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## CONSULTATIVE COUNCIL OF EUROPEAN JUDGES

(CCJE)

### OPINION NO. (2013) 16

#### ON THE RELATIONS BETWEEN JUDGES AND LAWYERS

adopted at the 14<sup>th</sup> plenary meeting of the CCJE

(Strasbourg, 13-15 November 2013)

## I. INTRODUCTION

1. In accordance with the terms of reference entrusted to it by the Committee of Ministers, the Consultative Council of European Judges (CCJE) decided to prepare, for 2013, an Opinion on the relations between judges and lawyers with a view to the better quality and efficiency of justice.
2. The Opinion has been prepared on the basis of previous CCJE Opinions and the relevant instruments of the Council of Europe, in particular the European Charter on the Statute for Judges (1998), the Magna Carta of Judges (2010) and the Committee of Ministers' Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities. It also takes account of the United Nations Basic Principles on the Independence of the Judiciary (1985), the United Nations Basic Principles on the Role of Lawyers (1990), the Bangalore Principles of Judicial Conduct (2002) and the Commentary of the Judicial Integrity Group on the Bangalore Principles (2007). Further, the Opinion draws on the work of the Council of Bars and Law Societies of Europe (CCBE), notably the Code of Conduct for European Lawyers (1998, amended in 2002 and 2006) and the Charter of Core Principles of the European Legal Profession (2006).

It takes account of the states' replies to the questionnaire and the report drawn up by the scientific expert Ms Natalie FRICERO (France), as well as the contributions made in the conference in Paris on 7 November 2012, organised jointly by the CCJE and the Paris Bar Association, and the conference in Rome on 13 June 2013, organised by the CCJE, the Italian High Council for the Judiciary and the National Bar Council of Italy.

The CCJE has also consulted the CCBE in the course of the preparation of this Opinion.

## II. RESPECTIVE ROLES OF JUDGES AND LAWYERS IN THE FUNCTIONING OF JUSTICE

3. States governed by the rule of law should organise their judicial systems in such a way that the supremacy of law and respect for fundamental rights and freedoms are guaranteed in conformity with the European Convention on Human Rights (hereafter the Convention), as well as the case-law of the European Court of Human Rights (hereafter the Court). Both judges and lawyers have vital roles to play in fulfilling this objective in the best possible way.

The CCJE has already acknowledged the essential role of co-operation among the various parties involved in the proper functioning of justice and the interaction between these actors. Thus, in paragraph 10 of its Opinion No. 12 (2009), the CCJE affirmed that the sharing of common legal principles and ethical values by all the professionals involved in the legal process is essential for the proper administration of justice.

4. Judges and lawyers have different roles to play in the legal process, but the contribution of both professions is necessary in order to arrive at a fair and efficient solution to all legal processes according to law.
5. Paragraph 2 of the UN Basic Principles on the Independence of the Judiciary stipulates that the judiciary shall decide matters before them impartially, on the basis of the facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. In the same document, paragraph 6 states that the principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

The CCJE stressed in its Opinion No. 1 (2001) that judicial independence is not a prerogative or privilege in the interests of the judges, but is a pre-requisite to the rule of law and a guarantee for those seeking and expecting

justice.

6. Within the framework of their professional obligation to defend the rights and interests of their clients, lawyers must also play an essential role in the fair administration of justice. Paragraph 6 of the Commentary on the Charter of Core Principles of the European Legal Profession of the CCBE defines the lawyer's role as follows: "*The lawyer's role, whether retained by an individual, a corporation or the state, is as the client's trusted adviser and representative, as a professional respected by third parties, and as an indispensable participant in the fair administration of justice. By embodying all these elements, the lawyer, who faithfully serves his or her own client's interests and protects the client's rights, also fulfils the functions of the lawyer in Society - which are to forestall and prevent conflicts, to ensure that conflicts are resolved in accordance with recognised principles of civil, public or criminal law and with due account of rights and interests, to further the development of the law, and to defend liberty, justice and the rule of law*". As it is stated in paragraph 1.1 of the Code of Conduct for European Lawyers of the CCBE, respect for the lawyer's professional function is an essential condition for the rule of law and democracy in society. The UN Basic Principles on the Role of Lawyers state that adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession. Principle 12 stipulates that lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.

7. Judges and lawyers must be independent in the exercise of their duties, and must also be, and be seen to be, independent from each other. This independence is affirmed by the statute and ethical principles adopted by each profession. The CCJE considers such independence vital for the proper functioning of justice.

The CCJE refers to Recommendation CM/Rec (2010)12, paragraph 7, which states that the independence of judges should be guaranteed at the highest possible legal level. The independence of lawyers should be guaranteed in the same way.

8. The CCJE refers to paragraph 12 of Recommendation CM/Rec(2010)12 which states that, without prejudice to their independence, judges and the judiciary should maintain constructive working relations with institutions and public authorities involved in the management and administration of the courts, as well as all the professionals whose tasks are related to the work of judges, in order to facilitate an effective and efficient administration of justice. Constructive relations are equally necessary in the course of proceedings, in order to obtain a fair and efficient solution to the legal process concerned.

9. Two areas of relations between judges and lawyers may be distinguished:

- on the one hand, the relations between judges and lawyers which stem from the procedural principles and rules of each state and which will have a direct impact on the efficiency and quality of judicial proceedings. In the conclusions and recommendations set out in its Opinion No. 11 (2008) on the quality of judicial decisions, the CCJE pointed out that the standard of quality of judicial decisions will clearly be the result of interactions between the numerous actors in the judicial system;
- on the other hand, the relations which result from the professional conduct of judges and lawyers and which require mutual respect for the roles played by each side and a constructive dialogue between judges and lawyers.

### **III. IMPROVEMENT OF PROCEDURAL RELATIONS, DIALOGUE AND COMMUNICATION DURING PROCEEDINGS**

10. Judges and lawyers share a fundamental obligation, namely compliance with the procedural rules and the principles of a fair trial.

The CCJE is of the opinion that constructive relations between judges and lawyers will improve the quality and efficiency of proceedings. They will also help in meeting the parties' needs: litigants expect that they and their lawyers will be heard and also expect judges and lawyers to contribute together to a fair resolution of their case according to law and within a reasonable time.

11. However, the quality and efficiency of judicial proceedings depend in the first place on adequate procedural legislation and rules on the principal aspects of procedure for civil, criminal and administrative cases. States should establish such provisions in accordance with Article 6 of the Convention. The drafting process for these provisions should involve the consultation of judges and lawyers, not in the interests of the two professions, but in the interest of the fair administration of justice. Consultation of court users is also important. It is also essential that these procedural frameworks are regularly evaluated and updated, where necessary, and that judges, lawyers and court users are involved in this process.

12. The CCJE considers that such legislation should provide judges with effective procedural tools to implement the principles of a fair trial and to prevent undue delays or illegitimate delaying tactics. Such legislation should be

sufficiently firm, and should provide for clear and fair time-limits, while also permitting the necessary flexibility.

13. Procedural rules form an essential tool to enable the resolution of legal disputes. Procedural rules determine the respective roles of judges and lawyers. It is essential that both judges and lawyers have a good knowledge and understanding of these rules, in the interest of a fair and timely resolution of the proceedings.
14. Guidelines agreed upon at an institutional level can also be useful to encourage co-operation and dialogue. The CCJE considers that courts should encourage the establishment of good practices resulting from agreements between the courts and the Bar. Agreements concerning the management and conduct of proceedings have been established in many judicial systems, taking a variety of forms<sup>[1]</sup>. The CCJE reaffirms that such procedural agreements should comply with procedural law and should be made public in order to ensure transparency for lawyers and litigants.
15. In practice, procedural rules, whether they concern civil, criminal or administrative cases, are often complex and allow a variety of procedural stages and intermediate appeals. This may cause unreasonable delays and high costs to the parties, as well as to society in general. The CCJE strongly supports efforts to analyse and evaluate the existing procedural rules in member States and to develop, where necessary, more transparent and adequate rules.

The international exchange of experience, by both judges and lawyers, should foster the development of “best practices” in the area of procedural frameworks. However, the different social and legal traditions of countries should be taken into account.

16. Equal access to information on procedural and substantive laws, and also to landmark case-law, should be provided as far as possible, both for judges and lawyers. The CCJE refers to paragraph 24 of Opinion No. 14 (2011), in which it considered that the judiciary should make case law, or at least landmark decisions, available on the internet i) free of charge, ii) in an easily accessible form, and iii) taking account of personal data protection.
17. Judges and lawyers must co-operate in meeting the needs of the parties. To this end, the CCJE considers it important to develop planning hearings and procedural calendars, to facilitate, in the interests of the parties, an effective co-operation between judges and lawyers. Further, judges and lawyers must cooperate in facilitating the friendly settlements in the interests of the parties. In its Opinion No. 6 (2004), the CCJE recommended the development of arrangements for the friendly settlement of cases. Joint training sessions can improve the understanding of the respective roles of judges and lawyers in the field of friendly settlements of disputes, by the processes of conciliation or mediation.
18. It is necessary to establish proper communication between courts and lawyers to ensure the speed and efficiency of proceedings. The CCJE considers that states should introduce systems facilitating computer communication between the courts and lawyers, in order to improve the service for lawyers and to enable them to consult easily the procedural status of cases. In its Opinion No. 14 (2011) on “Justice and Information Technologies”, the CCJE notes that information technologies play a central role in the provision of information to judges, lawyers and other stakeholders in the justice system as well as to the public and the media.

#### **IV. DEVELOPMENT OF MUTUAL UNDERSTANDING AND RESPECT FOR EACH OTHER’S ROLE - ETHICAL PRINCIPLES**

19. Judges and lawyers each have their own set of ethical principles. However, several ethical principles are common to both judges and lawyers, e.g. compliance with the law, professional secrecy, integrity and dignity, respect for litigants, competence, fairness and mutual respect.
20. The ethical principles of judges and lawyers should also concern themselves with the relations between the two professions.

With regard to judges, the CCJE stated in Opinion No. 3 (2002), paragraph 23, that judges should show the proper consideration due to all persons (for example, parties, witnesses, counsel) and no distinction should be made based on unlawful grounds or which would be incompatible with the appropriate discharge of their functions. Paragraph 5.3 of the Bangalore Principles states that a judge shall carry out his/her judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties. A judge must maintain order and dignity of debate in all proceedings before the court and be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity.

With regard to lawyers, paragraphs 4.1, 4.2, 4.3 and 4.4 of the CCBE Code of Conduct for European Lawyers express the following principles: a lawyer who appears, or takes part in a case, before a court or tribunal must comply with the rules of conduct applied before that court or tribunal. A lawyer must always have due regard for the fair conduct of the proceedings. A lawyer shall, while maintaining due respect and courtesy towards the court, defend the interests of the client honourably and fearlessly without regard to the lawyer's own interests or to any consequences to him- or herself or to any other person. A lawyer shall never knowingly give false or misleading information to the court.

21. The CCJE considers that the relations between judges and lawyers should be based on the mutual understanding of each other's role, on mutual respect and on independence vis-à-vis each other.

The CCJE accordingly considers it necessary to develop dialogues and exchanges between judges and lawyers at a national and European institutional level on the issue of their mutual relations. The ethical principles of both judges and lawyers should be taken into account. In this regard, the CCJE encourages the identification of common ethical principles, such as the duty of independence, the duty to sustain the rule of law at all times, co-operation to ensure a fair and swift conduct of the proceedings and permanent professional training. Professional associations and independent governing bodies of both judges and lawyers should be responsible for this process.

22. Training conferences for judges and lawyers should deal with their respective roles and with their relations, with the general aim of promoting the fair and efficient settlement of disputes, whilst respecting the independence of both sides. The CCJE refers to paragraph 10 of its Opinion No. 12 (2009), in which it considered that, where appropriate, joint training for judges, public prosecutors and lawyers on themes of common interest could contribute to the achievement of justice of the highest quality.
23. In the member States of the Council of Europe, judges are recruited in a wide variety of ways. The CCJE refers to the CEPEJ report "Evaluation of European Judicial Systems - Edition 2012", Chapter 11.1. In some countries, judges are mainly recruited from amongst experienced lawyers. In other countries, judges and lawyers do not share a common career. In these countries, the development of mutual understanding between the two professions is particularly important. One possible way of fostering such understanding would be the establishment of internships for trainee-judges in law firms and for trainee-lawyers in courts. If this is done, it is essential that the requirements of the independence and impartiality of the judiciary are guaranteed and that internships are organised in a transparent way.
24. Relations between judges and lawyers should always preserve the court's impartiality and image of impartiality. Judges and lawyers should be fully conscious of this, and adequate procedural and ethical rules should safeguard this impartiality.
25. Both judges and lawyers enjoy freedom of expression under Article 10 of the Convention.

Judges are, however, required to preserve the confidentiality of the court's deliberations and their impartiality, which implies, inter alia, that they must refrain from commenting on proceedings and on the work of lawyers.

The freedom of expression of lawyers also has its limits, in order to maintain, as is provided for in Article 10, paragraph 2 of the Convention, the authority and impartiality of the judiciary<sup>[2]</sup>. Respect towards professional colleagues, respect for the rule of law and the fair administration of justice - the principles (h) and (i) of the Charter of Core Principles of the European Legal Profession of the CCBE - require abstention from abusive criticism of colleagues, of individual judges and of court procedures and decisions.

## V. RECOMMENDATIONS

The CCJE reaffirms that "*the sharing of common legal principles and ethical values by all the professionals involved in the legal process is essential for the proper administration of justice*", and sets out the following recommendations:

- I. The CCJE recommends that states establish appropriate procedural provisions, which must define the activities of judges and lawyers and empower judges to implement effectively the principles of a fair trial and to prevent illegitimate delaying tactics of the parties. It also recommends that judges, lawyers and court users be consulted in the drafting of these provisions and that these procedural frameworks be regularly evaluated.
- II. The CCJE supports the international exchange of experience between judges and lawyers with a view of developing "best practices" in the area of procedural frameworks, taking into account, however, the different social and legal traditions of the countries concerned.

- III. The CCJE recommends that judges organise case management hearings within the framework of the relevant procedural laws, and establish, in consultation with the parties, procedural calendars, e.g. by specifying the procedural stages, setting out reasonable and appropriate timeframes and structuring the manner and timing of the presentation of written and oral submissions and evidence.
- IV. The CCJE recommends developing lines of communication between courts and lawyers. Judges and lawyers must be in a position to communicate at all stages in proceedings. The CCJE considers that states should introduce systems facilitating computer communication between the courts and lawyers.
- V. In order to meet the needs of the parties, the CCJE recommends developing arrangements for the friendly settlement of disputes. It considers that understanding the respective roles of judges and lawyers in the framework of friendly settlements by conciliation or mediation is a vital factor for developing this approach and that, as far as possible, joint training sessions on the various modes of friendly settlement should be provided.
- VI. The CCJE recommends the development of dialogues and exchanges between judges and lawyers at an institutional level (both national and international) on the issue of their mutual relations, whilst taking full account of the ethical principles of both lawyers and judges. Such dialogue should facilitate mutual understanding of and respect for the role of each side, with respect for the independence of both judges and lawyers.
- VII. The CCJE considers that, where appropriate, joint training for judges and lawyers on the themes of common interest can improve the quality and efficiency of proceedings.

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[1] See CEPEJ Studies No. 16, Contractualisation and judicial process in Europe.

[2] See also ECHR *Nikula v. Finland*, 21 March 2002; ECHR *Amihalachioaie v. Moldova*, 20 April 2004.