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Standards VI: Non-judicial Members in Judicial Governance

ENCJ Report 2015-2016



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Table of contents

Definitions	4
Introduction.....	4
Chapter I Development and elaboration of proposed standards	7
Previous standards – role and participation of non-judicial members	8
Composition of Judicial Councils and other relevant bodies	8
Appointment and promotion, discipline and complaint procedures.....	9
Chapter II Proposal of the Minimum Standards regarding non-judicial members in the Judicial Governance	10
Definitions	10
1. Composition of Judicial Councils and other relevant bodies with regard to non-judicial members	10
2. Process of selection and appointment of non-judicial members	11
3. Personal qualities, competences and political relationships of non-judicial members	11
4. Status of non-judicial members	12
5. Conduct	13
Chapter III Commentaries to Minimum Standards VI	14
1. Composition of Judicial Councils and other relevant bodies with regard to non-judicial members	15
2. Process of selection and appointment of non-judicial members	19
3. Personal qualities, competences and political relationships of non-judicial members	21
4. Status of non-judicial members	25
5. Conduct	27

Definitions

This report examines the role which non-judicial members (sometimes called “lay members”) should have in Judicial Governance. In this Report, the expressions “non-judicial members” and “Judicial Governance” shall have the following meanings:

“**Non-judicial members**” refers to individuals, who are not judges or prosecutors, participating in Judicial Councils and other relevant bodies.

“**Judicial Governance**” refers to the participation of non-judicial members in activities of Judicial Councils and other relevant bodies, including activities concerning judicial appointments and promotion as well as complaint and disciplinary procedures.

Introduction

The Project Team on the "Development of Minimum Judicial Standards VI: Non-judicial members in Judicial Governance" was established by the European Network of Councils for the Judiciary (ENCJ) in September 2015 as a result of the ENCJ work plan approved by the General Assembly held in The Hague on 3-5 June 2015.

The Project Team was established as a continuation of the work carried out by five former ENCJ Working Project Teams on the "Development of Minimum Judicial Standards". The following reports have already been published:

- Development of Minimum Judicial Standards I [2010-2011] (Judicial recruitment, selection, appointment and promotion, training and ethics),
- Development of Minimum Judicial Standards II [2011-2012] (Indicators related to Minimum Standards regarding recruitment, selection, appointment and promotion of members of the judiciary),
- Development of Minimum Judicial Standards III [2012-2013] (Evaluation of professional performance and irremovability of members of the judiciary),

- Development of Minimum Judicial Standards IV [2013-2014] (Allocation of cases),
- Development of Minimum Judicial Standards V [2014-2015] (Disciplinary proceedings and liability of judges).

The success of these projects confirmed that the adoption of common and minimum standards improves the understanding among judicial authorities of different legal systems and, therefore, contributes to the reinforcement of mutual confidence and judicial cooperation as well as facilitating the attainment of a common European judicial culture.

The ENCJ considered in addition that there is a need for the establishment of Minimum Judicial Standards in relation to the involvement of non-judicial members in Judicial Governance. Project VI was established to consider this issue, coordinated jointly by Italian coordinator – Professor Alessio Zaccaria of the University of Verona, member of the Italian Judicial Council and Polish coordinator – Lukasz Bojarski, member of the Polish Judicial Council (2010-2015), and President of INPRIS (Instytut Prawa i Społeczeństwa/Institute for Law and Society).

The Project Team has approached the task of defining minimum standards in this field on the basis that such standards, fully respecting the principle of subsidiarity and independence, should be limited to those which are considered indispensable for the organization and management of a Judicial Council or other relevant body as defined below.

Taking into account the great variety of possible participants in Judicial Governance and the various systems for appointing and managing non-judicial members in Judicial Governance across Europe, the Project Team sought to investigate the *status quo*, by forwarding a questionnaire to the representatives of various countries with specific regard to the participation of non-judicial members in a) Judicial Councils, b) judicial appointment procedures and committees, and c) complaint and disciplinary procedures or committees (please see the annex).

In addition the Project Team sought the opinions of members of Judicial Councils regarding the participation of non-judicial members in Judicial Governance by asking some open-ended questions in a separate questionnaire. In analysing the large amount of information thus obtained, we took into account the work already done by the previous five

Minimum Judicial Standards Projects and also conclusions reached on the subject internationally, such as those of the Venice Commission¹.

The draft report was presented to the ENCJ General Assembly which met in Warsaw 1-3 June 2016. The report and the standards and recommendations that it entails were adopted by the General Assembly on June 3rd 2016.

¹ The European Commission for Democracy through Law - better known as the Venice Commission as it meets in Venice – is the Council of Europe's advisory body on constitutional matters. The role of the Venice Commission is to provide legal advice to its member states and, in particular, to help states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law. It also helps to ensure the dissemination and consolidation of a common constitutional heritage, playing a unique role in conflict management, and provides “emergency constitutional aid” to states in transition.

Chapter I Development and elaboration of proposed standards

The Project Team has sought to concentrate principally on matters which have not already been the subject of conclusions by earlier ENCJ Working Groups. However, we have reflected on some matters already considered, such as the level at which non-judicial members should participate in Judicial Councils, appointment procedures and disciplinary bodies.

The Project Team proceeded to analyse the material obtained in response to two questionnaires and elaborated the proposed standards set out in this Report. The Project Team has focused on the following considerations:

- I. Composition of Judicial Councils and other relevant bodies with regard to non-judicial members
- II. Process of selection and appointment of non-judicial members
- III. Personal qualities, competences and political relationships of non-judicial members
- IV. Status of non-judicial members
- V. Conduct

The proposed minimum standards are listed in the second part of this report. Commentary is provided in the third part of the report. We also included, in blue boxes, examples contributed by different countries, underlining and demonstrating the role of non-judicial members in judicial governance. The selection is not intended to be either comprehensive or representative: its aim is to picture different interesting solutions taken at the country level. More detailed information is included in the Annex where we attach country replies to the questionnaire. We are grateful to all of the members of the Project Team for their insights and reflections on the questions identified for Minimum Judicial Standards in this area.

Previous standards – role and participation of non-judicial members

The question of the participation of non-judicial members was already considered in previous Reports, in particular the Councils for the Judiciary report 2010-2011. The Project Team adopts and concurs with the view which that Report expressed, that effective participation by non-judicial members in the work of Judicial Councils and other relevant bodies assists in avoiding either actual or perceived *self-interest, self-protection or self-referencing within the judiciary, as well as giving the judiciary greater legitimacy and reinforcing of the role of the judiciary as guardian and defender of the basic rights of each citizen* (see COUNCILS FOR THE JUDICIARY – Report 2010-2011, paragraph 2.4).

There is an emerging international consensus that Councils for the Judiciary should have a broad-based membership which includes a majority of judges but also makes provision for the participation of non-judicial members:

The most successful models appear to be those with representation from a combination of members elected and/or appointed from the ranks of legal, academic or civil society, with broad powers sufficient to promote both judicial independence and accountability (COUNCILS FOR THE JUDICIARY – Report 2010-2011, paragraph 2.2).

The Project Team is entirely satisfied that the composition of Judicial Councils and of all other relevant bodies *should* include the representation of non-judicial members.

Composition of Judicial Councils and other relevant bodies

The question of the composition of Judicial Councils and other relevant bodies, with regard to the proportion of non-judicial members, has already been considered and minimum standards proposed from the opposite point of view, that is, the participation of judges in Judicial Councils:

As indicated in previous reports, also the body in charge of judicial appointments should comprise a substantial participation of legal professionals or experts (including experienced judges, academics, lawyers, prosecutors and other professionals) and could also include independent non-judicial-members representing civil society, appointed from among

well-known persons of high moral standing on account of their skill and experience in matters such as human resources (STRENGTHENING MUTUAL CONFIDENCE: STANDARDS AND EVALUATION - Report 2010-2011, paragraph 2.2; STANDARDS FOR THE SELECTION, APPOINTMENT AND PROMOTION OF JUDGES - Report 2011-2012 paragraph 3.5).

The requirement of effective participation by non-judicial members can be met only where Judicial Councils include sufficient non-judicial members, with equal rights, in particular voting rights, and adequate practical and administrative support to ensure that such members can participate fully in Judicial Councils' work and decision making. The Project Team after an in-depth discussion considers that in general, **the proportion of non-judicial members should be between 1/3 and 50%, or such proportion as will ensure that the participation of non-judicial members to Judicial Councils' activities is effective, meaning that it can contribute considerably to their decision-making process.**

Appointment and promotion, discipline and complaint procedures

We concur with the proposal in Minimum Judicial Standards II, at paragraph 3.5, that **non-judicial members (no matter what their occupational background) *should* participate in any selection procedure regarding appointment to new judicial posts and promotion to senior judicial posts:** *The body in charge of judicial appointments should comprise a substantial participation of legal professionals or experts (including experienced judges, academics, lawyers, prosecutors and other professionals) and could also include independent lay members representing civil society, appointed from among well-known persons of high moral standing on account of their skill and experience in matters such as human resources.*

Similar considerations may apply to the participation of non-judicial members in disciplinary and complaint procedures.

Minimum Standards VI

Chapter II Proposal of the Minimum Standards regarding non-judicial members in the Judicial Governance

Definitions

“**Non-judicial members**” refers to individuals, who are not judges or prosecutors, participating in Judicial Councils and other relevant bodies.

“**Judicial Governance**” refers to the participation of non-judicial members in activities of Judicial Councils and other relevant bodies, including activities concerning judicial appointments and promotion as well as complaint and disciplinary procedures.

1. Composition of Judicial Councils and other relevant bodies with regard to non-judicial members

- 1.1 The composition of Judicial Councils and other relevant bodies should include non-judicial members.
- 1.2 The composition of such bodies should reflect the diversity of the society, including gender diversity.
- 1.3 The exact number and proportions of judicial and non-judicial members depends on the type of body. In particular:
 - In Judicial Councils, judges should constitute a majority, but not more than 2/3 of members. Therefore, non-judicial members should constitute at least 1/3 of members.
 - In other relevant bodies, non-judicial members should participate in any selection procedure regarding the appointment and promotion of judges (and prosecutors if applicable) at all levels of seniority.

2. Process of selection and appointment of non-judicial members

- 2.1 The process of selection, election or appointment of non-judicial members should be merit based and transparent.
- 2.2 Civil society should be involved in one or more of the abovementioned stages (selection, election or appointment), including the possibility to propose appropriate candidates for consideration.
- 2.3 Where non-judicial members are appointed by parliamentary bodies, it is desirable that their selection be subject to the achievement of particular qualified majorities in order to avoid political influence.

3. Personal qualities, competences and political relationships of non-judicial members

- 3.1 Non-judicial members should be persons of high moral standing who bring to Judicial Governance acknowledged skills and experience from outside the judiciary. Their conduct is expected to meet the high standards, like for instance standards set by the Seven Principles of Public Life [1995], guidance established by the United Kingdom's Committee on Standards in Public Life ('the Nolan Principles').² The Seven Principles are: selflessness, integrity, objectivity, accountability, openness, honesty and leadership. Non-judicial members must be appointed in accordance with the standards set out in the Dublin Declaration on Standards for the Recruitment and Appointment of Members of the Judiciary (2012). At paragraph II.5 we read: *The body in charge of judicial appointments should comprise a substantial participation of legal professionals or experts (including experienced judges, academics, lawyers, prosecutors and other professionals) and could also include independent lay members representing civil*

² <https://www.gov.uk/government/publications/the-7-principles-of-public-life>

society, appointed from among well-known persons of high moral standing on account of their skill and experience in matters such as human resources.

- 3.2 It follows that persons with a range of backgrounds and experience should be considered for appointment as non-judicial members. Possible categories of non-judicial members include: lawyers, academics, and other professionals like sociologists, psychologists, economists, specialists in human resources and representatives of Civil Society Organizations.
- 3.3 In order to secure the voice of civil society, non-judicial members should not be politicians or persons with political affiliations.
- 3.4 In order to respect the separation of powers, the Minister of Justice should not be a member of the Judicial Council or other relevant body.
- 3.5 Additionally, non-judicial members of Judicial Councils and other relevant bodies should not be involved in politics for a reasonable period of time before and after their mandate as member of a Judicial Council or other relevant body.
- 3.6 Certain persons should always be ineligible for appointment as non-judicial members. In particular:
 - Judges, even if retired,
 - Persons who have been convicted of criminal offences, who are or have been bankrupt, or who are otherwise disqualified from public office,
 - Members of Parliament (including former Members), and
 - Members of governments (including previous governments).

4. Status of non-judicial members

- 4.1 Non-judicial members should have the same rights and obligations as judicial members.
- 4.2 Judicial and non-judicial members should be involved in the decision making process. In order to ensure effective participation of non-judicial members it is

recommended that adequate quorum for the composition of the bodies and voting procedures (majorities for adoption of decisions) be adopted to give effect to this aspiration.

- 4.3 Non-judicial members must have the same voting rights and should be involved in the work of all relevant bodies, including presiding committees, working groups and subcommittees created by Judicial Councils. For that reason, they should have the same access as judicial members to support staff and technical assistance, to documents and resources.
- 4.4 Non-judicial members should receive the same remuneration/per diem as judicial members for their activities on Judicial Councils and other relevant bodies.

5. Conduct

- 5.1 Non-judicial members during their service on Judicial Councils and other relevant bodies should be bound by any rules of conduct applicable to judicial members of such bodies.
- 5.2 In drafting rules of conduct for Judicial Councils and other relevant bodies, account should be taken of the presence on such bodies of non-judicial members.
- 5.3 In particular the rules of conduct developed should deal with the following matters (depending on the competences of the particular body): confidentiality in respect of all matters; honesty; objectivity and impartiality; obligation to attend meetings; obligation to fulfil tasks; and obligation to recuse oneself in the case of conflict of interest.
- 5.4 In default of such rules of conduct, the conduct of non-judicial members may be guided by reference to the “Seven Principles of Public Life” or other similar rules.

Chapter III Commentaries to Minimum Standards VI

The purpose of the Project Team is to work out and recommend standards for the inclusion of non-judicial members (sometimes also called lay members) in Judicial Governance. The ENCJ has already stated in earlier reports in this Project that non-judicial members give an added value in Judicial Governance. Therefore, the Project Team approaches its task on the basis that the value of involving non-judicial members is established, in particular to avoid both the appearance and the reality of self-determination and corporatism within the judiciary.

The Project Team recognises the diversity of legal systems, national legal traditions and constitutional positions of the judiciaries in Europe. The Project Team underlines that a functioning system of justice can take number of different forms.

The Project Team is tasked with examining and proposing answers to the following questions:

- What is the reason for having non judges and, in particular, of involving non lawyers in Judicial Governance?
- How should non judges be involved in judicial governance?

In answering those questions, we have concluded that public confidence is reinforced when judges are appointed, promoted, and held to account by bodies which at least in part reflect the views of the society in which they work, giving an external perspective of what is appropriate.

We consider that it is important to have an external perspective on Judicial Governance, with input not only from legal professionals, as distinct from judges (lawyers, law professors, etc.), but also from those who can bring a true non-judicial perspective, representing the views of civil society and the public.

1. Composition of Judicial Councils and other relevant bodies with regard to non-judicial members

- 1.1 The composition of Judicial Councils and other relevant bodies should include non-judicial members.
- 1.2 The composition of such bodies should reflect the diversity of the society, including gender diversity.
- 1.3 The exact number and proportions of judicial and non-judicial members depends on the type of body. In particular:
 - In Judicial Councils, judges should constitute a majority, but not more than 2/3 of members. Therefore, non-judicial members should constitute at least 1/3 of members.
 - In other relevant bodies, non-judicial members should participate in any selection procedure regarding the appointment and promotion of judges (and prosecutors if applicable) at all levels of seniority.

The European Commission for Democracy through Law - better known as the Venice Commission as it meets in Venice - is the Council of Europe's advisory body on constitutional matters.

We have been assisted by several recent Opinions of the Venice Commission which bear upon the issues which we have been asked to consider. In its Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary in Albania published on 14 March 2016 (the Albania Opinion), the Venice Commission supported the inclusion of non-judicial members in Judicial Governance, but stopped short of recommending a high voting threshold:

14. ...The Venice Commission stresses that it is not its task to propose a specific constitutional rule for electing lay members of the HJC. In the Interim Opinion, the Commission only emphasized the need to secure a pluralistic composition of the HJC, including through implementing legislation, in order to ensure that the HJC represents a large spectrum of opinions and tendencies existing in the society.

15. Pluralistic composition may be attained by other means, not necessarily by establishing high voting thresholds. The presence of a strong judicial component within the HJC significantly reduces the risk of political capturing. (VENICE COMMISSION, Opinion No. 824/2015, CDL-AD(2016)009, at paragraphs 14-15.³)

The concept of non-judicial representation throughout the judiciary is based on the idea that for the rule of law and effective justice, the judiciary must reflect, and remain connected with civil society. Non-judicial members can hold up a mirror to the judiciary, showing a different side to certain issues. Non-judicial members can look at the issue from a broader perspective; they are not constrained by professional judicial habits or stereotypes. They can represent the interests and views of the society and become a connecting bridge between judges and society.

The presence of non-judicial members on Judicial Councils and other relevant bodies helps to promote a culture of trust and openness within the judicial system, such that the judiciary as a whole is accountable to the society in which they work, to discharge their functions transparently, efficiently and fairly. For example, when a non-judicial member chairs the board of a complaints committee, this can be seen as independent from the judge against whom the complaint is made.

Non-judicial members can assist in forming general policy to help ensure an independent and accountable judiciary, which is so perceived by civil society. The presence of non-judicial members on Judicial Councils and other relevant bodies promotes deeper discussions with better argument. Non-judicial members have many functions: they bring their life and professional experience into the process of evaluation, and they are interested generally in broader context of both the individual judge under evaluation, and the overall process of the court's decision making. Accordingly, the involvement of non-judicial members in judicial self-governance should be considered necessary.

³ [http://venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)009-e](http://venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)009-e)

Non-judicial members can bring expertise to the judiciary that is not available within the organisation, for example financial expertise, IT knowledge or experience in the human resources management field.

In **Belgium** there are **44 members** of the Judicial Council.

22 judicial members elected by their peers – 11 Dutch speaking and 11 French speaking members. Each linguistic college comprises at least 1 judge and 1 prosecutor.

22 non-judicial members appointed by the Senate – 11 Dutch speaking and 11 French speaking members. Each linguistic college comprises at least: 4 lawyers, members of the bar for at least 10 years, 3 university or college of higher education professors having at least 10 years of professional experience, and 4 members who hold an university or equivalent degree as well as 10 years of relevant professional experience.

In **France** following the constitutional reform passed in 2008, the number of **non-judicial members in the French Council is higher than judicial members** in order to avoid the risk of corporatism, self-interest and self-protection and to allow a large participation of legal professionals and experts. Each formation (judges and prosecutors) consists of 15 members including 8 lay members who belong to both formations. The principle of majority of non-judicial members doesn't undermine the independence of judiciary as long as the process of selection and appointment of non-judicial members, in the way the project team proposes, is transparent and protects non-judicial members from political pressures. If the non-judicial members represent a variety of trends of civil and political society, there is not, as the experience of the French High Council shows, a division between non-judicial and judicial members.

In the **Netherlands** the national selection committee for judges consists of a Presidency (two judges and two secretaries), twelve members and six deputies. The twelve members are: six judicial members and six non-judicial members with the minimum of one member from the

Public prosecutor's office, one lawyer and a maximum of four members coming from outside the judiciary. The six deputies are three judicial deputy members and three non-judicial deputy members: one from the Public prosecutor's office, a lawyer, a person coming from outside the judiciary.

One of the members of the Project Team observed that: ***The participation of non-judicial representatives as full members of the Council has proven to be very productive.*** *The contribution of non-judicial representatives gives occasion to more lively and fundamental debates and more relevant and original solutions. Although the fact that the non-judicial members are nominated by the Senate arouses some suspicion of political interference, the overall conclusion is positive and seems to improve the authority of the decisions of the High Council of Justice. In fact, the High Council has become the only official platform where judges, prosecutors, lawyers, professors and other representatives of civil society can debate as equals and make proposals to improve the functioning of the judiciary.*

Another Project Team member emphasised the importance of non-judicial members and of their professional status in civil society: ***They are really important in order to prevent to some extent the so-called internal solidarity among the judges.*** *The non-judicial representatives are part of a very necessary control that civil society should exercise over Judicial Governance. On one hand they are representatives of the people, appointed by the parliament, who demand that in a democratic society judges should be accountable to them, while on the other hand they are professionals who understand the delicate situation of such accountability if the authority and trust in the judiciary are to be maintained.*

2. Process of selection and appointment of non-judicial members

- 2.1 The process of selection, election or appointment of non-judicial members should be merit based and transparent.
- 2.2 Civil society should be involved in one or more of the abovementioned stages (selection, election or appointment), including the possibility to propose appropriate candidates for consideration.
- 2.3 Where non-judicial members are appointed by parliamentary bodies, it is desirable that their selection be subject to the achievement of particular qualified majorities in order to avoid political influence.

We have been much assisted by several recent Opinions of the Venice Commission.

In March 2016, the Venice Commission considered in detail the methods of appointment for non-judicial members of Judicial Councils (VENICE COMMISSION, Opinion No. 824/2015, CDL-AD(2016)009)⁴. The Opinion analyses different possible selection methodologies with a view to securing the selection of appropriate candidates and de-politicisation of the process. Below we refer only to some general statements from the Opinion: anyone interested in the more detailed analysis should refer to the Opinion itself.

16. As to the lay members, the process of their nomination is as important as the method of their election. Their detachment from politics may be ensured through a transparent and open nomination process, at the initiative of autonomous nominating bodies (universities, NGOs, Bar Associations, etc.) and completed by the Judicial Appointments Council, which is composed of members of the judiciary. Such nomination process should ensure that Parliament has to make a selection amongst the most qualified candidates, and not political appointees. (VENICE COMMISSION, Opinion No. 824/2015, CDL-AD(2016)009, at paragraph 16)

17. [...] The Venice Commission stresses that it belongs to the domestic legislator to select such system that would, first, ensure pre-selection of the most qualified candidates by

⁴ <http://www.venice.coe.int/webforms/documents/?country=34&year=all>

an appropriate expert body, and, second, leave the opposition a chance of influencing the election of the “lay” component of the HJC, through a qualified majority requirement or otherwise.) (VENICE COMMISSION, Opinion No. 824/2015, CDL-AD(2016)009, at paragraph 17)

The Venice Commission is of the opinion that elections from the parliamentary component should be by a two-thirds qualified majority, with a mechanism against possible deadlocks or by some proportional method which ensures that the opposition has an influence on the composition of Judicial Council (CDL-AD (2013)007, OPINION ON THE DRAFT AMENDMENTS TO THE ORGANIC LAW ON COURTS OF GENERAL JURISDICTION OF GEORGIA, §§52-53).

In order to provide for democratic legitimacy of the Judicial Council, other members should be elected by Parliament among persons with appropriate legal qualification taking into account possible conflicts of interest (CDL-AD(2007)028, REPORT ON JUDICIAL APPOINTMENTS BY THE VENICE COMMISSION, §29).

In **Bulgaria** the procedure before the National Assembly for the selection of non-judicial members of the Supreme Judicial Council is transparent and public. Motivated proposals together with the written concepts of each candidate, a detailed professional biography, declaration of property status and origin of the funds for property acquisition and declaration of the existence of a private interest under Conflict of Interest Prevention and Ascertainment Act (CIPAA) shall be published on the website of the National Assembly.

No later than 7 days prior to the hearing, non-profit-making legal persons registered to operate in the public interest, higher education institutions and scientific organisations may submit opinions about a candidate to the committee (Legal Affairs Committee of the National Assembly), including questions to be asked. The opinions and questions submitted to the committee shall be published on the website of the National Assembly.

The Legal Affairs Committee of the National Assembly shall hear, at an open session of the committee, each candidate. The committee shall put forward the nominations to the National Assembly by drafting a detailed and reasoned report on the professional qualities and integrity of the candidates. The report shall be published on the website of the National Assembly. The

National Assembly shall elect each member of the Supreme Judicial Council on a case-by-case basis by a majority of two-thirds of the National Representatives.

3. Personal qualities, competences and political relationships of non-judicial members

- 3.1 Non-judicial members should be persons of high moral standing who bring to Judicial Governance acknowledged skills and experience from outside the judiciary. Their conduct is expected to meet the high standards, like for instance standards set by the Seven Principles of Public Life [1995], guidance established by the United Kingdom's Committee on Standards in Public Life ('the Nolan Principles').⁵ The Seven Principles are: selflessness, integrity, objectivity, accountability, openness, honesty and leadership. Non-judicial members must be appointed in accordance with the standards set out in the Dublin Declaration on Standards for the Recruitment and Appointment of Members of the Judiciary (2012). At paragraph II.5 we read: *The body in charge of judicial appointments should comprise a substantial participation of legal professionals or experts (including experienced judges, academics, lawyers, prosecutors and other professionals) and could also include independent lay members representing civil society, appointed from among well-known persons of high moral standing on account of their skill and experience in matters such as human resources.*
- 3.2 It follows that persons with a range of backgrounds and experience should be considered for appointment as non-judicial members. Possible categories of non-judicial members include: lawyers, academics, and other professionals like sociologists, psychologists, economists, specialists in human resources and representatives of Civil Society Organizations.
- 3.3 In order to secure the voice of civil society, non-judicial members should not be politicians or persons with political affiliations.

⁵ <https://www.gov.uk/government/publications/the-7-principles-of-public-life>

- 3.4 In order to respect the separation of powers, the Minister of Justice should not be a member of the Judicial Council or other relevant body.
- 3.5 Additionally, non-judicial members of Judicial Councils and other relevant bodies should not be involved in politics for a reasonable period of time before and after their mandate as member of a Judicial Council or other relevant body.
- 3.6 Certain persons should always be ineligible for appointment as non-judicial members. In particular: Judges, even if retired,
- 3.7 Persons who have been convicted of criminal offences, who are or have been bankrupt, or who are otherwise disqualified from public office,
- 3.8 Members of Parliament (including former Members), and
- 3.9 Members of governments (including previous governments).

The Venice Commission has recommended that politicians, members of Parliament and representatives of executive power, should not be members of Judicial Councils and other relevant bodies. However, we recognise that a number of member countries currently include in their Judicial Councils *ex officio* members from other branches of power, who are currently stipulated by the law of those countries as members of Judicial Councils or other relevant bodies: we recommend that such statutory provisions be reassessed and where possible de-politicised.

The questionnaire responses also revealed that in some Member countries, non-judicial members are elected by the national Parliament on a political basis. We consider this to be inappropriate. We also consider that simple political affiliation presents a real problem and should be avoided, as it risks giving rise to a perception of conflict of interest between the political executive and the judiciary. Non-judicial members should be prohibited from having any political membership or affiliation during their service, and they should avoid having any kind of contact with politics for a reasonable period both before and after their appointment.

This goes further than the standard expressed by the Venice Commission that: *In order to insulate the-judicial council from politics its members should not be active members*

of Parliament (CDL-AD(2007)028, REPORT ON JUDICIAL APPOINTMENTS BY THE VENICE COMMISSION, §32). Regarding non-judicial membership, it is considered appropriate that such person should be appointed on the basis of their competence and standing in civil society. Legal experience gained from practising as a lawyer, or involvement in academia or other quasi-legal position, is considered desirable in order to guarantee that such lay persons have the requisite skills and experience in areas of Council competence, and have a sufficient understanding of judicial life to comprehend the functioning of the judicial system with a view to greater openness to civil society, thereby ensuring greater transparency for the activities of Judicial Council for the Judiciary (COUNCILS FOR THE JUDICIARY – Report 2010-2011, paragraph 2.5).

The project team highlights the advantages of including members of civil society who are held in high esteem by their peers and are in a position to represent the ordinary citizen in addition to the needs of society as a whole, thereby giving rise to a diverse representation of society. (COUNCILS FOR THE JUDICIARY – Report 2010-2011, paragraph 2.6).

In order to provide for democratic legitimacy of the Judicial Council, other members should be elected by Parliament among persons with appropriate legal qualification taking into account possible conflicts of interest (CDL-AD(2007)028, REPORT ON JUDICIAL APPOINTMENTS BY THE VENICE COMMISSION, §29).

The Venice Commission in 2007 considered that *Although the presence of the members of the executive power in Judicial Councils might raise confidence-related concerns, such practice is quite common. [...] Such presence does not seem, in itself, to impair the independence of Judicial Council, according to the opinion of the Venice Commission. However, the Minister of Justice should not participate in all Judicial Council's decisions, for example, the ones relating to disciplinary measures. (CDL-AD(2007)028, REPORT ON JUDICIAL APPOINTMENTS BY THE VENICE COMMISSION, at paragraphs 33-35)*

We have even considered whether it is appropriate for a political head of state to chair a Judicial Council, but after consideration, we agree with the pragmatic approach taken by the Venice Commission on this issue. *In parliamentary systems where the President / head of state has more formal powers there is no objection to attributing the chair of the Judicial Council to the head of state, whereas in (semi-) Presidential systems, the chair of Judicial*

Council could be elected by Judicial Council itself from among the non-judicial members of Judicial Council. Such a solution could bring about a balance between the necessary independence of the chair and the need to avoid possible corporatist tendencies within Judicial Council (CDL-AD(2007)028, REPORT ON JUDICIAL APPOINTMENTS BY THE VENICE COMMISSION, at paragraphs 33-35).

In the **Netherlands, the Visitation Committee** is tasked with evaluating the quality of the organization of the Judiciary (Court Review or court visitation). Once every four years an independent committee visits all the courts and prepares evaluation. The purposes of the court visitation are quality improvement and accountability to the public. The visitation committee is formed by the Council for the Judiciary. The review committee has 15 members, six of them are judges. The other members are drawn from all sections of society, including former cabinet ministers, mayors, the business community, the academic world, community organizations, lawyers (bar) and the prosecution office. In 2014 one of the evaluation criteria was the extent to which the courts are connected to society.

In **Lithuania, non-judicial members are always drawn from a wide range of professions:** economists, psychiatrists, psychologists, journalists, representative of Transparency International, etc. As a rule such members have a good renown in Lithuanian society and their opinions are highly valued.

In **France** since the constitutional reform passed in 2008 **the President of the Republic and the Minister of Justice no longer participate** in any meetings of the High Judicial Council.

4. Status of non-judicial members

- 4.1 Non-judicial members should have the same rights and obligations as judicial members.
- 4.2 Judicial and non-judicial members should be involved in the decision making process. In order to ensure effective participation of non-judicial members it is recommended that adequate quorum for the composition of the bodies and voting procedures (majorities for adoption of decisions) be adopted to give effect to this aspiration.
- 4.3 Non-judicial members must have the same voting rights and should be involved in the work of all relevant bodies, including presiding committees, working groups and subcommittees created by Judicial Councils. For that reason, they should have the same access as judicial members to support staff and technical assistance, to documents and resources.
- 4.4 Non-judicial members should receive the same remuneration/per diem as judicial members for their activities on Judicial Councils and other relevant bodies.

Non-judicial members should be provided with equal facilities to those afforded to judicial members, including equal voting, equivalent remuneration for their services or on a per diem basis, and must receive good administrative support.

Effective participation by non-judicial members cannot be achieved without proper voting rights in all the effective and operational structures, functions and competences of Judicial Councils or other relevant bodies, to ensure that non-judicial members connect with the judicial representatives in a constructive way. The Venice Commission's 2012 Opinion on Hungary deals with this point: *Judicial Councils should not be composed of judges only. It is important that such a pluralistic composition is achieved not only by inviting non-judges as guests, but also by including them as full members with voting rights* (CDL-AD(2012)020, OPINION ON THE CARDINAL ACTS ON THE JUDICIARY THAT WERE AMENDED FOLLOWING THE ADOPTION OF OPINION CDL-AD(2012)001 ON HUNGARY, §§33, 34).

Where appropriate, provision should be made for enhanced quorums for the composition of the bodies and voting procedures (majorities for adoption of decisions) to ensure a proper balance of power in decision making between judicial and non-judicial members on such bodies.

The role of non-judicial members will at least partly depend on the individual member's ability and interest in doing their best to carry out and implement their assigned functions.

The level of participation by non-judicial members may be full or part time: *It is clear from the workings of the project team that members of a Judicial Council for the Judiciary can work full time or part time, depending on the particular circumstances pertaining* (COUNCILS FOR THE JUDICIARY – Report 2010-2011, paragraph 2.6).

In order to secure the non-judicial perspective on the activities of Judicial Councils, the staff of Judicial Councils and other relevant bodies for example, in Studies and Documentation Centers, Boards and Committees, and working groups, should include non-judicial individuals in an adequate number.

The **French High Council** ensures that **non judicial and judicial members participate in all the work** of the Council in order to take advantage of the views of both categories of members. For instance, before the hearings of applicants for the positions of Presidents of tribunals or courts of appeal, two members of the Council, which includes (and this is mandatory) a non-judicial member and a judicial member, present the file of each applicant. In practice, this double view reinforces the objective way that the files of applicants are submitted, particularly if a member, judicial or non-judicial, initially looks favourably or unfavourably on an application.

Similarly, each of the three complaint committees consists of four members, two non-judicial members and two judicial members. The complainant is aware of the composition of the committee which has received his complaint that will be investigated not only by judges or prosecutors.

Last but not least, the Council ensures that the composition of each working group, in particular for defining the rules of procedure of the Council, allows for a balance between judicial members and non-judicial members.

In **Belgium** non-judicial members are “**full members**” of the Council with voting power. They have the same powers as the judicial members. Each body of the HCJ consists of an equal number of judicial and non-judicial members.

5. Conduct

5.1 Non-judicial members during their service on Judicial Councils and other relevant bodies should be bound by any rules of conduct applicable to judicial members of such bodies.

5.2 In drafting rules of conduct for Judicial Councils and other relevant bodies, account should be taken of the presence on such bodies of non-judicial members.

5.3 In particular the rules of conduct developed should deal with the following matters (depending on the competences of the particular body): confidentiality in respect of all matters; honesty; objectivity and impartiality; obligation to attend meetings; obligation to fulfil tasks; and obligation to recuse oneself in the case of conflict of interest.

5.4 In default of such rules of conduct, the conduct of non-judicial members may be guided by reference to the “Seven Principles of Public Life” or other similar rules.

We have been assisted in considering this question by the proposals in Minimum Judicial Standards V, Standards for Disciplinary Proceedings and Liability of Judges [2014-2015].

As already stated the Project Team considers that the same standards of conduct, whether expressed in a code of conduct or in rules of conduct applicable to the particular body should apply equally to non-judicial members, as to judicial members. If non-judicial members are to have equal voting rights and equivalent support and remuneration they must be

prepared to meet the same high standards as the judicial members of such bodies, and eventually to be removed from their role on a Judicial Council or other relevant body, in the event of significant failure to meet those same standards.

We note in particular the following indicator identified by the Project Team in Minimum Judicial Standards V:

III.1 ...Guidelines and/or a code of judicial ethics can strengthen public confidence and promote a better understanding of the role of a judge both in his private and public life. The guidelines and/or code must be available to the public.

The principles set out in Minimum Judicial Standards V may provide further useful guidance on the approach to regulating the conduct of, and where appropriate sanctioning, non-judicial members on Judicial Councils and other relevant bodies.

Non-judicial members balance the role of judicial members on Judicial Councils and other relevant bodies. They should be required to declare and avoid possible conflicts of interest arising out of their other activities, particularly where they are part-time members of Judicial Councils or other relevant bodies and remain active in their original professional roles at the same time.

Non-judicial members, even if they are lawyers or academics in the field, must undertake to respect the confidentiality of information which comes to them in such capacity, to demonstrate impartiality and integrity, and to be diligent in attendance at meetings and fulfilling tasks assigned to them. Such matters should be included in rules of conduct or in any relevant code of conduct, and supported by appropriate sanctions in the same way as those for judicial members, up to and including eventual removal in the event of significant failure to meet the standards required of them by rules of conduct or any relevant code of conduct.

The **Belgian Judicial Code** contains few ethical and deontological provisions for the members of the High Council of Justice. In order to fill up this gap, the High Council has adopted a deontological guide for its members. The guide specifies and illustrates the existing legal obligations (independence, impartiality, professional confidentiality...) and adds certain new standards concerning loyalty, equality, integrity and freedom of speech. The guide has a general part, which applies to all activities of the High Council and a second part which

28

particularizes the principles for specific activities, for example the principle of impartiality in the framework of the appointments of magistrates or the treatment of complaints. The guide is of a particular interest to the non-judicial members as they are not always familiar with these substantial principles.

The High Council has also established a deontological commission that investigates alleged deontological offences by members and can propose to the Assembly General to inflict a penalty to a member. A member that has a deontological question can also turn to the commission for advice. The advice can take the form of a recommendation.

The **United Kingdom's Committee on Standards in Public Life** has since 1995 published a set of standards ('the Nolan Principles')⁶ for behaviour by public officeholders. The Seven Principles of Public Life (selflessness, integrity, objectivity, accountability, openness, honesty and leadership) apply to anyone who works as a public office-holder in the UK. The Committee publishes annual reports regarding the application of these rules which may be of interest, indicating the kinds of difficulties which arise for public office holders.

⁶ <https://www.gov.uk/government/organisations/the-committee-on-standards-in-public-life>