



Strasbourg, 15 December 2008

**CDL-JD-PV(2008)002\***  
Engl. only

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**2<sup>ND</sup> MEETING OF  
THE SUB-COMMISSION ON THE JUDICIARY  
(Venice, 11 December 2008)**

**MEETING REPORT**

---

*\*This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

## 1. Adoption of the agenda

The agenda was adopted without changes.

## 2. Study on the independence of judges

Under the chair of Mr Bartole and later Ms Flanagan, the Sub-Commission examined the comments on the two aspects of the study, judges and prosecutors.

On the issue of **judges**, Ms Nussberger (CDL(2008)006) pointed out that the **right to the lawful judge is contained in many constitutions**. Often it is formulated in a negative way ("no one may be removed from his or her lawful judge"). This subjective right implied also that there **should be no abuse in the attribution of cases**. This could best be achieved by attributing cases to judges in a predetermined manner, rather than leaving full discretion to court presidents.

Messrs Hamilton, Torfason and Cameron were of the opinion that the **specialisation of judges in specific matters had to be taken into account**. Also it should be possible to attribute urgent cases to judges who were known to be able to deal quickly with a case. Ms Nussberger replied that there could be an automatic system of attribution of cases, allowing for exceptions. What was important was that the reasons for such exceptions were provided for in law and decisions were taken in a transparent manner in the individual case.

Ms Nussberger also pointed out that **any non-monetary remuneration of judges bore the danger of abuse**. The salaries should be high enough to avoid the need to attribute apartments etc. to judges. In some countries such elements of remuneration were a leftover from socialist times. It was pointed out that in his comments Mr Zorkin (excused) fully agreed on these issues (CDL(2007)008).

Mr Torfason raised the issue of a reduction of the judges' salaries, which should be regulated separately from those of civil servants. Ms Siljanovska proposed to deal also with the independence of the budget of the courts. Mr Bartole suggested taking up the issue of evaluation of judges and especially the question of how central and local input can be reconciled (central and regional judicial councils as well as from court presidents).

Ms Laffranque, President of the Consultative Council of European Judges (CCJE), welcomed the fact that the Secretariat note CDL-JD(2008)002 followed the structure of CCJE Opinion no. 1. The subject discussed also related to CCJE Opinions no. 6 (assignment of cases), 10 and 11 (internal independence of judges). In November 2009, **the CCJE and the Consultative Council of European Prosecutors (CCPE) were to adopt a joint opinion on the relations between judges and prosecutors**. In June, a joint Conference on this subject would be held in Bordeaux.

The CCJE gave opinions on general subjects but adopted also resolutions on problems in the judiciary of individual countries, e.g. Poland, Romania and Serbia.

Mr Desch, representing the European Committee on Legal Co-operation (CDCJ), informed the Sub-Commission that his Committee had been **mandated by the Committee of Ministers of the Council of Europe to prepare a revision of Recommendation (1994) 12 on the Independence of the Judiciary, which was deemed to be outdated**. The **problem was to find the delicate balance between independence and accountability**. The attitude of the Governments represented in the CDCJ quite naturally differed sometimes from that of the judges themselves.

In the presentation of his comments on **prosecutors**, Mr Sorensen (CDL-JD(2008)005) pointed out that there existed a number of international standards established by various bodies including the UN and the International Association of Prosecutors. He expressed **doubts about the “independence” of prosecutors** as a standard and rather **favoured the identification of guarantees against undue influence in individual cases**. If the Venice Commission were to recommend independence as a standard, this was unlikely to be followed in a large number of countries. There were also good reasons to keep a link between government and prosecution. Nordic countries did not experience the same problems as those in Eastern Europe. Ms Suchocka's paper (CDL-JD(2008)004) should be the starting point for further work but he disagreed on certain points. He was of the opinion that **there should be the possibility to give to junior prosecutors instructions also in individual cases**. A general prohibition of such instructions would lead to inefficiency and incoherence of the action of prosecution. There should be no **ban on seconding prosecutors also against their will**. A **prohibition of membership in a political party would be unconstitutional, at least in Denmark**.

Mr Hamilton (CDL-JD(2008)004) pointed out that it is necessary to **distinguish systems applying the legality or the opportunity principle**. In countries applying the legality principle, the question of independence was less crucial. Another issue was also **whether police or the prosecutor were in charge of investigation**. In the latter case, more supervision is required. Recommendation (2000) 19 left to the states the choice between independence and subordination to the executive. There was however a **general tendency** also in non-European countries (e.g. Canada) **to endow the prosecution service with independence**. **Recommendation (2000) 19 was especially weak as concerns the consequences of a complaint of a junior prosecutor against instruction deemed illegal** (removal of the junior prosecutor from the case).

In Eastern Europe, the **problem** was often one of the **general supervision of the courts** by the *prokuratura* (called *nadzor*) and **too wide powers unrelated to prosecution of criminal cases**, inherited from the Soviet system. Another problem often observed in opinions of the Venice Commission had been that there was a lack of **criteria under which a prosecutor general could be impeached**.

The participants agreed that more work was needed on the prosecution aspect of the report. It was important to have an input from the work of the CCJE and the CCPE on their joint opinion relating to the relations between judges and prosecutors.

**The Sub-Commission invited the rapporteurs to prepare for its next meeting - with the assistance of the Secretariat - a draft report on the independence of judges with a view to the adoption of the report by the plenary session of the Commission in March. In agreement with the Parliamentary Assembly, the part on prosecutors should be dealt with at a later session.**

### 3. Other business

The Secretariat informed the Sub-Commission that following a Conference in St. Petersburg, the Consultative Council of European Prosecutors had recently adopted an opinion on powers of prosecutors not related to the prosecution of crime, which was not fully in line with the opinions of the Venice Commission on this subject (CCPE(2008)3rev2).

**LIST OF PARTICIPANTS**

**CYPRUS:** Mr Frixos NICOLAIDES  
**DENMARK:** Mr Jorgen Steen SORENSEN

**GERMANY:** Ms Angelika NUSSBERGER  
**ICELAND:** Mr Hjörtur TORFASON  
**IRELAND:** Mr James HAMILTON  
**ISRAEL:** Mr Dan MERIDOR  
**ITALY:** Mr Sergio BARTOLE  
**LIECHTENSTEIN:** Mr Harry GSTÖHL  
**SWEDEN:** Mr Iain CAMERON  
**"The Former Yugoslav Republic of Macedonia":**  
Ms Gordana SILJANOVSKA-DAVKOVA

\*\*\*\*\*

Mr Eberhard DESCH, Head of Division of International Law, Federal Ministry of Justice, 11 015  
BERLIN, GERMANY (Former Chair of the CEPEJ)

Mrs Julia LAFFRANQUE, Judge, Supreme Court, Lossi Str. 17, 50093, TARTU (Chair of the  
CCJE)

Ms Muriel DECOT, Secretary of the CCJE, Justice Division DGHL

**SECRETARIAT (Venice Commission)**

M. Gianni BUQUICCHIO  
Mr Thomas MARKERT  
Ms Simona GRANATA-MENGHINI  
Mr Schnutz DURR  
Ms Tanja GERWIEN