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OPINION ON THE CONCEPT AND DRAFT OF THE “UNIVERSAL PRINCIPLES OF THE ACTIVITY OF THE JUDICIAL COUNCILS”

UZBEKISTAN

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Based on an unofficial English translation of the Concept Note and Draft Principles provided by Permanent Mission of the Republic of Uzbekistan to the OSCE



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EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

The independence of the judiciary is a fundamental principle and an essential element of any democratic state based on the rule of law and an integral part of the fundamental democratic principle of the separation of powers. Ensuring the independence and impartiality of a court or tribunal is as much a matter of principle as it is a matter of management.

It is welcome that Uzbekistan has taken steps to formulate and streamline principles intended to guide judicial bodies and their independent functioning in accordance with their respective mandates. The Concept Note and the Draft of the “Universal Principles of the Activity of the Judicial Councils” distinguishes between general and special principles for this purpose. At the same time the manner in which these principles are drafted, the structure and terminology used raise concerns as to the compatibility of these Draft Principles with existing standards and, ultimately, impair their practicality.

It is important that the universal principles reflect good and long-standing practices that are widely accepted and that may be upgraded to universal ones. It would therefore be welcome to reaffirm existing standards through their inclusion throughout the Concept Note and Draft Principles.

Another aspect that requires revision in the Concept Note and Draft Principles is the terminology, i.e., the language that is offered for titles of the principles and their content, which ultimately compromises the essence of the Draft Principles. The majority of principles either move away from already existing terms or introduce overlapping and mischaracterised ones.

The principles should be neutral, objective and above all be formulated and understood from the perspective of existing international principles pertaining to judicial or similar bodies.

More specifically, and in addition to what is stated above, ODIHR makes the following recommendations to improve the Concept Note and Draft Principles:

A. As to the general aspects of the Concept Note and Draft Principles:

1. To include references to relevant human rights standards, especially on the independence of the judiciary, and rule of law principles throughout the Concept Note and Draft Principles; [par 41]
2. To draft the Concept Note and Draft Principles in a manner that avoids confusing language and ambiguous terminology and phrases; [par 42]
3. To harmonize the definition of judicial councils provided in the Concept Note and Draft Principles with existing definitions based on international standards and guidelines; [par 43]

B. As to the general principles section of the Draft Principles:

1. To clarify the legal basis for the establishment of judicial councils in line with existing international documents and good practices; [par 47]

2. To reflect minimum standards and principles on selection and appointment processes in the Draft Principles; [par 63]
 3. To address the topics of immunity and liability of members of judicial councils with careful consideration, including using terminology in line with international standards and conditions that are clear and unambiguous; [par 65]
 4. To highlight security of tenure explicitly in principles concerning dismissal or removal of judicial council members; [par 68]
- C. As to the principles on the functions of judicial bodies:
1. To expand the principle of selection, appointment and promotion of judges with additional criteria, including the principles of equality and integrity, independence and impartiality; [par 71]
 2. To highlight the issue of financial support separately, reflecting that it is fundamental for the independent functioning of judicial councils to have their own premises, a secretariat and a sufficient number of qualified staff to perform their functions independently and autonomously; [par 75]
 3. To provide clear and precise criteria for the initiation of disciplinary proceedings against judges, while overall respecting the rule of law, and human rights of the judges involved; [par 76]
- D. To ensure that accountability of judicial councils is made an integral part of the Concept Note and Draft Principles; [par 84]
- E. As to the drafting process:
1. To ensure that the Concept and Draft Principles are subjected to inclusive, extensive and effective consultations, including with civil society and international governmental and non-governmental actors, and other relevant stakeholders; [par 88]
 2. To use a gender-neutral word, whenever possible, in reference to post-holders or certain categories of individuals; [par 89].

These and additional Recommendations are included throughout the text of this Opinion, highlighted in bold.

As part of its mandate to assist OSCE participating States in implementing OSCE commitments, the OSCE/ODIHR reviews, upon request, draft and existing legislation

to assess their compliance with international human rights standards and OSCE commitments and provides concrete recommendations for improvement.

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I. INTRODUCTION

1. On 5 August 2021 the Permanent Mission of Uzbekistan to the OSCE sent to the OSCE Office for Democratic Institutions and Human Rights (hereinafter “ODIHR”) a request for a legal review of the “Concept and the Draft of “Universal principles of the activity of the Judicial Councils” (hereinafter “the Concept Note” and “Draft Principles” respectively).
2. On 11 August 2021, ODIHR responded to this request, confirming the Office’s readiness to prepare a legal opinion on the compliance of the Concept Note and Draft Principles with international human rights standards and OSCE human dimension commitments.
3. This Opinion was prepared in response to the above request. ODIHR conducted this assessment within its mandate to assist the OSCE participating States in the implementation of their OSCE commitments.¹

II. SCOPE OF THE OPINION

4. The scope of this Opinion covers only the Concept Note and Draft Principles submitted for review. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional frameworks regulating judicial bodies.
5. The Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, it focuses more on those aspects that require amendments or improvements than on aspects of the Concept Note and Draft Principles that are not problematic. The ensuing legal analysis is based on international and regional human rights and rule of law standards, norms and recommendations as well as relevant OSCE human dimension commitments. The Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field.
6. Moreover, in accordance with the *Convention on the Elimination of All Forms of Discrimination against Women*² (hereinafter “CEDAW”) and the *2004 OSCE Action Plan for the Promotion of Gender Equality*³ and commitments to mainstream gender into OSCE activities, programmes and projects, the Opinion integrates, as appropriate, a gender and diversity perspective.
7. This Opinion is based on an unofficial English translation of the Concept Note and Draft Principles which is attached to this document as an Annex. Errors from translation may result. The Opinion is also available in Russian. However, the English version remains the only official version of the Opinion.

¹ ODIHR conducted this assessment within its mandate to assist the OSCE participating States in the implementation of their OSCE commitments. See especially OSCE Decision No. 7/08 Further Strengthening the Rule of Law in the OSCE Area (2008), point 4, where the Ministerial Council “[e]ncourages participating States, with the assistance, where appropriate, of relevant OSCE executive structures in accordance with their mandates and within existing resources, to continue and to enhance their efforts to share information and best practices and to strengthen the rule of law [on the issue of] independence of the judiciary, effective administration of justice, right to a fair trial, access to court, accountability of state institutions and officials, respect for the rule of law in public administration, the right to legal assistance and respect for the human rights of persons in detention [...]”.

² UN Convention on the Elimination of All Forms of Discrimination against Women (hereinafter “CEDAW”), adopted by General Assembly resolution 34/180 on 18 December 1979. Ukraine deposited its instrument of ratification of this Convention on 12 March 1981.

³ See OSCE Action Plan for the Promotion of Gender Equality, adopted by Decision No. 14/04, MC.DEC/14/04 (2004), par 32.

8. In view of the above, ODIHR would like to stress that this Opinion does not prevent ODIHR from formulating additional written or oral recommendations or comments on respective subject matters to Uzbekistan in the future.

III. LEGAL ANALYSIS AND RECOMMENDATIONS

1. RELEVANT INTERNATIONAL HUMAN RIGHTS STANDARDS AND OSCE HUMAN DIMENSION COMMITMENTS

9. The independence of the judiciary is a fundamental principle and an essential element of any democratic state based on the rule of law and an integral part of the fundamental democratic principle of the separation of powers.³ This independence entails that both the judiciary as an institution, but also individual judges, must be able to exercise their professional responsibilities without being influenced or fearful of arbitrary disciplinary investigations and/or sanctions by the executive or legislative branches or other external sources. The independence of the judiciary is also essential to engendering public trust and credibility in the justice system in general, so that everyone is treated equally before the law and seen as being treated equally, and that no one is above the law. Public confidence in the courts as independent from political influence is vital in a democratic society that respects the rule of law. In short, a state is governed by the rule of law if, *inter alia*, an independent, impartial and accountable judiciary prevents the exercise of arbitrary power by the authorities and protects the rights of individuals, so that public decision-making is predictable.
10. The principle of the independence of the judiciary is also crucial to upholding other international human rights standards.⁴ More specifically, the independence of the judiciary is a prerequisite to the broader guarantee of every person’s right to a fair trial i.e., to a fair and public hearing by a competent, independent and impartial tribunal established by law and by an accountable judiciary.
11. At the international level, it has long been recognized that litigants in both criminal and civil matters have the right to a fair hearing before an “independent and impartial tribunal,” as articulated in Article 10 of the Universal Declaration of Human Rights, which reflects customary international law, and subsequently incorporated into Article 14⁵ of the International Covenant on Civil and Political Rights (hereinafter “the ICCPR”).
12. The European Convention on Human Rights and Fundamental Freedoms (hereinafter “the ECHR”), the developed case law of the European Court of Human Rights (hereinafter “the ECtHR”) in the field of independence of judiciary and judicial councils (or similar bodies), and other instruments of the Council of Europe (hereinafter “the CoE”) may serve as useful reference documents from a comparative perspective. Article 6 of the ECHR provides that everyone is entitled to a fair and public hearing “by an independent and impartial tribunal established by law”. To determine whether a body can be considered “independent” according to Article 6 par 1 of the ECHR, the ECtHR considers various elements, *inter alia*, the manner of appointment of its members and

4 See e.g., OSCE Ministerial Council Decision No. 12/05 on Upholding Human Rights and the Rule of Law in Criminal Justice Systems, 6 December 2005, <<http://www.osce.org/mc/17347?download=true>>.

5 UN International Covenant on Civil and Political Rights (hereinafter “ICCPR”), adopted by the UN General Assembly by resolution 2200A (XXI) of 16 December 1966. The Republic of Uzbekistan ratified the ICCPR in 1995, <<http://indicators.ohchr.org/>>

their term of office, the existence of guarantees against outside pressure and whether the body presents an appearance of independence.⁶

13. The institutional relationships and mechanisms required for establishing and maintaining an independent judiciary are the subject of the UN Basic Principles on the Independence of the Judiciary (1985),⁷ and have been further elaborated in the Bangalore Principles of Judicial Conduct (2002).⁸ In particular, these principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules and conduct which bind the judge.⁹
14. In its General Comment No. 32 on Article 14 of the ICCPR, the UN Human Rights Committee specifically provided that States should ensure “the actual independence of the judiciary from political interference by the executive branch and legislature” and “take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of primary and secondary legislation, and establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them”.¹⁰
15. OSCE participating States have also committed to ensure “*the independence of judges and the impartial operation of the public judicial service*” as one of the elements of justice “*which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings*” (1990 Copenhagen Document).¹¹ In the 1991 Moscow Document,¹² participating States further committed to “*respect the international standards that relate to the independence of judges [...] and the impartial operation of the public judicial service*” (par 19.1) and to “*ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice*” (par 19.2).
16. Moreover, in its Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area (2008), the Ministerial Council also called upon OSCE participating States “*to honour their obligations under international law and to observe their OSCE*

6 See European Court of Human Rights (ECtHR), *Campbell and Fell v. the United Kingdom* (Application no. 7819/77, 7878/77, judgment of 28 June 1984), par 78, <<http://hudoc.echr.coe.int/eng?i=001-57456>>. See also *Olujić v. Croatia* (Application no. 22330/05, judgment of 5 May 2009), par 38, <<http://hudoc.echr.coe.int/eng?i=001-91144>>; and *Oleksandr Volkov v. Ukraine* (Application no. 21722/11, judgment of 25 May 2013), par 103, <<http://hudoc.echr.coe.int/eng?i=001-115871>>.

7 UN Basic Principles on the Independence of the Judiciary, endorsed by UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>>.

8 Bangalore Principles of Judicial Conduct, adopted by the Judicial Group on Strengthening Judicial Integrity, which is an independent, autonomous, not-for-profit and voluntary entity composed of heads of the judiciary or senior judges from various countries, as revised at the Round Table Meeting of Chief Justices in the Hague (25-26 November 2002), and endorsed by the UN Economic and Social Council in its resolution 2006/23 of 27 July 2006, <http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf>. See also Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct (2010), prepared by the Judicial Group on Strengthening Judicial Integrity, <http://www.judicialintegritygroup.org/images/resources/documents/BP_Implementation%20Measures_Engl.pdf>.

9 Bangalore Principles of Judicial Conduct, 2002, Preamble

10 UN Human Rights Committee, General Comment No. 32 on Article 14 of the ICCPR: Right to Equality before Courts and Tribunals and to Fair Trial, 23 August 2007, par 19, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f32&Lang=en>.

11 CSCE/OSCE, 1990 Copenhagen Document, pars 5 and 5.12.

12 OSCE, Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE (Moscow, 10 September-4 October 1991), <<http://www.osce.org/fr/odihr/elections/14310>>.

*commitments regarding the rule of law at both international and national levels, including in all aspects of their legislation, administration and judiciary”, as a key element of strengthening the rule of law in the OSCE area.*¹³ Further and more detailed guidance is also provided by the OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010) (hereinafter the “Kyiv Recommendations”).¹⁴

17. Other useful reference documents elaborated in various international and regional fora contain more practical guidance to help ensure the independence of the judiciary, including, among others:

- Reports of the UN Special Rapporteur on the Independence of Judges and Lawyers;¹⁵
- Reports and other documents of the European Network of Councils for the Judiciary (ENCJ);¹⁶
- The European Charter on the Statute for Judges (1998);¹⁷
- Report of the Council of Europe’s Commission for Democracy through Law (hereinafter “Venice Commission”) on the Independence of the Judicial System, in particular Part I on the independence of judges; and ¹⁸
- Opinions of the OSCE/ODIHR pertaining to judicial councils and the independence of the judiciary.¹⁹

18. The Opinion will also make reference to the opinions of the Consultative Council of European Judges (CCJE),²⁰ an advisory body of the Council of Europe on issues related

13 OSCE, Ministerial Council Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area, Helsinki, 4-5 December 2008, <<http://www.osce.org/mc/35494>>.

14 The OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010) were developed by a group of independent experts under the leadership of ODIHR and the Max Planck Institute for Comparative Public Law and International Law – Minerva Research Group on Judicial Independence, <<http://www.osce.org/odihr/kyivrec>>.

15 Annual reports available in six languages (including English and Russian) available at: <http://www.ohchr.org/EN/Issues/Judiciary/Pages/Annual.aspx>,

16 Available at <https://www.encj.eu/>.

17 European Charter on the Statute for Judges (Strasbourg, 8-10 July 1998), adopted by the European Association of Judges, published by the Council of Europe [DAJ/DOC (98)23], <<https://wcd.coe.int/ViewDoc.jsp?p=&id=1766485&direct=true>>

18 The recommendations and guiding principles developed by the Venice Commission in its reports and opinions are widely accepted as part of the soft law and although Republic of Kazakhstan is not a member to the Venice Commission, these documents may serve as important and useful sources for reference. Report on the Independence of the Judicial System is available at: [http://www.venice.coe.int/webforms/documents/?pdf=CDL\(2009\)055rev5-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL(2009)055rev5-e)

19 See for instance: Op. cit. footnote 5 (Final Opinion on Draft Amendments to the Act of the National Council of the Judiciary and Certain other Acts of Poland (5 May 2017), OSCE/ODIHR Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland (As Of 26 September 2017) available here: <http://www.legislationline.org/documents/id/20682>), Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland (30 August 2017) available here: <http://www.legislationline.org/documents/id/21259>, Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland (as of 26 September 2017) available here: <http://www.legislationline.org/documents/id/21444>, OSCE/ODIHR Opinion on the Law of Ukraine on the Judiciary and the Status of Judges (30 June 2017) available here: <http://www.legislationline.org/documents/id/21193>, OSCE/ODIHR Opinion on the law 29/1967 Concerning the Judicial System, The Supreme Judicial Council of the Judiciary, and the Status of Judges in Tunisia (as amended up to 12 August 2005 (21 December 2012), available here: <https://www.osce.org/odihr/99826?download=true> and several other opinions available at <http://www.legislationline.org/search/runSearch/1/type/2/topic/9>.

20 See 2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society and 2021 Consultative Council of European Judges (CCJE) Opinion No. 24. Further, available at <http://www.coe.int/t/dghl/cooperation/ccje/textes/Avis_en.asp>, particularly CCJE, Opinion No. 3 (2002) on the Principles and Rules Governing Judges’ Professional Conduct, in particular Ethics, Incompatible Behaviour and Impartiality, 19 November 2002, <[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE\(2002\)OP3&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2002)OP3&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true)>. See also CCJE, Opinion No. 1 (2001) on Standards Concerning the Independence of the Judiciary

to the independence, impartiality and competence of judges, and to the opinions and reports of the Venice Commission.²¹

1.1. Standards pertaining to Judicial Councils²²

19. In practice, ensuring the independence and impartiality of a court or tribunal is as much a matter of principle as it is a matter of management. In this sense, the management of the judiciary acquires relevance as a guarantee to protect independence and impartiality. The extent to which a body managing the judiciary (High Judicial Councils or similar) is able to safeguard the independence and impartiality of the judiciary depends in part on the scope and extent of its legally ascribed powers (such as on selection and recruitment, promotion, immovability, remuneration, ethical codes and discipline of judges). Human resource management systems also play a crucial role in guaranteeing the professionalism of the judiciary, and therefore the quality (effectiveness, efficiency and integrity) of justice.
20. There is no standard model for the judicial bodies in the OSCE region. The organization and management of these bodies vary according to different legal systems and country contexts. The most common model of composition is the mixed model where the judicial councils are composed of judicial and non-judicial members. While in some countries judicial councils have vast competencies, from appointment to dismissal of judicial members, there is not a common practice as to the functions or powers of these bodies. Generally, the judicial councils determine their own budget. However, some judicial bodies are also authorized to determine the budget of courts. Different practices exist as to the status of the members of the judicial councils and the grounds and procedures for their dismissal. According to the Sofia Declaration on Judicial Independence and Accountability²³, it is the essential task of judicial councils to “maintain and strengthen the independence of the Judiciary, especially when it is threatened”. Therefore, the composition, functions and role of judicial councils should be designed to ensure that judicial independence is upheld while maintaining the required level of judicial accountability. The independence of the judiciary can be strengthened by creation of a well-functioning and competent judicial council.

and the Irremovability of Judges, 23 November 2001, <[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE\(2001\)OP1&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2001)OP1&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true)>; Magna Carta of Judges, 17 November 2010, par 13, <[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE-MC\(2010\)3&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE-MC(2010)3&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true)>; and Opinion No. 18 (2015) on the Position of the Judiciary and its Relation with the Other Powers of State in a Modern Democracy, 16 October 2015, <[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE\(2015\)4&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2015)4&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true)>.

21 In particular European Commission for Democracy through Law (Venice Commission), Report on Judicial Appointments (2007), CDL-AD(2007)028-e, 22 June 2007, <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)028-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)028-e)>; Report on the Independence of the Judicial System – Part I: The Independence of Judges (2010), CDL-AD(2010)004, 16 March 2010, <[http://www.venice.coe.int/webforms/documents/CDL-AD\(2010\)004.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2010)004.aspx)>; and Rule of Law Checklist, CDL-AD(2016)007, 18 March 2016, <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e)>.

22 There is not a generally agreed definition of judicial councils and terminology differ between legal systems. For the purpose of this Opinion judicial councils are the various independent and autonomous bodies established at the national level to guarantee the independence of individual judges and the judiciary as a whole. See for more information: UN A/HRC/38/38 Report of the Special Rapporteur on the independence of judges and lawyers on Judicial Councils, 2 May 2018, pars 27-29.

23 European Network of Councils for the Judiciary, General Assembly, Sofia Declaration on Judicial Independence and Accountability, 5-7 June 2013, available at: https://www.encj.eu/images/stories/pdf/GA/Sofia/encj_sofia_declaration_7_june_2013.pdf.

21. Judicial councils have a different institutional basis in the system of governance in different countries but generally they have functions in the following areas:
- Appointment of judges;
 - Career progression;
 - Disciplinary actions;
 - Judicial training;
 - Supporting legislative reform;
 - Promotion judicial ethics;
 - Court management and financing.
22. It must be reiterated that the key **purpose** of judicial councils, or similar independent bodies, is to safeguard the independence of the judiciary and of individual judges. To serve this purpose, judicial councils must themselves enjoy sufficient independence from the other branches of power in their work and decision-making.²⁴ It is also important to note that when assessing whether a given body enjoys independence or not, the ECtHR has highlighted that the manner in which judges are appointed to a judicial council, and particularly the nature of the appointing authorities, is relevant for judicial self-governance.²⁵ More specifically, the ECtHR has stressed the importance of having the judicial corps elect its own representatives to the Council, in order to “*reduc[e] the influence of the political organs of the government on the composition of the [Council]*”.²⁶
23. The OSCE/ODIHR has noted in previous opinions that: “*In principle, judicial councils or other similar bodies are crucial to support and guarantee the independence of the judiciary in a given country, and as such should themselves be independent and impartial, i.e., free from interference from the executive and legislative branches. Indeed, interfering with the independence of bodies, which are guarantors of judicial independence, could as a consequence impact and potentially jeopardize the independence of the judiciary in general*”.²⁷ The Venice Commission also underlines that “*the due functioning of the Judicial Council, in those legal systems where it exists, is an essential guarantee for judicial independence*”.²⁸ Furthermore, the Venice Commission

24 ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010), par. 7; Council of Europe, Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities, adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies, par. 46.

25 ECtHR, Oleksandr Volkov v. Ukraine, (Application 21722/11) judgment of 9 January 2013, par 112, available here: https://www.google.com/url?sa=t&rcct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwi-o7Pc58bdAhXM-KQKHWFQCFwQFjAAegQIABAC&url=https%3A%2F%2Fwww.legislationline.org%2Fdocuments%2Fid%2F17748&usg=AOvVaw0N6_tYvw2G_soEGSb81mQy

26 Ibid. See also : ECtHR , Dolińska-Ficek and Ozimek v. Poland (Applications nos. 49868/19 and 57511/19) judgment of 21 November 2021, paras. 290-320, available here: <https://hudoc.echr.coe.int/fre?i=001-213200>

27 OSCE/ODIHR Final Opinion on Draft Amendments to the Act of the National Council of the Judiciary and Certain other Acts of Poland (5 May 2017), par 37.

28 Venice Commission Opinion On The Draft Law On Amendments to the Law On The Judicial Council And Judges (Montenegro), CDL-Ad(2018)015, par 37.

has recommended establishing judicial councils as a guarantee to prevent pressure from other branches of government and external actors.²⁹

24. International standards thus require that States respect and observe the independence of the judiciary. Where States have established judicial bodies to protect and promote the independence of the judiciary, some international and regional documents provide that judicial councils should be independent bodies, the **establishment** of which should be regulated by either the constitution or primary law.³⁰ Legal provisions regulating judicial councils should be clear and predictable.
25. The **composition** of the judicial council is of crucial importance for its ability to protect the independence of the judiciary. The council needs to be able to prevent undue influence from other branches of power as well as withstand internal pressures. There are various forms of composition of judicial councils and there is no one correct or legitimate format. According to the Kyiv Recommendations, the composition of judicial councils shall not be dominated by representatives of the executive and legislative branch, including the State President.³¹ Furthermore, the CCJE has expressly stated that it “does not advocate [for] systems that involve political authorities such as the Parliament or the executive at any stage of the selection process [of judge members of Judicial Councils]”.³² CCJE Opinion No. 24 (2021) further emphasizes that by whatever means members are selected and appointed, this should not be done for political reasons. The Venice Commission has concluded similarly: “*The exact composition of the judicial councils varies, but it is widely accepted that at least half of the council members should be judges elected by their peers.*”³³ The Recommendation of the Committee of Ministers of the Council of Europe states that “*not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary*”.³⁴
26. While they should be free from executive and legislative control, these independent bodies should also not be composed completely or over- prominently by members of the judiciary, so as to prevent self-interest, self-protection, cronyism and also perceptions of corporatism.³⁵ Thus “*not less than half the members of such councils should be judges*”, however, judges who are “*chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary.*”³⁶ The latter premise is also confirmed in the CCJE Opinion no. 24 which states that “[w]hen the Council for the Judiciary is composed

29 Venice Commission Report (CDL-AD(2007)028 on Judicial Appointments, par 48 “An appropriate method for guaranteeing judicial independence is the establishment of a judicial council, which should be endowed with constitutional guarantees for its composition, powers and autonomy.” Available here: <https://rm.coe.int/0900001680700a62>

30 See for example, 2021 CCJE Opinion No. 24 on the Council for the Judiciary at the Service of Society, par. 10; and UN A/HRC/38/38 Report of the Special Rapporteur on the independence of judges and lawyers on Judicial Councils, 2 May 2018, par. 92

31 Ibid.

32 2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society, para 31.

33 Venice Commission, Opinion on the Draft Act Amending the Act on the National Council of the Judiciary, on the Draft Act Amending the Act on the Supreme Court, Proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, (11 December 2017), par. 17, available here: http://krs.pl/admin/files/wwm/venice_com._opinion%20cdlad9042017031_of_11.12.2017_on_draft_acts_krs_sn_ustp.pdf

34 Council of Europe, Committee of Ministers, Recommendation 2010(12), section 27.

35 ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010), par. 7.

36 Council of Europe, Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities, adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies, para 27.

*solely of judges, the CCJE is of the opinion that these should be judges elected by their peers.”*³⁷

27. This approach is also reflected in the Kyiv Recommendations which state that “apart from a substantial number of judicial members elected by the judges, the Judicial Council should comprise law professors and preferably a member of the bar, to promote greater inclusiveness and transparency. Prosecutors should be excluded where prosecutors do not belong to the same judicial corps as judges. Other representatives of the law enforcement agencies should also be barred from participation. Neither the State President nor the Minister of Justice should preside over the Council.”³⁸
28. There is no unique approach to the **functions** of judicial councils. The CCJE deems that a council “*should have a wide role in respect of competences which are interrelated, in order that it can better protect and promote judicial independence and the efficiency of justice*”.³⁹ In its Opinion no. 24 the CCJE provides the range of powers that may be considered inherent to judicial councils, namely: the selection and appointment of judges, the promotion, evaluation and training of judges, disciplinary and ethical matters, control and management of a separate budget, the administration of courts, protection of the image of judges, opinions to other powers of the State, the co-operation with other relevant bodies on national, European and international level, the responsibility towards the public: transparency, accountability, reporting.⁴⁰ The Kyiv Recommendations consider that “... *A good option is to establish different independent bodies competent for specific aspects of judicial administration without subjecting them to the control of a single institution or authority. The composition of these bodies should each reflect their particular task. Their work should be regulated by statutory law rather than executive decree.*”⁴¹ Furthermore, the Kyiv Recommendations provide that “*in order to avoid excessive concentration of power in one judicial body and perceptions of corporatism it is recommended to distinguish among and separate different competences, such as selection, promotion and training of judges, discipline, professional evaluation and budget.*”⁴²
29. In many countries functions are divided between different bodies, in some others the judicial councils have various committees responsible for different aspects of judicial self-governance. The Venice Commission opined in this respect that ‘there are different models of distribution of administrative functions... The only important requirement is that the most important administrative functions should belong to a body or bodies enjoying a significant degree of independence.’⁴³
30. The Venice Commission has emphasised that the key role in **appointment** of judges should belong to the judicial governance body and that this body must be competent to make independent decisions regarding appointments.⁴⁴ The Kyiv Recommendations

37 2021 Consultative Council of European Judges (CCJE) Opinion No. 24, par. 27.

38 OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010), par.2.

39 2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society, para 41.

40 Ibid , p 42.

41 OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010), par. 2

42 Ibid, section 2.

43 Venice Commission CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, para 100.

44 See for example Venice Commission: Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine (CDL-AD(2013)034), par. 16, available here: Venice Commission:

provide that the State President’s involvement in appointment processes should be limited to refusal of candidates nominated by the High Judicial Council and only on procedural grounds and that such refusal be reasoned.⁴⁵

31. With respect to the role of the judicial councils in applying **disciplinary sanctions** on judges, the Venice Commission noted that disciplinary liability “*has different constitutive elements from criminal liability and applies a different standard of proof, however, it should be pointed out that criminal and disciplinary liability are not mutually exclusive. Disciplinary sanctions may still be appropriate in case of a criminal acquittal... If the misconduct of a judge is capable of undermining public confidence in the judiciary, it is in the public interest to institute disciplinary proceedings against that judge... In any event, it is important that both types of liability be used sparingly in order not to cause a chilling effect on the judiciary*”.⁴⁶ Recommendation 2010 of the CoE Committee of Ministers provides that: “*The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence*”.⁴⁷ Disciplinary proceedings against judges based on the rule of law should correspond to certain basic principles, which include the following: “*the liability should follow a violation of a duty expressly defined by law; there should be fair trial with full hearing of the parties and representation of the judge; the law should define the scale of sanctions; the imposition of the sanction should be subject to the principle of proportionality; there should be a right to appeal to a higher judicial authority*”.⁴⁸
32. The Kyiv Recommendations specify the judicial council should mainly be involved in establishing the criteria for **evaluating judges**, but not be directly involved in such evaluations as persons dealing with the evaluated judges on a regular basis on the local level should perform the actual evaluation.⁴⁹
33. An important aspect of judicial councils pertains to the **status** of its members. In some countries, judicial council membership is part-time work⁵⁰ and acting judges can also be members of the judicial council. In this case, their status as judges does not change and they continue to be covered by immunities. However, some specific immunities for members of judicial councils might be required. The Venice Commission stated that “[g]ranting immunity to members of the Council guarantees their independence and allows them to carry out their work without having to constantly defend themselves against, for instance, unfounded and vexatious accusations.”⁵¹ Pursuant to Opinion no.10

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)034-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)034-e), see also, Venice Commission: Opinion on the Draft New Constitution of Iceland (CDL-AD(2013)010), para. 137, available here: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)010-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)010-e).

45 OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010), section 23.

46 Venice Commission Amicus Curiae Brief, Republic of Moldova - Amicus Curiae Brief for the Constitutional Court on the Criminal liability of judges, (CDL-AD(2017)002) par. 18, available here: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)002-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)002-e)

47 Council of Europe, Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities, adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies, para 66.

48 Venice Commission, Opinion on the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia, (CDL-AD(2007)009) par. 9.

49 OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010), section, par 30.

50 Having said that the Venice Commission recommended that “the members of the [Judicial Council] should exercise their functions as a full-time profession.” CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, para 43.

51 CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, para 26.

CCJE members of the Council for the Judiciary (both judges and non-judges) should be granted guarantees for their independence and impartiality.

34. The OSCE/ODIHR and the Venice Commission have emphasized that independence of judges should not be compromised “through fear of the initiation of prosecution.”⁵² Similarly, it is crucial to ensure procedural **immunity** for the members of judicial councils, which typically includes special protection against arrest, detention and prosecution.⁵³
35. It is important that judicial councils are **financially and administratively independent**. Opinion no.10 of the CCJE stresses that these bodies should be financed in such a way that they are enabled to function properly. They should have appropriate means to operate independently and autonomously as well as power and capacity to negotiate and organize their own budgets effectively. Opinion No. 2 of the CCJE on the funding and management of courts provides: “5... *although the funding of courts is part of the State budget presented to Parliament by the Ministry of Finances, such funding should not be subject to political fluctuations. Although the level of funding a country can afford for its courts is a political decision, care must always be taken, in a system based on the separation of powers, to ensure that neither the executive nor the legislative authorities are able to exert any pressure on the judiciary when setting its budget. Decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence*”. It notes that it is important “...*that the arrangements for parliamentary adoption of the judicial budget include a procedure that takes into account judicial views.*”⁵⁴
36. With respect to the **dismissal** of members of the judicial council, it is noted that this can only be done for very serious reasons that are clearly stipulated by the law and that may harm the reputation of the judiciary.⁵⁵ As this body is closely linked to the judiciary, similar standards for dismissal of judges in courts can serve as guidance. According to a previous opinion by OSCE/ODIHR, “*there are three basic requirements which they set with respect to national laws governing the disciplinary responsibility of judges, i) A clear definition of the acts or omissions which constitute disciplinary offences; ii) The disciplinary sanctions must be proportionate to the respective disciplinary offence; and iii) The disciplinary proceedings must be of an appropriate quality.*”⁵⁶ Regulations of judges’ liability that lack these qualities may also be abused to exert undue pressure on judges when deciding cases and thus undermine their independence and impartiality.⁵⁷ Vague, imprecise and broadly-worded provisions that define members’ liability may

52 Venice Commission – OSCE/ODIHR, Joint Opinion on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic (CDL-AD(2014)018), para. 37, available here: <http://www.legislationline.org/documents/id/19099>

53 OSCE/ODIHR - Venice Commission, Joint Opinion CDL-AD(2016)025, Kyrgyz Republic - Endorsed joint opinion on the draft law "on Introduction of amendments and changes to the Constitution", par. 77, available here: <https://www.osce.org/odihr/313186?download=true>

54 Opinion no. 2 of the Consultative Council of European Judges (CCJE), pars. 5 and 10, available here: <https://rm.coe.int/1680747492>

55 OSCE-ODIHR Opinion on the Law on the Selection, Performance, Evaluation and Career of Judges in Moldova (13 June 2014), par 25, available here: <http://www.legislationline.org/documents/id/19100>

56 OSCE/ODIHR, Opinion on the Draft Law of the Republic of Moldova on the Disciplinary Responsibility of Judges. (14 December 2012), par 10, available here: <http://www.legislationline.org/documents/id/17699>, see also: Venice Commission - OSCE/ODIHR Joint Opinion on the Draft Law on Disciplinary Liability of Judges of the republic of Moldova (24 March 2014), par 15, available here: <http://www.legislationline.org/documents/id/18817>

57 Venice Commission: Opinion on the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia (CDL-AD(2007)009), pars 25 and 29, available here: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)009-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)009-e); Opinion on the Laws on Disciplinary Liability and evaluation of Judges of the Former Yugoslav Republic of Macedonia ”CDL-AD(2015)042, par 113, available here: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)042-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)042-e); see also Op. cit. footnote 24, pars 185-186. See also Action 1.3 of the Council of Europe Sofia Action Plan on Judicial Independence, to be found: <https://rm.coe.int/1680700285>

discourage an independent and impartial interpretation of the law, assessment of facts and weighing of evidence.

37. In its Opinion no.24 (2021) the CCJE reaffirmed and expanded the principles of Opinion no. 10, which further notes that judicial councils “*should play a role in ensuring that the judiciary works in a transparent and accountable way. ..*” and that “*...accountability of a Council for the Judiciary is itself an important source of functional legitimacy*”, and that “[t]he more powers and responsibilities a Council has, the more important it is that it should be accountable for the use of those powers...”.⁵⁸

2. BACKGROUND

38. It is welcome that Uzbekistan has taken steps to formulate and streamline principles that should guide judicial bodies and their independent functioning in accordance with their respective mandates. The Concept Note observes that standards for judicial councils are not incorporated into one international or regional document. Importantly, the UN Special Rapporteur in his 2018 Report recommended that “a comprehensive set of principles be developed under the auspices of the United Nations to identify common principles and good practices in relation to the establishment, composition and functioning of such councils”.⁵⁹
39. From the Concept Note it appears that it was developed following a proposal by the President of Uzbekistan made in his statement during the 46th UN Human Rights Council session to develop universal principles on judicial councils.⁶⁰ The Concept Note and Draft Principles aim to formulate universal principles that apply to the general nature, the functions and structure of judicial councils as derived from standards on judicial councils that are developed in existing international instruments and documents. The Concept Note distinguishes between general and special principles. The former pertains to those principles that aims to guide not only judicial councils, but also the entire judicial system of a State, whereas the latter attempts to streamline the functions of judicial councils in order to gradually eliminate the different understanding and interpretation of the independence of judicial councils.
40. The Draft Principles contain the special principles only, which are sub-categorized into “general”, “functional” and “organizational and structural”. The ensuing assessment focuses for a significant part on the Draft Principles according to each of these categories.
41. The Draft Principles contain 15 principles, each defined in a variable manner in terms of detail, subject matter and scope. A key noticeable feature of the Concept Note and Draft Principles are the absence of human rights references throughout the document. Whilst it is acknowledged that *judicial councils or similar bodies* are not as such regulated by international instruments, the development of principles should be in accordance with international human rights law, in particular Article 10 UDHR and Article 14 ICCPR. The Concept Note and Draft Principles at times includes some references of a general nature to international law though the lack of explicit references to human rights in relation to the independence of the judiciary is striking. The same observation applies to the lack of references to rule of law principles. **Since respect for human rights and upholding rule of law principles are prerequisites for the independence of the**

⁵⁸ 2021 Consultative Council of European Judges (CCJE) Opinion No. 24, par 13.

⁵⁹ UN A/HRC/38/38 Report of the Special Rapporteur on the independence of judges and lawyers on Judicial Councils, 2 May 2018, pars 89-90.

⁶⁰ See the Statement by the President of the Republic of Uzbekistan: <https://www.un.int/uzbekistan/news/speech-president-republic-uzbekistan-shavkat-mirziyoyev-46th-session-united-nations-human>.

judiciary, it is recommended to include references to relevant human rights, especially on the independence of the judiciary, and to rule of law principles throughout the Concept Note and Draft Principles. Additionally, it is observed that the Concept Note and Draft Principles seem to an extent to build on the thematic report on judicial councils of the UN Special Rapporteur on the independence of judges and lawyers⁶¹ and that the Concept Note’s scope is limited to judicial councils’ responsibilities towards safeguarding the independence of judiciary, excluding public prosecutors.

42. At times, language that is used in the descriptive paragraphs of the Draft Principles does not allow for a thorough understanding of the meaning of the principles. The following examples highlight this problem, namely “[m]embers of the Judicial Councils *may not disclose the secrecy of the meeting* and the information obtained during the making of decisions of the Council...” and “The issue of prosecution, removal and dismissal from office must be *considered by the Council in the presence of a member of the Council...*”. It is important for principles to be drafted in a manner that their meaning can be discerned unequivocally and without leaving any room for interpretations that would undermine existing rule of law standards. With respect to suspension or dismissal specifically, guidance can be drawn from CCJE Opinion No. 24.⁶² **The General Principles section in the Concept Note is drafted in a manner that does not allow for an understanding of the section’s meaning and would benefit from significant revision. It is recommended to draft the Concept Note and Draft Principles in a manner that avoids confusing language and ambiguous terminology and phrases.**
43. Finally, while judicial bodies differ from one country to another, Concept Note and Draft Principles fails to give a definition of a judicial council that is in line with existing international documents. In this regard the Concept Note and Draft Principles could harmonize the definition provided under the principle of constitutionality with the 2010 Council of Ministers recommendation which defines judicial councils as “independent bodies ... that seek to safeguard the independence of the judiciary and of individual judges and thereby to promote the efficient functioning of the judicial system”⁶³, or the Kyiv Recommendations, which define judicial councils as “bodies entrusted with specific tasks of judicial administration and independent competences in order to guarantee judicial independence”.⁶⁴ **It is recommended to harmonize the definition of judicial councils provided in the Concept Note and Draft Principles with definitions from existing international documents.**
44. Overall, the document would benefit from introducing numbering, such as paragraph numbers, to enhance legibility. Similarly, terminology used is at times vague and broad or simply unclear, rendering the very objective of the Concept Note and Draft Principles, namely to elucidate principles for judicial councils, difficult to attain. This is further compounded by the way in which each principle is drafted, in particular the focus being on various topics rather than each principle having a single, central focus. Specific recommendations are provided in the ensuing sections.

61 UN A/HRC/38/38 Report of the Special Rapporteur on the independence of judges and lawyers on Judicial Councils, 2 May 2018.

62 2021 Consultative Council of European Judges (CCJE) Opinion No. 24, pars. 36-38.

63 Council of Europe, Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities, adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers’ Deputies, par. 26.

64 OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010), par. 2.

RECOMMENDATION A.1

To include references to relevant human rights standards, especially on the independence of the judiciary, and rule of law principles throughout the Concept Note and Draft Principles.

RECOMMENDATION A.2

To draft the Concept Note and Draft Principles in a manner that avoids confusing language and ambiguous terminology and phrases.

RECOMMENDATION A.3

To harmonize the definition of judicial councils provided in the Concept Note and Draft Principles with existing definitions based on international standards and guidelines.

3. GENERAL PRINCIPLES FOR JUDICIAL COUNCILS

45. The Draft Principles contain a number of “*general principles*”, namely the principle of constitutionality of the establishment of judicial councils, the principle of independence from the judicial hierarchy, the principle of protection from the pressure of the legislative and executive branches of government, as well as the prohibition of pressure from the judicial councils on these structures, the principle of ensuring the protection of judicial councils from political pressure, the principle of independence of the members of judicial councils, the principle of restriction on service, the principle of ethical conduct and responsibility, and the principle of authorization.
46. The principle of constitutionality departs from the premise that each state’s “*proper understanding*” of the “*responsibility for ensuring the global human right to an independent (fair) court, considers it its duty to fix in the constitution (the basic law) separate mechanisms that guarantee the independence of the Judicial Councils*”. The essence of this principle is that a constitutional basis for the establishment of a judicial council be provided by states. It is noted that the term “*principle of constitutionality*” is generally used to refer to review of the compatibility of legislation with the constitution. Therefore the terminology used for this purpose by the Draft Principles, namely constitutionality, would benefit from clarity to avoid confusion. **It is recommended that the legal basis for the establishment of judicial councils is clarified in line with existing international documents and good practices.**
47. Further the descriptive part of the principle provides a definition of a judicial council, namely “*an independent body that carries out activities in the field of selection, training and advanced training of judicial personnel, their appointment and career development, financial and material support for the activities of judicial bodies and judges*”. As there is not one ideal model of a judicial council, this description seems to forego that other mechanisms may exist that carry out those functions or exclude the applicability of the Draft Universal Principles to those functions of existing judicial bodies that have more powers than is covered by this definition. Therefore, it is suggested that the description aligns more closely with the definitions provided above from the 2010 Council of Ministers’ Recommendation and the Kyiv Recommendations (see paragraph 43 above).

48. The third paragraph of the descriptive part of the principle on constitutionality refers to “states that vote for the adoption of these universal principles”. This introduces a high degree of vagueness as to which forum these principles are proposed for adoption, and in what form (e.g. resolution or legal instrument) or framework this document would be put for adoption. Statements in the principles such as “states that vote...” are confusing as to the origins of the document and whether this document has been submitted to consultations with the wider international community and the process that is envisaged (see below paragraph 85 and further).
49. Further, the descriptive paragraphs note that “States whose constitutions contain any provisions regarding the establishment and functioning of Judicial Councils, as well as their independence and role in guaranteeing the independence of the judiciary...make additional provisions in their constitutions that contribute to the further improvement of such values...”. This seems to require more than the provision of a constitutional basis for the establishment of judicial councils only. It also does not clarify the extent to which a judicial body’s scope of functions should be regulated in a State’s constitution. **It is recommended to clearly outline what the constitutional basis should regulate as a minimum in respect of judicial councils.** The 2018 report of the UN Special Rapporteur on the independence of judges and lawyers provides that “to guarantee their independence from the executive and legislative branches and ensure effective self-governance for the judiciary, judicial councils should be established under the constitution in those countries having a written constitution, or in the equivalent basic law or constitutional instrument in other countries”.⁶⁵ Thus while the establishment of judicial councils can be provided for in the constitution, the Draft Principles seem to go beyond this identified good practice yet in a vague manner. This aspect seems to be somewhat resolved by the last descriptive paragraph which states that “Provisions on the procedure for the establishment of Judicial Councils, the organization and conditions for conducting their activities should be regulated by a special law.” However, the term “special law” remains undefined and therefore unclear. It should remain a State’s prerogative to decide whether they provide arrangements for the judicial council and its functioning in the constitution or an equivalent law, and allowing further regulation by other types of legislation.
50. The principle of independence from the judicial hierarchy aims to guarantee independence of the judicial council and its members vis-à-vis courts and judges. However, rather than an obligation to guarantee such independence by the State, the principle provides that a specific legislative requirement ensures that interference by courts and judges in the work of judicial councils *shall not take place*. The third descriptive paragraph of this principle requires that states “strive to create conditions for the financial and material support of Judicial Councils independent of the judicial hierarchy”. The last descriptive paragraph continues that “Judicial Councils must strictly observe the principle of the independence of the judiciary and not allow interference in the activities of the courts in the administration of justice and the exertion of any kind of pressure or influence on the judges”.
51. This principle is overbroad, vague and covers too many thematic issues. Firstly, it is unclear the extent to which this principle, due to the way it is currently phrased, may restrict judicial councils in which judges are members. It should also be emphasized that this principle should not be excluded influence of courts completely, as some of the

65 UN A/HRC/38/38 Report of the Special Rapporteur on the independence of judges and lawyers on Judicial Councils, 2 May 2018, par. 92.

decisions of judicial councils may be subject to judicial review. Further, it is important to stress that either in the constitution or a law of similar status provision should be made to ensure the autonomy of judicial councils in relation to the executive and legislative powers as well as courts and judges.⁶⁶ More generally, the Draft Principles would benefit from clarifying, to the extent that current good practices and international standards allow, the functions, powers, composition, and administration of judicial councils rather than listing actions that these bodies should refrain from undertaking.

52. As to the aspect of states “striving” to provide “financial and material support”, the 2018 report of the UN Special Rapporteur on the independence of judges and lawyers states that judicial councils *should* be provided with adequate human and financial resources (see paragraphs 75 below). **It is recommended for the Draft Principles to be amended accordingly.**
53. The principle of protection from pressure by the legislative and executive branches of government, as well as the prohibition of pressure from the judicial councils on these structures and the ensuing principle of ensuring the protection of judicial councils from external political pressure, seemingly aim to protect the independent and autonomous functioning of judicial councils.
54. It is unclear why these two principles have been drafted separately, as they both deal with safeguarding the independence of judicial councils *from* external (political) influence and influence from judicial councils *on* external (political) actors. Noticeably both principles refer to “mechanisms” that should be created to prevent influence from and on judicial councils. Due to their broad nature, the principles could leave too much leeway for States to intervene in the independent functioning of judicial councils and thus producing undesired countereffects.
55. **The premise for these principles, however, should be that States ensure that conditions should be such that judicial councils can fully, independently assume their role as guarantors of judicial independence.** Such a role can only be attained where their powers in aspects relating to judicial careers as well their institutional structures and composition are established in a way that allows them to realize the said objective without external political pressure.⁶⁷ This cannot be currently discerned from these principles and their descriptive paragraphs.
56. The principles further state that “*legislation should prohibit direct interference in the activities of the judicial councils by the executive power and its structures, which may manifest themselves in the form of issuing (adopting) special normative legal acts concerning the regulation of their activities; establishing the procedure for hearing reports; supervising their activities; providing financing and material and technical services.*” This paragraph is broad and vague and thereby risks being interpreted as depriving a State’s power to adopt legislation regulating certain aspects of judicial councils. For example, States could enact legislation to regulate the selection and appointment process of members of judicial councils or pertaining to their budget or to ways in which their activities are reported on. Further, any concern as to a possible infringement of the independence of the judicial council could be mitigated by ensuring that in adopting policies and draft legislation that are likely to affect the judiciary or relate to the overall

⁶⁶ UN A/HRC/38/38 Report of the Special Rapporteur on the independence of judges and lawyers on Judicial Councils, 2 May 2018, par. 42. See also: 2021 Consultative Council of European Judges (CCJE) Opinion No. 24, par. 10.

⁶⁷ UN A/HRC/38/38 Report of the Special Rapporteur on the independence of judges and lawyers on Judicial Councils, 2 May 2018, par. 18.

issue of access to justice, judicial councils be consulted for advice.⁶⁸ In addition, judicial councils should be guided by transparency. This could entail that they should account for their use of funds by presenting reports to authorities.⁶⁹

57. The third descriptive paragraph under the principle of ensuring the protection of judicial councils from external political pressure appears to mitigate the risk of influence exerted by the judicial council on state and non-state actors and prohibits members “to be a member of political parties, public organizations, to participate in political (mass) events, debates, discussions, to speak in the media with opinions on political processes and events, to conduct opinion polls, etc.” This paragraph is open-ended and effectively denies without any apparent exception the exercise of freedom of expression, freedom of association and other civil and political rights by the members of judicial councils. The CCJE Opinion no. 3 (2002), while recognizing the importance of impartiality and advising restraint on the part of judges, provides that “judges remain citizens and should be allowed to exercise the political rights enjoyed by all citizens.”⁷⁰
58. Further, this paragraph appears to limit possibilities of lay members to become members of judicial councils. While it is important that external political influence on judicial councils is averted, such could be achieved by providing an exhaustive list of positions with which membership in the judicial council is rendered incompatible. For example, measures can be taken to prohibit that non-judge members of judicial councils are at the same time active politicians, members of parliament or part of the administration.⁷¹ Careful consideration should be given in drafting such a list to ensure that the exercise of human rights by judicial council members is not disproportionately limited.
59. The fourth and fifth descriptive paragraphs under the principle of ensuring the protection of judicial councils from external political pressure refer to the exclusion of high ranking officials of administration and parliament members from membership of the judicial councils, *as far as possible*. It must be stressed that both judge and non-judge members of judicial councils should not be *be active politicians or members of the executive or the legislature* to guarantee their independence from these branches of power.⁷²
60. The final paragraph of this principle is phrased in a way that does not allow to discern what safeguards are aimed to put in place. **Judicial councils must be sufficiently insulated to operate independently from external powers, however these bodies should not be isolated from society and should be able to engage with media and the public.** These bodies should be able to receive external input, while being aware of their independent roles and avoid lobbying interests.⁷³ Due to the way in which this descriptive paragraph is phrased, it puts far-reaching limits on potential outreach activities that may be carried out by judicial councils.
61. The principle of independence of the members of the judicial councils provides that members of judicial councils who are judges should retain their status as judges and “enjoy all the guarantees for ensuring the independence of judges and benefits provided

68 2021 Consultative Council of European Judges (CCJE) Opinion No. 24, para 26.

69 UN A/HRC/38/38 Report of the Special Rapporteur on the independence of judges and lawyers on Judicial Councils, 2 May 2018, par. 59.

70 See: Venice Commission and OSCE/ODIHR, Guidelines on Political Party Regulation (2nd edition), 14 December 2020, par. 147 available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2020\)032-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)032-e); and OSCE/ODIHR and Venice Commission, Guidelines on Freedom of Association, 2015, pars. 144-146 available at <https://www.osce.org/files/f/documents/3/b/132371.pdf>.

71 UN A/HRC/38/38 Report of the Special Rapporteur on the independence of judges and lawyers on Judicial Councils, 2 May 2018, par. 72.

72 2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society, under summary of recommendations and conclusions B.b.

73 2021 Consultative Council of European Judges (CCJE) Opinion No. 24, par. 43.

for by law”. Other members should also enjoy the same guarantees. The third descriptive paragraph under this principle outlines that such independence of judicial council members is ensured by “the procedure established by law for his election (appointment), his inviolability, the secrecy of meetings of the Council, and the provision of material and social security at the expense of the state, corresponding to his high status.”

62. One of the ways to achieve independence of the members is to ensure that members are selected in a manner that supports the independent and effective functioning of judicial councils and avoid the perception of political influence, self-interest, self-protection and cronyism.⁷⁴ A key aspect is for selection and appointment processes to be transparent and participatory. Further, States have a responsibility to provide adequate resources, including financial resources, which will foster judicial councils’ ability to function effectively, independently and autonomously.⁷⁵ However the way in which these issues are phrased in the principle mentioned above does not reflect the minimum standards and principles to ensure those very guarantees that can be discerned by international standards and good practices. **It is recommended to reflect these minimum standards and principles in the Concept Note and Draft Principles to ensure that guarantees from international standards and good practices are duly incorporated.**
63. The reference to “inviolability” is unclear. Should this refer to status of members of judicial councils, it is important to clarify to what extent and in which ways they enjoy immunity from criminal and/or civil liability, thus what the exceptions to functional immunity would be for these members. Further, the reference to the secrecy of meetings of judicial councils is a far-reaching restriction as there may be circumstances in which meetings can indeed be conducted publicly, with a view to further the transparency and accountability of judicial councils.
64. In the final descriptive paragraph of this principle, reference is made to liability of judicial council members. However, certain terminology used, such as “deliberately illegal decision”, leave way for wide interpretation or are unclear. While it is important to regulate accountability of members of judicial councils, mainly through disciplinary or, in exceptional cases, through criminal proceedings, it is important that the recourse to such proceedings does not lead to abuse or infringement of the independence of these members and the very functioning of the judicial councils and that fair trial rights are guaranteed.⁷⁶ **It is recommended to address the topics of immunity and liability of members of judicial councils with careful consideration, including using terminology in line with international standards and conditions that are clear and unambiguous.**
65. The “principle of restriction on service” and the “principle of ethical conduct and responsibility” cover several subjects, including ethical conduct and responsibilities of judges, confidential nature of judicial council meetings, incompatibility of judicial council membership with certain other roles, and suspension and dismissal of judicial council members.
66. At the outset, it is noted that these two principles are overlapping in terms of certain subjects they cover, such as the suspension and dismissal of members, incompatibility of

⁷⁴ Council of Europe, Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities, adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers’ Deputies, para 15-16.

⁷⁵ 2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society, para 37-38.

⁷⁶ 2021 Consultative Council of European Judges (CCJE) Opinion No. 24, para. 16-17. According to the CCJE non-judicial members should have equivalent protection and judges and non-judicial members should enjoy the same immunities as specified in 2002 CCJE Opinion No. 3, para. 51-77.

judicial council membership with certain other roles and ethical conduct. In any case, each of the areas that these principles aim to cover should be separately addressed.

67. Security of tenure is an important principle for ensuring the independence of judicial council members. However, this principle is not highlighted in the relevant paragraphs on suspension and dismissal, nor is a reference made to the importance of their rights to a fair trial where members are removed. Here too the terminology leaves room for wide and discretionary interpretation, and fails to include fundamental rule of law principles with respect to judicial councils. **It is recommended that security of tenure is highlighted explicitly in principles concerning dismissal or removal of judicial council members.**
68. Further, the paragraphs concerning ethical conduct of judicial council members should be drafted in an unambiguous manner, namely that they “must live up to the highest ethical and professional standards.”⁷⁷ Finally, it is noted that the principles provide that “judicial council members who are judges, cannot at the same time be senators, deputies of representative bodies of state power, may not be members of political parties, participate in political movements, or engage in any other paid activities other than scientific and pedagogical”. Any list of incompatible positions with membership of judicial councils should apply to all members of the judicial councils. In this case, the list of positions is also broadly defined. Whilst membership may indeed be considered incompatible with roles as active politicians, member of parliament or the executive, and generally they should avoid “any activities liable to compromise the dignity of their office and to maintain public confidence in the judicial system by minimising the risk of conflicts of interest”, the only exceptions provided are paid activities that are scientific or pedagogical in nature. However, members could for example pursue literary or creative activities without compromising their neutrality and impartiality.⁷⁸
69. The final principle under the “general principles” section is the principle of authorization. Similar to the concerns expressed above, several subject matters, namely the objective of judicial councils, and functions of these bodies are clustered together under this principle. Also, it is unclear what “preventive functions” of judicial councils are as this is left undefined. The principle also provides that “various education and research institutions” should be established under the judicial councils. It is not clarified whether this reference is made to the role of judicial councils in providing trainings to judges, or, for example, to cooperation between judicial councils and training institutions. Where independent bodies are created that each deal with specific aspects of judicial administration, it is important that the composition of these bodies should each reflect their particular task and their work should be regulated by statutory law rather than executive decree.⁷⁹

RECOMMENDATION B.1

To clarify the legal basis for the establishment of judicial councils in line with existing international documents and good practices.

RECOMMENDATION B.2

⁷⁷ 2021 Consultative Council of European Judges (CCJE) Opinion No. 24, pars. 16-17.

⁷⁸ 2002 Consultative Council of European Judges (CCJE) Opinion No. 3, pars. 22-37.

⁷⁹ ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010), par. 2.

To reflect minimum standards and principles on selection and appointment processes in the Draft Principles.

RECOMMENDATION B.3

To address the topics of immunity and liability of members of judicial councils with careful consideration, including using terminology in line with international standards and conditions that are clear and unambiguous.

RECOMMENDATION B.4

To highlight security of tenure explicitly in principles concerning dismissal or removal of judicial council members.

4. PRINCIPLES CONCERNING THE FUNCTIONS OF JUDICIAL BODIES

70. A widely recognized function of judicial councils is their role in the appointment of judges. The principle of selection, appointment and promotion of judges provides that the selection of judges should be based on the principles of openness and transparency and based on objective criteria, including on merit, having regard to the qualifications, skills and capacities of the candidates established by law by a competent authority. However, other criteria, such as integrity, independence and impartiality are also relevant and the process must also ensure that discrimination against judges or candidates for judicial office on any grounds, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability, or sexual orientation is prohibited. Further, reference should be made to the wide publication of vacancies and the process should ensure equal opportunities guaranteed to support a diverse group of independent candidates.⁸⁰ **It is recommended to expand this principle with additional criteria for the selection, appointment and promotion procedures, including the principle of equality and integrity, independence and impartiality.**
71. The principle of ensuring the career development of judges and their assistants concerns the professional advancement of judges. It is unclear what assistants refer to as this aspect is not addressed in the descriptive paragraphs under the principle. The promotion of judges should be based, in so far as possible, on specific objective criteria. Evaluations of judges should be conducted in a transparent manner and followed by a reasoned decision. Where judges disagree with the outcome, they should be able to have recourse to a judicial review.⁸¹ These aspects are currently not reflected in the principle’s descriptive paragraphs. In any case the principle refers to “principles of honesty, integrity and fairness” as criteria for career development. The criteria ‘honesty’ and ‘fairness’ remain undefined, and in any case leave too much space for wide interpretation and are inherently subjective in nature, in the absence of a well-established legal definition, and should be avoided. Similarly, reference to “the opinion of judicial communities” to be taken into account in promotions of judges and evaluating their performance risks undermining integrity of these processes. **It is recommended that principles concerning promotions and career advancement of judges include specific and objective criteria.**

⁸⁰ 2021 Consultative Council of European Judges (CCJE) Opinion No. 24, pars. 34.

⁸¹ See 2014 Consultative Council of European Judges (CCJE) Opinion No. Opinion No. 17.

72. The principle of administrative management of the judicial system and budget control provides that the “exercise of the powers of the Judicial Councils to administer and budget the activities of the judiciary is an important guarantee of the independence...” and that states should ensure financial independence by “devolving broad powers to the Judicial Councils to submit the draft budget of the courts” and that “Judicial Councils or other bodies of the judicial community should be entrusted with the functions of distributing and redistributing the allocated budget funds among the courts of all instances.”
73. From the 2018 report of the UN Special Rapporteur on the independence of judges and lawyers it can be discerned that international practice shows that judicial bodies “have general responsibilities with regard to the administration of the court system and/or the allocation of budgetary resources to the various courts”.⁸² The CCJE is of the opinion that “a system in which the Council for the Judiciary has extended financial competences requires serious consideration in those countries where such is not the case at present”.⁸³ The Kyiv Recommendations provide that “it would be advisable for... a Judicial Council, to present to the government the budgetary needs of the justice system in order to facilitate informed decision making. This body should also be heard by parliament in the deliberations on the budget. Judicial Councils may play a role also in the distribution of the budget within the judiciary.”⁸⁴
74. The abovementioned sources show that there is still significant discrepancy in how budgetary independence of judicial councils is regulated. Unlike these documents which cautiously approach the issue of budgetary independence, the present principle gives broad budgetary powers to the judicial council. In any case, the allocation of funds should be taken with the strictest respect for judicial independence and where the judicial councils do not have a role in the allocation of budget, they should be in a position to issue opinions regarding the allocation of the minimal budget which is necessary for the operation of justice, and to clarify their needs in order to justify its amount.⁸⁵ **It is recommended to highlight the issue of financial support separately and in less ambiguous terms. As mentioned above, it is fundamental for the independent functioning of judicial councils to have their own premises, a secretariat and a sufficient number of qualified staff to perform their functions independently and autonomously.**
75. The principle of disciplinary procedure concerns disciplinary action against judges in case of “gross and inexcusable unprofessional conduct”. It provides that a special independent body should be established for this purpose and the process should be transparent and open, unless otherwise decided. The concept of “inexcusable unprofessional” conduct is vague, and void of legal meaning and requires clarification. Further the principle does not address the different stages of disciplinary proceedings and different roles judicial councils and other independent bodies may have in this regard. The Kyiv Recommendations notes that “Judicial Councils shall not be competent both to a) receive complaints and conduct disciplinary investigations and at the same time b) hear a case and make a decision on disciplinary measures.” Further decisions taken in disciplinary proceedings should be subject to appellate oversight by a competent court.⁸⁶ It is crucial that safeguards are in place to ensure that these proceedings are not utilized

82 UN A/HRC/38/38 Report of the Special Rapporteur on the independence of judges and lawyers on Judicial Councils, 2 May 2018, par. 94.

83 2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society, pars 73-75.

84 ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010), par. 6.

85 2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society, pars 73.

86 ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010), par. 5.

to attack individual judges for political reasons. **It is recommended that principles concerning disciplinary proceedings against judges provide, at a minimum, clear and precise criteria for the initiation and conduct of these proceedings, overall respecting the rule of law and human rights of the judges involved.**

76. The meaning of the principle of legal security of the judiciary is unclear. It can be discerned that it aims to provide judicial councils with regulatory powers and a role where disputes arise between the judiciary and other branches of power. **It is recommended to revise this principle significantly to allow for a clear interpretation of the intended meaning of the principle.**

RECOMMENDATION C.1

To expand the principle of selection, appointment and promotion of judges with additional criteria, including the principle of equality and integrity, independence and impartiality.

RECOMMENDATION C.2

To highlight the issue of financial support separately, reflecting that it is fundamental for the independent functioning of judicial councils to have their own premises, a secretariat and a sufficient number of qualified staff to perform their functions independently and autonomously.

RECOMMENDATION C.3

To provide clear and precise criteria for the initiation of disciplinary proceedings against judges, while overall respecting the rule of law, and human rights of the judges involved.

5. PRINCIPLES CONCERNING SELECTION AND APPOINTMENT OF MEMBERS OF JUDICIAL BODIES, THEIR COMPOSITION AND ACCOUNTABILITY

77. The section on “organizational and structural principles of judicial councils” covers the principle of a democratic procedure for the selection of candidates for members of judicial councils, their appointment (election), the principle of independence of the chairpersons of judicial councils, the principle of openness and transparency and the principle of accountability.
78. The principle on the selection of judicial council members reflects, to a certain extent, the current standards and good practices. However, professions from which non-judge members may be elected are restricted to “law teachers, representatives of the legal profession and civil society institutions”, which may limit the diverse nature of the composition of judicial councils. These lay members could be drawn from a wide range of professions.
79. In addition, the principle states that prosecutors “should not be members of such councils” but continues “unless they belong to the same legal class as judges”. The latter exception is vaguely phrased and especially the meaning of “legal class” should be clarified. In this regard it is noted that the Kyiv Recommendations state that prosecutors should be

excluded, where they do not belong to the same judicial corps as the judges, while other representatives of the law enforcement agencies should be barred from participation in the judicial council.⁸⁷

80. The final paragraph under this principle provides that for “selecting candidates for Council members, States should make every effort and take effective measures to ensure gender participation”. **It is recommended that this terminology be revised in order to highlight that a gender perspective is integrated in the composition of judicial councils and that States promote gender parity in this respect.**⁸⁸
81. The principle concerning the independence of the Chair of the judicial council notes, among others, that this position can be elected by “all members”, there is “no objection to appointing the President of the Judicial Council to the head of State, while in (semi-presidential) systems, the President of the Council can be elected by the Council itself from among the non-judicial members of the Council”, and that it is important to ensure “balance between the necessary independence of the chairman and the need to avoid possible corporate trends in the Board.” The first part alludes to the chair of the judicial council being appointed *to* and not by the Head of State. While again this issue is broadly phrased, certain elements deviate from existing good practice and standards. Namely, the UN Special Rapporteur in his 2018 report noted that in parliamentary systems where the President or Head of State only has formal powers, there is no objection to appointing the Head of State as the chair of the judicial council, whereas in other systems the chair should be elected by the Council itself and should be a judge.⁸⁹ In addition, the Special Rapporteur also noted that “neither the Chief Justice, the President of the Supreme Court nor the Minister of Justice should be appointed as the Chair of a judicial council.”⁹⁰ The latter has been affirmed in the Kyiv Recommendations, which adds that the State President should also not preside over the judicial council.⁹¹ Finally, it is important to uphold the independence of the judicial councils unequivocally. **It is recommended to revise the principle on the appointment of a chair of judicial councils to ensure that the language is clear and that minimum standards are correctly reflected.**
82. The principle of openness and transparency is a key principle for the functioning of the judiciary. In the third descriptive paragraph reference is made to “the Commission”, which is a body that has not been introduced in the Draft Principles prior and requires clarification as to its role within or vis-à-vis the judicial councils. Further, the last paragraph concerns courts, which seems to go beyond the scope of the Draft Principles, which focuses on judicial councils.
83. The final principle on accountability does not clarify mechanisms for accountability of judicial bodies. For example, where these bodies have budgetary powers, they should account for their allotted financial resources. In any case, accountability mechanisms should not undermine directly or indirectly the independence and impartiality of judicial councils. **It is recommended that accountability of judicial councils is made an integral part of the Draft Principles.**

87 ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010), par. 17.

88 UN A/HRC/38/38 Report of the Special Rapporteur on the independence of judges and lawyers on Judicial Councils, 2 May 2018, par. 110. See also ODIHR policy paper on Gender, Diversity and Justice – Overview and Recommendations, May 2019.

89 UN A/HRC/38/38 Report of the Special Rapporteur on the independence of judges and lawyers on Judicial Councils, 2 May 2018, par. 112. See also 2021 Consultative Council of European Judges (CCJE) Opinion No. 24, pars. 35.

90 *Idem*.

91 ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010), par.7

RECOMMENDATION D.

To ensure that accountability of judicial councils is made an integral part of the Draft Principles.

6. FINAL COMMENTS RELATED TO THE PROCESS OF PREPARING THE CONCEPT NOTE AND DRAFT PRINCIPLES

84. In his 2018 report the UN Special Rapporteur recommended that “a comprehensive set of principles be developed under the auspices of the United Nations to identify common principles and good practices in relation to the establishment, composition and functioning of such councils.” It was noted that “such standards should be developed through an open and transparent process involving not only member States, but also national human rights institutions, civil society, and judges and their representative organizations. Existing international standards relating to judicial councils and the recommendations of international and regional bodies should be taken into account in the development and implementation of this new set of principles.”⁹²
85. Whilst acknowledging that the Concept Note and Draft Principles do not concern domestic legislation, but rather stipulate international standards, these principles of open and inclusive consultations remain pertinent. For consultations to be effective, they need to be inclusive and involve consultations and comments by the public, including civil society. They should also provide sufficient time to stakeholders, including judges and their representative organizations, to prepare and submit recommendations on the Concept Note and Draft Principles.
86. In light of the above, **the public authorities are encouraged to ensure that the Concept Note and Draft Principles are subjected to inclusive, extensive and effective consultations, including with civil society and international governmental and non-governmental actors, and other relevant stakeholders.**

6.1. Gender-neutral Legal Drafting

87. It is noted that the Concept Note and Draft Principles refer to individuals occupying certain official positions or belonging to a certain category using only the male form of a term, which would imply that the position is occupied by a man only. Furthermore, the male forms “him/his” are generally used instead of “him or her”/or “his or hers”. Established international practice requires legislation, policy documents and other public documents to be drafted in a gender neutral/sensitive manner.⁹³ **It is recommended that, whenever possible, the reference to post-holders or certain categories of individuals be adapted to use a gender-neutral word.** Alternatively, the plural form of the respective noun could be used instead of the singular (e.g., they or them) or it is recommended to use both male and female words, for instance “him or her/ his or her”.⁹⁴

⁹² UN A/HRC/38/38 Report of the Special Rapporteur on the independence of judges and lawyers on Judicial Councils, 2 May 2018, pars 89-90.

⁹³ See e.g., ODIHR, Comments on the Law on the Assembly and the Rules of Procedure of the Assembly from a Gender and Diversity Perspective (2020), pars 105-107; and Making Laws Work for Women and Men: A Practical Guide to Gender-Sensitive Legislation (2017), page 63. See also the UN Economic and Social Commission for Western Asia (ESCWA), Gender-Sensitive Language (2013); European Parliament, Resolution on Gender Mainstreaming (2019); Council of the European Union, ‘General Secretariat, Inclusive Communication in the GSC’ (2018); and European Institute for Gender Equality’s Toolkit on Gender-sensitive Communication (2018).

⁹⁴ See e.g., ODIHR, Report on the Assessment of the Assessment of the Legislative Process in the Republic of Armenia (October 2014), pars 47-48.

RECOMMENDATION E.1

To ensure that the Concept Note and Draft Principles is subjected to inclusive, extensive and effective consultations, including with civil society and international governmental and non-governmental actors, and other relevant stakeholders.

RECOMMENDATION E.2

To use a gender-neutral word, whenever possible, in reference to post-holders or certain categories of individuals

[END OF TEXT]
