

THE CODE OF ETHICS FOR MAGISTRATES
THEORETICAL AND PRACTICAL ASPECTS

FINAL REPORT ON SIX SEMINARS HELD BY ABA/CEELI
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“Judicial ethics is a relatively new phenomenon in regulatory legislation. This development can be explained in part by the growth of the judiciary, the public’s demand for transparency, and the increase in the number of complaints before different administrative councils against judges. The necessity to institutionalize judicial codes of ethics must, however, be carried out without restraining the independence of the judiciary. Presently, there are two divergent trends: one, an institutional and judicial re-enforcement of this independence; another, a political tendency to weaken judicial independence by subjecting it to extra-legal values”.

*“How to counterbalance codes of ethics and judicial independence”
Judge Yves-Mari Morissette, Court of Appeals in Quebec, Canada - (2003) 48
Mc Gill Law Journal 297.*

“Let’s be clear: Codes of Ethics are instruments for groups of professionals to reflect; the codes themselves are instruments to regulate... Codes of ethics find their source in moral considerations, their sanction find their source in the law”.

“La déontologie” Juge Eric Maitrepierre, document de lecture écrit dans le cadre de Jumelage Phare RO/IB/JH/!0 “Continuation de l’Assistance Accordée a l’Institut National de la Magistrature (INM) et a l’Ecole nationale des Greffes (ENG)”, Roumanie - Unpublished.

“Beyond the relatively rigid provisions of the Code of Ethics, between the lines, I got an answer to my question: a judge’s education is permanent, implies permanent self-control, and seeks moral values. In the end, the success in our career comes from our ability to communicate with and to understand litigants and to strictly apply the law” – “It helped me become more self-confident because now I know better what I am and what I am not allowed to do, what is appropriate and how I can protect myself in various situations when someone may try to violate my independence”.

Seminar attendees

I. BACKGROUND

How familiar are Romanian judges with their Code of Ethics¹? Do they generally agree with its provisions dealing primarily with principles of independence, dignity of the profession, impartiality, professional development and conflicts of interest? When asked to discuss real life situations that they might encounter, do they find that the Code, along with the 2004 Law on Judicial Organization² – which describes responsibilities and stipulates sanctions for disciplinary breaches - provide proper guidance? Do they agree on interpretations of these provisions and on what the Code means? And should the Code be amended and, if so how?

These were but a few of the questions which the American Bar Association /Central European and Eurasian Law Initiative (ABA/CEELI) office in Romania raised during six seminars which it held, nationwide, over a twelve months period in 2004-2005, with support from the US Agency for International Development (USAID).

A similar set of five seminars had been held the previous year by CEELI with support from the US State Department under the auspices of the Stability Pact Anti-Corruption Initiative (SPAI)³. ABA/CEELI organizers decided to retain the same methodology for the USAID sponsored seminars, e.g. to use factual

¹ In February 2001, the Superior Council of Magistrates (SCM) completed a draft code of ethics for Magistrates and asked ABA/CEELI for a comparative assessment of the draft. In June 2001, ABA/CEELI submitted its comments. The Code of Ethics for Magistrates (“Code”) was enacted in October 2001, following adoption by the SCM.

² Law No. 304/2004, along with two other pieces of legislation (Law no. 317/2004 on the SCM and Law No. 303/2004 on the Statute of Magistrates) were adopted in June/July 2004 as part of a “package” of judicial reform to conform with EU principles including those on judicial independence, toward anticipated accession by Romania to the European Union in January 2007.

³ The Final Report of the seminars sponsored under the auspices of SPAI can be found in Romanian and English on the ABA/CEELI website: <http://www.abaceeli.org>.

scenarios, drawn from situations judges might be confronted with in their daily professional lives, to stimulate discussions and observations. They drew also on the same moderators – judges Angela Harastasanu, Roxana Trif and Alexandru Vasiliu – all from the Brasov Court of Appeal - who are members of the faculty of the National Institute of Magistrates (NIM).

While the purposes of the seminars were the same (cf. table at page 2), there were differences: starting with the second seminar (Constanta – September 2004), attendees referred in their discussions to the new organic laws, including those on Judicial Organization, the Statute of Magistrates, and the Superior Council of Magistrates, that went into effect on September 27, 2004. Under these laws, the independence of Romanian magistrates was affirmed, by transferring many prerogatives previously held by the Ministry of Justice to the Superior Council of Magistrates – including oversight of judicial careers (access, evaluation, promotion, initiation of disciplinary investigations) and of initial and continuing education of magistrates. The new Law on Judicial Organization also restructured the judiciary by creating general assemblies of judges (to elect members of the SCM, hold debates on legal issues, present recommendations on draft laws or other issues requested by the SCM).

THE SIX SEMINARS AT A GLANCE

PURPOSE

- 1) gain a thorough knowledge of the provisions of the Code of Ethics for Magistrates and the Law on Judicial Organization
- 2) correctly apply ethical norms to certain concrete scenarios
- 3) encourage a debate about improving the current legislation on judicial ethics
- 4) stimulate the participants' interest in becoming trainers for the National Institute for Magistrates

SCHEDULE

- **Craiova (June 3-4, 2004)**
32 Judges from Craiova Court of Appeal; Tribunals in Dolj, Gorj and Mehedinti; First instance Courts (*Judecatoria*) in Slatina and Craiova
- **Constanța (September 7-8, 2004)**
25 Judges from Constanța Court of Appeal; Tribunals in Constanța and Tulcea; First Instance Courts in Constanța, Tulcea, Babadag and Mangalia

- **Iași (October 21-22, 2004)**
31 Judges from Iasi Court of Appeal; Tribunals in Iași, Vaslui; First Instance Courts in Bârlad, Huși, Pașcani, Hârlău;
- **Bucharest (November 25-26, 2004)**
30 Judges from Bucharest Court of Appeal; Tribunals of Bucharest, Teleorman, Giurgiu and Calarași; First Instance Courts in Bolintin-Vale, Giurgiu and Urziceni
- **Brasov (February 17-18, 2005)**
18 Judges from Brașov Court of Appeal; Tribunals in Covasna; and First Instance Courts in Brașov, Sf. Gheorghe, and Rupea)
- **Suceava (April 14-15, 2005)**
28 Judges from Suceava Court of Appeal; Tribunals in Suceava and Botoșani; First Instance Courts in Radauți, Darabani, Câmpulung Modovenesc, Gura Humorului, Suceava, Vatra Dornei, Dorohoi, Botoșani and Săveni

FACULTY

Judge Angela Hărăstășanu, Judge Roxana Trif, and Judge Alexandru Vasiliu, from the Brașov Court of Appeals. All are members of the faculty of the National Institute of Magistrates (NIM), and participated in 2001 in the program “The Role of the Judge in a Democratic Society” offered by the Netherlands Helsinki Committee in the Hague.

PARTICIPANTS

None of the participant-judges had attended previous seminars on judicial ethics and, for most of them, the seminar was their first experience with interactive teaching methodology.

Aside from providing participants with an opportunity to enhance and deepen their knowledge about ethics governing their profession, the seminars had another important purpose – to provide the SCM with field-based recommendations on how the Code might be improved. The end of the seminars cycle coincided with the Council’s⁴ schedule for revising the Code, as stipulated by Art. 39 of the new SCM law. ABA/CEELI provided the SCM with interim reports on seminar discussions at the end of each session, submitted commentaries on the draft revisions developed by the Council, and participated in discussions with representatives of the Council. The new Code was adopted on April 26, 2005, following posting on the SCM website to elicit further comments from the field. It entered into force on May 5, 2005.

⁴Following the September 2004 enactment of the new organic law on the SCM, Romanian magistrates held for the first time a two-stage peer election in October – December 2004. The “new” Council began operations in January 2005 and announced that – among other initiatives – it would revise the 2001 judicial Code of Ethics.

II. DISCUSSION

A. CASE STUDIES

In the first day of the seminar, the participants were introduced to both the teaching method and the goals of the seminar. Two case studies were discussed the first day, and the third case study was reviewed during the second day. Even though the technique was generally unfamiliar to most of them, all participants got actively involved in, and had high praise for the process (see Evaluations – appendix III). The diversity and novelty of the seminars method, and the switching of roles from one case study to another assured that most participants remained interested and involved until the end of the seminar.

The seminars' moderators developed hypothetical situations so that attendees would analyze legal provisions and debate on the applicability of these rules. The main purpose of the discussions was to gain a thorough knowledge of the provisions include in the Code of Ethics for magistrates and the Law on Judicial Organization. Additionally, the organizers intended to familiarize the participants with international comparative materials such as the United Nations Basic Human Rights and Fundamental Freedoms, Universal Charter of the Judge, and European Charter on the Statute for Judges (for a complete list of the materials provide to the participants, see Appendix II).

After the materials were reviewed carefully and the three working groups were formed, judges discussed the case studies among themselves. Each group had the task to find solutions to the issues raised by the trainers. The participants' conclusions were based on the legislation and comparative materials provided to them in advance. They identified the legal norms applicable to each case study, therefore providing a solid theoretical knowledge of the areas addressed in the case studies. They also proved to be very interested in the comparative materials and cited them frequently.

A high level of seriousness and substance characterized all the discussions over the course of two days. The moderators asked the participants to defend their arguments – whenever possible – with specific article numbers from the materials provided. While most of the judges were familiar with the Code of Ethics for Magistrates, a few disclosed that they were not aware of its existence.

METHODOLOGY AT A GLANCE

- The **case study** method was selected because of its interactive nature which assures a high level participation of all attendees. This method is characterized by an ongoing reciprocated dialog and can be coupled with role-playing activities. It offers an opportunity for all participants to express their opinions individually, as well as to reflect together on the conclusions of the discussions. The approach is also essential in obtaining input about the interpretation of certain applicable provisions.
- The moderators developed their own hypotheticals, all of which offer realistic situations which judges may face in their day-to-day professional and personal lives. Participants are asked to debate what an appropriate response or behavior should be, and interpret the provisions of the Code corroborated with other legal provisions and international instruments.
- Some of the scenarios set up a list of questions faced by an individual judge; others provide a number of brief patterns of facts. Participants are divided in three **working groups** and asked to **brainstorm** collectively their response to the questions raised. A spokesperson for each group presents the opinions and arguments in support of the different positions believed to be appropriate for the specific situations and issues. Participants also make their own contribution by presenting their personal opinion within the working groups or in the general debate which follows the report by each group.
- One of the scenarios involves a **role-play** in which participants divided in three groups act as “prosecutor”, “defense” and “judge” in a situation where a magistrate must appear before a disciplinary body (Superior Council of Magistrates) for alleged ethical violations. After arguments presented by the prosecution and the defense, the “SCM” retires for internal debate then presents its findings.

- The same working group approach was used in the second part of the seminar, during a debate entitled “The Code of Ethics for Magistrates – Is it modern, is it perfectible? – Discussions and Suggestions.”
- All materials, including the Code, legal norms and comparative materials, and the hypotheticals, were sent in advance to participants (see Appendices II – A-G).
- At each seminar, a “pre-post” test was administered (see Appendix IV) to gauge the knowledge gained during the seminar.
- All seminars were rated through evaluation forms, distributed by the organizers and filled out by the participants. (For an aggregate response, see Appendix III.)

I. FIRST CASE STUDY

The first case study (Appendix I-A) involves a case which, upon appeal, was sent back to trial on a technicality, a tendentious article written about the case in the local paper, comments on the case by a government representative, accusations that the court which will hear the case on retrial is biased, pressures from the Ministry of Justice on the Court President, and the request by the judge – assigned to the case – to be recused.

Seminar attendees all concluded that – while freedom of the press is guaranteed by Art. 30 of the Romanian Constitution – this does not give the right to journalists to make value judgments on pending cases, or to comment on the correctness of procedures followed in the case. Some said that the journalist had violated the journalists’ code of ethics (Art. 3 & 5), and most viewed this breach as ‘unacceptable’. A number of seminar attendees concluded that sanctions should be applied in this type of situation or that civil liability was incurred. It was proper for the article to disclose the names of the panel of judges which had heard the case on appeal, consistent with application of the Freedom of Information Law (No. 544/2001), but not to express an opinion about the panel. In several seminars, attendees pointed to the pressures placed on less experienced judges when such articles are published, and mentioned that – according to the jurisprudence of the European Court for Human Rights – , judges should resist pressures (“Impartiality is the capacity of judges to decide freely and without restrictions”).

A government official's comments that the Court of Appeal's decision delayed the final verdict and that he would ask for an emergency review of the case was found to violate the principle of separation of power (Principle I - Recommendation 94 (12) of the Council of Europe; Article 4 – Universal Charter of the Judge).

On the steps taken by the MoJ, to request from the President of the Court information on how the case was proceeding on retrial, participants were unanimous that this was illegal. In addition to a violation of the separation of power, this was also a violation of Art. 2 and 4 of the UN Fundamental Principles on the independence of the Judiciary, Art 1 (3) of the Statute of Magistrates, Art. 10 of Law No. 304/2004 on Judicial Organization, Art. 6 of the European Convention on Human Rights. Participants added that such monitoring would be equally unacceptable from the SCM – now the leading institution governing the judiciary – although some mentioned that, under its new statute, the SCM can request magistrates' opinions on pending cases. They further concluded that the relationship between the judiciary and the Ministry of Justice should be purely administrative.

Finally, they generally agreed that the judge, assigned to re-hearing the case, should not have asked for recusal. Some suggested that the judge should first have requested support from the SCM and from judges' associations.

II. SECOND CASE STUDY⁵

The second case study (Appendix I-B) called for the participants to analyze individual situations and identify *de facto* aspects that could be violations of the Code of Ethics and the Law on Judicial Organization. They were asked also to present arguments in support of their conclusions, even if there was no evidence that the fact pattern violated ethical norms.

For example, the first fact pattern indicated that a judge was to attend a reception given by an attorney who was a relative of the judge as well as defense counsel in a case assigned to the judge. Participants were divided on this issue. Some thought that the judge could attend the festivities if he recused himself from the case, citing Art 5 (3), Art. 12 and Art. 22 (1) of the Code, Art. 27 of the Civil Procedures Code, Art. 5 (2) of the Universal Charter of the Judge. Others disagreed and argued that the simple fact that the judge attended the reception should not be a reason for recusal – the judge would still be the attorney's relative, whether he attended the reception or not, and should only

⁵ In Iași, a different case study was presented – cf. Case Study no. 4 – Appendix I.

ask to be recused if other significant factors existed that would influence his opinion.

In the second example, the question was whether a judge should hear a criminal case when the defendant is someone he went to law school with. Opinions were divided, with most participants in favor of recusal, but some concluding that recusal was not necessary, or at least not until the closeness of the relationship was clear – although the question of “appearances” was hotly debated as well. Finally, some pointed out that the code of criminal procedures calls for self recusal only in cases of antagonism.

When a court president’s son goes on a class trip sponsored by a businessman with a highly visible commercial case pending in that court – the third situation – opinions were again divided. Approximately half of the participants thought that there was no conflict, as long as the Court President was not assigned the instant case – a remote possibility under the random case assignment system. Several recommended that, in order to preserve appearances, the son’s family should pay for the trip. In minority opinions, participants concluded that the appearance of benefiting from some advantages superseded all other considerations, and that the son should decline the invitation.

On the other hand, participants were unanimous that a judge assigned to hear a case involving a company in which he is holding shares, should ask to be removed from the panel. They invoked Art. 12 of the Code (magistrates have the duty to inform their superiors of any situation in which there is or might be an appearance that they have an interest of any kind), Art. 27 (magistrates are prohibited to participate in the management of a commercial company), and Art. 7 of Law No. 303/204 (which refers to activities prohibited for magistrates.)

The fifth hypothetical deals with an invitation to a Court President to attend a book signing reception. It is held at the premises of a political party. The author of the legal text is an attorney who attended the same law school as the Court President and has cases pending in that court. He gives an autographed copy of his book to the Court President. In all seminars, but one, the majority concluded that, while the president could legitimately accept the book under Art. 28 of the Code of Ethics (which permits gifts of a legal text), he should decline the invitation, per Art. 6 (2) and Art. 28 of the Code, because of the location of the event.

There was consensus also on the situation when a court president advises a judge on what verdict to render, citing Art. 20 (1), Art. 4, 22, and 23 of the Code in the president’s case, and Art. 5 (2) and Art. 19 of the Code in the judge’s case. The comments included harsh criticisms of both the judge and the president (unacceptable behavior), with some concluding that the judge – because was

uncertain on how to apply the law in that case – was incompetent and demonstrated a low level of professionalism which “blatantly affects the principle of judicial independence”. In one seminar, however, attendees said that the judge should not be labeled incompetent automatically, given the chaos of constantly changing legislation.

The final fact pattern involves an anonymous tip about alleged improprieties of a judge who is hearing a case as part of a Court of Appeals panel. Two judge-inspectors from the Ministry of Justice⁶ ask the other panel members whether the judge under investigation suggested to them how the case should be decided upon. Here again, there was consensus: the panel members should ignore the inspectors’ request and, in fact, the inspectors – now based at the SCM - should not conduct investigations on the basis of anonymous allegations. They argued, further, that an inspector judge of the Court of Appeals should be the one to conduct an investigation, if any (art. 44 of Law no. 317/2004). Several invoked Code provisions which specify clearly in what situations judges can offer information about their colleagues.

III. THIRD CASE STUDY⁷

This case study was handled through a role-play. The scenario deals with a hypothetical trial of a judge charged with disciplinary violations (see Appendix I-C). One of the groups had the task to identify violations committed by the judge and present appropriate arguments to support a disciplinary action before the Superior Council of Magistrates. The second group was to defend the magistrate and to develop arguments to counter the claims alleged in the request for a disciplinary action. The third group acted as the disciplinary board. In doing so, the group had to decide if a disciplinary action was warranted (Yes or No), explain its decision, and provide a list of legal provisions upon which the decision was based. All “boards” agreed that some sanctions should apply, but differed on their severity and on the reasons for their decision.

Systemic and repeated delays in rendering decisions:

- Yes: 4 - (Art. 15 (1) of Code, Art. 90 (1); Art. 97 (k) (i) of Law no. 303/2004);
- No: 1 – unfounded due to unrealistic caseloads; (minority opinions in two of the seminar: systematic delays were not proven; deadlines for court decisions do not apply, since judges do not have labor contracts that normally establish such deadlines⁸).

⁶ Note that under the new laws, judge inspectors now report to the Superior Council of Magistrates.

⁷ In Iasi, a different case study was presented – cf. Case Study IV – Appendix I-D.

⁸ The dissenters invoked the decision of the European Court for Human Rights (ECHR) concerning a Swiss judge who took one year to prepare his decision. ECHR found for the judge in view of the conceptual nature of the work. If domestic law established deadlines, these should be treated as recommendations, not mandatory deadlines.

Failure to observe the work schedule of the court:

- No: **5** – (arguments included: no proof that court activities had been disturbed; not systematic as required by Art. 97 (1) of Law No 303/2004; the working schedule for judges should take into consideration EU legal norms, according to which judges' independence should not be tampered with).

Publication of a legal article in a political magazine:

- Yes: **4**⁹ – (violation of Art. 6, Art. 12 and Art. 24 of the Code; Art. 97 of Law No. 303/2004)

Spending spare time/friendly relations with attorneys:

- Yes: **2** – (Violation of Art.7 (b) and Art.12 of Code; Art. 4.3 of the European Charter of Judges, and Art. 89 (1) of Law No. 303/2004)
- No: **3** – (arguments included the fact that there was no proof such fraternizing had affected the judge's decisions)

Criticisms about the conduct and competence of colleagues:

- Yes: **5** – (violation of Art. 97 (b) of Law no. 303/2004; Art. 32 of the Code)

Sanctions ranged from a reprimand (3 boards), including two boards who concluded that the overall conduct of the judge warranted a general reprimand; decrease in salary (1 board); 6 months suspension (1 board – including a minority opinion that called for exclusion from the magistracy.) All boards reserved their harshest criticism for disparaging comments on colleagues, closely followed by publication in a political journal.

IV. FOURTH CASE STUDY

In Iasi, the moderators presented a different disciplinary case study (see Appendix I), and the participants were divided among four groups: defense, prosecution, court board, and SCM. The court board concluded that the judge, under investigation, did not violate the code in two instances¹⁰, but that he had committed disciplinary violations. These included:

- Fraternization with a businessman, member of the same NGO as the judge, whom the judge knows to be under investigation for corruption and under a

⁹ One of the "boards" did not address the issue.

¹⁰ In the case study: e) providing information about laws applicable to a businessman's companies; k) publishing in a legal magazine comments on a closed case.

wiretap order: violation of Art. 10 (3) of Law No. 303/2004. (questions a) and b))

- Accepting two free meals, paid by the businessman, and agreeing to be his wedding witness: violation of Art. 21 of the Code, Art. 104 of Law No. 161/2003¹¹, and Art. 97 (b) of Law No. 304/2004 (questions c) and d))
- Judge's son goes on a trip sponsored by the businessman: violation of Art. 28 of the Code. (question f))
- Judge is assigned randomly one of the businessman's cases, who is the defendant, does not reveal the relationship nor asks to be recused, but finds against the defendant: violation of Art. 12 of the Code. (question g))
- While the case was pending, the judge gives the businessman inside information on the case: violation of Art. 10 (2) and Art. 17 of the Code, and of Art. 90 (20) and (3) of Law No. 303/2004. (question h))
- Judge makes comments on colleague: violation of Art. 23 of Code. (question i))
- Judge offers comments on the businessman's defense which the businessman interprets as suggestions for his appeal: Violation of art. 90 (3) of Law no. 303/2004. (question j))
- Judge's wife cashes profit on shares following a business transaction that the judge was aware of: violation of Art. 22 and 27 of the Code. (question l))
- The judge's mother receives a loan for medical treatment from the businessman, whose case has been assigned to the judge; and the businessman hires the judge's sister upon recommendation from the judge, to provide legal advice furnished by the judge: violation of Art. 22 and 28 of the Code, and of Art. 104 of Law No. 61/2003¹² (questions m) and n)).

Concluding that the judge had committed numerous violations, the court board initiated action before the Superior Council of Magistrates. In turn, the SCM found the judge guilty on nine counts [(c),d),f) g),h),i),l),m) n)], and decided on the following sanctions: a 15% reduction in salary for a 4-month period (4 votes); disciplinary transfer to another court for 3 months (2 votes) and exclusion from the magistracy (1 vote).

¹¹ Law no. 161/2003 stipulates measures to ensure the transparency of public dignitaries' acts as they exercise public functions, and establishes measures toward the prevention and sanction of corruption.

¹² In some of the seminars, the moderators polled attendees through a questionnaire on issues about judicial independence and impartiality, as well as their role in society – see Appendix V.

III. THE DEBATE

The seminar concluded with a debate on the topic “*The Code of Ethics for Magistrates – Is It Modern, Is It Perfectible? – Discussions and Suggestions.*” Participants offered their views toward drafting a new code or improving the current legislation. Their comments were submitted to the Superior Council of Magistrates at the conclusion of each seminar.

Seminars participants echoed most of the reservations expressed by their peers during the first round of judicial ethics discussions under the SPAI project, e.g. concerns that provisions of the Code and of other legal norms were difficult to understand, that there existed redundancies and sometimes contradictions between these different texts, and that there existed a lack of guidance on how to interpret the Code – an issue that argues for the need to develop, cross-reference and publicize disciplinary bodies’ jurisprudence.

Most notably, participants in all six seminars recommended that a revised Code of Ethics should echo EU norms (Recommendation 94 (12) of the Council of Europe), and include not only restrictions but also an affirmation of judges’ rights and entitlements (proper working conditions, access to necessary documents, sufficient staff, etc.) They cited as well, as good examples, US judicial codes of ethics, such as those developed in California and Missouri.

Further, they concluded unanimously that provisions which are redundant, and sometimes contradictory, in the Code and in binding law/internal regulations be eliminated from the Code. They cited, as one example, art. 19 of the Code which calls for mandatory participation in continuing education programs every 5 years, while the law on the Statute of Magistrates stipulates every 3 years. As another illustration, the fact that Art. 3 of the Code calls for disciplinary sanctions for violations of the Code, while the law on the Statute of Magistrate is silent on the issue. Or that the Code of Civil Procedures is less restrictive than the Code (Art. 13) in allowing magistrates to represent themselves or family members during litigation.

They noted that, too often, the language of the Code is vague or ambiguous. How should magistrates interpret terms such as “good fellowship”, “decent conduct”, or “dignity and honor of the profession”? Or, Art. 12 of the Code calls for magistrates to report dutifully to their Court President possible conflicts of interest, without stipulating whether non-reporting could lead to sanctions.

Finally, and most important, participants made distinctions between a Code of Ethics, a guide on moral issues, and disciplinary norms listed in the law. They argued that a moral code should not be confused with professional obligations leading to punitive sanctions. The latter should be detailed and specific, while the Code should be limited to basic principles, and participants cited the Code of Ethics for Journalists – with 8 simple principles – as a much better model than the Code for Magistrates. They gave, among other examples, that of “working hours” (Art. 15 (2) “Therefore, they shall observe the work schedule”) which, in their view, does not belong in a code of ethics and should be entirely eliminated from the Code.

This distinction between moral and disciplinary issues has been the subject of numerous articles¹³, and seminar participants generally agreed that non-observance of the Code should not lead to sanctions, except perhaps in extremely severe and rare circumstances. Rather, a Code should guide judges and enable them to reflect on their moral obligations, as described by some attendees: “the Code should be a collection of norms of conduct, and the current code does not meet these requirements” or, “its purpose is to improve the quality of justice”.

Some went as far as recommending that the Code be entirely eliminated. The majority however indicated that the Code is a useful instrument, and that its enactment should take place rather through the creation of a new body (named, by some, as a Council of Honor) that could provide guidance to younger judges, act as a preventive forum to hold discussions with peers when non-observance of ethical norms takes place, and monitor the provision of information and education on ethical issues.

¹³ Among many others:

“How to conciliate codes of ethics and judicial independence” Judge Yves-Mari Morissette, Court of Appeals in Quebec, Canada - (2003) 48 Mc Gill Law Journal 297.

“ La Déontologie” Judge Eric Maitrepierre, – unpublished paper prepared in the context of the EU Twinning/Phare project RO/IB/JH/10.

IV. CONCLUSION

The seminars evidenced a very real need for Romanian magistrates to have an opportunity to reflect on their moral obligations, to appreciate how breaches – however innocuous – could do harm to them and their profession, and to gain better insights of what a Code can accomplish. Their effusive evaluations spoke loudly to that effect.

It was evident, also, that the case study method and use of inter-active debates or role plays made a significant difference. Initial skeptics of the project argued that one “cannot teach ethics” to those who have no intention of behaving ethically. The argument is a correct one, particularly when the “training” takes place simply through lecturing participants. On the other hand, these seminars did not portend to teach or preach, but rather to give participants opportunities to think, debate, argue, and listen to each other. The seminars’ impact will not result in unethical individuals changing their behavior. Rather, it helped alert judges to situations which they might encounter and which they had not fully thought through, previously; as well, to an understanding of how to solve possible dilemmas, and avoid the unpleasant consequences of thoughtless or uninformed behavior.

As another result of these seminars, suggestions and recommendations from the “field base” were collected and provided to the Superior Council of Magistrates, to help enhance a revision of the Code. CEELI provided the Council with a report following each seminar, sent comments on the revised draft in March and April (see Appendix VI), those largely inspired by seminar discussions, and met in April with representatives of the Council for discussion of the final draft. The new Code was adopted by the Council on April 26, 2005 (see Appendix VII). It incorporates a large number of the observations presented during the process.

Some may argue that the new Code is not perfect, and is still perfectible. The concept of replacing disciplinary sanctions with an Honor Council forum was

not endorsed, and some redundancies of the Code with the Law on Judicial Organization were not eliminated. The seminar organizers were told, however, that the seminars curriculum materials and methodology will be incorporated by the National Institute for Magistrates as part of its regular courses – another opportunity for judges to continue their discussion and to provide future recommendations.

APPENDICES

I. Case studies

A. Case Study No. 1

Upon final appeal, the Court of Appeal (CoA) reversed the decision of the first instance court, and sent the case back for retrial because the summons procedure had not been followed properly.

The very next day, a national newspaper published an article which criticized the CoA conclusion for these reasons: the CoA had found against the government – which had won the case in the lower court, and for the opposing party – a businessman who belongs to an influential political party. The article concluded that the first instance court decision was just, while the appeal court decision was incorrect, and contrary to the evidence. Further, the article implied that the judicial panel was biased, and disclosed the names of the judges on the panel.

The journalist who wrote the article claimed that he had studied the case file, and that the first instance court had followed properly the summons procedures.

The article also quoted a member of the government, who expressed his dissatisfaction with CoA's decision, since it was delaying final resolution of the case. The government representative added that he would ask the lower court to review the case on an emergency basis.

The case was sent back for retrial.

As a result of the newspaper article, the president of the first instance court received a letter from the Ministry of Justice, which asked him to inform the Ministry of all the steps taken by the court following each hearing and, in case of delays, explanations on why such delays occurred. The journalist who had authored the first article continued to cover the case, and alluded – discretely – to an eventual decision in favor of the businessman.

In view of the Ministry of Justice’s request and of the articles in the newspaper, the judge assigned to the case asked to be recused, arguing that, under these circumstances, he could not be independent and impartial. His request was rejected.

Questions:

- 1. What is your opinion about the manner in which the journalist reported on the court decision and the parties in the case?*
- 2. Might the article(s) have put pressure on the judges and affect their independence and impartiality?*
- 3. Was it proper for the newspaper to reveal the names of the judges who sat on the CoA’s panel? What was the likely impact of such disclosure?*
- 4. Is it admissible for a journalist to express an opinion on how procedures were followed?*
- 5. Might the government representative’s statements interfere with the handling of the case and, if yes, how?*
- 6. What is your opinion about the Ministry of Justice’s request since it led to a form of “supervision” or “monitoring” of the case?*
- 7. In view of the Ministry of Justice request, and the journalist’s comments after each session, were the judge’s independence and impartiality affected?*
- 8. What are your comments on the type of relationship that should exist between the Ministry of Justice and the courts with respect to the handling of cases?*
- 9. What should have been the reactions of the judge to whom the case was assigned, of the president of the court, and of the judges’ association? What are your views on the judge’s request to abstain from hearing the case?*
- 10. What role should a judge’s view on his/her responsibilities and independence play in establishing a proper relationship with other branches of government? What is the current situation in Romania, in this regard?*
- 11. What other comments do you have?*

B. Case Study No. 2

Using the Code of Ethics as reference, please give your opinions about the following situations:

1. A judge attends a dinner held to celebrate a christening – that of the son of an attorney who is a relative of the judge as well as defense counsel in a case assigned to the judge.
2. How should a judge deal with a criminal case assigned to him and in which the defendant is a notary who went to law school with the judge?
3. The son of a court president goes on a trip with his classmates. A businessman sponsors the trip. He is the father of one of the son's classmates, and a party in a highly visible commercial lawsuit pending before that court.
4. A judge owns 7% of the shares of a commercial company. Do you think that he can hear a lawsuit in which that company is one of the parties?
5. During a book signing, held at the headquarters of a political party, the president of a Tribunal receives an autographed law book as a gift. The present is from a lawyer who is a former university colleague, and who now has several cases pending before the Tribunal. The lawyer also belongs to that political party.
6. A court president advises a judge on how to decide on a case before him. The judge is not convinced this is the correct decision, and is aware that the president's interference is against the law. He follows the suggestion, however, because he is not sure how to interpret and apply the legal provisions that pertain to the case. What are your comments?
7. Two inspector-judges from the Ministry of Justice go to a court and ask judges for their personal opinions concerning the professional and ethical conduct of one of their colleagues. This investigation is the result of an anonymous tip received at the Ministry. It has to do with a case on appeal, which is being heard by a panel of judges. The judge under investigation is one of the panel members. The other two members of the panel were asked if, during the deliberations, that judge suggested to them how to decide the case.

Each point presents a different situation. We ask that you provide comments on each one, and identify possible violations of the Code of Ethics and the law. Also, please identify the factors that can lead to such violations.

C. Case Study No. 3

The Court of Appeals' board has notified the Superior Council of Magistrates (SCM), asking that it hear a complaint lodged against judge A.B, and take disciplinary action.

According to the complaint, the judge is alleged to have committed the following disciplinary violations:

- Systematic and repeated delays in performing his duties.
- Failure to observe the work schedule of the court.
- Non-compliance with the general norms of conduct imposed by the Code of Ethics.

The complaint lists these transgressions: the judge is late, many times, in writing up his opinion after the verdict, thus exceeding the deadlines set by law; he is often late to work; he is known to be someone who spends his spare time in the company of lawyers who have cases pending before his court; and he publishes articles in a magazine belonging to a political party.

In addition, the complaint mentions that, in conversations with lawyers and at the editorial office of the magazine, the judge often criticizes the competence and ethical conduct of some fellow magistrates.

In response, Judge A.B. sent a memorandum to the Superior Council of Magistrates, arguing in his defense that:

- His workload is excessive - 2-3 court sessions per week, 50-80 cases each - and, for this reason, he does not have the time necessary to write up his decisions within the deadlines.
- He is late to work because he lives far away from the court and public transportation is unreliable.
- As a rule, he spends his spare time with lawyers he went to law school with, and with whom he has remained friends.
- His negative comments about the competence and conduct of some of his colleagues were directed at errors in their verdicts – and these verdicts were overturned later on upon appeal.
- The articles published in the magazine were “scientific”, e.g. professional reviews and legal commentaries.

Judge A.B. asked to be heard by the Superior Council of Magistrates in the presence of a defense attorney.

The judges' association asked permission from the Superior Council of Magistrates to take part in the hearings, as advocate of magistrates' professional rights.

Participants will be divided into three groups, each assigned to one of the following tasks:

- *Group No. 1 will identify the violations committed by the judge, support a disciplinary action, and specify which provisions of the Code of Ethics and the Law on Judicial Organization were violated.*
- *Group No. 2 will defend the judge and develop arguments to counter the claims contained in the request for disciplinary action.*
- *Group No. 3 will act as the Superior Council of Magistrates and will decide what disciplinary action to impose. Its decision will list the legal provisions upon which it is based.*

D. Case Study No. 4

Judge M. belongs to a 30-member NGO.

a) Businessman A.B. is also a member of that NGO. Judge M. knows that one of his colleagues authorized the wiretapping of A.B.'s phone calls, to obtain evidence on the commission of serious crimes of corruption.

b) During the NGO meetings, judge M. often conversed with the businessman, without letting him know that he was under investigation.

c) On two occasions, at a club, A.B. invited judge M. to lunch, and A.B. paid the bill both times.

d) Judge M. accepted A.B.'s request to be his witness at his wedding.

e) During the course of some conversations, the judge answered a few questions posed by A.B., regarding the legislation applicable to the activity of his commercial companies.

f) A. B. sponsored a youth association for a trip abroad, because he was acquainted with members of the association. One of the five beneficiaries of the trip was the judge's son, who knew who sponsored the trip.

g) A case was filed against A.B. for having committed corruption-related offences. By chance, judge M. was assigned the case on appeal. The judge, without informing anyone about his relationship with A.B., did not recuse himself, considering that there was no reason for it. During deliberations, evidence was examined and the initial verdict was upheld.

h) During the appeal process, judge M. accidentally met A. B. at the same club. Judge M. told him that the decision in his case was a fair one, and told him about the objective manner in which he and his colleague, when considering the verdict, examined all the evidence.

i) He also added that, even though his colleague was rather superficial and sometimes not very familiar with the files, he proved to be meticulous in this case.

j) On the same occasion, judge M. criticized A.B. for the lack of inspiration in building his defense. The latter understood his appeal should be based on these critiques.

k) After the final decision was upheld, judge M. published a commentary on the case in a legal magazine, with a note criticizing the manner in which the criminal investigation was conducted.

l) In the same period, due to a transaction between A.B.'s company and another company, in which the judge's wife had 10 shares for a total amount of 200,000 lei, the value of shares increased by 10,000 lei and the judge's wife cashed the profit, with her husband's knowledge, who knew about the increase in the value of shares.

m) The judge's mother, who needed medical care abroad, asked for and was given 10,000 euros by A.B., as a loan, with her son's knowledge, while A.B. had another pending case in court, randomly assigned to the judge for resolution.

n) The judge's sister, at his request, was employed as a consultant in A.B.'s company. Her well-paid job was to pass along legal advice she received from her judge brother regarding the operations of A.B.'s company; she did not have any legal education.

Do the acts of judge M. from letters a) – n) violate the ethical rules set forth by the Code of Ethics for Magistrates, Law No. 303/2004 and Law No. 161/2003?

II. Reference materials provided to participants

A. LIST OF MATERIALS DISTRIBUTED TO THE PARTICIPANTS

- The Code Of Ethics for Magistrates
- Law No. 303/2004 on the Statute of Magistrates (excerpts)
- Law No.304/2004 on Judicial Organization (excerpts)
- Law No. 317/2004 on the Superior Council of Magistrates (excerpts)
- Law No.161/2003 on Steps to Ensure Transparency in Holding Public Dignities, Public Positions and in the Business Community, to Prevent and Sanction Corruption (excerpts)
- The Romanian Constitution (excerpts)
- Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges
- The European Convention for the Protection of Human Rights and Fundamental Freedoms (excerpts)
- European Charter on the Statute for Judges
- The Universal Charter of the Judge
- UN Basic Principles on the Independence of the Judiciary
- Opinions No.1 and 2 (2001) of the Consultative Council of European Judges

B. THE CODE OF ETHICS FOR MAGISTRATES (2001)

- RATIONALE -

Considering the model of other professions and some other legal systems, the government's emergency ordinance no. 179/1999, which modified and completed law no. 92/1992 on judicial organization, mandated the adoption of an ethical code for magistrates, and the Supreme Council of Magistrates is responsible for its adoption.

Whereas, according to the current laws and regulations, this magistrates' representative body does not have its own staff or its own funds to provide the necessary support, they have asked for the assistance of the Ministry of Justice, especially the department for organization and human resources for law courts, in the development of the draft. In order to be informed by the experience of other states, important technical assistance was provided by ABA/CEELI Romania, which made available an impressive quantity of information to the council's general secretary. EU experts contributed to the drafting and their comments and suggestions proved to be very useful and gave substantial shape to this document.

Before drafting the code, the council received numerous proposals, observations and suggestions from magistrates throughout the country, as well as from the magistrates' associations; they all reflect, through their diversity, not only the interest in such topic but also the various ways of addressing it. Therefore, the basic principles of the draft code were considered useful to be submitted to the council for approval and decision. It was established that the magistrates' code of ethics, through its provisions, was to develop the magistrates' duties that were already included in the current constitutional and legal provisions in force, as well as in international documents, particularly in the European ones on the status of magistrates. Furthermore, the council decided that the ethical code's rules were to offer evaluation criteria for magistrates' conduct by institutions required to intervene during their professional career; thus, it is neither useful nor possible to establish other bodies to control the observance of such rules of conduct through an instrument of such nature.

THE MAGISTRATES' CODE OF ETHICS

GENERAL PROVISIONS

Art. 1 – The judiciary has an essential role in any society based on the principles of the rule of law, and magistrates have special powers, and accordingly, special responsibilities. In exercising such power and responsibility, in their relations with litigants, with the other participants in judicial activities, and with the entire society for whom confidence in judicial independence and correctness is a priority, magistrates shall have the rights stipulated by law and the obligations also regulated by law.

Art. 2 – The role of the code of ethic is to formulate standards of conduct for magistrates so that such conduct is in conformity with the honor and dignity of their profession.

Art. 3 – The observance of the standards of conduct as stipulated by the code of ethics shall be assessed by the authorities having the competence, under the law, to intervene in the carrying out of the magistrates' professional activities. Violation of such rules may lead to the enforcement, under the law, of disciplinary liability only in the last analysis, when its seriousness requires it.

Art. 4 – The present code applies to all magistrates, except for the provisions of Chapter VII, which apply to magistrate prosecutors only.

CHAPTER I: INDEPENDENCE OF THE JUDICIARY

Art. 5 – Magistrates have the duty to uphold the independence of the judiciary, not as a privilege of their own, but as a guarantee for society, without which the latter cannot exist as a democratic society, organized on the rule of law principles.

They must perform their function objectively and impartially, the law and the general principles of law being their only ground, without being subject to any outside pressure and influence.

In carrying out their activity, magistrates must have such a conduct that does not jeopardize in any way trust in their independence.

Art. 6 – Magistrates are forbidden to be members of political parties or to have public activities of a political nature. They may participate in public events only to the extent to which they do not express their political beliefs in such situations.

Magistrates shall not persuade other persons to join a political party, shall not participate in fund-raising for political parties and shall not allow the use of their prestige or image for such purposes.

Magistrates shall not provide any support to a candidate for a public political position.

Art. 7 – Magistrates must use all means at their disposal so that the participation of their close relatives in political activities should not affect their impartiality and should eliminate any appearance that it might affect their impartiality in performing their professional duties.

Art. 8 – Magistrates shall not make use of the activities they perform while exercising their duties for the purpose of expressing their political beliefs.

Art. 9 – The participation, under the law, of magistrates in different commissions for the elaboration of draft laws, regulations, international treaties or conventions, or any other type of commissions, as well as their consulting regarding the elaboration of drafts, shall not affect their independence and impartiality or allow for the creation of an appearance that these could be affected.

CHAPTER II: PROMOTION OF THE RULE OF LAW

Art. 10 – Magistrates have the duty to contribute to guaranteeing the supremacy of the law and the rule of law state and the citizens' fundamental rights and freedoms.

In criminal trials, they shall observe particularly the presumption of innocence and shall not express their opinion on the guilt or non-guilt of a person in any other way than the forms and means stipulated by law.

Magistrates shall not refuse to resolve a case based on the fact that the law does not provide for it, is not sufficient or too unclear.

Art. 11 – Both during procedures performed before them and apart from these, magistrates shall not manifest in any way, any prejudice related to one's race, sex, religion, nationality, socio-economic and cultural status.

They have the duty to protect citizens' equality before the law, ensuring a non-discriminatory legal treatment, to respect and defend the dignity, physical and moral integrity of all parties, in any capacity, in judicial procedures. No reason may justify degrading or humiliating treatments or harming of one's physical integrity, health or dignity.

CHAPTER III: IMPARTIALITY OF MAGISTRATES

Art. 12 – Magistrates have the duty to inform the relevant authorities to decide on the disclaimer about any cases in which they have or appear to have a conflict of interests of any kind.

Art. 13 – Magistrates shall not provide written or oral advice in litigation, even if such trials are pending in courts or prosecutors’ offices other than those in which they conduct their activities; nor can they publicly express their opinion on pending cases or on litigation which has been referred to prosecutors’ offices.

Magistrates are allowed to plead, under the law, only in personal cases, the cases of their parents, spouses and children, as well as of persons under their trusteeship or guardianship. Nevertheless, even in such circumstances, they are not allowed to make use of their position in order to influence the court’s decision or the prosecutor’s office’s decision and must avoid creating the appearance that they might influence the pending decision in any way.

CHAPTER IV: PERFORMANCE OF PROFESSIONAL AND JOB RESPONSIBILITIES

Art. 14 – Magistrates are called upon to perform their professional duties with competence and correctness and to fulfill their administrative obligations provided by law, regulations and administrative court orders.

Art. 15 – Magistrates shall act with the diligence necessary to perform the resolution of cases assigned to them with speed and within the statutory deadlines and, when the law does not provide for these, within reasonable terms.

Therefore, they shall observe the work schedule, and they should not get involved in other activities, the performance of which would affect the time they must spend in fulfilling their professional and job responsibilities. In case there is such a risk, magistrates shall give up the other activities so as not to prejudice the parties’ interests and the image of the judiciary in society.

Art. 16 – Magistrates shall impose order and decent behavior during related activities by adopting a dignified, civilized and impartial attitude towards parties, lawyers, witnesses, experts and other persons with whom they come in contact due to their position.

Art. 17 – Magistrates shall not disclose or use for purposes other than those directly related to the performance of their profession, information they learn due to their position as magistrates.

In case a court session must be confidential, under the law, magistrates shall keep all official documents in the courthouse or the prosecutors' office, and they should allow consulting of such documents only according to the law and regulations.

Art. 18 – Magistrates shall use or allow the use of available resources and material means according to their purpose, exclusively in the court's interest.

They have the duty to maintain the devices and equipment that have been entrusted to them in good condition and to return them when they are required to or when they cease their activity.

Art. 19 – Magistrates have to be continuously concerned with updating their professional knowledge and with maintaining an appropriate level of professional competence.

For this purpose, they shall attend, at least once in 5 years, training sessions for preparation or, as the case may be, professional improvement, organized by the National Institute of Magistrates, by academic institutions in country or abroad, or training sessions organized by the courts of appeals or, as the case may be, by the prosecutors' offices by the courts of appeals.

In addition, they shall continuously improve their theoretical knowledge on their own, and be up to date on information on national legislation and international law, especially European law.

Art. 20 – When acting in leadership positions to which they are appointed, magistrates shall be concerned with organizing staff activities and with using resources very efficiently, show initiative and a spirit of responsibility. In the decision-making process, they shall always give priority to the court's interests, or to the prosecutors' office's, and to a good administration of justice.

Magistrates who are court leaders shall verify any information acquired concerning dysfunctions in court activity, take necessary measures within their power and authority, including sanctions, and notify their hierarchical superiors when appropriate measures are beyond their authority.

When they draft or approve proposals for promotion, transfer or appointment of magistrates or when they approve or decide upon hiring support staff, magistrates in a leadership position must examine impartially and objectively the legal criteria relating to the candidates' professional competence and moral standing.

Magistrates in a leadership position shall not use their authority to intervene, other than as permitted by law, in the course of trials or to influence a decision.

CHAPTER V: DIGNITY AND HONOR OF THE MAGISTRATE'S PROFESSION

Art. 21 – Magistrates have the duty to refrain, both within and apart from their professional duties, from any acts or deeds that might compromise their dignity in court and in society.

Magistrates must uphold the prestige of the judiciary through appropriate conduct in relations with litigants, with colleagues, with the representatives of other state bodies, and with the entire social body.

Art. 22 – Magistrates are not allowed to sue or to allow for the resolution of their personal, familial interests or the interests of any other persons, in any way other than within the legal framework prescribed for all citizens, and are completely forbidden from using their position as magistrates in order to obtain advantages or be given priority in resolving such interests.

Magistrates are not allowed to intervene in order to influence a decision in any way, or permit others to do so in their interest when they seek promotion, transfer or appointment of any kind.

Art. 23 – Relationships between magistrates must be correct and based on respect and good faith toward their colleagues, irrespective of the position of such a colleague. Magistrates are not allowed to give their opinion on their colleagues' professional and moral integrity, except in those cases when it affects the image of the judiciary; in such a case, they may inform persons in positions of leadership and responsibility in the court or at the Ministry of Justice, and the Prosecutor's Office by the Supreme Court of Justice respectively.

Art. 24 – Magistrates may collaborate with publications in the legal, literary, scientific or social fields or in audio-visual programs, only if these are not politically oriented and the image and interest of the judiciary, or public confidence in the judicial system are not affected. Information referring to litigation pending in a court or a prosecutors' office, as well as any information on the organization and development of activities in such places will be made available for the press exclusively through magistrates who have been appointed as spokespersons by the leadership of a court or of a prosecutors' office pursuant to existing regulations.

Art. 25 – Magistrates are free to create professional associations or other organizations that represent their own interests, promotion of professional training and protection of their status, and they may join local, national or international professional associations and may participate in their meetings.

However, magistrates should not accept any responsibilities nor should they become involved in activities within these organizations that might affect negatively their professional activity or that, by their nature, means of financing or manner of action could, in any way, impede the fulfillment of their professional duties correctly, impartially and within legal requirements.

CHAPTER VI: INCOMPATIBLE ACTIVITIES FOR A MAGISTRATE

Art. 26 – Magistrates shall not hold in addition to their position as magistrates, any other public or private position, except for teaching activities in academic institutions. Even in such a case, magistrates are not allowed to develop any activity through which they or their close relatives can take advantage of any kind, if such could affect their impartiality or might harm the magistrate’s status or might appear to have affected their impartiality.

Art. 27 – Judges and prosecutors are forbidden to perform, directly or through intermediaries, trading activities, or to participate in the leadership of a trading or business enterprise or of a state-controlled agency. They are also forbidden to participate in the administration of such companies or agencies.

Art. 28 – Magistrates are forbidden to claim or accept, directly or indirectly, for themselves or for others, gifts or promises of gifts, favors or loans, while performing or in order to perform their professional responsibilities.

In performing their professional responsibilities or in order to perform their professional activities, magistrates may receive legal books offered by their authors or editors, invitations to professional activities, and scholarships under the same conditions as other participants.

Magistrates are forbidden to participate, directly or through intermediaries, in pyramid schemes, gambling, or investments systems for which transparency of funds is not provided.

Art. 29 – Magistrates who want to leave the bench shall immediately inform the leadership of the court or of the prosecutors’ office on their decision, in order for the necessary procedures for dismissal from office to be carried out. They may not undertake activities that are incompatible with a magistrate’s position until the necessary procedures for dismissal from office have been concluded.

Art. 30 – Magistrates shall submit a statement on their assets according to the conditions and terms provided by the law.

CHAPTER VII: SPECIAL PROVISIONS FOR MAGISTRATE PROSECUTORS

Art. 31 – Magistrate prosecutors shall carry out their activities according to the principles of compliance with the law, impartiality and hierarchical control.

When performing their functions, magistrate prosecutors must show impartiality, focusing their entire activity on discovering the truth.

Prosecutors have the duty to present all evidence necessary for discovering the truth, in support of both the accusation and the defense. They must ensure observance of the presumption of innocence of accused persons and of defendants.

Art. 32 – Prosecutors must execute with speed and fairness orders assigned, pursuant to the law, by their hierarchical superiors.

Art. 33 – Magistrate prosecutors must refrain from intervening in confidential deliberations and from offering comments on court decisions, except for comments on arguments in support of appeals filed according to the law.

C. RECOMMENDATION NO. R (94) 12 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON THE INDEPENDENCE, EFFICIENCY AND ROLE OF JUDGES

COUNCIL OF EUROPE

COMMITTEE OF MINISTERS

RECOMMENDATION No. R (94) 12

OF THE COMMITTEE OF MINISTERS TO MEMBER STATES

ON THE INDEPENDENCE, EFFICIENCY AND ROLE OF JUDGES

(Adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Having regard to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention") which provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law";

Having regard to the United Nations Basic Principles on the Independence of the Judiciary, endorsed by the United Nations General Assembly in November 1985;

Noting the essential role of judges and other persons exercising judicial functions in ensuring the protection of human rights and fundamental freedoms;

Desiring to promote the independence of judges in order to strengthen the Rule of Law in democratic states;

Aware of the need to reinforce the position and powers of judges in order to achieve an efficient and fair legal system;

Conscious of the desirability of ensuring the proper exercise of judicial responsibilities which are a collection of judicial duties and powers aimed at protecting the interests of all persons,

Recommends that governments of member states adopt or reinforce all measures necessary to promote the role of individual judges and the judiciary

as a whole and strengthen their independence and efficiency, by implementing, in particular, the following principles:

Scope of the recommendation

1. This recommendation is applicable to all persons exercising judicial functions, including those dealing with constitutional, criminal, civil, commercial and administrative law matters.
2. With respect to lay judges and other persons exercising judicial functions, the principles laid down in this recommendation apply except where it is clear from the context that they only apply to professional judges, such as regarding the principles concerning the remuneration and career of judges.

Principle I - General principles on the independence of judges

1. All necessary measures should be taken to respect, protect and promote the independence of judges.

2. In particular, the following measures should be taken:

a. The independence of judges should be guaranteed pursuant to the provisions of the Convention and constitutional principles, for example by inserting specific provisions in the constitutions or other legislation or incorporating the provisions of this recommendation in internal law. Subject to the legal traditions of each state, such rules may provide, for instance, the following:

i. decisions of judges should not be the subject of any revision outside any appeals procedures as provided for by law;

ii. the terms of office of judges and their remuneration should be guaranteed by law;

iii. no organ other than the courts themselves should decide on its own competence, as defined by law;

iv. with the exception of decisions on amnesty, pardon or similar, the government or the administration should not be able to take any decision which invalidates judicial decisions retroactively.

b. The executive and legislative powers should ensure that judges are independent and that steps are not taken which could endanger the independence of judges.

c. All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. The

authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules.

However, where the constitutional or legal provisions and traditions allow judges to be appointed by the government, there should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to the objective criteria mentioned above. These guarantees could be, for example, one or more of the following:

i. a special independent and competent body to give the government advice which it follows in practice; or

ii. the right for an individual to appeal against a decision to an independent authority; or

iii. the authority which makes the decision safeguards against undue or improper influences.

d. In the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. The law should provide for sanctions against persons seeking to influence judges in any such manner. Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law. Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary.

e. The distribution of cases should not be influenced by the wishes of any party to a case or any person concerned with the results of the case. Such distribution may, for instance, be made by drawing of lots or a system for automatic distribution according to alphabetic order or some similar system.

f. A case should not be withdrawn from a particular judge without valid reasons, such as cases of serious illness or conflict of interest. Any such reasons and the procedures for such withdrawal should be provided for by law and may not be influenced by any interest of the government or administration. A decision to withdraw a case from a judge should be taken by an authority which enjoys the same judicial independence as judges.

3. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

Principle II - The authority of judges

1. All persons connected with a case, including state bodies or their representatives, should be subject to the authority of the judge.
2. Judges should have sufficient powers and be able to exercise them in order to carry out their duties and maintain their authority and the dignity of the court.

Principle III - Proper working conditions

1. Proper conditions should be provided to enable judges to work efficiently and, in particular, by:

a. recruiting a sufficient number of judges and providing for appropriate training such as practical training in the courts and, where possible, with other authorities and bodies, before appointment and during their career. Such training should be free of charge to the judge and should in particular concern recent legislation and case-law. Where appropriate, the training should include study visits to European and foreign authorities as well as courts;

b. ensuring that the status and remuneration of judges is commensurate with the dignity of their profession and burden of responsibilities;

c. providing a clear career structure in order to recruit and retain able judges;

d. providing adequate support staff and equipment, in particular office automation and data processing facilities, to ensure that judges can act efficiently and without undue delay;

e. taking appropriate measures to assign non-judicial tasks to other persons, in conformity with Recommendation No. R (86) 12 concerning measures to prevent and reduce the excessive workload in the courts.

2. All necessary measures should be taken to ensure the safety of judges, such as ensuring the presence of security guards on court premises or providing police protection for judges who may become or are victims of serious threats.

Principle IV - Associations

Judges should be free to form associations which, either alone or with another body, have the task of safeguarding their independence and protect their interests.

Principle V - Judicial responsibilities

1. In proceedings, judges have the duty to protect the rights and freedoms of all persons.
2. Judges have the duty and should be given the power to exercise their judicial responsibilities to ensure that the law is properly applied and cases are dealt with fairly, efficiently and speedily.
3. Judges should in particular have the following responsibilities:
 - a.* to act independently in all cases and free from any outside influence;
 - b.* to conduct cases in an impartial manner in accordance with their assessment of the facts and their understanding of the law, to ensure that a fair hearing is given to all parties and that the procedural rights of the parties are respected pursuant to the provisions of the Convention;
 - c.* to withdraw from a case or decline to act where there are valid reasons, and not otherwise. Such reasons should be defined by law and may, for instance, relate to serious health problems, conflicts of interest or the interests of justice;
 - d.* where necessary, to explain in an impartial manner procedural matters to parties;
 - e.* where appropriate, to encourage the parties to reach a friendly settlement;
 - f.* except where the law or established practice otherwise provides, to give clear and complete reasons for their judgments, using language which is readily understandable;
 - g.* to undergo any necessary training in order to carry out their duties in an efficient and proper manner.

Principle VI - Failure to carry out responsibilities and disciplinary offences

1. Where judges fail to carry out their duties in an efficient and proper manner or in the event of disciplinary offences, all necessary measures which do not prejudice judicial independence should be taken. Depending on the constitutional principles and the legal provisions and traditions of each state, such measures may include, for instance:
 - a.* withdrawal of cases from the judge;
 - b.* moving the judge to other judicial tasks within the court;
 - c.* economic sanctions such as a reduction in salary for a temporary period;

d. suspension.

2. Appointed judges may not be permanently removed from office without valid reasons until mandatory retirement. Such reasons, which should be defined in precise terms by the law, could apply in countries where the judge is elected for a certain period, or may relate to incapacity to perform judicial functions, commission of criminal offences or serious infringements of disciplinary rules.

3. Where measures under paragraphs 1 and 2 of this article need to be taken, states should consider setting up, by law, a special competent body which has as its task to apply any disciplinary sanctions and measures, where they are not dealt with by a court, and whose decisions shall be controlled by a superior judicial organ, or which is a superior judicial organ itself. The law should provide for appropriate procedures to ensure that judges in question are given at least all the due process requirements of the Convention, for instance that the case should be heard within a reasonable time and that they should have a right to answer any charges.

D. THE EUROPEAN CHARTER ON THE STATUTE FOR JUDGES

EUROPEAN CHARTER ON THE STATUTE FOR JUDGES Strasbourg, 8 - 10 July 1998

The participants at the multilateral meeting on the statute for judges in Europe, organized by the Council of Europe, between 8-10 July 1998,

Having regard to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms which provides that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”

Having regard to the United Nations Basic Principles on the Independence of the Judiciary, endorsed by the United Nations General Assembly in November 1985;

Having referred to Recommendation No R (94) 12 of the Committee of Ministers to member states on the independence, efficiency and role of judges, and having made their own, the objectives which it expresses;

Being concerned to see the promotion of judicial independence, necessary for the strengthening of the pre-eminence of law and for the protection of individual liberties within democratic states, made more effective;

Conscious of the necessity that provisions calculated to ensure the best guarantees of the competence, independence and impartiality of judges should be specified in a formal document intended for all European States;

Desiring to see the judges' statutes of the different European States take into account these provisions in order to ensure in concrete terms the best level of guarantees;

Have adopted the present European Charter on the statute for judges.

1. GENERAL PRINCIPLES

1.1. The statute for judges aims at ensuring the competence, independence and impartiality which every individual legitimately expects from the courts of law and from every judge to whom is entrusted the protection of his or her rights. It excludes every provision and every procedure liable to impair confidence in such competence, such independence and such impartiality. The present Charter is composed hereafter of the provisions which are best able to guarantee the achievement of those objectives. Its provisions aim at raising the level of guarantees in the various European States. They cannot justify modifications in national statutes tending to decrease the level of guarantees already achieved in the countries concerned.

1.2. In each European State, the fundamental principles of the statute for judges are set out in internal norms at the highest level, and its rules in norms at least at the legislative level.

1.3. In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.

1.4. The statute gives to every judge who considers that his or her rights under the statute, or more generally his or her independence, or that of the legal process, are threatened or ignored in any way whatsoever, the possibility making a reference to such an independent authority, with effective means available to it of remedying or proposing a remedy.

1.5. Judges must show, in discharging their duties, availability, respect for individuals, and vigilance in maintaining the high level of competence which the decision of cases requires on every occasion - decisions on which depend the guarantee of individual rights and in preserving the secrecy of information which is entrusted to them in the course of proceedings.

1.6. The State has the duty of ensuring that judges have the means necessary to accomplish their tasks properly, and in particular to deal with cases within a reasonable period.

1.7. Professional organizations set up by judges, and to which all judges may freely adhere, contribute notably to the defense of those rights which are conferred on them by their statute, in particular in relation to authorities and bodies which are involved in decisions regarding them.

1.8. Judges are associated through their representatives and their professional organizations in decisions relating to the administration of the courts and as to the determination of their means, and their allocation at a national and local level. They are consulted in the same manner over plans to modify their statute, and over the determination of the terms of their remuneration and of their social welfare.

2. SELECTION, RECRUITMENT, INITIAL TRAINING

2.1. The rules of the statute relating to the selection and recruitment of judges by an independent body or panel, base the choice of candidates on their ability to assess freely and impartially the legal matters which will be referred to them” and to apply the law to them with respect for individual dignity. The statute excludes any candidate being ruled out by reason only of their sex, or ethnic or social origin, or by reason of their philosophical and political opinions or religious convictions.

2.2. The- statute makes provision for the conditions which guarantee, by requirements linked to educational qualifications or previous experience, the ability specifically to discharge judicial duties.

2.3. The statute ensures by means of appropriate training at the expense of the State, the preparation of the chosen candidates for the effective exercise of judicial duties. The authority referred to at paragraph 1.3 hereof, ensures the appropriateness of training programmes and of the organization which implements them, in the light of the requirements of open-mindedness, competence and impartiality which are bound up with the exercise of judicial duties.

3. APPOINTMENT AND IRREMOVABILITY

3.1. The decision to appoint a selected candidate as a judge, and to assign him or her to a tribunal, are taken by the independent authority referred to at paragraph 1.3 hereof or on its proposal or its recommendation or with its agreement or following its opinion.

3.2. The statute establishes the circumstances in which a candidate’s previous activities, or those engaged in by his or her close relations, may, by reason of the legitimate and objective doubts to which they give rise as to the impartiality and independence of the candidate concerned, constitute an impediment to his or her appointment to a court.

3.3. Where the recruitment procedure provides for a trial period, necessarily short, after nomination to the position of judge but before confirmation on a permanent basis, or where recruitment is made for a limited period capable of renewal, the decision not to make a permanent appointment or not to renew, may only be taken by the independent authority referred to at paragraph 1.3 hereof, or on its proposal, or its recommendation or with its agreement or following its opinion. The provisions at point 1.4 hereof are also applicable to an individual subject to a trial period.

3.4. A judge holding office at a court may not in principle be appointed to another judicial office or assigned elsewhere, even by way of promotion, without having freely consented thereto. An exception to this principle is permitted only in the case where transfer is provided for and has been pronounced by way-of a disciplinary sanction, in the case of a lawful alteration of the court system, and in the case of a temporary assignment to reinforce a neighboring court, the maximum duration of such assignment being strictly limited by the statute, without prejudice to the application of the provisions at paragraph 1.4 hereof.

4. CAREER DEVELOPMENT

4.1. When it is not based on seniority, a system of promotion is based exclusively on the qualities and merits observed in the performance of duties entrusted to the judge, by means of objective appraisals performed by one or several judges and discussed with the judge concerned. Decisions as to promotion are then pronounced by the authority referred to at paragraph 1.3 hereof or on its proposal, or with its agreement. Judges who are not proposed with a view to promotion must be entitled to lodge a complaint before this authority.

4.2. Judges freely carry out activities outside their judicial mandate including those which are the embodiment of their rights as citizens. This freedom may not be limited except in so far as such outside activities are incompatible with confidence in, or the impartiality or the independence of a judge, or his or her required availability to deal attentively and within a reasonable period with the matters put before him or her. The exercise of an outside activity, other than literary or artistic, giving rise to remuneration, must be the object of a prior authorization on conditions laid down by the statute.

4.3. Judges must refrain from any behavior, action or expression of a kind effectively to affect confidence in their impartiality and their independence.

4.4. The statute guarantees to judges the maintenance and broadening of their knowledge, technical as well as social and cultural, needed to perform their duties, through regular access to training which the State pays for, and ensures its organization whilst respecting the conditions set out at paragraph 2.3 hereof.

5. LIABILITY

5.1. The dereliction by a judge of one of the duties expressly defined by the statute, may only give rise to a sanction upon the decision, following the proposal, the recommendation, or with the agreement of a tribunal or authority composed at least as to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation. The scale of sanctions which may be imposed is set out in the statute, and their imposition is subject to the principle of proportionality. The decision of an executive authority, of a tribunal, or of an authority pronouncing a sanction, as envisaged herein, is open to an appeal to a higher judicial authority.

5.2. Compensation for harm wrongfully suffered as a result of the decision or the behavior of a judge in the exercise of his or her duties is guaranteed by the State. The statute may provide that the State has the possibility of applying, within a fixed limit, for reimbursement from the judge by way of legal proceedings in the case of a gross and inexcusable breach of the rules governing the performance of judicial duties. The submission of the claim to the competent court must form the subject of prior agreement with the authority referred to at paragraph 1.3 hereof.

5.3. Each individual must have the possibility of submitting without specific formality a complaint relating to the miscarriage of justice in a given case to an independent body. This body has the power, if a careful and close examination makes a dereliction on the part of a judge indisputably appear, such as envisaged at- paragraph 5.1 hereof, to refer the matter to the disciplinary authority, or at the very least to recommend such referral to an authority normally competent in accordance with the statute, to make such a reference.

6. REMUNERATION AND SOCIAL WELFARE

6.1. Judges exercising judicial functions in a professional capacity are entitled to remuneration, the level of which is fixed so as to shield them from pressures aimed at influencing their decisions and more generally their behavior within their jurisdiction, thereby impairing their independence and impartiality.

6.2. Remuneration may vary depending on length of service, the nature of the duties which judges are assigned to discharge in a professional capacity, and the importance of the tasks which are imposed on them, assessed under transparent conditions.

6.3. The statute provides a guarantee for judges acting in a professional capacity against social risks linked with illness, maternity, invalidity, old age and death.

6.4. In particular the statute ensures that judges who have reached the legal age of judicial retirement, having performed their judicial duties for a fixed period,

are paid a retirement pension, the level of which must be as close as possible to the level of their final salary as a Judge.

7. TERMINATION OF OFFICE

7.1. A judge permanently ceases to exercise office through resignation, medical certification of physical unfitness, reaching the age limit, the expiry of a fixed legal term, or dismissal pronounced within the framework of a procedure such as envisaged at paragraph 5.1 hereof.

7.2. The occurrence of one of the causes envisaged at paragraph 7.1 hereof, other than reaching the age limit or the expiry of a fixed term of office, must be verified by the authority referred to at paragraph 1.3 hereof.

E. THE UNIVERSAL CHARTER OF THE JUDGE THE UNIVERSAL CHARTER OF THE JUDGE

Preamble

Judges from around the world have worked on the drafting of this Charter. The present Charter is the result of their work and has been approved by the member associations of the International Association of Judges as general minimal norms.

The text of the Charter has been unanimously approved by the delegates attending the meeting of the Central Council of the International Association of Judges in Taipei (Taiwan) on November 17, 1999.

Art.1: Independence

Judges shall in all their work ensure the rights of everyone to a fair trial. They shall promote the right of individuals to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, in the determination of their civil rights and obligations or of any criminal charge against them.

The independence of the judge is indispensable to impartial justice under the law. It is indivisible. All institutions and authorities, whether national or international, must respect, protect and defend that independence.

Art.2: Status

Judicial independence must be ensured by law creating and protecting judicial office that is genuinely and effectively independent from other state

powers. The judge, as holder of judicial office, must be able to exercise judicial powers free from social, economic and political pressure, and independently from other judges and the administration of the judiciary.

Art.3: Submission to the law

In the performance of the judicial duties the judge is subject only to the law and must consider only the law.

Art.4: Personal autonomy

No one must give or attempt to give the judge orders or instructions of any kind, that may influence the judicial decisions of the judge, except, where applicable, the opinion in a particular case given on appeal by the higher courts.

Art.5: Impartiality and restraint

In the performance of the judicial duties the judge must be impartial and must so be seen.

The judge must perform his or her duties with restraint and attention to the dignity of the court and of all persons involved.

Art.6: Efficiency

The judge must diligently and efficiently perform his or her duties without any undue delays.

Art.7: Outside activity

The judge must not carry out any other function, whether public or private, paid or unpaid, that is not fully compatible with the duties and status of a judge.

The judge must not be subject to outside appointments without his or her consent.

Art.8: Security of office

A judge cannot be transferred, suspended or removed from office unless it is provided for by law and then only by decision in the proper disciplinary procedure.

A judge must be appointed for life or for such other period and conditions, that the judicial independence is not endangered.

Any change to the judicial obligatory retirement age must not have retroactive effect.

Art. 9: Appointment

The selection and each appointment of a judge must be carried out according to objective and transparent criteria based on proper professional qualification. Where this is not ensured in other ways, that are rooted in established and proven tradition, selection should be carried out by an independent body, that include substantial judicial representation.

Art. 10: Civil and penal responsibility

Civil action, in countries where this is permissible, and criminal action, including arrest, against a judge must only be allowed under circumstances ensuring that his or her independence cannot be influenced.

Art. 11: Administration and disciplinary action

The administration of the judiciary and disciplinary action towards judges must be organized in such a way, that it does not compromise the judges' genuine independence, and that attention is only paid to considerations both objective and relevant.

Where this is not ensured in other ways that are rooted in established and proven tradition, judicial administration and disciplinary action should be carried out by independent bodies that include substantial judicial representation.

Disciplinary action against a judge can only be taken when provided for by pre-existing law and in compliance with predetermined rules of procedure.

Art. 12: Associations

The right of a judge to belong to a professional association must be recognized in order to permit the judges to be consulted, especially concerning the application of their statutes, ethical and otherwise, and the means of justice, and in order to permit them to defend their legitimate interests.

Art. 13: Remuneration and retirement

The judge must receive sufficient remuneration to secure true economic independence. The remuneration must not depend on the results of the judges' work and must not be reduced during his or her judicial service.

The judge has a right to retirement with an annuity or pension in accordance with his or her professional category.

After retirement a judge must not be prevented from exercising another legal profession solely because he or she has been a judge.

Art. 14: Support

The other powers of the State must provide the judiciary with the means necessary to equip itself properly to perform its function. The judiciary must have the opportunity to take part in or to be heard on decisions taken in respect to this matter.

Art. 15: Public prosecution

In countries where members of the public prosecution are judges, the above principles apply *mutatis mutandis* to these judges.

NOVEMBER 1999

F. UNITED NATIONS BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY

Basic Principles on the Independence of the Judiciary

ADOPTED BY THE SEVENTH UNITED NATIONS CONGRESS ON THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS HELD AT MILAN FROM 26 AUGUST TO 6 SEPTEMBER 1985 AND ENDORSED BY GENERAL ASSEMBLY RESOLUTIONS 40/32 OF 29 NOVEMBER 1985 AND 40/146 OF 13 DECEMBER 1985

Whereas in the Charter of the United Nations the peoples of the world affirm, *inter alia*, their determination to establish conditions under which justice can be maintained to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

Whereas the Universal Declaration of Human Rights enshrines in particular the principles of equality before the law, of the presumption of

innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

Whereas judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens,

Whereas the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct,

The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be

taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

Independence of the judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Freedom of expression and association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

Qualifications, selection and training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

Conditions of service and tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration. Professional secrecy and immunity

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Discipline, suspension and removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behavior that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

G. OPINIONS NO. 1 AND 2 OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES

OPINION NO.1 (2001) OF THE CONSULTATIVE COUNCIL OF THE EUROPEAN JUDGES (CCJE) FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON STANDARDS CONCERNING THE INDEPENDENCE OF THE JUDICIARY AND THE IRREMOVABILITY OF JUDGES

(Recommendation No. R (94) 12 on the independence, efficiency and role of Judges and the relevance of its standards and any other international standards to current problems in these fields)

1. The Consultative Council of European Judges (CCJE) has drawn up this opinion on the basis of the responses of States to a questionnaire, texts prepared by the Working Party of the CCJE and texts prepared by the Chair and Vice Chair of the CCJE and the specialist of the CCJE on this topic, Mr. Giacomo OBERTO (Italy).

2. The material made available to the CCJE includes a number of statements, more or less official, of principles regarding judicial independence.

3. One may cite as particularly important formal examples:

- UN basic principles on the independence of the judiciary (1985),
- Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe to Member States on the independence, efficiency and role of judges.

4. Less formal developments have been:

- The European Charter on the Statute for Judges adopted by participants from European countries and two judges' international associations meeting in Strasbourg on 8-10 July 1998, supported by the meeting of the Presidents of the Supreme Courts of Central and Eastern European countries in Kyiv on 12-14

October 1998, and again by judges and representatives from Ministries of Justice from 25 European countries meeting in Lisbon on 8-10 April 1999,

- Statements by delegates of High Councils of Judges, or judges' associations, such as those made at a meeting in Warsaw and Slok on 23-26 June 1997.

5. Other material mentioned during the CCJE's discussions includes:

- Beijing Statement on principles of the independence of the judiciary in the Lawasia Region (August 1997), now signed by 32 Chief Justices of that region,

- The Latimer House Guidelines for the Commonwealth (19 June 1998), the outcome of a colloquium attended by representatives of 23 Commonwealth countries or overseas territories and sponsored by Commonwealth judges and lawyers with support from the Commonwealth Secretariat and the Commonwealth Office.

6. Throughout the CCJE discussions, members of the CCJE emphasized that what is critical is not the perfection of principles and, still less, the harmonization of institutions; it is the putting into full effect of principles already developed.

7. The CCJE also considered whether improvements or further developments of existing general principles may be appropriate.

8. The purpose of this opinion is to look in greater detail at a number of the topics discussed and to identify the problems or points concerning the independence of judges that would benefit from attention.

9. It is proposed to take the following topic headings:

- The rationale of judicial independence

- The level at which judicial independence is guaranteed

- Basis of appointment or promotion

- The appointing and consultative bodies

- Tenure - period of appointment

- Tenure - irremovability and discipline

- Remuneration

- Freedom from undue external influence

- Independence within the judiciary

- The judicial role

In the course of looking at these topics, the CCJE has sought to identify certain examples of difficulties regarding or threats to independence which came to its attention. Further, it has identified the importance of the principles under discussion to (in particular) the arrangements and practice regarding the appointment and re-appointment of judges to international courts. This topic is dealt with in paragraphs 52, 54-55).

THE RATIONALES OF JUDICIAL INDEPENDENCE

10. Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. Judges are “charged with the ultimate decision over life, freedoms, rights, duties and property of citizens” (recital to UN basic principles, echoed in Beijing declaration; and Articles 5 and 6 of the European Convention on Human Rights). Their independence is not a prerogative or privilege in their own interests, but in the interests of the rule of law and of those seeking and expecting justice.

11. This independence must exist in relation to society generally and in relation to the particular parties to any dispute on which judges have to adjudicate. The judiciary is one of three basic and equal pillars in the modern democratic state¹. It has an important role and functions in relation to the other two pillars. It ensures that governments and the administration can be held to account for their actions, and, with regard to the legislature, it is involved in ensuring that duly enacted laws are enforced, and, to a greater or lesser extent, in ensuring that they comply with any relevant constitution or higher law (such as that of the European Union). To fulfill its role in these respects, the judiciary must be independent of these bodies, which involves freedom from inappropriate connections with and influence by these bodies². Independence thus serves as the guarantee of impartiality³. This has implications, necessarily, for almost every aspect of a judge’s career: from training to appointment and promotion and to disciplining.

12. Judicial independence presupposes total impartiality on the part of judges. When adjudicating between any parties, judges must be impartial, that is free from any connection, inclination or bias, which affects - or may be seen as affecting - their ability to adjudicate independently. In this regard, judicial independence is an elaboration of the fundamental principle that “no man may be judge in his own cause”. This principle also has significance well beyond that affecting the particular parties to any dispute. Not merely the parties to any particular dispute, but society as a whole must be able to trust the judiciary. A judge must thus not merely be free in fact from any inappropriate connection, bias or influence,

he or she must also appear to a reasonable observer be free there from. Otherwise, confidence in the independence of the judiciary may be undermined.

13. The rationale of judicial independence, as stated above, provides a key by which to assess its practical implications - that is, the features which are necessary to secure it, and the mean by which it may be secured, at a constitutional or lower legal level⁴, as well as in day-to-day practice, in individual states. The focus of this opinion is upon the general institutional framework and guarantees securing judicial independence in society, rather than upon the principle requiring personal impartiality (both in fact and appearance) of the judge in any particular case. Although there is an overlap, it is proposed to address the latter topic in the context of the CCJE's examination of judicial conduct and standards of behavior.

THE LEVEL AT WHICH JUDICIAL INDEPENDENCE IS GUARANTEED

14. The independence of the judiciary should be guaranteed by domestic standards at the highest possible level. Accordingly, States should include the concept of the independence of the judiciary either in their constitutions or among the fundamental principles acknowledged by countries which do not have any written constitution but in which respect for the independence of the judiciary is guaranteed by age-old culture and tradition. This marks the fundamental importance of independence, whilst acknowledging the special position of common law jurisdictions (England and Scotland in particular) with a long tradition of independence, but without written constitutions.

15. The UN basic principles provide for the independence of the judiciary to be "guaranteed by the State and enshrined in the Constitution or the law of the country". Recommendation No. R (94) 12 specifies (in the first sentence of Principle I.2) that "The independence of judges shall be guaranteed pursuant to the provisions of the [European] Convention [on Human Rights] and constitutional principles, for example by inserting specific provisions in the constitutions or other legislation or incorporating the provisions of this recommendation in internal law".

16. The European Charter on the statute for judges provides still more specifically: "In each European State, the fundamental principles of the statute for judges are set out in internal norms at highest level, and its rules in norms at least at the legislative level". This more specific prescription of the European Charter met with the general support of the CCJE. The CCJE recommends its adoption, instead of the less specific provisions of the first sentence of Principle I.2 of Recommendation No. R (94) 12.

BASIS OF APPOINTMENT OR PROMOTION

17. The UN basic principles state (paragraph 13): “Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience”. Recommendation No. R (94) 12 is also unequivocal: “All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency”. Recommendation No. R (94) 12 makes clear that it is applicable to all persons exercising judicial functions, including those dealing with constitutional, criminal, civil, commercial and administrative law matters (as well as in most respects to lay judges and other persons exercising judicial functions). There is, therefore, general acceptance both that appointments should be made “on the merits” based on “objective criteria” and that political considerations should be inadmissible.

18. The central problems remain (a) of giving content to general aspirations towards “merits-based” appointments and “objectivity” and (b) of aligning theory and reality. The present topic is also closely linked with the next two topics (The appointing body and Tenure).

19. In some countries there is, constitutionally, a direct political input into the appointment of judges. Where judges are elected (either by the people as at the Swiss cantonal level, or by Parliament as at the Swiss federal level, in Slovenia and “the Former Yugoslav Republic of Macedonia” and in the case of the German Federal Constitutional Court and part of the members of the Italian Constitutional Court), the aim is no doubt to give the judiciary in the exercise of its functions a certain direct democratic underpinning. It cannot be to submit the appointment or promotion of judges to narrow party political considerations. Where there is any risk that it is being, or would be used, in such a way, the method may be more dangerous than advantageous.

20. Even where a separate authority exists with responsibility for or in the process of judicial appointment or promotion, political considerations are not, in practice, necessarily excluded. Thus, in Croatia, a High Judiciary Council of 11 members (seven judges, two attorneys and two professors) has responsibility for such appointments, but the Minister of Justice may propose the 11 members to be elected by the House of Representatives of the Croatian Parliament and the High Judiciary Council has to consult with the judiciary committee of the Croatian Parliament, controlled by the party forming the Government for the time being, with regard to any such appointments. Although Article 4 of the amended Croatian Constitution refers to the principle of separation of powers, it also goes on to state that this includes “all forms of mutual co-operation and reciprocal control of power holders”, which certainly does not exclude political influence

on judicial appointments or promotion. In Ireland, although there is a judicial appointments commission⁵, political considerations may still determine which of rival candidates, all approved by the commission, is or are actually appointed by the Minister of Justice (and the commission has no role in relation to promotions).

21. In other countries, the systems presently in place differ between countries with a career judiciary (most civil law countries) and those where judges are appointed from the ranks of experienced practitioners (e.g. common law countries, like Cyprus, Malta and the UK, and other countries like Denmark).

22. In countries with a career judiciary, the initial appointment of career judges normally depends upon objective success in examination. The important issues seem to be (a) whether competitive examination can suffice - should not personal qualities be assessed and practical skills be taught and examined? (b) whether an authority independent of the executive and legislature should be involved at this stage - in Austria, for example Personal senates (composed of five judges) have a formal role in recommending promotions, but none in relation to appointments.

23. By contrast, where judges are or may be appointed from the ranks of experienced practitioners, examinations are unlikely to be relevant and practical skills and consultation with other persons having direct experience of the candidate are likely to be the basis of appointment.

24. In all the above situations, it is suggested that objective standards are required not merely to exclude political influence, but for other reasons, such as the risk of favoritism, conservatism and cronyism (or “cloning”), which exist if appointments are made in an unstructured way or on the basis of personal recommendations.

25. Any “objective criteria”, seeking to ensure that the selection and career of judges are “based on merit, having regard to qualifications, integrity, ability and efficiency”, are bound to be in general terms. Nonetheless, it is their actual content and effect in any particular state that is ultimately critical. The CCJE recommended that the authorities responsible in member States for making and advising on appointments and promotions should now introduce, publish and give effect to objective criteria, with the aim of ensuring that the selection and career of judges are “based on merit, having regard to qualifications, integrity, ability and efficiency”. Once this is done, those bodies or authorities responsible for any appointment or promotion will be obliged to act accordingly, and it will then at least be possible to scrutinize the content of the criteria adopted and their practical effect.

26. The responses to questionnaires indicate a widespread lack of any or any such published criteria. General criteria have been published by the Lord Chancellor in the UK, and the Scottish executive has issued a consultation document.

Austrian law defines criteria for promotion. Many countries simply rely on the integrity of independent councils of judges responsible for appointing or recommending appointments, e.g. Cyprus, Estonia. In Finland, the relevant advisory board compares the candidates' merits and its proposal of any appointment includes the reasons for its decision. Likewise in Iceland, the Selection Committee⁶ provides the Minister for Justice with a written appraisal of applicants for district judgeships, while the Supreme Court advises on competence for appointment to the Supreme Court. In Germany, at both federal and Land level, councils for judicial appointments may be responsible for delivering written views (without detailed reasons) on the suitability of candidates for judicial appointment and promotion, which do not bind the Minister of Justice, but which may lead to (sometimes public) criticism if he does not follow them. The giving of reasons might be regarded as a healthy discipline and would be likely to give insight to the criteria being applied in practice, but countervailing considerations may also be thought to militate against the giving of reasons in individual cases (e.g. the sensitivity of the judgment between closely comparable candidates and privacy with regard to sources or information).

27. In Lithuania, although no clear criteria governing promotion exist, the performance of district judges is monitored by a series of quantitative and qualitative criteria based mainly on statistics (including statistics relating to reversals on appeal), and is made the subject of reports to the Courts Department of the Ministry of Justice. The Minister of Justice has only an indirect role in selection and promotion. But the monitoring system has been “strictly criticized” by the Lithuanian Association of Judges. Statistical data have an important social role in understanding and improving the workings and efficiency of courts. But they are not the same as objective standards for evaluation, whether in respect of appointment to a new post or promotion or otherwise. Great caution is required in any use of statistics as an aid in this context.

28. In Luxembourg, promotion is said to be based normally on the seniority principle. In the Netherlands there are still elements of the early seniority system, and in Belgium and Italy objectively defined criteria of seniority and competence determine promotion. In Austria, in relation to the recommendations for promotion made by the Personal senates (composed of five judges) to the Minister of Justice, the position by law is that seniority is considered only in case of equal professional ability of candidates.

29. The European Charter on the statute for judges addresses systems for promotion “when it is not based on seniority” (paragraph 4.1.), and the Explanatory Memorandum notes that this is “a system which the Charter did not in any way exclude because it is deemed to provide very effective protection for independence”. Although adequate experience is a relevant pre-condition to promotion, the CCJE considered that seniority, in the modern world, is no longer

generally⁷ acceptable as the governing principle determining promotion. The public has a strong interest not just in the independence, but also in the quality of its judiciary, and, especially in times of change, in the quality of the leaders of its judiciary. There is a potential sacrifice in dynamism in a system of promotion based entirely on seniority, which may not be justified by any real gain in independence. The CCJE considered however that seniority requirements based on years of professional experience can assist to support independence.

30. In Italy and to some extent Sweden, the status, function and remuneration of judges have been uncoupled. Remuneration follows, almost automatically, from seniority of experience and does not generally vary according to status or function. Status depends on promotion but does not necessarily involve sitting in any different court. Thus, a judge with appellate status may prefer to continue to sit at first instance. In this way the system aims to increase independence by removing any financial incentive to seek promotion or a different function.

31. The CCJE considered the question of equality between women and men. The Latimer House Guidelines state: “Appointments to all levels of the judiciary should have, as an objective, the achievement of equality between women and men”. In England, the Lord Chancellor’s “guiding principles” provide for appointment strictly on merit “regardless of gender, ethnic origin, marital status, sexual orientation...”, but the Lord Chancellor has made clear his wish to encourage applications for judicial appointment from both women and ethnic minorities. These are both clearly appropriate aims. The Austrian delegate reported that in Austria, where there were two equally qualified candidates, it was specifically provided that the candidate from the under-represented sex should be appointed. Even on the assumption that this limited positive reaction to the problem of under-representation would pose no legal problems, the CCJE identified as practical difficulties, first, that it singles out one area of potential under-representation (gender) and, secondly, that there could be argument about what, in the circumstances of any particular country, constitutes under-representation, for relevant discriminatory reasons, in such an area. The CCJE does not propose a provision like the Austrian as a general international standard, but does underline the need to achieve equality through “guiding principles” like those referred to in the third sentence above.

THE APPOINTING AND CONSULTATIVE BODIES

32. The CCJE noted the large diversity of methods by which judges are appointed. there is evident unanimity that appointments should be “merit-based”.

33. The various methods currently used to select judges can all be seen as having advantages and disadvantages: it may be argued that election confers a more direct democratic legitimacy, but it involves a candidate in a campaign, in politics

and in the temptation to buy or give favors. Co-option by the existing judiciary may produce technically qualified candidates, but risks conservatism and cronyism (or “cloning”)⁸ - and would be regarded as positively undemocratic in some constitutional thinking. Appointment by the executive or legislature may also be argued to reinforce legitimacy, but carries a risk of dependence on those other powers. Another method involves nomination by an independent body.

34. There is room for concern that the present diversity of approach may tacitly facilitate the continuation of undue political influence over appointments. The CCJE noted the view of the specialist, Mr. Oberto, that informal appointment procedures and overtly political influence on judicial appointments in certain States were not helpful models in other, newer democracies, where it was vital to secure judicial independence by the introduction of strictly non-political appointing bodies.

35. The CCJE noted, to take one example of a new democracy, that in the Czech Republic judicial appointments are made by the President of the Republic, on the motion of the Minister of Justice and promotions (i.e. transfer to a higher court or to the position of a presiding or deputy presiding judge) by either the president or the Minister. No Supreme Judiciary Council exists, although judges sit on committees which select candidates for judicial appointment.

36. Recommendation No R (94) 12 presently hedges its position in this area. It starts by assuming an independent appointing body:

“The authority taking the decision on the selection and career of judges should be independent of the government and administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules”.

But it then goes on to contemplate and provide for a quite different system:

“However, where the constitutional or legal provisions and traditions allow judges to be appointed by the government, there should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to the objective criteria mentioned above.”

The examples which follow of “guarantees” offer even greater scope for relaxation of formal procedures - they start with an special independent body to give advice which the government “follows in practice”, include next “the right to appeal against a decision to an independent authority” and end with the bland (and imprecisely expressed) possibility that it is sufficient if “the authority which makes the decision safeguards against undue and improper influences”.

37. The background to this formulation is found in conditions in 1994. But the CCJE is concerned now about its somewhat vague and open nature in the context of the wider Europe, where constitutional or legal “traditions” are less relevant and formal procedures are a necessity with which it is dangerous to dispense. Therefore, the CCJE considered 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.

38. The CCJE recognized that it may not be possible to go further, in view of the diversity of systems at present accepted in European States. The CCJE is, however, an advisory body, with a mandate to consider both possible changes to existing standards and practices and the development of generally acceptable standards. Further, the European Charter on the statute for judges already goes considerably further than Recommendation No. R (94) 12, by providing as follows:

“In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.”

39. The Explanatory Memorandum explains that the “intervention” of an independent authority was intended in a sense wide enough to cover an opinion, recommendation or proposal as well as an actual decision. The European Charter still goes well beyond current practice in many European States. (Not surprisingly, delegates of High Councils of Judges and judges’ associations meeting in Warsaw on 23-26 June 1997 wanted even fuller judicial “control” over judicial appointments and promotion than advocated by the European Charter.)

40. The responses to questionnaires show that most European States have introduced a body independent of the executive and legislature with an exclusive or lesser role in respect of appointments and (where relevant) promotions; examples are Andorra, Belgium, Cyprus, Denmark, Estonia, Finland, France, Iceland, Ireland, Italy, Lithuania, Moldova, Netherlands, Norway, Poland, Romania, Russia, Slovakia, Slovenia, “the Former Yugoslav Republic of Macedonia” and Turkey.

41. The absence of such a body was felt to be a weakness in the Czech Republic. In Malta such a body exists, but the fact that consultation with it by the appointing authority⁹ was optional was felt to be a weakness. In Croatia, the extent of potential political influence over the body was identified as a problem¹⁰.

42. The following systems will serve as three examples of a higher judiciary council meeting the suggestions of the European Charter.

i) Under article 104 of the Italian Constitution, such a council consists of the President of the Republic, the First President and Procurator General of the Court of Cassation, 20 judges elected by the judiciary and 10 members elected by Parliament in joint session from among university professors and lawyers of 15 years standing. Under article 105, its responsibility is “to designate, to recruit and transfer, to promote and to take disciplinary measures in respect of judges, in accordance with the rules of the judicial organization”.

ii) The Hungarian Reform Laws on Courts of 1997 set up the National Judicial Council exercising the power of court administration including the appointment of judges. The Council is composed of the President of the Supreme Court (President of the Council), nine judges, the Minister of Justice, the Attorney General, the President of the Bar Association and two deputies of Parliament.

iii) In Turkey a Supreme Council selects and promotes both judges and public prosecutors. It consists of seven members including five judges from either the Court of Cassation and the Council of State. The Minister of Justice chairs it and the Undersecretary of the Minister of Justice is also an ex-officio member of the Council.

43. A common law example is provided by Ireland, where the Judicial Appointments Board was established by Courts and Courts Officers Act 1995, section 13 for the purpose of “identifying persons and informing Government of the suitability of those persons for appointment to judicial office”. Its membership of nine persons consists of the Chief Justice, the three Presidents of the High Court, Circuit Court and District Court, the Attorney General, a practicing barrister nominated by the Chairman of the Bar, a practicing solicitor nominated by the Chairman of the Law Society, and up to three persons appointed by the Minister of Justice, engaged in or having knowledge or experience of commerce, finance or administration or with experience as consumers of court services. But it does not exclude all political influence from the process¹¹.

44. The German model (above) involves councils, whose role may be different depending on whether one is speaking of federal or Land courts and on the level of court. There are councils for judicial appointments whose role is usually purely advisory. In addition, several German Länder provide that judges shall be chosen jointly by the competent Minister and a committee for the selection of judges. This committee usually has a right of veto. It is typically composed of members of parliament, judges elected by their colleagues and a lawyer. The involvement of the Minister of Justice is regarded in Germany as an important democratic element because he is responsible to parliament. It is regarded as

constitutionally important that the actual appointing body should not consist of judges alone or have a majority of judges.

45. Even in legal systems where good standards have been observed by force of tradition and informal self-discipline, customarily under the scrutiny of a free media, there has been increasing recognition in recent years of a need for more objective and formal safeguards. In other states, particularly those of former communist countries, the need is pressing. The CCJE considered that the European Charter - in so far as it advocated the intervention (in a sense wide enough to include an opinion, recommendation or proposal as well as an actual decision) of an independent authority with substantial judicial representation chosen democratically by other judges¹² - pointed in a general direction which the CCJE wished to commend. This is particularly important for countries which do not have other long-entrenched and democratically proved systems.

TENURE - PERIOD OF APPOINTMENT

46. The UN basic principles, Recommendation No. R (94) 12 and the European Charter on the statute for judges all refer to the possibility of appointment for a fixed legal term, rather than until a legal retirement age.

47. The European Charter, paragraph 3.3 also refers to recruitment procedures providing “for a trial period, necessarily short, after nomination to the position of judge but before confirmation on a permanent basis”.

48. European practice is generally to make full-time appointments until the legal retirement age. This is the approach least problematic from the viewpoint of independence.

49. Many civil law systems involve periods of training or probation for new judges.

50. Certain countries make some appointments for a limited period of years (e.g. in the case of the German Federal Constitutional Court, for 12 years). Judges are commonly also appointed to international courts (e.g. the European Court of Justice and the European Court of Human Rights) for limited periods.

51. Some countries also make extensive use of deputy judges, whose tenure is limited or less well protected than that of full-time judges (e.g. the UK and Denmark).

52. The CCJE considered that where, exceptionally, a full-time judicial appointment is for a limited period, it should not be renewable unless procedures exist ensuring that:

i. the judge, if he or she wishes, is considered for re-appointment by the appointing body and ii. the decision regarding re-appointment is made entirely objectively and on merit and without taking into account political considerations.

53. The CCJE considered that when tenure is provisional or limited, the body responsible for the objectivity and the transparency of the method of appointment or re-appointment as a full-time judge are of especial importance (see also paragraph 3.3 of the European Charter).

54. The CCJE was conscious that its terms of reference make no specific reference to the position of judges at an international level. The CCJE is borne of a recommendation (no. 23) in the Wise Persons' Report of 1998, that direct co-operation with national institutions of the judiciary should be reinforced, and Resolution No. 1 adopted thereafter by the Ministers of Justice at their 22nd Conference meeting in Chisinau on 17-18 June 1999 referred to the CCJE's role as being to assist in carrying out the priorities identified in the global action plan "for the strengthening of the role of judges in Europe and to advise.... whether it is necessary to update the legal instruments of the Council of Europe". The global action plan is heavily focused on the internal legal systems of member states. But it should not be forgotten that the criteria for Council of Europe membership include "fulfillment of the obligations resulting from the European Convention on Human Rights" and that in this respect "submission to the jurisdiction of the European Court of Human Rights, binding under international law, is clearly the most important standard of the Council of Europe" (Wise Persons' Report, paragraph 9).

55. The CCJE considered that the ever increasing significance for national legal systems of supranational courts and their decisions made it essential to encourage member States to respect the principles concerning independence, irremovability, appointment and term of office in relation to judges of such supranational courts (see in particular paragraph 52 above).

56. The CCJE agreed that the importance for national legal systems and judges of the obligations resulting from international treaties such as the European Convention and also the European Union treaties makes it vital that the appointment and re-appointment of judges to the courts interpreting such treaties should command the same confidence and respect the same principles as national legal systems. The CCJE further considered that involvement by the independent authority referred in the paragraphs 37 and 45 should be encouraged in relation to appointment and re-appointment to international courts. The Council of Europe and its institutions are in short founded on belief in common values superior to those of any single member State, and that belief has already achieved significant practical effect. It would undermine those values and the

progress that has been made to develop and apply them, if their application was not insisted upon at the international level.

TENURE - IRREMOVABILITY AND DISCIPLINE

57. It is a fundamental tenet of judicial independence that tenure is guaranteed until a mandatory retirement age or the expiry of a fixed term of office: see the UN basic principles, paragraph 12; Recommendation No. R (94) 12 Principle I(2)(a)(ii) and (3) and Principle VI (1) and (2). The European Charter affirms that this principle extends to appointment or assignment to a different office or location without consent (other than in case of court re-organization or temporarily), but both it and Recommendation No. R (94) 12 contemplate that transfer to other duties may be ordered by way of disciplinary sanction.

58. The CCJE noted that the Czech Republic has no mandatory retirement age, but “a judge may be recalled by the Minister of Justice from his position after reaching the age of 65”.

59. The existence of exceptions to irremovability, particularly those deriving from disciplinary sanctions, leads immediately to consideration of the body and method by which, and basis upon which, judges may be disciplined. Recommendation No. R (94) 12, Principle VI(2) and (3), insists on the need for precise definition of offences for which a judge may be removed from office and for disciplinary procedures complying with the due process requirements of the Convention on Human Rights. Beyond that it says only that “States should consider setting up, by law, a special competent body which has as its task to apply any disciplinary sanctions and measures, where they are not dealt with by a court, and whose decisions shall be controlled by a superior judicial organ, or which is a superior judicial organ itself”. The European Charter assigns this role to the independent authority which it suggests should “intervene” in all aspects of the selection and career of every judge.

60. The CCJE considered

(a) that the irremovability of judges should be an express element of the independence enshrined at the highest internal level (see paragraph 16 above);

(b) that the intervention of an independent authority¹³, with procedures guaranteeing full rights of defense, is of particular importance in matters of discipline; and

(c) that it would be useful to prepare standards defining not just the conduct which may lead to removal from office, but also all conduct which may lead to any

disciplinary steps or change of status, including for example a move to a different court or area.

A detailed opinion on this matter containing draft texts for consideration by the CDCJ could be prepared by the CCJE at the later stage when it deals expressly with standards of conduct, although there is no doubt that they have a strong inter-relationship with the present topic of independence.

REMUNERATION

61. Recommendation No. R (94) 12 provides that judges' "remuneration should be guaranteed by law" and "commensurate with the dignity of their profession and burden of responsibilities" (Principles I(2)(a)(ii) and III(1)(b)). The European Charter contains an important, hard-headed and realistic recognition of the role of adequate remuneration in shielding "from pressures aimed at influencing their decisions and more generally their behavior ...", and of the importance of guaranteed sickness pay and adequate retirement pensions (paragraph 6). The CCJE fully approved the European Charter's statement.

62. While some systems (e.g. in the Nordic countries) cater for the situation by traditional mechanisms without formal legal provisions, the CCJE considered that it was generally important (and especially so in relation to the new democracies) to make specific legal provision guaranteeing judicial salaries against reduction and to ensure at least de facto provision for salary increases in line with the cost of living.

FREEDOM FROM UNDUE EXTERNAL INFLUENCE

63. Freedom from undue external influence constitutes a well-recognized general principle: see UN basic principles, paragraph 2; Recommendation No. R (94) 12, Principle I(2)(d), which continues: "The law should provide for sanctions against persons seeking to influence judges in any such manner". As general principles, freedom from undue influence and the need in extreme cases for sanctions are incontrovertible¹⁴. Further, the CCJE has no reason to think that they are not appropriately provided for as such in the laws of member States. On the other hand, their operation in practice requires care, scrutiny and in some contexts political restraint. Discussions with and the understanding and support of judges from different States could prove valuable in this connection. The difficulty lies rather in deciding what constitutes undue influence, and in striking an appropriate balance between for example the need to protect the judicial process against distortion and pressure, whether from political, press

or other sources, and the interests of open discussion of matters of public interest in public life and in a free press. Judges must accept that they are public figures and must not be too susceptible or of too fragile a constitution. The CCJE agreed that no alteration of the existing principle seems required, but that judges in different States could benefit from discussing together and exchanging information about particular situations.

INDEPENDENCE WITHIN THE JUDICIARY

64. The fundamental point is that a judge is in the performance of his functions no-one's employee; he or she is holder of a State office. He or she is thus servant of, and answerable only to, the law. It is axiomatic that a judge deciding a case does not act on any order or instruction of a third party inside or outside the judiciary.

65. Recommendation No. R (94) 12, Principle I(2)(a)(i) provides that "decisions of judges should not be the subject of any revision outside the appeals procedures as provided for by law" and Principle I(2)(a)(iv) provides that "with the exception of decisions on amnesty, pardon or similar, the government or the administration should not be able to take any decision which invalidates judicial decisions retroactively". The CCJE noted that the responses to questionnaires indicated that these principles were generally observed, and no amendment has been suggested.

66. The CCJE noted the potential threat to judicial independence that might arise from an internal judicial hierarchy. It recognized that judicial independence depends not only on freedom from undue external influence, but also freedom from undue influence which might in some situations come from the attitude of other judges. "Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law" (Recommendation No. R (94) 12, Principle I (2)(d). This means judges individually. The terms in which it is couched do not exclude doctrines such as that of precedent in common law countries (i.e. the obligation of a lower judge to follow a previous decision of a higher court on a point of law directly arising in the later case).

67. Principle I (2)(d) continues: "Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary". This is, on any view, obscure. "Reporting" on the merits of cases, even to other members of the judiciary, appears on the face of it inconsistent with individual independence. If a decision were to be so incompetent as to amount to a disciplinary offence, that might be different, but, in that very remote case, the judge would not be "reporting" at all, but answering a charge.

68. The hierarchical power conferred in many legal systems on superior courts might in practice undermine individual judicial independence. One solution would be to transfer of all relevant powers to a Higher Judicial Council, which would then protect independence inside and outside of the judiciary. This brings one back to the recommendation of the European Charter on the statute for judges, to which attention has already been invited under the heading of The appointing body and Freedom from undue external influence.

69. Court inspection systems, in the countries where they exist, should not concern themselves with the merits or the correctness of decisions and should not lead judges, on grounds of efficiency, to favor productivity over the proper performance of their role, which is to come to a carefully considered decision in keeping with the interests of those seeking justice¹⁵.

70. The CCJE took note in this connection of the modern Italian system of separation of grade, remuneration and office described in paragraph 30 above. The aim of this system is to reinforce independence and it also means that difficult first instance cases (e.g. in Italy, Mafia cases) may be tried by highly capable judges.

THE JUDICIAL ROLE

71. This heading could cover a wide field. Much of this field will arise for detailed consideration when the CCJE considers the topic of standards and is better left until then. That applies to individual topics such as membership of a political party and engagement in political activity.

72. An important topic touched on during the CCJE meeting concerns the inter-changeability in some systems of the posts of judge, public prosecutor and official of the Ministry of Justice. In spite of this inter-changeability, the CCJE decided that the consideration of the role, status and duties of public prosecutors in parallel with that of judges lay outside its terms of reference. However, there remains an important question whether such a system is consistent with judicial independence. This is a subject which is no doubt of considerable importance to the legal systems affected. The CCJE considered that it could merit further consideration at a later stage, perhaps in connection with the study of rules of conduct for judges, but that it would require further specialist input.

CONCLUSIONS

73. The CCJE considered that the critical matter for member States is to put into full effect principles already developed (paragraph 6) and, after examining the standards contained in particular in Recommendation No. R (94) 12 on the independence, efficiency and role of judges, it concluded as follows:

(1) The fundamental principles of judicial independence should be set out at the constitutional or highest possible legal level in each member State and its more specific rules at the legislative level (paragraph 16).

(2) The authorities responsible in each member State for making and advising on appointments and promotions should now introduce, publish and give effect to objective criteria with the aim of ensuring that the selection and career of judges are based on merit having regard to qualification, integrity, ability and efficiency (paragraph 25).

(3) Seniority should not be the governing principle determining promotion. Adequate professional experience is however relevant, and pre-conditions related to years of experience may assist to support independence (paragraph 29).

(4) The CCJE considered that the European Charter on the statute for judges - in so far as it advocated the intervention of an independent authority with substantial judicial representation chosen democratically by other judges - pointed in a general direction which the CCJE wished to commend (paragraph 45).

(5) The CCJE considered that when tenure is provisional or limited, the body responsible for the objectivity and the transparency of the method of appointment or re-appointment as a full-time judge are of especial importance (see also paragraph 3.3 of the European Charter) (paragraph 53).

(6) The CCJE agreed that the importance for national legal systems and judges of the obligations resulting from international treaties such as the European Convention and also the European Union treaties makes it vital that the appointment and re-appointment of judges to the courts interpreting such treaties should command the same confidence and respect the same principles as national legal systems. The CCJE further considered that involvement by the independent authority referred in the paragraphs 37 and 45 should be encouraged in relation to appointment and re-appointment to international courts (paragraph 56).

(7) The CCJE considered that the irremovability of judges should be an express element of the independence enshrined at the highest internal level (paragraph 60).

(8) Judges' remuneration should be commensurate with their role and responsibilities and should provide appropriately for sickness pay and retirement pay. It should be guaranteed by specific legal provision against reduction and there should be provision for increases in line with the cost of living (paragraphs 61-62).

(9) The independence of any individual judge in the performance of his or her functions exists notwithstanding any internal court hierarchy (paragraph 64).

(10) The use of statistical data and the court inspection systems shall not serve to prejudice the independence of judges (paragraphs 27 and 69).

(11) The CCJE considered that it would be useful to prepare additional recommendations or to amend Recommendation No. R (94) 12 in the light of this opinion and the further work to be carried out by the CCJE.

Strasbourg, 23 November 2001 CCJE (2001) OP N°2

**CONSULTATIVE COUNCIL OF EUROPEAN JUDGES
(CCJE) OPINION No 2 (2001) OF THE CONSULTATIVE COUNCIL
OF EUROPEAN JUDGES (CCJE)
FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS
OF THE COUNCIL OF EUROPE ON THE FUNDING AND
MANAGEMENT OF COURTS WITH REFERENCE TO THE
EFFICIENCY OF THE JUDICIARY AND TO ARTICLE 6 OF THE
EUROPEAN CONVENTION ON HUMAN RIGHTS**

1. The Consultative Council of European Judges (CCJE) has drawn up this opinion on the basis of the responses of States to a questionnaire, texts prepared by the Working Party of the CCJE and texts prepared by the Chair and Vice Chair of the CCJE and the specialist of the CCJE on this topic, Mr. Jacek CHLEBNY (Poland).

2. The CCJE recognized that the funding of courts is closely linked to the issue of the independence of judges in that it determines the conditions in which the courts perform their functions.

3. Moreover, there is an obvious link between, on the one hand, the funding and management of courts and, on the other, the principles of the European Convention on Human Rights: access to justice and the right to fair proceedings are not properly guaranteed if a case cannot be considered within a reasonable

time by a court that has appropriate funds and resources at its disposal in order to perform efficiently.

4. All the general principles and standards of the Council of Europe on the funding and management of courts place a duty on states to make financial resources available that match the needs of the different judicial systems.

5. The CCJE agreed that although the funding of courts is part of the State budget presented to Parliament by the Ministry of Finances, such funding should not be subject to political fluctuations. Although the level of funding a country can afford for its courts is a political decision, care must always be taken, in a system based on the separation of powers, to ensure that neither the executive nor the legislative authorities are able to exert any pressure on the judiciary when setting its budget. Decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence.

6. In the majority of countries, the Ministry of Justice is in turn involved in presenting the court budget to, and negotiating it with, the Ministry of Finance. In many countries, prior judicial input takes place in the form of proposals made either directly or indirectly by courts to the Ministry of Justice. However, in some cases, courts present budget proposals to the Ministry of Finance direct. Examples are the Supreme Courts of Estonia and of Slovakia for their own budgets and the Supreme Courts of Cyprus and of Slovenia for courts of all levels.

In Switzerland the Federal Supreme Court has the right to submit its own budget (approved by its Administrative Commission, consisting of three judges) to the Federal Parliament, and its President and Secretary-General have the right to appear to defend its budget before Parliament. In Lithuania a Constitutional Court decision of 21st December 1999 established the principle that each court had the right to have its own budget, separately itemized in the State budget approved by Parliament. In Russia, the Federal Budget must make separate provision for the budget of the Constitutional Court, the Supreme Court and other common law courts and the Federal Court of Arbitration and other arbitral tribunals, *and* the Council of Russian Judges has the right not only to participate in the negotiation of the federal budget, but also to be represented in its discussion in the chambers of the Russian Federal Assembly.

In the Nordic States recent legislation has formalized the procedure for coordinating court budgets and submitting them to the Ministry of Justice – in Denmark the Court Administration (on whose steering committee the majority of the members are representatives of different courts) fulfils this role. In Sweden the National Courts Administration (a special governmental body, with a steering committee, the minority of whose members are judges) fulfils a like function, with obligations to prepare rolling three-year budgets.

7. In contrast, in other countries there is no formal procedure for judicial input into the budget negotiated by the Minister of Justice or equivalent to fund court costs, and any influence is informal. Belgium, Croatia, France, Germany, Italy

(save for certain disbursements), Luxembourg, Malta, Ukraine and the United Kingdom all provide examples of legal systems within this category.

8. The extent to which the court system is considered to be adequately funded is not always related to the extent to which formal procedures exist for proposals by or consultation with the judiciary, although more direct judicial input was still regarded as an important need. The replies to the questionnaire too often reveal a wide range of deficiencies, from, in particular, a shortage of appropriate material resources (premises, furniture, office and computer equipment, etc) to a total lack of the kind of assistance that is essential to judges for the modern exercise of judicial functions (qualified staff, specialist assistants, access to computerized documentation sources, etc). In Eastern European countries especially, budgetary restraints have led Parliaments to constrict the monies made available for court funding to a relatively small proportion of that required (e.g. 50% in Russia). Even in Western European countries, budgetary constraints have operated to limit courtrooms, offices, IT and/or staff (in the latter case, meaning sometimes that judges cannot be freed from non-judicial tasks).

9. One problem which may arise is that the judiciary, which is not always seen as a special branch of the power of the State, has specific needs in order to carry out its tasks and remain independent. Unfortunately economic aspects may dominate discussions concerning important structural changes of the judiciary and its efficiency. While no country can ignore its overall financial capability in deciding what level of services it can support, the judiciary and the courts as one essential arm of the State have a strong claim on resources.

10. Although the CCJE cannot ignore the economic disparities between countries, the development of appropriate funding for courts requires greater involvement by the courts themselves in the process of drawing up the budget. The CCJE agreed that it was therefore important that the arrangements for parliamentary adoption of the judicial budget include a procedure that takes into account judicial views.

11. One form which this active judicial involvement in drawing up the budget could take would be to give the independent authority responsible for managing the judiciary – in countries where such an authority exists¹ – a coordinating role in preparing requests for court funding, and to make this body Parliament's direct contact for evaluating the needs of the courts. It is desirable for a body representing all the courts to be responsible for submitting budget requests to Parliament or one of its special committees.

12. Management of the budget allocated to the courts is an increasingly extensive responsibility requiring professional attention. The CCJE discussions have shown that there is a broad distinction between, on the one hand, systems in which management is undertaken by the judiciary or persons or a body answerable to the judiciary, or by the independent authority with appropriate administrative support answerable to it and, on the other, those in which management is entirely the responsibility of a government department or service. The 1 See the Opinion

N° 1 (2201) on standards concerning the independence, efficiency and role of judges, under the heading “the appointing and consultative bodies” former approach has been adopted in some new democracies, as well as other countries because of its perceived advantages in ensuring judicial independence and in ensuring the judiciary’s ability to perform its functions. 13. If judges are given responsibility for the administration of the courts, they should receive appropriate training and have the necessary support in order to carry out the task. In any event, it is important that judges are responsible for all administrative decisions which directly affect performance of the courts’ functions.

Conclusion

14. The CCJE considered that States should reconsider existing arrangements for the funding and management of courts in the light of this opinion. The CCJE in particular further draws attention to the need to allocate sufficient resources to courts to enable them to function in accordance with the standards laid down in Article 6 of the European Convention on Human Rights.

III. EVALUATIONS

EVALUATION RESULTS OF THE SEMINARS ON PROFESSIONAL ETHICS¹⁴

1. How do you consider this seminar from the point of view of its organization?

VERY USEFUL – 100%

COMMENTS:

- the participants highly appreciated the working group manner, in which all the attendees participated and could express their personal opinions;
- the seminars are considered useful because they make the participants study thoroughly the Code of Ethics, the Statute of Magistrates and other European norms referring to magistrates and justice in general;
- very well organized, under all aspects;
- extremely interesting due to the addressed topic, to discussions of case studies and to the exceptional professionalism of the moderators.

2. How do you consider the seminar from the point of view of the teaching method?

VERY USEFUL – 100%

COMMENTS:

- this is a new, interesting and attractive method, which encourages all judges to participate in the debates;
- the method should be used also in seminars conducted on other topics;
- interactive teaching generates the participants' interest, creates a connection between the attendees and the moderators, and maintains the attendees' attention to a maximum level;
- the teaching method was instructive, stimulating and very useful;
- the open dialog and division of participants in working groups imply team work and an exchange of ideas and opinions;
- the teaching method results in an improvement of our individual knowledge, due to the opinions of other participants and offers us the possibility to make an evaluation through our own arguments.

¹⁴ Compilation of participants' evaluations provided in May 2005 to ABA/CEELI by the National Institute of Magistrates (NIM).

3. Do you think this seminar has been useful for your professional activity?

YES – 90%

COMMENTS:

- it gives us the possibility to discuss provisions of the Code of Ethics for Magistrates, which are useful in our daily activity;
- the seminar was organized impeccably, the topic was very interesting, and the manner in which the seminar was designed and conducted was very good, due to the interactive character of discussions and the disseminated materials;
- useful and instructive, because there have been exchanges of opinions among the judges who participated in the debates;
- the seminar offered the participants the possibility to study domestic and international norms in the area of ethics;
- it was useful because it established the principles based on which judges should behave, both in their professional activity and in their private life;
- it offered a broader perspective regarding the magistrates' rights and duties.

4. How useful do you think the training materials have been?

VERY USEFUL – 100%

5. How useful do you think the group discussions have been?

VERY USEFUL – 100%

COMMENTS:

- the discussions were useful and each participant had the opportunity to honestly tell his/her opinion;
- very constructive and useful;
- each group member came with his/her ideas, which were discussed by the group and, interactively, with the other groups;
- the discussions generated an exchange of ideas regarding the professional conduct.

6. Did the seminar moderators (trainers) succeed to keep the participants' motivation at a high level?

YES – 100%

7. Were all the tasks clearly explained?

YES – 100%

8. Has it been very difficult to read all the materials during the training course?

NO – 90%

9. Was communication with the moderators good during the seminar?

YES – 100%

10. Would you prefer a more interactive seminar?

NO – 90%

11. The topic of the seminar is very useful to magistrates:

YES – 100%

12. I will use the information acquired during the seminar in performing my professional duties:

YES – 100%

IV. PRE-POST TESTS

PRE –TEST FORM

To best conduct the seminar, organizers kindly ask you to answer the questions below. Thank you!

1. Are you familiar with provisions of the Code of Ethics for Magistrates?

YES

NO

2. Please, list 3 of the duties of magistrates in leadership positions resulting from the Code provisions.

3. Under what circumstances should magistrates request their superiors to order their recusal, under the Code of Ethics for Magistrates?

4. What provisions of the Code of Ethics address situations in which a recusal order for certain judges is recommended?

5. Please, list 3 professional duties of magistrates, as specified by the Code of Ethics for Magistrates.

6. According to the Code of Ethics, is performance of administrative duties a professional obligation of magistrates?

YES

NO

7. Please, give two examples of situations in which self recusal is required, due to the existence of an interest of any kind in the case assigned to a judge.

8. The Code of Ethics for Magistrates establishes the obligation of continuous legal education for magistrates. Please, list 3 ways in which magistrates can apply this provision.

9. According to the Code of Ethics for Magistrates, could magistrates, through their conduct, negatively affect the prestige of the judicial authority?

YES

NO

If YES, in what way?

10. May magistrates express their opinions on the professional and moral probity of their colleagues?

YES

NO

If YES, in what situations?

POST-TEST FORM

To best evaluate the seminar results, organizers kindly ask you once again to fill in a new questionnaire. Thank you!

1. Do you think that you are more familiar with provisions of the Code of Ethics for Magistrates?

YES

NO

If YES, please mention briefly the provisions of the Code of Ethics for Magistrates you have known more thoroughly during the seminar.

2. Please, list 3 of the duties of magistrates in leadership positions resulting from the Code.

3. Under what circumstances should magistrates request their superiors to order their recusal, under the Code of Ethics for Magistrates?

4. What provisions of the Code of Ethics address situations in which a recusal order for certain judges is recommended?

5. Please, list 3 professional duties of magistrates, as specified by the Code of Ethics for Magistrates.

6. According to the Code of Ethics, is performance of administrative duties a professional obligation of magistrates?

YES

NO

7. Please, give two examples of situations in which self recusal is required, due to the existence of an interest of any kind in the case assigned to a judge.

8. The Code of Ethics for Magistrates establishes the obligation of continuous legal education for magistrates. Please, list 3 ways in which magistrates can apply this provision.

9. According to the Code of Ethics for Magistrates, could magistrates, through their conduct, negatively affect the prestige of the judicial authority?

YES
NO

If YES, in what way?

10. May magistrates express their opinions on the professional and moral probity of their colleagues?

YES
NO

If YES, in what situations?

V. RESULTS OF THE POLL QUESTIONNAIRE

The moderators in Suceava, Iași, Bucharest, Brașov, and Constanța presented the participants with an additional questionnaire, with a two-fold purpose. First, the questionnaire aimed at identifying the most important factors ensuring the judges' independence and impartiality. Second, the questionnaire was designed to elicit the judges' awareness of the pivotal role they play in the judicial reform process.

The participants listed judges' "mentalitate" (Romanian word meaning both "way of thinking" and "value system"), the existing legal provisions guaranteeing judicial independence, and a solid moral education as the most important factors for an independent judiciary. Appropriate working conditions and protection by professional associations were also mentioned at the top of the list in Bucharest and Iasi.

Judges' solid knowledge and strict observance of the law, the equal treatment of the parties, and the existing legal provisions guaranteeing their independence were identified as the most important factors ensuring judges' impartiality. In addition, the participants in Bucharest and Iași listed the respect and deference towards the litigants and the continuing reform of the judges' "mentalitate" among the most important impartiality factors.

With respect to their own role in the reform of the judiciary, all participants agreed that judges are guarantors of the citizens' rights and freedoms and of the existence of the rule of law state. A majority of participants expressed the opinions that judges are also guarantors of a democratic society and that the judiciary ensures a balance between the legislative process and the correct

enforcement of the law. While a few participants thought that judges represent the interest of the state, no participant expressed the opinion that judges represent the current political power.

The participants' complete answers are presented in the tables below, divided by seminars:

	Judges' Independence	
	Most important factors	Least important factors
Suceava	<ol style="list-style-type: none"> 1. judges' own "mentalitate" 2. legal provisions guaranteeing judicial independence 3. solid moral education 	<ol style="list-style-type: none"> 1. conduct of the court leader 2. promotion of the magistrates' interests by professional associations 3. conduct of the other government branches towards the judiciary
Iași	<ol style="list-style-type: none"> 1. legal provisions guaranteeing judicial independence 2. judges' own "mentalitate" and integrity 3. appropriate working conditions 4. protection by the Superior Council of Magistrates 5. solid moral education 	<ol style="list-style-type: none"> 1. support from professional associations 2. conduct of the legislative and executive powers towards the judiciary 3. conduct of the court leader
Bucharest	<ol style="list-style-type: none"> 1. judges' own "mentalitate" 2. appropriate working conditions 3. solid moral education 4. protection of the judges' interest by professional associations 	<ol style="list-style-type: none"> 1. conduct of the legislative and executive powers towards the judiciary 2. conduct of the court presidents
Brașov	<ol style="list-style-type: none"> 1. judges' own "mentalitate" 2. solid moral education 3. legal provisions guaranteeing judicial independence 	
Constanța	<ol style="list-style-type: none"> 1. legal provisions guaranteeing judicial independence 2. judges' own "mentalitate" and integrity 3. solid moral conduct 	<ol style="list-style-type: none"> 1. support provided by the Superior Council of Magistrates and other professional organizations

	Judges' Impartiality	
	Most important factors	Least important factors
Suceava	<ol style="list-style-type: none"> 1. solid knowledge and strict observance of the law 2. equal treatment of the parties 3. legal provisions guaranteeing judicial independence 	<ol style="list-style-type: none"> 1. judges' own professional experience 2. the media
Iași	<ol style="list-style-type: none"> 1. guarantees offered by the law 2. independence 3. solid knowledge and strict observance of the law 4. equal treatment of the parties 5. respect and deference towards the litigants 6. continuing reform of judge's own "mentalitate" 	
Bucharest	<ol style="list-style-type: none"> 1. solid knowledge and strict observance of the law 2. equal treatment of the parties 3. respect and deference towards the litigants 4. continuing reform of judge's own "mentalitate" 5. guarantees offered by the law 	
Brașov	<ol style="list-style-type: none"> 1. solid knowledge and strict observance of the law 2. equal treatment of the parties 3. respect and deference towards the litigants 4. independence 	
Constanța	<ol style="list-style-type: none"> 1. independence of the judiciary 2. good knowledge and strict observance of the law 3. equal treatment of the parties 	

	Judges' Role	
	Most important factors	Least important factors
Suceava	<ol style="list-style-type: none"> 1. guarantors of citizens' rights and freedoms 2. guarantors of the existence of the rule of law state 	<ol style="list-style-type: none"> 1. promoting the interests of the current political power 2. representing the interest of the state
Iași	<ol style="list-style-type: none"> 1. guarantors of observance of citizens' rights and freedoms 2. guarantors of the existence of the rule of law state 3. a balance between the processes of drafting laws and enforcing them 4. guarantors of a democratic society 	
Bucharest	<ol style="list-style-type: none"> 1. guarantors of observance of the citizens' rights and freedoms 2. guarantors of the existence of the rule of law state 3. guarantors of a democratic society 4. representing the law 5. a balance between the processes of drafting laws and enforcing them 	
Brașov	<ol style="list-style-type: none"> 1. guarantors of observance of citizens' rights and freedoms 2. guarantors of the existence of the rule of law state 3. guarantors of a democratic society 4. representing the law 	
Constanța	<ol style="list-style-type: none"> 1. guarantors of the existence of the rule of law state 2. guarantors of a democratic society 3. representing the law 	

VI. ABA/CEELI COMMENTARIES ON DRAFTS OF THE REVISED CODE

March 11, 2005

ABA/CEELI'S COMMENTS ON THE DRAFT CODE OF ETHICS FOR MAGISTRATES

(Code version as of March 8, 2005)

I. GENERAL OBSERVATIONS:

1. First of all, we would like to mention that we agree with the SCM members that an amendment to and updating of the Code of Ethics for Magistrates are necessary, because, ever since it was adopted, significant modifications were brought to the Statute of Magistrates and the Law on Judicial Organization. However, at the same time, we think that a reevaluation of the Code should take into account European regulations in the area, as well as suggestions of magistrates. For this purpose, ABA/CEELI provided the Superior Council of Magistrates (SCM) regularly with conclusions included in reports of the seminars organized on this topic in 10 courts of appeal, nationwide. From these documents it results that judges' opinions and suggestions are in line with the European model of code of ethics adopted on the recommendation of the Consultative Committee of European Judges (CCEJ). According to this model, there should be a clear demarcation between professional ethics and its being addressed from a strictly disciplinary perspective (we provide the SCM with a material prepared by Mr. Eric Maitrepierre, Deputy Director of the French School of Magistracy, in January 2005 – the material is available only in French¹⁵– which confirms our above statement).

For instance, Romanian judges who participated in the seminars represented that violations of the norms included in this code should be sanctioned by an honor council, which would operate under the jurisdiction of each court of appeal and would discuss with the judge in question the ways in which his/her conduct could be improved.

2. In our opinion, a code of ethics should regulate, briefly and concisely, the essential principles of relevance in the area of ethics, and should not include, redundantly, provisions already included in other laws. In fact, ABA/CEELI understood that the SCM initiative to review the Code of Ethics is based on the same premises but, at a first reading of the text, one can easily notice that the draft Code of Ethics (the version on March 8, 2005) is as over-inclusive as that of 2001.

¹⁵ A translation in Romanian was provided to the Superior Council of Magistrates subsequently.

II. SPECIFICS¹⁶:

□ In our opinion, **Article 1** of the draft code, which defines the purpose of the code, exceeds the scope of applicability of the concept of ethics, which refers to norms of conduct and ethical obligations of the profession of magistrate. We suggest that this article be eliminated and only the provisions of Article 2 be maintained in the **Role of the Code of Ethics** section.

□ In **Article 5, paragraph 3**, the wording **magistrates have the right and the obligation** to inform the SCM of any pressures on or interferences with the judiciary...□ contains a blatant contradiction, because, in our opinion, a right has a correlative obligation, and it is impossible for a right and an obligation to have the same content. We think this could be regulated either as a right (which can be used or not), or as an obligation (which implies mandatory compliance and the existence of a sanction for non-compliance).

We found that provisions of **Article 6, paragraph 1** reproduce *entirely* provisions of Article 8, paragraph 2 of Law no. 303/2004 on the Status of Magistrates. Also, provisions of **Article 12, paragraphs 1-5** of the draft code are entirely included in Article 9, paragraphs 1-4 of Law no. 303/2004 on the Status of Magistrates. Provisions of **Articles 18, paragraph 2, 23 paragraph 1, 24, paragraph 1, 25, paragraph 1 and 26, points a-d**, are in a similar situation because they are regulated identically in Articles 35, 36, 10, paragraph.1, and Article 10, paragraphs 3, 6, and 7 of the Law on the Status of Magistrates. Since the review of the Code is based on the intention to create an articulate and simple document, which would be a guide for the magistrates' conduct, we think that it is useless to duplicate existing regulations, which already have the power of legal norms, and we suggest *their elimination from the text of the Code*. In fact, ABA/CEELI, in an analysis conducted when the current Code of Ethics for Magistrates was drafted (June 2001) had the same suggestions (we attach a copy of the document, available only in English).

□ Referring to provisions of **Article 6, paragraphs 2 and 3**, we question the necessity of the existence of such regulations in the Code of Ethics for Magistrates, especially as they are not included among the restrictions listed in the Law on the Status of Magistrates, and as such, go beyond the law.

□ The content of **Article 9, paragraphs 1-2 and Article 10, paragraph 2** can be found, implicitly, in Article 5, paragraphs 1-2 of the Law on the Status of Magistrates. Moreover, we think that the text referring to observance of the presumption of innocence is out of place in such a code, since this is one of the

¹⁶ The shaded paragraphs in this subchapter address CEELI's observations that were adopted by the SCM and incorporated into the final version of the code.

basic principles of the criminal law. If we adopt this structure of the code, we should regulate also the other principles of the criminal trial and, why not, those in other areas of law.

▣ The provision of **Article 12, paragraph 5** is, on one hand, implicitly included in provisions of Article 6 of the Law on the Status of Magistrates, and, on the other, is incomplete and unclear, because the text of the draft code does not make any reference to the professional activity of lawyers but, in general, **▣to any activities carried out by lawyers▣**

▣ **Provisions of Article 14, paragraph 2** are poorly written. The provision, as it is currently written, is that magistrates **▣use their working hours▣▣** We think that a rephrasing of this provision is necessary, possibly this way: **▣▣. for this purpose, magistrates have the obligation to observe the working hours and to use efficiently the time necessary to fulfill their professional duties.▣** This article, which exists also in the current Code of Ethics, is objected to by magistrates, who wondered: 1) to what extent should the profession of magistrate be measured in terms of **▣efficiency▣** and 2) what happens in the situation **▣** which has become a rule in courts **▣** when they work beyond the working hours?

▣ We think it would be pertinent to add in **Article 22, paragraph 1** also the category of court clerks and administrative staff of courts and prosecutors▣ offices to which magistrates have to show respect, good-faith etc. We also wonder what the meaning **▣** in that context **▣** of the phrasing **▣correct relations▣** is, and insist once again on the fact that all the concepts used in the Code should have a clear meaning and should not be open to differing interpretations.

▣ The provision of **Article 19, paragraph 1** **▣...the use of material resources with maximum of efficiency▣**, is redundant, because it can be found also in **Article 17** of the draft Code.

▣ **Article 19, paragraph 2** goes beyond the law (Article 95, paragraph 1 of Law no. 303/2004), specifically the general provisions referring to magistrates▣ liability. There is no denying that court presidents and head prosecutors need to verify any information they received and to take steps within the limits of their jurisdiction, but such regulations should be included instead in the Internal Regulation of Courts and not in a code of ethics. We suggest that these provisions be included in Articles 10, 11, etc. of the Regulation Referring to Responsibilities of Court Presidents and Vice-presidents, as well as in similar articles referring to prosecutors.

▣ Despite a careful analysis of **Article 21, paragraph 2, last sentence**, we think it still remains unclear and vague, and its provisions, as currently written, result in the impossibility of interpreting and applying them.

□ The mention in *Article 22, paragraph 3*, referring to other authorized bodies(□□data and information referring to the professional or moral probity of a colleague shall be communicated to the SCM or *to other authorized bodies, as applicable.*□) needs to be detailed more explicitly, taking into account that, according to the law, the only body authorized to take steps in the area of professional conduct of magistrates is the SCM. In instances of criminal violations (*which are not under the scope of our Code*), there are other bodies authorized to take steps, but this goes beyond the provisions of this article in particular, and of the Code in general.

□ Provisions of *Article 26, point e* may be interpreted in various ways because the meaning of the phrasing □*constraining solidarity*□ is not clear. It is obvious that this article has been added to the draft code, because it cannot be found either in the current Code of Ethics or in Law no. 303/2004. Due to this, it needs a clearer language, to express accurately the legislators□ intention.

□ The entire content of *Article 28*, seems to be irrelevant to the purpose of the Code. Rather, it belongs to administrative norms, such as, for example, by-laws. We think that inclusion of such a provision in the Code is inappropriate.

□ As we mentioned above for judges, references to observance of the presumption of innocence need to be eliminated also from *Article 30, paragraph 2, last sentence*, referring to prosecutors.

Luminița Nicolaie
and
Ana-Maria Andronic,

ABA/CEELI

April 4, 2005

**ABA/CEELI COMMENTS ON THE DRAFT CODE OF ETHICS FOR
MAGISTRATES**

(version sent by the SCM on April 4, 2005)

As an introduction, ABA/CEELI would like to underline that many of the observations and recommendations offered several times by CEELI (as a result of the seminars on ethics conducted for judges in the period October 2003 – February 2005) were included in the final version of the draft Code of Ethics for Magistrates (sent to us by the SCM on April 4, 2005). For this, CEELI would like to thank the draft authors for their receptiveness and openness.

Our comments on and suggestions to this final version are the following:

1. We think that, in Article 9, paragraph 1, the wording “magistrates have the duty **not to show (...) influences** related to race, sex, religion, etc.” is not linguistically correct. As a result, we suggest a rephrasing of this paragraph as follows: “*During judicial procedures, magistrates shall have an equidistant attitude, without influences related to race, sex, religion, etc.*”
2. Paragraph 3 of Article 11 was and still is confusing, because it is not clear whether it makes reference to the prohibition for magistrates to provide legal advice. If this is the authors’ intention, we recommend introduction of the word “*professional*” after the word “*activity*”.
3. In Article 14 there is a *substantive error*, by omitting to introduce the word “*order*” after the verb “*to impose*”.
4. We believe that the concluding Articles 27 and 28 do not belong to Chapter VII. We recommend that Article 27 be included in Chapter III (Promoting the Rule of Law), thus becoming Article 10, while Article 28 should be included in Chapter VI (Dignity and Honour of the Magistrate Profession), thus becoming Article 19, paragraph 2.

Prepared by:
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and
Luminița Nicolae
ABA/CEELI

Art. 12 – (1) Magistrates are allowed to provide legal advice, under the law, only in their personal cases, the cases of their ascendants, spouses and descendants or their spouses, as well as of persons under their trusteeship or guardianship. Nevertheless, even under such circumstances, they are not allowed to make use of their position in order to influence the court’s decision or the prosecutor’s office decision and must prevent creating the appearance of such influence.
(2) Magistrates’ family and social relations must not influence the decisions they adopt in fulfilling their professional duties.

CHAPTER V FULFILLMENT OF PROFESSIONAL DUTIES

Art. 13 - Magistrates are called upon to fulfill their professional duties with competence and propriety and to fulfill their administrative obligations provided by law, regulations and duty orders.

Art. 14 – Magistrates must have the diligence necessary to decide the cases assigned to them according to case assignment, in a speedy manner and by observing the statutory deadlines and, when the law does not specify these, within reasonable terms.

Art. 15 – Magistrates must impose order and solemnity during court sessions and adopt a dignified, civil and impartial conduct before the parties, lawyers, witnesses, experts and other persons, and require a proper conduct from them.

Therefore, they must respect the work schedule, and they should not get involved in other activities which performance would affect the time they must spend in fulfilling their professional and work duties. In case there is such a risk, magistrates must give up the other activities so as not to prejudice the parties’ interests and the image of the judiciary in society.

Art. 16 – (1) Magistrates must not disclose or use for purposes other than those directly related to the fulfillment of their professional duties any information they obtained in their official position.

(2) In the cases where, according to the law, sessions have a confidential character, magistrates have the duty to keep the respective documents in the courthouse or the prosecutors’ office, and to allow for their consultation only in compliance with the law and regulations.

Art. 17 – Magistrates have the duty to use the resources and materials provided to them according to their purpose, exclusively in the interest of the court or prosecutors’ office.

Art. 18 – Magistrates have the duty to continuously bring their professional knowledge up to date and to keep themselves at an appropriate level of professional competence.

Art. 19 – (1) Magistrates in leadership positions shall organize the staff activities and show a spirit of initiative and responsibility. In the decision-making process, they shall always give priority to the court’s interests or, respectively, to the prosecutor’s office, and to a good administration of justice.

(2) Magistrates in leadership positions may not use their prerogatives to intervene in the progress of pending cases.

CHAPTER VI DIGNITY AND HONOR OF MAGISTRATE’S PROFESSION

Art. 20 – (1) Both in fulfilling their professional duties and apart from them, magistrates have the duty to refrain from any acts or deeds that might compromise their dignity in court and in society.

(2) Magistrates must uphold the prestige of the judiciary and strengthen public confidence in their integrity and impartiality through a proper conduct in relations with litigants, their colleagues, representatives of other state institutions, and with the entire society.

Art. 21 – Magistrates are not allowed to claim or to accept that their personal, family or other persons’ interests be resolved otherwise than within the legal provisions established for all citizens.

Art. 22 – (1) Relations of magistrates with their colleagues in court or prosecutors’ office shall be based on respect and good-faith, irrespective of their experience or position.

(2) Magistrates are not allowed to express their opinion on their colleagues’ professional and moral probity, except for those cases when this affects the image of the judiciary.

(3) Magistrates shall report to the Superior Council of Magistrates any data and information regarding the lack of professional or moral probity of any of their colleagues.

Art. 23 – (1) Magistrates may participate in drafting of specialized publications or studies, of literary or scientific works, or in audio-visual broadcasts, except for political ones.

(2) Information referring to cases pending in courts or prosecutors’ offices, as well as any information on their activities shall be made available to the press exclusively by public information and relations with the media offices, under the law.

(3) Magistrates may express their opinion by using the right to reply in the situations where in newspaper articles or radio and TV shows slanderous statements were made about them.

Art. 24 – Magistrates may not carry out any activities which, due to their character, way of financing or execution could affect in any way the fulfillment of their professional duties with impartiality, correctness, and within legal deadlines.

CHAPTER VII

ACTIVITIES INCOMPATIBLE WITH MAGISTRATE POSITIONS

Art. 25 – (1) Magistrates may not hold any other public or private position in addition to this capacity, except for teaching positions in higher education institutions, which may be held only as specified by law, except for executive positions in these institutions.

(2) Magistrates may act as trainers of the National Institute of Magistrates and the National School of Court Clerks, based on the curricula established by the two institutions with the leaderships of the courts or prosecutors' offices where trainers work.

Art. 26 – Magistrates are forbidden to participate, directly or through intermediaries, in pyramid schemes, gambling or investments systems for which transparency of funds is not ensured.