

CCJE(2015)4

London, 16 October 2015

## **CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)**

### **OPINION NO. 18 (2015)**

"The position of the judiciary and its relation with the other powers of state in a modern democracy"

#### **I. Introduction. The reason for the Opinion and its scope**

1. Over recent decades, the relationship between the three powers of the state (legislative, executive and judicial) has been transformed. The executive and legislative powers have grown more interdependent. The power of the legislature to hold the executive to account has decreased<sup>1</sup>. At the same time, the role of the judiciary has evolved. The number of cases brought to the courts and the number of legislative acts the courts must apply have increased dramatically. The growth of executive power in particular has led to more challenges to its actions in court and this in turn has led some to question the scope of the role of the judiciary as a check on the executive. There has been an increasing number of challenges in the courts to legislative powers and actions. As a result, the judiciary has increasingly had to examine and has sometimes even restrained the actions of the other two powers<sup>2</sup>. Today, for parties in litigation, and for society as a whole, the court process provides a kind of alternative democratic arena, where arguments between sections of the public and the powers of the state are exchanged and questions of general concern are debated. Courts rule on issues of great economic and political importance. International institutions, especially the Council of Europe and the European Court of Human Rights (ECtHR), the European Union and the Court of Justice of the European Union (CJEU) have all had a considerable influence in member states, particularly in strengthening the independence of the judiciary and in its role in the protection of human rights. Moreover, the application of European and international rules and standards and the implementation of decisions of the ECtHR and the CJEU have provided new challenges for the judiciaries in the member states and sometimes their application by courts has been challenged by politicians or commentators.

2. Although, in general, "the separation of powers" is accepted by all member states, a number of conflicts and tensions have surfaced in recent years that raise concern. Such concerns have been expressed in the Reports of the Secretary General of the Council of Europe in 2014 and 2015<sup>3</sup> as well as in the Situation Reports of the CCJE in 2013 and 2015. For example: in some countries, new political majorities have questioned the position of judges who are already in post<sup>4</sup>. In 2015, the Secretary General of the Council of Europe noted shortcomings in the enforcement of court decisions<sup>5</sup>. In some member states, the executive exercises considerable influence over the administration of the judiciary, thereby bringing into question the institutional independence of the judiciary and the independence of individual judges<sup>6</sup>. Economic crises and chronic underfunding of the judicial system in several member states raise the question of the budgetary responsibility of the legislature towards the judiciary<sup>7</sup>. A lack of legislation or (at the other extreme) rapidly changing legislation may be contrary to the principle of legal certainty<sup>8</sup>. There have also been verbal attacks on the judiciary by members of the executive and legislature. In 2014 and 2015, the Secretary General of the Council of Europe remarked that politicians and other commentators who have publicly criticised court decisions in recent years have thereby undermined the public confidence in the judiciary in various countries<sup>9</sup>. Politicians and the media have suggested that judiciaries are not sufficiently "accountable" to society. Such comments, which have included statements which question the "legitimacy" of judiciaries, were reported by member states in response to the questionnaire sent out in preparation of this Opinion.

Clearly, all these comments and actions must be viewed against the fact that today, in most European countries, traditional sources of authority are no longer as readily accepted as once they were. There has been a decline in "deference" towards public institutions. In the same vein, it is often stated nowadays that an application of basic democratic principles requires that there be a greater need for openness and transparency in the work of public institutions. All this means that those involved in providing public services have increasingly had to "account" for the way in which they carry out their work.

3. Therefore, in accordance with the terms of reference entrusted to it by the Committee of Ministers, the Consultative Council of European Judges (CCJE) resolved to reflect upon the legitimacy and accountability of the judiciary and the proper relationship between the three powers of state in a modern democracy and their responsibilities towards one another and to society in general in the 21<sup>st</sup> century.

4. This Opinion examines the following questions:

i. What relationship should there be between the judicial power of a state and the legislative and the executive powers?

ii. On what bases do judiciaries establish their right to act as such in a democratic society? How is the "legitimacy" of judicial power demonstrated?

iii. To what extent and in what ways should judiciaries be accountable to the societies they serve and to the other powers of the state?

iv. How can the three powers of the state exercise their respective authority in such a way as to achieve and maintain a proper balance between themselves and also act in the interest of the society they all serve?

This Opinion will not examine the basic principles of judicial independence, since this was considered in CCJE Opinion No. 1 (2001). The relationship of courts with the media was discussed in Opinion No. 7 (2005) Part C, and so that also will not be examined in detail in this Opinion.

5. This Opinion has been prepared on the basis of previous CCJE Opinions, the CCJE Magna Charta of Judges (2010), and the relevant instruments of the Council of Europe, in particular the European Charter on the Statute for Judges (1998), and Recommendation [CM/Rec\(2010\)12](#) of the Committee of Ministers on judges: independence, efficiency and responsibilities (hereafter "Recommendation [CM/Rec\(2010\)12](#)"). It also takes account of the OSCE Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010) – Judicial Administration, Selection and Accountability (hereafter "Kyiv Recommendations"); the 2013-2014 Report of the European Network of Councils for the Judiciary (ENCJ) on Independence and Accountability of the Judiciary (hereafter "ENCJ Report 2013-2014"); the reports of the Venice Commission on the Rule of Law (March 2011), on the Independence of the Judicial System, part I: the Independence of Judges (March 2010) and the Opinion No. 403/2006 of the Venice Commission on Judicial Appointments adopted at its 70th Plenary Session on 16-17 March 2007 (hereafter "Venice Commission, Judicial Appointments, 2007"); the Bangalore Principles of Judicial Conduct (2002); the CoE Secretary General's Reports (2014) and (2015); the New Delhi Code of Minimum Standards of Judicial Independence (New Delhi Standards 1982). This Opinion takes account of member states' replies to the questionnaire on the independence of the judiciary and its relation with the other powers of the state in a modern democracy and of a preparatory report drawn up by the scientific expert appointed by the Council of Europe, Ms Anne SANDERS (Germany). Moreover, the Opinion has benefited from contributions made in a seminar held in Strasbourg on 19 March 2015<sup>10</sup>. The opinion has also benefited from the seminar

organised by the Norwegian Association of Judges held in Bergen (Norway) on 4 June 2015<sup>11</sup>.

## **II. The constitutional framework of a modern democracy: where does the judiciary fit in?**

6. It is generally accepted that a modern democratic state should be founded on the separation of powers<sup>12</sup>. The judiciary is one of the three essential but equal pillars of a modern democratic state<sup>13</sup>. All three powers provide a public service and must hold each other accountable for their actions. In a democratic state which is subject to the rule of law, none of the three powers of state act for their own interest but in the interests of the people as a whole. In a democratic state bound by the rule of law, ("Etat de droit" or "Rechtsstaat") all the three powers must act on the basis of and within the limitations provided by law. The responses of member states to the questionnaire show that all member states recognise these fundamental principles.

7. In a democratic society it is the responsibility of the legislature to design the legal framework in which and by which society lives. The executive power is responsible for the administration of society (in so far as state agents have to carry it out) in accordance with the legal framework established by the legislature. The judiciary's function is to adjudicate between members of society and the state and between members of society themselves. Frequently the judiciary is also called upon to adjudicate on the relationship between two or even all three powers of the state<sup>14</sup>. All this must be done according to the rule of law. An independent and efficient court system is a corner stone of the rule of law<sup>15</sup>. The goal of any independent and efficient court system must therefore be to ensure the fair, impartial adjudication of legal disputes, thereby protecting the rights and liberties of all persons seeking justice. To achieve this goal, in any particular case the court must find the relevant facts in a fair procedure, apply the law and must provide effective remedies. In criminal cases, a court system must impartially and independently decide on whether and how certain actions deserve punishment<sup>16</sup>. In modern democratic states, an independent judiciary will ensure that governments can be held to account for their actions which are justiciable and will be responsible for ensuring that duly enacted laws are applied correctly. To a greater or lesser extent (depending on the particular constitutional arrangements in a state), the judiciary also ensures that the laws comply with any relevant constitutional provisions or higher law, such as that of the European Union<sup>17</sup>.

8. The widely differing histories, cultures and legal traditions of the member states of the Council of Europe have produced different "models" of constitutional structures which are, in many cases, constantly developing. Globalisation and the increasing influence of international and European organisations necessitate changes in the constitutional structures of individual member states. In particular, decisions of the ECtHR have done much to advance the protection of human rights and judicial independence and have had their effect on member states' constitutions. However, all these influences have also produced stresses on the relationship between the three powers of the state, especially in the relationship between the judiciary and the other two powers.

9. In principle the three powers of a democratic state should be complementary, with no one power being "supreme" or dominating the others<sup>18</sup>. In a democratic state, ultimately it is the will of the people, expressed through the proper democratic process that is supreme (sovereignty of the people). It is also fallacious to imagine that any one of the three powers of state can ever operate in complete isolation from the others. The three powers rely on one another to provide the totality of public services necessary in a democratic society. So, while the legislature provides the legislative framework, it is the judiciary that must interpret and apply it by virtue of its decisions and the executive is often responsible for the enforcement of judicial decisions in the interest of society<sup>19</sup>. In this way the three powers function in a relationship of interdependence, or of

convergence and divergence. Accordingly, there can never be a complete "separation of powers"<sup>20</sup>. Rather, the three powers of the state function as a system of checks and balances that holds each accountable in the interest of society as a whole. It has to be accepted, therefore, that a certain level of tension is inevitable between the powers of the state in a democracy. If there is such "creative tension", it shows that each power is providing the necessary check on the other powers and thus contributing to the maintenance of a proper equilibrium. If there were no such tension between the three powers, the suspicion might arise that one or two powers had stopped holding the other to account on behalf of society as a whole and thus, that one or more powers had obtained domination over the rest. Thus, the fact of tension between the judiciary and the other two powers of the state should not necessarily be seen as a threat to the judiciary or its independence, but rather as a sign that the judiciary is fulfilling its constitutional duty of holding the other powers to account on behalf of society as a whole.

### **III. Independence of the judiciary and separation of the powers**

10. The judiciary must be independent to fulfil its role in relation to the other powers of the state, society in general, and the parties to litigations<sup>21</sup>. The independence of judges is not a prerogative or privilege granted in their own interest, but in the interest of the rule of law and of all those who seek and expect justice. Judicial independence is the means by which judges' impartiality is ensured. It is therefore the pre-condition for the guarantee that all citizens (and the other powers of the state) will have equality before the courts<sup>22</sup>. Judicial independence is an intrinsic element of its duty to decide cases impartially<sup>23</sup>. Only an independent judiciary can implement effectively the rights of all members of society, especially those groups that are vulnerable or unpopular<sup>24</sup>. Thus, independence is the fundamental requirement that enables the judiciary to safeguard democracy and human rights<sup>25</sup>.

11. The principle of the separation of powers is itself a guarantee of judicial independence<sup>26</sup>. However, despite the frequently expressed importance of judicial independence, it must be pointed out that nobody – including the judiciary - can be completely independent from all influences, in particular social and cultural influences within the society in which it operates. After all: "No man is an island, entire unto itself"<sup>27</sup>. No judiciary – as with any power in a democratic state - is completely independent. The judiciary relies on the others to provide resources and services, in particular on the legislature to provide finances and the legal framework which it has to interpret and apply. Although the task of deciding cases according to the law is entrusted to the judiciary, the public relies on the executive to enforce judicial decisions. Shortcomings in the enforcement of judicial decisions undermine judicial authority and question the separation of powers<sup>28</sup>. Whilst all three powers share responsibility for ensuring that there is a proper separation between them, neither that principle nor that of judicial independence should preclude dialogue between the powers of the state. Rather, there is a fundamental need for respectful discourse between them all that takes into account both the necessary separation as well as the necessary interdependence between the powers. It remains vital, however, that the judiciary remains free from inappropriate connections with and undue influence by the other powers of the state<sup>29</sup>.

### **IV. The legitimacy of judicial power and its elements**

#### **A. The importance of legitimacy**

12. All three powers of the state exercise considerable authority. The legislature drafts laws and allocates the state's budget. The executive exercises authority, even to the extent of using physical force (within the law) in order to uphold and enforce the laws of the land. The judiciary not only decide matters of fundamental importance to individual citizens and to society at large but also affect with their judgments and rulings even the ordinary affairs of every individual who seeks the aid of the courts. In

order to do this, judges are given an authority and powers which are very far reaching. Such authority and powers are exercised on behalf of society as a whole. Consequently, society and the other powers of the state are entitled to be satisfied that all those given that authority and power (that is the judges individually and collectively), have a legitimate basis on which to exercise it in the name of society as a whole. In all modern democratic states at least one constituent body of the legislature is directly elected by the citizens of the state. There is force in the argument that legislatures and executives that are appointed (directly or indirectly) through elected representatives must thereby have "democratic legitimacy". It is perfectly proper to ask: from where does the judicial power derive its "legitimacy"?

## **B. Different elements of legitimacy of judicial power**

### **(1) The judicial power as a whole**

13. The judicial power is created as a part of the constitutional framework of democratic states that are subject to the rule of law. By definition, therefore, if the constitutional framework of such a state is legitimate, then the basis of judicial power as a part of that constitution is just as legitimate and just as necessary a part of the democratic state as the other two component powers<sup>30</sup>. All member states have some form of a constitution which, by differing means, (e.g. by long custom or a popular vote) is accepted as being the legitimate foundation of the state. The constitutions of all member states recognise and create (whether explicitly or implicitly) the role of a judiciary which is there to uphold the rule of law and to decide cases by applying the law in accordance with legislation and case law. Thus, the fact that a constitution creates a judiciary to carry out this role must itself thereby confer legitimacy upon the judiciary as a whole. When deciding cases, each individual judge exercises his authority as a part of the judiciary. Accordingly, the very fact that the judiciary is a part of a state's constitution provides legitimacy not only for the judiciary as a whole but each individual judge.

### **(2) Constitutional or formal legitimacy of individual judges**

14. In order to perform the judicial functions legitimised by the constitution, each judge needs to be appointed and thus become part of the judiciary. Each individual judge who is appointed in accordance with the constitution and other applicable rules thereby obtains his or her constitutional authority and legitimacy. It is implicit in this appointment in accordance with constitutional and legal rules that individual judges are thereby given the authority and appropriate powers to apply the law as created by the legislature or as formulated by other judges. The legitimacy conferred on an individual judge by his appointment in accordance with the constitution and other legal rules of a particular state constitutes an individual judge's "constitutional or formal legitimacy".

15. The CCJE has noted the different methods of appointment of judges in the member states of the Council of Europe<sup>31</sup>. These include, for example: appointment by a council for the judiciary or another independent body, election by parliament and appointment by the executive. As the CCJE has pointed out, each system has advantages and disadvantages<sup>32</sup>. It can be argued that appointment by vote of Parliament and, to a lesser degree, by the executive can be seen to give additional democratic legitimacy<sup>33</sup>, although those methods of appointment carry with them a risk of politicisation and a dependence on those other powers<sup>34</sup>. To counter those risks, the CCJE has recommended that every decision relating to a judge's appointment or career should be based on objective criteria and be either taken by an independent authority or subject to guarantees to ensure that it is not taken other than on the basis of such criteria<sup>35</sup>. The CCJE has also recommended the participation of an independent authority with substantial representation chosen democratically by other judges in decisions concerning the appointment or promotion of judges<sup>36</sup>. The constitutional legitimacy of

individual judges who have security of tenure must not be undermined by legislative or executive measures brought about as a result of changes in political power.

### **(3) Functional legitimacy of individual judges**

16. Judicial appointment in accordance with the constitution and law of a state, the exercise of the constitutional role of judges in deciding cases according to the legal framework designed by the legislature and the necessity that each judge must undertake to work within the established legal rules of conduct all provide an initial legitimacy for the judge. But legitimacy cannot rest there. As the CCJE has pointed out before, public confidence in and respect for the judiciary are the guarantees of the effectiveness of a judicial system<sup>37</sup>. To achieve and maintain legitimacy continuously, each judge and the judiciary as a whole can only do so by earning and retaining the confidence of the public. This second kind of legitimacy can be called "functional legitimacy".

17. "Functional legitimacy" must be earned through work of the highest possible quality which respects high ethical standards. In its previous Opinions, the CCJE has discussed different aspects of good judicial work and the ways of maintaining and improving the quality and efficiency of judicial systems in the interest of the society. Thus the CCJE has given Opinions on various means of achieving this, i.e. initial and in-service training of judges<sup>38</sup>, fair trial within a reasonable time<sup>39</sup>, effective application of international and European law<sup>40</sup>, councils for the judiciary at the service of society<sup>41</sup>, the quality of judicial decisions<sup>42</sup>, the effective enforcement of judicial decisions<sup>43</sup>, information technologies<sup>44</sup>, the specialisation of judges<sup>45</sup>, and the evaluation of judges<sup>46</sup>. The CCJE has stated that, in order to provide judicial services of high quality, the judiciary must also work with prosecutors<sup>47</sup> and lawyers<sup>48</sup> in an appropriate way. By applying these principles, individual judges and so the judiciary as a whole should achieve the overall goal of providing judgments of the highest possible quality in accordance with high ethical standards. Individual judges and the judiciary collectively will maintain legitimacy and the respect of its citizens by their efficiency and the quality of their work.

18. Judges must fulfil their duties within the provisions set out in the disciplinary and procedural rules<sup>49</sup> and (obviously) the criminal law. The powers of a judge are linked to the values of truth, justice, fairness, and freedom. Therefore, judges must perform their duties according to the highest standard of professional conduct<sup>50</sup>. In its Opinion No. 3 (2002), the CCJE discussed such standards and principles of professional conduct<sup>51</sup>. Working within these principles helps to ensure the legitimacy of individual judges who are part of the judiciary as a whole.

19. Like all other powers, the judiciary must also earn trust and confidence by being accountable to society and the other powers of the state<sup>52</sup>. It is therefore necessary next to examine why and how the judicial power and individual judges are to be accountable to society.

## **V. Accountability of judicial power**

### **A. Why is accountability important?**

20. In recent years, public services have moved towards more openness and have accepted that they must provide a fuller explanation of their work for the public they serve. As a consequence, the notion of accountability to the public has become of increasing importance throughout public life<sup>53</sup>. A public body will be "accountable" if it provides explanations for its actions and, of equal importance, the public body assumes responsibility for them. This "accountability" is as vital for the judiciary as for the other powers of the state because it, like them, is there to serve the public<sup>54</sup>. Moreover, provided a careful balance is observed, the two principles of judicial independence and accountability are not irreconcilable opposites. In the judicial context, "accountable"

must be understood as being required to give an account, that is: to give reasons and to explain decisions and conduct in relation to cases that the judges must decide. "Accountable" does not mean that the judiciary is responsible to or subordinate to another power of the state, because that would betray its constitutional role of being an independent body of people whose function is to decide cases impartially and according to law. If the judiciary were "accountable" to another power of state in the sense of being responsible or subordinate to it, then when cases involve those other powers of state, the judiciary could not fulfil its constitutional role as stated above.

21. The judiciary (as with the other two powers of state) provides a public service. It is axiomatic that it should account (in the sense explained above) to the society it serves. Judicial authority must be exercised in the interest of the rule of law and of those seeking and expecting justice<sup>55</sup>. Therefore, the judiciary faces the responsibility of demonstrating to the other powers of the state and to society at large the use to which its power, authority and independence have been put<sup>56</sup>. There has been an increasing demand by court users for a more effective court system. Better access to the courts has been considered of increasing importance<sup>57</sup>. Effectiveness and accessibility are aspects of demonstrating "accountability". The CCJE has recognised these trends before. In stipulating that judicial systems should produce justice of the highest quality and of proper accountability in a democratic system, the CCJE has emphasised one aspect of providing judicial "accountability" to society at large<sup>58</sup>.

22. There are further reasons why the judicial power should be accountable to the other powers of the state in the sense discussed above. First, it is the legislature which creates the legislative framework which the judiciary applies. Therefore, the legislature is entitled to have an account, in properly formulated reasons in decisions, of how the laws it has enacted are being interpreted and applied by the judiciary. Secondly, for the fulfilment of its duties towards society, the judiciary receives financial resources through decisions of the legislature and, in many member states, the executive. As the CCJE has stressed before, the general principles and standards of the Council of Europe place a duty on member states to make financial resources available that match the needs of different judicial systems<sup>59</sup>. It is evident from the responses to the CCJE questionnaire that the administrative and financial autonomy of judiciaries in member states varies considerably. The CCJE has recommended increasing the court's administrative and financial autonomy in order to protect judicial independence<sup>60</sup>. However, whatever way the budgetary and administrative stewardship of the judiciary is organised in a particular state, a judiciary's resources are allocated by parliament and come, ultimately, from tax paying citizens. Thus, just as the legislature and the executive are accountable for how they allocate resources, so also must the judiciary account to society for how the financial resources allocated to it are spent in the fulfilment of its duties towards society<sup>61</sup>.

## **B. How is accountability to be carried out?**

### **(1) What should the judiciary be accountable for?**

23. Justice aims to resolve disputes and, by the decisions which it delivers, the judiciary fulfils both a "normative" and "educative" role, providing citizens with relevant guidance, information and assurance as to the law and its practical application<sup>62</sup>. Therefore, first and foremost, the judiciary must be accountable through the work of the judges in deciding the cases brought before them, more particularly through their decisions and the reasons given for them. Judicial decisions must be open to scrutiny and appeal<sup>63</sup>. This may be called "judicial accountability" and it is paramount. In accordance with the fundamental principle of judicial independence, the appeal system is in principle the only way by which a judicial decision can be reversed or modified

after it has been handed down and the only way by which judges can be held accountable for their decisions, unless they were acting in bad faith.

24. In countries where judges are responsible for the management of the court system (which sometimes includes the court budget), the judiciary must be held accountable for their stewardship to the other powers of the state and to society at large<sup>64</sup>. In this area, judges entrusted with managing public funds are, in principle, in the same position as any other public authority that has responsibility for spending tax payers' money.

## **(2) To whom are judges accountable?**

25. Individual judges and the judiciary as a whole are accountable at two levels. First, they are accountable (in the sense described above) to the particular litigants who seek justice in particular judicial proceedings. Secondly, they are accountable (in the same sense) to the other powers of the state and, through them, to society at large.

### **(3) How is it done?**

#### **(a) Different elements of accountability**

26. There are different forms of accountability. First, as explained above, judges are made to account for their decisions through the appeal process ("judicial accountability"). Secondly, judges must work in a transparent fashion. By having open hearings and by giving reasoned judgments which are made available to the public (save in exceptional circumstances), individual judges will explain their actions and their decisions to the litigants who are seeking justice, the judge is also rendering an account of his or her actions to the other powers the state and to society at large. This form of accountability can be described as "explanatory accountability". Thirdly, if a judge has engaged in improper actions he/she must be held accountable in a more robust way, e.g. through the application of disciplinary procedures and, if appropriate, the criminal law. This can be called "punitive accountability".

#### **(b) Explanatory accountability**

##### **(i) Open hearings and judgments**

27. Fundamental tenets of judicial work, such as the requirement to hold public hearings and to give reasoned decisions that are available to the public, are founded on the principle that judges must give an account of their conduct and decisions. In public hearings, judges hear the evidence of the litigants and witnesses and the submissions of lawyers. Judges will (usually) explain the law publicly. The public at large can attend public court hearings to learn about the law and the judge's (or judges') conduct toward the parties before them<sup>65</sup>. This open procedure ensures a fair trial in accordance with Article 6 of the European Convention on Human Rights. Moreover, by attending hearings, (or, in some states, by viewing hearings on television<sup>66</sup> or on line) and through reporting of hearings, the public can understand better the judicial process. By this means, judges and the judiciary overall are also held to account. While formal procedural rules are important for public confidence in the judiciary, the practical experiences of citizens observing the judiciary in action and the availability of accurate information published by the media about the conduct of individual trials are of decisive importance<sup>67</sup>.

28. Judges must give reasons for their decisions, which should be made public save in exceptional circumstances. In this way, judges account for their decisions and enable the litigants and society at large to understand and to question their reasoning. Decisions must therefore be readily comprehensible, as the CCJE has stated before<sup>68</sup>. In a case where the losing party does not agree with the decision, it can be appealed. The



existence (even threat) of an appeal system should ensure a high standard of judicial decision making that is made within a reasonable time. This is in the interest of the parties and of society at large. In a case where a trial has not been concluded within a reasonable time<sup>69</sup>, special legal remedies can be sought, preferably in local courts or, if such remedies are not available, in the European Court of Human Rights. After the duty of the judge is completed and the decision is handed down, the public interest demands that it must be swiftly and effectively enforced<sup>70</sup>. In this respect, the judiciary is often reliant on the executive power to give effect to its decisions.

## **(ii) Other mechanisms of explanatory accountability**

29. There are several other ways that the judiciary can be made to account for its work and – if applicable – for its stewardship of the system for the administration of justice. Such means must never be misused by the other powers of state to interfere with the work of the judiciary. One obvious means is external: for example, by annual reports which are available to the general public. Other external methods by which the judiciary can be held accountable are: audits of a public audit committee, the work of inspectorates<sup>71</sup> and investigations. At a local or national level, many member states have set up “Ombudsman”, Public or Citizens’ Advocates or Mediators, or Inspectors General, appointed by the executive or by parliament, often with a significant degree of independence. These often work to hold the judiciary accountable. (The question of how to achieve a proper balance between accounting and external interference will be discussed in Section VI below).

30. The other means is internal: by the individual evaluation of judges. In most member states, judges are subject to some form of individual evaluation at some stage or other of their careers after appointment. Evaluation can be a useful means to hold judges accountable. As explained by the CCJE, the individual evaluation of the judges’ work can help to gain information on the abilities of individual judges and of the strength and weaknesses of a judicial system. Evaluation can help to identify the best candidates for promotion thereby maintaining or even improving the quality of a judicial system<sup>72</sup>. Evaluation must not be abused, e.g. to put political pressure on a judge or to question individual judgments.

## **(iii) Discussion with other powers of state**

31. Each of the three powers of the state depends on the other two to work effectively. Discussion between all is crucial to improve the effectiveness of each power and its cooperation with the other two powers. Provided that such discussions are undertaken in an atmosphere of mutual respect and have particular regard to the preservation of the independence and impartiality of any judges participating in such exchanges<sup>73</sup>, these discussions will be beneficial to all three powers of the state<sup>74</sup>. The CCJE has stressed the importance of judges participating in debates concerning national judicial policy. In addition, the judiciary should be consulted and play an active part in the preparation of any legislation concerning their status and the functioning of the judicial system<sup>75</sup>. The expertise of judges is also valuable when it comes to matters outside judicial policy. For example, by giving evidence to parliamentary committees, representatives of the judiciary (e.g. the highest authority of the judiciary or the High Council of Justice) can raise concerns about legislative projects and give the perspective of the judiciary on various practical questions. Some member states reported positive experiences with such exchanges<sup>76</sup>. In some member states, the judiciary engages in dialogue with the executive, when judges take a temporary leave of absence to work in the civil or criminal department of a ministry of justice<sup>77</sup>. In other member states, however, this is seen as a violation of judicial independence<sup>78</sup>.

## **(iv) Dialogue with the public**

32. As the CCJE has noted before, dialogue with the public, directly or through the

media, is of crucial importance in improving the knowledge of citizens about the law and increasing their confidence in the judiciary<sup>79</sup>. In some member states, the appointment of lay judges is seen as providing a helpful link between the judiciary and the public. The CCJE recommended in its Opinion No. 7(2005) on “justice and society” that the judiciary and individual courts should actively reach out to the media and the public directly<sup>80</sup>. For example, courts should assume an educative role by organising visits for schoolchildren and students, by providing information, and by actively explaining court decisions to the public and the media in order to improve understanding and prevent misunderstandings<sup>81</sup>. While there is a risk in engaging with the media, courts can help avoiding public misrepresentations through active contact and explanation. In so doing, the judiciary can be accountable to the society and ensure that the public perceptions of the justice system are accurate and reflect the efforts made by judges. In this way, the judges can also educate the public that there are limits to what a judicial system can do<sup>82</sup>.

### **(c) “Punitive accountability”**

33. As the CCJE has discussed previously, all judicial actions must be in accordance with the applicable principles of professional conduct, established disciplinary rules and – within conditions which preserve judicial independence and impartiality – the criminal law. Principles of professional conduct will be separate from their enforcement through disciplinary systems<sup>83</sup>. Given the importance of ethics and integrity for the public’s confidence in the judiciary, judges must behave with integrity both in their official functions and in their private lives<sup>84</sup> and will be accountable for their conduct if it is outside accepted norms. Sometimes the conduct of individual judges is too aberrant for mere explanation to suffice. The corollary of society granting such extensive powers and trust to judges is that there must be some means of holding judges responsible, and even removing them from office, in cases of misbehaviour so gross as to justify such a course<sup>85</sup>. This is particularly so in cases of judicial corruption<sup>86</sup>, which fundamentally undermine public confidence in judicial impartiality and independence. In other cases of judicial misconduct, criminal<sup>87</sup>, civil<sup>88</sup>, or disciplinary liability<sup>89</sup> will be appropriate, depending on the nature of the misconduct.

## **VI. How do the requirements of “legitimacy” and “accountability” affect the relationship that the judiciary has with the other two powers of the state?**

34. Legitimacy and accountability are closely linked. The judiciary should strive to retain and demonstrate its legitimacy by being accountable to the public. The principal means of doing so are by providing work of the highest possible quality and by explaining its actions and conduct to the other powers of the state and, both through them and directly, to society at large. As already noted, no one power of the state can act in complete isolation and separately from the other two. All powers function in a relationship of interdependence. Exchange and dialogue between the judiciary and the other powers of the state is therefore recommended. However, while all the mechanisms described above can be valuable in ensuring that the judiciary is accountable, they also bear the risk of being misused.

35. The full recognition of the basic safeguards of judicial independence, such as security of tenure, no change of function or location without a judge’s consent, appointment and promotion free from political influence, sufficient remuneration, and safety of life and property<sup>90</sup>, is a prerequisite for any satisfactory discussions between the three powers of the state. If such basic safeguards are respected, judicial independence will not suffer but, on the contrary, will benefit from an increased legitimacy earned through a combination of the satisfactory exercise of the judiciary’s constitutional function and the judges’ participation in exchanges. Continuance of both judicial independence and judicial legitimacy are not automatic: both have to be constantly earned<sup>91</sup>. The judiciary’s legitimacy and its independence is safeguarded best by excellent performance. To achieve this and earn the respect of the public, an

independent and accountable judiciary is open to justified criticism, learns from its mistakes and thereby continually improves its work. This way, independence and accountability do not contradict but, rather, enhance each other. However, it is important to emphasise that a judge is not responsible for the politics of a previous government or regime. Judges must not be subjected to criticism or a disciplinary process simply because they applied the law as laid down by a previous regime, unless they misapplied the law in bad faith.

36. It is especially difficult to balance the need to safeguard the judicial process from distortion and pressure from political sources against the need for open discussion of matters of public interest concerning the administration of justice. On the one hand, as the CCJE has pointed out, judges must accept that they are public figures and must not be over-sensitive<sup>92</sup>. Thus, when judges engage with the other powers of the state and society at large, they must take responsibility themselves to safeguard their independence<sup>93</sup> and impartiality. On the other hand, in all their dealings with the judiciary the other powers of the state must respect the principles of judicial independence and impartiality. Dialogue between the judiciary and other powers of state as well as with the public at large can be misused to violate judicial independence. For example, it is not acceptable for other powers of the state to criticise judicial decisions in a way that undermines judicial authority and encourages disobedience and even violence against judges<sup>94</sup>. It is also not acceptable that valid critical comments by a member of the judiciary of one of the other powers of state (or a member of it) that are made in the course of judicial duties should be met by removal from judicial office by one or other power of the state<sup>95</sup>. It is essential that dialogue between the three powers of the state and between the judiciary and the general public, as well as any inspections and investigations that are undertaken, are conducted in a climate of mutual respect. These processes must never be used to influence a particular judicial decision or to encourage disrespect or disobedience to judicial decisions.

37. With respect to civil, criminal and disciplinary liability (what has been called above "punitive accountability"), the CCJE stresses that the principal remedy for judicial errors that do not involve bad faith must be the appeal process. In addition, in order to protect judicial independence from undue pressure, great care must be exercised in framing judges' accountability in respect of criminal, civil and disciplinary liability<sup>96</sup>. The tasks of interpreting the law, weighing of evidence and assessing the facts that are carried out by a judge to determine cases should not give rise to civil or disciplinary liability against the judge, save in cases of malice, wilful default or, arguably, gross negligence<sup>97</sup>. Furthermore, in the event that the state has had to pay compensation to a party because of a failing in the administration of justice, only the state, not a litigant, should have the power to establish, through court action, any civil liability of a judge<sup>98</sup>.

38. It is appreciated that there are considerable differences in the constitutional structures of member states with the result that there is a considerable variation in the experience of individual states' on how the three powers interact. However, every country can learn from the experience of others. Not only can best practices be shared; first and foremost, international exchanges can help understand common problems and principles. Thus the experiences and practices of all member states should be shared through international and European institutions, including in particular the bodies of the Council of Europe.

## **VII. The need for restraint in the relations between the three powers**

39. As already discussed, the three powers function in a relationship of interdependence. In that sense there can never be a complete "separation of powers". However, in order to achieve a proper balance of the three powers of state, each power must exercise proper restraint in its relations with the other powers.

### **A. "Judicial restraint"**

40. The judiciary, as one of the three powers of the state, is accountable to the society it serves. Accordingly, the judiciary, like the other powers of the state, must always have the best interest of the public as its fundamental concern. This requires that the judiciary must recognise the social and economic conditions in which the other two powers of the state have to work. Moreover, the judiciary must be aware that there are limits to judicial and legal intervention in relation to political decisions that have to be made by the legislative and executive powers. Therefore, all courts within the judicial power must take care not to step outside the legitimate area for the exercise of judicial power. The CCJE recognises that both the legislative and the executive powers have legitimate concerns that the judicial power should not overstep its role.

41. In its dealings with the other two powers of state, the judiciary must seek to avoid being seen as guarding only its own interests and so overstating its particular concerns. Rather, the judiciary must take responsibility for the society it serves. The judiciary must show understanding and responsibility towards the needs of the public and the exigencies of the public purse. The judiciary can provide their insights on the possible effect of proposed legislation or executive decisions on the ability of the judiciary to fulfil its constitutional role. Judiciaries must also take care not to oppose all proposed changes in the judicial system by labelling it an attack on judicial independence. But, if judicial independence or the ability of the judicial power to exercise its constitutional role are threatened, or attacked, the judiciary must defend its position fearlessly. Examples of decisions which might come into those categories are massive reductions in legal aid or the closure of courts for economic or political reasons.

42. If it is necessary to criticise another power of the state or a particular member of it in the course of a judgment in a dispute or when it is necessary in the interests of the public, that must be done. For example, therefore, courts may criticise legislation or the failure of the legislative to introduce what the court would regard as adequate legislation. However, just as with the other powers of the state in relation to the judiciary, criticism by the judiciary must be undertaken in a climate of mutual respect. Judges, like all other citizens, are entitled to take part in public debate, provided that it is consistent with maintaining their independence or impartiality. The judiciary must never encourage disobedience and disrespect towards the executive and the legislature. In their professional and private relations with the representatives of the other powers, judges must avoid any conflict of interest and avoid any behaviour that might create a perception that judicial independence and impartiality and the dignity of the judiciary in general is impugned. As long as criticism is undertaken in a climate of mutual respect, it can be beneficial to society as a whole. However, it cannot be too often emphasised that it is not acceptable that reasonable critical comments from the judiciary towards the other powers of the state should be answered by removals from judicial office or other reprisals<sup>99</sup>. The CCJE also emphasizes that inadmissible behaviour by representatives of the legislative and executive powers and by politicians may occur in the form of connivance and, in certain cases, support for aggression or even radical, violent and unlawful actions against the judiciary<sup>100</sup>. Direct or indirect support for such actions against the judiciary is totally unacceptable. Not only are such actions a direct attack on judicial independence, they also stifle legitimate public debate by judges.

## **B. Restraint of the other powers**

43. Judicial restraint must be matched by an equal degree of responsibility and restraint from the other powers of the state. Above all the other powers of the state must recognise the legitimate constitutional function that is carried out by the judiciary and ensure it is given sufficient resources to fulfil it. This function of adjudicating on all legal disputes and of interpreting and applying the law is as fundamental to the well-being of a modern democratic state governed by the rule of law as are the functions of the legislative and executive powers of the state. In a state governed by the principle of separation of powers, interferences between the action of one branch of the State and other branches must be maintained within the bounds of the law and internationally

accepted standards. The CCJE considers that, when an unwarranted interference does occur, the powers of the state should loyally cooperate to restore the balance and so the confidence of society in a smooth functioning of public institutions. In all cases of conflict with the legislature or executive involving individual judges the latter should be able to have recourse to a council for the judiciary or other independent authority, or they should have some other effective means of remedy<sup>101</sup>.

### **(1) Questioning the appointment of judges already selected**

44. Decisions which remove basic safeguards of judicial independence are unacceptable even when disguised<sup>102</sup>. For example, a new parliamentary majority and government must not question the appointment or tenure of judges who have already been appointed in a proper manner. The tenure of individual judges can only be questioned if some breach of disciplinary rules or the criminal law by an individual judge is clearly established in accordance with proper judicial procedures.

### **(2) Legislation: changes to the system of justice**

45. The question of when and how often legislation should be changed falls within the responsibility of the legislature. However, too many changes within a short period of time should be avoided if possible, at the very least in the area of the administration of justice<sup>103</sup>. Where changes to the system of justice are made, care must be taken to ensure that they are accompanied by adequate financial, technical and procedural provisions and that there will be sufficient human resources<sup>104</sup>. Otherwise there is a risk of instability in the proper administration of justice and the public might perceive (wrongly) that any failings in administering a new system were the fault of the judiciary. That can lead to unnecessary mistrust and conflict.

### **(3) Legislature: parliamentary investigation committees**

46. There is a danger of an overlap between the proper role of the judges and that of parliamentary investigation committees. The CCJE recognises that national or local parliamentary bodies may, under the legislation of many member states, set up committees of inquiry to investigate social phenomena or alleged breaches of or a poor application of law. The powers of these committees are often similar to those of judicial authorities, such as the power to summon witnesses, order disclosure or seizure of documentary evidence, etc. In the CCJE's opinion, in order to preserve a proper separation of powers, in general the reports of committees of inquiry should never interfere with investigations or trials that have been or are about to be initiated by judicial authorities. If such reports must comment on existing judicial decisions in individual cases, they must do so with proper respect and should refrain from expressing any criticism in terms that would amount to a revision of decisions made. However, if the inquiry is investigating possible defects in the administration of justice which have been highlighted by a particular case, those proceedings can, with due care, be examined. An inquiry can never replace a proper judicial process.

### **(4) "Ombudsman", Public or Citizens' Advocates or Mediators, and Inspectors General**

47. "Ombudsman", Public or Citizens' Advocates or Mediators and Inspectors General appointed by the executive or by parliament often act with a significant degree of independence. They have the task of protecting the interests of the public by investigating and addressing complaints by individuals alleging violation of rights, usually by public entities. The tasks of such bodies is to investigate complaints and attempt to resolve them, usually through recommendations (binding or not) or mediation. This may, however, interfere with the development of individual cases that have been or are about to be initiated before a court. Such interventions must be prevented. Therefore, the CCJE recommends that legislation of member States clarifies

the relationships between “ombudsman” (or similar agencies’) powers and the powers of the courts. A good solution may be found in the rule, adopted in some states, whereby resort to such agencies should be made available before addressing the court; but when court proceedings are initiated, parties may appear before the agency only upon the recommendation of the judge in charge of the case.

### **(5) Administration of courts and Inspections**

48. Over the last decades, self-administration by the judiciary has been introduced or its scope enlarged in many member states. The models used in respect to the administration of the judiciary vary. In some countries, the administration of justice is undertaken by the Ministry of Justice; in others by independent agencies and in others by Councils for the judiciary. The CCJE has made recommendations on these issues<sup>105</sup>. In some countries, the executive, through ministries of Justice have exerted considerable influence on the administration of courts through directors of courts and judicial inspections, or, in cases where the court administration is directly dependent on a ministry of Justice. The presence of officials of the executive within the organising bodies of courts and tribunals should be avoided. Such a presence can lead to interferences with the judicial function, thus endangering judicial independence.

49. Problems on the interaction between the executive and the judiciary can occur in those states in which the Minister of Justice or other ministries or agencies, e.g. those having a power of audit and/or financial control, have the power to order inspections at courts. Such inspections may have different goals. For example, the inspection may be in order to acquire information to decide on financial allocations, or to obtain information concerning possible re-organisation of the court service, or to obtain information in order to take possible disciplinary actions against court staff and/or judges. Inspectorates are sometimes composed of judges or former judges, and are sometimes even established within High Councils for Justice. The CCJE considers that, while an insight by external investigators can help to see shortcomings in a particular institution, such as the judiciary, it is vital that, the activities of inspectors should never interfere with the development of judicial investigations and trials. The right of other powers of the state to be informed of or to investigate the system of justice should in all cases be exercised having regard to the limits imposed by judicial independence and (where provided for by law) by the secrecy of judicial investigations. Inspections should never concern individual cases, in particular cases that are pending trial.

### **(6) Budgetary autonomy**

50. The consequences of public financial difficulties, especially those resulting from the economic crisis since 2008, have caused serious problems in many member states. Access to courts and legal aid has been reduced, the workload of the courts has increased and the judiciary has been restructured. In their answers to the questionnaire, many member states reported discussions concerning the remuneration of judges. Salaries for judges have been frozen for many years or even lowered in recent years.

51. It is accepted that, subject to constitutional provisions, ultimately the decisions on the funding of the system of justice and the remuneration of judges must fall under the responsibility of the legislature. However, European standards should always be obeyed. The CCJE has made recommendations about the funding of the judiciary<sup>106</sup>. The judiciary should explain its needs to parliament and, if applicable, to the ministry of Justice. In the case of a severe economic downturn, judges, like all other members of society, have to live within the economic position of the society they serve. However, chronic underfunding of the judicial system should be regarded by society as a whole as unacceptable. This is because such chronic underfunding undermines the foundations of a democratic society governed by the rule of law.

## **(7) Criticism by members of the executive and legislature**

52. Politicians and others in public positions in member states often make comments that either demand that judicial powers be restricted or show little understanding of the role of an independent judiciary. Such comments are made especially during election campaigns, when decisions on constitutional issues have been given, or on pending cases. In principle, the judiciary must accept that criticism is a part of the dialogue between the three powers of the state and with the society as a whole. However, in the view of the CCJE, there is a clear line between freedom of expression and legitimate criticism on the one hand, and disrespect and undue pressure against the judiciary on the other. Politicians should not use simplistic or demagogic arguments to make criticisms of the judiciary during political campaigns just for the sake of argument or in order to divert attention from their own shortcomings. Neither should individual judges be personally attacked. Politicians must never encourage disobedience to judicial decisions let alone violence against judges, as this has occurred in some member states. The executive and legislative powers are under a duty to provide all necessary and adequate protection where the functions of the courts are endangered by attacks or intimidations directed at members of the judiciary. Unbalanced critical commentary by politicians is irresponsible and causes a serious problem because public trust and confidence in the judiciary can thereby be unwittingly or deliberately undermined. In such cases, the judiciary must point out that such behaviour is an attack on the constitution of a democratic state as well as an attack on the legitimacy of another state power. Such behaviour also violates international standards.

53. Individual courts and the judiciary as a whole need to discuss ways in which to deal with such criticism. Individual judges who have been attacked often hesitate to defend themselves (particularly in the case of a pending trial) in order to preserve their independence and to demonstrate that they remain impartial. In some countries, councils for the judiciary or the Supreme Court will assist judges in such situations. These responses can take the pressure off an individual judge. They can be more effective if they are organised by judges with media competence.

54. The rule that any analyses and criticisms by one power of state of the other powers should be undertaken in a climate of mutual respect applies as much to the judiciary as it does to members of the legislature and the executive. In fact, it is even more important for the judiciary to take extra care, because judges often have to decide whether the executive or the legislature have conducted themselves according to law. Furthermore, there will be no confidence in the decisions of a judiciary which permits its members to make unreasonable or disrespectful comments of the other powers of state. Those types of remark will only lead to a "war of words" which will itself undermine public confidence in the judiciary. Ultimately, a "war" like this could lead to the judiciary being unable to carry out its constitutional function of deciding disputes between citizens and between citizens and the state in a manner that is, and is seen to be, both independent and impartial. That would be to the detriment of society and democracy, which it is the judiciary's duty to serve and safeguard.

### **VIII: Summary of principal points**

1. The judiciary is one of the three powers of state in a democracy. They are complementary, with no one power being "supreme" or dominating the others (paragraph 9).
2. In a democratic state, the three powers of the state function as a system of checks and balances that holds each accountable in the interest of society as a whole (paragraph 9).
3. The principle of the separation of powers is itself a guarantee of judicial independence. The judiciary must be independent to fulfil its constitutional role

in relation to the other powers of the state, society in general, and the parties to any particular dispute (paragraph 10).

4. The legitimacy of the judiciary and individual judges is given, first and foremost, by the constitution of each of the member states, all of which are democracies governed by the rule of law. The constitution creates the judiciary and thereby confers legitimacy on the judiciary as a whole and the individual judges who exercise their authority as part of the judiciary: "constitutional legitimacy". The constitutional legitimacy of individual judges who have security of tenure must not be undermined by legislative or executive measures brought about as a result of changes in political power (paragraphs 13 - 15 and 44).

5. This constitutional legitimacy of the judiciary is reaffirmed by public confidence in and respect for the judiciary. These must be constantly earned and retained by the judiciary through excellent work of the highest standards: this is what the CCJE calls "functional legitimacy" (paragraphs 16 - 19).

6. The judiciary (like the other two powers of state) provides a public service. Therefore, the judiciary, like the other powers, has the responsibility of demonstrating to the other powers of the state and to society at large the use to which its power, authority and independence have been put. This can be called "accountability" (paragraphs 20 - 22). This "accountability" takes several forms.

7. First, there is the appeal system. The appeal system is, in principle, the only way by which a judicial decision can be reversed or modified after it has been handed down and the only way by which judges acting in good faith can be held accountable for their decisions. The CCJE has called this "judicial accountability" (paragraphs 23, 26).

8. Secondly, judges are made accountable by working in a transparent fashion, by having open hearings and by giving reasoned judgments, engaging with the public and the other powers of state. The CCJE has called this form of accountability "explanatory accountability" (paragraphs 27-32).

9. Thirdly, if a judge has engaged in improper actions of a sufficiently serious nature, he or she must be held accountable in a robust way, e.g. through the application of disciplinary procedures and, if appropriate, the criminal law. The CCJE has called this "punitive accountability". Care must be taken, in all cases, to preserve judicial independence (paragraphs 33 and 37).

10. With regard to the relations between the three powers of the state: first, judges, like all other citizens, are entitled to take part in public debate, provided that it is consistent with maintaining their independence and impartiality (paragraph 42).

11. The other powers of the state should recognise the legitimate constitutional function that is carried out by the judiciary and ensure it is given sufficient resources to fulfil those functions. Analyses and criticisms by one power of state of either of the other powers should be undertaken in a climate of mutual respect (paragraph 42).

12. The judiciary must be aware that there are limits to judicial and legal intervention in relation to political decisions that have to be made by the legislative and executive powers. Therefore, all courts within the judicial power must take care not to step outside the legitimate area for the exercise of judicial power (paragraph 40).



13. Decisions of the legislative or executive powers which remove basic safeguards of judicial independence are unacceptable even when disguised (paragraph 44).

14. Ministries of Justice must not exert influence on the administration of courts through directors of courts and judicial inspections in any way that might endanger judicial independence. The presence of officials of the executive within the organising bodies of courts and tribunals should be avoided. Such a presence can lead to interference in the judicial function, thus endangering judicial independence (paragraphs 48-49).

15. In order to preserve a proper separation of powers, committees of inquiry or investigation (whether parliamentary or otherwise), should never interfere with investigations or trials that have been or are about to be initiated by judicial authorities. Such non-judicial investigations are never a substitute for a judicial process (paragraph 46).

16. The CCJE recommends that legislation of member States clarifies the relationships between the powers of the "Ombudsman" (or similar agencies') and the powers of the courts (paragraph 47).

17. Chronic underfunding of the judiciary should be regarded by society as a whole as an unacceptable interference with the judiciary's constitutional role, because it undermines the foundations of a democratic society governed by the rule of law (paragraph 51).

18. Analyses and criticisms by one power of state of the other powers should be undertaken in a climate of mutual respect. Unbalanced critical commentary by politicians is irresponsible and can cause a serious problem. It can undermine public trust and confidence in the judiciary and could, in an extreme case, amount to an attack on the constitutional balance of a democratic state (paragraph 52). Individual courts and the judiciary as a whole need to discuss ways in which to deal with such criticism (paragraph 53).

19. The executive and legislative powers are under a duty to provide all necessary and adequate protection where the functions of the courts are endangered by physical attacks or intimidations directed at members of the judiciary (paragraph 52).

20. Politicians must never encourage disobedience to judicial decisions let alone, as it has happened in certain states, violence against judges (paragraph 52).

<sup>1</sup> See Gardbaum, "Separation of Powers and the Growths of Judicial Review in Established Democracies (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn From Sale?)", 62 *American Journal of Comparative Law* (2014) 613.

<sup>2</sup> Scholars have identified a "global expansion of judicial power": see Tate and Vallinder (eds), *Global Expansion of Judicial Power*, New York University Press, 1997.

<sup>3</sup> See respectively the Secretary General's Reports on the "State of Democracy, Human Rights and the Rule of Law in Europe" for 2014 and 2015, hereafter referred to respectively as the "CoE Secretary General's Report (2014)" and the "CoE Secretary General's Report (2015)".

<sup>4</sup> See the CCJE report on the situation of the judiciary and judges in the member states of the Council of Europe (2013), paras 13-18.

<sup>5</sup> See the CoE Secretary General's Report (2015), p. 14, 17, 27.

- <sup>6</sup> See the CoE Secretary General's Report (2015), p. 20-21.
- <sup>7</sup> See for legal aid: the CoE Secretary General's Report (2015) p. 22-23.
- <sup>8</sup> See the CoE Secretary General's Report (2015), p. 19.
- <sup>9</sup> See the CoE Secretary General's Report (2014), p. 22; the CoE Secretary General's Report (2015), p. 27.
- <sup>10</sup> In addition to the members of the CCJE Working Group, the seminar was attended by Professor Robert Hazell (the Constitution Unit, University College, London, United Kingdom), Mr Andrew Drzemczewski (Head of Legal Affairs and Human Rights Department of the Secretariat of the Parliamentary Assembly of the Council of Europe), Ms Anna Maria Telvis and Ms Ann Speck (Human Rights Association) and Mr Ziya Tanyar (Secretariat of the Venice Commission of the Council of Europe).
- <sup>11</sup> Contributions made by Professor Jørn Øyrehagen Sunde (University of Bergen), Ms Hanne Sophie Greve (President of the Gulating Court of Appeal, former judge at the European Court of Human Rights) and Ms Ingjerd Thune (President of the Norwegian Association of Judges).
- <sup>12</sup> See the CCJE Opinion No. 3(2002), para 16.
- <sup>13</sup> See the CCJE Opinion No. 1(2001), para 11; see also the CCJE Magna Charta of Judges (2010), para 1.
- <sup>14</sup> The CCJE recognises that this last task is sometimes carried out by a Constitutional Court and that, in some systems, the Constitutional Courts are not necessarily seen as part of the judiciary.
- <sup>15</sup> See the CoE Secretary General's Report (2014), p. 22.
- <sup>16</sup> See also for the functions of the judiciary: Garapon, Perdrille, Bernabé, Synthèse du rapport de l'HEJ La prudence et l'autorité: L'office du juge au XXI<sup>e</sup> siècle (2013).
- <sup>17</sup> See the CCJE Opinion No. 1(2001), para 11.
- <sup>18</sup> Alexander Hamilton, in Federalist 78, described the judiciary as the least dangerous of the three powers because it had "no influence over either the sword or purse..... It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments". Hamilton's view may not reflect the reality of judicial power over executive or even legislative action in Europe of the 21<sup>st</sup> century.
- <sup>19</sup> See the CCJE Opinion No. 13(2010) on the role of judges in the enforcement of judicial decisions.
- <sup>20</sup> See Aharon Barak, "The Judge in a Democracy" (Princeton Press 2008), Ch. 2.
- <sup>21</sup> See the CCJE Opinion No. 1(2001), paras 11, 12.
- <sup>22</sup> See the CCJE No. 3(2002), para 9.
- <sup>23</sup> For example: all English and Welsh judges on appointment have to swear to decide cases "according to the laws and usages of this Realm, without fear or favour, affection or ill will".
- <sup>24</sup> See e.g. the judgments of the ECtHR in the following cases: *Orsus v. Coratia* of 16.03.2010 – 15766/03 – para 147; *Sejdić and Finci v. Bosnia and Herzegovina* of 22.12.2009 – 27996/06 and 34836/06 – para 43; *Muñoz Díaz v Spain* of 08.12.2009 – 49151/07 – para 61, *D.H. and others v. Ukraine* of 23.11.2007 – 57325/00 – para 176; *Gorzelik v. Poland* of 17.2.2004 -

44158/98, paras 89-90, *Metropolitan Church of Bessarabia v. Moldova* of 13.12.2001 – 45701/99 - para 116, *Sidiropoulos v. Greece* of 10.07.1998 – 26695/95 - para 41, see on the protection of minorities by courts: *Sandalow*, *Judicial Protection of Minorities*, Mich. L. Rev. 75 (1977) 1162; *Cover*, *The Origins of Judicial Activism in the Protection of Minorities*, Yale Law School Legal Repository (1982).

<sup>25</sup> See *Volkov v. Ukraine* of 09.1.2013 - 21722/11 - para 199.

<sup>26</sup> See also the CoE Secretary General's Report (2014), p. 22.

<sup>27</sup> The English poet John Donne in Meditation XVII.

<sup>28</sup> See the CoE Secretary General's Report (2015), p. 14, 17, 27, see also the CCJE Opinion No. 13(2010) on the role of judges in the enforcement of judicial decisions.

<sup>29</sup> See the CCJE Opinion No. 1(2001), para 11.

<sup>30</sup> See the CCJE Opinion No. 1(2001), para 11; see also the CCJE Magna Charta of Judges (2010), para 1.

<sup>31</sup> See the CCJE Opinion No. 1(2001), paras 19-23; see also the Venice Commission, *Judicial Appointments*, 2007, paras 9-17.

<sup>32</sup> See the CCJE Opinion No. 1(2001), para 33.

<sup>33</sup> See e.g.: Fabian Wittreck, *Die Verwaltung der Dritten Gewalt*, Mohr–Siebeck, Tübingen, 2006. He argues that the legitimacy of all officials in a state derives ultimately from "the will of the people" (Art. 20(2) of the German Constitution). A similar argument can be advanced for other constitutions. See e.g. the Art. 3 of the Declaration of the Rights of Man and of the Citizen of 1789, integrated into the French Constitution: "The principle of any Sovereignty lies primarily in the Nation" ("Le principe de toute Souveraineté réside essentiellement dans la Nation").

<sup>34</sup> See the CCJE Opinion No. 1(2001), para. 33.

<sup>35</sup> See the CCJE Opinion No. 1(2001), para 37.

<sup>36</sup> See the CCJE Opinion No. 1(2001), para 45, rec. 4; Opinion No. 10(2007), paras 48-51. According to the ECtHR, judicial appointments by the legislature and the executive are permissible as long as the appointed judges are free from influence or pressure when carrying out their adjudicatory role. See: *Flux v. Moldova* of 3.7.2007 – 31001/03 - para 27. The notion of separation of powers and its importance for judicial appointment has also been discussed by the ECtHR: see *Volkov v. Ukraine* of 9.1.2013 - 21722/11 - para 109, and *Maktouf and Damjanovic v. Bosnia and Herzegovina* of 18.7.2013 – 34179/08 - para 49. The Venice Commission considers appointment of ordinary judges by vote of the Parliament inappropriate (Venice Commission, *Judicial Appointments*, 2007, para 12) and recommends appointment by a council for the judiciary with a substantial number or majority of members being elected by the judiciary: Venice Commission, *Judicial Appointments*, 2007, para 29.

<sup>37</sup> See the CCJE Opinion No. 3(2002), para 22.

<sup>38</sup> See the CCJE Opinion No. 4(2003).

<sup>39</sup> See the CCJE Opinion No. 6(2004).

<sup>40</sup> See the CCJE Opinion No. 9(2006).

<sup>41</sup> See the CCJE Opinion No. 10(2007)

<sup>42</sup> See the CCJE Opinion No. 11(2008).

<sup>43</sup> See the CCJE Opinion No. 13(2010).

<sup>44</sup> See the CCJE Opinion No. 14(2011).

<sup>45</sup> See the CCJE Opinion No. 15(2012).

<sup>46</sup> See the CCJE Opinion No. 17(2014).

<sup>47</sup> See the CCJE Opinion No. 12(2009).

<sup>48</sup> See the CCJE Opinion No. 16(2013).

<sup>49</sup> One example of a necessary procedural rule is the need for a judge to recuse himself where there may be an actual or perceived conflict of interest.

<sup>50</sup> See the CCJE Opinion No. 3(2002), para 8.

<sup>51</sup> See also the CoE Secretary General's Report (2015), p. 9.

<sup>52</sup> In its 2013-2014 Report, the ENCJ has explained that a judiciary that claims independence but which refuses to be accountable to society will not enjoy the trust of society. See the ENCJ Report 2013-2014, p. 4.

<sup>53</sup> See for a discussion of judicial accountability: Graham Gee, Robert Hazell, Kate Malleson and Patrick o'Brien "The Politics of Judicial Independence in the UK's Changing Constitution", Cambridge University Press, 2015, pp. 16 – 22.

<sup>54</sup> See on the importance of good governance and judiciary in the CCJE Opinion No. 7(2005), the CCJE Opinion No. 10(2007) and the CCJE Opinion No. 14(2011).

<sup>55</sup> See the CCJE Opinion No. 1(2001), para 11; Opinion No. 10(2007), para 9.

<sup>56</sup> See the ENCJ Report 2013-2014, p. 13.

<sup>57</sup> See the CCJE Opinion No. 6(2004), para 1.

<sup>58</sup> See the CCJE Opinion No. 17(2014), para 23.

<sup>59</sup> See Recommendation [CM/Rec\(2010\)12](#), para 32, and the CCJE Opinion No. 2(2001), para 4; Opinion No. 10(2007), para 37; Opinion No. 17(2014), para 35.

<sup>60</sup> See the CCJE Opinion No. 2(2001), para 14, and Opinion No. 10(2007), para 12.

<sup>61</sup> There is a duty of the other powers of the state to provide adequate funds for the judiciary: CCJE Opinion No. 2 (2001).

<sup>62</sup> See the CCJE Opinion No. 7(2005), para 7.

<sup>63</sup> Contini and Mohr "Reconciling independence and accountability in judicial systems", 3 Utrecht Law Review (2007) 26, 31-32, called this "legal and judicial accountability".

<sup>64</sup> Contini and Mohr "Reconciling independence and accountability in judicial systems", 3 Utrecht Law Review (2007) 26, 33-34, called this "managerial accountability".

<sup>65</sup> On relations of the courts with participants in court proceedings, see the CCJE Opinion No. 7(2005), paras 24-26. Exceptions can be made in cases where the litigants' interests for their privacy demand it.

- <sup>66</sup> See on the sensitive issue of television in court procedures: the CCJE Opinion No. 7(2005), paras 44-50.
- <sup>67</sup> See the CCJE Opinion No. 7(2005), paras 9, 24-26; see also Bühlmann and Kunz, "Confidence in the Judiciary: Comparing the Independence and Legitimacy of Judicial Systems", *West European Politics* Vo. 34, No. 2 (2011) 317, 332.
- <sup>68</sup> See about the quality of judicial decisions the CCJE Opinion No. 11(2008); Opinion No. 7(2005), para 56.
- <sup>69</sup> See the CCJE Opinion No. 6(2004).
- <sup>70</sup> See the CCJE Opinion No. 13(2010); see the CoE Secretary General's Report (2015), p. 14, 17, 27.
- <sup>71</sup> See the CCJE Opinion No. 1(2001), paras 27, 69 rec. 10.
- <sup>72</sup> See the CCJE Opinion No. 17(2014).
- <sup>73</sup> See the ECtHR: *Baka v. Hungary* of 27.5.2015 - 20261/12 – paras 99-102
- <sup>74</sup> Contini and Mohr "Reconciling independence and accountability in judicial systems", 3 *Utrecht Law Review* (2007) 26, 41-42, advocated the concept of "cooperative accountability".
- <sup>75</sup> See the CCJE Opinion no. 3(2002), para 34; Belgium and Montenegro reported exchanges of this kind.
- <sup>76</sup> See on relations between judges and parliament in the UK: Graham Gee, Robert Hazell, Kate Malleson and Patrick O'Brien: "The Politics of Judicial Independence in the UK's Changing Constitution", Cambridge University Press, 2015, pp. 92-125.
- <sup>77</sup> See the CCJE Opinion No. 3(2003), para 36.
- <sup>78</sup> See the Decision of the Constitutional Court of Lithuania of 21.12.1999, IV.9.
- <sup>79</sup> See the CCJE Opinion No. 7(2005).
- <sup>80</sup> See the CCJE Opinion No. 7(2005), C.
- <sup>81</sup> See the CCJE Opinion No. 7(2005), paras 7-23.
- <sup>82</sup> See the CCJE Opinion No. 7(2005), para 27.
- <sup>83</sup> See the CCJE Opinion No. 3(2002), para 49, recommendation iii.
- <sup>84</sup> See the CCJE Opinion No. 3(2002), para 50, recommendation ii.
- <sup>85</sup> See the CCJE Opinion No. 3(2002), para 51.
- <sup>86</sup> See the CoE Secretary General's Report (2015), p. 24-25; see also the work of GRECO in the fourth evaluation round [www.coe.int/greco](http://www.coe.int/greco).
- <sup>87</sup> See the CCJE Opinion No. 3(2002), paras 52-54.
- <sup>88</sup> See the CCJE Opinion No. 3(2002), paras 55-57.
- <sup>89</sup> See the CCJE Opinion No. 3(2002), paras 58-74; see also Kyiv Recommendations, paras 25-26.

<sup>90</sup> See the CCJE Opinion No. 1(2001); Recommendation [CM/Rec\(2010\)12](#), Chapter II, V, VI; see the CCJE Magna Charta of Judges (2010), paras 2-13;

<sup>91</sup> See the ENCJ Report 2013-2014, p. 4, 9.

<sup>92</sup> See the CCJE Opinion No. 1(2001), para 63.

<sup>93</sup> The ENCJ Report describes the perception of judges of their own independence as an aspect of "subjective independence", the ENCJ Report 2013-2014, p. 13, 3.3.2.

<sup>94</sup> See Recommendation [CM/Rec\(2010\)12](#), para 18.

<sup>95</sup> See ECtHR: *Baka v. Hungary* of 27.5.2015 - 20261/12.

<sup>96</sup> See Recommendation [CM/Rec\(2010\)12](#), Chapter VII; the CCJE Opinion No. 3(2002), para 51; see for an example of such a misuse: *Volkov v. Ukraine*, ECtHR of 9.1.2013 - 21722/11 – esp. para 199.

<sup>97</sup> See the CCJE Opinion No. 3 (2002), paras 75, 76; see also Recommendation [CM/Rec\(2010\)12](#), paras 66-71. The liability of the state is another matter with which this Opinion is not concerned. In the following decisions, the CJEU held in favour of state liability for damage caused by judicial decisions. The CJEU did not mention a liability of the judges who gave the judgments which caused the damage in question: CJEU (30 Sept. 2003, C-224/01, *Köbler vs. Austria*; Great Chamber, 13 June 2006, C-173/03, *Traghetti del Mediterraneo s.p.a. in liquidazione v. Repubblica Italiana*; 24 November 2011, C-379/10, *Commission v. Repubblica Italiana*; 9 Sept. 2015, C-160/14, *João Filipe Ferreira da Silva e Brito v. Estado português*).

<sup>98</sup> See Recommendation [CM/Rec \(2010\)12](#), paras 66 and 67. See the CCJE Magna Carta of Judges (2010), para 22.

<sup>99</sup> See ECtHR: *Baka v. Hungary* of 27.5.2015 - 20261/12.

<sup>100</sup> See the Open Letter of the Supreme Court of Ukraine, p. 2.

<sup>101</sup> See Recommendation(2010)12, Art. 8.

<sup>102</sup> See the CCJE report on the situation of the judiciary and judges in the member states of the Council of Europe (2013), paras 13-18.

<sup>103</sup> See the CoE Secretary General's Report (2015), p. 17.

<sup>104</sup> See the CCJE Opinion No. 11(2008).

<sup>105</sup> See the CCJE Opinion No. 10(2007).

<sup>106</sup> See the CCJE Opinion No. 2(2001).