

Dear Ladies and Gentlemen,

the Council of Europe (CoE)'s legal and advisory instruments provide broad and detailed guidance on judicial independence and serve as a basis for member States' laws and policies. The standards comprise formal legal obligations such as the European Convention on Human Rights, soft-law instruments such as the pivotal Recommendation of the Committee of Ministers (CM/Rec(2010)12) on judges: independence, efficiency and responsibilities, and political commitments, such as those set out in the Council of Europe Plan of Action on Strengthening judicial independence and impartiality.

Judicial independence is a rather abstract notion. It is a constitutional principle and human right at the same time. Without soft-law instruments and, of course, decisions provided by the Strasbourg Court and the European Court of Justice, it would have been impossible to reconstruct a "European minimum common denominator" on this very sensible subject. Soft-law instruments, in short, put some flesh on the bones of judicial independence. The subject of my speech will be judicial independence at institutional and individual level as reflected in the soft-law instruments of the CoE and particularly the Consultative Council of European Judges (CCJE), in the light of the rule of law backsliding in several CoE member States.

Judicial independence must be guaranteed at both institutional and individual levels, and it must be implemented in practice. As stressed by the CCJE in its Opinion no. 1 (2001) on Standards concerning the independence of the judiciary and the irremovability of judges: "What is critical is not the perfection of principles and, still less, the harmonisation of institutions; it is the putting into full effect of principles already developed. To live those principles is the challenge at hand".

Speaking of **institutional (or organisational) independence**, several criteria need to be taken into account.

- The institutional independence must be set out at constitutional level.
- The institutional independence must be provided for through existence of bodies of judicial self-government, such as Councils for the Judiciary or equivalent bodies. Their introduction has been recommended by the Committee of Ministers of the Council of

Europe¹, by the CCJE² and by the Venice Commission³. Over recent years, many European legal systems have introduced Councils for the Judiciary⁴.

- The judiciary must be provided with sufficient funds to carry out its functions and it should be for the judiciary itself to decide how these funds are used.
- Management of courts and their budgets must not be, directly or indirectly, run by the executive or legislative power. Court presidents must act as managers of independent courts and not as managers under the influence of the outside powers.
- Professional organisations of judges must be able to effectively defend their interests and those of their members.

I want to make a few observations on the protection of judiciary at constitutional level. The position of the judiciary depends on the normative level of the legal norms, which provide for the courts and their jurisdiction, and for the terms of the office and tenure of the judges; any change in such provisions would require a constitutional amendment. The main aspects that are usually found to be protected in national constitutions are: life tenure of the judge or until a fixed retirement; his or her irremovability; salaries and pensions; provisions for disciplinary proceedings; provisions for appointment and removal procedures; and security of tenure. National regulations vary greatly in this respect, the weakest form of guarantee of judicial independence being simply to affirm in the constitution that judicial independence will be respected. In this case, legislation may easily be passed in order to curtail judicial independence.

Therefore, additional principles of judicial independence should be laid down at constitutional level, such as: a rule against *ad hoc* tribunals; a lawful judge principle, which requires that judges be selected to hear cases by a predetermined internal plan prior to the commencement of the case; post-decisional independence of a judgment and its respect by the other branches

1 Recommendation of the Committee of Ministers (CM/Rec(2010)12) on judges: independence, efficiency and responsibilities, paras 26-29.

2 CCJE Opinion No. 1 (2001) on “Standards concerning the independence of the judiciary and the irremovability of judges”, para 45; CCJE Opinion No. 10 (2007) on the “Council for the Judiciary in the service of society”.

3 Venice Commission Report on the Independence of the Judicial System, Part I: the Independence of Judges, 12-13 March 2010, para 32.

4 The CCJE Bureau's Report on judicial independence and impartiality in the Council of Europe member States (2019 edition), para 20.

of the government; life tenure of a judge or until a fixed retirement and his or her irremovability; a legal basis should be made for the setting up of the Council for the Judiciary or equivalent body, for the definition of its functions and of the sectors from which members may be drawn and for the establishment of criteria for membership and selection methods.

As to the Councils for the Judiciary, the second criterion mentioned above, let me first recall the principles.

At least half of the members of such Councils must be judges elected by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary⁵. Elections must be free from any kind of external influence. Only an independent Council for the Judiciary can secure the independence of judges and their ability to render decisions which fulfil the requirements of an independent and impartial tribunal under Article 6 of the European Convention on Human Rights. The Councils for the Judiciary must have significant competences in order to effectively safeguard the independence of both the judicial system and of individual judges, and to guarantee at the same time the efficiency and quality of justice⁶. Such Councils must preferably be competent for the selection, appointment and promotion of judges; they must be able to carry out their duties in absolute independence from the legislature or the executive, as well as in absolute transparency as to the criteria of selection of judges. They must also be actively involved in the assessment of the quality of justice and in the implementation of techniques improving the efficiency of judges' work. Ethical issues may be a part of their mandates, as well as the organisation and supervision of the judicial training. The Councils may have financial competences to negotiate and manage the budget allocated to justice⁷.

In its Opinion no. 10 on the Council for the Judiciary at the service of society, the CCJE dealt extensively with this topic. The main principles expressed therein remain valid. However, what we have witnessed over the past decade is, that albeit, at least technically speaking, complying with all major European standards in this area, the model of judicial self-governance in several member states is subject to important perils, both from outside and sometimes even from inside of the judiciary. There have been examples where the Councils have been captured by

5 Recommendation of the Committee of Ministers (CM/Rec(2010)12) on judges: independence, efficiency and responsibilities, para 27.

6 CCJE Opinion No. 10 (2007) on the "Council for the Judiciary in the service of society", summary of the recommendations and conclusions, section A(b).

7 CCJE Opinion No. 10 (2007) on the "Council for the Judiciary in the service of society", summary of the recommendations and conclusions, section D(b)(c)(d)(e)(f).

government, politicians, judge or lay-members of the Councils, court presidents... Moreover, structural changes of judicial governance in several countries had little effect on transparency and accountability of the judicial system. The CCJE is strongly convinced that a good Council is still the best solution and to have one is often the only alternative. Recent challenges, however, call for responses. It appears that certain principles were not addressed in the Opinion no. 1, simply because they have been taken for granted for many years. For instance, while the requirement that at least half of the members of a Council must be judges still applies, a clear emphasis should be put on the question who these judges are and what qualities they must possess, and the nomination process. This is the reason why the CCJE decided to tackle the issues relating to the Councils for the Judiciary again in its 2021 Opinion. The objective is not to depart from the existing principles, I want to make this very clear, but to build on the existing principles and to offer solutions to the problems that must no longer be ignored.

I now turn to the **individual** (or functional) **independence of judges**. The criteria establishing the overall framework for judicial independence at individual level are well known.

- Decisions on judges' careers, including appointment, promotion, transfer, removal from office must be 1) taken independently of the executive and legislative powers; 2) made on merits, transparently, based on objective criteria and subject to review. The security of tenure of judges and their permanent appointment until the statutory age of retirement are a corollary of independence⁸. This implies that a judge's tenure cannot be terminated other than, in principle, for health reasons or as a result of disciplinary proceedings. Protection against undue dismissals of judges is of course an important element of judicial independence.
- Court presidents must not have influence on decisions vis-à-vis the judges of their courts.
- Judges' remuneration, social protection and other benefits, commensurate with importance of their mission, are also an inherent part of judge's individual independence.
- Independence and integrity are two sides of the same coin. When judges do not live up to the high standards of integrity expected from them, public mistrust is understandable. Ethical principles of professional conduct are therefore of vital importance.

⁸ CCJE Opinion No. 1 (2001) on "Standards concerning the independence of the judiciary and the irremovability of judges", paras 52 and 57.

If I had to pick the most important criterion among those enumerated above concerning judicial independence at the individual level, I would not hesitate. In member States, there are different legal models and appointment procedures for judges. They include, for example, appointment by a Council for the Judiciary or another independent body, election by Parliament and appointment by the executive, or mixed procedures. I know that it might sound like a broken record, but the importance of open, transparent and competitive access to the judicial profession cannot be underrated. As stated by Bobek, “[if] a transition country is able to establish and maintain it, half the battle for judicial reform has already been won.”⁹ It is therefore important not to narrow down the debate on how to select and appoint judges to the question of how to confer democratic legitimacy upon the judges, but it should be considered what other factors contribute to the legitimacy of the judiciary. Namely, the personal and professional suitability of judges should be taken into account.

As shown above, the CoE possesses an impressive machinery, which has been put in place to assist member States in complying with European standards, identifying problems and solving them. Yet, systemic problems in the area of justice have never been more serious, not only in new but also in old democracies. Attempts are made by politicians, in various ways, to control judges, the work of the Councils for the Judiciary, to remove disobedient judges. Controlling judges means controlling their decisions. If politicians decide who deserves justice, this entails discriminatory justice. The connection between the rule of law and democracy and respect for human rights in this context is evident. However, if these attempts are like a virus, once it enters your body, it spreads all over the place, then taking the right medicine, which is tailored to the type of “disease” is the right way to go to stop the virus from spreading. It is a rhetorical question whether in cases where the rule of law and democracy have been dismantled over the years, standard machinery comprising e. g. of monitoring, cooperation and standard-setting can help, or is it too little, too late. The answer to the question is: prevention without actions and sanctions can hardly work if the virus has spread all over the body. The CCJE is aware of these risks and, within the framework of its Terms of Reference, feels responsible to react. This is precisely why the CCJE chose the Councils for the Judiciary to be the topic of its opinion in 2021.

⁹ Bobek, Kosař, *Global Solutions, Local damages: A Critical Study in Judicial Councils in Central and Eastern Europe*, *Research Papers in Law*, 7/2013, p. 31.