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CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)

OPINION No. 6 (2004)

OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)

**TO THE ATTENTION OF THE COMMITTEE OF MINISTERS
OF THE COUNCIL OF EUROPE**

**ON FAIR TRIAL WITHIN A REASONABLE TIME
AND JUDGE'S ROLE IN TRIALS
TAKING INTO ACCOUNT ALTERNATIVE MEANS OF DISPUTE SETTLEMENT**

as adopted by the CCJE
at its 5th meeting
(Strasbourg, 22-24 November 2004)

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INTRODUCTION

1. Over the years, management of proceedings by the courts in Europe has been evolving towards fuller consideration of the interests of court users. Practitioners have directed attention to ways of meeting the public's expectations that all who seek justice should not only have readier access to the courts but also benefit from enhanced effectiveness of the procedures applied and more reliable guarantees that rulings delivered will be enforced.
2. The essential instrument of this evolution is the European Convention on Human Rights (ECHR), the case-law of the European Court of Human Rights (the Court) being consulted in order to interpret and apply its provisions.
3. Article 6 of the ECHR in particular has generated a fund of procedural law common to the different European states and brought into being general principles which, above and beyond the wealth and diversity of the national systems, are intended to secure the right of access to a court, the right to obtain a decision within a reasonable time at the end of a fair and equitable procedure, and the right to obtain enforcement of any judgment delivered.
4. The right to a fair trial is tending to become a true substantive right for the citizens of Europe, one whose enforcement is ensured by the Court and subsequently the domestic courts, for example by compensating litigants whose cases are not tried within a reasonable time.
5. For a number of years the Council of Europe has shown a constant concern to improve the public's access to justice, as reflected in its various Resolutions and Recommendations on legal aid, the simplification of procedures, reducing the costs of proceedings, the use of new technologies, reducing the courts' workload and alternative means of settling disputes.
6. The Court itself ensures that governments abide by the provisions of Article 6 of the ECHR, for example by reminding them, that any person wishing to bring legal proceedings must have access to a court, and that no state interference with this prerogative, whether in fact or in law, is permissible.
7. The Consultative Council of European Judges (CCJE) has given thought to how judges might participate in this effort to guarantee access to rapid and effective settlement of disputes.
8. It recalls that the 1st European Conference of Judges on "Early settlement of disputes and the role of judges", held at the Council of Europe on 24 and 25 November 2003, revealed that no matter how interesting and useful alternative measures such as mediation or conciliation may be, confidence in the judicial institution remains an essential feature of democratic societies.
9. It is therefore important that, when dealing with the justice system, citizens should know that they are dealing with an efficient institution.
10. In this context, this Opinion revolves around (A) the question of access to justice (B) the quality of the justice system and its assessment, quantitative statistical data, monitoring procedures (C) the courts' workload and case management and (D) alternative dispute

resolution with the emphasis on the judge's role in the implementation of the principles laid down in the ECHR and the case-law of the Court.

A. ACCESS TO JUSTICE

11. Public access to justice presupposes delivery of suitable information on the functioning of the judicial system.

12. The CCJE considers that all moves to provide the public with such information are to be encouraged.

13. The public should in particular be made aware of the nature of proceedings which may be brought, their possible duration, their cost and the risks involved in case of wrongful use of legal channels. Information should also be provided concerning alternative means of settling disputes which may be offered to parties.

14. This general information to the public can be supplemented by more precise information concerning in particular some of the landmark decisions delivered by the courts and how long it takes for cases to be dealt with in the various courts.

15. Information on the functioning of the judicial system can originate from various sources, such as the Justice Department (publication of information booklets, websites, etc.), the welfare services and the public legal advice services organised by lawyers' associations as well as other sources.

16. The courts themselves should participate in disseminating the information, particularly when they have public relations services. Amongst the relevant ways of disseminating information are the Internet sites run by certain courts.

17. The CCJE recommends the development of education programmes including a description of the judicial system and offering visits to courts. It also perceives a need to publish citizens' guides enabling potential litigants to gain a better grasp of the functioning of the judicial institutions, while also informing them of their procedural rights before the courts. Lastly, it recommends the general use of computer technology in order to provide members of the public with the same type of information on the functioning of the courts, the means of access to justice, the principal decisions delivered, and the statistical results of the courts.

18. The CCJE positively encourages the adoption of a simplified and standardised format for the legal documents needed to initiate and proceed with court actions. The recommended simplification is particularly advisable for minor litigation, for disputes involving consumers, and for cases in which the determination of the points of law and of fact raises virtually no difficulties (settlement of debts). It further recommends developing the technology whereby litigants may obtain, via computer facilities, the necessary documents for bringing an action before a court and either they or their representatives may be put directly in touch with the courts.

19. The CCJE also recommends that litigants be fully informed, by lawyers and courts or tribunals, even before proceedings are instituted, as to the nature and the amount of the costs they will have to bear, and that they be given an indication of the foreseeable duration of the proceedings up to the judgment.

20. In its Opinion No. 2 (2001), paragraph 9, the CCJE identified the importance of adequate funding to the operation of any judicial system. The question arises how far litigants, or others before court, can or should be expected to contribute to such funding through court fees. The CCJE considers that the judicial system should not obstruct access to justice through excessive costs. An efficient system of justice is of benefit to the public at large, not merely to those who also happen to become involved in litigation. The rule of law is demonstrated and established by the courts' efficient operation and judgments; and this enables the public at large to regulate and conduct its affairs securely and with confidence.

21. A legal aid system should be organised by the State to enable everyone to enjoy access to justice. Such aid should cover not only court costs but also legal advice as to the wisdom or the necessity of bringing an action. It should not be reserved for the neediest persons but should also be available, at least in part, to those whose average income does not enable them to bear the cost of an action unaided.

22. This system of partial legal aid allows the number of beneficiaries to be increased while preserving a certain balance between the authorities' obligation to facilitate access to justice, and individual responsibility. The CCJE considers that a judge or another authority acting judicially, should be able to take part in decisions concerning the grant of aid. If the authority required to rule on an application for legal aid is obliged to refuse it where the contemplated action appears manifestly inadmissible or ill-founded, it is indispensable, should action be brought by a litigant who has been refused aid, that the judge involved in the relevant decision should refrain from trying the case, for the sake of compliance with the duty of objective impartiality according to Article 6 of the ECHR.

23. The CCJE considers that legal aid should be financed by a public authority and covered by a special budget so that the corresponding expenses are not charged to the operating budget of the courts.

24. The provision of legal assistance to the parties is an important component of access to justice for litigants.

25. The CCJE notes, that in certain States, the intervention of a lawyer during the proceedings is not necessary. Other States draw distinctions according to the magnitude of the financial interests and the type of dispute or proceedings. The right for a litigant to plead his or her case before a court either personally or through the representative of his or her choice appears particularly suited to simplified proceedings, litigation of minor financial importance, and cases involving consumers.

26. Nonetheless, even in cases where there is no need to engage a lawyer at the outset, the CCJE considers that there should be provision enabling the judge, as an exceptional measure, to order the intervention of counsel if the case presents particular problems or if there is a major risk that the rights of the defence will be infringed. In that event, representation by a lawyer should have the support of an effective legal aid system.

27. Resolution (78) 8¹ states in paragraph 1 of the appendix that "no one should be prevented by economic obstacles from pursuing or defending his rights (...)".

¹ Resolution (78) 8 on legal aid and advice.

28. One must nonetheless guard against having the remuneration of lawyers and court officers fixed in such a way as to encourage needless procedural steps. Provision must also be made, pursuant to Recommendation No. R (84) 5² (principle 2-1 in the appendix), for sanctioning abuse of court procedure.

29. Legal aid is not the sole means of assisting access to justice. Other methods which can be used for this purpose include for instance an insurance for court costs, covering a party's own court costs and/or any sum payable to the other party where the case is lost.

30. The CCJE does not intend to discuss in detail, in this Opinion, a number of other arrangements for access to justice, including the conditional fees arrangement or the fixed expenses arrangement.

B. QUALITY OF THE JUSTICE SYSTEM AND ITS ASSESSMENT; QUANTITATIVE STATISTICAL DATA; MONITORING PROCEDURES

31. The provision of justice involves not only the work of judges and other legal professionals; it encompasses a number of activities performed within judicial institutions by governmental agents and private citizens; its operation heavily relies on judicial infra-structures (buildings, equipment, support staff, etc). Therefore, quality of the justice system depends both on the quality of infra-structures, which may be measured with criteria similar to those employed for other public services, and on the ability of legal professionals (judges, but also lawyers, prosecutors and clerks); even today it is possible to measure the work of such professionals against the benchmarks of law and of judicial or professional practice and deontology.

32. However, since the growing demand for justice in most countries are faced with limitations of the budget for the justice system, theory and practice suggest the possibility to assess the quality of judicial activity, with reference also to social and economic efficiency, through criteria that are sometimes similar to those employed for other public services.

33. The CCJE notes that a number of problems arise when applying to justice assessment criteria that do not take into account its specificities. Although similar considerations may apply to the activities of other legal professionals, the CCJE discussed the implications of such an approach to judicial activity.

34. The CCJE strongly emphasises, first of all, that the evaluation of "quality" of the justice system, i.e. of the performance of the court system as a whole or of each individual court or local group of courts, should not be confused with the evaluation of the professional ability of every single judge. Professional evaluation of judges, especially when aiming at decisions influencing their status or career, is a task that has other purposes and should be performed on the basis of objective criteria with all guarantees for judicial independence (see Opinion No. 1 (2001) of the CCJE, especially paragraph 45).

35. The practice of some countries shows an overlap which the CCJE deems inappropriate, between quality assessment of justice and professional evaluation of a judge. This overlap is reflected in the way in which statistics are collected. In some countries

² Recommendation No R (84) 5 of the Committee of Ministers to member States on the principles of civil procedure designed to improve the functioning of justice.

statistics are kept for each individual judge, in the others the figures are for each court. All are likely to keep records of the number of cases dealt with, but the former system attaches that figure to individuals. Systems which assess judges statistically typically include a figure for the percentage of successful appeals.

36. Some countries consider the percentage of the decisions reversed on appeal as an indicator. An objective evaluation of the quality of judicial decisions may be one of the elements relevant for the professional assessment of a single judge, (but even in this context one should take into account the principle of judicial internal independence and the fact that reversal of decisions must be accepted as a normal outcome of appeal procedures, without any fault on the part of the first judge). However, the use of reversal rates as the only or even necessarily an important indicator to assess the quality of the judicial activity seems inappropriate to the CCJE. Among several aspects that could be discussed with reference to this problem, the CCJE underlines that it is a feature of the justice system based on "procedures", that the quality of the outcome of a single case depends heavily on the quality of the previous procedural steps (initiated by the police, public prosecution, private lawyers or parties), so that evaluation of judicial performance is impossible without evaluation of each single procedural context.

37. The same considerations apply to other systems in which some assessment, through systems different from the observation of the reversal rate, is possible as to an individual decision taken by judges.

38. In some countries, assessment of quality of justice is done through collection of indicators measuring the performance of the court: how long it takes to deal with cases, how great the backlog is, how large the support staff is, the quantity and quality of infra-structures (with special reference to buildings and information technology), etc.

39. This approach is in principle acceptable, as it tends to evaluate "performance" of justice in a wider sense. However, the better approach, in the opinion of the CCJE, would be to evaluate justice in its even wider context, i.e. in the interactions of justice with other variables (judges and lawyers, justice and police, case law and legislation, etc.), as most malfunctions of the justice system derive from lack of coordination between several actors. The CCJE considers that it is also crucial to underline the interaction between the quality of justice and the presence of adequate infra-structures and support personnel.

40. Even if modern information technology allows very sophisticated data to be collected, the difficulty remains as to what variables should be measured and how and by whom the results should be interpreted.

41. As to data to be collected, no generally accepted criteria exist at this moment. This is due to the fact that administration of justice differs greatly from the purely administrative tasks that are typical of other public services, where measurement through indicators has developed and may be effective. For example, the fact that one court takes longer on average than another to deal with a case or has a greater backlog of cases may or may not mean that this court is less efficient.

42. Whatever may be the developments in this field, the CCJE considers that "quality" of justice should not be understood as a synonym for mere "productivity" of the judicial system; a qualitative approach should address rather the ability of the system to match the demand of

justice in conformity with the general goals of the legal system, of which speed of procedures is only one element.

43. The CCJE recommends that, as it is impossible at the moment to rely upon widely accepted criteria, quality indicators should at least be chosen by wide consensus among legal professionals, it being advisable that the independent body for the self-governing of the judiciary play a central role in the choice and the collection of "quality" data, in the design of the data collection procedure, in the evaluation of results, in its dissemination as feed-back to the individual actors on a confidential basis, as well as to the general public; such involvement may reconcile the need for a quality evaluation to be carried out with the need for indicators and evaluators to be respectful of judicial independence.

44. Usually statistical data are collected by courts and sent to a central authority that may be the Supreme Court, the High Council for the Judiciary, the Ministry of Justice or the National Court Administration. In daily data collection court registrars may play an important role. In some cases private agencies have participated in the identification of quality indicators and in the design of a quality control system.

45. The publication of statistical data concerning pending and past cases in each court, available in some States, is a further step towards transparency of the situation of workloads. Appropriate forms should be studied for the release of even reserved information to researchers and to the judiciary, in order to allow improvements of the system.

46. The centralised authority that gathers the data only sometimes performs a constant monitoring process. This monitoring does not always have, however, a direct and immediate impact on the organisation of the courts or allocation of human and material resources.

47. The CCJE believes that it is in the interest of the judiciary that data collection and monitoring be performed on a regular basis, and that appropriate procedures allow a ready adjustment of the organisation of courts to changes in the caseloads.³ In order to reconcile the realisation of this need with the guarantees of independence of the judiciary (namely, with the principle of irremovability of the judge and the prohibition of removal of cases from a judge), it seems advisable to the CCJE that the authority competent for data collection and monitoring should be the independent body mentioned in paragraphs 37 and 45 of its Opinion No. 1 (2001); if another body is competent for data collection and monitoring, the states should assure that such activities remain within the public sphere in order to preserve the relevant policy interests linked with the data treatment concerning justice; the independent body should however have power to take measures necessary to adjust the court organisation to the change in caseloads.

48. Smooth co-operation should take place among all actors as to interpretation and dissemination of data.

C. CASELOAD AND CASE MANAGEMENT

49. This section covers measures that may reduce the workload of courts as well as measures to assist the handling of cases coming to court. The CCJE takes these subjects

³ See part C, letter b.

together⁴ because both are of importance to the performance by courts of their duty to provide a fair trial within a reasonable time and there is a certain overlap.

I. GENERAL

50. Measures reducing the workload of courts included measures which have that object alone and measures that have an independent value. Recommendation No. R (86) 12 identifies measures applying to varying extents to criminal and civil courts⁵. Recommendations No. R (87) 18⁶ and No. R (95) 12⁷ deal specifically with criminal cases. As examples, measures such as the removal of non-judicial tasks or ensuring a balanced workload aim directly at ensuring an appropriate workload. Consensual settlement (whether by the parties alone or through mediation⁸) has an independent worth, reflecting the values of freedom of choice and agreement, compared with a court-imposed solution. Decriminalisation of minor offences may take place to reduce workload, or it may reflect a conclusion that it is preferable that certain types of offenders (e.g. youths) should be dealt with outside the formal criminal justice system. Clarity about motives may assist to identify the merits of particular proposals.

51. The CCJE starts with miscellaneous topics where the criminal and civil positions can be taken together or compared.

(a) Court administration

52. The CCJE has identified two basic models of court management⁹. In one, the judges play little or no direct role in the management of the courts. They can devote more of their time to judging, rather than take up time on non-judicial tasks for which they may not be suited by training or inclination. Although the courts could not run properly without the judges at least being consulted about administrative matters, decisions about managing budgets, employing staff and court buildings and facilities are in the hands of the

⁴ The issues of caseload and case management were dealt with within the framework of the 1st European Conference of Judges (see paragraph 8 above).

⁵ Recommendation No. R (86) 12 of the Committee of Ministers to the member States concerning measures to prevent and reduce the excessive work-load in the courts. It covers:

- (a) conciliation (or, to use the more current term, “mediation”) procedures, including lawyers’ duty to promote conciliation;
- (b) other extra-judicial dispute resolution procedures, including arbitration (and, although not expressly mentioned, ombudsmen);
- (c) the judge’s role to promote a friendly settlement;
- (d) the removal from judges of non-judicial tasks;
- (e) trial at first instance by single judges (as opposed to panels);
- (f) reviewing the competence of courts, to ensure a balanced distribution of workload;
- (g) evaluating the impact of legal (expenses) insurance, to see whether it encourages the filing of ill-founded claims.

Recommendation No. R (94) 12 of the Committee of Ministers to the member States reminded states that their duty to provide proper working conditions for judges included “taking appropriate steps to assign non-judicial tasks to other persons” in conformity with the earlier Recommendation.

⁶ Recommendation No. R (87) 18 of the Committee of Ministers to the member States concerning the simplification of criminal justice.

⁷ The Recommendation No. R (95) 12 of the Committee of Ministers to the member States on the management of criminal justice contains a variety of recommendations to address the increase in the number of complexity of cases, unwarranted delays, budgetary constraints and increased expectations from public and staff, under the headings of (I) Setting of objectives, (II) Management of workload, (III) Management of infrastructure, (IV) Management of human resources and (V) Management of information and communication.

⁸ See section D of this Opinion.

⁹ Cf its Opinion No. 2 (2001) on the Funding and Management of Courts, paragraphs 12-13.

administrators. Since, whatever system is employed, the money to run it must come from central government, this system helps to keep judges separate from the political pressures that follow from having to meet performance targets.

53. A disadvantage is that it is judges who must deliver the primary objective of the court system, the efficient and just disposal of cases, but in this model, they have little control over the environment in which they are trying to meet this objective.

54. In the second basic system, the senior judge in a court effectively manages it as well. He or she will have at least some discretion over the spending of the budget, the hiring and firing of staff and the court building and its contents. The advantages and disadvantages are a mirror image of the first: judges are taken away from their primary role and made to undertake tasks for which their background may not have prepared them. They are more likely to find themselves in dispute with public authority. On the other hand, they have real control over the means of delivering justice in their courts and have a greater influence over policy in allocating resources.

55. Many countries have systems which fall somewhere between the two extremes. What can be said to be recognised as being increasingly important is that judges should be consulted and have the opportunity to have a say in basic decisions about the shape of modern justice and the priorities involved. The CCJE underlines the need for this.

(b) Fluctuation in workloads

56. The workload of particular courts will increase or decrease over time. Demographic changes and, in the criminal sphere, changes in criminal patterns will drive this. These may be temporary. For example, a court near a border may have a dramatic increase in cases concerning illegal immigration or a court near an airport an increase in cases concerning drug importation.

57. In some jurisdictions, judges and/or cases may be transferred relatively easily between courts, at least on a temporary basis. The CCJE regards such flexibility as generally desirable, provided that the independence of the individual judges is respected and, in the case of transfer of a judge, the judge consents. It recognises of course that it must be exercised with due regard for practical problems of access to justice. Those involved in cases and the public generally are entitled to expect that cases will normally be handled on a relatively local and convenient basis.

58. In other jurisdictions, the judge assigned is fixed from the outset, transfers of judges require their consent and transfers of cases are possible, if at all, only with the consent of the parties. There may however be mechanisms within any court, whereby, e.g., an elected praesidium of judges may decide to transfer cases from an overloaded judge to another judge within the same court.

59. If there are permanent changes in workload, corresponding changes in court size will be needed, especially in the latter category of jurisdictions. Purely economic considerations (pointing towards closure of a local court) may here clash with the parties' and public's entitlement to relatively local and accessible justice. The CCJE encourages countries to study and develop appropriate criteria to enable these considerations to be taken into account and

balanced, ensuring that, while adopting to the evolution of the workload, the changes to the courts' methods are not conceived as a way of harming the independence of judges.

60. Nevertheless, the CCJE refers to its Opinion No. 2 (2001), in particular paragraphs 4 and 5, dealing with adequate resources. The possibility to transfer judges or files from one court to other court should not encourage to accept structural lack of resources. Such flexibility cannot substitute a sufficient number of judges, which is necessary to meet the workload, which normally is to be expected.

(c) Use of a single judge

61. In criminal cases, Recommendation No. R (87) 18, paragraph D.2 states that a single judge should be used "wherever the seriousness of the offence allows". But, in serious cases involving the liberty of the subject, the collegiality of fact-finding provided by a panel of three or more judges, whether lay or professional, is an important safeguard against decisions influenced by one person's prejudices or idiosyncratic views. In practice, less serious cases are usually decided by one judge and more serious cases by a panel, although the dividing line differs considerably between countries.

62. In civil cases, the general practice in common law countries is that first instance judges (being experienced practitioners appointed relatively late in their professional career) sit singly. In other jurisdictions having a career judiciary (and in countries such as France, where *tribunaux de commerce* consist of laymen), panels are still used at first instance, although there seems to be a trend towards greater use of single judges.

63. The use of panels can compensate for lack of experience on the part of individual members. It assists to ensure consistency of quality and to impart experience to younger judges. It may be difficult to abandon this system where a young judge or lay person would otherwise be the sole member of a first instance tribunal.

64. The CCJE considers that countries should encourage training and career development to make the use of single judges easier to hear first instance cases, wherever this can be achieved commensurately with the experience and capabilities of the judges available and the nature of the proceedings in question.

(d) Judges' assistance

65. The CCJE noted in its Opinion No. 2 (2001) that in numerous countries the judges have insufficient means at their disposal. However, the CCJE points out the need that a genuine reduction of inappropriate tasks performed by judges can only take place by providing judges with assistants, with substantial qualifications in the legal field ("clerks" or "referendars"), to whom the judge may delegate, under the same judge's supervision and responsibility, the performance of specific activities such as research of legislation and case-law, drafting of easy or standardised documents, and liaising with lawyers and/or the public.

(e) Extra-judicial activity

66. The CCJE endorses the view that the non-judicial activities listed in the Appendix to Recommendation No. R (86) 12 should not normally be assigned to the judges. But there are other activities that may distract or detract from the performance of judicial duties, including

activities in relation to court administration, where adequate assistance is not provided or funded (see point (a) above) and activity as private arbitrators, which is in most countries anyway inadmissible.

67. Criticism is often also levelled at time spent by judges working on commissions and similar bodies. There is a point of view that “a judge should be judging” and other activity is a waste of a valuable resource.

68. The CCJE does not consider that too much should be made of this point. If the commission is examining an aspect relevant to judicial work and the judge can add value to the work of that body, the time spent in such work cannot be regarded as wasted. Further, a judge will be a better judge for having the broader view that can be gained by working with professionals from other disciplines and on subjects that are related to but fall outside his normal work.

69. On the other hand, there are risks in judges becoming involved in enquiries established for political reasons, involving judgments on non-legal matters which may lie outside their direct experience. Judges should consider carefully whether it is sensible for them to lend their skills and reputations to enquiries of this nature¹⁰.

(f) Legal representation and the funding of legal costs

70. In criminal cases, it is right that legal aid or free legal representation should be available without evaluation of the merits of the defendant’s position. The problem seems to lie in the great differences between the nature and seriousness of the cases for which such aid or representation is made available in different countries. But in civil cases there is concern that methods of funding litigation may encourage ill-founded or excessive litigation, and this is not confined to legal expenses insurance¹¹. In any legal system, there is a tendency for work to gravitate to areas where fees are available. Suitable control systems need to be introduced for evaluating the merits of claims in advance and eliminating from eligibility for legal aid claims where the merits and/or sum in issue do not appear to justify the likely expense¹².

II. CRIMINAL COURTS

71. The CCJE turns next to subjects of specifically criminal relevance: It is at the outset important to remember two obvious but fundamental differences between criminal and civil proceedings:

(i) Civil proceedings almost always involve two private parties. The public has a general interest in the proper disposal of civil litigation but it has no interest in the

¹⁰ The CCJE refers to its Opinion No. 3 (2002), where it considered judicial ethics.

¹¹ Concerning the last, see paragraph 26 above.

¹² A similar problem arises in respect of agreements (now permitted in the United Kingdom) for conditional fees – that is agreements whereby lawyers’ fees are not to be paid by the claimant instructing the lawyer unless the claim succeeds, but are then payable by the losing defendant together with an uplift of up to 100% which goes to the benefit of the winning claimant’s lawyers. Such agreements can be used by an impecunious claimant to vex defendants and force them to settle, since (i) the claimant and his lawyers have no incentive to agree a reasonable fee – on the contrary; and (ii) unless the claimant takes out legal expenses insurance, the defendant if he wins is unlikely to recover any costs from the losing claimant. The English courts have recently taken firmer control to limit the fees that can be agreed under such agreements and the conditions on which they can be made.

outcome of a particular case. In criminal proceedings, the public has a real interest in the proper disposal of each case.

(ii) Procedural delay or irregularity can be sanctioned in civil proceedings by orders for costs or, as a last resort, striking the action out. In criminal proceedings, the prosecution may be sanctioned in monetary terms¹³ or in an extreme situation by dismissing the prosecution. It is much more difficult to sanction a defendant for delay or irregularity, although in some countries a defence lawyer may be ordered to pay wasted costs. The defendant himself usually lacks means to meet costs orders. And the ultimate sanction of dismissal of his case is not available. The court cannot say that he has forfeited his right to a trial because he has not complied with some procedural requirement.

72. Against this background, the CCJE examines certain specific problems.

(a) Discretionary prosecution

73. Recommendation No. R (87) 18 endorses the principle of discretionary prosecution “wherever historical development and the constitution of member states allow”, and states that, “otherwise, measures having the same purpose should be devised”. In the latter countries, the duties of independent public prosecutors (*ministère public*) may require cases to be brought before a court, and, if anyone has the power to suspend prosecution, it may only be a judge.

74. The Recommendation states that any decision not to prosecute should be “founded in law” (paragraph I.2), “exercised on some general basis, such as the public interest” (paragraph II.4) and only take place “if the prosecuting authority has adequate evidence of guilt” (paragraph I.2). The CCJE interprets the third condition as meaning no more than that, unless the prosecuting authority has adequate evidence of guilt, the question of discretionary prosecution cannot sensibly arise. But, where adequate evidence has not (yet) been obtained, the CCJE considers that it should be open to an investigating authority to decide that the seriousness and other circumstances of the offence, of the suspected offender and of the victim do not justify further efforts to obtain further evidence.

75. The Recommendation further states that a decision not to pursue, or to discontinue, criminal proceedings may be accompanied by a warning or admonition or be made subject to compliance with conditions (requiring in this latter case the alleged offender’s consent); that it should not be treated as a conviction or affect the offender’s record, unless he has admitted the offence; and that it should leave unaffected the victim’s right to seek reparation. In practice, the majority of (but very far from all) countries have some degree of discretion. One distinction is between those systems where cases may only be discontinued with conditions such as compensation to the victim and those where there exists a discretion to discontinue proceedings where it is deemed not to be in the public interest to continue them.

76. Three basic structures presently appear in Europe.

¹³ One should consider if this is compatible with the public nature of the Prosecutor's Office in many countries.

(i) The prosecuting authority has neither the power to drop a case nor to impose conditions/sanctions upon an offender if the evidence justifies prosecution. It merely has the function of preparing a case for court.

(ii) The prosecuting authority has the power to decide whether or not to prosecute (i.e. to drop a case completely) even though there is sufficient evidence to prosecute.

(iii) The prosecuting authority has both the power to decide whether or not to prosecute and also the possibility of dropping the case with conditions or a fine imposed on the offender with his consent as an alternative to the case going to court. Within this broad category, there are considerable differences as to the prosecutorial power. In some countries a full range of conditions including counseling and community service may be imposed. In others, the only condition is payment of a sum of money.

77. The CCJE encourages further studies in individual states which do not presently have any system of or equivalent to discretionary prosecution so as to give effect to Recommendation No. R (87) 18. The CCJE is of the opinion that each state should consider the role that courts could have in verifying the procedure carried out, especially when the victim disputes the decision to drop a case taken by the prosecuting authority.

(b) Simplified procedures

78. All member states appear to have some forms of simplified procedure, e.g. for administrative breaches and less serious crime, although the nature and extent of such procedures vary greatly. The impact of articles 5 and 6 of the ECHR must be considered when introducing and providing for such procedures always allowing for the possibility of an appeal before the judge.

(c) Guilty pleas and plea bargaining

79. Recommendation No. R (87) 18 recommends this in principle. Its terms contemplate an early plea of guilty entered in court at an early stage of the proceedings, which is the common law model. However, few countries have a formal system of this nature. It - and more particularly what may go with it, plea bargaining and a reduced sentence for a plea of guilty - are anathema to many non-common law systems. However, a number of countries have a system of attenuated proceedings where guilt is admitted. This functions in a similar way to a formal plea to the extent of allowing less evidence to be called and the case to proceed more swiftly.

80. The CCJE identifies, in any formal system for pleading guilty, advantages (perceived by common law systems) and possible dangers, as follows:

(i) Guilty pleas

81. If a defendant can be invited and is able to give a formal indication before a judge that he admits his guilt at an early stage in proceedings, a great deal of time and money will be saved. If this takes place in a formal setting, safeguards for a defendant can be built in. A confession made to the police may have been improperly obtained. A guilty plea is an acknowledgement that it was not. Lawyers must however have a professional obligation to confirm with the defendant that he really admits the necessary legal elements of the offence.

(ii) Plea bargaining

82. This encompasses two different things: charge bargaining and sentence bargaining.

83. Charge bargaining involves an agreement with the prosecution, whether formal or informal, that the prosecution will not proceed with one or more charges if the defendant admits others (e.g. involving a less serious offence). Such a procedure will not normally involve the judge at all, although there may be provision for judicial approval to be required. The argument in favour is that, if a defendant is willing to admit nine out of ten alleged burglaries, it cannot be in the interests of efficient justice that there should always have to be a full trial of the tenth charge simply because there is enough evidence to go to trial on it.

84. Sentence bargaining also occurs in a number of countries. But the common law has recognised that there are great dangers in allowing this to involve the judge. The danger is that a defendant may fall under pressure to plead guilty to an offence which he does not really admit in order to get a more lenient sentence from the judge who will be sentencing him.

(iii) Sentence discount

85. This is a different concept, which does not depend upon any bargain with anyone, whether prosecution or judge. The concept (accepted in some countries) is that a defendant who pleads guilty should normally receive a more lenient sentence than if he had not done so – the earlier the plea the greater the discount¹⁴.

86. Some may recoil from this idea. They would argue that what the defendant has done, he has done and that any offence deserves a certain punishment, once proved, whether it is admitted or not. The argument that a plea of guilty shows remorse is, in most cases, illusory. In some cases, a principled social answer is possible for those systems where trials are largely oral. If the main witness is vulnerable (particularly children and victims of sexual assault), the oral hearing may constitute a further trauma. In such cases, by his plea avoiding the need for a hearing, a defendant has lessened or avoided harm which his actions would otherwise have caused.

87. Outside this minority of cases, such an answer is not valid. If a man is charged with a series of burglaries because of fingerprint or scientific evidence, the only witnesses he has saved from giving evidence are professionals, well used to giving evidence. The reason for encouraging pleas of guilty by a discount then is the pragmatic advantages that guilty pleas bring in (i) ensuring the conviction of offenders, who know that they are guilty, but who would otherwise have no incentive not to insist on a trial in the hope that the evidence or witnesses against them might not persuade a jury or judge and (ii) shortening cases (and avoiding delay to other trials, even in cases where a conviction would anyway have resulted from a full trial. These are real pragmatic benefits for society as a whole.

88. But it is clear that, if sentence discounts are to be permitted, certain safeguards must be in place. Care must be taken by the lawyers and the judges to ensure that the pleas of guilty are voluntary and represent real admissions of guilt. Judges should not mention or be involved in any discussions between lawyers and the defendant regarding the possibility of

¹⁴ Generally up to one-third of the length of the sentence that would otherwise be passed.

such a discount. Judges should have the power not to approve of any plea, which it appears may not be truthful or in the public interest.

89. The CCJE doubts whether it would be realistic to recommend immediate implementation of a system of sentence discount for a guilty plea in all member states. But the CCJE recommends all countries to consider whether such a system might not bring benefits to their criminal justice process.

III. CIVIL COURTS

90. Recommendation No. R (84) 5 identified nine “principles of civil procedure designed to improve the functioning of civil justice”. This was a far-sighted early Recommendation, but still in practice often unimplemented. The CCJE considers that it would, if implemented generally, offer a real guarantee of compliance with states’ duty under article 6 of the ECHR to ensure “a fair and public hearing within a reasonable time” in civil proceedings.

91. The nine principles set out core elements of the case management powers which the CCJE considers that judges should have and exercise from the commencement to the conclusion of all civil (including administrative) proceedings in order to ensure compliance with article 6 of the ECHR. The CCJE will therefore summarise and comment on these Principles in a little detail.

92. Principle 1 of the Recommendation suggests a limit in proceedings of “not more than two hearings”, one preliminary and the second for evidence, arguments and, if possible, judgment, with no adjournments allowed “except when new facts appear and in other exceptional and important circumstances” and sanctions on parties, witnesses and experts failing to comply with court time-limits or non-attendance.

93. The CCJE views this principle as a general template. Some systems take evidence over a number of hearings. Others handle very large litigation which could not possibly be conducted within the constraints of one preliminary and one final hearing. The most important point is that judges should from the outset control the timetable and duration of proceedings, setting firm dates and having (and being willing wherever appropriate to exercise) power to refuse adjournments, even against the wishes of both parties.

94. Under Principle 2, judges should have power to control abuse of procedure, by sanctions on a party or lawyers.

95. Principle 3 reflects the essence of modern case management:

“The court should (...) play an active role in ensuring the rapid progress of the proceedings, while respecting the rights of the parties, including the right to equal treatment. In particular, it should have proprio motu powers to order the parties to provide such clarifications as are necessary; to order the parties to appear in person; to raise questions of law; to call for evidence, at least in those cases where there are interests other than those of the parties at stake; to control the taking of evidence; to exclude witnesses whose possible testimony would be irrelevant to the case; to limit the number of witnesses on a particular fact where such a number would be excessive (...).”

96. Principle 4 supplements this, by providing that the court should, except in cases expressly prescribed by law, be able to decide whether to use written or oral proceedings.

97. Principle 5 addresses what is, in the CCJE's view, a vital aspect of efficient case management: the need to crystallise the parties' claims and the nature of their evidence at the earliest possible stage – *and* to exclude the admission of new facts on appeal, unless they were (or, the CCJE would suggest, could not reasonably have been) known at first instance or there was some other special reason.

98. In some countries, the rules or culture governing litigation allow parties to correct and supplement their cases and evidence almost without restriction – even at an appellate level (see further below). The CCJE considers that this is no longer acceptable, and that the time has come to re-examine such rules and change such culture. Parties are entitled to “a fair ...hearing within a reasonable time” of their claim or defence, not to indefinite opportunities to present further and different cases - and especially not so by way of a second instance hearing on appeal.

99. Principle 6 is the important injunction that “Judgment should be given at the conclusion of the proceedings or as far as possible thereafter. The judgment should be as concise as possible. It may invoke any rule of law but it should with certainty resolve, expressly or implicitly, all claims raised by the parties”. Some states or courts operate more or less with formal rules stipulating maximum period(s) within which judgments should be delivered. Principle 7 (“steps should be taken to deter the abuse of post-judgment legal remedies”) lies outside the central concerns of this Opinion.

100. Principle 8 identifies some aspects of case management, including special procedures for (a) urgent cases, (b) undisputed cases, liquidated claims and small claims, (c) specific types of case. Among these are, it states:

“simplified methods of commencing litigation; no hearing or the convening of only one hearing, or (...) of a preliminary preparatory hearing; exclusively written or oral proceedings (...); prohibition or restriction of certain exceptions and defences; more flexible rules of evidence’ no adjournments or only brief adjournments; the appointment of a court expert (...); an active role for the court in conducting the case and in calling for and taking evidence.”

101. Principle 9 emphasises the need for “the most modern technical means [to] be made available to the judicial authorities”. The CCJE endorses and underlines the relationship between efficient technology and judges' ability to keep track of and control the litigation on their or their courts' dockets.

102. The general rationale of all these principles is that civil litigation threatens to become complex and lengthy to the point where it is not possible to comply with the requirements of article 6 (1) of the ECHR either in any particular case(s) or in any other cases, the speedy and efficient conduct of which is indirectly affected by the time and resources occupied by the former case(s).

103. States have to provide adequate - but not infinite - resources and funding for civil as well as criminal litigation¹⁵. Because neither the state nor parties have infinite resources,

¹⁵ Cf CCJE Opinion No. 2 (2001).

courts must control litigation, in the interests both of individual litigants and litigants in other cases.

104. Individual cases need to be conducted “proportionately”, meaning both in a manner that enables the parties thereto to obtain justice at a cost commensurate with the issues involved and the amounts at stake, and in a manner that enables other litigants to obtain their fair share of the court’s time for their disputes.

105. In short, parties are entitled to an appropriate share of the court’s time and attention, but in deciding what is appropriate it is the judge’s duty to take into account the burden on and needs of others, including the state which is itself funding the court system and other parties who wish to use it.

106. Different countries have differing levels of implementation of the principles in Recommendation No. R (84) 5. The general direction of legal reforms of civil procedure instituted over recent years has been in this direction. Judges have been given greater power on the “formal conduct” of civil proceedings, though not over their substantive progress – they cannot, for example, take steps to introduce into a case factual evidence that the parties have not adduced. However, in some member states it is still not the judge’s role to decide whether the procedure should be oral or written, or when to resort a summary judgment or to set time limits, because these matters are fixed by law. The CCJE considers that these restrictions to the powers of control and impetus of the judge on the progress of the procedure are not compatible with efficiency of justice.

107. The CCJE will now consider certain procedures which have been adopted or suggested in this area:

(a) Pre-action protocols

108. Pre-action protocols (developed in the United Kingdom) prescribe steps which should be taken before proceedings are even commenced. They are formulated by co-operation between representatives of those interested on both sides of certain familiar types of dispute (personal injury or medical negligence or construction industry insurers, lawyers and interested bodies). Their purpose is to achieve early identification of the issues, by exchange of information and evidence, which may enable parties to avoid litigation and reach a settlement. If settlement cannot be reached they ensure that parties are in a much better position to respond to timetables imposed once proceedings are issued. The court may sanction failure to follow a pre-action protocol.

(b) Pre-action information

109. This is a feature of litigation which enables a court, before litigation is begun, to order disclosure of documents by a person likely to be a party to such proceedings, where this is desirable, amongst other reasons, to enable that person to know whether the facts justify proceedings at all, or to enable him to take better informed steps to resolve the dispute amicably without proceedings.

(c) Protective measures

110. It is important that these should be available, where required, at an early stage, including in some cases before notification of the issue of proceedings to a defendant, or their purpose may be defeated.

111. A wide range of protective measures is available. Three main groups can be identified:

- (i) measures aiming to secure enforcement, e.g. seizure or a “freezing” injunction;
- (ii) measures intended to settle the situation provisionally (for instance, in family matters); and
- (iii) measures anticipating the final judgment.

112. In many countries, the claimant has to present an appearance of right (*fumus bonis iuris*) and he must normally show a risk that, without such measures, any final judgment obtained could not be enforced (*periculum in mora*). The measure can be ordered without hearing the other party (*ex parte*) but, after making such an order, the defendant has a right to be heard, when the measure can be either confirmed or revoked.

113. Injunctive relief is also widely available in other situations in member states (sometimes only if the claim has a documentary basis), in order to settle provisionally some aspect(s) of the dispute. Common law countries have also developed the tool of the “Anton Piller” order, whereby the court can order a search for documents or other evidence in the defendant’s possession or control, which might otherwise be destroyed or concealed. “*Mesures d’instruction*” *in futurum* can fulfil a similar function in France and other countries.

(d) Commencement of proceedings

114. Most member states have provided certain simplified (including electronic) methods of commencing litigation. But differences between the traditional methods of commencing proceedings make it difficult to compare the different methods of simplification. For example, in some countries, proceedings have always been begun by steps taken in court, whereas in others the plaintiff has had to notify the claim to the defendant before going to court. In the latter states, the simplification may simply consist in allowing proceedings to be begun without this step being taken.

(e) Identification of the parties’ cases

115. The CCJE has already underlined the importance of this in its discussion (above) of Principle 5 of Recommendation No. R (85) 5. It is central to good case management that each party in civil proceedings should have to be as explicit as possible as soon as possible regarding its case – and that changes or additions to a party’s case should not be made as of right, but should require the judge’s permission, which should only be given or withheld having regard to the stage which the proceedings have reached and the effect on their conduct as well as on other parties.

(f) Summary proceedings

116. There are major differences in terminology in this area. Not all states understand the concept of summary, simplified and accelerated procedures in the same sense. Some only

speak of procedures as summary when their outcome does not have the force of *res judicata*, and refer to simplified procedures when certain steps have been eliminated or made easy, and to accelerated procedures when time limits have been abbreviated compared with ordinary proceedings. These features can of course coincide, so that a procedure can, at the same time, be summary, simplified and accelerated.

117. Common law jurisdictions in contrast use the word “summary” to cover simplified and accelerated procedures leading to a final (*res judicata*) decision, although they also have procedures for provisional judgments, e.g. procedures whereby the court may, if provisionally satisfied that a defendant will be liable in debt or damages, order an “interim” payment of not more than a “reasonable proportion” of the liability to be paid to the claimant. If at a trial the claimant then fails to prove his case, the claimant must repay the interim payment, with interest.

118. Two civil law procedures are of particular importance: i) the order for payment (*Mahnverfahren, injonction de payer*); ii) the *référé* or, in the Netherlands, *kort geding*:

(i) The order for payment (or *Mahnverfahren*) is a procedure especially suited to uncontested monetary debts. At a claimant’s request, the court issues an order to pay without having heard the other party. In some countries a documentary basis is required for issuing the order, in other countries it is sufficient with the statement done by the claimant. If the defendant remains passive during the delay established by the law, the order becomes enforceable like an ordinary judgment. If the defendant objects, the plaintiff has to start a normal procedure if he wants to recover his debt. It is the debtor’s silence that transforms the initial order of payment into a judicial and enforceable decision that has the force of *res judicata*. In some countries a court clerk is in charge of the procedure. It is a written procedure, which permits computerized treatment (already in operation in some countries). Many cases are determined by this procedure.

(ii) The procedure of *référé* or *kort geding* enables a judge to decide any question after hearing the parties on the basis of the sometimes limited evidence that they are able to put before the court within a short time-limit. A decision is then rendered either immediately after the hearing or within a very short time. This is directly enforceable but the judgment does not have the force of *res judicata*. A party is free to commence a procedure on the merits, but if none is initiated, the *référé* judgment will determine the rights and obligations of the parties. Thus, the procedure on the merits will often never take place. Because of the importance of the *référé*, an experienced judge (often the president of the court) is normally in charge of this kind of procedure. The *référé* procedure in practice also assists to alleviate a court’s workload, and to avoid the delays inherent in some states in ordinary civil proceedings.

(g) Interlocutory judgments

119. The power to “direct a separate trial of any issue” can have real importance. To take an example, matters fundamental to jurisdiction should, in the CCJE’s view, be resolved by a separate judgment at the outset of proceedings. This avoids the need for unnecessary, costly and time-consuming argument and investigation on the merits. But in some countries there exists no procedure for giving interlocutory judgments, and in others any interlocutory judgment can only be appealed after the first instance court has gone into and determined the rest of the case.

120. The CCJE recognises that care is necessary in the selection and definition of issues suitable to be dealt with by interlocutory judgment. There is a risk that time, effort and costs may be spent on an interlocutory issue (or on an appeal in an interlocutory issue), when it would be speedier and simpler to resolve the rest of the case. With that caveat, the CCJE recommends that the procedure for giving interlocutory judgments should be available, and that immediate appeals in respect of interlocutory judgments should normally be permissible.

121. The remedies for avoiding delays due to such appeals should consist in either a requirement to obtain the permission of the court of first instance or appeal for any immediate appeal and/or a speedy appellate system.

(h) Evidence and documentation

122. Most states have flexible rules of evidence. In protective and summary procedures, the judgment will not necessarily be based on full evidence. In protective measures, the claimant need only present an appearance of his right (*prima facie* evidence) in civil law countries, or need normally only show an arguable case on the facts in common law countries.

123. There are important differences in relation to disclosure of documentation between common law and civil law countries. In the former each party must voluntarily make disclosure of relevant documents (that is documents on which he relies in support of his contentions or which materially affect his case or support the other party's case). The requirement to disclose unfavourable as well as favourable documents often proves a considerable incentive to settlement - either before or after disclosure has had to be made. It is also a considerable aid to fact-finding, at trial.

124. However, this procedure does rely on the honesty of legal advisers in advising their clients regarding production of documents, and it also involves legal and other costs in searching for and producing documents. It may be said therefore to be particularly suitable for larger or more complex cases.

125. In many other countries (especially civil law systems) a party can only gain access to a document under his opponent's control and upon which the latter does not intend to rely, by applying for an order that the particular document be made available. This implies that the party seeking the order has to know previously the existence of the document and has to identify it, which is not always easy.

(i) General case management powers

126. These are important at every stage of civil proceedings, to enable cases to be managed appropriately and proportionately. Judges should be able to exercise them by giving directions on paper, without the parties necessarily having any right to an oral hearing. They should be exercisable as contemplated by Recommendation No. R (84) 5 both in relation to pre-trial preparation and in relation to any trial.

(j) Incentives in respect of costs and interest

127. English law and some other systems have introduced provisions for offers to settle and payments into court, which can have severe financial consequences for a party failing at trial to better the other side's previous offer. A claimant may offer to accept, or a defendant may

offer to pay, less than the full claim. (In the case of a money claim, the defendant must also follow up his offer, by paying the money into court.) If a claimant gets more than he offered to accept, or a defendant is ordered to pay less than he offered to pay, then, save in the case of small claims, adverse consequences may follow in costs, and also, for a defendant, in interest.

128. In some countries, where lawyers' fees are regulated by statute, the legislature, in order to provide an incentive for lawyers to encourage settlement, has raised the statutory settlement fees for lawyers to 150% of the normal full fee.

(k) Enforcement

129. There are at present differences in attitude to enforcement of first instance judgments. In common law jurisdictions, the general rule is that such judgments are automatically enforceable, unless the court for good reason orders a stay. Good reason could include any unlikelihood of recovering monies paid, if the judgment were later set aside on a successful appeal. In civil law countries, in contrast, the position is sometimes regulated by law, sometimes left to the judge to decide. The judge may then grant provisional enforcement of the judgment, especially if there is a danger that, during the delay involved in any appeal, a situation might occur or be brought about by the losing party whereby the judgment would never be honoured. Normally, however, the winning party would then be required to provide security for any damage that might occur as a result of the enforcement if the judgment was reversed on appeal. It can be said to be usual in the case of money judgments for the judgment to be made enforceable by law or by the judge unless the debtor puts up security.

130. The CCJE considers that, to ensure the efficiency of justice, all countries should have procedures for provisional enforcement, which should normally be ordered, subject to satisfactory protection being made available to the losing party against the event of a successful appeal.

(l) Appeals

131. The different appellate systems divide into two broad groups: (a) appeals limited to revision on matters of law and the assessment of evidence, with no possibility on appeal of fresh new evidence or of a decision on any point not raised before the first instance judge; and (b) appeals in which such limitations do not exist and the court can hear new evidence and take into account new points raised in the proceedings before the appellate court.

132. There are intermediate systems, which in some cases or at some instances permit what is described as the "ordinary remedy" of an unlimited appeal, but in other cases or at other instances (e.g. in a court of cassation or Supreme Court) only permit the "extra-ordinary remedy" of a "review" on limited basis and in specific circumstances.

133. The difference between (a) and (b) is sometimes explained as being that in the former group an appeal is viewed primarily as a technique for ensuring uniformity in the application of legal principles (*ius constitutionis*), whereas in the latter group it is viewed as a procedural right, the main function of which is to give a party another opportunity (*ius litigationis*). That raises the question whether it is necessary or desirable that a party should have such a procedural right at any level, even a second instance level.

134. The CCJE has, in considering Principle 5 of Recommendation No. R (84) 5 (above), pointed out that nothing in article 6 of the ECHR requires the right to the appeal.

135. Although conscious of the weight of tradition in some countries favouring an unlimited right to (in effect) relitigate issues on appeal to a second instance, the CCJE wishes to indicate its disapproval in principle of this approach. There ought to be limitations on a party's right to adduce fresh evidence or to raise fresh points of law. An appeal ought not to be or to be regarded as an unlimited opportunity to make corrections in respect of matters of fact or law which a party could and should have put before a first instance judge. This undermines the role of the first instance judge, and has the potential to make irrelevant any case management by a first instance judge.

136. In the CCJE's view, it also tends to frustrate the legitimate expectations of the other party to the litigation, and to increase the length, cost and strain of litigation.

137. The CCJE notes, however, that even in countries accepting a *ius litigationis*, mechanisms (e.g. the power to declare hopeless appeals to be "manifestly ill-founded") have been developed which constitute a partial safety valve, reducing to some extent the overloading of the appellate system.

138. The CCJE therefore recommends that controls on unmeritorious appeal be introduced, either by provision of a leave to appeal to be granted by a court or by an equivalent mechanism that ensures that the speedy disposition of meritorious appeals is not impaired.

D. ALTERNATIVE DISPUTE RESOLUTION (ADR)

139. The Council of Europe has produced several instruments concerning alternative dispute resolution methods (ADR).¹⁶ Being aware of the many positive effects of ADR, among which is its potential to lead to speedy settlement of disputes, the CCJE proposed that ADR be one of the items to be dealt with at the 1st European Conference of Judges, within the larger framework of "case management".

140. The 1st European Conference of Judges demonstrated the importance of ADR in the early settlement of disputes.¹⁷ It is apparent that while ADR must not be regarded as a perfect way of alleviating the courts' excess workload, it is definitely useful and effective because it places the accent on an agreement between the parties, which is always preferable to an imposed judgement.

141. In the future the CCJE may engage in specific consideration of ADR. At present, within the scope of an opinion concerned with the reasonable duration of trials and the role of judges in the trial, the CCJE considers it necessary to encourage the development of ADR

¹⁶The Council of Europe has produced the following Recommendations relating to alternative dispute resolution:
- Recommendation No R (98) 1 of the Committee of Ministers to the member States on family mediation;
- Recommendation No R (99) 19 of the Committee of Ministers to the member States concerning mediation in penal matters;
- Recommendation Rec (2001) 9 of the Committee of Ministers to the member States on alternatives to litigation between administrative authorities and private parties;
- Recommendation Rec (2002) 10 of the Committee of Ministers to the member States on mediation in civil matters.

¹⁷ The Conference mainly concentrated on ADR in civil matters.

schemes, which are particularly suited to certain types of litigation, and to increase public awareness of their existence, the way they operate and their cost.

142. Since ADR and the justice system share similar objectives, it is essential that legal aid should be available for ADR as it is for standard court proceedings. However, both legal aid resources as well as any other public expenditures to support ADR should make use of a special budget, so that the corresponding expenses are not charged to the operating budget of the courts (see paragraph 23 above).

143. The discussions held within the CCJE focused specifically on the scope of mediation, on the role of the judge in mediation during court proceedings, on confidentiality of mediation operations, on the possibility that courts supervise training/accreditation in mediation and judges act as mediators and on the necessity of a judicial confirmation of the mediation agreement between the parties. Separate considerations were made, when relevant, for criminal law matters, on one hand, and civil law (and administrative law) matters, on the other hand.

144. As for the scope of ADR, the relevant Council of Europe recommendations show that it is not confined to civil proceedings. The scope of mediation in criminal matters raises specific questions, on which the CCJE's discussions concentrated.

145. Unlike ADR in civil matters, criminal mediation is not useful to alleviate the current workload of the court system, although it may have a preventative effect in respect of future crimes.

146. Recommendation No. R (99) 19 concentrates solely on "mediation" between offender and victim. However, although there is a need for further research, the CCJE considers that nowadays the wider debate concerns the broader concept of "restorative justice", i.e. procedures allowing diversion from the normal criminal process before it starts (soon after arrest), after it has started as part of the sentencing process or even during the execution of punishment. Restorative justice provides an opportunity for victims, offenders and sometimes representatives of the community to communicate, indirectly or directly, if necessary through a facilitator, about an offence (usually a minor offence concerning property or offences by young offenders) and how to repair the harm caused. This can lead to the offender making reparation - either to the victim, if the victim wishes, or to the wider community, for example by repairing property, cleaning premises, etc.

147. Therefore the scope of restorative justice in criminal matters is not as wide as ADR in civil matters; society may set "boundaries of permission" outside which it would not support the resolution of a criminal case other than by the normal court process. In contrast with civil cases, the community will also often be a proper participant in the process of restorative justice. Reconnecting offenders with the community they have harmed, including through repair of some of the damage they have caused, and involving the community in creating solutions to crime in their area, is at the heart of much restorative justice.

148. In a number of respects schemes for restorative justice require more careful implementation than ADR in civil disputes, as bringing victims and offenders into contact is a much more sensitive process than bringing two parties to a civil dispute together; its success depends in part on a cultural change for criminal justice practitioners used to the normal trial and punishment model of justice.

149. The CCJE discussed the role of the judge in mediation decisions considering first of all that recourse to mediation, in civil and administrative proceedings, may be chosen on the parties' initiative or, alternatively, the judge may be allowed to recommend that the parties appear before a mediator, with their refusal to do so sometimes being relevant to costs.

150. The second system has the advantage of having parties, who are in principle reluctant to seek an agreement, initiate a discussion; in practice, this step can in itself prove decisive in breaking the deadlock in a contentious situation.

151. In any case, the parties should also be allowed to refuse recourse to mediation; such a refusal should not infringe the party's right to have his/her case decided.

152. As for the role of the judge in criminal mediation, it is evident that, if a criminal case is diverted from the normal prosecution process before proceedings have been started, the judge will usually have no role. If the case is diverted to restorative justice after it has started, it will require an order of a judge so diverting it. There are also differences relating to the adoption, in the several countries, of the principles of discretionary or mandatory prosecution.

153. In view of the fact that within the restorative justice system obligations are imposed on the offender and restrictions may apply in the victim's interest, the CCJE considers that it may be good practice to give to all restorative justice arrangements (or, if appropriate, those that are more than mere warnings with no legal relevance) the formality of judicial approval. This will allow control of the offences that might give rise to restorative justice and of the conditions governing respect for the right to a fair trial and other provisions of the ECHR.

154. Must mediation operations be confidential? The CCJE's discussions show that this question must be answered in the affirmative regarding civil and administrative disputes. Seeking an agreement means, in general, that the parties must be able to talk to the mediator in confidence about possible proposals for settlement, without it being possible for this information to be divulged.

155. However, it would be useful to specify whether confidentiality should be absolute or whether it may be lifted by agreement between the parties. Also, one should ask whether the documents used during mediation may be produced in court if mediation has failed.

156. As the mediation procedure is based on agreement, it would seem possible to the CCJE to lift confidentiality in the event of an agreement between the parties; on the other hand, without such agreement it is inappropriate for the judge to take account of documents revealing one party's attitudes or the proposals made by the mediator for settling the dispute. It is open to question whether and how far the judge may (as permitted in some jurisdictions) consider refusal to access mediation or to accept a friendly settlement when making orders relating to trial expenses or costs.

157. As for confidentiality in ADR in criminal matters, the CCJE considers that, since the offender must be encouraged to speak frankly during the restorative justice process, confidentiality should also apply to this type of ADR. This poses the problem, especially in those systems where prosecution is obligatory, of what should be the consequences of

admission of other offences on the part of the offender or of persons who are not participating in the mediation process.¹⁸

158. Both in criminal and civil-administrative matters, the CCJE emphasises the need that ADR schemes be closely associated with the court system, since mediators should possess relevant skills and qualifications, as well as the necessary impartiality and independence for such a public service.

159. Therefore the CCJE emphasises the importance of training in mediation.

160. Recourse to mediators or mediation institutions outside the judicial system is an appropriate arrangement, provided that the judicial institution can supervise the competence of these mediators or private institutions as well as the arrangements for their intervention and their cost. The CCJE considers that appropriate legal provisions or court practice should confer the judge the power to direct the parties to appear before a judicially appointed mediator.

161. The CCJE considers it possible for judges to act as mediators themselves. This allows judicial know-how to be placed at the disposal of the public. It is nevertheless essential to preserve their impartiality in particular by providing that they will perform this task in disputes other than those they are required to hear and decide. The CCJE considers that a similar measure be taken within those systems that already provide for the duty of the judge to attempt conciliation of the parties to a case.

162. Judicial supervision of appointment of mediators is only one of the elements of a system designed to prevent dangers connected with privatisation of dispute resolution (and possible restrictions of substantial and procedural rights of the parties) that may result from a wide recourse to ADR. The CCJE considers that it is also essential that courts control the mediation proceedings and their outcome.

163. It emerged from the CCJE's discussions that in some circumstances the parties may be granted the right to settle a dispute by an agreement which is not subject to confirmation by the judge. However, such confirmation might prove essential in certain cases, particularly where enforcement measures have to be considered.

164. At least in this case the judge must enjoy substantial supervisory powers, particularly concerning respect for equality between the parties, the reality of their consent to the measures provided for by the agreement and respect for the law and for public policy. As for specific aspects concerning criminal mediation, the CCJE may recall here the considerations in paragraph 147 above.

SUMMARY OF THE RECOMMENDATIONS AND CONCLUSIONS

A. Access to justice

A.1. States should provide dissemination of suitable information on the functioning of the judicial system (nature of proceedings available; duration of proceedings in the average and in the various courts; costs and risks involved in case of wrongful use of legal channels;

¹⁸ Paragraph 14 of Appendix to Recommendation No. R (99) 19 only states that "Participation in mediation should not be used as evidence of admission of guilt in subsequent legal proceedings".

alternative means of settling disputes offered to parties; landmark decisions delivered by the courts - see paragraphs 12-15 above).

A.2. In particular:

- citizens' guides should be made available;
- courts themselves should participate in disseminating the information;
- education programmes should include a description of the judicial system and should offer visits to courts (see paragraphs 16-17 above).

A.3. Simplified and standardised formats for the legal documents needed to initiate and proceed with court actions should be adopted, at least for some sectors of litigation (see paragraph 18 above).

A.4. Technology should be developed whereby litigants may, via computer facilities:

- obtain the necessary documents for bringing an action before a court;
- be put directly in touch with the courts;
- obtain full information, even before proceedings are instituted, as to the nature and the amount of the costs they will have to bear, and indication of the foreseeable duration of the proceedings up to the judgment (see paragraph 19 above).

A.5. The remuneration of lawyers and court officers should be fixed in such a way as not to encourage needless procedural steps (see paragraph 28 above).

A.6. Provision should be made, pursuant to Recommendation No. R (84) 5 (principle 2-1 in the appendix), for sanctioning abuse of court procedure (see paragraph 28 above).

A.7. States should guarantee the right for a litigant to plead his or her case before a court either personally or through the representative of his or her choice, particularly when simplified proceedings, litigation of minor financial importance, and consumers' cases are involved; there should be, however, provision enabling the judge, as an exceptional measure, to order the intervention of counsel if the case presents particular problems (see paragraphs 24-26 above).

A.8. A legal aid system should be organised by the State to enable everyone to enjoy access to justice, covering not only court costs but also legal advice as to the wisdom or the necessity of bringing an action; it should not be reserved for the neediest persons but should also be available, at least in part, to those whose average income does not enable them to bear the cost of an action unaided; the judge should be able to take part in decisions concerning the grant of aid, making sure that the obligation of the objective impartiality is respected (see paragraphs 21 and 22 above).

A.9. Legal aid ought to be financed by a public authority and covered by a special budget, so that the corresponding expenses are not charged to the operating budget of the courts (see paragraph 23 above).

B. Quality of the justice system and its assessment; quantitative statistical data; monitoring procedures

B.1. The quality of the justice system depends both on the quality of infra-structures, which may be measured with criteria similar to those employed for other public services, and on the

ability performance of legal professionals (judges, but also lawyers, prosecutors and clerks), whose work may be only measured against the benchmarks of law and of judicial or professional practice and deontology (see paragraph 31 above).

B.2. It is necessary to assess the quality of judicial activity, with reference also to social and economic efficiency, through criteria that are sometimes similar to those employed for other public services (see paragraphs 32 and 33 above).

B.3. The evaluation of the activity of the court system as a whole or of each individual court or local group of courts should not be confused with the evaluation of the professional ability of every single judge, which has other purposes. Similar considerations may apply to the activities of other legal professionals involved in the functioning of the court system (see paragraphs 33 and 34 above).

B.4. The overlap between quality assessment of justice and professional evaluation of a judge should also be avoided when designing judicial statistics; in particular, the use of reversal rates as the only or even necessarily an important indicator to assess the quality of the judicial activity is inappropriate; the same consideration applies to other systems in which some assessment, through systems different from the observation of the reversal rate, is possible as to an individual decision taken by judges (see paragraphs 35-37 above).

B.5. Although no generally accepted criteria exist at this moment as to data to be collected, the goal of data collection should consist in the evaluating justice in its wider context, i.e. in the interactions of justice with other variables (judges and lawyers, justice and police, case law and legislation, etc.), as most malfunctions of the justice system derive from lack of coordination between several actors (see paragraph 39 above).

B.6. It is also crucial to underline, in the data collection procedures, the interaction between the quality of justice and the presence of adequate infra-structures and support personnel (see paragraphs 31 and 39 above).

B.7. Furthermore, "quality" of justice should not be understood as a synonym for mere "productivity" of the judicial system; a qualitative approach should address rather the ability of the system to match the demand of justice in conformity with the general goals of the legal system, of which speed of procedures is only one element (see paragraphs 38-42 above).

B.8. Quality indicators should be chosen by wide consensus among legal professionals (see paragraph 43 above).

B.9. Data collection and monitoring should be performed on a regular basis, and procedures carried out by the independent body should allow a ready adjustment of the organisation of courts to changes in the caseloads (see paragraphs 46-48 above).

B.10. In order to reconcile the realisation of this need with the guarantees of independence of the judiciary, the independent body mentioned in paragraphs 37 and 45 of the CCJE's Opinion No. 1 (2001) should be competent for the choice and the collection of "quality" data, the design of the data collection procedure, the evaluation of results, its dissemination as feedback, as well as the monitoring and follow-up procedures. The States should, in any case, assure that such activities remain within the public sphere in order to preserve the relevant

policy interests linked with the data treatment concerning justice (see paragraphs 43-48 above).

C. Case-load and case management

General

C.1. The recommendations in Recommendation No. R (87) 18 regarding reduction in the workload of courts should be implemented.

C.2. States should provide adequate resources for criminal and civil courts, and judges should (even where they have no direct administrative role) be consulted and have a say in basic decisions about the shape of modern justice and the priorities involved (see paragraphs 52-55 above).

C.3. Judges should encourage consensual settlement (whether by the parties alone or through mediation) since it has an independent worth, reflecting the values of freedom of choice and agreement, compared with a court-imposed solution (see paragraph 50 above and section D below).

C.4. It is generally desirable, in countries whose constitutional arrangements so permit, that there should be some flexibility enabling judges and/or cases to be transferred relatively easily between courts, at least on a temporary basis and subject to their consent, to cater for fluctuations in workload. Regard should always be had, when considering court closures, to the right of citizens to have convenient access to their courts (see paragraph 57-60 above).

C.5. The use of a single judge should be facilitated to determine guilt or innocence within conditions mentioned in paragraphs 61-64 above. The CCJE also considers that countries should encourage training and career development to make full use of single judges to hear first instance cases, wherever this can be achieved commensurately with the experience and capabilities of the judges available and the nature of the proceedings (see paragraphs 61-64 above).

C.6. The judges should have one or more personal assistants having good qualifications in the legal field to which they can delegate certain activities (see paragraph 65 above).

C.7. The non-judicial activities listed in Recommendation No. R (86) 12 should be assigned to bodies or individuals other than judges, and attention should be given to the risks inherent when judges are permitted to undertake other private work, which might impact on their public duties. Judges should not be discouraged from serving on relevant commissions and other out-of-court bodies but should exercise particular caution before accepting appointment in cases where essentially non-legal judgments are involved (see paragraphs 66-69 above).

C.8. In criminal cases, legal aid or free legal representation should be available without evaluation of the merits of the defendant's position. The CCJE recommends further study of the differences between the nature and seriousness of the cases for which such aid or representation is available in different countries. In civil cases suitable control systems need to be introduced for evaluating the merits of claims in advance (see paragraph 70 above).

C.9. In respect of all aspects of case management, comparative study of other states' experience offers valuable insights into specific procedural measures that may be introduced, a number of which are discussed in more details in the text above.

Criminal cases

C.10. Further studies ought to be encouraged in individual states which do not presently have any system of or equivalent to discretionary prosecution so as to give effect to Recommendation No. R (87) 18 (see paragraphs 73-77 above).

C.11. All countries should consider whether a system of sentence discount for a guilty plea might not bring benefits to their criminal justice. Any such plea must be in court and be taken by a judge. Lawyers should have a professional obligation to ensure that the plea of guilty is entered voluntarily and with the intention to admit each of the elements of the offence charged (see paragraphs 79- 89 above).

Civil cases

C.12. To comply with their duties under article 6 of the ECHR to ensure "a fair and public hearing within a reasonable time", states should provide adequate resources and courts should conduct individual cases in a manner which is fair and proportionate as between the particular parties and takes into account the interests of other litigants and the public generally; that means conducting such litigation in a manner that enables the parties thereto to obtain justice at a cost commensurate with the issues involved, the amounts at stake and (without prejudice to the state's duty to provide appropriate resources) the court's own resources and that enables other litigants to obtain their fair share of the court's time for their own disputes (see paragraphs 103-104 above).

C.13. The key to conducting litigation proportionately is active case management by judges, the core principles of which are stated in Recommendation No. R (84) 5. The most important point is that judges should from the outset and throughout legal proceedings control the timetable and duration of proceedings, setting firm dates and having power to refuse adjournments, even against the parties' wishes (see paragraphs 90-102 above).

C.14. Parties should be required to define and commit themselves to their cases and evidence at an early stage, and judges should have power, both at first instance and on any appeal, to exclude amendments and/or new material after that stage (see paragraphs 122-125 above).

C.15. States should introduce (a) effective protective measures, (b) summary, simplified and/or abbreviated procedures and (c) procedures for early determination of preliminary issues (including jurisdictional issues) and for the speedy resolution of any appeal in respect of such preliminary issues (see paragraphs 111-131 above).

C.16. Court judgments should be immediately enforceable, notwithstanding any appeal, subject to provision of security where appropriate to protect the losing party in the event of a successful appeal (see paragraphs 129-130 above).

C.17. Countries should give consideration to the possibility of introducing into their systems controls on unmeritorious appeals, in order to ensure that the speedy disposition of meritorious appeals is not impaired (see paragraph 138 above).

D. Alternative dispute resolution (ADR)

D.1. It is necessary to encourage the development of ADR schemes and to increase public awareness of their existence, the way they operate and their cost (see paragraph 141 above).

D.2. Legal aid should be available for ADR as it is for standard court proceedings; both legal aid resources as well as any other public expenditures to support ADR should make use of a special budget, so that the corresponding expenses are not charged to the operating budget of the courts (see paragraph 142 above).

D.3. Although, unlike ADR in civil matters, criminal mediation is not useful to alleviate the current workload of the court system, it may have a preventative effect in respect of future crimes; since Recommendation No. R (99) 19 concentrates solely on "mediation" between offender and victim, there is a need for further research on the broader concept of "restorative justice", i.e. procedures allowing diversion from the normal criminal process before it starts (soon after arrest), after it has started as part of the sentencing process or even during the execution of punishment; since schemes for restorative justice require more careful implementation than ADR in civil disputes, as bringing victims and offenders into contact is a much more sensitive process than bringing two parties to a civil dispute together, the success of such schemes depends in part on a cultural change for criminal justice practitioners used to the normal trial and punishment model of justice (see paragraphs 146-149 above).

D.4. Recourse to mediation, in civil and administrative proceedings, may be chosen on the parties' initiative or, alternatively, the judge should be allowed to recommend it; the parties should be allowed to refuse recourse to mediation; such a refusal should not infringe the party's right to have his/her case decided (see paragraphs 150-152 above).

D.5. In criminal mediation, if a criminal case is diverted from the normal prosecution process after it has started, it should require an order of a judge; all restorative justice arrangements (or, if appropriate, those that are more than mere warnings with no legal relevance) should have the formality of judicial approval (see paragraphs 151-152 above).

D.6. Information provided during mediation operations in civil and administrative disputes should be confidential; confidentiality may be lifted in the event of an agreement between the parties; it is open to question whether and how far the judge may consider refusal to access mediation or to accept a friendly settlement when making orders relating to trial expenses or costs (see paragraphs 154-156 above).

D.7. Confidentiality should also apply to ADR in criminal matters, especially in those countries where prosecution is obligatory. This poses the problem of what should be the consequences of admission of other offences on the part of the offender or of persons who are not participating in the mediation process (see paragraph 157 above).

D.8. Both in criminal and civil-administrative matters, ADR schemes should be closely associated with the court system; appropriate legal provisions or court practice should confer the judge the power to direct the parties to appear before a judicially appointed, trained

mediator, who may prove possession of relevant skills and qualifications, as well as of the necessary impartiality and independence for such a public service (see paragraphs 157-159 and 161 above).

D.9. Judges may act as mediators themselves, since this allows judicial know-how to be placed at the disposal of the public; it is nevertheless essential to preserve their impartiality in particular by providing that they will perform this task in disputes other than those they are required to hear and decide (see paragraph 161 above).

D.10. ADR settlement agreements should be subject to confirmation by the judge, particularly where enforcement measures have to be considered; in this case the judge must enjoy substantial supervisory powers, particularly concerning respect for equality between the parties, the reality of their consent to the measures provided for by the agreement and respect for the law and for public policy; as for specific aspects concerning criminal mediation, further guarantees should apply (see paragraphs 162-164 above).

APPENDIX**List of the Council of Europe texts and instruments cited in this Opinion**

Opinion No. 1 (2001) of the Consultative Council of European Judges (CCJE) on standards concerning the independence of the judiciary and the irremovability of judges.

Opinion No. 2 (2001) of the Consultative Council of European Judges (CCJE) on the funding and management of courts with reference to the efficiency of the judiciary and to article 6 of the European Convention on Human Rights.

Opinion No. 3 (2002) of the Consultative Council of European Judges (CCJE) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality.

Resolution (78) 8 on legal aid and advice.

Recommendation No. R (84) 5 of the Committee of Ministers to the member States on the principles of civil procedure designed to improve the functioning of justice.

Recommendation No. R (86) 12 of the Committee of Ministers to the member States concerning measures to prevent and reduce the excessive workload in the courts.

Recommendation No. R (94) 12 of the Committee of Ministers to the member States on the independence, efficiency and role of judges.

Recommendation No. R (87) 18 of the Committee of Ministers to the member States concerning the simplification of criminal justice.

Recommendation No. R (95) 12 of the Committee of Ministers to the member States on the management of criminal justice.

Recommendation No. R (98) 1 of the Committee of Ministers to the member States on family mediation.

Recommendation No. R (99) 19 of the Committee of Ministers to the member States concerning mediation in penal matters.

Recommendation Rec (2001) 9 of the Committee of Ministers to the member States on alternatives to litigation between administrative authorities and private parties.

Recommendation Rec (2002) 10 of the Committee of Ministers to the member States on mediation in civil matters.