REPORT:

TOWARDS A CULTURE OF ACCOUNTABILITY OF COUNCILS FOR THE JUDICIARY

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Acronyms/Abbreviations

CCJE	Consultative Council of European Judges
CoE	Council of Europe
VC	Venice Commission of the Council of Europe
ENCJ	European Network of Councils for the Judiciary
ECJ	Court of Justice of the European Union
ECtHR	European Court of Human Rights
HJC	High Judicial Council (Albania)
HJPC	High Judicial and Prosecutorial Council (Bosnia and Herzegovina)
HCOJ	High Council of Justice (Georgia)
CSM	Council for the Judiciary (Italy)
SJCRK	Supreme Judicial Council (Kazakhstan)
RvdR	Council for the Judiciary (The Netherlands)
NCA	Norwegian Courts Administration (Norway)
KRS	National Council for the Judiciary (Poland)
SCM	Superior Council of Magistracy (Romania)
CGPJ	General Council for the Judiciary (Spain)
HCJ	High Council of Justice (Ukraine)

Introduction

Background

At the core of the concept of judicial independence is the ability of individual judges and the judiciary as a whole to perform their duties free of undue influence or control by actors from outside the judiciary, be it other state powers (government and parliament), the media, public opinion, companies, or powerful people. The same goes for undue influence or control by actors from within the judiciary itself, be it senior judges not assigned to a case, presidents of courts or councils for the judiciary (hereafter: councils).

Governments and parliaments are of course in a position to influence and control the judiciary, simply because of the power over budgetary resources and the power to legislate. This influence and control may be exercised without unduly interfering in the independence of the judiciary, but the possibility of undue interference is obvious in numerous fields, such as the selection, appointment and promotion of judges, the disciplinary system for judges, or the allocation of the budget for the judiciary, its premises, allocation of support-staff or ICT services, etc.

In order to safeguard the judiciary from undue influence or control, the establishment of judicial self-governing bodies is absolutely necessary. This is widely recognized in Europe, North America and other parts of the world, even in the few countries in Europe that do not choose to have a national council for the judiciary. The European experience is that the degree of self-governance varies from country to country. It ranges from local self-governing bodies with specific powers in a ministerial model on the national level, to national self-governing bodies with wide powers, such as the power to select, appoint and promote judges, the power to discipline judges, the power to negotiate and distribute the budget for the judiciary, and the power to manage the organization of the judiciary (including premises, support staff, and ICT services).

In most European countries some of these national powers are placed with councils, notwithstanding the existence of other bodies of judicial self-government, such as judicial appointments committees (United Kingdom), disciplinary authorities (The Netherlands) or independent training schools (Italy).

Over the years judicial self-governing bodies have grown in independence and in powers in many countries, primarily, but not only, in countries which turned from a non-democratic system of governance to a system of democracy under the rule of law. In democracies there is no governance without responsibility, and no responsibility without accountability: government accounts to parliament; parliament to the citizens. Accountability in this context is a specific well-defined concept involving trust and powers to change parliament or the government before the end of term. But what is the purpose, practice and relevance of accountability in the context of councils?

Given the increased independence and powers of councils, accountability is indeed a challenge and an issue in many countries. The problem is that there is some evidence that governance by judges (councils, independent from the executive with a majority of judges) does not necessarily imply freedom from undue influence or control of individual judges, nor ethical or good governance of the judiciary.[1] Undue influence on judges and unethical and bad

[1] See Chapter 3.

governance of the judiciary will ultimately undermine the independence of the judiciary, and an independent judiciary is of utmost importance for society.

Objective

OSCE participating States have committed to "respect the internationally recognized standards that relate to the independence of judges and legal practitioners"[2] and to support and advance the "independence of judges and the impartial operation of the public judicial service"[3]. ODIHR has a mandate to assist participating States in implementing these and other human dimension commitments.[4]

In light of these commitments and the mandate of ODIHR, the aim of this paper is to explore the present standards on and practices of accountability of councils for the judiciary, identify issues in this field, and to propose options for the revision of the 2010 "Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia" [5] (hereafter: Kyiv Recommendations). The Kyiv Recommendations focus on Judicial Administration (part I), on Judicial Selection and Training (part II), and on Accountability of Judges and Judicial Independence in Adjudication (part III).

The Kyiv Recommendations were developed in June 2010 at a regional expert meeting hosted by ODIHR, together with the Max Planck Institute on Comparative Public Law and International Law, following and building on the results of a comprehensive analysis of the state of judicial independence in the entire OSCE region. Since publication, the Kyiv Recommendations have served to articulate compliance with international standards and good practices for judicial system reforms and have been extensively utilized by national authorities, civil society, the OSCE and other international organizations.

In order to ensure that the Kyiv Recommendations respond effectively to challenges across the OSCE region, in 2019, as part of the extrabudgetary project "Strengthening Inclusive and Accountable Democratic Institutions in the OSCE Region", ODIHR began the development of updated recommendations on judicial independence. The process of review of the Kyiv Recommendations is being carried out on the basis of detailed assessments, such as this one, and extensive consultations with justice sector stakeholders and leading experts from OSCE participating States.

One of the challenges and issues identified in the ongoing process of review of the Kyiv Recommendations is the accountability of judicial self-governing bodies. ODIHR believes that the improvement of the standards and practices of accountability of councils could be helpful in furthering good and ethical governance of the judiciary, in order to protect the independence of the judiciary for the benefit of society.

To this end, and in order to facilitate consultation with a wider range of stakeholders, ODIHR has commissioned this report on the topic of accountability of judicial self-governing bodies.

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[2] The Document of the Moscow Meeting of the Third Conference on the Human Dimension of the CSCE, Moscow (Moscow Document, 1991).
[3] The Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (Copenhagen Document, 1990).
[4] OSCE Ministerial Council, Decision No. 4/06, "Brussels Declaration on Criminal Justice Systems", Brussels, 5 December 2006.
[5] See at https://www.osce.org/odihr/KyivRec.

Methodology

The report has an exploratory nature. Therefore, a choice had to be made from the subjects relating to accountability of councils. The report will address the accountability of councils for their general powers, and for a specific type of problem: alleged unethical conduct of a member of a council.

The exploratory nature of the report also had consequences for the limited selection of international organizations whose standards were studied. The following international organizations were selected: the Consultative Council of Judges of the Council of Europe, the Venice Commission of the Council of Europe and the European Network of Councils for the Judiciary.

The report's exploratory nature is also the reason why a selection had to be made of councils from the OSCE participating States. The councils chosen represent the different varieties in councils as to powers and practices, and varied levels of trust of society. A total of eleven experts (seven men, four women) in the following countries (one per country) were interviewed on the basis of a questionnaire[6]: Albania, Bosnia and Herzegovina, Georgia, Italy, Kazakhstan, The Netherlands, Norway, Poland, Romania, Spain and Ukraine.

The answers of the national experts, the standards on accountability of the mentioned international organizations and the experience of the author as president of the European Network of Councils for the Judiciary are the basis of this paper.

This report has also benefitted from feedback received by experts at a 9 December 2020 workshop organized by ODIHR. The period of research for this report ended on 8 February 2021 and the report does not take into account developments which may have occurred after that date, with the exception of CCJE Opinion 24 of 5 November 2021: Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems.[7]

[6] See Appendix I.
[7] "Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems", CCJE, 24 (2021) (hereinafter referred to as CCJE Opinion 24).

Chapter 1: Accountability of councils

1.1 The reasons why councils must account

This is a chapter on judicial accountability, but it starts with judicial independence and impartiality. The reason is obvious. Independence of judges in individual cases is key to the impartiality of judgements, especially in cases against the government. This goes both for undue influence on decisions of judges from outside the judiciary, as from within the judiciary. For compliance to the law, individual judges account to a higher court; for compliance to professional ethics they account to disciplinary authorities, which in Europe are usually councils. These standards are widely accepted in Europe, with some exceptions.[8].

In order to protect an individual judge against undue influence from the government, a degree of self-governance of the judiciary is necessary. This brings in judicial self-governing bodies to take decisions such as on the selection, career and disciplining of judges, or the management of the judiciary (budget allocation). The important powers vested in these bodies need accountability, first of all to avoid that the judiciary becomes self-referential. A judiciary that is not open to input from society risks losing its moral credibility, the trust of the citizens, its relevance to society and at the end of the day its independence.[9]

Councils have a duty to protect the independence of the judiciary as national and powerful leaders of the judiciary, and because of this duty they are exposed to a great deal of pressure and competing interests. In these circumstances they are often inclined to protect the judiciary and themselves. Members of councils must be seen by society to behave ethically and to govern the judiciary in the best interest of society.[10] In this respect, ethical behavior of members of councils means acting in the best interest of the judiciary, not in other interests. Good governance means achieving results for the benefit of society, such as improving integrity, quality and speediness.

In other words: councils are accountable to society for the reason that the citizens must be able to trust that councils use the important powers society invested in them for the benefit of the citizens. It is crucial for the legitimacy of their independence, and for the improvement of the performance of the judiciary.

1.2 To whom and in what way are councils accountable?

From the reasons why councils must be accountable it follows that councils must account to society: to the citizens directly, and to the government and parliament as the chosen

[8] For example, in Poland, judges are being disciplined for the content of their judgments. See "Legal harassment of Polish Judges - report for the needs of EU justice scoreboard (2020)", Themis Association of Judges, March 2020. Many such cases are mentioned. The most striking are the cases of judges who are in a disciplinary procedure for applying the ECJ judgement of 19 November 2019 on the KRS.

[9] For the relationship between judicial independence, public trust and legitimacy see Frans Van Dijk, *Perceptions of the Independence of Judges in Europe. Congruence of Society and Judiciary*, (Palgrave Macmillan, Cham), 2021.

representatives of the citizens. This entails duties to inform on the state of the judiciary and to respond to questions of ministers or parliament, or the duty to engage in a dialogue with other state powers. The separation of state powers should not be an obstacle to this dialogue. Councils must also be directly accountable to citizens by means of outreach programs to explain how the judiciary operates and why it is relevant to society. Input from society can be obtained through external reviews or user surveys, so the judiciary gets information about its actual performance, and the wishes and expectations of citizens.

In some European countries, councils have to account for decisions on selection, appointment and promotion to one of the highest courts in the country, usually the Supreme Administrative Court. Recent developments in European Court of Human Rights (ECtHR) and Court of Justice of the European Union (ECJ) case law show that councils must realize they might have to account on aspects of their powers to European courts as well: both courts are increasingly touching upon councils in their jurisprudence on independent and impartial tribunals.[11] In this context, the ECJ held, for instance, that the degree of independence of a council that selects judges must be considered.[12] Factors which may be relevant for the purposes of an overall assessment of the guarantees of the independence of a council may include the dismissal of members of a council before the end of term, the way judges are elected in a council (by their peers or by parliament), and the potential for irregularities and lack of transparency in the appointment of council members.[13]

Some argue that accountability to a higher court or to disciplinary authorities is the only relevant way to ensure judicial accountability, because it has possible legal effect.[14] Thus, it mirrors the concept of accountability as is used in the relationship between government and parliament, or between a civil servant and minister. The question is, however, whether this concept of accountability is helpful for the judiciary and councils. It can be argued that judicial accountability cannot be limited to the few situations with legal effect. These situations are not sufficient to gain and maintain the trust of citizens, which is what accountability is about in the context of an independent judiciary and council.

1.3 The limits of accountability of councils

The limits of accountability are reached where it undermines directly or indirectly the independence and impartiality of judges in deciding cases.

The most obvious example of such a limit is the content of judgements. Independence and impartiality require that judges must be able to judge without being subjected to disciplining prosecutions because the government does not like the outcome of a case. For councils this implies, for instance, that they are obliged to make clear to society that they resist political

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[11] Koen Lenaerts, "New Horizons for the Rule of Law Within the EU", *German Law Journal,* 21(1), 2020, pp. 29-34.

[12] Judgment of the Court (Grand Chamber) of 19 November 2019, *A.K. and Others v Krajowa Rada* Sądownictwa (EU:C:2019:982), Joined Cases C-585/18, C-624/18 and C-625/18 , par. 139.

[13] *Ibid*., par. 143.

[14] David Kosař, "Perils of Judicial Self-Government in Transitional Societies", *Cambridge University Press*, 2016, p. 57. David Kosař and Samuel Spac, "Conceptualization(s) of Judicial Independence and Judicial Accountability by the European Network of Councils for the Judiciary: Two Steps Forward, One Step Back", *International Journal for Court Administration*, 9(3), 2018, pp. 37-46.

pressure or legislation to introduce ethical rules for judges forbidding them to apply aspects of European law, or forbidding them to explain and defend the concept of independence to citizens.[15]

A second example of a limit to accountability is that dialogues between a council and the government and parliament, or representative bodies of judges, must not create a de facto hierarchy, but must be on a voluntary basis.

As to the content of dialogues, the third limit is that the performance of individual judges or the results of individual cases cannot be subjects of dialogue with ministers or parliament[16], because the latter may use this as a tool to get some control over the courts. It is a very thin line between the demand of governments and parliaments to improve the performance of the judiciary and pushing judgements in a specific direction.[17] Dialogue with other state powers most only be on an aggregated level, such as consideration of issues and solutions to certain types of cases, types of problems for possible legislation, new general policies, or criticisms by scholars and public debates. However, the standards not to enter in a dialogue on individual cases does not apply to decisions of councils on alleged unethical behavior of members of councils or on alleged bad governance of councils, because (indirect) influence on individual court cases is not at stake. Furthermore, no judicial body besides the council itself usually has the power to decide these issues. This implies that the appearance of being self-referential has to be avoided by maintaining the utmost transparency of councils on these points.

The fourth and last limit to accountability of councils is the dismissal of members of a council by the government or parliament before the end of their terms. In case of unethical behavior of a member of a council, only criminal or disciplinary liability can end his or her term, or voluntary leave in the best interests of the judiciary. The exception to this rule is the vetting of judges shortly after a fundamental change of a constitution, for instance the change from a communist system to a democratic system under the rule of law, or to end (internationally recognized) endemic corruption in the judiciary. But this vetting mechanism is a onetime solution in case other solutions are not effective: it cannot be used over and over again in the same judiciary, for instance in case of a reappearance, years after a vetting, of a systemic pattern of unethical behavior of members of councils or bad governance of councils. Vetting every few years would destroy the independence of the judiciary in the end. Reappearance of a systemic pattern of unethical conduct of members of councils is a problem that has to be solved in another way, for instance by means of a pre-selection of candidate members for a council on the basis of integrity. Investment in the development of a culture of accountability will be helpful in this regard.

[15] "Position Paper of the Board of the ENCJ on the membership of the KRS of Poland", ENCJ, August 2018. See also "Position Paper of the board of the ENCJ on the membership of the KRS (expulsion)", ENCJ, May 2020.

[16] Individual cases will of course be pronounced in public and published on the internet.

[17] Philip Langbroek, "From the Managing Editor: Measuring judicial Performance, Independence and Accountability", *International Journal for Court Administration*, 9(3), 2018, pp. i-ii.

Chapter 2: Standards of European organizations on the accountability of councils

2.1 Introduction

Chapter 1 on the concept of accountability of councils refers to the recent case-law of the ECHR and the ECJ beginning to regulate aspects of councils. This development is recent, but it seems likely to evolve and prove to be of great importance, not only to the independence of councils, but also to their accountability.

In respect of independence and accountability of councils, the ECtHR and ECJ have no specific treaties or other sources of law to base decisions on, and therefore must rely on general principles and the standards of international organizations, such as the Consultative Council of European Judges of the Council of Europe (CCJE), the Venice Commission of the Council of the Council of Europe (VC) and the European Network for Councils for the Judiciary (ENCJ).

These standards already proved to be an inspiration in the past and present for European countries for the establishment and practice of councils, and are and will surely be an inspiration for countries and the ECHR and ECJ in the future.

2.2 The Council of Europe: The Consultative Council of European Judges (CCJE)

The CCJE is an advisory body of the Council of Europe on issues relating to the independence, impartiality and competence of judges. It is exclusively composed of judges.

In 2007 the CCJE gave an opinion (No. 10) on councils for the judiciary, and in 2021 complemented this opinion with another opinion (No. 24) in the light of the 'developments in recent years' that 'have challenged the principles and standards' expressed in opinion 10.[18]

The point of view of the CCJE on the general accountability of councils can be summarized as follows:[19]

1. A council is accountable to the citizens (No. 10, 91) and Parliament (No. 10, 94) for the budget;
2. The purpose of accountability is to maintain or enlarge trust of citizens in the judicial system (No. 10, 91; No 24, 9 and 12), to reduce the danger of political influence or the perception of self-interest, self-protection and cronyism within the judiciary (No. 10, 91), and to show that the council does not seek to cover up reprehensible actions of its members (No. 10, 95).

In Opinion No 10, the CCJE distinguishes four areas of accountability:

1. As to decisions regarding judicial careers:

[18] CCJE Opinion 24, *op. cit.*, note 7, par. 2.

[19] Parts of opinions 10 and 24 are quoted in Appendix I. The numbers in the resume refer to the paragraphs in the opinions.

- appointment criteria must be published;
- all decisions reasoned (93);

2. As to the budget:
   - reporting on the use of funds to Parliament;
   - control by the Audit Office (94);
3. As to disciplinary procedures:
   - publish formal and final decisions (95);
4. Activities, difficulties and improvement proposals:
   - periodically publish reports;
   - meetings with the press (96).

In Opinion No 24, the CCJE focusses on the following areas:

1. Functional legitimacy of councils for the judiciary: they must earn the trust of the public and its support through excellent, transparent work and accountability. In times of conflict with other powers, the support of the public will depend at least to a large extent on this perceived legitimacy of a council (12).
2. The councils for the judiciary as an important source of functional legitimacy: the more powers and responsibilities a council has, the more important it is that it should be accountable for the use of those powers (13).
3. The CCJE distinguishes between *judicial, punitive, and explanatory accountability* in relation to councils for the judiciary.
4. Judicial accountability of councils for the judiciary: certain decisions of a council affect rights protected by the ECHR; for example when decisions in relation to judges' careers are made, decisions must be reasoned and judges must have a right to judicial review. When the legal merit of a council's decision is reviewed in an independent court, the council is held accountable. Special attention should be paid to the independence and impartiality of any court reviewing the merits of the council's decisions, including independence from the council itself (15).
5. Punitive accountability: the members of a council for the judiciary must live up to the highest ethical standards and must be held accountable for their actions through appropriate means. They should not be immune from prosecution under the general criminal law. However, the CCJE wishes to underline that such means must be regulated and applied in a way that does not allow their abuse to infringe the independence and functioning of a council for the judiciary (16).
6. Punitive accountability: councils for the judiciary must develop standards of professional and ethical behaviour for their judicial and lay members and internal procedures for investigating shortcomings. Members must act according to those standards and the values of independence, impartiality and integrity. The disciplinary and criminal liability of members is an important aspect of punitive accountability. Fair trial rights of the members including the right to representation must be respected. Decisions taken in this context must be given with reasons and be open to judicial review (17).
7. Explanatory accountability: Every council for the judiciary must work in a transparent fashion, giving reasons for its decisions and procedures and be accountable this way. It must also be open to critical feedback and ready to improve constantly. This form of accountability is of special importance in the dialogue with other powers of state and civil society (18).

2.3 The Council of Europe: The Venice Commission (VC)

The VC is the Council of Europe's advisory body on constitutional matters. Its members are university professors, supreme and constitutional court judges, members of national parliaments and a number of civil servants. The VC works in three areas, one of them being 'democratic institutions and fundamental rights'. In this area it deals with rule of law and judicial reform issues in many studies and opinions over the years on different countries. These opinions are usually given on draft legislation of countries, after an invitation of the government.

Studying the vast material of the VC shows that it has no study on the concept of accountability. But it uses the word 'accountability' in regard to judiciaries and councils in several opinions.

On the basis of the opinions[20] the point of view of the VC as to the general accountability of councils could be briefly summarized as follows:

1. Councils should be independent; [21]
2. Councils have a duty to work for the common good of an independent and efficient judiciary,[22] which means, *inter alia* that it should enable the judges to protect the rights and freedoms of the people;[23]
3. Councils cannot function without the trust of the public in its operation and efficiency;[24]
4. Councils should therefore be accountable,[25] and for the reason to avoid negative effects of corporatism within the judiciary, due to its independent position;[26]
5. Accountability of councils is about the duty to be as transparent as possible and to inform the public, the executive and the legislative about the state of affairs in the judiciary;[27]
6. This duty to inform is through widely disseminated reports and other ways,[28] like the publication of the decisions of the council, a convincing reasoning of the decisions of the council,[29] and a voluntary dialogue with other State Powers;[30]
7. The duty to inform is more limited in scope than would be formal (or hierarchical) accountability of councils to the legislative and executive branches of power, and to judges;
8. Formal (or hierarchical) accountability in this respect means the duty of a council to appear in Parliament in order to answer questions and engage in discussion with the possible consequence of dismissal of a council (or one or more of its members) by the executive or the legislative if they lose confidence in the council.[31] A prohibition of formal accountability also applies to the issue of accountability of members of a council to judges, in that disciplinary procedures must focus only on compliance or not with the constitution

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[20] See Appendix II which contains the text of the reports referred to in the resume.
[21] Venice Commission, Report on Judicial Appointments (2007), CDL-AD(2007)028, par 48. See Appendix III.
[22] Venice Commission, Opinion on the Draft Amendments to the Law on The High Judicial Council of Serbia (2014), CDL-AD(2014)028, par 70. See Appendix III.
[23] Venice Commission on Judicial Appointments, *op. cit.*, note 21, par. 6. See Appendix III.
[24] Venice Commission, Opinion on the Draft Act to Amend and Supplement the Constitution (In The Field Of The Judiciary) of the Republic of Bulgaria (2015), CDL-AD(2015)022, par. 63.; Venice Commission, "Opinion on constitutional arrangements and separation of powers and the independence of the Judiciary and law enforcement of Malta (2018)", CDL-AD 028, par. 27. See Appendix III.
[25] Venice Commission on Bulgaria, *op. cit.*, note 24, par. 63. See Appendix III.
[26] Venice Commission on Judicial Appointments, *op. cit.*, note 21, par 51. See Appendix III.
[27] Venice Commission, Opinion on the Draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (2014), CDL-AD(2014)008, par. 71. See Appendix III.
[28] Venice Commission on Bulgaria, *op. cit.*, note 24, par 63. See Appendix III.
[29] *Ibid.*, par. 64.
[30] Venice Commission on Bosnia and Herzegovina, *op. cit.*, note 27, par. 72. See Appendix III.
[31] *Ibid.*, par 72. See Appendix III.

and the law, and not on whether a member still enjoys the confidence or not of judges who participated in his or her selection.[32]

The VC is against specific rules regarding accountability for non-ethical behavior of a member of a council. The ordinary rules of disciplinary and criminal liability (of judges) should apply. A member can also step down voluntarily. [33]

2.4 The European Network of Councils for the Judiciary (ENCJ)

The ENCJ is primarily a network of all councils for the judiciary in the European Union and European Union candidate states.[34] Members are required to be independent of the executive and legislature.[35]

Since 2013, the ENCJ has worked on a project called Independence and Accountability.[36] The aim of the project is to give councils a tool to improve the rules and practices on independence and accountability by establishing an improvement cycle every three years. The cycle consists of different elements: the identification and scoring of indicators, surveys on the indicators among councils, judges and lawyers, identifying problems on the basis of the results of the surveys, improvement plans of councils to redress these problems, and finally the implementation of the plan (including monitoring).[37]

In the ENCJ's vision, judicial independence and accountability are intertwined. As a prerequisite for independence, a judiciary has the responsibility to demonstrate to society the use to which judicial independence has been put[38], both as one of the means to gain or maintain the trust of the society it serves[39], but also to prevent endangering its independence in the short or long run.[40]

This intertwining of independence and accountability implies that independence stands in the way of hierarchical forms of accountability of the judiciary[41] in contrast to standard ways of accountability as known between civil servants to a Minister, or between a Minister and Parliament.

For now the ENCJ focusses on formal accountability and perceived accountability. Formal accountability relates to the rules about requirements and mechanism of accountability, and perceived accountability to the perceptions of judicial accountability in society.[42] It is worth

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[32] Venice Commission on Serbia, *op. cit.*, note 22, ,par. 67. See Appendix III.
[33] *Ibid.*, paras. 66 and 70. See Appendix III.
[34] ENCJ members are councils of EU states. Councils of candidate states to the EU are observers.
[35] Because the Polish Council for the Judiciary (KRS) does not comply with this requirement any longer it was suspended in 2018. The case of expulsion is pending.
[36] See https://www.encj.eu under the heading "Topics and Projects".
[37] See "Independence, Accountability and Quality of the Judiciary Indicators and Surveys: Leading a process of positive change. ENCJ Report 2018-2019", ENCJ, June 2019, par. 2.1.
[38] See "Independence and Accountability of the Judiciary. ENCJ Report 2013-2014", ENCJ, June 2014, p. 13.
[39] See "Distillation of ENCJ Principles, Recommendations and Guidelines. 2004-2017", ENCJ, 2017, par. 79.
[40] See "Independence, Accountability and Quality of the Judiciary Indicators and Surveys: Leading a process of positive change. ENCJ Report 2018-2019", ENCJ, June 2019, par. 3.1.
[41] See *ibid.*, par. 3.2.
[42] *Ibid.*, par. 3.1. See Van Dijk, *op. cit.*, note 9.

noting that the ENCJ uses 'formal accountability' in a totally different meaning than the VC in its opinions, as explained in par. 2.3 above.

The indicators of the ENCJ are a result of an active discussion between members and observers alike. ENCJ's concept of accountability was scientifically reviewed by the University of Utrecht and the method used in the improvement cycle validated in 2018[43].

The ENCJ identifies the following indicators for general accountability:

> Indicators of the formal accountability of the judiciary as a whole:
> Transparency about the functioning of the judiciary
> 1. Periodic reporting by the judiciary, with the following sub-indicators:
>   - Availability of annual reports
>   - Publishing of the annual report
>   - Scope of the annual report
>   - Periodic and public benchmarking of the courts
> 2. Relations with the press and outreach activities, with the following sub-indicators:
>   - Explanation of judicial decisions to the media
>   - Availability of press guidelines
>   - Broadcasting of court cases
> 3. Outreach activities aimed at civil society
>   - Open door days
>   - Educational programs conducted at schools
>   - Development of television/radio/social media program formats to give insight in the work of the judge
> 4. External review, with the following sub-indicators:
>   - Use of external review
>   - Responsibility for external review
> 5. Participation of civil society in governance bodies of the judiciary
>   - Selection and appointments of judges
>   - Disciplinary measures against judges
>   - Complaints against judges and the court (s) in general.
>
> (..)
>
> Indicators of the perceived accountability of the judiciary and the individual judge:
> 10. Adherence to ethical standards, as perceived by judges
> 11. Adequacy of actions by judicial authorities to address judicial misconduct and corruption, as perceived by judges
> 12. Adequacy of actions by judicial authorities to address judicial conduct and corruption, as perceived by lawyers.'

The ENCJ has no specific rules or indicators for the accountability of members of a council who behave unethically.

[43] See "Measuring Judicial Independence and Accountability", *International Journal for Court Administration*, Special Issue, 9(3), 2018.

2.5 Conclusions

The CCJE, VC and the ENCJ concur to a large extent on the principles of general accountability of a council: on why councils should be accountable, on what accountability entails, and what the limits of accountability are. The difference between the three is on the detail of elaboration of these principles.

To summarize:

1. Councils should be independent for the benefit of the citizens (CCJE, VC, ENCJ);
2. Councils need the trust of the public in order to perform their functions, and to perform their functions independently in the long run (CCJE, VC, ENCJ);
3. Councils should therefore be accountable to the public directly, and indirectly to the representatives of the public, like the Government and Parliament (CCJE, VC, ENCJ);
4. Accountability of councils is about the duty to be as transparent as possible and the duty to inform about the state of affairs in the Judiciary (CCJE, VC, ENCJ).
5. Means to inform are: widely disseminated reports, the publication of the decisions of a council, a convincing reasoning of the decisions of a council (CCJE, VC, ENCJ), and a voluntary dialogue with other state powers (CCJE, VC, ENCJ), meetings with the press (CCJE, ENCJ), outreach activities aimed at civil society and external review of the Judiciary commissioned by a council (CCJE, ENCJ).
6. The duty to inform may not result in a 'de facto hierarchy' to the legislative and executive branches of power, or to a body of judges (CCJE, VC, ENCJ).
7. A 'de facto hierarchy' exists in case a council has the duty to appear in Parliament in order to answer questions, or has the duty to engage in discussion with members of Parliament, or that the Government or Parliament can decide to dismiss a council (or one or more of its members) for lack of confidence. The same goes for these duties to a body of judges and dismissal by such a body (VC).

The CCJE and the VC deal with the situation of a member of a council that behaves unethically. The CCJE and the VC do not advocate specific rules for that situation: criminal and disciplinary liability of that member, or voluntary stepping down by that member are considered sufficient sanctions for unethical behavior.

Chapter 3: Accountability of councils in selected OSCE countries

3.1. Introduction

This chapter examines the standards and practices of selected councils on accountability in different OSCE sub-regions. The selected councils are: Albania, Bosnia and Herzegovina, Georgia, Italy, Kazakhstan, The Netherlands, Norway, Poland, Romania, Spain and Ukraine.[44]

These councils were chosen for their variety in powers, composition, electoral system and the way they operate. De jure and de facto accountability are both reviewed because formal rules alone are not enough to assess whether a council accounts in a way that gains or maintains the trust of society.[45]

The vast majority of the selected councils have powers on selection, appointment and promotion of judges and on disciplining judges, except for the Norwegian and Dutch councils. Their powers concentrate on the budget, quality and organizational development of the Judiciary. The Albanian and Bosnia and Herzegovina councils have all these powers. As a rule one could say that the more power a council has, the more it has to account to society.

All of these councils have a mixed composition of judges and lay members with a majority of judges. Only in the Norwegian council are judges in a minority, but the legislature in Norway is in the process of reviewing this. The judges in the councils are usually elected by their peers, except in Poland and Spain (both by the parliament by simple majority, 60%), Kazakhstan (selection by the Supreme Court and appointed by the President of the Republic) and The Netherlands (selected by representatives of judges, presidents and staff of courts).

The majority of the selected councils have gender-blind systems for election of judge members of judicial councils. Even in OSCE participating States where women are equally represented or even over-represented in quantitative terms within the judiciary, gender-based barriers persist, and women are frequently not proportionally represented in senior management positions, including on judicial councils.

The composition of councils and the electoral system of members of councils are important for the degree of independence and accountability of the councils. In case a council is only composed of judges elected by their peers the degree of its independence might be high, but so might be the risk of being self-referential. Such a council is able to prevent undue influence on the judiciary, but will not have incentives to listen to the needs of society as to quality and speediness. On the other hand, in case council members are elected by the parliament, the degree of the council's independence might be low, but it will be better equipped to listen to the needs of society.

So, a good balance has to be found between the degree of judicial, independent self-governance and accountability. To find the right balance is not easy, because it is not only about rules, but also about practices and the mindset of societies and judiciaries.[46]

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[44] The information is provided by experts on councils in the specific countries. See Methodology section of the Introduction above.

[45] Kosar, *op. cit.*, note 14, pp. 65 and further.

[46] On the subject of the importance of a good balance see: James E. Moliterno, Lucia Berdisová, Peter Čuroš, and Ján Mazúr, "Independence Without Accountability: The Harmful Consequences of EU Policy Toward Central

In this chapter the councils will be briefly assessed on the question of whether independence and accountability of the councils are balanced in a way that the councils are able to gain or maintain the trust of society. The following aspects will be mentioned: powers, composition and electoral system of the members, trust of society, general accountability, and accountability for unethical conduct of members of councils. The assessments and conclusions presented in this chapter reflect the views and inputs of the experts consulted in the preparation of this report.

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and Eastern European Entrants", *Fordham International Law Journal*, 42(2), 2018, pp. 481-551.; The Venice Commission, Opinion on Hungary (2019), CDL-AD(2019)004, par. 47.

3.2. Albania

3.2.1. Powers, composition and system of election of judge members

Since 2016, the High Judicial Council (HJC) has had powers over the selection, appointment, promotion and transfer of judges. It approves the rules of judicial ethics and monitors their observation, and it disciplines judges, except the judges who are members of the council. It administers the budget of the courts. The HJC has eleven full time members among which six are judges elected by the general meeting of judges, and five are lawyers elected by Parliament, based on objective criteria provided in the law.[47] The members cannot be re-elected.

3.2.2. Trust of society

Corruption in the judiciary has historically been seen by a broad segment of the domestic and international community to be a structural problem for society and the country.[48] To address the problem, amendments to the Constitution were adopted in 2016, creating the HJC among other institutions. They also introduced a vetting system for all judicial candidates for the HJC. This is part of the vetting of all approximately 300 judges in the country: they have to prove the legal origin of assets and are assessed on professional performance, including ethical conduct. The vetting is a thorough process, but slow, and is the reason why the HJC was not working until December 20, 2018. As a result of this vetting system the trust of society in the HJC is much higher than in its predecessor.

3.2.3. General accountability

The HJC has the duty to build and maintain public trust in the Judiciary. It accounts to the public and to Parliament. It also conducts a dialogue with Parliament. Its decisions are published on the internet.

3.2.4. Accountability for unethical conduct

Albania introduced a system for compliance with ethical standards for members of the HJC that appears promising but has not been tested yet. The HJC disciplines judges, except judges who are members of the HJC. The Constitutional Court decides on disciplinary allegations against members of the HJC. The members of the Constitutional Court are appointed by Parliament (3), the President of the Republic (3) and by the High Court (3) after a preselection of the Justice Appointment Council (JAC).[49] This committee is composed of nine magistrates (judges and prosecutors), who are selected by lot, taken by the President of the Republic. When selected, they are obliged to become a member of the JAC. The idea is to guarantee that the Constitutional Court will decide only on the merits of a case, also in disciplinary cases of council members.

Once positively vetted, a judge cannot be vetted again, but will be subject to a regular (every 3 to 5 years) performance evaluation (including ethics) by the HCJ, except for the judicial members of the HJC.

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[47] On Governance Institutions of the Justice System 2016, art. 3. See original at http://klgj.al/wp-content/uploads/2021/03/LIGJ-Nr.-115-2016-P%C3%8BR-ORGANET-E-QEVERISJES-S%C3%8B-SISTEMIT-T%C3%8B-DREJT%C3%8BSIS%C3%8B-i-Azhornuar.pdf and unofficial English translation at https://euralius.eu/index.php/en/library/albanian-legislation/send/87-governance-institutions/107-law-on-governance-institutions-of-the-justice-system-en.

[48] See, for example, discussion of the problem in recent EU Progress Reports.

[49] Venice Commission, Opinion on the appointment of judges to the Constitutional Court (2020), CDL-AD(2020)010, pp. 7-8.

3.2.5. Concluding observations

The HJC has been working less than two years, but it has already increased the trust of the population enormously. There have been no scandals around members of the HJC so far. Albania has introduced a vetting system for judges as a result of internationally recognized[50] endemic corruption in the judiciary[51]. Only positively vetted judges may be elected to the HJC. The vetting system is very drastic and will only be used as a one-time measure to break with a past of structural problems of corruption with judges. For the future performance evaluation of judges and disciplining them are the tools to uphold high ethical standards in the judiciary. Albania also introduced a system whereby disciplinary procedures against HJC members are decided by the Constitutional Court, with no role for the HJC. It appears that Albania found a promising balance between independence and accountability.

[50] See, for example, the Venice Commission's characterization of the impact of corruption on the judiciary in Albania in its opinions on the draft constitutional amendments which established *inter alia* the vetting procedure, as well as its opinion on appointment of judges to the Constitutional Court. See Venice Commission, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania (2015), CDL-AD(2015)045.; Venice Commission, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, CDL-AD(2016)009.; Venice Commission, Opinion on Appointment of Judges to the Constitutional Court of Albania (19 June 2020), CDL-AD(2020)010.

[51] As mentioned in par 1.3 this is a onetime only solution in case other solutions are not effective.

3.3. Bosnia and Herzegovina

3.3.1. Powers, composition and system of election of judge members

The High Judicial and Prosecutorial Council of Bosnia and Herzegovina (HJPC) has a wide range of powers related to appointment and disciplining of judges and prosecutors, supervision of judicial education, criteria of appraisal of performance of judges, ethical codes, opinions on draft legislation and supervision of the budget preparation of all courts.

The HJPC has fifteen members: eleven elected by judges and prosecutors from different levels (state, entity, cantonal, municipal), two lawyers appointed by the bar association, one member appointed by the national Parliament and one by the Government.

3.3.2. Trust of society

The trust of society in the HJPC is low. In recent years, frequent allegations of political influence, manipulations with appointments and disciplinary procedures, unethical behavior, conflicts of interest and failure to implement some of the key reforms needed for progress for future integration in the European Union have damaged the trust of society in the institution. The professional community and the general public have seen examples of selective application of HJPCs' own rules as a way of bending the framework to reach certain outcomes instead of operating in the service of the independent, professional and impartial judiciary.[52]

International observers look at the judiciary as a state body that outperforms the government and the parliament in professionalism, but find the performance of the HJPC nevertheless problematic. In the past the HJPC contributed highly to the independence, impartiality and professionalization of judges and the judicial organization, but now its performance has become a problem, as was reported in a 2019 European Union expert report.[53] Apart from the behavior of the HJPC and its members, another important reason for this deterioration is perceived by some to be that the other state powers do not allow an independent judiciary on a national level in the fragmented state of Bosnia and Herzegovina for their own political interests.

3.3.3. General accountability

The HJPC accounts in annual reports about the state of affairs of the judiciary. These reports are sent to all courts and international organizations. The president of the HJPC presents the report in Parliament.

There is rarely a dialogue between the state powers. The HJPC sometimes appears in hearings in Parliament, although it is not uncommon to refuse to appear for reasons of the independent position of the HJPC. The same reason for refusal is sometimes used in response to written questions of the Minister of Justice or Parliament.

The HJPC publishes on the website its final decisions (redacted decisions in disciplinary cases), reports, opinions, the ethical code, policies and external reviews by international experts.
The HJPC does not have outreach activities to the public, or a complaints procedure. Decisions not to appoint or not to promote judges cannot be scrutinized before a court. So there is no remedy against the HJPC not applying its rules and criteria.

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[52] See the OSCE Mission to Bosnia and Herzegovina's "Third Annual Report on Judicial Response to Corruption: The Impunity Syndrome", November 2020 in Chapter 2 for a description of some of these concerns.
[53] Reinhard Priebe, "Expert Report on the Rule of Law Issues in Bosnia and Herzegovina", 2019, paras. 64-77. See par. 65: "Over the last years, the HJPC has itself become part of the problem".

3.3.4 Accountability for unethical conduct of a member of the HJPC

The members of the HJPC can be criminally prosecuted for corruption by the prosecutor's office. In case a member is imprisoned on the basis of a binding judgement of a court, his or her mandate is terminated. A dismissal of a member for unethical conduct is also possible; a proposal to dismiss needs the 2/3 majority of the HJPC members present and voting.

Recent examples of allegations of unethical behavior of some of the HJPC members have raised an important issue of ethical and integrity standards established for judges and prosecutors not being applied to the HJPC members when acting as members. For example, after a corruption allegation was raised against the president of the HJPC in 2019, the HJPC adopted a wide immunity rule for members of the council, holding that even in case a member (indirectly) takes money to expedite a lawsuit, he or she is immune to disciplinary prosecution. NGOs reported many more examples[54] of partial and unethical conduct of council members without any consequences. In December 2020, the president of the HJPC stepped down after allegations of unethical behavior, because the members of the HJPC lost confidence in him.

3.3.5. Concluding observations

The rules concerning the position and the independence of the HJPC are well-articulated and in accordance with international standards. The HJPC is one of the councils in Europe with the most powers. Being such a powerful institution, it is of utmost importance that the HJPC respects and abides by the values and principles it is supposed to guarantee and that it leads by example. The more power a council has, the more it must account.

If members are seen or perceived not to act in accordance with their own rules on appointments, conflict of interest or disciplinary responsibility, this is very detrimental to the institution of the HJPC and to the trust of the general public in the HJPC. An appeal to a court in cases of non-appointment or non-promotion could change that. The legislator could restrict the disciplinary immunity for acts of members to the speeches and votes of members in council meetings, by law. For future elections of members of the HJPC a pre-selection of the candidates could be considered by persons of high moral reputation and international experts (temporarily).

Sometimes the HJPC uses its independent position as a reason not to inform Parliament or the Minister of Justice. The duty to inform always applies to cases concerning members of the HJPC.

[54] See for instance Freedom House Report on Nations in Transit (2020), Bosnia and Herzegovina, under the heading "Judicial Framework and Independence".

3.4 Georgia

3.4.1 Powers, composition and system of election of judge members

The main functions of the High Council of Justice (HCOJ) are on selection and appointment of judges, on disciplining judges, transferring judges, giving advice on judicial reforms, conducting quality management and on the relationship with the public.

The HCOJ has fifteen members; nine judges and six non-judges. Eight judges are elected by their peers, and one is an ex officio member of the council.

3.4.2 Trust of society

The rules concerning the HCOJ are in accordance with international standards. However, problematically, it is generally acknowledged that there is a long-standing practice of interference with individual cases of judges.[55] The HCOJ plays a key role in this by transferring judges who are reluctant to give in to political desires in individual cases, or by using other means of influencing judges in individual cases.[56] This makes judges susceptible to improper influence from within the judiciary. Because of this interference from the HCOJ in individual cases, the level of public trust in the judiciary is low, and declining.[57]

3.4.3 General accountability

The HCOJ provides annual reports of its activities to the conference of judges and publishes these reports on its webpage. It gives interviews to the press and publishes press releases. It does not organize outreach activities to the public or inform the President of the Republic, the Minister of Justice, or Parliament about its decisions and activities.

In July 2020, the Constitutional Court upheld a rule stating that a constitutional body (in this case, the HCOJ) has no duty to reason its decision.[58] This was in a case about the HCOJ's appointment of Supreme Court judges. Four Constitutional Judges were in favor and four against. In such a situation (equal number of votes for and against) a rule/law is not quashed according to Georgian law.

3.4.4 Accountability for unethical conduct of a member of the HCOJ

The integrity of the members of the HCOJ is seen as an important problem in the judiciary: they allegedly use their powers for the purpose of improperly influencing judges in individual cases. The HCOJ can block a prosecution of a member by a qualified majority. Such a decision does not need to be reasoned or made public.

[55] "Judicial (In)Dependence: judicial governance lessons for Eastern Partnership countries", Democracy Justice Reforms, September 2019, page 6.
[56] According to input provided by expert consulted by the author during the drafting of the report.
[57] "2019 Index of Economic Freedom", The Heritage Foundation.
[58] Judgment of the Constitutional Court of Georgia of 30 July 2020, *Public Defender of Georgia v. Parliament of Georgia*, N3/1/1459,1491, paras. 38-56, especially p. 49: "Accordingly, the High Council of Justice does not violate the right protected by the first sentence of art. 25(1) of the Constitution of Georgia when selecting candidates for judges of the Supreme Court without written justification." This quote is from the official version translated by the Constitutional Court, available in the Georgian language at https://www.constcourt.ge/ka/judicial-acts?legal=9956.

3.4.5 Concluding observations

The legal framework concerning the HCOJ protects the Judiciary from formal influence from politics as to appointments, dismissals and transfers of judges. However, the HCOJ is widely believed to misuse its powers to influence judges in individual cases.

As a solution to this problem, accountability for decisions of the HCOJ could be considered. This would imply that discretionary decisions have to be reasoned. They should be brought to the attention of the general public, the President of the Republic, the Minister of Justice and the Parliament so they can be scrutinized and criticized. This is all the more true in case the HCOJ blocks a prosecution of one of its members for unethical conduct. Along these lines the balance between independence and accountability may be reinforced.

3.5 Italy

3.5.1 Powers, composition and system of election of judge members

The Italian Council for the Judiciary (CSM) has powers over the selection, evaluation and promotion of judges, and disciplining and transfer of judges. Since 2002, the CSM has consisted of 27 members: 16 judges elected by their peers, eight lay members appointed by Parliament, and three ex officio members. The members cannot be re-elected. The Minister of Justice has powers over the organization and functioning of justice services.

3.5.2 Trust of society

The rules of independence of the CSM are in accordance with international standards, but the practice of the appointment of judges to high positions negatively affects the trust of society in the CSM. This practice is shaped by the electoral system of the judicial members. In Italy, all judges vote for candidates, which means in practice that a candidate, mostly only locally known, must have the support of a national 'corrente' (current, plural 'correnti'), a group of judges, within the National Judges Association. Correnti can be organized around an idea of the role of a judge in society or around other ideas. Once a judge is elected in the CSM thanks to one of the correnti, he or she may feel the need to support the candidates of that corrente for important positions in the judiciary. Thus, a system has grown in which the correnti divide important positions in the judiciary among their supporters, not on the basis of competence and merit, but on loyalty.[59] Forty-five percent of judges think that appointments in the High Court of Cassation are based on other reasons than competence and merit.[60] This problem was highlighted by a scandal in 2019 (see 3.5.4) around a former CSM member, following which politicians proposed a series of reforms to reduce the influence of the correnti. One of the proposals is to divide the national constituency into several regional constituencies, so candidates no longer need the support of the national correnti organizations. The proposals are still being discussed.

3.5.3 General accountability

The CSM accounts to the general public and to the parliament in an annual report. There is transparency of the discussions (they are broadcast on the radio) and the decisions in the plenum (reasoned and published). Proposals to the Minister of Justice are made public, as are the opinions on draft legislation. There is a formal and informal dialogue on proposals concerning the judiciary. CSM participation in hearings in Parliament are rare. Answering questions of the Minister of Justice or Parliament is seen as incompatible with the separation of powers. Interested individuals can challenge decisions of the CSM on appointments and discipline before administrative courts.

3.5.4 Accountability for unethical conduct of members of the CSM

The members of the CSM can be criminally prosecuted on the basis of the rules that apply to every citizen, except for what they say or vote in the plenum of the council. In case the CSM feels the prosecutor is misusing his power to prosecute a member, it can challenge the prosecution before the Constitutional Court. Judicial members can be disciplined by the CSM on the request of the Minister of Justice or the General Prosecutor.

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[59] Simone Benvenuti and Davide Paris, "Judicial Self-Government in Italy: Merits, Limits and the Reality of an Export Model", *German Law Journal*, Special Issue - Judicial Self-Governance in Europe, 2018, 19(07), pp. 1656 and further.

[60] "Independence and Accountability of the Judiciary. ENCJ Survey on the independence of Judges 2019", ENCJ, 2019, p. 34.

Criminal or disciplinary conviction can lead to the loss of the position as a judge, and thus the membership of the CSM.

In 2019, a criminal investigation was conducted into a former judicial member of the CSM (Luca Palamara). The investigations revealed that Palamara met with three members of the CSM and two politicians and they discussed the appointment of a new chief prosecutor of Rome.[61] One of the two politicians was under investigation by a prosecutor of Rome. The investigators found a number of other conversations and chats where Palamara discussed with members of the CSM the appointment of judges in high judicial positions. This caused a huge media and political outcry and damaged the confidence of the citizens in the Judiciary. In order to reduce the damage for the reputation of the Judiciary and the CSM, the president of the CSM asked the involved CSM members to step down. These members, in total five judges and one prosecutor, decided to leave the CSM.

3.5.5 Concluding observations

The CSM is given the power to independently select the best person for high judicial office on the basis of competence and merit. Proposals to reduce the influence of the correnti on the selection of judges to high positions are essential to restore the trust of the citizens.

[61] For a summary of the procedural steps in the case, see "Il Caso Palamara: tutte le tappe del caos procure", *la Repubblica*, 19 September 2020.

3.6 Kazakhstan

3.6.1. Power, composition and system of election of judge members

The Supreme Judicial Council of the Republic of Kazakhstan (SJCRK) was established by law in 2016 as an autonomous state institution charged with implementing the constitutional powers of the President of the Republic of Kazakhstan on the formation of courts and for safeguarding the independence of the Judiciary and the immunity of judges. Previously it functioned on the basis of a decree of the President of the Republic.

The SJCRK has powers over the selection, evaluation, promotion, transfer, disciplining and dismissal of judges. It recommends the President of the Republic to appoint and dismiss judges. The appointments and dismissals of members of the Supreme Court have to be approved by the Senate.

The judicial members of the SJCRK are selected by the Supreme Court and appointed by the President of the Republic. At least half of the members of the SJCRK are judges. The other members are ex officio members, such as the President of the Supreme Court, the Minister of Justice, the Prosecutor General, and the chairpersons of the relevant standing committees of both houses of Parliament, or are appointed by the President of the Republic from among legal scholars, lawyers or foreign experts.

3.6.2. Trust of society

Traditionally, the trust of society in the judiciary is low, and so also low in the SJCRK, due to the fact that the judiciary is not considered by the citizens as independent from the executive.[62] The President of the Supreme Court enjoys some extra-judicial powers allowing to re-open proceedings that were finalized. The Prosecutor General has broad oversight powers, including powers outside the realm of criminal justice. He or she reports to the President of the Republic. The Prosecutor General can also suspend the execution of non-criminal decisions in case they are contested in cassation by himself.

A reversion of a decision in appeal may have repercussions on the judge that took the decision in first instance, because it might be a reason to question his or her performance; acquittals continue to be very rare. A president of a court enjoys a lot of formal and informal powers that may affect (the functioning of) judges, including material benefits.

Judges are inclined to follow the line of higher courts that is often defined by presidents of courts. This line tends to show a prosecutorial bias, routinely following the position of the Prosecutors Office, which undermines the trust of society in the independence of judges.

The President of the Supreme Court invests in a more independent attitude of judges by improving the self-governance of the judiciary and focusing on its increasing efficiency through digitalization and service-orientation. He also established a policy that led to more acquittals. These measures to promote an independent judiciary may have a positive impact on the trust of society.

[62] See "Nations in Transit 2020: Dropping the Democratic Facade", Freedom House, 2020. The report rates the Judicial Framework and Independence 1,25 on 7.00.

3.6.3 General accountability

The SJCRK reports in an annual report to the President of the Republic. This report is made public. The SJCRK does not account in other ways to the general public or Parliament. Its decisions are not published on the internet. The way the SJCRK operates remains largely unknown to the public and the judiciary. This gives the impression to the citizens that the SJCRK functions more as an oversight arm of the President rather than as an independent judicial council.

3.6.4. Accountability for unethical conduct of members of the SJCRK

No public information is available on how accountability and ethical standards are upheld in the SJCRK. The way the SJCRK makes decisions on selection of members of various SJCRK commissions and runs its procedures would benefit from more transparency. This extends to the integrity of its members, to the integrity of the members of its commissions and to the procedures it follows to reach decisions.

3.6.5. Concluding observations

The influence of the executive on judges is still very dominant, although there are initiatives to reduce this dominance. An improvement on accountability will be helpful, including more openness on how members of the SJCRK and its various bodies, including the qualification and disciplinary panels, are selected. Decisions, protocols, and assessment criteria should be publicly available. There is a perceived need to develop special rules on integrity and conflict of interest. Increasing the number of judges on the SJCRK and selecting the other members through an open competitive procedure could decrease the dependence on the President. In respect of all of these issues, the development of guidance on accountability in the Kyiv Recommendations may be very relevant, especially since Kazakhstan is not a member of the Council of Europe.

3.7. The Netherlands

3.7.1 Powers, composition and system of election of judge members

The Netherlands Council for the Judiciary (RvdR) is responsible for the budget of the judiciary, for human resources concerning judges and staff, for support of the uniform application of law, for the quality of judgements, for opinions on draft laws, and for housing and ICT. The RvdR does not select, appoint or promote judges or conduct disciplinary proceedings, except for the selection of court presidents and court board members.

The members are selected by representatives of several judicial bodies. At the moment there is parity between judges (2) and laypersons (2) in the RvdR. One of the judges is the chair of the RvdR, and has by law the casting vote.

3.7.2 Trust of society

The trust of society in the Judiciary is high. The RvdR monitors every three months the public confidence in the Judiciary. Over the years it is constantly high, far higher than the public confidence in the Government, politicians or Parliament. Yet, there is more and more criticism of the RvdR that it is not able to reform the Judiciary in order to comply with the societal demands of speediness, affordability and quality of judicial proceedings.[63] This criticism comes from politicians, groups of citizens and from several external review committees (convened in the years 2010, 2014 and 2018) on the quality of the judiciary. These committees are appointed by the RvdR every four years and are composed of twenty to twenty-six members, with a majority of members of society, and a minority of judges. The members of society come from companies, universities and other organizations, and belong to the top in their field. In small groups of members the committee visits all the courts, assesses the quality of the courts on a wide variety of aspects, and reports back to the council. The report is published on the website of the RvdR. Thus the committee gives input from society to the Judiciary and its organization. The last committee (2018) was critical on the speediness of judgements, backlogs and progress in digitalization. It concluded that the culture and the structure of the governance of the Judiciary are the main causes for the lack of progress in these fields. In case this inability to live up to the demands of society becomes a structural problem, it will surely influence the trust of society in the Judiciary in the long run and risks the reduction of organizational autonomy. [64]

3.7.3. General accountability

The RvdR performs all forms of general accountability as proposed by the CCJE, the VC and the ENCJ, including outreach programs to society.

The duty to inform Parliament and the Minister of Justice is limited to information on the performance of the judiciary as an organization. No information is provided on individual courts, judges or decisions. These limits are protected in information protocols between the RvdR and the Ministry of Justice on the budget and on ICT.

In the last few years, the responsibility and accountability of the RvdR has been extended to co-operation with the criminal justice chain (police, public prosecution service, the parole board

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[63] Elaine Mak, "Judicial Self Government in the Netherlands: Demarcating Autonomy", *German Law Journal*, 2018, 19(7), p. 1812.

[64] In case the judiciary is not able to reform speedily in the coming years, it risks the reduction of organizational autonomy. See for instance "Rapport visitatie gerechten 2018", *de Rechtspraak*, March 2019, pp. 38-39.

and the Ministry of Justice) and the immigration chain (i.a. Immigration Service, Ministry of Justice and the Council of State). The aim of the co-operation is to improve the logistical performance (including ICT) of these chains. To improve the logistics of the chain more specific information has to be shared, probably also on specific courts. This co-operation responds to the criticism of society that these chains do not perform well.

3.7.4. Accountability for unethical conduct of members of the RvdR

There are no special rules for criminal or disciplinary liability for members of the RvdR. A criminal or disciplinary conviction can result in the member having to step down. There are no examples to date of unethical behavior of members of the RvdR. Judge-members of the RvdR can be disciplined by the Supreme Court.

3.7.5. Concluding observations

The high level of public trust in the judiciary appears to be due to the high quality work of the judges, the outreach programs to the citizens and press relations. However, the RvdR does not perform well on reforms necessary for the trust of society. The external review committee 2018 mentioned insufficient budget, but also the culture of the Judiciary and its governmental structure as causes that prevent sufficient progress. The judiciary has to find answers in order to maintain the high trust of society.

3.8 Norway

3.8.1 Powers, composition and system of election of judge members

The Norwegian Courts Administration (NCA) deals with the budget, the organizational development of the judiciary, its premises and ICT. NCA was established in 2002 together with the Appointment Board and the Supervisory Board. The three bodies are independent from each other, but the NCA has secretariat functions for the other two.

The NCA is composed of nine members: four judges, two lawyers, two members of civil society and one from the courts staff. The judge-members are appointed following consultation, inter alia, with the Norwegian Association of Judges.

3.8.2 Trust of society

The trust in the Norwegian judiciary is monitored by the NCA and is continuously very high. Nevertheless, a State Committee recently proposed changes in the system of self-governance in order to create a council that better can live up to the demands of society (speediness and digitalization, better constitutional protection) and have the power to direct courts in national matters. The COVID-19 crisis made this obvious, because courts reacted differently to this on many issues such as the opening of courts. In the pending discussion on a new court mapping (in this case, reorganization of courts through remapping the districts, with an aim to reduce the number of total districts), some presidents of courts raised the question of who represents the judiciary to the other state powers: the NCA or the presidents of courts. This should be made clear as well in the proposed self-governance system.

3.8.3 General accountability of the NCA

The NCA publishes annual reports for the public on the internet. Interviews are given on television. Financial statements are reported to the Government. In the national budget process, statistics and other developments in the Judiciary are reported. There is a formal and informal dialogue with the Minister and Parliament (Standing Committee). The NCA does not discuss individual cases or the performance of individual judges with the Government or Parliament.

Under the umbrella of the NCA, the courts organize outreach programs for the general public, such as open court days. There is no quality review of the Judiciary by a committee composed of members from society, nor court user surveys. Such a review and surveys are seen by the NCA and the Association of Judges to be necessary to improve the performance of the judiciary for the benefit of society.[65]

3.8.4 Accountability for unethical conduct of members of the NCA

Members can be criminally and disciplinary prosecuted by the common rules. The NCA does not have powers to discipline judges. There have been no examples of prosecutions of members of the NCA so far. The ethics of the members are not seen to be a problem by society at large, or within political discourse.

3.8.5 Concluding observations

The NCA accounts to the general public and to the other state powers in many ways. Nevertheless, its general accountability can be improved by receiving structural input from

[65] According to input provided by expert consulted by the author during the drafting of the report.

society by introducing external reviews and court user surveys for the improvement of the performance and accountability of the Judiciary.

3.9. Poland

3.9.1 Powers, composition and system of election of judge members

The main powers of the National Council for the Judiciary (KRS) are in the field of appointments of judges, adopting ethical codes and expressing opinions on judicial training and legislation. Judges have a majority in the KRS (fifteen out of twenty-five members). They are selected by a simple majority of Parliament, on the basis of a selection process that lacks transparency. The Minister of Justice is responsible for the budget and for justice services.

3.9.2 Trust of society

By law and de facto the KRS has had a strong independent position for many years, but the undermining of the independence of the KRS by the executive without successful resistance from society points to an apparent lack of trust of society.

From 2017 on, the judges in the KRS were not elected by judges anymore, but by Parliament (simple majority), and the power over the Judiciary was concentrated in the hands of the executive.[66] From that moment the KRS started to attack the independence of individual judges.[67] Because of these developments, the European Court of Justice and the Polish Supreme Court questioned the independence of the KRS, with the Supreme Court holding it not independent.[68] The ENCJ members ruled by a large majority that the KRS de facto was not independent from the executive anymore;[69] it had gradually become an instrument of the executive to appoint judges on the basis of loyalty to the Government and to attack judges who opposed the Government's judicial reforms.[70]

3.9.3 General accountability of the KRS

By law the KRS has a duty to inform both houses of Parliament and the President of the Republic on annual activities, current matters and needs of the justice system. The limits of this accountability are observed, because the law states that Parliament is not allowed to vote on this information. The KRS answers in writing questions of the Parliament, the Minister of Justice and the Ombudsman.

The KRS publishes the information given to the Parliament and the President of the Republic, and opinions on general matters, on the internet. Decisions in individual cases are not published. The Chair, Vice-chair or the Spokesperson of the KRS give interviews on television, radio and in newspapers. Before its reform, the KRS was never active in reaching out to the public, nor did it conduct external reviews on the performance of the Judiciary; it did not get input from

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[66] Anna Sledzinska-Simon, "The Rise and Fall of Judicial Self-Governance in Poland: On Judicial Reform Reversing Democratic Transition", *German Law Journal*, Special Issue, 2018, 19(7), p. 1839.

[67] Problematic measures taken by the KRS included: appointment of judges on the basis of loyalty rather than merit; establishment of ethical rules prohibiting all resistance of judges to the "reforms" of the government as forbidden political behavior; launching disciplinary proceedings against judges on the basis of these rules.

[68] See *A.K. and Others v Krajowa Rada Sądownictwa (EU:C:2019:982)*, *op. cit.*, note 12. For the follow-up on *A.K. and Others v Krajowa Rada Sądownictwa (EU:C:2019:982)* see Resolution of Civil, Criminal and Labour & Social Insurance Chambers of the Supreme Court of 23 January, 2020, n. 2/2020.

[69] For the reasons why, see the "Position Paper of the Board of the ENCJ on the suspension of the KRS", ENCJ, May 2020.

[70] For examples and elaborate reasoning see ENCJ, *op. cit*. See also Pawel Filipek, "New National Council of the Judiciary and its Impact on the Supreme Court in the Light of the Principle of Judicial Independence", *Problems of Contemporary International, European and Comparative Law*, 2018, pp. 177-196. See also David Kosar, "Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Government in Europe", *German Law Journal*, 2018, 19(7), p. 1586.

society as to societal demands, nor act upon this input. Judges' associations now account to the general public by explaining to society what judges do at festivals and in judicial cafes,[71] but the KRS has condemned these activities as forbidden political action for which judges are disciplinarily liable and prosecuted.[72]

A dialogue exists between the KRS and the Minister of Justice: the Minister is ex officio a member of the KRS. Furthermore, the KRS has a duty to notify the Minister of appointment procedures in specific cases, so the Minister may give her or his opinion on specific cases.

3.9.4 Accountability for unethical conduct of a member of the KRS

All members of the KRS (judges and members of Parliament) have immunity from criminal liability,[73] meaning that they can only be prosecuted with the consent of a court (judges) or Parliament (members of Parliament) and judges can be disciplinarily liable.[74] The disciplinary procedure is before disciplinary courts, not the KRS. If judges lose the status of a judge, they cannot remain a member of the KRS.

In the last ten years there was only one case of corruption among members of the KRS. It concerned a member of Parliament who was simultaneously a member of the KRS.[75] In 2015, amid allegations of corruption, MPs voted not to grant a request by the prosecution to lift the member's parliamentary immunity. The member of Parliament lost his seat during the October 2015 parliamentary elections, and upon the resulting expiry of his immunity, was subsequently prosecuted.

In 2019, in the Kasta-watch affair[76] a member of the KRS was allegedly involved in a hate-speech campaign on social media against judges opposing the judicial reforms in Poland. In this campaign personnel files of judges from the Ministry of Justice were used. The KRS investigated the allegation by asking the member whether he was involved. On the basis of his denial, the KRS did not pursue the matter further.

In 2020, the Polish Supreme Court held, applying an ECJ test, that the KRS was not independent from the executive any more as of 2017.[77] This implies violation of the ethical standards that members must act in the best interest of the Judiciary. As yet, the council has not accounted for this situation, but cases are pending before the ECJ and the ECtHR.

[71] Małgorzata Gersdorf and Mateusz Pilich, "Judges and Representatives of the People: A Polish Perspective", *European Constitutional Law Review*, 16(3), 2020, pp. 345-378, especially p. 378: "Due to some historical reasons (..) law appears an odd thing to a large part of our society; attitudes of legal nihilism are very common. It would be an illusion to believe that such attitudes might be changed in the short term. It is, rather, a task for years, requiring much patience and persistence. Nevertheless, judges should undertake this work. They have no other choice."

[72] Themis Association of Judges, *op. cit.*, note 8.

[73] *Constitution of the Republic of Poland 1997* art. 181 and art. 105, sec. 2.

[74] *Law of the Organization of Ordinary Courts 2001,* art. 107.

[75] See Freedom House Nations in Transit (2016), Poland, under the heading "Corruption" and "Bury usłyszał sześć zarzutów, w tym przyjęcie dużej łapówki. Nie przyznał się do winy", *tvn24.pl*, 19 November 2015 for a description of the case involving former MP and member of the KRS Jan Bury.

[76] "Attacks on judges and independent prosecutors in Poland. An ODG event at the OSCE forum", Open Dialogue Foundation, September 2019.

[77] See note 68.

3.9.5 Concluding observations

The KRS has powers to safeguard the independence of the Judiciary, but since 2017 these powers have been used to further undermine the independence of judges. Since then, the members do not act in the best interests of an independent Judiciary anymore, which is a violation of international ethical standards of judges. This is despite the fact that the legislation on the KRS reflects the opinions of the CCJE, VC and ENCJ on accountability. A lack of public outreach may be a reason why the support of the citizens to the Judiciary was not sufficient to counter the serious undermining of the independence of the KRS.

3.10 Romania

3.10.1 Powers, composition and system of election of judge members

The main powers of the Romanian Superior Council of Magistracy (SCM) are the selection, evaluation and promotion of judges, and the disciplining of judges. The SCM also approves the code of judicial ethics and gives opinions on draft laws. The Minister of Justice is responsible for the budget and justice services.

The SCM consists of nineteen members, nine judges elected by their peers, five prosecutors, two lay members and three ex officio members, such as the president of the High Court of Cassation.

3.10.2 Trust of society

The trust of society in the SCM is unstable. This is caused by the fact that the SCM and independent judges/prosecutors became more and more successful in the fight against corruption, which created political pressure against the judiciary (with reproaches of corporatism and lack of accountability), attempts to change legislation, and open conflicts among the judges and prosecutors of the SCM.[78] In 2011, the European Commission noted in its Mechanism for Cooperation and Verification (CVM) report that improving the accountability of the judiciary remains an important challenge, especially regarding the disciplinary system of judges.[79] Subsequent CVM reports have echoed these concerns. The lack of accountability of the SCM has been generally criticized.[80]

3.10.3 General accountability

The SCM annually reports on the state of the judiciary and on its own activities. The reports are submitted to the Parliament and published. There is a formal and informal dialogue between the Minister of Justice and the SCM on the budget of the judiciary, because the budget of the courts is in the hands of the Minister. Such dialogues also exist with Parliament regarding draft laws. There has been a workshop convened between representatives of the judiciary and of other state powers to draft best practice guidelines for the relationship between the judiciary and the other state powers. The SCM has adopted these best practice guidelines; the other state powers not yet.

The agenda and the decisions of the SCM are published, except for preliminary decisions on disciplinary matters. Interviews on television are given.

3.10.4 Accountability for unethical conduct of members of the SCM

Members of the SCM can be criminally prosecuted. The investigation is carried out by a special section of the SCM.[81] The ordinary rules for citizens apply, except that the SCM has to give its consent for a search or arrest warrant, just like in every case which involves judges or prosecutors.

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[78] Bianca Selejan-Gutan, "Romania: Perils of a "Perfect Euro-Model" of Judicial Council", *German Law Journal*, Special issue — Judicial Self-Government in Europe, 19(7), 2018, p. 1708.

[79] "Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism", European Commission, COM(2011) 460 final, July 2011, at p. 5. CVM stands for the mechanism for Cooperation and Verification.

[80] According to input provided by expert consulted by the author during the drafting of the report. See also Selejan-Gutan, *op. cit,* note 78.

[81] Section for the Investigation of the Offences in the Justice System.

Anyone can file a complaint about a judge. It is the Chief Inspector, who is appointed by the SCM on the proposal of a committee of five members of the CSM, who finally decides to disciplinarily prosecute. A case against a judge is decided by a section consisting of all judges of the SCM. Its disciplinary decisions can be appealed to the High Court of Cassation and Justice. In 2013, the plenum of the SCM removed two of its members due to unethical conduct. The Constitutional Court held the rules of removal unclear and therefore unconstitutional. The Constitutional Court reinstated the members. In 2015, a judge in the previous SCM was sentenced to one year in prison for corruption offences. The judge resigned from the judiciary.[82] A prosecutor of the same council was criminally charged, acquitted and reinstated as prosecutor.[83]

The position of the Chief Inspector is crucial in disciplining judicial members. Recently there was a scandal around the selection of Chief Inspector, because the minority of two in the committee claimed that the majority of three evaluated the candidate on evaluation criteria not provided by law. As of this writing the case is pending before a court.

3.10.5 Concluding observations

The SCM seems to comply with international standards concerning general accountability. All decisions of the SCM on selection, promotion and discipline are open for judicial review, which creates some transparency and quality improvements, for instance on the criteria for evaluation. Rules have been established on best practices in the relationship between the judiciary and other state powers. This is important to guard independence in the necessary co-operation between the state powers, for instance regarding the budget of the courts in Romania.

The disciplinary prosecution of council members also seems to comply with international standards. An independent Chief Inspector, selected by the SCM, decides to prosecute, and the decision is taken by the relevant section of the SCM. Judicial review is open to the High Court of Cassation. Nevertheless, criticism of the lack of transparency and low accountability remains. If not addressed, that might endanger the independence of the judiciary.[84]

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[82] See "Toni Neacşu, fost membru CSM, condamnat definitiv la un an închisoare cu suspendare", *agerpres.ro*, 23 March 2015 for a description of the case involving former SCM member Adrian Toni Neacşu.

[83] See "George Bălan, fost vicepreşedinte CSM trimis în judecată de DNA şi achitat definitiv, revine în magistratură", *romaniatv.net*, 19 July 2019 for a description of the case involving former vice-president of the SCM George Balan.

[84] See Selejan-Gutan, *op. cit,* note 78,p. 1739 and further.

3.11 Spain

3.11.1 Powers, composition and system of election of judge members

The General Council for the Judiciary (CGPJ) has powers to appoint, transfer and promote judges, as well as to discipline judges. It issues opinions and recommendations to Parliament. The CGPJ prepares its own budget, which is then decided on by Parliament. The budget for the courts and the responsibility for court services are with the Minister of Justice.

The CGPJ has twenty-one members, twenty elected by Parliament with a 60% majority: twelve judges and eight lay members. The members cannot be re-elected. The President is chosen by the twenty members of the council elected by Parliament, but in practice this tends to be determined through political negotiations as well.

Recently the Government proposed to change the 60% majority required for the parliamentary vote on selection of CGPJ members to a 50% majority in a second round should nobody be elected in the first round. No doubt this will make the CGPJ even more political in the eyes of society and judges.[85] [86]

3.11.2 Trust of society

The trust of society in the CGPJ is low but is improving in the last four years.[87][88] The main reason for the low trust is the election system of the members of the CGPJ. The process of selection involves negotiations between political parties, but it is not always easy for them to reach an agreement. In 2008, 2013 and 2018 these negotiations resulted in members of the CGPJ staying on for more than a year after the end of their terms. As a consequence the council is perceived as politized by citizens and judges alike. Almost 70% of judges feel that appointments by the council for high judicial positions are based on other reasons than competence and merit.[89] Judges in Spain are broadly perceived by society as independent in deciding cases.

3.11.3 General Accountability

The CGPJ accounts to the general public and Parliament by annual published reports on the state of the Judiciary. It publishes its decisions on the internet. Since 2012, the CGPJ participates in a dialogue with Parliament to enhance institutional collaboration, although the CGPJ is not obliged to appear in Parliament.[90] The CGPJ is only obliged to answers questions of Parliament regarding the annual report.

In a Mixed Commission, the CGPJ and the Minister of Justice cooperate formally and informally on urgent matters such as the COVID-19 pandemic, and more strategic matters, such

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[85] The European Judges Association says in its communication of 13 October 2020 on the legislative proposal that it will "increase the risk of political influence in the appointment of members of the Judicial Council, damaging the perception of the society on an effective judicial independence. See "https://www.iaj-uim.org/news/eaj-statement-about-spain/", EAJ, October 2020.

[86] See Nuria Diaz Abad, "The Time to Speak Up: Why the Reform of the Spanish Council of the Judiciary Disrespects European Standards", *VerfBlog*, 2020.

[87] Aida Torres Perez, "Judicial Self-Government and Judicial Independence: the Political Capture of the General Council of the Judiciary in Spain", *German Law Journal*, 2018, 19 (7), p. 1769 and further.

[88] See 3.11.5

[89] ENCJ, *op. cit.*, note 60, p. 34.

[90] Perez, *op. cit.*, note 87, p. 1794.

as partnership agreements regarding information exchange, database access and on new technologies.

In 2010, the CGPJ formulated objective criteria and evaluation requirements for appointments of judges in high positions on the basis of merit and competence.[91] In 2020, the Commission on Judicial Ethics of the Council considered that members are advised not to be phoned or visited by candidates for a high judicial position. Decisions of the CGPJ can be challenged by way of judicial review before the Supreme Court.

Since 2014, the CGPJ implements a policy of transparency, including a transparency portal, which provides the public with information on topics such as remuneration, declaration of assets of all members, travel expenses and company cars. This effort was recognized with a first place award by the Council for Transparency and Good Governance, a council established by Spanish law, for the year 2017.

3.11.4 Accountability for unethical conduct of members of the CGPJ

The members of the CGPJ may be criminally prosecuted. A criminal charge has to be brought before the Supreme Court. A three-fifths majority of the CGPJ can fire a member of the Council for serious breach of his or her duties.

In 2012, the President of the Council resigned after having charged more than Euro 6000 on the budget of the council for private travelling.

3.11.5 Concluding observations

The way politicians are involved in the appointment of members of the CGPJ is reason for citizens to distrust the independence of the Council. This especially applies to discretionary appointments of judges for high positions, which are perceived to be taken on the basis of (political) loyalty rather than merit and competence. Since the aforementioned reforms in 2010, the Council has been working to improve the trust of the citizens by investing in accountability: dialogue, transparency (asset declaration of members), objective criteria of promotion of judges, and stricter ethical rules. As a result the trust of society is improving.

[91] *Ibid.*, p. 1788.

3.12. Ukraine

3.12.1 Powers, composition and system of election of judge members

The High Council of Justice (HCJ) reviews the selection of judges made by the High Qualification Commission of Judges and decides whether a person will be proposed to the President of Ukraine for an appointment as judge. The transfer of judges from one court to another is also one of the powers of the HCJ. It also has disciplinary powers and the power to dismiss judges.

The HCJ has twenty-one members: ten judges elected by their peers and ten elected by, respectively, the President of Ukraine (2), Parliament (2), advocates (2), law schools (2) and prosecutors (2). The Chair of the Supreme Court is ex officio member. The President of the HCJ is elected by the members for two years and can be re-elected.

3.12.2 Trust of society

The public support for the courts and the HCJ is low, due to corruption in the Judiciary. Although considerable progress has been made in the fight against corruption, mostly on the legislative level, it remains a big issue in the Judiciary. The practice of the HCJ is generally seen as a problem[92] rather than a contribution to the fight against corruption. In July 2020, the public support for courts was 12%, while 78% do not trust the judicial system overall. The Judiciary is currently at the top of public agencies least trusted by the public.[93]

3.12.3 General accountability

The HCJ publishes its final decisions on the website and issues press releases. Dismissed judges can appeal the HCJ decision to the Supreme Court.

Apart from the above, the HCJ does not account to society, the Minister of Justice, or to Parliament. It does not organize outreach activities, like open days in court for citizens explaining what judges do.

The HCJ publishes annual reports on independence of judges,[94] but the reports are focused on independence from external pressures, not about the dangers to independence from within the Judiciary by internal pressures from presidents of courts,[95] or pressure from the HCJ on judges by using its disciplinary authority.[96] Reportedly, judges who recently protested against actual internal pressures were not supported by the HCJ, but criminally and disciplinarily prosecuted. Members of the HCJ are thought to pressure judges for certain outcomes of individual cases.[97]

3.12.4 Accountability for unethical conduct of members of the HCJ

The integrity of the members of the HCJ has widely been seen as a problem. That is why the President of Ukraine proposed to Parliament to establish the Integrity Commission, consisting

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[92] "Analytical reports claim that legislative assignment of creation of new courts and lustration of the judicial corps to agencies consisting mostly of judges (HQCJ and HCJ) was a fatal mistake in terms of public interests (..)". See Democracy Justice Reforms, *op. cit.,* note 55, p. 8.

[93] "The beginning of a new political year: trust in social institutions", Razumkov Centre, July 2020.

[94] See annual reports on independence of judges in Ukraine: https://hcj.gov.ua/page/shchorichna-dopovid-pro-stan-zabezpechennya-nezalezhnosti-suddiv-v-ukrayini.

[95] "On the State of Ensuring Independence of Judges in Ukraine. Shadow annual report (2019)", the Center for Political and Legal Reforms (CPLR).

[96] Democracy Justice Reforms, *op. cit.,* note 55, p. 8.

[97] According to input provided by expert consulted by the author during the drafting of the report.

of three international experts and three members of the HCJ, for "cleaning" the Supreme Court and the HCJ. In 2019, Parliament accepted this proposal. The issue was brought before the Constitutional Court, which held in March 2020 that the law on the Integrity Commission was unconstitutional because the Integrity Commission, as a subordinated body to the HCJ, couldn't be involved in "cleaning" the HCJ members. As a reaction to this judgement, in July 2020 several amendments to the law were introduced to the Parliament, one of them proposing the introduction of a mechanism to ensure the integrity of HCJ members by pre-screening the HJC candidates as well as current HJC members by an independent commission with international experts in a decisive role.[98] This proposal is in line with recent agreements between Ukraine and the IMF,[99] and Ukraine and the European Union.[100] Experiences with pre-selecting judges for the High Anti-Corruption Court by international experts with a veto right are very positive.[101]

3.12.5 Concluding observations

The legal rules on independence of the HCJ are robust, but unethical conduct of its members is nonetheless still perceived to be a problem. The HCJ is not seen to fight corruption in the judiciary, but on the contrary to maintain the system of corruption, for instance by internally pressuring judges in individual cases.

Solutions can be found by involving 'eyes from outside the national legal community' in the work of the HCJ. The following possibilities could be considered:

First, the introduction of seats for non-lawyers in the HCJ. Second, the introduction of the involvement of persons of high moral reputation in the pre-selection of candidates for the HCJ, possibly international experts (temporarily). And last, the introduction of a duty to inform the President of Ukraine, the Minister of Justice and Parliament.

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[98] Two alternative draft laws to the presidential draft law on 'Judicial Reform' submitted to Parliament, draft law no. 3711-1, https://www.pravo.org.ua. See weekly analytics of the CPLR for 6-13 July, 2020.

[99] "Ukraine: Request for Stand-by Arrangement", International Monetary Fund (IMF) Staff Country Report No. 20/197, June 11, 2020, para 23(b).

[100] Memorandum and Loan Agreement, July 2020, Annex I: Structural Reform Criteria, point no. 3. See https://www.kmu.gov.ua/en/news/uryad-pidpisav-ugodu-shchodo-otrimannya-12-mlrd-yevro-makrofinansovoyi-dopomogi-vid-yes.

[101] Democracy Justice Reforms, *op. cit.,* note 55, p. 8.

Chapter 4: Analysis and Recommendations

4.1. Supplement the Kyiv Recommendations with rules on accountability of councils

Councils must be accountable to society for the reason that citizens must be able to trust that councils use the powers society invested in them for the benefit of the citizens. Accountability of councils is about the legitimacy of judicial self-governance. This wide concept of accountability does not only include (legal) rules concerning councils, but also their practices. In short: it is about legality and (judicial) culture. It goes without saying that changes of culture in organizations take time. The same applies, perhaps even more, for changes of culture in judiciaries.[102]

Select country cases in Chapter 3 show that judicial self-governance[103] does not necessarily imply freedom from undue influence or control of individual judges, ethical conduct of councils and their members, or good governance by councils. Problems mentioned in one or more countries include:

- Transparency on the procedures of the councils is sometimes lacking, so society is not able to see whether they are independent, govern the judiciary well, or that their members behave ethically;
- Decisions of councils are not always reasoned;
- Decisions of councils on appointments to high judicial positions are not seen to be taken on the basis of merit and competence alone, but also in the interest of political parties or in the interest of groups of judges;
- Decisions of councils on disciplinary matters concerning its members are not seen to be taken on the basis of ethical rules alone, but also on the basis of self-interest or other interests;
- Councils are not trusted to fight corruption in the Judiciary;
- Council members are seen to influence the outcome of individual cases;
- Councils are not able to live up to the expectations of the citizens as to speediness of judicial reforms.

The results of chapter 3 show that it is important to establish rules and practices (a judicial culture) of accountability. The Kyiv Recommendations can be very helpful in developing such a culture. That is why it is recommended that the Kyiv Recommendations should be supplemented by rules of guidance on accountability of councils. As not all OSCE participating States are members of the Council of Europe, this would also ensure the broad dissemination of guidance drawing on relevant regional and international standards.

In several countries political actors have threatened to reduce the powers of councils because of the abovementioned problems.[104] However the answer is not a reduction of independence of councils, but the development of a judicial culture of accountability, because an independent judiciary and independent judicial self-governing bodies best serve society.

Recommendation:

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[102] This report is not about the managerial instruments how to achieve such a culture change, so the report refers – in this stage – to the instruments the OSCE/ODIHR uses in its culture programs, like education. It might be advisable to go in deeper into this aspect in further studies.

[103] Even in case the judicial self-governance is in accordance with international standards of independence.

[104] See, for example, in Spain (at 3.6.5) and in Kazakhstan (at 3.11.5).

Supplement the Kyiv Recommendations with rules of guidance on the accountability of councils.

4.2 Towards a culture of general accountability of councils

4.2.1 Introduction

There are councils in all kinds of varieties. Some have large powers, some very limited powers. As a rule one might say that the more powers a council has, the more it has to account.[105] In chapter 1, the reasons for accountability of councils are given, as well as the content and limits of the concept. The outcome of this chapter will not be repeated here, but referred to nonetheless. In chapters 2 and 3, the standards of the international organizations and the practices of the selected countries give a rich variety of aspects for developing a culture of general accountability. Here the focus will be on transparency about the activities and plans for the future to citizens, Parliament and the Government; dialogue with the Government, and openness to input from society.

4.2.2 Transparency

Most councils examined for this report have some degree of openness to the public as to their (working) procedures, with the exception of Kazakhstan. Most councils publish the dates of meetings of the council, and its agenda and minutes. Some livestream the sessions in the council on the internet (Bosnia and Herzegovina, Italy), and have rules about open voting. The others just publish the decisions of the council, mostly with a reasoning, and sometimes not (Georgia).

Most councils inform the citizens by a variety of communication means about issues concerning the judiciary, but only a few councils inform citizens on policy matters or strategic issues of the judiciary, even though widely informing the public is essential for the understanding and trust of society. The duty to inform entails the activities of the past and the plans for the future in a way that is understandable to the citizens and can be criticized by the public and scholars alike. This should include informing society about members of a council, including topics like remuneration, declaration of assets, travel expenses and company cars.[106] Councils should also inform the citizens on the topic of how judges work and why an independent judiciary is important to society. This can be done by open door days, educational programs conducted at schools and the development of television/radio/social program formats (outreach programs). The example of Poland shows how important these activities are.[107]

Parliament and the Government[108] are not always (widely) informed by councils. This is because of the national interpretation of the rule of separation of powers, which may not help the Judiciary to be understood by citizens, Parliament or the Government, and will eventually create problems (independence, budget, lack of trust) for the judiciary, as examples in the previous chapter show. This 'separation of powers rule' can be observed by establishing standards about what information is given, for instance only information on the Judiciary as an organization, and no information on individual court cases or individual judges,[109] and

[105] See 4.2.5, pt.2.
[106] The Spanish Council is a good example of such a transparency. See 3.11.3.
[107] See 3.9.2.
[108] Kazakhstan and Ukraine are the only councils which do not inform the Government or Parliament.
[109] The Netherlands (3.7), Romania (3.10) and Spain (3.11) have developed such standards.

standards on the consequences of the given information, for instance no de jure or *de facto* hierarchy.[110]

What is needed is a rule that information is given to citizens, Parliament and the Government except in case it endangers the independence of the Judiciary.

To prevent constant discussion on the topic of what information endangers the independence of the judiciary, the implementation of this rule must be laid down in information protocols, agreed between a council and Parliament/Government. This 'information unless' rule can be very helpful to improve the performance of councils and the judiciary, and thus will help to gain and maintain the trust of society.

4.2.3 Dialogue with Parliament and the Government

A formal and informal dialogue between councils and the Government is inevitable for councils to reach their goal of improving the quality of judgements and the judiciary in many policy areas, such as draft laws regarding the Judiciary, the budget of the courts, housing, staff and ICT services. These dialogues must be conducted in a way that the independence of the Judiciary is not compromised. Again, agreements on dialogues between the state Powers will be helpful to secure the independent position of the Judiciary in the co-operation with other State Powers.[111]

4.2.4 Openness to the input of society

Due to the independence of judges, most Judiciaries have a judicial culture that is directed inward. The risk of such a culture is that the Judiciary becomes out of touch with society and its demands of quality and speediness of judgements and quality of the judicial organization (ability to reform, digitalization). In order to reduce these risks councils must organize input from society. Three instruments are especially important for this purpose. First, a complaints procedure against the behavior of judges[112] and the performance of courts in individual situations. Second, a customer satisfaction survey in which court users are asked about experiences with the court on several aspects. The third instrument is a review on the quality of the courts and judicial organization by a committee commissioned by a council. The example of The Netherlands shows how such a committee could work, how important a critical review from outside the Judiciary is to improve the organization of the Judiciary, and how difficult it is for a Judiciary to change.[113]

4.2.5 Recommendations on general accountability of councils

1. Councils are accountable to society.
   The reason is that society must be able to trust that council use the powers society invested in them. See 1.1.

2. The more powers a council has, the more it has to account.

[110] See Spain.
[111] The same goes for logistical cooperation in criminal chains or immigration chains. See The Netherlands 3.7.3.
[112] This complaints procedure is not open to issues regarding decisions of the judge. Appeal is the proper way of dealing with these issues.
[113] See 3.7.2.

This rule follows from the fact that there is a large variety in powers of councils, and the general rule in the constitutional law of many countries is that an organ of a state only has to account for the powers it has. CCJE opinion 24, par 13 concurs.

3. The aim of accountability of councils is to gain and maintain the trust of society about the way councils use their powers of self-governance. This implies utmost transparency about their activities, dialogues and openness to criticism from society in order to improve.
   See 1.1 and 1.2

4. The instruments of councils are all means suitable to reach the aim of accountability, such as information on council procedures, annual reports, reasoned published decisions, press contacts, remunerations of councilors, declarations of assets, information on travel expenses and company cars, dialogue with other state powers, dialogue with society (external review), and direct contact with citizens (complaints procedure, customer satisfaction surveys and outreach activities).
   See 1.3, 2.5 and 4.2

5. The limit of accountability is the independence of the judiciary. This implies:
   - no information or dialogue on individual cases or judges;
   - no legal hierarchy between a council and other actors, such as the power of Parliament or a congress of judges to dismiss a (member of a) council for lack of confidence;
   - no de facto hierarchy between a council and other actors such as the duty to appear or to answer questions in Parliament or to a congress of judges.
   See 1.3

4.3 Accountability for (alleged) unethical conduct of members of councils

4.3.1 Introduction

A perception in society that members of councils are performing their duties unethically causes low trust of society, and thus undermines the legitimacy of judicial self-governance, necessary for an independent Judiciary.

Chapter 3 shows different kinds of (alleged) unethical conduct of members of councils mentioned in one or more countries, such as:

- in appointments of judges to high positions;
- in disciplinary matters of members of councils;
- lack of commitment of members of councils to the fight against corruption in the judiciary;
- the contribution of members of a council to undermining the independence of the judiciary, and
- influencing the outcome of individual court cases.

The chapter also gives some hopeful examples of improvements in the trust of society in councils: Albania is an example, because of the vetting system of candidate members of the council, and Spain is another, because of the success of the transparency policy of the council.

The lack of trust of society can be addressed by general standards for accountability of councils.

4.3.2 Appointments of judges to high judicial positions

For different reasons society does not trust that some councils appoint judges in high places on the basis of competence and merit. In Spain the reason is the influence of political parties on the election of the members of the council. The Spanish Council tries to address the lack of trust by a transparency policy, objective criteria for discretionary appointments, and stricter ethical rules concerning the appointments process.[114] In Italy the influence of groups of judges is the reason for a critical society. The Italian Council tries to change the election system of judicial members so that a candidate does not need the support of one of the correnti.[115] In Bosnia and Herzegovina society does not see the council applying its own rules for appointments.[116] The introduction of a review by an independent court could change that.

The recommendations below draw on good practices in a number of participating States.

Recommendations:

6. Apply the international standard for the selection of judges in councils: election by their peers;
   This is the standard of the CCJE, the VC and the ENCJ. Not all countries apply this standard, such as Kazakhstan, The Netherlands, Poland and Spain.

7. Develop a system of election of judges in councils that results in societies seeing that members operate in the best interest of an independent Judiciary instead of in other interests. Elements of such a system could be:
   - pre-selection of candidates for councils on integrity (see Bosnia and Herzegovina 3.3.5 and Ukraine 3.13.5);
   - reduction of the influence of groups of judges in the selection process of councilors (see Italy 3.5.4);
   - a performance evaluation on ethics of judges every 3 to 5 years (see Albania 3.2.4)[117];
   - declaration of assets in countries facing corruption challenges (see Albania 3.2.2 and Romania[118]);
   - involvement of international experts with decisive powers in the pre-selection of candidates for a council in countries facing corruption challenges (see Ukraine 3.12.5);
   - effective monitoring by civil society and international organizations of the election process in countries facing corruption challenges (see Ukraine 3.12.5).

8. Develop clear ethical rules for members of councils for behavior around appointments of judges to high judicial positions;
   See Spain 3.11.3

9. Develop objective criteria for discretionary appointments (usually high judicial positions);
   See Bosnia and Herzegovina 3.3.5; Italy 3.5.5 and Spain 3.11.5.

10. Introduce a system that shows to society that objective criteria of appointments are applied, for instance by transparency of the procedure and reasoned decisions;
    See Bosnia and Herzegovina 3.3.5; Georgia 3.4.3 and Kazakhstan 3.6.5

[114] See 3.11.4 and 3.11.5.
[115] See 3.5.5.
[116] See 3.3.5
[117] Only judges with a positive evaluation are allowed to be candidates for the council.
[118] In Romania all judges have to declare their assets, not just the members of the council.

11. Introduce the possibility of review of decisions on appointments by an independent court, with a full scope of review with respect to application of procedural rules, and with a wide margin of appreciation with respect to substance (ie whether the outcome is in compliance with the objective criteria of selection).
See Bosnia and Herzegovina 3.3.5; Georgia 3.4.5;

4.3.3 Disciplining members of councils

For different reasons some councils are not successful in showing to society that ethical rules are applied to members of these councils in disciplinary proceedings. The Bosnia and Herzegovina Council introduced a de facto immunity for its members;[119] the Georgian Council prevents its decisions on disciplinary proceedings against the members from being scrutinized and criticized by the public or other state powers,[120] while its members are believed to influence the outcome of individual court cases. In the case of the Kazakhstan council it is unclear how decisions are taken to discipline members.

A possible solution to the problem could be to adjust the law in a way that councils have nothing to do with disciplinary procedures against their members. Such laws exist in Albania,[121] The Netherlands[122] and Norway.[123]

Another redress of the problem could be to introduce a rule that the functional immunity of council members is limited to speeches and votes in council meetings. Decisions on council members must be fully transparent: reasoned, published and with a possibility of review by an independent court.

Recommendations:

12. In disciplinary cases of members of councils, introduce either a procedure in which a council has nothing to do with the procedure, or introduce a fully transparent procedure before the council with reasoned decisions which are published and may be reviewed by an independent court.

13. Introduce a (legal) rule that the functional immunity of members of councils is limited to speeches and votes in council meetings.

4.3.4 Influence on individual court cases by members of a council

The issue of council members influencing the outcome of individual court cases is noted as a concern in several countries. For example, in Georgia this issue might be addressed by improving the practice of disciplinary proceedings against members (see 3.4.5). In situations such as that in Ukraine, more structural solutions may be needed to address to unethical conduct of members of the council, such as a pre-selection of candidates for the council on ethics by persons of high moral reputation (temporarily also some international experts). Albania has

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[119] See 3.3.5.
[120] See 3.4.5.
[121] See 3.2.4.
[122] See 3.7.1.
[123] See 3.8.1.

adopted this model, with success.[124] Vetting has been used as a drastic, one-time only solution used in order to address a systemic pattern of unethical conduct of judges when other solutions have not been effective, for instance following the change from a communist system to a democratic system under the rule of law, or to end (internationally recognized) endemic corruption in the judiciary in a country that is in transition to a democracy under the rule of law.[125] Less drastic solutions are the introduction of seats for non-lawyers in the council, the introduction of a system of pre-selection of candidates on integrity, and the introduction of a duty to account to other state powers.[126]

Recommendation:

14. Introduce for countries in transition to democracy under the rule of law with a (internationally recognized) systemic problem of unethical conduct of judges (corruption), the possibility of pre-selecting candidates for the council on integrity by a committee, composed of persons of high moral reputation (temporarily also some international experts).

[124] See 3.2.2.
[125] See 1.3, last paragraph.
[126] Kazakhstan and Ukraine are the only councils in this paper that do not account to Parliament or the Government. See 3.6.3 and 3.12.3.

Chapter 5: OVERVIEW OF RECOMMENDATIONS

General recommendation:

Supplement the Kyiv Recommendations with rules of guidance on the accountability of councils.

Recommendations on the general accountability of councils:

1. Councils are accountable to society.
   The reasons are that society must be able to trust that council use the powers society invested in them. See 1.1

2. The more powers a council has, the more it has to account.
   This rule follows from the fact that there is a large variety in powers of councils, and the general rule in the Constitutional Law of many countries that an organ of a state has to account for the powers it has.

3. The aim of accountability of councils is to gain and maintain the trust of society about the way councils use their powers of self-governance. This implies utmost transparency about its activities, dialogues and openness to criticism from society in order to improve.
   See 1.1 and 1.2

4. The instruments of councils are all means suitable to reach the aim of accountability, such as information (on council procedures, annual reports, reasoned published decisions, press contacts, remunerations of councilor, declaration of assets, travel expenses, company cars), dialogue with other state powers, dialogue with society (external review), direct contact to citizens (complaints procedure, customer satisfaction surveys and outreach activities).
   See 1.3, 2.5 and 4.2

5. The limits of accountability are the independence of the Judiciary. This implies:
   - no information or dialogue on individual cases or judges;
   - no legal hierarchy between a council and other actors, such as the power of Parliament or a congress of judges to dismiss a (member of a) council for lack of confidence;
   - no *de facto* hierarchy between a council and other actors such as the duty to appear or to answer questions in Parliament or to a congress of judges, again, with the exception of information on individual cases or judges.
   See 1.3

Recommendations on (alleged) unethical conduct of members of councils: appointments of judges to high judicial positions:

6. Apply the international standard for the selection of judges in councils: election by their peers;
   This is the standard of the CCJE, the VC and the ENCJ. Not all countries apply this standard, such as Kazakhstan, The Netherlands, Poland and Spain.

7. Develop a system of election of judges in councils that has as a result that societies see that members operate in the best interest of an independent Judiciary instead of in other interests. Elements of such a system could be:

- pre-selection of candidates for councils on integrity (see Bosnia and Herzegovina 3.3.5 and Ukraine 3.13.5);
- reduction of the influence of currents of judges in the selection process of councilors (see Italy 3.5.4);
- a performance evaluation on ethics of judges every 3 to 5 years (see Albania 3.2.4)[127];
- declaration of assets in countries facing corruption challenges (see Albania 3.2.2 and Romania[128]);
- involvement of international experts with decisive powers in the pre-selection of candidates for a council in countries facing corruption challenges (see Ukraine 3.12.5);
- effective monitoring by civil society and international organizations of the election process in countries facing corruption challenges (see Ukraine 3.12.5).

8. Develop clear ethical rules for members of councils for behavior around appointments of judges to high judicial positions;
   See Spain 3.11.3

9. Develop objective criteria for discretionary appointments (usually high judicial positions);
   See Bosnia and Herzegovina 3.3.5; Italy 3.5.5 and Spain 3.11.5.

10. Introduce a system that shows to society that objective criteria of appointment are seen to be applied, for instance by transparency of the procedure and reasoned decisions;
    See Bosnia and Herzegovina 3.3.5; Georgia 3.4.3 and Kazakhstan 3.6.5

11. Introduce the possibility of review of decisions on appointments by an independent court, full on procedure and marginally on substance.
    See Bosnia and Herzegovina 3.3.5; Georgia 3.4.5;

Recommendations on (alleged) unethical conduct of members of councils: disciplining members of councils:

12. In disciplinary cases of members of councils: Introduce either a procedure in which a council has nothing to do with the procedure (see Albania 3.2.4; The Netherlands 3.7.1 and Norway 3.8.1), or introduce a fully transparent procedure before the council with reasoned decisions which are published and may be reviewed by an independent court (see Bosnia Herzegovina 3.3.4 and Georgia 3.4.5).

13. Introduce a (legal) rule that the functional immunity of members of councils is limited to speeches and votes in council meetings (see Bosnia and Herzegovina 3.3.5 and Italy).

Recommendations on (alleged) unethical conduct of members of councils: internationally recognized endemic unethical behavior in the Judiciary.

14. Introduce for countries in transit to a democracy under the rule of law with a (internationally recognized) structural problem of unethical behavior of judges (corruption), the possibility of pre-selecting candidates for the council on integrity by a

[127] Only judges with a positive evaluation are allowed to be candidates for the council.
[128] In Romania all judges have to declare their assets, not just the members of the council.

committee, composed of persons of high moral reputation (temporary also some international experts).

This is not vetting. See 1.3. This pre-selection committee must not consist of politicians or be driven by party political motives. Rules of selection of members of the committee and of the way the committee operates must guarantee this.

APPENDIX I: Questionnaire on the Accountability of Councils for the Judiciary

A. On the Council for the Judiciary in your country

1. When was the Council established?
2. For what purpose was the Council established?
3. Is the Council able to live up to this purpose?
4. What are the main powers of the Council?
5. What is the composition of the Council?
6. Who appoints the members of the Council?
7. Can (a member of) the Council be fired? If so, by whom and on what grounds?
8. Are there examples of firing (a member of) the Council. If so, what was the given reason?

B. On the accountability of the Council in your country as to its general powers

1. Does the Council account for its actions and decisions regarding its powers?
2. If so, to whom?
   - The general public?
   - The Minister of Justice?
   - The Parliament?
   - Others?
3. In what way does the Council account?
   - Annual published report?
   - Decisions published on the internet?
   - Interviews on television?
   - In reports to the Minister of Justice and/or Parliament?
   - In hearings in Parliament?
   - By answering (written) questions of the Minister of Justice and/or Parliament.
4. Is there a (regular) dialogue between the council and the Minister of Justice/Parliament? If not, why not? If so, is it formal or informal? Is it also used to give account, or to express wishes?
5. Are there limits to the accountability of the Council in the light of the independent position of the Judiciary? If so, are these limits agreed upon between the state-powers, and put in writing?

C. On the accountability of the Council in your country in the specific case that a member of the Council is being accused (in the media, by politicians or by others) of non-ethical behavior, especially corruption.

1. Can a member of the Council be criminally prosecuted for corruption?
2. Who decides to prosecute?
3. Are there special safeguards for the prosecution of a member of the Council in the light of the independent position of the Judiciary? If so, what are they?
4. Can a member of the Council be disciplined? If so, by whom, and who initiates the procedure?
5. Can the Council arrange its own investigation in case of a member is suspected of corruption? If so, is there a procedure? Are there examples of such an investigation?
6. What are the possible criminal, disciplinary or other sanctions in case a member is proved to be corrupt?
7. Can a member proven to be corrupt be fired? If so, by whom?
   - The Council, by what majority?
   - The Minister of Justice?
   - The Supreme Court?
   - Parliament?
   - The Disciplinary Authority?

8. Could you describe the most important case of alleged corruption (or other serious non-ethical behavior) in recent years of a member of the Council and how the Council dealt with it?
9. Was the action of the Council in this important case aimed at restoring the public confidence in the judiciary of your country? Was it successful?

D. What do you feel is especially important for me to know about the rules and practices of accountability of the Council in your country?

APPENDIX II: Relevant Excerpt of CCJE Opinion Number 10 (2007) and CCJE Opinion Number 24 (2021)

In 2007 the CCJE gave an opinion (Number 10) on the Council for the Judiciary at the service of society. Parts regarding the accountability of councils are quoted below:

> "10.The CCJE also takes the view that the Council for the Judiciary should promote the efficiency and quality of justice, so assisting to ensure that Article 6 of the European Convention on Human Rights is fully implemented, and to reinforce public confidence in the justice system. In this context, the Council for the Judiciary has the task to set up the necessary tools to evaluate the justice system, to report on the state of services, and to ask the relevant authorities to take the necessary steps to improve the administration of justice."

> **"VI. THE COUNCIL FOR THE JUDICIARY IN SERVICE OF ACCOUNTABILITY AND TRANSPARENCY OF THE JUDICIARY**
>
> 91. Given the prospect of considerable involvement of the Council for the Judiciary in the administration of the judiciary, transparency in the actions undertaken by this Council must be guaranteed. Transparency is an essential factor in the trust that citizens have in the functioning of the judicial system and is a guarantee against the danger of political influence or the perception of self-interest, self-protection and cronyism within the judiciary.
>
> 92. All decisions by the Council for the Judiciary on appointment, promotion, evaluation, discipline and any other decisions regarding judges' careers must be reasoned (see also paragraph 39 above).
>
> 93. As it has already been mentioned, transparency, in the appointment and promotion of judges, will be ensured by publishing the appointment criteria and disseminating the post descriptions. Any interested party should be able to look into the choices made and check that the Council for the Judiciary applied the rules and criteria based on merits in relation to appointments and promotions.
>
> 94. When the Council for the Judiciary has budgetary powers, it is only logical that it should be accountable for the use of the funds in question to the Parliamentary assembly which adopted the budget. The portion of the budget allocated to the judicial system should be controlled by the Audit Office in charge of supervising the use of public money, when it exists.
>
> 95.When the Council for the Judiciary has disciplinary powers, judges who are the subject of disciplinary proceedings shall be fully informed of the grounds of the decision so that they can evaluate if they should contemplate appealing against the decision (see paragraph 39 above). In addition, the Council for the Judiciary could consider the publication of decisions taken which are both formal and final, in order to inform, not only the whole of the judiciary, but also the general public of the way in which the proceedings have been conducted and to show that the judiciary does not seek to cover up reprehensible actions of its members.
>
> 96. The Council for the Judiciary should periodically publish a report of its activities, the aim of which being, on the one hand, to describe what the Council for the Judiciary has done and the difficulties encountered and, on the other, to suggest measures to be taken in order to improve the functioning of the justice system in the interest of the general public. The publication of this report may be accompanied by press conferences with journalists, meetings with judges and spokespersons

of judicial institutions, to improve on the dissemination of information and on the interactions within the judicial institutions."[129]

In 2021, the CCJE gave an opinion (Number 24) on the Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems**.** Parts regarding the accountability of Councils are quoted below:

"**Legitimacy and accountability of the Council for the Judiciary**

9. In some member states the legitimacy, functions, composition and accountability of Councils for the Judiciary has been called into question, leading to changes in the law which have affected their powers, composition, competencies and functions. The legitimacy of all Councils is of the utmost importance in upholding the rule of law. Therefore, the CCJE wishes to highlight its sources. The CCJE has explained before that the legitimacy and accountability of judicial power must go hand in hand. The CCJE distinguishes two sources of legitimacy for the power of individual judges and the judiciary. Formal or constitutional legitimacy is created by the constitution of the respective member state and lawful judicial appointments. Functional legitimacy is based on the trust of the public created through excellent work, transparency and accountability. These two sources of legitimacy are also relevant for Councils for the Judiciary.

[. . .]

Accountability

12. While a regulation in the constitution provides a formal source of legitimacy, this is not enough, but must be complemented with functional legitimacy. Every Council for the Judiciary and the judiciary it represents must earn the trust of the public and its support through excellent, transparent work and accountability. In times of conflict with other powers, the support of the public will depend at least to a large extent on this perceived legitimacy of a Council.

13. The CCJE wishes to reaffirm that the Council for the Judiciary should play a role in ensuring that the judiciary works in a transparent and accountable way. Moreover, the accountability of a Council for the Judiciary is itself an important source of functional legitimacy. The more powers and responsibilities a Council has, the more important it is that it should be accountable for the use of those powers.

14. The CCJE distinguishes between judicial, punitive, and explanatory accountability not only in relation to individual judges and the judiciary as a whole but also in relation to Councils for the Judiciary.

a. Judicial Accountability

15. Like other bodies of state, no Council for the Judiciary is above the law. Certain decisions of a Council affect rights protected by the ECHR; for example when decisions in relation to judges' careers are made, decisions must be reasoned and judges must have a right to judicial review. When the legal merit of a Council's decision is reviewed in an independent court, the Council is held accountable (judicial accountability). Special attention should be paid to the independence and impartiality of any court reviewing the merits of the Council's decisions, including independence from the Council itself.

b. Punitive accountability

[129] "On the Council for the Judiciary at the service of society", CCJE, 10(2007), paras. 10 and 91-96.

16. The members of a Council for the Judiciary must live up to the highest ethical standards and must be held accountable for their actions through appropriate means. They should not be immune from prosecution under the general criminal law. Just as in relation to individual judges, who may be held accountable for their actions, this might be termed punitive accountability. However, the CCJE wishes to underline that such means must be regulated and applied in a way that does not allow their abuse to infringe the independence and functioning of a Council for the Judiciary.

17. Councils for the Judiciary must develop standards of professional and ethical behaviour for their judicial and lay members and internal procedures for investigating shortcomings. Members must act according to those standards and the values of independence, impartiality and integrity. The disciplinary and criminal liability of members is an important aspect of punitive accountability. Fair trial rights of the members including the right to representation must be respected. Decisions taken in this context must be given with reasons and be open to judicial review.

c. Explanatory accountability

18. Every Council for the Judiciary must work in a transparent fashion, giving reasons for its decisions and procedures and be accountable this way. This may be called explanatory accountability. It must also be open to critical feedback and ready to improve constantly. This form of accountability is of special importance in the dialogue with other powers of state and civil society."

APPENDIX III: Excerpts of Relevant Venice Commission Opinions

In the 2007 report on Judicial Appointments the VC concludes that an independent Council is an appropriate method for guaranteeing judicial independence[130]. It then says:

> '51. A balance needs to be struck between judicial independence and self-administration on the one side and the necessary accountability of the judiciary on the other side in order to avoid negative effects of corporatism within the judiciary. (..)[131].

In 2010 the VC formulated the reason why judges should be independent thus:

> 6.(..), the independence of the judiciary is not an end in itself. It is not a personal privilege of the judges but justified by the need to enable judges to fulfil their role of guardians of the rights and freedoms of the people.[132]

In the 2014 opinion on the draft act on the Council for the Judiciary in Bosnia and Herzegovina (HJPC) the VC says the following:

> 'I. Reporting obligations of the HJPC
>
> 69. According to the Article 25.2, "not later than 01 May each year, the Council shall prepare an annual report listing its activities and describing the state of the judiciary and prosecution, including recommendations for improvement. The annual report of the Council shall be open to public."
>
> 70. Article 25.3 adds that "at the invitation of the Parliamentary Assembly or another body referred to under the preceding Paragraph, the President or any other authorized representative of the Council will attend a session and directly explain the report and answer any questions of parliamentary representatives or members of the other body. Discussion of the report and conclusions may result in assessments, suggestions and proposals which do not challenge the independence of the Council."
>
> 71. The work of the HJPC should be as transparent as possible; it should be accountable to the public through widely disseminated reports and information. The duty to inform may also include an obligation to submit the report to the Parliamentary Assembly about the state of affairs in the judiciary or prosecution service. However, this should not be transformed into a formal accountability of the HJPC to the legislative or executive branches of power.
>
> 72. In this respect, Article 25.3 is clearly problematic as it stipulates where reports receive a negative assessment, the Parliamentary Assembly "may remove the Presidency or a member of the Presidency from the Council." This provision should be deleted. On the other hand, it should be a right, not a duty of the President of the HJPC to attend the Parliamentary Assembly's session and/or engage in the discussion of the report.'

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[130] Venice Commission on Serbia, *op. cit.,* note 22, par. 48-50.
[131] *Ibid.*, par 51.
[132] Venice Commission, Report on the Independence of the Judicial System – Part I: The Independence of Judges (2010), CDLAD(2010)004, paras. 6 and 32.

In the same year the VC considers the Draft Law on the Serbian Council for the Judiciary (HJC):

> **'Reasons – and Dismissal in the case of the conviction for the criminal offence**
>
> (..)
>
> 58. In the Venice Commission's view, HJC members should be trusted to perform their duties independently and according to the law during the term of their mandate. It would therefore be more appropriate to deal with "breach of duty" cases through the usual disciplinary procedure, which should be clearly set out by the draft Law and an appeal to a court of law should be provided (in this respect, see Article 155 of the Constitution). The proportionality principle should be adequately taken into account and the dismissal should only be applied as a measure of last resort (in addition see paragraphs 65-70 below).'
>
> **'Dismissal initiative/motion; dismissal procedure and decision; vote of confidence**
>
> (..)
>
> 66. A procedure on the preservation of confidence is specific to political institutions such as governments which act under parliamentary control. It is not suited for institutions, such as the HJC, whose members are elected for a fixed term. The mandate of these members should only end at the expiration of this term, on retirement, on resignation or death, or on their dismissal for disciplinary reasons.
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> 67. A disciplinary procedure can only be applied in cases of disciplinary offences and not on grounds of "lack of confidence". Article 41 clearly defines the reasons that can lead to a dismissal of the HJC members. The disciplinary procedure must only focus on the question whether the HJC member failed to perform his or her duties "in compliance with the constitution and law". This question must not be confused with the question whether said member still enjoys the confidence of the judges who participated in his or her election. (..).
>
> 70. (..) The Venice Commission would like to point out that a vote of confidence regarding members of a judicial council is highly unusual. Members of judicial councils are independent and often have to make decisions that are unpopular or will not please judges. In subjecting them to a vote of no confidence, their independence will be reduced, making them too dependent on the wishes of the judges and removing them from their role of pursuing the goals of an independent and efficient judiciary for the state as a whole. Furthermore, such a vote is difficult to reconcile with the disciplinary functions of a judicial council. The Venice Commission therefore strongly recommends for such a procedure not to be introduced.'

In the 2015 opinion on the draft act on the Council for the Judiciary in Bulgaria (SJC) the VC puts it like this:

> '63. In the Venice Commission's view, the work of judicial councils should be as transparent as possible; they should be accountable to the public, including through widely disseminated reports and information. This is of particular importance for the Bulgarian SJC, in the light of its (current and proposed) organization and composition (8 judges and 5 lay members in the Judges Chamber, KS) and of the need for increased public trust in its operation and efficiency.
>
> 64. The principle of transparency is also of key importance when dealing with individual cases. From this perspective, decisions of the SJC Chambers and Plenum, including on disciplinary matters, should demand the open vote of their members and the accountability of their decisions. (..).'

In the 2018 Opinion on Malta the VC stated:

> '27. It is of vital importance for the rule of law that there is public trust in the proficiency of the judiciary to operate in an independent and impartial manner.'[133]

[133] Venice Commission on Malta, *op. cit.*, note 24, par. 27.