



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Opening of the Judicial Year

Seminar

Strengthening Confidence in the Judiciary

Appointment, promotion and dismissal of judges and ethical standards

Speech by Jasna Omejec¹

Strasbourg, 25 January 2019

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1. Introduction

At this 2019 Judicial Seminar we are continuing to hold, in the words of Judge Lemmens, “a kind of European judicial summit”², this year to discuss the mechanisms that can contribute to strengthening confidence in the judiciary. Today, the judiciary has gained relevance in public life as never before, and judges are much more visible than ever in public debate³. Thus, the judiciary, above all, must enjoy

¹ This article is based on a panel paper prepared for the Judicial Seminar on strengthening confidence in the judiciary held at the European Court of Human Rights on 25 January 2019. The author would like to thank the ECtHR judges Gabriele Kucsko-Stadlmayer and Ksenija Turković for their comments on the first draft of the panel paper. All remaining errors are the sole responsibility of the author. The views expressed herein are personal and do not bind the Venice Commission in any way.

² Lemmens, Paul, Opening words, Dialogue between judges 2018, Proceedings of the Seminar “The Authority of the Judiciary 1. Challenges to the authority of the judiciary 2. Responses to the challenges” (Strasbourg, 26 January 2018), Council of Europe, European Court of Human Rights, 2018, at 7.

³ Moreover, Judge Lemmens pointed out that judges in some countries “make statements through the media and form an extraordinary pool of experts who are often called to the highest positions of the administration, working next door to political bodies; significant numbers leave the judicial branch to compete in political elections and take seats in Parliament”; *ibid.*, at 14.

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public support and public confidence in order to be successful in carrying out its mission⁴, especially in these post-modern times when “authority is in universal decline”⁵. Confidence in the judiciary is related to “the legitimacy of the courts, as the latter encompasses the legality (acting according to the law), the shared values (values that are shared by those with authority and those subject to that authority), and the consent (the sense amongst the citizens of a moral obligation to obey the authority) that should characterize the judiciary”⁶.

Public support and confidence, as well as the public perception of judicial independence, are heavily influenced by how judges are appointed, promoted and dismissed. However, the judiciary is not a simple structure. In practice, we must clearly state which courts we are talking about, and the same goes for judges. Not a few differences exist between judges of the ordinary courts, constitutional court judges and judges of the European Court in Strasbourg. For example, issues and controversies relating to promotions or probationary periods for judges⁷ do not arise at all in relation to judges of the European courts or those of the constitutional courts and the highest, supreme, courts.

Furthermore, constitutional and supreme courts occupy different roles under their countries’ Constitutions. Accordingly, a different manner of judicial appointment is required in order to guarantee the specific role of these courts⁸. Judges are the acting force of these courts, and the rules concerning their appointment broadly reflect what constitutional and supreme courts stand for. In the nature of things, candidates for the office of constitutional court judge are most exposed to public scrutiny owing to the political character of their election or appointment. In sum, the constitutional design of the court influences judges in action, who make the court in reality.

This paper will address only the system of ordinary courts, which accounts for most of the career judges in every country.

2. Main Principles of Independence of the Judiciary

The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “the Convention”) states that “[e]veryone is entitled to a fair and public hearing by an independent and impartial tribunal established by law” (Article 6 § 1). According to the case-law of the European Court of Human Rights (hereinafter “the ECtHR” or “the Court”), the object of the term “established by law” in Article 6 § 1 is to ensure “that the judicial organisation in a democratic society [does] not depend on the discretion of the Executive, but that it [is] regulated by law emanating from Parliament”⁹. Similarly, judges must be independent of other organs of the State, which involves freedom from inappropriate connections with and influence by these organs. This is essential in order to foster public confidence in justice and the rule of law. Consequently, independence also serves as the guarantee of impartiality. Judges should be and should be seen as independent and impartial in the discharge of their duties. The case-law of the ECtHR sheds light on these and many other important aspects of judicial independence. However, by its very nature, the Court does not approach the issue from a systemic point of view,

⁴ “The Court has on many occasions emphasised the special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a law-governed State, must enjoy public confidence if it is to be successful in carrying out its duties” (ECtHR, *Baka v. Hungary* [GC], no. 20261/12, § 164, 23 June 2016).

⁵ Lemmens, *op. cit.*, *supra* note 2, at 7.

⁶ Background Document for the Judicial Seminar 2019: Strengthening the confidence in the judiciary, ECtHR Registry, Strasbourg, 2019, at 4. Available at https://www.echr.coe.int/Documents/Seminar_background_paper_2019_ENG.pdf (last accessed 15 January 2019).

⁷ As regards probationary judges, see *infra* note 35.

⁸ See CDL-AD(2007)028 – “Judicial Appointments, Report adopted by the Venice Commission at its 70th Plenary Session” (Venice, 16-17 March 2007), Opinion No. 403/2006, Venice, 22 June 2007, § 7.

⁹ See *Zand v. Austria*, no. 7360/76, Commission report of 12 October 1978, Decisions and Reports (DR) 15, at 70 and 80.

unlike the European Commission for Democracy through Law (the Venice Commission), a consultative body of the Council of Europe in constitutional matters¹⁰.

The Venice Commission has repeatedly observed that “[t]he independence of the judiciary has both an objective component, as an indispensable quality of the Judiciary as such, and a subjective component as the right of an individual to have his/her rights and freedoms determined by an independent judge. Without independent judges, there can be no correct and lawful implementation of rights and freedoms. Consequently, the independence of the judiciary is not an end in itself¹¹. It is not a personal privilege of the judges but justified by the need to enable judges to fulfil their role of guardians of the rights and freedoms of the people”¹². In the same report¹³ the Commission set out the relevant standards for ensuring the independence of the judiciary, which can be summarised as follows.

- Principles which ensure the independence of the judiciary should be set out in the Constitution or an equivalent text.
- All decisions concerning appointment and the professional career of judges should be based on merit, applying objective criteria within the framework of the law (see *infra* Section 2.1.).
- An independent judicial council should have a decisive influence on decisions affecting the appointment or career of judges (see *infra* Chapter 3, especially Section 3.2.).
- Ordinary judges should be appointed permanently until retirement.
- The principle of irremovability should be supported in the Constitution.
- The level of remuneration should be guaranteed by law in line with the dignity of judicial office and the scope of a judge’s duties.
- Judges should be protected from external influence and, as a result, should enjoy functional immunity.
- Judges should not put themselves into a position where their independence may be questioned, a principle which makes judicial office incompatible with other functions and operates to restrict political activities.
- Judicial decisions should not be subject to revision outside the appeal process.
- The principle of internal judicial independence is incompatible with a relationship of subordination of judges in their judicial decision-making activity¹⁴.

2.1. Principles Relating to the Appointment, Promotion and Dismissal of Judges

The judicial branch is the main guarantee of the very existence of the rule of law and a fundamental guarantee of a fair trial. By virtue of its independence, it is not directly accountable to any electorate¹⁵.

¹⁰ See CDL-JD(2008)002 - “European Standards on the Independence of the Judiciary. A Systemic Overview”, Study No. 494/2008, Strasbourg, 3 October 2008; and CDL-PI(2015)001 – “Compilation of Venice Commission Opinions and Reports Concerning Courts and Judges”, Strasbourg, 5 March 2015.

¹¹ According to Di Federico, among the civil-law countries with a consolidated democratic system Italy is certainly the one where judicial independence has acquired the highest recognition both in terms of the amplitude of the legal provisions formally intended for its protection and in terms of how those provisions have been interpreted. However, “[t]he Italian case shows that when the value of judicial independence is pursued as an end in itself at the expense of other important values (such as accountability and guarantees of professional competency) a series of negative consequences ensue. In particular, Italy’s experience shows that the very provisions intended to protect judicial independence when carried too far may, paradoxically, turn out to be self-defeating, i.e., detrimental to judicial independence.” Di Federico, Giuseppe, “Independence and accountability of the judiciary in Italy. The experience of a former transitional country in a comparative perspective” [a modified version of an article that was previously published in Andras Sayo (ed.), *Judicial Integrity*, Leiden, Martinus Nijhoff, Koninklijke Brill NV, 2004]. Available at <http://siteresources.worldbank.org/INTECA/Resources/DiFedericopaper.pdf> (last accessed 28 December 2018).

¹² CDL-AD(2010)004-e – “Report on the Independence of the Judicial System Part I: The Independence of Judges”, adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), Study No. 494/2008, Strasbourg, 16 March 2010, § 6.

¹³ *Ibid.* This general report on the most important European standards applicable to the judiciary constitutes a key reference for the Venice Commission in the assessment of country-specific legislation regulating the judiciary and the guarantees put in place to ensure its independent functioning.

¹⁴ *Ibid.*, §§ 22, 23, 31, 38, 43, 44, 46, 60, 62, 65-67 and 72.

¹⁵ See Background Document, *supra* note 6, at 4.

Therefore, the principles relating to the appointment, promotion and dismissal of judges, which underlie the independence of the judiciary, are of the utmost importance, especially for the public perception of judicial independence.

In this light, it should be emphasised again that the selection and careers of judges should be regulated in accordance with objective criteria based on merit, having regard to qualifications, integrity, ability and efficiency¹⁶. The judicial appointment procedure must be transparent and independent in practice. The decisions must be based on the above-mentioned objective criteria, and should not be influenced by any other reasons. There is a general acceptance that political considerations should be inadmissible in the process of appointments of judges. Furthermore, security and stability of tenure are essential elements of judicial independence. Judges cannot be subjected to arbitrary removal from office. When disciplinary proceedings are initiated against a judge, the guarantees in Article 6 of the Convention must be complied with because public confidence in the functioning of the judiciary is at stake. Similarly, growing importance is attached to procedural fairness in cases involving the removal or dismissal of judges, including disciplinary proceedings. Finally, the issue of criminal and civil liability and immunity of judges could be addressed in the light of the principles and rules governing judges' professional conduct. All these principles contribute to inspiring public confidence in the judiciary.

2.2. Standards of Professional Ethical Conduct

The Consultative Council of European Judges (hereinafter "the CCJE") requires that the powers entrusted to judges be strictly linked to the values of justice, truth and freedom. The standards of conduct applied to judges are the corollary of these values and a precondition for confidence in the administration of justice. The methods used in the settlement of disputes concerning the ethical aspects of judges' conduct should always inspire confidence. Consequently, the CCJE, in its Opinion no. 3¹⁷, sought to answer the following questions. What standards of conduct should apply to judges? How should standards of conduct be formulated? What if any criminal, civil and disciplinary liability should apply to judges?

For the purposes of this paper, it is sufficient to emphasise that a "judicial code of ethics"¹⁸ or "principles of conduct", adopted by representative assemblies of judges, have been introduced for judges in many European countries¹⁹. According to the CCJE, "they express the profession's ability to reflect its function in values matching public expectations by way of counterpart to the powers conferred on it. These are self-regulatory standards which involve recognising that the application of

¹⁶ The Commonwealth Latimer House Principles recognise that, in order to uphold the rule of law, engender public confidence and dispense justice, the judiciary must be "independent, impartial, honest and competent". The aim of judicial appointment processes should be to provide a reliable means of identifying persons who possess these qualities, and to do so in a manner that is legitimate, in order to sustain public confidence in the judiciary. See "The Commonwealth Latimer House Principles (2003) on the Accountability of and the Relationship between the Three Branches of Government", Abuja, Nigeria, 2003. Source: *The Appointment, Tenure and Removal of Judges under Commonwealth Principles. A Compendium and Analysis of Best Practice* (Report of Research Undertaken by Bingham Centre for the Rule of Law), London, The British Institute of International and Comparative Law, 2015, Appendix 1, Principle IV, at 114. Available at https://www.biicl.org/documents/689_bingham_centre_compendium.pdf?showdocument=1 (last accessed 3 January 2019).

¹⁷ CCJE (2002) Op. N° 3 – "Opinion no. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality", Strasbourg, 19 November 2002. Available at <https://rm.coe.int/16807475bb> (last accessed 3 January 2019). This Opinion covers two main areas: the principles and rules governing judges' professional conduct, based on determination of ethical principles, which must meet very high standards and may be incorporated in a statement of standards of professional conduct drawn up by the judges themselves, and the principles and procedures governing the criminal, civil and disciplinary liability of judges.

¹⁸ The CCJE considers the word "code" to be inappropriate, since "it is clear that the code does not consist of disciplinary or criminal rules, but is a self-regulatory instrument generated by the judiciary itself." The CCJE suggests that it is desirable to prepare and speak of a "statement of standards of professional conduct", rather than a code. *Ibid.*, points 42 and 46.

¹⁹ For example, in Bosnia and Herzegovina, Croatia, Estonia, France, Italy, Lithuania, Kosovo, Malta, Montenegro, the Republic of Moldova, Serbia, Slovakia, Slovenia, the Czech Republic, the Russian Federation and Ukraine. The oldest is the Italian "Ethical Code" adopted on 7 May 1994 by the Italian Judges' Association, a professional organisation of the judiciary.

the law is not a mechanical exercise, involves real discretionary power and places judges in a relationship of responsibility to themselves and to citizens”²⁰.

Additionally, in order to provide the necessary protection of judges’ independence, the CCJE emphasises that any statement of standards of professional conduct should “recognise the general impossibility of compiling complete lists of pre-determined activities which judges are forbidden from pursuing; the principles set out should serve as self-regulatory instruments for judges, i.e. general rules that guide their activities. Further, although there is both an overlap and an interplay, principles of conduct should remain independent of the disciplinary rules applicable to judges in the sense that failure to observe one of such principles should not of itself constitute a disciplinary infringement or a civil or criminal offence”²¹.

It is apparent that the independence and impartiality of judges cannot be protected solely by principles of conduct. Statutory and disciplinary rules should also play a part, and standards of professional conduct of judges should be quite distinct from them.

In this light, the approach of the Venice Commission to the professional ethics and disciplinary liability of judges should be mentioned. In its three opinions on the codes of judicial ethics of Kazakhstan, Tajikistan and Kyrgyzstan²², the Venice Commission expressed a preference for a code of ethics, which has only the force of a recommendation, not a binding document applicable directly in disciplinary proceedings. The Venice Commission stressed that “... a code of ethics should not be directly applied as a ground for ... disciplinary sanctions. ... The purpose of a code of ethics is entirely different from that achieved by a disciplinary procedure and using a code as a tool for the disciplinary procedure has grave potential implications for judicial independence”²³.

Nevertheless, the Commission is aware that the distinction between discipline and professional ethics is not watertight²⁴. Thus, it acknowledged that codes of conduct for judges adopted by the professional associations of judges “may give guidance to disciplinary authorities for their decisions in disciplinary matters”²⁵. It observed that “there will always be a certain interplay between the principles of ethical conduct and those of disciplinary regulations. In order to avoid the suppression of the independence of a particular judge on the basis of general and sometimes vague provisions of a code of ethics, sanctions have to rely on explicit provisions in the law and should be proportionate to and be applied as a last resort in response to recurring, unethical judicial practice”²⁶. Thus, the Venice Commission is in favour of enumerating in the law an exhaustive list of specific disciplinary offences, rather than giving a general definition, which may prove too vague²⁷.

²⁰ CCJE (2002) Op. N° 3, *supra* note 17, point 45.

²¹ *Ibid.*, point 48.

²² CDL-AD(2016)013 – “Opinion on the draft Code on Judicial Ethics of the Republic of Kazakhstan”, adopted by the Venice Commission at its 107th Plenary Session (Venice, 10-11 June 2016), Opinion no. 841/2016, Strasbourg, 13 June 2016. CDL-AD(2013)035 – “Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan”, adopted by the Venice Commission at its 97th Plenary Session (Venice, 6-7 December 2013), Opinion No. 739/2013, Strasbourg, 10 December 2013. CDL-AD(2014)018 – “Joint Opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic”, adopted by the Venice Commission at its 99th Plenary Session (Venice, 13-14 June 2014), Venice Commission Opinion no. 770/2014, ODIHR Opinion-Nr.: JUD-KYRG/248/2014, Strasbourg / Warsaw, 16 June 2014.

²³ *Supra* note 22. CDL-AD(2016)013, § 6; CDL-AD(2013)035, §§ 15 and 16; CDL-AD(2014)018, §§ 25-27.

²⁴ CDL-AD(2016)013, *supra* note 22, § 7.

²⁵ CDL-AD(2015)018 – “Report on the Freedom of Expression of Judges”, adopted by the Venice Commission at its 103rd Plenary Session (Venice, 19-20 June 2015), Opinion no. 806/2015, Strasbourg, 23 June 2015, § 23; CDL-AD(2016)013, *supra* note 22, § 31.

²⁶ CDL-AD(2016)013, § 8 with further references; CDL-AD(2013)035, § 31. See *supra* note 22.

²⁷ CDL-AD(2016)013, *supra* note 22, § 8.

3. Systems for Managing the Administrative Organisation of the Judiciary in Europe

The previous section dealt with the main principles of independence of the judiciary, especially those relating to the appointment, promotion and dismissal of judges and the standards of professional ethical conduct of judges. By their very nature, principles are always expressed in general terms. However, it is their actual content, as well as their implementation in any particular State, including the institutional architecture, that is ultimately critical²⁸. This brings us to the central topic, namely the systems for managing the administrative organisation of the judiciary, including the appointment, promotion and dismissal of judges (hereinafter “judicial management”), that have been established in European countries in order to achieve these aims in practice. The systems can be divided, roughly speaking, into two main groups.

The first group is based on judicial management by a council for the judiciary or comparable agency as an independent and politically neutral judicial body (hereinafter “judicial council”). According to Voermans and Albers, judicial councils act as intermediaries between the judiciary and the politically responsible administrators in the government or parliament itself, in order to safeguard the independence of the judiciary or for the efficient management and administration of judicial organisations²⁹. These judicial management authorities have different powers in different European countries. Voermans and Albers divide them into two main models.

The first one is the Southern European model (for example, in France, Italy, Spain and Portugal), where the judicial councils are enshrined in the Constitution. They act as boards tasked with the appointment and promotion of judges and with disciplinary action against judges, which means that they fulfil only primary functions in safeguarding judicial independence. The second is the Northern European model (for example, in Sweden and Ireland) in which the judicial councils “have rather far-reaching powers in the area of administration (supervision of judicial registry offices, case loads and case stocks, flow rates, promotion of legal uniformity, quality care etc.) and court management (for example, housing, automation, recruitment, training, etc.) and, in addition to that, play an important part in the budgeting of courts (involvement in setting the budget, distribution and allocation, supervision and control of expenditure, etc.)”³⁰. In other words, judicial councils exist in name but form a “court service model”, having a very limited role in the recruitment, appointment and promotion of judges. As a rule, these councils play only a facilitating role in this process and do not exercise disciplinary powers *vis-à-vis* judges either.

Mathieu characterised the judicial councils belonging to the Southern European model as “*les conseils supérieurs de la magistrature*” whose task is essentially, if not exclusively to contribute to the management of judges’ careers, dealing with judicial appointments, promotions and disciplinary proceedings against judges. The judicial councils belonging to the Northern European model (that is, the court service model) are characterised by this author as “*les conseils supérieurs de justice*”, which have broader responsibilities relating to the organisation and functioning of the justice system³¹.

²⁸ Bearing this in mind, the primary task of the Venice Commission, namely to provide States with legal advice in the form of “legal opinions” on draft legislation or legislation already in force which is submitted to it for examination, is of particular importance. See Scheppele, Kim Lane, “Courts under Political Pressure: Minimum Criteria for Judicial Independence in Europe”, in *Courts, Social Change and Judicial Independence*, organised by Adriana Silvia Dreyzin de Klor, Miguel Poiars Maduro, and Antoine Vauchez, RSCAS Policy Papers 2012/07, European University Institute, Florence, Robert Schuman Centre for Advanced Studies, Global Governance Programme, June 2012, at 51. See also Volpe, Valentina, “Drafting Counter-Majoritarian Democracy. The Venice Commission’s Constitutional Assistance”, *Heidelberg Journal of International Law*, Vol. 76, No. 4 (2016), pp. 811-843.

²⁹ Voermans, Wim; Albers, Pim, *Councils for the Judiciary in EU Countries*, Council of Europe, European Commission for the Efficiency of Justice (CEPEJ), March 2003, at 14. Available at https://www.researchgate.net/publication/228153259_Councils_for_the_Judiciary_in_EU_Countries (last accessed 5 January 2019).

³⁰ *Ibid.*, at 14.

³¹ Mathieu, Bertrand, « Réforme des institutions: que prévoit-elle sur le volet Justice? », *Le club des juristes*, 5 April 2018. Available at <http://blog.leclubdesjuristes.com/reforme-institutions-prevoit-volet-justice/> (last accessed 6 January 2019).

The second main group is based on judicial management by the non-judicial branches of government. The Federal Republic of Germany is an example of this model. Voermans and Albers call it “the undivided model”, in which the task of managing the judiciary is entrusted to the politically responsible government authorities³². However, when it comes to the appointment of judges, this does not necessarily have to be done by “the legislature and/or the Head of State or the executive-only appointment system”. Under this model, the political body appoints judges, but in the process of selecting or shortlisting candidates, a judicial council, judicial appointments commission or similar independent public body may be involved. Practices vary greatly.

Under the appropriate conditions, both arrangements (the Southern and Northern European models of judicial councils, on the one hand, and the undivided model, on the other hand), and their many hybrid systems, are equally credible.

3.1. Differences between Appointment Systems in “Career” and “Recognition” Judiciaries

In addition to the differences existing between the previously described groups in the sphere of judicial management, the systems for appointing judges also differ between those countries with a career judiciary (mostly civil-law countries) and those with a “recognition” judiciary³³, where judges are appointed from the ranks of experienced practitioners (mostly common-law countries).

Traditionally, the civil-law judiciaries of continental Europe have been organised along the lines of a bureaucratic, civil service model and do not differ fundamentally from the State bureaucracy, reflecting the old division of law from politics³⁴. In the continental European model of a career judiciary, judges start at a low position soon after graduating from law school. Early recruitment is complemented by the strongly hierarchical character of the judicial organisation. “The essence of a career judiciary is that judges are appointed to junior positions and are gradually promoted to senior positions. Senior positions typically include seats on the supreme court and special offices in the supreme court. Junior positions often correspond to judgeships in trial courts of first instance. In some career judiciary structures, junior judges may not sit on trial courts but may assist senior judges. The promotion track includes senior positions entitled to such assistants. The archetype, therefore, of a career judiciary means that judges’ careers start early in the lower courts and that they have a reasonable expectation of being promoted to higher courts, contingent upon their performance. Notably, the life tenure of career judges does not attach to a specific court. Also notable is the great number of supreme court judges”³⁵.

By contrast, in the common-law model of a recognition judiciary, judges are appointed late in their careers, after a full career as practitioners or academics. Judges are appointed to specific courts and face very long odds of reaching the highest court. In contrast to the career judiciary, in a recognition

³² Voermans and Albers, *op. cit.*, *supra* note 29, at 12.

³³ See Georgakopoulos, Nicholas, “Discretion in the Career and Recognition Judiciary”, *The University of Chicago Law School Roundtable*, Vol. 7, Issue 1, Article 8, (2000), pp. 205-225.

³⁴ Guarnieri, Carlo, “Appointment and career of judges in continental Europe: the rise of judicial self-government”, *Legal Studies*, Vol. 24, Nos. 1-2 (April 2006), at 169 and 170, with further references.

³⁵ Georgakopoulos, *op. cit.*, *supra* note 33, at 209. Georgakopoulos further pointed out that “[c]areer judiciary systems will most often assign life tenure to judicial positions. Tenure, however, may be awarded after a period during which the performance of the candidate is under review” (at 209). In this light, it is worth mentioning that the Polish Constitutional Tribunal found that the law entrusting probationary judges with adjudicatory functions contravened the principle of judicial independence because they could be removed by the Minister of Justice. Judgment of 24 October 2007, Case no. SK 7/06. See Śledzińska-Simon, Anna, “The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition”, *German Law Journal*, Vol. 19, No. 07 [Special issue — Judicial Self-Government in Europe] (2018), at 1844-1845 and note 22.] Moreover, the Venice Commission has always been critical of probationary periods, stating that “ordinary judges should be appointed permanently until retirement. Probationary periods for judges are problematic from the point of view of their independence”, since “they might feel under pressure to decide cases in a particular way”, “wishing to please superior judges who evaluate [their] performance”. See CDL-AD(2012)001 – “Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary”, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), Opinion 663/2012, Strasbourg, 19 March 2012, §§ 66-68.

judiciary the appointment of judges constitutes, in part, recognition of the judge's previous career³⁶. "The essence of the recognition judiciary is that judicial appointments are made after the candidates have already had their first legal career, that judges have life tenure in a specific court, and that the probability of promotion to a higher court is very small. Appointments may be made either by a combined action of the legislature and the executive or through a direct election, although elected judges usually do not fit the archetype because they do not have life tenure. One might have the impression that most common law jurisdictions have recognition judiciaries, but this archetype is probably representative of much fewer jurisdictions, particularly since most states in the U.S. have an elected judiciary. Moreover, institutional features that produce judicial incentives similar to a career judiciary may influence a system that is nominally considered a recognition judiciary"³⁷. Further, a position in the judiciary does not demand any particular previous training or experience as a judge. A recognition judiciary tends to rely on appointment mechanisms that involve the other branches of government and therefore are usually more politicised in nature (including the use of direct election in some States of the US)³⁸.

When it comes to the appropriate system for judicial appointments in a particular country, the Venice Commission has pointed out that international standards in this respect are more in favour of the extensive depoliticisation of the process. "However, no single non-political 'model' of appointment system exists, which could ideally comply with the principle of the separation of powers and secure full independence of the judiciary." In some older democracies or in States with democratically proven judicial systems, in which the executive power has a strong influence over judicial appointments, such methods of appointment are regarded as traditional and effective. Indeed, they may work well in practice and allow for an independent judiciary because the executive is restrained by legal culture and traditions which have developed over a long time. On the other hand, new democracies have not yet had a chance to develop these traditions which can prevent abuse. Therefore, explicit constitutional provisions are needed as a safeguard to prevent political abuse by other State powers in the appointment of judges³⁹. In these countries, according to the Venice Commission, an independent judicial council should have a decisive influence on decisions concerning the appointment and career of judges⁴⁰.

One particular model of the judicial council, which is advocated by the European Union (hereinafter "the EU") and the Council of Europe (hereinafter "the CoE"), including the Venice Commission, is the so-called "European model of judicial councils" or "judicial council Euro-model". This model "played a key role in the fourth wave of judicial councils" in Europe in the late 1990s and the early years of the twenty-first century⁴¹.

3.2. *The European Model of Judicial Councils*

According to Preshova et al., judicial reforms were not seen as a very important issue for the so-called "old" Member States of the EU. However, the issue became a focus of interest with the accession to the EU of the Central and Eastern European Countries (hereinafter "the CEECs"), and now even more so for the Western Balkan countries (hereinafter "the WBCs") aspiring to become members of the EU. The EU and CoE-driven processes of institutionalisation of the judicial councils were seen as one of the most important pillars of these judicial reforms. "These reforms, led by the EU, have been characterised by a

³⁶ Georgakopoulos, *op. cit.*, *supra* note 33, at 205.

³⁷ *Ibid.*, at 210.

³⁸ Garoupa, Nuno; Ginsburg, Tom, "Hybrid Judicial Career Structures: Reputation Versus Legal Tradition", *The Journal of Legal Analysis* (2011), at 2-3, with further references. Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1905755 (last accessed 10 January 2019).

³⁹ CDL-AD(2007)028, *supra* note 8, §§ 2-3 and 5-6.

⁴⁰ CDL-AD(2010)004-e, *supra* note 12, § 32.

⁴¹ Kosař, David, *Perils of Judicial Self-Government in Transitional Societies*, Cambridge: Cambridge University Press, 2016, at 126.

strong emphasis on the establishment of powerful judicial councils as institutions for judicial self-administration and guardians of judicial independence. This EU approach is the result of a sort of joint effort of both the Council of Europe and the EU, along with a plethora of non-governmental organisations, development agencies and experts in a so-called 'international rule of law industry'. The end result of this 'joint venture' is the 'European model' of judicial councils. They have promoted the establishment of a strong judicial council, at the beginning only as a 'recommendation' for the CEECs, while later on as a strict requirement and obligation for the countries of the Western Balkans⁴². The European model of a strong judicial council was for the first time introduced as a compulsory requirement within the EU negotiation framework for Montenegro.

There is no formal document that defines this model. However, Kosař extracted the parameters of this model from various documents originating from different bodies of the EU and the CoE. These documents, together with the institutional dialogue between the relevant bodies of the EU and the CoE, "reveal that there is a mutual agreement on this issue"⁴³. Kosař concluded that there are five key requirements of the judicial council Euro-model that may be distilled from the plethora of documents produced by numerous organs and affiliated bodies of the EU and the CoE:

1. Judicial councils should have constitutional status.
2. At least 50% of the members of the judicial council must be judges, and these judicial members must be selected by their peers, that is, by other judges⁴⁴.
3. Judicial councils should be vested with decision-making and not merely advisory powers.
4. Judicial councils should have substantial competences in all matters concerning the careers of judges, including selection, appointment, promotion, transfer, dismissal and disciplining.
5. The judicial council must be chaired either by the President or the Chief Justice of the highest court or by the neutral Head of State⁴⁵.

This set of five criteria is not a definitive list of the requirements and recommendations proposed by the EU and the CoE, but rather the lowest common denominator of what is expected and what the EU and the CoE advocate. Kosař argued that "these five criteria also capture the 'invisible rationale' of the Judicial Council Euro-model – to concentrate as much power as possible in one institution that is dominated by judges. This 'self-government' of judges is a golden thread running through all five criteria"⁴⁶. Thus, the key feature that distinguishes the European model, as promoted, from its competing alternatives, including other types of judicial councils, is that it centralises competences affecting virtually all aspects of judges' careers in one place and grants control over this body to the judges.

As such, the European model of judicial councils is only a subset of the various judicial councils that exist in Europe. The composition of the national judicial councils, their competences as well as their power, vary considerably. Consequently, by no means all of the European States which have opted for the judicial council model would meet the criteria of the European model of judicial councils as identified above⁴⁷.

⁴² See Preshova, Denis; Damjanovski, Ivan; Nechev, Zoran, "The Effectiveness of the 'European Model' of Judicial Independence in the Western Balkans: Judicial Councils as a Solution or a New Cause of Concern for Judicial Reforms", CLEER Papers 2017/1, Centre for the Law of EU External Relations, at 7. Available at http://www.asser.nl/media/3475/cleer17-1_web.pdf (last accessed 12 January 2019).

⁴³ Kosař, op. cit., *supra* note 41, at 127.

⁴⁴ However, the Venice Commission consistently points out that the overwhelming supremacy of the judicial component in the judicial council "may raise concerns related to the risks of 'corporatist management'", CDL-AD(2007)028, *supra* note 8, § 30.

⁴⁵ Kosař, op. cit., *supra* note 41, at 128-129.

⁴⁶ *Ibid.*, at 129.

⁴⁷ See Bobek, Michal; Kosař, David, "Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe", Department of European Legal Studies Research Paper in Law, 07/2013, Bruges, College of Europe, 2013, at 17 and 18. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2351299 (last accessed 13 January 2019).

3.3. Effects of the European Model of Judicial Councils in the CEECs and WBCs

Bobek and Kosař rightly stressed that “the constitutional independence of the judicial power in the form of a judicial council might work in case of mature political environments, where decent ethical standards extant and embedded in the judiciary guarantee that the elected or appointed judges-administrators will put the common good before their own”⁴⁸. This means that the European model of judicial councils is based above all on preconditions relating to legal culture and judicial ethics. It is built “on the premise that judges are reliable, solid actors who know their business and are able to administer it. It is therefore considered wise to insulate the judiciary from the democratic process”⁴⁹.

However, the same constitutional insulation of judicial power in the European transition democracies (the CEECs and, especially, the WBCs) has either been awkward or had outright disastrous consequences for judicial independence and for the state and reform of judiciaries in general in these countries⁵⁰.

Analysing the transformative role of the constitutional courts in the European transition democracies (the CEECs and the WBCs), the author⁵¹ argued that, from the first day of their creation, these States had been extremely socially and politically unstable as a result of the accumulated problems of transition, many of which had to be solved through the courts. At the same time, these countries nurture an “image of a well-ordered society”, a kind of normative expectation, an orientation towards the values of a society that does not exist but to which they aspire, and which is formulated in their Constitutions and includes the European model of judicial councils. Thus, life in society in the European transition democracies has been marked by a condition that can be defined, to quote Dimitrijević, as the “drama of opposed imperatives”. Dimitrijević describes this “drama” as “completely specific”. In these countries, it has been necessary to simultaneously “institute and formulate the separate and competing processes of building a modern nation State, developing a market economy, establishing constitutional democracy and protecting social justice. The additional problem is that these countries do not have the tradition of democratic political culture or subjects/bearers of the democratic process as described. Whereas contemporary constitutional democracy is the result of a long process of learning in which people searched ‘step by step’ for various rational answers to the demands that were emerging in the social fabric, post-socialism is expected to implement this democracy as a model for people who have, in social terms, not articulated the need for such a system and about whom no one can be certain that they understand and accept democratic values”. In addition, “for most people, constitutionalism as a political ideology was not an inherently legitimate foundation for the new system. They usually understood freedom as liberation from communism, not as the protection of the individual from all kinds of authority or the readiness to assume responsibility for one’s own destiny within a constitutional framework of basic rights. They did not understand the principle of the separation of powers as forcing objectivity on the political sphere by placing it within the boundaries of the law, but merely as a rejection of one-party dictatorship. They did not see the market economy as the social and economic foundation of democracy but as consumer welfare, and so forth. In short, the new societies lack elementary reflection about the meaning and significance of constitutionalism. An instrumental approach to the constitution functions as a kind of perverted prolongation of the socialist tradition”⁵². In short, the

⁴⁸ Ibid., at 27-28.

⁴⁹ Ibid., at 18.

⁵⁰ Ibid., at 28.

⁵¹ Omejec, Jasna, *Novi europski tranzicijski ustavi i transformativna uloga ustavnih sudova* (New European Transitional Constitutions and Transformative Role of Constitutional Courts), in the Collected Papers from a Round Table: Twentieth Anniversary of the Croatian Constitution (Zagreb, 16 December 2010), ed. Arsen Bačić, Library: Modernizacija prava, book 12, Zagreb: Croatian Academy of Sciences and Arts, Scientific Council for State Administration, Judiciary and the Rule of Law, 2011, pp. 61-85.

⁵² See Dimitrijević, Nenad: *Ustavna demokratija shvaćena kontekstualno* (Constitutional Democracy Understood in Context), Edicija REČ, Fabrika knjiga, Belgrade 2007, at 110-111, 123-124. Translated by the author.

European post-communist States accepted in their new Constitutions the components of the *model* of the desirable future society, but these do not correspond to real life in those States⁵³.

All this has had an impact on the EU and CoE-driven judicial reforms in these countries, including the implementation of a European model of judicial councils, where the judges themselves have been assigned a key role. For example, both Slovakia and Romania are prime examples of countries that closely followed the European model of judicial councils. However, both these countries have struggled to cope with the new model. The Romanian Superior Council of Magistrates strengthened the corporatist features of the Romanian judiciary, with all the accompanying negative effects such as the lack of transparency and minimal accountability⁵⁴. The Judicial Council of the Slovak Republic, with the help of politicians, was hijacked by judges who used their powers to capture the judiciary from the inside. These judges used their powers in a manner that helped them to protect their own interests⁵⁵. Further, as regards the Slovenian judiciary, Zobec pointed out that, “[t]he paramount problem of the Slovenian judiciary is the judiciary itself. First of all, the politics residing inside it, which has been preserved as part of the heritage of the totalitarian era in the form of obstinate mental patterns firmly rooted in the old regime, expressing itself in collectivist and corporatist mind-set. There, in the judiciary, this mind-set (as one form of the parallel, concealed, or deep state) thrives and feeds itself in terms of mode de pense, values and worldviews thanks to institutional closure and complacency. In a normal state with established democratic tradition and legal culture, this would engender positive effects – it would foster what would already be there: internally, mentally independent judiciary. Unfortunately, in Slovenia, it is also being fostered what there already is: anything but an intellectually autonomous and independent judiciary. ... The politics needs to do nothing, it needs not to impact on the judiciary in anything or with anything in order to submit it to itself and to put it under its influence for the time to be. This influence is already there, inside the judiciary, and it has, so to speak, been always there”⁵⁶.

Accordingly, Preshova et al. detected four general negative effects of the European model of judicial councils in the European post-communist States: “**First**, the ‘European model’ is based on assumptions and preconditions relating to legal and judicial culture and mentality that was/is not in place in most of these countries. Therefore, it can be said that the model has been introduced prematurely. **Second**, as a result of this, not only have judicial councils not been able to guarantee judicial independence, but they have opened the door to further threats to it from both internal and external actors, and exacerbated the issue of judicial accountability. The insulation of the judiciary through judicial councils has made it even more prone to political pressure. **Third**, while judicial councils have tried to safeguard judicial independence, individual independence of judges has in certain cases been compromised, as a result of political pressure, mainly through the disciplinary procedure, evaluation of their work and dismissal. Judicial councils have served as an instrument for the disciplining of disobeying and dissenting voices in the judiciary. **Fourth**, despite being one of the goals of judicial councils, increasing the transparency of the judiciary has not been achieved. As a result of the increasing political pressure and existing judicial clientelism as led by the judicial elites, the judicial councils consequently became less transparent and closed to the public in the exercise of their powers and duties”⁵⁷. It is indeed true

⁵³ This deep rift between the “ideal” and the “real”, that is, the imbalance between the normative values arising from the doctrine of the substantive law-based State and the positive legal rules, including the way in which they are applied, is a pronounced structural characteristic of all the European post-communist States. Omejec, op.cit., *supra* note 51, at 73.

⁵⁴ See Selezjan-Guțan, Bianca, “Romania: Perils of a ‘Perfect Euro-Model’ of Judicial Council”, *German Law Journal*, Vol. 19, No. 07 [Special issue – Judicial Self-Government in Europe] (2018), pp. 1707-1740.

⁵⁵ See Spáč, Samuel; Šipulová, Katarína; Urbániková, Marína, “Capturing the Judiciary from Inside: The Story of Judicial Self-Governance in Slovakia”, *German Law Journal*, Vol. 19, No. 07 [Special issue – Judicial Self-Government in Europe] (2018), pp. 1741-1768.

⁵⁶ Zobec, Jan, *Mehki trebuch slovenskega sodstva. Delo* (8 December 2012), Available at: <https://www.delo.si/mnenja/gostujoce-pero/mehki-trebuh-slovenskega-sodstva.html> (last accessed 14 January 2019). Translated into English by Avbelj, Matej, in “Contextual Analysis of Judicial Governance in Slovenia”, *German Law Journal*, Vol. 19, No. 07 [Special issue – Judicial Self-Government in Europe] (2018), at 1918-1919.

⁵⁷ Preshova et al., op. cit., *supra* note 42, at 21.

that, despite its being one of the goals of judicial councils, increased transparency of the judiciary has not been achieved. The judicial councils have become closed to the public. They shut themselves like sea-shells, with no effective external (democratic) control.

To conclude, imposing the European model of a strong judicial council in the typical post-communist transition States is ill-suited to meet the normative values and expectations that were the object of the judicial reforms. The impact of the historical, cultural and institutional legacies, especially the legacies of communist judicial culture, on the dynamics of contemporary judicial reform and the behaviour of judges has hitherto proved too strong. According to Preshova et al., “[o]ne cannot simply establish new institutions amidst an existing judicial culture and mentality, power regimes and personalities, which have psychological ties to the previous regime and expect it to deliver a substantially different result. Consequently, judicial councils have in essence brought changes without reforms”⁵⁸. In the words of Dicosola, “the adoption of reforms introducing completely new rules without a parallel process of transformation of culture risks to be useless or, even worse, to produce an adverse effect”⁵⁹. The same goes for new institutions such as judicial councils established on the basis of principles devised by the EU and the CoE. The “de-communisation” of the judiciary through the European model of judicial councils appears to have been unsuccessful in most of the CEECs and WBCs.

4. Concluding Remarks

It seems that, at the end of the day, everything comes down to legal culture, of which judicial ethics are an inherent part. Legal culture appears to be extremely important for every aspect of the judicial system, including those aspects relating to judicial councils as well as to the appointment, promotion and dismissal of judges.

This simple truth brings to mind the Convention, because more than anything else the Convention reflects the very same philosophy. As Professor Wildhaber, former President of the ECtHR, pointed out, the Convention “is an essential part of our common heritage, an outstanding testimony to European ethical and legal culture ...”⁶⁰. Speaking about the moral principles underlying the Convention (“the ECHR”), Letsas emphasised: “The only consensus that is morally significant is the one entailed by the drafting of the ECHR and the agreement to be legally bound by certain fundamental principles of liberal democracy”⁶¹. In this light, the CoE Committee of Ministers rightly emphasised that the democratic stability of the continent depends on the Convention, which plays the central role as a constitutional instrument of European public order⁶². Indeed, it seems that the Convention is the main, if not the only, pan-European instrument that has the integrative capacity to create a European legal identity.

Accordingly, the commitment to the set of values enshrined in the Convention, which all European countries can agree to, as well as their effective implementation at the national level, have a stronger “capillary” impact on ensuring the independence of the judiciary and on the general position of judges than anything else. This is because the Convention, unlike the idea of the European model of judicial councils that has been promoted, demands a change of legal mindset as well as acceptance of the specific legal culture. Thus, if the general principles of judicial independence which the ECtHR develops

⁵⁸ Preshova et al., op. cit., *supra* note 42, at 20.

⁵⁹ Dicosola, Maria, “Judicial Independence and Impartiality in Serbia: between Law and Culture”, *Diritti Comparati*, 17 December 2012. Available at <http://www.diritticomparati.it/judicial-independence-and-impartiality-in-serbia-between-law-and-culture/> (last accessed 15 January 2019).

⁶⁰ Wildhaber, Luzius, Speech given on the Occasion of the Opening of the Judicial Year, 21 January 2005, in Annual Report 2004, Registry of the European Court of Human Rights, Strasbourg, 2005, at 33.

⁶¹ Letsas, George, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford University Press, Oxford, 2007, at 11.

⁶² Declaration by the Committee of Ministers of the Council of Europe, “Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels”, 114th Session, 12 May 2004.

in its case-law are respected and successfully implemented, including those relating to the appointment, promotion and dismissal of judges – processes which have to be free from political influence – and if all three branches of State power are willing to accept and develop the legal culture on which the Convention is based, including ethical principles, then the institutional form of appointment, promotion and dismissal of judges becomes a matter of secondary importance.

In that case, the form chosen does not have to be the same everywhere. Hence, the variety of forms simply demonstrates that Europe is speaking in one language of judicial mission in a modern democratic State governed by the rule of law, but that this language is sub-divided, so to speak, into many different dialects.