- To what extent does the existing training programme meet your needs?
- What are your suggestions for improvements to training?

4.4 The research showed four significant results. First, and most important for present purposes, it revealed a common request for training in practical skills rather than substantive law, with less emphasis on set-piece lectures and more opportunities for role play and group discussions facilitated by experienced judges.

4.5 These are two typical quotes from the research: "We need more on judgecraft skills - we can all do the academic stuff"; and, "We need less focus on substantive law. I don't mind being taken through it, but it's how we deal with it that matters".

4.6 That phrase, "It's how we deal with it that matters", is memorable and might be said to underlie the changes the College has made. The College's view is that the most important aspect of judging is not necessarily knowledge of the law, but how judges *deal* with the situations they meet and the people they judge. Training should be addressed principally to that.

4.7 Although less relevant, I will summarise the other three results of the research. The first was a strongly held view that judicial education should, so far as practicable, be tailored to the needs of the individual judge. One size does not fit all. Different judges have different learning needs and they should not all be treated in the same way.

4.8 Second, there was a common view that, whilst residential courses were valuable, they occurred infrequently and there was a need for more support between courses, particularly through the use of electronic media.

4.9 Third, the review concluded that the College should acquire greater professionalism in the design and delivery of training programmes. Judges involved in training are just that, judges, but they are not trained educators and they are not experts in adult education, a separate, highly developed skill in its own right. The trouble with judges (at least in England!) is that they tend to think they are good at everything.

5. RESPONSE OF THE COLLEGE TO THE LEARNING NEEDS ANALYSIS AND THE SHIFT TO TRAINING IN JUDGECRAFT

5.1 The College responded to the research by making five main changes to its programme of education. The changes are to continuing education, not induction training, since the College has yet to review its programme of induction training. Of these five changes the first two are the most important for present purposes:

- Training in substantive law is delivered to a substantial extent through the College website rather than at face to face seminars
- Training in judgecraft now occupies a significant amount of time at face to face seminars
- Continuing education is mandatory, not voluntary, but many judges now develop their own personal education programme by choosing a course or courses from an annual prospectus and booking online
- There is a wider variety of courses from which they may choose, since the wider the choice, the more likely it is that judges will be able to create a programme that meets their individual requirements
- The College now employs experts in adult education to assist judges in the design and delivery of training materials.

5.2 I shall restrict myself to the first two changes, those concerning the balance between substantive law and judgecraft. As regards the first, if you had attended a judicial training seminar in England several years ago you would probably have been bored. For the most part you would have been exposed to a series of talking heads, each talking at you for an hour or so about the law. The heads would have belonged to senior judges or academics and you would have listened to them politely or, more likely, you would have listened to them until you lost concentration or fell asleep. This would have been particularly so after lunch. Of course, you would have learned something along the way but you would not have remembered much afterwards. The benefit to you would have been low but the cost of accommodating you at an expensive training venue would have been high. The two did not match: low benefit, high cost.

5.3 The College has tried to increase the benefit without increasing the cost. To a significant extent, training in substantive law is now delivered electronically, not by face to face lectures. Presentations on substantive law are placed in an e-library on the College website, which is available to all judges. The presentations may take the form of paper documents, an audio podcast or a video podcast. Judges can download them or listen to them on their I-phone (if they are really desperate). They will no longer listen to a lengthy series of lectures at the seminars themselves.

5.4 The College believes that this change is beneficial in two ways. First, it reduces listening time at seminars. After all, you can only listen to someone for so long before you lose concentration. At most College seminars judges are not expected to listen to a presentation for longer than 30-45 minutes before engaging in a practical, participative activity. A lecture lasting for an hour would be unusual. Second, and more important, the effect of limiting the number of lectures at face to face seminars is to free up considerable (expensive) time for other training activities.

5.5 This extra time is used to focus on judgecraft. The College's view is that the most effective judicial training is that which requires *active participation* by judges and gives them the maximum opportunity to practise and develop their skills.

5.6 This cultural shift towards training in judgecraft is the second and most important change the College has made. In what follows I shall use a seminar called 'The Business of Judging' as an example of such training, but the same principle applies across the whole College curriculum. Seminars of this kind seem to meet the needs of English judges. I am not trying to promote the English method or suggest it is the right one. It is simply the College's response to its own domestic research.

6. 'THE BUSINESS OF JUDGING'

6.1 The title of the seminar derives from a book of the same name by Lord Bingham, one of the greatest English judges. Its predecessor was called 'The Craft of Judging', a title that perhaps better describes the content of this form of seminar. There are a number of topics to consider:

- Who designs and delivers the seminar?
- How are they chosen?
- Who attends it?
- What is its aim?
- What is the content?
- What do judges think about it afterwards?

6.2 Who designs and delivers it?

The answer is judges. The College works on the overriding principle that judges train judges. And the College's view is that *practising* judges know best what the training needs of other judges are. That has two consequences. The first is that, generally speaking, the College does not ask retired judges to deliver training, despite their obvious experience. The second is that the College relies less and less on assistance from academics. They are undoubtedly the masters of the law but on the whole they do not have the day to day experience of being a judge and what that involves. In the College's view actual judicial experience is the main requirement for being an effective judicial trainer.

6.3 The judicial trainers used at this particular seminar are of two kinds, a course director and a number of course tutors. The course director is responsible for the design of the training materials. As for course tutors, judges spend most of their time at the seminar working in small groups of six judges. Each group is facilitated by a judge called a course tutor. Since so much of the College's training is now carried out in small groups, course tutors are central to its operation. They are, if you like, the 'engine room' of judicial training in England and Wales and there are over 200 of them within the College.

6.4 The Business of Judging has 36 places for participating judges. This means that the teaching staff for this seminar comprises a course director and six course tutors.

6.5 How are the trainers chosen?

With some exceptions the selection process is the same for both course directors and course tutors. The posts are advertised, those who wish to apply complete an application form, some are short-listed for interview and the successful applicants are chosen at interview. The selection panel comprises three judges. It is an open and transparent process.

6.6 Who attends this seminar?

The answer is any judge who chooses to do so. The seminar is open to all. A judge is a judge. They may sit in different courts or tribunals but all should possess the key qualities set out in paragraph 3.2. It is the College's view that judges can develop these essential qualities by being trained together. Of course there must be jurisdiction-specific training as well, but there should also be common training in generic judicial skills. This promotes consistency of approach and raises standards across the board. So the judges who attend the seminar are criminal judges, family judges, civil judges, employment judges, immigration judges and any other kind of judge.

6.7 What is the aim of the seminar?

This is set out in the programme, as follows:

"The aim of the seminar is to enable you to improve your judicial skills by practising them and learning from judges who sit in other jurisdictions."

The essence of the seminar is practising, as set out in the following paragraphs.

6.8 What is the content of the seminar?

The seminar lasts for two days. It is a paperless seminar. There is nothing to read and nothing to prepare, which may be one reason it is popular. It occupies a total of 13 training hours and judges spend only 2.5 of those in plenary sessions listening to others speak. For the rest of the time they work in small groups of six judges supervised by an experienced course tutor, as stated above. This means that the seminar is about 20% listening and 80% doing. You would find similar proportions in other College seminars.

6.9 The seminar is divided into four parts. Part 1 is entitled 'Judicial conduct and ethics'. In their small groups the judges are invited to discuss seven 'in court' and 'out of court' scenarios. The College wrote the scripts, which were then filmed using professional actors and placed on a DVD. Judges watch the DVD and discuss how they would deal with each scenario against the background of the English 'Guide to Judicial Conduct'. The College encourages consistency of approach but not robotic consistency.

6.10 Part 2 is entitled 'Assessing credibility and reliability, making a decision and giving an oral judgment'. The assessment of credibility and reliability is surely one of the most important judicial skills and is required in most cases, whatever the jurisdiction. Very often cases turn on the facts, not the law. In the small group setting the judges are asked to watch a DVD showing the conflicting evidence of the claimant, the defendant and their witnesses in a case alleging sexual harassment of an employee by her employer. It is an invented case in which the College wrote the script and which was again filmed using professional actors and advocates. It shows the kind of factual dispute that could arise in any jurisdiction anywhere in Europe – the employment jurisdiction is merely the vehicle and the law is simple. The judges are asked to complete questionnaires indicating the factors that affected their assessment of the witnesses' credibility and reliability and they then discuss the relative weight of those factors. There are no right or wrong answers.

6.11 After a short period for preparation each judge gives a brief oral judgment in the case, lasting about five minutes. (In England and Wales immediate oral judgments are very common but a similar exercise could be devised for written judgments.) The judgment is delivered in the small groups. Each judgment is filmed on micro-disc and all or part of the film is replayed there and then within the group. Each judge receives feedback from the course tutor and the other members of the group on his or her 'performance' and there is a discussion of the learning points that arise. In a country where one judge rarely sees how another judge goes about his or her work, this is a valuable learning tool. Judges take the only copy of the film home with them.

6.12 Part 3 is entitled 'Managing judicial life'. 'Judicial life' really means 'judicial stress'. This short part aims to help judges deal with the stress of the job and consists of a presentation by a judge with special expertise in judicial welfare. It is a time for reflection in advance of the highly participative Part 4.

6.13 Part 4 is perhaps the culmination of the seminar and is called 'Dealing with high conflict and unexpected situations in the court or tribunal'. Here each judge is asked to conduct a *live* hearing lasting a few minutes. They will have received a brief summary of the case in advance but they do not know what is about to happen. In an attempt to simulate the court or tribunal setting the case is acted out by professional advocates and professional actors. The judge's task is to assess, manage and solve the (sometimes difficult) problems that unfold before him or her.

6.14 The judge's 'performance' is filmed and all or part of the film is replayed within the group. The judge then receives immediate feedback on his or her performance from the course tutor and the members of the group. There are six scenarios and each member of the group presides as the judge in a different scenario. Two are set in the civil jurisdiction, two in the tribunals jurisdiction² and one each in the criminal and family jurisdictions, but the judge could be asked to deal with any of them. The scenarios are merely a focus for discussion and exchange of knowledge. Again the judges take the only copy of the film home with them.

6.15 The predecessor of the 'Business of Judging', the 'Craft of Judging', included an additional section entitled 'Managing child and vulnerable witnesses', a truly cross-jurisdictional topic. In this section three scenarios involving a child or vulnerable witness were presented, each witness being played live by a professional actor. The judges were asked how they would deal with the situations that arose.³

6.16 On any view this is a raw and intensive form of training and judges are undoubtedly nervous before it starts. This apprehension tends to dissipate as soon as they start 'performing'. Almost all say that the experience was not as bad as they expected and that they forgot about the camera quickly. Such a seminar, admittedly expensive, is the nearest training can come to real judicial life and for that reason it is, in the College's view, an effective method of developing some of the judicial skills set out in paragraph 3.2.

6.17 What do judges think about the seminar afterwards?

At the end of the seminar the judges complete evaluation questionnaires, which are then analysed by the College and distilled into a separate report. In answer to the question, 'How useful was the seminar to you in your role as a judge?', an average of 92% of participants say the seminar was very or substantially useful to them, whilst the remainder declined to answer the question. One judge said, 'The best training event I have ever attended; it was an invaluable opportunity to see how others deal with issues and to learn from constructive criticism.' But it is not all one way. Another judge said, 'The scenarios were too difficult and some of them were highly unlikely to occur in real life.'

6.18 The College has run the 'Business of Judging' seminar on several occasions now and has decided that training in judicial skills will play a significant part in its curriculum for the foreseeable future. It will not replace jurisdiction-specific training but will complement it as, we think, a valuable method of developing judicial skills and improving judicial consistency and performance. It has also been observed by members of the EJTN Best Training Experts' Panel with a view to assessing its transferability to other European jurisdictions.

² The first in the Employment Tribunal and the second in the Immigration and Asylum Tribunal

³ The College does not deliver this module at present since budgetary cuts have required a reduction in the length of the seminar.

7. THE EUROPEAN CONTEXT

7.1 Judgecraft crosses borders.

7.2 The College can already evidence that in the context of the Commonwealth, since it has delivered the 'Business of Judging' in Singapore, Malta and, as recently as August 2013, Mauritius. Since the seminar deals with generic judicial skills it is exportable, though some changes to the scripts were necessary to accommodate local differences in law and procedure. These changes were comparatively modest.

7.3 As far as Europe is concerned, there are several instruments of the European Parliament and the European Commission which stress the need to foster a 'genuine European judicial culture'. These are fine words but what do they mean?

7.4 I can see that training judges in European law, training them in the legal systems of other countries, developing their linguistic skills and organising exchange and other programmes are ways of achieving this elusive goal.

7.5 I think, however, that the *real* feature that unifies European judges is the similarity (or identity) of the judicial skills they require to do the job, whether in Madrid or Bucharest. I suggest, therefore, that common training in judgecraft will not only improve judges' individual skills but also help to build mutual confidence and trust among European judges and to foster a genuine European judicial culture.

7.6 I note that the new Strategic Plan of the European Judicial Training Network includes the following:

"EJTN will provide seminars and other training activities on judgecraft skills (including case management, reason writing, assessing credibility, questioning techniques, evidence gathering) where they are deemed relevant to the generic professional training of the European judiciary."

7.7 It will be interesting to see whether the Pilot Project on European Judicial Training identifies training in judgecraft as a 'best practice' for building a European judicial culture.

7.8 The EJTN will have its own views on the design and delivery of common European training in judgecraft. One possibility would be a small series of pilot seminars designed by a working group with representatives from (say) four countries. The seminars would be attended by judges from those countries and, if evaluation showed them to be successful, the training materials could be used more widely in the European Union.



INDEPENDENCE AND ETHICS: A NEW LEGITIMACY

Gracieuse LACOSTE

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ABSTRACT

Our democracies face a new challenge with regard to the judiciary. The increasingly litigious nature of our societies and increased role of the media are adding new complexities. Our societies expect responsibility, efficiency and transparency in the functioning of the judicial system. Authority and the force of the law are no longer enough to serve justice. The legitimacy of judges relies on public confidence. If they are independent, their responsibility and ethics strengthen the credibility of the judicial system.

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INTRODUCTION

Serving justice is an essential activity in a democratic society, with one fundamental prerequisite: an independent judiciary and judges. It is generally accepted that the organisation and functioning of the judiciary must be independent of executive and legislative powers in order to meet international and European standards.

On reflection, this contribution should have been called ‘In search of a new legitimacy for justice’.

The traditional and formal concept of the separation of powers does not take into account changes in our societies, which are faced with the emergence of new powers, media influence and public opinion. The framework of the sovereign State itself is being called into question as a result of the globalisation of the economy, finances, crime and communication. The law is no longer the sole prerogative of national parliaments; the overlapping of national and supranational standards means that a new legislative outlook is being established for all.

At the same time, the rise of litigiousness in its disputes between individuals or punishing the perpetrators of criminal offences, has led to a considerable increase in matters being referred to judges, trivialising judicial recourse. Judges have not been spared in the search for responsibility and the fight against impunity.

Against this backdrop, the traditional notion of independence or autonomy, a privilege at the basis of judges’ immunity, is being called into question. The application of the principle of independence ensures that everyone can have their case reviewed by an independent court or judge.

Furthermore, the general requirement for transparency with regard to the functioning of all institutions and the development of the media have brought problems in the judicial system or the failings of judges into focus. In their activities, judges can no longer rely on authority and the force of the law alone in order to exercise this function, which is nonetheless essential for the rule of law. It is considered legitimate that judges should accept responsibility in return for their independence. Judges have become accountable for the credibility of the judicial system and the slightest failing by one judge reflects on them all. Judges develop their own individual and collective legitimacy by demonstrating, on a case-by-case basis, the professional values which form the basis for serving justice. Ethics and responsibility have become the trade-off for judges’ independence.

1. THE INDEPENDENCE OF JUDGES: A DEMOCRATIC GUARANTEE FOR ALL

1.1. State of play

It is always worth reaffirming that serving justice, an essential activity in a democratic society, has one fundamental prerequisite: an independent judiciary, judges and resources, in order to ensure that they function correctly.

Analysis of the different coexisting judicial systems shows that the institutional organisation of each State reflects the historical relationships between the different powers and the place occupied by justice.

Generally speaking, it is recognised that the principle of independence is borne of an organisation which ensures the separation of powers without interference from executive and

legislative powers in the functioning of the system⁴. Traditionally, when we talk about the independence of the judiciary we are referring to relationships with politicians, the executive, and less directly, with the legislature⁵.

In order to be able to serve justice, judges are granted exceptional powers, including the power to contravene, under certain circumstances, fundamental freedoms and the freedom of individuals. Judges' independence is provided for in a statute freeing them from interference, from another authority, from another party or from public opinion, thereby ensuring that the person on trial has a fair trial before an independent and impartial judge.

This 'classical and traditional' notion of justice is being shaken by changes in modern society; the institutional framework is no longer enough to justify and legitimise independence. The current situation has become more complex as justice, like all institutions, is facing calls for transparency led by the media. At the same time, the search for responsibility, a characteristic of our societies, has led to litigiousness and therefore trivialised legal recourse.

The judiciary must handle mass disputes while remaining attached to its rituals, which are applied by specialised professionals using substantive and procedural laws which are often unfamiliar to those affected by them. It is not unusual that dissatisfaction emerges as a result of this clash, leading to criticism of the judicial system.

However, aside from that, cases which have received considerable media attention have publicly highlighted individual failings and institutional issues. According to the most radical and sometimes caricature-like media coverage, partially reflected in public opinion, justice is neither fair nor efficient, it is not independent, it is not impartial, judges are irresponsible, they protect one another and there is supposedly a corporatist code of silence which prevents their responsibility from being called into question. Some politicians have stated without hesitation that judges should be made to pay.

Generally speaking, in France and in other countries, this has been followed by a general crisis of confidence and a calling into question of how justice works⁶. The quality of court decisions and improving the efficiency of European judicial systems have become research topics⁷.

The denial of any impunity, a sign of our times, has led to the emergence of questions about the legitimacy of the judiciary in debates on justice. Questions have been asked about the trade-off for judges' exorbitant powers and calls have been made for internal and external control.

This situation is made more complex by widespread media coverage and the development of new media delivering information in real time, a concept that is alien to the functioning of the judicial system. Communication, including communication on personal matters, tends to become a real jungle, sometimes to the detriment of privacy or the presumption of innocence. Some cases, particularly criminal cases, have started a media wave targeting individuals, politicians, authorities, media personalities, judges, etc. Matters are constantly referred to the court of public opinion and emotion without the judiciary managing to provide a suitable response or protection for individuals.

This broad outlook leaves us with two questions: how do we ensure that the principle of independence is a legitimate right and how do we ensure, specifically, the right of all those on trial, in all cases, to have their case reviewed by an independent and impartial judge?

⁴ Art. 10 of the UDHR, General Assembly of the United Nations, 20 December 1948.

⁵ As this study is about France, it focuses on the situation of presiding judges with irremovability. Members of the French Public Prosecutor's Office have the status of judges; they are bound by impartiality in the application of the law, cannot be forced to keep quiet about an offence and have freedom of speech at hearings.

⁶ For example: Outreau case in France, Dutroux case in Belgium, Amber Gold case in Poland, etc.

⁷ Mbongo, P., *La qualité des décisions de justice*, Council of Europe Publishing, 2008, http://www.coe.int/t/dghl/cooperation/cepej/series/Etudes4Qualite_fr.pdf.

1.2. Outlook

Faced with this situation, what are the solutions in order to regain legitimacy and public confidence? This general contribution, produced by a judge, does not aim to offer ready-made solutions but to suggest areas for reflection which could strengthen the legitimacy of the principle of independence. It proposes four axes to specifically revitalise independence: the institutional level, the law, resources and knowledge of the judiciary by the general public.

1.2.1. Institutional level

While the ‘classical and traditional’ notion of the separation of powers has its limitations, it is still relevant for ensuring institutional independence; it is simply a case of reviewing it by integrating mechanisms which respond to the problems mentioned earlier.

It is worth remembering that each State’s higher legislation⁸ must govern the judicial system, its independence and the independence of judges. The continental model of a constitutional body liaising with other powers to effectively ensure independence and a statute for judges is still the most common model in Europe (High Council of the Judiciary or Council of Justice). However, this does not require questioning British, US or Anglo-Saxon-inspired judicial systems: their historical evolution has led to a model for organising the judiciary and separating powers which respects the principle of independence.

The composition of this constitutional body responsible for justice represents an issue in terms of legitimacy. Judges hold a majority share in order to preserve independence and prevent any interference from other powers. Another school of thought holds that this composition leads to corporatism. Two criticisms are raised time and again: corporatism and politicisation. In both cases the result is a lack of legitimacy for the body in question. By taking these two risks seriously, mixed solutions incorporating, on an equal footing, external figures, civil society representatives and judges elected by their peers in accordance with democratic election principles, will make it possible to restore democratic legitimacy.

Composition is not everything. The appointment of the presidency must also be democratic and transparent.

Lastly, this body must have the resources to ensure the independence of the judiciary through the appointment of judges, by following their careers and having disciplinary powers over them.

In an ideal world, it should also have budgetary control in order to avoid any threats to independence through the allocation of resources.

As the body in charge of the independence of the judiciary, it must be possible to refer to it matters posing a threat to the independence of the judiciary or judges in a specific situation, or for it to look into such matters on its own initiative. In such a situation, its decisions or recommendations must be respected. Examples of protective texts in this area remain few and far between. Institutional mechanisms enabling anyone concerned, be they a judge or the person facing trial, to refer matters directly to the body in charge of independence when independence is at risk would represent a step forward to guarantee independence. These mechanisms should remain balanced in order to prevent judges becoming destabilised and the institution becoming paralysed.

Higher legislation must provide for the irremovability of judges. There must be a specific statute governing their rights and duties. Recruitment, training, appointment, career development, advancement and discipline must be specified. This statute is the cornerstone that enables independent judgement by preventing any risk of destabilisation. This mechanism

⁸ The Constitution or equivalent standard depending on the legal system.

for protecting judges also applies to those facing trial, who must be assured that they will be judged by an independent, impartial and competent judge with integrity. When all of these values and conditions are met, on a case-by-case basis, regardless of the case in question, it is up to the judge to apply the law, or to provide a legal solution, to the situation submitted to him or her.

1.2.2. The Law

There are several coexisting models with regard to the application of the law. Aside from these differences, whether with regard to procedural provisions or substantive rules, the principle behind all of these models is equal treatment.

Questions remain about judges' relationship with the law and their room for manoeuvre. Contradictory movements can be seen which are shaking up traditional historical perceptions.

The law is no longer the sole prerogative of national parliaments; the overlapping of national and supranational standards means a new legislative framework is being established for all. Judges must apply it to each case with the possibility, in some cases, of bypassing national law, which undeniably increases their power.

This situation is not unusual in itself as our societies are faced with issues which go beyond the Nation-State. Laws have become borderless, as has crime, with mafia networks and money laundering networks working along State borders - their victims, our whole communities. Given these powers, States do not want to lose control of their repressive national space and have long resisted providing sufficient rules or institutions to respond effectively. The fight against terrorism has been used to justify, even by way of prevention, attacks against the rights of individuals and their freedoms, the limitations of which have been proven.

At the same time, in criminal matters, some States choose to adopt laws providing for automatic sanctions⁹. Not only do they convey an outdated view of the role of judges as the 'mouth of the law' and mistrust towards judges, they have damaging effects in terms of legitimacy. The application of automatic sanctions can lead to unfair situations as sentences no longer in reflect the facts. Repeat offences become the determining factor, with the facts falling into second place. Since criminal justice ought to be positioned at a reasonable distance, passing disproportionate automatic sanctions could delegitimise the institution responsible for them.

Analysis of this paradoxical situation raises questions about the role granted to judges and the trust placed in them. It is part of the judge's mission to assess the rules for applying the law to a particular case. Due to its general nature, by definition, the law cannot cover everything and any system which limits the judge's margin of interpretation has damaging effects by turning against justice.

The main challenge for our democratic nations is to find the balance between efficiency and respect for individual rights, to favour access to judges so that they may evaluate the situation and finally to give them the ability to fulfil their mission. Supranational and national frameworks must work together to enable this essential balance to be reached.

1.2.3. Resources

A poor judiciary, which has no resources and is unable to respond within a reasonable time frame, loses all legitimacy.

⁹ For example: United States, minimum sentences for around 100 offences; Canada, minimum sentences for around 40 offences; Germany, minimum sentences for offences considered particularly serious; Spain, restricted sentences; California, 'Three-strikes law'; France, minimum sentences.

All of the comparative work carried out in Europe on the efficiency of the functioning of national judiciaries is fascinating but, for the moment, the objectives are still not being conveyed fully at State level¹⁰.

In view of this, the Council of Europe could propose a European recommendation, with a range, by determining a budget per inhabitant. We can hope that such an assessment would make public authorities take responsibility.

1.2.4. Knowledge of the judiciary

Lastly, citizens' knowledge of institutions remains the most effective democratic foundation. The judiciary remains a world apart, little known by the public. All school education programmes should include a presentation of the world of justice and thereby reduce the knowledge gap linked to ignorance about the functioning of the judiciary.

In addition to presenting the judiciary, information on the protection of rights and individual freedoms, the idea of public order and the role of criminal law and legal regulation methods could provide citizens with the key to understanding and facilitate respect for the rules of collective living.

The judiciary, and judges, must take care to be better understood by adapting their written and oral statements to their audience. A real communication policy should promote knowledge of the functioning of the judiciary. Individual decisions should however remain respectful of the private lives of those involved.

Our changing and demanding democratic societies believe in limitless transparency, with new streaming media, which need immediate information, encouraging this movement. Some proceedings, often criminal cases, have been the subject of live broadcasts and streaming, becoming real soap operas with a global stage. In terms of justice, transparency must take a secondary role to respect for the private lives of those involved; some stages of the trial are public, others are not, but the principle of the presumption of innocence must always be respected.

Investigations into the judiciary¹¹ reveal paradoxical conclusions: the person on trial individually facing their case wants a serious investigation to take place within a reasonable period of time, but not too quickly, with respect for their private life. Collectively, those on trial can denounce time frames in the justice system, either for being too long or too short, the cost of proceedings, the complexity of the organisation, etc.

A rational communication policy on the functioning of the judiciary would prevent a distorted view of the reality of the judiciary; it would not make criticisms disappear but it would limit them to more rational margins.

Regular monitoring of the state of opinion on the functioning of the judiciary (barometer) could enable us to measure the public's satisfaction and confidence. This should be carried out by the body responsible for independence in order to avoid any risk of 'manipulation-exploitation' against the judiciary.

¹⁰ Reports by the European Commission for the Efficiency of Justice. 2012 Edition – Efficiency and Quality of Justice.

¹¹ For example, in France – Mission de recherché Droit et Justice 'Les Français et la Justice' [Law and Justice Research Mission 'The French and Justice'] - http://www.gip-recherche-justice.fr/catalogue/PDF/rapports/00-RF_Bastien_Francois.pdf.

2. RESPONSIBILITY AND ETHICS OF JUDGES IN EXCHANGE FOR INDEPENDENCE

This analysis is based on the situation in France but many common points can be found in other countries in Europe.

As mentioned above, the development of the media calls for enhanced general transparency with regard to the functioning of all institutions; cases in the media spotlight have focused on problems in the judicial system or the failings of judges. Some proceedings have put the judiciary on trial¹² and fed into politicians' and citizens' desire to see judges held responsible for their actions, in exchange for their independence.

The question that comes up time and again is 'Who will judge the judges?' Judges' accountability is considered a legitimate exchange for their independence. It is no longer accepted that judges wash their hands of their responsibility in the name of their independence.

Judges have become accountable for the credibility of the judicial system, and the slightest failing by one judge reflects on them all.

As mentioned, the evolution of the legislative field means that several models of judges coexist: in criminal matters, automatic sentencing makes the judge a distributor of sanctions, while other areas subject to interpretation make them 'creators of law'. These various functions require changing ethical rules and responsibilities.

A 'failed' judge is no longer a judge and it is legitimate that they should accept responsibility, including disciplinary measures. The statistics confirm that individual failings remain residual.

Nevertheless, judges develop their own individual legitimacy by demonstrating, on a case-by-case basis, the professional values which form the basis of serving justice. Collectively, judges' ability to become involved in defining the rules upon which justice is based can only serve to reinforce their legitimacy in the eyes of the public.

As necessary as it is in order to sanction inevitable individual failings, a system of responsibility that is compatible with independence is not enough to ensure trust in the functioning of the judicial system and ethics, understood both in the sense of day-to-day professional morals and also as a guide for preventing individual failings.

2.1. Responsibility of judges

Against a backdrop of tension, the responsibility of judges is still being addressed in France through disciplinary sanctions. The difficult relationships between judges and politicians¹³ and the role of public opinion have given rise to the idea that judges enjoy a system of "impunity" and that a caste developed in the absence of any sanctions.

While we can understand calls for responsibility against judges in exchange for their exceptional powers, we must never lose sight of the fact that, given their specific task, only a system of specific responsibility could enable us to ensure their independence¹⁴.

¹² This was the case in France with the Outreau trial, which was the subject of a parliamentary committee of inquiry. The press has reported on the shakeup of the French judiciary as a result of the Outreau case. The Dutroux case in Belgium has also had an impact on the judiciary.

¹³ For example: France, 2005, Statements on the murder of Nelly Cremel: according to some politicians, *'the judge must pay'*.

¹⁴ Lacoste, G., 'Le recueil des obligations déontologiques des magistrats: de la défiance à la confiance, in Simon, J., *La déontologie des cadres de la fonction publique pour un service public responsable*, Scérén-CNDP, Chasseneuil du Poitou, 2012, pp. 37 – 44.

In France, judges are public officials, with a particular status, which explains the peculiar rules of their responsibility: the State is responsible for repairing the damage caused by the defective functioning of the public service of the judiciary.

In contrast, the professional failings of judges are sanctioned using discipline by the High Council of the Judiciary, a pluralist constitutional body, in accordance with procedural rules set out in the statute of the judiciary, along with the types of sanctions, in application of the principle of legality.

Criticism of corporatism and of a code of silence in the judiciary has spurred the authorities to change the rules of referral in disciplinary matters. For a long time, the Minister for Justice was the only person to have this power. He has had to resign himself to sharing it with the first presidents and attorneys general of the courts of appeal and then, under certain conditions, with those on trial, parties involved in judicial proceedings. The fact that these three referral methods coexist means that the idea that French judges are experiencing a situation of impunity in cases of failings can no longer be confirmed or disseminated. The person responsible in the court of appeal, the minister at national level and the person on trial concerned can initiate disciplinary proceedings, and therefore impunity is not possible.

However, in order to guarantee those on trial a ruling without the risk of interference from any possible source, including the media or public opinion, the principle of independence ensures that judicial decisions are only subject to a new examination using the remedies provided for by law. This sort of 'immunity', which only covers the judicial decision, and never the judge, is only limited when the judge 'has exceeded his or her competences or disregarded the nature of their referral, so much so that all he or she has achieved is an act removed from any judicial activity'¹⁵.

In reality, French judges can be sanctioned for the conditions in which they render their decisions or exercise their functions: slowness, delays, various inadequacies and biased attitudes account for 70 % of the sanctions pronounced by the High Council of the Judiciary¹⁶.

Contrary to popular belief, judges, bound by common law criminal responsibility in their private lives, can also be called to respond to disciplinary authorities for these offences, which also represent disciplinary infractions, without the presumption of innocence allowing them to evade such sanctions. A disciplinary sanction may indeed be pronounced without waiting for the criminal courts to make a definitive ruling.

Judges must respect their professional obligations, but they must also refrain from private actions which could discredit the judiciary. They are accountable for the impact of their behaviour on the image of the judiciary.

There are seven kinds of disciplinary sanctions, ranging from warnings to dismissals.

2.2. Judicial ethics

For around twenty years, a movement has been taking place, regardless of the legal system, whereby judges are realising that they can no longer simply rely on their legal authority and the force of the law to serve justice in their daily lives and that they have become accountable for the credibility of the judicial system, with the slightest failing by one judge reflecting on them all.

This general movement has led judges to formalise the founding values relating to the task of serving justice and this movement is reflected in the drafting of the Bangalore Principles, under the aegis of the United Nations¹⁷.

¹⁵ *Decision S 44 of 8 February 1981*, Recueil des décisions disciplinaires du Conseil supérieur de la magistrature.

¹⁶ French High Council of the Judiciary - Recueil des décisions disciplinaires.

Aware of society's expectations of judges, the Consultative Council of European Judges, within the framework of the Council of Europe, addressed this subject in opinion no 3 in 2002¹⁸. In order to overcome all the risks threatening independence, this opinion recommended that judges or a legitimate authority should define ethical principles. The European Network of Councils for the Judiciary adopted a declaration on ethics in London on 4 June 2010, drafted by a working group on this subject¹⁹.

In France, the debate on ethics, which began in the 1990s, has been plagued with recurrent attacks against judges. Responsibility and ethics have been used in a latent war with politicians to limit independence. There have also been strong fears that judges will have to individually bear responsibility for problems in the system or the lack of resources under the guise of responsibility and ethics. Fears of an attack on independence have put a stop to any attempt to formalise French judicial ethics for several years.

The publication in 2006 of the disciplinary case law collection, a database on discipline for judges, was a decisive first step. Transparency with regard to sanctions and the reasons behind them has allowed for democratic control, within limits.

It was only with the law of 5 March 2007 that a solution was found when, paradoxically, the French legislator entrusted the drafting of a collection of ethical obligations to the body responsible for discipline, a solution far removed from the European standard, which recommends separating discipline from ethics.

The participatory method adopted by the High Council of the Judiciary has allowed judges to play a part in defining ethical obligations, and is therefore in line with the recommendations of the Consultative Council of European Judges which supports judges establishing the principles of professional conduct. Contributions from the courts of appeal have been incorporated by theme. In June 2010, the collection was made public²⁰, presented in the form of six principles: independence, impartiality, integrity, legality, care for others, discretion and reserve. These principles are accompanied by comments or recommendations. They apply on three levels: the institutional level, the exercise of functions and the personal approach.

This public collection is intended for judges, public prosecutors and the public. Through training, knowledge of its content should serve as a framework for the judiciary. The National School for Magistrates offers training programmes on ethics in the form of initial and continuous training. The publicity surrounding this can only improve public information about judges' activities when carrying out their various tasks and thereby strengthen the credibility of the institution.

As each State is responsible for formalising its ethics depending on its historical evolution and its own references, interpretations have taken or will take various forms: collections, recommendations, codes of deontology or judicial ethics, etc.

Leaving aside these diverse interpretations, analysis of the various ethical obligations already adopted shows that the content is universal: independence, impartiality, integrity, reserve-discretion, diligence, respect and ability to listen, equal treatment, competence and transparency. There are historical explanations for the variations (duty of legality, dignity, delicacy), but the main founding values of the act of serving justice always remain the same.

¹⁷ The Bangalore Principles (draft code of judicial ethics) dated 2001: http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Bangalore_principles_EN.pdf.

¹⁸ Conseil Consultatif des Juges Européens, Avis n° 3 sur les principes et règles régissant les impératifs professionnels applicables aux juges et en particulier la déontologie, les comportements incompatibles et l'impartialité, [https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE\(2002\)OP3&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3](https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2002)OP3&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3).

¹⁹ ENCJ Working Group www.encj.eu.

²⁰ French High Council of the Judiciary, Recueil des obligations déontologiques des magistrats, Dalloz, Paris 2010, available at: http://www.conseil-superieur-magistrature.fr/files/recueil_des_obligations_deontologiques_des_magistrats_FR.pdf.

It should also be noted that judges, as individuals, must also display qualities such as courage, wisdom, common sense, humanity and conscience, which of course makes them perfect figures, something which is difficult for a human being to achieve, but which is legitimate from the point of view of the person on trial.

Raising awareness of these ethical obligations is the surest way to break the feeling of impunity and all-powerfulness of judges which some media sources tend to propagate in public opinion.

Training for judges is the ideal melting pot for these values and qualities to be integrated and worked on specifically in order to be applied to the act of serving justice on a daily basis, in order to permeate legal practice as a manner of being and acting.

Finally, the most delicate part falls to judges, who must be aware that both their professional behaviour and their private lives and conduct in society have an influence on the image of the judiciary and public confidence.

CONCLUSION

Independent, impartial, competent and diligent judges with integrity are not enough to ensure confidence in the judiciary. Judges must carry out their work with wisdom, loyalty, humanity, courage, seriousness and prudence and they must be able to listen, communicate and understand the meaning of the work. While these requirements are not specific to judges they are nonetheless essential for ensuring the right to justice for all.

Independence and confidence have a price and although judges are partly responsible, we must not lose sight of the fact that discipline and judicial ethics, as essential as they are, will not be able to carry public confidence in the judiciary on their own. In order to respond to the expectations of the public, of society, we must lead institutional reforms that guarantee the independence of the judiciary, establish fair, tailored procedures and allocate human resources, budgetary resources and equipment to the judiciary, which are essential if it is to function effectively.

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Φ Φ Φ

THE INDEPENDENCE OF THE JUDICIARY

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ABSTRACT

This note examines the international and European standards concerning the independence of the judiciary, distinguishing between external and internal independence. It also presents the main indicators of independence, as used by the Venice Commission in its analyses.

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EXECUTIVE SUMMARY

At the European and international level, there exist a very large number of texts on the independence of the judiciary. They deal with both external and internal independence and the principles they establish should be incorporated in the Constitution or equivalent texts, in order to avoid being repealed or modified by ordinary laws.

External independence is a concept referring to the independence of the judiciary as a whole and of individual judges from the political power, notably the government, the legislative power, political parties, etc. The fundamental basis of external independence is a system whereby judges are appointed by an independent body, composed by at least a half of judges chosen by their peers. In such a system, the High Judicial Council, or Superior Council of the Judiciary, is also competent to take all measures concerning the legal status of judges, such as promotions, transfers, disciplinary sanctions, dismissals, etc.

The notion of internal independence refers to the relationship between individual judges and the president of the court and higher judges, that is, to the judges' independence and autonomy in carrying out the judicial functions in respect to the structure to which they belong. The fundamental basis to ensure internal independence is the constitutional principle of the natural judge established by law, that is to say, the right of everybody to a lawful judge identified on the basis of objective criteria predetermined by law, not on the basis of discretionary choices of the president of the court in the allocation of cases to the judges.

The principle, expressed in numerous European Constitutions, is an essential but not sufficient guarantee of independence. Internal independence can also be jeopardized by a hierarchical organization of the judiciary, where the decisions of the judges are subjected to the control of the president of the court or to preliminary instructions and directives. It is worth mentioning that in hierarchical judicial organizations the presidents of courts are the privileged channel through which the government may exercise pressure on the judiciary.

The independence of individual judges is also guaranteed by the constitutional principle that "Judges are subject only to the law". This principle guarantees independence both from influences, instructions and recommendations coming from within the judiciary and from external pressures coming from the political power. The principle is closely linked to the constitutional principle of equality among judges: both principles are incompatible with any form of hierarchical organization or supremacy of upper judges on lower judges.

The main indicators of the independence of the judiciary are the following:

- the provisions dealing with independence are set up in the Constitution;
- appointment, composition and competences of the High Judicial Council are provided for, so as to avoid any interference of the executive power;
- the residual powers of the Minister of Justice, if any, do not extend to the adoption of career, transfer and disciplinary measures;
- the internal structure of the judiciary is not hierarchically organized;

the president of the court is not entrusted with any power in the allocation of the cases or of interference on the decisions of the judges..

INTERNATIONAL STANDARDS ON EXTERNAL AND INTERNAL INDEPENDENCE OF THE JUDICIARY

1. THE SOURCES OF EUROPEAN STANDARDS

At the European and international level, there exist a very large number of texts on the independence of the judiciary, starting with Article 6 of the European Convention of Human Rights, which guarantees the right to an independent and impartial tribunal established by law.²¹

I will refer above all to three sources of different origin and level, which deal with the principles that are deemed essential to guarantee the independence of the judiciary as a whole and the independence of individual judges when they exercise judicial functions. These sources are:

- Recommendation CM/Rec (2010)12 of the Committee of Ministers of the Council of Europe on “Judges: independence, efficiency and responsibilities”, adopted on 17 November 2010;²²
- Opinion No. 1/2001 (and other subsequent opinions) of the Consultative Council of European Judges (CCJE);²³
- the report “On the independence of the judicial system: the independence of judges”, adopted by the Venice commission on 13 March 2010,²⁴ which takes into account the most important documents on the matter of the last ten years.

It is worth mentioning that very often the difference among the three documents rests only on the order in which the principles are listed and examined: there is a substantial agreement on the content of the principles that are essential to guarantee the external and internal independence of the judiciary.

2. GENERAL PRINCIPLES

First of all, it is important to underline that the independence of the judiciary is neither an end in itself, nor a personal privilege of the judges. The main function of the independence principle is to guarantee the right of an individual to have his/her rights and freedoms determined, protected and implemented by an independent and impartial judge. We could say that the independence of the judiciary as a whole is the essential condition of judicial independence, which enables judges to fulfil their role of guardians of the rights and freedoms of the people. From this point of view, the independence of judges is an indispensable premise of the rule of law.

It is worth mentioning that the close relationship between the independence of the judiciary

²¹ Article 6(1) provides as follows: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

²² Available at <https://wcd.coe.int/ViewDoc.jsp?id=1707137>.

²³ All CCJE’s opinions are available at: http://www.coe.int/t/dghl/cooperation/ccje/textes/Avis_en.asp.

²⁴ Available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2010\)004-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)004-e).

and the rule of law suggests that the basic principles ensuring the independence of the judges should be set up in the Constitution or equivalent texts, that is to say, at the highest level of the national legislative system. When this is the case, the fundamental principles cannot be repealed or modified by ordinary laws, and perform a role of binding guidance on the matter.

All that said, the independence of the judges can be viewed from two distinct but interlinked viewpoints:

- that of the relations of the judiciary as a whole (and of individual judges) with the political power – notably the government, the legislative power, the political parties, the economic power centers, etc. When we deal with this kind of issues, we refer to the so-called external independence;
- that of the relations of each judge with other judges (in particular, the president of the court and higher judges), that is, the judges' independence and autonomy in carrying out the judicial functions in respect to the structure to which they belong: the so-called internal independence.

3. EXTERNAL INDEPENDENCE

The guarantees of external independence have been the object of numerous recommendations, opinions, and directives. Exhaustive and detailed standards have been proposed or adopted at the Council of Europe level, even though they are not always followed by all States.

Before dealing with the European standards on the matter we must take into account, as it has been pointed out by the Venice Commission²⁵, that in Europe there exist a variety of different systems for judicial appointments, which are a fundamental premise of judicial independence, and that it would be impossible to adopt a single model for all countries. For instance, in older democracies the executive or legislative 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 a legal culture and tradition which have grown over a long time.

In new democracies, however, which did not yet have a chance to develop the cultural background of the independence of the judiciary, explicit and specific constitutional safeguards are needed to prevent political abuse in the appointments of judges. In particular, appointments of ordinary (non-constitutional) judges are not an appropriate subject for a vote by Parliament because the danger that political considerations prevail cannot be excluded.

It is also necessary to take into account that the European standards are destined to be enforced mainly in countries of civil law tradition, such as the European continental countries, and are developed mainly bearing in mind the specificities of the legal systems belonging to that tradition.

All that said about the scope of application of European standards, the fundamental basis of external independence is deemed to be a system whereby judges are appointed and governed by an independent body composed largely – at least half of the members - by judges chosen by their peers from all levels of the judiciary and with respect for pluralism within the judiciary²⁶, that is to say, including representatives of all the categories of judges and their

²⁵ See Venice Commission, Report on Judicial Appointments (CDL-AD(2007)028), points 44-47. The report is available at [http://www.venice.coe.int/webforms/documents/CDL-AD\(2007\)028.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2007)028.aspx).

²⁶ As for the role, composition and functions of the judicial council it suffices to mention the standards contained in the Recommendation of the Committee of Ministers of the CoE CM/Rec (2010)12 (points 26 to 29), in Opinion 1 (2001) of CCJE, the CoE's European Charter on the Statute for Judges in Europe (available at http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges_EN.pdf),

ideological positions. The body is normally called High Judicial Council.

In systems where judges and public prosecutors belong to the same judicial organization, as for instance in Italy, Turkey, and France, the Superior Council of the Judiciary is a unitary body, which includes judges and public prosecutors. Other countries, such as for instance Bosnia-Herzégovina, Moldova, Montenegro, and Serbia, have separate high councils, respectively for judges and public prosecutors. The appointment system and the competences of the Public Prosecutors Council are partially different from those of the High Judicial Council, since very often the public prosecution service is under the authority of the minister of justice.

Coming back to the High Judicial Council, the body is also competent to take all measures concerning the legal status of judges (promotions, transfers, disciplinary measures, dismissals, etc.), and to promote the efficient functioning of the judicial system; as a consequence, it should be composed by full time members. The main reason for the creation of the Judicial Council, which performs the role of a self-governing body of the judiciary, is to avoid undue influence, pressures and any direct or indirect interference of the political power on the judges, removing the decisions concerning legal status and career aspirations of the judges from the hands of the government and the Parliament.

On the contrary, in authoritarian regimes, as well as in systems that don't implement the principle of the separation of powers, the minister of justice is very often, if not always, entrusted with the power to govern the judiciary, which is in such a way submitted to the control of the executive.

The large participation of judges in the Judicial Council has a decisive influence in safeguarding the autonomy and independence of the judiciary from political power, but it does imply that judges may be quite self-governing. It is necessary to provide a proper balance between self-administration and the necessary accountability of the judiciary, in order to avoid negative effects of corporatist management of the judiciary. One way to achieve this goal is to establish a balanced composition among the members of the Judicial Council.

In order to provide democratic legitimacy of the Judicial Council, it seems reasonable that it should be linked to the representation of the will of the people, as expressed by the Parliament. Non-judicial members should be elected by the Parliament among persons with appropriate legal qualification, such as lawyers, law professors, civil society exponents, and/or by professional bodies such as University law professors, bar association, non-profit social organizations, etc. The need to insulate the judicial council from politics suggests that non-judicial members should not be current members of the Parliament. In order to reduce the risk of politicization of such a body, non-judicial members should be elected by the Parliament with the qualified majority of two thirds. Following this method, a compromise has to be sought with the opposition, which is more likely to bring about a balanced and highly professional composition.

The presence of the minister of justice in the Judicial Council is quite common, but it raises some concern, above all in matters relating to transfers and disciplinary measures. So, it is advisable that the minister of justice, if an ex officio member of the Council, should not be involved in decisions concerning the transfer of judges and disciplinary measures, as this could lead to inappropriate interference by the Government over the judiciary.

As for the President of the Judicial Council, the best solution in order to avoid possible corporatist tendencies within the judiciary seems to be that the President should be appointed by all the members of the Council from among non-judicial members, with the qualified majority of two thirds. Such a system guarantees the correct type of connection between the judiciary and the political power, expressed in a pluralistic way by the Parliament. Some countries entrust the president of the highest court of the judiciary, who is normally an ex

and the numerous documents of the Venice Commission, in particular the 2007 Report on Judicial Appointments (CDL-AD(2007)028), and the 2010 Report on the Independence of the judicial system (CDL-AD(2010)004), points 28-32.

officio member of the body, with the presidency of the Judicial Council, but this solution could have the negative effect of fostering judicial corporatism within the council.

All the decisions of the Judicial Council on the legal status of judges must be submitted to judicial review by a judicial body, such as the Court of Cassation, an administrative court, or the Constitutional Court (as happens, for instance, in Croatia).

4. INTERNAL INDEPENDENCE

While opinions and directives of international bodies have devoted great attention to the external independence of the judiciary, the internal independence of individual judges has received less attention, at least from a quantitative point of view. The fundamental principles of independence within the organization of the judiciary are contained in the already mentioned Recommendation of the Committee of the Ministers of the CoE, in the CCJE opinions, and in numerous documents of the Venice Commission²⁷.

The first constitutional basis to ensure internal independence is the implementation of the principle of the natural judge established by law, that is to say, the right of everybody to a lawful judge. As for internal independence, such a right means that the judge who rules on a specific case must be identified on the basis of objective criteria predetermined by law, not on the basis of discretionary choices of any individual, be he or she internal or external to the judiciary.

In this regard it has been noted that, within single tribunals, the allocation of the cases to a specific section or judge is often left to the subjective and discretionary choices of the president of the court. Thus, it would be possible to influence the outcome of the case by choosing a judge with certain ideological or political inclinations.

In order to overcome the risk of discretionary choices, which are supposedly inherent in the power of the head of the office, it has been strongly recommended that the natural judge be identified on the basis of objective and general criteria, such as for instance the alphabetical or chronological order of the cases or the categories of cases, or through the use of a computerized system²⁸. The exceptions, which must also be provided for by law or by special regulations, should take into account the workload, the specialization of the judges, the complexity of legal issues, etc.

The principle of the natural or lawful judge, established in art. 6 of the European Convention of Human Rights²⁹, which provides the right of everyone to "an independent and impartial tribunal established by law", is also present in numerous Constitutions, such as those of Austria, Belgium, Estonia, Germany, Greece, Italy, Luxemburg, Netherlands, Portugal, and Slovakia. In most cases it is drafted in a negative form, such as "Nobody can be removed from the natural judge established by law" (see for instance Article 25.1 of the Italian Constitution). As a consequence, a case could be withdrawn from the natural judge only on the basis of objective criteria previously provided for by law and following a transparent procedure before a pre-established authority within the judiciary.

²⁷ In particular they are set out in the Venice Commission Documents CDL-JD(2008)002, "European standards on the independence of the Judiciary-A systematic overview", available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-JD\(2008\)002-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-JD(2008)002-e), under the subtitle "Independence within the judiciary", and in the already mentioned report of 2010 (points 68-81).

²⁸ See Venice Commission Report, CDL-AD(2010)004, point 80; Recommendation (94)12 of the Committee of the Ministers of the Council of Europe, Principle 1.2.e) and f), available at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=534553&SelectionMode=1&DocId=514386&Usage=2>.

²⁹ For the relationship between Article 6 of ECHR and the principle of the natural judge established by law see the Court's case-law mentioned in footnotes of point 76 and 77 of the already mentioned Venice Commission Report, CDL-AD(2010)004.

The right to a lawful judge is an essential guarantee, but not a sufficient one. The internal independence can be jeopardized by a hierarchical organization of the judiciary. In such a system, the decisions taken by a given judge are subjected to the control of the president of the court, due to his or her power over the subordinated judges; more in general, judicial decisions may be influenced or determined through preliminary instructions and directives or subsequent checks by higher judges, be they appeal, court of cassation, supreme court judges. It must be recalled that in hierarchical judicial organizations the presidents of courts are the privileged channel of the government to exercise pressure on the whole judiciary. These are the main reasons why a hierarchical structure of the judiciary has been unanimously criticized as incompatible with the independence of individual judges.

The constitutional principle that more directly sets out the incompatibility between a hierarchically structured judiciary and the internal independence of the judges is formulated in numerous European Constitutions with the formula “judges are subject only to the law” (see for instance Article 101.2 of the Italian Constitution)³⁰, but in practice the constitutional principle does not always go along with a non-hierarchical structure of the judiciary. Anyway, in the abstract the principle should guarantee the independence of the judges both from undue influences, instructions and recommendations coming from within the judiciary, and from external pressures coming from the political power.

Moreover, from another viewpoint, the principle sets out the rule that the control over the decisions of a judge can only be exercised through procedural remedies, that is, through an appeal to a higher judge, not through preventive recommendations, explanatory directives or legal interpretations addressed to the lower courts.

Taking into account that the problems related to the hierarchical structure of the judiciary obviously refer to civil law systems, and that they need to be interpreted differently in common law systems, where precedents of higher courts are binding to lower courts, the constitutional principle of the subordination of the judge only to the law is closely linked to the constitutional principle of equality among judges. The principle means, on the one hand, the refusal of a hierarchical power of control of upper judges on lower judges, on the other hand, that judges can be distinguished only by their different functions, such as first instance, appeal, legitimacy, investigative, adjudication. Both meanings of the principle are incompatible with any form of hierarchical organization or supremacy within the judiciary.

5. COROLLARIES OF THE JUDGES’ INDEPENDENCE

There are some necessary corollaries of the external and internal independence of the judges. They can be summarized as follows:

- **Tenure until the mandatory retirement age or the expiry of the term of office** is a fundamental guarantee of external independence. In effect, when the recruitment procedures provide for a probationary period before confirmation on a permanent basis, or when appointment is made for a limited, but renewable, period, the independence of judges is undermined, since they may feel under pressure to decide cases in a particular way so as to increase their chances of renewal or reappointment.

In order to reconcile the need of probation and evaluation with the independence of judges, some systems provide for probationary periods during which candidate judges can assist in the preparation of adjudication without taking judicial decisions, which are reserved to permanent judges.

- **The guarantee of irremovability**, normally established at the constitutional level, is strictly linked to external and internal independence. The transfer of a judge to another court or to

³⁰ See also the Constitutions of Albania, Andorra, Georgia, Germany, Latvia, Portugal, Romania.

another judicial office, even by way of promotion, should only be possible with his/her consent, or in case of disciplinary sanctions, lawful reforms of the court system, temporary assignment to reinforce a neighbouring court. In fact, fear to be transferred without consent to another court or office could undermine the freedom of judgment, influence the decision and interfere more generally with judicial independence.

- **The remuneration of judges** should be established and guaranteed by law and should correspond to the dignity of the profession and be adequate for protecting judges from undue outside interference. Non-monetary remunerations, such as apartments, cars, holidays, etc., even if defined by law, always involve scope for discretion and are a potential threat to judicial independence.

- The independence of the judiciary requires that **Courts should be financed on the basis of objective and transparent criteria established by law**, not on the basis of discretionary decisions of the executive or legislative power. In particular, the judiciary should be given the opportunity to express its views about the proposed budget through the Judicial Council.

- **External independence needs to be protected from civil liability** in case of judicial errors or other failings done in good faith in the administration of justice. In these cases, civil liability should only lie against the State. On the contrary, when not exercising judicial functions or in case of passive corruption or of bad faith, judges should be liable under civil, criminal and administrative law in the same way as any other citizen.

6. THE EVALUATION CRITERIA OF THE INDEPENDENCE

The main criteria utilized by the Venice Commission to evaluate the external and internal level of independence of the judiciary are the following:

- the provisions dealing with judicial independence must be set up in the Constitution or in equivalent texts at the highest level of the national legislative system;
- the existence of a High Judicial Council, entrusted with the power to take all measures concerning the legal status of judges;
- at least half of the members of the High Judicial Council must be judges elected by their peers; the non-judicial members, if appointed by Parliament, must be elected with the qualified majority of two-thirds;
- the existence and, in case, the practical scope of application of the residual powers of the Minister of Justice must not extend to the judges' career, transfers and disciplinary measures;
- the allocation of cases must be organized on the basis of objective and general criteria, according to the principle of the natural judge established by law, not on the basis of the discretionary power of the president of the court;
- the judiciary must be organized according to the constitutional principles that judges are subject only to the law and that they are to be distinguished only by their different functions, not on the basis of a hierarchical organization;
- the guarantees of tenure until retirement age and irremovability of the seat and function must be provided for in the Constitution.

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