Max-Planck-Institut für
ausländisches öffentliches Recht und Völkerrecht

Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233

Anja Seibert-Fohr (ed.)

Judicial Independence in Transition

Springer

Max-Planck-Institut für ausländisches
öffentliches Recht und Völkerrecht

Beiträge zum ausländischen öffentlichen Recht und Völkerrecht

Begründet von Viktor Bruns

Herausgegeben von
Armin von Bogdandy · Rüdiger Wolfrum

Band 233

Anja Seibert-Fohr (ed.)

Judicial Independence in Transition

Lydia Friederike Müller/Dominik Zimmermann/
Eva Katinka Schmidt/Saskia Klatte (Assistant Editors)

Springer
the language of science

ISSN 0172-4770
ISBN 978-3-642-28298-0 ISBN 978-3-642-28299-7 (eBook)
DOI 10.1007/978-3-642-28299-7
Springer Heidelberg New York Dordrecht London

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über http://dnb.d-nb.de abrufbar.

Gedruckt auf säurefreiem Papier

Springer ist Teil der Fachverlagsgruppe Springer Science+Business Media (www.springer.com)

For the
OSCE Office for Democratic Institutions and Human Rights

The reports on Armenia, Belarus, Estonia, Moldova, Poland and the Russian Federation in this publication were published with the support of the OSCE Office for Democratic Institutions and Human Rights (ODIHR). The opinions and information this publication contains do not necessarily reflect the policy and position of the ODIHR.

Preface

Judicial Independence in Transition

This book describes judicial independence as a central aspect of the rule of law in different stages of transition to democracy in the OSCE region. From a legal comparative perspective it shows that the implementation of this principle requires continuous efforts, not only in countries in transition but also in established democracies which are confronted with ever new challenges to judicial independence. Based on the conviction that States can learn from each other's experience it gives a broad overview of a variety of mechanisms to ensure judicial independence and identifies shortcomings in the current implementation of this principle. By analyzing judicial reforms in transitional countries it also seeks to guide international actors engaged in rule of law reforms.

As the first part on judicial independence in comparative analysis explains, the book is based on a contextual approach without, however, negating common concerns and developments. To illustrate different stages in the guarantee of judicial independence the rest is divided into separate parts: on new challenges in so-called established democracies, on transitional processes in new member states of the European Union and on obstacles for transition in post-Soviet states. Each part starts with thematic chapters which consider current issues which have proved to be prevalent in their contexts followed by chapters on selected countries from the region. The final part seeks to bring the regional parts together by summarizing and identifying common concerns and by making recommendations for the future of judicial independence in the region.

The country studies on post-communist states originated from a joint project of the Max Planck Minerva Research Group on Judicial Independence and the OSCE Office for Democratic Institutions and Human Rights (ODIHR). I started thinking about it during the course of

several OSCE Human Dimensions Meetings which showed once again that without an independent judiciary the guarantee of human rights is futile. When contacted in 2008, the ODIHR Head of the Rule of Law Unit, Carsten Weber, was immediately responsive to the idea of initiating a joint project on the Independence of the Judiciary. With the aim of addressing enduring deficiencies in the protection of the rule of law in Eastern OSCE participating States, ODIHR commissioned a number of state reports, predominantly from CIS countries, which were based on a uniform questionnaire drafted by ODHIR with the advice of the Minerva Research Group and the Venice Commission of the Council of Europe. With the assistance of Lydia Friederike Müller (Minerva Research Group) and Eva Katinka Schmidt (ODIHR) these reports were amended by the authors in order to ensure a comprehensive and balanced account of the state of affairs in their respective countries. I am grateful to ODIHR for giving me permission to publish edited versions of the reports from Poland, Estonia, the Russian Federation, Belarus, Moldova and Armenia which have proven to be most insightful and now form one part of this book.

While the cooperation with the OSCE focused on Eastern Europe, the South Caucasus and Central Asia, the Minerva Research Group broadened its perspective by including a number of States in other stages of transition. To gain a comprehensive understanding of the mechanisms for protecting judicial independence used by so-called established democracies and in order to identify current issues in Western countries experts from the United States, Canada, England and Wales, France, Italy, Sweden, Switzerland, The Netherlands and Belgium were asked for contributions on their home countries. Also scholars from Hungary and Romania were consulted in order to advance the understanding of reforms in EU accession states and to identify lessons learned by their processes of transition from communism to a democratic rule of law. While the number of countries to be considered was necessarily limited, the countries presented in this book are examples of models of judicial administration which can also be found elsewhere in the region. In order to facilitate comparative research all reports which have been edited with the help of Dominik Zimmermann (Minerva Research Group) are based on the same structure. At the same time the structure was intended to be flexible enough for the authors to explain particularities in each state so that the reader will understand the broader context. The country studies presenting the state of affairs of 2009/2010 provided the basis for comparative analysis (conducted in 2010) in the thematic chap-

ters which deal with specific aspects of judicial independence more substantively.

Annexed to the book are the Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia. They were elaborated by an Expert Conference which was organized and hosted by the OSCE Office for Democratic Institutions and Human Rights together with the Minerva Research Group from 23 to 25 June 2010 in Kyiv. They summarize the joint project with the OSCE by addressing the issues which were identified as common to and prevalent in post-communist countries. On the basis of the state reports the participants, among them prominent scholars and senior practitioners from 19 OSCE participating States, as well as from the Council of Europe and its Venice Commission, considered structural deficiencies and possible avenues for future reform in the Eastern region.

This book could not have been written without the support of the Max Planck Society's generous grant for setting up the Minerva Research Group. All authors of this book deserve special merit for their dedicated efforts to answer persistent questions for more information and for their patience with my scrupulous editing. Apart from my warm thanks to Lydia Friederike Müller, Dominik Zimmermann, Eva Katinka Schmidt and Saskia Klatte for their contribution as assistant editors I would like to express my gratitude to Jenny Laube, David Roth-Isigkeit and Saskia Kollbach for their very able and devoted help with citations, research assistance and proofreading and to Kate Eliot for the native speaker check. Finally my thanks go to all members of the ODIHR Rule of Law Unit for organizing the conference and to all participating experts for their contribution to the Kyiv Recommendations.

Though we have summarized the results of our work with respect to post-Soviet countries in the Kyiv Recommendations this is an ongoing project which will now focus on appropriate ways to implement the proposals on site, an effort which has already been initiated by the OSCE Office for Democratic Institutions and Human Rights. Also in academia this book – even though it goes beyond the regional focus of the Kyiv Recommendations – by giving an extensive overview of the various mechanisms used domestically to protect judicial independence, highlighting new developments and considering new issues of judicial independence in North America, Europe, South Caucasus and Central Asia can only be part of a broader academic dialogue. This gives me hope that it will stimulate further discussion and that the wealth of in-

formation and insight contained in the studies will rouse further interest in comparative judicial research.

Anja Seibert-Fohr

Max Planck Institute for Comparative Public Law
and International Law, Heidelberg

Table of Contents

Introduction: The Challenge of Transition 1
Anja Seibert-Fohr

I. Judicial Independence in Comparative Analysis

Judicial Independence: Structure, Context, Attitude 19
Vicki C. Jackson

Judicial Accountability and Conduct: An Overview 87
Giuseppe Di Federico

II. New Challenges in Established Democracies

The Persistent Politics of Judicial Selection:
A Comparative Analysis 121
Graham Gee

Judicial Independence in England and Wales 147
Sophie Turenne

Judicial Independence in Sweden 185
Joakim Nergelius and Dominik Zimmermann

Judicial Independence in The Netherlands 231
Roel de Lange

Judicial Independence in France 273
Antoine Garapon and Harold Epineuse

Judicial Independence in Belgium 307
Benoît Allemeersch, André Alen and Benjamin Dalle

Judicial Independence in Italy 357
Giuseppe Di Federico

Judicial Independence in Switzerland 403
Regina Kiener

Judicial Independence in Germany 447
Anja Seibert-Fohr

Judicial Independence in the United States of America 521
Russell Wheeler

Judicial Independence in Canada: A Critical Overview 567
Fabien Gélinas

III. Transitional Processes in New Member States of the EU

Judicial Administration Reforms in Central-Eastern Europe: Lessons to be Learned 603
Zdeněk Kühn

The Drive for Judicial Supremacy 619
Cristina E. Parau

Judicial Independence in Poland 667
Adam Bodnar and Łukasz Bojarski

Judicial Independence in Estonia 739
Timo Ligi

Judicial Independence in Hungary 793
Zoltán Fleck

Judicial Independence in Romania 835
Ramona Coman and Cristina Dallara

IV. Obstacles for Transition in Post-Soviet States

Judicial Reforms in Post-Soviet Countries – Good Intentions with Flawed Results?..... 885
Angelika Nußberger

The Accountability of Judges in Post Communist States: From Bureaucratic to Professional Accountability 909
Peter H. Solomon, Jr.

Judicial Administration in Transitional Eastern Countries 937
Lydia F. Müller

Judicial Independence in the Russian Federation 971
Olga Schwartz and Elga Sykiainen

Judicial Independence in the Republic of Belarus 1065
Alexander Vashkevich

Judicial Independence in Moldova 1119
Nadejda Hriptievschi and Sorin Hanganu

Independence of the Judiciary in Armenia 1197
Grigor Mouradian

Judicial Independence in Kyrgyzstan and Kazakhstan: A Legislative Overview 1255
Maksat Kachkeev

V. Conclusion: Judicial Independence in Transition

Judicial Independence – The Normativity of an Evolving Transnational Principle 1279
Anja Seibert-Fohr

Appendix

Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia 1363

List of Contributors 1375

Introduction
The Challenge of Transition

Anja Seibert-Fohr

Strengthening the rule of law has become a key factor in the transition to democracy and the protection of human rights.[1] As such it plays a vital role in the activities of those organizations engaged in supporting countries in transition. Though the significance of the rule of law has materialized in international norm setting[2] its implementation lacks a solid conceptual foundation. The Organization for Security and Co-operation in Europe (OSCE) – the successor to the CSCE which helped to end the cold war – is now active in supporting states of the former Soviet Union and South-Eastern Europe in the development of strategies to strengthen the rule of law.[3] A central element of this endeavour

[1] For the relationship between the rule of law and development see e.g. M. J. Trebilcock/R. J. Daniels, Rule of Law Reform and Development: Charting the Fragile Path of Progress (2008). For the relationship of the rule of law and democracy in comparative sociology see L. Morlino, The Two 'Rules of Law' between Transition to and Quality of Democracy, in: L. Morlino/G. Palombella (eds.), Rule of Law and Democracy: Inquiries into Internal and External Issues, 39 (2010).

[2] See e.g. Art. 14 International Covenant on Civil and Political Rights (ICCPR), United Nations General Assembly Resolution 2200A [XX1]. 16 December 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) (entered into force 23 March 1976); Art. 6 and 13 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), ETS 5; 213 UNTS 221. For an overview see B. Olbourne, Independence and Impartiality: International Standards for National Judges and Courts, 2 The Law and Practice of International Courts and Tribunals 97 (2003).

[3] For an overview of the Human Dimension activities see Organization for Security and Co-operation in Europe, OSCE Handbook (2007), available at

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233, DOI 10.1007/978-3-642-28299-7_1,

is judicial independence, which protects the courts in their adjudication from influence and pressure contrary to the law.[4] While most foreign and international rule of law initiatives have tried without much success to transplant Western institutional safeguards to transitional countries on an *ad hoc* basis,[5] it is now time to reconsider this early approach. For this purpose, through a detailed account of the current situation this book takes stocks, considers advances in and shortcomings of judicial reform in individual states and offers advice for future strategies.

The OSCE region is unique and particularly suited to the analysis of judicial independence in transition because it includes countries in different stages of transition.[6] Several Central and South Eastern European countries, for example, in their accession process to the European Union intensified their efforts to strengthen judicial independence as long as almost two decades ago[7] and learned lessons on how to cope with the

---

<http://www.osce.org/publications/sg/2007/10/22286_952_en.pdf>. For a methodology and evaluation see J. Binder, The Human Dimension of the OSCE: From Recommendation to Implementation (2001).

[4] See e.g. Helsinki Ministerial Council Decision No. 7/08, Further strengthening the rule of law in the OSCE area, MC.DEC/7/08, para 4, available at <http://www.osce.org/documents/mcs/2008/12/35586_en.pdf>.

[5] G. Ajani, By Chance and By Prestige: Legal Transplants in Russia and Eastern Europe, 43 A.J.C.L. 93 (1995). For an analysis of EU efforts towards rule of law reform see A. Magen/L. Morlino, International Actors, Democratization and the Rule of Law: Anchoring Democracy? (2008); T. Delpeuch, Evaluation of Sociological Critiques of International Legal Reform Transfers Based on an Analysis of American Judicial Assistance in Bulgaria, in R. Coman/J.-M. De Waele (eds.), Judicial Reforms in Central and Eastern European Countries, 79 (2007). For a critique of the European Commission with respect to judicial independence reform in particular see D. Smilov, EU Enlargement and the Constitutional Principle of Judicial Independence, in: W. Sadurski et al. (eds.), Spreading Democracy and the Rule of Law, 313 (2006). For an early stocktake of US efforts in post-communist countries see e.g. J. DeLisle, Lex Americana?: United States Legal Assistance, American Legal Models and Legal Change in the Post-Communist World and Beyond, 20 U. Pa. J. Int'l Econ. L. 179 (1999). For the term "legal transplant" see A. Watson, Legal Transplants: An Approach to Comparative Law (1974).

[6] For a definition of transition to democracy see Morlino (note 1), 41.

[7] For the EU requirements for accession see A. Seibert-Fohr, Judicial Independence in EU Accessions: The Emergence of a European Basic Principle, 52 German Yearbook of International Law 405 (2009).

communist heritage of a judiciary largely dependent on the executive.[8] Despite differences among post-communist countries their insight is relevant for other former communist countries, such as post-Soviet states in Eastern Europe and Central Asia which are still in search of adequate mechanisms for developing an independent judiciary. Highlighting the experience of transitional processes in Central Europe, this book seeks to feed the insight gained there into the dialogue with states from Eastern Europe, Eurasia and the Transcaucasus, and gives impulses for OSCE activities and feedback to the European Union for its future enlargement policies. Instead of advocating an ideal mechanism it is intended to identify drawbacks of initially advocated reforms so that similar strategies are avoided in future. The book also explains the legislative and institutional reforms in post-Soviet countries, identifies generic problems there and makes concrete suggestions for further reforms which are context-specific. With its geopolitical focus on OSCE participating States the collection seeks to complement the literature on judicial independence[9] and to follow up with a specific focus on rule of law reform in post-communism.[10]

---

[8] For a critical analysis of rule of law reforms in the aftermath of the communist regime see A. Czarnota/M. Krygier/W. Sadurski (eds.), Rethinking the Rule of Law after Communism, 265 (2005); R. Coman/J-M. De Waele (eds.), Judicial Reforms in Central and Eastern European Countries, 79 (2007); A. Czarnota/M. Krygier/W. Sadurski (eds.), Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders (2006); D. Piana, Judicial Accountability in New Europe: From Rule of Law to Quality of Justice (2010).

[9] See e.g. S. Shetreet (ed.) Judicial Independence: The Contemporary Debate, 496 (1985); J. Bell, Judiciaries within Europe (2006); K. Eichenberger, Die richterliche Unabhängigkeit als staatsrechtliches Problem (1960); R. Kiener, Richterliche Unabhängigkeit (2001); P.H. Russell/D. O'Brien (eds.), Judicial Independence in the Age of Democracy – Critical Perspectives from around the World (2001); G. Canivet/M. Andenas/D. Fairgrieve (eds.), Independence, Accountability, and the Judiciary (2006); S. Burbank/B. Friedman (eds.), Judicial Independence at the Crossroads: An Interdisciplinary Approach (2002); K. Malleson (ed.) Appointing judges in an age of judicial power – Critical perspectives from around the world (2006); S. Gloppen/R. Gargarella/E. Skaar, Democratization and the Judiciary: The Accountability Function of Courts in New Democracies (2004); A. Sajó, Judicial Integrity (2004); A. Dodek/L. Sossin, Judicial Independence in Context (2010).

[10] For rule of law reforms more generally see M. Trebilcock/R. Daniels, Rule of Law Reform and Development: Charting the Fragile Path of Progress (2008).

The collection of state-specific studies describes in detail the legal situation of judiciaries in states from North America, over Western, Central and South-Eastern Europe to post-Soviet states. It thus transcends the dialogue which is usually conducted among Western civil law or common law jurisdictions.[11] The survey shows that there is a variety of institutional and legal mechanisms intended to ensure judicial independence. At the same time it reveals that judicial independence is not a matter of concern just for the Eastern OSCE region. Even in so-called established Western democracies the protection of judicial independence is evolving and subject to new challenges.[12] But, despite the differences in the institutional framework, there are common concerns which are transnational in nature, warranting a more comprehensive comparative approach.

The diversity of safeguards illustrates that there is not a single standard model for ensuring judicial independence. Neither is judicial independence to be seen as a principle of complete judicial autonomy and power, but in its functional role for a democratic state which is based on the rule of law. While transitional countries are faced with the problem of building an independent judiciary in the first place, Western democracies are increasingly confronted with the problem of how to ensure the independence of the judiciary while retaining accountability in the interest of the rule of law and democracy.[13] In this respect some Western domestic models which, on the international level, have been described as particularly useful for procedurally and institutionally strengthening judicial independence, prove in an analysis of their functioning in the country of origin to be quite problematic. By highlighting this insight the book helps to demystify alleged role models and counsels a more contextual approach.

---

[11] For a very insightful comparative analysis which goes beyond the usual common law–civil law divide see also Bell (note 9).

[12] For the need for a cross-historical study see Burbank/Friedman (note 9), at 7.

[13] Canivet/Andenas/Fairgrieve (note 9); Russell/O'Brien (note 9); Sajó (note 9).

A. The Point of Departure: OSCE Commitments to Judicial Independence

In order to understand the point of departure for this comparative endeavour it is necessary to consider the commitment of the OSCE participating States to judicial independence. While not explicitly mentioned in the Helsinki Final Act of 1975 the rule of law has been an important aspect of European security in the context of human rights from an early stage.[14] In several meetings in the 1980s participating States of the Conference on Security and Co-operation in Europe affirmed their commitment to ensuring the effective exercise of human rights and fundamental freedoms by law.[15] In order to show their determination to ensure effective remedies for those claiming human rights violations the participating States on their Vienna Meeting in 1986 promised to ensure "the right to a fair and public hearing within a reasonable time before an *independent and impartial* tribunal [emphasis added]".[16] Since the Copenhagen Meeting in 1990 the rule of law has

[14] For the activities of the OSCE in this field see F. Evers, OSCE Efforts to Promote the Rule of Law, History, Structures, Survey, 20 Core Working Paper (2010). For the human dimension of the OSCE see J. Binder, The Human Dimension of the OSCE: From Recommendation to Implementation (2001); M. Boumghar, Les enjeux de la dimension humaine, in: E. Decaux/S. Sur (eds.), L'OSCE, Trente Ans Après L'Acte Final de Helsinki: Sécurité Cooperative et Dimension Humaine, 75 (2008). For the relevance of human security in Central Asia see S. Tadjbakhsh, A Human Security Agenda for Central Asia, in F. Sabahi/D. Waner (eds.), The OSCE and the Multiple Challenges of Transition: The Caucasus and Central Asia 169, at 171 et seq. (2004). For a general overview see Organization for Security and Co-operation in Europe, OSCE Handbook (2007), available at <http://www.osce.org/publications/sg/2007/10/22286_952_en.pdf>.

[15] Concluding Document of the Madrid Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe, section on Questions Relating to Security in Europe, Principles, Madrid, 6 September 1983, available at <http://www.osce.org/documents/mcs/1980/11/4223_en.pdf>; see also Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Co-operation in Europe, Questions Relating to Security in Europe, Principles, Item 13, Vienna, 15 January 1989, available at <http://www.osce.org/documents/mcs/1986/11/4224_en.pdf>.

[16] Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Co-operation in Europe, id., Item 13.9.

been among the explicit commitments of the Conference on Security and Co-operation in Europe.[17] The participating States declared that the independence of judges is "among those 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".[18] In the Moscow Document of 1991, apart from committing to respect the internationally recognized standards of judicial independence and making special reference to the International Covenant on Civil and Political Rights, the participating States specified their commitment by declaring that they

> "will, in implementing the relevant standards and commitments, 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, paying particular attention to the Basic Principles on the Independence of the Judiciary, which, inter alia, provide for
>
> (i) prohibiting improper influence on judges;
>
> (ii) preventing revision of judicial decisions by administrative authorities, except for the rights of the competent authorities to mitigate or commute sentences imposed by judges, in conformity with the law;
>
> (iii) protecting the judiciary's freedom of expression and association, subject only to such restrictions as are consistent with its functions;
>
> (iv) ensuring that judges are properly qualified, trained and selected on a non-discriminatory basis;
>
> (v) guaranteeing tenure and appropriate conditions of service, including on the matter of promotion of judges, where applicable;
>
> (vi) respecting conditions of immunity;

---

[17] Document of the Bonn Conference on Economic Co-operation in Europe Convened in Accordance with the Relevant Provisions of the Concluding Document of the Vienna Meeting of the Conference on Security and Co-operation in Europe, Preamble, Bonn, 11 April 1990, available at <http://www.osce.org/documents/eea/1990/04/13751_en.pdf>; Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, I (3), Copenhagen, 29 June 1990, available at <http://www.osce.org/documents/odihr/1990/06/13992_en.pdf>; Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, II (18), Moscow, 3 October 1991, available at <http://www.osce.org/documents/odihr/1991/10/13995_en.pdf>.

[18] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, I (5.12), id.

(vii) ensuring that the disciplining, suspension and removal of judges are determined according to law."[19]

It is important to note that the rule of law concept of the CSCE and later the OSCE has always been a part of its commitment to human rights and democracy. The special emphasis on democracy in this context clarifies that a rule of law in a democratic society is envisaged. This avoids the misconception of the rule of law as a matter of law enforcement in an authoritarian regime. Democratic rule of law stands for a concept of respect for fundamental rights and limited state power.[20] In this respect judicial independence is a central element providing individuals with an effective remedy against violations of their rights.

Apart from the individual commitment to judicial independence the participating States promised as early as in 1991 in Moscow that they would co-operate to identify where problem areas existed in the protection of judicial independence and to develop ways and means to address and resolve such problems,[21] as well as that they would facilitate the dialogue among those interested in ensuring respect for the independence of the judiciary.[22] They promised to co-operate continuously in the drafting of legislation intended to strengthen respect for the independence of judges and in the area of their education and training.[23] The commitment to promote the development of independent judiciaries was repeated in the OSCE Charter for European Security of 1999.[24] The participating States in 2008 reaffirmed their commitment and encouraged participating States "to continue and to enhance their efforts to share information and best practices" to strengthen the rule of law in the area of the independence of the judiciary in Helsinki Ministerial

---

[19] Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, II (19.2), Moscow, 3 October 1991, available at <http://www.osce.org/documents/odihr/1991/10/13995_en.pdf>.

[20] For the general interpretation of the rule of law as a concept of government limited by law see B. Tamanaha, On the Rule of Law: History, Politics, Theory , at 114-119 and at 137 et seq. (2004).

[21] Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, II (20.3), Moscow, 3 October 1991, available at <http://www.osce.org/documents/odihr/1991/10/13995_en.pdf>.

[22] Id. (20.2).

[23] Id. (20.4).

[24] OSCE Document of the Istanbul Summit, para 45, available at <http://www.osce.org/documents/mcs/1999/11/4050_en.pdf>.

Council Decision no. 7/08 on further strengthening the rule of law in the OSCE area.[25]

It is this commitment to an independent judiciary and promise of co-operation which prompted us to analyze the current state of affairs and to give guidance for future reforms. In accordance with the above-cited Moscow Document we have focused the analysis in the country studies on judicial selection (including the qualification and training of judges), tenure and promotion, remuneration, case assignment, discipline and removal, immunities, the role of associations for judges, resources, internal and external influence including security as well as judicial ethics.

B. Judicial Studies and Multidisciplinarity

While the normative and structural guarantees of judicial independence play a prominent role in this book we have tried to give a more comprehensive picture by also describing actual practice.[26] Previous scholarship has stressed the importance of social science research and consideration of customs apart from norms.[27] Therefore we have included authors from different disciplines. Apart from leading scholars of constitutional law, comparative constitutional law, civil and criminal procedure and legal sociology, social and political science, practitioners, human rights lawyers and people who have a general interest in the judiciary have been consulted. In order to prevent allegations of self-interest, experts from outside the judiciary and the political branches have been chosen as authors with the request to consider the legal and practical situation on site. Their studies identify various factors to be considered apart from formal, structural protections needed so that judicial independence can be effectively ensured.

---

[25] Helsinki Ministerial Council Decision No. 7/08, Further strengthening the rule of law in the OSCE area, MC.DEC/7/08, para 4, available at <http://www.osce.org/documents/mcs/2008/12/35586_en.pdf>.

[26] For the call for more empirical research in evaluating judicial independence see e.g. T. Paretti in Burbank/Friedman (note 9), 22.

[27] See C. Cameron in Burbank/Friedman (note 9), 134, arguing that formal structural protections are not sufficient to protect judicial independence. See also C. Geyh in Burbank/Friedman (note 9), 160, stressing the importance of customs respecting judicial independence.

It would be beyond the confines of this introduction to elaborate on the country studies individually. But it is essential to acknowledge that the very insightful and critical contributions by Benoît Allemeersch, André Alen and Benjamin Dalle (Belgium); Adam Bodnar and Łukasz Bojarski (Poland); Ramona Coman and Cristina Dallara (Romania); Giuseppe Di Federico (Italy); Zoltán Fleck (Hungary); Antoine Garapon and Harold Epineuse (France); Fabien Gélinas (Canada); Nadejda Hriptievschi and Sorin Hanganu (Moldova); Maksat Kachkeev (Kyrgyzstan); Regina Kiener (Switzerland); Roel de Lange (Netherlands); Timo Ligi (Estonia); Grigor Mouradian (Armenia); Joakim Nergelius and Dominik Zimmermann (Sweden); Olga Schwartz and Elga Sykiainen (Russian Federation); Sophie Turenne (England and Wales); Alexander Vashkevich (Belarus); and Russell Wheeler (United States) have been the basis for the comparative analysis of the final as well as of the thematic chapters and a major source of insight for the entire project including the recommendations in the annex.

C. Diversity and Contextualism

As indicated before, this book describes different means of implementation, and thus illustrates the diversity of legal mechanisms for ensuring judicial independence. Vicki C. Jackson describes them in her chapter on *Structure, Context, Attitude* as "packages of judicial independence" which vary from country to country. She introduces us to some general considerations on judicial independence and provides us with valuable insights for comparative analysis. Elaborating on the worldwide diversity of structural features of judicial independence, she asks us to consider their broader context. Her analysis of different measures which have been adopted to ensure judicial independence, such as with respect to judicial selection, tenure, salaries, recusal, decisional authority, case assignment, legal reasoning, discipline, immunity, physical security, administrative autonomy and training measures, shows that they work differently depending on the historical, legal and social context in each country, and therefore seen in isolation are not necessarily an indicator for judicial independence. Advancing judicial independence is a complex process which also requires us to consider the interaction between different features. Vicki C. Jackson argues that instead of generalizing about which particular structural feature is consistent with judicial independence we should recognize that different packages of safeguards may lead to the same result.

D. Independence and Accountability

A recurrent issue throughout the book is the identification of different measures which ensure judicial accountability without abrogating judicial independence. Giuseppe Di Federico in his chapter on *Judicial Accountability and Conduct* explains the growing importance of judicial accountability on the basis of the increasing role of the judiciary in modern democracies. Recognizing the need for new forms of legitimacy he gives an overview of innovations in the area of judicial conduct and discipline which are spreading across national borders. In order to ensure accountability without influencing judicial decision-making he advocates measures to improve the capacity of judges to maintain public trust and confidence in their independent efficient adjudication. His analysis of the country studies which reveals flaws even in established democracies suggests that strengthening the proactive role of codes of ethics is instrumental and that citizens can play a positive role in making a disciplinary system more effective. Calling for careful monitoring of the application of the rules contained in these codes he reminds us that the guarantee of judicial independence compels all countries to try to progress and that the long process of judicial reform in transitional countries requires patience and persistence. His plea for more transparency as a means to ensure accountability without influencing the outcome of cases is a continuing theme throughout this volume.

A variety of other potential means to ensure judicial accountability is illustrated by the state-specific chapters which – apart from judicial discipline and codes of ethics – also describe complaints procedures, recusal, public access, training, recruitment and promotion and their relationship to judicial independence. Peter H. Solomon, Jr. in his chapter *The Accountability of Judges in Post Communist States: From Bureaucratic to Professional Accountability* draws from this survey in an effort to find options for reform in Russia and other post-communist countries. Having identified the prevailing mechanisms of bureaucratic accountability as a major obstacle to judicial independence in post-Soviet countries, he considers alternative forms of accountability to be found in OSCE participating States which have experienced similar challenges. Since most Western European civil law countries also have a career judiciary he considers their accountability mechanisms and finds that the bureaucratic accountability of judges can take more benign forms even in hierarchically organized judiciaries. He describes factors which have helped to soften bureaucratic accountability and emerging alternative means of accountability grounded in professional solidarity – a devel-

opment in Western civil law democracies which has only started to gain ground in Central European countries. In response to the particular flaws in post-communist states and in an effort adequately to balance independence and accountability he advocates several concrete mechanisms for strengthening professional accountability.

E. Legitimizing Judicial Power

A central aspect of building and maintaining an independent judiciary is recruitment. As our country studies show, recent developments in some Western countries, such as the English Constitutional Reform Act 2005, indicate a trend structurally to separate the nomination process from the political branches.[28] Judicial appointment commissions can now be found in a variety of Western European countries.[29] There have been voices also in Canada for non-partisan appointments.[30] On the other hand countries such as the United States, Switzerland and Germany, retaining their call for democratic legitimacy of the judiciary, provide for selection by the political branches or by way of election.[31]

Graham Gee in his chapter *The Persistent Politics of Judicial Selection: A Comparative Analysis* addresses this controversy in Western political debate and asks how far the claimed depoliticization process should go in countries such as England. Drawing on a number of country studies in this volume he maps the competing interests and concerns in the context of judicial selection. According to his analysis there will always be

---

[28] See S. Turenne, Judicial Independence in England and Wales, in this volume, Chapter B. I. 2.

[29] See e.g. J. Nergelius/D. Zimmermann, Judicial Independence in Sweden, in this volume, Chapter B. I. 2.; A. Garapon/H. Epineuse, Judicial Independence in France, in this volume, Chapter B. I. 2.; G. Di Federico, Judicial Independence in Italy, in this volume, Chapter B. I. 2.; R. de Lange, Judicial Independence in The Netherlands, in this volume, Chapter B. I. 2.; B. Allemeersch/A. Alen/B. Dalle, Judicial Independence in Belgium, in this volume, Chapter B. I. 2.

[30] See F. Gélinas, Judicial Independence in Canada – A Critical Overview, in this volume, Chapter B. I. 2.

[31] See R. Wheeler, Judicial Independence in the United States of America, in this volume, Chapter B. I. 2.; R. Kiener, Judicial Independence in Switzerland, in this volume, Chapter B. I. 2. Selection; A. Seibert-Fohr, Judicial Independence in Germany, in this volume, Chapter B. I. 2.

political dimensions to the selection of judges because of the ability of courts to hold political institutions accountable. Shifting the responsibility for judicial selection from politically accountable institutions completely to institutions in which judges play a significant role does not make the judiciary immune from political considerations. Therefore he cautions that the depoliticization rationale should not be taken too far because total isolation from democratic legitimacy runs the risk that a transparent and balanced political process may be replaced by unacknowledged unilateral political influence on and within the judiciary.

F. Democracy *versus* Judicial Autonomy

The caveat against judicial autonomy at the expense of democratic accountability can also be found in the chapters on judicial administration. Zdeněk Kühn, considering *Judicial Administration Reforms in Central-Eastern Europe,* identifies lessons to be learned from new EU member states. Comparing the Czech model of centralized management of the courts performed by the Justice Ministry with the Hungarian judicial self-governance model and the various alternatives between those extremes, such as that of Poland with powers being shared between judicial organs and executive authority, he argues for the latter. Experience in Central-Eastern Europe suggests that in the interest of ensuring accountability without allowing political control over judicial decision-making, selected competences of a judicial council may work better than broad competences. Like Graham Gee in his analysis of Western judiciaries, Zdeněk Kühn argues that there is a need for a carefully balanced democratic responsibility. He concludes that it is for the democratically elected branches to decide on the general criteria relevant for the selection of judges and ultimately to decide on the judicial budget as part of the state budget.

Cristina Parau in her provocative chapter *The Drive for Judicial Supremacy* takes this argument even further, considering the relationship between the three branches of government in the aftermath of reforms in Central-Eastern Europe. Taking the example of Romania she describes the risks of turning a subservient judiciary in a post-communist country into a power supreme over the democratically elected branches. Her chapter is divided into a theoretical part where from a political science perspective she develops her own typology of separation of powers and an empirical part which examines in more detail the nature of the judiciary that has emerged in Romania. She criticizes that instead of

co-equality the judiciary through the Judicial Council has assumed a high degree of autonomy in that country. Ascribing this development to a misrepresented meaning of judicial independence she warns that the development towards what she calls "vicious supremacism" is likely to undermine the fundamental principles of separation of powers and checks and balances.

G. Judicial Independence *versus* Authoritarianism

While there is a risk of overstretching judicial independence at the expense of democratic legitimacy in some Western and Central-Eastern European Countries, the situation in post-Soviet states is still characterized by numerous dependencies which are detrimental to both the rule of law and democracy. Angelika Nußberger in her analysis *Judicial Reforms in Post-Soviet Countries: Good Intentions with Flawed Results?* identifies initial advances and subsequent setbacks in Russia and neighbouring countries since the 1990s. Drawing on the case studies in this volume she lists specific structural deficits, communist heritage and abuse of power as major obstacles to judicial independence. Despite institutional changes, the dominance of authoritarian leadership by the Presidential administration and by Court presidents continues to jeopardize both external and internal independence. At the same time, acknowledging some positive developments she cautions us not to underestimate the complexity and difficulties of transitional reforms and to understand them as a continuous process of trial and error. Her description of efforts by the Council of Europe's Commission for Democracy through Law (Venice Commission) to assist judicial reform and of relevant jurisprudence by the European Court of Human Right leads her to the conclusion that the international community can play a valuable role in anchoring fair trial standards in the legal cultures of the post-Soviet countries.

One of the areas identified by Angelika Nußberger as requiring further reform is the administration of the judiciary. In response to her call for convincing solutions Lydia F. Müller in *Judicial Administration in Transitional Eastern Countries* describes and classifies the different administrative models in the region and identifies the competing principles relevant for judicial administration. Drawing from a comparative analysis of the Eastern and Central European country studies in this volume, she argues that a balance needs to be struck between self-administration and democratic control. Her contribution thus takes on a concern

which is prevalent in the other parts of this book dealing with established democracies and new EU member states and pursues it with respect to post-Soviet States. With her delineation of potential remedies she explains the considerations of the experts attending the Kiev conference which, together with other relevant insights from the country studies, have entered the *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*, a set of proposals annexed to this volume summarizing the outcome of our joint project with the OSCE to strengthen judicial independence in these countries.

H. Rhetoric or Normativity?

While the major part of this book is divided into three parts, each dealing with the particularities in different stages of transition – i.e. *New Challenges in Established Democracies*, *Transitional Processes in New Member States of the EU* and *Obstacles for Transition in Post-Soviet States*[32] the final chapter deals with the question whether there is room for a common denominator despite the variety of domestic structural safeguards to ensure judicial independence. The chapter entitled *Judicial Independence – The Normativity of an Evolving Transnational Principle* critically examines the position voiced elsewhere that judicial independence is a mere rhetoric with varying meanings.[33] It seeks to respond to this challenge by resorting to a multi-level governance concept and argues that the recognition of diversity does not abrogate the commitment to an international principle. In any case international guarantees should not be misinterpreted as providing a blueprint for domestic law.

---

[32] It is important to acknowledge that despite the division into these three parts the stages of transition within these parts vary. The reference to established democracies is not intended to suggest that they have already achieved an ideal state of affairs. Rather, all states are in a continuous evolutionary process.

[33] For divergent views on the meaning and normativity of judicial independence in the US context see Burbank/Friedman (note 9). For the assertion that there is a myth of a common European theory of judicial independence see D. Smilov, EU Enlargement and the Constitutional Principle of Judicial Independence, in: W. Sadurski et al. (eds.), Spreading Democracy and the Rule of Law, 313, at 316-334 (2006).

The chapter explores the scope for a common understanding by considering judicial independence from a macro perspective. Our comparative analysis shows common concerns throughout the entire OSCE region. There is agreement on a common core, a transnational concept of judicial independence the normativity of which transcends the traditional confines of the state. In order to maintain this unity in diversity it is necessary to find the right balance between the interpretation of judicial independence as an international normative principle which has been the subject of numerous international commitments[34] and consideration of contextual diversity. Conceptualizing judicial independence as a functional principle which provides for an obligation of result rather than of means helps to identify it as a transnational norm which nevertheless gives room for diverse and context-specific implementation.

[34] See e.g. Art. 14 ICCPR, United Nations General Assembly Resolution 2200A [XX1]; Art. 6 ECHR, Art. 8 American Convention on Human Rights (ACHR), OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99 (1969).

I. Judicial Independence in Comparative Analysis

Judicial Independence: Structure, Context, Attitude

*Vicki C. Jackson**

Judicial independence and impartiality have become transnational legal norms, instantiated in many national constitutions and in the core human rights covenants to which the great majority of the nations of the world subscribe.[1] Judicial independence has received specific attention from the United Nations, in part because widespread official agreement on adherence to the values of judicial independence is too often matched by disregard for judges' independence in concrete instances.[2]

* The author thanks Professors Judith Resnik, Anja Seibert-Fohr, Jed Shugerman and Mark Tushnet for helpful comments and discussions, and thanks Amelia Royce and Savannah Lengsfelder for their able research assistance.

[1] See, e.g., Article 14, International Covenant on Civil and Political Rights, UNTS, vol. 999, at 171.

[2] See, e.g, U.N. Basic Principles on the Independence of the Judiciary (1985), adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, available at <http://www2.ohchr.org/english/law/indjudiciary.htm>; United Nations, Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers: Report of the Special Rapporteur, Param Cumaraswamy, UN Doc E/CN.4/1995/39 P 35 (1995). On the intersecting influences of international and national law on concepts of judicial independence, see S. Shetreet, The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges, 10 Chi. J. Int'l L. 275

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233, DOI 10.1007/978-3-642-28299-7_2, Published by Springer-Verlag Berlin Heidelberg 2012

The reasons for valuing judicial independence are well known. Uncontroversially, there is the goal of achieving impartial justice as between the parties; judges who have a stake in the controversy, or who are related by ties of affection or finance to one of the parties, cannot render or be seen to render impartial justice in private disputes. In public law disputes, the goal of impartial justice as between the parties also advances the function of judges serving as a check on government wrongdoing or abuse of power. Yet insofar as the state employs the judges, public law disputes might be thought to require an even *greater* degree of judicial distance, or structural capacity for independent evaluation of the parties' claims (including those by or about the government).[3]

Independence has components of independence *from* certain forces and independence to *do* justice impartially.[4] At its core, the idea of judicial independence goes to the nature of the decisions judges make in adjudicating the cases before them: Judges are supposed to be independent of "men" or human pressures, so that they are free impartially to apply the "laws."[5] In addition to embracing norms against corruption or decision based on ties of kinship or affection, this idea has at least three aspects: attitudinal features (that is, a willingness to decide against the govern-

---

(2009); V. C. Jackson, Constitutional Engagement in a Transnational Era, at 98-100 (2010).

[3] Norms of impartiality would ordinarily hold that a judge whose livelihood depended on payments from one party could not be expected to do impartial justice in a dispute between that party and others, at least absent all parties' consent. Yet public judges are paid by their governments. In order to provide "impartial" justice to citizens who challenge government action, judges need a particular degree of independence from the governments that, typically, pay their salaries. Compare further *Van Rooyen* v. *State*, 2002 (8) BCLR 810 (CC), 2002 SACLR LEXIS 18, at 25 (Const Ct. S. Afr.).

[4] See, e.g., V. C. Jackson, Packages of Judicial Independence: The Selection and Tenure of Article III Judges, 95 Geo. L. J. 965, at 969 (2007); P. S. Karlan, Judicial Independences, 95 Geo. L. J. 1041 (2007) applying Isaiah Berlins' "two concepts of liberty" to the idea of judicial independence.

[5] See *Marbury* v. *Madison*, (1803) 5 U.S. 137, at 163 referring to "a government of laws, and not of men". See also e.g., *Beauregard* v. *Canada*, (1986] 2 S.C.R. 56, at 69 (Canada Sup. Ct.) ("the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider – be it government, pressure group, individual or even another judge – should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision."); *Van Rooyen* v. *State* (note 3), at 27-28.

ment, or a willingness to listen and decide with an open and fair mind the parties' claims and defenses); competency factors (one cannot apply the law or make legal judgments about the law's correct interpretation without knowledge of and training in law); and institutional factors (legal structures or rules, designed to protect judges from improper influence or pressure and thus promote independent decision-making).

Attitudinal factors may be the most important in practice to achieving impartiality; it is difficult to achieve an impartial and open-minded attitude through legal rules and structures alone, although some structures or legal rules may make it harder to maintain an attitude of independent impartiality than others. Attitudinal factors are also of great importance in the other political organs and in society,[6] which frame or constrain the possibilities for judicial independence. Yet measuring attitudes of independence would seem to require agreement on quite contestable baseline issues: for example, if one measure of judicial independence is a willingness to rule against the government, how can one evaluate this without an agreed baseline on what appropriate levels of disagreement with government positions should be? One can make relative statements, simply using disagreement with the government or invalidation of legislation to describe courts as, relatively, more or less "independent" as a positive matter; but such data may not in fact be measuring independence in any normatively valuable sense: As fascinating work by Gretchen Helmke has illustrated, judges may vote to invalidate laws because they do *not* feel independence from political actors and seek to gain favor with new or incoming regimes in order to survive in their judicial position.[7]

Moreover, while most would agree that judges should decide "independently" of purely political pressures, many scholars argue that

---

[6] See, e.g., M. Ramseyer, The Puzzling (In)Dependence of Courts: A Comparative Approach, 23 J. Legal Stud. 721, at 730-731(1994) suggesting that a "hands off" attitude in the U.S. political branches results from a culture that does not approve of penalizing judges for their decisions, rather than from specific constitutional provisions; cf. J. L. Entin/E. Jensen, Taxation, Compensation and Judicial Independence, 56 Case Western Res. 965, at 967 (2006) ("Even with all the overheated rhetoric now common in Washington, it is almost impossible to imagine Congress's mounting a straightforward economic attack on the judiciary.") The coexistence of such attitudes with support for contested judicial elections involving incumbent state court judges must be noted.

[7] G. S. Helmke, Courts Under Constraints: Judges, Generals and Presidents in Argentina, at 154-158 (2004).

judges should take into account changing understandings – whether in legislative or executive offices or among the general population – in reaching their own judgment of the law.[8] There is strong agreement in principle that public or political pressures should not affect judges' views of the application of the law to contested facts in individual cases; but less agreement on the role of public or political actor understandings in determining what the correct understanding of the law is.[9] It may be a very fine line between attending to "popular" views and understandings because, as a matter of independent judicial judgment, these are appropriate sources of interpretation, and attending to "popular" views because if the judge does not, she will lose her position, or suffer other adverse consequences (including reputational ones). Quantifying this distinction would also be a formidable challenge.

Judicial independence has both personal and institutional aspects.[10] It may be possible to secure the relative independence of the judiciary

---

[8] Such arguments are most typically made about constitutional issues. See, e.g., A. Barak, Purposive Interpretation in Law, at 190-191 (2005) (noting relevance of contemporary constitutional goals, values and principles in understanding the "objective" meaning of constitutional text and arguing that the "objective" meaning assumes more importance than its "subjective" or originally intended meaning); H. H. Wellington, Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication, 83 Yale L.J. 221, at 244 and 284 (1973); D. A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877, at 933 (1996); cf. H. L. McBain, The Living Constitution, at 30-31(1928) (on legislative interpretation).

[9] An independent judge would not allow the popularity of a particular party, or the desires of the public or politicians for one or the other side to "win," to influence their decision in applying the law. But what role the views of the public or political actors should play in determining the correct legal rule, at what Professor Scheppele calls the level of the rule, is a more complex matter, as is its relationship to judicial independence. See K. L. Scheppele, Declarations of Independence: Judicial Reactions to Political Pressures, in: S. B. Burbank/B. Friedman (eds.), Judicial Independence at the Crossroads: An Interdisciplinary Approach, 227, at 230-231 (2002).

[10] See, e.g., *Valente* v. *The Queen*, (1985) 2 S.C.R. 673, at 687 ("[J]udicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government[…]"); S. Shetreet, Judicial Independence: New Conceptual Dimensions and Contemporary Challenges,

from the legislature or the executive part of the government *without* at the same time developing a culture of individual judicial independence, as where the apex of the judiciary exercises tight control over the adjudicatory decisions of lower court judges using powers, apart from review on appeal – such as by controlling the working conditions, or salary increases or professional advancement – of lower court judges. Such systems might be justified by reference to other values, including the benefits of a high degree of uniformity and consistency within the judiciary to the norms asserted by the apex court. In systems that highly value individual judicial independence (sometimes referred to as "internal" independence"),[11] the primary means of controlling error in decision-making is through an adjudicatory rather than administrative or bureaucratic process; it would be regarded as inappropriate for senior judges to seek to advise or influence lower court judges; and separate judicial opinions may be regarded as an ordinary consequence of individual judicial independence in multi-member panels. Where personal independence is protected, the basis for doing so is in a larger sense institutional, that is, of promoting the capacity of members of the judiciary to provide impartial justice.[12]

This simplified summary, of course, elides many of the complex issues that can arise, including the role of popular views, or the actions of political branches, in helping to define what "the law" is. Acknowledging these gray or contested areas, judges nonetheless are held to the goal of hewing to the law and to a capacity independently to determine what the law is in the particular cases that come before the courts. At the same time, constitutional courts are typically subject to checks – formal, legal checks by which power rests in the hands of other branches to control nominations or appointments, or to control the jurisdiction of the courts, or to be able to amend the constitution that gives power to the courts; and informal checks arising out of scholarly and public cri-

---

in: S. Shetreet (ed.), Judicial Independence: The Contemporary Debate, at 598-599 (1985); Shetreet (note 2), at 284-285 (distinguishing individual and "collective" independence).

11 See, e.g., M. Kuijer, The Blindfold of Lady Justice: Judicial Independence and Impartiality in Light of the Requirements of Article 6 of ECHR, at 265-267 (2004); Shetreet (note 2), at 286-287.

12 See J. Riedel, Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Germany, in: G. Di Federico (ed.), Recruitment, Professional Evaluation And Career Of Judges And Prosecutors In Europe: Austria, France, Germany, Italy, the Netherlands and Spain, at 107 (2005).

tique of their decisions, or even, some would say, from checks arising from the risks of noncompliance or evasion of judicial judgments.[13]

Thus, advancing judicial independence is a complex process, fraught with the potential for disagreements over how to balance the important interests in maintaining an independent judiciary with the demands of some form of accountability in the exercise of all forms of public power. To capture and advance these forms of independence, a number of structural legal approaches and elements may come into play. I explore these elements in Part I of this essay, emphasizing the interaction of different features in creating an overall "package" of independence and accountability.

In Part II, I suggest that the apparent polarity between accountability and independence is overstated, insofar as some forms of accountability may *enhance* the legitimacy of courts and contribute to their independence. This complicates efforts to generalize about whether certain structural features are consistent with or required by norms of judicial independence. Whether a particular feature will promote judicial independence in a particular court system cannot always be determined in the abstract; it may well be quite context-dependent, contingent on the historical development of the particular system as well as other structural and contextual features at work. I use two main examples to illustrate this: whether separate opinions are permitted or prohibited; and what selection method for choosing judges is used.

---

[13] For disagreement on whether risks of noncompliance and resistance are legitimate prudential factors in judicial decisionmaking, compare A. M. Bickel, The Supreme Court, 1960 Term – Forward: The Passive Virtues, 75 Harv. L. Rev. 40, at 77-79 (1961) (noting the "disagreeable necessity" that many "Negro" children do not yet attend integrated schools or that miscegenation laws continue to exist) with G. Gunther, The Subtle Vices of the Passive Virtues: A Comment on Principle and Expediency in Judicial Review, 64 Colum. L. Rev. 1, at 22-24 (1964) (disagreeing with Bickel, and arguing that "miscegenation laws are invalid, no matter what the reaction of Southern opinion may be"). On the possibility of noncompliance with Supreme Court decisions in the United States, see T. J. Peretti, Does Judicial Independence Exist, in: Judicial Independence at the Crossroads, (note 9), at 117 (summarizing studies that show that "compliance […] is neither automatic nor complete").

I. Packages of Judicial Independence: Complex and Interdependent Legal Structures

There are many factors that contribute to judicial independence including, perhaps most importantly, the broader culture – legal, political and social. The independence of the legal profession is an important aspect of this larger culture. Without a sense of professionalism and independence in the bar, it is very difficult to expect from the judges a sense of independence from influence and adherence to the law as a somewhat autonomous source of norms.[14] Without attitudes – within the bar, within other branches of government, and more generally among the public – that value law and the legal system and regard it as, ideally, separated from political influences in the course of adjudication – structural features of the most exquisite exactness will in all likelihood fail. It is thus important to emphasize at the outset the importance of informal, or sociological forms of checks, structures of thought, and influences, which can promote, contain or undermine judicial independence.

The broader sociolegal environment is, moreover, intimately connected to how different legal features of the formal provisions for independence or accountability will work in practice. Interpretive approaches (for example, compare "textualism" with "purposivism") and the presence of a body of "higher" law (whether customary or written) may contribute to the "independence" of judges, especially in evaluating the validity of written rules.[15] It is thus necessary to understand – in each setting – how legal structures operate within the particular political/legal/sociological context. But doing so is beyond the scope of this essay, which will focus on identifying legally regulated forms of protecting or constraining judicial independence, and their theoretical interdependences and variability in valence.

The essay will also focus primarily on the judges of the highest courts holding power to review the constitutionality of laws. The situation of judges on such high courts, and judges in the ordinary judiciary or in lower courts, differ in ways relevant to discussions of independence and accountability. For one thing, a wider range of influences and controls

---

[14] See M. J. Horwitz, Constitutional Transplants, 10 Theoretical Inq. L. 535, at 542-545 (2009).

[15] Cf. Scheppele (note 9), at 238-246 (arguing for interpretive approaches and judicial dependence on principles that provide some "critical distance" from current political pressures and bargaining).

may legitimately be brought to bear on lower court judges, typically through processes of appellate review within the judiciary and through administrative discipline.[16] Politically contentious disputes of constitutionality, moreover, are at their most focused in the highest courts, in part because of the powerful law-making or law-negativing elements of constitutional adjudication in the final and highest courts, which raises the stakes for reconciling democratic values with constitutional review.[17] For these reasons, this essay focuses primarily, though not exclusively, on judges of the highest courts with jurisdiction over constitutional issues.

The range of legal structures or elements that may bear on judicial independence is complex and multi-featured; it is always related to mechanisms of what has come to be called "accountability" (a complex of concerns that relate both to preventing judicial misbehavior and abuse of office and to the quite different concern for responsiveness of the courts to democratic change). For example, publicity of judgments might be thought of as primarily a form of judicial accountability. Yet the public record of decisions and their reasons can also strengthen understandings of what the law is in the broader juristic community in

---

[16] On the role of appellate review in constraining serious error in lower court decisions, see L. A. Kornhauser/L. G. Sager, Unpacking the Court, 96 Yale L.J. 82 (1986); J. Ferejohn/L. Kramer, Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint, 77 NYU L. Rev. 962, at 998 (2002) (suggesting that Kornhauser/Sager's work illustrates that an appellate hierarchy can help "ensure that no individual judge can, by his or her actions alone, inflict too much damage on the judiciary by making aberrant or overly ambitious decisions"). Cf. S. Levinson, The Role of the Judge in the Twenty-First Century: Identifying "Independence," 86 B.U. L. Rev. 1297 (2006) (noting that lower courts have less "independence" from being reviewed by appellate courts); Burbank/Friedman (note 9), at 7, (on need to separate analysis of high courts and other courts). On the possibility that appellate judges can constrain – other than through post facto appellate review – the decisional independence of trial court judges, see A. Vashkevich, Judicial Independence in the Republic of Belarus, in this volume, Chapter C. II. 1. (on the "zonality" system); on the impact of appellate reversals on salaries, see O. Schwartz/E. Sykiainen, Judicial Independence in the Russian Federation, in this volume, Chapter B. IV.

[17] Cf. V. Ferreres Comella, Constitutional Courts and Democratic Values (2009); S. Burbank/B. Friedman, Reconsidering Judicial Independence, in: Burbank/Friedman (note 9), at 29 (suggesting that appellate courts, which decide on legal questions, should be more tied to public opinion than trial courts, which decide on facts in individual cases).

ways that reinforce judges' ability independently to apply that law.[18] Below are a number of different features that might be thought to comprise part of what we could think of as the "package" of legal protections and restrictions on judicial independence that exist in any particular system.

1. The Power to Select: Methods; Criteria; Numbers

As will be discussed further in Part II below, there are several different models for how judges are selected. A preliminary observation is that any selection method necessarily locates power somewhere; and any location of power has risks of abuse. Structural features of judicial independence are sometimes understood to refer primarily to issues such as tenure in office (and protections from removal), financial remuneration, and administrative independence.[19] As James Madison said, in defending the provisions for presidential nomination and appointment with the concurrence of the Senate against claims that they gave the political branches too much influence, "the permanent tenure by which the ap-

---

[18] Transnational norms in Europe and elsewhere generally favor public and transparent decisions by courts. See, e.g., 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), Recommendation 15 ("Judgments should be reasoned and pronounced publicly […]"); KYIV Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Europe, 23-25 June 2010 (OSCE Office for Democratic Institutions and Human Rights and Max Planck Minerva Research Group on Judicial Independence), Recommendation 32 ("[D]ecisions shall be published in databases and on websites in ways that make them truly accessible and free of charge."); see also U.S. Constitution Amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial [….] "). Cf. *Berenson-Mejia* v. *Peru*, Inter-Am. C.H.R. (25 November 2004) (case arising from petition no. 11,876), 147, at 150 (finding violation of Article 8(1) of the American Convention on Human Rights where, inter alia, the judges were "faceless", their identity obscured); id., at 198 (finding a violation of Article 8(5), which requires that "criminal proceedings […].be public, except insofar as may be necessary to protect the interests of justice"). But cf. N. Hriptievschi/S. Hanganu, Judicial Independence in Moldova, in this volume, Chapter B. II. 4. (noting debate over value of publishing decisions on the web).

[19] See *Reference re Remuneration of Judges of the Provincial Court of Prince E. Island*, (1997) 3 S.C.R. 3 (Sup. Ct. Canada).

pointments are held […] must soon destroy all sense of dependence on the authority conferring them."[20] Yet selection methods may relate to the institutional independence of courts, to the extent that courts themselves influence their own membership; and may be related to the individual independence of the judges if the selection systems are related to the competence of those chosen; moreover, selection systems and tenure/renewability features are intimately connected in evaluating effects on independence.

In some countries the selection of the highest court to resolve constitutional questions relies on a different method than for the ordinary courts;[21] in other jurisdictions, like the United States, as a constitutional matter the procedures may be the same for all judges of the same overall court system, though different conventions apply in practice. For highest constitutional courts, it is not uncommon to find overtly political methods of appointment by, for example, chief executive officers, or parliaments, or a combination thereof;[22] sometimes in parliamentary systems a majority vote is required, sometimes a supermajority.[23] But in some systems the judges themselves exercise significant influence upon or even control selection of their successors.[24] One also finds powers al-

---

[20] The Federalist No. 51 (J. Madison), in: C. Rossiter (ed.), The Federalist Papers (1787) 320, at 321 (1961).

[21] Compare, e.g., German Basic Law, Art. 33 (requiring competency-based selection of members of the public service) with id. Art. 98 (concerning selection of lander judges) and id. Art. 94 (concerning selection of the Federal Constitutional Court judges). On recruiting and evaluation of German judges, see generally Riedel (note 12).

[22] See In re Certification of the Constitution of the RSA, (1996) (4) SA 744 (CC) (S.A.) paras. 124, 135-136 (rejecting challenge to provisions for executive and legislative appointment of members of the JSC; also rejecting challenge to failure of constitution specifically to provide for a magistrate's commission to choose other judicial officers, indicating range of methods permissible).

[23] See J. Ferejohn/P. Pasquino, Constitutional Adjudication: Lessons from Europe, 82 Tex L. Rev. 1671, at 1681-1682 (2004) (distinguishing "monocratic, majoritarian, and supermajoritarian" appointment mechanisms).

[24] See, e.g., India Constitution Article 124 para 2 (providing that the President is obligated to "consult" with the Chief Justice concerning appointments to Supreme Court and is authorized to consult with judges of the Supreme Court and state high courts); see also *Supreme Court Advocates on Record Ass'n* v. *Union of India*, A.I.R. 1994 S.C. 268 [hereafter 1994 Judges Case] (essentially holding that the Chief Justice's opinion on judicial appointments, which must be formed in consultation with relevant other judges, had to be given primacy

located to nominating or selection committees, whose make-up may vary and may include judges, parliamentarians, lawyers, law professors, members of governments, or other persons appointed by the executive or legislative authorities, and whose powers may range from a strong power to recommend that binds the executive absent good cause to a much weaker power to review and express opinions on the selection made by political actors.[25] High court judges might also, at least in theory, be selected, or confirmed or retained, by popular vote, as is the case in some very large U.S. states.[26]

---

in the presidential appointment process; disagreeing with *S. P. Gupta* v. *President of India and Others*, A.I.R. 1982 S.C. 149 , which had suggested that while consultation was mandatory the Chief Judge did not have a veto over the President's choice); In re *Appointment/Transfer of Judges*, A.I.R. 1999 S.C. 1 (elaborating on the consultative process within the judiciary with respect to judicial selection and how it may constrain the Chief Justice, and discussing selection criteria and the role of seniority and merit). Article 124 has been a contentious provision, even since the original drafting of the Indian Constitution. In the 1970s, when the President failed to appoint the most senior of the judges to be chief justice (that is, the more senior judges were "superseded"), they resigned in protest, and ensuing controversy and reform efforts resulted in a long period thereafter where the judges' wishes were respected by the executive. See M. P. Singh, Securing the Independence of the Judiciary – The Indian Experience, 10 Indiana Int'l/Comp. L. Rev. 245, at 266 (2000) (explaining that "[o]n both occasions apparently the superseded judges had given judgments inconvenient to the executive while the superseding judges had given judgments palatable to the executive," thereby "establish[ing] a clear nexus between the independence of the judges and their appointment"). The 1994 Judges Case cited above laid down fairly elaborate procedures designed to assure that the Chief Justice's views, formed after consultation with other judges, would generally prevail on issues of judicial appointments, and the 1999 decision, In *re Appointment and Transfer of Judges*, developed further procedures to strengthen the collegial nature of the Chief Justice's role. See generally Singh (id.), at 267-277. On Italy, see also Levinson (note 16), at 1305; on other countries, see also id. (describing judicial self-selection mechanisms in Colombia, Turkey, Georgia, Chile, South Korea).

[25] See, e.g., RSA Constitution § 174 (S.Afr.) (providing for a Judicial Services Commission to provide a list of potential nominees to the Constitutional Court from which the President must choose, or give reasons for not doing so); Constitutional Reform Act 2005, c. 4 (U.K.) §§ 26-31.

[26] On the use of popular elections for selecting or retaining state court judges in the United States, see R. Wheeler, Judicial Independence in the United States of America, in this volume, Chapter B. II. 2. On other countries' use of elections to select judges at lower level courts, see e.g. Kuijer (note 11), at 226 (professional election of lay judges in Belgium, popular election of judges in

The degree and type of connection between selection methods and judicial independence and accountability depends in part on the tenure and renewability *vel non* of the appointment. To the extent one is concerned about influences *in office*, the initial selection method may not be nearly as important as tenure and renewability. Long tenures are generally associated with greater possibilities for judicial independence from political appointing authorities, though the connection is not invariable. Nonrenewable terms likewise are thought to mitigate risks to independence from incentives for reappointment, though again, not necessarily. Shorter tenures, especially with renewable terms, might be thought to increase the importance of selection processes that emphasize the competence and impartiality of the candidates.

The selecting authority's capacity to influence the overall weight of the court on contentious issues is increased if that authority also controls the *number* of justices on the court. In some countries, the numbers of judges on the highest court are more or less fixed by the constitution, as in France (nine, plus ex-Presidents of the Republic) or Italy (15). But it is not uncommon for a constitution itself to be silent on the number of high court justices, as in the United States: in the 19th century the numbers of authorized positions on the U.S. Court were changed on several occasions, in at least one period quite plainly to deny the sitting President the power to make appointments. In the 20th century, however, an effort by a very popular President to obtain legislation increasing the numbers of positions provoked a public outcry, leading to a conventional norm against "court-packing."[27] In Egypt, the Chief Justice of the Court reportedly has authority to increase its numbers and has done so in the past, evidently in response to the president's displeasure with prior court decisions.[28] In Argentina, a combination of "court-packing" increases in the numbers of justices and use of impeachment to remove disliked justices has facilitated executive influence over the

---

Swiss cantons); R. Kiener, Judicial Independence in Switzerland, in this volume, Chapter B. II. 2.

[27] For useful accounts of Franklin Roosevelt's Court–packing plan, see W. E. Leuchtenberg, The Supreme Court Reborn (1995); J. Shesol, Supreme Power: Franklin Roosevelt vs. The Supreme Court (2010).

[28] See M. H. Hamad, The Politics of Judicial Selection in Egypt, in: K. Malleson/P. H. Russell (eds.), Appointing Judges in an Age of Judicial Power: Critical Perspectives form Around the World 271, at 272-273 (2006) (describing how the Chief Justice increased the number of members of the Court from nine to 15).

Supreme Court.[29] Yet in India, at least some scholars regard the power of the Chief Justice to recommend, and the power of the court to require the executive to act on, judicially initiated proposals to expand the numbers of judges on the High Courts in order to meet increased workload, as consonant with the independence and well functioning of the judiciary.[30]

2. Tenure

It is common to think of certain protections of tenure in office as an important aspect of judicial independence. One kind of model is represented by the practices for federal judges in the United States, Canada, the UK and Australia; federal judges serve "during good behavior," and can only be removed from office through certain elaborate legislative procedures. In the United States, federal judges in effect have "life tenure," because there is no mandatory retirement age; they can be removed from office only on impeachment in the House and conviction in the Senate for "Treason, Bribery, or other high Crimes and Misdemeanors."[31] Australia and Canada both amended their constitutions in the mid 20th century to provide for mandatory retirement ages (of 70 and 75 respectively);[32] their judges can be removed only by "address" in the legislature;[33] and in the UK, judges serve "during good behaviour" and mandatorily retire at age 70 (though there is some talk of raising the limit to 75).[34] In all of these systems the independence of the judiciary –

---

29 See Helmke (note 7), at 92-97.

30 See Singh (note 24), at 290.

31 See U.S. Constitution Article III para 1 (serve during good behavior), Article II para 4 (standard for impeachment and removal from office for high crimes and misdemeanors).

32 See Constitution Act, 1867, para. 99 (Canada) (reflecting a 1961 constitutional amendment setting the mandatory retirement age at 75); Constitution Alteration (Retirement of Judges) Act 1977 (No. 83 of 1977) (Australia).

33 See Constitution Act, 1867, para. 99(1) (Canada) (judges to hold office "during good behaviour" and are "removable by the Governor General on Address"); Constitution of Australia Article 72(ii) (judges removable only on a finding of "proved misbehaviour or incapacity").

34 See Judicial Pensions and Retirement Act 1993, c. 8, para. 26 (England) (providing that judges hold office "during good behaviour" up to a mandatory

in the sense of the judges seeking to decide according to law, and without being influenced by financial interests or ties of affection to the parties – is well established.

In other systems the independence of the judiciary is secured in different ways. In many countries the regular judiciary forms a special kind of "civil service," with administrative or bureaucratic criteria determining the process of advancement and constraining the discipline or firing of judges. Even where the highest court is differently selected, there may be interconnections such as the requirement, in Germany, that six of the 16 judges on the Constitutional Court (that is, three on each Senate of eight) have served as judges on a federal high court,[35] or in Italy, that five of the 15 Constitutional Court judges be selected by the judiciary.[36] In Japan, the selection system for the Supreme Court is nominally based on aspects of the so-called "Missouri" plan, by which the executive nominates the judge to office and the judge faces a retention election soon thereafter at which the people can either confirm the judge in office or vote the judge out. Despite the formal use of retention elections in Japan, they are not the focus of political attention: while the system provides for ten year renewable terms, appointees tend to be near the end of their career, serve average terms of only six years and tend not to stand for election to second terms; there is little media coverage of judicial retention elections; and as recently as 2006 it is reported that no judge has been voted out.[37]

---

retirement age of 70). For recent parliamentary discussion of raising the retirement age to 75, see <http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/100712-0001.htm>. See also S. Turenne, Judicial Independence in England and Wales, in this volume, Chapter B. III. 1.

35 See C. Landfried, The Selection Process of Constitutional Court Judges in Germany, in: Malleson/Russell (note 28), at 196, 200; see also J. H. Langbein, The German Advantages in Civil Procedure, 52 U. Chi. L. Rev. 823, 851 (1985) (explaining that judges of the federal supreme court in Germany are largely selected from the career judiciary, who are elevated based largely on a meritocratic review and evaluation of their work).

36 See Italian Constitution, Article 134, § 1 ("The constitutional court consists of fifteen justices; one third being appointed by the president, one third by parliament in joint session, and one third by ordinary and administrative supreme courts."); M. L. Volcansek, Judicial Selection in Italy: A Civil Service Model with Partisan Results, in: Malleson/Russell (note 28), 159, at 161.

37 See KENPO [Constitution], Article 79, para. 2 (Japan) (providing for retention elections every ten years for Supreme Court Justices (who are appointed to office)). For much of the information above on Japan, see D. M. O'Brien,

In contrast to the life tenures discussed above, in many countries the highest constitutional courts judges serve for fixed terms, often nonrenewable.[38] Some have argued that judicial tenure for life or until a normal retirement age, or service in nonrenewable long terms, are essential requisites for the exercise of judicial independence.[39] Judges who are dependent on the appointing authority for their continuation in office are unlikely to exercise independence of judgment, for fear of not being reappointed; judges with short nonrenewable terms may be influenced in their decisionmaking by their need to find employment after their short term ends. Yet there are some distinguished international (or supranational) courts whose numbers serve relatively short terms, and are

---

The Politics of Judicial Selection in Japan and Ten South and Southeast Asian Countries, in: Malleson/Russell (note 28), at 355, 358-360; T. Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases 46 (2003) (average tenure of Supreme Court justices only six years). The voting rules themselves make it difficult to vote a judge out, as failures to vote are treated as votes in support. See D. O'Brien, id., at 359. See also D. O'Brien/Y. Ohkoshi, Stifling Judicial Independence from Within: The Japanese Judiciary, in: P. H. Russell/D. O'Brien (eds.), Judicial Independence in an Age of Democracy, at 53 (2001) (describing popular review as "virtually meaningless"); T. Hattori, The Role of the Supreme Court of Japan in the Field of Judicial Administration, 60 Wash. L. Rev. 69, at 76 no. 39 (1984) (stating that votes for dismissal have never been more than 11% and no justice has been removed through the retention election provision).

[38] Thus, in Germany, the justices of the constitutional court – a highly regarded national constitutional court in Europe – serve fixed terms of 12 years, nonrenewable; the members of the French Conseil Constitutionnel serve 9 years. In the United States, the terms for judges in the highest state courts in the American states vary: six years in Texas, 12 years in California, 14 years in New York. See Texas Constitution, Article 5, Section 2 (c); N.Y. Constitution Article 6 (2); Cal. Constitution Article VI para. 16(a). See generally ABA, Roadmaps (2008); Judicial Selection: The Process of Choosing Judges (2008). As this report shows, the American states use a diversity of methods to choose judges for appellate and general jurisdiction courts: two states use legislative selection, in three states the governor has sole discretion to select, subject to confirmation by senate or by special commission; 20 states rely on nonpartisan or partisan elections; 16 states use some form of "merit selection" where the governors' choice is constrained by the recommendations of a nominating commission; and the rest use a combination of methods. Id., at 7.

[39] See, e.g., The Federalist No. 78 (Alexander Hamilton), in: C. Rossiter (ed.), The Federalist Papers 465 (1961) (characterizing life tenure during good behavior as "the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws").

eligible for reappointment: judges of the European Court of Justice, for example, serve six year renewable terms; the judges of the ICJ are appointed for nine year renewable terms (by the UN Security Council and General Assembly). Earlier studies had challenged the use of short renewable terms, for example, on the European Court of Human Rights in part because of the challenges for independence that frequent renewal issues create (and especially on a court with a separate opinion practice).[40]

Tenure and renewability rules are intimately related to the accountability of courts; one way for nonjudicial actors to help influence a court's decisions is by replacing its judicial members. It is perhaps not surprising to see short terms with renewable appointments in the ICJ and the ECJ (and formerly, in the ECtHR), in which concerns for accountability and member state control may loom larger than with respect to na-

---

[40] See J. Limbach et al, Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights, at 25 (2003) (noting recommendation of the Council of Ministers to change from 6-year renewable to 9-year nonrenewable terms on the ECtHR); E. Voeten, The Impartiality of International Judges: Evidence from the European Court of Human Rights, 102 Am. Pol. Sci. Rev. 417, at 430 (2008) (finding "some evidence that career insecurities make judges more likely to favor their national government when it is party to a dispute," but also finding overall evidence of impartiality in reviewing challenges to government behavior, and suggesting that the "insulation" of the ECtHR judges "could be improved upon through" adopting the then pending protocol to provide for nonrenewable nine-year terms). The judges of the ECtHR, who used to serve for six year renewable terms, now, as a result of Protocol 14, will serve 9 years, nonrenewable. The judges are selected from lists of three candidates proposed by each member state and voted on by the Parliamentary Assembly of the Council of Europe. For recommendations for improving the procedures by which the judges are nominated by member states and voted on by the Parliamentary Assembly, see J. Limbach, id. Whether international tribunals should be designed to aspire to the kind of independence that is often thought to be a desideratum of domestic courts is another matter. Compare, e.g., L. R. Helfer/A. Slaughter, Toward a Theory of Effective Supranational Adjudication, 107 Yale L.J. 273 (1997) with E. A. Posner/J. Yoo, Judicial Independence in International Tribunals, 93 Cal. L. Rev. 1 (2005) (arguing against judicial independence for international tribunals and suggesting that independence is not related to effectiveness of international tribunals but will lead to low usage rates and/or high noncompliance rates; treating the supranational courts in Europe as more like domestic courts). For a thoughtful typology and discussion of independence and effectiveness in different contexts, see K. J. Alter, Delegating To International Courts: Self-Binding Vs. Other-Binding Delegation, 71 Law & Contemp. Probs. 37 (2008).

tional courts.[41] Although some high courts (including some state supreme courts in the US) have very short renewable terms as well, longer terms may be associated with the more highly regarded courts.[42] In Germany, for example, whose Federal Constitutional Court is well-regarded and influential in Europe, the Constitutional Court justices now serve nonrenewable terms of 12 years (which reflects an increase from the original eight year renewable terms).[43] Having fixed nonre-

---

[41] Challenges in the European Court of Human Rights to terms as short as three years for specialized courts in national judicial systems have been rejected. See M. Kuijer (note 11), at 231-235.

[42] One empirical study of citations found that opinions by judges in states with partisan or nonpartisan elections to choose judges ranked lower in influence (measured by citations by other state courts) than opinions by judges from states with "merit system" or wholly appointive mechanisms for judicial selection. See S. J. Choi/M. Gulati/E. A. Posner, Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary, J. M. Olin Working Paper No. 357, University of Chicago Law School (2007), at 56, Table 3, available at <http://ssrn.com/abstract=1008989>. To take a concrete example: California and Texas are the two largest population states, with roughly 37 million and 24 million residents, respectively. In Texas, the judges of the highest state courts (the Texas Supreme Court, which is the highest court for civil matters, and the Texas Court of Criminal Appeals, which is the highest court for criminal matters) serve for relatively short, six-year, renewable terms; they are chosen and run in partisan elections (the governor may make an appointment to fill an unexpired term); and the opinions of Texas judges rank relatively low in objective measures of influence. See S. J. Choi/M. Gulati/E. A. Posner, Evaluations and Information Forcing: Ranking State High Courts and Their Judges, 58 Duke L. J. 1313, at 1338 (2009) (Table 4) (Texas Civil ranked 39th, Texas Ct Criminal Appeals ranked 51st). In California, the judges serve longer terms and California is treated as a "merit selection" state in the US (its judges are not chosen in popular elections); the state Supreme Court judges are initially appointed by the governor and stand for retention elections at the next general election and then every 12 years. The opinions of California judges rank highest (on a measure of citation by outside courts, measured per judge year, so as to avoid any effect from California also being the largest state court system). See id. (California ranked first). As these studies also show, although California has ranked high on citation influence in a number of other studies, the Chamber of Commerce's study of the views of business lawyers as to the quality of state courts ranked states quite differently; and on other measures of evaluation – such as numbers of opinions produced per judge – states with elected judges rank higher. See id., at 1335.

[43] See D. P. Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany, at 20-21 (1997) (describing this 1970 change and noting its

newable terms of some length at once enables the appointing authority to have more regular input into the makeup of the court, promoting its responsiveness to changing views, while at the same time not impairing individual forms of judicial independence.

The connection, however, between length of tenure and independence is not linear, nor is it determined solely by the legal structures and rules. Judges who serve for relatively short terms but who are nominated to the bench only near the end of their careers may have incentives for independence roughly comparable to those nominated for longer terms (or life terms) earlier in their careers, [44] especially if the limited terms are nonrenewable. Longer terms are likely to produce more independence of reasoning, all other things being equal, but "other things" rarely are equal. If salary or other benefits and/or promotion depend on administrative review by superiors or outside authority,[45] the independence producing effect of long terms may be mitigated by the incentive effects of hierarchical review linked to material or status benefits. And if in a particular national culture removal mechanisms are freely used, or court-packing is a norm, then even nominal life tenure will not necessarily produce serious levels of independence.[46]

3. Financial Dependence/Independence: Salaries and Pensions

Some constitutional instruments provide that judges' salaries may not be subject to diminution during their term in office,[47] or prohibit legis-

---

link, in the political process, to authorization of dissenting opinions). Note that the ordinary judiciary in Germany hold essentially "life appointment" with retirement at age 65; a typical career is about 35 years, since they go in after completing initial examinations. Riedel (note 12), at 95.

[44] See text at *supra* note 37 (describing ten year terms of judges on Japan's Supreme Court).

[45] See *supra* note 16; see also Vashkevich (note 16), Chapter B. IV. 2. (describing how availability of housing funds for judges is on dependent on local executive authorities).

[46] Argentina provides an example of both. See, e.g., R. Bill Chavez, The Rule Of Law In Nascent Democracies: Judicial Politics In Argentina, at 9-12 and 38-41 (2004); Helmke (note 7), at 63-92.

[47] See, e.g., U.S. Constitution Article III (providing that federal judges "shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office"); Constitution Austra-

lation targeting judges' salaries only.[48] The evident purpose is to prevent legislatures or governments from using salaries as an indirect tool to influence judges, e.g., by punishing judges with whose decisions they disagree, possibly to force them to leave office.[49] Such provisions are generally regarded as salutary in promoting judicial independence; but, if it is the courts that enforce and interpret the provisions, the potential for apparently self-dealing behavior might be thought to exist.[50] Yet, as already noted, threats to the individual independence of judges may come not only from the political branches but from financial incentives or penalties controlled by other judges.[51]

In Canada the financial guarantees of judicial independence found in Section 100, Constitution Act, 1867, apply, according to the text, only to the higher levels of the judiciary; moreover, section 100 does not in terms prohibit salary reduction but states that salaries of higher level judicial officers "shall be fixed and provided by the Parliament of Can-

---

lia, 1990, Article 72(iii) (providing that federal judges "[s]hall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office"); Argentina Constitution 1994, Article 110 (providing that judges "shall hold their offices during their good behavior, and shall receive for their services a compensation that the law shall determined and that shall not be diminished in any way while they remain in office"); Constitution India. Article 125; but cf. id., Article 360, Section 4(b) (authorizing downward adjustments of salaries in time of emergency).

48 Basic Law, Judicature, (Israel) Article 10. See also Reference re Provincial Judges' Remuneration, (1997) 3 S.C.R. 132, at 182 (Canada) (explaining that a salary decrease that runs across the government is easier to justify constitutionally than a decrease that singles out judges).

49 Some judges in the US have at times complained that the failure to raise salaries during periods of inflation has the effect of a diminution, but these claims have been generally rejected. Cf. *United States* v. *Will*, 449 U.S. 200 (1980) (rejecting claim that prospective failure to allow cost of living increase to federal judges violates the Constitution's salary protections).

50 For possible examples, see below (discussing Canadian Reference re Provincial Judges' Remuneration); and *Evans* v. *Gore*, 253 U.S. 245 (1920) and *Miles* v. *Graham*, 268 U.S. 501 (1925) (treating a neutral income tax that applied to judges salaries like others to be unconstitutional), overruled in effect in *O'Malley* v. *Woodrough*, 307 U.S. 277, at 281-283 (1939) and overruled expressly in *United States* v. *Hatter*, 532 U.S. 557, at 567 (2001).

51 See *supra* note 16; L. F. Müller, Judicial Administration in Transitional Eastern Countries, in this volume, Chapter I. (describing presiding judges' ability to impact other judges' remuneration).

ada."[52] In the *Provincial Judges Reference Case* the Canadian Supreme Court held that the principle of judicial independence transcended its particular instantiations in the text, and required that lower court provincial judges be protected from salary adjustments in the absence of a recommendation by an independent commission. Even where the reduction was part of a general salary reduction for government employees, changes in the judges' salaries could not be made in the absence of a commission recommendation.[53]

The range of financial arrangements that may affect judicial independence are not limited to pay decreases or their equivalent. Although provisions like those of the U.S. constitution against diminution in salary arise out of concerns to prevent salary reductions from being used as a threat to judicial independence, if judicial salaries are unduly *high*, relative to other legal work available to the prospective or actual judges, a threat to independence might derive from effects of high salaries, alone or in combination with the prospect of reappointment.[54] On the other

---

[52] Constitution Act, 1867, Section 100 (Canada)

[53] See Reference Re Provincial Judges' Remuneration, (1997) 3 S.C.R., at 113-114.

[54] Some drafters of the U.S. Constitution were concerned that legislative pay raises for serving judges might threaten judicial independence; the decision to prohibit only reductions in salary was influenced in part by the concern that, with life tenure, pay increases might be necessary to account for inflation. See Entin/Jensen (note 6), at 971-975. Concerns that salaries not be so high as to encourage the seeking of judicial office for reasons of salary have continued. See id., at 1006-1007 (describing Charles Evans Hughes' concerns in the early 20th century); see also Posting of R. Posner to the Becker-Posner Blog, <http://www.becker-posner-blog.com/archives/2007/03/judicialsalari.html> (March 18, 2007, 08:42 EST), quoted in S. Baker, Should We Pay Federal Judges More?, 88 B.U. L. Rev. 63, 69-70 no. 29 (2008). (suggesting that "one effect of raising judicial salaries would be to make the job a bigger patronage plum for ex-Congressmen, friends of Senators, and others with political connections, so that the average quality of the applicant pool might actually fall"); for a different concern, see Chief Justice J. G. Roberts, Jr., 2006 Year-End Report on the Federal Judiciary, at 3-4 (2007) (expressing concern that because federal judges salaries have not increased in recent years, most new federal judges are coming from government positions rather than, as in the past, from the private practice of law). Cf. Reference re Remuneration (note 19), at 133 (asserting that requirement of an independent commission to make recommendations before change in judges' pay should apply to any changes, including increases, in judicial salaries). A problem in a large polity is that salaries uniformly set for judges of the highest court may be differentially attractive either on the basis of geography,

hand, a system of life tenure or tenure until retirement age would not be fully effective in promoting the desired independence unless judges have some financial security upon retirement. A dramatic difference in retirement behavior occurred among federal judges in the US once pensions were provided; many judges had previously stayed in office until their death, even if their competence had become subject to doubt.[55] Others have at times left for more remunerative employment when salaries remained flat (or effectively declined) during long inflationary periods.[56] Thus, financial conditions may undermine the intended effects of long tenures, or careful selection methods.[57]

---

or (in any system) on the basis of the type of law practice engaged in. See Voeten (note 40), at 421 (noting how "lucrative" ECtHR judgeships are compared to those in many member states; 2,600 Euro for Constitutional Court judges in Moldova as compared with 188,349 Euro for judges on the European Court); Limbach et al (note 40), at 18 (noting that high salary, then of 170,000 EUR/annum, for ECtHR judges amounts to more than expected life savings in some member states, leading appointments to be regarded as political plums); E. Voeten, The Politics of International Judicial Appointments, 9 Chi. J. Int'l L. 387, at 393-394 (2009) (suggesting that judges from poorer countries on the ECtHR were more likely to vote with their own governments because the judges were "more worried about losing their jobs as the opportunity costs were larger").

[55] See, e.g., A. Ward, Deciding To Leave: The Politics Of Retirement From The United States Supreme Court at 16-19 and 69-210 (2003).

[56] See, e.g., Chief Justice J. G. Roberts, Jr., 2006 Year-End Report on the Federal Judiciary (1 January 2007) (arguing for judicial pay increases and noting that "[i]n the past six years, 38 judges have left the federal bench, including 17 in the last two years. If judicial appointment ceases to be the capstone of a distinguished career and instead becomes a stepping stone to a lucrative position in private practice, the Framers' goal of a truly independent judiciary will be placed in serious jeopardy.").

[57] For shorter term appointments, protecting the judge's capacity to participate in whatever retirement or pension system she was otherwise entitled to benefit from would be an important aspect of preventing future financial incentives from influencing judicial decisions. For discussion of recent provisions for leaving allowances or pensions for judges on the European Court of Human Rights, see Mr J.-P. Costa, President, European Court of Human Rights, Speech: Independence of Constitutional Courts, Round Table of Constitutional Courts, 11 June 2010, available at <http://www.echr.coe.int/NR/rdonlyres/3F07B488-16DD-49F4-8CFE-08B8050B757B/0/OhridroundtableConstitutionalcourts11062010.pdf> and European Commission of Ministers, On the status and conditions of service of judges of the European Court of Human Rights and of

4. Legal Requirements for Independence or Impartiality; Recusal, Disqualifications and Bans on Extrajudicial Activities

Many though not all constitutional instruments assert the independence of the judiciary as an explicit constitutional principle: the South African Constitution, for example, provides that "The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."[58] Without a cultural commitment to judicial independence in society,[59] and without structurally independent courts to give meaning to such a provision, however, the mere presence of such a guarantee in a constitution may be little more than an unenforced aspiration.

Many though not all constitutions or statutes governing the judiciary include, as part of their effort to operationalize judicial independence, general provisions about not undertaking activity incompatible with impartiality or independence and specific bans on other office holding or forms of remunerative employment while in office.[60] In addition, there may be recusal (case specific) rules, that do not disqualify the judge from holding office but do preclude her participating in a particular matter.[61] That is, some activities (for example, serving simultaneously as a paid member of the Parliament) might be regarded as incompatible per se with holding the office of judge; other activities may be

---

the Commissioner for Human Rights, Resolution CM/Res(2009)5 (2009), Article 10, available at <https://wcd.coe.int/ViewDoc.jsp?id=1508697&Site=CM>.

58 RSA Constitution, Article 165(2) (S.Afr.); see also id., Article 165 (3), (4).

59 Cf. Schwartz/Sykiainen (note 16), Chapter F. (noting the need for a shift in "attitudes of public officials, if not also the public itself, toward law, including respect for law as a good in itself").

60 See, e.g., Israel, Basic Law: Judicature, Article 2 (Independence) ("A person vested with judicial power shall not, in judicial matters, be subject to any authority but that of the law."), Article 11 (prohibiting judges from engaging in any "additional occupation" or without the consent of the president carrying out any other "public function").

61 See e.g., Discussion, Disqualification of Judges (The Sarokin Matter): Is It a Threat to Judicial Independence?, 58 Brooklyn L. Rev. 1063 (1993) (discussing appellate courts' disqualification of trial judge for the appearance of bias in light of statement in his opinion on discovery issues concerning industry tendency not to disclose health risks); G. Di Federico, Judicial Independence in Italy, in this volume, Chapter B. II. (describing authority to transfer magistrates to other judicial offices "for either functional incompatibility or ambient incompatibility").

deemed to disqualify the judge from participating in certain cases where the judge's impartiality might be questioned.[62] In Germany, for example, judges can run for parliaments but cannot act as judge while holding parliamentary office.[63] In the United States, there is no explicit constitutional ban on a federal judge also holding office in the executive branch, and in its early years John Marshall held the positions of Chief Justice and Secretary of State for a brief period of time. But there is a ban on members of the Congress holding any other office of trust under the United States,[64] which would preclude joint legislative and judicial office holding.

Some legal instruments, like the ECHR, specifically announce the expectation of independence and impartiality in connection with bans on other activity: "During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office [...] "[65] The US does not include such a requirement at constitutional level, but it embodies its demands at least in part in a series of statutory prohibitions. Thus federal judges are disqualified from sitting in any case involving a business in which they own stock;[66] and more generally a federal judge is re-

---

[62] See, e.g., Turenne (note 34), Chapter B. V. (noting recent decision on disqualification of a judge from participating in case involving Pinochet due to the judge's participation on the charitable board of one of the intervenors in the case, Amnesty International, notwithstanding the absence of any financial interest, based on the nonpecuniary interest of Amnesty in seeing Pinochet extradited, an interest which gave rise to an appearance of bias by the judge). See also *supra* note 61, *infra* note 66.

[63] Riedel (note 12), at 108.

[64] U.S. Constitution Article I, para. 6.

[65] European Convention on Human Rights, art 21; cf. M. Künnecke, The Accountability and Independence of Judges: German Perspectives, in: G. Canivet/M. Andenas/D. Fairgrieve (eds.), Independence, Accountability and the Judiciary (2006) (describing German Criminal Code, provisions prohibiting abuse of judicial office, used to prosecute GDR judges for judgments given under the GDR regime, in ways arguably inconsistent with the prior position on the application of the statute to the prosecution of judges in the Nazi regime after World War II).

[66] See 28 U.S.C. para. 455 (b)(4), (5) (also extending recusal requirements based on family member's financial interests). They are also quite limited in undertaking compensated work apart from their judicial activities, being for the most part limited to teaching and to receiving amounts equal to no more than

quired to disqualify himself or herself "'in any proceeding in which his [or her] impartiality might reasonably be questioned.'"[67] Enforcement of these provisions is left to the judges themselves, which in some cases has created controversy (potentially undermining public trust in the impartiality and independence of the judges);[68] yet "outside" enforcement of such provisions may be subject to prosecutorial discretion that runs risks to judicial independence as well.[69]

Whether particular extrajudicial activities are or are not consistent with judicial independence may be quite socially contingent. In some countries, sitting justices are asked to chair commissions of inquiry into major political incidents, an evident effort to deploy judges' perceived independence and prestige to resolving fraught political questions, without significant public concern about the effects of such service on the independence of the courts.[70] John Bell notes that in Spain, experience

---

15% of their judicial salary from such outside work. 5 U.S.C. app. paras. 501-502 (2000); see also Baker (note 54), at 69.

[67] 28 U.S.C. para. 455(a).

[68] See generally S. L. Bloch/V. C. Jackson/T. G. Krattenmaker, Inside the Supreme Court: The Institution and its Procedures, at 1054-1061 (2008) (summarizing literature surrounding such controversies, including a justice's "duck hunting" with a named party in a pending case).

[69] For these reasons, it has been suggested that judicial discipline should be resolved primarily in proceedings controlled by judges. See, e.g., Shetreet (note 10), at 652; see also Kuijer (note 11), at 245-247.

[70] On the use of sitting judges to chair commissions of inquiry in Israel, see, e.g., M. Edelman, The Changing Role of the Israeli Supreme Court, in: J. R. Schmidhauser (ed.), Comparative Judicial Systems: Challenging Frontiers In Conceptual And Empirical Analysis (1987) (discussing Agranat and Kahan commissions of inquiry). In the United States, Justice Robert Jackson headed up the Nuremberg prosecutions (occasioning some private divisiveness within the Supreme Court and disagreement about the propriety of the assignment); Chief Justice Earl Warren chaired the commission of inquiry into the assassination of President J. F. Kennedy. There is but a small amount of scholarship on such extrajudicial activities in the U.S. Cf. Code of Conduct for United States Judges Canon 5, subsection G ("A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice, unless appointment of a judge is required by Act of Congress. A judge should not, in any event, accept such an appointment if the judge's governmental duties would interfere with the performance of judicial duties or tend to undermine the integrity, impartiality, or independence of the judiciary.").

under Franco has created an atmosphere in which extrajudicial activities by sitting judges are suspect,[71] while in Sweden, judges are "encouraged to participate in a range of activities, especially relating to law reform."[72] Participating in extrajudicial activities may influence public attitudes towards the court more generally, affecting the context for legislative action concerning support for courts and their operations.

5. Decisional Authority and Jurisdiction

A *sine qua non* of judicial independence is the authority, with respect to matters of a judicial nature within a court's jurisdiction, to decide matters independently of the views of outside actors. What is sometimes referred to as a "freedom from outside pressures" does not mean that the courts should be unaware of the legal views of relevant parties, but that the courts' decisional authority is freely exercised and not required, by law, convention, or physical or economic threat, to follow the views of any outside party.[73] Moreover, decisional independence may entail legal limitations on the authority of other branches, even the legislature in its lawmaking capacity, retroactively to deprive parties of the benefits of a court's final judgments.[74]

---

[71] See J. Bell, Judicial Cultures and Judicial Independence, 4 Cambridge Y.B. Eur. Legal Stud 47, at 57 (2001-2002) (noting that Spanish judges may not belong to political parties, though judges are allowed to take leave and run for political office).

[72] Id., at 58. See generally J. Nergelius/D. Zimmermann, Judicial Independence in Sweden, in this volume, Chapter C. 1. (noting Swedish judges' roles in giving advice on the constitutionality of draft legislation and their participation on legislative reform committees).

[73] See, e.g., ECtHR, *Findlay* v *United Kingdom*, Judgment of 25 February 1997, RJD 1997-I, 30 (concluding that a court martial tribunal was not independent as required by Article 6, because the convening officer, who played a central role in the proceedings, was superior in rank to and chose all the other members and had the authority to confirm or reject the tribunals conclusions); see generally M.Kuijer, *supra* note 11, at 245-247 (discussing freedom from outside pressure and *Beaumartin* v. *France* (Judgment of 24 November 1994, Series A, No. 296-B), where the ECtHR held impermissible, under Article 6, a national legal practice requiring a judge to follow an executive interpretation of an international legal instrument).

[74] In the U.S., case law distinguishes between the authority by law to deprive private parties of the benefits of a prior judgment, see *Plaut* v. *Spendthrift*

The relationship between a court's jurisdiction and its independence is not intuitively obvious.[75] Courts with seemingly broad jurisdiction to review the constitutionality of legislation may be very deferential, as was the case in Japan for many decades; courts designed to support executive power *vis à vis* the legislature (as in the 1958 Constitution in France) may, when circumstances change, exploit seemingly narrow conferrals of jurisdiction to expand the grounds on which legislation can be declared unconstitutional.[76] Nonetheless, it might be thought that there are formal indicia, relating to jurisdiction or decisional authority, that are suggestive of the independent authority of the court. Some countries, for example, include constitutional or statutory provisions that specifically state that the court's decisions are binding on other parts of the government.[77] Yet some powerful constitutional courts, in the world, including the United States Supreme Court, exer-

---

Farm Inc., 514 U.S. 211 (1995) (holding that a statute extending a statute of limitations and requiring prior civil judgments based on a limitations bar to be reopened was unconstitutional), and the authority to enact a law by which the federal government abandons a res judicata defense in actions by non-federal parties (there, Indian tribes suing the United States for breach of treaty obligations), see, e.g., *United States* v. *Sioux Nation*, 448 U.S. 371 (1980).

[75] Cf. J. Ferejohn, Independent Judges, Dependent Judiciary: Explaining Judicial Independence, 72 S Cal L Rev 353, at 356 (1999) ("There is a line, sometimes quite fine and hard to discern, that separates appropriate forms of institutional dependence from objectionable interferences with the execution of the judicial power."); id. at 359-361 (noting disagreements among legal scholars over Congress' power to strip jurisdiction from the federal courts and suggesting that even if Congress in generally has such a power particular exercises of that power might be inconsistent with judicial independence).

[76] See, e.g., Decision no. 71-44 DC, 16 July 1971, Journal officiel du 18 Juillet 1971, at 7114, Recueil, at 29 (French Conseil Constitutionnel decision, treating the preamble and fundamental principles of the laws of the Republic as constitutional norms that could be enforced to invalidate laws passed by parliament).

[77] See, e.g., Constitution of India, Article 141; Law on the Federal Constitutional Court in Germany (Gesetz über das Bundesverfassungsgericht), Article 31(1) (F.R.G.) ("The decisions of the Federal Constitutional Court shall be binding upon Federal and Land constitutional organs as well as on all courts and authorities."), available at <http://www.iuscomp.org/gla/statutes/BVerfGG.htm#1>; cf. ECHR, article 46(1)("The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties […]").

cise powers of judicial review with real force against executive and legislative power without any such specific constitutional statement.

Does it matter to the quality of judicial independence whether a court's jurisdiction is mandatory or permissive, or whether within its jurisdiction the court has other ways of limiting the occasions for its exercise? A number of scholars in the United States have argued that as the scope of the Supreme Court's permissive jurisdiction grew *vis à vis* its mandatory jurisdiction, so has its power; and a court's power may well be reasonably associated with its institutional independence.[78] Are there other, judicially developed limitations on the exercise of jurisdiction that are designed or function to protect judicial independence? Some have suggested that "justiciability" doctrines (in the United States, these would include, for example, rules of party "standing," the rule against "advisory opinions" and the rule against deciding "political questions) may be a device to protect the Court's independence by preventing its entailment in politically controversial matters.[79] Alex Bickel's work suggests that the "passive virtues" are an essential feature of the Supreme Court's ability to function in a democracy, in part by enabling the Court to delay or defer decision until such time as its honest, and independent, legal judgment could as a prudential matter be announced as the law of the law.[80] Whether this should be understood to reflect the necessary jurisdictional discretion that an independent judiciary should have or rather as a symptom of an unduly politically minded judiciary is the subject of normative debate.[81]

While the breadth of a court's jurisdiction bears a complex relationship to its independence, the binding effect of the court's judgments on the parties and the need for executive aid in enforcing judgments might be regarded as a less ambiguous requirement of respect for judicial independence. One might in this regard distinguish between the enforcement of a judgment as to the particular parties and enforcement of the

---

[78] See, e.g., E. A. Hartnett, Questioning Certiorari: Some Reflections Seventy-five Years After the Judges' Bill, 100 Colum. L. Rev. 1643 (2000).

[79] See, e.g. Ferejohn/Kramer (note 16), at 1003-1015.

[80] A. M. Bickel, The Supreme Court, 1960 Term – Forward: The Passive Virtues, 75 Harv. L. Rev. 40 (1961).

[81] For a critique of Bickel, concerned with the tension between the prudential aspects of the "passive virtues" and the need for judges to be principled in their decisionmaking, see G. Gunther, The Subtle Vices of the "Passive Virtues:" A Comment on Principle and Expediency in Judicial Review, 64 Colum. L. Rev. 1 (1964).

court's reasoning as to the law for the future; yet in systems with abstract review this distinction may be inapposite.[82]

6. Legislative Control of Procedural Rules and Jurisdiction; Ease of Constitutional Amendment or Lawful Departure from Constitutional Norms

Does the possibility of legislative control of procedural rules, or of jurisdiction, in response to concerns about the court's exercise thereof, have the potential adversely to affect independence? Does ease of constitutional amendment in response to a court's decision have this possibility as well? A constitutional amendment in response to an abstract or concrete judgment that a law is unconstitutional might be seen to go to the court's independence; but it might alternatively be understood as a form of democratic response perfectly compatible with the independent power of the court to interpret an existing constitution.[83] How such a dialogue is viewed might well depend on how often the court's judgment as to constitutionality is accepted as controlling; if amendments become completely routine responses then the effectiveness of the court as an independent check on government may be called into question.

It is normatively contestable and empirically difficult to resolve whether a court whose constitutional judgments can be subject to overruling by the political branches will tend to act with less independence of judgment than courts whose judgments are less easily, as a formal matter, overturned. On the one hand, it has been argued that a court that knows its judgments can be easily overturned by statute or amendment will be more bold in its decisions.[84] On the other hand,

---

[82] See, e.g., The Southwest Case, 1 BVerfGE 14 (1951) (Federal Constitutional Court of Germany) (asserting that once the FCC declares a law unconstitutional, "no federal law with the same content can again be deliberated and enacted […]", transl. by W. F. Murphy/J. Tanenhaus, Comparative Constitutional Law: Cases and Commentaries, at 208-212 (1977)).

[83] Cf. S. Wright, The French Conseil Constitutionnel in 1999, 6 European Pub. L. 146, at 147 (2000) (describing constitutional amendments made in response to decisions of French Conseil Constitutionnel). The problem of "unconstitutional" constitutional amendments must be left to be considered elsewhere.

[84] See, e.g. R. A. Posner, The Supreme Court, 2004 Term: Foreword: A Political Court, 119 Harv. L. Rev. 31, at 89-90 (2005). Cf. Peretti (note 13), at 113

many judges and scholars argue that a natural desire to avoid "overruling" by the political branches will result in much greater caution and less independence in such courts.[85] And the Canadian example of what Mark Tushnet calls "weak judicial review" illuminates, if nothing else, the impossibility of resolving these questions as a positive matter without detailed knowledge of the context – there, for use of the "section 33" override clause.[86] This clause of the Canadian constitution authorizes the national or provincial legislatures to enact laws "notwithstanding" certain specified Charter rights, effective for a period of no more than five years; despite the apparent possibility for vigorous legislative dialogue with and challenge to judicial decisions through such a device, its use has been at best quite subdued in Canada.[87] On Tushnet's account, the possibility of the Section 33 override invigorating a democratic dialogue with the court over constitutional meanings was vitiated

---

(summarizing literature on statutory interpretation, including literature that assumes that "policy motivated justices will […] tak[e] a position […] as close to [their] ideal point as possible without being so far from Congress that it is overturned").

85 See V. C. Jackson, Multi-Valenced Constitutional Interpretation and Constitutional Comparisons: An Essay in Honor of M. Tushnet, 26 Quinnipiac L. Rev. 599, 666 n. 234 (2008); see also L. Favoreu, Constitutional Review in Europe, in: L. Henkin/A. J. Rosenthal (eds.), Constitutionalism and Rights: The Influence of the United States Constitution Abroad 38, at 46 (1990); Singh (note 22), at 256-257 (asserting that the frequent amendment of the Indian Constitution in response to Supreme Court rulings "was not healthy for the independence of the judiciary because any of its decisions that were inconvenient to the government of the day could be easily overruled by constitutional amendment").

86 See Canadian Charter of Rights & Freedoms para. 33, Part I of the Constitution Act, 1982 (being sched. B to the Canada Act 1982, c. 11 (U.K.)).

87 See M. Tushnet, Judging Judicial Review: Marbury In The Modern Era: Alternative Forms Of Judicial Review, 101 Mich. L. Rev. 2781 (2003); see also S. Gardbaum, The New Commonwealth Model of Constitutionalism, 49 Am. J. Comp. L. 707 (2001). For Tushnet's analysis of the inefficacy of the Canadian constitution's provision for legislative overruling to promote democratic dialogue, see M. Tushnet, Policy Distortion And Democratic Debilitation: Comparative Illumination Of The Countermajoritarian Difficulty, 94 Mich. L. Rev. 245 (2005). For other perspectives on the degree of democratic dialogue under the Canadian Charter, see e.g. P. W. Hogg/A. A. Bushell, The Charter Dialogue Between Courts and Legislatures, 35 Osgoode Hall L. J. 75 (1997); J. L. Hiebert, Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?, 82 Tex. L. Rev. 1963 (2004).

in part by the political acts of Quebec, in making so blanket a use of the override as to delegitimate its use in practice. National context matters.

7. Particular Procedures: Case and Opinion Assignment

Matters of court practice and procedure may implicate independence in a variety of ways; rulemaking authority may be shared with the legislatures, though typically courts retain some degree of control over their own practice and procedure. In the Canadian constitutional caselaw on judicial independence, there are three structural components to judicial independence: tenure security, financial security and administrative independence. With the respect to the last, only the "essential minimum" of administrative independence is constitutionally protected – the Canadian Supreme Court has defined this "as control by the judiciary over 'assignment of judges, sittings of the court, and court lists – as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions [...]' These matters 'bear directly and immediately on the exercise of the judicial function.'"[88]

Case assignment practices, referred to in this passage, can implicate the independence of the judiciary as a whole if authorities outside the courts have power to assign sensitive cases to particular courts or judges, deemed likely by the case assigning authority to rule in a particular way.[89] Whether made from outside or within the courts, the power to assign cases in a discretionary way can threaten some forms of

---

[88] Reference re Remuneration (note 19), at 141-142, quoting J. Ledain, in *Valente* v. *The Queen* (note 10).

[89] See, e.g., *Van Rooyen* v *State* (note 3), at 228-230 (holding unconstitutional a statutory provision authorizing a Minister, an executive official, to assign particular duties to particular magistrates). For similar reasons, the use of "*ad hoc*" tribunals or of "*ad hoc*" referrals of cases from one court system to another raise judicial independence concerns. See Shetreet (note 10), at 615-617. Cf. ECtHR, *Öcalan* v. *Turkey* [GC], 2005-IV Eur. Ct. H.R. 131, paras. 112-118 (finding a violation of the right to an independent and impartial tribunal under Article 6 of the ECHR to have arisen from the participation of military judges in significant parts of the proceedings against a civilian in a special national security court); *Hamdan* v. *Rumsfeld*, 548 U.S. 557, at 631-633 (2006) (discussing whether certain military commissions complied with Common Article 3 requirements for a "regularly constituted court").

independence.[90] Rules or conventions such as opinion assignment in a multi-member judicial panel by a judicial member thereof based on seniority (and assuming that the result reflects the views of a majority) pose little or no threat. Yet concentrating assignment power for all opinions in a single official (such as a chief judge) may enable the degree of intra-judiciary independence to be kept to low levels.[91] That is, depending on the degree of intra-judicial independence of individual judges in the system, the power to assign writing of opinions may become a disciplinary tool with respect to the judge's past behavior, more than a tool for the effective or expert drafting of opinions expressing the decision of the court. If combined with a power (either in an outside appointing authority or internal judicial selection or recruitment power) to add judges, the ability to influence through administrative or political means the interpretation of the law is considerable.

8. Unanimity or Separate Opinions; Institutional and Individual Independence

One practice that varies considerably among constitutional courts is whether the opinions are given only as a court, or whether separate opinions are permitted; even among courts in which separate opinions are permitted, there are substantial differences in informal norms about the frequency of use of the separate opinion. The question whether separate opinions are allowed or encouraged must be seen in the context of the distinction between institutional and individual elements of judicial independence, and of different conceptions of what the law is, as will be discussed further in Part II below.

---

[90] Cf. Kuijer (note 11), at 270-271 (noting threat to individual, decisional independence arising out of the assignment of cases and noting case law emphasizing importance of assignment according to pre-existing rules); Schwartz/Sykiainen (note 16), Chapter B. V. (noting manipulations of assignments of cases by court chairpersons in Russia); Müller (note 51), Chapter C. I. (noting as a "major problem" the influence of court presidents on other judges' independence through their power to assign cases).

[91] See Hamad (note 28), at 271 (describing assignment powers of chief justice in Egypt). Cf. Reference re Remuneration (note 19), at 152 (suggesting that some administrative functions, including a decision to close the courts for particular days, might be so important an administrative decision as to require the collective judgment of the court, and could not be constitutionally decided by the Chief Judge acting alone).

9. Authority to Remove; Discipline Short of Removal; Periodic Evaluation for Retention or Promotion

The tension between judicial discipline (or performance-related review) and judicial independence is widely recognized. Yet in those judiciaries whose ordinary courts are staffed on civil service or bureaucratic lines, a system of review and evaluation is an essential component.[92] In common law jurisdictions that do not have career judges, there are typically procedures for removal (in cases of extreme misconduct),[93] or for re-evaluation of judges before they are reappointed,[94] or for lesser forms of discipline.[95] Systems of discipline administered in whole or in part by judges may be contrasted with provisions authorizing political actors to remove judges, as by impeachment in the legislature. Some argue that, in order to protect judicial independence, judges must be involved (either directly or through the possibility of judicial review), in proceedings for judicial discipline or removal;[96] yet an entirely autonomous judicially administered disciplinary system could be perceived as sheltering miscreant judges from appropriate standards of accountability, thereby detracting in the long run from judges' capacities in democratic cultures to maintain a healthful independence.

In the United States, federal Article III judges serve "during good behavior," and are generally understood to be removable only through

---

92 For discussion of a line of German decisions on the distinction between administrative evaluation and threats to judicial independence, see Künnecke (note 65), at 226-227.

93 See, e.g., Wheeler (note 26), Chapter B VII; Turenne (note 34), Chapter B. VII.

94 On the role of nominating and tenure commissions in evaluating and re-evaluating judges for appointment and reappointment in the District of Columbia, see D.C. CODE paras. 1-204.31(c), -204.32, -204.33(c), 11-1502. See also D. C. Brody, The Use of Judicial Performance Evaluation to Enhance Judicial Accountability, Judicial Independence, and Public Trust, 86 Denv. U.L. Rev. 115, 118 (2008) (describing the origin, in Alaska, of the use of judicial performance evaluations as an aid to voters in retention elections).

95 See, e.g., 28 U.S.C. para. 351 et seq. (authorizing the federal judiciary to discipline judges for conduct "prejudicial to the effective and expeditious administration of the business of the courts". On the operation of the federal judicial discipline system, see generally Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice (Sept. 2006) (Breyer, J., Chair).

96 For discussion, see Kuijer (note 11), at 273-274.

impeachment in the House of Representatives and conviction on a two-thirds vote of the Senate, and only for "Treason, Bribery or other high Crimes and Misdemeanors," a standard that has been narrowly interpreted (though not without controversy).[97] In a number of systems removal of a judge requires findings at two stages, and may require supramajority or majority vote in the legislature as a final step.[98] Legislative decisions on impeachment and removal of judges are not judicially reviewable in some systems, as in the United States, while elsewhere, as in Germany, they are subject to judicial review (before taking effect).[99] Provisions for removal that are applicable to the highest constitutional courts may differ from those applicable to lower or ordinary courts. Removal by impeachment in the US or Germany is limited to very serious offenses, and rarely if ever used; in the US, there is a broad (though not unanimous) consensus that removing a federal judge requires proof of criminal conduct (or at serious abuse of office), not merely a record of poor judicial decisions.

Systems of discipline and removal are very varied. Disciplinary review by outside authorities is sometimes regarded as less consonant with independence than review by a purely judicial hierarchy or council. But even if outside forces cannot impose sanctions on judges for opinions they disagree with, in some career judiciary systems higher members of the judiciary may transfer lower court judges with whose decisions they disagree to less desirable assignments,[100] thereby affecting "internal" in-

---

[97] For discussion, see generally Jackson (note 4).

[98] Compare RSA Constitution (S.Afr.) Article 177 (requiring a supermajority vote in the National Assembly to remove judges, and only on the recommendation of a Judicial Services Commission that includes judges as members) and U.S. Constitution Article I, §§ 2, 3, Article II, § 4 (requiring impeachment by the House and a two-thirds vote in the Senate to convict and remove from office) with *Van Rooyen* v. *State* (note 3), at para. 183 (upholding provisions concerning magistrate judicial officers for removal by a majority vote in Parliament); Section 11(3) of the Supreme Court Act, 1981, UK (providing for a simple majority in both houses of parliament to remove judges); Constitution of Ireland, Article 35 cl. 4 (simple majority); Constitution of Australia, para. 72(1)(ii)); Canada Constitution Act, 1867, para. 99(1).

[99] See Künnecke (note 65), at 228 (noting that in Germany, the law provides for impeachment and removal of federal judges only on a motion by the Bundestag before the Federal Constitutional Court).

[100] See O'Brien/Ohkoshi (note 37), at 44-50 (discussing "crushing" the independence of lower courts, through decisions of the Chief Justice concerning, e.g., "reassignment to less desirable courts" or "salary rankings"). For an alter-

dependence (i.e., of the judges from each other). Defining the line between appropriate administrative discretion in higher levels of judiciary and inappropriate use of discretion to sanction judges can be a difficult call.[101] Moreover, in this area as well as others discussed in this paper, it is not clear that structural or institutional differences translate into greater or lesser degrees of individual judicial independence, or whether it is the broader sociolegal environment which conditions how those structures are used that makes more of a difference. But it is not hard to imagine why – at least in theory – a power of discipline and removal would operate differently when combined with a power to appoint or select new judges, than when the power to discipline is separate, both institutionally and in fact, from the power to select new judges.

10. Immunity in Civil Damages?

If judges could readily be sued and held personally liable in damages by disappointed litigants, the effects on the fair administration of justice would be substantial; many qualified persons would not undertake the task of judging, which requires decisions that create winners and losers; and decisionmakers might hesitate to rule against more powerful and well resourced litigants, whose capacity to sue them civilly might be greater than others. For these reasons, some degree of immunity from civil damages by disappointed litigants may be a requirement for an independent judiciary.[102] If the state indemnifies or assumes responsibility

native account emphasizing how single party control affected judicial independence in Japan, see Ramseyer (note 6). For case discussion, see, for example, *Van Rooyen* v. *State* (note 3) at 201, 225 (holding that it is inconsistent with constitutionally required independence to transfer a judge as a penalty, but that it is permissible to empower a commission, whose acts are subject to review in higher courts, to transfer a judge if there is a good reason). See also Kuijer (note 11), at 247 (criticizing ECtHR jurisprudence for failure to recognize how transfers can threaten independence in ways similar to removal).

[101] See Shetreet (note 10), at 639-640 (discussing U.S. Chandler case and German practice).

[102] See *Stump* v. *Sparkman*, 435 U.S. 349 (1978) (holding that judges are immune from civil liability for acts taken in their judicial capacity, unless they act in the clear absence of all jurisdiction); accord, *Mireles* v. *Waco*, 502 U.S. 9 (1991). See generally M. Cappelletti, Who Watches the Watchmen? A Comparative Study of Judicial Responsibility, in: S. Shetreet (ed.), Judicial Independence: The Contemporary Debate, at 564-567 (1985). For critical commentary on the

for damage, however, issues about immunity may be less relevant to judge's adjudicatory independence but still raise important questions about the needs of the court system to funnel challenges through the appellate process and to secure the finality of judgments.[103] Thus, the question whether judges can be sued for damages for their judicial errors may be understood in different terms in different systems, depending not only on other structural aspects of judicial independence but more broadly on the conception of the relationship of the state to its officers (including judges) *vis à vis* harm to its population from unlawful government conduct.[104]

11. Other Working Conditions; Physical Security

Working conditions, from the mundane (is there air conditioning in the courthouse? are there computers or other access to legal sources?), to matters of life and death (with respect to physical security of judicial officers and their families) can have a significant impact on the ability of

---

scope of judicial immunity, see, e.g., A. A. Olowofoyeku, Accountability versus Independence, The Impact of Judicial Immunity, in: G. Canivet/M. Andeans/D. Fairgrieve (eds.), Independence, Accountability and the Judiciary, 357, at 380-382 (2006). For additional discussion, see, e.g., A. Garapon/H. Epineuse, Judicial Independence in France, in this volume, Chapter B. VIII.; Di Federico (note 61), Chapter B. VIII.

[103] In Germany, unless a judge engages in criminal activity, their judgments cannot be attacked, but this is described as protecting *res judicata* more than judicial independence. See Künnecke (note 65), at 230. But it matters that in Germany, the state has vicarious liability for acts of its officers in ways not found in the United States. For discussion of judicial liability and vicarious state liability arising out of adjudicatory errors, see G. Agnastaras, The Principle of State Liability for Judicial Breaches: The Impact of European Community Law, 7 Eur. Pub. Law 281 (2001) (emphasizing distinction between personal liability of judges, which would threaten judicial independence, and state liability).

[104] In some countries, the state as a whole is liable for damages resulting from the wrongful acts of its officials. Although it is possible that the threat of state liability for judicial error might indirectly influence adjudicatory judgment, it would seem that the effect would be only in the direction of avoiding decisions that would be viewed as errors of law by higher or reviewing courts, an effect that already arguably arises out of the possibility of appellate review itself. Where, however, the state reserves authority to seek indemnification from the judges, issues of independence might arise. See Kuijer (note11), at 262-263.

judges to function with independence. In the case of physical threats, or of executive branch withholding of working benefits to influence decision, "independence from" improper influence is at risk. The ability to have access to legal information and reasonable working conditions brings into play the "independence to" apply the law. Judges are public employees, and a wide range of conditions – favorable offices, up-to-date equipment, vacation time, location, court staff, law clerks – can in theory be used as a bureaucratic form of discipline or influence, although this form of potential discipline will not necessarily be viewed legally as a threat to judicial independence.[105] Transfers of judges to different locations has been indentified in some countries as a particular tool to sanction rulings that the government is unhappy with.[106] Other conditions of employment – such as the ability to join in associations of other judges – which some systems might prohibit as impairing independence might be thought by others to be a helpful condition for maintaining independence, through professional associations.[107]

In some courts legislators or others impose time requirements for completion of work on cases; case completion rates in some systems may affect professional advancement (as in Germany).[108] Federal courts in the

---

[105] See *Valente* v. *The Queen* (note 10), at 46 (rejecting constitutional challenges to government control of certain discretionary benefits for judges). For a survey sent to judges by a single legislator that was seen as an effort to intimidate federal judges from spending too much time on outside activities (such as speaking engagements), see P. E. Longan, Congress, the Courts and the Long Range Plan, 46 Am. U. L. Rev. 625, at 636 (1997) (discussing survey Senator Grassley sent to individual federal judges in the mid-1990s).

[106] See Singh (note 24), at 249-250 (stating that judicial independence requires that judges not be transferred without their consent and that any such transfers are controlled by the judiciary itself, not by the executive). As Singh explains, a mass transfer of judges occurred during the "Emergency" period in India, leading to a judicial challenge to the transfers that succeeded on the grounds that the president had not consulted the Chief Justice before making the transfers. Id., at 267.

[107] See, e.g., N. Brown/H. Nasr, Egypt's Judges Step Forward, Carnegie Endowment for International Peace (May 2005) (discussing role of a nominally social organization, the "Judges' Club," in advancing judicial independence in Egypt); cf. U.N. Basic Principles on Independence of the Judiciary, para. 9 (Office of the UN High Commissioner for Human Rights (1985 declaration including that judges should be free to join with other judges in professional associations).

[108] See Künnecke (note 65), at 226 (noting quotas for case completion applied to evaluate judicial performance in Germany). On the possibility that pressures

US generally rely on "softer" systems of encouraging timely completion of cases by mandatory "reporting" for cases of a certain age, though some federal statutes impose deadlines or time constraints for decision in particular classes of cases;[109] and some US states more aggressively tie receipt of salaries to timely completion of work through "no ruling-no pay" laws.[110] And in some systems legislatures may seek to influence, at least in the short term, what courts can adjudicate, by prohibiting the courts from meeting, as occurred in the early years of the United States when Congress changed the Term of the Supreme Court so as to avoid the Court's hearing and deciding cases for a substantial period of time.[111]

---

for case completion and for "case management" may undermine the role of the courts as independent adjudicators, see generally J. Resnik, Managerial Judges, 96 Harv. L. Rev. 346 (1982); J. Resnik, Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III, 113 Harv. L. Rev. 924 (2000).

[109] See Civil Justice Reform Act, 28 U.S.C. para. 476(a) (requiring semi-annual public reporting for each judicial officer of all motions and bench trials pending decisions for more than six months and all cases not resolved within three years of filing). On statutory deadlines for decision, see, e.g., *Miller* v. *French*, 530 U.S. 327, 350 (2000) (noting but not deciding "whether there could be a time constraint on judicial action that was so severe that it implicated […] structural separation of powers concerns" about judicial independence); C. T. Struve, Time and the Courts: What Deadlines and their Treatment Tell Us About the Litigation System, 59 DePaul L. Rev. 601 (2010).

[110] See L. A. Sutin, Check, Please: Constitutional Dimensions of Halting the Pay of Public Officials, 26 J. Legis. 221, 258-268 (2000) (describing "no ruling no pay" provisions in state courts and asserting that three state courts have found such provisions unconstitutional intrusions on judicial independence). See also, Alaska Stat. § 22.05.140(b) (2011) ("A salary disbursement may not be issued to a justice of the supreme court until the justice has filed with the state officer designated to issue salary disbursements an affidavit that no matter referred to the justice for opinion or decision has been uncompleted or undecided by the justice for a period of more than six months.").

[111] In late 1801, Marbury filed a petition with the U.S. Supreme Court seeking a mandamus to compel the Secretary of State to turn over his judicial commission to serve a five year term as justice of the peace. In the early part of 1802, the U.S. Congress enacted legislation cancelling the June and December, 1802 Terms of the Supreme Court, resulting in the Court not convening again to hear Marbury's petition until February 1803. How large a role the filing of the petition (and the Court' issuance of a "show cause" order to the government in response), played in the story of this legislation can be debated, but plainly Congress was aware of the show cause order and some members were

Every system needs a mechanism for determining working conditions. Leaving working conditions entirely to the judges, especially with respect to issues of salary, would be seen as imprudent; yet giving authority over these issues to executive or legislative branches carries with it the risk of abuse to restrain the exercise of judicial authority. Moreover, there may be tensions between institutional and individual independence: for individual judges to be wholly in charge of their own sitting, or vacation schedules, could wreak havoc with the court; but to allow persons other than the judges to control such calendar issues risks the unreasonable use of such powers. Whether control over such relatively minor details should be viewed as a substantial interference with judicial independence or not can be debated; but the potential for abuse, especially if exercised by those with other powers of influence over the composition or jurisdiction of the court, should not be overlooked, adding to the challenge of getting a complete picture of the structural features of systems of judicial independence.

While there are many approaches to working conditions, on the need for physical security for judicial officers there is widespread agreement. If judging requires a considerable level of civil immunity from damages actions based on alleged judicial errors, then *a fortiori* judging requires a high level of protection from those who would threaten judges' safety. Typically, judges and courts are dependent on other branches for the appropriate level of police and security protection. Long tenures mean little if judges can be physically intimidated, whether into leaving the bench or into deciding or refraining from deciding based on such coercive influences.

---

quite unhappy with it. See, e.g., W. S. Treanor, The Story of Marbury v. Madison: Judicial Authority and Political Struggle, in: V. C. Jackson/J. Resnik (eds.), Federal Courts Stories, 39 (2010); J. M. O'Fallon, Marbury, 44 Stan. L. Rev. 219, 239 (1992) (suggesting that the change in the Court's Terms had less to do with avoiding decision in Marbury and more to do with avoiding the Court's hearing challenges to legislation repealing the Circuit Court Acts until after it had come into effect). In this case, it was legislative action that postponed the hearing; executive suspension to prevent courts from hearing politically delicate cases has occurred elsewhere. See, e.g., Shetreet (note 10), at 608-609 (1981).

12. Administrative and Budgetary Autonomy

Although it is not uncommon for court budgets and hiring to be handled through a broader ministry of justice, which may also employ and supervise prosecutors,[112] in a number of systems – notably the United States federal courts and Germany – the high constitutional courts' obtaining control of their own budget and hiring were seen as important steps to establishing the constitutional court as a serious and independent institutional check on the other branches of government.[113] In this area, again, there are tensions between the concepts of institutional vs. individual independence: some courts hire, for example, law clerks and court clerks as a court, without their being assigned to particular judges (as in the U.K. Supreme Court); in other systems (as in federal courts in the United States), individual judges have authority to hire their own chamber staff. The influence of junior staff is much debated; but it seems plausible that in theory a judge's independence may be enhanced by her ability to hire her own staff, while a court's institutional independence is reinforced by its having control over its personnel (*vis à vis* executive officers)

Issues of budgetary requests and planning may devolve upon a single chief judge's office, or a council of judges, or on a specialized government agency or an executive branch ministry;[114] who participates, and what powers are shared, can raise many sensitive issues. Broader planning by courts, in their administrative capacity, to meet social problems may occur, as they do quite widely, for example, in many of the state courts in the United States (from which experiments, for example, in "problem solving" courts for juvenile crime, or drug abuse, or domestic violence, have emerged).[115] Yet court initiatives on social problems or

---

[112] See, e.g., Garapon/Epineuse (note 102), Chapter B. I. 1. (describing an "executive model" of judicial administration).

[113] See Kommers (note 43), at 16; Shetreet (note 10), at 592, 603, 646 (describing creation in 1939 of Administrative Conference of the United States and the federal courts' authority directly to submit a budget to Congress). Cf. Reference re Remuneration (note 19), at 143 (rejecting idea that control over budget is a constitutionally required form of judicial independence).

[114] See Bell (note 71), at 51. Cf. Wheeler (note 26), Chapter B. I. 1. (noting practices of Chief Justices in appointing to Judicial Conference Budget committees judges with useful contacts with legislators).

[115] See, e.g., N.Y. State Courts, Office of Policy and Planning, Problem-Solving Courts, available at <http://www.nycourts.gov/courts/problem_solving>

issues may be seen as trenching on the prerogatives of other branches of government, as in the criticism that the single "long term plan" issued by the U.S. federal judiciary in the mid-1990s evoked, by scholars who believed its comments on the jurisdiction that should or should not be conferred on the courts may have trenched on areas of legislative policy.[116]

A number of high courts have sought control over their own budgets and autonomy in administration from other branches, suggesting that institutional independence of courts may rest in part on these degrees of control. But, as with other factors, what may seem an indicia of independence may be less so, if, for example, one of the political branches of government can control who can act on behalf of the judiciary in the administration of its business.[117] Moreover, even in systems where the courts have achieved a high degree of administrative and budgetary autonomy, the legislative process may still control the appropriations authorized to be spent, providing a potentially potent way to express legislative displeasure with the courts or, even if there is no specific confrontation between the branches, broader budgetary concerns may result in limitations that adversely affect court operations.[118]

13. Mandatory Judicial Education?

Some jurisdictions impose mandatory education requirements on judges, some do not. For example, judicial education requirements are mandatory in Germany for junior (probationary) judges; but for per-

---

[116] See, e.g., J. Resnik, Constricting Remedies: The Rehnquist Judiciary, Congress and Federal Power, 78 Ind. L. J. 223, at 296 (2003) (suggesting that the federal courts' taking on of a "lobbying" role on policy proposals undermines the legitimacy of adjudication).

[117] See Schwartz/Sykiainen (note 16), Chapter B. I. 1. (describing the creation of the Judicial Department of the RF Supreme Court (modeled on the Administrative Office of the U.S. Courts) as an administrative body formally independent of the executive branch, but in the selection of whose head the President of the RF plays a significant role).

[118] See, e.g., Ferejohn/Kramer (note 16), at 984-986 (describing the U.S. Congress' budgetary authority over the Article III federal courts); J. Resnik, Judicial Independence and Article III: Too Little and Too Much, 72 S. Cal. L. Rev. 657, 668 (1999); Longan (note 105), at 630 (describing suspension of civil jury trials in federal courts in 1986 because of lack of funds for juror fees).

manent judges "continuing legal education" (CLE) is optional; compulsory requirements for CLE would be considered inconsistent with independence.[119] Some American states impose mandatory CLE on judges, comparable to that required for lawyers.[120] Issues of independence have seldom been raised in the U.S. in connection with mandatory judicial CLE, perhaps in part because CLE requirements can be satisfied with a wide range of choice of courses. In Europe, however, "mandatory in-service training would generally be viewed as an infringement of judicial independence."[121] If mandatory judicial education were combined with a curriculum tightly controlled by a single source, questions of judicial independence from undue political control or influence could arise (and even more so if combined with power to discipline or adversely affect working conditions).[122]

14. Conclusion

The very large number of factors identified above emphasizes one of the reasons for the importance of sociolegal context in understanding whether courts function in fact with degrees of independence from other power sources. For given the number of variables; the opportunities for application of provisions in ways not consistent with their intent; and the possibilities for good faith disagreements, e.g., about the line between administrative review and evaluation and interference with judicial independence, it may well be a mistake to think of judicial independence as having singular and necessary institutional features. Much depends on how the formal structures work in practice and on

---

[119] See also Riedel (note 12), at 92-94, 113-117.

[120] See, e.g., Act of May 26, 1983, 68th Leg., R.S., ch. 344, paras.1-2, 1983 Tex. Gen. Laws 1792-1793 (Texas law providing for mandatory continuing legal education for judges); State Commission on Judicial Conduct: 2000 annual report, 64 Tex. B. J. 298, at 307-308 (2001) (reporting on discipline of state judges in Texas for failure to complete CLE requirements).

[121] Dr. C. Thomas, Review of Judicial Training and Education in Other Jurisdictions 5 (May 2006); Cf. Reference re Remuneration (note 19), at 45 (noting that the provincial judges themselves control many important decisions, including continuing legal education).

[122] For different approaches to legal education, both initial and continuing, see, e.g., Hriptievschi/Hanganu (note 18), Chapter B.1. 2.; Di Federico (note 61), Chapter B. I. 2.

their interactions. To the extent that there are such features, many would suggest that *long tenure in office, with protections against arbitrary removal,* is a central support for judicial independence. This may be true. Yet systems that provide for short tenures with renewals even by popular election may function with significant degrees of independence, provided that the elections are not salient or contested in a partisan way.[123] Thus, while one can say that particular structures will have a tendency to insulate, or not, judges from political, or popular, pressures, one cannot say that the presence or absence of any such feature will have a strongly determinative effect, apart from the political and social context in which the courts operate. I now want to deepen the analysis by focusing on two areas, in the next section.

II. Context and Structures of Independence: Is Judicial Independence Dependent on Judicial Accountability?

I have described the complexity of analysis produced by the interactions among different structural features, as well as the significance of sociolegal and political culture in explaining how legal structures actually will operate. [124] Seemingly long terms may not protect independence if, for example, political powers routinely exercise powers of removal, as in Argentina. As U.S. constitutional history suggests, even life tenure, strong protections against salary diminution, and political norms against efforts to utilize a legislative removal power, may not prevent the legislature from acting to withdraw the Court's jurisdiction to prevent its deciding important matters (action that, on at least one

---

[123] In both the United States and Switzerland there are judicial elections with candidates endorsed by political parties. See Wheeler (note 26), Chapter B. II., Kiener (note 26), Chapter B. II.

[124] Cf. C. Cameron, Judicial Independence: How Can You Tell It When You See It?, in: Burbank/Friedman (note 9), at 139-140 (suggesting that the value of constitutional protections of salary and tenure is that "they establish bright lines for determining when the executive or legislature violates a societal or political convention supporting judicial independence" and citing R. Hardin's work); C. Gardner Geyh, Customary Independence, in: Burbank/Friedman (note 9), at 160-175 (discussing customary norm against Court-packing in the US).

significant occasion, was acquiesced in by the Supreme Court).[125] Likewise, nonrenewable single terms may not achieve the independence towards which they aim if judges are allowed and in fact do tend to seek government appointments to other judicial positions in other courts, [126] or seek remunerative employment in the private sector thereafter, or if they are forced to seek remunerative private employment because pensions are not available.

In addition to the complex interdependence of these features, a different though perhaps related point is this: elements that are regarded as favorable to judicial independence in one setting may have a quite different, indeed the opposite, valence in another context. Particular histories and particular sequences of development in part account for this. Additionally, the possibility of divergent valences of particular institutional features arises because the appropriate independence of the courts may rest on their sustaining a degree of sociolegal legitimacy, which may in turn rest on mechanisms of "accountability" (both internal mechanisms of reason-giving and review and other mechanisms for appropriate control or influence by branches, or publics, outside the courts). That is, accountability is not always in tension with independence but in some contexts might be understood as reinforcing judicial independence, indeed, even as necessary to sustain judicial independence over time.[127]

---

[125] See *Ex parte McCardle*, 74 U.S. 506 (1869); see also D. J. Meltzer, The Story of Ex parte McCardle: The Power of Congress to Limit the Supreme Court's Appellate Jurisdiction, in: Jackson/Resnik (note 111). Moreover, with all of the protections of independence that federal judges have, many scholars believe that the Supreme Court is in fact constrained or influenced by public opinion (with some disagreement on whether this is normatively good or appropriate). See generally B. Friedman, The Will of the People: How Public Opinion has Influenced the Supreme Court and Shaped the Meaning of the Constitution (2009).

[126] See, e.g., M. L. Volcansek, Constitutional Politics in Italy, at 24 (2000) (noting the possibility that, in a system without life tenure and with a nonrenewable term, "a measure of self interest, be it standard of living or career ambitions, may impinge on judicial independence" and describing several significant post-court careers of former Constitutional Court judges in Italy); see also Voeten (note 40), at 420 (noting that governments can nominate judges, after service of their term on one court, "for other prestigious national or international positions" and observing that in 2006, "four of the 25 ECJ judges had previously served on the ECtHR").

[127] For a different but not unrelated argument, see Ferejohn/Kramer (note 16), at 974 (arguing that independence and accountability are not "ends" in

Political scientists suggest that all constitutional courts are in some ways constrained by the tolerances of other power holders.[128] The tolerance of other power holders, in turn, is related to the levels of what political scientists call "diffuse support" for the independence of the courts. Measures that might be cast as mechanisms of "accountability," assuring that courts are subject to some forms of input or influence by democratic branches, may thus indirectly contribute to the independence of those courts, to the extent that the accountability mechanisms support their public legitimacy.

Thus, for example, some U.S. scholars have argued that legislative control of the Supreme Court's jurisdiction reinforces its legitimacy. Because the Constitution authorizes Congress to make exceptions to the Court's appellate jurisdiction, the Court's exercise of jurisdiction could be regarded as implicitly authorized or acquiesced in; the unexercised possibility of legislative withdrawal of jurisdiction might be understood to strengthen the Court's legitimate independence in the exercise of the jurisdiction it had.[129] Others, however, view control over jurisdiction as a threat to judicial independence – especially where it can be or is used to respond substantively to the court's constitutional decisions with

---

themselves but part of a dynamic equilibrium towards a "satisfactory" process of adjudication in a democracy); see also Burbank/Friedman (note 17), at 14-16 (viewing "judicial independence and accountability "as the joint product of purposive legal and political arrangements").

[128] See, e.g., L. Epstein/J. Knight/O. Shvetsova, The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government, 35 Law & Soc'y Rev. 117 (2001) (discussing tolerances of other political actors for judicial decisions departing from their ideal points); cf. Ginsburg (note 37) (arguing that rational politicians might establish judicial review as a kind of insurance when they can see they will not always be in power); M. C. Stephenson, "When the Devil Turns …": The Political Foundations of Independent Judicial Review, 32 J. Legal Stud. 59 (2003) ("[S]upport for independent judicial review is sustainable only when the political system is sufficiently competitive, the judiciary is sufficiently moderate, and the political competitors themselves are sufficiently risk-averse and concerned with future payoffs […]"). For potential examples of judicial decisions that elicited serious push back from other political actors, see Ran Hirschl, Beyond the American Experience: The Global Expansion of Judicial Review, in: M. A. Graber/Michael Perhac (eds.), Marbury Versus Madison: Documents and Commentary 129, at 142-144 (2002).

[129] See, e.g., C. L. Black, Jr., Decision According to Law, at 37-39 (1981).

which the political branches disagree.[130] Legislative control of jurisdiction, then, can be both a support for and a check on judicial independence. The effect of such provisions depends in part on whether and how they are exercised, and on how the public responds to the Court's decisions and to efforts to restrict the Court's jurisdiction.

The issue of legislative control of the jurisdiction of the highest court may not exist in every constitutional democracy; some constitutional courts may derive their jurisdiction primarily from constitutional grants,[131] others through jurisdictional acts enacted by the legislature pursuant to constitutional authority. But every judicial system faces the question of how to choose their judges; and every judicial system that uses multimember bodies for decision (as almost all systems do at least at the appellate level) faces the question of separate opinions. I will use these two examples to further illustrate how the interplay of accountability and independence may be mutually supportive, rather than opposed,[132] and how a particular feature of a judicial system may have quite different valences for judicial independence, depending on the context.

1. Selecting Judges: Elections, Appointments, Expertise and Legitimacy

A first question might be whether there is any relationship between selection systems and judicial independence. Popular election of judges, it might be thought, would bear little relationship to their independence

---

[130] See, e.g., L. Sager, Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17 (1981); L. G. Ratner, Congressional Power Over the Appellate Jurisdiction of the Supreme Court, 109 U. Pa. L. Rev. 157 (1960).

[131] See, e.g., German Basic Law, Arts. 92, 93.

[132] For the conventional view contrasting accountability with independence, see S. Levinson, The Role of the Judge in the Twenty-first Century: Identifying "Independence", 86 B. U. L. Rev. 1297 (2006). On the complex character of the concept of accountability itself, noting the twin desires for accountability to the law (or to professional legal norms) and accountability to the democratic public, see M. Tushnet, Judicial Accountability in Comparative Perspective, in Accountability in N. Bamforth/P. Leyland (eds.), The Contemporary Constitution (forthcoming, 2012).

once in office, if the elected term is long enough and nonrenewable.[133] Where judges may be re-elected or reappointed, or hold office for *short* terms and might need support from the appointing authority for other jobs in the future, selection (and promotion and renewal) methods implicate significant aspects of independence from external forces. It is the combination of selection method, tenure and the possibility of reappointment (or appointment to other positions) that creates the potential for an independence-threatening dynamic.[134]

In systems with longer tenures, it might be thought that the initial selection mechanism bears less of a relationship to the practical independence judges can and will exercise. There is, to be sure, something to this point, especially in the case of "life" tenure or nonrenewable long terms. But to the extent that judicial independence is an independence *to* properly interpret and apply the law, the kinds of candidate selected for the bench may bear on their capacity and inclination towards this kind of independence. If judges lack competence in law, then they cannot exercise the kind of judicial independence that is sought, an independence from outside influence for the purpose of being able to decide according to the law. If a judge is very independent-minded and not subject to influence by others, *but* is an impulsive decisionmaker or has deep biases which go unexamined, that person is not capable of exercising the judgment for which judicial independence is valued. Thus, legal expertise and judicial temperament – *which some selection processes may filter and identify better than others* – are qualities related to judicial independence.

Yet even expertise does not bear an entirely straightforward relationship to judicial independence. A court's capacity to sustain an independent approach to adjudication is – as noted above – constrained, as well, by the limits of public tolerance, which may be influenced by the sociolegal legitimacy of the court and its judges. In sociolegal cultures

---

133 See, e.g., E. L. Rubin, Independence as a Governance Mechanism, in: Burbank/Friedman (note 9), at 86 (independence depends more on the "ongoing ability" of those who select judges "to transmit signals to the judge as a result of that selection process, signals that the judge would need to attend to).

134 In some US states, judicial elections are both partisan and very expensive to finance; contributions from entities that may later appear before the judges raise particular concerns about their independence and impartiality. Cf. *Caperton* v. *A. T. Massey Coal Co.,* 556 U.S., 129 S. Ct. 2252 (2009) (finding due process violation in elected judge sitting on appeal of very major campaign contributor to his election).

whose understandings of law are connected to a belief that expertise is the essential criterion for judging, expertise-based selection models will enhance a court's legitimacy; in sociolegal cultures with more varied concepts of law and judging, however, expertise alone may not be sufficient and factors of fair participation or inclusion based on group or geographical membership may be important to the capacity of a court to function with independence.

Thus, selection criteria and methods may be connected, indirectly or directly, to capacities for and ability to sustain judicial independence, although their effects may still be smaller than those of tenure length or renewability.[135] As a theoretical matter, moreover, it is difficult to conclude that selection methods designed to focus only on professional expertise will necessarily produce a more properly independent court than selection methods rooted to a greater degree in the political legitimacy and sociolegal judgments of the appointing or selecting authorities. Selection methods that do not purport to focus on qualifications at all would, in most settings, produce courts that lack high degrees of legitimacy; the arguments for treating judicial decisions as final and authoritative become less weighty if the judges are seen as no better qualified than persons chosen by lot to perform the task, though the authority of office and need to have some decisionmaker resolve contested cases would still be at work. But whether expertise only, or a combination of more political and expert criteria, will produce a more properly independent court is a question that theory alone cannot answer.[136]

---

[135] Cf. J. Shugerman, The Twist of Long Terms: Judicial Elections, Role Fidelity and American Tort Law, 98 Geo L. J. 1349, 1399 (2009) (finding that the tenure of judges selected through popular elections matters substantially to the quality of their decisions; that judges with shorter terms who need to run for reelection more often are more likely to be beholden to special or party interests to finance their campaigns but that judges elected for longer periods demonstrate stronger degrees of independent orientation to the public interest).

[136] See also N. Garoupa/T. Ginsburg, Guarding the Guardians: Judicial Councils and Judicial Independence, 57 Am. J. Comp. L. 103 (2009) (finding little relationship between the use of judicial councils and the quality or independence of the judicial system). Cf. F. du Bois, Judicial Selection in Post-Apartheid South Africa, in: Malleson/Russell (note 28), at 283 (noting the tension between "lawyerly excellence and social legitimacy"); *Van Rooyen* v. *State* (note 3), para 56-61 (approving of expansion of judicial selection commissions to include many more nonjudicial members, in part in recognition of the constitutional commitment to transforming gender and racial disparities), available at <http://www.saflii.org/za/cases/ZACC/2002/8.pdf>.

Specific historical contexts make a difference to whether particular selection methods at particular times are independence-promoting or not. An example is drawn from U.S. experience. In the United States, each of the 50 states has their own court system; and the great majority of cases, criminal and civil, including cases involving important questions under the federal Constitution, that are brought and decided in the United States begin in the state court systems. Each state has authority to determine the form of its courts, including the selection methods for judges. A majority of the state court systems in the United States now use elections to select or retain at least some of their judges. In some states, including the large state of Texas, all judges run for election or re-election at least every six years (on some lower courts, every four years).[137]

In recent years, this process of running for election has been widely criticized as antithetical to norms of judicial independence; those who defend the current system do so on grounds of democratic accountability, not judicial independence.[138] Yet, when judicial elections were first initiated in the United States in the 1840s and 1850s, they were in some sense supported by reformist, pro-judicial-independence arguments.[139]

---

[137] See American Judicature Society, Methods of Judicial Selection in Texas, available at <http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=TX>. See generally Wheeler (note 26), Chapter B. II. 2. (discussing effects of fundraising for campaigns in state judicial elections).

[138] On the pernicious effects of public elections on impartial justice, see S. B. Bright, Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions About the Role of the Judiciary, 14 Ga. St. U. L. Rev. 817, at 847-851 (1998) (describing state judicial campaigns where, for example, an incumbent judge boasts of the number of times he has upheld death sentences). Efforts by states to limit the public promises judicial candidates might make face constitutional obstacles, see *Republican Party of Minnesota* v. *White*, 536 U.S. 765 (2002) (holding unconstitutional a state law prohibiting judicial candidates from making public pronouncements on contested legal issues), a decision that many believe will lead to longer and more costly campaigns in which major donors will exert influence. See, e.g., R. Briffault, Judicial Campaign Codes After *Republican Party of Minnesota* v *White*, 153 U. Pa. L. Rev. 181 (2004); R. Paine, Caulfield, In the Wake of White: How States are Responding to *Republican Party of Minnesota* v *White* and How Judicial Elections are Changing, 38 Akron L. Rev. 625 (2005).

[139] See J. Shugerman, Economic Crisis And The Rise Of Judicial Elections And Judicial Review, 123 Harv. L. Rev. 1061 (2010); but cf. C. Nelson, A Re-Evaluation of the Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America, 37 Am. J. Legal Hist. 190 (1993) (suggesting that the

Elections, it was argued by many, would result in judges who were more independent of legislators and governors, and would thus be better situated to protect the people from oppressive legislative measures. No longer would the state court judges be chosen through political patronage appointments, beholden to the politicians who appointed them. As Jed Shugerman reports, some reformers advocated popular elections as a measure to avoid the cronyism of back-room political appointments and constrain legislative profligacy; by providing for popular elections they sought to produce judges who would be more inclined to strike down legislation; and they got what they were hoping for.[140]

The "valence" of a selection system towards independence thus depends on a careful analysis of the specific context, including what a proposed new selection method is replacing.[141] It must also be analyzed in terms of the questions set forth above: independence *from* what? to *do* what? and by *whom* (the judiciary as an institutional whole or its individual members)?

Thus, when elections were first initiated in the U.S. they were intended to promote greater judicial independence from legislators and governors, by increasing judges' legitimacy through (but also "dependence" on) election by the people. Over time, however, the abuses and defects of electing judges led to further reform efforts, including the develop-

---

movement for election of judges was intended, at least by the legal community, to constrain both legislative and gubernatorial officials and also the judges); K. L. Hall, The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860, 45 The Historian 337, at 343-346, 348, 354 (1982-1983) (emphasizing the role and interests of "constitutional moderates in the legal profession" in explaining movement to judicial elections and their view that "popular election offered a means of enhancing rather than subverting judicial power," by eliminating the effects of partisanship as existed in the appointive processes and creating incentives for more efficient court administration).

[140] See Shugerman (note 139), at 1067-69, 1089, 1097-1104, 1115; see also Shugerman (note 135), at 1351-1352.

[141] Thus, one scholar has argued that the "fact that U.S. [judicial] commissions have almost always replaced an electoral system has produced a very different political context" for the use of nominating commissions than exists in Canada or in England and Wales. K. Malleson, The New Judicial Appointments Commission in England and Wales: New Wine in New Bottles?, in: Malleson/Russell (note 28), at 45 (noting also that in the U.S. "there is evidence that the need to achieve consensus [on judicial nominating commissions […] has led to the rejection of dynamic higher-risk candidates" but emphasizing that this outcome results from "the context of the far more politized U.S. system").

ment of "nonpartisan" elections or "merit selection."[142] In many (though not all) states, use of the "Missouri plan" or "merit selection" system now combines initial selection through recommendations of a nominating committee and appointment by the governor, followed by a "retention" election, in which the voters decide whether to retain the particular judge. Under this approach, voters retain a direct check (in their capacity to vote out a judge), but the selection of judges is allocated to the combined efforts of a nominating commission and executive officer. The details of the use of nominating commissions matters: Jed Shugerman found that in states where the commissions have the initiative in proposing, rates of challenges to incumbent judges are lower than in states where the governor has initiative because, he suggests, opponents of sitting judges who can influence governors to appoint their favored replacements have stronger incentives to mount electoral challenges to judicial incumbents.[143]

Today, as noted, elections in the US are defended primarily on grounds of accountability, and are viewed as something of a threat to judicial independence especially in cases involving unpopular defendants or issues.[144] The valence of elections in the understanding of judicial independence has shifted with the change in context over time, as the procedures of nominating commissions have arguably become more transparent and thus appeal to sensibilities of demographic representation and inclusive participation.

Popular elections are seldom used outside the United States.[145] Selecting judges is achieved through political representatives' decisions (heads of

---

[142] For discussion and references to the literature, see L. Epstein/J. Knight/O. Shvetsova, Selecting Selection Systems, in Burbank/Friedman (note 9), at 196-200.

[143] J. Shugerman, The People's Courts: Judicial Elections and judicial Independence in America (forthcoming 2011) (contrasting experience in California, where the Governor has the initiative, with experience in more conventional "Missouri plan" states).

[144] See, e.g., A.G. Sulzberger, "Voters Move to Oust Judges Over Decisions," N.Y. Times, 25 September 2010, A1 (reporting that around the country state court judges are being targeted for electoral defeat on account of their decisions, including three Iowa judges who participated in holding that a ban on same-sex marriage was impermissible).

[145] See Shugerman (note 139), at n. 3 (referring to Switzerland's use of elections for some lay judges at the cantonal level and Japan's use of retention elections following government appointment of members of the Supreme Court);

government, legislatures or both); selection by members of the existing judiciary; through some combinations of these methods; through civil-service like testing and evaluation (often involving members of the existing judiciary as evaluators), alone or in combination with other methods;[146] or through nominating committees or commissions (or some combination of such commissions and politically accountable decisionmakers). The judges of the highest courts in many countries typically have distinctive appointment mechanisms (as do supranational courts, which play a larger role in European legal life than in most other parts of the world). Appointments at this high court level are often through mechanisms that differ from those of the civil-service or bureaucratic selection mechanisms of the ordinary judiciary; they may utilize more overtly political appointment mechanisms, even if the regular judiciary is recruited through more expertise-focused bureaucratic methods. This may reflect recognition of the more controversial, and more fundamental, issues that arise in a high constitutional court and the greater need for structures to provide democratic legitimacy to reinforce the court's independence.

Current debates on appointment methods for high national or supranational courts might be captured by the opposition of "expert" and more political selection mechanisms. "Political" methods of appointment – whether by action of the head of government or the parliament or some combination thereof – have in recent years been subject to critique.[147]

Kiener (note 26); cf. A. Kessler, Marginalization and Myth: The Corporatist Roots of France's Forgotten Elective Judiciary, American Journal of Comparative Law, Summer 2010; Stanford Public Law Working Paper No. 1470271, available at <http://ssrn.com/abstract=1470271> (discussing the "corporatist" form of electing judges of commercial and labor courts in France).

146 See M. L. Volcansek, Appointing Judges the European Way, 34 Fordham Urb. L. J. 363, at 368 (2007) (discussing "civil service, shared appointment, and shared appointment with partisan quotas"); id. at 377 (noting that in Europe constitutional court judges are most typically selected through a "shared appointment" process, usually with some partisan political influence); see also Garapon/Epineuse (note 102), Chapter B. II.; Di Federico (note 61), Chapter B. II.

147 A distinct but related critique would apply to self-selection methods, that is, selection by judges of other members of their court. This self-selecting method, arguably embodying more presumptive "expertise" in determining the qualities of being a good judge, nonetheless entails the concentration of considerable power in an existing institution to define its own makeup. Judicial self-selection contributes to the formal independence of the court in the sense of its autonomous powers, but at the same time may increase the court's isolation

Principles of judicial independence have been invoked in support of calls for a nominating commission or judicial council approach to the selection of judges for international courts and for some national high courts. Such an approach is sometimes claimed to represent a trend in practice towards the "expert" and "nonpolitical" appointment methods.[148] Changes have been recommended or introduced towards more transparent, more broadly participatory appointment mechanisms that may depend less directly on decisions by elected representatives.[149] Yet

---

from appropriate forms of outside accountability or influence. Whether the absence of these forms of external accountability support, or detract from, the broader sociolegal support (or "diffuse" support) necessary for a judiciary to act with some independence of popular views may depend on other contextual features.

[148] See, e.g., Limbach et al (note 40), at 27-28 (recommending use of nominating commissions – an "independent body to devise the State's list" – within each member state to propose three names to the European Parliamentary Assembly for its selection of one to serve as a judge on the ECtHR); Recommendation No. R (94) 12 of the committee of Ministers to Member States on the Independence, Efficiency and Role of Judges (1994) (Council of Europe, Committee of Ministers Recommendation) Article I. 2. c.

[149] For the relatively new UK Supreme Court Act, the Constitutional Reform Act of 2005, c. 4, paras. 29-31, provides for a powerful selection commission to nominate a single person for each vacancy. See Constitutional Reform Act, 2005, Schedule 8 (England). While the Lord Chancellor has power to refuse to appoint the nominee, the requirement of giving reasons and the limitations of the ground for such refusal suggests that the Lord Chancellor will rarely if ever exercise this option. The system is plainly set up to give the Commission presumptive authority to select. Knowing that a commission is involved tells us relatively little, however; a key question is who serves on the Commission and how are those members chosen. In the UK, the selection commission for recommending the nominee for Supreme Court judges is as a statutory matter made up of representatives of the judicial appointment boards for the three different court systems within its jurisdiction. (These would be the Judicial Appointments Commission for England and Wales, the Judicial Appointments Board in Scotland, and the Judicial Appointments Commission in Northern Ireland. See U.K. Supreme Court website, available at <http://www.supremecourt.gov.uk/> (corporate info, selection process). At least one of these must be a lay person, together with the President and Deputy President of the Supreme Court; in this respect it differs from the commission used to select lower court judges, which has far more lay representation, including its chair. See Constitutional Reform Act of 2005 paras. 63, 64/Sched. 12 (establishing a Judicial Appointments Commission for England and Wales with 15 members whose chair must be a lay person, with five other members to be lay persons,

it remains uncertain whether the use of such commissions results in a better, more independent bench, as compared with a wide range of methods of selection by political representatives and a wide range of possible tenures in judicial office.[150]

Commission systems tasked with increasing the diversity of the bench may be able to use advertising and recruitment as newer channels of identifying judicial talent; their use may be able to increase the diversity both of those who participate in judicial selection and in who sits on the bench.[151] A committee or commission system (depending on its make

---

that selects judges based on merit, character and diversity; it is obligated to consult with the Lord Chief Justice and one other person who has held this post or has other relevant experience, and in making recommendations to the Lord Chancellor, explain whether the Commission followed the advice of the statutory consults). A recent advisory report has recommended that the Supreme Court's Selection Committee be modified, so as to reduce the numbers of judges on it and ensure more gender and ethnic diversity. See U.K. Ministry of Justice, Report of the Advisory Panel on Judicial Diversity (February 2010), available at <http://www.justice.gov.uk/publications/judicial-diversiy-report.htm>. For a discussion of the possibility of further parliamentary involvement in selecting supreme court justices in the U.K., see M. L. Clark, Introducing a Parliamentary Confirmation Process for New Supreme Court Justices: Its Pros and Cons, and Lessons Learned from the U.S. Experience, 43 Public Law 464 (2010).

[150] See Garoupa/Ginsburg (note 136), at 128-129; L. Bierman, Judicial Independence: Beyond Merit Selection, 29 Fordham Urb. L. J. 851, 860 (2002); J. M. Shepherd, The Influence of Retention Politics on Judges' Voting, 38 J. Legal Stud. 169 (2009) (finding evidence that judges respond to political pressures to win re-election or reappointment); L. L. Berg et al., The Consequences of Judicial Reform: A Comparative Analysis of the California and Iowa Appellate Court Systems, 28 W. Pol. Q. 263 (1975).

[151] See Malleson (note 141), at 41-44 (describing, *inter alia*, how the Ontario commission personally wrote to 1200 women lawyers asking them to consider applying for judgeships); cf. B. M. Henschen/R. Moog/S. Davis, Judicial Nominating Commissioners: a national profile, 73 Judicature 328, at 334 (1989-1990) (finding increase in women on judicial nominating commissions since 1973 but also finding that the commissioners "on the whole remain overwhelmingly white […] and reflective of both an educational and occupational elite"). Experience in the United States is mixed, leading some scholars to conclude that at least at times, "merit plans" have produced less diverse benches in terms of race, ethnicity, religion and gender than other systems in use. See, e.g., Shugerman (note 143), at ch. 11 (the Missouri plan) (forthcoming 2011) (summarizing the literature); H. R. Glick/C. E. Emmett, Selection Systems and Judicial Characteristics: Recruitment of State Supreme Court Judges, 70 Judicature 228, at

up), may also be able to focus on the technical qualifications of judges in a manner that goes beyond the political process. And if lay members as well as elected officials or members of government are included, some argue that interests in democratic participation are better served.

On the other hand, such systems may rule out "maverick" talents that would benefit the bench, tend towards a degree of homogeneity in credentialing or views, and obscure rather than increase the transparency of the powers behind the nominating process;[152] selection by a single head of government may result in more transparency and accountability, than selections by large multi-member commissions. Moreover, questions of diversity are not contiguous with the issue of independence.[153] And by diffusing the power to appoint to a sizable committee, made up of representatives from different sources, it is possible that accountability for appointments may be diminished and diffused, rather than being enhanced.

Nomination by a single elected official bears the risks of allowing a single person or party to exercise too much control over who sits on highest courts; it might be particularly avoided in settings in which a political process is seeking to make a "clean break" with prior authoritarian or dictatorial regimes. Nominations by a single person – at least in the absence of widespread consultation, whether mandated or as a matter of convention – may also narrow too much the field of candidates, especially among those groups newly entered into the legal profession. Yet

---

233 (1986-1987) (finding that "merit selection appears to limit the recruitment of minorities" in terms of religion as compared to partisan or nonpartisan elections and also finding that merit selection judges did not have greater judicial credentials than judges chosen through other methods); M. S. Hurwitz/D. N. Lanier, Women and Minorities on State and Federal Appellate Benches, 1985 and 1999, 85 Judicature 84, at 85 (2001-2002) (concluding that "[a]ppellate courts are becoming more diverse – and selection method no longer seems associated with the characteristics of those selected for the bench;" noting conflicts in older studies on whether the merit selections systems do or do not enhance diversity).

[152] See J. Allan, Judicial Appointments in New Zealand: If it were done when 'tis done, 'twere well it were done openly and directly, in: Malleson/Russell (note 28), at 103.

[153] See Garoupa/Ginsburg (note 121), at 128 (finding that de facto judicial independence scores do not increase with the use of stronger judicial councils); see also id., at 129 (suggesting that "the emergence of judicial councils as an international 'best practice' for promoting judicial independence and quality may be unjustified").

having a single public official charged with nominations may concentrate accountability in a single location; and in well functioning democracies, public officials may be responsive to public opinion even in situations in which they posses legally unfettered powers of appointments.[154] Nomination by a single official with confirmation required by a parliamentary body, assures "political input" and offers the possibility of checks on power, as does divided nominations among different sources (which, however, may diminish to some extent the focus and hence accountability of public decisionmaking).

Though there are undoubtedly differences in these selection mechanisms, their connection to independence – at least in systems that already provide for long tenure – is at best indirect. As argued earlier, having appropriate forms of influence on the composition of a Court may enhance its legitimacy which in the long run may enhance the practical independence with which it can act; and there may be reason to think that political appointments, coupled with strong tenure and salary protections, at once yield good levels of judicial independence and political accountability.[155] In comparing mechanisms, much depends on the details – who are the members of the commission that makes recommendations; who selects them; does the commission essentially choose or take the initiative in identifying the nominees, or does it act as a check on executive choice. Given the complex valence of independence, and the competing advantages – for judicial independence in all of its meanings – of different selection systems, a certain degree of caution should be exercised in efforts to prescribe single forms of selections for what may be very different environments. Real caution should be exercised in making claims about particular selection methods promoting judicial independence – whether or not a method does is relative to what it is replacing; and depends both on structural details and the legal culture in which it is used.

---

[154] Allan (note 152), at 107-117.

[155] Cf. *Van Rooyen* v. *State* (note 3), at paras. 106-107 (concluding that "[t]he mere fact […] that the executive and the legislature make or participate in the appointment of judges is not inconsistent with the separation of powers or the judicial independence that the Constitution requires" and finding support for this conclusion from the appointment processes of Australia, the U.S., Canada and Germany).

2. Dissent – Competing Traditions of Justification, Divergent Conceptions of Law, Changing Historical Contexts

In the Anglo-American traditions of common law adjudication, it is customary for each judge on a multi-member court to feel free each to give a separate opinion. This practice of "seriatim" opinions by each of the different members of a collegial appellate bench continues, for example, in the Australian High Court, and, it would appear, in the U.K. (though, in what some regard as a significant development, some recent decisions of the new Supreme Court are denoted "Judgment of the Court");[156] commenters for decades have debated the effects of the multiplicity of opinions often found in decisions of the U.S. Supreme Court. When John Marshall, the third Chief Justice of the United States Supreme Court, sought in the early 19th century to corral his colleagues into joining a single opinion (with notable success), some important public figures – including Thomas Jefferson – raised strong objection, suggesting that *hiding* the varying opinions of the justices from the public was inconsistent with traditions of reason giving that legitimized the act of judging in a democracy; joint opinions deprived the people of the knowledge of divergences among the justices, enabling judicial "laziness" and undue concentrations of power in the Chief Justice.[157] In the U.S. context, the justices of the Supreme Courts have always been free to dissent; norms and practices of the degree of unanimity and dissent have varied over time. [158]

Unanimity has been praised as contributing to the clarity and predictability of the law. A profusion of separate opinions have been criticized as creating confusion for lawyers and lower courts, and as detracting from public regard for law as an independent source of norms, inde-

---

[156] See, e.g., What's Old is New: The UK Supreme Court, in: Metropolitan Corporate Counsel, January 2010, at 28 (editors' interview with I. Lidsky); *O'Brien* v. *Ministry of Justice*, Trinity Term, 2010, UKSC34 (28 July 2010).

[157] See, e.g., D. M. Roper, Judicial Unanimity and the Marshall Court – a Road to Reappraisal, 9 Am. J. Legal Hist. 118, at 118 (1965) (describing Jefferson's view that issuing opinions of the court was a "dangerous engine of consolidation" under a "crafty" chief judge, and a product of the laziness of other members); see also P. W. Kahn, The Reign of Law, at 101-124, 211-219 (1997) (describing Marshall's work in getting to single opinions as suggestive of the impartiality of law or law as the clear will of the people).

[158] See generally Bloch et al. (note 68), at 583-634 (summarizing and excerpting literature on dissent).

pendent from the personal opinions of the judges.[159] The present U.S. Chief Justice, John Roberts, has also argued that unanimity would have the beneficial effect of tending to produce "minimalist" opinions on which justices of divergent views could agree.[160] Yet the ability to file separate opinions or dissenting opinions has been praised by others as contributing both to judicial independence, insofar as it allows or encourages each judge to develop his or her own independent judgment about the law, and to the positive development of the law, in at least two ways: Separate opinions, it is argued, improve the current decision by challenging the majority in the case at hand to improve defects in its reasoning, and may also improve the subsequent course of the law by laying down a way of thinking about the legal issue whose correctness may be vindicated in future decisions.[161] Finally, it is suggested, separate opinions improve the ability of lawyers and the public to evaluate the majority's judgments, contributing to various forms of democratic decisionmaking and accountability.[162] The debate in the U.S., however, is over how much, not whether, to have separate or dissenting opinions.[163]

---

[159] See, e.g., J. Laffranque, Dissenting Opinion and Judicial Independence, 8 Juridica International 162, at 168-169 (2003) (also noting separate opinions as possible threat to independence promoting benefits of secrecy of deliberation); see also D. Dickson (ed.), The Supreme Court in Conference, 1940-1985, at 881 (2000) (suggesting that if dissents increase, the Court's authority might suffer). For a measured discussion of the benefits and risks of different types of dissent, see R. B. Ginsburg, Speaking in a Judicial Voice, 67 N.Y.U. L. Rev. 1185, at 1202 (1992); R. B. Ginsburg, 20th Annual Leo and Berry Eizenstat Memorial Lecture, The Role of Dissenting Opinions, 21 October 2007, available at <http://www.supremecourt.gov/publicinfo/speeches>.

[160] See R. Heberle, Roberts Calls for Consensus on Court, The Hoya.com (21 May 2006), available at <http://www.thehoya.com/note/5400> (reporting on Chief Justice Roberts' Commencement Address, at Georgetown University Law Center, at the end of his first Term in May 2006), reprinted in Bloch, et al. (note 68), at 595-596.

[161] See, e.g., W. J. Brennan Jr., In Defense of Dissents, 37 Hastings 427 (1986); A. Scalia, The Dissenting Opinion, 1994 J. Sup. Ct. History 33 L. J. 427, at 428–438 (1986). (It is easy to see how an internally circulated dissent might improve majority opinions, but this function could arguably be performed without actually publishing the internal dissent.).

[162] For a suggestion that allowing dissent performs a coordination function in systems with decentralized judicial review, see J. Ferejohn/P. Pasquino, Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice, in: W. Sadurski, Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe

In other countries, a different tradition prevails, one in which collegial, appellate courts issue their public judgments in a single voice, notwithstanding the possibility of internal dissent. In France and Italy, for example, separate opinions are not permitted; nor by practice do they issue in the European Court of Justice.[164] In these kinds of contexts, a norm forbidding the issuance of separate opinions, it has been argued, enhances the independence of the Court, in important measure by removing the form of individual accountability that having signed separate opinions creates.[165] Moreover, Mitchell Lasser has argued, the justificatory tradition, and legitimacy, of the French legal system's appellate

---

in a Comparative Perspective, at 33 (2002). Query, though, whether the decentralized character of review and the multiplicity of courts with authority to pronounce might be thought to favor unanimity rules within courts, precisely on coordination grounds? Their argument may be limited to dissenting practice in the Supreme Court; but the claim that separate opinions provide more guidance to the lower courts seems empirically quite contestable, at odds with doctrine forbidding lower courts from departing from Supreme Court precedent even if they believe the Court itself would overrule a prior precedent, and at odds with the grounds typically offered to justify the practice. The authors may have withdrawn from this claim in later work. See Ferejohn/Pasquino (note 23), at 1699 (suggesting that the external focus of deliberation in the U.S. Court, with its many separate and dissenting opinions, means that "the state of law can remain unsettled, hopeless and futile activities may be needlessly encouraged, and inadequately reasoned doctrine can be produced").

163 Dissatisfaction with the volume of separate opinions has led to some rather novel proposals. See, e.g., C. S. Lerner/N. Lund, Judicial Duty and the Supreme Court's Cult of Celebrity, Geo. Wash. L. Rev. (forthcoming) (arguing for adopting a rule that all opinions, majority opinions and separate opinions, must be anonymous so that individual justices would not be motivated by a quest for personal glory in writing dissents or other separate opinions).

164 See Voeten (note 54), at 403 (commenting on the tradition of no dissents on the ECJ, and suggesting it derived from the civil law legal systems of the participating states). See also Volcansek (note 126), at 31 (linking absence of published separate opinions in Italian Constitutional Court with that court's independence).

165 In addition, the time pressure of decisionmaking in reviewing laws in the French Conseil Constitutionnel may contribute to the desirability of a practice involving relatively short, single opinions. See Ferejohn/Pasquino (note 163), at 33-34.

bodies resides in a bifurcation between the court's public opinion, and the accompanying discourse of commentary and critique.[166]

A requirement of unanimous anonymous judgments may help protect the judges from undue forms of pressure. This may be a particularly pressing concern for those supranational courts whose selection methods (one judge per member state) create a particular risk of the judges being expected by their own states to act on behalf of that state, rather than as an impartial member of an international adjudicatory body. It is not only the international character of a tribunal and having its membership composed of judges proposed by each of the different states that undergirds this claim, but the fact that the judges on these tribunals serve relatively short terms, thereby creating more of a risk that a judge might be subject to external influence, whether consciously or unconsciously, were her judgments on a controversial subject individually publicly reported.[167] Moreover, to the extent that unanimity is associated with a view of law as having single answers to difficult questions, unanimous judgments may also protect the independence of judges (not only on supranational courts but also on relatively new constitutional courts in systems trying to establish traditions of judicial independence) by sheltering them under the aegis of the voice of the law.

To those accustomed to the Anglo-American tradition of dissent, it might seem that any gains to the independence of the judiciary as a whole from mandatory public unanimity would come at the sacrifice of individual judicial independence; yet one might look at the matter quite differently. First, to the extent that a tribunal has an associated court officer, like the Judge Advocate Generals in the ECJ, who issue their own separate (and public) opinions prior to the Court's judgment, the possibility of legal divergence is preserved in the public eye. Second, as Professor Lasser's work in connection with the French courts suggests, the absence of published opinions does not necessarily imply the absence of vigorous internal dissent and debate, functioning as a check on the court and manifesting – internally – the independence voices of the dif-

---

166 See M. Lasser, Judicial Transformations (2009); M. Lasser, Judicial Deliberations (2004).

167 See, e.g., Ferreres Comella (note 17), at 48 (noting that anonymity helps secure judges against external pressure if they speak with a single voice, and specifically helps protect judges from pressures from those they might turn to for jobs later).

ferent judges.[168] Moreover, a focus on internal deliberation, associated with systems that either prohibit separate opinions or in which they are rare, may actually be related to an improved quality of decisionmaking: as Professors Ferejohn and Pasquino have written, "'anonymity' may well facilitate *internal* deliberative practices by making members amenable to compromise and mutual persuasion and not giving them a reason to have pride in their jurisprudential consistency as individual judges."[169]

Thus, a rule of apparent unanimity, even when a court is split, if rigorously enforced through confidentiality protection of the internal deliberative process, may help protect individual jurists from undue outside influence and nonlegal pressures, without necessarily interfering with their internal deliberative independence. Where judges serve for short terms and can be reappointed, there may be particular concern for the possibility of repercussions from public dissent. In systems that adopt short terms with possibility of reappointment, one might imagine that they do so precisely to assure the kind of public accountability that would (arguably) be thwarted with a rule of anonymity; yet, one could also imagine, that the reasons for insisting on judges from member states is to assure that all perspectives from different national traditions are available in the discourse, not to have the judge be an advocate for a particular country's point of view. The difference may be a fine one, but this understanding accommodates in theory schemes that require member judges from or nominated by particular member states and that also prohibit public reporting of dissenting views.

Although I have suggested that unanimous reporting of judgments may be a particularly pressing need where judges are all appointed by member states to a federal or quasi federal body and where the risks of a judge feeling beholden to his own country are very high, it must be noted that the two supranational European courts have different rules. In the ECJ, separate opinions are not allowed; in the European Court of Human Rights, they are allowed and not unusual in practice. Both tribunals have a seat for a judge from or proposed by each member state

---

[168] See Lasser (note 167); Ferejohn/Pasquino (note 23), at 1692 (distinguishing two kinds of deliberation, internal and external; purpose of internal deliberation is "the effort to use persuasion and reasoning to get the group to decide on some common course of action").

[169] Ferejohn/Pasquino (note 23), at 1695 (emphasis added); see also Ferejohn/Pasquino (note 147), at 35.

to the respective treaty.[170] Each has had relatively short, six year renewable terms of service, though under Protocol 14 of the ECHR, which entered into force 1 June 2010, the terms have now become nine year nonrenewable terms.[171] Nonrenewability and the lengthening of the term both might be thought to "fit" better with the practice of individual dissent; for in the absence of these structural features, it might be thought more likely that some forms of individual disagreement might reflect a judge's dependence on appointing authorities, rather than her independence of mind; yet the ECtHR has until recent months had short renewable terms and has allowed separate opinions.[172]

Is allowing separate opinions or dissent on the highest "constitutional decisionmaking" adjudicatory body generally or universally advisable? One recent study suggests that allowing separate opinions is more conducive to the development of a human rights consciousness: "Separate opinions have been symbolic in the creation of a European human rights discourse because they are personal voices in that discourse which qualify the institutional voice of the Court."[173] Is allowing "per-

---

[170] See Volcansek (note 146), at 380 (describing "unwritten rule" on ECJ that one judge will come from each member state). However, as discussed below, next note, the two tribunals differ in their approaches to having "national" judges assigned to particular panels.

[171] See European Convention, Article 23, as amended by Protocol 14. Interestingly, the ECtHR requires a "national judge" to be part of the panel for cases against that state (e.g., if case is against Russia there must be a Russian judge on the panel that hears the case); there is no comparable requirement for the European Court of Justice. See the "Consolidated Version of the Rules of Procedure of the Court of Justice", Notices from the European Union Institutions, Bodies, Offices, and Agencies, 2010 (C 177/01), 2 July 2010, available at <http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-04/rp.en.pdf>. One recent study found, somewhat to its authors' surprise, that in cases where the ECtHR finds a violation the "national" judge is rarely alone in dissent; "[m]ost often, where the national judge is a dissenting judge, one or more other judges also dissents." R. C. A. White/I. Boussiakou, Separate Opinions in the European Court of Human Rights, 9 Human Rights L. Rev. 1, 49 (2009). This study also found that in the ECtHR, most decisions (80%) were not unanimous.

[172] See Voeten (note 40), at 425-426 (reporting data showing some tendency of ECtHR national judges to vote with their own government to a greater extent than other judges, whether the home government won or lost, though also finding a "good amount of independence" in the national judges' voting patterns).

[173] White/Boussiakou (note 171), at 60.

sonal voices" of judges an enactment of the focus on the individual that is a principal concern of human rights law? If so, should it be seen as an expression of a personal "right" of the judges to express their opinion?

In a recent book, Professor Victor Ferreres Comella argues in favor of separate or dissenting opinion for a different set of reasons, sounding in the workings of democracy and based on an evolutionary understanding of law. His work is focused particularly at the level of constitutional court decisionmaking, even in systems that do not permit dissent in the decisions of the ordinary courts. Acknowledging the risks to the goals of securing judges from undue outside pressures and of reinforcing the authority of the Court *vis à vis* the public that the practice of (anonymous) single opinions of the court is meant to promote, he and others argue nonetheless that the special role of a constitutional court in a democracy favors allowing separate opinions;[174] because the constitution speaks to the most fundamental questions of justice and liberty, which may be very controversial, internal disagreements should be made public to "enrich[h]" the "democratic conversation". [175] Many other commentators agree; Professor Lani Guinier, for example, has written on the democracy-enhancing potential of dissents, especially oral dissents;[176] and the public debates in the United States between Justices Scalia and Breyer over interpretive approach have been praised on similar grounds. Yet the experience of, say, France, suggests that unanimity is not necessarily correlated with an absence of vigorous democratic discussion, as a number of the Conseil Constitutionnel's unanimous rulings have resulted in constitutional amendments to in effect overturn the judgment.[177] So, one might ask, whether the relative contribution of open judicial debate to democratic discourse varies depending on the capacity of parliamentary or civic organs to carry on a rich debate, and

---

[174] In addition to Ferreres Comella's work, see Laffranque (note 159), at 170-172.

[175] Ferreres Comella (note 17), at 49; cf. White/Boussiakou (note 171), at 57 (noting that Judges of the Strasbourg court favor continuing the practice of separate opinions in promoting debate among the judges and in making transparent the nuances and disagreements of the court).

[176] See L. Guinier, The Supreme Court, 2007 Term: Foreword: Demosprudence Through Dissent, 122 Harv. L. Rev. 4 (2008).

[177] See *supra,* note 83.

possibly, with the ease of amendment or of legislative forms of overrulings of court decisions.[178]

Second, Ferreres Comella and others suggest, publication of judges' disagreements signals to the public that there "is room for evolution and reconsideration of the issues in the future".[179] This point brings to mind the jurisprudential (and sociocultural) underpinnings of the debate over dissent and separate opinions in constitutional courts.[180] For those who believe law is not "evolutionary," the argument for publication of dissents on this ground is inapt. Such jurists still might believe in the value of dissent, at least internally, in trying to assure that the court correctly decides the law; but whether the dissent should be published might on this theory depend also on the role of *stare decisis* or similar doctrines in supporting the authority of the court, and the openness of the legal culture to the evolutionary view of the law, a view already well accepted in, for example, the jurisprudence of the ECtHR.

It has also been suggested that "the very fact that the publication of dissents is authorized helps reinforce the authority of judicial decisions when they really are unanimous."[181] True enough; but whether one thinks differential degrees of authority are desirable to communicate might depend not only on a jurisprudential view of the law but also on an evaluation of the stability (and desirability in a particular context) of adherence to the rule of law (in the form of compliance with court

---

[178] Ferreres Comella (note 17), at 62, also suggests that one of the advantages of publishing dissent is to give the public a measure of the intellectual rigor of the government and of those challenging the statute. This is an advantage on the assumption that in a democracy, a public response can appropriately be had, emphasizing again the possible relationships between arguments for judicial dissent and assumptions about the appropriateness of political disagreement with the Court's decisions.

[179] Ferreres Comella (note 17), at 49. For a slightly different point, see White/Boussiakou (note 171), at 57 (noting judges views in favor of separate opinions as indicating that legal issues are not always so clear cut) see also Laffranque (note 159), at 171 (describing as a "primary function of the dissenting opinion […] the development of law […]"). This justification might be applicable to many jurisprudential views; there is no necessary association between a particular interpretive approach, viz, originalism vs. purposivism, and the degree of certainty the approach is likely to produce in its practitioners as to the correct answer to legal problems.

[180] Cf. Ferejohn/Pasquino (note 162), at 23 n. 6 (linking shifting dissent practice in the U.S. Court to the "increasingly pluralist culture").

[181] Ferreres Comella (note 17), at 49.

judgments).[182] Defenders of the forced public unanimity model, by contrast, argue that judicial authority (and thus, presumably, the court's institutional independence) may be reinforced by "prevent[ing] unwarranted distinctions being made by the public about a particular decision's significance based on whether it had been reached unanimously or by majority verdict."[183] Concerns for inviting noncompliance with non-unanimous decisions are implicit here, thus suggesting that the balance of costs and benefits of disclosures on this account may depend on other aspects of attitudes towards the rule of law.

Finally, it is argued, the publication of dissenting opinions may have benefits to the dignity of those in the minority or on the losing end of the judgment. Laffranque suggests that the "dissenting opinion guarantees dignity to the judge who remained in the minority," and Ferreres Comella notes the possibility that being aware of dissenting opinions may diminish the humiliation of those who suffer defeat – whether the government or the challengers.[184] The notion of a court opinion as a form of humiliation for the loser might itself be a distinctively European concern, reflecting longstanding cultural commitments to honor and dignity that some comparativists have distinguished from U.S. legal traditions.[185] Moreover, some work on procedural justice has suggested that an adverse court judgment may not have this effect at all, if the par-

---

[182] Ferreres Comella particularly favors allowing dissents in constitutional courts in the European model, where lower courts issue judgments in a univocal way; and if one believes that the law before the courts should be understood as evolutionary, and if there is generally good compliance with judicial judgments, there is much to this argument.

[183] A. O. Sherif, The Freedom of Judicial Expression, in: K. Boyle/A. O. Sherif (eds.), The Right to Concur and Dissent: A Comparative Study, in: Human Rights and Democracy: The Role of the Supreme Constitutional Court of Egypt, at 144 (1996). For an analogous concern with respect to whether stare decisis should apply with less force to prior decisions decided by a narrow majority, see *Payne* v. *Tennessee*, 501 U.S. 808, 853-854 (1991) (J. Marshall, dissenting) (emphasis added) ("[T]he majority's debilitated conception of stare decisis would destroy the Court's very capacity to resolve authoritatively the abiding conflicts between those with power and those without. If this Court shows so little respect for its own precedents, it can hardly expect them to be treated more respectfully by the state actors whom these decisions are supposed to bind […]").

[184] Ferreres Comella (note 17), at 62; Laffranque (note 159), at 169.

[185] See J. Q. Whitman, The Two Western Cultures of Privacy: Dignity Versus Liberty, 113 Yale L. J. 1151 (2004).

ties feel that their concerns have been fully and fairly aired. Perhaps implicit in the concern over party humiliation is a conception of the capacity of a court, and its judgments, to weave or support the bonds of civic trust, by enabling parties with different views on the merits or about interpretation to feel like full participants in an important legal conversation.[186] Acknowledging the force of losing views in an opinion of the court might further this goal;[187] hearing dissenting justices agree with one's position in public might produce a greater sense of vindication (or "consolation").[188] But it is also possible that knowing that four out of nine justices were persuaded, but five were not, will heighten the losers' anger.[189] Whether publishing dissents will create more or less public trust, or anger, are in some respects empirical questions, the answers to which do not seem obvious.

---

[186] In this sense, the presence of separate opinion may be seen as much as a mirror as a contributor to a high degree of pluralism or disagreement about appropriate interpretive approaches to legal problems. See also *supra* notes 179, 182.

[187] Cf. T. R. Tyler, Why People Obey the Law, at 161-165(1990) (emphasizing importance of perception of fair process to acceptance of results even by those who disagree with them and describing as elements of fair process the opportunity to present arguments, being listened to and having one's view considered by an unbiased decisionmaker); T. R. Tyler/K. Rasinski, Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson, 25 Law & Soc'y Rev. 621, at 622-623 (1991) (providing evidence that procedural justice may influence public acceptance of court results indirectly, by influencing perceptions of the courts' legitimacy).

[188] See White/Boussiakou (note 171), at 57 (explaining Strasbourg judges' views that publication of separate opinions offers "consolation" to the losing party in knowing that some judges agreed).

[189] Moreover, if it is the general practice of a court not to publish dissent, it is possible that more losing parties will feel better about their losses than in a system where dissents are published; if a losing party receives no or only a single dissent she may feel worse than if all judgments are unanimous and the loser can tell herself a story about probable dissent within. This possibility reinforces my view, in text above, that these arguments are based on empirical assumptions that are at this point difficult to establish by evidence.

III. Concluding Remarks

There may be irresolvable quasi-empirical, quasi-normative disagreement on a number of the features discussed above, including whether political selection or nominating commission selection will yield "better" or more "independent" judges, or whether it is consequentially good or normatively appropriate for judges to write individual opinions, or have the capacity to do so, or whether the members of a multi member court speak only in a single collegial voice, suppressing public dissent. Empirically, one might wonder whether encouraging multiple separate opinions may publicly commit justices to particular positions in ways that make open-minded judicial compromise in obtaining "court" positions more difficult.[190] Normative disagreement may be related to jurisprudential understandings of the nature of law: if law is seen as a form of "inquiry,"[191] per Patrick Glenn, it would seemingly be hospitable to multiple voices. Or if a court is understood to have the power to "evolve" what "the law" is, having internal disagreements publicly expressed along the way may well contribute to the "evolutionary" task. But those who view law as the fixed command of a sovereign, until that "law" is changed by authorized political (i.e., nonjudicial) processes, may favor the clarity and univocality of the unanimous opinion.

In addition to jurisprudential and normative differences, and competing empirical assumptions, all of which may undergird different normative views about the value of unanimity compared to dissent, or the importance of a nonpolitical "merit" selection system, there may be other factors of history and context that are relevant. I mentioned above the question of compliance with judicial judgments: one might imagine that in a society with a weak tradition of complying with court judgments, rules of unanimity might for a time produce greater clarity and thus increase the chances of compliance. Moreover, if a court is newly established in a particularly fraught, divided society, there may be real benefit from a rule of seeming unanimity, to avoid fanning flames of disagreement by revealing the nature of divisions among a court.

One way of understanding both the ECJ and the US Supreme Court's move under John Marshall towards more unanimous opinions is as an institution-building device, designed to promote the independence of a

---

[190] See Ferejohn/Pasquino (note 23), at 1695.

[191] See H. P. Glenn, Persuasive Authority, 32 McGill L. J. 261 (1987).

fairly weak and fragile judicial body in a newly formed and not yet fully stable federation or confederation. What the US experience suggests is that norms of dissent, and their perceived relationship to independence, may shift over time, as views of law change.[192] Whether the ECJ, or the European constitutional courts, should move to allowing separate opinions is, this essay suggests, not a question with a generically correct answer, in either direction. Likewise, whether nominating commissions will yield "better", more diverse, and more independent jurists than other appointment mechanisms giving authority to existing political office holders is likewise a question that does not have a generic answer, but will depend on other structural features, more general aspects of the particular country's history and legal culture,[193] and on (perhaps) normative disagreements about what types of characteristics the best judges should have, and, empirically, the best way to get there in a particular polity. What is "better" may depend on conceptions of the relationship of demographic representativeness to the quality and legitimacy of judging.

More generally, it is important to recognize that the independence of courts may be dependent on there being sufficient accountability mechanisms, that independence and accountability are not necessarily opposed qualities of a system of judging in a democracy but interact with each other in complex ways. For example, absent a selection system that guarantees each member state a representative, perhaps supranational courts would not be given the jurisdiction that they enjoy to decide independently; perhaps allowing member states some autonomy in how they select members is related to their willingness to allow the functioning of an independent supranational court.[194] Perhaps separate opinions make a court more "accountable," in the sense of providing more information about the members' public views (and may enable monitoring of the degree to which individual justices are consistent with their own prior opinions); but perhaps the publication of individual opinion will make judges with long and secure tenures more inclined to be self-defensive about their own jurisprudence in the face of

---

[192] See R. Post, The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court, 85 Minn. L. Rev. 1267 (2001).

[193] See Bell (note 71), at 60.

[194] Cf. Volcansek (note 146), at 381 (noting that during the Maastricht Treaty negotiations, member states "rejected a proposal from the European Parliament to lengthen judicial tenure to twelve-year non-renewable terms").

public critique, and less able to take a freshly independent look. Whether separate opinion practice makes a court (or its justices) more independent in applying and pronouncing the law is a question that simply cannot be answered in the abstract. To further complicate matters, there may be rough equivalencies in the production of appropriate degrees of independence in many combinations, or "packages" of features.[195] One ought, therefore, to approach with caution efforts to develop detailed 'best practices' guides to judicial independence, at least insofar as those guides are intended to be transformed into rigid constitutional or quasi-constitutional rules.

[195] See L. Kornhauser, Is Judicial Independence a Useful Concept?, in: Burbank/Friedman (note 9), at 53 (discussing the idea of "multiple realizability," that "[c]ourt systems with very different structural features provide sufficient independence to promote both political stability and economic development"); cf. Garoupa/Ginsburg (note 136), at 104 (arguing that the diversity of judicial selection systems suggests the absence of consensus on how best to secure independence).

Judicial Accountability and Conduct: An Overview

Giuseppe Di Federico

A. Introduction

One of the most visible aspects of the evolution on the modern democratic state is the increasing political, social and economic relevance of the judiciary. The diffusion of legislation protecting a wide range of citizens' social and economic interests has generated ever increasing occasions for citizens to resort to judges for the protection of their rights (e.g. regarding human rights, health, social security, education, labour relations, family relations, commercial relations, customer's rights, even recreational activities and the media). Indeed, there are very few areas of vital interest for citizens that have remained untouched by judicial decisions.[1] Such phenomena are mainly due to the so-called *law explosion* and the changing nature of legislation connected to the development of the welfare state. Moreover, the dangerous evolution of criminal activities – from those in the metropolitan areas to those that have acquired an international dimension – has made judicial repression of crime ever more important. Indeed, the very development of the welfare state has had important consequences also in the criminal sector, insofar as the state and other public agencies have become the main spending subjects, with the consequence of increasing the occasions for corruption, now present at an unprecedented level. Furthermore, because the proper working of the judicial system is a key factor in attracting foreign in-

[1] The literature on this phenomenon is quite ample. See, for example, L. Friedman, Total Justice (1985); K. Malleson, The New Judiciary. The Effects of Expansion and Activism (1999).

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233, DOI 10.1007/978-3-642-28299-7_3,

vestments, it is also a relevant factor of economic development.[2] One can therefore certainly say that the very well-being of the citizens and of the community as a whole has become far more dependent on the content of judicial decisions and on the expediency with which they are rendered than in the past. For these and other reasons the workload of the courts has increased considerably and the activities and responsibilities of judges have become far more complex. Moreover it has become quite evident that the professional qualifications now required for the proper exercise of the judicial role go far beyond the necessary knowledge of the law and the skills required for its interpretation in concrete cases.[3]

Such developments in the political, social and economic scope of judicial power has in turn spurred, in some democratic countries more than in others, the search for adequate means to render the judiciary more accountable and efficient while at the same time safeguarding its inde-

---

[2] See the reports "Doing Business" of the World Bank, available at <http://www.doingbusiness.org/ExploreTopics/EnforcingContracts/?direction=Asc&sort=3>.

[3] The trend to include qualities other than those related to juridical knowledge among those required for the proper exercise of the judicial function emerges quite clearly in an analysis of the developments that have taken place in the processes of recruitment and professional evaluation of judges, as well as those that have taken place in their programs of initial and continuing education. In Germany, for example, evaluations made both in the processes of recruitment and of periodic professional evaluation in the course of the career include "qualities" like "ability to work under pressure", "openness toward new technologies", "ability to work in team", "ability to mediate" and many others that have little to do with knowledge of the law and capacity to apply the law in concrete cases. See J. Riedel, Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Germany, in: G. Di Federico (ed.), Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe, at 86 (2005), available at <http://www.irsig.cnr.it>. In other countries, like Austria and The Netherlands, the process of recruitment includes psychological tests which evaluate, *inter alia*, the capacity of the candidates to concentrate and operate under stress, the capacity to work in a team, the capacity to mediate and deal with conflicts. Such information as well as other data on the administration of psychological tests has been collected by the author either during interviews (in Austria) or by correspondence (for The Netherlands). Furthermore in an increasing number of countries the programs of initial and continuing education include topics other than those of a legal nature such as, for example, programs intended to improve the capacity of the judges in organizing and managing their work load, also with modern information and communication technologies.

pendence. To this end, in many states reforms in the area of judicial governance have been implemented and/or are in the process of being introduced and/or are the subject of an ongoing debate. Such reforms or reform initiatives are intended to ameliorate the recruitment process, initial and continuing education, professional evaluation (where pertinent), judicial ethics and discipline. In this chapter I will deal with judicial ethics and judicial discipline while well aware of the fact that judicial discipline is functionally interconnected with other aspects of the governance of the judiciary. In fact, one might say that the greater or lesser role of judicial discipline is, generally speaking, inversely related to the quality of judicial recruitment, the effectiveness of initial and continuing education, and the thoroughness of periodic professional evaluations (where they exist).[4] In any case, judicial ethics play a crucial role for the very legitimacy of the judicial function.

Leaving aside all the complex considerations that such a topic would require, in general terms one can certainly say that the traditional legitimization of the powers of the judge to decide on the rights of the citizens was that his task was *simply* that of applying the law to specific cases.[5] The responsibility for the substance of his decisions was therefore to be assigned exclusively to the legislators who, in turn, would be

---

[4] The fact that judicial discipline plays a limited role when the system of judicial recruitment is very rigorous has often been remarked. In an unpublished report presented at a conference on judicial ethics held in London in 1996 Sir Thomas Bingham, then Lord Chief Justice of England, reminded us that in the previous 300 years no English High Court Judge had been dismissed for ethical reasons because of "the practice of appointing judges from a small pool of candidates, sharing a common professional background and known personally or for professional repute to those making and advising on appointments". Similarly, the stringent and complex procedures for the appointments of US federal judges is considered the main reason why there is such a limited number of US federal judges involved in judicial disciplinary proceedings. See for example A. D. Hellman, Judges Judging Judges: The Federal Judicial Misconduct Statutes and the Breyer Committee Report, 28 The Justice System Journal 426, at 430 (2007).

[5] Such a conception of the judicial role has dominated for at least two centuries, i.e. at least from the time in which it was portrayed as such by Montesquieu in his famous book *De l'Esprit des Lois* (The Spirit of the Laws) of 1748. The judge – to use Montesquieu's definition – was merely the "mouth of the law". In such a conception of the zero power of the judge, differences in judicial decisions on similar cases or revision of judicial decisions by a higher court were, as a rule, considered to be due to differences in the professional qualification and expertise of the different judges.

responsible to the electorate. It is doubtful that such a representation of the judicial role ever corresponded to reality or represented the actual nature and substance of judicial work. However, the increasing role of the judge in the definition of the actual content of the rights of the citizens that has occurred in the last 40 to 50 years has made that traditional representation of the judge's role even less credible and tenable than in the past, to say the least. The very legitimacy of the judicial function rests, far more than in the past, on the capacity of the judge and of the judicial corps to acquire and maintain the confidence and trust of the citizens and of the community. Hence a greater need that the judge be not only independent and impartial, but also that his/her behaviour within and without the office be such as to make them also *appear* impartial and independent in the eyes of the citizens.

In the last decades, judicial ethics and judicial discipline have, in fact, received unprecedented attention in many democratic states. One of the most visible phenomena has been the adoption of codes containing, in greater or lesser detail, rules of judicial conduct in an increasing number of states, both in transitional countries as well as in countries of consolidated democracy. Furthermore growing attention has been devoted in some states to other relevant aspects of judicial discipline, such as: the rights of the judges under disciplinary proceedings; the search for an adequate balance between transparency and confidentiality of disciplinary proceedings and disciplinary decisions; the adoption of procedures to facilitate the citizens in addressing their complaints to the competent authorities; the rights of the compliant citizen to be informed of the outcome of their initiative; the inclusion of the topic of judicial ethics in programs of initial and continuing education for judges and in law schools. Reforms in those areas are more advanced in some states than in others, and certainly the states that first addressed the topic of judicial ethics and judicial discipline are ahead of others in the adoption of reforms intended to render judicial discipline more effective, transparent and fair. Until ten years ago most of those aspects of judicial discipline had been taken into consideration and regulated only in the United States. In recent years they have been regulated to a certain extent elsewhere. Consequently, the amount of information we could utilize in this chapter is available in great detail for the United States, but less abundant or in any case limited, for other countries. Furthermore, while for most of the Western European countries, the United States and Canada I have far more information than that which has been included in the reports presented in this book for those countries, for most of the other countries considered here the only informa-

tion available to me in a language I can read is supplied in the country reports published herein.

On the basis of the material available I decided that the most viable and useful choice in writing this chapter was to give a synthetic overview and discuss the more relevant innovations which have occurred in the area of judicial conduct and discipline, and in particular the diffusion of the codes of ethics, their monitoring and modifications, their proactive function, the role of the citizens in disciplinary proceedings and the protection of the judges' rights and independence in the area of judicial discipline. In the course of my presentation I will show that some of the innovations in those areas are spreading across national borders. By this I am in no way implying that those innovations will in the future be adopted, or should be adopted as such, in other countries. My intent is only to illustrate and discuss possible answers to challenges that are real. I am fully aware that the great difference in the amount of information available for the different countries will have as a consequence that my presentation will appear cursory with regard to the countries for which a substantial amount of documentation does exist, while it will be of necessity limited for other countries.

Quite a few states have adopted codes of conduct not only for judges but also for court employees, such as Romania, the Russian Federation, and the United States, just to mention a few. The consideration of those codes is outside the scope of this chapter. This is of course in no way intended to mean that one should underestimate the considerable contribution that the enactment of the codes for court employees might give to the trust of the citizen in their justice system.

Finally, let me add that the codes containing rules or principles of judicial conduct are variously labelled in different countries even if they serve the same function. For the sake of simplicity and to avoid confusion, I will use only the two most recurrent labels when making reference to the codes in general, that is: *codes of judicial ethics* and *codes of judicial conduct*. Obviously, when I make reference to the code of a specific country, I will use its official title.

B. Judicial Ethics and Enforceable Codes of Judicial Conduct

The role of judges is inextricably tied to a set of characteristics and values that are essential for the very legitimacy of the judicial function.

Prominent among those are that judges should perform their functions with integrity, impartiality, and independence as well as diligence (insofar as justice delayed is justice denied). Judges are expected to perform their work with competence and treat the litigants, witnesses and attorneys with courtesy and respect. They are furthermore expected to behave with honesty and propriety both on the bench and in their private life so as to inspire trust and confidence in the community, avoiding with care to behave in a way that demeans their high office.[6] Such values are undisputed in all democratic countries, but the ways in which they are promoted, implemented or enforced varies considerably from country to country. Among the more visible and significant differences one should include the specificity with which principles of ethics or judicial conduct are spelled out and whether or not they are enforced by means of disciplinary proceedings. To be sure, judicial discipline has long existed in various forms in all democratic countries. However, judges were, and still are in many countries, disciplined on the basis of rules formulated in rather vague terms. Such disciplinary systems have been the object of criticism for reasons that concern both the independence and the accountability of judges. On the one hand, the wide discretion of disciplinary authorities in applying norms formulated in vague terms could be a threat to independence, insofar as the norms could be misused to sanction judges for their judicial orientations. On the other hand, an extremely wide discretion placed in the hands of disciplinary authorities, often composed exclusively or prevalently of judges, could render the disciplinary system ineffective, insofar as the members of those authorities could use their disciplinary powers with excessive leniency when judging the improper behaviour of fellow judges. The need to codify judicial ethics has often been invoked and certainly among the more forceful statements on the matter one can quote a former Chief Justice of India, Justice Verna:

> "With the increase in judicial activism, there has been a corresponding increase in the need for judicial accountability. There is a perception that the people are doubting whether some of us in the higher judiciary satisfy the required standards of conduct. Since we are the ones laying down the rules of behaviour for everyone else, we have to show that the standard of our behaviour is at least as high as the highest by which we judge the others. We have to earn the moral au-

---

[6] See J. M. Shaman/S. Lubert/J. J. Alfini, Judicial Conduct and Ethics, at 1 (1995).

> thority and justify the faith the people have placed in us. One way of doing this is by codifying judicial ethics and adhering to them."[7]

Actually, in the last 50 years, and more notably in the last ten years, an increasing number of countries around the world have adopted in a variety of forms and levels of specificity codes of judicial ethics or enforceable codes of judicial conduct. The first code intended to set standards of professional and ethical behaviour for judges, called *Canons of Judicial Ethics*, was issued by the American Bar Association (ABA) in 1924. Such Canons were not, at the time, intended as an enforceable set of rules, but as an ideal guide, a source of inspiration for the judges. In 1972, the ABA revised the 1924 Canons, giving them a new name, the *Model Code of Judicial Conduct* which was rewritten yet again in 1990 and 2007.

Unlike the 1924 Canons, the Code was intended to be an enforceable set of rules. And in fact it has been adopted as such by all of the 50 States, as well as by the federal court system. Although in adopting the Code the states and federal system have felt free to revise it here and there, nonetheless the Code forms the basis for a fairly uniform body of law throughout the nation that regulates judicial conduct.[8] Actually, as we shall see, the basic structure of the ABA Code has influenced in various ways the writing of the codes of ethics of quite a few other countries. It seems therefore useful to portray in general terms its basic features. The principles (or canons) of the Code of Judicial Conduct illustrate in general terms the implications of the basic values of the judicial role, such as: independence, integrity, impartiality, competence, and diligence. Such principles are thereafter followed by a list of rules concerning what judges can and cannot do in application of those principles, both on and off the bench. Although such rules are binding and

---

[7] In D. P. Cumaraswamy, Tensions between Judicial Independence and Judicial Accountability, at 9, available at <http://www.article2.org/mainfile.php/0205/104/>.

[8] See J. M. Shaman, Judicial Ethics: Independence, Impartiality, and Integrity, at 8 (1996). The article is available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=991625>. This article includes a brief description of the development of judicial discipline in the United States. A more detailed description can be found in Shaman/Lubet/Alfini (note 6) at 1-28; a precise and updated description of the history and evolution of the American Bar Association Model Code can be found in A. J. Lievense/A. Cohn, The Federal Judiciary and the ABA Model Code: the Parting of the Ways, 28 The Justice System Journal 271 (2007).

enforceable, it is not contemplated that every transgression will result in the imposition of discipline: factors such as the seriousness of the transgression, previous disciplinary transgressions, the negative consequences for the image of justice as well as other attenuating circumstances may be taken into consideration. As is the case with all written statements, also rules of conduct leave room for interpretation. In order to minimize the scope of improper interpretation, the Code is prefaced by a *terminology section* in order to further specify the meaning of the expressions used in the rules of conduct. Furthermore each set of rules in the Code is followed by a commentary that discusses their implication and provides examples of *proper* or *improper* behaviour. Commentaries do not have, and are not intended to have, binding nature; they simply provide guidance regarding the purpose, meaning and proper application of the rules.

Until the early 1990s, rules of judicial ethics or conduct had been adopted only in the US, both at state and federal level. In June 1996, the Lord Chancellor's Department of England and Wales and the French Minister of Justice held a seminar on judicial ethics in London with the participation of judges and scholars from eleven European countries: Belgium, France, Germany, Ireland, Italy, The Netherlands, Poland, Portugal, United Kingdom, Spain, and Sweden.[9] It turned out that at that time none of those countries had a code of ethics or conduct to speak of, and in most of them disciplinary decisions were largely made on the basis of norms formulated in vague terms.[10] A 2004 survey of the European Network of Councils for the Judiciary[11] shows that at that time only one of the 12 Western European countries who answered the questionnaire had passed a law that included a detailed set of enforceable rules of judicial conduct, i.e. Spain.[12] In the other 11 countries judi-

---

[9] Unfortunately the country reports presented at that seminar, which I attended as a key speaker, were never published.

[10] For the disciplinary rules and disciplinary systems of Austria, France, Germany, Italy, The Netherlands and Spain as of 2005, see Di Federico (note 3), available at <http://www.irsig.cnr.it>.

[11] At present the European Network of Council for the Judiciary associates the councils of 17 countries. Other European countries which do not have a judicial council, such as Germany or Austria, have been associated as *Observers*. See <http://www.encj.net/encj/>.

[12] Such rules are not stated in a document *ad hoc* like a code of ethics, but are inserted in a chapter of the Organic Law on Judicial Power (*Ley Organica del Poder Judicial*) where also the disciplinary system is regulated. Such a law

cial discipline was still largely based on rules formulated in generic terms, which in some countries were integrated by a very limited number of law provisions on specific aspects of judicial behaviour (for example the rules of disqualification).[13] It must be added that since 2004 several Western European countries have either adopted codes of ethics, as England and Wales,[14] The Netherlands and Italy, or pursued the same end by publishing disciplinary judgements, as France (thereby establishing a body of *judge-made laws* that are used as precedents in disciplinary proceedings[15]). In several other countries the adoption of a code is under consideration, as for example in Germany. More widespread has been the adoption of codes of judicial conduct in post-communist countries. Such is the case for Armenia, Belarus, Estonia, Georgia, Moldova, Kazakhstan, Hungary, Poland, Romania, and Russia.[16] A significant role in promoting the adoption of codes of judicial ethics or conduct has been played by international initiatives that have elaborated model codes like the *Bangalore Principles of Judicial Conduct* and the *Latin American Code of Judicial Ethics*.[17] Such model codes are explicitly addressed to the national judiciaries that do not as yet have codes of judicial conduct for the purpose of adoption and implementation.

---

provides a list of 19 types of disciplinary violations divided in "very serious", "serious" and "minor". See M. Poblet/P. Casanovas, Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Spain, in: Di Federico (note 3), at 207.

13 See <http://www.csm.it/ENCJ/pdf/Questionnaire_answers_JudicialConduct.pdf>.

14 For the text of the Guide to Judicial Conduct of England and Wales see <http://new.judiciary.gov.uk/NR/rdonlyres/F8F48439-2E5C-4DAD-A241-DE5E9675FBDA/0/guidance_guide_to_judicial_conduct_update_2008.pdf>.

15 See A. Garapon/H. Epineuse, Judicial Independence in France, in this volume, Chapter D. I.

16 To my knowledge only some of the texts of the codes of ethics of those countries are available online, i.e. those of Estonia at <http://www.nc.ee/?id=842>; Georgia at <http://www.supremecourt.ge/default.aspx?sec_id=933&lang=2>; Poland at <http://www.archiwum.komornik.pl/en/01ethics.php3>; and Romania at <http://www.abanet.org/rol/publications/romania_magistrates_ethics_06.2005.pdf>. Other codes that are available in English (those of Belarus, Moldova and Russia) not to be found online.

17 The English version of this document can be found online by writing "Latin American code of judicial ethics".

At the international level the most comprehensive and well-known document on the topic is the *Bangalore Principles of Judicial Conduct*[18] developed under the auspices of the United Nations Organization on Drugs and Crime (UNODC). Such Principles were first elaborated by chief justices and senior judges from eight Asian and African States, drawing upon 24 different codes of judicial conduct as well as various documents adopted at the international level prevalently on the concept of judicial independence. Subsequently, the document underwent extensive consultations involving chief justices and senior judges from over 75 States. The Bangalore Principles of Judicial Conduct have the same basic structure as the codes of judicial conduct of the ABA described above but differ in some respects (i.e. content and wording). The Bangalore Principles are articulated around six basic values: *independence*, *impartiality*, *integrity*, *propriety*, *equality*, *competence and diligence*. A short definition of the meaning of each of those values for the judiciary is also provided, as well as a list of the expected behaviour on the part of the judges in application of each of the six basic values. More recently, the United Nations Office on Drugs and Crime (UNODC) has also sponsored a training manual on judicial ethics,[19] as well as a computer-based training programme which is currently under development. In recent years several States have utilized the Bangalore principles in writing their codes of ethics or conduct, for example, England and Wales and Armenia.[20]

The codes of judicial ethics or conduct that have been adopted so far around the world differ from one another in various ways.[21] Be it suffi-

---

[18] See <http://www.unodc.org/pdf/corruption/corruption_judicial_res_e.pdf>.

[19] See <http://www.unodc.org/documents/corruption/publications_unodc_judicial_training.pdf>.

[20] Information that I acquired from UNODC indicates that numerous states have issued or are preparing codes of judicial conduct either by adopting the Bangalore Principles, or by taking inspiration from them: the Philippines, Serbia, Jordan, Afghanistan, Belarus, Bolivia, Bulgaria, Burkina Faso, England and Wales, Ecuador, Germany, Greece, Hungary, Iraq, Latvia, Lithuania, Marshall Islands, Mauritius, Mexico, Namibia, The Netherlands, Nigeria, Slovenia, Uzbekistan, Venezuela and several countries of East Africa.

[21] Quite a few codes of judicial ethics of countries outside the OSCE area are available online. Among those, just to mention a few, the code of judicial ethics of China (available at <http://www.accci.com.au/code.htm>) and the Philippines (available at <http://www.chanrobles.com/codeofjudicialconduct.html#CODE%20OF%20JUDICIAL%20CONDUCT>); the codes of South

cient here to indicate the more significant ones. In most of the states the codes are enforced in disciplinary proceedings. In others, instead, they are not conceived as a set of enforceable rules, but rather as an ideal guide of judicial behaviour. Such is the case, for example, of the codes adopted in Estonia, Canada, Australia, and England and Wales.[22] In some states the rules of judicial behaviour are followed by detailed comments that provide guidance to the behavioural implications of those rules as, for example, in the US, Canada, and Australia. In other countries the codes consist of a simple list of rules of behaviour which has the same structure of a penal code, as in Estonia, Italy, and Romania. Generally speaking, the former type of code is a characteristic of the codes of the countries of common law tradition, while the latter are typical of countries of civil law tradition. With some exceptions though, for example, in the code of judicial conduct of Moldova, certainly a country of civil law tradition, the rules of conduct are followed by extensive commentaries. A commentary to the Georgian code has also been prepared.[23]

In the few countries where judges and prosecutors belong to the same corps, some have a code that regulates the conduct of both judges and prosecutors in spite of the substantial differences that exist between the two roles, as for example in Italy. In other countries, instead, the code does include specific and separate rules for the prosecutors, as for example in Romania.[24] All the codes regulate judicial behaviour both on and off the bench. All provide rules regarding the behaviour of judges *vis-à-vis* the parties of judicial proceedings, all of them deal with extra-judicial activities, and in particular with the involvement of judges in

---

Africa, Nigeria, Uganda, Rwanda, Tanzania can be consulted at <http://www.judicial-ethics.umontreal.ca/en/codes%20enonces%20deonto/africa.html>.

[22] See the Canadian Ethical Principles for Judges, at 3, available at <http://www.cjc-ccm.gc.ca>. See also the Foreword to the Guide to Judicial Conduct of England and Wales, available at <http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-in-detail/index/guide-to-judicial-conduct>. The text of the codes of ethics of Australia and Estonia are available at <http://www.aija.org.au/online/GuidetoJudicialConduct%282ndEd%29.pdf> and <http://www.nc.ee/?id=842>.

[23] See <http://www.aija.org.au/online/GuidetoJudicialConduct%282ndEd%29.pdf>.

[24] In the Romanian code of ethics there are 30 rules that are addressed to *magistrates* (i.e. both judges and prosecutors) and only three addressed to prosecutors only.

active politics. All of them include provisions intended to protect the image of impartiality and décor of the judge, even from improper behaviour of his/her family members. It would certainly be beyond the scope of this chapter to provide a systematic, comparative analysis of the content of the available codes. As already indicated, a good many of them can in any case be consulted online. Suffice it to add here that in some of the codes the various aspects of judicial behaviour are regulated in greater detail than in others. Some of the differences are due to the different characteristics of the various judicial systems,[25] others reveal substantive differences among the different countries in regulating the same aspects of judicial behaviour, or indicate in very specific terms aspects of judicial behaviour which in other countries would be considered implicit in more general norms.[26]

C. Monitoring of the Codes of Judicial Ethics and of Disciplinary Proceedings

Several of the authors of the national reports published in this volume make reference to the fact that the codes of ethics include rules that are formulated in vague terms. Some of them express their concern for the negative consequences on judicial independence deriving from the wide discretion left in the hands of the authorities empowered to apply the code. In no way do I want to underestimate their worries by saying that, in fact, all codes of conduct include in various degrees rules that are vague; indeed, the reading of many codes has made me fully aware that the degree of *vagueness* might make a big difference. I am raising this issue only to indicate on the one hand the reasons why codes usually include at least some rules that leave ample room for interpretation and on the other, the instruments that some countries have adopted to clarify as much as possible the meaning of the rules of judicial conduct and to promote their correct application or comprehension. The rea-

---

[25] In the states of the US where judges are elected, a specific part of the code regulates in detail the conduct of the judges who run for election. For a brief analysis of the nature of those regulations see M. I. Harrison, The 2007 ABA Model Code of Judicial Conduct: Blueprint for a Generation of Judges, 28 The Justice System Journal 257, at 268 (2007).

[26] For example in the Judicial Code of Ethics of Moldova, the commentary to Article 6 on "Order and Solemnity During Court Hearings" states that "[a]t the beginning of trials, judges must turn off their cell phone."

sons for which some of the norms of the enforceable codes of judicial conduct are formulated in generic terms seem to be embedded in the very nature of the codes of conduct insofar as one of their primary purposes "is to advise and inspire judges to adhere to the highest standards of ethical conduct, [...] however another purpose of the codes is to serve as a basis for discipline".[27] In other words, even the more detailed enforceable codes try to combine in the same document two purposes that are to a certain extent conflicting: to provide at the same time inspirational guidance and disciplinary rules.[28]

Such a tension between two conflicting purposes of the codes of conduct does not of course mean that efforts are not or should not be made to render most of the rules more precise in their wording. Actually such a task, as we shall see, has been pursued in several countries, mainly, but not only, through a constant monitoring of the actual working of judicial discipline and the consequent, recurrent revisions of the codes. The country with the most diffused and diversified system of monitoring of the codes of ethics is the country that has the longest experience in the use of the codes, i.e. the United States. As a rule the judicial conduct organizations that operate in the 50 States prepare an annual report which describes the nature of their activities, their interpretations of the code and, if it is the case, the modifications of the code which on the basis of their experience would be advisable. Such a report is available to

---

[27] See Harrison (note 25), at 262.

[28] Id.; see also P. L. Ostermiller, The New ABA Judicial Code as a Basis for Discipline: Defending a Judge, 28 The Justice System Journal 309, at 309 (2007). Quite a few are the *inspirational rules* included in the ABA code revised in 2007. For example rule 1.2 provides that "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety". The vocational nature of such a rule is explicitly acknowledged in the ABA commentary to that rule by stating: "Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms". Similar considerations could be made regarding other provisions of the code, such as article 3.1 (C) which provides that judges shall not "participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality". The text of the ABA model code of judicial conduct is available at <http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf>.

the public and in many states it is distributed to the judges.[29] At the federal level the task of monitoring the application of the code is not only assigned to various authorities internal to the federal judiciary (such as the heads of court, the district councils and the US Judicial Conference) but it has also been conducted by commissions appointed *ad hoc* to verify the efficacy of the Judicial Conduct and Disability Act for federal judges of 1980. Two such commissions have been appointed so far, in 1990[30] and 2004 (the latter will be considered in the following paragraph). Furthermore several private organizations have played and continue to play an important role in monitoring the application of the codes in disciplinary proceedings also by publishing and commenting state and federal disciplinary decisions in specialized periodicals, by organizing recurrently conventions on questions of judicial discipline, by acting as consultants on matters regarding the codes and judicial discipline both at the state and federal levels.[31]

---

[29] Both the annual reports and the state codes can be consulted online state by state together with a wealth of other information on the activities of the state judicial conduct organizations. See, for example, the websites of California (available at <http://cjp.ca.gov>) or Connecticut (available at <http://www.ct.gov/jrc/site/default.asp>). All the websites of the state judicial conduct organization can be consulted at <http://www.ajs.org/ethics/eth_conduct-orgs.asp>.

[30] In 1990, the Congress of the US created the National Commission on Judicial Discipline and Removal, whose charge included investigation of problems related to the discipline and removal of life-tenured federal judges, and evaluation of alternatives to the then existing arrangements for judicial discipline and removal, including statutory and constitutional amendments. The Commission held six public hearings during 1992 and 1993, and submitted its final report on 2 August 1993 to the President, Congress, and the Chief Justice of the United States. The report is in three parts: (1) a description of the appellate courts' processes for handling conduct and disability matters; (2) a discussion of data on the effects of the Act that the authors collected from interviewing chief circuit judges, circuit executives, and clerks of court, reviewing complaints and orders, and examining statistical data from the Administrative Office of the US Courts; and (3) a summary of chief circuit judges' assessments of the value of the Act and suggestions for change. The report presents the views of chief judges on the impact, or lack of impact, of the 1980 Act.

[31] Prominent among such private organizations are the American Bar Association (at <http://www.abanet.org>) which first created the Model Code of Judicial Conduct and which periodically provides for its revision, and the American Judicature Society (at <http://www.ajs.org>).Two of the periodicals of the American Judicature Society provide on a regular basis updated informa-

Certainly the monitoring of the application of the codes of ethics, of disciplinary proceedings and sanctions is far more diffused than in other countries, due in large part to the fact that they have preceded the other countries in the issuing and implementation of codes of conduct. However, in other countries, too one can now find a formal recognition of the importance of providing institutional mechanisms specifically intended to facilitate the revision and updating of the codes of ethics through a constant monitoring of its actual use, a monitoring which is also intended to acquire information on the insurgence of critical aspects of judicial behaviour that would require regulation. Such is the case in England and Wales. In the foreword to the very first edition of the Guide to Judicial Conduct of England and Wales of 2004, the Lord Chief Justice of the time, Harry Kenneth Woolf, acknowledges the need of an ongoing activity for the monitoring of that Guide.[32] After declaring his pride for the "existing standards of judicial conduct" in his country, he nevertheless underlines that the Guide to Judicial Conduct is a document that must be open to future innovations because "the responsibilities and the public perception of the standards to which judges should adhere are continuously evolving."[33] A "Standing Committee" was then appointed by the Judges' Council "to keep the Guide under review and to deal with any points of principle that may not be dealt with in the Guide or that may need revision."[34] And actually two "supplements" of the Code were thereafter published in 2006 and 2008.[35] England and Wales have also activated monitoring activities on specific aspects of disciplinary proceedings which I will deal with in

tion on the development of and debates on judicial conduct and judicial discipline in the US: the bimonthly *Judicature* and the quarterly *The Judicial Conduct Reporter.* The latter reports in each issue the latest developments in judicial discipline, tracks changes in codes of conduct, and analyses in every issue the most recent advisory opinions and disciplinary decisions (reported in anonymous form). Both periodicals have been published at least since the 1980s (that is when I started consulting them).

[32] The text of the Guide to Judicial Conduct in England and Wales is available at <http://www.judiciary.gov.uk/NR/rdonlyres/6AA2E609-537A-4D47-8B11-02F86CD30851/0/judicialconduct_update0408.pdf>.

[33] Id., at iii-iv, where the Lord Chief Justice also gives a personal example of the evolving judicial mores by recalling: "[W]hen I came to the Bar it was considered in order for a son to appear before his father. This would be unacceptable today. So this Guide will have to evolve to keep up with these changes."

[34] Id., at viii.

[35] Id., see the front page.

paragraph E. I. Judicial Discipline, the Role of the Citizens, and the Monitoring of its Actual Functioning.

Means other than those indicated so far have been adopted which contribute to the updating of the codes of ethics and the fairness of disciplinary proceedings. Such are the *advisory opinions* that are rendered to clarify the meaning of the rules of judicial ethics and the adoption of detailed rules to regulate disciplinary proceedings. We shall also deal with them in the following paragraphs.

D. The Proactive Function of the Codes of Ethics

The main purpose of the rules of judicial ethics or judicial conduct is to protect and restore public confidence and public trust in the judiciary and, by the same token, to uphold the very legitimacy of the judicial function. Sanctioning the improper behaviour of judges is certainly important, as we shall see later on, for the promotion and maintenance of public confidence in the judiciary. However, the main purpose of the rules of judicial ethics "is essentially forward looking and not punitive, the emphasis is on the correction of conditions that interfere with the proper administration of justice in the courts."[36] The more the judges get acquainted with those rules and act accordingly, the more the codes will be effective and serve their main purpose. Hence the importance to devise appropriate means to maximise the proactive function of the codes. The most widely used means of the kind adopted by many countries consists in the inclusion of the topic of judicial ethics in the programs of initial and continuing education of judges. This is evident even if we restrict our analysis to the 19 countries included in this book: of the 14 countries that have adopted a code of judicial ethics or conduct, nine have activated learning programs on the topic in the period of initial training (usually of a compulsory nature) or as part of the programs of continuing education (usually optional).[37] This is a function that has

[36] Quote from the commentary to rule 1 which states the purpose of the 1980 Judicial Conduct and Disability Act for US federal judges. See A. D. Hellman, Judges Judging Judges: The Federal Judiciary Misconduct Statute and the Breyer Report, 28 The Justice System Journal 426, at 427 (2007).

[37] See section D of the relevant chapters. Among the countries that have a code of judicial ethics or conduct and have activated teaching programs on the subject I have included France, though France does not have a code of proper judicial conduct. It has however, as we have already said, a published body of

been facilitated and most probably will be further developed in many countries by another rather recent development in the governance of the judiciary connected to the increasing political, economic and social scope of the judicial function in modern democratic societies, i.e. the creation and diffusion in an increasing number of countries of schools dedicated to the initial training and continuing education of judges. Be it sufficient to recall here that traditionally after recruitment the processes of professional socialization of the judges, including the acquisition of ethical rules, took place as part of the on-the-job training, and that continuing education was left to the personal initiative and responsibility of the judges themselves.[38] Actually the creation of the first structured schools for the initial and continuing education of judges operating at the national level dates back to about fifty years ago, i.e. the *École Nationale de la Magistrature* in France established in 1958[39] and the Federal Judicial Center in the United States in 1967.[40]

With regard to judicial ethics, as of now little information is available on the way this is being taught in most of the countries, while its effectiveness is of crucial importance if the code is to serve its proactive function. This lack of information should not be surprising if one considers that the introduction of the codes in most countries is a (relatively) recent phenomenon. The experience of the states that have long adopted codes of judicial conduct – i.e. the US both at the level of the 50 states and at the federal level – and have been monitoring the effectiveness of its application, do provide interesting indications both of the reasons that generate violations of the rules of conduct on the part of the judges and the means that might be effective in minimizing the occurrence of such violations. Where the monitoring of the application of the codes has been conducted on a regular basis, results show, in fact, that violations are usually inadvertent and that among the more fre-

---

disciplinary decisions that are being used as precedents in disciplinary proceedings and are utilized in programs of initial and continuing education that deal with judicial ethics.

38 With regard to continuing education, the interviews I conducted in Italy in the first years of the 1960s and in England in 1973 show that at that time the very idea that judges already in service might need further training was considered to be almost offensive to the judiciary, as it implied a public recognition that the judges did not already possess the professional knowledge necessary to perform their judicial duties with full competence.

39 See <http://www.enm.justice.fr/>.

40 See <http://www.fjc.gov/>.

quent causes of violation are "the lack of knowledge, lack of attentiveness, and overconfidence."[41] Furthermore codes often need to be interpreted to determine what is permissible and what is not: "finding and reading the appropriate canon is usually only the beginning of an ethics inquiry. To answer many questions, it is necessary to examine and analyze the body of interpretations surrounding the canons and the purposes behind them. This means that teaching about the canons involves more than imparting black letter rules."[42] Two major steps have been taken to face those difficulties: on the one hand to make the educational tools more effective and on the other provide advisory opinions to the judges who have doubts concerning their ethical obligations.

As to the adoption of more effective didactic tools, the in-person seminars of initial and continuing education have been complemented by "demonstrative and interactive methods" supported by *ad hoc* information and communication technologies. Satellite broadcasts, web-based tutorials, and publications on ethical issues are offered which can be used by the judge at one's desk at the time of his choice.[43] Spouses are encouraged to attend seminars on judicial ethics during the training sessions of both federal and state judges because, especially on matters concerning the appearance of impropriety and independence, it is often hard to separate judicial conduct from family conduct, and it is hard to

---

[41] With regard to the overconfidence of the judges it is interesting to quote from John S. Cooke, a former judge, now deputy director of the US Federal Judicial Center and former director of education: "Most judges, and especially the newly appointed ones, find their attention consumed with hundreds of cases requiring many decisions just to keep up, and ethical issues can get overlooked in this press of business, particularly when such issues appear in a benign context or are buried in a mount of details. Because judging is not for the timid and judge's faith in his or her ability – and rectitude – is essential to the job, the self confidence necessary for making decisions that can fundamentally alter people's lives may sometimes blind a judge to others' perception of the judge's actions, a particular concern when ethical questions arise". See J. S. Cooke, Judicial Ethics Education in the Federal Courts, 28 The Justice System Journal 385, at 388 (2007).

[42] Id., at 386.

[43] Id., at 388-393, where the author provides for an illustration of the didactical means and ICT technologies adopted by the US Federal Judicial Center for its educational programs in the area of judicial ethics.

avoid that improper behaviour of family members would not affect the image of integrity of the judge.[44]

An important proactive function is also played by advisory opinions. In the United States, federal judges and state judges who are in doubt as to the meaning of the ethical rules are entitled to ask and receive an advisory opinion from an authoritative and qualified agency. Such opinions serve not only the purpose of assisting the judges that asked to be aided in the interpretation of the code but, as they are made available online, they are useful to the entire corps of state and federal judges in order to better understand the rules of their respective codes of conduct.[45] It is worth noting that doubts have been expressed on whether advisory opinions should be issued at all, mainly when the advising agency is also vested with disciplinary powers. Especially in such a case it is feared that the issuing of opinions may bind the same agency to a disciplinary conduct that it may not want to take at a later date when all the relevant facts have been developed. Though advisory opinions are not, by their very nature, binding, some of those agencies add a proviso indicating the tentative nature of the opinion and specifying that the issuing authority may take a different view in the future if additional facts are present.[46]

E. Disciplinary Proceeding

I shall limit my presentation here to some of the many issues connected to disciplinary proceedings that are relevant for the protection of judicial independence and the effectiveness of the disciplinary proceedings,

---

[44] See E. F. Rosemblum, Judicial Ethics for All: An Expansive Approach to Judicial Ethics Education, 28 The Justice System Journal 394, at 400-401 (2007); see also Cooke (note 41), at 391.

[45] For the advisory opinions at the state level, see, for example those: of Arizona available at <http://www.azcourts.gov/ethics/JudicialEthicsAdvisoryOpinions.aspx>; of Alaska, available at <http://www.ajc.state.ak.us/conduct/conduct.html#advopinions>; of Texas available at <http://www.courts.state.tx.us/judethics/ethicsop.asp>.

For the opinions expressed with regard to the Federal code see <http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct.aspx>. On each of these websites one can find not only the advisory opinions but also the text of the corresponding code of conduct.

[46] See Shaman/Lubet/Alfini (note 6), at 22.

issues that in various ways have been raised in the country reports published in this volume. Namely, the role of citizens and the safeguards for judges in disciplinary proceedings.

I. Judicial Discipline, the Role of the Citizens, and the Monitoring of its Actual Functioning

Disciplinary initiative, depending on the country, is formally assigned to one or more subjects. Sometimes the initiative is exclusively in the hands of judicial authorities and more often is in the hands of a plurality of subjects that may include, depending on the country, heads of courts, judicial councils or committees composed of both judges and non judges, members of the executive like the Ministry of Justice and the President of the Republic, Parliament as well as other public authorities. Be that as it may, in all countries complaints on the part of citizens play, *de facto* or formally, a major role in eliciting disciplinary investigation and disciplinary initiatives on the part of the authorities empowered to perform those tasks. Transparency in the use of citizens' complaints is just as important as that regarding disciplinary investigation and adjudication if one wants to avoid that they might be misused to undermine judicial independence, as indicated in some of the national reports here published.[47] Such an aspect of disciplinary proceedings has been disregarded even in countries of long established democracy, like, for example, France, Germany, and Italy. In some democratic countries, instead, the role of citizens' complaints is considered a basic resource in the promotion and maintenance of the citizens' trust in the judicial function, as well as a tool for the effective functioning of a fair system of judicial discipline. Such is the case of the United States and,

[47] See O. Schwartz/E. Sykiainen, Judicial Independence in the Russian Federation, in this volume, Chapter B. VI. The authors indicate that "[s]ometimes a complaint against a judge received from a member of the public becomes a perfect reason for the chairperson to settle old scores with that judge. Existence of such practices could be caused by the fact that procedures for dealing with abovementioned complaints are informal and not officially regulated. Some formalizing could prevent abuse". See also Z. Fleck, Judicial Independence in Hungary, in this volume, Chapter B. VI. The author indicates that there are no regulations regarding the handling of complaints and that therefore the court presidents can at their full discretion use them in the evaluation of professional performance and in deciding discretionally whether to initiate or not a disciplinary proceeding.

recently, of other countries like, for example, England and Wales, and New Zealand.

The first initiatives to assign a formal role to the citizens in the promotion of disciplinary proceedings and, to some extent, a role also in the following phases of the proceedings has taken place in the US, both at the state and federal levels. Since the 1970s all of the 50 states of the US have adopted (and frequently revised) detailed rules for disciplinary proceedings and have established judicial conduct organizations – composed in varying proportions of judges and lay members – which in a plurality of ways facilitate the presentation of complaints and keep the complainant informed of the results of their initiative.[48] Most of them facilitate the presentation of complaints by providing the citizens with forms to file complaints correctly, and also various forms of assistance for their compilation. In 1980, the US Congress approved a statute, the Judicial Conduct and Disability Act (JCDA), specifically intended to allow any citizen, by means of a specific procedure, to file a complaint against federal judges on the basis of misconduct or disability. This procedure is also intended to make sure that the complaints be duly considered and acted upon disciplinarily in case of actual misconduct. In the first years of the 2000s, criticisms were expressed by the US Congress as to the efficacy with which the JCDA had been implemented. Such criticisms were largely based on the belief that the processing of the complaints suffered from undue *guilt favouritism* deriving among other things from the fact that, unlike what happens for the state judiciaries, at the federal level disciplinary investigations and decisions are exclusively in the hands of the judges themselves.[49] In 2004, a commission was established to verify whether complaints expressed by the citizen had been actually acted upon with the needed diligence and efficacy.

---

[48] See C. Gray, How Judicial Commissions Work, 28 The Justice System Journal 405 (2007). This article also provides information on the different provisions existing in the various states with regard to confidentiality during investigation and on dismissals. The same subject is dealt with by R. H. Temberckjian, Judicial Disciplinary Should be Opened, 28 The Justice System Journal 419 (2007). For the composition of the judicial conduct organizations see <http://www.ajs.org/ethics/pdfs/Commissionmembership.pdf>. As can be noticed by consulting this website I have used in the text the expression "judicial conduct organization" to indicate organizations that perform the same type of function but have adopted different names in different states.

[49] For a concise presentation of the disciplinary proceedings and of the authorities entitled to investigate and decide on matters concerning the discipline of US federal judges see <http://www.ajs.org/ethics/eth_fed-jud-conduct.asp>.

The commission, headed by a judge of the Supreme Court, revised a large sample of complaints and in 2006 published its findings.[50] Among the many findings the Commission's report states that: "Overall termination that are not consistent with […] the Act's requirements are rare, amounting to about 2% to 3% of all terminations."[51] Among the many recommendations issued by the commission to make the JCDA more effective, suffice it here to recall: those that are intended to facilitate the citizens in filing their complaints; the recommendation that "committees of local lawyers" be promoted "to serve as conduits between lawyers and judges to communicate problems of judicial behaviour"; the need to provide adequate training to the head of courts for a more accurate processing of the citizens' complaints; the need to promote an accurate monitoring of disciplinary proceedings.[52] New and more detailed procedures on disciplinary proceedings have since been issued which include also rules that allow the dissatisfied complainant to petition for review of the decisions adopted in their case.[53] Nevertheless, criticisms are still voiced in the US Congress and more stringent legislation is at this writing pending to guarantee that the citizens' complaints be dealt with more effectively.[54]

---

[50] The text of the report is available at <http://www.supremecourt.gov/publicinfo/breyercommitteereport.pdf>.

[51] Id., at 7.

[52] Id., all the recommendations are listed at 8-9.

[53] The text of the "Rules for Judicial-Conduct and Judicial-Disability Proceedings" revised in 2008 is available at <http://www.ca7.uscourts.gov/jm_memo/compla.pdf>. In the Appendix one can find copy of the form that has to be filled to file a complaint.

[54] See the bill Judicial Transparency and Ethics Enhancement Act of 2009 which has been introduced both in the US Senate and in the US House of Representatives. Both bills provide for the creation of the Office of the Inspector General of the Federal Courts. The Inspector General would be appointed by the Chief Justice of the Supreme Court for a term of four years. His duties would include the following tasks: to conduct investigations of alleged misconduct of judges in the judicial branch under the Judicial Conduct and Disability Act of 1980 that may require oversight or other action by Congress; to conduct and supervise audits and investigations; to provide the Chief Justice and Congress with an annual report on the Inspector General's operations: to make prompt reports to the Chief Justice and to Congress on matters which may require further action; to recommend changes in laws and regulations governing the Judicial Branch.

In England and Wales, an *ad hoc* office was created in 2006, the Office for Judicial Complaints (OJC), to deal with complaints about the personal conduct or behaviour of a "judicial office-holder". Prior to the OJC, members of the public would write to the Lord Chancellor or to the head of courts but there was no established procedure for dealing with misconduct complaints. The OJC is now in charge of receiving the complaints, conducting the relative investigations and keeping the complainant informed of the results of their initiatives (reception, reasons for dismissals, ongoing investigations, etc.) following a detailed procedure.[55] As our task here is only that of illustrating the importance attributed to the role of the complainants as a contribution to promoting and maintaining public confidence in members of the judiciary, it is important to indicate that in several ways the OJC facilitates the citizens in the filing of their complaints, such as by providing on its website an interactive form for filing the complaint which provides all the key information required in order that the OJC's caseworkers may carry out complaint investigations and avoid the "delay of unnecessary correspondence seeking missing information"; and by recording and transcribing the complaints of citizens who find it difficult to send a written document. Furthermore, special training is provided for the OJC caseworkers to deal with complainants that suffer from a mental disability.[56] The OJC publishes a yearly report on its activities.[57] In order to improve its services to the citizens the OJC carries out and publishes a yearly survey among the complainants to verify both the efficiency and quality of the service, such as the timing, the politeness, clarity, professional performance of the OJC caseworkers, and the promptness of the service rendered (including questions on the number of telephone rings before the citizen's call is answered).[58] Citizens who feel that the OJC has failed to handle their complaints properly or fairly can address the Judicial Appointments and Conduct Ombudsman, who however, can only consider and act with regard to the correctness of the procedures

---

[55] The Judicial Discipline Regulations as amended in 2008 is available at <http://www.judicialcomplaints.gov.uk/docs/Judicial_discipline_regs_-_consolidated_version.pdf>.

[56] See the Annual Report 2008-2009 of the Office for Judicial Complaint, available at <http://www.judicialcomplaints.gov.uk>.

[57] The four yearly reports published so far can be consulted on the website indicated in the previous note.

[58] Id., see the Annual Report 2009-2010 of the Office for Judicial Complaint, annex D.

followed by the OJC in reaching its decision to dismiss the citizens' complaints, but cannot comment on whether the OJC decision was correct or not.[59] The OJC does not have any authority beyond that of conducting investigations or terminating cases for which investigations are not allowed by law. The task of sanctioning judges belongs to other authorities[60] who are bound to inform the complainant of their decisions.[61]

Since 2005, the citizens of New Zealand can formally address their complaints to a newly established institution, the Judicial Conduct Commissioner, created with the specific purpose "to enhance public confidence in, and protect the impartiality and integrity of the judicial system."[62] Furthermore, a law has been approved that regulates in detail the tasks of the Judicial Conduct Commissioner and of the entire disciplinary procedure.[63] Similarly to the OJC of England and Wales, the New Zealand office of the Judicial Conduct Commissioner not only provides the citizens with a form that enables them to formulate their complaints with all the information that is needed, but also offers its assistance to the citizens that cannot adequately file their complaints. In any case, the Commissioner, upon receiving a complaint, must send a written acknowledgement to the complainant and when the complaint is dismissed, must also notify the complainant not only of its dismissal, but also of the grounds on which that decision was made. While considering the role of the citizens in disciplinary proceedings, it is important to note that among the reasons for which the Commissioner may terminate a complaint, two of them are certainly of interest: a) "that the complaint has been resolved to the complainant's satisfaction following an explanation from the judge who is the subject of the complaint"; b) "the fact that a complaint has been resolved to the complainant's satis-

---

[59] See Judicial Appointments and Conduct Ombudsman, available at <http://www.judicialombudsman.gov.uk/docs/Conductbookletforwebsite.pdf>.

[60] The decisions on disciplinary matters are made jointly by the Lord Chancellor and the Lord Chief Justice.

[61] Article 40 of the Judicial Discipline and Regulations provides that "[t]he Lord Chancellor and the Lord Chief Justice shall inform the complainant whether his complaint has been upheld or dismissed, and what if any disciplinary action they have agreed to take".

[62] See <http://www.jcc.govt.nz/>.

[63] The Judicial Conduct Commissioner and Judicial Conduct Panel, as amended in 2010, available at <http://www.legislation.govt.nz/act/public/2004/0038/latest/DLM293553.html>.

faction because of an apology by the judge who is the subject of the complaint."[64] The Judicial Conduct Commissioner prepares a yearly report on his activities which is submitted to the House of Representatives and published for the general public.[65] Similarly to the English OJC, the New Zealand Judicial Conduct Commissioner does not have any authority beyond that of conducting investigations or terminating cases for which investigations are not allowed by law. The task of sanctioning judges belongs to other authorities.[66] In most other countries, including those covered by the reports published in this book, the role of the citizens in disciplinary proceedings, if any, is quite limited, like for example that of receiving notice of acknowledgement for the complaints they send to various state authorities. Among the reports concerning Eastern European countries published here, some relevant details on the filing and processing of complaints are provided in the Polish report. A formal procedure for the filing of complaints has been issued by the Ministry of Justice. Complaints can be filed also orally, both at the Ministry and at the competent court, a procedure intended to facilitate the citizens who for various reasons might have difficulties in preparing a written document. The Polish Ministry of Justice publishes annually information concerning the "types of complaints" received, "examples of particular complaints and information on how complaints are dealt with".[67]

Traditionally, in most western countries of continental Europe, judicial proceedings are still considered an internal affair of the justice system, so much so that in some countries, like for example Italy, the citizens are not even entitled to be notified of the reception of the complaints sent to the authorities in charge of disciplinary proceedings, let alone to be personally informed of the outcome of their initiative.[68] The major

---

[64] See id., section 15 A of the Judicial Conduct Commissioner and Judicial Conduct Panel Act.

[65] The reports published so far are available at <http://www.jcc.govt.nz/template.asp?folder=REPORTS_AND_NEWS>.

[66] The process of removal of a judge is quite complex. For an overview of the entire disciplinary proceedings see <http://www.legislation.govt.nz/act/public/2004/0038/latest/DLM293719.html#DLM293719>.

[67] See A. Bodnar/Ł. Bojarski, Judicial Independence in Poland, in this volume, Chapter B. VI.

[68] See G. Di Federico, Judicial Independence in Italy, in this volume, Chapters B. VI. and VII. In Italy disciplinary judgements formally have the same publicity as any other judicial decision. However it would be extremely diffi-

exception is to be found in Sweden where the long established institution of the *Ombudsman* receives and investigates the complaints of the citizens with regard to the conduct of all public officials, judges included.[69] It must be added, however, that a recent reform of the French Constitution provides that the citizens be given a formal role in disciplinary proceedings.[70]

II. Guarantees for the Judges in Disciplinary Proceedings

Here I will deal only with the issue of the procedural guarantees for the judges in disciplinary proceedings. Certainly there are other aspects of judicial discipline that are relevant for the protection of judicial independence and which have been indicated with concern in some of the reports. However, little space is provided for the elaboration of useful comments. A few examples follow. In some of the reports concern for the protection of judicial independence is voiced with regard to the fact that Presidents of the Republic can decide on their own on disciplinary measures[71] or that the heads of court perform a predominant role in dis-

---

cult for the complainant to have access to the body of disciplinary decisions and no less difficult to find out whether among them there is a disciplinary decision that concerns the substance of his complaint.

[69] See J. Nergelius/D. Zimmermann, Judicial Independence in Sweden, in this volume, Chapter B. VI.

[70] Article 31 of the Constitutional reform of 2008 (*Loi constitutionnelle n° 2008-724 du 23 juillet 2008*).This article modifies also the composition of the Judicial Council (*Conseil Superieur de la Magistrature*).The main modification is that the magistrates will no longer be a majority in the Council. Among the primary reasons for such a change was the intention to avoid the phenomenon of corporative bias in the decisions of the Council.

[71] In Belarus, for example, the President of the Republic decides not only whether to implement or not the proposals made by the disciplinary authorities regarding the more serious disciplinary sanctions (including removal from office), but he has also the power to "impose any disciplinary sanction on any judge without initiating disciplinary proceedings." See A. Vashkevich, Judicial Independence in the Republic of Belarus, in this volume, Chapters B. VII. 2. and 3. In Armenia the President of the Republic is the only authority that can decide on the dismissal of judges, see G. Mouradian, Independence of the Judiciary in Armenia, in this volume, Chapter B. VII. 5.

ciplinary matters.[72] The only comment I could provide is that I share their concern and express my hope that those threats to judicial independence will soon be removed, but obviously this is not my task here. The same can be said for the concerns expressed in some reports with regard to the *improper* consideration of the merit of judicial decisions in disciplinary judgements,[73] or with regard to disciplinary sanctions based on the reversal rate at the appellate level.[74]

With regard to confidentiality I could not have offered much more than an incomplete synoptic table on the decisions adopted in various countries and a comment indicating that in the last two decades disclosure of various aspects of disciplinary measures has considerably increased. Similar considerations are in order with regard to disciplinary sanctions. To the synoptic table regarding the sanctions adopted in different countries I could add only comments regarding the fact that in some countries retired judges too are subject to disciplinary measures,[75] and

---

[72] See for example Vashkevich (note 71), Chapter B. VII. 2.; see also Mouradian (note 71), Chapters B. VII. 4. and 9.

[73] Threats to judicial independence due to the use of disciplinary proceedings and sanctions to discourage judges from adopting undesired judicial decisions, or to punish them for having done so, is reported in some of the national reports. See for example M. Kachkeev, Judicial Independence in Kyrgyzstan and Kazakhstan, in this volume, Chapter B. VII. 1. See also Schwartz/Sykiainen (note 47), Chapter B. VII. 5. Above in the text I intentionally used the expression "*improper* consideration of the merit of judicial decision" because in all the disciplinary systems with which I am familiar there have been cases in which the merit of the cases has been used for disciplinary measures, and rightly so. For example in cases where judges sentence a defendant to serve a long period in jail when only a fine is authorized by the law, or when a judge motivates his refusal to apply a law because that law is contrary to God's commands. Obviously in a note I cannot discuss in general terms under what circumstances the consideration of the merit of a judicial decision is proper or contrary to the protection of judicial independence. It is in fact a rather complex subject. Among the writings that have dealt with the matter in detail, supplying also an analysis of problematic cases that have actually occurred, see S. Lubet, Judicial Discipline and Judicial Independence, 61 Law and Contemporary Problems 59 (1998). This article is available at <http://www.law.duke.edu/journals/61LCP Lubet>.

[74] See for example, Schwartz /Sykiainen (note 47), Chapter B. VII. 5.; see also Kachkeev (note 73), Chapter B. VII. 1.

[75] Such is the case, for example, in Estonia and in some of the states of the US. See T. Ligi, Judicial Independence in Estonia, in this volume, Chapter B. VII. 1. See also Gray (note 48), at 409 where the reasons for disciplining retired

that in some countries forms of *self imposed sanctions* are in use.[76] A few comments, instead, might be of some interest with regard to the procedural guarantees offered to the judges who undergo disciplinary proceedings. Almost all the country reports published in this volume indicate the existence of basic formal guarantees to protect the independence of the judges in disciplinary proceedings, such as: the right of the judge to be promptly informed of the complaints filed against him; the right to have knowledge of all the evidence collected against him; the right to be heard (orally and in writing) by the disciplinary authority at all levels of the disciplinary proceedings; the right to be present in disciplinary hearings; the right to legal assistance; and also the right to appeal an unfavourable disciplinary decision. In spite of the existence of such guarantees, some of the reports on the post-communist countries indicate that disciplinary initiatives and disciplinary sanctions are being used to intimidate judges, to influence the content of their decisions, and to dismiss undesired judges.[77] In this regard it is appropriate to recall the words of a famed judge of the Supreme Court of the United States, Robert Jackson, who once said that:

---

judges are also provided by saying "even if a judge is no longer presiding over cases a sanction may still be essential to the preservation of the integrity of the judicial system especially if that integrity has been critically undermined, because the alternative, silence, may be construed by the public as an act of condonation".

[76] Above, in paragraph E.I. Judicial Discipline, the Role of the Citizens, and the Monitoring of its Actual Functioning, I have indicated occasions of "self imposed" sanctions with regard to New Zealand. Such "self imposed" sanctions can be found also in Canada and in the United States. I have placed this expression in quotation marks because they might not be really of a voluntary nature but rather the end result of a "bargaining" between the judge and the disciplinary authorities, as has been made clear in a recent case which occurred in England, where a judge had used words in open court with regard to a non-British defendant that could have been construed as displaying prejudice against them for not being British, including saying: "We take exception to people coming to our shores and abusing our hospitality." Removal was considered in this case as the words used fell short of the qualities of social awareness and sound judgement expected of the judiciary. However, long service as a judicial office holder without previous complaint and his apology and contrition were taken into account in the final decision. Office for Judicial Complaints, Annual Report 2009-2010, at 18. Available at <http://www.judicialcomplaints.gov.uk/docs/Judicial_discipline_regs_-_consolidated_version.pdf>.

[77] Schwartz/Sykiainen (note 47), Chapter B. VII. 5.

> "Severe substantive laws can be endured if they are fairly and impartially applied. Indeed, if put to a choice, one might well prefer to live under Soviet substantive law applied in good faith by our common law procedures than under our substantive law enforced by Soviet procedural practices."[78]

The criticism expressed by Justice Jackson, directed to the Soviet practices and not to its formal law of procedure, seems to be fully validated by the Russian report published in this book which provides relevant information on the contrast between formal guarantees and their actual implementation. In fact, the authors, Olga Schwartz and Elga Sykiainen, indicate a sufficiently detailed list of the legal provisions that are meant to guarantee a fair disciplinary proceeding for the judge and to protect at the same time his/her independence.[79] On the other hand the authors provide sufficient evidence, including specific examples, to the effect that in spite of those procedural guarantees, disciplinary proceedings and disciplinary measures are used in a variety of ways to influence judicial decisions and, by the same token, gravely undermine judicial independence.[80] Commenting on the causes of such phenomena the authors say: "An instrumental approach to law dominated Soviet culture, but law served as an instrument mainly of the ruling party. In post-Soviet Russia law has become an instrument of a variety of powerful individuals and groups, but an instrumental approach to law still predominates," and more generally they add: "Clearly, the emergence of truly independent and effective courts requires changes in the broader culture."[81]

Effective means to promote, within and without the legal professions, the interiorization of the values which inspire the very existence of the procedural rules meant to protect judicial independence is a task for which no one has a readily available recipe. However, some indications regarding the means that could possibly stimulate a greater fairness in disciplinary proceedings can nevertheless be found in the experiences of other countries, as for example a very detailed body of *actionable* rules for disciplinary proceedings. As an example, let me indicate the *Rules for Judicial-Conduct and Judicial-Disability Proceedings* for the Federal Judges of the United States, revised in 2008: seven articles containing

---

78 Quote taken from Lubet (note 73), at 61.

79 Schwartz/Sykiainen (note 47), Chapter B. VII. 3.

80 Id., Chapter B. VII. 5.

81 Id., Chapter F.

hundreds of legally binding rules, most of them extremely detailed and accompanied by substantial commentaries. These rules regulate in detail not only the rights of the judges and the role of the complainants; not only the appellate procedures available to judges and complainants; not only the rules of evidence and investigation; but also the ways in which to protect the judges from the filing of "repetitive, harassing, or frivolous complaints"; a detailed regulation of confidentiality/disclosure in disciplinary proceedings and the manners in which to make public information concerning ongoing disciplinary proceedings and disciplinary decisions.[82] Similar, detailed procedures do exist also in other states, such as in England and Wales.[83]

F. Concluding Remarks

In this chapter I have indicated the principal innovations introduced in recent years in the area of judicial conduct and judicial discipline, in particular those intended to promote and maintain the trust of the citizens in their judges as a necessary prerequisite for the very legitimacy of the judicial function in a modern democratic society. To that end, I have not only illustrated the importance of detailed rules of judicial behaviour but also indicated that a careful monitoring of the application of the rules contained in the codes of conduct is functional in rendering those rules more effective and more consonant with the expectations of the citizens regarding judicial behaviour. I have underlined that the primary function of the rules of judicial conduct is not that of punishing the judges who act in violation of those rules. Far more important in the promotion and maintenance of the community's trust in the judicial function is that the code performs a proactive function. And I have summarily illustrated the means that are being used to strengthen the proactive function of the codes, e.g., adequate didactic methods for the

---

[82] The text of the Judicial-Conduct and Judicial-Disability Proceedings for federal US judges revised in 2008 is available at <http://www.ca7.uscourts.gov/jm_memo/compla.pdf>.

[83] Detailed procedures for disciplinary proceedings have been implemented in England and Wales in 2008 (see <http://www.judicialcomplaints.gov.uk/docs/Judicial_discipline_regs_-_consolidated_version.pdf>) and Canada (<https://www.cjc-ccm.gc.ca/cmslib/general/conduct_complaint_procedures_en_fr.pdf>. Such procedures are provided also for each of the 50 US state judiciaries (for an example see <http://www.state.wv.us/wvsca/JIC/jdprules.htm#Judicial>).

teaching of judicial ethics; advisory opinions available to the judges on the meaning of the rules of conduct; the wide circulation of information regarding the code and of the interpretation of disciplinary rules as applied in concrete disciplinary cases. With reference to the experiences of various countries I have highlighted the positive role that the citizens can have in promoting a more effective disciplinary system once their participation is supported by adequate organizational structures which perform a variety of functions aiming to assist the citizens in filing their complaints properly; to inform them of the results of their initiative, if relevant, inform them of the motivations that led to the termination of their complaints; and periodically to prepare and make public reports on their own activities and performance. I have also suggested, although with some caution, that a very detailed body of *actionable* rules of disciplinary procedure, like the ones already enacted in some countries, might be effective in avoiding that the disciplinary system be used to influence judicial decisions in the countries where such a menace to judicial independence still seems to exist. Finally, I have more than once indicated that most of these innovations adopted to promote a more effective balance between the values of judicial independence and judicial accountability are to a large extent quite foreign to the great majority of the countries of the OSCE area.

Indeed, the title of this book "Judicial Independence in Transition" as well as the recommendations regarding judicial independence in "Eastern Europe, South Caucasus and Central Asia" published in the appendix, clearly reveal that *one* of the primary aims of this volume is to contribute to the promotion of reforms in the area of judicial governance mainly, though not only, with regard to former communist countries. The presentation I have made of the main innovations that have occurred in recent years in the area of judicial conduct and discipline have been made also with that end in view, not only to meet the expectations of the sponsors of this book, but also for my personal inclination and prolonged professional experience. Having participated in various ways in initiatives of judicial reform in quite a few countries around the world I am aware of the difficulties that reform projects always encounter, and also of the fact that the adoption of reforms that have been successful in other countries might produce results other than those which were hoped for or expected. Nevertheless, I cannot recall any major reform proposals in any sector of the judicial system that have been planned without taking into consideration the successful experiences, as well as the failures, of other countries in the same sector. After all there are not many other concrete sources of inspiration and knowledge that

the reformer can draw upon. It goes without saying that the experiences of other countries in projects of judicial reform have to be considered in greater detail than what I could provide in this chapter. I have therefore systematically provided reference to the existing documentation concerning the innovations in the area of judicial conduct and discipline which I have described in the course of my presentation.

It has often been said that it is more difficult to introduce substantive, innovative reforms in the judicial sector than in any other public service. My experience, including that in my own country, makes me inclined to subscribe to that statement. For certain, it would be hard to disagree with a judicial reformer of fame, Arthur Vanderbilt, when he warns his future epigones by saying that "[j]udicial reform is not for short winded people".

II. New Challenges in Established Democracies

The Persistent Politics of Judicial Selection: A Comparative Analysis

Graham Gee

A. Introduction

The politics of judicial selection runs deep. Decisions such as whom to select as judges and how to select them will inevitably have political dimensions, whether these relate to ideological politics, party politics, regional politics, group politics and so forth. Because selection processes ultimately shape the ability of courts to hold political institutions to account – and, in some countries, their ability to enforce constitutionally entrenched limits on the legislature – it could hardly be otherwise. The political dimensions vary, of course, from country to country, and, within any one country, from period to period, and perhaps even from court to court. But, in the final analysis, whether our focus is on civil law or common law systems, there will always be political dimensions to the selection of judges. In this essay, I want to sketch some of the ways in which judicial selection is distinctively political in character (and, here, I use the term *selection* to include not only initial recruitment into the judiciary, but also a judge's subsequent progression up the judicial ranks). I do so as part of a larger argument against the *depoliticization* of judicial selection. Any and all attempts to eliminate politics are bound to fail, and all too often efforts to restrict the role of political institutions in the selection of judges are misdirected. Politics cannot be removed from the recruitment and selection of judges, and nor should it be. The political dimensions must instead be brought into the open and publicly acknowledged. For at the end of the day, political institutions must always have a role in judicial selection.

To make this argument, I begin by sketching (admittedly with a very broad brush) the politics of selection in civil law and common law sys-

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233, DOI 10.1007/978-3-642-28299-7_4,

tems.[1] More particularly, I want to draw out the various political dimensions to judicial recruitment in the models articulated by Carlo Guarnieri and Patrizia Pederzoli – namely, the model of a *bureaucratic* judiciary associated with the civil law tradition on the one hand, and the model of a *professional* judiciary characteristic of the common law tradition on the other.[2] The former model is based on Guarnieri and Pederzoli's analysis of the judiciaries in France, Italy, Portugal and Spain, while the latter model is based on England and the United States. Both models are relevant to other countries in proportion to the degree to which their judiciaries resemble those in the countries just listed. To be clear, both models are highly stylized, and inevitably simplify the diversity of experiences and practices found in different civil law and common law countries, and do no more than hint at the complex interplay of factors that shape patterns of judicial selection in any one country.[3] Because several features of the models are exaggerated, it will always be possible to identify civil law and common law countries that depart, to a greater or lesser extent, from the bureaucratic and professional models respectively. Indeed, no one country embraces either of the models unambiguously; rather, in most countries, there are a variety of different courts, performing more or less distinct roles, and perhaps using selection procedures associated with the different models. All that said, a comparison of these models still helps identify, in broad terms, the various and differing political dimensions to judicial selection in civil law and common law systems.

Two main points emerge from a comparison of the bureaucratic and professional models. First, despite different judicial structures and different approaches to the recruitment of judges, there are political dimensions to selection under each of the models. The main difference is that while the politics of selection in a professional judiciary is concentrated on the initial selection of judges, it is focused on a judge's subsequent progression upon the judicial ranks in a bureaucratic judiciary.

---

1 In doing so, I concentrate on professional, rather than lay, judges. On lay judges, see J. Bell, Lay Judges, 5 Cambridge Yearbook of European Law 293 (2002).

2 See C. Guarnieri/P. Pederzoli, The Power of Judges: A Comparative Study of Courts and Democracy, at 66-68 (2002).

3 For an insightful, general discussion of the interplay of factors that shape patterns of judicial selection for different types of judicial role, see J. Bell, Principles and Methods of Judicial Selection in France, 61 Southern California Law Review 1757, at 1769-1780 (1988).

Second, there is a basic impulse to restrict the role of representative political institutions in judicial selection under both models. This is reflected in the increasing reliance on Judicial Councils under the bureaucratic model as well as the increasing interest in independent appointment commissions under the professional model. Common to both models, in other words, is a dynamic of depoliticization. This observation forms the starting point for a larger argument against taking the depoliticization of judicial selection too far. Drawing on political science writings on depoliticization, I reflect on some of the consequences of shifting responsibility for the selection of judges away from the political realm. I conclude by cautioning against taking the depoliticization of selection too far.

B. The Model of a Bureaucratic Judiciary

Traditionally, in civil law countries, the judiciary has been organized around what Guarnieri and Pederzoli have termed a bureaucratic model. When articulating this model, Guarnieri and Pederzoli had judiciaries in France, Italy, Portugal and Spain in mind. However, to varying degrees, this model has also informed judiciaries in Austria, Finland, Germany, Greece, the Netherlands and Sweden.[4] It conceives of the judiciary as part of the national public bureaucracy. Judges are viewed as civil servants, that is to say, as *functionaries*,[5] with their primary role to apply pre-existing legal rules promulgated by the legislature. Under the model, the traditional assumption is that the judicial function involves important but largely routine work, with the outcome of disputes typically of greater significance to the litigants than the wider community. To put this differently: judging, under the bureaucratic model, is viewed more as a *job* in which people spend a substantial part of their working life, and less as a *public office* that is charged with performing important social, economic and constitutional tasks.[6] In keeping with this vision of judges as part of the larger national public bureaucracy, and without denying that the trend towards the increasing political relevance of the

---

4 M. L. Volcansek, Appointing Judges the European Way, 34 Fordham Urban Law Journal 363, at 372 (2007).

5 J. Merryman/R. Perez-Perdomo, The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America, at 35 (3rd ed., 2010).

6 J. Bell, Judiciaries within Europe: A Comparative Review, at 24 (2006).

judiciary applies to civil law and common law countries alike, the judicial role under the bureaucratic model has traditionally been viewed as less politically significant, less prestigious and with a lower profile than under the professional model associated with the common law tradition.

According to Guarnieri and Pederzoli, there are five main features that distinguish the model of a bureaucratic judiciary.[7] First, judicial recruitment is based largely on competitive examinations and, in this, resembles recruitment into the civil service. Judges are recruited at a young age, normally immediately after graduating from university. Typically, competitive public examinations are open to law graduates. Previous professional experience is not required and is in no way assessed by the examinations. Selection is instead on the basis of written and oral examinations that test a candidate's theoretical understanding of the law.[8] Though the Ministry of Justice tends to be responsible for the conduct of the examinations, as well as for monitoring judicial recruitment as a whole, the selection of judges under the bureaucratic model is merit-based, with little scope for partisan considerations at the moment of initial recruitment. There is concern, however, that examinations might frustrate efforts to diversify the judiciary, for example, by unduly favouring middle-class candidates.[9]

Second, the training and socialization of judges occurs within the judiciary itself. Because they lack prior professional experience, newly appointed judges undergo a probationary training period under the supervision of senior judges. Training not only prepares successful candidates for their future work by enhancing their legal knowledge and practical skills, it also helps to forge a common sense of identity within the judiciary. At the same time, however, this results in a division between the judiciary and the legal profession; a division not paralleled in common law countries where judges tend to be recruited from, and share the values of, the legal profession.[10] This division under the bureaucratic

---

7 Guarnieri/Pederzoli (note 2), at 66-67.

8 Id., at 35.

9 D. M. Provine/A. Garapon, The Selection of Judges in France: Searching for a New Legitimacy, in: K. Malleson/P. H. Russell (eds.), Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World, 176, at 187 (2006).

10 G. Di Federico, Recruitment, Professional Evaluation, Career and Discipline of Judges and Prosecutors in Italy, in: G. Di Federico (ed.), Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe: Aus-

model encourages the relative insularity of the judiciary and leads to the *balkanization*[11] of the legal profession.

Third, bureaucratic judiciaries are hierarchical, with successful candidates entering at the lowest judicial rank, but with a reasonable expectation of working their way up the career ladder until retirement. In a career judiciary that treats judges as civil servants, there tend to be fairly powerful trade unions to defend the organizational interests of the judiciary.[12] In some civil law countries, such as France, levels of union membership across the judicial system are significantly higher than in other professions.[13] One explanation for this is that membership is commonly believed to be beneficial to a judge's promotion prospects.[14] Under the bureaucratic model, promotions are made on the basis of two criteria – namely, seniority and merit. Considerable discretion is afforded senior judges to determine *merit*; however, broadly speaking, *merit* has been identified with technical competence, expertise and good judgment. The final decision whether to promote a specific judge may be left to the Minister of Justice, and may involve input from the legislature, but much weight tends to be placed in practice on 'peer review', and in particular the recommendations of the judicial elite.[15] Indeed, there is often a close alliance in bureaucratic judiciaries between senior judges and the officials in the Ministry of Justice.[16] In career judiciaries, judges have tended to form "a bureaucratic corps of government servants, who are in a sense employees of the ministry of justice just as other civil servants are employees of the ministry of agriculture or the foreign ministry […] [and who] have a great many ties of outlook and

---

tria, France, Germany, Italy and The Netherlands and Spain, 127, at 128-129 (2005).

11 Merryman/Perez-Perdomo (note 5), at 103.

12 See G. Di Federico, Judicial Independence in Italy, in this volume, Chapter B. IX.

13 Trade union membership across the judiciary in France varies between 30-35%, which compares with 10-15% across the country as a whole. See S. Boyron, The Independence of the Judiciary: A Question of Identity, in: G. Canivet/M. Andenas/D. Fairgrieve (eds.), Independence, Accountability and the Judiciary, 77, at 88 (2006).

14 Id., at 89.

15 Guarnieri/Pederzoli (note 2), at 49-50.

16 See G. Di Federico, The Italian Judicial Profession and Its Bureaucratic Setting, The Juridical Review 40, at 48 (1976).

sympathy with other government executives".[17] While progressing up the judicial ranks, senior judges often have considerable contact, and develop ties, with officials in the Ministry of Justice.

Fourth, judges under the bureaucratic model are generalists rather than specialists. Successful candidates are not recruited for specific roles, but rather are expected to be able to perform the various different roles associated with their rank of the judiciary; they might, for example, be required to hear family disputes, resolve commercial disputes or even, in some civil law countries, to serve as a public prosecutor, and they might be expected to change from one to the other during a life-long judicial career.

Fifth, under Guarnieri and Pederzoli's bureaucratic model, guarantees of judicial independence are said to be weaker than those found in professional judiciaries, especially in respect of the internal independence of the judiciary.[18] To be clear, Guarnieri and Pederzoli's claim is simply that judges under the bureaucratic model enjoy a *lower* degree of internal independence than their counterparties under the professional model. This is most obvious, perhaps, in terms of the influence of senior judges on the promotion prospects of junior colleagues, at least insofar as there is a potential tension between the independence of individual judges in the lower courts on the one hand and a pronounced hierarchy that privileges the views and preferences of high-ranking judges on the other. At the same time, insofar as the Ministry of Justice retains overall responsibility for recruitment and has a say in promotion decisions, there remains the possibility of direct, external influence from political actors.

The model of a bureaucratic judiciary is premised, then, on an approach to judicial recruitment that assumes that judges are appointed young, following competitive examinations, and subsequently trained and socialized within the judiciary itself. This approach further assumes that, once appointed, judges will remain in service throughout their entire working life, following a career path that combines merit and seniority. Though this remains the dominant model in the civil law tradition, there has been a trend in recent years towards introducing opportunities for lateral entry into the judiciary by experienced legal professionals and civil servants. This trend reflects a concern to secure a more di-

---

17 M. Shapiro, Courts: A Comparative and Political Analysis, at 151 (1981).

18 Guarnieri/Pederzoli (note 2), at 66.

verse and less insular judiciary.[19] That civil law countries, with the notable exception of Italy, increasingly recruit from among legal practitioners as well as recent graduates gives recognition to the fact that being a judge "requires a blend of experience and qualities that cannot be found just among those who wish to dedicate their lives to being judges".[20] Related to this is a trend to establish judicial schools to train new judges, with the example of the *École Nationale de la Magistrature* in France being replicated in other countries, such as Spain and Portugal, but not yet in Italy. Admission is not limited to success in competitive examinations, but open to those with graduate degrees in law and non-judicial professional experience. These schools also provide continuing education courses for sitting judges.

C. The Model of a Professional Judiciary

The model of a professional judiciary is associated with common law systems, and has been embraced to differing degrees and in different ways in England, the United States, Canada, Australia and New Zealand. The model is *professional* in the sense that it is distinguished by its close relationship with, and might even be described as dominated by, the bar. If the bureaucratic model tends to envisage judging as a lifelong *job*, the professional model places more stress on judging as a *public office* to which those who excel at the bar aspire. Judging, especially in the appellate courts, is generally recognized as performing important social and constitutional tasks, for example, by enunciating principles that provide certainty to commercial transactions or holding political actors to account for legal wrongs on legal grounds. In this, the model has tended to place more emphasis than the bureaucratic model on the fact that judges often have an important norm-creating as well as norm-applying role. Put in slightly different terms, the judicial function has long been recognized as *political*, in the sense that judges exercise discretion when deciding contentious public policy questions under the guise of politically sensitive legal disputes. Unsurprisingly, judges under the professional model have also tended to have a higher profile and greater prestige than their counterparts in bureaucratic judiciaries, with

---

[19] R. de Lange, Judicial Independence in The Netherlands, in this volume, Chapter B. II. 1.

[20] Bell (note 6), at 19.

their initial appointment typically triggering greater interest from political actors.

As with the bureaucratic model, Guarnieri and Pederzoli identify five features that distinguish the professional model.[21] First, most judges are appointed only after having acquired substantial professional experience at the bar, and thus when first appointed are much older than newly appointed judges under the bureaucratic model.[22] Appointments under the professional model are normally made either by the executive (as in the systems of substantially unfettered ministerial discretion characteristic of judicial appointments in Canada, Australia and New Zealand and, prior to the reforms of 2005, England) or following combined action by the executive and legislature (as in federal judicial appointments in the United States). However, in England, since 2005, candidates for most positions on the bench are recommended by an independent Judicial Appointments Commission, with the minister able to reject recommendations only in limited circumstances. Proposals for reforming judicial selection around a non-partisan appointments commission akin to that in England animate the contemporary debate in Australia, Canada and New Zealand.

Second, recruitment focuses mainly on lawyers who have practiced as advocates and appeared regularly before the higher courts (although in some common law countries, there is a history of appointing a small number of legal academics to the bench). This approach ensures that there are shared values between the bar and the bench; and, indeed, under the professional model, it is common to talk of a strong and independent bar as a prerequisite for an independent judiciary. One consequence of recruiting experienced practitioners is that newly appointed judges have already acquired practical skills and tend to be familiar with the day-to-day workings of courts. Continuing education is available for judges, but less emphasis tends to be placed on compulsory judicial training than under the bureaucratic model.[23] A further result of the professional model's approach to selection is that if the legal profession lacks diversity, so too will the judiciary. A commonplace criticism is that judges in common law countries are mostly white, middle-class males from professional families, with elite educational backgrounds,

---

21 Guarnieri/Pederzoli (note 2), at 67.

22 J. L. Waltman, Courts in England, in: J. L. Waltman/K. M. Holland (eds.), The Political Role of Law Courts in Modern Democracies, 108, at 111 (1988).

23 See K. Malleson, Judicial Training and Performance Appraisal: The Problem of Judicial Independence, 60 Modern Law Review 655 (1997).

and whose professional experience is limited to lucrative work at the bar.[24] In the face of this criticism, there is heightened awareness in common law countries of the need to strive for greater diversity on the bench.[25]

Third, there tends to be no formal system of career advancement, and promotions are less common than under the bureaucratic model where the highest administrative, civil and criminal courts are normally staffed by many more judges. Less emphasis has tended to be placed on the appraisal of junior judges by more senior colleagues.[26] All of this contributes to a much less pronounced judicial hierarchy under the professional model (though, in some common law countries, the senior judiciary has exerted considerable influence on decisions both about whom to appoint as judges in the first place as well as whom to promote from the lower ranks of the judiciary). Fourth, while judges under the bureaucratic model are supposed to be able to perform all of the roles associated with their rank, judges under the professional model are normally recruited for particular positions on specific courts. Once appointed, most judges cannot normally be removed or transferred without cause. Fifth, there have tended to be stronger guarantees of judicial independence than under the bureaucratic model, both in terms of internal and external relationships. For example, in one common law country – Canada – there is not only a guarantee of judicial independence in the constitutional text, but also a set of decisions of the Supreme Court that characterizes judicial independence as an *unwritten* constitutional principle. By designating judicial independence as an unwritten principle, the Court has enforced limits on the legislature relating to

---

[24] See, for example, in the context of England and Wales, the seminal critique by J. A. G. Griffith, The Politics of the Judiciary (5th ed., 1997). For more recent research on the composition of the judiciary in England and Wales, see P. Darbyshire, Where do English and Welsh Judges Come From?, 66 Cambridge Law Journal 365 (2007).

[25] See K. Malleson, Diversity in the Judiciary: The Case for Positive Action, 36 Journal of Law and Society 376 (2009); and K. Malleson, Rethinking the Merit Principle, 33 Journal of Law and Society 126 (2006).

[26] See, for example, the discussion of the lack of a systematic professional development and evaluation that traditionally characterized the Australian judiciary in J. M. Williams, Judicial Independence in Australia, in: P. H. Russell/ D. M. O'Brien (eds.), Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World, 173, at 187-188 (2001).

such matters as the remuneration and immunity of judges that cannot be found in the constitutional text itself.[27]

D. The Politics of Judicial Selection – Some Preliminaries

With sketches of Guarnieri and Pederzoli's bureaucratic and professional models now in place, I want to explore the political dimensions to judicial selection within each model. So far I have spoken rather loosely of the *politics* of – or *political dimensions* to – judicial selection. There are, in fact, a number of different, if normally closely related, senses in which we can talk of the *politics* of selection in bureaucratic and professional judiciaries. To my mind, there are five main senses. The first concerns the various influences that inevitably shape, to some extent, the composition of the judiciary, whether stemming from political actors, judicial actors or private actors (such as bar associations or large law firms), and whether focused on the initial selection of judges or their subsequent progression up the judicial ranks. The second sense traces the extent to which representative political institutions, such as the executive and the legislature, are involved in deciding who should be selected or promoted. Together, these two senses bring into perspective the distribution of power in judicial selection. The third sense concerns the extent to which ideology is taken into account as part of the evaluation of a candidate's suitability, whether for initial selection or subsequent promotion. The fourth sense focuses on group politics, whether taken to refer to the internal group dynamics of the judiciary as a whole, or the need to render more diverse the range of groups represented on the bench. The fifth and final sense is concerned with the ways in which, and the degree to which, selection addresses the political legitimacy of the judiciary. To be sure, this short list does not exhaust the many possible political dimensions to judicial selection. The point is simply that there are a great number of senses of the *politics* of judicial selection, with five of particular relevance to Guarnieri and Pederzoli's bureaucratic and professional models. In the next two sections, I trace, once again in a synthetic and approximate fashion, the political dimensions to judicial selection under each of the bureaucratic and professional models.

---

[27] See the essays included in L. Sossin and A. Dodek, Judicial Independence in Context (2010).

E. The Politics of Selection in Bureaucratic Judiciaries

As we have seen, under the bureaucratic model, recruitment has traditionally been via merit-based competitive public examinations, and, even though the Ministry of Justice typically has overall responsibility for judicial selection, there has normally been little scope in practice for political considerations to influence the initial recruitment of judges from among the ranks of law graduates. Political influence is concentrated instead not on initial recruitment but on a judge's career progression. In a career judiciary, prospects for promotion – with the attendant higher salary, prestige and influence – depend on the appraisal of a judge's work by more senior colleagues, often with some involvement by political actors. The incentive, then, may be for judges to write opinions that comply with the expectations of those in power, whether they be ministers or more senior judges, who might themselves owe their lofty rank within the judiciary to alliances with powerful politicians in the Ministry of Justice. There are, perhaps, two main ways in which judges might seek to comply with the expectations of senior colleagues.[28] First, junior judges might adhere to the interpretations adopted by higher courts. Second, they might write rulings in ways that enable their decisions to be reviewed quickly and easily by the higher courts. Noting that judges under the bureaucratic model are much less inclined than their counterparts under the professional model to regard the legal questions before them as generating issues of "first impression". Nicholas Georgakoppoulos has suggested that more junior judges under the bureaucratic model might be reluctant to depart from the interpretations adopted by higher courts for fear that it irks the appellate judges whose recommendations and reports form a crucial part of the promotion process. That is to say, judges on the cusp of promotion might fear that frequently departing from the interpretative approach of higher courts would risk upsetting their more senior colleagues by, for example, reducing the breadth of interpretations adopted by appellate courts, undercutting the preferences of those courts while at the same time increasing the workload for appellate judges.[29]

In several civil law countries, the creation of Judicial Councils has significantly weakened the influence of both the judicial elite and the executive on the promotion prospects of junior judges. The composition

---

[28] N. L. Georgakopuoulos, Discretion in the Career and Recognition Judiciary, 7 University of Chicago Law School Roundtable 205, at 212 (2000).

[29] Id.

and functions of the Judicial Councils vary between countries, but typically includes some responsibility for promotions. Membership usually comprises representatives from the judiciary, legal profession and political system. Of particular importance is the balance of judicial to non-judicial members on Judicial Councils and the method of selecting the judicial members.[30] Where judicial membership is determined by trade union elections, such as in Italy, Judicial Councils have triggered a more prominent and powerful role for trade unions.[31] More generally, as Carlo Guarnieri notes, "when judges are in control of the councils, corporatist interests tend to be privileged, and sometimes the power of the judicial factions becomes a threat to the independence of the individual judge"; however, "when political or parliamentary appointees are in the majority, it is not such a great gain over the past situation of executive predominance".[32] However, when their composition mixes judicial and non-judicial elements, and where they have responsibility for promotion decisions, Judicial Councils can help to enhance the external and internal independence of bureaucratic judiciaries.[33]

In terms of the judiciary's external relations with political institutions, the creation of Judicial Councils with responsibility for promotions reduces the relative power of the Ministry of Justice. Responsibility for

---

[30] For an overview, see N. Garoupa/T. Ginsburg, The Comparative Law and Economics of Judicial Councils, 27 Berkeley Journal of International Law 52 (2008).

[31] In Italy, where competition between trade unions with opposing political ideologies is intense, judges who seek promotion typically align themselves with one of the unions represented on the Judicial Council. As Volcansek explains, "[b]y declaring their political preferences so openly the judges have left themselves no mantle of apolitical credibility from which they can derive legitimacy." M. L. Volcansek, Judicial Selection in Italy: A Civil Service Model with Partisan Results, in K. Malleson/P. H. Russell (eds.), Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World, 159, at 167-168 (2006).

[32] C. Guarnieri, Courts as an Instrument of Horizontal Accountability: The Case of Latin Europen, in: J. M. Maravall/A. Przeworski (eds.), Democracy and the Rule of Law, 223, at 239 (2003). For an example of a Judicial Council where corporatist judicial interests dominate, see the analysis of Italy's *Consiglio Superiore della Magistratura*, in G. Di Federico, Independence and Accountability of the Judiciary in Italy: The Experience of a Former Transitional Country in a Comparative Perspective, in: A. Sajó (ed.), Judicial Integrity, 181 (2004).

[33] C. Guarnieri, Appointment and Career of Judges in Continental Europe: The Rise of Judicial Self-Government, 24 Legal Studies 169, at 182-183 (2004).

appointing non-judicial members of the Judicial Council is usually allocated to the legislature, thus endowing the political parties represented in the legislature with an opportunity to influence the judiciary directly, without having to filter any concerns through the Ministry of Justice.[34] In terms of the internal independence of the judiciary, which has traditionally been a weak point under the bureaucratic model, the Judicial Councils reduce the power of the more senior judges over their junior colleagues. Whereas promotions in bureaucratic judiciaries traditionally privilege the recommendations of high-ranking judges, judicial membership on the Judicial Council usually includes representatives from all ranks of the judiciary, thus reducing the relative strength of senior judges.[35] Because judges in the lower courts now participate in selecting judges for the higher courts, less importance tends to be placed on the reports and recommendations of senior judges. This leads to wider criteria being relied upon when making promotions: no longer are technical legal competence or willingness to adhere to the rules of higher courts the sole criteria for assessing a candidate's suitability for promotion. As Guarnieri observes, the "[v]iews of others outside the judicial system (in particular, political parties in Parliament) have gained in importance, especially if they can participate in the appointment of members of the [Judicial] Council".[36] Indeed, in assessing the importance of Judicial Councils on the politics of judicial selection in bureaucratic judiciaries, Guarnieri concludes that the reforms "have not so much reduced the political influence on the judiciary as they have altered the way political influence is exercised and, therefore, the relative power of political and institutional actors".[37] Traditionally the influence of the executive and (albeit to a lesser extent) the legislature on the judiciary has been filtered through senior judges who have been in control of promotions. However, as Guarnieri has explained, the creation of Judicial Councils has "opened up a third channel of political influence, which can be seen as a consequence of the slow but steady attempt to limit executive power and the consequent strengthening of judicial guarantees in civil law judiciaries".[38] I will summarize the politics of se-

---

34 Id., at 183.

35 Z. Fleck, Judicial Independence in Hungary, in this volume, Chapter B. I. 2.

36 Guarnieri (note 33), at 183.

37 Id., at 185.

38 Id., at 184.

lection under the bureaucratic model below, but first I want to turn to the professional model.

F. The Politics of Selection in Professional Judiciaries

Political influences in a bureaucratic judiciary operate not at initial recruitment, but are channelled through the procedures for career advancement. In a professional judiciary, by contrast, where opportunities for promotion are much more limited, political influences operate largely through the procedures for initial recruitment. Because opportunities for promotion within professional judiciaries are so limited, and because there tend to be robust guarantees of judicial independence that insulate judges from political influences once they are appointed, the procedures for judicial recruitment under the professional model are "the most immediate and visible means of connection between the judiciary and other parts of the political system".[39] Involvement of political institutions in judicial recruitment, whether via executive appointment or combined executive nomination and legislative hearing, is viewed as a way of securing a measure of political legitimacy for judges who have long since been recognized as performing an important social, economic, constitutional and, ultimately, political role.[40] This approach also helps to ensure that candidates for the bench, who once appointed are otherwise insulated from most political influences, will share, in broad terms, the values and outlook of the polity as a whole.

In several common law countries, judicial selection is a function of the executive, usually performed by, or upon the advice of, a specific minister and discharged at the executive's discretion. A distinctive feature of judicial appointments in systems of ministerial discretion is that the regime regulating recruitment and selection is, for the most part, a matter of convention, rather than formal legal rules. Typically, the law simply provides that judges are to be appointed by the executive acting on the recommendation of a designated minister; for example, the Minister of Justice in Canada, the Attorneys General in Australia and New Zealand and, prior to the reforms of 2005, the Lord Chancellor. By convention, ministers consult in private with interested parties, including high-ranking judges and legal organizations. The purpose of the minister's

---

[39] Guarnieri/Pederzoli (note 2), at 34.

[40] Id.

consultations is to identify suitable candidates for the bench, and, in particular, much weight tends to be placed on the comments of the senior judges. Once a suitable candidate has been found, the minister informs the cabinet, which then routinely acts on the minister's recommendations.

Opportunities for political patronage in a system of ministerial discretion are fairly obvious (although because the number of positions on the higher courts tend to be fairly limited, the scope for shaping long-term political agendas through judicial appointments is also relatively restricted). During the 19th and first half of the 20th centuries, judicial appointments in several common law jurisdictions were influenced by partisan political considerations. However, in most common law jurisdictions – with the notable exception of Canada where blatant episodes of political patronage were evident in federal judicial appointments in the 1980s[41] – a convention developed through the course of the 20th century that ministers would treat partisan considerations as irrelevant when determining a candidate's suitability for judicial office.[42] This is, of course, how it should be. That a lawyer is politically active, for example by being a member of or a donor to a political party, does not mean that they are not also qualified for judicial office, but nor should it be treated as relevant when determining suitability for appointment to the bench. That is to say, political activity and connections do not

---

41 See P. H. Russell/J. Ziegel, Federal Judicial Appointments: An Appraisal of the First Mulroney Government's Appointments and the New Judicial Advisory Committees, 41 University of Toronto Law Journal 4 (1991); and T. Riddell/L. Hausegger/M. Hennigar, Federal Judicial Appointments: A Look at Patronage in Federal Appointments since 1988, 58 University of Toronto Law Journal 39 (2008). For brief discussion of the system of advisory committees that were set up in response to the problem of patronage in judicial appointments by the federal government, see G. Gee, The Politics of Judicial Appointments in Canada, in: Judicial Appointments: Balancing Independence, Accountability and Legitimacy, 99 (2010).

42 For example, in the New Zealand context, see G. Palmer, Judicial Selection and Accountability: Can the New Zealand System Survive?, in: B. D. Gray /R. B. McClintock (eds.), Courts and Policy: Checking the Balance, 11, at 44 (1995); and J. McGrath, Appointing the Judiciary, New Zealand Law Journal 314 (1998).

disqualify someone from judicial office, but nor are they relevant criteria when making an appointment.[43]

Even though contemporary practice is for ministers to eschew partisan political considerations, there is concern in a growing number of common law countries about a system that relies heavily on unbridled ministerial discretion. Criticism has revolved around the concentration of power in the hands of a single minister, and the lack of transparency in an approach that relies on the secret soundings that the minister receives from interested parties. That judges spent an increasing amount of time resolving politically sensitive legal disputes, and reviewing the actions and decisions of the government in particular, gives rise to a particular need to prevent ministers from employing appointment powers in ways that might undermine the independence of the judiciary, for example by appointing a political placeman. Criticisms of this type have led to the development of protocols that enhance the transparency of the appointment process, for example, by setting out the parties that the minister must consult when identifying suitable candidates for the bench. These criticisms have also triggered interest in proposals to shift responsibility for identifying suitable candidates for the bench from a minister to the sort of non-partisan appointments commission that has operated in England since 2005. The Judicial Appointments Commission in England – which is composed of judges, lawyers and lay people, but no politicians – makes recommendations that the Lord Chancellor can, in practice, reject only in very limited circumstances. Proposals for reform in many common law countries centre on a system where ministers must appoint persons recommended by the non-partisan commission, but can ask for alternative names if not satisfied with the commission's initial recommendation.[44]

---

[43] L. Sossin, Judicial Appointment, Democratic Aspiration and the Culture of Accountability, 58 University of New Brunswick Law Journal 11, at 35 (2008).

[44] For example, in the New Zealand context, see T. Eichelbaum, Judicial Independence: Fact or Fiction?, New Zealand Law Journal 90 (1993); and R. Cooke, Empowerment and Accountability: The Quest for Administrative Justice, 18 Commonwealth Law Bulletin 1326 (1992). Cf. P. East, A Judicial Commission, New Zealand Law Journal 189 (1995); and J. Allan, Judicial Appointments in New Zealand: If it were done when 'tis done, then 'twere well it were done openly and directly', in: K. Malleson/P. H. Russell (eds.), Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World, 103 (2006).

Criticism has also concentrated on the lack of diversity in professional judiciaries that rely on ministerial discretion.[45] Diversity means different things in different contexts, but, for the most part, concern in common law countries has focused on gender and racial diversity. In systems of ministerial discretion, those appointed to the bench have tended to be well qualified and independently minded white males who have had long and successful careers at the bar. A commonplace criticism of systems of ministerial discretion is that where there is a readily identifiable pool of candidates at the bar whose qualifications for judicial office are obvious, and who are known to the political and judicial elites, there is very little incentive for the minister to encourage interest in a judicial post amongst those whose backgrounds are more unorthodox and who are perhaps not widely known to the judicial and political elites.[46] The imperative of securing a more diverse judiciary has further heightened interest in non-partisan appointments commissions. Proponents of reform argue that commissions result in more women and minorities being appointed as judges, especially where the commission itself features demographic diversity.[47] Opponents refute this, arguing that no clear relationship exists between the procedures used for judicial selection and the composition of the bench, and that increasingly diverse judiciaries are best explained by the increasing diversity within the legal profession.[48]

Proposals for reforming systems of ministerial discretion have tended to focus on a nominating commission akin to that found in England rather than the combined executive nomination and legislative confirmation proceedings associated with federal judicial appointments in the

---

[45] For examples drawn from the debate on gender diversity in Australia, see S. Cooney, Gender and Judicial Selection: Should There Be More Women on the Courts?, 19 Melbourne Law Review 20 (1993); B. Harris, Appointments to the Bench – The Role of a Judicial Service Commission, 15 Adelaide Law Review 191 (1993); and D. O'Sullivan, Gender and Judicial Appointment, 19 University of Queensland Law Journal 107 (1996).

[46] R. Sackville, The Judicial Appointments Process in Australia: Towards Independence and Accountability, 16 Journal of Judicial Administration 125 (2007).

[47] See, for example, in the context of the United States, M. Reddick, Merit Selection: A Review of the Social Scientific Literature, 106 Dickinson Law Review 729 (2002). See generally K Malleson, Rethinking the Merit Principle in Judicial Selection, 33 Journal of Law and Society 126 (2006).

[48] Id. See also Riddell/Hausegger/Hennigar (note 41), at 63.

United States (though for one recent appointment to the Supreme Court of Canada, the candidate selected by the federal government appeared before a parliamentary committee for a non-binding, pre-appointment hearing[49]). The nomination and confirmation of candidates for the federal bench in the United States are viewed as highly political. Both the President and Senate scrutinize the political ideology of judicial candidates, though importance attaches to professional credentials as well. Professional legal associations, and notably the American Bar Association, also scrutinize the suitability of judicial candidates, and the role of a great variety of interest groups in judicial nomination is a distinctive feature of judicial appointments in the United States. By splitting responsibility for nomination and confirmation between the executive and legislature, candidates are subjected to two rounds of scrutiny by political institutions that, depending on the most recent rounds of presidential and congressional elections, might be under the control of different political parties. The potential for partisan political conflict in confirmation proceedings for federal judicial nominees is obvious, especially at times of divided government, and the process has been the subject of considerable criticism.[50] But it is also possible that insofar as federal judicial appointees might have to secure the support of a coalition across political parties as well as different branches of government, the confirmation process might actually lend authority as well as an appearance of neutrality to the federal judiciary. That is to say, judges appointed in this way acquire an important measure of political legitimacy by being scrutinized by two different democratic institutions whose authority stems from multiple rounds of popular elections and that might even be controlled by different political parties.[51]

---

[49] See P. W. Hogg, Appointment of Justice Marshall Rothstein to the Supreme Court of Canada, 44 Osgoode Hall Law Journal 527, at 530 (2006). For the emerging debate about possible parliamentary hearings for appointments to the new UK Supreme Court, see M. L. Clark, Introducing a Parliamentary Confirmation Process for New Supreme Court Justices: Its Pros and Cons, and Lessons Learned from the U.S. Experience, Public Law 464 (2010).

[50] S. L. Carter, The Confirmation Mess: Cleaning Up the Federal Appointment Process (1994); B. Wittes, Confirmation Wars: Preserving Independent Courts in Angry Times (2009).

[51] J. Resnik, Judicial Selection and Democratic Theory: Demand, Supply and Life Tenure, 28 Cardozo Law Review 579, at 594 (2005).

G. Comparison of the Politics of Judicial Selection

It should by now be plain that there are distinct, if different, political dimensions to the selection of judges in the bureaucratic and professional models. Keeping in mind the five main political dimensions identified above, we might summarize the politics of selection under each model as follows:

	Bureaucratic Judiciaries	**Professional Judiciaries**
Political Influence	Concentrated on promotion decisions.	Concentrated on initial recruitment.
Political Institutions	Senior judges traditionally influenced promotion, but their power has been reduced in countries with Judicial Councils	Either executive discretion or combined executive and legislative action, but growing interest in nominating commissions
Political Ideology	Not a feature of promotion decisions; stress on technical competence instead	Not a feature of ministerial discretion, but prominent in federal appointments in US
Group Politics	Between lower and senior judges	Search for greater diversity
Political Legitimacy	Traditionally a less prominent concern	Involvement of political actors secures some political legitimacy

H. The Phenomenon of Depoliticization

Within both the bureaucratic and professional models, it is possible to discern a basic impulse to take the politics out of judicial selection. One theme in debates about selection and recruitment in both bureaucratic and professional judiciaries is the need to avoid politicizing the judiciary, with many reform proposals purporting to depoliticize judicial selection.[52] For example, under the bureaucratic model, where the judici-

[52] A good example of this is provided by comments in 2003 of the then Lord Chancellor, Lord Falconer, when explaining a series of constitutional reforms that included the creation of the Judicial Appointments Commission, "What governs our approach is a clear desire to place power where it should be:

ary has traditionally been viewed as exercising little control over public policy, proposals for reform frequently have sought to enhance the independence of a politically weak judiciary by providing for Judicial Councils that give judges greater control over their own affairs, including by reducing the influence of the Ministry of Justice on judicial promotions. Where under the professional model, the judiciary has long been recognized as performing important social, economic and constitutional roles, many now point to the need to insulate judicial selection from political considerations, for example, by seeking to move responsibility for identifying suitable candidates for the bench away from political institutions and to non-partisan nominating commissions instead. In other words, under both models, and irrespective of whether judges are in relative terms politically weak or powerful, there is a dynamic pushing for the depoliticization of judicial selection. In the remainder of this essay, I want to reflect on this dynamic in the context of the Judicial Appointments Commission in England (though much of what follows also has a wider relevance). I begin, however, by reflecting on the increasingly rich political science literature on the phenomenon of depoliticization within general patterns of modern government.

The political science literature suggests that the term *depoliticization* is, in a sense, a misnomer.[53] Though it is true that the dictionary definition takes depoliticization to denote, in absolute terms, removing all political connections or the rendering of something as apolitical, a more nuanced definition is required when employing this notion within the complex realities of politics and law. For the phenomenon that the rubric of depoliticization captures is not the elimination of politics, but its displacement. Depoliticization is perhaps more accurately characterized as *arena-shifting*.[54] The depoliticization of a policy involves shifting responsibility for that policy away from representative political institutions – such as the executive and legislature – to some new arena and a new decision-maker. Depoliticization, in other words, reduces the involvement of representative political institutions in a decision-making sphere. However, this alone does not change the political nature of the

---

increasingly not with politicians, but with those best fitted in different ways to deploy it […] This depoliticising of key decision-making is a vital element in bringing power closer to the people"; Lord Falconer, Speech to the Institute for Public Policy Research (2003).

[53] M. Flinders/J. Buller, Depoliticization: Principles, Tactics and Tools, 1 British Politics 293, at 295 (2006).

[54] Id.

decision itself. Depoliticizing a decision-making responsibility alters the arena in which, and the process by which, decisions are made, but it does not automatically purge those decisions of their political dimensions, and might even bring different political dimensions to the fore.

The most frequent tactic of depoliticization is where politicians delegate day-to-day responsibility for an issue to a "non-majoritarian institution" that is insulated to some extent from political control; that is to say, an agency that has specialized public authority separate from that of representative political institutions, which is neither directly elected by the people, nor directly managed by politicians.[55] A key rationale for this tactic is that the non-majoritarian institution typically pursues a clearer, more focused mandate than politicians, using decision-making processes that are more transparent and more inclusive than the secret, and often insular, deliberations associated with ministers, cabinets and government.[56] The politician delegating decision-making responsibility usually specifies a set of objectives that the non-majoritarian institution must meet. A number of consequences flow from delegating an issue to a non-majoritarian institution. One is that politicians often search out novel and perhaps subtle ways to exercise some political influence over a delegated issue. Or as Matthew Flinders and Jim Buller put it, a gap sometimes develops between the "principled commitment to depoliticization" and its "practical implementation".[57]

A common assumption is that depoliticization tactics are normatively desirable.[58] Delegating responsibility for some issue to a non-majoritarian institution that is insulated to some extent from political control is commonly assumed to be a good thing, and especially in an age where politics and politicians are associated in the popular consciousness with duplicity, greed, corruption and inefficiency.[59] Many politicians share these assumptions. For it seems that politicians have internalized a view of politics as little more than horse-trading, rent-seeking and office-seeking and of themselves as largely self-interested, self-serving and un-

---

55 M. Thatcher/A. Stone Sweet, The Politics of Delegation: Non-Majoritarian Institutions in Europe, 25 West European Politics 1 (2002).

56 Id., at 19.

57 Flinders/Buller (note 53), at 302.

58 J. Buller/M. Flinders, Democracy, Depoliticization and Arena-Shifting, in T. Christensen/P. Laegreid (eds.), Autonomy and Regulation: Coping with Agencies in the Modern State, 53, at 54 (2006).

59 C. Hay, Why We Hate Politics (2007).

trustworthy. That politicians depoliticize day-to-day responsibility for particular issues can be read as evidence that they no long trust themselves. Depoliticization can be read, in other words, as "an announcement by the demos that it does not trust itself and wishes to put certain policy questions beyond its own reach".[60] Ironically, however, by taking a policy issue seriously, and by concluding that this issue should in fact be delegated to a non-majoritarian institution, politicians act in ways that indicate that they are not nearly as bad or untrustworthy as these commonly held assumptions suggest.

I. The Depoliticization of Judicial Selection in England

With these lessons in mind, I want to consider the trend towards depoliticization of judicial appointments in England. The creation of the Judicial Appointments Commission in 2005 provides a good example of the depoliticization of judicial selection. The Judicial Appointments Commission is an independent commission that selects candidates for judicial office in England and Wales. It has 15 members: six lay people, five judges, two lay judges and two members of the legal profession.[61] This reflects a very strong legal presence, although the chair must be one of the lay members. The Judicial Appointments Commission recommends a single name to the Lord Chancellor, who accepts or rejects that name, or invites the Judicial Appointments Commission to reconsider its recommendation. If the Lord Chancellor rejects a recommendation, reasons must be given. Previously the Lord Chancellor and Prime Minister had, in practice, unfettered discretion when making judicial appointments, but this discretion has been effectively removed.

In this way, the creation of the Judicial Appointments Commission has altered the arenas and procedures through which appointment decisions are made, in effect removing responsibility for judicial selection from ministers to a non-majoritarian institution. Noteworthy is the very considerable extent to which the involvement of political actors in judicial selection has been squeezed out (and even though it is widely ac-

---

[60] M. Shapiro, The Problems of Independent Agencies in the United States and the European Union, 4 European Public Policy 278, at 289 (1997). Cited in Buller/Flinders (note 58), at 72.

[61] See S. Turenne, Judicial Independence in England and Wales, in this volume, Chapter B. II. 2. b).

cepted that political considerations have not been a significant feature of judicial appointments in England for 50 or 60 years). One option would have been to provide the Lord Chancellor with a shortlist from which to choose.[62] The list could have been ranked or unranked. Plainly, ministerial discretion would have been greatest where the shortlist was unranked.[63] Neither approach was followed in England, where a single recommendation is presented to the Lord Chancellor. The composition of some selection commissions, such as the Judicial Services Commission in South Africa, includes members of the legislature in order to enhance its political legitimacy. But, once again, this option was not seriously considered in England.[64] Arguably, the new system in England goes too far in circumscribing the scope for political involvement. It is perhaps unsurprising therefore that, at times, the relationship between the Lord Chancellor and Judicial Appointments Commission has been strained, with clashes over such matters as who should determine non-statutory eligibility criteria for judicial postings.[65] It is possible, of course, that there were genuine disagreements over such matters. But it is also possible that after having delegated responsibility to the Judicial Appointments Commission, the Lord Chancellor has nevertheless sought novel ways to exercise some degree of political influence, for example by seeking to exercise control over the eligibility criteria for judicial office.

Though the creation of the Judicial Appointments Commission has depoliticized judicial selection by changing the arenas and procedures through which selection decisions are made, it has not purged those decisions of their political dimensions. For the question of whom to appoint as a judge always retains distinctly political dimensions, in terms for example of the legitimacy and diversity of the judiciary, as well as political implications for institutional relationships across the political and legal systems. But more than this, the depoliticized approach that is organized around a commission that is itself distinguished by a strong legal presence risks privileging a new set of political considerations, namely what might be called "the politics of the lawyer class".[66] As

---

[62] See K. Malleson, Creating a Judicial Appointments Commission: Which Model Works Best?, Public Law 102, at 111 (2004).

[63] Id.

[64] Id., at 118.

[65] See Turenne (note 61), Chapter B. II. 1. d).

[66] I borrow this phrase from B. T. Fitzpatrick, The Politics of Merit Selection, 74 Missouri Law Review 675, at 690 (2009).

with any large group, there are doubtless a range of opinions and beliefs amongst individual lawyers. It seems reasonable to suppose, however, that the views of most (but clearly not all) lawyers might be more liberal than members of the general public, especially on matters of social policy.[67] It might also be that the distribution of views among lawyers differs from those of non-lawyers on such matters as the proper role of and limits on courts or the proper approach to the protection of rights. If lawyers are indeed more liberal than the general public – both in terms of those issues that animate political debate and questions about the proper role of courts – and if the opinions of the legally qualified members on the Judicial Appointments Commission carry extra weight, then we might expect a liberal disposition to be reflected, to some extent, and over time, in those ultimately appointed as judges, especially to higher courts which review the most politically contentious cases.

It might be argued that the advantage of the Judicial Appointments Commission is that it concentrates on the professional credentials of candidates, not on matters of ideology. Perhaps this is so. However, just as ideology might from time to time influence a minister's selection under a system of direct ministerial appointment, it seems plausible that this could also be true for a depoliticized system, especially when considering appointments to the higher courts. However, even if this is not so, and the Judicial Appointments Commission in fact succeeds in disregarding the ideological views of candidates in all cases, there may still be a problem. For if the distribution of ideological views among lawyers differs from the rest of the public, then a method of appointment that does not permit some latitude for ideological considerations will culminate in a judiciary that reflects the skewered ideological distribution found amongst the legal profession.[68]

To put this differently: one result of depoliticizing judicial appointments might in fact be "a lack of heterogeneity among those ultimately chosen as judges, that we might end up with an insulated, self-selecting lawyerly caste".[69] Even where a non-partisan commission such as the Judicial Appointments Commission is charged with promoting gender and racial diversity, depoliticization could, in other words, jeopardize the diversity of ideological views on the bench, with an increasing gap

---

[67] Id.

[68] Id., at 676.

[69] Allan (note 44), at 110.

developing between the opinions of judges on the one hand and the political class and public at large on the other. Given that political involvement has traditionally been seen as an important means of securing an important measure of legitimacy for professional judiciaries, as well as a way of ensuring shared values between the judicial and political elites, the dynamic of depoliticization should give us cause for concern. Thus, while the impulse to remove politics from the selection of judge is understandable, it must not be taken too far. In short, there must always be a role for political institutions in judicial selection – and, in the context of a professional judiciary, this involves preserving a critical channel for injecting political legitimacy into judicial decision-making. It may be that recent reforms in England go too far in shifting responsibility away from political institutions. All of which reminds us that the politics of judicial selection are persistent, and that the choice before us is never between a *political* or *non-political* system of selection. Rather, the choice is always about how can we channel the political dimensions to judicial selection in ways that secure a judiciary that is independent, diverse and legitimate.

J. Conclusion

I began by sketching the broad contours of the models of a bureaucratic judiciary and professional judiciary developed by Carlo Guarnieri and Patrizia Pederzoli. I then sought to render explicit some of the political dimensions to the recruitment and selection of the judges in the two models. In doing so, my aim was to point to the great number of different ways in which judicial recruitment and selection are political; that is to say, my aim was to underscore the inescapably politically nature of judicial selection. One theme evident in both the bureaucratic and professional models was a basic concern to *depoliticize* judicial selection. By looking at some recent political science literature, I suggested that depoliticization is, perhaps, best understood as *arena-shifting*, whereby responsibility for judicial selection shifts from representative political institutions to non-majoritarian institutions, such as the Judicial Appointments Commission in England. In particular, I stressed that depoliticization does not eliminate politics from the appointment of judges, but rather shifts it to a new arena. Ultimately, depoliticization might also privilege the politics of the legal profession in ways that might ultimately erode the traditional connection in professional judiciaries between the courts on the one hand and political institutions on the other.

Judicial Independence in England and Wales

*Sophie Turenne**

A. Introduction

Following a comprehensive programme of constitutional reform that started with the Human Rights Act in 1998, a debate on judicial independence[1] and accountability has re-emerged in England and Wales.[2] Only in the Constitutional Reform Act 2005 (CRA) has the longstanding convention that government ministers have to uphold the continued independence of the judiciary been formalized.[3] The CRA also introduced some formal safeguards for judicial independence, viz. new mechanisms for appointing, training and disciplining judges (B). Although these measures acknowledge the growth in size and complexity of the judiciary, they have led to new administrative responsibilities for the Lord Chief Justice, despite strained financial resources. The creation of a Judicial Appointments Commission, and the emphasis on training

* I am grateful to Professor John Bell for his comments on an earlier draft.

1 It is suggested that freedom from outside influence is a defining feature of judicial independence. Such outside influence refers to political pressure, to pressure from other judges and the media and also to the indirect pressure that can arise from the social composition of the judiciary. As a result, judicial independence is secured by many factors, such as salary, tenure, immunity and the formal mechanisms of appointment and removal.

2 For an account of previous years, see J. A. G. Griffith, The Politics of the Judiciary (5th ed., 1997); R. Stevens, The Independence of the Judiciary (1993); see also N. Browne-Wilkinson, The Independence of the Judiciary in the 1980s', 4 Public Law 44 (1988) about the Lord Chancellor's threats to judicial independence *via* the Lord Chancellors' Department mechanisms of financial control of the courts.

3 Section 3 CRA.

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233, DOI 10.1007/978-3-642-28299-7_5, Published by Springer-Verlag Berlin Heidelberg 2012

and detailed guidelines on judicial conduct (D), complete the gradual emergence of a career judiciary.

But in the recent words of the Lord Chief Justice, "[…] times change, and however they do change, for the purposes of the judiciary, our independence and effectiveness must be reinforced."[4] His guarded introduction to his *Business Plan for 2009-2010* – the very title of which is likely to make many judges wince – acknowledges a judiciary, potentially under threat from a combination of a powerful executive and its own obligation to give effect, if "possible",[5] to all legislation in a way that is compatible with the ECHR (C). The advent of the Human Rights Act has exacerbated the opportunities for politicians and judges to come into conflict (D). The developments below suggest that judicial independence is maintained despite having to accommodate strained resources and some tensions with the executive.

B. Structural Safeguards

The CRA set up a new leadership structure: while the Lord Chancellor is responsible for the administrative functioning of the courts, the Lord Chief Justice is responsible for the judicial function of the courts[6] (I). The CRA has also brought greater transparency and professionalism in the appointment process (II). It however creates new pressures, with a need to develop the notion of promotion within the judicial hierarchy (III), and a concern that the current judicial remuneration is not well-suited to the judiciary (IV). A recent emphasis on the standards of judicial conduct combines a traditional and unsatisfactory reliance on a case law on recusal (V), with some new statutory requirements for disciplinary proceedings (VI and VII). Judicial immunity remains limited to cases where the judge: (i) acts in the *bona fide* exercise of his office; and (ii) in the belief (though mistaken) that he has jurisdiction (VIII). But some new challenges have surfaced. The changes brought under the CRA also call for a judiciary to have a clearly identifiable voice, and the Judges' Council's role is significant in this respect (IX). Furthermore, in

---

[4] See the Judicial Office's Business Plan for 2009-2010 (the Judicial Office provides administrative support to Judge Lord Chief Justice)

[5] Section 3 Human Rights Act 1998.

[6] The Lord Chief Justice is the President of the Courts of England and Wales and the presiding judge of the Criminal Division of the Court of Appeal.

spite of increasing the administrative load of the judiciary, resources are under strain (X).

I. Administration of the Judiciary

1. Organs in Charge of the Administration of the Judiciary

a) A New Leadership Structure

Until the CRA came into force in April 2006, the office of the Lord Chancellor had relatively weak internal governance structures. The Lord Chancellor and the Minister of Justice are now one and the same person, although confusingly both titles remain (in the media, the current Lord Chancellor, Kenneth Clarke is more commonly referred to as the Minister for Justice). The CRA transferred the role of head of the judiciary from the Lord Chancellor, a government minister whose appointment is a political one, to the Lord Chief Justice, who is chosen by a specially appointed committee, convened by the Judicial Appointments Commission.

The CRA thereby formalized the existing partnership between the government and the judiciary, known as the Concordat. This agreement set out a system of consultation and joint decision-making between the Lord Chief Justice and Lord Chancellor in areas such as judicial discipline and court management, setting in place a new leadership structure.[7] In addition, since the CRA, the Judicial Appointments Commission, subject to the Lord Chancellor's remaining limited role in this area, is responsible for the selection of judges.[8] It started work in 2006.

b) The Ministry of Justice

Since 2005, the administration of the courts has been overseen by Her Majesty's Courts Service (HMCS), originally an executive agency of the Ministry of Justice (itself a recently founded department). From April 2011, HMCS and the Tribunals Service have integrated to form Her Majesty's Courts and Tribunals Service (HMCTS) and HMCTS is re-

---

[7] The Concordat was established following discussions between the Judges' Council, senior judges and the Department for Constitutional Affairs (DCA, as the Lord Chancellor's Department had been briefly retitled).

[8] See *infra* B. II. 2. c).The Judicial Selection Process.

sponsible for managing all tribunals and courts, including the magistrates' courts, except the UK Supreme Court. It deals with the operation of court facilities and the treatment of court users, and provides the administrative system, the staff and the infrastructure (IT, buildings). In that sense, it is similar to a Judiciary Agency such as that in Spain or Sweden. The new Supreme Court, formerly the judicial committee of the House of Lords, also has its budget provided by the Ministry of Justice but has operational autonomy.[9]

Judicial fears that the new Ministry would leave the courts vulnerable to budget restrictions (competing in particular with the costs of maintaining prisons, which is now also within the Ministry's remit) led senior judges, during 2007, to negotiate with the government for greater autonomy over the disposal of the resources for the administration of justice. A new partnership between the Lord Chancellor and the Lord Chief Justice was agreed in 2008 and renewed in 2011.[10] Under this agreement, the operation of the HMCS, now HMCTS, is no longer controlled by the Ministry of Justice but it is not fully autonomous either.[11] The Lord Chancellor and Lord Chief Justice are partners for the governance, financing and operation of HMCTS: they jointly agree the aims, priorities and funding for HMCTS. Day-to-day governance of the HMCTS is delegated to a board with an independent Chairman.

c) The Lord Chief Justice

Under the CRA, the Lord Chief Justice's responsibilities include the deployment of individual judges and their welfare, training and guidance, and the judicial business of the courts (including the allocation of work within the courts).[12] The Lord Chief Justice is also responsible for representing the views of the judiciary to Parliament, to the Lord

---

[9] See Lord Phillips expressing reservations about the Court's financial independence, Judicial Independence and Accountability: A View from the Supreme Court, Lecture at UCL Constitution Unit, 8 February 2001.

[10] Her Majesty Courts Service Framework Document, April 2011, Cm. 8043.

[11] The budget is still allocated by Parliament to the Ministry of Justice and then by the latter to the HMCTS.

[12] The Lord Chief Justice exercises these responsibilities through the Judges' Council and the Judicial Executive Board, a committee that comprises senior members of the judiciary.

Chancellor and to Ministers generally. The Lord Chief Justice shares responsibility with the Lord Chancellor for the provision of, and the complaints and disciplinary system for the judiciary.[13]

The day-to-day relationship between the Lord Chief Justice and Lord Chancellor will depend on how, in practice, the new leadership arrangements (set out in the Concordat) work. Much may depend on their respective personalities too. Until June 2007, the latter tended to be a senior practising lawyer of high repute appointed after a long career in practice who sat in the Lords. In Gordon Brown's first cabinet, Jack Straw (a non-practising barrister and also a former Home Secretary) sat instead in the Commons.[14] But future Lord Chancellors need not have a significant background in the law[15] and may conceivably be career politicians with their eyes on promotion to other departments. They may find that defending judicial independence, which they are required to do by statute, does not lead to career advancement after all.

2. Judges' Council

Separate from the Judicial Appointment Commission there is a Judges' Council for England and Wales. The present Judges' Council acts as a body representing the views and interests of each tier of the judiciary.[16] It informs and advises the Lord Chief Justice, has discussions with the Lord Chancellor in relation to the financing of the courts[17] and other issues relating to the judiciary as a whole, and publishes an Annual Report. Therefore, to a great extent, it is a forum rather than an institution of governance. But it also selects three judicial members of the Judicial Appointments Commission.[18]

Since 2002, the Judges' Council is representative of each tier of the judiciary in England and Wales and also includes tribunals and magistrates'

---

13 See *infra* B. VI. Judicial Conduct Complaint Process and B. VII. Judicial Accountability: Discipline and Removal Procedures.

14 In the 17th century, Sir Thomas More was the first non-cleric to be Lord Chancellor and he was in the Commons, as were a number of his successors.

15 Section 2 of the CRA allows the Prime Minister to appoint anyone whom he deems to be "legally qualified".

16 Lord Justice Thomas, The Judges' Council, Public Law 608 (2005). The role and membership of the Judges' Council is currently under review.

17 See para. 24 of the 2004 Concordat (note 7).

18 See schedule 12, para. 7 CRA.

representatives. It comprises 18 members and is chaired by the Lord Chief Justice. The latter and the Senior Presiding Judge of the House of Lords (soon to be the Supreme Court) serve *ex officio*; the usual period of membership for the other members is three years. There are no direct elections to the Council. Each level of the judiciary has its own Association[19] or Council where elections are held and the officers of those Associations or Councils (or their delegates) serve on the Judges' Council.

II. Selection, Appointment and Reappointment of Judges

Judges in England and Wales are recruited following some experience as a legal practitioner. The required degree of practising experience will vary according to the level of the jurisdictions. Apart from the lowest level of jurisdiction, comprising Magistrates and tribunal members, the mainstream judiciary is divided into members of the Supreme Court (formerly the House of Lords), the Court of Appeal, followed by the High Court and then the circuit judges, and the district judges (1). Greater transparency and professionalism in the appointment process have been introduced under the Judicial Appointments Commission in 2006 (2). The government appoints judges on a permanent basis (3) upon advice of the latter, on the basis of the candidates' legal practice and merit. In brief, some objective criteria and procedures are in place, although some tension exists in defining the non-statutory eligibility criteria that apply to some judicial appointments. In addition, the recognition that all judges need regular training (4) departs from the long-established view that the art of judging was seen to be acquired almost by osmosis[20] with the judicial office.

1. Eligibility

Eligibility for the court judiciary relies upon some statutory qualifications as a barrister, solicitor, or, since 2005, as a 'legal executive' under a qualification awarded by the Institute of Legal Executives. It combines

---

19 The Council of Her Majesty Circuit Judges, the Association of Her Majesty District Judges and the Magistrates' Association.

20 F. Gibbs, Judges Go Back to School to Learn the Art of Judging, Times Online, 3 September 2009.

legal practising experience with *merit* and *good character*, and some non-statutory qualifications, which aim to tailor the job description to the specific needs of the court at issue. But first we briefly discuss the non-professional judges, i.e., the magistrates and the tribunal members, who cover a very wide caseload in the lowest courts.

a) Non-Professional Judges

aa) Magistrates

About 29,000 magistrates are responsible for taking judicial decisions on about 97% of criminal cases,[21] and a substantial amount of family matters.[22] They have no legal qualification but receive training from the Judicial Studies Board on procedures and sentencing, as well as on issues of non-discrimination. They sit with a legally qualified clerk who further advises them on issues that may arise in individual trials. Magistrates are appointed by the Lord Chancellor after approval by the Lord Chief Justice, following consultation with local advisory committees made up of magistrates and other local people. Their work is voluntary and unpaid, so only those with time and resources tend to apply. Concerns remain about the disproportionate number of conservative candidates being appointed, thus failing to ensure a politically balanced composition of the magistrates' bench.[23]

bb) Tribunal Members

Tribunals are, since April 2011, part of the civil justice system. They cover a wide range of different areas, e.g., mental health, employment or asylum and immigration cases.[24] Tribunal members are appointed on a fee-paid basis, with some full-time presidents and chairmen for some of the larger tribunals. Chairmen, also known in some tribunals as tribunal judges, are legally qualified.

---

21 They deal with minor offences and can sentence to fines of up to 5,000 GBP (6,014.26 EUR) and imprisonment for up to six months.

22 Their decisions in criminal cases can be appealed before the Crown Court or on points of law to the High Court (Administrative Division); and in family cases, to the High Court (Family Division).

23 K. Malleson, The Legal System, at 231 (3rd ed. 2007).

24 Schedule 14 CRA.

The Lord Chancellor is responsible for appointments to many tribunals, following an application and interview process under the JAC auspices. In each of the last three years, the JAC has made more recommendations for tribunal appointments than it has for the courts. Importantly, the Senior President of Tribunals remains responsible to the Lord Chancellor and is required to report to him.[25] Independence of the Senior President of Tribunals has also been embodied in the CRA 2005, as amended by Section 1 of the Tribunals, Courts and Enforcement Act 2007.

b) Statutory Qualifications for Professional Judges: Advocacy Experience

aa) Supreme Court

The criteria mirror those of the judicial committee of the House of Lords and require either holding high judicial office for a period of least two years or having higher rights of audience (i.e. rights to make representations in court) for 15 years.[26] The members appointed at the House of Lords were in practice judges at the Court of Appeal, although by convention two members were from Scotland and one from Northern Ireland.[27]

bb) Court of Appeal, High Court Judges, Circuit and District Judges

The statutory qualifications are based on the years of experience in advocacy, with a greater number of years required according to the senior status of the Court.[28] Direct entry is common at all levels in the judiciary below that of the Court of Appeal.

---

[25] Section 43 2007 Tribunals Act.

[26] In other words, he or she must have a right of audience, that is, the right to make representations in Court, in the Crown, County or Magistrates' Court as a solicitor or barrister, see section 25(1) CRA.

[27] This is implied by section 27(8) CRA, stating that the Supreme Court judges "will have knowledge of, and experience in, the law of each part of the United Kingdom".

[28] See section 10(3)(a) (b) and (c) Senior Courts Act 1981 (formerly known as the Supreme Court Act 1981, see CRA sch.11, s. 59); section 71 Courts and Legal Services Act 1990 as amended by sections 50-52, Tribunals, Courts and Enforcement Act 2007; section 9 County Courts Act 1984.

cc) Recorders

Recorder is a fee-paid part-time judicial role held by practising lawyers.[29] A distinctive feature of the English system is its reliance on members of the legal profession acting as part-time judges – nearly 60% of judicial posts are part-time. The function of the fee-paid part-time post is both to fill a need and to provide a training ground for potential full-time judges.[30] However, holding a fee-paid part-time judicial post is difficult for solicitors who unlike barristers are not self-employed, and must obtain the agreement of their partners to taking unpaid time off to sit as a judge.[31]

c) Statutory Qualifications for Professional Judges: Good Character and Merit

Crucially, the Judicial Appointments Commission is required, under the CRA, to select people of good character solely on the basis of merit.[32] Merit had traditionally been defined by reference to success in the courtroom as an advocate, which was considered as a good preparation for being a judge.[33] Following its statutory duty to encourage diversity in the range of applicants,[34] the Judicial Appointments Commission widened the definition of merit. Its definition of merit uses five qualities and abilities: intellectual capacity; personal qualities; an ability to understand and deal fairly; authority and communication skills; effi-

---

[29] A seven-year Crown or County Court qualification is required, Tribunals, Courts and Enforcement Act 2007, s. 50/ Sch.10, Pt.1.13.

[30] In so far as Circuit judges need to have held a designated judicial appointment for at least three years.

[31] The Lord Chief Justice recently suggested that the major law firms should be willing to release younger partners for part-time judicial posts as part of their *pro bono* activities, see F. Gibb, Lord Judge: Recession could Harm Judicial Diversity, Times Online, 12 March 2009. But individuals need to serve a minimum number of days a year (depending on the position), which can be difficult to fit into another full-time career.

[32] Section 63(2) and (3) CRA. To make the assessment of good character, applicants are invited to declare issues relating to tax, motoring offences etc., in their application.

[33] J. Bell, Judiciaries within Europe, at 313 (2006); H. Cecil, The English Judge (1970).

[34] Section 64(1) CRA.

ciency. In so doing it reduced the relevance of advocacy skills, as opposed to communication skills.[35]

d) Non-statutory Eligibility Criteria for Professional Judges

The CRA is unclear on who may define the non-statutory eligibility criteria. There is a tension between the Lord Chancellor and the Judicial Appointments Commission who jointly consider what is appropriate. On the one hand, the Judicial Appointments Commission, keen to encourage diversity, aims to ensure that the non-statutory criteria are kept to a minimum given their potential to narrow the pool of potential candidates. On the other hand, since the Lord Chancellor is responsible for the administrative functioning of the courts, the Lord Chancellor considers himself best placed to determine their needs in consultation with the Lord Chief Justice. It is argued by the Lord Chief Justice that the Judicial Appointments Commission, like a recruitment agency, must respond to the needs of the client's business; and "those needs must be judged and articulated by the business, not the recruitment agency".[36] This is likely to be a continuing source of tension.

e) Assessment of Requisite Skills

References are always sought. Although there is no formal requirement that a referee should be a judge, a number of potential applicants to a judicial post indicated in a recent survey their belief that in practice one needs a reference from a High Court judge to be successful.[37]

---

[35] The House of Lords Select Committee on the Constitutional Reform Bill in 2004 refused to give any specific interpretation or content to the notion of *merit* as the criterion for judicial appointment, see CRA, Chapter 2, 63; K. Malleson, Rethinking the Merit Principle in Judicial Selection, 33 Journal of Law and Society 126 (2006). In 2010 the JAC introduced leadership and management as additional requirements for some senior judicial positions.

[36] See the Joint Committee on the Draft Constitutional Renewal Bill, The Draft Constitutional Renewal Bill, Report, Vol. 1 (2008), para. 174. In that report, the Joint Parliamentary Scrutiny Committee confirmed that the Lord Chancellor should be given the power to determine non-statutory eligibility criteria.

[37] See the research commissioned by the Judicial Appointments Commission, Barriers to Application for Judicial Appointment Research, at 3 (2009), available at <http://www.judicialappointments.gov.uk>.

In addition, the Judicial Appointments Commission uses various (alternative or combined) methods of assessing applicants. For all positions, a paper sift (references and self-assessment) is required. For small selection exercises, i.e., for some specialist and the most senior appointments there is more likely to be only one paper sift followed by a panel interview. However for large selection exercises, the paper sift will only be considered after qualifying tests, consisting of case studies, have been used to shortlist candidates. In addition, the large exercises will involve a selection day that is likely to involve a combination of role-play exercises and a formal interview.[38] Interviews and role-play exercises in particular make the appointment process more transparent, as they make the background of the applicants as apparent as their abilities.

2. The Process of Judicial Selection

Before the CRA, the opinions of judges and senior lawyers were sought on the applicants. This was known to its critics as secret soundings, with the result that the appointment depended on the visibility of the individual to the judges through social and work networks.[39] Although the consultation process was praised for appointing individuals on merit, it was also perceived as encouraging self-replication, with judges being part of a narrow social elite (a).[40] A most significant constitutional change under the CRA is therefore the creation of the Judicial Appointments Commission (b). Together with new statutory rules for judicial appointments, the Commission largely eliminates the patronage element and brings transparency in the judicial selection process (c), although some concerns remain (d).

a) Criticisms of the Composition of the Judiciary

First, a persistent criticism of the judiciary is that the judges have been white, male and upper middle class, privately educated Oxbridge

---

[38] Formal interviews by selection panels for the lower judicial posts were introduced in the 1990s and eventually extended to the High Court, see Bell (note 33), at 313.

[39] Report on Judicial Appointments and QC Selection, Main Report (1999), (the 'Peach Report'), at 5.

[40] Griffith (note 2), at 18-22.

graduates and barristers.[41] Second, women began to enter the judiciary in 1965, much later than in a number of European countries.[42] Although the entry rate into the Bar and into the solicitor's profession has now reached equality between men and women, a significant problem has also been the loss of younger women from the profession.[43] Third, there are similar concerns about the low number of ethnic minority candidates for judicial appointment. The need for a more diverse judicial composition, in order to enhance the public confidence in the courts, has been acknowledged under the CRA, which requires the Judicial Appointments Commission to have regard to the need to encourage diversity in the pool of applicants.[44]

b) Composition of the Judicial Appointments Commission

The Judicial Appointments Commission, launched in April 2006, is a public body sponsored by the Ministry of Justice. Due to its heavy workload, it consists of 15 members appointed for relatively short part-time terms.[45] The Judicial Appointment Commission consists of six lay people, five judges (taken from the different levels of court), one solicitor, one barrister, two lay judges (one magistrate and one tribunal member).[46] The three most senior judicial members are appointed by the Judges' Council. No member can be appointed to the Judicial Appointments Commission if he or she is employed in the civil service, in order to ensure full independence of the Judicial Appointments Commission. Under the CRA, the other members are appointed by a

41 Bell (note 33), at 314. Many solicitors now have rights of audience in the higher courts too, but see the account in the Law Society Gazette, 21 May 2009, of the widespread concerns among solicitor-advocates that "judicial appraisal" might form part of their own quality assurance process, overseen by the Legal Services Commission.

42 Bell (note 33), at 315.

43 C. McGlynn, The Status of Women Lawyers in the United Kingdom, in: U. Schultz/G. Shaw (eds.), Women in the Worlds' Legal Professions, Chapter 9 (2003).

44 Section 64 (1) CRA. This provision is the result of a compromise, see the Parliamentary Select Committee on the Constitutional Reform Bill, Report, Vol. 1 (2004).

45 The commissioners are to be appointed for a term of office no longer than five at any one time and may not serve a total of more than ten years.

46 Schedule 12 CRA.

method entirely independent of the executive, i.e., by open competition.[47]

The composition of the Judicial Appointments Commission ensures a judicial and public input into the appointment of judges, and it removes any possibility of political influence. The strong legal presence is mitigated by the fact that the chair of the Commission is a lay member.[48] In addition, the lay members must never have been practising lawyers. Lay members are expected to channel new approaches in appointments into the Judicial Appointments Commission. Although some have suggested that it is heavily influenced by its judicial members, with a risk of the Commission "cloning the existing judiciary in terms of skills and experience",[49] drawing further conclusions would be premature.

c) The Judicial Selection Process

The Judicial Appointments Commission's process is based on selection by independent panels, who will, *via* the Commission, recommend names for the Lord Chancellor to appoint to any judicial post in England and Wales.[50] The Prime Minister now only plays a formal role in the process, thus limiting the danger of any future party politicization

---

47 The Lord Chancellor must appoint the commissioners for England and Wales after consultation with an advisory body consisting of the Lord Chief Justice, the chair of the Commission (once appointed) and an additional lay member appointed by the Minister.

48 Note that, in order to ensure judicial independence, the European Charter on the Statute for Judges recommends that at least half the members of a commission should be judges. This approach does not serve best the English judiciary, see K. Malleson, The New Judicial Appointments Commission in England and Wales: New Wine in New Bottles?, in: K. Malleson/P. H. Russell (eds.), Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World, 39, at 48 (2006).

49 R. Hazell, Britain's Constitutional Reforms: Trivial or Transforming?, Transcript of Anthony Simpson Memorial Lecture (2009).

50 The appointments will still need to be passed to the Queen by the Prime Minister, on the advice of the Lord Chancellor. The panel will generally consist of three people: a) a panel Chair who has been appointed following the Nolan Principles on Appointments to Public Offices. 31 panel chairs were engaged by the Judicial Appointments Commission in 2008; b) an independent lay member. Lay members have varied backgrounds and experience; c) a judicial member, who provides the necessary technical expertise and legal knowledge. He or she is generally drawn from the jurisdiction to which the appointment relates.

of the system. For the same reason, the Lord Chancellor's role is reduced to that of providing a safeguard against the appointment of unqualified candidates.[51] Although some judicial consultation remains in some form,[52] the revised processes for selection mark "a significant extension of a professionalism in judicial appointments, and a greater recognition of a career".[53]

For all appointments (Supreme Court judges, Court of Appeal, High Court and inferior judges' appointments), the Lord Chancellor receives a report and a single recommendation, which he can accept, reject or invite reconsideration of.[54] But the Judicial Appointment Commission could also decide that none of the applicants was suitable for appointment and decline to make a recommendation,[55] and in such case the Lord Chancellor can ask the Judicial Appointments Commission to reconsider that decision.[56] The Lord Chancellor has therefore not been removed from the decision making progress. However, if the minister rejects the nominee, she or he must give reasons for doing so. This is an important safeguard against the abuse of ministerial discretion,[57] but it is not clear which reasons will be regarded as legitimate, and the only fallout from any unsatisfactory decision would seem to be at a political level.

---

51 Malleson (note 23), at 212. See, however, the (then) Lord Chancellor Jack Straw asking for reconsideration of the panel's recommendation, leading to the delayed appointment of Sir Nicholas Wall as Head of Family Division, Fr. Gibbs, Sir Nicholas Wall: a doughty fighter for family justice who will speak up, Times Online, 8 April 2010.

52 Sections 27, 71, 80, 88(3) and 94(3) CRA.

53 Bell (note 33), at 313. A forecast of expected vacancies is agreed with the Ministry of Justice every year. The posts are advertised widely. The Judicial Appointment Commission makes itself accountable by publishing an annual report, and by having its Chairman and Deputy Chairman questioned by Parliament.

54 Sections 26(3), 70, 71, 73 and 90 CRA.

55 Section 88(2) CRA.

56 Section 93 CRA.

57 Malleson (note 23), at 46-7.

d) Remaining Concerns

This Judicial Appointment Commission has been operating for three years. In July 2008, the Parliamentary Joint Select Committee, on behalf of judicial independence, rejected as premature some legislative proposals for further reform of the appointment process. It considered that there was no justification for any "significant and controversial departure from the balance achieved by the 2005 reforms" and rejected a proposed reform which would have allowed the Lord Chancellor to set targets for the Judicial Appointments Commission to achieve.[58] This was perceived as potentially undermining the independence of the appointments process. The Parliamentary Joint Select Committee did nonetheless express its disappointment with the lack of measurable progress towards increasing diversity within the judiciary. Even so, the Judicial Appointments Commission had raised the number of women High Court judges to 17 with five women being appointed between 1 April 2008 and June 2009, the highest number ever.[59] More women and black and minority ethnic (BME) candidates are applying for judicial roles than before the JAC was set up; more women are also being selected under the JAC than before (the number of successful BME candidates has remained constant). Identifying adequate responses to these issues is a work in progress, with a range of proactive measures currently undertaken by the Ministry of Justice.[60] Some recent research[61] indicates, within potential applicants, a remaining widespread perception of inherent prejudice in the application process.

In addition, the same research points to structural or cultural reasons why some solicitors and barristers do not apply to become judges, including the requirement of fee-paid part-time judicial experience, difficult for many applicants with family commitments, or the need to be away on the circuit, i.e., sitting away from their home, for several weeks. In the light of this, a salaried part-time working scheme now

---

[58] See the Joint Committee on the Draft Constitutional Renewal Bill (note 36), para. 141.

[59] This seems to confirm that the 'trickle up' hypothesis on which ministers and judges had relied has been abandoned because it was not credible, see Bell (note 33), at 317.

[60] A Judicial Diversity Strategy agreed jointly by the Lord Chancellor, Lord Chief Justice and Chairman of the Judicial Appointments Commission, was announced to Parliament and published on 17 May 2006.

[61] See *supra* note 37.

operates both in the courts and tribunals, up to but excluding the High Court.[62] It is not clear yet whether the extra flexibility in working hours will prove sufficiently attractive to those in private practice.

Remarkably, a shift to a judicial career was recommended in 2010 by an Advisory Panel to the Lord Chancellor, with the aim of achieving greater diversity within the judiciary.[63] However the stage for entry into a judicial career was left unclear. It was later clarified that this was not a call for a career judiciary, where judges are appointed after graduating from university and trained for the bench, but rather a call to the legal profession to bring about further changes in its composition. As the LCJ reiterated that call, the pressure towards greater judicial diversity has however further increased, with yet another inquiry into Judicial Appointments, launched in May 2011 by the House of Lords Constitution Committee. It started with the words "[a] judiciary is only as good as the people appointed to its most senior positions", alluding to the distinct appointment process at the Supreme Court which has failed to bring greater diversity there.

3. Length of Office and Reappointment

There is no probationary period for judges, who may serve until retirement age.[64]

4. Training

In 1979, a systematic structure for judicial training, the Judicial Studies Board was created, providing a pupillage, sitting alongside a more experienced judge and an induction programme with annual refresher courses. In April 2011, the Judicial Studies Board became a Judicial College, including the Tribunal Training Group. Responsibility for the content of judicial education is transferred from the Judicial Studies Board to the judges themselves, with the aim of promoting a culture of

---

[62] The first cadre of Circuit Judges commenced salaried part-time sittings during 2005-2006, with a steady increase of judicial office holders into the scheme since then. A three-year review of the scheme is under way.

[63] Report of the Advisory Panel on Diversity, 2010, panel chaired by Baroness Julia Neuberger.

[64] See *infra* B. III. Tenure and Promotion and B. VII. Judicial Accountability: Discipline and Removal Procedures.

self-development among judges. The focus is on practical skills and ethical standards, more than on updates on the law. Financial strain, however, means that continuing education is reduced, in 2011-2012 to one seminar a year for High Court and other salaried judges below, and to less than one seminar a year for fee-paid judges (depending on the last date of attendance). Continuing education coexists with circuit criminal seminars, the district judge annual seminar and the deputy district judge annual seminars.

The Judicial College draws its funds, staff and much of its corporate support directly from the Ministry of Justice. Judicial training needs are assessed, and training materials are developed, by the main committees of the Judicial College. But the Judicial Studies Board is controlled by an Advisory Council which is responsible to the Lord Chief Justice and the Senior President of Tribunals. The Council's main role is to ensure that the work of the Judicial College is scrutinized and challenged. Its members include sponsors and interested parties such as the Permanent Secretary of the Ministry of Justice, representatives of the Courts' and Tribunals' judiciaries and legal professional bodies, and academic specialists who are selected through competition.

Training is mandatory, and from 2009 has been extended to the newly appointed recorders and deputy district judges. The Judicial College's activities fall under three main headings: 1) Initial training for new judicial office-holders and those who take on new responsibilities. 2) Continuing professional education of existing judicial office-holders. Since 2005, in addition to training sessions, manuals are produced as support for judges (bench books). 3) Training programs to support major changes to legislation and to the administration of justice.[65]

The Judicial Studies Board, now Judicial College, has been praised and is perceived to contribute to judicial independence.[66] This is the result of the involvement of judges both running the Judicial Studies Board, now Judicial College, and giving many of its sessions.[67] However the management and appraisal structure remains to be acted upon. A pilot scheme of appraisal for recorders begun in 2005, but this is an underde-

---

[65] Judicial Studies Board, Annual Report 2007-08, at 2.

[66] T. Bingham, The Business of Judging. Selected Essays and Speeches, at 60 (2000).

[67] K. Malleson, New Judiciary, at 161-3 (1999).

veloped area compared with continental judiciaries, mainly for financial reasons.[68]

III. Tenure and Promotion

1. Tenure

High Court judges and above hold office until retirement age (the age of 70) "during good behaviour".[69] They can only be removed by the Queen if both Houses of Parliament pass a resolution requiring them to go, and no judge has ever been removed in this way.[70] Judges below the High Court are formally less secure. They must retire at the age of 70, but they can be removed by the Lord Chancellor "on the grounds of incapacity or misbehaviour", detailed below.[71]

2. Promotion

Promotion is now decided by the Judicial Appointments Commission, whose selection process reduces the risk of judgments being tailored in the lower courts for executive approval at the right time. But some formal safeguards for internal independence, i.e., the independence of a judge from more senior judges, are now required, both for the court judiciary and the tribunal judiciary.[72] This is the consequence of the increased managerial responsibilities that some judges have over other judges in their division or circuit, relating to their caseload, deployment, and the allocation of particular cases.

---

[68] Bell (note 33), at 313. The recorder scheme has stopped due to lack of funding. Appraisa is more systematic before tribunals.

[69] Section 11 (2) Senior Courts Act 1981 (formerly known as the Supreme Court Act 1981).

[70] See, in the case of illness or disability, section 11(8 and 9) Senior Courts Act 1981 (formerly known as the Supreme Court Act 1981).

[71] Section 17 (4) Courts Act 1971, section 108 (1) CRA; see *infra* B. VII. Judicial Accountability: Discipline and Removal Procedures.

[72] J. Beatson, The 32nd Blackstone Lecture: Reforming an Unwritten Constitution (May 2009); see *R v. UK,* (1997) 24 EHRR 221 and *R v. Spear,* (2003) 1 AC 734.

IV. Remuneration

1. Remuneration

The government annually decides the judicial pay structure and the level of remuneration upon guidance from an independent review body, the Senior Salaries Review Body (SSRB).[73] The differentiation in the remuneration of particular posts is based on the job weight assessment. The current salary structure is divided into ten salary groups (with uniformity within those groups), according to the level of the court and the significant managerial, advisory and administrative responsibilities exercised within the court. For example, the salary structure acknowledges that, at Circuit level, some judges are responsible for the allocation of criminal, civil or family judicial work, in addition to dealing with procedural matters and giving general advice and guidance to the other judges. The judiciary receives no form of performance-related pay. This reflects a view that performance-related pay would run counter to judicial independence and the judiciary's constitutional position, and also that uniform pay rates help to maintain collegiality.[74]

In its annual review, the SSRB examines whether the pay structure and level of remuneration are well suited to the needs of the judiciary.[75] The SSRB also conducts major reviews of the judicial pay structure every four to five years. Those major reviews are essential as, relying on independent job evaluation exercises, they acknowledge the changes in job weight (e.g. the weight of management duties at court level) at different levels over time. Their assessments have systematically led them to suggest increases in judicial salaries, except in 2010 and 2011, "against a background of a long recession followed by severe pressure on public finances". Since there are no trade unions for judges or any specific mechanism for collective pay bargaining, the judiciary is highly dependent on the SSRB's assessments.

However the advice of the SSRB is not binding. Indeed, in 2009, for the fourth year running the pay increase suggested by SSRB (approximately

---

[73] Administration of Justice Act 1973 (c.15).

[74] See the SSRB 2011 Report on Senior Salaries, Report no. 77, Com. 8026.

[75] Sitting days and leave entitlements, under governmental remit (via the HMCS), follow three categories: Circuit judges and Supreme Court judges (50 days leave per year, 210 sitting days per year)/District Judges and Magistrates' Courts (45 days of leave/215 sitting days) /Tribunals (40 days of leave/220 sitting days).

2.6%) was not be implemented in full.[76] Nor is there any Parliamentary debate on judicial salaries.[77] The relatively low public profile of the judges tends to put them at a disadvantage in fighting the government's decisions not to accept the advice of the SSRB.

2. Benefits and Privileges

There is no privilege or taxable benefit as such in addition to salary and pension. Judges can only claim travel and subsistence expenses occurred in the course of their judicial duties. Magistrates have (similar) arrangements for travel and subsistence expenses.

3. Retirement

The judge's pension is his benefit, with its value to an average member of the judiciary amounting to around 35% of salary.[78] A maximum pension of one-half of the final salary of a judge is payable after 20 years as a judge.[79] In broad terms, members of the judiciary pay a contribution of between 1.8 and 2.4 % of salary to accrue a final salary pension at the rate of 1/40th for each year of service up to 20 years. This follows a long-running tax dispute between the judiciary and the government,[80]

---

[76] The SSRB 2011 Report (note 74) indicates that senior salaries comprise 2,240 salaried members in over 90 categories of post across the United Kingdom. They refer to the salaried, full- and part-time members of the judiciary but not fee-paid members. In 2009, the government decided that in the current economic circumstances an award of 1.5% for the judiciary was appropriate. Yet the SSRB noted that as the opportunities for progression within the judiciary are significantly fewer than for the other public sector groups, and that the judiciary does not benefit from the performance-related pay which exists in the other public sector 'senior salary' groups.

[77] Judges are paid out of the consolidated fund and their salaries cannot be reduced, see section 12 Supreme Court Act 1981.

[78] See the Judicial Pensions Scheme Resource Accounts 2006-07 HC 73.

[79] See the Judicial Pensions and Retirement Act 1993, section 3.

[80] The pensions tax regime came into force on 6 April 2006. The judicial pension schemes now allows judges to keep their money in a non-tax-exempt private scheme, but judicial pensions no longer attract the preferential tax treatment afforded to tax-approved schemes, *i.e.*, a tax-free lump sum benefits payable on retirement or following the death of a judge and tax relief on contri-

the outcome of which is to maintain (though not to improve) the value of the judicial remuneration package. The use of a different index (the Consumer Prices Index) from April 2011 is however likely to reduce the value of judicial pensions. The Pensions Bill 2011 also makes provision for judges to make contributions for their pensions (at present judges contribute only for widows'/widowers' and dependants' benefits).

V. Case Assignment and Recusal

Under the 2004 Concordat, the judge in charge of each court alone decides how and by whom each case will be heard. The Resident Judge[81] (in the Crown Court) and the Presiding Judges of the Circuit allocate the work between judges/particular courts and decides the priorities for hearing cases, listing cases before particular judges.[82] In practice, much of the listing is accordingly dealt with by court administrative staff (e.g., the Listing Officer in the Crown Court), employed by HMCTS.

There is an ongoing tension here since listing is a judicial function in the English court system, but efficient listing is also an administrative priority under case management rules. In practice, then, the principle of continuity, i.e., the same judge stays with the case, needs to be balanced with the principle of efficiency of listing: some judges will be sitting away on the circuit and may not be available in a timely manner, with a hearing being delayed as a consequence. A judge who takes over a case from another is generally bound by any pre-trial rulings already made by his predecessor.

---

butions. Following protests from the judiciary (with a reported threat of resignation from senior judges) there is now a new non-pensionable lump sum payment on a judge's retirement and a reduction in the pension contribution rates payable by judges.

[81] Each Circuit court centre has a Resident Judge, normally the senior judge, in charge of the criminal listing.

[82] See section 9 of the Courts and Legal Services Act 1990. In relation to judges assigned to particular cases, the level of judiciary to which a judge belongs and his or her experience or specialization ("ticketing") will determine the level or type of work he or she can undertake.

Judges must recuse themselves from cases on account of a risk of bias.[83] There are two kinds of bias. First, having a pecuniary interest in the case gives rise to automatic disqualification, with a duty of recusal resting on the judge.[84] In the *Pinochet (No 2)* case,[85] however, the House of Lords extended automatic disqualification to the promotion of a relevant political or social cause. In doing so, it set aside its own decision that had been reached with the participation of Lord Hoffman who was a member of the charitable board of one of the parties to the case (Amnesty International). The scope of that decision remains limited,[86] and the common law standards relating to bias and those under Article 6 ECHR are the same.[87] Second, apprehended bias exists where there is some other reason to believe that there is a real danger that the judge is actually biased.[88] Unsurprisingly given the nature of the rules against bias, the objective test adopted, of a fair-minded and well-informed observer, lends itself to forensic manoeuvring[89] in the context of each case.

The practice has been that the judge must decide whether he or she is sufficiently impartial to decide the case. If the judge becomes aware of any matter which could be said to give rise to a real danger of bias, it should be disclosed to the parties so that it may be the subject of argument. Nonetheless the decision whether there is a reason why others might believe him to be biased is left to the same judge, a matter of obvious concern. Following the *Pinochet (No 2)* decision, Lord Irvine (then Lord Chancellor) suggested that future decisions on potential bias in the House of Lords should be collectively taken, with the panel of judges addressing the issue of bias before the hearing, with the Law

---

[83] See *Magill v. Porter and Weeks,* (2001) UKHL 67; *Lawal v. Northern Spirit,* (2003) ICR 856; G. Hammond, Judicial Recusal: Principles, Process and Problems (2009). In the case of automatic disqualification, it is arguable that, as in the United States, the parties cannot waive the requirement for the judge to stand down.

[84] *Locabail (UK) Ltd v. Bayfield Properties Ltd & Anor,* (1999) EWCA Civ 3004; *AWG Group Ltd v. Morrison,* (2006) EWCA Civ 6; A. Olowofoyeku, Suing Judges: A Study of Judicial Immunity (1994).

[85] *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2)* (2001) 1 AC 119.

[86] *Meerabux v. The Attorney General of Belize (Belize),* (2005) UKPC 12 (23 March 2005).

[87] *Lawal v. Northern Spirit* (note 83), at para. 14.

[88] *Locabail (UK) Ltd v. Bayfield Properties Ltd & Anor* (note 84).

[89] Hammond (note 83), at 52.

Lord in the chair making the final decision.[90] But the need for clearer review mechanisms (when the judge declines the recusal), for example with a standing review panel of judges within each court, applies to all courts and tribunals. Case assignment constitutes the most effective way to tackle recusal, as in New Zealand,[91] where the actual allocation of cases keeps judges who should not be involved in a case off the bench. In brief, the processes adopted by the courts of England and Wales have not been expressly formulated and can be developed, most likely by way of practice directions.

VI. Judicial Conduct Complaint Process

In England and Wales the judicial conduct complain process falls under the disciplinary proceedings outlined in the following section.

VII. Judicial Accountability: Discipline and Removal Procedures

Until recently, the Lord Chancellor informally resolved complaints.[92] Traditionally, most judges would "do the decent thing" and resign[93] if the Lord Chancellor remained dissatisfied at the end of their meeting. Since the CRA, complaints from anyone against the judicial conduct (i.e., other than against decisions in proceedings) are handled by the Office for Judicial Complaints, which makes recommendations for the Lord Chief Justice and the Ministry of Justice to act upon.[94]

---

[90] K. Malleson, Judicial Disqualification after *Pinochet (No 2)*, 63 Modern Law Review 119 (2000).

[91] P. Butler, The Assignment of Cases to Judges, 1 New Zealand Journal of Public and International Law 83 (2003).

[92] The process was rarely invoked, see Stevens (note 2), at 166.

[93] Bell (note 33), at 323.

[94] Sections 115 to 117 of the CRA provide the Lord Chief Justice with the power to make regulations and rules governing disciplinary cases, with the agreement of the Lord Chancellor.

1. Grounds for Disciplinary and Removal Proceedings

As mentioned above, Circuit judges can be removed by the Lord Chancellor on the grounds of incapacity or misbehaviour. There is no statutory definition of misbehaviour or misconduct. Both the Guide for Judicial Conduct and Memorandum on Conditions of Appointment and the Terms of Services (given to each mainstream judge on appointment)[95] are extensively relied upon by the Office for Judicial Complaints to define judicial misconduct. The Office for Judicial Complaints lists the following grounds for taking disciplinary action, without giving further details:[96] inappropriate behaviour or comments, not fulfilling judicial duty, misuse of judicial status, motoring offences, discriminatory comments, criminal convictions, professional conduct and conflict of interest.

2. The Disciplinary Process

If there is a matter to be investigated, the investigation is carried out by a judge nominated by the Lord Chief Justice, of at least the same rank as the judge under investigation.[97] The defendant judge is invited to reply to the Office for Judicial Complaints' request for information.[98] The investigating judge will then advise the Lord Chancellor and the Lord Chief Justice whether there needs to be a judicial investigation by a judge. Alternatively, the nominated judge may advise that disciplinary action should be taken without the need for any further investigation. Complaints about disciplinary cases can be made to the Judicial Appointments and Conduct Ombudsman.[99]

---

[95] The Judges' Council only developed that code of conduct in 2002 (updated in 2008). See *infra* D. I. Code of Ethics for Judges.

[96] See Office for judicial complaints, available at <http://www.judicialcomplaints.gov.uk>.

[97] Where a complaint is made against either a Tribunal Office Holder or a Magistrate; it is dealt with in the first instance by the relevant Tribunal President or Magistrates Advisory Committee.

[98] In 2006, new disciplinary procedures introduced naming judges whose conduct was the subject of an investigation, see the Judicial Discipline (Prescribed Procedures) Regulations 2006.

[99] Section 62 CRA.

3. Sanctions

Even if a complaint against the defendant judge is upheld by the Office for Judicial Complaints, sanctions can only be imposed with the joint agreement of the Lord Chief Justice and the Lord Chancellor. We have already mentioned removal. In cases falling short of removal, the CRA empowers the LCJ after following due process, to issue formal advice, a formal warning or reprimand.[100] It does not differentiate between superior and inferior judges, and does not specify the effect of such measures. They could perhaps be used in conjunction with directions to ensure that judges are limited to the types of work that they carry out if this is appropriate. The Lord Chief Justice also has power to suspend someone from being a judge where a judge is subject to criminal proceedings, serving a sentence or where the action that led to the criminal proceedings taken place is being used to begin dismissal proceedings.[101]

4. Statistics

Two members of the mainstream judiciary (3,600 members, that is, everyone above the rank of magistrate or tribunal member) were removed from office in 2009-10 and 2008-9. This amounts each year to just 0.038% of the full and part-time district judges, circuit judges and judges of the High Court and Court of Appeal.[102] Disciplinary action was also undertaken against 58 out of 29,000 lay magistrates in 2009-2010 and 2008-2009 (0.02% of the magistrate body), and against 9 out of 9,000 Tribunals' members in 2009-2010 (0,001% of the Tribunals' body), against 12 in 2008-2009 (0.0017% of the Tribunals' members).

---

[100] Section 108 (4) CRA.

[101] Section 108 (4) CRA. The Lord Chief Justice may also suspend someone who has been convicted of an offence but where it has been decided not to dismiss the person if the Lord Chief Justice believes it is necessary to do so in order to maintain the confidence of the judiciary, or where a judge is being investigated for misbehaviour other than a criminal offence, see S. 108(5) and (6) CRA.

[102] See the Office for Judicial Complaints' Annual Reports for 2008-2009 and 2009-2010.

VIII. Immunity for Judges

Since the 17th century the judiciary have been immune from actions arising out of judicial proceedings.[103] Judicial immunity applies where the judge: (i) acts in the *bona fide* exercise of his office; and (ii) in the belief (though mistaken) that he has jurisdiction. However there is a distinction between inferior and superior judges.[104] Judges of the High Court and the Court of Appeal are immune from personal civil liability provided that they acted in good faith, judicially and in his/her capacity as a judge. Circuit and district judges may be in certain circumstances liable in tort for actions beyond their jurisdiction and to judicial review proceedings. It has been suggested that difference in liability should be addressed by the legislature.[105] Judicial immunity only extends to judicial activities carried out "in the honest belief that it is within [the judge's] jurisdiction".[106]

IX. Associations for Judges

The English judiciary lacks any union/association activity, but there are alternative mechanisms through which the judges influence the development of the law and of the judicial institution. First, the Judges' Council traditionally transmits the collective views of the judiciary. It played a decisive role in negotiations between the Lord Chief Justice and the Lord Chancellor on their 2008 Concordat. Since the CRA, however, senior judges sit as board members of HMCTS, ensuring that the directors are aware of concerns from the wider judiciary, including judicial salaries and the needs of the courts. Second, the CRA formalized the traditional role of spokesperson for the judiciary played by the Lord Chief Justice, as President of the English and Welsh courts, who

---

[103] Olowofoyeku (note 84), The Human Rights Act 1998 (section 9) expressly preserves judicial immunity. A specific liability insurance for judges is not known.

[104] *Sirros v. Moore,* (1975) QB 118.

[105] Lord Templeman in *Re McC,* (1985) AC 528; D. Pannick, Judges, at 95-99 (1987); C. Gearty, Personal liability of Justices, 46 Cambridge Law Journal 12, at 14.

[106] See the rationale underlying judicial immunity as expressed by Lord Denning MR in *Sirros v. Moore,* (1975) QB 118, at 136. Subject to judicial immunity, the common rules of civil and criminal liability apply to judges.

can present written submissions to Parliament. Third, retired senior judges, especially Law Lords and ex-Lord Chancellors, also use their freedom to express views that serving office-holders feel inhibited from expressing.

With a new Supreme Court separate from the House of Lords, the CRA has now created a greater distance between judges and political decision-makers, and more formal mechanisms may emerge through which the views of judges are represented to decision-makers. In particular, the diversity of activity between judges at different levels may require structures additional to the Judges' Council. It is unlikely that the English will follow the Spanish and French models of judges' associations based on political allegiance.[107]

X. Resources

The Ministry of Justice negotiates the budget with the Treasury; and the Ministry of Justice then makes an allocation to HMCTS. This allocation is part of the overall budget for the Ministry of Justice and therefore may be subject to reduction during the year because of other calls on that budget for extra expenditure elsewhere in the Ministry. In 2008, HMCS recognized the need to offer adequate facilities, to those judges with leadership, administrative or representative responsibilities. This assistance may take the form of non-sitting time, administrative support or provision of IT or similar equipment. Overall, resources are under strain, as exemplified by the substantial reduction in the training plans from the Judicial College.[108] There will be more judicial assistants for the Supreme Court, who are expected to be young barristers and whose effectiveness remains to be measured.

C. Internal and External Influence

The CRA increased the separation of powers but safeguards are still needed in relation to the executive (I). Judgments are based on the law

---

[107] Bell (note 33), at 322. These are more like their German counterparts as voluntary associations with some interest in professional education.

[108] Gibbs (note 20).

(II), with no evidence of improper influence on judicial decisions (III) or threat to the security of judges (IV).

I. Separation of Powers

The CRA increased the separation of powers in three ways. First, the Lord Chief Justice is Head of the judiciary but is not anymore a senior member of the Cabinet, nor a Speaker in the House of Lords. Secondly, the creation of a new Judicial Appointments Commission greatly reduced the role of ministers in judicial appointments. Thirdly, full-time members of the judiciary are excluded from the House of Commons and from the House of Lords. Equally, by statute, no Member of Parliament can be appointed to the Judicial Appointments Commission. Finally, the participation of the Law Lords in the activity of the legislature has started to wind down since October 2009. From that time onwards, only retired Law Lords and those who are presently Law Lords are able to participate in political debate on their retirement; and newly appointed members to the Supreme Court have no legislative role on retirement.

Individual judges may be invited to give evidence to Parliamentary Committees,[109] subject to the well-established rules and conventions that prevent judges from commenting on certain matters. Parliamentary Committees respect these rules and conventions. The prohibited matters include the merits of government policy, the merits of individual cases whether involving that judge or other judges, or of particular serving judicial officers, politicians and other public figures, and the merits, meaning or likely effect of provisions in prospective legislation. The judiciary must obviously be wary of becoming involved in pre-legislative consultation.[110] In addition, under the Erskine May Parliamentary Practice, a Member of Parliament should not criticize a judge by name in Parliament (although this does happen outside Parliament).

---

[109] Under Standing Orders, Select Committees and their sub-Committees have power to "send for persons, papers and records" relevant to their terms of reference.

[110] A.W. Bradley, Relations between Executive, Judiciary and Parliament: an Evolving Saga?, 4 Public law 470, at 488 (2008); see para. 11.5 of Her Majesty Courts Service Framework Document, Cm. 7350 (2008); M. Arden, Judicial Independence and Parliaments, in: K. Ziegler, D. Baranger/A.W. Bradley (eds.), Constitutionalism and the Role of Parliaments, Ch. 10 (2007).

Subject to the *sub judice* rule, the decisions and conduct of individual judges may however be mentioned in debates in either House.

It is in relation to the executive branch that the safeguards are most needed. Under the CRA, the executive plays a very restricted part in the appointment, promotion, and discipline of judges. But although the executive should not criticize the personal decisions of a judge, there have been occasions where this happened, especially when the courts find policies of the government to be unlawful under principles of judicial review or in breach of human rights. A critical question for the coming years is whether this trend will continue or whether the pendulum will swing against this transfer of power to judicial decision-makers.[111] The use of judges to conduct enquiries (e.g., the Hutton enquiry into the death of David Kelly, an Iraq weapons inspector, in 2004) has also been criticized as undermining their independence by politicizing them.[112]

II. Judgements

1. Basis

Judgements are based on law in the sense that, once a judge has decided what the applicable legal principle is, he may not discard it through personal dislike or belief that the principle might soon be changed, or a sense that the judgement might cause popular outrage. Instead he must apply the law as it is understood to be and leave it to the higher courts or the legislature to decide to effect any change.[113] The judges perpetuate the myth that they do not change the common law; instead they find more accurate ways of expressing it, so that previous cases are not usually said to be over-ruled but rather distinguished or "better explained".[114]

---

[111] Le Sueur/Malleson (note 16), at 109.

[112] J. Beatson, Should Judges Conduct Public Inquiries?, 121 Law Quarterly Review 221 (2005).

[113] *C v. DPP*, (1996) AC 1.

[114] Bell (note 33), at 337. "Sometimes the common law finds new words to describe old principles", Judge LCJ, Judicial Independence and Responsibilities, 16th Commonwealth Law Conference (April 2009).

2. Practice

The latest annual statistics[115] indicate that in 2008, in 70% of cases at Crown Court, defendants pleaded guilty; this figure has crept up gradually from 56% in 2001. In 2008, 60% of the defendants who pleaded not guilty were acquitted. Of those not pleading guilty, 61% were discharged by the judge, 9% were acquitted on the direction of the judge, 1% were otherwise acquitted and 29% were acquitted by a jury. By contrast, magistrates (who hear the least serious cases and whose mainly conservative background has already been noted) are notorious for convicting, some of them even having said in court that where there is a conflict of evidence, they would always believe the police officer.[116]

3. Structure of Judgements

There are no established conventions for written judgements. In practice, one will see, in a civil judgement at first instance, a short summary of the applicable law, where the judge outlines (for example) what needs to be proven by the claimant, followed by his reasons for holding whether or not he has discharged his burden of proof. Frequently the judge will announce that he/she has reminded himself/herself of various evidential points in deciding whose case to believe.[117] He/she will usually give some indication as to why he/she prefers the evidence of one side to that of the other.

Should a case go to appeal, the court is likely to summarize the facts found by the judge, which may be fully or partly agreed, and concentrate upon the subject of the appeal, which will typically be that the judge wrongly identified or misapplied the substantive law or that he/she misdirected himself/herself or made a perverse error when finding one or more of the facts, or made some other error which deprived one party of a fair trial.

Decisions by the House of Lords generally command respect, both in the profession and in the academic community. In the House of Lords, unlike in the lower courts, all judges are expected to give an opinion,

---

115 According to Judicial and Court Statistics 2008.

116 A. Sanders/R. Young, Criminal Justice, at 486 (3rd ed. 2007).

117 E.g., that eyewitness identification, even of persons known to the witness, is often unreliable evidence.

though it may be just a few sentences expressing full agreement with the detailed opinion of a colleague. Sometimes there are one or two leading opinions with which the other members very briefly agree, but on other occasions disagreements arise. It is possible for three judges to give different reasons for the same outcome, whilst the other two judges give the same reasons for the opposite outcome. Here each individual opinion might be clearly reasoned but the final outcome may be thought to be rather less than the sum of its parts – or even less than any of its parts. It is possible that the new Supreme Court decides to give some composite judgments, as is often the practice in the Court of Appeal.

4. Public Access

Decisions are published on various internet sites (e.g., <http://www.bailii.org.uk>) in newspapers, and legal databases for subscribers. Decisions of the House of Lords were published on the parliamentary website; decisions of the new Supreme Court are disclosed on the Supreme Court's website. All courts are open to the public, except family courts,[118] and exceptionally other courts where evidence involves issues of national security. Access is free but often reporters must observe anonymity orders relating to victims or children, and restrictions are also possible to avoid prejudice to related forthcoming trials.

III. Improper Influence on Judicial Decisions

There is no credible evidence that powerful officials or other persons seek directly to influence judges. Nor is there any suggestion that particular judges are assigned to particularly sensitive cases at the behest of senior figures in government. No judge in modern times is known to have accepted or even to have been offered a bribe.

However, there are contemporary concerns over public pressure in the media on judges following some cases.[119] On some notorious occasions, Members of Parliament and ministers have been known to echo the disapproval of some parts of the media. Perhaps the best-known example is the low sentence given to a convicted paedophile where the judge had

[118] Family court hearings were open to the media in April 2009, but proceedings can only be reported in the press with the judge's permission.

[119] See Bradley (note 110).

correctly applied existing sentencing guidelines. Regrettably the Home Secretary of the day joined in the attack on the trial judge, and the incident heightened concerns among the judiciary that the Lord Chancellor is not in a sufficiently strong position to remind his Cabinet colleagues of their duties to respect the decisions of the judiciary.[120] On another occasion the Home Office was ordered to allow six men, formerly acquitted of hijacking an airplane on the grounds of duress, indefinite leave to remain in the United Kingdom; and the then Prime Minister Tony Blair remarked that "it's not an abuse of justice for us to order their deportation, it's an abuse of common sense frankly to be in a position where we can't do this".[121] But the judgment was upheld with the words that "Judges and adjudicators have to apply the law as they find it, and not as they might wish it to be".[122] Notwithstanding the apparently robust terms of the CRA,[123] it has been suggested that a convention that ministers should not criticize adverse decisions ought to have been included.[124]

It is commonly agreed that the advent of the Human Rights Act has exacerbated the opportunities for politicians and judges to come into conflict. The House of Lords' Select Committee on the Constitution recorded 17 declarations of incompatibility since 2000 and this does not include several more occasions where the courts have avoided a declaration only by controversially stretching their interpretation of the legislation. Most prominently, senior judges have struck down central aspects of the government's efforts to detain or monitor terrorist suspects whom the Crown Prosecution Service does not wish to prosecute.[125] The recent tensions that have developed between executive and judici-

---

[120] See Select Committee on the Constitution, Sixth Report of 2006/07 (11 July 2007), para. 45.

[121] The Prime Minister was commenting on *R (on the application of S) v. Secretary of State for the Home Department,* (2006) EWHC 1111 (Admin), see the Joint Committee On Human Rights' Thirty-Second Report (7 November 2006), Section 2.

[122] *R (on the application of S) v. Secretary of State for the Home Department,* (2006) EWHC 111.

[123] See supra note 2.

[124] Bradley (note 110), at 478-480 thought the matter should have been addressed in the 2004 Concordat.

[125] *A v. Secretary of State for the Home Department* (2004) UKHL 56; *Secretary of State for the Home Department (Respondent) v. AF (Appellant) (FC) and another (Appellant) and one other action*, (2009) UKHL 28.

ary "have to be managed and kept in proportion if public confidence is to be maintained in the independence of the judiciary and the integrity of government".[126]

There have been happier moments for relationships between the judiciary and the government, even when the Human Rights Act or analogous issues of civil liberties have been invoked. The readiness of their Lordships to uphold anti-social behaviour orders as compatible with Article 6 ECHR has aided a central plank of the government's fight against low level street crime.[127] Two decisions of their Lordships have enabled the government to avoid further public scrutiny behind the legality of its decision to invade Iraq in 2003.[128] Undoubtedly, the judiciary has treated each of these cases according to their own understanding of procedural fairness and the scope of human rights law, rather than as a series of conflicts with the government. But whether this is the popular perception is unclear.

At the time of writing the long-term future of the Human Rights Act remains unclear. It is certainly arguable that, when some ministers have remembered the protocol not to attack individual judges, they have instead criticized the Human Rights Act, whilst meaning their audience to understand that the individual judgment is the real cause of their ire. Whilst the Act remains, tension between the judiciary and the executive looks likely to continue.

IV. Security

The Judges' Council recently agreed to develop a more proactive and coordinated approach to judicial security and to create a new Sub Committee. This Sub Committee will be chaired by a High Court judge who will also be responsible for considering what action to take on individual security threats as and when the need arises. But no judge is known to have been intimidated in relation to court proceedings, and recently, sections 44 and 46 of the Criminal Justice Act 2003 have been applied for the first time so as to allow a Crown Court trial to be con-

---

126 Bradley (note 110).

127 *R v. (Crown Court of Manchester), ex p McCann*, (2002) UKHL 39.

128 *R v. Jones,* (2006) UKHL 16; *R v. Prime Minister and others, ex p Gentle and another*, (2008) UKHL 20.

tested without a jury (i.e., the single judge is to be the tribunal of fact) on account of serious concerns with jury tampering.[129]

D. Ethical Standards

Principles of judicial conducts are listed in some non-legally binding documents drafted by judges (I), and the recent emphasis on training includes seminars on judicial conduct (II).

I. Code of Ethics for Judges

In addition to the judicial oath ("I will do right by all manner of people, after the law and usages of his realm, without fear or favour, affection or ill will"), the principles governing the judicial conduct in- and outside the court are stated both in the Memorandum on Conditions of Appointment and Terms of Services (given to each mainstream judge on appointment) and in the non-legally binding Guide for Judicial Conduct.

First, the Guide for Judicial Conduct introduces in broad terms the six principles developed under the Bangalore Principles of Judicial Conduct: judicial independence, impartiality, integrity, propriety (and the appearance of propriety), equality of treatment to all before the courts and competence and diligence. In addition, the Guide introduces guidance on personal relationships and perceived bias as well as on activities outside the courts, in relation to the media for example, or after retirement. The Guide's section on propriety is effectively a check-list of potential activities each of which is capable of a possible reprimand or even removal, from having to accept a level of public scrutiny higher than that normally experienced by the average citizen, to financial probity and the need to avoid all possible potential or actual conflicts of interest.

Second, in the Memorandum on Conditions of Appointment and Terms of Service relating to Circuit judges, the Lord Chancellor states that "the public must be entitled to expect all judges to maintain at all

[129] *R* v. Twomey; R v. *Blake*; R v. *Cameron;* R v. *Hibberd*, (2009) EWCA Crim 1035.

times the proper standards of courtesy and consideration".[130] This is in line with the propriety section of the Guide of Judicial Conduct, and as already noted, breach of this requirement may be a ground for dismissal.[131] A clear link, therefore, is made between ethics and disciplinary proceedings.

II. Training

Judicial conduct and ethics are part of the induction programmes and the seminars annually offered by the Judicial College.[132]

E. Supreme/Higher Courts

The Lord Chief Justice is president of the judiciary in England and Wales, but he/she does not sit in the UK Supreme Court except when required to do so as an acting judge of that court.[133] The Law Lords are a distinct group of judges. Its members also serve as members of the Privy Council, which serves as a supreme court for a diminishing number of members of the Commonwealth. The new Supreme Court, a quasi-federal court, retains most of the distinctive features of the House of Lords except that it is no longer part of the legislative chamber and its members lose all connection with this non-judicial side. As Professor Malleson documents, the saga of the creation of the Supreme Court results from a more intense consideration of the notion of formal judicial independence, following the Human Rights Act and a number of decisions of the ECtHR.[134]

---

[130] See the Information Tribunal discussing this point, Appeal Number: EA/2008/0084, 10 June 2009, para. 45.

[131] See *supra* B. VII. 1. Grounds for Disciplinary and Removal Proceedings.

[132] See *supra* B. II. 4. Training.

[133] Section 68 CRA.

[134] K. Malleson, Modernising the Constitution: Completing the Unfinished Business, 24 Legal Studies 119 (2004).

F. Conclusions

The English have a strong historical commitment to the independence of individual judges, and their independence has been formally respected, both in the CRA and more often than not in practice, in response to isolated incidents when judges have been criticized. At the same time, it is clear that much depends on the constitutional relations external to the judiciary, such as the unbalanced relationship between Parliament and the Government, which controls the House of Commons. The attitude of senior judges to their role also matters. The choices of the Prime Minister for the role of Lord Chancellor, and the personal relationships between future Lord Chancellors and Lord Chief Justices will do much to determine future developments, in particular relating to the prominent issue of control over resources and deployment of judges.

As the judiciary has grown in size and complexity, the CRA introduced greater formality and professionalism into the processes of appointing, disciplining and managing judges.[135] The creation of the Judicial Appointments Commission with new procedures has "the potential to secure the long-term independence of the judicial system, to promote the diversification of the bench and to enhance public confidence in the system."[136] A key test of the new relationship between the judiciary and the other branches will be the workings of the Judicial Appointments Commission, which have been heavily criticized and are now under review before Parliament.

In terms of external perceptions of the judiciary, a more proactive attitude may emerge, due to the revitalization of the Judges' Council, and the creation of the Judicial Communications Office to guide the judiciary through the media. The lack of an annual report, unlike the French *Cour de cassation* and the *Conseil d'Etat* is however noticeable; yet it would provide a clearly identifiable voice for the judiciary.

Some other knock-on effects of the recent constitutional reform still need to be addressed. When, under the CRA, the Lord Chancellor's position was abolished as contrary to the principle of separation of powers, little forethought was given to its consequences. Resources have

---

135 Bell (note 33), at 311; see also A. King, The British Constitution (2007), at Chapter 6, for a review of the changes in the role of the judges since the 20th century.

136 Malleson (note 35), at 51.

been under great strain, notwithstanding the heavy managerial load placed upon the judiciary under the CRA. In addition, some formal safeguards for internal independence, i.e., the independence of a judge from more senior judges, are required, both for the court judiciary and the tribunal judiciary. One of those safeguards needs to be the appraisal structure that exists in other countries, and still needs to be acted upon for the court judiciary and the tribunal judiciary in England and Wales, beyond the current pilot scheme of appraisal that is in place for recorders only. An appraisal structure would effectively support the development of judicial promotion, a notion also underdeveloped compared with other countries. Another safeguard, however, might be provided by the dual leadership between the Lord Chief Justice and Lord Chancellor, on non-political issues such as the judicial deployment at a particular court, where the Lord Chancellor may provide an independent yet authoritative view.[137] Finally, the recent emphasis on ethical standards cannot mask the uncertainty about the grounds for disciplinary action and the under-developed procedures for recusal. Practice directions, arguably, are needed in this area.

It is not altogether clear what other countries may have to learn from recent English experience. It is the tradition of judicial independence in England, rather than the broad but imprecise terms of the CRA, which seems to make the current situation workable. Much the same might be said of the perceived impartiality and integrity of English judges. At the same time, the potential effects of distorted media coverage, if only upon the public perception of the judiciary, present a challenge which may not exist in the same form in other countries and which is not fully resolved in England and Wales. However, the high numbers of practitioners who are prepared to accept a cut in salary to become judges[138] do suggest that the prestige of the position is undiminished and that within the profession itself, the judges are acknowledged to be discharging their functions well.

---

[137] Beatson (note 72), at 17. It is also suggested that the Lord Chancellor should be given the power to determine the non-statutory eligibility criteria for judicial appointments, see *supra* B. II. 1. d) Non-statutory Eligibility Criteria for Professional Judges.

[138] But by no means always. See H. Genn, The attractiveness of senior judicial appointment to highly qualified practitioners: report to the Judicial Executive Board (2008).

Judicial Independence in Sweden

Joakim Nergelius and Dominik Zimmermann

A. Introduction

The status of the judiciary in Sweden is to be seen against the background of the unique constitutional setting underpinning the Swedish legal order. With the gradual abandonment of the constitution from 1809, the adoption of the new Swedish constitutional act in 1974[1] represents the elevation of the principle of popular sovereignty to the position of the main and overarching constitutional value. Hence all public power is considered to derive indivisibly from the people[2] and the different branches of Government merely exercise the different functions vested in them by the constitution.[3] This is reflected in a concentration of power in the legislative and the executive branches. In addition, a combination of profound confidence in state supervision instead of judicial control,[4] the existence of a variety of alternative dispute settlement mechanisms and scepticism towards the judiciary's role in the set-

[1] *Regeringsform*, SFS 1974:152 (Instrument of Government; hereinafter: IG). Formally, Sweden has four constitutional acts, but the Instrument of Government of 1974 is by far the most important.

[2] Karnov – Svensk lagsamling med kommentarer 2009/10 – band 1, at 20 note 282 (14th ed., 2009).

[3] H.-H. Vogel, Schweden, in: A. von Bogdandy/P. Cruz Villalón/P. M. Huber (eds.), Handbuch Ius Publicum Europaeum Band I: Grundlagen und Grundzüge staatlichen Verfassungsrechts, 507, at 558 (2007).

[4] Generally see N. Karlson, Grundlagen, demokratin och tidsandan: om bakgrunden till 1974 års regeringsform, Sveriges konstitution, in: N. Berggren, N. Karlson/J. Nergelius (eds.), Makt utan motvikt: om demokrati och konstitutionalism, at 1-35 (1999).

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233, DOI 10.1007/978-3-642-28299-7_6,

ting up of a welfare state as conceived by the main political forces[5] resulted in a reduced role of the courts in public life and in the somewhat cursory treatment of the judiciary in the constitution.

Traditionally authorities, trade unions and other organizations in Sweden play a more important role than the judiciary in safeguarding individuals' interests.[6] The constitution reflects this e.g. by regulating courts of law and administrative authorities in close relation to one another.[7] The question of the separation of adjudication and administration was dealt with very rudimentarily and reluctantly by the constitutional drafting committee in 1973 (*Grundlagsberedningen*).[8] Although the IG distinguishes between courts, responsible for the administration of justice, and central and local Government administrative authorities, responsible for the public administration,[9] Chapter 11 IG ("Administration of justice and general administration") deals with courts and ad-

---

5 Cf. P.-H. Lindblom, Civil and criminal procedure, in: M. Bogdan (ed.), Swedish Law in the New Millennium, at 201 (2000); J. Nergelius, Svensk statsrätt, at 22 (2006).

6 C. Sandgren, God rättskipning – särskilt om rättskipningens oavhängighet som kvalitetskriterium, in: S. Heckscher/A. Eka (eds.), Festskrift till Johan Hirschfeldt, 455, at 459 (2008). This is also e.g. demonstrated by the relatively low number of lawyers in Sweden. According to the Council of Europe the number of lawyers per 100,000 inhabitants in 2006 was 49, as compared to 76 in France, 115 in Norway and 168 in Germany; see European Commission for the Efficiency of Justice (CEPEJ), European judicial systems – Edition 2008 (data 2006): Efficiency and quality of justice, at 214 (2008), available at <http://www.coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp>. The number of professional judges is equally low, with 13.9 per 100,000 inhabitants in 2006; id., at 110.

7 O. Ställvik, Domarrollen – Rättsregler, yrkeskultur och ideal, at 92 (2009).

8 See the comments made on the subject by the justice minister, *Proposition 1973:90 med förslag till ny regeringsform och ny riksdagsordning m. m.* (Government bill with a proposal for a new instrument of Government and new riksdag [parliament] act), at 233.

9 Chapter 1 Article 8 IG. According to Ragnemalm the distinction between courts of law and administrative authorities is "a purely formal one", H. Ragnemalm, Administrative justice in Sweden, at 22 (1991). Still H. Strömberg in his acclaimed book on administrative law uses the term *domstol* (court) to describe ordinary courts, and the term *myndighet* (authority) to mean both administrative courts and administrative authorities; see H. Strömberg, Allmän förvaltningsrätt, at 223 (24th ed., 2008).

ministrative authorities together and e.g. establishes their independence in a comparable manner.[10]

The Swedish judiciary consists of general courts (*allmänna domstolar*), general administrative courts (*allmänna förvaltningsdomstolar*) and special courts.[11] The general courts deal with criminal and civil law cases at three levels[12] and the main judicial burden lies with the 49 district courts[13] and the six courts of appeal.[14] The Supreme Court was established in 1789 and is the only general court explicitly mentioned in the constitution.[15] Its primary task is to provide guidance on the application of the law through its judgments which serve as precedents, to hear applications for a new trial and to decide on the extension of limitation periods. Three levels of administrative courts[16] hear cases relating to disputes between individuals and the authorities. As of February 2010 there are 12 county administrative courts[17] and four administrative

---

[10] See Nergelius (note 5), at 239-247.

[11] The general and administrative courts are the focus of this chapter. Special aspects of the supreme courts are dealt with below at E. Supreme/Higher Courts.

[12] The district courts (*tingsrätt*), courts of appeal (*hovrätt*) and the Supreme Court (*Högsta Domstolen*).

[13] See *Förordning om rikets indelning i domsagor*, SFS 1982:996 (Government ordinance on the division of the territorial jurisdictions of the realm). See also Sveriges Domstolar, *Årsredovisning 2009*, at 22-27 (2010), available at <http://www.domstol.se/Publikationer/Arsredovisning/ÅR_202009_webb.pdf >.

[14] Chapter 2 Article 6 *Rättegångsbalk,* SFS 1942:740 (hereinafter: Code of Judicial Procedure).

[15] Chapter 11 Article 1 IG.

[16] County administrative courts (*förvaltningsrätt*; formerly *länsrätt*), administrative courts of appeal (*kammarrätt*) and the Supreme Administrative Court (*Regeringsrätten*).

[17] *Förordning om allmänna förvaltningsdomstolars behörighet m.m.*, SFS 1977:937 (Government ordinance on the jurisdiction of the administrative courts). The number was significantly decreased from 23 to 12 in 2010, due to the increase in cases before administrative courts, new areas of law and the increased need for the administrative courts to have competence in special legal areas (which was also due to the influence of EU-law). See *Proposition 2008/09:165 En långsiktigt hållbar organisation för de allmänna förvaltningsdomstolarna i första instans* (A long-lasting organization of first instance administrative courts), at 104-107.

courts of appeal.[18] The Supreme Administrative Court was established pursuant to Chapter 11 Article 1 IG and is composed of at least 14 justices, of whom two-thirds must be legally trained judges.[19] Important special courts include the Labour Court (*Arbetsdomstolen*), the Market Court (*Marknadsdomstolen*) and the Court of Patent Appeals (*Patentbesvärsrätten*). The existence of such courts, in which representatives of interest groups may even be in a majority, has at times been questioned; the Labour Court[20] was, however, considered by the European Court of Human Rights as a proper court in the sense of Article 6 European Convention on Human Rights (ECHR).[21] Still, the absence in the Swedish constitution of detailed rules on which cases and disputes need to be examined by courts, together with a long historical tradition of an independent administration, may explain the large number of cases in which Swedish citizens have complained to the Strasbourg court of alleged violations of Article 6 ECHR.

---

[18] Section 1 *Förordning om allmänna förvaltningsdomstolars behörighet m.m.*

[19] Section 3 *Lag om allmänna förvaltningsdomstolar*. All the current 17 justices at the Supreme Administrative Court are legally trained.

[20] Pursuant to Chapter 3 *Lag om rättegången i arbetstvister*, SFS 1974:371 (Law on court procedures in labour disputes) the Labour Court is composed of a maximum of four presidents, four vice presidents and 17 further judges, all of whom are appointed by the Government for a period of three years. The presidents and vice-presidents, who are to be legally qualified and experienced in the judicial profession, as well as three ordinary judges, who are to have special knowledge of the conditions on the labour market, must not be considered to represent employers' or employees' interests. The following institutions can make proposals for appointment to the bench: the Confederation of Swedish Enterprises (*Föreningen Svenskt Näringsliv*) appoints four judges, the Swedish Association of Local Authorities and Regions (*Sveriges Kommuner och Landsting*) appoints two, the Swedish Agency for Government Employers (*Arbetsgivarverket*) one, the Swedish Trade Union Confederation (*Landsorganisationen i Sverige*) four, the Swedish Confederation for Professional Employees (*Tjänstemännens centralorganisation*) two and the Swedish Confederation of Professional Associations (*Sveriges Akademikers Centralorganisation*) one.

[21] ECtHR, *AB Kurt Kellermann* v. *Sweden*, Judgment of 26 October 2004, available at <http://hudoc.echr.coe.int/>. In a previous case in 1989 (ECtHR, *Langborger* v. *Sweden*, Judgment of 22 June 1989, Series A, No. 155), the former, less well-known but very similar *Bostadsdomstolen* (Housing Court) was, however, seen not to meet the requirements of Article 6 ECHR as an independent court. After the judgment this court simply ceased to exist.

Strong protection for judicial independence is provided by Chapter 11 Article 8 IG, which states that no judicial or administrative function may normally be performed by the Parliament (*Riksdag*).[22] Furthermore a very important rule is to be found in Chapter 11 Article 2 IG, according to which no public authority, including the *Riksdag*, may determine how a court of law shall adjudicate an individual case or otherwise apply a rule of law in a particular case. It is worth noting that although no traditional separation of powers is expected to occur in Sweden, this provision has actually strengthened the position of the courts as compared to the constitution of 1809, where nothing was said on judicial independence as such. Moreover, no court of law shall be established by reason of an act which has already been committed, or for a particular dispute or otherwise for a particular case.[23] The initiative to establish a separate body responsible for the administration of the judiciary in the 1970s in order to increase its efficiency came to serve as a model in many other Scandinavian countries.

B. Structural Safeguards

In Sweden one may distinguish between the administration of the judiciary, largely dealt with by the National Courts Administration (*Domstolsverket*; DV) together with the individual courts, and decisions with respect to the appointment and careers of judges, on which an independent authority (*Domarnämnden*), responsible for the nomination process, co-operates with the Government.

I. Administration of the Judiciary

1. Organs in Charge of the Administration of the Judiciary

Pursuant to Chapter 11 Article 4 IG provisions relating to the functions of the courts which are relevant to the administration of justice, i.e. the

---

[22] One example of a judicial function exercised by the Parliament is the *Riksdag's* consent to legal action being taken against a member of the *Riksdag* on account of an act or statement made in the exercise of his mandate; see Chapter 4 Article 8 IG.

[23] Chapter 2 Article 11 IG.

delivery of judgments and decisions,[24] the principal features of their organization, and court procedure are laid down in law. Thus the administration of the judiciary can to a large extent be regulated by the Government through statutory instruments.[25] In consequence responsibility for the administration of the judiciary has been entrusted to the DV by Government ordinance.[26] The DV is responsible in particular for the management of the judiciary, including the equipment and staffing levels, and it oversees the need for development of the courts' organization. General instructions for the court administration are provided in the Government's Terms of Reference (*Regleringsbrev*), which accompany the annual budget.[27] The *Regleringsbrev* sets out the objectives of the judiciary's operations, the optimal processing time for court cases and the appropriations granted for each fiscal year. Although most of these instructions are directed to the DV, some, such as the timescales within which cases are to be decided, are directed straight at the courts.[28] The courts themselves are responsible for their own administration within the framework set up by the DV and the Ministry of Justice.[29] This implies that the chief judge is responsibility to the DV not only for meeting performance targets and financial administration, but also the court's management of personnel and the distribution of cases.[30] Furthermore the chief judge has to produce reports on members

---

[24] Cf. *Proposition 1973:90 med förslag till ny regeringsform och ny riksdagsordning m. m.*, at 387-388.

[25] Cf. Chapter 8 Article 13 IG on the legislative competences of the Government, the so-called *regeringens restkompetens*; see H. Strömberg, Normgivningsmakten enligt 1974 års regeringsform, at 151-168 (3rd ed. 1999).

[26] See *Förordning med instruktion för Domstolsverket*, SFS 2007:1073 (Government ordinance with instructions for the National Courts Administration).

[27] Justitiedepartementet, Regleringsbrev för budgetåret 2010 avseende Sveriges Domstolar, Regeringsbeslut 21 December 2009 (The Government's terms of reference for the budget year 2010 regarding the Swedish courts; hereinafter: *Regleringsbrev*), Ju2009/10260/DOM.

[28] *Regleringsbrev* (note 27), at 1.

[29] This responsibility mainly lies with the chief judge (see e.g. section 28 *Förordning med tingsrättsinstruktion*, SFS 1996:381 [Government ordinance with instructions for the district courts]) and the president of the courts of appeal (see e.g. section 25 *Förordning med hovrättsinstruktion*, SFS 1996:379 [Government ordinance with instructions for the courts of appeal]).

[30] See *infra* B. V. Case Assignment and Recusal.

of his/her court who are seeking a new appointment.[31] At times attempts have been made by other authorities to influence the administration of the judiciary by exerting influence on the DV. An example is a memorandum submitted by the National Tax Board (*Riksskatteverket*) to the DV in which the Board requested priority for cases handled by courts where the limitation period was about to expire. The fact that the DV forwarded this memorandum unmodified to all county administrative courts and administrative courts of appeal was criticized by the Parliamentary Ombudsman (*Justitieombudsmannen*) as detrimental to the independence of the courts.[32]

2. Judicial Council

The *Domstolsverket* was set up in 1975 for the purpose of the administration of the courts.[33] It was established to remove some of the burden of the administration of the judiciary from the Government Offices (*Regeringskansliet*) as well as the courts themselves, and to increase the efficiency of the judiciary.[34] The DV is an independent administrative organ which is bound by the general instructions provided by the Government but independent in the sense that the Government may not influence how the DV decides a particular case.[35] The influence from the DV has gradually increased and it now acts on its own initiative regarding the making of suggestions on the organisation and the working

---

[31] See *infra* B. II. 2. The Process of Judicial Selection and Training of Judges.

[32] See Justitieombudsmannen, Ämbetsberättelse 1999/2000, at 48 (2000).

[33] Similar bodies have in recent years been established in Denmark (the *Domstolsstyrelsen* in 1999) and in Norway (the *Domstoladministrasjonen* established in 2001). The administration of the judiciary in Finland, however, remains under the general administration of the Ministry of Justice. See A. Eka, Judicial Council – ett råd i tiden?, in: S. Heckscher/A. Eka (eds.), Festskrift till Johan Hirschfeldt, 95, at 102-104 (2008).

[34] See SOU 1971:41. *Ny domstolsadministration*, at 29 (A new court administration). T. Rolén, Domstolar i förändring, in: S. Heckscher/A. Eka (eds.), Festskrift till Johan Hirschfeldt, 431, at 431-432 (2008).

[35] Cf. Chapter 11 Article 7 IG. Administrative authorities coming under the Government are principally independent from the Government (the so-called principle on the prohibition of ministerial government; *principen om förbud mot ministerstyre*) and the latter may only provide general instructions to the authorities.

methods of the courts.[36] Due to these activities the DV is sometimes criticized as being a Government tool not only to manage but indeed to control the judiciary.[37] It has been argued that the duty of the DV, as an administrative organ under the Government, to follow the instructions of the Government creates the risk of a governmentally controlled judiciary and that thus a DV established by law and "owned" solely by the judiciary would be preferable.[38] Yet it must be recognized that the system of independent administrative authorities is a fully functioning component of the larger Swedish model of administration.[39]

The DV was established to work for the best possible disposition of the resources with which the judiciary has been supplied by the Government.[40] According to the Government ordinance establishing the DV it has to provide administrative support and service to the judiciary.[41] Thus the DV not only distributes the budget between the courts but produces statistics on and monitors the efficiency of the courts and is called upon to promote the development and quality of the work of the courts.[42] The DV also sets up working groups in order to analyze and suggest new and more efficient working procedures for the courts. Beyond these tasks the DV functions as a secretariat for the authority responsible for making proposals for the selection of judges (*Domarnämnden*),[43] which itself is an independent authority under the Govern-

---

[36] This goal was formulated in the budget proposal for the year 1999, see *Proposition 1998/99:1 Budgetpropositionen för 1999 utg. omr. 4*, at 76 (Budget proposal for the year 1999).

[37] "It is obvious that the Domstolsverket is supposed to be a governing and not a servicing body." (translation by the authors), G. Petrén, Domstolsverket och domstolsväsendet – en studie i regeringsteknik, Svensk Juristtidning 651, at 654 (1975); P. Eriksson, Domstolsverket (DV) och Domstolsstyrelsen – Olika sätt att reglera domstolsadministrationen, 1 Tidskrift för Sveriges Domareförbund, 23, at 23 (2000).

[38] G. Regner, Domstolarna och kontrollmakten, in: L. Marcusson (ed.), Festskrift till Fredrik Sterzel, 257, at 264 (1999).

[39] Nergelius (note 5), at 240-241.

[40] *Proposition 1974:149 Kungl. Maj:ts proposition med förslag till organisation av den nya centralmyndigheten för domstolsväsendet m.m.* (Government bill with a proposal on the organization of the new central authority for the judiciary), at 6.

[41] Section 1 *Förordning med instruktion för Domstolsverket*.

[42] *Regleringsbrev* (note 27), at 3.

[43] Section 5 *Förordning med instruktion för Domstolsverket*.

ment.[44] This function has been criticized as contributing to the risk of undue influence on and lacking transparency in the selection and appointment of judges.[45] As early as in the *travaux préparatoires* it was recognized that the DV's tasks may not infringe upon the core adjudicatory functions of the judiciary;[46] instead the DV ought to promote a well adapted organization, suitable working routines, develop education and information for the courts and thereby establish the preconditions for effective work and the independent exercise of the judicial function of the courts.[47] The DV itself is eager to underline that it is its fundamental objective to strengthen the independence of the courts and to release time and resources for the adjudication process.[48]

Since the DV is an administrative authority under the Government it is headed by a director-general who is responsible for the work of the DV to the Government, which also appoints him/her.[49] Pursuant to section 3 of the instructions for the DV there shall be a board consisting of a maximum of ten members appointed by the Government, which is headed by the director-general.[50] The board supervises operations and advises the director-general. Currently the board comprises nine members: two members of parliament, one representative of the office of the public prosecutor (*Åklagarmyndigheten*), three representatives of other administrative agencies, two judges and one court clerk (*domstolssek-*

---

[44] See *infra* B. II. 2. The Process of Judicial Selection and Training of Judges.

[45] The recent draft bill on the selection and appointment of permanent judges seeks to remedy these deficiencies, see *Proposition 2009/10:181 Utnämning av ordinarie domare* (Appointment of permanent judges).

[46] See also section 1 subsection 2 *Förordning med instruktion för Domstolsverket*.

[47] Ibid.

[48] See, e.g., Sveriges Domstolar, Operational Plan 2009-2011, at 4 (2009), available at <http://www.domstol.se/Publikationer/Verksamhetsplan/vp_2009-2011_eng_webb.pdf>.

[49] Section 2 *Förordning med instruktion för Domstolsverket*, in conjunction with sections 2-3 *Myndighetsförordning*, SFS 2007:515 (Government ordinance on administrative authorities).

[50] The DV comprises eight departments: Finance Department, Human Resources Department, Development Department, IT Department, Security Department, Communications Department, Administrative Department and Legal Department. Moreover, the DV has an Internal Audit Office.

reterare).[51] In March 2010 the Government submitted a draft bill which would determine in more detail the required professional background of the board members and provide the *Riksdag* with the competence to appoint two of the nine members.[52]

II. Selection, Appointment and Reappointment of Judges

1. Eligibility

There are few formal requirements for the appointment of judges as a degree of professionalism is ensured by the typical career steps undergone by most new judges. Although there is no formal requirement that judges must have participated in the special education of judges[53] or even have previously served as law clerks, the majority of permanent judges have in fact undergone such training.[54] The preconditions for appointment as a judge follow from the Code of Judicial Procedure which stipulates that every judge must be a Swedish citizen[55] and have taken the tests prescribed by the Government, i.e. the Degree of Master of Laws or the equivalent older law degree.[56] The fact that the required tests are determined by the Government and not by law is questionable, as it in theory allows for radical changes in the recruitment process which may undermine the purely judicial competence of courts.[57] Attempts to weaken the nationality requirement in the sense that it would

---

[51] For the current composition see Sveriges Domstolar, Domstolsverkets organisation, available at <http://www.domstol.se/templates/DV_InfoPage____899.aspx>.

[52] See *Proposition 2009/10:181 Utnämning av ordinarie domare* (Appointment of permanent judges).

[53] See *infra* B. II. 2. The Process of Judicial Selection and Training of Judges.

[54] SOU 2008:125. *En reformerad grundlag*, at 320 (A reform of the basic law).

[55] The nationality requirement is also laid down in the constitution, see Chapter 11 Article 9 section 3 IG; cf. E. Holmberg/N. Stjernquist, Grundlagarna med tillhörande författning, at 387-388 (1980).

[56] Chapter 4 section 1 Code of Judicial Procedure. *Förordning om kunskapsprov för behörighet som domare, m.m.*, SFS 2007:386 (Government ordinance on knowledge test for qualifications as judge), in conjunction with annex 2 of the *Högskoleförordning*, SFS 1993:100 (Government ordinance on universities).

[57] Cf. Ställvik (note 7), at 167.

apply only to permanent judges did not lead to any changes in the applicable law.[58] A person is not eligible to perform the functions as judge if he/she has been declared bankrupt or if an administrator has been appointed under the Children and Parents Code to act on his/her behalf.[59] Interestingly the requirements for becoming a lawyer are more detailed and, *inter alia*, demand integrity and general suitability to take a post as a lawyer.[60] This may be explained by the important role played by the training for future judges which is offered within the judiciary and which will thus be elaborated in more detail in the following.

The structure of training of future judges (*domarutbildningen*) has for long remained unchanged and still serves as the ideal approach to the holding of any office as judge.[61] It may be divided into three different stages.[62] (I) The young lawyer first serves as a reporting clerk (*fiskal*) in a court of appeal or as assistant judge in an administrative court of appeal, where the tasks mainly include the reporting of cases.[63] Admission as a reporting clerk or assistant judge presupposes the possession of a law degree, Swedish nationality and the completion of two years' service as a law clerk (the so-called *notarietjänstgöringen*)[64].[65] Decisions on admission as a reporting clerk or assistant judge are made by the indi-

---

[58] See SOU 2000:106. *Medborgarskapskrav i svensk lagstiftning* (The demand for citizenship in Swedish legislation). The recent committee on the review of the Swedish constitution supported the citizenship requirement but suggested it be applied only with regard to permanent judges, whereas ordinary laws should provide for such a requirement applicable to non-permanent judges, *Proposition 2009/10:80 En reformerad grundlag* (A reform of the basic law), at 239-240.

[59] Chapter 4 section 1 subsection 2 Code of Judicial Procedure.

[60] Chapter 8 section 2 subsection 1 paras. 4-5 Code of Judicial Procedure.

[61] SOU 2003:102. *En öppen domarrekrytering*, at 87 (An open recruitment of judges).

[62] The education is the same for both the general courts and the general administrative courts.

[63] Section 17 *Förordning med hovrättsinstruktion*; section 17 *Förordning med kammarrättsinstruktion*, SFS 1996:380 (Government ordinance with instructions for the administrative courts of appeal).

[64] Admissions are decided by the DV; see sections 2 and 7 *Notarieförordning*, SFS 1990:469 (Government ordinance on law clerks).

[65] See sections 38 and 41 *Förordning med hovrättsinstruktion*, and sections 38 and 41 *Förordning med kammarrättsinstruktion*.

vidual (administrative) courts of appeal.[66] In making their decisions the superior courts are called upon to work closely with the DV and to follow similar selection criteria to those established for the selection of judges.[67] (II) After serving as a reporting clerk or assistant judge at a superior court the young lawyer serves as an assistant judge (*fiskal*) at a district court or county administrative court for two years. Decisions on admission are made by the respective competent superior court.[68] The tasks with which the assistant judge is entrusted may encompass the exercise of judicial functions, to the degree that this is commensurate with the assistant judge's experience.[69] The chief judge has to ensure that the assistant judge's education is comprehensive and progressive and in accordance with the educational plan established by the DV in consultation with the superior courts.[70] (III) After a minimum of two years' service in the first instance courts the young lawyer returns to the (administrative) court of appeal to serve as an assistant judge (*adjungerad*) for one year.[71] After completion of this service the young lawyer may be appointed an associate judge of appeal by the president of the (administrative) court of appeal, after consultation with the head(s) of division(s) of the courts where the applicant served in the previous stages of the education.[72]

During all three stages the young lawyer must participate in obligatory education organized by the DV, consisting of schooling in judicial ethics, the role of the judge, EC law, the writing of judgments, and the

---

66 Section 38 *Förordning med hovrättsinstruktion*; section 38 *Förordning med kammarrättsinstruktion*.

67 Cf. *Proposition 2007/08:113 Rekrytering av domare*, at 25 (Recruitment of judges). See at note 90.

68 Section 42 *Förordning med tingsrättsinstruktion*; section 37 *Förordning med förvaltningsrättsinstruktion*, SFS 1996:382 (Government ordinance with instructions for the county administrative courts).

69 Section 11 *Förordning med tingsrättsinstruktion*; section 10 *Förordning med förvaltningsrättsinstruktion*.

70 Section 5 *Förordning med tingsrättsinstruktion*; section 4 *Förordning med förvaltningsrättsinstruktion*.

71 Section 40 *Förordning med hovrättsinstruktion*; section 40 *Förordning med kammarrättsinstruktion*.

72 Sections 30 subsection 3, 3 subsection 3 *Förordning med hovrättsinstruktion*.

management of judicial work.[73] In addition to this centrally organized education the reporting clerk or assistant judge may also be offered supplementary courses organized by the superior court to which he/she is posted. According to a study conducted in 2007, those courses primarily include an introductory course, the presentation of cases, the procedural rules applicable in superior courts, the handling of the mass media, guidance on the usage of modern Swedish, and secrecy.[74] Since the superior courts are responsible for the education of young lawyers, the risk of outside influence is relatively small.

2. The Process of Judicial Selection and the Training of Judges

a) The Process of Judicial Selection

Appointments to posts at courts of law or administrative authorities coming under the Government[75] are made by the Government or by a public authority designated by it.[76] As in England there is no career judiciary in Sweden. Instead of automatic appointments to higher or different posts, judges who want to be appointed to a different judicial post must apply following the abovementioned selection and appointment procedure.

For the purpose of making proposals to the Government for the appointment of judges there is an independent authority (*Domarnämnden*) which operates under the Government and is linked to the DV

---

[73] For an overview of the education see Ds 2007:11. *En mer öppen domarutbildning*, at 67-68 (A more open education of judges).

[74] Id., at 68-71.

[75] The IG does not distinguish between appointment to posts at courts and administrative authorities (under the Government), underlining the close connection in Swedish public law between these two kinds of organs.

[76] Chapter 11 Article 9 section 1 IG and Chapter 4 Article 2 Code of Judicial Procedure. The authority to which the appointment could be delegated is the DV. This delegation has, however, never been used and is moreover prohibited by the more detailed provisions on the appointment of judges, e.g. Chapter 4 section 2 Code of Judicial Procedure. On the elimination of this possibility for delegation see SOU 2000:99. *Domarutnämningar och domstolsledning – frågor om utnämning av högre domare och domstolschefens roll*, at 125-129 (Judicial appointments and judicial management – questions on the appointment of higher judges and the chief judge's role) and *Proposition 2009/10:80 En reformerad grundlag*, at 130-131.

which serves as its secretariat.[77] The (maximum) nine members of the *Domarnämnd* are appointed by the Government for a renewable three year term.[78] A majority of the members, including the chairman, are to be or to have been permanent judges; one must be a lawyer. In cases where the chief judge or chief justices (*domstolschefer*) are being appointed, the director-general of the DV shall have the function and rights of a full member of the *Domarnämnd*. In all other cases the members of the DV may be present and issue statements during the deliberations but do not have a right to take part in the decision-making. The fact that the *Domarnämnd* is established by a Government ordinance instead of parliamentary law, as well as the function of the DV as its secretariat, raises concerns regarding the independence of the process of preparing appointments, and has led to a proposed new law which would, if adopted, increase the autonomy of the *Domarnämnd* and instead allow for influence from Parliament in deciding its composition.[79]

In the appointment of judges (as well as other public officials), attention is to be paid only to objective factors such as merit and competence;[80] merit relates to the number of years of professional experience within a given field[81] and competence *inter alia* refers to judicial competences, independence, integrity and the capacity to cope with stress and high pressure of work.[82] Competence shall be the primary consideration unless particular reasons demand otherwise.[83] Other grounds besides merit and competence may be taken into consideration,[84] including

---

77 The *Domarnämnd* is managed according to instructions from the Government, *Förordning med instruktion för Domarnämnden*, SFS 2008:427 (Government ordinance with instructions for the *Domarnämnd*).

78 Section 8 *Förordning med instruktion för Domarnämnden*.

79 See *Proposition 2009/10:181 Utnämning av ordinarie domare*.

80 Chapter 11 Article 9 section 2 IG. On the application of these criteria in practice see G. Lagerbjelke, Självständig under lagarna – Essäer om domarrollen, at 183-189 (1996).

81 *Proposition 1973:90 med förslag till ny regeringsform och ny riksdagsordning m. m.*, at 405.

82 See the *Kravprofil för ordinarie domare*, *supra* note 90.

83 Section 4 *Lagen om offentlig anställning*, SFS 1994:260 (Law on public employment).

84 Section 4 *Anställningsförordning*, SFS 1994:373 (Government ordinance on public employment).

equality of opportunity between women and men.[85] In recent years, the issue of equality between men and women has gained much attention, but it is not likely that a less qualified woman could get a post for which a more qualified man had also applied.[86]

Vacancies for judges are usually published by the DV and the relevant court. The application forms supplied by the *Domarnämnd inter alia* request the applicant to list references from the last five years of professional activity, including the names of judges for whom the applicant worked during the three stages of his/her education to become judge.[87] It ought to be highlighted that in a situation where disagreement arises between a court and the DV on whether to appoint a successor or a new permanent judge the question is referred to the Government for a decision,[88] which underlines the Government's fundamental right to appoint judges.

The procedure before the *Domarnämnd* is predominantly in writing and begins with the call for written statements by the referees listed by the applicant. A compilation of these statements is sent to the chief judge at the court where the vacancy was announced.[89] The chief judge

---

[85] "Other grounds may *inter alia* include equality of opportunity between men and women. This equality may have a decisive influence in situations where the [*Domarnämnd*] considers applicants to be equally qualified as regards merit and competence." See *Proposition 1989/90:79 om domarbanan och meritvärderingen vid tillsättning av domartjänster*, at 12-13 (Government bill on the judicial career and the appraisal of merit in the appointment of judicial offices); translation by the authors.

[86] This follows in part, at least indirectly, from *Abrahamsson et al* v. *Fogelqvist*, which concerned academic chairs reserved for women and which was heard by the European Court of Justice in 2000 (C-407/98, ECR 2000 I, at 5539). The European Court of Justice here found the installation of 30 academic chairs for which only women could apply, to be contrary to EU law.

[87] Cf. *supra* B. II. 2. The Process of Judicial Selection and Training of Judges.

[88] *Regleringsbrev* (note 27), at 15.

[89] Section 7 subsection 2 *Förordning med instruktion för Domarnämnden*. The chief judge is requested to make a statement and is urged to meet and interview the applicant in question. The request that the chief judge meet the applicants was introduced in the Governmental instructions to the *Tjänsteförslagsnämnden* (the predecessor organ of the *Domarnämnd*) in October 2003, see *Förordning om ändring i förordningen med instruktion för Tjänsteförslagsnämnden för domstolsväsendet*, SFS 1988:318 (Government ordinance with amendments to the Government ordinance with instructions for the Tjänsteförslagsnämnden for the judiciary). It was based on the desire to widen the base for de-

shall then send the list of candidates back to the *Domarnämnd* after having arranged them in order of preference. The eventual proposal made by the *Domarnämnd* to the Government is based on this list, on a profile of qualification (*kravprofil*) established by the *Domarnämnd* for permanent judges and on the basis of a special profile for judges in a leading position.[90] The profile of qualification highlights that the selection is made pursuant to the rule in Chapter 11 Article 9 IG; thus only objective factors such as merit and competence may be taken into account. When the position to be filled is that of a senior judge at a district court or county administrative court, the chief judge and a person appointed by the *Domarnämnd* interview the applicants, whereafter the chief judge submits his statement. When the position to be filled is that of a chief judge at a district court or county administrative court the *Domarnämnd* conducts the interviews. The *Domarnämnd's* proposal to the Government may concern one or several candidates, placed in a non-binding order of preference. Overall there have been very few cases where the Government has not followed the suggestions it has received.[91]

b) Training of Judges

As the three stage preparation phase mentioned above is not a necessary precondition to access to judicial office in Sweden,[92] the need for *on the job training* for newly appointed permanent judges arises. This demand is met by the recently established Academy of Judges (*Domstolsakademin*) which offers non-obligatory courses and which since 1 January 2010 has had overall responsibility for in-service training for per-

---

cision-making since the chief judge may as such possess knowledge of some, but not all, candidates (cf. Ds 2007:11. *En mer öppen domarutbildning*, at 92-93).

[90] Sveriges Domstolar, *Kravprofil för ordinarie domare*, available at <http://www.domstol.se/upload/domarnamnden/kravprofil.pdf> and Sveriges Domstolar, *Chefsprofil för chefer inom Sveriges Domstolar*, available at <http://www.domstol.se/upload/domarnamnden/chefsprofil.pdf>. On these profiles of qualification see Ställvik (note 7), at 182-185.

[91] K.-G. Ekeberg, Om domarutnämningar, in: S. Heckscher/A. Eka (eds.), Festskrift till Johan Hirschfeldt, 107, at 112 (2008).

[92] This is the result of the gradual opening up of the judicial profession to those who do not have this career background, a process which has taken place over the past years.

manent judges.[93] The academy was set up under the DV to fulfil the DV's responsibility to ensure that the courts had the necessary competence to carry out their tasks.[94] Teachers at the academy are employees of courts, universities and other authorities.[95] The academy was established in 2008 and operates under the DV, which oversees the appointment of its principal who bears overall responsibility for the choice of subjects in the education programme, the content of the education, and for any follow-up and development. It is envisaged that the court to which the newly appointed judges are appointed will contribute to the education, e.g. by allowing older colleagues to attend court proceedings presided over by the newly appointed judges.[96] Although it is too early to assess the impact of this form of education on the judicial activities of young judges, it ought to be treated with caution due to the risk of putting younger judges under unnecessary psychological pressure by means of the supervision of older colleagues.

3. Length of Office and Transfers

Swedish judges usually hold office until retirement, which in Sweden is reached at the age of 65.[97] The law even lays down a duty on a judge to resign from his/her office on reaching retirement age.[98] Judges are also constitutionally protected against arbitrary transfers to a different position. The transfer of a permanent salaried judge to a different judicial post may occur only if organizational considerations so dictate and if the new judicial office is of "equal status",[99] i.e. if it is a permanent posi-

---

[93] See Sveriges Domstolar, *Utbildning för nyutnämnda domare*, available at <http://www.domstol.se/templates/DV_InfoPage____8204.aspx>.

[94] Id., at 27.

[95] The academy's syllabus, which is established by the principal and those responsible for the various subject areas of the education is available at Sveriges Domstolar, *Domstolsakademin Undervisningsplan*, 18 November 2009, Diarienr. 1480-2008.

[96] See the report which formed the basis for the establishment of the academy, Sveriges Domstolar, *Domarskola*, Domstolsverkets rapportserie 2008:1, at 16.

[97] See section 7 *PA 03 Pensionsavtal*, available at <http://www.arbetsgivarverket.se/upload/Avtal-Skrifter/36265_PA%2003%20TOT.pdf>.

[98] Section 5 *Lag om fullmaktsanställning*, SFS 1994:261 (Law on the employment by mandate).

[99] Chapter 11 Article 5 section 3 IG.

tion with the same or largely the same salary and duties which are essentially similar to those of his/her current post.[100] No geographical limitation applies to transfers. It is unclear how this rule applies where no judicial office of "equal status" is available.[101]

III. Tenure and Promotion

1. Tenure

During his/her tenure a Swedish judge is protected by a fundamental and constitutionally enshrined irremovability,[102] which aims to ensure his/her independence.[103] This constitutional provision is reiterated and underlined in statutory provisions which apply to the terms of employment.[104] Judges are not subject to a probationary trial period once appointed to a permanent position. The question of the introduction of a trial period was addressed by a Governmental committee in 2003 but was rejected as incompatible with the principle of the irremovability of judges.[105]

2. Promotion

As indicated above Sweden does not have a career judiciary; hence there is no separate procedure for promotion to higher courts. Instead, appointment to a higher court or position follows the selection procedure

---

[100] *Proposition 1964:140 Kungl. Maj:ts proposition 1964:140 grundlagsändringar*, at 100 (Government bill with suggested amendments to the constitution).

[101] A question which was highlighted but left open by the Governmental committee in SOU 2000:99. *Domarutnämningar och domstolsledning - frågor om utnämning av högre domare och domstolschefens roll*, at 54.

[102] Chapter 11 Article 5 IG. On the conditions under which a judge may be removed from office see below at section B. VII. Judicial Accountability: Discipline and Removal Procedures.

[103] G. Petrén/H. Ragnemalm, Sveriges grundlagar och tillhörande författningar med förklaringar, at 274 (1980); Karnov – Svensk lagsamling med kommentarer 2009/10 – band 1, at 20 note 293 (14th ed. 2009).

[104] See e.g. section 7 *Lag om fullmaktsanställning*.

[105] SOU 2003:102. *En öppen domarrekrytering*, at 289 (An open recruitment of judges).

described above.[106] Any application requires information to be provided on experience acquired and the names of referees who can attest to the competences of the applicant. Thus if a judge aspires to apply for a different position, e.g. at a higher court, testimonials from colleagues, i.e. superior judges are requested and have a decisive influence.[107] Senior judicial posts are filled by the ministry of justice, and in particular applicants who have not followed the ordinary career of a judge, for example leading practitioners, have been appointed.[108] Decisions on who to appoint to higher judicial office comes down to an interpretation of the rule in Chapter 11 Article 9 section 2 IG mentioned above,[109] according to which only merit and competence may be taken into consideration. Merit will then refer to the individual's skill, while competence is more formal and mainly based on years served.[110] In reality, although the criteria which have to be followed are objective,[111] this system may not be described as transparent.

IV. Remuneration

1. Remuneration

The payment of judges follows the rules applicable to other civil servants. A general wage agreement concluded between the Swedish Agency for Government Employers (*Arbetsgivarverket*) and SACO-S (the Swedish Confederation of Professional Associations) contains gen-

---

[106] See *supra* B. II. 2. The Process of Judicial Selection and Training of Judges.

[107] According to P. Eriksson this system is detrimental to the independence of judges; see P. Eriksson, Den svenske domarens (o)självständighet, in: Hovrätten över Skåne och Blekinge (ed.), Ratio omnia vincit – En vänbok till Trygve Hellners (1998).

[108] See e.g. K.Å. Modéer, Lemän och Lagerlöfvar, at 84, 119-120 (1999).

[109] This rule, according to its wording, applies to "filling a vacancy" in general.

[110] Petrén/Ragnemalm (note 103), at 287; Holmberg/Stjernquist (note 55), at 387.

[111] Petrén/Ragnemalm (note 103), at 287.

eral principles for the setting of salary rates,[112] and *inter alia* prescribes that salaries shall be determined on an individual basis. A separate agreement was concluded between the DV and JUSEK (*Förbundet för jurister, samhällsvetare och ekonomer*; the Federation of Lawyers, Social Scientists and Economists) in October 2008.[113] According to this agreement there is a minimum salary for judges and guaranteed salary increases apply.[114] Beyond the minimum level salaries are determined on an individual basis.

The minimum wage amounts to 47,500 SEK (5,260 EUR) and 49,000 SEK (5,420 EUR) depending on length of service for judges of district courts and judges of (administrative) courts of appeal.[115] The minimum wage of senior judges fluctuates between 60,500 SEK (6,690 EUR) and 62,200 SEK (6,880 EUR). A special guarantee of salary increases is provided for which ensures that between the beginning and end of the agreement's period of validity increases must have reached 2,500 SEK (280 EUR) per month for a permanent judge.

The individual salary level is arrived at between the DV and the judge, usually represented by his/her union (i.e. JUSEK), and this entails a holistic appraisal of certain objective criteria in relation to the individual judge.[116] These criteria are responsibility, the degree of difficulty of tasks he/she has performed, the judge's capability, and results in relation to the goals of the judiciary. Responsibility means those responsibilities which follow from a position as permanent judge, in particular delegated, functional and administrative responsibility. Capability is defined as the way in which the responsibilities have been assumed and difficult tasks have been performed in relation to the aggregated results. However, the agreement explicitly states that the number of cases or matters decided by a judge and his/her activities ultimately resulting in judicial decisions may not be included in the assessment.[117] The agreement fur-

---

[112] *Ramavtal 2007-2010 om löner m.m. för arbetstagare inom det statliga avtalsområdet mellan Arbetsgivarverket och Saco-S*, available at <http://www.arbetsgivarverket.se/upload/saco.pdf>.

[113] *Lokalt avtal mellan Domstolsverket och Jusek angående lönerevisioner inom ramen för RALS 2007-2010*, available at <http://www.jusek.se/upload/PDF/avtal_jusek_dv_2007-2010.pdf>.

[114] Section 7(a) *Lokalt avtal mellan Domstolsverket och Jusek*.

[115] Section 8 *Lokalt avtal mellan Domstolsverket och Jusek*.

[116] Section 7 *Lokalt avtal mellan Domstolsverket och Jusek*.

[117] Section 7b *Lokalt avtal mellan Domstolsverket och Jusek*.

thermore states that the setting of salary rates may not be undertaken in such a way as to influence the independence of judges' judicial activities.[118]

The individualisation of judge's salaries in Sweden was criticized by the European Association of Judges in a resolution adopted on 27 September 2007.[119] The resolution noted "with concern the new system for the remuneration of Swedish judges", criticized that "the introduction of variations in judicial remuneration based on non-objective criteria" is contrary to well-established international standards of judicial independence and urged the Swedish Government to ensure that the system for determining salaries be entirely consistent with those standards.[120] This criticism deserves to be emphasized.[121] Although the number of decided cases may not be used in the setting of a judge's salary, a number of non-objective considerations may have a potential influence on it. It can for example not be ruled out that peripheral activities performed by a judge may affect the overall assessment of his/her capabilities.

2. Benefits and Privileges

To the knowledge of the authors there are no benefits or privileges beyond the remuneration described above. There is no system of bonuses for the number of cases decided by a judge or court. Judges may, however, acquire benefits from the performance of extrajudicial activities. These are limited to engagements, activities and mandates which do not shake confidence in the judge's impartiality.[122]

---

[118] Id.

[119] The European Association of Judges, Resolution Concerning the Remuneration of Judges in Sweden, adopted in Trondheim, 27 September 2007, available at <http://xoomer.virgilio.it/goberto/trondheimen.htm>.

[120] Currently, Sweden is the only member state of the Council of Europe which has introduced a system whereby the salaries of individual judges are individually determined taking into account the performance of judicial duties and activities.

[121] For criticism of the individualization of judges' salaries from within the political sphere in Sweden see *Prestationslöner för domare*, Motion till riksdagen 2009/10:K341 av Ingvar Svensson (kd). See also Betänkande 2009/10:JuU12 *Processrättsliga frågor*, at 13 (Questions of procedural law).

[122] Section 7 *Lagen om offentlig anställning*. See also *infra* C. III. Improper Influence on Judicial Decisions.

3. Retirement

Judges are paid like other civil servants and receive pensions on the same basis. The level of pensions is determined by the general agreement reached between the *Arbetsgivarverket* and the unions representing the judges.[123]

V. Case Assignment and Recusal

Cases are usually assigned by lot or any other system guaranteeing randomness.[124] The basis for the assignment of tasks is to be laid down in the rules of procedure of the individual courts.[125] However, the Government ordinance prescribing the random assignment of cases allows for considerable exceptions to be made, e.g. to reach a reasonable distribution with respect to the types of cases or the origin of the case in the court districts or to allow cases which are linked in some way to be adjudicated by the same court division. Moreover, the chief judge of a first instance court has the authority to divide the judges into different divisions, with a view to providing every judge with experience of adjudication of different kinds of cases. The DV has issued general recommendations on the formulation of rules of procedure for first instance courts, according to which random assignment is endorsed and exceptions are required to be explicitly set out in the rules.[126] The senior judge has no direct influence on these matters.[127] However, the chief judge of a first instance court and the president of an (administrative) court of appeal are solely responsible for the determination of adminis-

---

123 See *Pensionsavtal för arbetstagare hos staten m.fl.*, PA 03.

124 See e.g. section 9 *Förordning med tingsrättsinstruktion*; section 10 *Förordning med hovrättsinstruktion*. Similar rules apply for the administrative courts.

125 See e.g. section 8 *Förordning med tingsrättsinstruktion*; section 14 *Förordning med hovrättsinstruktion*.

126 *Domstolsverkets allmänna råd för utformning av arbetsordning för tingsrätt och förvaltningsrätt*, 19 January 2010, Domstolsverkets författningssamling 2010:1.

127 See also Consultative Council of European Judges, Questionnaire for 2007 CCJE opinion concerning the Councils for the Judiciary: Reply submitted by the delegation of Sweden, CCJE REP(2007)15.

trative matters.[128] Such decisions must, however, be taken with respect to the independence of the individual judge in the exercise of his/her adjudicatory functions. It ought to be a subject of criticism that the distribution of cases may be regulated by a Government ordinance as this subject cannot be referred to the issues that pursuant to Chapter 11 Article 4 IG must be laid down in law. Under its earlier instructions from the Government the DV was explicitly prohibited to prescribe that certain cases be assigned to particular judges or that individual judges exercise particular adjudicative functions.[129] Although it may be assumed that this rule is still adhered to, the new instructions of 2007[130] omitted this provision.

The grounds on which a judge may be disqualified from hearing a case are the following:[131] if he has an interest in the matter at issue (e.g. as a party); if he has a personal relationship with one of the parties; if he is the adversary of a party; if, acting in another court as a judge or officer or as an arbitrator, he has previously dealt with the matter; if any other special circumstances exist which are likely to undermine confidence in his impartiality in the case.[132] A judge is obliged to reveal any matters known to him/her which may be expected to form the basis for disqualification, and any party to a dispute may submit a motion of recusal.[133] Decisions on the disqualification of a judge are taken by the court without the participation of the judge in question.[134] Usually these decisions are not reasoned[135] and are criticized for taking too long,

---

[128] Section 28 *Förordning med tingsrättsinstruktion*; section 26 *Förordning med förvaltningsrättsinstruktion*; section 25 *Förordning med hovrättsinstruktion*; section 25 *Förordning med kammarrättsinstruktion*.

[129] See section 2 *Förordning med instruktion för Domstolsverket*, SFS 1988:317 (Government ordinance with instructions for the National Courts Administration).

[130] *Förordning med instruktion för Domstolsverket*.

[131] See Chapter 4 Article 13 Code of Judicial Procedure.

[132] This basis for disqualification is to be interpreted as an objective criterion, see P. Fitger, Domstolsprocessen, at 30 (1993).

[133] Chapter 4 Article 14 sections 1-2 Code of Judicial Procedure.

[134] Chapter 4 Article 15 section 3 Code of Judicial Procedure.

[135] Criticism in this regard has e.g. been voiced by members of Parliament, cf. Motion 2000/01:Ju807 *Regler för domarjäv* (Rules on the challenge of judges).

although an expeditious procedure is required by law.[136] One interesting case was the decision by the district court of *Attunda* which in May 2008 decided to disqualify a judge from participating in a case after the judge had made certain statements in an interim judgment which, in the view of the district court, would give an objective observer reason to doubt the judge's impartiality.[137] The decision is a unique case of a judge being removed from a case merely on the basis of his statements in the grounds for a judicial decision.

VI. Judicial Conduct Complaint Process

This kind of control is mainly exercised by the so-called *Ombudsman*, an original Swedish institution dating back to 1809.[138] The *Ombudsman* is to "supervise the application of laws and other statutes in the public service, under terms of reference drawn up by the *Riksdag*".[139] His supervision of the judiciary is considered one of the foundations of the Swedish constitution.[140] The Ombudsman may exercise his functions on his own initiative or following complaints from individuals.[141] It is the latter possibility which has established the *Ombudsman* as an important control mechanism in Swedish public law. The ombudsman is entitled to be present at the deliberations of a court of law or an administrative authority and shall have access to its records and documents.[142] He does not have the right to express an opinion at these deliberations.[143] A court of law or an administrative authority and any official working there must always provide the Ombudsman with any information and opinions asked for. If this request is not met, criminal or disci-

---

136 Chapter 4 Article 15 section 2 Code of Judicial Procedure. See e.g. RÅ 2009 ref 8, 5; NJA 1981:1205; NJA 2007:841.

137 Mål nr T 3798-07 Aktbilaga 128, 5-6.

138 Cf. Chapter 12 Article 6 IG.

139 Chapter 12 Article 6 IG. The terms of reference are laid down in *Lag med instruktion för Riksdagens ombudsman*, SFS 1986:765 (Act with Instructions for the Parliamentary Ombudsmen).

140 Vogel (note 3), at 563.

141 Section 14 *Lag med instruktion för Riksdagens ombudsman*.

142 Chapter 12 Article 6 IG.

143 See section 21 subsection 3 *Lag med instruktion för Riksdagens ombudsman*.

plinary proceedings may be instituted for the violation of official duties.[144] However, that function in particular has lost much of its importance in recent years. More common are the annual reports published by the Ombudsman (*Justitieombudsmannens ämbetsberättelse*), in which the conduct of judges or other public officials is addressed.

VII. Judicial Accountability: Discipline and Removal Procedures

1. Formal Requirements and Judicial Safeguards

Judges may be removed from office only if the removal is based on law.[145] This is established by the constitution which enumerates the grounds for removal, namely committing of a criminal act or gross or repeated neglect of official duties resulting in the impression that a judge is manifestly unfit to hold office and the reaching of the relevant retirement age.[146] Although the assessment required under the first alternative may lead to difficulties in the individual case, the criteria are considered to be sufficiently predictable. One deficiency of these constitutional provisions is that there is no formal requirement for a court decision to remove a judge.[147] However, the Instrument of Government provides a judicial safeguard in the sense that a permanent salaried judge who has been removed from office by means of the decision of a public authority other than a court of law shall have the right to call for the decision to be examined before a court of law.[148]

Questions of removal, suspension, examination by a medical practitioner and disciplinary sanctions for misconduct are tried – except when they relate to justices of the Supreme Court and the Supreme Adminis-

---

144 Karnov – Svensk lagsamling med kommentarer 2009/10 – band 3, at 23 note 330 (14th ed. 2009).

145 Section 4 *Lag om fullmaktsanställning*.

146 Chapter 11 Article 5 IG.

147 C. Sandgren, God rättskipning – särskilt om rättskipningens oavhängighet som kvalitetskriterium, in: S. Heckscher/A. Eka (eds.), Festskrift till Johan Hirschfeldt, 455, at 475 (2008). This has been criticized by the Governmental committee in SOU 2000:99. *Domarutnämningar och domstolsledning – frågor om utnämning av högre domare och domstolschefens roll*, at 53-54.

148 Chapter 11 Article 5 section 2 IG. See on this Holmberg/Stjernquist (note 55), at 374-375.

trative Court –[149] by the Government Disciplinary Board (*Statens Ansvarsnämnd*), which is an authority under the Government.[150] The right to submit complaints to the Board is granted to the courts at which the affected judge serves, the Parliamentary Ombudsman (JO) and the Office of the Chancellor of Justice (JK). Individuals, the media and others cannot submit complaints directly, but may do so to the JO and JK. Legal proceedings on account of a criminal act or the examination of the removal from office or the suspension from duty of Supreme (Administrative) Court justices are instituted in the Supreme Court by the JO or the JK.[151] The Government Disciplinary Board conducts its own investigations and may for this purpose request information or statements from authorities or individuals or make it possible for anybody who can supply information to be present at its sessions. The five members of the Board are appointed by the Government, and the chairman and vice chairman shall be lawyers and have judicial experience.[152] Decisions taken by the Board may be appealed to the Labour Court (*Arbetsdomstolen*) if the affected judge is a member of a trade union[153] or else to the district courts. Thus even if the removal of a judge is decided by a different organ from a court of law judicial protection is guaranteed, although this protection has often been criticized as being too weak,[154] especially since the examining court in most cases is the Labour Court, which is composed of a majority of lay judges representing the labour organizations (trade unions and employers being equally represented)

---

[149] According to Chapter 3 Article 3 Code of Judicial Procedure the Supreme Court functions as a court of first instance in cases concerning liability or civil claims based on offences committed in the exercise of official authority by a justice of the Supreme Court and the Supreme Administrative Court or by a judge of a court of appeal, or a judge referee of the Supreme Court. Moreover, the Supreme Court acts as a court of first instance to determine whether a justice of the Supreme Court or of the Supreme Administrative Court should be discharged or suspended from office or should be required to submit to medical examination.

[150] See *Förordning med instruktion för Statens ansvarsnämnd*, SFS 2007:831 (Government ordinance with instructions for the Government Disciplinary Board).

[151] Chapter 12 Article 8 IG.

[152] Section 2 *Förordning med instruktion för Statens ansvarsnämnd*.

[153] See *infra* B. IX. Associations for Judges.

[154] Cf. Nergelius (note 5), at 246.

and their interests and not permanent and independent judges.[155] The involvement of the Labour Court essentially transforms the question of removal into a labour dispute before a special court, which is surprising not only given the level of protection granted to judges in other (European) countries[156] but also that of advocates in Sweden, who have the right to appeal any decision on denial or expulsion from membership of the Bar Association to the Supreme Court.[157] Disciplinary measures which may be decided by the Board are warnings and deductions from salaries.[158]

2. Practice

Proceedings before the Government Disciplinary Board affecting judges are quite rare. The Board's annual report for 2009 shows that five new complaints had been filed.[159] No decision on removal or suspension was taken in 2009, which in part may be explained by the fact that the judges in question sometimes take matters into their own hands.[160] For the same year three decisions were taken on disciplinary responsibility, of which two did not lead to any action and one resulted in a warning.

---

[155] On the composition of the Labour Court see *supra* note 20. It may be emphasized that although the ECtHR considered the Labour Court a proper court in the sense of Article 6 ECHR in its decision in *AB Kurt Kellermann* v. *Sweden* (cf. *supra* note 21, para. 61), it did not in that decision deal with the *independence* of the Labour Court or the *impartiality* of its professional judges.

[156] Cf. Nergelius (note 5), at 246.

[157] Chapter 8 Article 8 Code of Judicial Procedure: "Anyone denied membership of the Bar Association, or expelled from it, may appeal against the decision to the Supreme Court."

[158] Section 15 *Lagen om offentlig anställning*.

[159] 10 in 2005, 3 in 2006, 6 in 2007 and 2 in 2008. See Statens Ansvarsnämnd, Redogörelse för verksamheten år 2009, available at <http://www.statensansvarsnamnd.se/Verksamh2009.pdf>.

[160] The last positive decision in this regard was taken in 2005.

VIII. Immunity for Judges

The independence of judges in Sweden is not ensured through particular immunities. Instead judges may be held liable for official and non-official actions.[161] However, there are limitations enshrined in the restrictive formulation of the preconditions for removal from office.[162] Apart from the judges themselves, the Government may also be liable to pay reparations for damage caused by public authorities, which include courts.[163] The courts of appeal shall function as courts of first instance in cases concerning liability or private claims based on offences committed in the exercise of official authority by a judge of a lower court.[164] The Supreme Court functions as a court of first instance regarding offences committed by a justice of the Supreme Court or the Supreme Administrative Court or by a judge of a court of appeal or a judge referee of the Supreme Court.[165]

IX. Associations for Judges

The freedom of association laid down in Chapter 2 Article 1 section 5 IG also applies to judges. Two associations represent the interests of judges and the judiciary in general: the Swedish Association of Judges (*Sveriges Domarförbund*) and a trade union, SACO-JUSEK. *Sveriges Domarförbund*[166] is open to both permanent and non-permanent judges and SACO-JUSEK includes other lawyers besides judges. According to the regulations of the *Sveriges Domarförbund*, its purpose is to represent judges in the drafting of pertinent legislation and the administration of justice, to protect their independence, to monitor issues of rele-

---

161 J. Hirschfeldt, Domstolarna som statsmakt – några utvecklingslinjer, in: Kungl. Vitterhets historie och Antikvitets Akademien, Vitterhetsakademiens årsbok 2007, at 4 (2007).

162 Cf. *supra* at note 146.

163 Chapter 3 section 2 *Skadeståndslag*, SFS 1972:207 (Tort liability act).

164 Chapter 2 Article 2 section 1 Code of Judicial Procedure.

165 Chapter 3 Article 3 section 1 Code of Judicial Procedure.

166 *Sveriges Domarförbund* consists of a board of 11 judges including chairman and deputy chairman, and 7 deputy board members.

vance to the judiciary and to provide a forum for judges.[167] It also represents Swedish judges at the international level, e.g. in the International Association of Judges. SACO-JUSEK, as a federation of trade unions (*fackförbund*), instead focuses on safeguarding and promoting the trade-union-related, professional and social interests of its members.[168] Moreover, it considers itself to have a function in the further development of labour law standards and in the increased conclusion of collective agreements. Both associations have an indirect influence on the legislation affecting the judiciary, as bodies to which a proposed legislative measure is submitted for consideration (as so-called *remissinstans*).[169] Membership of both *Sveriges Domarförbund* and SACO-JUSEK is voluntary[170] and has no influence on the career of a judge. *Sveriges Domarförbund* has approximately 850 members, which is a relatively low portion of the overall number of permanent (1,270) and non-permanent judges (8,500), both of which may be members.[171] SACO-JUSEK has a membership of around 80,000, of whom 31% are lawyers. Approximately 75% of Swedish judges are members.[172] *Sveriges Domarförbund* is financed by membership fees, and according to the protocols of the annual board meetings the financial situation of the association has been stable in recent years. SACO-JUSEK is mainly financed through membership fees.[173] Additional income is generated

[167] See section 1 *Stadgar för Sveriges domareförbund* (Regulations of the *Sveriges domareförbund*), available at <http://www.domareforbundet.se/stadgar.html>. During its annual meetings the Association has for example discussed issues such as the individual setting of judges' salaries; see e.g. *Protokoll fört vid styrelsemöte i Stockholm 2003-01-29* (Protocol of the annual meeting 2003), available at <http://www.algonet.se/~domarefb/protokoll/protkoll20030129.htm>.

[168] See the regulations of JUSEK, available at <http://www.jusek.se/upload/PDF/Organisation_politik/Stadgar_2007.pdf>.

[169] The *remissvar* (comments on a proposal circulated for consideration) are part of the *travaux préparatoires* which are a significant proportion of the legal sources used (*inter alia* by courts) in the interpretation of relevant legislation.

[170] This already follows from the constitutionally protected right of freedom to associate with others, which also encompasses the right not to be a member of any association.

[171] See European judicial systems – Edition 2008 (note 6), at 109.

[172] See the JUSEK, *Årsredovisning 2008/2009* (Annual financial report for 2008/2009), at 6, available at <http://www.jusek.se/upload/PDF/Årsredovisning_2009.pdf>.

[173] Id., at 8.

by the earnings from publications (e.g. the newspaper *Jusektidningen*) and revenues from shares in the surplus from public limited insurance companies.[174] Associations do not receive any financial or material support from the state.

X. Resources

The total public budget allocated to the judicial system in Sweden (i.e. courts, prosecution and legal aid) in 2006 as percentage of per capita GDP was 0.23%.[175] This is relatively low compared to other European countries, such as the UK (0.35%), Germany (0.38%) or Spain (0.30%). In the view of the authors this must, however, be seen in the light of the traditionally minor role played by Swedish courts in dispute resolution.[176] The existence of other bodies, including e.g. the National Board for Consumer Complaints (*Allmänna reklamationsnämnden*), which is also state-funded and which also deals with dispute resolution, has limited the need for courts and judges.[177] The courts in Sweden are considered to be public authorities and are not underfinanced as such. As stated above, the DV distributes the budget provided by the ministry of justice.[178] According to the DV's latest operational plan, the budget of the Swedish courts is currently "under severe strain and a considerable injection of resources will be necessary […] to enable the courts to operate".[179] Reasons are the constant increase in the number of registered cases, in particular criminal cases. The DV's statistics for 2007-2009 are the following:[180]

---

174 Id., at 15.

175 European judicial systems – Edition 2008 (note 6), at 45.

176 J. Bell, Judiciaries within Europe – A comparative review, at 239 (2006).

177 SOU 1994:99. *Domaren i Sverige inför framtiden*, at 52-53 (The future of the Swedish judge).

178 Court rooms, offices, libraries and information technology are also equipped and maintained within the limits of the court budget which is managed by the DV.

179 Operational Plan 2009-2011 (note 48), at 10.

180 See Sveriges Domstolar (note 13), at 16.

Year	2007	2008	2009
Registered cases	328,721	350,632	370,726
Decided cases	328,496	359,431	363,221

In order to remedy the situation the Government has heeded the DV's requests and increased the appropriations for the judiciary by 100 million SEK (11 million EUR) for 2009. Further increases will follow between 2010 and 2012 (150 million SEK [17 million EUR] for 2010, 100 million SEK [10 million EUR] in 2011, 100 million SEK [11 million EUR] in 2012). The judiciary is audited by the National Audit Office (*Riksrevision*), an authority under the *Riksdag* which examines the activities of the State.[181]

C. Internal and External Influence

I. Separation of Powers

As stated above, the idea of the separation of powers has not had a decisive influence on the Swedish constitution, which instead relies on the principle of popular sovereignty, i.e. that all public power proceeds from the people.[182] As a consequence, the separation of the judiciary from the administration – and in particular administrative authorities – has not fully come about, as demonstrated by the common chapter 11 in the IG.[183] In the past this has led to courts dealing with issues which today would be referred to the administration[184] and *vice versa*.[185] The

[181] Chapter 12 Article 7 IG.

[182] Cf. Chapter 1 Article 1 section 1 IG. See J. Nergelius, Constitutional Law, in: M. Bogdan (ed.), Swedish Law in the New Millennium, at 66-68 (2000); W. Warnling-Nerep/A. Lagerqvist Veloz Roca/J. Reichel, Statsrättens grunder, at 33-34 (2005).

[183] The recent Constitutional Reform Committee considered devoting a special chapter in the IG to the Courts, see SOU 2008:125. *En reformerad grundlag*.

[184] E.g. the district courts' role as registration authorities. Cf. Ställvik (note 7), at 93.

[185] Cf. above (Chapter A. Introduction) on the role of administrative authorities in providing redress for individuals. Administrative authorities also often used the same procedures as courts of law.

judiciary and its separation from other branches of Government gained importance with the gradual extension of the protection of individual rights in Chapter 2 IG in the late 1970s,[186] Sweden's membership of the EU and the inclusion of the ECHR in the Swedish legal order in 1995. Furthermore the influence of the Government on the judiciary, through the DV or other bodies such as the Government Disciplinary Board, may seem questionable for the protection of the judiciary's independence. This has historical roots in the perception of the function of the courts as supporters of the monarch's[187] – and later the parliament's and Government's – exercise of power and a parallel lasting suspicion towards any organ which may exercise a controlling function over the political branches.[188] Still today traces of this conception can be seen in the setting by the Government of goals for the turnaround time for cases[189] and the DV's annual evaluation of the degree to which these goals have been met.[190]

Other examples include the right of judicial review of legislation, which even today has evolved in only a rudimentary fashion, and the involvement of judges and courts in the law-making process. Courts not only function as *remissinstans*, i.e. bodies which are invited by the Government to respond to and give their views on a legislative proposal, but individual justices of the Supreme (Administrative) Court also serve as members of the Council on Legislation (*Lagrådet*), which is an organ that delivers opinions on the legal soundness and constitutionality of draft legislation submitted by the Government.[191] Another tradition which reveals the lack of a separation of the branches of Government

---

186 On this development see J. Nergelius, Konstitutionellt rättighetsskydd – Svensk rätt i ett komparativt perspektiv, at 589-613 (1996).

187 This can be seen even today, e.g. in the names of courts ("hovrätt", where "hov" is Swedish for the royal household) or the titles of judges ("justitieråd", i.e. justice of the Supreme Court, where "råd" means counsellor/advisor). For a short overview see Eriksson (note 107).

188 Nergelius (note 5), at 22. For an overview see also Bell (note 176), at 289-292.

189 See *supra* at note 27.

190 See the Operational Plan 2009-2011 (note 48), at 14.

191 See K.-G. Algotsson, Lagrådet, rättsstaten och demokratin under 1900-talet (1993); K.-G. Algotsson, Lagrådet, rättsstaten och demokratin, in: T. Håstad/L. Lewin (eds.) Politik och juridik – Grundlagen inför 2000-talet, at 37-67 (1998). See also E. Holmberg/N. Stjernquist, Vår författning, at 142-145 (11th ed. 1998).

and a potential threat to judges' independence is the frequent participation of judges, in particular chief judges, in legislative reform committees.[192] This role of the judge is particularly delicate as statements made in this function may give rise to a reluctance later to criticize relevant legislation in the process of a judicial review. Judges may also at times serve as legal secretaries in a ministry.

II. Judgements

1. Basis

According to Chapter 1 Article 1 section 3 IG all public power shall be exercised under the law, which also implies that judgments must be based on law.[193] Moreover no public authority may determine how a court of law shall decide an individual case or otherwise apply a rule of law in a particular case.[194] Apart from written sources such as laws and Government ordinances other, unwritten sources of law, such as general principles of law, are traditionally not very important in Swedish law. Some principles such as proportionality, objectivity in the public administration and equality before the law may be found in the text of the IG;[195] otherwise they are normally not taken into account in constitutional interpretation.[196] The same holds true for customary law, with the possible exception of what may be called constitutional custom (*konstitutionell praxis*), a term which is, however, delicate and the significance of which is difficult to grasp. In terms of jurisprudence, no regular constitutional custom may be said to exist.[197] Moreover, the so-called

---

[192] J. Nordquist, Domstolarna i det svenska politiska systemet – Om demokrati, juridik och politik under 1900-talet, at 150-158 (2000).

[193] See e.g. Petrén/Ragenmalm (note 103), at 18; Holmberg/Stjernquist (note 55), at 44.

[194] Chapter 11 Article 2 IG.

[195] On these principles see L. Marcusson (ed.), Offentligrättsliga principer (2005).

[196] The topic is studied as such in L. Marcusson (ed.), Offentligrättsliga principer. See also A. Peczenik, Principer i det svenska statsskicket, in: N. Berggren/N. Karlson/J. Nergelius (eds.), Makt utan motvikt – Om demokrati och konstitutionalism, at 109-153 (1999).

[197] However, it has occurred in particular during the 1990s that the Government, when proposing new legislation to the Parliament which may be uncon-

travaux préparatoires (*lagförarbeten*) have always been an important source of law in Sweden and they are commonly consulted by courts and frequently cited in decisions.[198] This Nordic tradition, which is stronger in Sweden than in any other country,[199] could be seen as another example of the rather weak position of the courts in relation to other branches of Government, as it implies a tradition of the courts not only to follow the written laws quite literally, but also to pay heed to the intentions and purposes uttered by the various organs involved in the process of drafting legislation. The influence of European law on Swedish national law as well as the incorporation of the European Convention on Human Rights into the Swedish legal order has led to a gradual reduction in the importance of this source of law and instead adherence to higher constitutional values.

2. Practice

According to the DV the number of criminal cases decided in district courts was 73,720 in 2007, 82,504 in 2008 and 85,714 in 2009.[200] The corresponding numbers for the Courts of Appeal are 8,383, 9,276 and 9,209 and for the Supreme Court 1,419, 1,494 and 1,659.[201] Statistics on acquittals are not available; however the Swedish National Council for Crime Prevention (*Brottsförebyggande rådet*) provides statistics on convictions in district courts. Here the number was 62,405 for 2007 and

---

stitutional or at least doubtful from a constitutional point of view, has referred to the existence of constitutional custom when trying to justify the passing of the new bill. This was the case in particular in relation to the traditional – but legally undefined – autonomy of the municipalities. Academic opinion is divided on this point. Support has been raised by the retired professor F. Sterzel. For criticism against it, see Nergelius (note 5), at186.

198 One explanation may be that judges themselves are often involved in the process of drafting legislation but also because of deference to the superiority of the legislature. See A. Peczenik/G. Bergholz, Statutory interpretation in Sweden, in: D.N. MacCormick/R.S. Summers (eds), Interpreting Statutes, at 324-327 (1991).

199 See e.g. F. Sterzel, Författning i utveckling – Konstitutionella studier av Fredrik Sterzel, at 47 (1998).

200 The DV keeps statistics of the registered and decided cases of the judiciary, see Sveriges Domstolar (note 13), at 24.

201 Ibid. at 30 and 34.

69,454 for 2008.[202] Compared to the number of criminal cases brought to the district courts according to the statistics of the DV (75,894 for 2007 and 83,037 for 2008)[203] the level of acquittals is between 16-18%.

3. Structure

The Code of Judicial Procedure contains fundamental rules on the structure and content of judgments. Thus a judgment shall be in writing and specify in separate sections the following contents:[204] the court, time, and place of pronouncement of the judgment; the parties and their legal representation; the parties' demands and objections, and the circumstances on which they are based; the final judgment and the reasoning in support of the judgment. Judgments delivered by a superior court shall, to the degree considered necessary, contain an account of relevant judgment(s) of lower court. Court judgments are usually considered to use difficult terms and vocabulary, which has had a negative effect on the perception of courts among the general public. Still, recent studies conducted by a Government investigation revealed insufficient judicial argument, and deficiencies in the structure and outline of judgments.[205] Reasons for this are the traditional structures in the judiciary, where views on how judgments ought to be formulated are determined by what colleagues have done in the past.[206] A number of strategies were proposed to improve readability and judicial reasoning, including pertinent training and the formulation of regulations on the design of judgments and recommendations on how judgments should be drafted.[207]

---

[202] Brottsförebyggande Rådet, Personer lagförda för brott – Slutlig statistik för 2007, at 2; Brottsförebyggande Rådet, Personer lagförda för brott – Slutlig statistik för 2008, at 3, available at <http://www.bra.se/>. Statistics for the year 2009 are not available yet.

[203] Sveriges Domstolar (note 13), at 24.

[204] Chapter 17 Article 7 Code of Judicial Procedure.

[205] SOU 2008:106. *Ökat förtroende för domstolarna – strategier och förslag* (Increased confidence in the courts – strategies and recommendations).

[206] SOU 2008:106. *Ökat förtroende för domstolarna – strategier och förslag*, at 19.

[207] It should be mentioned that on 1 January 2010 a new language law entered into force according to which "[t]he language [i.e. Swedish] of the public sector [i.e. *inter alia* courts] is to be cultivated, simple and comprehensible"; section 11 *Språklag*, SFS 2009:600 (Language law).

The implementation of these strategies will lie with the courts and the DV.[208]

4. Public Access

The main rule that court procedures shall be public is laid down in the constitution and ordinary law.[209] In practice, however, this is often limited due mainly to interests of private parties. The courts may decide to hold parts of a hearing behind closed doors where confidential information can be expected to be presented. Deliberations among judges in the preparation of judgments are held behind closed doors unless the court decides otherwise.[210] Judgments are delivered in public.[211]

According to the Freedom of the Press Act every Swedish citizen shall be entitled to have free access to official documents, which include court rulings which have not been labelled confidential.[212] With this legislation Sweden is complying with the pertinent requirements of international law.[213] In order to obtain access to a particular decision a person must contact the relevant court, which is allowed to charge a handling fee.[214] Older decisions which are no longer stored by the individual courts are available through central archives.[215] According to a Government ordinance of 1999 a public legal information system is established under the direction of the DV,[216] which makes basic legal information, such as judgments, statutes, *travaux préparatoires* and interna-

---

[208] SOU 2008:106. *Ökat förtroende för domstolarna – strategier och förslag*, at 301.

[209] Chapter 2 Article 11 section 2 IG; 5:1 Code of Judicial Procedure.

[210] Chapter 5 Article 5 Code of Judicial Procedure.

[211] Chapter 5 Article 5 section 2 Code of Judicial Procedure.

[212] Chapter 2 Article 1 *Tryckfrihetsförordning*, SFS 1949:105 (Freedom of the press act).

[213] See e.g. Article 14 section 1 CCPR *in fine* and Article 6 section 1 ECHR.

[214] See *Avgiftsförordning*, SFS 1992:191 (Government ordinance on administrative fees).

[215] For example the *Riksarkivet* (National archives). There are also some local archives from the district court and the county administrative court in Stockholm and from the district court in Malmö.

[216] *Rättsinformationsförordning*, SFS 1999:175 (Government ordinance on judicial information).

tional legal sources, available in electronic form.[217] The DV decides what further information should be included in the system.[218] Leading judgments from the Supreme Court, the Supreme Administrative Court, the (Administrative) Courts of Appeal and a number of special courts are included, and the courts themselves determine which are considered to be "leading cases". The database is available free of charge.[219] Judicial decisions are also published in a number of annual publications. A selection of judgments of the Supreme Court which are considered to have a higher judicial value are published in the *Nytt Juridiskt Arkiv* series. Summaries of the judgments of the Supreme Administrative Court are published in an annual private publication, *Regeringsrättens Årsbok*. Decisions of the Courts of Appeal appear in the *Rättsfall från hovrätterna* series and cases from the Labour Court are printed in *Arbetsdomstolens domar*.

III. Improper Influence on Judicial Decisions

Sweden still seems to be a country where problems of undue influence by senior judges, prosecutors, Government officials or private interests is fortunately very rare. Cases where undue influence may have occurred are rapidly publicized; one such example is the suspicion of partiality of a judge in the so-called Pirate Bay case.[220] The relations of the judiciary with the media do not follow particular rules, which may be explained by the anyway very rare contacts between them. Lawyers and prosecutors are traditionally the ones asked by the media to give statements on pending cases. The education offered by the DV contains courses on how judges should approach the media.[221]

Generally judges are not allowed to exercise ancillary activities which could interfere with their impartiality or damage the court's reputa-

---

[217] The has been implemented on a website, Lagrummet.se, available at <http://www.lagrummet.se/>.

[218] Section 9 *Rättsinformationsförordning*.

[219] Section 20 *Rättsinformationsförordning*.

[220] Svenska Dagbladet, Domare i Pirate Bay-mål kan vara jävig, 23 April 2009, available at <http://www.svd.se/nyheter/inrikes/domare-i-pirate-bay-mal-kan-vara-javig_2783119.svd>.

[221] See Sveriges Domstolar (note 95), at 3.

tion.[222] Permanent judges are obliged on their own initiative to report to their respective court the peripheral activities they are engaged in.[223] Chief justices of the Supreme Court and Supreme Administrative Court and the presidents of the (Administrative) Courts of Appeal must report their peripheral activities to the Government.[224] Chief judges of district courts and county administrative courts report to the *Domarnämnden*.[225] Both the Government and the *Domarnämnden* take a decision in the individual case. A recent proposal that judges should be prevented from exercising any kind of peripheral activities was not supported by the Government as it was considered to isolate judges from the rest of society.[226] Most concerns connected to judges' peripheral activities are still deemed to be appropriately addressed by the provisions on disqualification.[227] Judges being involved in politics is relatively rare nowadays. One major problem has been the involvement of judges in arbitration, not least because of the high salaries that were paid for these services. A law reform in 2002 did not consider that a prohibition on acting as an arbitrator should be introduced.[228]

---

[222] See section 7 *Lagen om offentlig anställning*.

[223] Section 7(d) *Lagen om offentlig anställning*.

[224] Section 33 *Förordningen med instruktion för Högsta domstolen*, SFS 1996:377 (Government ordinance with instructions for the Supreme Court); section 32 *Förordningen med instruktion för regeringsrätten*, SFS 1996:378 (Government ordinance with instructions for the Supreme Administrative Court); section 56 *Förordning med hovrättsinstruktion*; section 54 *Förordning med kammarrättsinstruktion*.

[225] Section 58 *Förordning med tingsrättsinstruktion*; section 48 *Förordning med förvaltningsrättsinstruktion*.

[226] See Proposition 2000/01:147 *Offentliganställdas bisysslor*, at 12 (Side activities of public employees).

[227] Proposition 2000/01:147 *Offentliganställdas bisysslor*, at 16. *Supra* B. V. Case Assignment and Recusal.

[228] See Domstolsverket, Yttrande över bisyssleutredningens betänkande Offentligt anställdas bisysslor (SOU 2000:80), Dnr 1427-2000 (9 January 2001), at 2.

IV. Security

The security of the courts is governed primarily by the law on security controls in courts.[229] General security checks, comprising body searches and searches of objects carried by visitors to the courts' facilities, may be ordered by the senior judge of a court or any other judge to whom this right has been delegated. Special security controls may be imposed by the court if there is considered to be a risk of a crime being committed during court proceedings.[230] As a consequence of a number of highly publicized incidents and the generally perceived hardened social climate the security situation at courts has been the object of concern.[231] According to reports from the courts to the DV the number of incidents – which may include events such as stolen objects or violent occurrences – was 26 for 2003 and remained relatively stable until 2008 when there were 170 reported incidents.[232] This increase was in part a result of the new routines for the reporting of such incidents, but was also viewed as a sign of an increase in the actual number of incidents. A special investigator appointed by the Government in 2009 concluded that the possibilities for conducting security checks in courts are too limited, as they presuppose the identification of a risk. The legislative changes suggested included the ability to conduct security checks as a preventive measure and envisaged the widening of the senior judge's competences by allowing him/her also to decide on special security checks.[233] The proposals are at the time of writing under scrutiny by the Government. According to a report issued by the DV in 2007 on general security checks in courts, the percentage of court employees (including judges) who felt safe in the court facilities had increased from 61% in 2002 to 78% in 2006.[234] The number of employees reporting

---

[229] *Lagen om säkerhetskontroll i domstol*, SFS 1981:1064 (Security controls in courts). Additional pertinent rules derive from the Code of Judicial Procedure (e.g. Chapter 5 Article 1).

[230] Section 2 *Lagen om säkerhetskontroll i domstol*.

[231] See the Kommittédirektiv, *Säkerhetskontroll i domstol*, Dir. 2008:127, at 1 (Security controls in courts); SOU 2009:78. *Ökad säkerhet i domstol*, at 71 (Increased security in courts).

[232] These data originate from the security department of the DV and were published in SOU 2009:78. *Ökad säkerhet i domstol*, at 71.

[233] SOU 2009:78. *Ökad säkerhet i domstol*, at 150-153, 159-162.

[234] Domstolsverket, *Allmän säkerhetskontroll i domstol – en utvärdering*, Rapport 2007:1, at 21.

having been subject to threats or violence decreased slightly for the same period from 8% to 6%.

D. Ethical Standards

I. Code of Ethics for Judges

There is no comprehensive and general code of ethics for judges in Sweden.[235] However, various rules on the ethical conduct of judges can be found in old rules from the 15th century, the so-called *Olaus Petri domarregler*, which are seen as still valid.[236] The purpose of the rules is to protect individuals from arbitrariness and severity by the judiciary and from convictions for crimes they did not commit.[237] Despite their lacking codification in a formally binding instrument they have for long been considered binding and were often referred to as a source of law.[238] The rules *inter alia* prescribe that the judicial power may not be abused, that judges shall be objective in their decision-making, and that a judge may not accept bribes or let his decisions be influenced by gifts, violence or friendship. Further rules demanding certain ethical standards in judicial conduct are at times derived from the constitution itself, the Code of Judicial Procedure, or other statutes pertaining to judicial procedure.[239] Attempts have been made to adopt a code of ethics, e.g. the

---

[235] There are codified ethical standards for attorneys, the so-called Code of Professional Conduct for Members of the Swedish Bar Association (*Vägledande regler om god advokatsed*).

[236] These rules were never codified in a binding legal instrument but have nevertheless been included in the traditional statute book (*Sveriges Rikes Lag*) since 1734, see *Sveriges Rikes Lag* 2009, at CXLI note 1. See on the *Olaus Petri domarregler* e.g. G. Schmidt, Die Richterregeln des Olavus Petri – Ihre Bedeutung im Allgemeinen und für die Entwicklung des Schwedischen Strafprozeßrechts vom 14. bis 16. Jahrhundert (1966).

[237] Å. Holmbäck, Våra domarregler, in: Festkrift tillägnad Axel Hägerström, 265-279, at 270 (1928).

[238] Ställvik (note 7), at 93; H. Munktell, Domarreglerna i praxis fore 1734 års lag, Svensk Juridisk Tidskrift 516, at 516 (1939).

[239] For an overview, see P. Eriksson, Domaretik – en översikt och några personliga synpunkter, in: Departementets utredningsavdelning (ed.), 35 års utredande – en vänbok till Erland Aspelin, 127 (1996).

draft code submitted by *Sveriges Domarförbund* in 1996.[240] More recently plans have been made public by *Sveriges Domarförbund* and the *JUSEK domstolssektion* to elaborate a proposal on a code of ethics for judges.[241] The need to codify these rules is particularly felt as the importance and significance of the courts in Sweden have increased as a consequence of the impact of EU law and the ECHR.[242]

II. Training

There is no mandatory training on ethical standards offered to judges before or after taking office. For lawyers who participate in the special education of judges courses on judicial ethics are offered. With the gradual opening up of access to judicial office to those not given the special education of judges,[243] teaching at a later stage for already appointed judges has become a new priority. As a consequence the *Domstolsakademin* offers courses for both newly appointed and more experienced judges which include topics such as the role of the judge, judicial independence, judicial ethics and foundational values.[244] Participation in these courses is not mandatory. The courses are funded by the *Domstolsakademin*, i.e. the DV, and the content of the courses is determined by the director of the *Domstolsakademin*.

---

[240] Reprinted in P. Eriksson, Domaretik – en översikt och några personliga synpunkter, in: Departementets utredningsavdelning (ed.), 35 års utredande – en vänbok till Erland Aspelin, 127, at 127 (1996).

[241] See the press release in the newspaper of JUSEK of 5 November 2009, Jusek Tidningen, *Tydligare etik för domare*. Similar recent initiatives can be found in Denmark and Norway.

[242] C. Sandgren, Etiska riktlinjer för domare och åklagare?, 3 Juridisk Tidskrift (2009-10).

[243] See the reforms proposed by the Government in *Proposition 2007/08:113 Rekrytering av domare*, which *inter alia* called for a broader consideration of lawyers who have not participated in the special education of judges preparing them for judicial office.

[244] See the educational programme of the *Domstolsakademin* for judges at ordinary courts, Domstolsverket, *Domstolsakademin – Utbildningsprogram våren 2010 – Allmän domstol*, and for judges at ordinary administrative courts at Domstolsverket, *Domstolsakademin – Utbildningsprogram våren 2010 – Allmän förvaltningsdomstol*, both available at <http://www.domstol.se/>.

E. Supreme/Higher Courts

The number of judges at the two supreme courts of Sweden, the Supreme Court[245] and the Supreme Administrative Court, is determined in law in the sense that there must be at least 14 judges or such higher number as may be considered necessary.[246] As a consequence even without support in law, e.g. by a Government ordinance, the number of judges may be increased.[247] Selection of the justices to the two supreme courts is made by the Government and there is no independent organ – such as the *Domarnämnd* – which prepares for the appointments and guarantees transparency in the nomination procedure. This selection procedure (*kallelseförfarandet*) has been criticized as it leads to a majority of justices being drawn from the circle of prominent jurists in the Government Offices (*Regeringskansliet*).[248] A legislative committee in 2000 made suggestions on how to alter the procedure for the appointment of supreme court justices in Sweden, *inter alia* proposing the establishment of a special body responsible for the preparation of appointments.[249] These suggestions were seized upon in a recent Government bill.[250] It has also been criticized that the constitution does not contain a prohibition on the appointment of supreme court judges by

---

[245] S. Strömholm, General features of Swedish law, in: M. Bogdan (ed.), Swedish Law in the New Millennium, at 43-44 (2000). The Supreme Court differs from many continental counterparts in that it not only deals with questions of law but also examines the facts of the cases brought before it.

[246] Chapter 3 Article 4 Code of Judicial Procedure.

[247] See on this Ställvik (note 7), at 162.

[248] Nergelius (note 5), at 246. The current system of Government run appointments to the supreme courts seems to violate Principle I.2.c. of the Recommendation No R (94) 12 of the Committee of Ministers to Member States on Independence, Efficiency and Role of Judges requesting that "[t]he authority taking the decision on the selection and career of judges should be independent of the Government and the administration." Even if a legal system allows judges to be appointed by the Government, the Recommendation demands that "there should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to […] objective criteria."

[249] SOU 2000:99. *Domarutnämningar och domstolsledning – frågor om utnämning av högre domare och domstolschefens roll.*

[250] *Proposition 2009/10:181 Utnämning av ordinarie domare*.

the DV or by any other authority.[251] In view of the minor political nature of the two Swedish supreme courts – compared to many European supreme/constitutional courts – such a prohibition would have been consequential. Administration of the two supreme courts of Sweden, the Supreme Court and the Supreme Administrative Court, differs from that of lower courts insofar as they are not included in the operational goals established by the Government e.g. in the form of desired turnaround times.[252]

Another concern regarding the supreme courts relates to the removal of justices. According to Chapter 12 Article 8 IG the Supreme Court examines whether a member of one of the two courts shall be removed from office, suspended from duty, or obliged to undergo examination by a medical practitioner. Legal proceedings on account of a criminal act committed by a justice shall likewise be instituted in the Supreme Court. Thus judges of the Supreme Court may be required to pass judgment on one of their colleagues.[253] A reform has been proposed to the effect that questions relating to a member of one of the supreme courts can only be examined in the other.[254]

F. Conclusion

The Swedish judiciary is characterized by a long-standing continuity. Traditionally the role of courts as forums for dispute settlement was comparatively small, and instead courts were perceived as part of the overall political system which strove for the implementation of a fixed political agenda. This is e.g. mirrored in the lack of a tradition of review by courts of administrative decisions, for which instead independent

---

[251] C. Sandgren, God rättskipning – särskilt om rättskipningens oavhängighet som kvalitetskriterium, in: S. Heckscher/A. Eka (eds.), Festskrift till Johan Hirschfeldt, 455, at 475 (2008).

[252] Sveriges Domstolar, *Årsredovisning 2006*, at 13, available at <http://www.domstol.se/>.

[253] The issue is far from theoretical, as shown in 2005 when it was revealed that a judge at the Supreme Court, Mr. Thorsson, had violated the law by purchasing sexual services from a male prostitute. However, the Chancellor of Justice in a contested decision did not initiate any proceedings against Mr. Thorsson. See Nergelius (note 5), at 263-264.

[254] SOU 2008:125. *En reformerad grundlag*, at 341.

redress within the administration was provided. These structures make any reform of the judiciary cumbersome. However, Sweden's EU membership in 1995 and the influence of the judgments of the ECtHR have led to an increased separation of the judiciary from the executive and legislative branches of Government. Moreover, this development has increased the importance of the judiciary and transformed courts and judges into guardians of such values, rather than a tool used to implement Government policies.[255]

Although the general public has relatively high confidence in the Swedish judiciary,[256] from the perspective of judicial independence some features must be highlighted as problematic. These include the individualisation of judges' salaries and the Government run appointment of justices.[257] Moreover, the close link between the central organ in charge of the administration of the judiciary, the DV, and the Government,[258] complicates the classification of the DV as either a servicing organ for the courts or one with which the judiciary is sought to be governed.[259] In addition, the role of the chief judge of a court ought to be viewed critically. Although some of his/her functions, such as the responsibility to establish internal operational goals and the distribution of funds within the court, may be motivated from a practical viewpoint, others, such as the decisive influence of testimonials from superior judges on

---

[255] SOU 1998:135. *Domstolsorganisationen – sammanställning av grundmaterial från 1995 års Domstolskommitté*, at 51 (Organisation of courts – compilation of basic material of the 1995 judicial committee).

[256] Eurobarometer 72 (autumn 2009) shows a 64% confidence rate in the authorities and 60% confidence rate in the legal system; compared to the corresponding data of e.g. 57% and 39% for France and 46% and 48% for the United Kingdom. See Eurobarometer 72 Autumn 2009, at 124, available at <http://ec.europa.eu/public_opinion/archives/eb/eb72/eb72_vol1_fr.pdf>.

[257] Cf. the imminent reform of the procedure for selection and appointment of judges, which particularly affects supreme court justices but which provides for increased transparency and a more independent procedure for all appointments to judicial office; *Proposition 2009/10:181 Utnämning av ordinarie domare*.

[258] In comparison, the Danish *Domstolsstyrelsen* was established in order to underline the independence and self-governing position of the judiciary. Another important difference is that the DV was established by a Government ordinance, which can more easily be altered, whereas the *Domstolsstyrelsen* has its basis in a parliamentary law, *Lov Nr 401 om Domstolsstyrelsen*, 26 June 1998.

[259] Cf. G. Petrén, Domstolsverket och domstolsväsendet – en studie i regeringsteknik, Svensk Juristtidning 651, at 651 (1975).

the selection and appointment of judges, must be seen as latently perilous for the establishment of an independent judiciary. This is especially the case where, in the absence of more detailed regulation, the competences of the chief judge are interpreted overly generously.[260] A number of reforms affecting the judiciary have been introduced in recent years. Of those already mentioned the recent Constitutional Reform Committee's proposal to devote a special chapter in the Instrument of Government to the judiciary, instead of sharing a chapter with other public authorities, is the most essential one. In a draft law based on the work of the Constitutional Reform Committee which is expected to enter into force in 2011, this is even one of the main ideas.[261]

[260] Cf. e.g. the statement made by the Government investigation on the appointment of judges and the role of the chief judge: "Up to the limits of independent judging the individual judge is […] subjected to the obligation to follow the instructions of the chief judge […]." (Translation by the author.) SOU 2000:99. *Domarutnämningar och domstolsledning – frågor om utnämning av högre domare och domstolschefens roll*, at 51. See also T. Rolén, Domstolar i förändring, in: S. Heckscher/A. Eka (eds.), Festskrift till Johan Hirschfeldt, 431, at 440 (2008).

[261] *Proposition 2009/10:80 En reformerad grundlag*, at 38-40.

Judicial Independence in The Netherlands

*Roel de Lange**

A. Introduction

From a perspective of both separation of powers – or checks and balances – and peaceful settlement of disputes, impartial solution or settlement of disputes by official courts is an important ingredient of the rule of law. Impartial solution is enhanced if it is controlled by objective norms, laid down in statutes or other legislative or constitutional instruments. Furthermore it is facilitated if the judiciary – part of the public organization of the State – has a position independent of the government and the legislature. It must be said, however, that the relationship between impartiality and independence in general is not entirely unambiguous.[1] The European Court of Human Rights (ECtHR) is very sensitive about the two notions, and has found violations of Article 6 ECHR by the Netherlands in two cases. The first case, *Benthem*

* This chapter was written in 2010 and finalized at the end of that year. Only in very exceptional cases, later developments could be mentioned. P.M. van den Eijn-den's PhD dissertation, Onafhankelijkheid van de rechter in constitutioneel perspectief (Judicial independence in a constitutional perspective), defended at Nijmegen Radboud University in May 2011, was not yet available at the time of writing.

[1] The European Convention on Human Rights (ECHR) in Article 6 mentions the two elements separately. It has been argued by scholars, however, that independence is necessary in order to guarantee impartiality; see M. de Werd, De benoeming van rechters (The appointment of judges), at 305-306 (1994); Van der Pot, Handboek van het Nederlandse staatsrecht (Handbook of Dutch Constitutional Law), at 603-604 (15th ed. 2006); M. Kuijer, The Blindfold of Lady Justice. Judicial Independence and Impartiality in Light of the Requirements of Article 6 ECHR, at 203 sqq. (2004).

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233, DOI 10.1007/978-3-642-28299-7_7,

v. *The Netherlands*,[2] dates back to 1985 and dealt with a type of administrative appeal which has since been abolished. The second case, *Van de Hurk* v. *The Netherlands*,[3] was decided by the ECtHR in 1994. The Court found the Netherlands in violation because in an obsolete and never-used legislative provision there was a power vested in the Crown to correct judgments of the Economic Appeals Court (*College van beroep voor het bedrijfsleven*). Unsurprisingly, the controversial provision was struck off the statute-book shortly after the ECtHR's judgment. Other case law affected the Netherlands as well. Although it was not a party to *Procola* v. *Luxembourg* (1995),[4] that judgment had an enormous impact on discussions in the Netherlands regarding the organization and position of the Council of State. Traditionally an advisory body to the government and the Crown, it had over the years developed certain court-like functions and had acquired a new division, the Judicial Division of the Council of State (*Afdeling rechtspraak van de Raad van State*)[5], which from the mid-1970s onwards had played an important role in the development of the new system of remedies for administrative decisions. This system, as well as a new statute regarding administrative decision-making (the General Administrative Law Act) had just grown to maturity in 1994, when in 1995 the ECtHR produced a judgment regarding the Luxembourg Council of State, which apparently had to have consequences for its very similar counterpart in the Netherlands as well. The Council of State modified its procedures and its organization in order to meet the criticisms, and in order to ensure that the doubts which had been raised with regard to its impartiality and independence were removed. In the 2003 case of *Kleyn* v. *the Netherlands*[6] the ECtHR confirmed that it could not find a violation of Article 6 in the Council of State's new working methods. Nevertheless the Dutch Council of State has been making a continuous effort in recent years to meet the Article 6 standards convincingly. In 2010 a complete

---

2 *Benthem* v. *The Netherlands*, Judgment of 23 October 1985, Application No. 8848/80, Series A No. 97.

3 *Van de Hurk* v. *The Netherlands*, Judgment of 19 April 1994, Application No. 16034/90, Series A No. 288.

4 *Procola* v. *Luxembourg*, Judgment of 28 September 1995, Application No. 14570/89, Series A-326.

5 Nowadays called the Administrative Judicial Division (*Afdeling bestuursrechtspraak*) of the Council of State.

6 *Kleyn and Others* v. *The Netherlands*, Judgment of 6 May 2003, Applications Nos. 39343/98, 39651/98, 43147/98 and 46664/99.

revision of the structure and membership of the Council of State has been achieved.[7]

There is no explicit mention in the Dutch Constitution of judicial independence and/or impartiality.[8] There are different views on whether it is implicitly included in, or presupposed by, the Constitution. According to the Government, Arts. 116 and 117 of the Constitution form the basis for the independence of the judiciary, but constitutional lawyers have differing views on this matter.[9] In Dutch legal literature one may traditionally find a distinction being drawn between different types of independence of the judiciary: personal, substantive and institutional.[10] Personal independence relates to the way judges are appointed; substantive independence says that no other body can give directions to the judiciary. In *Yakıs* v. *Turkey* (2001) the ECtHR[11] considered: "in order to establish whether a tribunal can be considered 'independent' for the purpose of Art. 6 (1), regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence."[12] Hardly any of these aspects are explicitly dealt with in the Dutch Constitution. In the

---

7 Wet van 22 April 2010 (revision of the organization of the Council of State), Staatsblad (Official Gazette) 2010, 175, entered into effect on 1 September 2010.

8 Only the judiciary in The Netherlands (i.e., the part of the Kingdom of the Netherlands which lies in Europe) is discussed in this chapter.

9 P. P. T. Bovend'Eert, Rechterlijke Organisatie, Rechters en Rechtspraak (Judicial Organization, Judges, and Adjudication), at 21 (2008).

10 J. B. J. M. ten Berge, Organisatie en individuele rechter in balans (A balance between the organization and the individual judge), in: J. B. J. M. ten Berge /A. M. Hol (eds.), De Onafhankelijke Rechter (Independence of the Judiciary), 12, at 16 (2007) emphasizes institutional independence, i.e. avoiding undesirable influence from other state powers; C. A. J. M. Kortmann, Constitutioneel Recht (Constitutional Law) (5th ed. 2008); Bovend'Eert (note 9), at 18 sqq.; P. P. T. Bovend'Eert, Rechterlijke onafhankelijkheid (Judicial Independence), in: ten Berge/Hol (eds.), id., 29, at 30 emphasizes the distinction between functional independence, i.e. guaranteeing the judge's freedom of judgment, and personal independence, i.e. guaranteeing security with regard to the legal position of the individual judge (appointment, salary, working conditions, etc.).

11 The Kingdom of the Netherlands is a party to the ECHR.

12 *Yakış* v. *Turkey*, Judgment of 25 September 2001, Application No. 33368/96, para. 36.

Judiciary Organization Act 2001 (*Wet op de Rechterlijke organisatie*) and the Judicial Officers (Legal Status) Act (*Wet rechtspositie rechterlijke ambtenaren*; hereinafter: JOLS Act) some safeguards of independence can be found. They will be discussed in more detail later. It needs to be noted now, however, that these safeguards are embedded in the regulation of the structures of management of the judiciary. Over the past two decades the organization and management of the Dutch judiciary have been undergoing reorganization and reorientation. There have been major shifts in the organization of the judiciary and the division of competences between various kinds of courts. In particular, the creation of a complete system of judicial review with regard to administrative decision-making has meant that not only has the relationship between criminal, civil and administrative courts changed, but there have also been major shifts in the organization of the judiciary. At the district court level there has been a fusion between civil, criminal and administrative courts. Only at the highest level are they still separate.

While this reorganization of the judiciary was taking place, the Netherlands also saw the introduction of a new management structure for the judicial organization as a whole as well as for the courts separately. As far as the courts are concerned, they now have a governing board which has a number of management powers. As far as the judiciary as a whole is concerned, the new structure has at its heart a Council for the Judiciary, an intermediary body between the judiciary and the Ministry of Justice. Under the old system the Ministry of Justice was more or less directly involved in matters relating to the legal position of individual judges (appointment, salary, promotion, etc.). Under the new system, introduced in 2002, the Council for the Judiciary[13] has been given a large number of the management tasks which formerly lay with the Ministry of Justice. This means that in the field of recruitment, assessment, education and training, appointment, salaries and promotion, the Council now has a role to play. Furthermore, in the areas of budgeting, setting performance standards and benchmarks, housing and location of courts, and distribution of judicial work over the different parts of the organization, too, the Council has been involved in decision-making or has acquired powers to decide issues by itself. In particular when this has an impact on work distribution it may also have a bearing on judicial independence. Case-assignment within the courts and the distribution of cases between the courts may in the future no longer be a matter which is decided exclusively by the courts themselves. All in all, the

[13] See *infra* B. I. 2. A closer look at the Council for the Judiciary.

problem of the relationship between the traditional requirements of judicial independence under the rule of law and the new requirements of public management has now become the focus of much attention. This is true for the judiciary itself and also for academic interest in matters judicial.

B. Structural Safeguards

I. Administration of the Judiciary

1. Organs in Charge of the Administration of the Judiciary

According to the Judiciary Organization Act and the Council for the Judiciary Act (*Wet Raad voor de rechtspraak*) there is a Council for the Judiciary (*Raad voor de rechtspraak*) which has management and budgetary powers and responsibilities. The Council also takes care of the recruitment and selection of judges. The courts have their own administrations, too.[14] The Ministry of Justice has a – limited – role to play in the administration of the judiciary. The Minister has overall political responsibility with regard to the general and strategic questions that concern the organization of the judiciary. The Minister, not the Council, has the constitutional power to initiate new legislation on the organization and reform of the judiciary.

Judges are appointed by the Crown (i.e., by Royal decree, countersigned by the Minister of Justice), and this gives the government some formal influence. In practice this power of appointment does not have a great significance. This has been the situation since 2002, when the Judiciary Organization Act underwent a major revision, an important part of which was the introduction of the Council for the Judiciary. Before that, the Ministry of Justice used to have much more direct involvement in the administration of the courts, in the selection and promotion of judges, and in the establishing of budgetary necessities. Since 2002, these tasks have become the core activities of the Council for the Judiciary. The Ministry's budget is part of the larger State budget which

[14] The Constitution does not define "judge" or "court". However, it distinguishes between courts which do not and courts which do belong to the "judiciary" (*rechterlijke macht*). Only courts which are a part of the judiciary have the power to pass a sentence depriving a person of his/her liberty (Article 113 Constitution).

is set annually in an Act of Parliament (Article 105 Constitution). The Ministry's budget also includes the budgets for the courts. The Court of Cassation in the Netherlands, the *Hoge Raad*,[15] is mentioned under a separate heading in the budget, because it is not subject to the powers of the Council for the Judiciary.[16] The rest of the budget is destined for the Council for the Judiciary.[17]

The Minister of Justice has an agreement with the Council for the Judiciary about the main aspects of the performance of the judiciary in the coming budget year. This concerns the number of cases which will be decided, and is therefore referred to as a "production agreement".[18] In recent years, a system has been developed by means of which the workload of courts and individual judges can be measured according to more or less objective standards. Against this background there has since the 1980s been the desire to reduce the cost of the public sector. As part of the reorganization of the judiciary mentioned above, a new financing system was introduced. At the core of that system is the classification of types of cases according to their complexity. This has now been in operation, with some modifications, since 2002. The system is laid down in a government regulation, based on the Judiciary Organization Act. In the Regulation on the Financing of the Judiciary 2005 (hereinafter: BFR),[19] there is provision for a contribution by the Minister of Justice to the Council for the Judiciary. This contribution is then further distributed among the courts according to rules laid down in the Regulation. Article 23 BFR states that the Council subdivides the Minister's contribution into four parts. One is "related to production", another to

---

15 The highest court in civil, criminal and tax matters.

16 The planned budget for the *Hoge Raad* in 2010 is approximately 26 million EUR. Explanatory Memorandum for the Budget of the Ministry of Justice, TK 2009-2010, 32 123 ch. VI, no. 2, at 38. An even more exceptional position is reserved for the Judicial Division of the Council of State, the highest court in a great number of administrative cases. This court also does not fall within the powers of the Council for the Judiciary, because it is part of the Council of State. As such, it is not mentioned in the budget of the Ministry of Justice but in a separate budget for the High Offices of State (*Hoge colleges van staat*).

17 The planned budget for the Council for the Judiciary for 2010 is approximately 913 million EUR. Explanatory Memorandum for the Budget of the Ministry of Justice, TK 2009-2010, 32 123 ch. VI nr. 2, at 38.

18 Explanatory Memorandum (see previous footnote), at 50.

19 Besluit Financiering Rechtspraak 2005, Staatsblad (Official Gazette) 2005, 55.

housing, and there are parts for "specific expenses" and for expenses which are administered on a central level by the Council for the Judiciary. The contribution which the Council pays to the courts consists of five parts: production-related, judicial costs, housing, specific expenses, and "other expenses" (Article 25 BFR). Article 26 BFR contains a formula for the "production related" contribution: the number of cases in different categories ("product groups") multiplied by the "local prices". This may be set by the Council (Article 27(1) BFR). Measurement of the workload can lead to outcomes which may affect the standards for local prices (Article 27(2) BFR). The whole system is based on the existence of a system of "production measurement" (Article 2(1) BFR), of "price measurement" (Article 3 BFR) and of "workload measurement" (Article 4 BFR). A crucial element here is the categorization of types of cases in order to establish how much time a court ought to spend on a particular case. In this crucial area, the government regulation provides that the Council for the Judiciary "administers" the definitions and models which lie at the basis of the division into product groups and categories of cases (Article 2(3) BFR). The Minister of Justice has to approve any "significant modifications" in that division, as well as in the underlying definitions and models (Article 2(4) BFR).

There is general agreement that efficiency in the operation of the courts has been enhanced. Speed in the handling of cases has been seen to be essential, and courts have succeeded in achieving much quicker working processes than in the past.[20] The financing system may be of importance for the independence of the judiciary as a whole, but it certainly is important for the position of the individual courts and judges. The amount of time allocated for the consideration and processing of a case is limited and clearly specified, and there is little room for readjustment by the individual judge. Performance indicators and standards are now also used for the assessment and promotion of individual judges. In 2009 there was a case of the dismissal of a judge by the *Hoge Raad* on the ground that the judge was "unfit", among other things because this

[20] P. Langbroek, Bekostiging van de Rechterlijke Organisatie (Financing the Judicial Organization), Nederlands Juristenblad, at 161 (2007/3), argued that it would be preferable if the Council for the Judiciary were to propose a budget which would then be sent to Parliament – without any modifications – by the Minister of Justice. Parliament could then also decide on the "price per minute" of judicial work, on which the whole system of financing is currently based. As it is now, the "price per minute" is the result of negotiations between the Council for the Judiciary and the Ministry of Justice.

particular judge fell dramatically short of the production standards.[21] The *Hoge Raad* states that there has to be a high threshold for the dismissal of judicial officers; "the instrument of dismissal on grounds of unfitness for judicial office may not be used in any way that may threaten the independence of the judiciary."[22] The *Hoge Raad* emphasizes in this context that the dismissal had nothing to do with the substance of the judge's decisions, but only with the working speed, methods of communication (or lack of it), and the general way of functioning of the judge concerned in the court organization.

The Judiciary Organization Act 2001, which entered into force on 1 January 2002, also introduced some new functions. Presidents of district courts are now more managerial than in the past. This has the consequence that some of the guarantees of judicial independence do not apply to them. The members of the management boards of courts – including the President of the court – are appointed to that function by the government for a period of six years (reappointment is possible). On a proposal from the Council for the Judiciary, the Government may dismiss members of the management boards for unfitness other than by disease. Although this has met with criticism in legal doctrine[23] it is currently the law.

2. A Closer Look at the Council for the Judiciary

The Council for the Judiciary (*Raad voor de rechtspraak*), already mentioned in the previous paragraph, is not mentioned in the Constitution (*Grondwet*), but in the Judiciary Organization Act and in the Council for the Judiciary Act of 2001, which both entered into force on 1 January 2002.

As we saw, the Council has powers regarding the budget of the judiciary (except for that of the *Hoge Raad*, the Supreme Court of the Netherlands, which is deliberately left out of the scope of the Council). The functions of the Council are solely administrative. Beside the budget, this includes the organization of the recruitment and selection of judges. Also, the Council supports the judicial organization by re-

---

[21] HR, 15 December 2009, LJN:BK6646. The case concerned serious malfunctioning over a long period (dating back to 1997), partly due to an alcohol problem.

[22] Id., para. 3.7.

[23] Bovend'Eert (note 9), at 224-225.

search, and it has an advisory role with regard to legislative and policy proposals from the government which have consequences for the judiciary.[24] The Minister of Justice has extensive powers with regard to the Council.[25] The Council now has four members, two of whom have to be from the judiciary. There is a statutory requirement that the President of the Council is a member of the judiciary. Members of the Council for the Judiciary are appointed by the Crown on the proposal of the Minister of Justice.[26] According to Arts. 107 and 86(5) of the Judiciary Organization Act the government has disciplinary powers with regard to the members of the Council. A governmental decision to dismiss or suspend one of the members is appealable to the *Hoge Raad*.

Since the Council for the Judiciary is a management structure, it is unsurprising that there is a statutory provision (Article 96 of the Judiciary Organization Act) which provides that the Council shall not interfere in the procedural treatment or the substantive judgment or the decision in a particular case. It has to be said that this provision is not very explicit as regards the precise guarantees relating to the independence of judges and courts. The best way to read these guarantees is to see them as not explicitly laid down in the Judiciary Organization Act but having the form of exceptions[27] to the management powers of the ruling boards of the courts and of the Council for the Judiciary. The crucial point here is that the notion of "management" (*bedrijfsvoering*) in the Judiciary Organization Act is not completely clearly and satisfactorily delineated from the point of view of "procedural treatment" of cases, which is also used in the Judiciary Organization Act.[28]

In practice, in recent years the Council has developed activities in order to guarantee and enhance the *quality* of judicial work and the functioning of the judicial organization. As a part of this process, new working

---

[24] Article 95 of the Judiciary Organization Act.

[25] Bovend'Eert (note 9), at 221: The Minister has supervisory powers and powers of instruction, and the Council is under a duty to keep him informed and report to him annually. Arts. 91, 93, 102 and 105 of the Judiciary Organization Act.

[26] Arts. 84 and 85 Judiciary Organization Act.

[27] Bovend'Eert (note 9), at 23.

[28] This is the view of the legislator according to Kamerstukken II 1999/2000, 27 182, no. 3, at 13-15; for a critical discussion see P. P. T. Bovend'Eert, Rechterlijke Onafhankelijkheid (Judicial Independence), in: J. B. J. M. Ten Berge/A. M. Hol (eds.), De Onafhankelijke Rechter (The Independent Judge), 29, at 36-37 (2007).

methods within the courts have been developed, including training and coaching within the courts, regular meetings of judges in which interesting developments in case law are discussed, generally promoting the feeling among judges that they and their colleagues are co-operating members of a well-functioning organization.[29] There are so-called *visitations* – a form of review or inspection – at regular intervals by an external commission, on which members of the judiciary are also represented. The most recent inspection/review took place in 2009-2010.[30]

II. Selection, Appointment and Reappointment of Judges

1. Eligibility

The first requirement for judges is that they have an academic degree in law. This implies the requirement of a bachelor's and a master's degree, both in law. Statutory provision is made for the specific requirements of the necessary academic legal training in terms of courses which have to be part of the curriculum in order for the candidate to acquire *effectus civilis*. Only those who have a degree with *effectus civilis* qualify for the judiciary. For appointment as a judge, there is a minimum age limit of 30 years and judges must have Dutch nationality.[31] After university, additional training is required for the bench. There are two ways in which one can be appointed to the bench. One is to undertake additional training immediately after university. It involves three years of practical and theoretical training. The other is to come to the bench after a number of years (normally eight) of professional experience, preferably in a legal profession (this may include working as a civil servant in a department where legislation is drafted, or with an administrative body). Those who come to the bench after working elsewhere also receive a

---

[29] W. M. C. J. Rutten-Van Deurzen, Kwaliteit van rechtspleging. Kwaliteitsbevordering en de rol van de Raad voor de rechtspraak (Quality of Adjudication. Quality enhancing and the role of the Council for the Judiciary) (2010).

[30] The report, Rapport Visitatie Gerechten 2010 (Report Visitation Courts 2010) of the commission under the presidency of Prof. Frans Leijnse, a former Member of Parliament, was published in July 2010. Its conclusions point in the same direction as what is described in this chapter.

[31] Article 1c Judicial Officers (Legal Status) Act.

period of additional specialized training, although somewhat shorter than that undertaken directly after graduation.

In order to be accepted for the specialized additional training candidates go through a selection process which involves tests and an interview. Most of the requirements are objective: a Master's degree in Dutch law, intellectual and behavioural (social) competence, integrity, the capacity to deliver careful judgment, the ability to work with speed and diligence. There is an analytical test and a psychological assessment for every candidate without professional experience. For those with professional experience only the assessment is obligatory without the need for a separate analytical test.

2. The Process of Judicial Selection

The Crown, i.e. the government, appoints judges. They are appointed by Royal decree countersigned by the Minister of Justice. Judicial officers, however, play a significant role in the process of selection. Appointments are made on the basis of a *recommendation* which is put together by the court which has a vacancy. The Council for the Judiciary is responsible for recruitment. There is an application procedure for most judicial posts. Candidates who have applied undergo the test(s) described above, and if they pass they face three interviews with a special committee. The Judiciary Selection Committee (*Selectiecommissie rechterlijke macht*) is composed of experienced judges, people from outside the judiciary and – in the case of the selection of Trajectory A candidates, who can also qualify for posts as public prosecutors – from the Public Prosecution Service. Because this is to a large extent a procedure in which magistrates themselves are involved, it cannot be said that it is entirely publicly transparent. But there is a high degree of transparency due to the fact that there is a protocol for recruitment and selection, there is an established method (STAR: Situation, Task, Action, Result) for the interviews, and at least some of the questions at the interviews are predictable or even knowable beforehand. The candidate is therefore expected to be well-prepared for the interview.[32] As far as can be ascertained from the legal literature about this, there is no criticism of the fairness of the selection process. Occasionally, there is criticism

[32] Details of the selection can be found in an interview with the Judiciary Selection Committee: K. G. F. van der Kraats/F. W. Pieters, De Selectie van de Ideale Magistraat (Selecting the Ideal Magistrate), Tijdschrift voor de Rechterlijke Macht (TREMA), at 330 (2009/8).

of the judiciary but this virtually always has to do with specific outcomes of cases, or with specific judicial attitudes in certain cases. This type of criticism probably cannot be generalized to the judicial selection process.

There are no formal rules with regard to minority and gender representation. The General Equal Treatment Act applies. As far as gender is concerned, there has been a development: over the past 10-15 years, the judiciary has seen a large influx of women. Starting at the lower levels of the organization, the judiciary has become feminized to a remarkable extent. At present, the majority of lower court judges are female.[33] This is, however, not (yet) reflected in appointments at the highest level. The *Hoge Raad,* the highest court, has six female judges out of a total of 45 members. In the highest administrative courts, the picture is slightly more mixed, although in the Judicial Division of the Council of State the number of female judges is also not very high.[34] It would be normal to expect that in due course female judges from the lower courts will be appointed to positions in higher courts. On one occasion – but that was as far back as the 1980s – Parliament intervened in favour of a female candidate who was on the *Hoge Raad*'s appointment shortlist. Parliament put her first on its recommendation, so that the government had no alternative but to appoint her.

With regard to minority representation again there are no formal rules. But the application of the Equal Treatment Law (in combination with the constitutional provision which guarantees equal access to posts in the public service) leads to a situation in which the judiciary is gradually mirroring the Dutch population.[35] There is active recruitment by

[33] Id., at 333.

[34] The percentage of women in the Judicial Division of the Council of State is not easy to calculate because of the complicated composition of the Council as a whole and its several divisions. There are full members some of whom are not actually working members (e.g., the Queen), and part-time working members, some of whom are only symbolic. Of the 20 full working members, five are women, and of the 32 special working members, 11 are women. Source: Annual Report Council of State 2008, at 177.

[35] Gradually, because the process by which the children and grandchildren of migrants who did not traditionally have academic qualifications, will need time to achieve the required training. This process is well under way, especially with regard to female descendants of Turkish and Moroccan migrants (in all, 10% of the population of the Netherlands is of *non-western* origin, according to the website of the Central Bureau of Statistics [available at <http://www.cbs.nl/>]; the majority of those persons are of Turkish and Moroccan descent).

the Council for the Judiciary, with targets of 20% minority participation, but according to the Judiciary Selection Committee minority candidates do not fare well in the analytical test.[36] The test has been adjusted to accommodate candidates who are not native Dutch speakers.[37]

3. Length of Office and Reappointment

For almost all judicial posts, appointment is for life. Article 117(1) of the Constitution provides that "members of the judiciary who are judges" and the Procurator General at the *Hoge Raad* will be appointed for life. This seems to exclude judges from those courts which do not belong to the *judiciary*. However, various statutory provisions have created a system in which – although without a guarantee in the Constitution – judges are normally appointed for life, even in the administrative courts which are not part of the judiciary.[38] Surprisingly, appointment to the position of President of a District Court and President of a Court of Appeal is for six years and not for life. The explanation is that such posts are administrative rather than judicial.

III. Tenure and Promotion

1. Tenure

As we saw, judges who are members of the judiciary and the Procurator General at the *Hoge Raad* are appointed for life. Their retirement age – as established by statute on the basis of Article 117(2) Constitution – is 70.[39] Since there is no probationary trial period all depends on the process of selection.

---

36 Van der Kraats/Pieters (note 32), at 333.

37 Id.

38 Article 3 Council of State Act (*Wet op de Raad van State*), Arts. 3 & 4 of the Act on the Administrative Courts of Appeal (*Beroepswet*) (applies to the *Centrale Raad van Beroep* and refers to the Judicial Officers (Legal Status) Act (*Wet rechtspositie rechterlijke ambtenaren*), and Arts. 4 & 5 of the Act on Economic Administrative Courts (*Wet bestuursrechtspraak bedrijfsorganisatie*).

39 Considering the fact that the government has induced a societal debate about the age of retirement, it would not be surprising to see the retirement age for judges increase in the coming years.

2. Promotion

Article 5c of the Judicial Officers (Legal Status) Act provides that if there is a vacancy at a court – and this includes vacancies for vice-President and co-ordinating vice-President – the court's management board shall make up a list of three candidates. This list is sent through the Council for the Judiciary to the government. For higher judicial and prosecutorial officers there is a separate appointment procedure laid down in a Legislative Order. The assessment of candidates' suitability for higher office is also made on the basis of regular evaluation interviews which a court's management[40] has with the judges.

IV. Remuneration

1. Remuneration

The remuneration of judges is regulated in the Judicial Officers (Legal Status) Act.[41] Pursuant to Article 7 of the Act, the various functions in the judiciary – judicial, prosecutorial and clerk – are divided into 13 categories.[42] The article has an Appendix in which the precise salaries are determined. The starting level for each individual judge is decided by the management of the court involved. In theory the decisive factor ought to be the level of the candidate's function and previous working experience. Article 13 of the Judicial Officers (Legal Status) Act provides that at first appointment a judicial officer will receive the lowest salary in the appropriate scale, but the second paragraph of the same article allows deviations from that principle. In the case of a dispute about whether a deviation should apply, a decision will be taken only after advice has been sought from three specified judicial officers, all appointed by the Minister.[43] In the highest courts, there may be different situa-

---

[40] Article 1(2) of the Judicial Officers (Legal Status) Act determines the "functional authority" as the management board of the court.

[41] On the basis of the Act there is an *Algemene maatregel van bestuur* (Government decree, a form of delegated legislation) which regulates salaries in more detail. For deputy judges there is a separate provision in Article 9 of the Judicial Officers (Legal Status) Act (for district courts and courts of appeal) and Article 10 of the Act (for the *Hoge Raad*).

[42] There are 12 categories plus a category 11a.

[43] This is not arbitration, nor is it part of a private law negotiation. The procedure reflects the fact that under Dutch law appointment to the judiciary is a

tions depending on previous working experience and income. Annual increases are provided for in almost every scale of the salary schedule and are paid automatically. In practice this means that one can expect to be functioning on a certain salary scale and to receive annual increases for eight to ten years. With regard to certain management functions in the courts, there is statutory provision for additional salary.[44]

Judges are able to support themselves and their families on their salaries, and they enjoy a reasonable or good standard of living. In general one would have to say that judicial officers are well-paid functionaries. The proper comparison would seem to be with the public sector. Higher court judges could be compared in salary to members of parliament, and some higher civil servants.[45] According to statistics which were assembled in 2009, pay in the public sector is 10-15% below pay in the private sector.[46]

2. Benefits and Privileges

On top of salary there is additional holiday pay, compensation for health care insurance costs, travel expenses on an equal footing with those received by (other) civil servants. In case of jubilees, i.e. if a person has been a civil servant for 12,5 or 25 or 40 years, there is a fixed special reward, based on the normal salary.[47] In exceptional cases, the JOLS Act provides for extraordinary payment.[48] In some cases, the advice of the Council for the Judiciary on these payments is required.[49] Apart from this there are no material benefits other than remuneration.

---

civil service appointment determined by public law. The appointment is a unilateral act of the Crown.

[44] Article 4(b) and (c) *Wet bestuursrechtspraak bedrijfsorganisatie*, Article 3(b) and (c) *Beroepswet*.

[45] There is a category of civil servants in the highest management positions in departments and other public organizations which has a higher salary, however. Government ministers do not have the highest salaries in the publicly financed sector as a whole. Not only certain civil servants, but also other people (e.g., television presenters) earn a higher salary. In this context, judicial salaries are not particularly high.

[46] This would also apply to judicial positions.

[47] Article 16 of the Judicial Officers (Legal Status) Act.

[48] Article 46 JOLS Act.

[49] Article 36(3) JOLS Act.

3. Retirement

Judges receive a pension on retirement. The only requirement is that they have reached the age limit. Early retirement is possible, but will affect the size of the pension. The pension would normally be 70% of the average earnings throughout a judge's career.[50] The ABP (civil service pensions) pension fund was privatized in 1995, and the Pension Regulation was also revised.[51] Judges who have previous working experience in the private sector may be in a different situation altogether, as may judges who have worked abroad (e.g., in an international court). But it is certainly true that normally a retired judge will have no financial worries after retirement. This was not substantially altered by the financial crisis of 2008-2009, although pension funds have had a very difficult time.

V. Case Assignment and Recusal

A number of rather different problems arise under the heading of case assignment and recusal.[52] Case assignment is important for judicial impartiality and is therefore related to judicial independence. Decisions about case assignment should be taken as independent decisions. Recusal has different aspects. There is informal recusal or withdrawal, formal voluntary recusal and formal involuntary recusal.

The problem of case assignment can be discussed at three levels. It is a.) a problem of relative powers and the distribution of powers between courts; b.) a problem of specialization within courts; and c.) a problem of division of labour within courts or within chambers of courts. On each of these levels, there are specific problems in the Netherlands. In part these problems are related to the introduction of new public management techniques into the judicial organization and into the workings of the judiciary. First, there are specialized courts and specialized chambers within certain courts, and not all courts have powers in all

---

[50] However, there may be differences in each individual case.

[51] The most recent version of this Regulation was published in the *Staatscourant* (not the Official Gazette, but the State Journal for less important official publications), 234 (2007).

[52] P. Langbroek/M. Fabri (eds.), The Right Judge for Each Case: Case Assignment in Six Countries (2007). Philip Langbroek's contribution (paras. 105-132) describes the situation in Dutch courts.

types of cases. With regard to some areas of law (military law, economic administrative law, company law, to name just a few examples) there are formal divisions of power and attribution of cases to specialized courts on a statutory basis.[53] The standard model of the organization of the district courts is that there are civil, criminal and administrative sectors. Within the civil sector there is a further division into trade,[54] insolvency and family cases, and within the administrative sector into social insurance, migration, and other cases. For small claims and small crimes there is a separate single-judge chamber (*kantonrechter*, *politierechter*), which is organizationally integrated into the district court as a whole. District court hearings are held by single judges or three-member panels.

Secondly, there is specialization within courts. This means that cases of a certain type, regarding certain specific legal problems, will preferably be assigned to the specialists and that provision has to be made if they are not available. There is a certain level of specialization among judges, e.g. leading to a division in civil and criminal cases, but also within civil, criminal and administrative law there are further specializations (labour law, migration law, intellectual property law). There are specialized judges in cases involving children (both on the criminal and on the civil courts).

Thirdly, there is a normal division of labour within courts. Article 22 JOLS Act provides that the court's management board shall distribute the work among the judicial officers who work at the court. Because some judges work more hours than others,[55] the composition of cham-

---

[53] Military cases can only be brought before the District Court in Arnhem, and economic administrative cases only before the District Court in Rotterdam. On the basis of statutory law, five district courts have specialized tax chambers. R. J. G. M. Widdershoven, Fiscale Rechtspraak in Twee Feitelijke Instanties (Tax Adjudication in Two Stages), TreMa, at 40 (2009).

[54] In practice, *trade* is a fairly wide label which involves among other things cases on liability in tort, including government tort liability cases. (Intuitively, these will probably not be associated with *trade* by most trained lawyers).

[55] The basic working week for judges is 36 hours, according to Article 20 of the JOLS Act. The maximum is 40 hours a week. In practice, judges work considerably more. The JOLS Act explicitly provides for shorter and part-time working hours. Moreover, entitlements to holiday vary with age (Arts. 23-25 of the JOLS Act). In addition, Article 27 JOLS Act provides for pregnancy and maternity/paternity leave, as well as leave for adoption and foster care, and Article 33 provides for sick leave and leave in the event of an accident. Article 4:1 of the Labour and Care Act (*Wet Arbeid en zorg*) provides for leave in the event

bers as a matter of management of the court is not always easy. Deputy judges – i.e., professionals who work in a legal function (academic or practising, sometimes retired) and do part-time work as judges – help to fill the gaps.[56]

A typical problem which has given rise to controversy in recent years is the issue of the additional hearing locations (*nevenzittingsplaatsen*).[57] This issue is relevant for judicial independence because it affects the assignment of cases, and may lead to a change in the rules for case-assignment or in the application of those rules. Normally and as a matter of statutory law, a court will have its seat in the main city of its jurisdiction (be it a district [arrondissement] or an appeal court's jurisdiction). However, as early as in 1933 – as compensation for the reduction in the total number of district courts – the Judiciary Organization Act enabled the government to name seats outside the main city, where circuit or "travelling" judges could conduct sessions. In the context of the reorganization of immigration law in 1994, the option was introduced that these adjacent locations could also be outside the court's district or *ressort*. Later, this option was then also applied to cases involving special risk from the point of view of security. In Amsterdam and Rotterdam especially secure locations were built[58] in which high-security cases (organized crime, and in Rotterdam the so-called *Al-Qaeda* trial) could be held. Currently the situation in criminal law is that there is a National Co-ordinator who *assists* the management of the courts with re-

---

of "calamities", and this provision is applicable by analogy to judicial officers (Article 34 JOLS Act). For short-term care leave (Article 5(1) Labour and Care Act) judicial officers are entitled to full pay (Article 35 JOLS Act). Article 37 JOLS Act provides special rules for entitlement to pay during parental leave. Finally, there is extraordinary leave which can be granted with or without payment (Article 39 JOLS Act).

56 Article 5 of the Judicial Officers (Legal Status) Act provides that deputy judges "can be called upon for the performance of certain activities" ("*kunnen voor het verrichten van werkzaamheden worden opgeroepen*").

57 The matter is dealt with in the Regulation on additional locations (nevenvestigingsplaatsen) and additional hearing locations (nevezittingsplaatsen) of 10 December 2001, Stb. 616. There is a very instructive recent opinion of *Advocate-General* Knigge at the *Hoge Raad* on this issue, to be found in case LJN: BI3877 d.d. 8 September 2009 (the Opinion is dated 12 May 2009), available at <http://Rechtspraak.nl> [Search term: BI3877]. The Opinion is only available in Dutch.

58 The Amsterdam one is nicknamed *The Bunker*.

gard to cases which have a *mega* character (*mega-strafzaken*), i.e., which a court is expected to take at least 30 hours to hear.

In 2004 this option was extended to all types of cases, not just criminal cases, and the Council for the Judiciary was given a power to appoint particular additional hearing locations. This power – the statutory basis for which is doubtful, to say the least – was subsequently used to such an extent that the main cities of other districts were also appointed as *adjacent locations* of other courts. In practice, this means that almost any kind of case can be assigned to almost any court. The statutory rules with regard to the relative powers of the courts (territorial division of jurisdiction) have thereby been largely undermined.[59] This conclusion was also drawn by the First Chamber of the States-General (the *senate* of the Dutch Parliament). In a letter of 13 June 2006 it wrote to the Minister of Justice to point out that "de facto, a change in the jurisdictional territorial division of the Netherlands had been achieved".[60] In the process of reorganization of the judiciary which is now going on, there is new statute law, the so-called Judiciary Modernization (Evaluation) Act (*Evaluatiewet modernisering rechterlijke organisatie*).[61] This will lead to the redrawing of the territorial jurisdictional map of the Netherlands.[62] Meanwhile, the controversy over the use of the present management instruments with such far-reaching effects for the distribution of work of the courts continues.[63]

---

[59] Remarkably, *Advocate-General* Knigge in his aforementioned Opinion is very critical about all this, but his criticism is ignored by the *Hoge Raad*. This is all the more remarkable since one of the key points in the *Advocate-General's* Opinion is that there was no statutory basis (although one was required) for choosing this particular court – rather than another court – for judging the case at hand (point 9.2 of the Opinion).

[60] "*de facto is dus sprake van een wijziging van de rechterlijke indeling van Nederland*". The passage is quoted in point 8.5 of the Opinion of *Advocate-General* Knigge (see note 57), and can be found in the Parliamentary papers (*Kamerstukken*) 2006-2007, 30300 VI, E.

[61] Wet van 19 mei 2011, Stb. 2011, 255 (Act of May 19, 2011, Official Gazette 2011, 255). The consequences of this legislation cannot be fully dealt with in this chapter.

[62] The "redrawing of the jurisdictional map" is a process of reorganization of the judiciary which is expected to lead to a reduction in the number of district courts from 19 to 10, and in the number of courts of appeal from 5 to 4.

[63] See the Report of the Deetman evaluation committee 2008 and the reaction of P. R. G. M. Becht/P. A. H. Lemaire, Kwaliteit is een zaak van de

In a 2008 report, the Dutch Association for the Judiciary (*Nederlandse Vereniging Voor Rechtspraak*; NVVR) published its view on the feasibility of redrawing the jurisdictional map. In a large number of categories of cases, spreading of cases among courts is – in general – considered feasible. Only in certain types of cases where either specialized legal knowledge is required or where there is a local aspect to the case is assignment to a court other than the local (district) court considered undesirable.[64] As Philip Langbroek notes, the *ius de non evocando* (the right not to be *prevented* by government intervention from petitioning a court which the law provides) – although laid down in Article 17 of the Dutch Constitution – has only relatively limited application in the Netherlands.[65] Access to justice is not explicitly mentioned in the Dutch Constitution as a fundamental right.

Normally senior judges (e.g., vice-Presidents or co-ordinating judges) will be in charge of case assignment. They distribute cases within the court, and within chambers. The Dutch system of case assignment is that in each court there is a division in chambers with a certain level of specialization. However, the division is not very rigid, so that if there is a relative overload of cases of a certain type, judges can be assigned to those cases if necessary. Also – even – not only within, but also between courts there is a certain system of redistributing and reallocating cases.[66] This is not without its problems and the system is currently under discussion.

If there is a risk of lack of impartiality which becomes apparent only in the course of a trial, then reassignment should be possible. Statistics are

---

professional, rechters aan het roer!, TreMa, at 205 (2009/5), as well as the publications by M. Boone/P. Langbroek/P. Kramer/S. Olthof/J. van Ravensteyn, Financieren en verantwoorden. Het functioneren van de rechterlijke organisatie in beeld (Financing and accountability. A picture of the judiciary at work), (2007); P. Langbroek (note 20); and E. Mak, Rechtspraak in balans (Judiciary in balance), (2008).

[64] This may surprise foreign readers who might assume that impartiality would require avoidance of familiarity with the *couleur locale*. Nevertheless, this is precisely what the NVVR argues.

[65] Langbroek (note 20), at 109.

[66] P. Langbroek/M. Fabri, Rapport Zaakstoedeling Raad voor de Rechtspraak (Report for the Council for the Judiciary on Case Assignment) (2008).

not available.[67] But according to research by Ter Voert and Kuppens (2002) every year a surprising 40% of judges withdraw from a case.[68] Also some reassignment or reallocation may be desirable for management reasons. In some cases there has been public debate about the reassignment of cases. A well-known example is the case of *Hasan Nuhanovic*, who worked as an interpreter for the United Nations in Srebrenica. Members of his family were killed by the Serbs in July 1995 during the Srebrenica Massacre, and he sued the State of the Netherlands on the basis of insufficient military protection by the Dutch forces in Srebrenica.[69] In his case, a judge was replaced without explanation. Questions were asked in Parliament.[70]

---

[67] According to Langbroek (note 20), at 111 "registration in the courts concerning these points is inadequate." This conclusion is based on an observation by the NVVR and the research of Ter Voert/Kuppens (see next footnote).

[68] M. Ter Voert/J. Kuppens, Schijn van Partijdigheid van Rechters (Appearance of Partiality of Judges), Wetenschappelijk Onderzoek- en Documentatiecentrum, (2002), available at <http://www.nvvr.org/nl-nl/Content.aspx?type=publication&id=14>.

[69] District Court's-Gravenhage 10 September 2008, LJN: BF0181. An English translation is available at <http://Rechtspraak.nl> [Search term: BF0181]. This court judgment contains the following passage with regard to the controversial replacement of Judge Punt:

"1.3 In order to meet the provisions of Article 155, sub 2 of the Code of Civil Procedure, and in response to what the counsels for the claimants argued in their oral pleadings, the court sets out the following about its composition for dealing with this case as well as the case of [M. M.-M.], [D. M.] and [A. M.] versus the State, cause-list [*read: case-list – RdL*] number 06-1672 (hereafter: the [M.] case).

In May and June 2005, provisional examinations of witnesses preceded the summons. The examinations were held, in turn, by Ms A.C. van Dooijeweert, LL.M. and Mr. B.C. Punt, LL.M. The latter in the [M.] case also acted as judge before whom the parties were ordered to appear in person on April 25 2007. Neither are part of the panel of three judges which was formed in late 2007, early 2008 to hear the pleadings in this case and the [M.] case and deal with them further. Ms. van Dooijeweert, who presided over the civil law section in 2005, was appointed presiding judge of another section in 2006 and has not worked in the civil law section since. Mr. Punt does not form part of the department within this section dealing with proceedings commencing with a writ of summons concerning liability of the State. This was already so when he was asked at the time to conduct the provisional examinations of witnesses. Originally, it was strictly for this purpose, and later also to sit at the hearing where the parties were ordered to appear that he was appealed to, due to understaffing

As a matter of principle, decisions on the allocation – and removal – of cases involve only judges themselves, or Presidents of chambers, or the President of the court, according to circumstances. There is no interference from other State bodies.

Judges can be removed from a case either by withdrawing or voluntary recusal (e.g., in the event of a conflict of interest arising during the procedure) or by involuntary recusal. In the event of a motion for recusal a separate chamber of the same court is assembled to adjudicate on the motion. Any party to the litigation has the right to file a recusal motion. If – very exceptionally – such a motion concerns the whole court, two solutions have been found. Either a separate chamber of the most senior judges of the court decides on the motion;[71] or senior judges from other highest courts who sit as deputy judges in the court which has been targeted by the motion are called upon to form the chamber which will then decide on the motion.[72]

Recusal used to be very rare, but has become more frequent in the last decade. To the extent that research data are available, it is quite possible

---

of the department in question. Subsequently, in mid 2007, he was asked whether he would remain involved in this case and, possibly, others concerning Srebrenica. The consultations held with him resulted in the decision, fully subscribed to by him that he would refrain from further involvement. Entering into this was also – apart from the fact that he was and is not working for the said department – that his number of hours to be worked had been reduced, on his own request, as of February 2007, upon reaching the age of 65, whereas the Srebrenica case was expected to be exceptionally time-consuming. The hearing where the parties had to appear in person was another case, in view of its limited extent: establishing (irrespective of the legal merits) whether settlement was possible.

In response to certain specific remarks put forward by counsels on behalf of the claimants in their oral pleadings the court adds the following. The fact that Mr. Justice Punt is not part of the section of the court now dealing with the case has nothing to do with his assessment of the merits of the case. The allegation that this judge was 'taken off the case' due to his opinion on the dispute, even 'just before the oral pleadings' as the counsels on behalf of the claimants suggested or even presumed, is far from the truth."

70 Information available at <http://Leugens.nl> with further documentation. Search term: "Nuhanovic".

71 This has been done by the Administrative Judicial Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*).

72 This occurred once in the Social Security Administrative Appeal Court (*Centrale Raad van Beroep*).

that this was triggered by the case law of the ECtHR on impartiality.[73] In *Procola* v. *Luxemburg*[74] and *Kleyn* v. *The Netherlands*,[75] the ECtHR held that "objective impartiality" is crucial, and showed that it had doubts whether some administrative courts actually lived up to that standard. Recusal motions have become more familiar in administrative law, but they also occur in criminal law.[76] Very exceptionally, recusal is applied and awarded where there is a (even distant) family relationship between a judge and a person involved in the litigation or criminal trial (e.g., as a witness).[77] According to some scholars, motions for recusal are sometimes – and apparently nowadays more regularly – used by defence counsel as part of the litigation tactics. It may be that defence counsel tries in this way to pressurize the court; it may also be just that counsel wants to obtain some procedural delay in order better to prepare the defence.[78] In criminal litigation, there have so far been no examples of cases in which the prosecution has filed such a motion. Defense motions of this type also occur only exceptionally. In administrative cases, no examples have been found of administrative authorities filing such a motion.[79] There are separate rules for recusal of members of the *Hoge Raad*.[80]

---

[73] On the (plans for) a code of conduct: M. Kuijer, The Blindfold of Lady Justice. Judicial Independence and Impartiality in Light of the Requirements of Article 6 ECHR, at 434 sqq. (2004).

[74] *Procola* v. *Luxembourg*, Judgment of 28 September 1995, Application No. 14570/89, Series A-326.

[75] *Kleyn and Others* v. *The Netherlands*, Judgment of 6 May 2003, Applications Nos. 39343/98, 39651/98, 43147/98 and 46664/99.

[76] District Court Utrecht (recusal chamber) 18 November 2009, LJN BK 3732: in a preliminary procedural decision – in a murder case – the criminal chamber of the district court had already taken a view on a matter which should only have been dealt with in the final judgment. By doing so, the criminal chamber violated the requirement of objective impartiality according to the district court's recusal chamber, and had to be replaced by a new chamber of 3 other judges.

[77] This happened in 2008 in the *Holleeder-case* (a big organized crime case).

[78] Prof. Floris Bannier, quoted in Trouw Journal 7 April 2009, at 4.

[79] In an exceptional case in 2009, a member of the recusal chamber was recused by the judge who was the object of a recusal request on which the recusal chamber was to pass judgment. Then judges from another court were asked to rule on this second recusal. According to their judgment, the right to recusal lies only with the parties to litigation. Therefore, the recused judges'

VI. Judicial Conduct Complaint Process[81]

The constitutional basis for the complaints procedure is Article 116(4) of the Constitution: supervision of judicial officials and others – by members of the judiciary with a judicial function – is regulated by statute. There is a formal procedure on the basis of Article 26 of the Judiciary Organization Act – the "statute" referred to in Article 116(4) of the Constitution. Article 26 provides that the court's administrative bodies have to devise a set of rules with regard to complaints. Only after this option has been used is there access to the *Hoge Raad* for complaints. The Procurator General plays a subsidiary role in this process. Access to the Procurator General exists only after complaints procedures in the lower courts have been exhausted.

The courts' complaints rules need not be identical. In fact, they differ slightly from court to court. Article 26 of the Judiciary Organization Act provides that the court's ruling board shall make a regulation with regard to complaints. This regulation is required by Article 26(2) to have the consent of the Council for the Judiciary. Such consent may be refused only when the regulation is contrary to the law or to the interests of good management of the court. There is a model regulation which is almost literally followed by most courts. The normal pattern which can be discerned in the complaints procedure's rules is the following: complaints can be made by everyone who has been affected by the behaviour of a magistrate in his/her official capacity (i.e., in the exercise of public powers). Both private citizens who are parties to a dispute and the lawyers representing them may lodge a complaint.

According to the model regulation, complaints will be reviewed and investigated by the court's ruling board,[82] which has the power to decide to set up a Complaints Commission which will have advisory status. The ruling board is not bound by the Complaints Commission's find-

---

recusal request was inadmissible. District Court Zutphen 1 December 2009, LJN:BK4858.

[80] Article V of the *Reglement Inwendige Dienst* of the *Hoge Raad* (Internal Service Rules, latest revision: 2008) provides that an *ad hoc* chamber (the "fourth chamber") of the *Hoge Raad*, led by the President of the *Hoge Raad* or one of its vice-Presidents, shall decide these issues.

[81] This paragraph has benefited from research by Sheetal Achaibersing, a law student at Erasmus School of Law, in the context of her master's thesis (2010).

[82] Article 9(1) of the Model regulation on complaints.

ings. Complainants are informed of the outcome in writing.[83] The court's ruling board is obliged to deal with complaints within six weeks, and if a Complaints Commission is set up then within ten weeks. If the board decides that the complaint will not be taken into consideration the complainant has to be informed within four weeks of filing it. According to research of M. Laemers (2006), most of the courts comply with the rules and the time-limits.[84] If the complaints are well-founded, the normal disciplinary sanctions are available. Precisely this is the reason that the complaints rules are set by the board of each court. The President of the court has a disciplinary power which he may then decide to use. If a complaint has been presented to the Procurator General at the *Hoge Raad*, he is now increasingly inclined to consult the Presidents of the courts.[85] The Annual Report of the *Hoge Raad* details the number of complaints which has been usually around 50 a year in recent years.[86] As a consequence of the recent *Evaluatiewet modernisering rechterlijke organisatie* there now is provision in article 13g of the Judiciary Organization Act for an annual report by the Procurator-General and the President of the *Hoge Raad* on the complaints procedure.

VII. Judicial Accountability: Discipline and Removal Procedures

1. Formal Requirements

As a matter of constitutional law, Article 117(1) of the Constitution guarantees the independence of the individual judge by appointment "for life". This guarantee can also be found in Article 1a of the JOLS Act. At first sight this would seem to imply that a judge cannot be re-

---

[83] More information on complaints practice can be found in the annual reports published by the courts and the Council for the Judiciary.

[84] M. Laemers, Open opstelling van rechters en aandacht voor kwaliteit (Open attitude of judges and attention for quality), in: L. E. de Groot-van Leeuwen et al. (eds.), De ongehoorzame rechter (The disobedient judge), at 33-54 (2006).

[85] Bovend'Eert (note 9), at 191. An older case which was decided by the *Hoge Raad* in 1991 may serve as an illustration. NJ 1992, 29 (this case may still be relevant according to Bovend'Eert (note 9), at 191).

[86] In 2002, there were 78 complaints, 2003: 41, 2004: 48, 2005: 52, 2006: 47, 2007: 39, 2008: 52.

moved by any government body. As has been written elsewhere, "[t]he fact that the judge does not have to fear consequences for his own employment from the way he functions, and particularly from the decisions he takes in specific cases – even when applying the law with regard to and against the government – is one of the most important guarantees of judicial independence."[87] The *Hoge Raad*, however, can dismiss a judge. The procedure is surrounded with special guarantees. These will be discussed in the next section. Normally the power to initiate disciplinary and removal proceedings would lie with the president of the court to which the judge belongs. The legal basis is provided by Arts. 46 sqq. of the JOLS Act.

2. Disciplinary Proceedings

Chapter 6A of the Judicial Officers (Legal Status) Act contains detailed provisions – based on Article 117 of the Constitution – with regard to disciplinary matters. In light of Article 117(3) Constitution it is simply logical that there would be a statute which dealt with the issues concerning the legal position of judicial officers as well as with the suspension and dismissal of such officers. Chapter 6A is entitled "Disciplinary measures, suspension and dismissal". This could suggest that dismissal is here dealt with only in a disciplinary context, but that is not the case. The three elements in the title of Chapter 6A stand somewhat apart. Strictly speaking, suspension is not a disciplinary measure. Nor could it be, since Article 117 of the Constitution does not provide a basis for it. Suspension occurs if the behaviour of a judge is such that there are serious reasons to expect that it could lead to dismissal (Article 46f(2)(b) JOLS Act). The President of each court (not the governing board) has the power to impose disciplinary sanctions,[88] with a possibility of appeal to the Central Appeals Tribunal (*Centrale Raad van Beroep*), which is the highest court in civil service cases.[89] The dismissal of a

---

[87] R. de Lange/P. A. M. Mevis, Constitutional Guarantees for the Independence of the Judiciary, in: J. H. M. van Erp/L. P. W. van Vliet (eds.), Netherlands Reports to the Seventeenth International Congress of Comparative Law, 327, at 339 (2006).

[88] Here also, for reasons related to judicial independence: the President is always himself a judicial officer, while the governing board has a mixed membership.

[89] L. F. M. Verhey, De onafhankelijkheid van de rechter naar Nederlands recht, in: P. van Orshoven, L. F. M. Verhey/K. Wagner, De onafhankelijkheid

judge can, however, only be ordered by the *Hoge Raad*; the government has no power to dismiss a judge.[90] The Procurator General at the *Hoge Raad* will also be involved in such proceedings because it is he who will bring the case before the *Hoge Raad*. The President of the court, the Procurator General at the *Hoge Raad*, and the *Hoge Raad*, respectively, conduct the investigation(s).

The wider context for these provisions is a tension which has been observed by various authors, viz. the tension between the efficient administration of justice and effective management of government branches – including the judiciary – on the one hand, and the requirements which flow from the ideal of the rule of law, such as access to court, fair trial, guarantees against undue delay, and guarantees for *objective* impartiality,[91] including the requirement of judicial independence. In part, these requirements of management and of the rule of law point in the same direction. In part, they do not.[92]

Dismissal of judicial officers takes place by royal decree[93] either at their own request or on their reaching the statutory age of retirement, which is now 70. The Dutch Constitution in Article 117 does allow for the dismissal of individual judges if they do not perform according to certain standards of professional conduct. But there has to be a statutory basis for such dismissal. There is also the guarantee that the Constitution determines which body is competent to dismiss judges. Unsurprisingly the Constitution, adhering to the independence of the judiciary, has appointed a judicial body, viz. the *Hoge Raad,* to fulfil this task and to exercise this power.

---

van de rechter, at 70 (2001), with reference to page 71 of the explanatory memorandum to the legislative proposal *Organisatie en bestuur gerechten* (Organization and administration of the judiciary), Parliamentary documents II 1999/2000, 27 181 no. 3.

[90] Article 117(3) of the Constitution.

[91] According to the case law of the ECtHR, e.g. *Procola* v. *Luxembourg*, Judgment of 28 September 1995, Series A, No. 326; *Kleyn and Others* v. *The Netherlands*, Judgment of 6 May 2003, available at <http://hudoc.echr.coe.int/hudoc/>; *Sacilor Lormines* v. *France*, Judgment of 9 November 2006, available at <http://hudoc.echr.coe.int/hudoc/>.

[92] This is the central theme of E. Mak's doctoral dissertation, Rechtspraak in balans (Judging in balance), (2008).

[93] Article 117(2) Constitution; Article 46h JOLS Act.

The issues regarding dismissal of judicial officers are dealt with exclusively in the Constitution and the Judicial Officers (Legal Status) Act. On the basis of the Judicial Officers (Legal Status) Act a judicial officer who has been appointed for life can be dismissed by the Supreme Court only in the following situations:

a. Long-term illness which leads to permanent unsuitability to fulfil his judicial duties; in that case the Supreme Court has the power to assign him to other duties (Article 46k(1) JOLS Act) which should be "suitable" or "acceptable" in terms of the law applicable to civil servants. If these other duties are then declined, dismissal becomes a possibly adequate reaction.
b. Unsuitability to perform judicial tasks (on other grounds than illness).
c. If the judicial officer accepts a position which is *de jure* incompatible with judicial office.
d. Loss of Dutch nationality.
e. Final conviction for a serious criminal offence, or a final and irrevocable judgment which imposes on him a measure entailing the deprivation of liberty.
f. Placement under financial guardianship, bankruptcy or suspension of payments, application of the statutory debt rescheduling arrangement, or commitment for debt i.e. one of the various forms of financial incapacity determined by law;
g. As a result of action or omission, seriously prejudicing the proper functioning of the administration of justice or the confidence that is to be placed in it.
h. Repeated failure to comply with provisions which prohibit him from exercising a certain occupation, or provisions which determine a permanent or continuous residence, or which prohibit him from having meetings or conversations with parties or their lawyers or attorneys, or from accepting any special information or documents from them, or which impose on him an obligation to keep a secret, even after a disciplinary written warning has been issued to him.

As we see, the situations in which a judicial officer can be dismissed are regulated in great detail by the relevant Act of Parliament. This follows from the requirements of the principle of legality. It also complies with the criteria which the ECtHR developed in its case law on accessibility

and foreseeability. In light of this it has been questioned whether ground (f) is necessary in a democratic society.[94]

Dismissal cannot be imposed as an additional penalty. This is explicitly ruled out by Article 28(2) of the Dutch Penal Code, a provision which regards disqualification from public office as an additional sanction.

As was mentioned above, judicial officers who have been appointed for life can also be dismissed if they themselves ask to be. In this context it should be noted that a dismissal on request is not the same as a voluntary resignation. The procedure for dismissal by the Supreme Court against the will of the judge involved is in practice hardly ever applied; cases involving dismissal are already rather exceptional, and when they do arise it is not uncommon for the judge involved to pre-empt them by requesting his own dismissal. This is usually the case when a judge is suspected of a criminal offence which he does not deny. Dismissal proceedings the outcome of which is already self-evident can thus be avoided. It cannot be ruled out that a judge who requests his own dismissal in such a situation does so partly on the basis of conversations with other people, in which he may be influenced in the decision he takes.

3. Judicial Safeguards

Article 46e(1) of the JOLS Act provides that a warning can be imposed only after the judicial officer in question has had the opportunity to put forward his view orally or in writing. Appeal from this sanction lies to the Central Appeals Tribunal (Article 47(3) JOLS Act).

4. Sanctions

Apart from dismissal, suspension and the application of disciplinary sanctions are also possible. Here, too, the Supreme Court has a role to play (Article 46f JOLS Act). It may suspend pending dismissal. A separate decision to suspend the payment of salary may be necessary, and this the Supreme Court is also empowered to make. Possible disciplinary sanctions which can be applied by the President of a court include a written warning, which can be imposed only after the judicial officer in question has been heard (Article 46e(1) of the JOLS Act: he then has a right to present his views orally or in writing). Here, too, this sanction

---

[94] De Lange/Mevis (note 87), at 342.

can be imposed only by a judicial officer and not by the board of management of the court, because – as we saw – this board is partly composed of people who are not judicial officers.

5. Practice

Disciplinary proceedings take place, but not very frequently. Judges who do not function well or have made a serious mistake also step back on their own initiative.[95] There is no evidence to indicate that there is any abuse of these proceedings, or that there are issues which need to be discussed in the light of judicial independence.

VIII. Immunity for Judges

Judges have immunity for official actions pursuant to Article 42 JOLS Act. For non-official actions there is no immunity.[96] Article 42 JOLS explicitly rules out judges' liability in tort for their judicial decisions. It is not the judge, but the State which will be held responsible.[97] There is State liability in tort for judicial errors. The standard for this liability is severe, but very exceptionally the *Hoge Raad* has awarded damages, albeit in only two cases.[98] One must assume that if a judicial error has been made, note of that is made and it could affect chances of promo-

---

[95] In January 2010, a deputy judge at the Amsterdam district court had taken copies of files home (that is allowed under certain strict conditions) and mistakenly thrown them away as part of the normal rubbish. They were found and taken to a newspaper. The judge, confronted with the news, immediately resigned.

[96] E.g., there have been criminal cases (and dismissal) against a judge who had child pornography and against a judge who beat his wife. J.F.M. Jansen, De persoonlijke aansprakelijkheid van de rechter (personal liability of judges), Nederlands Juristenblad 1212 (2008). Reactions by G. Vrieze, Rechtersvervolgingen (prosecutions of judges) Nederlands Juristenblad 1864 (2008); H. S. M. Kruijer, Persoonlijke aansprakelijkheid van de rechter, Nederlands Juristenblad 1867 (2008) with a postscript by J. F. M. Jansen (at 1868-1869).

[97] HR 11 October 1991, NJ 1993, 165 (Van Hilten), see also G.E. van Maanen/R. de Lange, Onrechtmatige Overheidsdaad (Government Liability in Tort), at 76 and 132 (2005).

[98] This happened in 1994 and 2005, respectively.

tion. However, information on these issues is not in the public domain, nor is it easily available (partly for understandable reasons). There is a separate regime for compensation in the event of detention.[99] Alongside this regime, there is also the possibility of compensation for damage based on normal tort liability. In this system, compensation is paid regularly. There are no figures available indicating that this is not considered to be a normal risk of the judicial profession.

IX. Associations for Judges

The Dutch Association for the Judiciary (*Nederlandse Vereniging voor Rechtspraak*) has existed since 1923 and represents judges.[100] Membership of the Association is entirely voluntary.[101] According to its own website, the Association membership consists of around 75% of judicial civil servants (i.e. not only magistrates [judges and prosecutors] but also registrars, assistants, etc.), totalling approximately 3,100 members.[102] It is a regular debating partner with the Council for the Judiciary, the Minister of Justice, and Parliament. The Association regularly publishes advice and recommendations. The Association describes itself as an organization of professionals as well as a trade union, and in this latter capacity is an associate member of the Union for Intermediate and Higher Functionaries, which is a regular trade union. The Association is very active in promoting the interests of its members and the judicial profession as such. It negotiates the salaries and working conditions of judicial personnel. But civil servants generally (including judicial personnel) are excluded by Dutch law from the right to strike.

---

[99] N. M. Dane, Overheidsaansprakelijkheid voor schade bij legitiem strafvorderlijk handelen (Government liability for damages in the context of legitimate criminal prosecutions), in particular at 85 sqq. (2009).

[100] J. Adriaanse, Mits op Waardige Wijze (Provided it is in a dignified manner), De Nederlandse Vereniging voor Rechtspraak 1923-1998, at 123 (2008).

[101] Since membership of the Association is voluntary and its organization is that of a private association, the size of resources is entirely the responsibility of the Association itself. If necessary it could raise the annual fee for its members.

[102] The website is also available in English at <http://www.nvvr.org/>. The Annual Reports of the Association (since 2002) can be downloaded from the website.

Among the Association's declared other functions are "to contribute to good, efficient, uniform and comprehensible administration of justice in the Netherlands"; good education of the judiciary, good information of the public, contacts with the government and with sister organizations abroad,[103] as well as the promotion of the interests of its members. The Annual Reports provide a picture of considerable involvement in public and other debates on the judiciary. However, the Association has abstained from defending courts against political criticism in individual cases. This criticism usually concerns sentencing. The Association certainly has influence on matters concerning the judiciary. It is taken very seriously by the Ministry of Justice and Parliament. With regard to issues of the organization of the judiciary, budgets and administration, it has to compete with other actors, such as the Council for the Judiciary.

X. Resources

Housing the judiciary, like other areas of the administration of justice, is undergoing changes under the influence of the new public management. New buildings have been created for some courts, whereas other courts have resisted moving from their traditional locations. In recent years, the Ministry of Justice has made proposals to restructure and rearrange the locations of the various courts. Cities which were traditionally important (Dordrecht, Zutphen, Middelburg) but are now not very large still have their own court districts, whereas fast-growing urban areas like Almere do not. Where objective quantitative criteria for the allocation of courts are lacking, decision-making on these issues depends on prestige, lobbying and negotiation. Obviously, one of the arguments in favour of restructuring and rearranging is a more efficient allocation of resources to the benefit of the accessibility of justice. Whether the office and courtroom facilities are adequate is partly a matter of objective measurement (numbers of square metres per full-time-equivalent) and partly a matter of office culture. If members of the court do large amounts of their work at home the situation is different from that in a court where there is a true office culture. Since every court is different in this respect, it is difficult to give a general picture.

---

[103] The association is a member of the European Association of Judges, the International Association of Judges, and the International Association of Prosecutors.

C. Internal and External Influence

I. Separation of Powers

In his recent study on courts and judges in the Netherlands, Paul Bovend'Eert writes that the concept of *judicial independence* rapidly loses its significance if it does not take as its starting point the specific relationship between the judiciary and the other branches of government.[104] The most important legal safeguard against interference by other State bodies is appointment for life, laid down in the Constitution. Neither in law nor in practice is there any responsibility of the judiciary as a whole or of its members to any State bodies or officials. There is also the unwritten constitutional principle of non-interference, the *sub iudice* principle which traditionally governs the relationship between politics and the judiciary. Under that principle, for the period during which a case is not definitively decided by the courts, politicians are supposed to refrain from comment.

The Dutch Constitution is not based on a rigid notion of the strict separation of powers. Rather, it adheres to an idea – admittedly sometimes rather vague and not very well developed in the constitutional text – of checks and balances. This means in practice that it is certainly legitimate for the legislature to react to certain judicial decisions by enacting new statute law or modifying statute law. The existence of this generally accepted power explains why the courts in their turn pay attention to legislative history, i.e. parliamentary debates and deliberations on certain statutory provisions. This works in two ways: one is that if a court is searching for a solution to a specific legal problem, it may defer to the legislature if a legislative proposal is already the object of parliamentary deliberations; the other is that if a legislative provision is challenged before the court as violating directly applicable international law, the court may try to reconstruct legislative intent and may also reflect on the sustainability of the provision in the light of international law. In the latter case, it is quite normal in the Netherlands for a court to pay attention to the various arguments which have been exchanged in parliament.

Nevertheless, it is also clear that there is a constitutional principle that the judiciary should be protected against direct interference from the legislature or the executive. Relatively speaking the judiciary is more

---

[104] Bovend'Eert (note 9), at 17.

separated from the other powers than the other powers are separated from each other.[105] This is reflected in Arts. 116(4) and 117 of the Constitution. In light of this principle, questions have been asked with regard to the relationship between the Ministry of Justice and the judiciary. Although the Council for the Judiciary was set up with the intention that it should be an intermediary and a buffer between the judiciary and the Ministry, in practice it has a working relationship with the Ministry and exchanges so much information with it that the Minister has "much more insight into the functioning of the judicial organization than was possible prior to the introduction of the new legislation in 2002".[106] Comparing this with the relationship between the judiciary and Parliament, Bovend'Eert holds that it would be unacceptable if a minister were to have the power to set a minimum and a maximum price on the activities of parliament, such as discussing legislative proposals, question time, presenting a motion. He wonders why such a system is then considered acceptable for the judiciary, which equally ought to be an independent and autonomous power in the State.[107]

II. Judgments

1. Basis

Judgments are exclusively based on law.[108]

2. Structure

As to whether there are any requirements in law about how a judgment is to be written, we have to distinguish between the general constitutional requirement that court decisions have to be reasoned (Article 121 Constitution)[109] and the style of adjudication. Dutch courts used to fol-

---

[105] Bovend'Eert (note 9), at 229.

[106] Id., at 235.

[107] Id., at 236.

[108] Remarkably, this can be derived only indirectly from Article 118(2) of the Constitution which provides that the *Hoge Raad* has a power of cassation of judgments in the event of "violation of the law".

[109] As the ECtHR has acknowledged, the way in which a decision is reasoned may differ in every individual case. ECtHR, *Gorou* v. *Greece* (No. 2),

low the French style – going back to the Napoleonic era – which was characterized by an apodictic approach. Judgments – also from the *Hoge Raad* – in the past were grammatically just one sentence, albeit sometimes several pages long. Since the 1980s, however, the courts have started changing their style, beginning with criminal cases. Since the 1990s judgments have been written in a direct style, but without any attempt at rhetoric.[110] With the inheritance of the *French* style of adjudicating the court speaks with one voice, concurring or dissenting opinions are never published, the secret of the judicial chambers is absolute and complete. This means that sometimes the reasoning of a court rests on a compromise between the members of the Chamber which has given the judgment.

The style of writing of judgments is broadly similar between courts. This applies to civil, criminal and administrative courts. If a candidate is selected for judicial appointment and judicial training, a course in judgment writing is obligatory. However, variations in style may be discerned in those courts in which the judges themselves – rather than assistants, clerks or junior lawyers – draft the judgments. Then again, normally in chambers a certain homogenization of style will be achieved. Court judgments have a standard structure. This is obviously not the same for criminal, civil and administrative cases. However, within each of the branches of adjudication one can observe a great similarity in style and approach. Judgments of highest courts tend to be relatively elaborate. With regard to judgments of lower courts the situation is much more complex. In some cases no written judgment is given. There is only a so-called *head-tail* judgment, i.e. an abbreviated version of the judgment, and a full written version will be provided only when one of the parties appeals to a higher court. Although judgments may be given in full, there is criticism in some cases of their substance. The quality of the reasoning is sometimes questioned.

3. Public Access

According to the Constitution (Article 121) trials are public but Acts of Parliament may provide for exceptions to this rule. Apart from security

Judgment of 20 March 2009, para. 37, available at <http://hudoc.echr.coe.int/hudoc/>.

[110] One of the few exceptions to this rule is a district court judgment from Aruba (by Judge Wit). But Aruba is outside the spatial scope of our chapter, as indicated in the preliminary remarks.

measures, there are no specific impediments to public access to the courts. Media access is regulated by the courts themselves on a case-by-case basis. Judgments have to be reasoned and make it clear on what grounds the court bases its decision. The pronouncement of judgments has to take place in public. In practice, in many criminal cases there are no published judgments. The judgments are read out in court, and only if there is an appeal will the judgment be made into a full text available to parties and the appeal court. The most important judicial decisions are published on a general website called Rechtspraak.nl which is subdivided and has links to every court in the Netherlands.[111] It has a search engine which enables one to search the published case law in its entirety, i.e. in a non-edited and non-abridged version. There are a number of journals, both general and specialized on certain fields of law (tax law, civil law, transport law, company law, human rights law, media law, etc.), which regularly publish important case law. The most important of these journals are the *Nederlandse Jurisprudentie* (Dutch case law) in civil and criminal cases, the *Administratiefrechtelijke beslissingen* (Administrative Case law) and the *Jurisprudentie Bestuursrecht* (Judicial decisions in Administrative Law), which have most of their published cases annotated by eminent scholars. Traditionally, the *Nederlandse Jurisprudentie* is very close to the *Hoge Raad* organizationally. The editor-in-chief is currently the Procurator-General at the *Hoge Raad*, and the group of annotators is regularly seen as the recruiting ground for new members of the *Hoge Raad* or Advocates-General at the *Hoge Raad*.[112]

III. Improper Influence on Judicial Decisions

There has never been a case reported in the Netherlands of a corrupt judge or court officer. There are no figures on special requests or *ex parte* communication, if they have occurred at all.[113] In recent years

---

[111] *De Rechtspraak*, available at <http://www.rechtspraak.nl/>.

[112] It is also very normal that former members of the *Hoge Raad* or former Advocates-General after retirement are involved in annotating important judgments of the *Hoge Raad*.

[113] Recent cases in Belgium and South Africa (both in 2008) prove that also in a well-developed legal system it is not entirely illusionary. In Belgium the cabinet of Prime Minister Yves Leterme was brought down by a scandal involv-

there is one particular case, the so-called Chipshol case, which may turn out to be an example. But this case is still *sub iudice*. With regard to media pressure it has to be noted that cases of attacks on the judiciary[114] in the Netherlands are not dealt with as criminal offences. There is no crime of contempt of court, and if there is criticism of court decisions this is almost invariably a matter of public debate. Particularly – and perhaps not surprisingly – in criminal cases there is widespread media attention.

In recent years, criticism has come from various angles. This is relevant for judicial independence, since media attention and public debates and expressions of feeling can have an impact on the Members of Parliament, who may then in turn comment on individual cases while they are still in the hands of the courts (*sub iudice*). A number of tendencies may be observed in this respect. First, there are a number of social scientists and psychologists who have paid particular attention to issues of proof, reliability of witnesses and the possibility of prejudice on the part of the courts.[115] Secondly, the activities of television journalist Peter R. de Vries have focussed on a number of court cases in which there was a possibility of judicial error.[116] In the widely publicized Schiedam murder case it was convincingly demonstrated that the district court and the appeal court had made serious errors of judgment. A suspect had confessed and was convicted, but afterwards it turned out that another person had in fact committed the murder. This case caused enormous debate within the judiciary, too. The various courts have re-evaluated their working processes and their way of dealing with cases like these.

---

ing political pressure on a court of appeal regarding the politically sensitive rescue operation of Fortis Bank Belgium.

[114] See in general E. Barendt, Freedom of Speech, at 312 sqq. (2nd ed., 2005).

[115] Han Israëls, Peter J. van Koppen, W. A. Wagenaar, De slapende rechter (The sleeping judge), (2009); Reaction by Marc Loth, "Slapende rechters" of "dwalende deskundigen"? ("Sleeping judges" or "erring experts"?), Nederlands Juristenblad, at 1142-1147 (2009). Marc Loth is a judge in the *Hoge Raad.*

[116] In the so-called Putten murder case, De Vries has first helped to clear two suspects who had confessed, by demonstrating that they could not possibly have committed the murder and that their conviction must have been based on an error of judgment by an expert witness. As it turned out, in the end another person was convicted, and the two original suspects' cases were reviewed by the *Hoge Raad*.

Thirdly, the instrument of revision of judgments by the *Hoge Raad* in cases of judicial error has gained popularity. In the three widely publicized cases of Lucia de Berk, the Putten murder, and the Schiedam park murder, the *Hoge Raad* accepted the cases for revision.[117] Not always did new investigation lead to revision.[118] Fourthly, Advocate-General at the *Hoge Raad* Nico Jörg in one of his opinions gave a list of complaints about the quality of judgments by the courts of appeal. This also contributed to much closer scrutiny by lawyers and by the general public of the work of the courts of appeal. Fifthly, there are political cases or criminal cases with a strong political aspect which have received large-scale media attention. Two examples in particular should be mentioned. The murder of politician Pim Fortuyn in 2002, one week before he was expected to win a landslide victory in the general election, was a monumental event in Dutch political history (the last political murders having been committed in the 17th century). A suspect was caught by the police almost immediately, and the criminal case against him received much media attention. When a sentence was handed down, there was debate about whether the Fortuyn's murder was an attack on democracy and whether that should have been counted as an aggravating circumstance; also, there was criticism in political circles of the sentence (18 years' imprisonment) as too lenient. Opinions were divided on whether this should be considered as normal public debate on criminal matters, or rather as illegitimate pressure on the judiciary.[119]

IV. Security

In general security for the courts is provided by specialized personnel. Even they are monitored and supervised in order to ensure that security

---

[117] In the first case, Lucia de Berk was convicted of murdering a number of babies in a hospital during her work as a nurse there. After lengthy review procedures, however, it was established that she was innocent. This was – uniquely – explicitly pronounced by the court. She was released from prison and will receive compensation from the government. In the Putten and Schiedam cases suspects were convicted of the murders but eventually there turned out to be another perpetrator.

[118] HR 18 March 2008, LJN:BA1024 (Deventer murder case): no revision.

[119] Nick Huls argues that courts should be able to deal with this type of societal debate: N. Huls, Rechter, ken uw rechtspolitieke positie! (Judge be aware of your Political Position in Law!), at 37 sqq. (2004).

stays guaranteed. In special cases police officers will assist the court guards. Generally security measures will be aimed at the safety and security of suspects, witnesses, and public prosecutors. There is a high security court building (*The Bunker*) in Amsterdam, used only for special criminal cases. On one occasion, a missile was launched, hitting The Bunker on the day before the start of one of the most spectacular and large-scale organized crime cases. There is also a high-security court building in Rotterdam. Apart from rare incidents, the general picture is that security measures are necessary and sufficient. There have never been serious incidents in which judges were victims of violence in court. Occasionally a court or one of its judges has been the subject of threats. In 2009, the Amsterdam Court of Appeal ordered the criminal prosecution of a Member of Parliament (Geert Wilders). Subsequently the court received large numbers of hate-mail from followers of that politician. So far, there has been no public information with regard to particular security measures for individual judges. But public figures who are the object of threats receive personal security, sometimes for a long time and at considerable expense. This applies to Members of Parliament, ministers, mayors and other public figures. One must assume that, as a consequence of the hate-mail in the Wilders case, there is a higher state of security alert, at least in the court involved in that case.[120]

D. Ethical Standards

There is an ethical code for judges in the Netherlands which concerns impartiality.[121] A working group of the Council for the Judiciary has provided guidelines for the relationship between judges and the political system. Since the 1970s, it used to be accepted that judges were members of municipal councils. This is now no longer considered wise. The Constitution provides for leave during a period of service on a national parliamentary body (i.e., as a member of the Second Chamber/Chamber of Commons). Membership of the Senate is considered

[120] Meanwhile, in 2011, the case has ended with an acquittal by the Amsterdam District Court. No incidents occurred.

[121] Leidraad onpartijdigheid van de rechter (Guidelines for the impartiality of judges) (2004). The *Leidraad* very occasionally plays a role in court cases, e.g. regarding recusal (District Court Groningen 2 July 2009, LJN: BJ1333) and regarding standards that should apply to arbiters (District Court The Hague 20 April 2009, LJN: BL4455).

compatible with a position as (deputy) judge, but it is now considered incompatible by the Council for the Judiciary working group. Some judicial positions have always been constitutionally incompatible with membership of any chamber of Parliament (e.g., *Hoge Raad*).

E. Supreme/Higher Courts

The recruitment and appointment of members of the *Hoge Raad* takes place in a way which differs from that in other courts. Selection for highest judicial office – membership of the *Hoge Raad* and of the highest administrative courts – is largely a matter of co-opting by those courts themselves. Informally, there is a circle of judges and academics who may qualify for highest judicial office. Article 118(1) Constitution provides that members of the *Hoge Raad* are appointed on a proposal by the Second Chamber of the States-General. The way this proposal is made is not very clear. The *Hoge Raad* itself makes a list of six candidates (*the recommendation*). Normally the Second Chamber takes the three highest from that list (*the proposal*). Very exceptionally the Second Chamber departs from the recommendation. As van Koppen and ten Kate have shown, the number of cases in which a person would not be recommended by the *Hoge Raad* but nevertheless be considered by it is very small, and all but one of them occurred before 1918.[122] Very rarely does the Second Chamber change the order of the recommendation. In 1975 this happened – for the first time in 20 years – in the case of Mrs Van den Blink who then in 1976 became the second female member of the *Hoge Raad*.[123] In 2011, for the first time in parliamentary history, one parliamentary group (the PVV of Geert Wilders) openly voted against the candidacy of law professor Ybo Buruma for the Hoge Raad, on the grounds that he was a member of the Social-Democratic party and a rather outspoken critic of the PVV.

It is appropriate to highlight the position of the Procurator General at the *Hoge Raad*. It is very exceptional or even unique from the point of view of judicial independence. The Procurator General is an independent judicial officer, but he is not a judge. He is not under any instruction from the government or the Minister of Justice. The Procurator General has a role to play in advising the *Hoge Raad* – in the form of

---

[122] P. J. van Koppen/J. ten Kate, De Hoge Raad in Persoon, at 91 (2003).

[123] The first woman being Mrs. Minkenhof, who was appointed in 1967.

opinions by him or his deputies, the Advocates General at the *Hoge Raad* – as well as in disciplinary proceedings against judges, complaints procedures, and some other special procedures. As far as we have been able to discover, the Netherlands is the only country in the world in which this official is an independent magistrate.

F. Conclusion

As follows from the above analysis and also according to the personal opinion of the author, the most pressing issue for judicial independence is political involvement in concrete criminal cases. There is notable pressure on the judiciary by way of public comments by Members of Parliament on sentencing practices, including attacks on the supposed partisanship of certain members of the courts.

Another pressing issue is the effect of the new public management on judicial independence. The way in which lines have been drawn in the Judiciary Organization Act leaves room for an administration of justice in which a judicial judgment in a concrete case would not merely be a matter of application of the law to the particular circumstances in the case, but also of the application of judicial policy which results from the co-operation of judges and courts in administrative entities such as working groups for the development of guidelines with regard to particular issues of the application of law and judicial law-making. Some of the problems under discussion here can be solved by a different attitude in the political arena and within the legislature. The legislature has to realize that it is responsible for creating general guidelines – and that that is both a power and a duty – but it must stay clear of concrete cases.

The Council for the Judiciary was modelled on examples in other countries – the *Scandinavian model*. However, it is now following a course of its own, profiling itself as an efficient manager of an efficient judicial organization. Its benefits and disadvantages have been the subject of debate in the Netherlands. That debate has not yet ended, although it is fair to say that the Council is now an established agency of the Ministry of Justice. It is perceived by some as the spokesman for the judiciary as a whole, but this is a misconception. The *Hoge Raad* is not subject to the management of the Council, and there is also the Dutch Association for the Judiciary which acts as a spokesman and a representative of judges. All in all, the issue of the position of the Council in this respect

has not been finally settled. Its role in the management of the judiciary and the structuring of the work processes within and between the courts is still developing. The tension between judicial independence as a crucial value in a system characterized by the rule of law on the one hand, and the requirements of public management on the other, will certainly remain on the agenda in future years.

Judicial Independence in France

*Antoine Garapon and Harold Epineuse**

A. Introduction

Though the independence of the French judiciary has been discussed for decades, the concerns raised by this topic have changed tremendously over the years. For a long time, as a result of the so-called French concept of separation of powers,[1] the debate revolved round the independence of the judiciary *vis-à-vis* the legislative and the executive branches: while the government and Parliament were deemed legitimate powers, the judiciary, on the other hand, was not elected and thus was not initially recognized as a power *per se*, but as a mere authority, the role of which was strictly limited to applying the law. Furthermore, in order to shield the legislative and the executive from any intrusion by the judiciary, courts were prohibited from adjudicating on Acts, Bills and any other documents issued by the government or Parliament.[2] A parallel court system was thus created to resolve disputes arising out of administrative acts. This system, which has the *Conseil d'Etat* at its head, will not be discussed in this chapter as it is conceived as an autonomous system of adjudication with a different recruitment and career system for its judges, different types of relations between the different court levels, a separate budget, etc. The following sections will thus deal only with the *justice judiciaire* which has jurisdiction over

* The chapter was written with the assistance of Isabelle Moy and Nana Mjavanadze.

1 DC 86-224, 23 January 1987, *Conseil de la Concurrence*.

2 Lois des 16 et 24 August 1790 (Acts of 16 and 24 August 1790). All French statutes and regulations can be found at <http://www.legifrance.gouv.fr>. Most of them are translated into English.

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233, DOI 10.1007/978-3-642-28299-7_8, © by Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V., to be exercised by Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Published by Springer-Verlag Berlin Heidelberg 2012

civil, commercial, social and criminal matters, as opposed to the *justice administrative*.

While the duality of the court system remains, there has been a gradual shift in the balance of power between the three branches of government. First, the courts are now entitled to check whether legislation complies with international and European law, even if the national law was enacted by Parliament after the coming into force of the international treaty or European statute.[3] Moreover, following a 2008 constitutional reform, courts can now decide at the request of a litigant to send a pending case for constitutional review to the *Conseil constitutionnel* the prerogatives of which were recently increased.[4] The Constitution of 4 October 1958 (the "Constitution") is the core instrument regulating judicial independence in France. The rules relating to the recruitment, promotion, tenure and liability of judges are contained in the *ordonnance No. 58-1270* of 22 December 1958 (hereafter the "Ordinance").[5] Codes of civil procedure, criminal procedure and of judicial organization also contain some provisions about judicial independence.

It must be said also that in France, the term *magistrat* (magistrate) refers only to certain categories of judges and includes such judges and prosecutors in a single body (in which differences in status apply between judges and prosecutors). It does not include administrative judges (who are specifically called *magistrats administratifs* with a different status), nor does it include members of the *Conseil constitutionnel* (equivalent to a constitutional court) or revenue courts (*juridictions des comptes*). Moreover, the status provided by the Ordinance of 1958 applies only to career judges, and not judges for commercial first instance cases, who are elected, or judges competent for labour law in first instance.[6] Career *magistrats* number approximately 8,000 people and encompass a variety of judges, some of whom are specialized (juvenile court judges, family judges, investigating judges, minor criminal and civil cases judges).

---

[3] See Cass. Ch. mixte 24 May 1975, "*Cafés Jacques Vabres*"; CE 20 October 1989, *Nicolo*.

[4] All information about the constitutional reform can be found on the website of the Senate: available at <http://www.senat.fr/dossierleg/pjl07-365.html>. For an overview of the role of the *Conseil constitutionnel* see <http://www.conseil-constitutionnel.fr>.

[5] See S. Guinchard, G. Montagnier, A. Varinard, Institutions juridictionnelles, at 169 (9th ed., 2007).

[6] CE ass. 2 February 1962 (*Beausse*).

The evolution of the French judiciary since 1958 has resulted in somewhat of a mutual defiance between the political sphere and ordinary courts, sometimes prone to political activism[7] but objectively linked to an increasing demand for regulation by the population which has more and more demanded that the judiciary and the individual judge to be a cornerstone institution. Several constitutional or legal reforms thus increased the role of the judge in France and tried to promote judicial independence according to European standards.[8] Then, since 2000 and a final reform which never came into force, the situation of the French judiciary has evolved in the eyes of public opinion and politicians. The first asked for more accountability of judges as a counterpart to greater independence and prerogatives given to them during recent decades, and the second expecting judges to focus on new priorities and control their caseload. Meanwhile, a number of recent scandals involving corruption or their private lives as well as wrongful conviction cases[9] have significantly tarred the image of judges in French public opinion and opened the way for a new institutional reform focusing on the accountability of judges and efficiency of the judiciary. It thus comes as no surprise that the *Conseil Supérieur de la Magistrature* (the High Judicial Council or "CSM"), in its Annual Report for 2007, chose to reflect on the general feeling of mistrust toward the judiciary.[10] A first law of criminal proceedings was enacted in the same year to react to the poor image of judges in society and to modify some elements of the training of judges and the CSM prerogatives, until a more extensive constitutional reform sought by new President Sarkozy (who, as a former Minister of Home Affairs, had sought such a reform and had several times criticized failures of the justice system) and voted on in 2008 by the

---

7 Id.

8 Opinion 94-2 on the Independence of the Judiciary of the Committee of Ministers of the Council of Europe and the European Charter on the Status of Judges elaborated by the Council of Europe played a key role in the evolution of the protection of judicial independence in France, as well as a means by which the ideas of French judges' associations found a place and an instrument of reference for further national reforms. Available at <http://www.coe.int/legal>.

9 Most notably the *Outreau* case in 2004, available at <http://www.lcp.an.fr/outreau>.

10 The report is available at <http://www.conseil-superieur-magistrature.fr/sites/all/themes/csm/rapports/RAPPORT_MAGISTRATURE_2007.pdf>.

Congress (some key elements of the reform are nevertheless still waiting for implementation acts) can take place.

As bleak as this picture may seem, there is reason to hope. In fact, following the judicial tsunami, as it were, of the last decade, policies have been implemented to restore trust in the judiciary at both the Parliamentary and Ministry of Justice levels. Because true independence is based on unquestionable competence as well as integrity, and necessarily implies some degree of responsibility, all aspects of the status and career of judges have been and are still being carefully re-examined since 2004, so that we can affirm that France is still involved in a long transitional period. On another hand, some improvements may still be needed on some aspects which cannot be affected by legislation, especially in the way the Ministry of Justice and the courts organize and carry on their relationships.

B. Structural Safeguards

I. Administration of the Judiciary

1. Organs in Charge of the Administration of the Judiciary

France has adopted the "executive model", meaning that the administration and management of the judiciary (outside the scope of discipline, judicial appointments and the general prerogatives of Heads of courts) are under the direct influence of the executive, which in turn, is accountable to Parliament, the ultimate seat of sovereignty. Specifically, the Minister of Justice, also called *Garde des Sceaux* ("Guardian of the Seals") by reference to his historical attributions, heads the Ministry of Justice or *Chancellerie*, and manages the "public service of justice", in which 72,094 agents are involved.[11]

In accordance with the principle of separation of powers, the Minister of Justice has no judicial powers. His mission consists in addressing issues which arise at a national level and co-ordinating policies relating to

[11] 29,349 for judiciary services; 9,027 for judicial protection and the young; 32,139 for the administration of prisons; 1,579 for judiciary policies. C. Baar/K. Benyekhlef/F. Gélinas/R. Hann/L. Sossin, Modèles d'administration des tribunaux judiciaires (2006), available at <http://hdl.handle.net//1866/692>. Les chiffres-clés de la Justice (2008) available on the website of the Ministry of Justice at <http://www.justice.gouv.fr>.

the judiciary. His prerogatives include the nomination of government officials within the ministry (among them mostly judges and prosecutors in specialized posts) and court administrators called *greffiers*, as well as the nomination and promotion of the great majority of people working in the courts, at least with a right to propose appointments (including judges of ordinary rank). If the formal appointment of judges in their career is finally in the hands of the CSM, it will be seen nevertheless that the Ministry of Justice's influence in the preparation of the process is decisive. The Minister, together with the General Inspection Service (under the Ministry's authority) and the CSM, also plays a role in disciplining magistrates, which is subject to oversight for legality by the *Conseil d'Etat* (the administrative Supreme Court). Furthermore, the Minister of Justice is in charge of preparing bills on various legal issues.

The Ministry is organized into six directorates, with a staff composed almost exclusively of judges at the highest level and in specialized positions: 1) Civil Affairs; 2) Criminal Affairs and Acquittals; 3) Judiciary Services; 4) Prison Administration; and 5) Judicial Protection for the Young. There are a number of additional divisions, such as the General Inspection of Judiciary Services. Lastly, a "General Registry" (*Secrétariat général*), divided into various sections (Strategy and Performance; Support and Income of the Ministry; Central Administration; European and International Affairs; Access to Law and Support for Victims) was created in 2005 to assist the Minister in carrying out the modernization and decentralization of the ministry.[12]

2. Judicial Council

The *Conseil Supérieur de la Magistrature* was created by statute on 30 August 1883, and granted constitutional recognition by the Constitution of 27 October 1946. The role, composition and powers of the CSM, the general task of which is to assist the President of the Republic in guaranteeing the independence of the judiciary, are defined in Arts. 64 and 65 of the Constitution of 4 October 1958. The organization of the CSM has changed dramatically since the constitutional reform of 27 July 1993 and the Law of 5 February 1994, which aimed at addressing a number of criticisms regarding the independence of the institution. Be-

[12] Available at <http://www.justice.gouv.fr/art_pix/1_stat_anur08_20081013.pdf>, at 14.

fore that date, the members of the CSM were appointed by the President, its powers in terms of nomination of magistrates were limited, and State prosecutors did not even come within the scope of its prerogatives. With the *loi constitutionnelle No. 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République* (the constitutional law of 23 July 2008 relating to the modernization of the institutions of the Vth Republic), the CSM is about to undergo another significant evolution.

a) Composition

The current CSM, which will serve until the end of January of 2011, is the last of its kind, because a constitutional reform appoints more laypeople to it. Apart the President of the République and the Ministry of Justice, the CSM is composed of 16 members: 12 judges and prosecutors elected by their peers and representing every level in the judicial system,[13] and four non-judges members appointed respectively by the President of the République, the President of the House of Representatives, the President of the Senate, and the General Assembly of the Council of State (*Conseil d'Etat*, the Supreme Administrative Court). The members appointed by the President of the House of Representatives and the President of the Senate cannot belong to either chamber, but the member elected by the General Assembly of the Council of State is a member of the Council. The CSM is functionally divided into two divisions of 10 members: five judges, one prosecutor plus the four non-judges members for the judges division; five prosecutors, one judge plus the four non-judges members for the prosecutors division. The two divisions meet once a month in Plenary Meetings. All members are in office for a four-year non-renewable term.

[13] Depending on the division, the CSM is formed by 1) either a judge or a State prosecutor from the Supreme Court; 2) either a chief president or chief prosecutor from an Appellate Court; 3) the head of a court of first instance (president of the court or Prosecutor of the Republic); and 4) three magistrates from courts and tribunals.

b) Powers and Functions

The role of the CSM is threefold: a) to assist the President in maintaining the independence of the judiciary; b) to appoint judges; and c) to ensure the discipline of magistrates.[14]

aa) Guaranteeing the Independence of the Judiciary

The CSM must report annually on what it is has undertaken to accomplish in each of its missions in the shape of an annual report. Acting as a watchdog for the independence of the judiciary, the CSM has a right to submit to the President its opinion on any issue relating to the safeguarding of the judiciary, whether such opinion is requested or not. For instance, the CSM has issued an opinion concerning the proposals made by a commission appointed to reflect on ethics in the magistracy (Opinion dated 20 May 2005) as well as one on the separation of powers following the *Outreau* case.[15] In addition, the CSM has the duty to inform judges as well as the *Ecole nationale de la magistrature* (the National School of Magistracy or "ENM") of possible changes in the organization of the judiciary or the status of judges. These issues, which involve both sections of the CSM, are typically discussed in the course of the monthly meetings.

bb) Appointing Judges

With respect to the appointment of magistrates of the *Cour de cassation*, Heads of appellate courts and Heads of major first instance courts, the judicial division of the CSM collects and *selects* applications, which are then submitted to the President for his formal signature, after an interview process and a formal vote among the CSM judicial division members. As for the appointment of all other judges, the judicial group is in charge of reviewing and approving the applications submitted by the Minister of Justice, whose role is thus determinant (the CSM having little opportunity to check all the candidates' profiles in this big movement of positions). The judicial group's decision is binding. The process for appointing State prosecutors is similar, though here, the CSM division's choice is not binding on the Minister of Justice. In fact, in recent

[14] Arts. 64 and 65 of the Constitution.

[15] Available at <http://www.conseil-superieur-magistrature.fr/node/48#2avis>.

years, the Minister of Justice has objected to a number of applications submitted by the State prosecutors' division. General prosecutors, i.e. the heads of prosecution at a regional level, on the other hand, are directly appointed by the Council of Ministers. This difference is not an issue of judicial independence in itself, but a principal of diarchy applying to the administration of the courts, it must be understood that Presidents of appellate courts have to bargain with General Prosecutors whose career depends entirely on the executive.

c) Outlook for the Future High Judicial Council

The constitutional provisions relating to the CSM were modified by Article 31 of the constitutional law adopted in 2008. A new version of Article 65 of the Constitution was completed according to a law of 22 July 2010, voted on 23 June 2010 and transferred to the constitutional council who approved the law by a decision of 19 July 2010.[16] The new CSM is expected to become operative at the end of January 2011, after new elections and appointments of its members.

The composition of the CSM will be extended to more non-judges and non-prosecutor members who now have a majority in the council. The President of the Republic, the President of the Parliament and the President of the Senate will appoint one more member each; also the National Bar Council will appoint one member. The CSM's powers have been extended: the prosecutors' division will give its (advisory) opinion on all appointments, including for general prosecutors with the appellate courts and the *Cour de cassation*. Lastly, in response to a suggestion made by the CSM in its report for 2007, any citizen who deems that, in the course of proceedings in which he was involved, a judge has behaved in a way which may entail disciplinary sanctions, has a right to file a complaint with the CSM directly. However, the complaint must first be examined by a special committee which will determine whether the claim is legally founded before passing it on to the appropriate disciplinary division.

A precision given by the Ministry of Justice at the request of a Member of Parliament settles that only judges and prosecutors, and no other judicial staff, are concerned by the new disciplinary proceedings and that such a procedure can be pursued parallel to a civil action under Article

[16] Decision of 19 July 2010, N°2010-611 DC.

141-1 of the Judicial Code.[17] In order to preserve the impartiality of the disciplinary section the Constitutional Council has decided that presidents of first instance or appellate courts and prosecutors or general prosecutors, who are members of the CSM, will not hear any disciplinary case *vis-à-vis* judges or prosecutors belonging to their court.

II. Selection, Appointment and Reappointment of Judges

1. Eligibility

Traditionally, judges were appointed after first passing a competitive entrance exam for the ENM, meaning that they would enter the judiciary following their initial training at a fairly young age, typically around 27 years old. While this is still the prevailing route to the magistracy, there have, over the past 20 years, been political as well as legislative efforts to promote alternative paths to the profession and diversify the judicial body. Thus, there are now two paths to becoming a magistrate: 1) by first being admitted to the ENM as "junior judicial officers" (*auditeurs de justice*); or 2) by being almost directly admitted to the magistracy. This system largely depends on the will of the Ministry of Justice which decides annually how many posts will be made available in which category. The fact is that in recent years fewer positions have been made available in the first category so that the recruitment of new judges and prosecutors has been diversified in age and experience.

a) Admission to the ENM

Applicants to the ENM are admitted either (aa) by passing one of three competitive exams[18] or (bb) by title. All applicants, however, must be

[17] Rep. Min. N°66005, JOAN Q 13 July 2010.

[18] The subjects covered by the competitive exam are the following: 1) "knowledge and understanding of the contemporary world" (essay on a current issue from a legal, historical, social and philosophical standpoint); 2) civil law (which notably includes legal sources, family law; torts; contracts, property; trusts and estates) or civil procedure; 3) criminal law or criminal procedure; 4) Organization of the State, the judiciary, civil liberties and public law; 5) European and international law; 6) commercial and labour law; 7) a report based on a variety of documents (newspaper articles, judicial decisions, statistical data, etc); 8) foreign language; 9) a "real-life situation" (*mise en situation*). Several candidates are given the same set of facts, on which they must individually make a

French citizens, in full possession of their civic rights, of good character, physically fit, and must not have any disease which could give rise to a protracted leave of absence.[19]

aa) Admission through Competitive Exams

There are three kinds of competitive exams, for which the education and age requirements differ. With respect to the first, applicants must be under 31 years old, of French nationality and must have completed at least four years of undergraduate study, or have graduated from certain schools (e.g. *Ecole Normale Supérieure*, *Institut d'Etudes Politiques*).[20] There is no prerequisite of a legal education. For the second competitive exam, applicants must be civil citizens or in the military with four years' professional experience, and must be under 46 and 5 months.[21] Applicants taking the third competitive exam must be under 40 and have either worked for eight years, served as an elected representative, or exercised judicial powers as a lay judge, for instance in an industrial or commercial tribunal.[22]

bb) Admission by Title

Applicants must be over 31 but under 40, and have either: 1) a master's degree in law, economics or social sciences and fours years' experience in the legal, economic or social field; 2) a doctorate in law and a master's degree in another subject; or 3) a master's degree in law, and at least three years' experience as a teaching assistant in law.[23] Before the *Loi organique* (organic law) of 5 March 2007, judicial officers admitted by title used to be limited to 1/5 of the number of officers admitted through a competitive exam, but now represent 1/3.

---

decision and then discuss it with the others and before a jury. The debate is followed by an individual interview with a jury, during which the candidate makes a presentation on a current topic and has a discussion with the jury on his or her background, motivation, etc.

19 Article 16 of the Ordinance (Ordonnance No. 58-1270 of 22 December 1958).

20 Article 17 section 1 of the Ordinance.

21 Article 17 section 2 of the Ordinance.

22 Article 17 section 3 of the Ordinance.

23 Article 18 section 1 of the Ordinance.

cc) Education at the ENM

Upon admission to the ENM, students are appointed as junior judicial officials, not magistrates, who nevertheless are considered part of the judiciary and paid accordingly.[24] During this three-year probationary period, junior judicial officials receive both an academic and a practical education, and are regularly subject to evaluation.[25] Academic education itself is comprised of general training (with courses on topics such as ethics, justice and the media, legal medicine, discrimination, etc.) as well as specific training in preparation for the exercise of their future office. For instance, for junior judicial officials about to become State prosecutors, the specific judicial training (*enseignement fonctionnel*) includes sessions on the supervision of investigations, on the criminal liability of minors, etc. As far as practical education goes, junior judicial officials must undertake several internships, including one in a law firm, as well as in a police station and in a prison. Towards the end of their education at the ENM, junior judicial officials take a ranking exam (*examen de classement*) and, based on their results and the recommendations of the jury, a group of people entitled to decide on the quality of the candidate, they choose which post they would like to apply for, and submit their request to the Minister of Justice. It should be noted that following the Organic Law of 2007, the jury may also declare any reservations they may have about certain candidates.[26]

b) Direct Admission

Although the law of 5 March 2007 has increased the number of potential judges admitted by this route (1/4 instead 1/5 of the total number of judges entering the second rank, and 1/10 instead of 1/15 of judges promoted to the first rank), direct admission remains very restricted. First, only certain categories of people, including attorneys, clerks, and law professors, may apply.[27] Secondly, applications are submitted to a "selection committee", which decides which applicants will follow the recruitment process. Under the Law of 5 March 2007, there is now a mandatory probationary period for all eligible judges, after which the

[24] See *infra* B. IV. Remuneration.

[25] See website of the ENM for complete details, available at <http://www.enm.justice.fr>.

[26] Article 21 of the Organic Law of 5 March 2007.

[27] Article 25 of the Ordinance.

jury of the ENM delivers an opinion on whether the person is suitable for exercising judicial functions.

2. The Process of Judicial Selection

The selection of candidates for judicial positions arises out of the junior judicial officials' results at the ranking exam or, with respect to judges directly entering the magistracy, the decision of the selection committee. In addition, the jury makes recommendations or reservations concerning the positions they see candidates as being fit for. On the basis of candidates' requests and those views, the Minister of Justice will post applications for each vacant judicial position, and in turn the President of the Republic will appoint judges to those positions.

During their first two years at the ENM, junior judicial officials receive a very thorough education, with the emphasis not only on the professional skills required for each kind of function in a judge career but also on the role of judges and the judiciary. In addition to the training received before their appointment, prospective judges are trained specifically in preparation for their future office.[28] While there is still not enough emphasis on the learning of procedural rules according to some scholars,[29] generally speaking, training has been significantly enhanced by recent legislation.

Though there are no regulations regarding minority or gender representation, the ENM provides statistical data on the number of female vs. male candidates and appointed judges. Overall, there is an overwhelming majority of women in the magistracy, which is particularly remarkable given that women were not allowed to enter the profession until 1946.

3. Length of Office and Reappointment

Once appointed judges have served their probation period there is no system of reappointment in France. As a rule, judges stay in offices for 40 years, whereupon they retire.

---

[28] See *supra* at B. II. 1. a. cc. Education at the ENM.

[29] Guinchard/Montagnier/Varinard (note 5) at 171 et seq.

III. Tenure and Promotion

1. Tenure

Tenure is one of the main aspects, if not the main aspect, of the difference in status between judges and State prosecutors. Once they are appointed, judges cannot be removed (*principe d'inamovibilité*).[30] This means that judges are protected against arbitrary removal, transfer and suspension. They do not, however, have tenure for life and may be instructed to retire, discharged for disability or subjected to disciplinary sanctions.

2. Promotion

The promotion of judges is governed by the Ordinance and Decree 93-21 of 7 January 1993. The hierarchy within the judiciary system has been simplified and there are now only two ranks and three levels of positions: the first rank, the second rank and the "unranked" offices (*hors hiérarchie*).[31]

a) Promotion of Ranked Judges

For a judge to be promoted from the second tier to the first tier, he must 1) comply with certain seniority prerequisites, and 2) be listed on the "promotion table" (*tableau d'avancement*) established by a "promotion committee" (*Commission d'avancement*) composed of 20 magistrates (16 elected by their peers and four *ex officio*).[32] The promotion table is based on an evaluation of the judge's performance by his or her superior, the judge having had an opportunity to be heard.[33] Each selected judge receives the promotion table, which, for transparency purposes, is published in each court area. Judges who have been promoted to a higher rank or office are appointed by decree of the President, upon the proposal of the Minister as approved by the CSM. Magistrates who have not been promoted can request that their names be inscribed on the promotion table (provided, however, they meet the seniority re-

---

30 Article 64 of the Constitution and Article 4 of the Ordinance.

31 Law No. 2001-539 of 25 June 2001.

32 Article 35 of the Ordinance.

33 Article 19 of the Decree of 7 January 1993.

quirement). Lastly, second-tier judges may not be appointed to first-tier positions in a court area where they have held an office for more than five years. By imposing a certain degree of mobility, this rule aims at preserving the independence and impartiality of judges. Apart from being promoted to a higher rank, judges may be chosen to perform certain duties (e.g. office of the president), regardless of their rank. "Ability and selection lists" for possible appointments are thus sent to the CSM and to the chief presidents of the *Cour de cassation* and appellate courts.

b) Promotion of Unranked Judges

A first-tier judge may apply for an "unranked" office provided, however, he or she has held two first-tier offices in two different jurisdictions. Unranked judges are appointed without reference to the promotion committee, either with the prior agreement of the CSM (*avis conforme*) or simply upon its proposal (judges at the *Cour de cassation*, chief presidents of appellate courts, and presidents of certain great instance tribunals).[34]

IV. Remuneration

1. Remuneration

Judges belong to the highest rank of the French civil service and are paid accordingly, in a timely manner, depending on their rank in the career evolution. Salaries are determined in advance by the Ministry of Justice, based on ranking, seniority and the specific duties performed. According to the official ranking grid for the year 2008, the starting salary is 31,200 EUR and can go up to 103,600 EUR. Judges can thus provide a comfortable living for themselves and their families. Junior judicial officials are entitled to a monthly compensatory allowance,[35] the gross amount of which is currently 19,700 EUR.

---

[34] As far as public prosecutors are concerned, the CSM's opinion is not binding on the Chancellor, and is not even requested for higher offices (e.g. general prosecutor), which are assigned directly by the Council of Ministers.

[35] Article 17 section 1 of the Decree of 7 January 1993.

2. Benefits and Privileges

In addition to their salaries, judges receive substantial benefits and privileges, with bonuses amounting to 41% of their monthly salaries (and 47% in the future[36]). One major bonus is the *prime modulable* (flexible bonus), which is designed to take better consideration of the individual merit of each judge and his contribution to the good performance of the judiciary. This type of bonus was initially awarded only to members of the *Cour de cassation* but was extended to other magistrates in 2003. Flexible bonuses are based on monthly gross salary and range from 5% to 9% depending on the magistrate's position and evaluation of the performance of his duties, cases dealt with in a year etc.

Additional benefits and bonuses may apply depending on the judicial office or duties in question, or on special circumstances. For instance, a biannual bonus is allocated to magistrates who take on the workload of absent colleagues. Also, judges who work overseas, are seconded to international organizations, or within the Ministry of Defence receive bonuses in the form of years of service, and thus rise more quickly in ranking. In order to encourage mobility overseas, the salaries of judges appointed to France's overseas departments and territories are substantially increased, with a rise ranging from 40% for the islands of Guadeloupe and Martinique to 105% for the islands of Wallis and Futuna. Judges who work in those remote areas receive additional benefits such as allowances, tax benefits, moving costs, etc.

3. Retirement

Judges' retirement pensions are included in common system of civil service pensions, judges and military personnel being treated as a separate category.[37] Retirement pensions are based on the judge's professional record, though their amount may not exceed 75 to 80% of the judge's last salary. Since 1 January 2005, allowances and bonuses have been taken into account in the calculation of retirement pensions, which results in a substantial increase.

---

[36] Declaration of the Minister of Justice at the congress of the *Union des Syndicats de Magistrats*, held at Reims on 18 October 2002, *Les Annonces de la Seine*, 21 October 2002, at 6.

[37] For full detail see <http://www.retraites.gouv.fr>.

V. Case Assignment and Recusal

Cases are statutorily assigned to a particular jurisdiction on the basis of material jurisdiction (i.e. the nature of the case and the level of jurisdiction), territorial jurisdiction (except where only one jurisdiction is competent), and/or personal jurisdiction (e.g. minors, military, etc.). Once the jurisdiction of a particular forum is established, the head of the court is in charge of assigning the case to a particular magistrate, based on objective criteria such as the judge's special skills and availability. There is no random system of case assignment.

When issues of independence or impartiality arise in the course of proceedings, cases can be reassigned to another judge by various mechanisms.[38] First, where a judge has reason to believe he may be biased towards one of the parties, he must refrain from taking part in the decision and ask to be replaced by another judge.[39] Second, the parties have a right to challenge their judge (*récusation*), provided they show evidence of bias,[40] and comply with certain procedural requirements.[41] The judge must immediately refrain from any action on the case but can have the recusal proceedings reviewed by an appellate court. Where the request for recusal is rejected, the petitioner may be subject to a fine of up to 1,500 EUR, in addition to any claim for damages. Lastly, a case may be transferred to another jurisdiction where it is inappropriate for an otherwise competent judge to take part in a decision under the circumstances.[42] Transfers may be decided on where there is evidence of bias on the part of several judges or the entire tribunal (*renvoi pour cause de suspicion légitime*), or as a matter of public policy (*sûreté publique*).

---

[38] Under certain sets of circumstances, it is considered improper for a judge to even exercise his or her functions, and it is thus simply prohibited. For instance, in the interest of an impartial judgment, judges who are affiliated or related (up to the uncle/nephew degree) may not sit on the same bench. Likewise, a judge may not participate in a decision where he or she is affiliated or related to counsel for one of the parties.

[39] Article 339 of the New Code of Civil Procedure.

[40] In accordance with European legislation, there is no restriction on the definition of bias.

[41] See Article 342 of the New Code of Civil Procedure.

[42] Arts. 356-365 of the New Code of Civil Procedure and Article 363 of the Code of Criminal Procedure.

Statistical data show that requests for recusals have significantly increased in recent years. However, basing itself on the high volume of rejections of such requests, the CSM, in its opinion of 11 March 2004,[43] pointed out that motions for recusal were often unjustified. According to the CSM, the abusive resort to recusals can be accounted for by a party's desire to obstruct and delay the proceedings. It can also be viewed as an attempt to choose one's judge by process of elimination of other magistrates as well as to cast doubt on the Court's impartiality.

VI. Judicial Conduct Complaint Process

In France, there is no formal procedure for complaints against judges apart from disciplinary proceedings. There is, however, an alternative path for resolving conflicts with judges, which consists of resorting to the national Ombudsman (*Médiateur de la République*).[44] Anyone may file a complaint relating to the behaviour of a judge (excessive delay, etc.) and the procedure is free of charge. Complaints are first reviewed either by a Member of Parliament or by an Ombudsman's associate, who will either deal with the matter himself or pass the file along to the Ombudsman. The Ombudsman may then initiate disciplinary proceedings, or at least request an explanation within a given time.

In addition to this informal complaint process, citizens may file claims relating to judicial conduct in the form of formal proceedings, though such proceedings are never initiated directly against judges themselves but always via or against the State.[45] Among the various actions available to citizens, only those based on special liability rules are required to follow specific procedural rules.

---

[43] Available on CSM website, available at <http://www.conseil-superieur-magistrature.fr>.

[44] A *Médiateur de la Republique* was first put in place in 1973, with a view to improving relations between the administration and citizens. The *Médiateur* is appointed for a six-year term and may not be removed. His missions include reviewing rules and procedures which appear to be inadequate, as well as reflecting on acts of misconduct, and making suggestions. Neither the administration nor the government may give instructions to the *Médiateur*, who is an "independent authority".

[45] See *infra* B. VII. Judicial Accountability: Discipline and Removal Procedures.

The current reform of the CSM empowers the Council to receive complaints on a judge's misconduct which could be a basis for disciplinary action. Details of both the process and the CSM's technical ability to undertake it (human resources and budget consequences) are unavailable yet, as they are still before the Parliament.

VII. Judicial Accountability: Discipline and Removal Procedures

1. Formal Requirements

Where a judge may have committed a breach of duty relating to his status, of honour, tact or dignity, the Minister of Justice, the chief presidents of the various appellate courts and the General Prosecutor are entitled to initiate disciplinary proceedings for a "disciplinary offence" (*faute disciplinaire*).[46] Furthermore, this right has been opened to any citizen who, in the course of proceedings, deems that a judge has violated a disciplinary rule while performing his duties. Breaches of a judge's professional obligations include bias and professional negligence. In addition, any private conduct by the judge which could reflect poorly on the image of the judiciary (e.g. theft, alcoholism, etc.) may constitute a breach of the judge's obligations in his private life. Judges are not liable for any error in interpreting or applying the law.

2. Disciplinary Proceedings

With respect to judges, proceedings are brought before the CSM, which acts as disciplinary council and is chaired by the Chief President of the *Cour de cassation*.[47] Following an investigation conducted by the Inspector of Judiciary Services and supervised by the Minister of Justice, the Chief President or the Minister of Justice presents the facts to the CSM, which, in turn, will appoint one of its members (*rapporteur*) to carry out an investigation and submit a report. In the course of the investigation conducted by the CSM, the defendant is heard by one of his peers, and in some cases by the plaintiff and the witnesses.[48] Once the

---

[46] As defined in Article 43 of the Ordinance.

[47] Article 65 section 6 of the Constitution; Article 50 section 2 of the Ordinance.

[48] It should be noted that the gap between the budget of the Ministry of Justice and those of the CSM necessarily impacts on the way investigations are

investigation is completed, the defendant is summoned to a public hearing. The director of judiciary services speaks on behalf of the Minister of Justice, whereupon the *rapporteur* reads his report. On the basis of this report, the CSM will deliberate *in camera* but give its decision in public. The decision, which must be legally reasoned, is immediately enforceable, the Minister of Justice having no choice but to execute the sanction.[49]

3. Judicial Safeguards

Under French law, Article 6 of the European Convention of Human Rights does not apply to disciplinary proceedings relating to magistrates, and thus defendants do not have, for instance, a right to summon a particular witness. However, pursuant to the Ordinance as well as the case law of the *Conseil d'Etat*,[50] magistrates are granted a number of guarantees of a fair trial. As soon as proceedings have been begun, the defendant is entitled to access the entire file built up against him.[51] The defendant is granted a fair hearing in the course of the investigation and is subpoenaed to attend the proceedings, though he may exceptionally be represented by somebody else. He may defend himself or be assisted by one of his peers or a lawyer. The defendant may not be subjected to searches or seizures. Magistrates are not entitled to defend themselves at the stage of the preliminary investigation, though they benefit from certain guarantees (fair hearing, access to the letter of the Minister of Justice, to reports written by their supervisors and other evidence, briefing on the disciplinary proceedings, etc.).[52]

---

conducted. This is even more of a concern in light of the fact that the investigation led by the Inspector of Judiciary Services is monitored by the Minister of Justice, *not* by the CSM, which may not examine facts which were not submitted in the course of the preliminary investigation.

[49] Disciplinary proceedings initiated against prosecutors are carried out in the same fashion, except for the fact that, here, the disciplinary council is composed of members of the prosecutors' division and chaired by the General Prosecutor. The key difference, however, is that, the CSM will simply submit an opinion, based on which the Minister of Justice will decide what sanction to execute.

[50] See notably CE 18 December 1936 (*Hurlaux*); CE 22 November 1946 (*Maugain*); CE 14 March 1975, (*Rousseau*).

[51] Arts. 51 and 63 of the Ordinance.

[52] Information Bulletin of the Cour de cassation, 15 June 2000, at 15 et seq.

Disciplinary decisions, whether they apply to judges or to State prosecutors, are always subject to legal review by the *Conseil d'Etat*. However, the scope of the review differs greatly. With respect to decisions applicable to judges, the *Conseil d'Etat* acts as a *juge de cassation*, meaning that the review will cover the formal legality of the decision (competence and procedure) and its substantive legality, limited however to the legal qualification of facts. With respect to State prosecutors, on the other hand, the *Conseil d'Etat*, as a *juge de l'excès de pouvoir* (judge of the abuse of power), will, in addition to the review described above, also make sure that the sanction inflicted is not clearly disproportionate to the offence (*erreur manifeste d'appréciation de la gravité de la sanction par rapport à la faute*). Furthermore, the *Conseil d'Etat* has gradually expanded the scope of the review of disciplinary decisions against State prosecutors,[53] which only enhances the discrepancy between the levels of protection for the two kinds of magistrates.

4. Sanctions

Disciplinary sanctions include the following: reprimand added to the judge's file, transfer, withdrawal from certain duties, downgrading, demotion, forced retirement or termination of office, revocation with or without pension benefits.[54] In addition to initiating disciplinary sanctions, chief presidents (with respect to judges) and general prosecutors (with respect to prosecutors) may give warnings to bring to the attention of the authorities certain facts which could disrupt the smooth functioning of the judiciary.

5. Practice

Based on the Report of the CSM for 2007, while there is evidence of breaches of duty on the part of judges, very few proceedings are actually initiated. Not surprisingly, chief presidents of appellate courts seem to be reluctant to bring actions against judges in their courts, lest their actions may not succeed and thus their authority be shaken. As a result, in the eyes of the general public, judges seem to belong to a self-protecting profession. To address this issue, the CSM had suggested

---

[53] See in particular CE 23 October 1995 (*M. de Chaunac de Lanzac*); CE 20 June 2003 (*Stilinovic*); CE 18 October 2000 (*Terrail*).

[54] Article 45 of the Ordinance.

that the procedural rules of disciplinary proceedings be amended so as to allow any citizen to bring an action against a judge, provided, however, that the claim passes muster with a qualified committee. This right was indeed created in the constitutional law of 23 July 2008, though the conditions of its exercise are still under discussion.[55]

VIII. Immunity for Judges

Magistrates do not benefit from any immunity with respect to acts performed outside the scope of their judicial activity. In addition, judges may be subject to discipline for their private actions, should those actions tar the image of the judiciary.[56] Strictly speaking, with respect to acts performed within the scope of judicial functions there is no immunity either. In practice, however, judges are arguably immune to any kind of liability. First, as in virtually all legal systems, judges may not be held liable for mistakes made in their judgments, but, in return, the parties have the option of appealing a decision they consider unfair. Mistakes made by judges are thus "naturally" corrected through a system of "double jurisdiction" (*double degré de jurisdiction*).

In some cases, this mechanism does not suffice to compensate for judicial errors, especially once a final judgment has been reached. In an attempt to address this issue, while at the same time protecting judges from preposterous claims, specific liability rules have been put in place.[57] Under this framework, (1) the State is responsible for judges' negligence under the theory of a defective judicial public service, but (2) not where judges are personally at fault (2).

1. Liability of the State for Defective Judicial Public Service

The State is liable for any injury caused by a defective judicial service, insofar as such damage results from an "act of gross negligence" or a

---

[55] For more details on the current status of the implementation law, see *Projet de loi organique relatif à l'application de l'article 65 de la Constitution*, dated 10 June 2009.

[56] See *supra* B. VII. Judicial Accountability: Discipline and Removal Procedures.

[57] Article L. 781 section 1 § 1 of the COJ.

"denial of justice".[58] While gross negligence used to be narrowly defined, recent case law has broadened its scope, thus making it easier for the plaintiff to prove.[59] Under the current definition, gross negligence consists in any shortcoming based on one or several acts, tending to show that the judicial public service is not competent to accomplish its mission. A denial of justice is established where a judge refuses to answer a claim or does not make any efforts to decide the case within a reasonable time. In the modern trend, denial of justice is construed more broadly and consists in the breach, on the part of the State, of the task of fulfilling its "duty of judicial protection".[60] For instance, the State has been held liable for denial of justice where a judge was unable to estimate the amount of damages.[61] The State also endorses judges' responsibility in the event of a judicial mistake or where a person has wrongly been temporally detained.[62]

2. Personal Liability of the Judge for Personal Tort

Magistrates are liable only for their personal torts. Though "personal tort" is not statutorily defined, Article 11 section 1 of the Ordinance specifies that the personal offence must relate to the operation of the judicial public service. Moreover, pursuant to the *Giry* case,[63] personal tort, as opposed to gross negligence, is characterized by an intent to harm. As previously indicated,[64] claims based on personal tort can only be made by the State, following an action brought by a citizen. Given that there is no evidence of such proceedings, judges are *de facto* immune from prosecution with respect to their official actions.

---

58 Article L. 781 section 1 § 1 of the COJ.

59 Cass. Ass. Plén., 23 February 2001.

60 The phrase was coined by Louis Favoreu in *Du déni de justice en droit public francais*, LGDJ, at 534.

61 Cass. 3e civ. 6 February 2002.

62 See *supra* B. VI. Judicial Conduct Complaint Process.

63 Civ. 2e, 23 November 1956.

64 See *supra* B. VI. Judicial Conduct Complaint Process.

IX. Associations for Judges

1. Associations

Though there are several associations of specialized judges, there is no association for magistrates in general, only unions. Specialized associations include the *Association Française des Magistrats Instructeurs* (French Association of pre-trial investigation judges or "AFMI"). Their mission is to review all legal and judicial reforms and to defend the interests of investigating judges. With the reform bill relating to the *juge d'instruction* or preliminary investigation phase judge, the AFMI has been particularly active in recent months and was consulted by the government. The *Association des Jeunes Magistrats* (Association of Young Magistrates) includes 173 members[65] and is open to all judges, including junior judicial officials. It organizes forums and monitors judiciary reforms. Lastly, the *Association des Magistrats de la Jeunesse et de la Famille* (Association of Magistrates of Youth and Family) researches legal and judiciary issues on children and families among others.

2. Unions

Unions of judges have played an increasingly important role over the years, notably *vis-à-vis* the Administration and the CSM. The *Union syndicale des magistrats* ("USM") and the *Syndicat de la Magistrature* ("SM") are the two major unions, representing roughly 60% and 30% of magistrates, respectively (a former association called APM no longer exists). Membership is voluntary. Though officially neutral, with general missions (to ensure the independence of the judiciary, reflect on the recruitment and training of judges, defend professional interests of the judiciary), the SM is clearly left-wing oriented while the USM leans moderately to the right.

Unions are not explicitly addressed by the 1958 Ordinance but, pursuant to Article 10, judges are prohibited from going on strike and from gathering to collectively impede or obstruct the operation of courts. In practice, however, tensions with the Minister have recently resulted in strikes and demonstrations. As far as resources are concerned, unions are adequately equipped for their needs, which remain rather modest. For instance, the USM has a union office, with a landline, a computer and an internet connection. Moreover, union representatives benefit

[65] Available at <http://www.jeunesmagistrats.fr>.

from reduced judicial obligations in order to pursue their political activities.

X. Resources

Pursuant to the Law of Finances for the year 2008, 6,519 billion EUR were then allocated to the Ministry of Justice, i.e. 4.5% more than for 2007, and 1,615 jobs were created.[66] These figures are remarkable in light of the fact that the national budget was increased by only 1.6% (i.e. the inflation rate) and that the State abolished 22,900 jobs. Specifically, 400 jobs were created (including 187 positions of magistrates and 187 clerks), 121 million EUR were allocated to the refurbishment of buildings for the judiciary, and 67 million EUR to new technologies (digitization of criminal files, electronic exchanges with law firms in civil matters, video-conferences). Though there is arguably a political will to fund the judicial system better, the budget represents only 1.83% of the State budget (amounting to approximately 355 billion EUR for 2008). The most serious issue is the heavy workload of magistrates, which contributes to a persistent *malaise* within the profession. For instance, in 2007, there were 8,140 magistrates, assisted by 10,355 clerks and 22,215 civil servants to tackle 1,099,043 civil cases and 4,903,537 criminal cases.[67] As far as offices and courtrooms are concerned, though they could definitely be modernized, they provide a working environment which is adequate overall.

C. Internal and External Influence

I. Separation of Powers

1. Safeguards Against the Legislative Branch

As a rule, the legislative branch may not interfere in the adjudication of cases brought before the courts. There are, however, a number of exceptions to this principle.

---

[66] Available at <http://www.justice.gouv.fr/art_pix/1_budget2008.pdf>.

[67] Available at <http://www.justice.gouv.fr/index.php?rubrique=10054&ssrubrique=10303>.

a) Interpretative Laws

This kind of regulation aims at interpreting and specifying the meaning and scope of a law which is already in existence. Interpretative laws are by nature retroactive. The issue with such laws is that they can be passed by the legislature at the time of a particular case, thus having a direct impact on the outcome. The *Cour de cassation* has criticized such abuses.[68]

b) Retroactive Laws

Retroactive laws are forbidden with respect to criminal matters except where such laws would be in favour of the defendant. Though they are authorized for civil matters, they are relatively rare due to their controversial nature. The *Cour de cassation* has even stated that retroactive laws must serve a pressing general interest.[69]

c) Validating Laws

Validating laws are meant to validate a regulation or a decision by the government, and are voted on by Parliament at its request. This type of intrusion by the legislative is rather frequent, especially with respect to administrative courts. Based on the case law of the *Conseil constitutionnel*, such laws are authorized provided they serve a pressing general interest and are limited in scope (i.e. they are not applicable to adjudicated cases).

d) Laws of Amnesty

Laws of amnesty operate as a prohibition to any criminal action. When such laws are passed in the course of a trial, they are a major encroachment on the independence of judges. Though validating laws were deemed constitutional,[70] a complete end to any kind of investigation including civil proceedings infringes the International Covenant on Civil and Political Rights of 1966, pursuant to which States must ensure that any person whose rights or freedoms are violated shall have his right

68 Cass. 1ère civ., 9 July 2003.

69 Cass. Ass. Plén., 23 January 2004 (*Le Bas Noyer c/Castorama*).

70 DC 89-258, 8 July 1989 (*Dix de Renault*).

determined by competent judicial authorities and to develop the possibilities of judicial remedy.[71]

2. Safeguards Against the Executive Branch

a) Constitutional Protection

The constitutional protection of judges is twofold. First, the President of the Republic is the guarantor of the independence of the judicial authority.[72] Secondly, every time the status of magistrates was about to be amended, the Constitutional Council checked that the law at stake complied with judicial independence and equality among judges.

b) A Specific Status: Recruitment, Promotion, Tenure

The Ordinance of 1958 creates a status for all magistrates which aims to preserve the independence of judges. Professional judges are appointed by passing a competitive exam. Promotions are decided not only by the executive but also by advisory boards, where magistrates are represented. Most importantly, promotions are transparent. Thirdly, judges are irremovable,[73] meaning that they cannot be transferred to another post without their consent. Though technically part of the same judicial body, State prosecutors are first and foremost agents of the executive branch, and are thus subject to a less protective statute. Not only can the executive have an influence on promotion and disciplinary matters relating to State prosecutors but it has the power to remove them from office.

c) The CSM, a Watchdog of Judicial Independence

The same discrepancy permeates the CSM. Indeed, while the judicial division acts as a fully-fledged disciplinary jurisdiction, and is endowed with real powers in terms of appointment, the prosecutors' division is at best consulted by the government, which may act as it wishes with respect to promotions and sanctions. Furthermore, it is critical to ensure

---

71 A. Seibert-Fohr, Prosecuting Serious Human Rights Violations, at 37-45 (2009).

72 Article 64 of the Constitution.

73 Article 4 of the Ordinance.

not only the constitutional independence of the CSM, but also its effective independence. The fact is that a lot could be done in that respect, notably by reducing the workload of magistrates sitting on the CSM in order for them fully to perform the duties relating to their mandates.

II. Judgments

1. Basis

Under the French concept of judicial power, the judge is seen as a mouthpiece of the law, his role being strictly limited to the application of the law. Though judgments are technically based exclusively on law, there are significant exceptions to the rule. In some cases, judges are encouraged to take into account the actual situation of the parties toward one another, in particular in connection with consumer contracts. Moreover, judges are often compelled to give decisions where the law is silent. Lastly, one cannot but acknowledge that there is, among a small number of judges, a trend to promote their own political views through their decisions (e.g. on the statute of limitations relating to the use of corporate property). This issue was actually raised by the Minister of Justice in the course of his speech to the ENM class of 1997.

2. Practice

Statistics on acquittals are published annually by the Minister of Justice. For the year 2007, acquittals accounted for 529 of the 85,375 releases (0.6%).[74]

3. Structure

In keeping with the idea that the role of the judge is confined to applying the law, French legal decisions are structured as syllogisms, with the applicable law in the premise, the facts at issue in the major part (*motifs*), and the resulting decision in the final part (*dispositif*). Moreover, judgments are very concise and impersonal, with no room allowed for dissenting opinions. However coherent and well-reasoned judgments may be from a substantive standpoint, the truth is that they remain ab-

---

[74] Les chiffres-clés de la Justice (2008), at 29.

struse for the layman. This is not so much due to the presence of archaic or technical terminology, but rather to the convoluted syntax that presides over all legal decisions. It should be noted that there is a general awareness of the problem and the clarity of law has been deemed a constitutional principle.[75] Recent decisions show that change is underway.

4. Public Access

The rule of publicity of proceedings stems from both national and international law,[76] and applies to judicial decisions as well as proceedings.

a) Publicity of Proceedings

Proceedings in all civil, criminal and administrative jurisdictions are held in public. There are, however, exceptions to the rule, in particular with respect to criminal proceedings. First, pursuant to the rule of secrecy of the investigation (*secret de l'instruction* – Article 11 of the Code of Civil Procedure), the investigation of crimes and misdemeanours takes place in the office of the investigating magistrate (*juge d'instruction*) and everyone participating in the investigation has a duty to keep any relevant information confidential. In practice, the rule of secrecy of the investigation does not apply to the defendant, whose lawyer has access to the file. Moreover, there is current debate on whether some information should be disclosed to the public in the interests of the defendant's rights. To address this issue, the prosecutor has been granted the right, as a matter of course or at the request of the parties, to disclose objective information derived from the investigation. Secondly, proceedings take place *in camera* when morality, law and order, the interests of minors or the protection of privacy is at stake, or when publicity may contravene the interests of justice. Sentencing is done *in camera*, unless the defendant has requested otherwise.

Media coverage is generally not allowed, and while faithful reports of the proceedings are authorized, the use of visual and recording devices

---

[75] DC 2000-437, 19 December 2000.

[76] Article 10 of the Universal Declaration on Human Rights of 10 December 1948 and Article 6 of the European Convention on Human Rights.

is forbidden.[77] Trials may, however, be broadcast under certain restricted conditions. For instance, under Law No. 85-699 dated 11 July 1985, the sound and visual recording of trials is allowed for purposes of historical archives or in the interest of public information with the prior agreement of the parties and the prosecution. To date, only a few cases (including the *Barbie*, *Thouvier* and *Papon* trials) have been recorded. It should be noted that it was recently suggested, in a report submitted to the Minister of Justice, that proceedings be more publicized, within the boundaries of the interests of the judicial system and the parties.

b) Publicity of Judgments

Judgments are also public and may be read out loud in the course of a public hearing or kept at the clerk's office for public access.[78] Some publications, such as the Public Records, are meant to inform third parties.

III. Improper Influence on Judicial Decisions

There are no systematic mappings of such improper influence in France. Some disciplinary cases demonstrate that it does exist, and that safeguard mechanisms of alert and treatment are not sufficient to avoid such influence from growing and jeopardizing the right to a fair trial.

IV. Security

Court security measures are rather basic in France. Usually, they are limited to metal detectors at the entrances to court buildings and identity control by police officers. In 2008, 39 million EUR were allocated to security in courts, i.e. 5.1% more than for the previous year. Overall, court security seems adequate. In addition to material security measures, there are security regulations that are specific to judges. French magistrates have a statutory right to protection from any kind of threats and assaults they may face in fulfilling their judicial functions,[79] and the

[77] Article 308 of the Code of Criminal Procedure; Article 38ter of the Law of 29 July 1881.

[78] Arts. 450 and 451 NCPC, Decree No. 2004-836 dated 20 August 2004.

[79] Article 11 of the *Ordinance* No. 58-1270 of 22 December 1958.

State is liable for any kind of direct injury caused to the judge. This right was recently extended to magistrates' spouses, children and parents.[80]

French judges are seldom victims of threats or assaults *per se*, though they are increasingly subject to verbal attacks and legal action. In fact, a division within the Inspection of judicial affairs has been specifically appointed to administer this type of matter, and the number of cases has risen dramatically (15 cases in 1997 vs. 72 in 2003). Most cases revolve round the liability of a judge or slander against a judge, while only a minority of cases are based on threats or assaults. Therefore, the issue in France is more one of serenity and legitimacy than security.

Magistrates are entitled to benefit from their statutory protection by simply showing that there is a link between whatever threat they have endured and their judicial responsibilities,[81] and by requesting such protection. Additional security measures consist in free legal advice, damages for the moral and material prejudice, and psychological support. However, given the very nature of the violence magistrates have to face, statutory protection does not seem adequately to respond to the problem. According to the CSM, too many attacks remain unpunished because of a failure to react on the part of magistrates' supervisors as well as a feeling of resignation among magistrates themselves, who, in some cases, are even afraid to be discharged from the case. In an opinion issued on 11 March 2004, the High Judicial Council thus made a number of suggestions to address the issue, including the reinforcement of security measures in courtrooms and the possibility for the Minister of Justice to file a complaint on behalf victims.

D. Ethical Standards

I. Code of Ethics for Judges

Though there is currently no Code of Ethics for judges, the possibility of having one has been heavily debated over the last five years, notably in connection with the report issued by the *Cabannes* Commission.[82]

---

[80] Article 112 section 5 of Law No. 2003-239 of 18 March 2003.

[81] Ministerial memorandum No. SJ-02-001-A3 of 24 January 2002.

[82] The *Cabannes* Commission, named after the Chief Prosecuting Attorney, was appointed in 2003 by the Minister of Justice to reflect on ethics within the

Because the judiciary appeared by and large resistant to the idea of such a code, and yet felt the need to have a coherent set of ethical rules, a compromise has been found in Parliament, with the CSM undertaking to draft a collection of ethical rules for judges. This collection was published for the first time in June 2010[83] and must not be used as a basis for disciplinary action against a judge.

Be that as it may, judges' professional conduct is bound by several principles, to be found in miscellaneous regulations, such as the 1958 Ordinance; Article 43 of the Regulations on Magistrates; some Articles in the codes of criminal and civil procedure; Article 6 of the European Convention of Human Rights and the case law of various courts. The main principles governing judges include the duty of honour, tact and dignity,[84] the duty of discretion,[85] the duty of loyalty and professional skills,[86] the duty of confidentiality,[87] the duty of independence,[88] and the duty of impartiality.[89]

For a long time, the principles listed above were mere moral standards, the scope of which was difficult to appreciate. In fact, in rather perfunctory decisions, the CSM would simply assess the seriousness of the case, without providing a satisfying legal analysis of the facts. In the 1970s, the CSM realized that it had a pedagogic role to play and started making explicit reference to legal sources and focusing its reasoning on the legitimate expectations of citizens. Moreover, under the influence of the ECHR, there has been a shift from a confidential to a public control of judges' deontology. Not only did disciplinary hearings become public in the late 1990s but the CSM decided a few years ago to publish all of its disciplinary decisions. Thus, the CSM's case law has become critical in understanding the scope of ethical principles and how they actu-

---

judiciary. The Commission made ten proposals to the Chancellor, who in turn submitted them to all magistrates.

83 Conseil Supérieur de la Magistrature, Recueil des obligations déontologiques (2010).

84 Article 43 of the Ordinance.

85 Article 79 of the Ordinance.

86 Article 43 of the Ordinance.

87 Article 6 of the Ordinance.

88 Article 64 of the Constitution and Article 6 section 1 of the ECHR.

89 Article 6 section 1 of the ECHR; Arts. L. 115-5-1159 of the Code Organizing the French Judicial System; Arts. 47, 339, 341 of the Civil Procedure Code and Article L. 724 section 1 of the Trade Code; the case law of the CSM.

ally operate. Violation of the principles listed above is sanctioned by disciplinary action.

II. Training

Before taking office, junior judicial officials receive mandatory training on ethical rules at the ENM. Specifically, future judges follow a seminar (24 hours of classes), with workshops, guest speakers (magistrates and other practitioners), and lectures on the status of the judge, the meaning of the oath, and the powers and duties of the judge in the light of the ECHR. During their tenure, judges may receive at least five days a year of continuing education.[90] Thus, judges have the option to obtain additional training on ethics, either at the ENM ("national continuing education") or in their own court area ("decentralized continuing education"). Whether it is carried out by the ENM faculty or by members of the various appellate courts, continuing education is funded by the ENM. Continuing education is now mandatory.

E. Supreme/Higher Courts

Judges who sit on the *Cour de cassation* and on the appellate courts are unranked judges. Their appointment raises no particular concern beyond what has been described above.

F. Conclusion

The overview of how judicial independence is guaranteed in France reveals some risks which are maybe less in the domain of the law and constitutional reform (such as that currently underway) than in the domain of the administration and the promotion of a culture of independence. More could be done to ameliorate the situation of the French judiciary which could be more self-administered than it is now (and consequently, more accountable), more transparent in its process (and conse-

[90] Article 14 of the Ordinance; Article 50 of Decree No. 72-355 of 4 May 1972.

quently avoid a climate of suspicion against what some call corporatism) and live with the idea of a duty of independence. New leverages may be used to help the French judiciary to break definitively with its historical heritage. These are not in the legal reforms of the last decade, but maybe in a continuing improvement of the culture of independence and a considerable administrative reorganization. On the contrary, the new environment promoting a managerial approach reinforced a risk of pressure on the judiciary which could jeopardize its fight for independence. The price for the next step in the quest for a mature judicial power in France is probably, for the judiciary itself, in the will for a more transparent process and a culture of accountability so that people will be certain that no part of the judiciary (from the High Judicial Council decisions on the careers of judges to individual cases in court) could be subject to capture from any other part of society.

Judicial Independence in Belgium

Benoît Allemeersch, André Alen and Benjamin Dalle

A. Introduction

The independence of the judiciary lies at the core of Belgian thinking about the rule of law.[1] Despite its fundamental character, it has re-

[1] While academic contributions on the issue of the independence of the Belgian judiciary are numerous in the Dutch and French languages, articles in English on this subject are rare. Most notable is P. Lemmens, The Independence of Judiciary in Belgium, in: M. Storme (ed.), Effectiveness of judicial protection and the constitutional order, Belgian Report at the II[nd] International Congress of Procedural Law 49 (1983). For contributions in Dutch see in particular J. Delva, De onafhankelijkheid van de Belgische rechter ten aanzien van de uitvoerende macht, 43 Tijdschrift voor Bestuurswetenschappen en Publiekrecht, at 175 and 231 (1988); X. De Riemaecker/G. Londers, De plaats van de rechterlijke macht in de Staat en zijn logisch gevolg: de onafhankelijkheid van de magistraat, in: X. De Riemaecker/G. Londers (eds.), Statuut en deontologie van de magistraat 7 (2000); I. Dupré, Ontwikkelingen inzake de rechterlijke onafhankelijkheid in België, in: J.P. Loof (ed.), Onafhankelijkheid en onpartijdigheid. De randvoorwaarden voor het bestuur en beheer van de rechterlijke macht 43 (1999); K. Loontjens, Het recht op een onafhankelijke en onpartijdige rechter: stand van zaken, 51 Tijdschrift voor Bestuurswetenschappen en Publiekrecht 9 (1996); M. Storme, Betekenis en statuut van de rechterlijke macht als staatsmacht, 33 Tijdschrift voor Privaatrecht 1343 (1996); P. Van Orshoven, De onafhankelijkheid van de rechter naar Belgisch recht, in: P. Van Orshoven/L.F.M. Verhey/K. Wagner, De onafhankelijkheid van de rechter 77 (2001); J. Velaers, De onafhankelijkheid van de rechterlijke macht na de recente herziening van de Grondwet, 26 Limburgs Rechtsleven 373 (2000). For contributions in French see in particular X. De Riemaecker/G. Londers, La place du pouvoir judiciaire dans l'Etat et son corrolaire, l'indépendance des magistrats, in: X. De Riemaecker/G. Londers (eds.), Statut et déontologie du magistrat 7 (2000); F. Dumon, De l'Etat de droit, 94

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233, DOI 10.1007/978-3-642-28299-7_9,

mained an unwritten principle of constitutional law for more than 160 years. The written Constitution, as adopted when Belgium gained independence in 1830, did not make any literal reference to the independence of the judiciary. The only relevant provision seemed to be Article 40, the basic provision underlying the organization of justice, which stated (and to date, still states) nothing more than "[t]he judicial power is exercised by the courts". Some other provisions of the Constitution, however, have always contained implicit applications of the principle of independence to more concrete situations. For instance, Article 152 contains the principle of lifelong tenure; Article 154 states that the salaries of members of the judiciary and the Prosecutor's Office are determined by Act of Parliament; and Article 155 deals with the positions incompatible with the office of judge. Notwithstanding the absence of an explicit legal provision, the principle of judicial independence has always been considered to have supreme normative value in Belgium. Any doubt that could have risen about that, was dispelled when the concept of judicial independence was qualified by the Court of Cassation as a "general principle of law",[2] which under Belgian law is considered a category of binding sources of law. The binding character of that principle also stemmed from Article 6 of the ECHR and Article 14 of the ICCPR, two provisions in human rights instruments to which Belgium is a party and which are self-executing in the Belgian legal order.

Despite this long tradition of independence as an unwritten norm, the principle of the independence of the judiciary was expressly enshrined

---

Journal des Tribunaux 473 (1979); W.J. Ganshof van der Meersch, Les garanties de l'indépendance du juge en droit belge, in: Rapports des juristes belges au IVième Congrès de l'Académie internationale de droit comparé, 6 Revue de Droit International Comparé 155 (1954, special edition); J. Van Compernolle, L'indépendance et l'impartialité du juge, in: P. Lemmens/M.Storme (eds.), Vertrouwen in het gerecht – Confiance dans la justice, 17 (1995); J. Van Drooghenbroeck/S. Van Drooghenbroeck, Les garanties constitutionnelles de l'indépendance de l'autorité judiciaire, in: E. Dirix/Y.H. Leleu (eds.), The Belgian reports at the Congress of Utrecht of the International Academy of Comparative Law (2006).

[2] Court of Cassation, Annual Report 2002-2003, at 107-110, available at <http://www.cass.be>. The application of this principle in the case law is, however, rare. See, e.g., Constitutional Court, No. 67/98 (10 June 1998, available at <http://www.constitutionalcourt.be>) and Court of Cassation, No. C960429N (22 June 1998, available at <http://www.juridat.be>).

in the Belgian Constitution in 1998.[3] Since then, Article 151 of the Constitution has stated that "Judges are independent in the exercise of their judicial duties." The addition of this provision came in the context of a wider reform of Belgian justice that year which had as one of its objectives the strengthening of judicial independence *vis-à-vis* the executive branch while ensuring judicial accountability. This was done through the creation of an autonomous High Council of Justice and the introduction of evaluation schemes for judges seeking promotion or having managerial functions.

Despite the constitutional guarantees there are current challenges to the independence of the courts in Belgium. These challenges have received considerable attention from the public and the legal profession in the aftermath of what is known as the Fortis demise. Fortis was a multinational banking and insurance group which, due to the effects of the financial crises in September 2008 and after the Belgian Government's intervention, was dissolved and sold to a French competitor.[4] Disgruntled about not having been consulted, a group of shareholders launched summary proceedings before the President of the Brussels Commercial Tribunal and, on appeal, before the Brussels Court of Appeal. Due to a conflict which arose between the three judges handling the case in the Court of Appeal, one judge refused to sign the judgment, triggering a hectic and confusing series of consultations involving the President of the Court of Appeal, the President of the Court of Cassation, the offices of the Minister of Justice, the Minister of Finance and the Prime Minister and the Prosecutor-General of the Court of Appeal. When a judgment was pronounced by only two judges an unprecedented sequence of events unfolded, where the Minister of Justice resigned after refusing to direct the Prosecutor-General of the Court of Appeal to submit the case for an extraordinary review by the Court of Cassation. Soon afterwards the Government resigned too after published letters from the Prime Minister and the President of the Court of Cassation revealed contacts between government officials and prosecutors. The findings of the ensuing special investigation by the Parliament and the High Council of Justice have led to new insights into the relationship

---

[3] Amendment to the Constitution of 20 November 1998 (Belgian State Gazette, 24 November 1998).

[4] For an overview of these events (from a corporate and financial law perspective), see De zaak Fortis, 2 Tijdschrift voor Rechtspersoon en Vennootschap 156 (2009).

between the executive and the judiciary in Belgium.[5] They will be discussed extensively later in this text.

The following account of the state of affairs concerning judicial independence in Belgium aims to present Belgium's key achievements and shortcomings in the field of judicial independence in the *post Fortis* era. Its primary focus is on the members of the Bench.

B. Structural Safeguards

In the Belgian system, the judiciary is composed of *magistrates*, which is a generic term used for both judges and prosecutors. Although many judges started their careers as prosecutors and occasionally have offices in the same court building, they exercise their functions completely separately from the prosecution. Judges are usually assigned to one or more chambers of the courts, generally numbering either one or three judges. At first instance, there are judges of the peace, police judges and judges in the labour tribunal, the commercial tribunal and the tribunal of first instance. Judges in appellate jurisdictions – courts of appeal and labour courts – as well as the highest jurisdiction, the Court of Cassation, are referred to as *counsellors* (*conseillers*, *raadsheren*). Prosecution before the courts of first instance is conducted by the Crown Prosecutor, leading a team of Deputy Crown Prosecutors.[6] Prosecution before the appellate jurisdictions and the Court of Cassation is handled by a Prosecutor-General, assisted by Attorneys-General and Deputies-General.

---

[5] Commission of Inquiry, Parliamentary Documents: House of Representatives 2008-2009, No. 52 1711/007, available at <http://www.dekamer.be>; High Council for Justice, Report of the special investigation into the functioning of justice following the Fortis case, approved by the general assembly of the Council on December 16th, 2009, available at <http://www.hrj.be>. For a first discussion of these reports, see M. Rigaux, Les illusions perdues. Réflexions à propos du rapport de la commission Fortis, 6347 Journal des Tribunaux 221 (2009); M. Rigaux, Le rapport du Conseil supérieur de la justice sur l'enquête relative au fonctionnement de l'ordre judiciaire à l'occasion de l'affaire Fortis, 6385 Journal des Tribunaux 137 (2010).

[6] In the labour tribunals prosecution is handled by the so-called Labour Auditor and a team of Deputy Auditors.

I. Administration of the Judiciary

1. Organs in Charge of the Administration of the Judiciary

In Belgium, a federal State divided into entities called Communities and Regions,[7] the administration of the justice system falls within federal jurisdiction. In the federal state structure, the administration of the courts is primarily in the competence of the executive branch, which is hierarchically structured and comprises different organs and departments. While Belgium traditionally followed the executive model of court administration, the justice reform of 1998 created a new system with a mix of executive power and intervention by an independent institution. This was done through the establishment of the High Council of Justice as an external organ with a significant role in the recruitment and promotion of judges as well as the evaluation of courts' performance. The purpose of this innovation was to ensure more objectivity in judicial selections and improve the quality of judicial services.

The federal Minister of Justice is to date still the highest official responsible for the administration of justice and the organization of the judiciary. The Minister is accountable to the federal Parliament, which consists of the House of Representatives and the Senate. Generally, the House of Representatives, and more specifically its well-respected Justice Commission, takes on the role of democratic watchdog of the functioning of the courts, while the Senate has its calling as a meeting place for dialogue, reflection and fundamental reform. Headed by the Minister of Justice, the federal Department of Justice (*Federale Overheidsdienst Justitie – Service Public Fédéral Justice*)[8] is in charge of the daily management of the justice system. It consists of four Directorates-General, of which the Directorate-General for Judicial Organization is in charge of the operations of the judiciary,[9] in particular its logistics and human resources policy.[10] The Minister of Justice and his depart-

---

[7] Article 1 of the Constitution.

[8] FOD Justitie, available at <http://www.just.fgov.be>.

[9] The other Directorates-General (DG) are the DG Legislation and Fundamental Rights and Freedoms, the DG Penitentiary Institutions and the DG "Justice Houses".

[10] Courthouses and other Department of Justice buildings, like all State buildings, are managed by an administrative entity called "the State Buildings Agency" (*Regie der Gebouwen / Régie des Bâtiments*), which falls under the authority of the Minister of Finance. L.P. Suetens, Bestuursstructuur

ment are assisted by several advisory councils, such as the Advisory Council of Magistrates[11] and the Commission for the Modernization of Justice. The High Council of Justice also issues advice, *inter alia* on proposed legislation.

In respect of the administration of the prosecution, most noteworthy is the College of Prosecutors-General comprising the Prosecutors-General for the Courts of Appeal.[12],[13] The Prosecutors-General for the Courts of Appeal are in charge of prosecution in these courts but are also the hierarchical superiors of the Crown Prosecutors, who handle prosecution before the lower courts. The College of Prosecutors-General co-ordinates the application of criminal law policy and oversees the good functioning of the prosecution in the courts. Its decisions are binding upon all prosecuting officers. It operates *under the authority of* the Minister of Justice, theoretically implying a hierarchical subordination, while in practice it enjoys significant autonomy.

On the level of each court individually, the judge acting as President is in charge of its daily management and organization.[14] One of the most important functions of a Court President is the assignment of cases to judges.[15] He/she has wide discretion in assigning judges to their respective chambers, which enables him/her to exercise significant influence on judges. However, given the extended centralization and the far-reaching competence of the federal administration with respect to management and organization, the powers of the Court Presidents as well as the budget at their disposition have remained very limited. For example, a President cannot hire or discharge his own administrative staff or court clerks, purchase computers for his staff or order renovation or significant building repairs. Generally, this is not considered as a threat

---

rechterlijke organisatie, 2 Algemeen Juridisch Tijdschrift 101 (1995-1996, special file). See also <http://www.buildingsagency.be>.

[11] See *infra*, B. I. 2. Organs in Charge of the Administration of the Judiciary and B. IX. Associations for Judges.

[12] Article 143*bis* of the Judicial Code (*Gerechtelijk Wetboek / Code Judiciaire*), introduced by Act of 10 October 1967; Belgian State Gazette 31 October 1967, available at <http://www.juridat.be>.

[13] The Minister of Justice presides over the meeting when he is present, which in practice is said to be the exception. The Federal Prosecutor may also participate in the meetings of the College.

[14] Article 90 of the Judicial Code.

[15] *Infra*, B. V. Case Assignment and Recusal.

to judicial independence. However, there have been many debates about the efficiency of such a system.[16] Magistrates have come out to testify in the mainstream media about the poor quality of management provided by the central administration. Too slow and too bureaucratic are complaints that are often heard. These discussions further intensified after reports about poor management in the Brussels Court of Appeal and Commercial Court in 2008 and 2009.[17] Many observers have since called for an increase in the role of the local courts and the curtailment of the powers of the central administration, so as better to meet the needs of each individual court organization.[18] Critics say this may not work so well, because Court Presidents – being judges – have not been trained for management functions. Rather, it would be more preferable to recruit professional managers to perform these functions. Some magistrates have nevertheless resisted that idea for fear of seeing their independence undermined. A compromise was found by the Government in April 2010, when it was decided to give the local courts more autonomy and a bigger budget, while at the same time providing for the appointment of professional court managers working under the supervision and authority of a college of court presidents.[19] The dis-

---

16 See e.g. T. Toremans, Het Themisplan: het varkentje nog lang niet gewassen – Verslag van een debatavond van de Vlaamse Juristenvereniging, 27 Rechtskundig Weekblad 1078 (2006).

17 See in this respect the various reports of the High Court of Justice, attesting to various dysfunctions in these courts (apart from the special Fortis report which has already been mentioned): Special investigation into the Commercial Court of Brussels, report approved by the general assembly on 21 April 2010, available at <http://www.hrj.be>; Updated audit report on the Court of Appeal of Brussels, approved by the general assembly of 16 December 2009, available at <http://www.hrj.be>; Audit report on the Court of Appeal of Brussels, validated by the joint advisory and audit commission on 10 April 2008, available at <http://www.hrj.be>; Audit report on the Court of Appeal of Brussels, approved by the general assembly of 30 June 2004, available at <http://www.hrj.be>.

18 See e.g. R. Van Ransbeeck (ed.), De toekomst van de Belgische rechterlijke orde, (2009); J.-L. Franeau, Réflexions à propos de la réforme du paysage judiciaire en Belgique, 15 Journal des Tribunaux 258 (2010); R. Depré, J. Plessers/A. Hondeghem (eds.), Managementhervormingen in Justitie. Van internationale ontwikkelingen tot dagelijkse praktijk (2005).

19 The political agreement has not been published (yet) but is based on the proposals put forward by the Minister of Justice. See S. De Clerck/I. Dupré, Naar een nieuwe architectuur voor Justitie – Het Gerechtelijk Landschap. Oriëntatienota, available at <http://www.just.fgov.be>. Also S. De Clerck, Het

missal of the Government shortly thereafter casts doubts on the probability of this plan being executed in the short term.

Finally, it is noteworthy that the law has given the prosecution and the Minister of Justice some responsibilities in respect of the proper functioning of the courts. Indeed, the Judicial Code has in vague terms given the prosecution supervision over each court.[20] In addition, the same Code states that prosecutors watch over the preservation of order in the courts, adding that they do so under authority of the Minister of Justice.[21] Similarly, the Belgian legislator has empowered the Minister of Justice to instruct the Prosecutor-General of the Court of Cassation to submit for the Supreme Court's review any judicial act whereby a magistrate exceeds his legal powers.[22] Until recently, these provisions were regarded as of very little practical importance. In the Fortis case, however, reference was made to these at various times and the question was raised as to their conformity with the separation of powers.[23]

2. High Council of Justice

The High Council of Justice (*Hoge Raad voor de Justitie / Conseil supérieur de la Justice*) plays an important role in the selection of judges and is an authoritative voice in the justice policy debate. It was created in 1998 and started working in 2000.[24] Its constitutional foundations are laid down in Article 151 of the Constitution,[25] while detailed rules are laid down in Part II of the Judicial Code which deals with judicial or-

---

gerechtelijk landschap: naar een nieuwe architectuur voor Justitie, in: R. Van Ransbeeck (ed.), De toekomst van de Belgische rechterlijke orde, 117 (2009).

[20] Article 140 of the Judicial Code.

[21] Article 399 of the Judicial Code.

[22] Article 1088 of the Judicial Code.

[23] This issue will be discussed further *infra* in section C. I. Separation of Powers.

[24] J. Laenens, Samenstelling en werking van de Hoge Raad voor de Justitie, in: J. Laenens/M. Storme (eds.), In de ban van Octopus / Dans l'encre d'Octopus, 25 (2000); M. Storme (ed.), De Hoge Raad voor de Justitie na vier jaar gewogen / Le Conseil supérieur de la Justice, une évaluation après quatre ans (2005); M. Verdussen (ed.), Le Conseil supérieur de la justice (1999). See also <http://www.csj.be>.

[25] It was introduced by amendment to the Constitution on 20 November 1998 (Belgian State Gazette, 24 November 1998).

ganization.[26] Article 151 section 3 of the Constitution lists the powers and functions of the High Council of Justice. The Council has three main objectives. First, it aims to make more objective the nomination and the appointments procedure of magistrates. To that end, it has received the authority to set the exams for the judicial selection process and to make nominations for every vacancy.[27] In addition, the Council drafts guidelines and programmes for judicial traineeship. Second, the Council is expected to bring in a form of external control over the functioning of the justice system, over and above the existing internal mechanisms. It does that through a centralized complaints system for citizens,[28] as well as the undertaking of extensive court audits (*infra*, this section). Third, it provides advice to policy makers on the better functioning of the judiciary. This involves mainly the issuing of opinions on legislative proposals and policy memoranda.

The High Council of Justice is a *sui generis* body which does not belong to any of the existing branches of state power.[29] Indeed, this Council is independent of each of the three branches of the State in order to facilitate objective, external control over the judiciary. Article 151 paragraph 2 of the Constitution explicitly states that the High Council of Justice respects the independence of the judiciary. The Council consists of 44 members and is composed of a Dutch–speaking and a French–speaking commission, each with 22 members. In each commission, there is a nomination and appointments committee, and an advice and audit committee. Each commission is comprised of equal numbers of, on the one hand, judges and members of the Crown Prosecutor's Of-

---

[26] Article 259*bis*1 – 22 of the Judicial Code, introduced by Act of 22 December 1998 (Belgian State Gazette, 2 February 1999).

[27] *Infra*, B. II. Selection, Appointment and Promotion of Judges.

[28] *Infra*, B. VI. Judicial Conduct Complaint Process.

[29] On the subject of the constitutional position of the High Council of Justice, see F. Delpérée, Le statut et la composition du Conseil supérieur de la justice, in: M. Verdussen (ed.), Le Conseil supérieur de la Justice, 57 (1999); P. Van Orshoven, De staatsrechtelijke positie van de Hoge Raad voor de Justitie, in: J. Laenens/M. Storme (eds.), In de ban van Octopus / Dans l'encre d'Octopus, 11 (2000); P. Van Orshoven, Het statuut van de Hoge Raad voor de Justitie. Enkele kanttekeningen, in: M. Storme (ed.), De Hoge Raad voor de Justitie na vier jaar gewogen / Le Conseil supérieur de la Justice, une évaluation après quatre ans, 3 (2005).

fice,[30] and, on the other hand, of other members appointed by the Senate with a two thirds majority of the votes cast.[31] The magistrates of the High Council are elected by their peers in a Dutch-speaking and a French-speaking electoral college, in direct and secret elections.[32] The members of the High Council have a four year mandate, which may be renewed once. The Council may terminate a mandate prematurely for "serious reasons" and by a two thirds majority in each commission.[33]

After ten years of operation, the appraisal of its operation is quite positive. Bearing in mind its three objectives, it is fair to say that the High Council has achieved at least two of them.[34] First, it has indeed made the judicial selection process more objective. Through its professionalism, it has increased the attractiveness of a judicial career and the credibility of the recruitment process. It is beyond doubt that this has had a very positive effect on the overall quality and aptitude of newly appointed judges. Second, it has proven a reliable and skilful advisor to the policymakers, bringing added value to the policy debate and commanding respect from all other stakeholders. As far as its third objective is concerned, that of exercising external control over the justice system, there is still room for improvement. While the High Council has undertaken some remarkable audit investigations into the performance of certain courts – their conclusions often being extensively covered by the

30 The fact that half the members of the High Council of Justice are themselves magistrates is seen as a guarantee of sufficient independence.

31 Article 151 section 2 of the Constitution, and Arts. 259*bis*-1 and 259*bis*-2 (2) of the Judicial Code. The members appointed by the Senate are deemed to represent society in general.

32 For details concerning the election procedure see Article 259*bis*-2 section 1 of the Judicial Code and the Royal Decree of 15 February 1999 (Belgian State Gazette, 26 February 1999).

33 Article 259*bis*-3 of the Judicial Code.

34 Compare with G. Vervaeke, C. Malmendier, J. Siscot, M. Bertrand, J. Vandescotte, D. Vyverman, C. Vandresse, R. Van Nuffel/P. Van Wassenhove, De bijdrage van de Hoge Raad voor de Justitie tot de modernisering van justitie, 41 Orde van de dag, 35, at 35 (2008). For earlier evaluations of the High Council's operation see M.L. Storme (ed.), De Hoge Raad voor de Justitie na vier jaar gewogen (2005); C. Matray, Le Conseil supérieur de la Justice: de quelques perplexités, in: Institut d'Études sur la Justice, Une justice en crise: premières réponses, at 153 (2002); K. Kloeck, De Hoge Raad voor de Justitie. Motor voor een humane en communicatieve justitie?, in: L. Dupont/F. Hutsebaut (eds.), Herstelrecht tussen toekomst en verleden. Liber Amicorum Tony Peters, 357, at 357 (2001).

national media – it lacks the necessary instruments to conduct thorough investigations in case of serious irregularities and to follow up adequately on its findings and recommendations. Also, there are problems with information streams, such that the committees dealing with the application for promotion of a certain judge often are not aware of disciplinary or criminal investigations against that same judge or even of relevant findings in the report of the Council's own advice and audit committees. Finally, it has turned out that the process in which citizens can turn to the High Council with complaints about the justice system is not very accessible, too cumbersome and not efficient.[35]

II. Selection, Appointment and Promotion of Judges

Belgium follows the continental European model of a career judiciary. Judges are primarily recruited from junior legal professionals who go through additional judicial training but also, though to a lesser extent, from more senior legal professionals who, apart from their professional experience, have demonstrated their skills in an entrance exam. Judicial appointment is within the purview of the High Council of Justice and the executive branch.[36] In a two-stage procedure applicants first have to demonstrate their eligibility by means of a judicial examination and may then apply for nomination. In both of these stages, the key role is for the High Council of Justice which sets out the content of the exams and conducts the hearings for nominations. The executive branch comes in only when the appointment has to be formalized, upon nomination by the High Council of Justice.

---

[35] For that reason, the High Council has itself proposed to delegate most of its responsibilities in respect of complaints to the local courts and keep only a right of supervision: see Motion of the General Assembly of the High Council of Justice, approved on 30 September 2009, at 3, available at <http://www.hrj.be>.

[36] For a comprehensive and critical overview see H. Van Espen, Het menselijk kapitaal van de magistratuur – Selectie, aanwerving en vorming van magistraten (2009).

1. Eligibility

For all positions on the Bench[37] candidates must be proficient in the Belgian official languages[38] and hold a Master of Laws degree or a Doctorate in law.[39] Moreover it is necessary to pass a professional exam to become eligible.[40] The law does not provide for a quota or special modalities for women, minorities or the disabled. There are three pathways to entering the judiciary which depend on the level of prior professional experience. For candidates with little legal professional experience, there is a written and oral comparative entrance exam for judicial traineeship.[41] The number of vacant positions for judicial trainees is determined every judicial year by a Royal Decree.[42] The Minister of Justice appoints the trainees in the order of their results in the comparative entrance exam. There are two types of judicial traineeship, namely the short traineeship of 18 months which leads only to a position with the Public Prosecutor's Office, and a long traineeship of three years which allows appointment either to the Public Prosecutor's Office or to the Bench. A judicial traineeship includes a theoretical component organized by the recently established Institute of Judicial Training (*Instituut voor gerechtelijke opleiding / Institut de formation judiciaire*).[43] It also

---

37 Except for the lay judges at the Labour and Commercial Courts.

38 Article 287*quinquies* section 1 of the Judicial Code.

39 More stringent requirements apply to a number of judicial functions. For instance, in order to be appointed as a Justice of the Peace or as a judge in the Police Court, a candidate (i) must be at least 35 years old and (ii) must have wide experience as a magistrate or in legal functions. The law defines wide experience in objective terms, listing the different professional functions which count as experience and the necessary seniority required in those functions: Article 187 section 2 of the Judicial Code.

40 Depending on the professional background of the candidate there are three types of exams. This requirement, however, does not apply to "substitute" judges (*plaatsvervangende rechters / juges suppléants*).

41 I.e. the candidate must have been a trainee at the Bar or have performed another legal function for at least one year during the three years prior to enrolment for the exam.

42 Article 259*octies* of the Judicial Code.

43 Act of 31 January 2007 concerning judicial education and the creation of an Institute of Judicial Training (*Wet inzake de gerechtelijke opleiding en tot oprichting van het Instituut voor gerechtelijke opleiding / Loi sur la formation judiciaire et portant création de l'Institut de formation judiciaire*; Belgian State Gazette, 2 February 2007), which was amended by the Act of 24 July 2008

provides for practical experience with the Public Prosecutor's Office, the prison service, the police, the Federal Prosecutor's Office, and a notary or a bailiff, or the legal department of a public economic or social institution. In the long traineeship, there is in addition practical training with a trial court. During the traineeship, the trainee is under the supervision of two magistrates of the court or public prosecutor's office where he or she is training, who evaluate his or her performance. Moreover, all judicial trainees are evaluated by a commission for the evaluation of judicial traineeship, which is composed of magistrates and education experts.

For experienced lawyers there is a professional capabilities exam.[44] This exam is similar to the one described above, but provides for direct access to the Judiciary without the need to complete a traineeship. The candidates who pass the exam obtain a certificate of professional ability which gives them the right to apply for a judgeship within a period of seven years. For lawyers with a minimum of 20 years' practice at the Bar who want to enter the Bench, there is an oral evaluation exam.[45] This involves a meeting with three hearing groups drawn from the nomination and appointments committee of the High Council of Justice. Discussions deal with the motivation of the candidate and his ideas about his future career, his knowledge of the law, and his abilities relevant to the function of a magistrate. The nomination and appointments committee gives its decision on the basis of the reports of the three hearing groups and the advice of a representative of the Bar. If successful, the candidate will obtain an evaluation attestation which is valid for three years. The maximum number of judges recruited by means of the oral evaluation exam is 12% of the total number of magistrates at the level of the Court of Appeal in the relevant judicial district.[46] In recent

(Belgian State Gazette, 4 August 2008). It is in operation as of 1 January 2009. The Institute develops its programme for judicial trainees taking into account the directives of the High Council of Justice. See *infra*, D. II. Training.

[44] I.e. lawyers with a minimum of 10 years' professional experience at the Bar (Article 190 (2) of the Judicial Code).

[45] Article 187*bis* of the Judicial Code.

[46] The Constitutional Court has held that the fact that experienced lawyers do not have to pass a written exam does not violate the constitutional equality principle, taking into account this maximum percentage (Constitutional Court, No. 142/2006, 20 September 2006). Previously, the Constitutional Court had annulled the Act which provided for the exceptional system for experienced lawyers because it did not include a maximum percentage (Constitutional Court, No. 14/2003, 28 January 2003).

years, the High Council has continued to improve this process and make it as professional as possible. For example, new exam forms were developed, behavioural interview techniques were introduced and research was undertaken on the use of innovative psychological tests.

2. The Process of Judicial Selection

Each vacancy for the position of judge is published online. Previously, judges were in principle appointed directly by the executive branch, which led to the *politicization* of these appointments.[47] The creation of the High Council of Justice in 1998 has curtailed the responsibility and the powers of the executive in respect of the appointment of judges.[48] Though judges continue to be appointed by the executive branch, the appointment is based on a motivated nomination of the candidate after an evaluation of competence and qualification by the relevant appointments committee of the High Council of Justice. The nomination can only be made with a two-thirds majority. The executive branch can reject the nomination but it will have to state its reasons for doing so.[49] The High Council then has 15 days to issue a new nomination. There are no data available on the frequency of rejection but it is said to happen rarely if ever. After the 1998 reforms, the High Council almost immediately acquired a moral authority in the selection process which the executive branch is very reluctant to challenge.

While the reform is broadly approved, critics say that there is still a degree of political and ideological influence in the nomination and promotion process, and that the transparency of the nomination process is still subject to improvement.[50] Their concern is centred round the composition of the High Council, half of its members being appointed by the Senate (with a two-thirds majority). They fear that these members

---

47 See Lemmens (note 1), at 57-60.

48 A distinction must be drawn between appointment as a judge, which is for life, and the appointment of a judge to a specific "mandate", which is for a limited period of time (see *infra*, B. III. 2. Promotion).

49 The procedure is described in Article 259*ter* section 5 of the Judicial Code.

50 R. de Corte, Benoeming, aanwijzing en selectie, in: M. Storme (ed.), De Hoge Raad voor de Justitie na vier jaar gewogen / Le Conseil supérieur de la Justice, une évaluation après quatre ans, 33, at 48-59 (2005); A. Delvaux, Nominations judiciaires: l'arbitraire survit encore, 23 Journal des Procès 10 (472nd ed. 2004).

will let political or ideological labels influence their assessment. The selection process being confidential for reasons of privacy, evaluating these comments is difficult. However, when recently questioned by the specialized press about these concerns, former members of the High Council stated without exception either that they had never observed any political or ideological influence or, alternatively, that even when they suspected some bias, the diversity in the selection committee and its vast autonomy was a more than sufficient guarantee of the objectivity of the outcome.[51] They added that full objectivity is utopian and that 95% of fully objective nominations is in any event the highest attainable level. The result of the process in the last ten years, with highly qualified lawyers being selected and its outcome relatively rarely contested, seems to support these statements.

The appointment of lay judges in the labour and commercial courts, on the other hand, is still largely within executive discretion without nomination by the High Council of Justice.[52] Following revelations about an important creditor of the President of the Commercial Court in Brussels having been appointed a lay judge (and later also a judicial expert) at the same court, some have called for a more objective system of appointment of lay judges.

3. Length of Office and Reappointment

Since appointment to the function of magistrate is for life, there is in principle no need for reappointment.[53] However, in addition to the functions as a magistrate, there are several "mandates" at the various Courts. Indeed, there are the mandates of President (of the courts), of "vice-mandate" (vice-presidents) and "special mandates" (investigating

---

[51] B. Aerts/R. Boone, Hoge Raad voor de Justitie na 10 jaar. '95 procent objectieve benoemingen is het hoogst haalbare' , 207 Juristenkrant 8 (2010).

[52] Lay judges are appointed by the executive branch for five years upon nomination by respectively the Minister of Labour and the Minister competent for small business and the self–employed, and drawn from candidates submitted by unions and employees' organizations, and by employers' associations (Arts. 198-199 of the Judicial Code). A similar process applies to the appointment of the lay judges in the Commercial Court (Arts. 203 et seq. of the Judicial Code).

[53] The abovementioned lay judges in the Labour and Commercial Courts are, however, appointed for a renewable term of five years (Arts. 202 and 204 of the Judicial Code).

magistrates, youth magistrates, etc.).[54] While their function as judge has no time limit, holders of a mandate occupy their office for a fixed term of three to five years, which is in principle renewable after evaluation.[55]

III. Tenure and Promotion

1. Tenure

Article 152 of the Constitution provides that judges are appointed for life. No judge can be removed from office or suspended except by court order. This provision implies that judges may be removed from office only as a result of a decision of a disciplinary authority, or of a conviction for a serious crime. Thus only a judicial decision may deprive a judge of his office or suspend him. Further, Article 152 of the Constitution explicitly provides that legislation is to determine retirement age and pension rights.[56] Besides security of tenure it also provides that the transfer of a judge may not take place except by way of a new appointment and with his consent. On reaching retirement age, a judge is automatically deemed incapable of exercising his function. He is accorded emeritus status in order to emphasize that he retains the status of a judge and remains subject to the disciplinary authority of the Court of Cassation.

2. Promotion

Promotion of judges to higher functions in the judicial hierarchy is organized as an appointment to that vacant higher position, which is always published by means of a call for applicants in the Belgian State Gazette. The High Council again plays a key role: it conducts the hearings, collects the underlying information and makes the nominations. It ensures the objectivity and integrity of the process. This way of proceeding does not seem to pose a real threat to judicial independence, although some have claimed the contrary.

---

[54] Article 58*bis*, 2°-4° of the Judicial Code.

[55] On the subject of evaluation see *infra*, B. VII. 6. Evaluation. See Arts. 259*quater – sexies* of the Judicial Code for more details.

[56] Article 383 et seq. of the Judicial Code (see *infra*, B. IV. 3. Retirement).

While appointment to a higher position is sometimes open to candidates who have not served on a lower level,[57] in practice the vast majority of these appointments are for judges in function, serving at a lower level. As such, although not in so many words set out in the law, there is an informal career path for judges depending on the prestige and financial remuneration linked to each function. However, the relatively minor variations in financial remuneration means that seeking promotion is not a must for every judge and frequently higher positions remain open for lack of candidates.

For promotion to a higher position, special requirements as to eligibility always apply.[58] These requirements are set by law and are transparent, fair and objective; most of them simply refer to professional experience and seniority. Obviously, criteria such as motivation, commitment, social and management skills and the ability to cope with stressful situations will also play a role. These are however not mentioned in the law. In the case of the appointment of a judge of the Court of Appeal or of the Court of Cassation, the full Bench of the relevant Court delivers its opinion, supported by reasons, in advance of the nomination by the High Council of Justice.[59] This is also the case for appointments to the position of President of the Court of Cassation or President of the Court of Appeal. The Vice–President of the Court of Cassation, the Chairmen of its Chamber panels, the Presiding Chairmen of the Chamber panels of the Court of Appeal, and the Vice–Presidents of the lower courts are selected for their positions by the judges of these Courts from among their own members.

---

[57] See *infra*, footnote 59.

[58] For the Court of Appeal, e.g., 15 years' experience in legal functions, the last five years of which as a judge, is required in principle (Article 207 of the Judicial Code).

[59] This information applies to the promotion of lower court judges to the post of a judge of the Court of Appeal or the Court of Cassation. Note however that judges in the Court of Appeal may also be selected from lawyers with 15 uninterrupted years of experience who have passed the professional capabilities exam (Article 207 section 3, 2° of the Judicial Code, cf. *supra*).

IV. Remuneration and Incompatibilities

1. Remuneration

Members of the judiciary are able to function independently only if they are also financially independent of the executive. That is why pursuant to Article 154 of the Constitution the salaries of members of the judiciary and the Public Prosecutor's Office must be determined by Act of Parliament. Salaries are set by the Legislative branch according to an abstract table, based on objective criteria such as seniority and function, and never assigned to specific individuals. This is considered a sufficient safeguard against unlawful influence by the Parliament over the judiciary. The Government and, *a fortiori*, the Minister of Justice must strictly follow the salary scales set by the Parliament and are prohibited from granting any additional fees, bonuses or other forms of financial remuneration, even if this is extended to all magistrates on an equal basis.[60]

Arts. 355 to 365 of the Judicial Code contain detailed provisions on the salaries of judges at all levels so that there is no discretion for the executive as to the level of remuneration (except for promotions, which involve a salary increase). The salaries, which are due from the day of taking the oath until the day of ceasing in function[61], are generally paid correctly. The concrete salary depends on the level of the judicial hierarchy in question and the seniority of the judge. The basic salaries range from approximately 60,000 EUR per year for regular first instance judges to approximately 100,000 EUR for the First President of the Court of Cassation.[62] There is an automatic increase in salary on the ba-

---

[60] J. Velaers, De Grondwet en de Raad van State: Afdeling wetgeving, at 506 (1999).

[61] Article 377 section 1 of the Judicial Code.

[62] Article 355 of the Judicial Code mentions the annual salaries before taxation and at an index of 100%. All components of a salary are adjusted to the consumer price index (Article 362 of the Judicial Code). The cited salaries are, respectively, 57,642 EUR and 103,561 EUR (index 1.4859; base salary respectively 38,793.06 EUR and 69,696.16 EUR). For detailed schemes for each post see Adviesraad van de Magistratuur / Conseil consultatif de la magistrature, Vademecum over het sociaal en financieel statuut van de magistraten / Vademecum du statut social et financier des magistrats (2009).

sis of acquired seniority, every three years.[63] In addition to this basic salary, multiple add-ons are provided for judges with the same qualifications and/or holding the same office, such as for judges specializing in cases concerning minors.[64] The financial and social-security rules applying to judges differ significantly from those for lawyers working in the private sector. While the salaries of judges are sometimes considered to be lower than the salaries and fees of legal professionals with a similar level of responsibility or expertise in the private sector, other conditions (regarding such things as pension rights, lifetime appointment, and so on) are more advantageous than in the private sector.

2. Social Security and Benefits

The social security rules applying to judges stem from a complex scheme of statutory and regulatory texts. Judges make social security contributions from their salaries, like any civil servants with a permanent position. Judges generally enjoy equal or similar social security benefits to those of regular employees, including medical treatment cover, family allowance, pregnancy, and work-place accident and illness cover. But judges in principle do not enjoy the usual unemployment benefits, which is generally not problematic since judges are appointed for life. Judges' annual holidays differ significantly from those of regular employees and officials. The judicial year starts on 1 September and ends on 30 June of each year.[65] During the months of July and August, there are court sessions only in the holiday chambers. For most judges, this implies that they have to take their annual holidays during the months of July and August.

3. Retirement

Judges retire at the age of 67, or when they are no longer able to adequately discharge their duties due to serious and lasting impairment.[66]

---

[63] Arts. 360 and 360*bis* of the Judicial Code. The increases range from approximately 1,800 EUR to approximately 4,500 EUR depending on position and seniority.

[64] Article 357 of the Judicial Code.

[65] Article 334 of the Judicial Code.

[66] Article 383 of the Judicial Code. For the magistrates of the Court of Cassation, the retirement age is 70 years.

The case of serious and lasting impairment warranting early retirement sometimes leads to discussions when the judge in question refuses to retire. There is a procedure in place to determine objectively whether there is indeed a serious and lasting impairment which prevents the judge from fulfilling his duties adequately. This procedure entails the case being brought before a special commission which will hear the judge and has the medical expertise in house to assess the situation.[67] The power to prevent this procedure from being set in motion lies with the Minister of Justice, because he has the authority over leave of absence.[68] As long as the Minister tolerates the absence and extends leave, there is no case for forced retirement. One could say that this puts the executive branch in a favourable position towards the Judiciary and especially any judges struggling with health issues and absenteeism.

A special honorary retirement regime (*emeritaat / éméritat*) is designed for retired magistrates with at least 30 years' service, of which 15 years were as a magistrate.[69] Magistrates in this retirement regime receive a pension based on the average salary during the last five years of service.[70] This amount is, however, limited to a relative maximum (75% of the reference salary) and an absolute maximum (approximately 70,000 EUR per year). If the magistrate does not have 30 years' service, the pension is reduced by 1/30 for every year by which he falls short. If the magistrate does not have 15 years' service as a magistrate, the pension will be calculated on the basis of percentages (*tantièmes*) of the income earned within and outside the judiciary.[71]

---

[67] R. Janvier, Sociale bescherming, in: X. De Riemaecker/G. Londers (eds.), Statuut en deontologie van de magistraat, 200 (2001).

[68] Indeed, under Article 332 of the Judicial Code any absence of longer than one month requires the permission of the Minister of Justice.

[69] Article 391 of the Judicial Code.

[70] This is the reference income determined in Article 8 section 1 of the Act of 21 July 1844 concerning civil and ecclesiastic pensions (*Algemene wet op de burgerlijke en kerkelijke pensioenen / Loi générale sur les pensions civiles et ecclésiastiques*, Belgian State Gazette, 31 July 1844).

[71] For a more detailed analysis see Adviesraad van de Magistratuur / Conseil consultatif de la magistrature, Vademecum over het sociaal en financieel statuut van de magistraten / Vademecum du statut social et financier des magistrats (2009).

V. Case Assignment and Recusal

The Presidents of the Trial Court and the First Presidents of the Court of Appeal are responsible for the assignment of cases in their respective districts.[72] This is considered an administrative task which is far too closely connected with the exercise of judicial office to be entrusted to the central authorities, i.e. the Ministry of Justice. To avoid any appearance of arbitrariness towards the parties, the assignment of a case to a specific judge or bench is subject to pre-set rules promulgated in each court. These are contained in a so-called Regulation of the Court, which is established by Royal Decree and thus by the executive branch upon the advice of certain members of the Bench, the Public Prosecutor's Office and the Bar Association. This specific regulation determines *inter alia* the number of chambers per Court and their respective subject matter jurisdictions, and for the trial courts the schedules for introductory hearings and hearings on the merits.[73] Thus, every citizen and every lawyer can on the basis of this regulation know beforehand to which chamber his or her case will be referred. For each court individually such Regulation is set by Royal Decree. The President of each court can, when it is necessary to guarantee the smooth operation of the court, create temporary Chambers (for example, for cases of unusual complexity or size) or transfer cases from one Chamber to another (for example, if one Chamber is seriously hampered in its functioning due to illness or the absence of its members).[74] Which judge is assigned to which chamber is also decided by the President, usually at the beginning of every judicial working year.[75] This power of the President is completely discretionary in this respect: he may remove any judge arbitrarily from his area of expertise without any possible recourse. This is problematic in many ways: it gives the president too much influence, it is not a transparent process, there is no protection against arbitrariness

---

[72] Article 90 and 109 of the Judicial Code. For a commentary on the system for assigning cases see D. Chabot-Léonard, La repartition des affaires au sein du tribunal de première instance, Journal des Tribunaux 391 (1972).

[73] Article 88 section 1, and Article 106 of the Judicial Code.

[74] Specific provisions exist for assignment to special functions, such as judges in juvenile matters or examining judges in criminal matters. Depending on the nature of the function, the assignment is done by the executive branch or, alternatively, the President of the Court of Appeal (Arts. 89 and 90 of the Judicial Code).

[75] Article 79 of the Judicial Code.

and occasionally it is a source of great conflict or tension in the working environment.

If there is any concern about the assignment of cases in civil matters among the different departments, chambers of judges or judges, the question must be submitted to – again – the President of the Court.[76] Such a problem may be raised either by the Court itself or by the litigating parties (who have the right to submit written arguments on this matter). The Crown Prosecutor gives non-binding advice, but the authority to reassign the case is held by the President. Only the Public Prosecutor's Office has a right of appeal against the President's decision concerning reassignment. From the above it is clear that the President has wide powers as to assignment of cases and that protection against abuse of these powers is relatively weak.

Recusal of an individual judge (*wraking / récusation*) is possible in a number of circumstances which are comprehensively listed in Article 828 of the Judicial Code.[77] This provision contains one ground of recusal which serves as a sort of *catch all* rule: the legitimate suspicion of bias. Any circumstance which could reasonably give rise to the belief that the judge is biased is therefore included and may give rise to recusal. Other grounds for recusal listed in that provision are: personal interest in the dispute, family connections, financial relations with one of the parties, hostility, involvement in other litigation relating to the issue or to the parties, serving as the custodian or liquidator for one of the parties, having advised or published on a given dispute, having been involved as a judge in both the first instance and appellate phase of the procedure, having been a witness in respect of the issue concerned, and having received gifts or payments from one of the parties. Every judge who is aware of a ground for recusal against him or her must withdraw from the case.[78] If the judge is not aware of the issue, or knowingly refuses to withdraw, the parties may move for recusal. This motion must be submitted before the beginning of the pleadings, except where the ground for recusal arises afterwards.[79] A judge who has refused to withdraw and subsequently, upon motion for recusal by one of the parties, is ordered to abstain from handling the case, will have to pay the

---

[76] Article 88 section 2 of the Judicial Code.

[77] See e.g., G. Closset-Marchal, La récusation en droit belge, 17 Tijdschrift voor Belgisch Burgerlijk Recht 605 (2003).

[78] Article 831 of the Judicial Code.

[79] Article 833 of the Judicial Code.

costs of the procedure. He may also face disciplinary sanctions because the duty to withdraw from a case in the event of risk of bias is a professional duty.[80]

A motion for recusal can be made against one judge or even, if need be, against all the judges on the bench. Exceptionally, one can even ask for the case to be withdrawn from a certain court altogether and referred to another court. Recusal of a Court as a whole (*Onttrekking van de zaak aan de rechter / dessaisissement*) is possible both in civil[81] and criminal matters.[82] This procedure may, for instance, be initiated for reasons of public security or in the event of legitimate suspicion, in particular about the independence and impartiality of the Court. Both the parties and the Public Prosecutor's Office may initiate this procedure.[83] It is dealt with by the Court of Cassation.

VI. Judicial Conduct Complaint Process

According to Article 151 section 3, first alinea, 8° of the Constitution, the High Council of Justice has the authority to receive and follow up on complaints relating to the operation of the judiciary and the Public Prosecutor's Office, as well as to conduct enquiries into the operation of the judiciary and Public Prosecutor's Office.[84] The complaint mechanism is described in Article 259*bis*-15 of the Judicial Code and is open

---

[80] X. De Riemaecker/G. Londers, Deontologie en tucht, in: id. (eds.), Statuut en deontologie van de magistraat, 320 (2001).

[81] Arts. 648-659 of the Judicial Code.

[82] Arts. 542-552 of the Criminal Procedure Code.

[83] Except for proceedings on the basis of public security, which may be initiated only by the Prosecutor-General for the Court of Cassation (Article 651 of the Judicial Code).

[84] K. Kloeck/E. Van Dael, Naar een behoorlijke interne en externe klachtenregeling voor de rechterlijke orde, in: R. Depré, J. Plessers/A. Hondeghem (eds.), Managementhervormingen in Justitie. Van internationale ontwikkelingen tot dagelijkse praktijk, 339 (2005). For a discussion on whether external control of the functioning of justice is compatible with judicial independence see A. Van Oevelen, Zijn onafhankelijkheid van de rechterlijke macht en externe controle op de werking van de rechterlijke macht onverenigbaar met elkaar?, in: F. Van Loon/K. Van Aeken (eds.), 60 maal recht en 1 maal wijn. Rechtssociologie, Sociale Problemen en Justitieel beleid. Liber Amicorum Jean Van Houtte, at 313 (2001).

to any person, including judges, lawyers, and the general public.[85] The advice and investigation committees of the High Council receive and follow up these complaints of judicial misconduct. A complaint must be in writing, dated and signed, and must mention the full identity of the complainant. The High Council does not deal with complaints which are already the subject of disciplinary or criminal proceedings.[86] Neither will the Council consider complaints about the content of judicial decisions or objections which may be addressed through the use of the existing procedural means (appeal, cassation, etc.). The dismissal of a complaint is final and cannot be appealed.

When a complaint is accepted, it is brought to the attention of the hierarchical superior of the judge against whom the complaint was made. The judge in question is notified in due time and has the right to submit oral or written comments to the High Council. The High Council may request additional information from all magistrates to whom it has notified the complaint. It does not have other powers of investigation. At the end of the proceedings the complainant is informed in writing about the steps which have been taken as a result of the complaint. If it appears that the complaint is well-founded, the High Council of Justice cannot impose sanctions but it may formulate recommendations to remedy the problem and propose actions to improve the operation of the judiciary. These recommendations and proposals are addressed to the entities concerned as well as to the Minister of Justice. Where the matter seems to warrant disciplinary measures it is transferred to the relevant disciplinary authority, but merely on an informative basis as the High Council lacks the authority to decide whether or not there was indeed a violation of professional standards.

At least once a year, every advice and investigation committee drafts a report about the steps which have been taken as a result of the complaints received. For reasons of privacy, no personal information about the complainants or the judges involved is made public. The reports are integrated into the annual report which contains detailed information

---

[85] The vast majority of complaints are submitted by the general public. See the annual reports, on the website of the High Council of Justice, available at <http://www.csj.be>.

[86] When the High Council presumes that a disciplinary offence has been committed, it will notify the competent disciplinary authority of the person concerned with the request to determine whether disciplinary proceedings must be initiated.

and statistics about the complaint mechanism.[87] It appears from these reports that many of the well-founded complaints relate to the judicial backlog and to deficient communication with the parties during the treatment of the case (e.g. inappropriate comments made by a judge during trial). The statistical data also demonstrate that there is generally no backlog in dealing with complaints. Of the files closed in 2008, for example, 60.54% were closed within a period of three months. Only 5.42% of the cases were closed after a period of more than one year. The statistical data also show that over 55% of the complaints are inadmissible because they fall outside the scope of the Council's jurisdiction (e.g. complaints over the merits of a specific claim or the content of a specific judgment). For the remainder of the complaints, which do fall within the Council's jurisdiction, the success rate is 25.57%.

In addition to this formal complaint procedure, every person having an interest may submit a complaint to the hierarchical superior of a magistrate – for judges this is often the President of the Court – which may result in disciplinary action. In order to be examined, the complaint must be written, dated, signed, and must mention the full identity of the complainant.[88] Such a complaint may also be addressed to the Minister of Justice, who will transmit it to the Crown Prosecutor's Office if there is evidence to believe that there may be a ground for initiating disciplinary proceedings. If the complaint involves a judge, the Crown Prosecutor will in turn transmit it to the appropriate disciplinary authority (often the president of the court) who maintains full autonomy in assessing whether disciplinary action is required. For that reason, the possibility of a complaint received by the Minister or the High Council giving rise to disciplinary proceedings should not be considered a threat to judicial independence.

---

[87] The annual reports have been published since 2000 on the website of the High Council of Justice, available at <http://www.csj.be>.

[88] In that case, the superior informs the magistrate concerned about the existence of the complaint, the identity of the complainant, as well as the alleged facts (Article 410 section 3 of the Judicial Code).

VII. Judicial Accountability: Discipline, Removal Procedures and Evaluations

1. Formal Requirements

The complaint procedure which is generally intended to ensure improvements in judicial services may lead to disciplinary proceedings against the judge in question if serious misconduct is involved. Disciplinary proceedings may also be initiated in the absence of a formal complaint, as long as there are objective indications of misconduct. The disciplinary authority charged with initiating disciplinary proceedings is the superior in the judicial hierarchy of the magistrate concerned. For instance, the First President of the Court of Cassation is the superior of the First Presidents of the Courts of Appeal, each First President of the Court of Appeal is the superior of the members of that Court, and so on.[89] The same applies to disciplinary proceedings in respect of members of the Public Prosecutor's Office. Disciplinary proceedings may be initiated *ex officio*, following a complaint or on demand by the Public Prosecutor's Office.[90] The Minister of Justice is always informed when disciplinary proceedings have been initiated.[91]

Disciplinary sanctions may be imposed on magistrates who have failed to fulfil the obligations of their function, such as neglecting to issue a judgment, or who have damaged the dignity of their office by their behaviour, whether in private or in the exercise of their functions. This is also the case where particular tasks have been neglected in a way which damages the smooth operation of the justice system and confidence in the institutions.[92] For instance, a judge convicted of knowingly accepting stolen property had severely breached his duties and the required dignity of his function and therefore was dismissed as a member of the judiciary.[93] Likewise, a judge who was convicted of abuse of confidence and issuing a cheque without funds was removed from office.[94] A magistrate who had been violent to his wife and whose financial situation

---

89 Article 410 of the Judicial Code.

90 Article 410 (3-4) of the Judicial Code.

91 Article 405*ter* of the Judicial Code.

92 Article 404 of the Judicial Code.

93 Court of Cassation, No. D940025N, 17 November 1994, available at <http://www.juridat.be>.

94 Court of Cassation, No. D010015N, 29 November 2001, available at <http://www.juridat.be>.

had worsened due to excessive spending and his taking on several loans was deemed to have harmed the dignity of his office.[95] Magistrates who are prosecuted either in criminal proceedings or in disciplinary proceedings may be temporarily suspended in the interests of the judicial service, on the basis of an administrative order of the disciplinary authority until the case has been finally adjudicated on.[96] However, disciplinary proceedings may not be initiated on the basis of *bad* judgments. It is generally assumed that the independence of the judiciary requires an absolute absence of control over the content of judicial decisions beyond the appeals and judicial review procedures.

2. Disciplinary Proceedings

Whether disciplinary proceedings are warranted is in the discretion of the disciplinary authority. In any event, disciplinary proceedings can only be initiated within a timeframe of six months starting from the moment at which the disciplinary authority (very often the President of the Court) obtained knowledge of the facts which justify the disciplinary proceedings. The disciplinary authority commencing the disciplinary procedure is in charge of the investigation into the allegations if these concern facts which are punishable with a mild sanction. Where the disciplinary authority concludes after investigation that a severe sanction[97] should be imposed, the case must be submitted to the National Disciplinary Council (*Nationale Tuchtraad* / *Conseil national de discipline*)[98] which will issue a non-binding advice concerning the penalty that should be applied.[99] The Council is divided into a Dutch-speaking and a French-speaking Chamber which are each composed of members of the judiciary, of the Public Prosecutor's Office, as well as persons not belonging to the judiciary, such as lawyers and law professors.[100] In principle, the disciplinary authority charged with initiating disciplinary proceedings is equally charged with imposing mild penal-

---

[95] Court of Cassation, No. D000010F, 7 December 2000, available at <http://www.juridat.be>.

[96] Article 406 of the Judicial Code. E.g. Court of Cassation, No. D960012N, 13 December 1996, available at <http://www.juridat.be>.

[97] *Infra* B. VII. 4. Sanctions.

[98] Article 411 of the Judicial Code.

[99] Article 409 of the Judicial Code.

[100] See in detail Article 409 (2 - 8) of the Judicial Code.

ties (warnings and reprimands).[101] Severe sanctions, however, may only be pronounced by a chamber of judges of the Court which is immediately superior to the magistrate concerned.[102] The members of the Court of Cassation, which is the supreme court of the judiciary, are judged by the general assembly of that Court.

Importantly, the executive branch does not intervene in disciplinary procedures concerning members of the judiciary. This is not the case for members of the Public Prosecutor's Office, where the King imposes the sanctions of automatic dismissal and impeachment, while the Minister of Justice, the Prosecutor-General for the Court of Cassation, the Federal Prosecutor, or the Prosecutor-General for the Court of Appeal pronounce other sanctions.[103]

3. Judicial Safeguards

In addition to the guarantees outlined above, several safeguards are provided to ensure a fair disciplinary process. The magistrate concerned must be heard during the investigation and has the right to be assisted or represented by a person of his choice. At least 15 days before the hearing by the investigating body, the files are accessible to the defendant and his representative.[104] The defendant is also heard by the disciplinary authority in a public hearing, except where the defendant explicitly demands a hearing *in camera*. At this hearing, the defendant may also be assisted or represented by a person of his choice. At least 15 days before this hearing, the files are accessible to the defendant and the person of his choice, and a copy of them may be freely obtained.[105] The magistrate concerned must be properly summoned to the hearing by means of a registered letter which gives notice of the reasons for the hearing, the facts of the alleged disciplinary offence, the place and timeframe for consulting the files, and the place and date of the hearing.[106]

---

101 Article 412 section 1 of the Judicial Code.

102 For instance, the first Chamber of the Court of Appeal adjudicates over members of the Courts of First Instance.

103 Article 412 sections 2 and 3 of the Judicial Code.

104 Article 419, third alinea of the Judicial Code.

105 Arts. 421-422 of the Judicial Code.

106 Article 423 of the Judicial Code.

The disciplinary decision must be communicated to the magistrate concerned within a month of being made and must contain justification for the decision, notice of the opportunity to appeal it, as well as the time-limits and procedures for doing so.[107] An order of removal from the judiciary may be pronounced only by a two-thirds majority in the Chamber dealing with the case.[108] The magistrate concerned may appeal the decision imposing a penalty.[109] Apart from the magistrate concerned, the Public Prosecutor's Office also has the right to appeal all disciplinary decisions.[110] The appeal proceedings must be initiated within a month starting from notice of the decision.[111] When a person has been punished by a disciplinary sanction, he may request the disciplinary authority to revise the decision on the basis of new elements.[112]

4. Sanctions

The law lists the sanctions which may be applied. They are subdivided into mild and severe disciplinary sanctions.[113] Mild sanctions are warnings and reprimands. Severe sanctions are further subdivided into severe sanctions of the first and second degree. Severe sanctions of the first degree consist of the partial deduction of salary, disciplinary suspension, revocation of a mandate (e.g. as president of a court) and disciplinary suspension combined with the revocation of a mandate. Severe sanctions of the second degree are removal measures, namely automatic dismissal, release from office, and impeachment. The law generally does not give instructions as to which kind of conduct triggers which sanction. In principle, the choice of the appropriate sanction remains within

---

[107] Article 424 of the Judicial Code.

[108] Article 420 of the Judicial Code.

[109] Article 415 of the Judicial Code. Depending on the hierarchical position of the magistrate and the type of sanction the appeal is heard by the General Assembly of the Court of Cassation, the United Chambers of the Court of Cassation, the First Chamber of the Court of Cassation, or the First Chamber of the Court of Appeal.

[110] Article 415 section 12 of the Judicial Code. Members of the Public Prosecutor's Office may appeal mild sanctions to the Minister of Justice or the Prosecutor-General for the Court of Cassation or the Court of Appeal.

[111] Article 425 of the Judicial Code.

[112] Article 427*quater* of the Judicial Code.

[113] Article 405 of the Judicial Code.

the full discretion of the disciplinary authority. As an exception to this rule, consistent delay in issuing judgments must at least be punished with a severe sanction of the first degree.[114]

5. Practice

Disciplinary proceedings are often used in cases involving infractions of the Criminal Code, such as behaviour relating to the abuse of alcohol. Other cases relate to practices which endanger public confidence in the judiciary, such as indecent behaviour, abuse of the office of judge, or critical comments in the media regarding judicial decisions. Most disciplinary decisions concerning judges are not published. Under the principle of disciplinary discretion, disciplinary proceedings are considered confidential, or at least off-limits to the public. There have been suggestions by policymakers that this system should be reformed to ensure that at least the person making the complaint is entitled to information about the result of the disciplinary proceedings, but these have not yet been turned into law. As a result, it is difficult to assess the disciplinary practice.[115] There are no credible reports about abuse of disciplinary proceedings. Also, it appears that these proceedings are used sparingly. For instance, an assessment of the disciplinary sanctions in the period between 1973 and 1998 demonstrates that in this period only 49 warnings were registered.[116] This assessment also concludes that since 1992 there have been increasingly more disciplinary proceedings, in particular in respect of magistrates responsible for significant delays in the handling of files.

In 2009, when revelations about dysfunctions in the Brussels courts attracted national media attention, questions were raised about the crucial role of court presidents in the disciplinary process. As the hierarchical superior of the judges in his court, the president has discretion over the

---

[114] Article 770 section 5 of the Judicial Code.

[115] Article 427 of the Judicial Code provides that the Minister of Justice will establish a central (non-public) database containing anonymous versions of all disciplinary decisions.

[116] However, most warnings are expressed orally and there are no systematic assessments of all individual files (X. De Riemaecker/G. Londers, Deontologie en tucht, in: X. De Riemaecker/G. Londers (eds.), Statuut en deontologie van de magistraat, 309, at 370-380 (2000); X. De Riemaecker/G. Londers, Déontologie et discipline, in: X. De Riemaecker/G. Londers (eds.), Statut et déontologie du magistrat, 303, at 356-366 (2000).

initiation of disciplinary investigations and proceedings. Does this pose a threat to substantive independence inside the judiciary? Absolute independence does not exist and is not desirable either. Judges who violate the rules should be subject to sanctions. Until recently, the person judged to be best placed to ensure that unprofessional behaviour is adequately dealt with was the supervising court president. However, practice shows that presidents generally show great restraint in using these powers, which they consider a poisoned chalice.

At the request of the judiciary, Government and Parliament have started discussions on reform of the disciplinary process which should include delegation of disciplinary powers to an independent and specialized body. Although this process is far from finalized, it is already clear what will be the main controversies. First, should this disciplinary body be composed of only magistrates or should it also be open to external members? Conservative voices within the judiciary are of the opinion that disciplinary proceedings are a matter for the judiciary only, and that external participation poses a risk to their independence. However, recent media stories about dysfunctional judges and long-lasting deficiencies in certain courts has made public opinion lose faith in the capacity of the judiciary to "clean up its own mess". Stakeholders demand more transparency and accountability, which requires external participation. A second point of discussion is whether or not disciplinary reform should follow an integrated model. The integrated model stands for bringing together the disciplinary powers with the power to nominate and promote judges and to examine the smooth operation of courts. In the current system, this would mean assigning the disciplinary powers to the High Council of Justice, which has already publicly shown interest in this new role. However, this ambition of the High Council has been met with some resistance. Some voices within the judiciary argue that disciplinary proceedings cannot be delegated to a body half the members of which are politically appointed without putting its independence at risk. In this respect, the National Disciplinary Council seems to be in a more favourable position, as its external members are not politically appointed but are attorneys and professors assigned by, respectively, the Bar and the universities.

6. Evaluations of Judges

In order to ensure the proper operation of the judiciary judges are subject to evaluation. All judges are assessed one year after taking their oaths and afterwards every three years. The process entails one or pos-

sibly more consultations with the evaluator and a formal, written report. For chief and presiding judges (*chefs de corps*, *korpschefs*) there is an evaluation consisting of a follow-up conversation in the second year of their term, as well as a more extensive evaluation, comprising several consultations and a fully-fledged written evaluation report, at the end of their term. A similar procedure also applies to assisting chief and presiding judges, such as the vice-presidents of the courts.[117] The evaluation of judges is done by members of the judiciary in order to ensure its independence. The evaluation is not related to individual judicial decisions, but only to the functioning of the magistrate.[118] There are no official guidelines or standards for measuring functioning: this seems to be done on a case by case basis. When the evaluation leads to the assessment *insufficient*, there are financial consequences for the judge involved.[119] For the holders of a *mandate*, the evaluation has consequences for the renewal of the mandate.[120]

There is fierce criticism of the way the evaluation process is currently organized. From two surveys among magistrates, taken in 2001 and 2006, it has appeared that almost all consider the process much too tedious, bureaucratic and excessively time-consuming. Also, there is not enough clarity as to whether the evaluation serves merely to help the evaluated judge to perform better, or whether it can also be used in a disciplinary inquiry. The High Council for Justice has recommended simplifying the procedure and preventing the evaluation from being used in disciplinary matters.

---

[117] See E Van Den Broeck/J. Hamaide, De evaluatie van de magistraten, in: R. Depré, J. Plessers/A. Hondeghem (eds.), Managementhervormingen in Justitie. Van internationale ontwikkelingen tot dagelijkse praktijk, 291 (2005). The Constitutional Court has clearly affirmed that the Presidents (i.e. the President of the Court of Cassation, the Presidents of the Court of Appeal, and the Presidents of the lower courts) are not subject to evaluation (Constitutional Court, No. 122/2008, 1 September 2008).

[118] Royal Decree of 20 July 2000 which determines the specific rules regarding the evaluation of magistrates, the evaluation criteria, and their weighting (*Koninklijk besluit tot vaststelling van de nadere regels voor de evaluatie van magistraten, de evaluatiecriteria en hun weging / Arrêté royal déterminant les modalités d'évaluation des magistrats, les critères d'évaluation et leur pondération*, Belgian State Gazette, 2 August 2000).

[119] Article 259*decies* section 3, and Article 360*quater* of the Judicial Code.

[120] Article 259*undecies* of the Judicial Code.

VIII. Immunity for Judges

1. Civil Liability

The independence of the judiciary does not imply that no action can be taken in respect of judges who fail to fulfil their obligations. Apart from disciplinary proceedings[121] and the recusal procedure,[122] it is also possible to claim damages from a judge in a limited number of cases. When a wrongful act of a judge committed in the exercise of his function causes injury, there is no personal liability of the judge, save in respect of four professional faults, as for example fraud or for refusal to deliver a judgment.[123] A claim on this basis must be initiated within 30 days before the Court of Cassation which may then order the judge to pay damages or may annul the judgment.[124] If the claim is dismissed, however, the claimant may be ordered to pay moral damages to the judge.[125]

Judges can in principle not be held liable in person for errors made in the exercise of their office, save for some very exceptional circumstances such as fraud.[126] However, since the 1990s, it has been accepted that the State may be held liable under Arts. 1382 and 1383 of the Civil Code[127] for a wrongful act committed by a judge or by a member of the Public Prosecutor's Office.[128] When the act complained of is directly related to the judicial decision, a claim for damages against the State will succeed only if the decision has been revoked, modified, or annulled on account of a violation of a rule of law by a final judgment. The Court of Cassation follows a twofold *fault concept*: liability for damages arises upon violation of a constitutional or a legislative rule prohibiting or

---

121 See *supra*, B. VII. 1.-5. Judicial Accountability.

122 See *supra*, B. V. Case Assignment and Recusal.

123 The causes are listed in Article 1140 of the Judicial Code.

124 Arts. 1142-1143 of the Judicial Code.

125 Arts. 1146-1147 of the Judicial Code.

126 Article 1140 of the Judicial Code.

127 Belgium's tort law is based on Arts. 1382 and 1383 of the Civil Code, which contain the general principle that one must compensate injuries caused by one's wrongful act. In order to be successful, a claimant must prove that (i) he has incurred damage, (ii) the respondent has committed a fault and (iii) this wrongful act has caused the damage.

128 Court of Cassation, No. 8970 (*Anca I*), (19 December 1991), available at <http://www.juridat.be>; and Court of Cassation, No. C930303F (*Anca II*) (8 December 1994), available at <http://www.juridat.be>.

compelling actions of a certain type, or upon violation of the general duty of care. Since 1991 the State has, however, rarely been held liable for damages for a wrongful act by or omission of a member of the Judiciary.

2. Criminal Liability

The Criminal Procedure Code contains detailed rules concerning proceedings against judges who have committed crimes[129] both in a private capacity[130] and in the framework of their judicial office.[131] Judges enjoy a "privilege of jurisdiction" (*voorrang van rechtsmacht / privilège de juridiction*), meaning that in principle they are tried by the Courts of Appeal.[132] Moreover, only the Prosecutor-General for the Court of Appeal has the authority to commence such proceedings.[133] This specific procedure aims to ensure the independence of the judiciary by preventing people from making frivolous claims against judges and by guaranteeing that magistrates are not tried by their immediate colleagues and peers.[134] According to the Constitutional Court this exceptional procedure does not violate the principle of equality.[135]

---

[129] For minor offences the regular procedures apply.

[130] Arts. 479-482*bis* of the Criminal Procedure Code.

[131] Arts. 483-503*bis* of the Criminal Procedure Code.

[132] The judges of the Court of Appeal come before the Court of Cassation, which may transfer the case to a Criminal Court or to an examining magistrate. The Court of Cassation also has jurisdiction over criminal proceedings regarding courts as a whole (Arts. 481-482 and 485-503 of the Criminal Procedure Code). Political and press offences, except for press offences motivated by racism or xenophobia, as well as crimes which carry a sentence of imprisonment in excess of five years, are tried by jury in the Criminal Assizes.

[133] Arts. 479 and 483 of the Criminal Procedure Code.

[134] J. de Codt, De vervolging van magistraten, in: X. De Riemaecker/G. Londers (eds.), Statuut en deontologie van de magistraat, 151, at 151-152 (2000); J. de Codt, Poursuites contre les magistrats, in: X. De Riemaecker/G. Londers (eds.), Statut et déontologie du magistrat, 143, at 143-144 (2000).

[135] E.g. Constitutional Court, No. 66/94, 14 July 1994.

IX. Associations for Judges

There are several non-governmental associations which represent the interests of certain groups of magistrates. Membership of these associations is not mandatory. For instance, the Royal League of Justices of the Peace and Police Court Judges[136] defends the professional interests of those particular magistrates. It serves as a liaison with the media and participates in policy discussions. The High Council of Justice[137] does not represent the judiciary, but can be seen as the liaison between the judiciary on the one hand and the legislative and executive branches on the other. In 1999, an Advisory Council of Magistrates (*Adviesraad van de magistratuur / Conseil consultatif de la magistrature*) was set up by the Minister of Justice.[138] The mission of this official body is to give non-binding opinions and participate in negotiations on all aspects of the status, rights, and working environment of judges and members of the Public Prosecutor's Office. The Council may give advice on its own initiative or at the request of Parliament or the Minister of Justice.[139] The Advisory Council of Magistrates is composed of 44 members from all levels of the judiciary. It is subdivided into a Dutch-speaking and a French-speaking college with 22 magistrates each. The members of the Advisory Council are elected by their peers for a term of four years, which may be renewed once.

X. Resources

The Department of Justice receives a large amount of funding out of the State budget. For instance, in 2008 more than 1.6 billion EUR was spent

---

136 *Koninklijk Verbond van de Vrede- en Politierechters / Union Royale des Juges de Paix et de Police*, available at <http://www.kvvp-urjpp.be>.

137 See *supra*, B. I. 2. Organs in Charge of the Administration of the Judiciary.

138 Act of 8 March 1999 establishing an Advisory Council of Magistrates (*Wet tot instelling van een Adviesraad van de magistratuur / Loi instaurant un Conseil consultatif de la magistrature*, Belgian State Gazette, 19 March 1999). The Advisory Council of Magistrates was, however, actually set up only in 2006. The Advisory Council of Magistrates has a website, which is accessible via <http://www.just.fgov.be>.

139 Article 5 of the Act of 8 March 1999 establishing an Advisory Council of Magistrates.

on the Department of Justice.[140] A major component of the expenses is the payment of wages.[141] However, there is still much room for improving office and courtroom facilities. In particular, the Justice Department still has a serious backlog in updating and co-ordinating its ICT infrastructure. Several projects notwithstanding,[142] the Belgian judiciary does not yet have a modern and integrated ICT system. While appropriate funding is definitely part of the solution to these logistical problems, the management of the justice system must also be improved. In addition to the need to implement integrated projects for the whole of the judiciary, it is of key importance to grant more financial autonomy and responsibility to the Courts and their Presidents[143] in order to enhance administrative efficiency through the involvement of the judges who are closest to actual practice. However, with such autonomy must necessarily come more accountability. There should be accountability in terms of expenses and financial policy in general. More autonomy will also require accountability for the courts' functioning and performance, for instance by workload measurement techniques.[144] Some magistrates and

---

[140] House of Representatives, General Presentation of the Budget, Parliamentary Documents House of Representatives 2008-2009, No. 52 1526/001, at 131. See also the Justice Department's Annual Report of 2008, available at <http://www.just.fgov.be>.

[141] As mentioned above, the salaries of judges are determined by the Judicial Code. These salaries are generally paid correctly. See *supra*, B. IV. Remuneration and Incompatibilities.

[142] For instance the Phenix and Cheops projects. See B. Colson, J.F. Henrotte, V. Lamberts, E. Montero, D. Mougenot, D. Vandermeersch/I. Verougstraete, Phenix – Les tribunaux à l'ère électronique (2007); and I. Verougstraete, ICT in de gerechtelijke wereld: het Phenix-project, in: R. Depré, J. Plessers/A. Hondeghem (eds.), Managementhervormingen in Justitie. Van internationale ontwikkelingen tot dagelijkse praktijk, 183 (2005).

[143] R. Depré/J. Plessers, Een trend naar verzelfstandiging van de gerechten. Wat kan België leren van zijn buurlanden?, in: R. Depré, J. Plessers/A. Hondeghem (eds.), Managementhervormingen in Justitie. Van internationale ontwikkelingen tot dagelijkse praktijk, 45 (2005). The idea of granting more autonomy and responsibility to the courts is also supported in the coalition agreement of the governments Leterme/Van Rompuy, at 28 (18 March 2008), available at <http://www.belgium.be>.

[144] R. Depré, V. Conings, D. Delvaux, A. Hondeghem, F. Schoenaers/J. Maesschalck, Haalbaarheidsstudie naar een werklastmeting voor de zetel. Etude de faisabilité de la mise en oeuvre d'un instrument de la charge de travail destiné au siège, (2007); R. Depré, Personeelsplanning en werklastmeting, in: R. Depré,

their representative organizations have been wary of such an evolution, fearing that more accountability will undermine their independence. Others had less honourable motives for opposing workload measurement, fearing that its findings could lead to reduction of their overstaffed teams. More and more magistrates, however, acknowledge that workload measurement is essential to good management. They admit that independence of judges in the exercise of their judicial functions does not necessarily rule out the fact that the court to which the judge belongs should be able to justify its use of government money in light of its performance and workload. In other words, there is no reason why independence and accountability could not go together. As an illustration of this growing awareness, the judiciary has made a start with workload measurement as of 2007, which is currently still in process.

C. Internal and External Influence

I. Separation of Powers

As mentioned above, the separation of powers and the principle of the independence of the judiciary are entrenched in the Constitution and guaranteed by the Judicial Code. Save for the abovementioned concepts in terms of evaluation and disciplinary sanctions, judges are not accountable to any state body or officials. However, the judicial and the executive branches are not entirely independent from one another: they have shared competences outside the sphere of judicial decision-making. This is illustrated, for example, by enforcement. Judgments and orders are enforced in the name of the King, in his capacity as the head of the executive branch.[145] Indeed, that their enforcement comes within the jurisdiction of the executive is aptly evidenced by the fact that it is the executive which determines the standard terms at the end of each judicial decision which are required to render it enforceable.[146] The Public Prosecutor's Office is charged with the enforcement of judgments.[147] As regards enforcement in criminal matters, the picture is

J. Plessers/A. Hondeghem (eds.), Managementhervormingen in Justitie. Van internationale ontwikkelingen tot dagelijkse praktijk, at 67 (2005).

[145] Article 40 of the Constitution.

[146] Article 1386 of the Judicial Code.

[147] Article 139 of the Judicial Code.

mixed. In 2007, the executive relinquished to the newly created Sentencing Administration Court (*Strafuitvoeringsrechtbank / Tribunal de l'Application des Peines*) its power to deal with all matters relating to the serving of prison sentences.[148] The right to remit or to reduce a sentence imposed by a judge is however still a privilege of the King.[149]

The Minister of Justice has no authority to order that specific cases or certain categories of criminal offence should not be pursued. This would violate the principle of the separation of powers. However, the Minister of Justice does have the power to order the start of criminal proceedings.[150] Also, as mentioned before,[151] the Minister of Justice is empowered to instruct the Prosecutor-General of the Court of Cassation to submit for the Supreme Court's review any judicial act whereby a magistrate exceeds his legal powers.[152] In the Fortis case, the Minister of Justice was asked to use this power against the judgment of the Court of Appeal which was issued in the absence of the minority judge. The Minister of Justice refused, because the State was too closely involved and had an interest in the outcome of the proceedings. In its report on the Fortis events, the High Council of Justice suggested that this power be taken away from the Minister of Justice and left in the hands of the highest prosecutor in the land, the Prosecutor-General of the Court of Cassation.[153]

As has been outlined above,[154] the executive, despite its primary responsibility for the administration of courts, has only limited powers in the appointment of judges. The creation of the High Council of Justice as a

---

148 Article 157 section 4 Constitution; Act of 17 May 2006 concerning the establishment of Sentencing Administration Courts (*Wet houdende oprichting van strafuitvoeringsrechtbanken / Loi instaurant des tribunaux de l'application des peines*; Belgian State Gazette 15 June 2006).

149 Article 110 of the Constitution. Article 111 of the Constitution provides that the King cannot pardon a federal Minister or a member of a Community or Regional Government convicted by the judiciary, except on petition by the House of Representatives or the Community or Regional Parliament.

150 Article 151 section 1 of the Constitution; Article 274 of the Criminal Procedure Code.

151 *Supra*, B. I. 1. Organs in Charge of the Administration of the Judiciary.

152 Article 1088 of the Judicial Code.

153 Report of the special investigation into the functioning of justice following the Fortis case (note 5), at 45-46.

154 See *supra*, B. II. Selection, Appointment and Promotion of Judges.

separate organ to ensure judicial accountability and depoliticize judicial selection has limited the potential influence of the executive on judicial decision-making. The 1998 reform, thus, shows a gradual shift from the exclusive competence of the executive branch for the administration of the judiciary to the introduction of formal structures to ensure that administrative powers are not misused in order to impact on core judicial functions. The exclusive competence of the judiciary for the assignment of cases, the legislative guarantee for the remuneration of judges and the exclusive competence of the judiciary to sanction judicial misconduct are essential for the protection of judicial independence *vis-à-vis* the other branches of government.

Another area where the executive and the judiciary have shared responsibilities is the supervision of the proper functioning of the courts. This supervision is a matter not only for the court presidents, but also for the prosecution, which in turn performs its duties in this respect under the authority of the Minister of Justice.[155] In general terms, both the parliamentary report on the Fortis case and the report of the High Council of Justice leave this model largely uncriticized but they have urged the legislator to clarify the scope of this supervision and to limit the influence of the executive in this respect, especially in cases where the State is an interested party.[156]

In order to ensure external independence Article 155 of the Constitution provides that no judge may accept a salaried position from the government, unless it is unremunerated and on the condition that – whether the position is remunerated or not – it is not a position which is considered by the legislator to be incompatible with the position of being a judge. Indeed, some acts contain provisions whereby they proclaim that a certain function can never be held by a judge. In this respect, Article 293 of the Judicial Code provides that a judge may hold no paid political office nor any administrative position, nor hold the office of public notary, bailiff, practising lawyer, nor fulfil any military function, nor be a member of the clergy. By way of exception, the executive branch has been delegated the authority to grant an exemption,

---

[155] For a short description of the system, see *supra*, B. I. 1. Organs in Charge of the Administration of the Judiciary.

[156] Parliamentary Documents: House of Representatives 2008-2009 (note 5); Report of the special investigation into the functioning of justice following the Fortis case (note 5), at 25.

so as to allow judges to hold university teaching positions or to sit on selection committees and examining boards.[157]

In the exercise of its function, the executive sometimes calls upon magistrates for their expertise. This is often organized on an *ad hoc* basis, for example when magistrates take part in working groups composed of civil servants and external experts to prepare legislation. For more long-term commitments, the executive has the ability to request the temporary secondment of a magistrate. This, however, only applies to magistrates in the prosecutor's office. Judges may not be seconded to the executive, as that would be contrary to the constitutional prohibition on judges accepting remunerated office from the government.[158] In 2008, a total of 22 magistrates from the prosecutor's offices were seconded to the executive, *inter alia* to the state agencies involved in national intelligence or the fight against money-laundering as well as to the cabinets of various Government Ministers.[159] This practice, which had gone largely uncontested for decades, has been heavily criticized in the aftermath of the Fortis controversy.[160] Magistrates seconded to the Government cabinets had informal contacts with former colleagues in the judiciary who were working on the case. In their respective reports, both the parliamentary commission and the High Council of Justice criticized these contacts.[161] They recommended banning secondments of magistrates to government cabinets, except for the cabinet of the Minister of Justice. The recruitment of magistrates for the Justice cabinet should no longer be handled by the cabinet itself, but through the intervention of the College of Prosecutors-General.[162] Also, it was suggested that a code of conduct for seconded magistrates, with clear instructions about contacts with magistrates in office, be put in place. Finally, all contacts between the executive and magistrates, whether judges or prosecutors, should be properly documented in writing and should never take place

---

157 Article 294 of the Judicial Code.

158 Article 155 of the Constitution.

159 Ministry of Justice, Justitie in cijfers, at 11 (2009).

160 See e.g. T. Marchandise, Le ministère public et le politique: ordre et désordre, in Association syndicale des magistrats (ed.), Justice et politique: je t'aime moi non plus …, 104 (2009).

161 Parliamentary Documents: House of Representatives 2008-2009 (note 5), at 68; Report of the special investigation into the functioning of justice following the Fortis case (note 5), at 9-12.

162 *Supra*, B. I. 1. Organs in Charge of the Administration of the Judiciary.

directly but through the appropriate channels, meaning the hierarchical superiors.

II. Judgments

1. Basis

Judgments are based on the *law*, that is, every generally binding rule, irrespective of the issuing authority. This includes the Constitution, self-executing treaties[163] and provisions of European law, statutes enacted by both the federal and the state legislatures,[164] administrative regulations and orders, and general unwritten principles of law. Since Belgium belongs to the civil law tradition, it has no doctrine of precedent. Hence, judgments do not formally have a binding effect on future cases involving either different parties or the same parties in a different case. Article 6 of the Judicial Code explicitly prohibits the judiciary from issuing general decisions. The Constitution considers the authoritative interpretation of statutory law to be the sole prerogative of the Legislature.[165] Yet, in practice, judgments given by the higher courts do enjoy considerable persuasive authority. As most judges do not want their judgments to be overruled, the rulings of the higher courts are complied with for the most part. Also, higher courts are not legally bound by their own decisions. These higher courts, however, generally feel very reluctant to overrule themselves, so as not to endanger the predictability of their decisions. Apart from the Court of Cassation, which does not adjudicate on the merits of a case, meaning that it deals only with

---

[163] In the *Le Ski* judgment of 1971, the Court of Cassation ruled that a self-executing treaty prevails over both former and later Acts of Parliament, which therefore should be declared inoperative by any court. The Court of Cassation argued that it is "the very nature of the international law as determined by the treaty that leads to this primacy." (Court of Cassation, 27 May 1971 [*Le Ski*], *Pasicrisie* 1971, I, 886-920).

[164] According to Article 1 of the Constitution, Belgium is a federal State composed of Communities and Regions. Both the Communities and the Regions have legislative authorities and may, within their powers, enact statutes which have the same binding force as federal statutes.

[165] Article 84 for federal Acts; Article 133 for Community Acts. The Constitutional Court has also accepted the authoritative interpretation for Regional Acts (Constitutional Court, No. 193/2004, 24 November 2004 and No. 25/2005, 2 February 2005).

questions of law,[166] the courts must necessarily apply the law to the facts of the cases submitted to them. This evidently involves a personal assessment by the judges.

According to Article 5 of the Judicial Code, a Belgian court may not refuse to deliver a judgment, even if there is no or only an incomplete law governing the situation submitted to it. In order to resolve those situations which were not anticipated by applicable legislative or regulatory rules, the courts have acknowledged the existence of unwritten general principles of law.

In order to ensure adequate legal review and uniform application of the law, the Constitution established a Court of Cassation for the whole of Belgium. The Court of Cassation is Belgium's highest court of ordinary jurisdiction and its principal task is to ensure that judgments comply with the law. The Court must ensure only that decisions made on appeal are not in contravention of the law and have not violated any prescribed procedure which would otherwise render a decision null and void.[167] The Court has no jurisdiction over a possible misinterpretation of the facts.

2. Practice

There is substantial statistical information available concerning the outcome of judicial proceedings, although the management of these data is organized by several entities, which does not promote uniformity and transparency. The Department of Justice provides statistical data concerning the courts.[168] These include the number of acquittals and convictions at the levels of the Police Courts and the Criminal Courts,[169]

---

[166] According to Article 147 of the Constitution, the Court of Cassation is prohibited from dealing with the facts of the cases submitted to it. After quashing a decision which it considers illegal, the Court of Cassation refers the case to another court of the same level as that from which the annulled decision issued.

[167] Article 608 of the Judicial Code.

[168] Namely the Permanent Bureau of Statistics and Workload Measurement (*Vast Bureau Statistiek en Werklastmeting / Bureau Permanent Statistiques et Mesure de la Charge de Travail*), available at <http://www.vbsw-bpsm.be>. The Department of Justice also publishes a document called "*Justitie in cijfers / Justice en chiffres*", which presents a number of key figures and statistical data.

[169] Excluding the Criminal Assizes (*Hof van Assisen / Cour d'Assises*).

subdivided by type of crime and judicial district. For instance, of the 270,595 cases tried in 2008 by the Belgian Police Courts, 21,542 resulted in an acquittal. The College of Prosecutors-General[170] also distributes statistical data concerning the operation of the Public Prosecutor's Office in the Criminal Court. Finally the Service for Criminal Policy[171] within the Department of Justice provides data concerning the types of penalties, crimes, offenders etc.

3. Structure

Article 780 of the Judicial Code contains the formal elements which must be mentioned in each judgment, such as the names of the judges who have considered the case, the names of the parties, the subject matter of the claim and the answer to the (written) arguments of the parties, and the date of pronouncement in public hearing. These requirements are generally well observed in practice. Not mentioning one of these elements would render a judgment null and void. Importantly, the judgment must refer to a concise, specific ruling/order (*dictum*) as well as justification for this ruling. Article 149 of the Constitution provides that each judgment must be supported by reasons[172] so that the parties are able to understand the judgment. It also enables the appeal courts to review the lower courts' decisions. Since judges are obliged to give reasons for their rulings in a clear, consistent and unambiguous way, and to consider and answer the arguments put forward, the parties are protected against arbitrary decisions. The constitutional duty to provide reasons is considered to be an essential element of due process, and hence is applicable to all the courts, those of ordinary jurisdiction as well as the statutory courts, such as the administrative law courts.

---

[170] Available at <http://www.just.fgov.be>.

[171] *Dienst voor het Strafrechtelijk beleid / Service de la Politique Criminelle*, available at <http://www.dsb-spc.be>.

[172] This obligation is confirmed in Article 780, 3° of the Judicial Code, which states that the judgment must include the answer to the written arguments of the parties. Article 195 of the Criminal Procedure Code imposes a more stringent obligation to provide reasons in a number of criminal cases. It has been explicitly prescribed that judgments emanating from the Trial Division and the Appeal Division of the Criminal Court must justify the nature and degree of the punishment.

4. Public Access

Article 148 of the Constitution provides that hearings in courts and tribunals are open to the public. Moreover, according to Article 149 of the Constitution, judgments as a whole (i.e. the *dictum* [specific ruling/order] and the reasons together) should also be given in open court. *Open court* protects citizens against arbitrary judicial decisions. The judge is well aware that he is subject to the control of the public present in the courtroom. This guarantee is of practical importance, because some trials (particularly important criminal trials) are attended by journalists and are reported on in the newspapers. Open court must also be seen as a measure to inspire confidence in the legal system, because citizens can see for themselves whether the judiciary is being objective or not. Judgments in civil and commercial cases, however, are generally not reported in the newspapers. Their annotation in law reviews may be regarded as a substitute for the scrutiny of the press in criminal cases. Many important judgments are also published on the website of the judiciary.[173] Magistrates of the Court of Cassation are involved in deciding what is worth being published and what is not.

The rule that judgments must in all cases be pronounced in open court has raised some criticism because it is viewed as a very time-consuming burden. The Legislation Division of the Council of State, however, has stressed that the requirement to deliver judgment in public is absolute and must be applied strictly.[174] Unlike the rule requiring the public pronouncement of judgments which allows of no single exception, Article 148 of the Constitution explicitly provides a number of exceptions to the principle of public hearings, namely in those cases where public access could pose a danger to order or good behaviour. Such an exception requires an order of the court. In practice, some cases where the rule of hearings in public may be deviated from (such as divorce proceedings, child adoption, and child/youth protection cases) are explicitly laid down in statutes. However, in cases of political offences or press offences, proceedings cannot be *in camera* except by unanimous decision of the court.

---

[173] Available at <http://www.juridat.be>.

[174] Advice of the Legislation Division of the Council of State, 8 October 1990, L.19.647/2. However, Article 149 of the Constitution has been designated for amendment, in order to allow legislation to provide for exceptions to the rule that judicial decisions be delivered in public (Declaration for revision of the Constitution of 1 May 2007, Belgian State Gazette, 2 May 2007).

III. Improper Influence on Judicial Decisions

There are hardly any credible reports of improper influence on judicial decisions. Magistrates who engage in corruption may be punished with severe penalties, including prison sentences ranging from five to ten years.[175] It is assumed that corruption by magistrates is rare. In important criminal cases which are tried by jury in the Assize Court, media coverage is often extensive and sometimes partly biased. However, according to the Court of Cassation, in principle this does not imply any improper influence, taking into account that all evidence is examined during court sessions.[176]

As highlighted above, possible improper influence on judicial decisions played a key role in the events surrounding the Fortis controversy in November and December 2008. As mentioned before, both a parliamentary commission of inquiry and the High Council of Justice made a thorough analysis of these events in order to determine whether the judicial process in the Fortis case had been obstructed or whether undue pressure had been exercised. Having heard from members of both the judiciary and the executive, the parliamentary commission concluded that, regarding the first instance proceedings, the contacts between the Ministers' offices and the Crown Prosecutor's Office of Brussels (which was to issue, as *amicus curiae,* a non-binding opinion on the legal merits of the claim in the Fortis case) had endangered the principle of the separation of powers.[177] With regard to the proceedings before the Brussels Court of Appeal, the commission of inquiry expressed its concern about a number of contacts between Ministers' offices, law firms, and judges because these "might be a violation of the separation of powers principle".[178] However, the commission of inquiry was not able to determine whether or not there had been political pressure put on the Brussels Court of Appeal.

The analysis of the High Council of Justice, which had engaged in a similar investigation, was much more outspoken. The Council was of the opinion that the various contacts between magistrates working on

---

175 Article 249 of the Penal Code.

176 Court of Cassation, No. P071648N, 19 February 2008, available at <http://www.juridat.be>.

177 Parliamentary Documents: House of Representatives 2008-2009 (note 5), at 68.

178 Id., at 70-71.

the Fortis case and advisors to the Government were inappropriate and had created an appearance of collusion.[179] The Council also expressed grave concern over the fact that it had been suggested by other members of the Government that the Minister of Justice use his right to have a case submitted to judicial review by the Prosecutor-General of the Court of Cassation. The mere fact of considering such a request in a case where the Belgian State had a substantial interest was sufficient to create a conflict of interest, according to the report. This conclusion, however, was recently contradicted by a remarkable study.[180] After extensive research, the author, a constitutional scholar, concluded that the abovementioned facts were insufficient to amount to a violation of the separation of powers principle, at the same time admitting that ethical considerations and the principle of procedural equality do warrant some concern over the way the case was handled.[181]

In addition, the High Council took the view that in the Fortis case judicial independence had also been undermined by the judiciary itself. Specifically, the Council took offence at the fact that one judge had been excluded from the deliberations by the other two, as well as the fact that the Court President had confided in the President of the hierarchically higher court, the Court of Cassation.[182] A similar conclusion was reached by the scholar cited above, stating that the separation of powers was violated by the initiative taken by the President of the Court of Cassation to write a letter to the President of Chamber of Representatives to denounce the "obstruction of justice" in the Fortis case.[183]

The reports of the Parliament and the High Council both made various recommendations for future reform, most of which have been discussed

---

[179] Report of the special investigation into the functioning of justice following the Fortis case (note 5), at 9.

[180] F. Meersschaut, De scheiding der machten in de storm van de Fortis-zaak, in A. Alen/S. Sottiaux (eds.), Leuvense Staatsrechtelijke Standpunten, 189 (2010).

[181] Id.

[182] Report of the special investigation into the functioning of justice following the Fortis case (note 5), at 15 and 34.

[183] Meersschaut (note 180), at 190. The author added that if it would appear that the Prosecutor-General with the Court of Appeals has indeed insisted on a replacement of all three judges that were in charge of the Fortis file at the time of the events, this would also qualify as a breach of the separation of powers principle (id., at 190).

above.[184] They also stressed the sanctity of deliberation: external contact over a case which is in deliberation should be avoided as much as possible, even if the contact is with the president of the hierarchically superior court or is established in the context of the prosecutor's supervision of the proper working of the court and the regularity of the proceedings. In this respect, the two authoritative opinions have without any doubt reshaped the law.

The possible criminal liability of members of the judiciary regarding the Fortis case is currently being examined by the Court of Appeal in Ghent. Meanwhile, the recommendations made by the parliamentary commission and the High Council of Justice have been discussed in parliament and will undoubtedly lead to further debate.[185] Pending the 2010 elections, however, the reform process is currently suspended.

IV. Security

Belgium does not have a tradition of violence or threats against judges and their families. In high-profile criminal cases, such as proceedings concerning terrorist crimes, it sometimes happens that members of the Public Prosecutor's Office are given police protection. Security measures in and around courts are relatively limited. In principle, everyone enjoys free access to the court and there is generally no systematic identity- or security-check at the entrances of courthouses. Although there have been important improvements in recent years, the security of the courts is still far from perfect. This was, for instance, painfully demonstrated when journalists of the francophone public broadcasting corporation RTBF stayed overnight at the Central Law Courts in Brussels and were even able to examine confidential court files.[186] A number of recent escapes of prisoners from the Central Law Courts in Brussels have made it clear that additional measures must be taken to improve security in and around the courts.

---

[184] *Supra*, chapter C. I. Separation of Powers.

[185] See e.g. Complete Report of the 12 January 2010 meeting of the Justice Commission in the House of Representatives, Parliamentary Documents CRIV 52 COM 745, at 10, available at <http://www.dekamer.be>.

[186] Ploeg RTBF overnacht ongestoord in Brussels justitiepaleis, De Standaard, 9 April 2009, at 8.

D. Ethical Standards

I. Code of Ethics for Judges

There is no (optional) code of ethics for judges.[187] The deontological standards applying to judges are mandatory and are not written down in a codified text. These standards are, in the first place, determined in the Constitution and contained in statutory law (in particular the Judicial Code). For instance, a judge may not refuse to deliver judgment[188] and must justify his ruling.[189] In addition to these constitutional and statutory obligations, there are a number of unwritten rules, which are elaborated in disciplinary decisions, academic writings and inaugural speeches of Prosecutors-General. These rules are derived from Article 404 of the Judicial Code, which forms the basis for disciplinary proceedings.[190] They include rules concerning competence and diligence, loyalty and objectivity, as well as confidentiality and discretion. On the basis of these unwritten rules, for example, a magistrate is not supposed to participate in carnival parades which lampoon State institutions.[191]

II. Training

As a matter of professional duty, judges are required to keep their legal know-how up to date, provided they are given the opportunity and the time to do so by their hierarchical superiors.[192] There are however no formal quota or minimal requirements. Nevertheless, whether a judge makes sufficient effort in terms of continuing legal education will often be a topic touched upon during his evaluation, and may also be taken

---

[187] X. De Riemaecker/G. Londers, Deontologie en tucht (note 116), at 323; X. De Riemaecker/G. Londers, Déontologie et discipline (note 116), at 312.

[188] Article 5 of the Judicial Code (see *supra* C. III. 1. Basis).

[189] Article 149 of the Constitution and Article 780, 3° of the Judicial Code (see *supra*, C. III. 3. Structure).

[190] See *supra*, B. VII. 1. Formal Requirements.

[191] X. De Riemaecker/G. Londers, Deontologie en tucht, in: idem (eds.). Statuut en deontologie van de magistraat (note 116), at 340-350; X. De Riemaecker/G. Londers, Déontologie et discipline (note 116), at 329-338.

[192] X. De Riemaecker/G. Londers, Deontologie en tucht, in: id. (eds.), Statuut en deontologie van de magistraat, 342-343.

into account by the High Council for Justice if the judge applies for promotion. The training of a judge focuses on legal knowledge and skills, but also on social awareness. Several training sessions deal primarily or incidentally with ethical standards. For instance, in 2009, the Institute of Judicial Training scheduled training sessions concerning deontology and disciplinary law. The implementation of these programmes (the organization of courses, the recruitment of teachers, and so on) and the logistical aspects (classrooms, course materials, and the like) are supported by the Department of Justice. Apart from initial training, every judge has a right to continuing legal education from the Institute of Judicial Training.[193]

E. Conclusion

The creation of the High Council of Justice in 1998 is largely seen as a positive step in earning the trust of the public and in the independence of the judiciary. While there is still room for more objectivity and transparency in the nomination and promotion process, the creation of the High Council has brought about a more objective decision-making process, in which the Minister of Justice is no longer the sole decision-maker. The Council has also introduced a formally organized complaints mechanism, the results of which are communicated in a transparent way. It also serves as an external advisor on and guardian of the justice system. Another positive element in the development of an independent judiciary in Belgium is the fact that the majority of rules are guaranteed in the Constitution and further specified by statutory laws (in particular the Judicial Code). This produces a situation in which the judiciary does not depend on decisions of the executive with regard to wages, pensions, disciplinary decisions, and so on.

Serious tension between the executive and the judicial branches of the State arose in December 2008, when allegations were raised of political pressure on the Brussels Court of Appeal in the Fortis case. Although the Parliamentary commission of inquiry established to examine this allegation did not find evidence of such political pressure, this important case demonstrates that upholding the independence of the judiciary is a continuous obligation on all actors. Both the parliamentary commission

[193] Article 4 of the Act of 31 January 2007 on judicial education and the creation of an Institute of Judicial Training.

of inquiry and the High Council concluded their reports into the events with a number of recommendations regarding the separation of powers and the functioning of the judiciary. A number of these recommendations may prove useful to further the independence of the judiciary and to prevent new incidents of potential political influence over judicial proceedings. If there is reform along these lines, this will mean a continuation of the change which has silently taken place in the last two decades, whereby the executive's powers in the judicial process have become more and more limited. The question remains what the role of the High Council of Justice will be in this: it has the ambition to gain many more powers and be more actively involved in justice policy, but whether it will succeed in this, remains to be seen.

Another important challenge facing Belgium's judiciary concerns the introduction of more financial autonomy and responsibility for the courts and their heads of personnel. This measure should enable the courts to manage their resources more efficiently. This *decentralization* of financial and logistical management must necessarily go hand in hand with a degree of accountability for the courts' operation and costs, for instance by workload measurement techniques. It is, however, a key concern that this accountability should not hamper judicial independence in any way.

Judicial Independence in Italy

Giuseppe Di Federico

A. Introduction

The most accurate way to assess the actual status of external and internal judicial independence of the Italian judiciary is to analyze the governance of the judiciary from recruitment to retirement and the extent to which external authorities, and in particular the Minister of Justice, may influence decisions in that area. In Italy there are several types of courts which employ *career* judges: the administrative courts, the court of accounts, the Constitutional Court and the so-called *ordinary courts*. The present study deals only with the governance of career judges of *ordinary courts*, i.e. courts the judicial competence of which encompasses all criminal cases and the great majority of civil cases.

Just as in France, Belgium, Romania and Bulgaria, Italian judges and prosecutors (both called *magistrates*)[1] belong to the same corps; they are jointly recruited and can move from one position to the other. However the governance of prosecutors varies greatly. Unlike in the other countries, in Italy the basic features of the governance of judges and prosecutors are the same, as are the guarantees of their independence; prosecutors as well as judges can neither receive instructions from outside agencies nor be held accountable for their investigative or forensic activities.[2] It is therefore difficult to deal with the governance of

[1] Whereas the term *magistrate* in Italy – as well as in France – is used to include both judges and public prosecutors, in Spain, on the other hand, it is used to indicate a specific level of the career of judges, and in the United Kingdom and in the United States it is used to indicate judges having specific functions.

[2] G. Di Federico, Prosecutorial accountability, Independence and Effectiveness in Italy, in: B. Cooper (ed.), Promoting Prosecutorial Accountability, Independence and Effectiveness, 299 (2008); G. Di Federico, The Independence

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233, DOI 10.1007/978-3-642-28299-7_10,

judges in a fully separate way from that of prosecutors, due also to the fact that judges and prosecutors jointly elect their representatives in the agencies of *self-government of the magistrates*, i.e. the Superior Council of the Magistracy, the judicial councils of the 26 districts of courts of appeal and the council of the Supreme Court of Cassation.[3]

The Italian ordinary court system employs around 92% of all *career* magistrates (i.e. judges and prosecutors) operating in the various types of courts. At present the law provides for 10,109 career magistrates for the ordinary justice system.[4] A little over two-thirds of the total number of magistrates is assigned to juridical functions; the others perform prosecutorial functions. Around 200-300 magistrates are on temporary leave of absence to perform other duties.[5] In addition to career magistrates, *ordinary courts* also employ an even higher number of *honorary judges* whose *status* is quite different from that of career magistrates and thus is outside the scope of this paper.[6]

There are 222 courts of ordinary justice staffed by career magistrates: the Supreme Court of Cassation, 26 courts of appeal, 166 tribunals (courts of general jurisdiction) and 29 juvenile courts. The number of judges serving in the various courts varies greatly: there are 396 judges assigned to the Supreme Court of Cassation; the number of judges assigned to the 26 courts of appeal varies between 10 and 161; the number of judges assigned to the 166 tribunals is between 6 and 392.[7]

---

and Accountability of the Public Prosecutor: Search of a Difficult Equilibrium, 9 Mediterranean Journal of Human Rights 2, at 93 (2005).

3 In quoting the existing legislation the expression "judicial offices" (*uffici giudiziari*) must be used to indicate jointly both courts and prosecutors offices.

4 The law has progressively and substantially increased the number of ordinary career magistrates in the last 40 years: from 5,703 in 1962 to 10,109 in 1999.

5 See *infra* D. I. Code of Ethics for Judges.

6 There are several types of honorary judges: 4,700 judges of the peace, 3,498 honorary judges who perform various functions in the courts of general jurisdiction (*tribunali*); 1,096 honorary judges working in juvenile courts. There are also 1,936 honorary prosecutors. It is worth noting that the total number of honorary magistrates (i.e. judges and prosecutors) is considerably higher than that of career magistrates: 11,780 honorary magistrates as against 10,109 career magistrates.

7 There are also 848 courts where ordinary justice is administered by honorary judges of the peace.

B. Structural Safeguards

Pursuant to Article 101 of the Italian Constitution "judges are subject only to the law".[8] The Italian magistrates elect their representatives in the institutions of self-governance of the judiciary.

I. Administration of the Judiciary

1. Organs in Charge of the Administration of the Judiciary

In order to protect judicial independence, the Italian Constitution of 1948 provides that all decisions concerning judges and prosecutors from recruitment to retirement (e.g. promotions, transfers, discipline, disability etc.) be within the exclusive competence of the Superior Council of the Magistracy (*Consiglio Superiore della Magistratura*; hereafter: SCM).[9] Due to this organizational structure of self-governance the magistracy is institutionally free from outside interference.

2. Judicial Council

a) General Characteristics of the System of Judicial Councils

The SCM is predominantly composed of magistrates elected by their colleagues. The Constitution provides that two thirds of the members must be magistrates and that one third of the members be elected by Parliament, with a qualified majority guaranteeing the representation of parliamentary minorities,[10] from among law professors and lawyers with 15 years of professional experience.[11] The Constitution further

---

[8] For the English version of the Italian Constitution see <http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf>.

[9] The structure and functions of the SCM are regulated in Arts. 104-107 Constitution. Article 105 Constitution provides that the SCM has the exclusive competence "to recruit, assign, move, promote, and discipline" members of the magistracy.

[10] The representatives of Parliament are elected in a joint session of the Senate and the Chamber of Deputies; each must receive 3/5 of the votes of the total number of the members of Parliament in one of the first two ballots, and thereafter 3/5 of the voters.

[11] Article 104 Constitution.

provides that the SCM be presided over by the President of the Republic – who, however, rarely attends its meetings – and include among its members the President of the Supreme Court of Cassation and the Prosecutor General of the Supreme Court of Cassation.[12] Article 104 section 5 Constitution provides that the SCM must elect its Vice President from among the members designated by Parliament. At present the SCM is composed of 27 members. In addition to the three *ex officio* members, 8 members are elected by Parliament and 16 by the magistrates. All 24 elected members are renewed *in toto* every four years and cannot be re-elected for the next four years (Article 104 section 7 Constitution).

Although initially the higher ranks of the magistracy were greatly overrepresented on the SCM and were elected only by their rank peers, since 1968 no higher ranking magistrate can be elected to the SCM without the electoral support of the lower ranking magistrates. It is worth noting that none of the more established Superior Councils of the Magistracy of continental Europe (e.g. those of France, Spain and Portugal) has such a predominance of members elected by the magistrates, nor an electoral law which makes those members so prone to the corporate expectations of the lower ranks of the judiciary.

The wide range of functions and activities of the SCM is supported by a rather complex organization which includes an extensive staff.[13] The annual operating budget of the SCM is over 30 million EUR, which does not include the salaries of the 37 magistrates who work in the Council. Since the 1980s the activities of the Plenary Sessions of the SCM are open to the public[14] (unless the Plenum itself decides other-

---

[12] Id.

[13] In addition to the 27 councillors the SCM has a staff of more than 270, including 19 magistrates (on leave of absence from their offices), 144 functionaries, 64 chauffeurs, 22 ushers, and 24 assistants to the councillors (of their own choice). Furthermore, from time to time, the SCM acquires specialized services from individuals or firms.

[14] Participation of outsiders in the SCM sessions is rather rare, to say the least. The only exceptions are those in which the President of the Republic presides over the *Plenum* or when situations of conflict are discussed (be they conflicts with the executive or on parliamentary bills, or else conflicts arising in judicial offices which have received ample publicity). On those occasions all the available space is usually occupied by the press. A well known radio station (*Radio Radicale*) records all the sessions of the SCM (with the exception of those which the SCM from time to time decides to hold behind closed doors). *Radio Radicale* broadcasts nationwide selected parts of the SCM meetings.

wise) and the members of the SCM cannot be censured for the opinions they express in the exercise of their official functions.[15]

Appeals against disciplinary judgments of the SCM can be brought before the united civil section of the Supreme Court of Cassation.[16] All other decisions of the SCM on the *status* of judges and prosecutors (transfer, professional evaluations, career, etc.) can be challenged by the magistrates concerned in the administrative courts. Such challenges are rather frequent: on the average there are more than 250 a year.[17] Often the magistrates' appeals are successful and compel the SCM to reverse its decision, even for the appointment to the most prestigious judicial positions.[18] The high number of successful appeals corresponds to a widespread sense among magistrates that the decisions of the SCM are often not based on merit but are, instead, unduly influenced by the role that the SCM representatives of the various factions of the magistracy play in support of their respective associates.

The system of *self-governance* of the magistracy also includes 26 judicial councils of the courts of appeals (*consigli giudiziari*), which perform an advisory function in all the decisions of the SCM regarding the *status* (promotions, professional evaluations, etc.) of judges and prosecutors working in their respective areas of territorial competence. Each district council is composed of the President of the court of appeal, the Prosecutor General and a number of magistrates elected by their colleagues, which varies with the size of the various districts.[19] Recently a judicial council having the same basic characteristics and functions as the district councils was also established at the Supreme Court of Cassation for both judges and prosecutors.[20]

---

15 Article 32 bis Law no.1/1981.

16 See *infra* B. VII. 2. Disciplinary Proceedings.

17 In the years 2007 and 2008 there were 297 and 244 appeals respectively, of which a large percentage were against decisions regarding the appointment of heads of court and prosecutors' offices.

18 In 2007, for example, such was the case for the appointment of the President of the Supreme Court of Cassation and for two of the presidents of the sections of the Supreme Court.

19 Law no. 111/2007.

20 Id.

b) The Expansion of the Powers of the SCM

Although the SCM came into existence only in 1959, since then its role has progressively expanded far beyond managing judicial personnel. Its influence on and supervision of the internal functioning of judicial offices is in many ways remarkable. The SCM has also acquired considerable influence over the decisions of the executive and legislative powers concerning all matters affecting the magistrates and the judicial system. The expansion of the powers of the SCM beyond those expressly provided for by the Constitution has taken place through a combination of new laws approved by Parliament, a *liberal* interpretation of the existing laws and the direct initiative of the SCM, based on the idea that the Council is endowed with *implied powers* deriving from the mission of promoting, protecting and defending judicial independence. In particular, the SCM explicitly and frequently asserts that it is its duty to operate as the *organizational apex of the magistracy*, responsible for the *administration of jurisdiction*. The following are the main areas of the expansion of the powers of the SCM.

aa) Regulation and Supervision of the Organization and Internal Functioning of the Courts

In preparing an organizational plan which *inter alia* establishes the criteria for the assignment of cases to individual judges, the heads of court have to follow an extremely detailed set of rules issued by the SCM,[21] which throughout the drafting process of the plan exercises a supervisory function.[22] But there are also other means that the SCM uses in supervising, monitoring and influencing the internal working of judicial offices, such as:

---

[21] See Article 7 bis, regio decreto (R.D.) no. 12/1941 (Statute of the magistracy). The content of this article has been supplemented by a series of laws approved by Parliament between 1999 and 2001. Following the provisions of this article the SCM writes and periodically revises the detailed instructions which the Presidents of courts are bound to follow in preparing the organizational plans of their respective courts.

[22] See further *infra* at B. V. Case Assignment and Recusal.

- inspections conducted by a delegation of its members, or the summoning of magistrates to the SCM, whenever it deems that there are conflicts or operating difficulties to be solved;[23]
- the frequent *authentic* interpretations of laws and regulations concerning relations among the magistrates and their status in their judicial offices, interpretations given in answers to questions submitted by the heads of judicial offices or by single magistrates;
- the creation of new functions and operative positions in the courts. Since 1995 the SCM, on its own initiative, appoints two magistrates for each court of appeal (*magistrati referenti per l'informatica*) whose task is both to promote the use of information and communication technologies (ICT) and to avoid that technological innovations and management may be used to limit the independence of the judiciary;
- On its own initiative the SCM exonerates magistrates from their judicial duties, usually varying from 30-50% of the standard judicial workload, in order to facilitate their engagement in non-judicial activities: for example members of the judicial council of courts of appeal, the ICT magistrates, magistrates engaged in a variety of educational tasks, magistrates engaged in various commissions, and magistrates working part time in international initiatives. On rare occasions magistrates are completely exonerated while formally remaining in charge of their judicial functions.

bb) Continuing Education

One aspect of the expansion of the SCM's powers relates to the continuing education of magistrates. The full control of the educational activities of magistrates has always been considered by the SCM as a necessary means by which to protect and promote judicial independence. Whereas the initial training of magistrates has been regulated and non-systematic initiatives of continuing education have been promoted by the SCM since its creation,[24] it is only from the early 1990s that the SCM has progressively developed centralized and local structures for

[23] Magistrates are summoned also for a variety of other reasons, e.g. to hear the candidates who are competing to be assigned to a directive function or to a judicial function in a specific court (or prosecutors' office) or else for the promotion of operating practices which the SCM regards as beneficial for the proper working of judicial offices and the protection of internal independence.

[24] See *infra* at D. II. Training.

the planning and management of programmes of continuing education which now constitute one of its main activities.[25] Nowadays the SCM regulates the initial training of magistrates and promotes non-systematic initiatives of continuing education. With the active support of the ANMI, the SCM has even ensured that magistrates of its own choice be included by universities in the committees which plan and supervise the programmes of the postgraduate schools in charge of preparing law graduates for the legal professions.[26] Though a law passed in 2006 provides for the establishment of a Superior School of the Magistracy, this institution has not yet been created and is not presently in sight.[27]

cc) Opinions Concerning Legislative Initiatives

The law provides that the SCM may express advisory opinions to the Minister of Justice on legislative bills dealing with the administration of justice.[28] The SCM has asserted its power to express such opinions on its own initiative on any legislative initiative which it considers to be of relevance for the judiciary, even when the Minister of Justice has declared that he is not interested in the opinion.[29] Furthermore the SCM has extended its initiative to include not only bills initiated by Parliament but also amendments introduced in the course of the legislative process. True enough the opinions are still formally addressed to the Minister of Justice, but *de facto* they are intended to influence parliamentarians. The opinions of the SCM acquire immediate publicity due to the fact that the meetings of the plenary sessions of the SCM are open to the public.

---

[25] See the website of the SCM, available at <http://www.csm.it>. The SCM is also an active member of the European Judicial Training Network (EJTN).

[26] As a consequence quite a few magistrates teach in those schools.

[27] Legislative Decree (D.Lgs.) no. 26/2006. The law provides for the organizational structure of the school such that the control of all its activities remains in the hands of the SCM.

[28] Article 10 Law no. 195/1958.

[29] The SCM initially only expressed its opinions on bills prepared by the Executive and only if such opinions have been expressly requested by the Minister of Justice.

dd) Reprimands of Criticisms Expressed Against the Magistracy or its Members

Whenever the majority of the SCM deems that criticism of the magistracy as a whole or some of its members is unjustified and/or offensive, it formally issues an official statement of reprimand as a means of protecting the independence of the judiciary and of its individual members. Reprimands of this nature have repeatedly been approved by the SCM against prime ministers and other members of the executive.

In sum, the expansion of the powers of the SCM has generated recurrent conflicts with members of the Executive and even with the President of the Republic. This is true in particular with regard to the reprimands addressed by the SCM against harsh criticisms of the judiciary by members of the executive and politicians and the opinions the SCM adopts of its own initiative on bills discussed in Parliament and even on individual amendments to those bills presented during the parliamentary discussion.[30]

II. Selection, Appointment and Reappointment of Judges

In Italy, as well as in other countries of continental Europe, the recruitment and career of judges are modelled on those of the higher echelons of national public bureaucracies. Judges (and prosecutors) – like other public servants – are recruited by means of regular public competitions based on exams, written and oral, in which theoretical knowledge of various branches of the law is verified. As a rule, participants in those competitions are graduates in law without any professional experience, and in any case previous professional experience *per se* is not in any way taken into account in the process of selection. The bureaucratic model of recruitment is based on the assumption that the processes of professional socialization, the ripening and development of the professional skills of magistrates will take place and be governed en-

[30] Particularly relevant was the conflict between the SCM and the President of the Republic Francesco Cossiga in the period from December 1985 to January 1986. President Cossiga had tried to prevent the SCM from adopting deliberations which he thought were outside its competence, while the majority of the SCM (including all the magistrate councilors) maintained that the SCM, as a collegiate body, had full control of its own agenda. Since Cossiga no other President of the Republic has overtly tried to impede deliberations on matters which the Council had decided were within its own competence.

tirely from within the judicial system. It implies, therefore, a sharp division of the processes of cultural socialization and the development of professional skills on the part of the various legal professions (i.e. lawyers, judges and prosecutors) soon after the period of higher education – a division which does not exist in common law countries where judges are recruited from among lawyers and where those processes are commonly shared by all the legal professions. Even though other continental European countries also provide for a career judiciary, access to the Italian judiciary is strictly limited to young lawyers, whereas in France and Spain a limited proportion of judges and prosecutors is recruited from among lawyers, law professors or other persons having previous professional experience in the application of the law.[31] While in most countries of continental Europe judges and prosecutors are recruited separately and have different career paths, Italian judges and prosecutors are recruited together, follow the same career and can be assigned equally to the various judicial and prosecutorial functions. It is a characteristic of the bureaucratic system that judges and prosecutors are recruited to satisfy indistinctly all of the functional needs existing in the court system of first instance. When promoted to the higher levels of their career they are formally supposed to be able to indiscriminately fill any of the vacancies at the higher levels of jurisdiction.

1. Eligibility for the National Competition

The law provides that graduates who want to undertake a career as magistrates have to participate in a national competition (*concorso per magistrato ordinario*).[32] In order to participate in the competition to become a magistrate the candidates must: have the full exercise of their

[31] In Italy the only, extremely limited, exception is the appointment for "exceptional merits" of university law professors and lawyers with 15 years of professional experience as judges of the Supreme Court of Cassation. So far their number has consistently been less than 10 out of the 359 judges of the Court of Cassation.

[32] The recruitment of magistrates is regulated by D.Lgs. no. 160/2006 as modified by Law no. 111/2007. As a rule the number of judicial positions available in each competition is between 200 and 300. In addition to the national competitions there are also separate competitions for the judicial offices of the autonomous province of Bozen *(Bolzano)* where the predominant language is German. Knowledge of both the Italian and German languages is therefore required. For the rest both the prerequisites and the nature of the written and oral exams are the same as those indicated for the national competition.

political and civil rights; be of "irreprehensible conduct"; be physically fit for the job; have a law degree and a post-graduate degree in a variety of juridical areas or professional experience (e.g. as an administrative judge or a high-ranking executive in the civil service) or have passed the bar examination.[33] Both candidates who have failed in three competitions and candidates who have been dismissed from their jobs in a public agency are excluded from participation. The SCM is competent for all decisions concerning actual possession of the aforementioned prerequisites on the part of the applicants. Only the requirements of "irreprehensible conduct" and of the candidate's health might entail a discretional evaluation. An analysis of the SCM's decisions in the last 40 years shows a decrease in standards for both those prerequisites.[34] As to the "irreprehensible conduct", the only candidates who are consistently excluded are those who have been charged with or sentenced for criminal violations of a voluntary nature. As to the health requisite, no specific check is actually made to relate the candidates' health to the specific functions they will perform once recruited. Special assistance is provided for the handicapped who participate in the competition.[35] Reform proposals to introduce psychological tests (as in Austria, The Netherlands and Hungary[36]) were not approved.

2. The Process of Judicial Selection and Training of Judges

Because the judicial career is far more appealing than any other career in public service in terms of salary, career prospects and pension, the number of candidates participating in the first written exam is usually well over 5,000. To be successful the candidates must pass three written exams and several oral exams. For the written part the law requires three different essays "of a theoretical nature" in which specific issues concerning civil law, criminal law and administrative law are considered.[37] The additional 11 oral exams test specific areas of law[38] and a

---

[33] Article 2 D.Lgs. no. 160/2006.

[34] See G. Di Federico, Le qualificazioni professionali del corpo giudiziario, in: G. Di Federico (ed.), Preparazione professionale degli avvocati e dei magistrati: discussione su un'ipotesi di riforma, 4, at 10-13 (1987).

[35] In the course of the past competitions, for example, blind candidates have been admitted and allowed to use the Braille system for their written exams.

[36] Psychological tests are about to be introduced also in the recruitment of French magistrates.

[37] Article 3 D.Lgs. no. 160/2006.

conversation is held in a foreign language chosen by the candidate from among English, Spanish, French and German. The examining commission is appointed by the SCM and is composed of 21 members of the judiciary with substantial seniority, five university professors, three lawyers entitled to practise at the higher level of jurisdiction and professors of the languages chosen by the candidates.[39] The selection process is particularly exacting in the phase of the written exams. More often than not, the number of successful candidates is lower than the number of positions offered in each competition.[40] At the end of the selection process the president of the examining commission transmits to the SCM the list of successful candidates and a report containing a description of the selection process, of the difficulties encountered and sometimes also suggestions to improve the selection process. Thereafter the SCM verifies the regularity of the selection process, approves the list of winners and appoints them as *ordinary magistrates*.

Since in a system of bureaucratic recruitment newly recruited magistrates do not have any previous professional experience, they have to undergo a period of initial training, which in Italy lasts for no less than 18 months, before being assigned to perform specific judicial functions autonomously.[41] The actual length and content of the initial training are

---

[38] Article 1 D.Lgs. no. 160/2006. The 11 oral exams are the following: civil law and basic elements of Roman law; civil procedure; criminal law; criminal procedure; administrative, constitutional and fiscal laws; labour law; commercial and bankruptcy laws; labour and social security laws; European community law; international law and elements of juridical information technology.

[39] The five university professors are chosen by the SCM from among a list proposed by the National University Council and the three lawyers from a list prepared by the National Council of Lawyers.

[40] Research data clearly show that the current system of written exams does not provide a reliable measure of the knowledge of the candidates. In Italy the national competitions for the recruitment of magistrates last from two to three years. Several times the candidates who become magistrates in one competition also participate in the written exams of the following competition without knowing the results of the previous written exam. Studies by the author found 472 such cases and discovered that 279 (59.9%) of those who had become magistrates in the first competition did not succeed in passing the written exams of the following competition. See G. Di Federico (note 34), at 13-19.

[41] In Europe the length of this period, the content of the initial training and the evaluation of the trainees vary from country to country. G. Di Federico (ed.), Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe: Austria, France, Germany, Italy, The Netherlands and Spain

regulated by the SCM which *directs, co-ordinates and controls* such training with the assistance of the district judicial councils.

The SCM has divided the period of initial training in two functionally different parts: ordinary training (*tirocinio ordinario*) and specific training (*tirocinio mirato*). Ordinary training lasts for no less than 13 months and is intended both to expand technical knowledge and above all to familiarize the trainees with the actual judicial work through various experiences of on-the-job training.[42] At the end of *ordinary training* the SCM assigns each newly recruited magistrate to the specific judicial office (either as a judge or as a prosecutor) where they will serve after completing their training. For the following five months the trainees are then assigned to a programme of on-the-job training in the specific functions of their first posting as judges or prosecutors. The on-the-job training is complemented and integrated by seminars on various topics held at both local and national levels.

The capacity of newly recruited magistrates actually to perform judicial functions as judges and prosecutors is evaluated at the end of both periods of initial training. Such evaluations are made by the SCM on the basis of the reports and advisory opinions of the magistrates who have been in charge of the on-the-job training at the local level, of the heads of the offices attended, and of the local district council. In the event of a negative evaluation the trainee has to undergo an additional period of training, at the end of which a new evaluation is made. In the event of a second negative evaluation the SCM dismisses the trainee. As a rule the evaluations are highly laudatory for all trainees. Analysis of the records of the SCM decisions of the last ten years does not reveal any case of dismissal or prolongation of the training period specifically due to a negative evaluation.

In almost all competitions for judicial recruitment since the early 1980s the number of women who have been recruited has been consistently higher than that of men. Thus there has been no need to provide for a certain representation of women in the different ranks of the judiciary. Nevertheless the internal regulation of the SCM (Article 29-bis) provides for the creation, within one of its advisory commissions, of a spe-

---

(2005). This book can be consulted and downloaded at <http://www.irsig.cnr.it>.

[42] Six months are reserved for the civil sector and seven months for the criminal sector (including four months in criminal jurisdiction and three months in a prosecutor's office).

cial *Committee for equal opportunities*, the task of which is "to formulate proposals for the elimination of the obstacles that impede the full realization of equal opportunities for men and women in the work of magistrates and the promotion of positive actions".[43] Hence several opinions have for example been expressed and adopted by the SCM on matters of maternity or paternity leave of absence.

3. Length of Office and Evaluation

After the 18 months of training the newly recruited magistrates are finally assigned actually to perform autonomously the specific judicial function in the office to which they were sent at the end of the first period of initial training. Their appointment becomes permanent without the need for reappointment. After the evaluation which takes place at the end of initial training there is a system for regular periodic professional evaluations of magistrates which is a consequence of the bureaucratic model of recruitment. Its purpose is to verify that the young magistrates have actually acquired the necessary professional competence; to choose those who are best qualified to fill vacancies at the higher levels of jurisdiction; and finally to ensure that magistrates maintain their professional qualifications throughout their several decades of service and until compulsory retirement. Another important and often overlooked function of an effective evaluation system is that of providing information which will permit the assignment of magistrates to specific functions which they are best suited to perform.

III. Tenure and Promotion

1. Tenure

Judges (and prosecutors) recruited by means of national competition enter the judiciary rather young – as a rule between 25 and 30 years of age – and generally remain in service for their entire working lives following a career which in various ways formally combines seniority of service and evaluations of professional merit. Judges have guaranteed

[43] Internal regulation of the SCM, available at <http://www.csm.it>.

tenure and the law provides that magistrates have to retire at the age of 75.[44]

2. Promotion, Professional Evaluations and Career

There are two types of professional evaluations: those which take place periodically and those which take place when magistrates have to be promoted to a higher court or to a specific judicial role (such as that of the president of a court). It is important here to keep in mind the very peculiar relationship which for the past 40 years or so has existed between promotion, professional evaluation and career; a relationship which distinguishes Italy from other civil law countries which have a bureaucratic (or civil service) magistracy. The main characteristics of that peculiar relationship are: a) positive professional evaluations may be attributed by the SCM to all magistrates who have the minimum seniority required by the law for the various levels of their career; b) all the magistrates who are evaluated positively by the SCM are formally entitled to be destined for judicial positions in the higher levels of the jurisdiction but remain in the same judicial role occupied thus far until there are vacancies at the higher levels; c) all magistrates who receive a positive evaluation by the SCM are paid the salary of the higher level of the career even if they remain in post in the previous *lower* judicial functions. Important consequences include that the SCM has, with rare exceptions, promoted with highly positive evaluations all magistrates to the higher levels of the career (and salary) on the mere basis of their seniority of service,[45] and that accordingly most magistrates perform

[44] Article 34 Law no. 289/2002.

[45] The author made a complete review of all professional evaluations in two different periods. From May 1979 to June 1981 the SCM made 4,034 professional evaluations concerning four career levels. The number of those who obtained a positive evaluation and the relative promotions were 4,019 (i.e. 99.6% of the total number of evaluations). Only 15 received a negative evaluation and all 15 either had been given very grave disciplinary sanctions or were accused of criminal violations. In the 11 years from 1993 to 2003 the SCM made 9,656 career evaluations, and the negative evaluations were 117, of which 94 had received one or more disciplinary sanctions or were awaiting criminal proceedings. For a more detailed analysis see G. Di Federico, Recruitment, professional evaluation, career and discipline of judges and prosecutors in Italy, in: G. Di Federico (ed.), Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe: Austria, France, Germany, Italy, The Netherlands and Spain, 127, at 138-142 (2005).

their judicial functions at a level of the jurisdiction which is lower than that formally associated with their level of career while at the same time receiving the higher salary of their formal level.[46]

a) Periodic Professional Evaluations and Promotions[47]

Professional evaluations and promotions are now regulated by a new law.[48] In addition to the professional evaluation that takes place at the end of initial training Italian magistrates are evaluated seven times at four-yearly intervals.[49] For each of the seven levels of evaluation and promotion the law provides a detailed list of the judicial roles that magistrates may exercise. Each magistrate is also allowed to ask the SCM to be assigned to vacant judicial positions on lower levels than his/her own.[50]

Magistrates are evaluated with reference to four aspects of their performance: capacity, productivity, diligence, and motivation. The law specifies the concrete elements which have to be taken into account with regard to each of those four aspects.[51] Further specifications have been provided by instructions issued by the SCM and can be consulted on the Council's website.[52] Heads of courts and district councils are bound by those norms and regulations when expressing their evaluations, as is the SCM itself when making its final decisions on the matter.

---

[46] Research conducted by the author in 2002 showed that most of the magistrates already promoted to the highest career and salary level were still working in courts of general jurisdiction. Only 5.5% of the appellate magistrates were working at the appellate level (89 out of 1,560), and only 1.6% of the cassation magistrates were working at the level of the Supreme Court of Cassation (24 out of 1,533).

[47] Professional evaluations made for the purpose of promotions to the Supreme Court of Cassation are dealt with separately below: see *infra* E. Supreme/Higher Courts.

[48] D.Lgs. no. 160/2006. This reform was implemented in August 2007.

[49] Article 11 D.Lgs. no. 160/2006.

[50] Recently, for example, the Prosecutor General of Turin asked and obtained from the SCM to be appointed as head of the prosecution office at the first level of jurisdiction in the same city.

[51] Article 11 D.Lgs. no. 160/2006.

[52] See Consiglio Superiore della Magistratura, available at <http://www.csm.it>.

The outcome of each evaluation may be *positive*, *not positive* or *negative*. As under the previous law all magistrates who receive a *positive* evaluation are promoted to the next level with no restrictions. If the magistrate receives a *not positive* evaluation he must be evaluated again after one year and his salary increases will be delayed by one year. If the magistrate receives a *negative* evaluation he has to be evaluated again in two years and his salary increases will be postponed until then. Also, in the event of a *negative* evaluation the SCM may decide that the magistrate has to follow one or more courses of re-qualification, and/or may move the magistrate to a different judicial position in the same location. If after two years the evaluation remains *negative*, the magistrate is dismissed. The law provides that during and after the evaluation process the magistrate has the right to be heard in writing and/or in person by the district judicial council and by the SCM.[53] He must in any event be heard by the SCM both in the event of a *negative* evaluation and in the course of the dismissal procedure which follows two negative evaluations.[54] The final decision of the SCM may, like any of its other administrative decisions on the *status* of magistrates, be challenged before an administrative judge.

The new law on professional evaluation and career was proposed and approved to render professional evaluations and promotions more stringent. Starting from the late 1960s the SCM interpreted the laws on professional evaluation and promotion, which required stringent processes of evaluation, in such a lax way as to promote all candidates at the very moment each of them had completed the minimum seniority required by law for promotion to the various career levels. Negative evaluations occurred very rarely, namely when the magistrates had received grave disciplinary sanctions or were accused of criminal violations.[55] Originally the request by the majority of magistrates to eliminate a career system based on the evaluation of their judicial work was justified in the name of judicial independence, and more specifically as a means to avoid that judicial decisions at the lower levels of jurisdiction might be unduly influenced by higher ranking magistrates who had been recruited during the fascist period. However, the marked tendency

---

[53] See Article 11 D.Lgs. no. 160/2006.

[54] Id.

[55] For a description of the system of professional evaluation and career of Italian magistrates from the late 1960s, its evolution and the momentous consequences it had for the system of governance of the judiciary see G. Di Federico (note 45), at 137-150.

of the SCM in due time to promote all magistrates to the top of the career (and salary) path without substantive professional evaluations has continued for almost 40 years, far beyond the time during which its original justification could be reasonably invoked.[56] It is too early to say whether the 2007 law on professional evaluation and career will remedy this long-standing lack of substantive professional evaluation. The analysis of the decisions of the SCM in application of the new law conducted by the author up to 31 March 2009 shows that all the magistrates evaluated were regularly promoted. It is nevertheless too early to make an empirically reliable evaluation of the efficacy of the new law.

b) Professional Evaluation, Level of Career and Role Assignment

The SCM frequently stages national competitions to fill vacancies which occur in the courts at the higher level of jurisdiction or presidents of courts. All magistrates who have reached the level of career which qualifies them to fill the specific openings offered can apply. If there is more than one candidate for the same position the SCM must evaluate their professional qualifications and on a comparative basis choose the best qualified candidate. However, as all competing candidates have previously received extremely positive appraisals in the periodic evaluations of their professional performance, the greatest merit cannot be easily determined. Thus it often happens that success in obtaining the desired position depends decisively on the support that the representatives of the various factions of magistrates in the SCM are capable of rallying in support of their affiliated candidates. Such a phenomenon (called *correntismo*) is widespread and has characterized the decisional processes of the SCM for decades. This holds true above all, but not only, with regard to appointments to the positions of presidents of courts, prosecutor's offices or judicial offices in much desired locations. In recent years, harsh criticism has been levied against those long-standing decisional practices and their negative effects, including criticisms voiced by two Presidents of the Republic in their formal addresses as Presidents of the SCM.[57] Among the negative effects, the earlier mentioned rather frequent annulment of SCM decisions by administrative courts for lack of plausible motivations may be highlighted.

---

[56] Id.

[57] For example in a letter addressed by President Ciampi to the SCM on 22 February 2006. Concern for the negative effects of *correntismo* has also recently been expressed by President Napolitano.

3. Transfers

In order to protect judicial independence and impartiality the Constitution provides that magistrates cannot be removed from their offices without their consent (Article 107). In countries like Italy, where magistrates are recruited to fill vacancies in all judicial offices (451 at the various levels of jurisdiction), mobility among the offices is, however, a functional necessity so that vacancies also in less desirable offices may also be fulfilled.

Before the mid-1960s, mobility among the judicial offices was induced by the system of evaluation which was then closely tied to the promotion system, mainly – but not only – because, once promoted, magistrates had to be assigned to a judicial position corresponding to their new rank.[58] Thereafter for 40 years Italian magistrates have been promoted to the higher levels of their career while remaining in the judicial positions they have occupied hitherto, with very few of them exercising judicial functions corresponding to their rank. One of the consequences of the lack of correspondence between promotions and transfers to a different judicial position is that in recent decades transfers could be decided by the SCM only following a request by a magistrate. The new system of professional evaluation instituted in 2007 does not change this. Only newly recruited magistrates can be assigned *ex officio* by the SCM to unpopular judicial posts. A magistrate may even remain in his post of first destination until compulsory retirement, and at the same time step by step obtain increases in his salary until he reaches the top of the salary and pension scale. The difficulties in filling vacancies in unpopular courts (and public prosecutors' offices), generated for decades by a generalized system of positive evaluations and promotions, are such that in the past the law had to provide magistrates incentives of various types in order to induce them to accept transfers to unpopular locations. However, such incentives turned out to be insufficient to solve the problem. Therefore, a new law had to be passed which grants an additional 2,500 EUR net a month for a period of four years (plus other advantages) to magistrates who agree to be transferred to 75 positions in unpopular judicial offices.[59] The new incentives have been only partly effective.

---

[58] For the many reasons which induced mobility among courts and inside courts see G. Di Federico, The Italian Judicial Profession and its bureaucratic setting, 1 The Judicial Review 40 (1976).

[59] Law no. 181/2008.

IV. Remuneration

1. Remuneration

Italian magistrates have been particularly successful in obtaining adequate judicial salaries due to three concurring factors.[60] (1) By a law of 1984, ordinary and administrative magistrates obtained substantial financial benefits after a complex combination of judicial initiatives, judicial decisions *in causa propria*, and powerful pressures brought to bear on the Minister of Justice and Parliament by the National Association of Magistrates (ANMI).[61] (2) The increased financial benefits provided for by the 1984 law have permanent effect. In fact, that law provides that those benefits be re-calculated periodically on the basis of a rather favourable mechanism which, every three years, guarantees substantial increases in salaries, pensions and exit bonuses.[62] This provision is specifically intended to avoid magistrates, like other public servants, being regularly obliged to obtain salary increases by way of direct dealings with the executive, a fact which hypothetically might indirectly influence judicial conduct. (3) During the past 40 years of professional evaluations, career and salary increases of magistrates have been *de facto* decided by the SCM with reference to the minimum seniority required by law for promotion to the different levels of the judicial career. With extremely rare exceptions, all magistrates in 28 years of service reach the highest level of their career where they usually remain for 15-18 years with periodic salary increases until retirement age.

To the author's knowledge, the financial benefits gained by Italian judges (and prosecutors) are by far the highest among the judiciaries of continental Europe, and most probably also with regard to most other democratic countries.[63] Such differences derive not from the fact that

---

[60] Only the main aspects of the magistrates' financial benefits have been indicated here. For a complete list of all the norms that regulate the matter see Article 51 D.Lgs. no. 160/2006.

[61] See G. Di Federico, Costi e implicazioni istituzionali e legislativi in materia di retribuzioni e pensioni dei magistrati, Rivista Trimestrale di Diritto Pubblico no. 2, 373 (1985). See also F. Zannotti, La Magistratura, un gruppo di pressione istituzionale (1989).

[62] Research data from 2004 clearly show the differences in financial benefits between Italian judges (and prosecutors) and those of Germany, Austria, France, Spain, and The Netherlands. G. Di Federico (note 41).

[63] Id., at 153, 155. At the time of writing the precise data to update the salaries, pensions and retirement bonuses of Italian judges which the author helped

the salaries of Italian magistrates are higher than those of other European judges at the various levels of the judicial career, but from the fact that the SCM, in due time, promotes almost all judges (and prosecutors) to the highest level of their career and salaries, while in other countries only a limited number of judges reach the highest levels of the judicial career, salary and pension. Generalized promotions for all have raised salaries, pensions and exit benefits of magistrates to a level considerably higher than that of other civil servants.

2. Benefits and Privileges

Magistrates may acquire other benefits by performing a variety of extrajudicial activities.[64] Full-time non-judicial activities (e.g. as elected members of national and EU Parliament, local government, or in high level administrative posts) may be very well paid and/or provide additional pensions and special medical assistance also for family members. Moreover, part-time activities like university teaching may be a source of additional benefits.

3. Retirement

In Italy the period of service of judges and prosecutors is longer than in other countries of continental Europe which adopt a bureaucratic system of recruitment. The compulsory retirement age is now set at 75.[65] Hence, Italian magistrates usually remain in service for over 45 years. The level of pensions of magistrates (as well as those of other employees) is calculated with reference to the level of their salaries. The net salary of Italian magistrates in the last years before retirement is well over

---

to publish in 2004 are not available. However, considering that in the five intervening years there have been two salary increases (in 2006 the increase was of 12.30% and in 2009 of 10.13%), the author can venture to indicate – on the basis of a rather conservative estimate – that at present the net monthly salary of a magistrate with two years' seniority is not much lower than 3,000 EUR; with 13 years' seniority around 4,400 EUR net a month; with 20 years' seniority close to 5,400 EUR; and with 28 years' seniority the net monthly salary is around 6,300 EUR (all salaries for 13 months a year).

[64] On extra-judicial activities see also *infra* C. III. Improper Influence on Judicial Decisions.

[65] In France, Austria and most federal states of Germany the retirement age is 65, and in Spain 70.

7,000 EUR monthly (for 13 months per year, as the stipend is given twice in December),[66] and after they reach retirement age they receive net monthly pensions (13 months per year) which are well over 6,000 EUR, and a net exit bonus of over 300,000 EUR.[67] For the six magistrates of the highest rank who are appointed to the presidency or vice presidency of the highest courts or as head and vice head of the highest office of public prosecution, salaries, pensions and exit bonuses are considerably higher.

V. Case Assignment and Recusal

Every three years all the presidents of courts at all levels of jurisdiction have to prepare a very detailed organizational plan setting out the criteria for the division of work, for the assignment of cases to the individual judges, for the substitution of magistrates in the event of impediments, for mobility from one specific internal judicial role to another and for many other aspects of the internal working of the courts. In preparing the organizational plan and exercising their supervisory powers the heads of court have to follow an extremely detailed set of rules issued by the SCM.[68] Furthermore, effective procedures have been activated to ensure that the SCM's regulations are implemented. In any case for all decisions concerning the organizational plan of the court the head of court must consult the magistrates in his office and cases of dissent must be communicated to the SCM. The individual judges of the court and the competent district judicial councils can object in writing to the plan prepared by the heads of court. The organizational plan is

---

66 The president of the Court of appeal of Milan interviewed by a newspaper in July 2009 showed that his net monthly salary, for 13 months, was 7,673 EUR. He also expressed his doubts that all the many magistrates of his seniority should receive his same salary regardless of their actual judicial performance. See the newspaper Il Giornale, Io non sono strapagato ma i colleghi inetti sì (11 July 2009).

67 See G. Di Federico (note 45), at 153-154. Salaries, pensions and exit bonuses indicated in this article were those of 2003 while judges have received two rises since then.

68 See Article 7 bis, R.D. no. 12/1941 (Statute of the magistracy). Following the provisions of this article the SCM writes and periodically revises the detailed instructions which the Presidents of courts are bound to follow in preparing the organizational plans of their respective courts.

thereafter sent with any objections to the SCM, which either approves it or requests adjustments. Any variations in the management of the original three-year organizational plan must be communicated for approval to the local judicial council and then to the SCM. In the event that the SCM decides that the head of a court has committed grave violations in managing the organizational plan it may decide to include its reprimands in the personal dossier of that head of court. Thereafter the SCM may also use such reprimands as a negative element in all future professional evaluations, and in particular in the context of the evaluations concerning reappointment as head of court.[69]

VI. Judicial Conduct Complaint Process

There is no formal procedure for addressing complaints regarding the behaviour of magistrates. Complaints however are frequently addressed to the SCM. The first commission of the SCM analyzes them and may make three different kinds of recommendations to the plenum of the SCM. (1) If the complaint appears to address a disciplinary violation it has to be transferred to the authorities in charge of disciplinary initiatives (i.e. the Ministry of Justice or the Prosecutor General of the Supreme Court of Cassation).[70] (2) If the complaint does not have disciplinary implications but reveals that there are nevertheless functional difficulties in the operation of a judicial office, the commission conducts an inquiry which may lead to the authoritative transfer of one or more magistrates to another judicial office for either *functional incompatibility* or *ambient incompatibility*. In such a case the magistrates involved are entitled to be heard by both the first commission and the plenum of the SCM in *quasi*-judicial proceedings. In these proceedings magistrates are assisted by an advocate (usually a colleague), and if they are transferred they may appeal the SCM's decision before an administrative judge. (3) If the complaint does not reveal relevant problems the case is terminated; this in practice is the most frequent occurrence. In all three abovementioned cases the complainants are not entitled to be informed of the outcome of their complaints.

---

[69] Since 2006 such evaluations of the heads of court take place every four years: see Article 45 D.Lgs. no. 160/2006.

[70] See *infra* B. VII. Judicial Accountability: Discipline and Removal Procedures.

VII. Judicial Accountability: Discipline and Removal Procedures

1. Formal Requirements

Disciplinary initiative is formally in the hands of the Minister of Justice and of the Prosecutor General of the Supreme Court of Cassation.[71] *De facto* most initiatives are taken by the Prosecutor General. In 2006 a new law on judicial discipline was approved by Parliament with the intention of making magistrates fully aware of the nature and content of disciplinary violations and making disciplinary proceedings more effective and rigorous.[72] In particular, the new law was intended to provide an answer to the widespread criticisms which had for many years portrayed judicial discipline as excessively benevolent towards magistrates.[73] The 2006 law provides for 37 different disciplinary violations concerning the behaviour of judges and prosecutors both in and outside their office. The list of disciplinary violations is all-inclusive, in the sense that magistrates cannot be disciplined for actions other than those *specifically and explicitly indicated by the law*.[74] For many of the disciplinary violations the law also sets out the corresponding sanctions. Affiliation to a political party and active participation in political activities are among the disciplinary violations to be sanctioned.[75] Nevertheless magistrates are still allowed to appear on party tickets in national, local, and European elections, be elected and even assume positions of responsibility in the organization of the political party for which they

---

71 See Article 107 Constitution. The disciplinary initiative of the Prosecutor General of the Supreme Court of Cassation and its role in disciplinary proceeding are now regulated by Arts. 14-18 of D.Lgs. no. 109/2006.

72 D.Lgs. no. 109/ 2006.

73 D. Cavallini, La giurisprudenza disciplinare sui ritardi dei magistrati ordinari nell'espletamento delle attività giudiziarie, 58 Rivista trimestrale di Diritto e Procedura civile no.4, 1489 (2004); D. Cavallini, Il giusto processo tra diritto positivo e deontologia giudiziaria, in: C. Guarnieri/F. Zannotti (eds.), Giusto processo?, 219 (2006); D. Cavallini, La libertà di parola del magistrato al confronto con i nuovi illeciti disciplinari, 62 Rivista trimestrale di Diritto e Procedura civile 541 (2008).

74 The recent law on judicial discipline (D.Lgs. no.109/2006) does not contain a specific provision to this effect. However, that is the interpretation which has been given by the disciplinary commission, due to the fact that the law provides only a list of violations without any norm which legitimates the punishment of deeds other than those explicitly listed.

75 Article 3 (h) D.Lgs. no. 109/2008.

were elected and return to the exercise of judicial functions after the end of their electoral mandate. To many, including this author, it may seem a very obvious contradiction, but apparently it is not such according to the ANMI, the SCM, the Minister of Justice and Parliament.

The Prosecutor General of the Supreme Court of Cassation must prosecute all violations brought to his attention, the only exception being those of "little relevance".[76] The heads of judicial offices are obliged to report all violations and can be disciplined for not doing so.[77] An internal regulation of the SCM provides that the SCM itself may inform the Minister and the Prosecutor General of events which seem to be disciplinary violations. Citizens' complaints are supposed to be considered by the authorities which exercise disciplinary initiatives and by those which may report those complaints to them.[78] Disciplinary proceedings are terminated regardless of the gravity of the charges when the investigation phase exceeds two years, when the decision of the SCM is delayed for more than two years, or when the violation becomes known more than ten years after its occurrence. The Prosecutor General has to communicate to the Minister of Justice his/her decision to terminate a case and the Minister has the right to ask that the case in any event be judged by the Disciplinary Commission of the SCM. Furthermore the Minister of Justice can add further disciplinary charges to those formulated in each case by the Prosecutor General.

2. Disciplinary Proceedings

The Italian Constitution provides that judicial discipline be administered by the SCM.[79] This task is performed by the Disciplinary Commission, which is the only sub-unit of the SCM which has powers of its own and which is composed of six members whom the SCM chooses from among its own ranks by way of a secret ballot.[80] As a rule it is presided over by the Vice President of the SCM. In any case the President

---

[76] Article 3-bis D.Lgs. no. 109/2008.

[77] Article 14 D.Lgs. no. 109/2008.

[78] However, there are no provisions which entitle citizens to be informed of the results of their complaints.

[79] Article 105 Constitution.

[80] Two are chosen from among the members designated by Parliament and four from among those elected by the magistrates. Ten additional substitute members are elected as well.

of the SCM can preside over the Disciplinary Commission whenever he/she so wishes; in these cases the Vice President is excluded from the judging panel. As a rule the Minister of Justice initiates (and motivates) his requests for disciplinary proceedings after an investigation conducted by the magistrates of his Inspectorate. Both where the initiative is taken by the Minister and by the Prosecutor General, it is the Prosecutor General (but usually a magistrate in his office) who conducts the formal investigation and performs the forensic function before the disciplinary commission.

3. Judicial Safeguards

The disciplinary initiative and the charges must be communicated to the magistrate concerned within 30 days. He/she has the right to be assisted in his/her defence by a magistrate colleague (by far the most frequent occurrence) or by a practising lawyer. After a long debate on whether the SCM's Disciplinary Commission was an administrative agency or a court of justice the second interpretation prevailed.[81] In fact the decisions of the SCM's Disciplinary Commission can be appealed on questions of law before the united civil sections of the Supreme Court of Cassation. The opinions of the Disciplinary Commission, as well as those of the Supreme Court of Cassation on matters of judicial discipline, are publicized in the same way as any other judicial decision.

4. Sanctions

The disciplinary sanctions provided for by the law are admonition, censure, loss of seniority for a minimum of two months to a maximum of two years (which leads to a delay in salary increases), temporary incapacity to exercise supervisory functions in judicial offices for a minimum of six months to a maximum of two years, temporary suspension from the judicial functions for a minimum of three months to a maximum of two years (which results in a reduced salary for the period of suspension), and dismissal.[82] In addition to the major sanctions the magistrate may be transferred to another judicial function and location, when the SCM's Disciplinary Commission deems that his permanent

[81] Decision of the Constitutional Court of 1971, no. 2.

[82] Article 12 D.Lgs. no. 109/2006.

tenure in his previous position is incompatible with the proper functioning of the administration of justice.

5. Practice

Table 1 sets out the basic quantitative information on the activities of the SCM's Disciplinary Commission between 2001 and 2008. It must be emphasized that the figures cannot easily be compared with those of other judicial systems because of their difference in nature.[83]

[83] The number and nature of disciplinary initiatives and sanctions may vary as a consequence of the different characteristics of the various judicial systems, such as the features of recruitment and related processes of socialization in the judicial profession, the rigour with which conduct on and off the bench is taken into account in evaluating the members of the judiciary for promotion to the higher levels of jurisdiction, and the nature and extent of the supervising powers of the heads of judicial offices. In some continental European countries judges and prosecutors acquire full judicial status and tenure at the very moment at which they start exercising judicial functions (like in Italy), while in other countries full judicial status and tenure are granted after the professional competence and character of the candidates have been tested in the actual exercise of judicial work (in Germany, for example, this period varies from three to five years). It is obvious that the final recruitment in the latter countries is based on more relevant information on actual professional capacity and personal characteristics, i.e. those very elements which later on may give rise to disciplinary proceeding and sanctions (temper, equilibrium, resistance to stress, ability to collaborate with others, etc.). The relevance of the system of recruitment to these matters becomes even more evident when we compare countries with bureaucratic systems of recruitment with those that recruit judges from the higher echelons of the legal profession. This point is well represented in a paper written by Sir Thomas Bingham, Lord Chief Justice of England, for a seminar on "Judicial Ethics in Europe" held in London in June 1966. In this paper he recalls that in the last 300 years no English High Court Judge has been dismissed for ethical reasons and, with cause, he maintains that this is due to "the practice of appointing judges from a small pool of candidates, sharing a common professional background and known personally or by professional repute to those making and advising on appointments".

Table 1: Disciplinary proceedings 2001-2008

Proceedings/ Years	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**	**Total**
Admonition	18	17	18	14	19	16	9	12	123
Censure	3	5	4	3	7	8	5	4	39
Loss of seniority	0	1	6	1	4	7	6	8	33
Dismissal	0	2	0	1	1	1	0	3	8
Incapacity for directive positions	0	0	0	0	0	0	0	1	1
No. punishments	**21**	**25**	**28**	**19**	**31**	**32**	**20**	**28**	**204**
No. acquittals	54	47	31	43	55	66	23	24	343
No. proceedings terminated before trial	66	39	50	45	40	51	45	52	388
Tot. proceedings	**141**	**111**	**109**	**107**	**126**	**149**	**88**	**104**	**935**
Appeals to the Supreme Court of Cassation	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**	**Total**
Revised	5	2	6	6	4	0	5	2	30
Rejected	15	9	11	12	10	14	31	17	119
Other	0	0	0	0	0	0	0	2	2
No. appeals	**20**	**11**	**17**	**18**	**14**	**14**	**36**	**21**	**151**

VIII. Immunity for Judges

There is no criminal immunity for judges. Actually a law, requested by citizens through a referendum, provided that judges can be sued for damage generated by their judicial decisions.[84] However, the circumstances under which such an initiative may be taken by citizens are so very limited and the procedure so cumbersome that initiatives of this nature are, to say the least, extremely rare and *de facto* no judge has ever been sentenced to pay damages.

IX. Associations for Judges

The ANMI, i.e. the trade union to which well over 90% of all magistrates are affiliated,[85] plays a major role in the election of judges and prosecutors to the SCM and in orientating their policies in the course of their mandate. Actually the electoral competition takes place among candidates who are sponsored by the four factions of the ANMI. Most of the national leaders of ANMI and of its four factions have become members of the SCM. While the elected members change every four years, the magistrates' trade union guarantees continuity of action of its representatives in the Council in support and promotion of its conception of judicial independence and of the corporative interests of the judicial corps. While on such matters the orientations of the different factions of the ANMI are largely identical, in the decisional process of the SCM the representatives of the four factions as a rule support the requests and interests of their respective associates on matters such as transfers and appointments to heads of courts, chiefs or deputy chiefs of prosecution offices.

---

[84] In 1987 a referendum was held to abrogate the ineffective laws on the civil responsibility of magistrates. Over 20 million citizens (80.20% of the voters) voted for the abolition of the existing law and for the promulgation of a more effective one. Parliament afterwards passed a new law which basically ignored the citizens' request. For an analysis of the reasons see G. Di Federico, The crisis of the justice system and the referendum on the judiciary, in: R. Leonardi/P. Corbetta (eds.), Italian Politics: A Review, 25 (1989).

[85] At present 8,284 magistrates out of 8,886 (93%) are paying members of the ANMI.

X. Resources

In Italy the budget for the justice system per inhabitants is higher than in other Western European countries.[86] However the Association of Italian magistrates, heads of courts and the SCM often request that more funds be allocated for the administration of justice.

C. Internal and External Influence

I. Separation of Powers

The Italian Constitution provides that the judiciary is independent and autonomous from the legislative and executive powers (Article 104 Constitution) and that "judges are subject only to the law" (Article 101 Constitution). Pursuant to Article 105 Constitution all decisions concerning the governance of magistrates (from recruitment to retirement) are within the exclusive competence of the SCM. Therefore the SCM is the bulwark of judicial independence from all other powers. Naturally Parliament is empowered to legislate on matters concerning the administration of justice. However, the SCM regularly on its own initiative expresses its opinions on bills pending in Parliament relating to the justice system.

The Minister of Justice plays a very limited role in decisions concerning the status of judges (and prosecutors).[87] The main power of the Minister in the governance of the judicial corps is its power to initiate disciplinary proceedings against magistrates.[88] The Minister of Justice can participate in all the plenary sessions of the SCM, but without the right to

---

[86] See European Commission for the Efficiency of Justice (CEPEJ), Report Edition 2008 (data 2006), in particular Table 2, at 18-19 and Figure 2, at 20, available at <http://www.coe.int/T/dghl/cooperation/cepej/default_en.asp>. Actually Figure 2 shows that with reference to the "annual public budget allocated to all courts per inhabitants in 2006" Italy spends more than France, England and Wales, Scotland, Finland, Denmark, and most other European countries.

[87] For a description of the role of the Minister of Justice and of the organization of his ministry see D. Carnevali/F. Contini, Il Ministero della giustizia, in: G. Di Federico (ed.), Manuale di Ordinamento Giudiziario, 203 (2004).

[88] Cf. *supra* B. VII. Judicial Accountability: Discipline and Removal Procedures.

vote. He/she has the right to be informed of all decisions the Council is about to take on the status of magistrates, of the proposals formulated by the SCM's advisory committees and of the relevant documentation, and the Minister is empowered to formulate motivated opinions on all those proposals. The Minister of Justice hardly ever exercises such prerogatives and participates in the sessions of the SCM only on ceremonial occasions. On extremely rare occasions, if ever, does he/she express an opinion on the merits of the decisions the SCM is about to take on the status of magistrates.

Some of the powers assigned to the Ministry of Justice by the 1958 law on the structure and functions of the SCM[89] have been cancelled or circumvented by two decisions of the Constitutional Court. The first such decision related to the ability of the SCM, pursuant to the 1958 law, to decide on matters concerning the status of magistrates only following a specific request of the Minister of Justice. It was an important power, similar to that of the French Minister of Justice, insofar as the Council could successfully oppose the Minister's proposal but could not decide otherwise, but was instead obliged to wait for a new ministerial proposal. In December 1963 the Italian Constitutional Court decided that such a power of the Minister was unconstitutional because it was incompatible with judicial independence.[90] Since then the SCM has acquired full control of its own agenda and decisions. The second decision concerns the commission for the appointment of heads of judicial offices, which is the only advisory commission of the SCM which is functionally connected to an outside authority. The law provides that the advisory commission must submit its proposals of nominee/s to the Minister of Justice once the preparatory work is completed and before the Council can decide on the matter. In 1992 the SCM, on one of the very rare occasions of conflict with the Minister of Justice, obtained from the Constitutional Court a decision on the actual powers of the Minister. The Constitutional Court decided that the Minister cannot have a veto power on the proposals of the SCM's advisory commission, because that would be contrary to judicial independence. It decided that the law simply provides that a real effort should be made to reach a joint decision; otherwise the proposals of the advisory committee are in any case to be submitted, as originally formulated, to the Council for its final decision.[91]

---

89 Law no. 195/1958.

90 Sentence of the Constitutional Court no. 168 of 1963.

91 Sentence of the Constitutional Court no. 379 of 1992.

With regard to the role of the Minister of Justice it is important to point out that almost all the executive positions (high, intermediate and low) in the Italian Ministry of Justice are assigned to magistrates. At present the Ministry of Justice employs 84 magistrates including the heads of the Minister's Cabinet, of the Ministerial departments, of the legislative office, of the inspectorate, of the jail system, and of the directorate for the planning and implementation of technological innovations. The formal decisions to assign magistrates to the Ministry are made by the SCM following a nominal request from the Minister. In continental European countries the presence of judges (and prosecutors) in the ministries of justice is quite common. However, the status of the Italian magistrates who work at the Ministry of Justice is quite different from that of their counterparts in other countries. In Italy the Minister has no powers with regard to all decisions concerning their professional evaluation and promotion, their future appointments to desired judicial roles or locations, or their discipline. All those decisions are exclusively in the hands of the SCM. It is only natural that the magistrates at the Ministry should try to conform their conduct as much as possible to the expectations of the magistrates' trade union and its representatives in the SCM, also because some of the magistrates who acted otherwise have been severely penalized by the Council.[92] A deliberation approved by the magistrates of the ANMI's section at the Ministry of Justice in 1983 is quite telling regarding the perception they have of their role at the Ministry and of the importance of their presence there.[93] The deliberation plainly states that one of their primary tasks is to avoid the Min-

[92] Among the several examples of this phenomenon the most well known is that of the negative evaluation made by the SCM's commission for the appointment of Giovanni Falcone as director of the National Anti-mafia Directorate. Falcone was the internationally most famous Italian magistrate for his successful investigation of national and international cases of organized crime and was at that time Director of the Department of Criminal Affairs of the Ministry of Justice. He had prepared for the Minister of Justice a Legislative Decree for the more efficient investigation and prosecution of mafia crimes, a legislative decree which was vehemently opposed by the Magistrates' trade union and by most of its representatives in the SCM. The proposal of the SCM advisory commission not to appoint Falcone as head of the Anti-mafia Directorate was not considered by the Plenum of the Council because meanwhile Falcone had been assassinated by the mafia in May 1992.

[93] For the text of this deliberation see G. Di Federico/M. Sapignoli, Processo penale e diritti della difesa: la testimonianza di 1000 avvocati penalisti, at 33 note 53 (2002).

ister of Justice taking initiatives which are detrimental to judicial independence.[94]

II. Judgments

1. Basis

Pursuant to Article 111 Constitution, all judicial decisions must be motivated in writing. Every decision has to be motivated with reference to the existing laws, as interpreted by the judges delivering the decision. Appeals on matters of law (i.e. against the interpretation of the law made by a judge of a lower court) are provided both to the appellate courts and to the Supreme Court of Cassation.

2. Practice

The statistics from courts of general jurisdiction for the year 2008 show that out of 261,502 judgments there were 59,446 acquittals (30.7% of the total) and there were 8,872 *promiscuous* judgments (only partial ac-

[94] Such a deliberation justifies in various ways the need for all executive positions in the Ministry of justice to be assigned exclusively to members of the judiciary. Among the various reasons, this document states that the role of magistrates in the Ministry is necessary "to diminish the dangers that the 'serving function' assigned by the Constitution to the Minister for the functioning of the judicial system might be used to condition judicial power and, therefore, substantially violate the fundamental principle of the independence of the magistracy". On occasion the magistrates of the Ministry have openly opposed the initiatives of their Minister, and in doing so received the support of the SCM. In October 2001 some of the magistrates of the Legislative office of the Ministry had prepared a document which was severely critical of a legislative initiative of the Minister. The Minister decided anyway to present his bill in Parliament. The magistrates of the Ministry's Legislative office reacted by informally providing the opposition parties in Parliament with the document which the Minister had disregarded. On this episode see the two articles which this writer published in the newspaper: Il Messaggero, Magistrati del ministro? In teoria si, ma dipendono dal CSM (20 October 2001); I magistrati ministeriali stanno lì a 'marcare' il Ministro (22 October 2001).

quittals). The percentages of acquittals do not vary substantially for the previous three years.[95]

3. Structure

For civil cases Article 132 of the code of civil procedure provides that judgments must indicate the names of the judge/s, the names of the parties and their advocates, a concise presentation of the judicial proceedings and of the motives (in fact and law) for the decision, and the signature of the judge.[96] In criminal cases in addition to the names of the judge/s and the parties, the judgment must state the charges, the conclusions of the parties, a concise indication of the reasons (in fact and law) for the judgment, the decision and the specific norms on which it is based, as well as the signature of the judge or the presiding judge (Article 546 Code of Criminal Procedure).[97]

4. Public Access

All judicial decisions of the Supreme Court of Cassation can be consulted on a database called *Italgiure Web*.[98] Quite a few law reviews[99] have their own consultable databases which contain a substantial number of selected judicial decisions of the Supreme Court of Cassation, of the courts of appeals and of the courts of first instance. Consultation of those databases, however, requires the payment of a fee.

All courtroom proceedings are open to the public and to the media.[100] However, some restrictions do exist with regard to proceedings involving minors. Under special circumstances the judge may decide to hold a

---

[95] In the years 2005-2007 the percentage of acquittals varied between 32% and 34%.

[96] Italian Code of Civil Procedure (*Codice di Procedura Civile*), available at <http://www.altalex.com/index.php?idnot=33723>.

[97] Italian Code of Criminal Procedure (*Codice di Procedura Penale*), available at <http://www.altalex.com/index.php?idnot=2011>.

[98] See ItalgiureWeb, available at <http://www.italgiure.giustizia.it/>.

[99] Such as: Foro Italiano, De Jure, Juris data, Infoleges, De Agostini Professionale.

[100] See Article 471 Code of Criminal Procedure and Article 128 Code of Civil Procedure.

hearing behind closed doors (for example for reasons of public order or decency) or forbid the use of photo or television cameras.

III. Improper Influence on Judicial Decisions

Cases of ascertained outright corruption of Italian judges are extremely rare. The phenomenon of *ex parte communications* seems to be widespread and hardly avoidable because judges and prosecutors belong to the same corps, usually work in the same buildings and have daily opportunities to meet, and frequent professional and social encounters.[101] Improper pressure is often voiced by the media or by politicians and might be due only to the personal characteristics of the judges, certainly not to the lack of guarantees for the protection of judicial independence.

However a series of negative consequences has been generated by the fact that promotions are based on length of service including the performance of non-judicial functions in the public sector. The years spent in such activities are calculated in terms of seniority as if they were spent in the performance of judicial functions in all the SCM's decisions (regarding professional evaluation, career, salary, transfers etc.). This has greatly facilitated the search for extra-judicial activities on the part of many magistrates. In other words, Italian magistrates can shop around for additional revenue in the public sector without losing any of the advantages of their judicial career. The dimensions and nature of the phenomenon have in many ways eroded the borderline between the judiciary and the political class, threatening the very independence of the judiciary. Moreover, when the SCM has to decide who to assign a much sought-after judicial position and one of the applicants is a magistrate who spent years in full-time extra-judicial activities, the calculations of those years as if they were years of judicial service might (as actually happens) result in their prevailing over magistrates with more years of actual judicial service.[102]

---

[101] See G. Di Federico/M. Sapignoli (note 93), at 15-24.

[102] For an example see the minutes of the meeting of the SCM held in the afternoon of 6 July 2006. Two magistrates were competing for a position as head of one of the sections of the Supreme Court of Cassation. Both were already judges of that Court and both had highly and equally appreciative professional evaluations. One of them, Judge De Luca, had formal seniority of three years more that that of Judge Di Iorio. However Judge De Luca had been a member

A relevant number of magistrates have held positions of direct representation of political parties:[103] as members of the national Parliament,[104] as members of the European Parliament,[105] as members of the national executive,[106] as presidents of regional governments,[107] as mayors of cities,[108] or as members of the executives of several local governments.[109] One magistrate Parliamentarian was even elected as national secretary of a political party (the Socialist Democratic Party). Most of those magistrates at the end of their political careers return to exercising judicial functions (including the one who was secretary of a political party), and can even sentence representatives of political parties in opposition to that which they represented in Parliament.[110] There are nu-

---

of Parliament for seven years. Therefore in terms of actual judicial service judge Di Iorio had four years' more judicial experience than Judge De Luca. The vast majority of the SCM decided that judicial seniority had to include the years spent in Parliament and appointed Judge De Luca. At that time this writer was a member of the SCM and wrote the reasoning in favour of Di Iorio with reference to his longer period of actual judicial experience. This writer was also president of the SCM advisory committee for the appointment to "directive positions", a committee which must hear the opinion of the Minister of Justice before submitting its proposals to the SCM (see *infra* C. I. Separation of Powers). The Minister agreed with the majority of the SCM advisory committee on the choice of Judge De Luca, then he turned toward this writer and, smiling, said that he could not but share the proposal of the majority of the SCM's commission because, after all, Judge De Luca had been a colleague of his in Parliament for many years.

[103] At present the magistrate-mayor of the city of Bari is also the regional secretary of the centre-left Democratic Party.

[104] Considering all the national elections since the mid-1970s, the number of magistrates elected has varied from a minimum of 12 in 1979 to a maximum of 27 in 1996 (in this election 50 magistrates participated in the electoral contest on various party tickets).

[105] Two or three for each election.

[106] Only in the last three years at least one minister (of justice) and four undersecretaries.

[107] For the regions of Marche and Sardinia.

[108] Even major cities like Genoa and Bari.

[109] Even of major cities like Naples, Palermo and Bologna, or regions like Sicily.

[110] The best known case is that of a magistrate serving on one of the judging panels of the Court of Cassation, Judge Pierluigi Onorato. He had been a par-

merous other non-judicial positions occupied by members of the judiciary which can be obtained only through the sponsorship of political parties or of single members of the political class, such as: members of *national authorities* (for the discipline of labour relations, competition, information and communications technologies, etc.), members of parliamentary commissions of inquiry, administrative positions in various ministries (some of which are in direct collaboration with Ministers and under-secretaries), consultants to the President of the Republic and to the office of the Prime Minister, and various positions in international organizations. Magistrates holding those positions have the opportunity, through daily contact and collaboration, to establish solid relations with influential members of the political class, in view (at times successful) of more rewarding appointments to positions which are within the spoils system governed by political parties. The number of magistrates who in various ways cultivate relations with political parties or party leaders to obtain rewarding extra-judicial positions furthers the erosion of the borderline between the judiciary and the political class.[111]

The widespread phenomenon of extra-judicial activities has often been the object of heated debate. Reform commissions have unsuccessfully requested, in the name of judicial independence, that magistrates neither be allowed to run as candidates in national, local and European elections, nor that they be appointed as members of the Executive.[112] Two referenda were held to forbid extra-judicial activities as incompatible with judicial independence. The majority of citizens voting were in fa-

---

liamentarian of the Communist Party for several legislatures. In a judicial case regarding a parliamentarian of staunch anticommunist standing, Marcello Dell'Utri, the magistrate who had been parliamentarian for the Communist Party was given the task of instructing the case for the judging panel and, later, writing the collegiate decision. The anticommunist parliamentarian was sentenced to more than two years' imprisonment. Furthermore, it turned out that in the opinion written by Judge Onorato an attenuating circumstance specifically put forward by the defence had not been considered. For a description of this judicial case see G. Di Federico, Se il giudice è un ex Onorevole PCI, Il Resto del Carlino (28 November 1999); G. Di Federico, Quel giudice molto Onorato e molto PCI, Il Resto del Carlino (6 December 1999).

[111] Such positions are often very rewarding also from the financial point of view, like those of members of national regulatory authorities or members of Parliament. From the age of 65 magistrates who are former members of Parliament draw a pension in addition to their salary as members of the judiciary.

[112] See Commissione Ministeriale per la riforma dell'ordinamento giudiziario, in: Documenti Giustizia no. 5, 1087, at 1102-1118 (1994).

vour of such reform[113] but the referenda did not achieve the necessary *quorum*.[114] It showed, however, how widely diffused among citizens is the belief that the nature and dimensions of extra judicial activities, as they have developed in Italy, are incompatible with judicial independence.

The collecting of information concerning judges and judges' associations by the Italian Intelligence and Military Security Services, which was revealed by the Office of the Prosecutor of Milan in July 2006 and criticized in a report by the UN Special Rapporteur on the independence of judges and lawyers,[115] is unacceptable and serious. The subsequent statement issued on 4 July 2007 by the SCM in defence of judicial independence (some of the informants quoted anonymously there were magistrates) was certainly appropriate.[116] However, the statement of the SCM also reveals that the information collected on the magistrates (predominantly public prosecutors) could hardly have been used to blackmail them and to threaten judicial independence. In the view of the author the information collected seems to suggest that the intelligence authorities had a marked leaning towards also wasting taxpayers' money. It should be mentioned that between April 1990 and July 2007 the SCM issued 18 statements in defence of the independence of magistrates (predominantly prosecutors) for the verbal attacks received mainly by politicians.[117]

---

113 In the 1995 referendum 11,160,923 citizens (85.6% of the votes) were in favour, and 10,200,692 in 2000.

114 In Italy a referendum is successful only when the absolute majority of the electorate actually votes.

115 Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy (28 May 2008), UN Doc A/HRC/8/4/Add.1, at 109-110, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/8session/A.HRC.8.4.Add1.doc>.

116 The statement can be consulted on the website of the SCM, available at <http://www.csm.it/>.

117 All these deliberations of the SCM can be read in full text on the SCM's website. Ibid.

IV. Security

The security of courts is no longer an issue which is debated in Italy. Although 25 magistrates – predominantly prosecutors, instructing judges, magistrates engaged in the management of the jail system – were assassinated almost exclusively by terrorists and the mafia between 1969 and 1992, no assassination attempt was carried out in the last 17 years. Of the magistrates killed 18 were prosecutors and two instructing judges (who before 1989 conducted investigations just like public prosecutors), three were judges (one of them was killed because she was in the same car as a prosecutor specializing in mafia crimes), and two were involved in the management of the jail system.

All magistrates involved in proceedings regarding organized crime or terrorism are provided with security (bullet proof) cars and a police escort round the clock. Their houses or temporary residences (e.g. during holidays) are under police surveillance. Very strict security measures are adopted to protect the courtrooms destined for trials involving organized crime (i.e. relating to the mafia and terrorism).

D. Ethical Standards

I. Code of Ethics for Judges

Until 2006 the law did not provide for a detailed code of judicial ethics. In 1994 the ANMI was called upon to draft a code of judicial conduct, yet the Judicial Code of Ethics resulting from this was not legally binding. The 2006 law on judicial discipline, the purpose of which was to make magistrates fully aware of the nature and content of disciplinary violations and to make disciplinary proceedings more effective and rigorous, contains an exhaustive list of disciplinary violations providing guidance on behaviour which can be disciplined.[118]

II. Training

Newly recruited magistrates are provided with one or more lectures on judicial discipline and the content of the code. No special consideration

[118] See *supra* B. VII. 1. Formal Requirements.

has been given to training on ethical standards in the programmes of continuing education.

E. Supreme/Higher Courts

Until 2006 the posting of magistrates to the Supreme Court of Cassation did not follow an evaluation procedure different from that for any other posting to a higher court. The recent law on professional evaluations, however, provides that in decisions regarding the professional evaluation of judges the SCM must take into account also the opinion of a committee of five members composed of three high level magistrates, a university professor, and a lawyer entitled to advocate in the Supreme Court. All the members of that committee of experts are appointed by the SCM.[119] In its decisions the SCM can disregard the opinions of this committee, but only on the basis of an *ad hoc* motivation.

F. Conclusion

Considering the measures adopted by democratic countries to implement judicial independence, external and internal, at the applied level the *guarantees* of independence, and with them the very meaning of judicial independence, vary greatly from one country to another in crucial areas of the governance of the judiciary, such as the role and compositions of the agencies of self-governance of the judiciary,[120] the supervi-

---

[119] Article 12 D.Lgs. no. 160/2006.

[120] Among judicial councils of Western European continental countries the Italian SCM is the only one which has all the decisional powers on the status of judges from recruitment to retirement. In Belgium, Portugal, Spain the councils are competent for the recruitment of judicial personnel, while in France, Sweden, and The Netherlands they are not. In Portugal and Spain the councils are competent on matters of professional evaluation for the promotions of judges. In Belgium, Denmark, France, Sweden and The Netherlands they do not have such powers, and in France, Portugal and Spain they have powers with regard to disciplining judges, while the councils of Belgium, Denmark, Sweden and The Netherlands do not. The ratio of representatives of the judges in the national judicial councils varies greatly: from 2/3 in the Italian SCM to an equal number of magistrates and experts in the Belgian Council. Furthermore the same reasons that inspired the creation of national judicial councils vary from

sory role played by the heads of courts,[121] the powers of the Minister of Justice or other outside agencies.[122]

In Italy judicial independence, external and internal, has received a great deal of attention and its implementation at the operational level now permeates all aspects of the governance of the judiciary. The value of judicial independence as interpreted and promoted by the magistrates' trade union and its representatives in the SCM has given rise to a remarkable expansion of the powers of the Council and has successfully inspired the legislation on many aspects of judicial governance. Compared to other European countries the scope of independence in Italy is broader. The Minister of Justice does not have any decisional powers in the governance of the judiciary, the only exception being the power of disciplinary initiative expressly assigned to him by the Constitution. It is the SCM which is in charge of the governance of magistrates and *de facto* entrusted with the task of protecting judicial independence.

The role of the SCM and the developments of judicial governance in Italy seem fully to validate the worries frequently expressed in several countries with regard to the actual functioning of national judicial councils composed of a majority of magistrates, namely that the value of independence be used as a means to pursue the corporate interest of magistrates to the detriment of an effective balance between the values of independence and accountability, a balance which is necessary for the proper and efficient functioning of the judicial system.[123]

---

country to country. The creation of national judicial councils of all former transitional countries (Eastern and Central European countries as well as Italy, Spain and Portugal) had and have as their primary goal the promotion and protection of judicial independence; the Councils of Denmark and The Netherlands were created (respectively in 1999 and 2002) primarily to promote the better management and performance of courts (and with it also a more accountable judiciary); the Belgian Council was created in 1999 primarily to re-establish the credibility of the judiciary which had been shaken by a grave series of scandals.

[121] For example the relevant role played by the heads of courts in France, Germany and Austria in the supervision and evaluation of judicial performance would in Italy be considered a violation of internal independence. Cf. G. Di Federico (note 41).

[122] Just the main ones: in Denmark, Sweden and The Netherlands all members are appointed by the Minister of Justice or the Cabinet of Ministers. In Spain both judges and experts are elected by Parliament.

[123] Such a debate has gone on for years in Italy, Spain and France. In Spain the statute of the judiciary was modified in 1985 and it provides that the judge

One of the most obvious evolutions of the modern democratic state is the increasing political relevance of the judiciary.[124] Indeed, there are very few areas of vital interest for citizens which have remained untouched by judicial decisions.[125] Furthermore, the proper working of the judicial system is a key factor in attracting foreign investment, and thus also a relevant factor of economic development. The very well-being of the citizens and of the community as a whole has become far more dependent than in the past on the content of judicial decisions and on the expediency with which they are delivered. Such developments in the political relevance of judicial power have in turn spurred, in some democratic countries more than in others, the search for adequate means to render the judiciary more accountable, while at the same time safeguarding its independence. In this light one can read the efforts of many democratic states to devise and implement more stringent and effective measures to ensure that the judges be carefully selected and throughout the period of their service perform their duties with professional competence, diligence, efficiency, impartiality, and maintaining a posture which inspires the confidence of citizens. Much more than in the past judicial independence and accountability are considered as two faces of the same coin which cannot be dealt with separately at the policy making level. In no way does this paper underestimate the crucial importance of a fully independent judiciary for the proper functioning of a democratic community. However independence is an instrumental

---

members of the Council are no longer elected by their colleagues, but instead by Parliament by qualified majority (Arts. 111-113 *Ley Organica del Poder Judicial* 6/1985 as modified by the *Ley Organica* 2/2001). A recent reform of the French Constitution has modified the composition of the judicial council in such a way that, among other things, the ordinary magistrates elected by their colleagues are no longer in a majority in the Council (Article 31 of the *Loi Constitutionnelle* no. 2008-724 of 23 July 2008).

[124] C. Neal Tate/T. Vallinder (eds.), The Global Expansion of Judicial Power (1995).

[125] This applies to matters such as human rights, health, social security, education, labour relations, family relations, commercial relations, customers' rights, even recreational activities and the media, etc. The literature on this phenomenon is ample. See, for example, L. M. Friedman, Total Justice (1985); K. Malleson, The New Judiciary. The effects of expansion and activism (1999). Moreover, the dangerous evolution of criminal activities (from those in the metropolitan areas to those which have acquired an international dimension) has made judicial repression of crime ever more important for citizens and the community as a whole.

value and not an end in itself. It is primarily intended to create the most favourable conditions under which the judge may decide in an impartial way, *sine spe ac metu* (without fear or hope). Measures adopted with the intention of promoting judicial independence should not in any case gravely undermine other values equally important for the proper functioning of the judicial system, such as the guarantees of professional qualification and diligence in the performance of judicial duties, short of generating – as in the Italian case – serious dysfunctional consequences.

One of the most quoted judicial aphorisms is that "justice delayed is justice denied". Delayed justice is a widespread phenomenon in Italy, and the judicial system is one of the most inefficient worldwide according to the ratings of the World Bank in its recommendations to investors.[126] Certainly Italy is by far the country which has received the highest number of condemnations for delayed justice by the European Court of Human Rights (ECtHR) and the Committee of Ministers of the Council of Europe: more than 12 times as many as those collected together by Austria, Belgium, Germany, Norway, Sweden, Switzerland, the Netherlands, and the UK.[127] Actually the Committee of Ministers officially recognized the serious inadequacy of the Italian situation and the very great risk which it implied for a democratic state based on the

[126] With regard to the efficiency of contract enforcement the last ranking made by the World Bank places Italy at the lowest level (level 169 out 181 countries considered), i.e. after all the countries of Western Europe, all but one of the countries of Eastern and Central Europe, all the countries of the Anglo Saxon legal tradition. Even most of the countries of Africa and Asia seem to do better than Italy. See Enforcing contracts, available at <http://www.doingbusiness.org/ExploreTopics/EnforcingContracts/?direction=Asc&sort=3>.

[127] Up to and including 2006 2,909 violations for excessive delays were found for Italy as against 231 for the other eight countries together: see H. Keller/A. Sweet Stone (eds.), A Europe of Rights – The Impact of the ECHR on National Legal Systems, at 729-788 (2008). Actually those data do not portray the full gravity of the problems of judicial delays. By 2001 the excessive number of Italian cases of delay brought before the ECtHR was such as to create an unmanageable backlog. Italy was then compelled to pass Law no. 89 of 2001 (the so-called *legge Pinto*) which provides a legal remedy for excessive delays before the national appellate courts: a remedy which has drastically reduced the number of Italian applications before the ECtHR from an average of almost 400 cases a year decided in the period 1996-2001 to an average of a little over ten in the period 2003-2006 (ibid., at 810-811).

rule of law.[128] This is despite the substantial investment in human and financial resources in Italy.[129] One of the causes of that inadequacy is certainly the lack of substantial control over the professional performance and diligence of Italian magistrates by the SCM for the last 40 years.

The SCM has paid no attention to the view that the guarantees of high professional standards might themselves be one of the necessary *ingredients* of judicial independence. This is probably due to a misunderstanding of the concept of judicial independence, as the current system of promotion demonstrates. In Italy professional evaluations and promotions have for many years been based on seniority of service and not (as required by the law) on assessment of professional performance. This was originally requested by the association of magistrates and by the SCM in order to promote the independence of the lower ranks of the judiciary from the influence of a limited number of high ranking magistrates, but it lasted for several decades beyond the period in which that original reason could reasonably be invoked. Though in the last 15 years the ANMI and its representatives in the SCM have recognized the need for a more substantial assessment of the professional performance of magistrates, this insight has so far not produced substantial effects on the operational level.

Another drawback for the effective functioning of the judiciary is the *de facto* practice that magistrates for the entire period of 40/45 years of their service can be transferred from one court (or prosecutor's office) to another only if they so wish. Therefore the only effective means to fill the vacancies in judicial offices located in areas disliked by magistrates has been to offer very substantial increases in monthly salaries and other privileges in order to induce a sufficient number of magistrates voluntarily to agree to be transferred.

The present chapter has analyzed some of the negative consequences of a system which relies heavily on the Superior Council of the Magistracy for the governance of the judiciary. Recently, however, some laws have been passed which are explicitly intended to provide remedies, while others seem to be in the making. Those which have already been passed are the law of 2006 on the disciplinary system which is intended to ren-

---

[128] Id., at 426-427.

[129] See European Commission for the Efficiency of Justice (CEPEJ), Report Edition 2008 (data 2006), in particular Table 2, at 18-19 and Figure 2, at 20, available at <http://www.coe.int/T/dghl/cooperation/cepej/default_en.asp>.

der judicial discipline more rigorous, and the law of 2007 intended to re-establish a rigorous system of professional evaluation. Those laws are too recent to pass any definitive empirical evaluation of their efficacy at the present time. However, it can be said that the new system of professional evaluation has certainly not achieved the expected results in the first three years of its application. No reform initiatives are being advanced to re-establish clear boundaries between the judiciary and the political class. Though the law of 2006 on judicial discipline forbids magistrates from "be[ing] members of political parties or participate systematically and with continuity in party activities",[130] the law of 2007 on professional evaluations provides that – as in the past – magistrates who are elected as representatives of political parties in Parliament or in the executives at national and local levels, as well as those who hold full-time positions which are part of the spoils system controlled by party leaders, can obtain at the same time all the advantages of the judicial career and in due time reach the highest rank, salary and pension.

[130] See Article 3 D.Lgs. no. 109/2006.

Judicial Independence in Switzerland

*Regina Kiener**

A. Introduction

The basic provision concerning judicial independence in Switzerland is Article 191c Federal Constitution, which states that in their adjudicative activity all judicial authorities are independent and subject only to the law. Furthermore, the basic rights catalogue states the right to an independent and impartial tribunal established by law.[1] Judicial independence as guaranteed in Article 191c Federal Constitution has a two-dimensional meaning: on the one hand, it guarantees a judicial organization that realizes the basic right to an independent and impartial tribunal established by law.[2] On the other hand, Article 191c Federal Constitution is to be seen in connection with the principle of separation of powers and demands to secure the judiciary institutionally as a separate power.[3] In Switzerland with its strong democratic tradition, though, the legislative branch predominates over the other branches of

* The author would like to thank her research assistants Dr. iur. Melanie Krüsi for critical reflection on the text and help with research and translation and MLaw Sibilla Bondolfi for her research assistance.

1 Article 30 section 1 *Bundesverfassung der Schweizerischen Eidgenossenschaft* (BV) (Federal Constitution) 18 April 1999, SR 101 (Switz.); see R. Kiener, Richterliche Unabhängigkeit, at 18 (2001).

2 Article 30 section 1 BV.

3 G. Steinmann, Art. 191c (3) BV, in: B. Ehrenzeller/P. Mastronardi/R. J. Schweizer/K. A. Vallender (eds.), Die schweizerische Bundesverfassung (in the following: St. Galler Kommentar) (2nd ed., 2008). For details see Kiener (note 1), at 25-30.

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233, DOI 10.1007/978-3-642-28299-7_11,

government.[4] The Federal Assembly holds essential responsibilities such as high supervision (*Oberaufsicht*) over the federal judiciary[5] or the power to elect and re-elect the federal judges.[6] Furthermore, the Federal Supreme Court is bound by federal statutory law and has to apply it, even if it turns out to be unconstitutional.[7] The Swiss emphasis on the democratic principle also entails constitutional specialities like modest formal criteria of eligibility as a judge[8] or a limited term of office for judges with the need to be re-elected. Capable of jeopardizing judicial independence in a considerable way, the requirement to be re-elected is one of the most pressing issues of judicial independence in Switzerland.[9] This chapter will discuss these issues and will show that, in practice, the independence of the Swiss judiciary is not put into question.[10]

As to the legal bases of judicial independence, guarantees are included in the cantonal constitutional provisions pertaining to the cantonal judiciary. Both the Confederation and the cantons have their own statutes on the organization of the judiciary and the status of judges. However, there is no specific law on judges, like for instance the German Federal

---

4 For the federal level see Article 148 section 1 BV and Article 190 BV; see also U. Häfelin/W. Haller/H. Keller, Schweizerisches Bundesstaatsrecht, at 417 (2008). See *infra* C. I. Separation of Powers.

5 Article 169 section 1 BV; Article 3 section 1 *Bundesgesetz über das Bundesgericht* (BGG) (Federal Law on the Federal Supreme Court) 17 June 2005, SR 173.110 (Switz.); Article 3 section 2 *Bundesgesetz über das Bundesverwaltungsgericht* (VGG) (Federal Law on the Federal Administrative Court) 17 June 2005, SR 173.32 (Switz.); Article 3 section 2 *Bundesgesetz über das Bundesstrafgericht* (SGG) (Federal Law on the Federal Criminal Court) 4 October 2002, SR 173.71 (Switz.); Article 3 section 2 *Bundesgesetz über das Bundespatentgericht* (PatGG) (Federal Law on the Federal Patent Court) 20 March 2009, SR 173.41 (Switz.). See *infra* B. I. 1. Organs in Charge of the Administration of the Judiciary; B. I. 2. Judicial Council.

6 Article 168 BV; Article 5 section 1 BGG; Article 5 section 1 VGG; Article 5 section 1 SGG, Article 9 section 1 PatGG. See *infra* B. II. 2. The Process of Judicial Selection; B. II. 3. Length of Office and Reappointment.

7 Article 190 BV.

8 See *infra* B. II. 1. Eligibility.

9 See *infra* B. II. 3. Length of Office and Reappointment; B. VII. Judicial Accountability: Discipline and Removal Procedures (especially B. VII. 4. Sanctions and Practice); E. Supreme Court; F. Conclusion.

10 See *infra* F. Conclusion.

Judges Act (*Richtergesetz*), either at federal or at cantonal level. Provisions on the independence of courts and on the impartiality of judges can be found in the federal and cantonal constitutions, in federal and cantonal statutes on civil, criminal or administrative procedure, and in statutes on court organization. In addition, the federal courts as well as the cantonal courts have passed administrative regulations on matters of court organization.[11] In the legislation one will encounter great variety, according to the court level and the judicial branch concerned. Due to these circumstances, from a Swiss perspective it is almost impossible to give a review that takes into account all different aspects of the subject of this chapter. In what follows, the author refers to the federal level and – where data are available – to the cantonal level as well, thereby trying to focus on the rules and regulations common to the majority of the cantons.

Judicial independence in Switzerland is a rather complex issue as, as a result of the federal structure, both the Confederation (*Bund*) and the 26 cantons (*Kantone*, the states) have their own judicial systems.[12] The federal judiciary consists, on the one hand, of the Federal Supreme Court (*Bundesgericht*) and, on the other hand, of the federal courts of first instance. The Federal Supreme Court embodies the highest federal judicial authority.[13] As the court of final appeal in almost every legal field it watches over the correct and uniform application of federal and international law.[14] On appeal, it reviews the decisions of the cantonal courts in matters of civil, criminal and administrative law,[15] as well as

---

[11] See e.g., with regard to the Federal Supreme Court, *Reglement für das Bundesgericht* (BGerR) (Administrative Regulation on the Federal Supreme Court) 20 November 2006, 173.110.131 (Switz.).

[12] For the federal system see e.g. R. Rhinow/H. Koller/C. Kiss/D. Thurnherr/D. Brühl-Moser, Öffentliches Prozessrecht (2010). For the cantonal system see e.g. D. Buser, Kantonales Staatsrecht: eine Einführung für Studium und Praxis (2004); R. Hauser/E. Schweri, Kommentar zum zürcherischen Gerichtsverfassungsgesetz vom 13. Juni 1976 mit den seitherigen Änderungen (2002); H. Hausheer, Die neue Gerichtsorganisation des Kantons Bern und deren Auswirkungen auf den Zivil- und Strafprozess (1996).

[13] Article 188 section 1 BV. See also Article 1 section 1 BGG.

[14] See H. Koller, Art. 1, in: M. A. Niggli/P. Uebersax/H. Wiprächtiger (eds.), Basler Kommentar Bundesgerichtsgesetz (in the following: BSK BGG), at paras. 37-46 (2008).

[15] See Arts. 72-77, Arts. 78-81 and Arts. 82-89 BGG.

the decisions of the federal judicial authorities.[16] As there is no special constitutional court, the Federal Supreme Court also serves as a constitutional court when such issues are raised by litigants.[17] The Federal Criminal Court (*Bundesstrafgericht*)[18] is the court of first instance in matters of federal crimes, i.e. crimes of a specific nature assigned to the federal jurisdiction by federal statutory law,[19] whereas the Federal Administrative Court (*Bundesverwaltungsgericht*) deals with appeals against decisions of the federal administration.[20] There are a limited number of specialized courts, such as for instance expropriation tribunals (*Schätzungskommissionen*).[21] The military courts are part of a specialized military judiciary entirely separate from the civil judiciary.[22]

At cantonal level, each of the 26 cantons has its own constitution and its own parliament, government and court system. Although the cantonal courts mainly apply federal civil and criminal law and a considerable part of federal administrative law is administered by them too, the cantons are autonomous in the organization of their courts.[23] In civil and criminal matters there are generally two judicial levels within one can-

---

16 See Article 75 section 1, Article 80 section 1 and Article 86 section 1 BGG.

17 See W. Kälin/C. Rothmayr, The Judicial System, in: U. Klöti/P. Knoepfel/H. Kriesi/W. Linder/Y. Papadopoulos (eds.), Handbuch der Schweizer Politik, 177, at 179 (4th ed., 2006). See also id., at 186-192.

18 See SGG.

19 Article 26 section a SGG in conjunction with Arts. 336-337 *Strafgesetzbuch* (StGB) (Federal Penal Code) 21 December 1937, SR 311.0 (Switz.): e.g. organized crime, white-collar crime, money laundering, corruption etc.

20 See Article 33 VGG; regarding the Federal Administrative Court see B. Ehrenzeller/R. J. Schweizer (eds.), Das Bundesverwaltungsgericht: Stellung und Aufgaben, Referate der Tagung vom 24. Oktober 2007 in Luzern und vom 15. Mai 2008 in Lausanne (2008).

21 See Arts. 59-65 *Bundesgesetz über die Enteignung* (EntG) (Federal Expropriation Act) 20 June 1930, SR 711 (Switz.).

22 The *Militärstrafprozess* (MStP) (Federal Military Criminal Code) 23 March 1979, SR 322.1 (Switz.), establishes military courts of first instance (Arts. 5-8 MStP), military appellate courts (Arts. 9-12 MStP) and military courts of cassation (Arts. 13-15a MStP). The judges are members of the (non-standing) armed forces; the decisions of the military courts may not be appealed to the Federal Supreme Court. See G. Biaggini, BV-Kommentar, Vorbemerkungen zu Art. 188-191c, at para. 10 (2007).

23 Biaggini (note 22), Vorbemerkungen zu Art. 188-191c, at para. 8.

ton. There are district courts (*Bezirksgerichte*, *Kreisgerichte*, or *Amtsgerichte*) serving as courts of first instance, and a cantonal court (*Kantonsgericht*, or *Obergericht*) serving as a court of appeal.[24] As for public law disputes, specialized administrative courts (*Verwaltungsgerichte*) decide on appeals against decisions of the cantonal administration, because in Switzerland disputes between citizens and the government are considered not as civil law proceedings but as a separate area of law. In several cantons, there is no special administrative court and the administrative judicial function is instead exercised by the administrative law division of the cantonal court.[25] In any case, the decisions of the cantonal courts and of the administrative courts may be appealed to the Federal Supreme Court.[26] In most cantons, there are a number of specialized courts, such as for instance juvenile courts (*Jugendgerichte*), tenancy courts (*Mietgerichte*), labour courts (*Arbeitsgerichte*) or cantonal expropriation tribunals.[27] In a number of larger cantons specialized divisions of the cantonal courts like commercial courts (*Handelsgerichte*) or economic crimes courts (*Wirtschaftsstrafgerichte*) serve as courts of first instance in the specific issues assigned to them by law.[28] The rules and regulations on specialized courts vary widely among the cantons. In general, there are no special constitutional courts at cantonal level.[29] As a result of the new unified federal codes on civil procedure and on

---

[24] See Kälin/Rothmayr (note 17), at 182.

[25] See also P. Zappelli, Switzerland, in: Union Internationale des Magistrats (ed.), Traité d'organisation judiciaire comparée, Volume I, 329, at 332 (1999).

[26] See Article 75 section 1, Article 80 section 1 and Article 86 section 1 subsection d BGG.

[27] See Kälin/Rothmayr (note 17), at 182-183.

[28] With regard to the cantonal *Wirtschaftsstrafgericht* see e.g. Article 1 section 1 subsection 1 and Article 11 subsection 2 *Gesetz über die Organisation der Gerichtsbehörden in Zivil- und Strafsachen* (GOG) (Bern Law on the Organization of the Civil and the Criminal Courts) 14 March 1995, 161.1 (Bern). See also O. Vogel/K. Spühler, Grundriss des Zivilprozessrechts und des internationalen Zivilprozessrechts der Schweiz, at 129 (102) (8th ed. 2006); R. Hauser/E. Schweri/K. Hartmann, Schweizerisches Strafprozessrecht, at 8 (6) and (9) (6th ed. 2005).

[29] For an example see Article 104 *Constitution de la République et Canton du Jura* (Jura Constitution) 20 March 1977, SR 131.235 (Switz.). In the Canton of Waadt constitutional jurisdiction is exercised by a constitutional division of the cantonal court, see Article 136 *Constitution du Canton de Vaud* (Waadt Constitution) 14 April 2003, SR 131.231 (Switz.).

criminal procedure,[30] cantonal court organization will lose some of its complexity, firstly because the number of first instance courts will be reduced rather than increased, and secondly because cantons tend to converge rather than to diverge when harmonizing the organization of their authorities according to the minimal standards prescribed by the Confederation.[31]

B. Structural Safeguards

I. Administration of the Judiciary

1. Organs in Charge of the Administration of the Judiciary

The responsibilities for the administration of the judiciary vary due to the fact that the Confederation and the 26 cantons enact their own rules on court administration. At federal level, the courts by constitutional provision administer themselves.[32] At cantonal level, there is a tendency towards judicial self-administration;[33] however, in a considerable number of cantons the parliaments and the ministries of justice hold compe-

---

[30] *Schweizerische Zivilprozessordnung* (ZPO) (Federal Code on Civil Procedure) 19 December 2008, SR 272 (Switz.); *Schweizerische Strafprozessordnung* (StPO) (Federal Code on Criminal Procedure), 5 October 2007, SR 312 (Switz.).

[31] In 2006, Switzerland was one of the European countries with the highest number of courts per inhabitant, see European Commission for the Efficiency of Justice (ed.), European judicial systems: efficiency and quality of justice (in the following: CEPEJ report), at 83 and at 86 (2010).

[32] See Article 188 section 3 BV and Article 25 section 1 BGG (Federal Supreme Court); Article 14 VGG (Federal Administrative Court); Article 23 section 1 SGG (Federal Criminal Court). For the Federal Supreme Court see C. Kiss/H. Koller, Art. 188 BV, in: St. Galler Kommentar (note 3), at paras. 26-40; R. Ursprung/D. Riedi Hunold, Art. 13, in: BSK BGG (note 14).

[33] See e.g. Article 12 *Gerichtsorganisationsgesetz Kanton Appenzell Innerrhoden* (Appenzell Innerrhoden Law on Court Organization) 25 April 1999, 173.000 (Appenzell Innerrhoden); § 82 section 2 *Verfassung des Kantons Basel-Landschaft* (Basel-Landschaft Constitution) 17 May 1984, SR 131.222.2 (Switz.); § 96 section 1 *Verfassung des Kantons Aargau* (Aargau Constitution) 25 June 1980, SR 131.227 (Switz.); Article 91bis section 1 *Verfassung des Kantons Solothurn* (Solothurn Constitution) 8 June 1986, SR 131.221 (Switz.). See also Kiener (note 1), at 294.

tences with regard to the administration of the judiciary. Moreover, both at federal and at cantonal level, even the courts with the right to self-administration remain under the high supervision (*Oberaufsicht*) of the parliament.[34] In addition, the federal and cantonal parliaments are involved in the management of the budget of the courts,[35] as they have to approve the draft court budget. In the Confederation and in cantons with self-administration of the judiciary the budget is presented to the assembly by a representative of the highest court,[36] whereas in cantons with a stronger involvement of the executive branch the court budget is part of the general state budget and therefore presented to the assembly by the government.

2. Judicial Council

At federal level, there is no judicial council and only a few cantons – Fribourg,[37] Geneva,[38] Neuchâtel,[39] Jura[40] and Ticino[41] – have established

---

[34] Article 169 section 1 BV; for the Federal Supreme Court see Article 3 section 1 BGG. See P. Mastronardi, Art. 169 BV, in: St. Galler Kommentar (note 3), at para. 20; Kiener (note 1), at 296-297; A. Lienhard, Oberaufsicht und Justizmanagement, 1 Justice – Justiz – Giustizia (2009), available at <http://richterzeitung.weblaw.ch/content/edition.aspx?id=587>; A. Tobler, Zur Tragweite der parlamentarischen Oberaufsicht über die Gerichte – Positionen in der Rechtslehre, Bericht der Parlamentarischen Verwaltungskontrollstelle zuhanden der Geschäftsprüfungskommission des Ständerats (11 March 2002), BBl 2002, at 7690-7726; M. Béguelin/H. Hess/P. Schwab, Parlamentarische Oberaufsicht über die eidgenössischen Gerichte, Bericht der Geschäftsprüfungskommission des Ständerates (28 June 2002), BBl 2002, at 7625-7640.

[35] For the federal level see Article 167 BV; T. Stauffer, Art. 167 BV, in: St. Galler Kommentar (note 3).

[36] For the Federal Supreme Court see Article 142 section 3 and Article 162 section 2 *Bundesgesetz über die Bundesversammlung* (Parlamentsgesetz, ParlG) (Law on the Federal Parliament) 13 December 2002, SR 171.10 (Switz.); see also H. Koller, Art. 3, in: BSK BGG (note 14), at paras. 40-57.

[37] Arts. 125-128 *Constitution du Canton de Fribourg* (Fribourg Constitution) 16 May 2004, SR 131.219 (Switz.). See A. Colliard, Le Conseil de la magistrature dans le canton de Fribourg: ses fondements, ses compétences et ses activités, 2 Justice – Justiz – Giustizia (2009), available at <http://richterzeitung.weblaw.ch/content/edition.aspx?id=629>; P. Vallet, L'élection et la surveillance des Autorités judiciaires et du Ministère Public dans la Nouvelle Constitution du Canton de Fribourg, 3 Justice – Justiz – Giustizia, at 24-31 (2006), available at <http://richterzeitung.weblaw.ch/content/edition.aspx?id=215>.

such bodies.[42] The judicial councils consist of between five (Jura) and eleven (Geneva) members. In general, they are composed of members of the judiciary, the prosecution authority, parliament and the government as well as of external professionals like university professors and lawyers.[43] The bodies appointing the members of the judicial councils vary from canton to canton, as the responsibility can be given exclusively to the parliament, but also to other bodies such as the executive or the judiciary.[44] To the best of my knowledge, there are no rules on dismissal.[45]

In general, the judicial councils are entrusted just with the administrative and disciplinary supervision of the courts, whereas the high supervision (*Oberaufsicht*) is exercised by the cantonal parliament.[46] With regard to the disciplinary power of the judicial councils, two systems can be distinguished: either the judicial council is competent to deliver even the harshest sanction – the removal of a judge – or that power is as-

---

38 Article 135 *Constitution de la République et Canton de Genève* (Geneva Constitution) 24 May 1847, SR 131.234 (Switz.). See L. Peila, Conseil supérieur de la magistrature à Genève, 2 Justice – Justiz – Giustizia (2009), available at <http://richterzeitung.weblaw.ch/content/edition.aspx?id=630>.

39 *Loi instituant un Conseil de la magistrature* (LCM) (Law on a Judicial Council) 30 January 2007, 162.7 (Neuchâtel).

40 *Loi d'organisation judiciaire* (Law on the Judicial Organization) 23 February 2000, 181.1 (Jura). See J. Moritz, Le Conseil de surveillance de la magistrature dans le canton du Jura, 2 Justice – Justiz – Giustizia (2009), available at <http://richterzeitung.weblaw.ch/content/edition.aspx?id=649>.

41 Article 79 *Costituzione della Repubblica e Cantone Ticino* (Ticino Constitution) 14 December 1997, SR 131.229 (Switz.). See V. Tuoni, Il consiglio della magistratura del Canton Ticino, 2 Justice – Justiz – Giustizia (2009), available at <http://richterzeitung.weblaw.ch/content/edition.aspx?id=616>.

42 See P. Zappelli, Le Conseil Supérieur de la Magistrature, instrument pour l'indépendance des magistrats, 2 Justice – Justiz – Giustizia (2009), available at <http://richterzeitung.weblaw.ch/content/edition.aspx?id=636>; P. Zappelli, Le juge et le politique, en particulier la question de l'élection, in: M. Heer (ed.), Der Richter und sein Bild, 83, at 94-98 (2008).

43 See e.g. Article 126 section 1 Fribourg Constitution. See also Zappelli, Le Conseil Supérieur (note 42), at 31-36.

44 See Zappelli, Le Conseil Supérieur (note 42), at 31-36.

45 See e.g. Article 126 sections 2 and 3 Fribourg Constitution.

46 Arts. 127 and 104 Fribourg Constitution; Article 79 section 1 Ticino Constitution; Article 135 Geneva Constitution.

signed to the cantonal parliament.[47] In two cantons – Fribourg and Ticino – the judicial councils are also involved in the nomination of the judges; however, their recommendations are not binding on the authority entrusted with the formal appointment.[48] In the last few years, several attempts to introduce judicial councils have been turned down both by the federal and the cantonal legislators.[49] One of the main objections raised is the supposed lack of democratic legitimacy and accountability of those bodies. One might suggest that the political parties, traditionally playing a crucial role in the selection and election of judges, in fact are not willing to cede this power to any body independent of party influence.[50]

II. Selection, Appointment and Reappointment of Judges

1. Eligibility

In Switzerland, the formal criteria of appointment for judges are modest, as democratic legitimacy is still considered more important than professionalism, at least by the formal requirements laid down by the constituent power. Candidates for the Federal Supreme Court must fulfil the same criteria of eligibility as candidates for the National Council (*Nationalrat,* i.e. the House of Representatives) and for the Federal Council (*Bundesrat,* i.e. the Federal Government).[51] According to Articles 143 and 136 Federal Constitution, besides being vested with legal

[47] See Zappelli, Le Conseil Supérieur (note 42), at 23 and 31.

[48] Article 103 section 1 subsection e and Article 128 Fribourg Constitution. See also Zappelli, Le Conseil Supérieur (note 42), at 31-32.

[49] Regarding the Confederation see Ch. Bandli/M. Kuhn, Erste Erfahrungen am Bundesverwaltungsgericht – Interne Zuständigkeitsfragen und Beziehungen zu anderen Staatsorganen, in: Ehrenzeller/Schweizer (note 20), 35, at 63-65; D. F. Marty, Qui a peur du Conseil de la magistrature?, 2 Justice – Justiz – Giustizia, at 3-5 (2009), available at <http://richterzeitung.weblaw.ch/content/edition.aspx?id=638>. Regarding the Canton of Aargau, see U. Hodel, Totalrevision des Gerichtsorganisationsgesetzes des Kantons Aargau (GOG) verbunden mit einer Teilrevision der Kantonsverfassung, Beschluss des Grossen Rates vom 11. November 2008 auf Rückweisung, 1 Parlament – Parlement – Parlamento 13, at 13-14 (2009).

[50] See Zappelli, Le Conseil Supérieur (note 42), at 26-27; Marty (note 49), at 5.

[51] See R. Kiener, Art. 5, in: BSK BGG (note 14), at paras. 17-20.

capacity candidates need to be Swiss citizens and at least 18 years old.[52] In practice though, only legal professionals with significant practical experience, such as judges, lawyers and law professors, qualify as Federal Supreme Court judges.[53] The same rules apply to the eligibility of judges of the federal courts of first instance. Federal judges are recruited either from within the judicial system, notably among the judges of the higher cantonal courts, or from among legal professionals such as lawyers, law professors or administrative officials.[54] As for the cantonal courts, the formal criteria of eligibility are similarly open. However, they vary from canton to canton and may even differ between the first instance and appeal courts within a canton. Only in a minority of cantons is legal education a statutory eligibility criterion. In practice, legal experience plays a vital role, though. In almost half of the cantons only candidates with an overall legal education and professional experience are considered.[55] Most first instance judges served as court clerks, public prosecutors or lawyers before taking the bench.[56] Nevertheless, there are still cantons where district courts are composed entirely of lay judges, the court clerks being the only trained jurists taking part in the law-finding process.[57] Furthermore, in a few cantonal courts and in quite a number of district courts only the president is required by law to be a professional, whereas the other members of the court – often sitting as occasional judges – need not have professional legal training.

---

[52] See A. Kley, Art. 136 BV, in: St. Galler Kommentar (note 3), at paras. 3-5; R. Lüthi, Art. 143 BV, in: St. Galler Kommentar (note 3), at paras. 2-5.

[53] See Kälin/Rothmayr (note 17), at 178; Kiener (note 1), at 263-264; Kiener, Art. 5, in: BSK BGG (note 14), at para. 23 with further reference at footnote 69; Zappelli (note 25), at 329.

[54] With regard to Federal Supreme Court judges, see W. Bosshart, Die Wählbarkeit zum Richter im Bund und in den Kantonen, at 62-67 (1961); Kälin/Rothmayr (note 17), at 183; Kiener, Art. 5, in: BSK BGG (note 14), at para. 23; K. Spühler/A. Dolge/D. Vock, Kurzkommentar zum Bundesgerichtsgesetz, Art. 5, at para. 9 (2006).

[55] Zappelli (note 25), at 329.

[56] Bosshart (note 54), at 62-67; Kälin/Rothmayr (note 17), at 177; Kiener, Art. 5, in: BSK BGG (note 14), at para. 23; Spühler/Dolge/Vock (note 54), Art. 5, at para. 9.

[57] E.g. Grison or Appenzell Innerrhoden; see Kälin/Rothmayr (note 17), at 178; as for lay judges see R. Ludewig-Kedmi/E. Angehrn, Sind Laienrichter noch zeitgemäss?, 3 Justice – Justiz – Giustizia (2008), available at <http://richterzeitung.weblaw.ch/content/edition.aspx?id=524>.

Most cantonal constitutions set the minimum age at 18 years, although in practice most judges are older than 30 at the time of their election. In a couple of cantons, a higher minimum age is either required by law[58] or set by the fact that a professional education is a mandatory prerequisite for election. Neither specialized tests nor competitive exams are part of the application procedure.[59] As a general rule, candidates are asked for a personal interview, first by the political parties endorsing them, and later by the parliamentary judicial committee preparing for the election on behalf of the assembly. In a number of cantons, these committees also hear the cantonal court, the cantonal lawyers' associations and the cantonal judges' associations on the candidates,[60] whereas in cantons with direct elections of judges there are normally no preliminary hearings at all.

2. The Process of Judicial Selection

The political nature of judicial appointment is characteristic of the Swiss judicial system.[61] Federal Supreme Court judges are elected by the United Federal Assembly (*Vereinigte Bundesversammlung*),[62] the two chambers of the federal parliament specifically conjoined for this purpose.[63] At cantonal level, judges are elected either by parliament or by plebiscite.[64] In 17 cantons, district court judges are elected by popular vote, whereas for the cantonal courts election by the cantonal parlia-

---

58 Such as for instance 25 years in Geneva; see Zappelli (note 25), at 329.

59 See also Zappelli (note 25), at 329 and 330.

60 S. Deutsch/C. Wissmann, Neuerungen im Verhältnis zwischen Parlament und Justiz im Kanton Bern, 1 Parlament – Parlement – Parlamento 15, at 16 (2009).

61 Kälin/Rothmayr (note 17), at 177.

62 See B. Ehrenzeller, Art. 168 BV, in: St. Galler Kommentar (note 3), at paras. 10-19.

63 Article 157 section 1 subsection a BV in conjunction with Article 168 section 1 BV. See A. Fischbacher, Richterwahlen durch das Parlament: Chance oder Risiko?, 1 Parlament – Parlement – Parlamento 4, at 4 (2005).

64 See A. de Weck, Election, réélection et surveillance: rencontre des pouvoirs judiciaire et politique, 4 Justice – Justiz – Giustizia, at 9 (2008), available at <http://richterzeitung.weblaw.ch/content/edition.aspx?id=547>.

ment is the rule.[65] In other cantons all judges are elected by plebiscite.[66] There is a leaning towards election by parliament, though.[67] At federal level as well as in most cantons, there is no self-recruiting system for judges, yet in two cantons, members of the courts of first instance are elected by the cantonal court.[68] In cantons where there are judicial councils, these bodies are involved in the selection process, but do not have the power to elect judges.[69] The executive branch does not take part in the process of the selection and election of judges. If judges are elected by parliament, the process of judicial selection is generally administered by a parliamentary judicial committee.[70] At federal level as well as in numerous cantons, vacant posts are publicly announced,[71] yet there are still cantons where this is not the case. The rule of concordance among the political parties (*Konkordanz*), which is informally agreed upon by the relevant political actors and according to which seats are distributed on the basis of party strength, also applies to the selection and election of judges.[72] At federal as well as at cantonal level, candidates for the bench are therefore commonly endorsed by a political party.[73] As a consequence, party membership or at least ideological

---

65 In 18 cantons, cantonal judges are elected by parliament; see Zappelli, Le juge et le politique (note 42), at 86.

66 For instance in Geneva, Basel-Stadt or Uri; see Zappelli, Le juge et le politique (note 42), at 86.

67 See e.g. Deutsch/Wissmann (note 60), at 16; R. Schnyder, l'elezione dei giudici in Ticino da parte del Gran Consiglio, un modo di procedere non senza problemi, 1 Parlament – Parlement – Parlamento 21, at 21 (2009); Zappelli, Le juge et le politique (note 42), at 87.

68 Article 131 section 4 Waadt Constitution; Article 7 section 4 *Gesetz über die Gerichtsbehörden des Kantons Wallis* (Wallis Law on Courts) 27 June 2000, 173.1 (Wallis). See Zappelli (note 25), at 332; Kiener (note 1), at 260.

69 See *supra* B. I. 2. Judicial Council.

70 For the procedure at federal level see Article 40a ParlG and Arts. 135-138 ParlG.

71 For the federal level see Article 40a section 2 ParlG; see also Zappelli (note 25), at 332.

72 See Kiener (note 1), at 269.

73 See id.; Biaggini (note 22), Art. 188, at para. 13; N. Raselli, Richterliche Unabhängigkeit unter Druck, Die Gefahren des geltenden Wahlsystems, 2 Justice – Justiz – Giustizia (2) (2006), available at <http://richterzeitung.weblaw.ch/content/edition.aspx?id=171>.

closeness to the party endorsing the candidate is the rule.[74] Only in the smallest cantons, where judges are elected by plebiscite and judicial election is considered to depend solely on the personality of the candidate, do the political parties seem to have little or no influence on the election of judges. Judges who owe their election to the support of a political party habitually pay a voluntary annual contribution which may amount to 5% of the judge's annual income.[75] There are hardly any mandatory regulations regarding minority and gender representation.[76] In practice, federal judges are, among other criteria, appointed according to linguistic criteria.[77] In bilingual or multilingual cantons, linguistic criteria matter as well, at least for judges applying for appeal courts.[78] Regional and gender criteria may also play a role, but are not formalised by the law either.[79] There is no formal training required (or offered) for appointed judges before they take the bench.[80]

The process of judicial selection, in particular the rule of concordance, is mostly accepted, even among scholars, as a means of representing the foremost political tendencies within the confederation and the cantons,

---

74 See Kälin/Rothmayr (note 17), at 177-180; Kiener (note 1), at 189 and 269.

75 Zappelli, Le juge et le politique (note 42), at 90-91.

76 For an example see U. Meisser, GR: keine stärkere Gewichtung sprachlicher Kompetenzen der Richter, 2 Justice – Justiz – Giustizia, at 5 (2009), available at <http://richterzeitung.weblaw.ch/content/edition.aspx?id=634>; see also N. Raselli, Bundesrichterwahlen und richterliche Unabhängigkeit, in: B. Luginbühl/J. Schmidt (eds.), Diskriminierung und Integration, (Rechts-) Geschichten in einem sozialen System, 33, at 35 (2006). There is no overall statistics on representation.

77 Kiener (note 1), at 268; Ehrenzeller, Art. 168 BV, in: St. Galler Kommentar (note 3), at para. 15; Zappelli (note 25), at 332; Raselli (note 76), at 35.

78 See Bern, Fribourg, Wallis or the Grisons; see e.g. Article 62 section 2 *Verfassung des Kantons Wallis* (Wallis Constitution) 8 March 1907, SR 131.232 (Switz.); see Kiener (note 1), at 268; Zappelli (note 25), at 330.

79 See Kiener (note 1), at 268-269; Kiener, Art. 5, in: BSK BGG (note 14), at para. 26; W. Haller, in: J.-F. Aubert et al. (eds.), Kommentar zur Bundesverfassung der Schweizerischen Eidgenossenschaft vom 29. Mai 1874, Art. 107/108, at 22 (1987-1996); A. Fischbacher, Verfassungsrichter in der Schweiz und in Deutschland: Aufgaben, Einfluss und Auswahl, at 423 (2006); Zappelli (note 25), at 331.

80 See also CEPEJ report (note 31), at 199; Zappelli, Le juge et le politique (note 42), at 92.

thus securing a broad representation of attitudes and perspectives within the judiciary and thereby strengthening the confidence which the courts must inspire in the public.[81] But there is also severe criticism of applying the rule of concordance to the judiciary.[82] And even those accepting the system of party endorsement strongly criticize the fact that judges formally need to be (or need to become) members of the political party by which they have been endorsed.[83] As a consequence, qualified candidates who do not want to commit themselves to a political party merely for career reasons have a very limited chance of being elected. And even the best qualified candidates who in fact are party members may be passed over because the vacant post is assigned to a less skilled person who happens to be a member of a political party actually underrepresented in the court concerned. Despite the crucial role of the political parties within the process of selection and election of judges, the legislator is not willing to regulate the role of the political parties. As a consequence, the procedure remains obscure for the public and for potential candidates, too.[84] However, there are some exceptions to this rule.[85]

---

[81] See H. Seiler, Richter als Parteivertreter, 3 Justice – Justiz – Giustizia (2006); for further details see Kiener (note 1), at 270-276; see also Zappelli (note 25), at 331.

[82] Among others see M. Borghi, Incostituzionalità dell'ingerenza dei partiti, in: S. Bianchi et al. (eds.), L'indipendenza del giudice nell'ambito della procedura di elezione, in particolare nel Cantone Ticino, 61 (2004); M. Livschitz, Die Richterwahl im Kanton Zürich, at 256-292 (2001).

[83] Among others see Fischbacher (note 63), at 242-260, 278-282, 292-296 and 444-446; U. Häfelin/W. Haller/H. Keller, Bundesstaatsrecht, at 1711 (7th ed. 2009); Kiener (note 1), at 277; Kiener, Art. 5, in: BSK BGG (note 14), at paras. 23 and 28; Bosshart (note 54), at 58 and 71; K. Spühler, Der Richter und die Politik: Die Wahlart der Richter und ihre Unabhängigkeit gegenüber den politischen Gewalten, 1 Zeitschrift des Bernischen Juristenvereins (ZBJV) 28, at 31-33 (1994).

[84] For an example see Deutsch/Wissmann (note 60), at 17, referring to the Canton of Bern.

[85] According to Article 131 section 3 Waadt Constitution, the body responsible for the election pays heed to the balanced representation of the different political opinions (*Meinungsrichtungen*).

1. Length of Office and Reappointment

Switzerland is a significant exception to the principle of appointment for life for judges, as judges, including those of the Federal Supreme Court, are elected for a limited but renewable term of office, usually of between four and six years.[86] There is a slight tendency towards extending the length of judicial office within the cantons.[87] The principle of a limited term of office is meant to secure the continuous democratic legitimacy of the judiciary.[88] However, the requirement to be re-elected poses a certain threat to judicial independence.[89] Non-reappointment may by no means be used to "punish" a judge for his/her decisions as otherwise there is a danger that judges, towards the end of their term, might feel the need to consider the effects of their judgments upon their career.[90] In practice, although there is no right to reappointment, reappointment is the rule.[91] At federal level, hitherto, a request for reappointment has never been definitely turned down.[92] Within the cantons, denials of reappointment occasionally happen, but remain extremely rare.[93] In practice, judges are reappointed unless there are serious doubts about their ability to properly fulfil judicial functions. Changes in party strength after parliamentary elections which, according to the rule of concordance, formally lead to the overrepresentation of certain parties within the judiciary are not considered legitimate reasons for non-reappointment.[94] The criteria for reappointment are the same as

---

86 For the federal level see Article 168 BV; Kley, Art. 9, in: BSK BGG (note 14), at para. 2; de Weck (note 64), at 42.

87 Zappelli, Le juge et le politique (note 42), at 89.

88 See *supra* A. Introduction.

89 Kiener (note 1), at 279-282, 285-289 and 257-258.

90 Id., at 286.

91 See id., at 285; Zappelli, Le juge et le politique (note 42), at 90.

92 See Kley, Art. 9, in: BSK BGG (note 14), at para. 3; see also P. Zappelli, Switzerland: L'indépendance des juges, in: Union Internationale des Magistrats (ed.), Traité d'organisation judiciaire comparée, volume II, 491, at 498 (2004).

93 See Kälin/Rothmayr (note 17), at 178; Kiener (note 1), at 285.

94 See Kiener (note 1), at 273 and at 288; R. Kiener/B. Durrer/S. Faessler/M. Kruesi, Verfahren der Erneuerungswahl von Richterinnen und Richtern des Bundes: Gutachten im Auftrag der Gerichtskommission der Vereinigten Bundesversammlung, 3 Verwaltungspraxis der Bundesbehörden (VPB) 350, at 360 (2008) with further reference.

those for appointment.[95] Reappointments are decided upon by the same body as is responsible for the election of judges. There is no supervisory body monitoring the process of reappointment. At federal level, the reappointment procedure is somewhat simplified compared to the appointment process, as the names of the judges seeking re-election are officially recorded in the electoral lists; also, there are no preliminary screenings.[96] However, there are no judicial safeguards for Federal Supreme Court judges who have been denied reappointment, as decisions of the Federal Assembly are not subject to any review.[97] One might strongly argue that Switzerland thereby violates the right to an effective remedy as guaranteed in Article 13 ECHR and Article 2 section 3 ICCPR.[98] As for the cantonal judiciary, a judge may appeal to the Federal Supreme Court against non-reappointment for a violation of his/her voter's rights where re-election has been turned down by plebiscite.[99] The Federal Supreme Court has not yet decided whether there is a federal remedy where re-election has been denied by the cantonal parliament. In most cantons judges whose requests for reappointment have been rejected receive either severance pay or a pension.[100]

In general, the reappointment process is perceived as fair. It is not always sufficiently transparent, though. Judges whose reappointment is put into question are more or less subtly forced to resign as the political parties which previously endorsed them now informally communicate that they will no longer do so. This approach may protect judges against unwanted publicity going along with non-reappointment, yet at the same time they are denied the opportunity to challenge the decision as the event occurs on an informal level. The Swiss system is even more

---

95 Id. at 359-360.

96 Article 136 ParlG; see Kiener/Durrer/Faessler/Kruesi (note 94), at 360.

97 Article 189 section 4 BV; see Kiener (note 1), at 287-288, and W. Haller, Art. 189 BV, in: St. Galler Kommentar (note 3), at paras. 55-60.

98 See Kiener/Durrer/Faessler/Kruesi (note 94), at 365-366. As to Article 13 ECHR (in conjunction with Article 10 ECHR) see e.g. ECtHR, *Wille v. Liechtenstein*, Judgment of 28 October 1999, RJD 1999-VII, paras. 71-78, regarding non-reappointment of a judge. On Article 2 section 3 ICCPR (in conjunction with Arts. 17, 25 lit. c. and 26 ICCPR) see e.g. HRC *Kazantzis v. Cyprus*, 7 August 2003, Communication No. 972/2001, para. 6.6, regarding non-appointment of a judge.

99 Article 82 section c BGG; see BGE 131 I 366, cons. 2.1 at 367; G. Steinmann, Art. 82, in: BSK BGG (note 14), at para. 82.

100 Zappelli (note 92), at 498.

questionable due to the fact that the power of reappointment in most cases is vested in the same body which is also in charge of the supervision of the judiciary and thereby competent to impose disciplinary sanctions. As disciplinary bodies tend to avoid formal disciplinary action and would rather advise a judge to resign, they indirectly deny the judges concerned the right to a fair procedure in which allegations must be formally disclosed and the right to be heard is guaranteed.[101]

III. Tenure and Promotion

1. Tenure

Judges serve a limited term of office with the possibility of re-election. Only in one canton (Fribourg) are judges elected for life (that is until reaching retirement age).[102] At federal level, the term of office is six years.[103] In the cantons, the term of office is usually between four and six years, with a maximum of ten years (Ticino)[104] and a minimum of one year (Appenzell-Innerrhoden).[105] The number of terms is not limited. If re-elected, a judge may serve as many terms as applied for until reaching the formal retirement age (usually at 64 for women and at 65 for men;[106] at 68 for Federal Supreme Court judges[107]). Throughout the

---

[101] Kiener (note 1), at 287-289.

[102] Article 121 section 2 Fribourg Constitution; see de Weck (note 64), at 42-49; Vallet (note 37), at 23; Zappelli, Le juge et le politique (note 42), at 99.

[103] Article 145 BV und Article 9 section 1 BGG (Federal Supreme Court); Article 9 section 1 VGG (Federal Administrative Court); Article 9 section 1 SGG (Federal Criminal Court).

[104] Article 81 section 1 Ticino Constitution.

[105] Article 20 section 2 *Verfassung für den Eidgenössischen Stand Appenzell I. Rh.* (Appenzell-Innerrhoden Constitution) 24 November 1872, SR 101.000 (Switz.), concerning members of the cantonal court.

[106] For the federal courts of first instance see Article 9 section 2 SGG and Article 9 section 2 VGG, in conjunction with Article 10 section 2 subsection a *Bundespersonalgesetz* (BPG) (Federal Law on Federal State Officials) 24 March 2000, SR 172.220.1 (Switz.) and Article 21 section 1 *Bundesgesetz über die Alters- und Hinterlassenenversicherung* (AHVG) (Federal Law on the Old-age and Survivors' Insurance) 20 December 1946, SR 831.10 (Switz.).

[107] Article 9 section 2 BGG; see Biaggini (note 22), Art. 145, at para. 4.

Confederation there are no probationary periods for judges during which they are assessed.

2. Promotion

Switzerland does not have a career judiciary; consequently there is no procedure for promotion to higher courts. As a result, judicial office at a first instance court is principally considered not as an office for the first part of a judge's professional life, but as an office for a lifetime. Federal judges are, however, also recruited from within the judicial system, notably among judges of the higher cantonal courts.[108] Whether this practice influences the independence of the higher cantonal courts (*tailored judgements*) one can only speculate. As candidates for the bench are commonly endorsed by a political party, the chance to be elected will primarily depend on party affiliation. It is, however, easily conceivable that a party, among other factors, will also consider a judge's general loyalty to the party mindset – a fact which at first sight is well able to jeopardize judicial independence. Yet, one must keep in mind that, in practice, the political parties will present only candidates with a moderate party profile, as otherwise their candidate will be rejected by the appointing body.

IV. Remuneration

1. Remuneration

As a general rule, judicial salaries in Switzerland are equivalent to those of civil servants in leading positions. Judges generally earn more than public prosecutors at the same stage of their career.[109] Federal Supreme Court judges are paid 80% of the remuneration of the members of the Federal Council, which is significantly more than any other Federal state official with the exception of the Head of the Federal Chancellery.[110] Judges of the federal courts of first instance – the Federal Ad-

---

[108] See *supra* B. II. 1. Eligibility.

[109] See European Judicial Systems, table 93, at 189 (factor 1.2 at the beginning of their careers, and factor 1.8 at the end of their careers).

[110] *Bundesgesetz über Besoldung und berufliche Vorsorge der Magistratspersonen* (Federal Law on Salaries and Pensions of Magistrates) 6 October 1989, SR 172.121 (Switz.); *Verordnung der Bundesversammlung über Besoldung und*

ministrative Court and the Federal Criminal Court – are paid like civil servants in leading positions.[111] At cantonal level, judges are generally well paid, too, although salaries differ from canton to canton. In the Canton of Bern, for example, members of the cantonal court and the administrative court respectively are scaled in the same (top) salary class as for instance university professors,[112] whereas first instance judges receive the same salary as leading state officials such as, for instance, the academic director of the state university. In short, judges are able to support themselves and their families on their salary.[113] Salaries are paid on time and are adapted to inflation. Advancement in salary is generally automatic and based on neutral criteria such as the time served in office. As a consequence, judges of different ages working in the same court are not paid equally, a source of certain frustration for the younger judges mastering the same workload as their older, but better paid colleagues.[114] There is no general system of paid leave. Judges need not have professional risk insurance as compensation for damage caused in the exercise of their office is secured by state liability.[115]

2. Benefits and Privileges

To the best of my knowledge, there are no benefits or privileges other than remuneration for judges. In particular, there is no productivity bonus system, for such a system is considered inconsistent with the prin-

---

berufliche Vorsorge von Magistratspersonen (Parliamentary Decree on Salaries and Pensions of Magistrates) 6 October 1989, SR 172.121.1 (Switz.). The gross salary in 2008 was about 227,000 Euro, the net salary about 212,000 Euro, see CEPEJ report (note 31), at 210; see also Kiener, Art. 5, in: BSK BGG (note 14), at para. 30.

[111] See *Verordnung der Bundesversammlung über das Arbeitsverhältnis und die Besoldung der Richter und Richterinnen des Bundesstrafgerichts und des Bundesverwaltungsgerichts* (Parliamentary Decree on Salaries and Pensions of Federal Judges) 13 December 2002, SR 173.711.2 (Switz.).

[112] Annex 1 *Personalverordnung des Kantons Bern* (PV) (Bern Law on State Officials) 18 May 2005, 153.011.1 (Bern).

[113] On the admissibility of avocations for regular Federal Supreme Court judges see Article 7 BGG and Arts. 18-23 BGerR. See also *infra* D. I. Code of Ethics for Judges.

[114] *Federal Supreme Court judges* are paid equally, regardless of age or time served in office.

[115] See *infra* B. VIII. Immunity for Judges.

ciple of judicial independence. Presidents of higher courts usually receive an allowance for representation costs during their term of office,[116] whereas federal judges are paid at least part of the costs of public transport. At the end, judges are regarded as public servants fulfilling their duties on behalf of the community, and they therefore have the same rights and duties as any other state official. If for instance the law provides for premiums like extra holidays or salary bonuses for officials who have served for a certain period of time, these provisions apply to judges as well.

3. Retirement

Judges may exercise their functions until they reach retirement age (in general mandatory at 64 for women and at 65 for men;[117] certain cantons do not have a statutory retirement age, though[118]). After retirement, judges – according to the federal social security system which also applies to the cantons – receive a government pension[119] as well as a pension (i.e. an occupational benefit plan) from their pension fund.[120] Both insurances are mandatory for judges while they are in service, with the exception of the Federal Supreme Court judges, who are subject to special legislation.[121] The benefits paid by the different types of social security are in principle financed by contributions levied on income. As a

---

116 For the Federal Supreme Court see Article 1 section 3 Federal Law on Salaries and Pensions of Magistrates; for the Canton of Zurich see *Beschluss des Kantonsrates über die Festsetzung der Besoldungen der Mitglieder des Obergerichtes* (Zurich Law on the Salaries of Cantonal Court Judges) 22 April 1991, 212.53 (Zurich).

117 For the federal courts of first instance see Article 9 section 2 SGG and Article 9 section 2 VGG, Article 13 section 2 PatGG, all in conjunction with Article 10 section 2 subsection a BPG and Article 21 section 1 AHVG.

118 Federal Supreme Court judges retire at the age of 68, see Article 9 section 2 BGG. See also *supra* B. III. 1. Tenure.

119 Article 112 BV provides that the old-age, survivors' and disability insurance (so-called first pillar) must cover the basic needs in an appropriate way; see U. Kieser, Art. 112 BV, in: St. Galler Kommentar (note 3), at paras. 13-16.

120 Article 113 BV provides that the occupational benefit plan (so-called second pillar), together with the old-age insurance (first pillar), must enable the insured person to maintain the previous standard of living in an appropriate way; see Kieser, Art. 113 BV, in: St. Galler Kommentar (note 3), at paras. 6-10.

121 See Parliamentary Decree on Salaries and Pensions of Magistrates.

rule, employers and employees contribute equally. In any case, judges after their retirement receive sufficient funds to be able to maintain their standard of living.[122]

V. Case Assignment and Recusal

According to Article 30 section 1 Federal Constitution, courts must be established by law.[123] Pursuant to Federal Supreme Court case law, the jurisdiction of a court and its composition must be laid down in the law.[124] With regard to the assignment of cases to the judges, the statutory laws prescribe only the number of judges forming a judicial panel,[125] whereas the rules on case assignment are either formally delegated to court regulation[126] or left to the discretion of the presidents of the court or the court sections respectively. According to the administrative regulation of the Federal Supreme Court, for instance, cases are assigned to the seven court sections according to the subject matter concerned.[127] Within the competent court section, cases are assigned by the president according to the criteria established by law, for instance workload, language, sex or specialist knowledge of the judges.[128] This system is also common within the cantonal judiciary. As the presidents

---

[122] As a general rule, judges receive a pension of about 60-70% of their former income depending on their length of office, family situation etc. Federal Supreme Court judges receive a pension of half of the salary of a judge in office, provided they have been in office for at least 15 years (Article 3 section 2 subsection c Parliamentary Decree on Salaries and Pensions of Magistrates).

[123] See Steinmann, Art. 30 BV, in: St. Galler Kommentar (note 3), at paras. 7-8.

[124] On the significance of this see BGE 129 V 196, cons. 4.1 at 198; see also Kiener (note 1), at 375-380; Steinmann, Art. 30 BV, in: St. Galler Kommentar (note 3), at paras. 7-8.

[125] See e.g. Article 20 BGG; Article 21 VGG; Article 27 SGG; see also Article 336 StPO.

[126] See e.g. Article 22 BGG; see also Article 24 VGG and Article 20 SGG.

[127] Article 26 and Arts. 29-35 BGerR. The same rules apply to the Federal Criminal Court, Article 10 *Reglement für das Bundesstrafgericht* (Administrative Regulation on the Federal Criminal Court) 20 June 2006, SR 173.710 (Switz.); see M. Féraud, Art. 22, in: BSK BGG (note 14), at paras. 2-5.

[128] See Article 40 BGerR; see Féraud, Art. 22, in: BSK BGG (note 14), at paras. 6-10.

thereby end up assigning the reporting judge as well as the panel of judges adjudicating the case, they may to a certain extent steer the outcome of the case, so that one may well argue that the appearance of judicial independence is subject to doubt.[129] Taking into account these concerns, the Federal Administrative Court introduced a random system of assignment.[130] Within the confederation as well as within the cantons, a case can be reassigned to another judge by decision of the president of the court or of the court section concerned if there are good reasons such as, for instance, the illness of the judge originally assigned to the case.[131]

According to Article 30 section 1 Federal Constitution, the parties to a case have the right to an independent and impartial court.[132] The procedural laws specify the criteria on which judges may be challenged. As a rule, a judge is pre-empted from participating in a case when he/she has a personal interest in the outcome of the case, when he/she has been involved in the case in another position, when he/she has a close relationship or when he/she is closely related to one of the parties.[133] In addition, a judge may not participate in a case if there are other circumstances capable of arousing a legitimate and objectively justified suspicion of bias,[134] for instance, if a judge's remarks before or during the

---

[129] See Ch. Bandli, Zur Spruchkörperbildung an Gerichten: Vorausbestimmung als Fairnessgarantien, in: Mitarbeiterinnen und Mitarbeiter des Bundesamtes für Justiz (eds.), Aus der Werkstatt des Rechts, Festschrift für Heinrich Koller, 209 (2006); Biaggini (note 22), Art. 30, at para. 5; Kiener (note 1), at 376-378; J.-P. Müller/M. Schefer, Grundrechte in der Schweiz, at 935 (4th ed. 2009).

[130] Article 31 *Geschäftsreglement für das Bundesverwaltungsgericht* (Administrative Court Statute) 17 April 2008, SR 173.320.1 (Switz.); see Bandli (note 129), at 217.

[131] But not in the case of schedule conflicts, see the decision of the Federal Supreme Court 6P.102/2005 cons. 2-4 (26 June 2006).

[132] See R. Kiener, Garantie des verfassungsmässigen Richters, in: D. Merten/H.-J. Papier (eds.), Handbuch der Grundrechte in Deutschland und Europa, Band VII/2: Grundrechte in der Schweiz und in Liechtenstein, 701, at 703-706 (2007); Steinmann, Art. 30 BV, in: St. Galler Kommentar (note 3), at paras. 9-16.

[133] See Article 34 section 1 subsection a-d BGG; Article 38 VGG. Also see Article 47 section 1 subsection a-e Federal Code on Civil Procedure.

[134] See Article 34 section 1 subsection e BGG; Article 38 VGG. Also see Article 47 section 1 subsection f Federal Code on Civil Procedure. See also BGE 114 Ia 50, cons. 3b at 54-55; BGE 112 Ia 290, cons. 3a at 293; Kiener (note 1), at 68-84 and at 346.

proceedings support the conclusion that he or she has already formed an opinion on the outcome of the case.[135] A motion for recusal may be submitted by the litigants or by the judge concerned.[136] The recusal is decided upon by the college of judges assigned to the case, or alternatively by the superior authority in the case of a single-judge trial.[137] The judge concerned may not take part in the recusal procedure.[138] The decision on recusal may be challenged by the parties to the case but not by the judges involved.[139]

VI. Judicial Conduct Complaint Process

There is a common understanding that every citizen may at any time file a supervision complaint (*Aufsichtsbeschwerde*) against any state official, even if there is no such provision in the law.[140] At cantonal level, most statutory procedural laws establish the right to a supervision complaint if a judge breaches his or her official duties.[141] Supervision complaints do not serve to defend individual legal positions, but aim at protecting the public interest in the proper behaviour and functioning of the public authorities.[142] A supervision complaint is generally made in order to provoke the supervisory authority to make use of its power of supervision and discipline.[143] The complainant may for instance require

---

135 BGE 125 I 119, cons. 3a at 122. See also Steinmann, Art. 30 BV, in: St. Galler Kommentar (note 3), at paras. 10.

136 Kiener (note 1), at 363-371; see e.g. Article 35 and 36 section 1 BGG.

137 See e.g. Article 37 section 1 BGG.

138 See e.g. Article 37 section 1 BGG.

139 See e.g. Article 92 section 1 BGG.

140 For the Confederation see Article 129 ParlG; for an example see the decision of the Federal Supreme Court 12T_4/2008 (16 February 2009).

141 See e.g. § 108 section 1 *Gerichtsverfassungsgesetz des Kantons Zürich* (Zurich Law on the Organization of the Judiciary) 13 June 1976, 211.1 (Zurich); Article 18 Bern Law on the Organization of the Civil and the Criminal Courts; Article 101 *Gesetz über die Verwaltungsrechtspflege* (VRPG) (Bern Law on Administrative Procedure) 23 May 1989, 155.21 (Bern).

142 See O. Zibung, Art. 71, in: B. Waldmann/Philippe Weissenberger (eds.), VwVG: Praxiskommentar zum Bundesgesetz über das Verwaltungsverfahren, at para. 18 (2009).

143 Hauser/Schweri (note 12), § 108, at para. 3.

disciplinary action, but not the formal repeal of a judgment.[144] In any case, a judge may initiate a supervision complaint at his or her own initiative in order to be cleared of allegations. The complaint is reviewed by the body responsible for the supervision of the court concerned. According to statutory law, this will be either the president of the court, the superior court or – with regard to the highest courts – the federal or the cantonal parliament acting through its supervisory committees.[145] Where there are signs of misbehaviour or dysfunction, the supervising body opens an investigation. Due to the informal character of the remedy, there is no time-frame in which to reply to the complaint. Also, the complainant does not have the formal status of a party to the procedure and therefore does not have a right to be informed about its outcome. If serious complaints against a judge accumulate, they may lead to the opening of disciplinary action. Furthermore, a procedure may result in the conclusion that the shortcomings alleged exist and that specific counter-measures have been taken; it may also result in the conclusion that allegations against a judge have been dismissed. There are no strict rules on informing the public of the results of an investigation; in practice, results are made public if there is a general interest in the case. Where such institution exists, complaints against judges may also be addressed to the ombudsman's office.[146] Apart from complaints initiated by individuals, the supervisory body is obliged to open an enquiry *ex officio* if there are serious indications of misbehaviour of a judge,[147] for example, by unduly delaying proceedings. As part of quality control policies certain courts started satisfaction surveys among court users such as litigants or lawyers.[148] These surveys are often initiated by court presidents and are not conducted on a regular basis.

---

144 Id.

145 See Article 40a ParlG; R. Kiener/B. Durrer/S. Faessler/M. Kruesi, Verfahren der Amtsenthebung von Richterinnen und Richtern der erstinstanzlichen Gerichte des Bundes: Gutachten im Auftrag der Gerichtskommission der Vereinigten Bundesversammlung, 3 VPB 316, at 331 (2008).

146 For an example see § 89-§ 94 a *Verwaltungsrechtspflegegesetz* (VRG) (Zurich Law on Administrative Procedure) 24 May 1959, 175.2 (Zurich).

147 Hauser/Schweri (note 12), § 108, at para. 47.

148 For an example see S. Wyler, Gute Noten für Berner Gerichte, Der Bund, at 39 (6 April 2001).

VII. Judicial Accountability: Discipline and Removal Procedures

1. Formal Requirements

Despite their independence judges have a series of responsibilities which may lead to disciplinary proceedings if they are not fulfilled. However, in Switzerland disciplinary proceedings do not play the same role as in other judicial systems. The limited tenure of Swiss judges and their re- or non-reappointment already serve as an important basis for judicial accountability. In this respect the Swiss judicial systems differs from jurisdictions which provide for life tenure where disciplinary proceedings are the only option for removing judges from office for misconduct. Once more the standards within Switzerland vary considerably: Federal Supreme Court judges by constitutional provision are elected for a term of office of six years[149] during which they can be neither sanctioned nor removed from office, as the statutory law does not provide any disciplinary sanctions for them.[150] Theoretically, non-reelection for vital reasons is the only way of ensuring that Federal Supreme Court judges maintain a professionally and personally satisfactory profile.[151] In practice, should there be distinct signs of infraction of judicial responsibilities, the court president or the parliamentary supervisory committee discusses the issue with the judge concerned. As an *ultima ratio* in exceptional circumstances, the judge is informally asked to resign but can by no legal means be forced to do so. As for the federal courts of first instance, the law does not determine any disciplinary sanctions apart from removal.[152] The removal procedure is initiated by the parliamentary supervisory committee – based on its own perceptions or on notification by a third party – and is ended by a parliamentary decree.[153] These procedures are restricted to the most serious derelictions of judicial duties (e.g. repeated omission of an official act prescribed by law, obvious or repeated abuse of authority, obvious and

---

[149] Article 145 BV; Article 9 section 1 BGG.

[150] See Biaggini (note 22), Art. 145, at paras. 3 and 5.

[151] Non-reappointment for other than *vital reasons* means a serious threat to judicial independence; see Kiener (note 1), at 288.

[152] Article 10 VGG; Article 10 SGG, Article 14 PatGG.

[153] Article 40a ParlG; Article 10 VGG; Article 10 SGG, Article 14 PatGG. See Kiener/Durrer/Faessler/Kruesi (note 94), at 331; P. Tschümperlin, Die Aufsicht des Bundesgerichts, 105 Schweizerische Juristen-Zeitung (SJZ) 233, at 237 (2009).

clear partiality and severe infractions of the dignity of office).[154] Within the cantons, there is too broad a variety of disciplinary and removal procedures to describe in a few sentences. In a considerable number of cantons disciplinary or removal procedures do not exist.[155] In certain cantons, there are no specific disciplinary procedures, but judges may be dismissed either by parliamentary decree or by the decision of a judicial authority on offences regulated by statutory law. In a few cantons there are disciplinary sanctions, reprimand being the most common sanction imposed on a judge.[156]

2. Disciplinary Proceedings

The formal procedures for disciplinary actions and the removal of judges are regulated by law. As a rule, the supervisory body is also in charge of disciplinary proceedings. Depending on the pertinent law, this body is either a judicial authority – like the president of the court –, a judicial council, or the parliament. The investigation is conducted by the disciplinary body, or in the case of parliaments by a parliamentary committee.[157] However, for reasons of confidentiality and professionalism the investigation is often assigned to a third party like for instance a former judge or a university professor, particularly in cantons where the (non-standing) parliament is in charge of the supervision of judges. Should there be no specific rules on disciplinary proceedings allegations of misconduct are investigated by analogy with the pertinent statutory laws on administrative procedure.

---

[154] Deliberately or grossly negligent severe infraction of judicial duties (Article 10 subsection a VGG; Article 10 subsection a SGG, Article 14 subsection a PatGG), such as, for example, the repeated omission of an official act prescribed by law, obvious or repeated abuse of authority, obvious and clear partiality or severe infraction of the dignity of office (see Article 65 section 2 *Gerichtsorganisationsgesetz des Kantons Jura* (Jura Law on Judicial Organization) 23 February 2000, 181.1 (Jura)). See EJPD, Bundesamt für Justiz, Amtspflichten der Richterinnen und Richter der erstinstanzlichen Bundesgerichte: Gutachten vom 13. Oktober 2007, 3 VPB 306, at 313-314 (2008).

[155] See Kiener (note 1), at 287-289.

[156] See e.g. Arts. 45 and 45a *Personalgesetz* (Bern Law on State Officials) 16 September 2004, 153.01 (Bern).

[157] At federal level, see e.g. Article 40a ParlG on the judicial committee; see also Kiener/Durrer/Faessler/Kruesi (note 94), at 329-342.

3. Judicial Safeguards

Judges involved in disciplinary or removal procedures have the right to a fair trial, notably the right to be heard (Article 29 Federal Constitution).[158] At federal level, there are no judicial safeguards for judges of the federal courts of first instance being removed from office, as decisions of the Federal Assembly are not subject to any remedy.[159] Switzerland may thereby violate the right to a remedy pursuant to Article 13 ECHR and Article 2 section 3 ICCPR as well as the right to equal access to public service pursuant to Article 25 lit. c ICCPR.[160] At cantonal level, a judge may challenge the decisions of the cantonal disciplinary authority in the Federal Supreme Court.[161]

4. Sanctions and Practice

As a matter of fact, the primary and – in the Federation as well as in many cantons – only disciplinary sanction is non-re-election after the judge's term of office has ended. With regard to judicial independence (Article 191c Federal Constitution) and the constitutional principle of proportionality (Article 5 section 2 Federal Constitution) this situation may lead to disturbing results. On the one hand, for minor offences non-re-election is obviously disproportionate and at the same time infringes the principle of judicial independence. On the other hand, as there are no proportionate sanctions available, the violation of judicial duties often enough remains unsanctioned, for the disciplinary bodies tend to accept judges whose ability properly to fulfil judicial functions is subject to doubt, rather than risk an infringement of the principle of an independent judiciary as such.

---

158 Kiener/Durrer/Faessler/Kruesi (note 94), at 324-326 and at 336-342.

159 Article 189 section 4 BV; see Kiener (note 1), at 287-288, and Haller, Art. 189 BV, in: St. Galler Kommentar (note 3), at paras. 55-60.

160 Kiener/Durrer/Faessler/Kruesi (note 94), at 328-329. See also *supra* B. II. 3. Length of Office and Reappointment.

161 Article 83 section g BGG; Article 113 BGG.

VIII. Immunity for Judges

Judges do not enjoy absolute immunity, but are protected in several respects. As for proprietary liability, the state is liable for damage that a federal judge, in the exercise of his or her office, unlawfully caused to a third party.[162] In their private life, however, federal judges are – like every citizen – subject to civil action and civil liability.[163] With regard to criminal prosecution, federal judges are immune: criminal proceedings for official actions are begun only after the federal parliament has given its approval.[164] As for non-official actions, criminal proceedings may be initiated but with the written consent of the judge, or after the assembly of his fellow judges has given its approval. If consent is denied, the public prosecutor's office may appeal to the Federal Assembly.[165] In recent decades, though, the immunity of a Federal Supreme Court judge has never been challenged.[166] According to Article 347 section 2 subsection b Federal Criminal Code, the cantons have the competence to create immunity mechanisms for cantonal judges. There is no synopsis on the existence of such mechanisms at cantonal level. As a rule, judicial immunity relates only to judges serving in courts of appeal and is limited to official actions.[167] For crimes related to non-official actions, cantonal judges are not granted immunity, and district judges do not enjoy immunity at all. Generally immunity from criminal prosecution is lifted if the initiation of criminal proceedings seems objectively justified and does not simply appear to be an act of revenge by a troublemaker or a strategic manoeuvre by a political party.[168]

---

[162] Article 146 BV; Article 3 section 1 *Verantwortlichkeitsgesetz* (VG) (Federal Law on the Responsibility of the Confederation, State Authorities and State Officials) 14 March 1958, SR 170.32 (Switz.).

[163] Fischbacher (note 63), at 181.

[164] Article 14 section 1 VG; Article 347 section 1 StGB.

[165] Article 11 BGG; Article 12 VGG; Article 11 SGG, Article 16 PatGG.

[166] In 1987, a petition by citizen *Karel Rychetsky* asking to withdraw the immunity of two Federal Supreme Court judges was turned down by the Federal Assembly, see petition 87.260, AB-N 1987 IV p. 1759, AB-S 1988 II p. 418, AB.N 1988 III p. 1465.

[167] For the Canton of Zurich see Article 44 section 3 *Verfassung des Kantons Zürich* (Zurich Constitution) 27 February 2005, SR 131.211 (Switz.); e.g. Hauser/Schweri (note 12), at 142, para. 12.

[168] See C. Huerlimann, Die Eröffnung einer Strafuntersuchung im ordentlichen Verfahren gegen Erwachsene im Kanton Zürich, at 120-121 (2006).

IX. Associations of Judges

The freedom of association laid down in Article 23 Federal Constitution also applies to judges.[169] There are several national associations for judges in Switzerland, the most prominent being the Association of Swiss Judges (*Schweizerische Richtervereinigung SRV*) with about 500 members.[170] More specialized with regard to the professional background of their members are the Swiss Association of Commercial Judges (*Schweizer Verband der Richter in Handelssachen SVRH*)[171] and the Swiss Association of Justices of the Peace and of Mediators (*Schweizerischer Verband der Friedensrichter und Vermittler*).[172] The Swiss Group of Magistrates for Mediation and Conciliation (*Schweizerische Richtervereinigung für Mediation und Schlichtung*) is a national section of the Group of European Magistrates for Mediation (GEMME). Furthermore, there are several national network organisations, such as the Conference of first instance courts (*Konferenz der erstinstanzlichen richterlichen Behörden*) or the Conference of district court presidents and investigating judges (*Konferenz der Gerichtspräsidenten und Untersuchungsrichter*). At cantonal level, there are only a few cantonal or regional associations.[173] There are no specific laws or regulations concerning these associations. The associations are non-partisan, nor are they unions.[174] The main objectives of these associations are the safeguard and promotion of judicial independence and the development of the administration of justice. In addition, they aim at cultivating personal relations among judges.[175] The associations organize widespread

---

169 Kiener (note 1), at 188.

170 Association suisse des magistrats de l'ordre judiciaire, Associazione svizzera dei magistrate, available at <http://www.svr-asm.ch>.

171 Schweizer Verband der Richter in Handelssachen, available at <http://www.handelsrichter.ch>.

172 Schweizerischer Verband der Friedensrichter und Vermittler, available at <http://www.friedensrichter-vermittler.ch>.

173 E.g. *Verband Bernischer Richter und Richterinnen VBR* (Canton of Bern Association of Judges), *Association des magistrats du pouvoir judiciaire de Genève* (Canton of Geneva Association of Judges), *Associazione dei magistrati ticinesi* (Canton of Ticino Association of Judges and Prosecutors) or *Zentralschweizerische Vereinigung der Richterinnen und Richter ZVR* (Association of Judges of Central Switzerland).

174 Zappelli (note 92), at 502.

175 See e.g. Article 2 of the Statute of the Swiss Association of Judges.

activities. They regularly hold seminars and conferences; at times, they launch studies among their members, referring to questions like working conditions or remuneration. They establish study groups and they actively take part in the consultation procedure on federal or cantonal draft laws. The Association of Swiss Judges is regularly consulted by the federal legislator on issues relating to procedural law and to other matters concerning the judiciary.[176] The same is true for the cantonal and regional associations, which are consulted by the cantonal legislator on cantonal or regional draft laws and on other issues regarding the judiciary. Membership of the associations is voluntary. An estimated 30 to 40% of Swiss judges are members of at least one association. We suggest that one reason for this comparably low figure is that membership is of no relevance to the career of a judge; furthermore, Swiss judges generally do not perceive themselves as members of a social class, a view shared (and probably even expected) by the public. Associations of judges are funded by membership fees and earnings from seminars or conferences. They do not receive any financial or material support from the state.

X. Resources

Switzerland is one of the European countries with the highest budget allocations to the courts per inhabitant.[177] On average, 70% of the costs are linked to the remuneration of judges and court staff, whereas 30% are allocated to computerization, justice expenses, investments in new buildings and maintenance, as well as to the advanced training of judges and staff.[178] The number of staff is set either by statutory law or by decision of the body responsible for the administration of the judiciary (which can be the cantonal court, the parliament or the executive).[179] At the Federal Supreme Court, for instance, the 38 judges are assisted in their work by a staff of 280 people.[180] Court rooms, offices, libraries

[176] See *Bundesgesetz vom 18. März 2005 über das Vernehmlassungsverfahren* (VIG) (Federal Act on the Consultation Procedure) 18 March 2005, SR 172.061 (Switz.).

[177] 104 EUR per inhabitant or 0.22% per capita GDP in 2008, see CEPEJ report (note 31), at 15-29.

[178] CEPEJ report (note 31), at 25.

[179] See Zappelli (note 92), at 497.

[180] Geschäftsbericht des Bundesgerichts, at 10 (2008), available at <http://www.bger.ch/gb-bger2008_d.pdf>. At the Federal Administrative Court, the

and information technology are equipped and maintained within the limits of the court budget.[181] The level of computerization for the direct assistance of judges and court staff is very high throughout the confederation,[182] and even small district courts in rural areas are fully computerized. In short, the resources provided for maintenance, equipment, staffing etc. are adequate, and office and court room facilities are of such a standard that they provide an adequate working environment for judges and staff.[183]

C. Internal and External Influence

I. Separation of Powers

In spite of their independence judges do not operate in a vacuum. In Switzerland, the judiciary is part of the system of separation of powers with its elements of checks and balances determined by the federal and cantonal constitutions.[184] According to Article 144 section 1 and 2 Federal Constitution, the Federal Supreme Court judges may not at the same time be members of the House of Representatives (*Nationalrat*), of the Senate (*Ständerat*) or of the Federal Government (*Bundesrat*), and full-time Federal Supreme Court judges may not hold another office in the confederation or in a canton.[185] Due to the strong impact of the democratic principle though, the legislative branch is predominant

ratio is 74 judges and 280 members of staff, at the Federal Criminal Court, 15 judges and 35 members of staff.

[181] Zappelli (note 92), at 497.

[182] CEPEJ report (note 31), at 87.

[183] See also Zappelli (note 92), at 497.

[184] Among others, see Biaggini (note 22), Vorbemerkungen zu Art. 143-191c; R. J. Schweizer, Vorbemerkungen zur Justizverfassung, in: St. Galler Kommentar (note 3), at 2752, paras. 10-15.

[185] These incompatibilities also apply to the judges of the Federal Criminal Court and the Federal Administrative Court (see Article 6 SGG and Article 6 VGG) as well as to the cantonal judiciary (see e.g. Article 42 section 1 *Verfassung des Kantons Zürich* [Zurich Constitution] 27 February 2005, SR 131.211 [Switz.]).

over the other branches of government.[186] As a rule, the parliaments exercise high supervision (*Oberaufsicht*) of the judiciary,[187] whereas supervision of the courts of first instance is administered either by higher courts[188] or by judicial councils, provided that such bodies exist.[189] In addition, most judges are elected (and re-elected) by parliament (if not by popular vote),[190] and the main budgetary power is vested in the legislative branch.[191] If any, the executive branch has only limited formal influence on the judiciary, notably in cantons where court budgets are administered by the ministry of justice. In theory, undue influence can occur in the context of any of these functions. This is hardly ever the case in practice, though. Neither the legislative nor the executive branch has the power to overrule judicial decisions or to interfere with judicial proceedings, as high supervision is restricted to the formal administration of justice and clearly does not refer to judicial decisions.[192] However, the fact that judges in Switzerland are elected for a limited term of office after which they need to be re-elected poses a certain threat to ju-

---

[186] According to Article 148 section 1 BV, the *Bundesversammlung* (the Federal Assembly) is the highest federal authority; see e.g. J.-F. Aubert, Die schweizerische Bundesversammlung von 1848 bis 1998 (1998), or U. Zimmerli, Bundesversammlung, in: D. Thürer/J.-F. Aubert/J. P. Müller (eds.), Verfassungsrecht der Schweiz, 1027, at 1028-1029, para. 2 (2001).

[187] For the federal courts see Article 169 section 1 BV; for an overview see Tobler (note 34), at 7690-7726; Béguelin/Hess/Schwab (note 34), at 7625-7640. See also Mastronardi, Art. 169 BV, in: St. Galler Kommentar (note 3); A. Tobler, Die parlamentarische Oberaufsicht über die eidgenössischen Gerichte: Eine aktuelle Untersuchung der Geschäftsprüfungskommission des Ständerates, 3 Parlament – Parlement – Parlamento 13 (2002).

[188] For the Federation see Article 15 section 1 subsection a BGG, Article 3 SGG (Federal Criminal Court), Article 3 VGG (Federal Administrative Court), Article 3 PatGG (Federal Patent Court) and *Aufsichtsreglement des Bundesgerichts* vom 11. September 2006 (AufRBGer) (Federal Supreme Court Regulation on the Supervision of Courts of First Instance) 11 September 2006, SR 173.110.132 (Switz.).

[189] See *supra* B. I. 2. Judicial Council; see also Zappelli (note 92), at 492.

[190] See *supra* B. II. 2. The Process of Judicial Selection.

[191] See *supra* B. I. 1. Organs in Charge of the Administration of the Judiciary.

[192] Article 26 section 4 ParlG; see Kiener (note 1), at 299-300; Mastronardi, Art. 169 BV, in: St. Galler Kommentar (note 3), at para. 20.

dicial independence, and even more so if the electing body is also vested with the power of supervision.[193]

II. Judgments

1. Basis

Judgments are based on law, according to the rule of law enshrined in Article 5 section 1 Federal Constitution.[194] In addition, Article 191c Federal Constitution states that in their adjudicative activity judicial authorities are independent and subject only to the law.[195]

2. Practice

There are no overall statistics on acquittals. The annual report of the Federal Supreme Court contains elaborate statistics on the number of appeals dismissed for formal and for material reasons and on the number of appeals approved.[196] Similar statistics are published in the annual reports of the cantonal courts.[197]

3. Structure

Whereas the formal requirements of a decision are governed by statutory procedural law,[198] the law does not determine how a judgment is to be written. However, the right to be heard as guaranteed in Article 29 section 2 Federal Constitution according to the established Federal Su-

---

[193] Kiener (note 1), at 285-289 and at 257-258. See *supra* B. II. 3. Length of Office and Reappointment.

[194] Biaggini (note 22), Art. 5, at paras. 7 and 12; Y. Hangartner, Art. 5 BV, in: St. Galler Kommentar (note 3), at paras. 5-29.

[195] See Steinmann, Art. 191c BV, in: St. Galler Kommentar (note 3).

[196] Geschäftsbericht des Bundesgerichts (note 180), at 18-31.

[197] See e.g. Geschäftsbericht des Obergerichts des Kantons Bern, at 22 (2008), available at <http://www.jgk.be.ch/site/og_geschaeftsbericht2008.pdf>.

[198] According to Arts. 34-35 VwVG for instance, public law decisions must be issued in written form and must be reasoned; furthermore, they must include instruction on the right to appeal. See also Article 238 ZPO and Article 357 StPO.

preme Court case law embodies the right to a reasoned judgment.[199] The Federal Supreme Court has developed differentiated standards on how a judgment must be reasoned in order to comply with the requirements laid down by the constitution. Notably, courts are obliged to consider the substantial arguments brought forward by the litigants and must disclose all arguments relevant for the decision.[200] These standards are usually duly followed in practice. If a judgment is not reasoned in accordance with the requirements laid down by the constitution, it may be challenged in any proceedings for infraction of Article 29 section 2 Federal Constitution.[201]

4. Public Access

Public access to judgments is determined by statutory procedural law in accordance with the requirements of international law (Article 6 section 1 ECHR, Article 14 section 1 CCPR) and federal constitutional law (Article 30 section 3 Federal Constitution).[202] As a minimum, court rulings (the title of the judgment and the judgment itself, but not the grounds of the decision) must be displayed to the public for 30 days at the court registry.[203] Furthermore, the courts are formally obliged by

---

[199] Among others see R. Kiener/W. Kälin, Grundrechte, at 425-426 (2007); Müller/Schefer (note 129), at 885-892.

[200] Among others see BGE 129 I 232, cons. 3.2 at 236; BGE 126 I 97, cons. 2a at 102; M. Albertini, Der verfassungsmäßige Anspruch auf rechtliches Gehör im Verwaltungsverfahren des modernen Staates: eine Untersuchung über Sinn und Gehalt der Garantie unter besonderer Berücksichtigung der bundesgerichtlichen Rechtsprechung, at 360-369 (2000); Kiener/Kälin (note 199), at 421; Müller/Schefer (note 129), at 868-869.

[201] For an example see BGE 131 II 271, cons. 11.7.1 at 303.

[202] For an overview see H. Aemisegger, Öffentlichkeit der Justiz, in: P. Tschannen (ed.), Neue Bundesrechtspflege, Auswirkungen der Totalrevision auf den kantonalen und eidgenössischen Rechtsschutz, 375, at 379-393; U. Saxer, Vom Öffentlichkeitsprinzip zur Justizkommunikation, I Zeitschrift für schweizerisches Recht (ZSR) 459 (2006); Steinmann, Art. 30 BV, in: St. Galler Kommentar (note 3), at paras. 28-40.

[203] Article 30 section 3 BV; for the Federal Supreme Court see Article 59 section 3 BGG and Article 60 BGerR; for the Federal Administrative Court see Article 42 VGG. See also BGE 133 I 106, cons. 8.1-8.2 at 107-108; Biaggini (note 22), Art. 30, at para. 20; S. Heimgartner/H. Wiprächtiger, Art. 59, in: BSK BGG (note 14), at paras. 30-34 and 76-82.

statutory procedural law not only to grant individual notice of their activities, but also to inform the public in an active manner about their jurisdiction.[204] Consequently, both the federal courts and a number of cantonal courts have set their proper information standards, either in administrative regulations on court organization[205] or in specific administrative information regulations (*Informationsreglemente*).[206] The Federal Supreme Court and the Federal Administrative Court publish all material decisions on the court website, whereas the Federal Criminal Court publishes a selection of leading decisions.[207] The online databases of these three courts offer advanced research tools which enable the user to search both within the integral text and through meta-data such as key words or legal norms.[208] Access is not restricted to specific users and is free of charge. In addition, the Federal Supreme Court database offers an expert search tool that is subject to a charge. Furthermore, both the Federal Supreme Court and the Federal Administrative Court publish a selection of leading cases in their official print journals which are available on subscription.[209] At cantonal level, the standards vary considerably. Most cantonal courts publish a selection of their decisions on the court website.[210] In certain cantons, there are specialized journals

[204] Article 27 section 1 BGG (Federal Supreme Court); Article 29 section 1 VGG (Federal Administrative Court); Article 25 section 1 SGG (Federal Criminal Court), Article 25 PatGG (Federal Patent Court); for the cantons see Article 54 section 1 ZPO. See P. Tschümperlin, Art. 27, in: BSK BGG (note 14), at paras. 2-3.

[205] For the Federal Supreme Court see BGerR; for the Federal Criminal Court see *Reglement für das Bundesstrafgericht*.

[206] For the Federal Administrative Court see *Informationsreglement für das Bundesverwaltungsgericht* (Administrative Court Information Statute) 21 February 2008, SR 173.320.4 (Switz.).

[207] For the Federal Supreme Court see Article 59 section 3 BGG and Article 59 BGerR; for the Federal Administrative Court see Arts. 5 and 6 *Informationsreglement für das Bundesverwaltungsgericht*. For the publication practice of the Federal Supreme Court see P. Tschümperlin, Öffentlichkeit der Entscheidungen und Publikationspraxis des Schweizerischen Bundesgerichts, 99 SJZ 265 (2003).

[208] For the Federal Supreme Court see <http://www.bger.ch>, for the Federal Administrative Court see <www.bundesverwaltungsgericht.ch>, for the Federal Criminal Court see <http://www.bstger.admin.ch>.

[209] For the Federal Supreme Court see Article 58 BGerR; for the Administrative Court see Article 7 Informationsreglement für das Bundesverwaltungsgericht.

[210] See also Zappelli (note 92), at 497.

subject to subscription publishing a selection of leading cantonal court decisions,[211] while other cantonal courts publish their leading decisions in their annual reports.[212]

If there are court proceedings, they are open to the public.[213] Courts usually publish the dates of court proceedings on their websites.[214] The media and the public may attend the proceedings, but do not have access to the files[215] and may be excluded if substantial public or private interests are at stake.[216] However, not all judicial decisions are delivered in a court setting with the judges hearing the case publicly. While this is generally the case with criminal proceedings[217] and civil law proceedings,[218] the Federal Supreme Court and the federal courts of first instance typically decide by written proceedings;[219] the same is true for the cantonal administrative courts.[220] Court proceedings are by excep-

---

[211] See e.g. Bernische Verwaltungsrechtssprechung BVR, available at <http://www.ebvr.ch>, publishing scholarly papers on administrative law matters along with selected decisions of the Bern Administrative Court.

[212] For instance the Zurich Court of Cassation or the Zurich Administrative Court.

[213] Article 59 BGG. For the cantons see Article 54 section 2 ZPO and Article 67 section 1 StPO. See also Biaggini (note 22), Art. 30, at paras. 17-18; Heimgartner/Wiprächtiger, Art. 58, in: BSK BGG (note 14), at para. 6 and Heimgartner/Wiprächtiger, Art. 59, in: BSK BGG (note 14), at para. 35.

[214] Zappelli (note 92), at 503. The Federal Supreme Court ruled that it is constitutional to inform the public via the press of these dates, see decision 1P.347/2002, cons. 3.2 (25 September 2002).

[215] Zappelli (note 92), at 503.

[216] See e.g. Article 59 section 2 BGG (Federal Supreme Court). For the cantons see Article 54 section 3 and 4 ZPO (civil procedure); Article 68 section 1 StPO (criminal procedure). See also Heimgartner/Wiprächtiger, Art. 59, in: BSK BGG (note 14), at paras. 53-75.

[217] For the cantons see Article 67 section 1 StPO; for the Federal Criminal Court see Article 30 SGG.

[218] Article 54 ZPO.

[219] Article 58 BGG (Federal Supreme Court); Article 40 section 1 VGG (Administrative Court); Article 30 SGG (Federal Criminal Court).

[220] E.g. Article 31 Bern Law on Administrative Procedure; see also Article 54 ZPO and Arts. 67-70 StPO.

tion held if the law requires or if the court decides to debate in public.[221] In practice, there are hardly any impediments to public and media access.[222] Journalists accredited to the court have special rights such as access to rooms generally not open to the public, or privileged access to the database of the court; in addition, they are actively informed by the courts about the dates and issues of impending court hearings or they receive abstracts of the facts of the case, etc.[223] If a case attracts considerable public attention the number of visitors may be restricted,[224] although in exceptional cases courts can temporarily move to provisional court premises in order to meet the demands of the media and the public. The media are generally not allowed to take pictures or to broadcast during court proceedings.[225]

III. Improper Influence on Judicial Decisions

From an outside perspective there is no evidence that judicial decisions have been unduly influenced by senior judges, prosecutors, government officials or private interests. It can happen, though, that politicians in public critically comment on judicial decisions, and on a few occasions following a specific trial politicians have openly announced that they would oppose the re-election of the judges involved.[226] Since judges in

---

[221] Article 58 section 1 BGG; Heimgartner/Wiprächtiger, Art. 58, in: BSK BGG (note 14), at paras. 6-31 and Heimgartner/Wiprächtiger, Art. 59, in: BSK BGG (note 14), at para. 41.

[222] F. Zeller, Zwischen Vorverurteilung und Justizkritik: Verfassungsrechtliche Aspekte von Medienberichten über hängige Gerichtsverfahren (1998); see also M. Heer/A. Urwyler (eds.), Justiz und Öffentlichkeit – Justice et public (2007).

[223] See e.g. *Richtlinien betreffend die Gerichtsberichterstattung am Bundesgericht* (Federal Supreme Court Guidelines for the Media) 6 November 2006, SR 173.110.133 (Switz.), or Arts. 12-16 Administrative Court Information Statute; the cantonal court guidelines for the media are published in Heer/Urwyler (note 222), at 149-258.

[224] Article 68 section 1 subsection b StPO.

[225] Article 62 BGerR (Federal Supreme Court); Article 16 *Reglement für das Bundesstrafgericht*; Article 69 StPO; Heimgartner/Wiprächtiger, Art. 59, in: BSK BGG (note 14), at paras. 48-51.

[226] For examples see Biaggini (note 22), Art. 88, at para. 13; Zappelli, Le juge et le politique (note 42), at 117.

Switzerland do not have life tenure, such behaviour endangers judicial independence, notably if it stems from members of parliament, as in the Federation and in a great number of cantons the parliament is the body responsible for the re-election of judges. There are no signs that such incidents have had a chilling effect on the judges involved; however, media and scholars have critically commented on these threats to judicial independence.[227] Although media reporting of a trial can be intensive, it is widely considered as fair. Hitherto, no court proceedings have ever been declared void due to unfair media coverage.

In recent decades, to the best of my knowledge, there has been only one conviction of a judge for corruption (Article 322ter Federal Criminal Code).[228] *Ex parte* communication is formally forbidden by the statutory procedural law.[229] The right to a fair trial (Article 29 Federal Constitution) and the right to an independent and impartial court (Article 30 section 1 Federal Constitution) are additional factors precluding improper influence on judicial decisions.

IV. Security

Although the standards of court security differ considerably among the courts, security is in general regarded as sufficient by the judges. While access to the federal courts and to most cantonal courts is guarded, in certain district courts the entrance is supervised, but by the registry, and visitors are only controlled by face check. As a rule, security guards or registrars are informed about the daily schedule of the court and the names of the parties who will seek entry during the day. In district courts, security gates, access badges and video surveillance are still not standard, although these safety measures are becoming more frequent. In many court buildings, there is no separate entrance for judges and

---

[227] Among others see Kiener (note 1), at 285-287; Biaggini (note 22), Art. 88, at para. 13; Zappelli, Le juge et le politique (note 42), at 117-121; R. Kiener, Sind Richter trotz Wiederwahl unabhängig?, 5 Plädoyer 36 (2001); see also D. Strebel, Die Politiker richten es selber, 11 Die Weltwoche (2003) (24 March 2003).

[228] See Corte delle Assise correzionali di Lugano ex parte Franco Verda (27 July 2002).

[229] "*Verbot des Berichtens*", see e.g. § 84 *Gerichtsordnung des Kantons Schwyz* (Schwyz Law on the Organization of the Judiciary) 10 May 1974, 231.110 (Schwyz); § 129 Zurich Law on the Organization of the Judiciary; Hauser/Schweri (note 12), § 129.

court staff. If there is evidence that a party to a case may be violent, the police are present during trial, in plain clothes if appropriate. Most courts, offices and registries are equipped with alarm systems such as security buttons directly linked to the local police. Only in a few cantons are judges instructed how to behave in emergency situations or how to deal with aggressors. During their career most Swiss judges are sooner or later subject to threats, although a considerable number of judges reported to the author that they had never been threatened at all. Serious threats hardly ever occur and in small court districts and rural areas do not seem to happen at all. No physical assaults have been reported. However, there seems to be a certain tendency towards annoying or defaming judges, for instance by e-mails or telephone calls to their homes, by letters to the editors of local newspapers or by e-mail campaigns addressed to members of parliament (i.e. the body responsible for the supervision of judges). If serious threats occur, the police are informed and decide together with the judge concerned on the measures to be taken. In the very few incidents reported, offenders were arrested, or criminal proceedings were opened. In particular cases, judges were placed under police protection.

D. Ethical Standards

I. Code of Ethics for Judges

With the exception of the code of conduct adopted in the canton of Basel-Landschaft[230] there are no codes of ethics for judges, either at cantonal or at federal level.[231] This fact does not put judicial independence into question as there are numerous statutory provisions for the safeguarding of judicial conduct and ethics. Above all, the statutory procedural laws regulate the situations in which a judge must withdraw from

[230] *Verhaltenskodex der Richterinnen und Richter des Kantonsgerichts des Kantons Baselland*, available at <http://www.baselland.ch/fileadmin/baselland/files/docs/gerichte/verhaltenskodex.pdf>. See S. Gass, Richterethik/Richterdeontologie – Überlegungen zu einer Rechtstheorie, in: Deutscher Richterbund (ed.), Justiz und Recht im Wandel der Zeit. Festgabe 100 Jahre Deutscher Richterbund, 125-148 (2009).

[231] Zappelli (note 92), at 501.

a case.[232] These laws also set the basic rules of judicial conduct, such as for instance the duty to act in good faith.[233] Furthermore, the law defines the standards on which additional occupation, such as working as a lawyer, trustee or notary, is incompatible with the judicial function[234] and it sets out the activities which have to be disclosed by a judge when taking office, like for example being a member of the board of administration of a public or private corporation.[235] In addition, the federal courts and most cantonal courts have passed administrative regulations on court organization matters which, among other questions, regulate the standards of decent attire of judges sitting in court[236] or the procedures to be followed if conflicts occur among the judges or between judges and their staff.[237]

II. Training

Judges are not offered any institutionalised formal training on ethical standards before or after taking office.

---

[232] For the federal level see e.g. Article 34 BGG; for the cantons see Article 47 ZPO and Article 54 StPO.

[233] Article 52 ZPO; Article 3 section 2 subsection a StPO.

[234] See e.g. § 9 section 1 *Gerichtsorganisationsgesetz des Kantons Aargau* (GOG) (Aargau Law on Judicial Organization) 11 December 1984, 155.100 (Aargau): "[…] judges omit avocations that compromise the fulfilling of their official duties or that are suitable to jeopardize the confidence in their judicial independence. Notably, working as a lawyer, trustee or notary is forbidden."

[235] See e.g. § 3a Zurich Law on the Organization of the Judiciary or § 35 *Gerichtsorganisationsgesetz des Kantons Basel-Landschaft* (GOG) (Basel-Landschaft Law on Judicial Organization) 22 February 2001, 170 (Basel-Landschaft).

[236] See e.g. Article 36 Administrative Court Statute; Article 15 Criminal Court Statute; Article 15 *Geschäftsreglement des Obergerichts des Kantons Bern* (Bern Cantonal Court Statute) 9 December 1996, 162.11 (Bern).

[237] See e.g. Article 24 BGerR; Article 16 *Geschäftsreglement für das Bundesverwaltungsgericht*.

E. Supreme Court

One of the main concerns about the judicial independence of the Federal Supreme Court is the fact that Federal Supreme Court judges are elected for a period of only six years (Article 169 Federal Constitution), after which they are subject to re-election. Even though hitherto only once has a Federal Supreme Court judge applying for re-election been rejected by the Federal Assembly,[238] judicial independence may be jeopardized by the possibility of not being re-elected and its influence on the decision-making process. However, the fact that the Federal Supreme Court does not have the competence to declare void statutory laws passed by the Federal Assembly[239] may at least defuse the main threats to judicial independence which go along with the limited term of office.

F. Conclusion

In the past few years, judicial independence in Switzerland has been strengthened insofar as the principle of the separation of powers has been remodelled by diminishing the influence of the other branches of government on the judiciary, notably with regard to self-administration of the judiciary. Nevertheless, from an outside perspective, judicial independence may still seem frail, mainly because a considerable number of the judges are elected by popular vote. Furthermore, Swiss judges in fact are endorsed by a political party and do not have life tenure as they are elected for only a limited period of time. Where judges are elected by parliament, the system of a limited term of office is even more questionable due to the fact that the parliament in most cases is also in charge of the supervision of the judiciary and thereby competent to enact disciplinary sanctions. However, this system is deeply rooted within the Swiss constitutional design with its predominant emphasis on democratic accountability.[240] Furthermore, there is a common understanding, also among legal scholars and judges, that in practice judicial inde-

---

[238] The judge concerned immediately applied for the vacant seat in the by-election and was in fact elected in the next General Assembly plenary session a few weeks later, see Kiener (note 1), at 286, with further reference.

[239] See Article 190 BV.

[240] See also Zappelli, Le juge et le politique (note 42), at 110.

pendence in Switzerland is not put into question.[241] This view is shared by international surveys. According to the World Economic Forum's latest competitiveness report, for example, Switzerland's public institutions are rated among the most effective and transparent in the world (ranked 4th); the report explicitly stresses factors like an independent judiciary, a strong rule of law and strong accountability of the public sector.[242] According to the Global Corruption Report by Transparency International (2007), focusing on Corruption and Judicial Systems, Switzerland belongs to the world's top ten countries with regard to *de facto* judicial independence.[243] Still, the Swiss judicial system is hardly appropriate to be taken as a role model for other countries, as it is narrowly intertwined with the specific and unique characteristics of the Swiss model of direct democracy, notably with regard to the selection, election and supervision of judges.

The most pressing issue of judicial independence remains the fact that judges are elected for only a limited period of time, after which they have to run for re-election.[244] The remedial measures to be taken are available, as it would suffice to amend the Federal Constitution and the cantonal constitutions by introducing unlimited terms of office for

---

[241] Kälin/Rothmayr (note 17), at 180; see also P. Albrecht, Richter als (politische) Parteivertreter? 3 Justice – Justiz – Giustizia (2006), available at <http://richterzeitung.weblaw.ch/content/edition.aspx?id=191>; H. Seiler, Richter als Parteivertreter? 3 Justice – Justiz – Giustizia (2006), available at <http://richterzeitung.weblaw.ch/content/edition.aspx?id=193>; P. Abravanel, La déontologie du juge, 4 Aktuelle juristische Praxis (AJP/PJA) 421 (1995); P. Abravanel, Indépendance de la justice et efficacité du système judiciaire, 87 SJZ 274 (1991); Zappelli, Le juge et le politique (note 42), at 115-121.

[242] X. Sala-i-Martin/J. Blanke/M. Drzeniek Hanouz/T. Geiger/I. Mia/F. Paua, The Global Competitiveness Index: Prioritizing the Economic Policy Agenda, in: World Economic Forum (ed.), The Global Competitiveness Report 2008-2009, 3, at 11.

[243] S. Voigt, Economic growth, certainty in the law and judicial independence, in: D. Rodriguez/L. Ehrichs (eds.), Global Corruption Report 2007 – Transparency International – Special Focus: Corruption in Judicial Systems, 24, at 25 (2007).

[244] Kiener, Wiederwahl (note 227), at 37-40; Biaggini (note 22), Art. 188, at para. 13; Schweizer, Vorbemerkungen zur Justizverfassung, in: St. Galler Kommentar (note 3), at para. 14; S. Gass, Wie sollen Richterinnen und Richter gewählt werden? Wahl und Wiederwahl unter dem Aspekt der richterlichen Unabhängigkeit, 5 AJP/PJA 593, at 606-607 (2007); Raselli (note 76), at 39-41.

judges.[245] Last but not least, the fact that judges in practice need to be, or after their election need to become, members of the political party endorsing them is considered among scholars and judges more and more incompatible with judicial independence.[246]

[245] The Fribourg Constitution was amended accordingly in 2004, see Article 121 section 2 Fribourg Constitution; Zappelli, Le juge et le politique (note 42), at 97 and 99.

[246] See, among others, T. Balmelli, Quelques remarques sur l'exigence de réformer les procédures de désignation des juges: La controverse des contributions financières réclamées par les partis, 3 Justiz – Justice – Giustizia (2006), available at <http://richterzeitung.weblaw.ch/content/edition.aspx?id=192>; N. Queloz, Compléments récents apportés au droit pénal suisse de la corruption et développements relatifs aux relations entre juges et partis politiques, 3 Justiz – Justice – Giustizia (2006), available at <http://richterzeitung.weblaw.ch/content/edition.aspx?id=213>.

Judicial Independence in Germany

*Anja Seibert-Fohr**

A. Introduction

Judicial independence has played an important role in building a democratic order in the Federal Republic of Germany since the end of the Third Reich.[1] The Basic Law of 1949 (*Grundgesetz*) with its elaborate rights catalogue was a reaction to the Nazi dictatorship which had used the judiciary to pursue its inhuman policies.[2] In order to protect these fundamental rights in the future the new constitution provided for the separation of powers and gave the judiciary an independent supervisory function. Since then judges have been entrusted with the role of defending the Basic Law, including its rights catalogue, against government encroachments.[3] Judicial review extends to statutory laws and thus protects fundamental rights even against democratic decisions of parlia-

* The author would like to thank David Roth-Isigkeit and Saskia Klatte for their research assistance and help with citations and Dr. Christiane Schmaltz for valuable comments on an earlier draft of this chapter.

1 For its historical role in German law from 1555 on see G. Plathner, Der Kampf um die richterliche Unabhängigkeit bis zum Jahr 1848 (1935); D. Simon, Die Unabhängigkeit des Richters (1975).

2 H. Rottleuthner, The Conformity of the Legal Staff, in: M. Karlson/O. P. Jónsson/E. M. Brynjarsdóttir (eds.), Recht, Gerechtigkeit und Staat, 441 (1993); I. Staff, Justiz im Dritten Reich (1978), L. Gruchmann, in: M. Boszat/H. Möller (ed.), Das Dritte Reich, 83 (1983); M. Stolleis, Recht im Unrecht, 190 *et seq.* (1994).

3 M. Künnecke, The Accountability and Independence of Judges: German Perspectives, in: G. Canivet/M. Andenas/D. Fairgrieve (eds.), Independence, Accountability and the Judiciary, 217, at 218 (2006); J. Bell, Judiciaries within Europe, 109 (2006).

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233, DOI 10.1007/978-3-642-28299-7_12,

mentary majorities.[4] In the performance of their judicial function judges shall be independent and subject only to the law. This fundamental principle of the German constitutional order is formally protected by the Basic Law.[5] Its importance for liberal democracy was once again emphasized by the experience of the German Democratic Republic[6] and it continues to be a central aspect of the rule of law in Germany even today.

Apart from the constitutional guarantee, judicial independence is protected by the laws regulating the judiciary and procedural law.[7] The Federal Judges Act (*Deutsches Richtergesetz*, DRiG) and the Judicature Act (*Gerichtsverfassungsgesetz*, GVG) provide basic guarantees for all judges.[8] They apply to federal and state (*Land)* judges alike since there is – unlike in the United States – an integrated court system in Germany which is composed of state and federal courts depending on the differ-

4 Article 93 (1) Basic Law.

5 Article 97 Basic Law.

6 Rottleuthner (note 2).

7 For the guarantee of judicial independence in Germany generally see e.g. J. Limbach, Im Namen des Volkes – Macht und Verantwortung der Richter, at 89-104 (1999); A. Baer, Die Unabhängigkeit der Richter in der Bundesrepublik Deutschland und in der DDR (1999); J. Zätzsch, Richterliche Unabhängigkeit und Richterauswahl in den USA und Deutschland (2000); J. Limbach, Die richterliche Unabhängigkeit – ihre Bedeutung für den Rechtsstaat, Neue Justiz 281 (1995); F. Lansnicker, Richteramt in Deutschland (1996).

8 Section 1 Judicature Act; Section 25 Federal Judges Act. Judicial independence of state judges is also guaranteed by the constitutions of the states which copy verbatim or analogously repeat Article 97 (1) Basic Law. Article 65 (2) Baden-Württemberg Constitution; Article 85 Bavarian Constitution; Article 63 (1) Berlin Constitution; Article 135 (1) Bremen Constitution; Article 62 (1) Hamburg Constitution; Article 126 (2) Hessen Constitution; Article 39 (3) Niedersachsen Constitution; Article 121 Rheinland-Pfalz Constitution; Article 110 Saarland Constitution; Article 36 (1) Schleswig-Holstein Constitution; Article 108 (1) Brandenburg Constitution; Article 76 (1) Mecklenburg-Vorpommern Constitution; Article 55 (2) Sachsen Constitution; Article 83 (2) Sachsen-Anhalt Constitution; Article 86 (2) Thüringen Constitution.

ent levels of jurisdiction.[9] While the highest courts are federal courts, the courts of first instance and courts of appeal are state courts.[10]

The guarantee of judicial independence as a central aspect of the rule of law is directed against all government bodies, but primarily against the legislative and executive branches.[11] According to German legal doctrine it has three dimensions: substantive independence requires that judges in their decision-making process are bound only by law, not by any determination or other means of influence of other parties.[12] Judges shall be free to form their view on the merits of each case.[13] A number of meticulous legal safeguards seek to insulate judges against pressures which may compromise their independence.[14] Personal independence as the second dimension protects judges in their individual capacity against arbitrary external interventions.[15] Involuntary transfer, suspension and dismissal require a judicial decision based on statutory grounds.[16] Finally the third dimension, the notion of structural independence, has so far been less prominent in law and legal doctrine.[17] It

---

9 N. Foster/S. Sule, German Legal System and Laws, chapter 3 (2003); H.-E. Böttcher, The Role of the Judiciary in Germany, 5 German Law Journal 1317 (2004).

10 In other words, the court system is hierarchically integrated at the federal level. For more information see D. P. Kommers, Autonomy versus Accountability: The German Judiciary, in: P. H. Russell/D. M. O'Brien (eds.), Judicial Independence in the Age of Democracy: Critical Perspectives from around the World, 131, at 140 (2001).

11 Whether it includes protection against interference by the public is controversial. R. Wassermann, Art. 97, in: E. Denninger *et al.* (eds.), Kommentar zum Grundgesetz für die Bundesrepublik Deutschland (Alternativkommentar), Vol. 2, at paras. 86 *et seq.* (3rd ed. 2001).

12 BVerfGE 14, 56, at 69.

13 Bell (note 3), at 171.

14 Kommers (note 10), at 134.

15 BVerfGE 4, 331, at 346; BVerfGE 14, 56, at 69; BVerfGE 26, 186, at 198; BVerfGE 42, 206, at 209.

16 Article 97 (2) Basic Law.

17 For the assertion that Article 97 does not involve institutional independence see E. G. Mahrenholz, Justiz – eine unabhängige Staatsgewalt?, DRiZ 432, at 433 (1991). According to Hoffmann-Riem the legislative and executive branches have a role to play in influencing judicial structures. W. Hoffmann-Riem, Richterliche Unabhängigkeit in Zeiten struktureller Veränderungen der

only prohibits the combination of judicial and executive or legislative functions[18] so that judges are not allowed to exercise legislative or executive functions at the same time as judicial functions.[19]

In its current form the German notion of judicial independence underlying the Basic Law and the relevant laws on the judiciary finding its expression in the structure of judicial administration is not a principle of absolute independence. It is rather based on a concept of democratic governance which is characterized by mutual checks and balances. The requirement of democratic accountability corresponds to the important role the judiciary plays in terms of judicial review and its influence on political matters. Instead of being structurally isolated from the other branches of government the judiciary is democratically accountable by means of judicial selection and judicial administration more generally.[20] Most notably, the ministries of justice, which are accountable to parliament, have primary responsibility for judicial administration including judicial selection.[21] In order to reconcile accountability with independence a complex model of differentiated responsibilities and participatory rights has been developed.

Against the backdrop of the growing trend in Europe to establish judicial councils and in reaction to executive plans to introduce management principles to enhance the efficiency of the justice system, however, judges' associations have called for more self-administration of the judiciary in Germany.[22] Though there is little public and academic percep-

---

Justiz, in: R. Pitschas/A. Uhle (eds.), Wege gelebter Verfassung in Recht und Politik, Festschrift für Rupert Scholz, 499, at 509 (2007).

18 Article 97 Basic Law requires the separation of judicial and administrative functions.

19 Section 4 Federal Judges Act.

20 See Article 20 (2) Basic Law. A. Tschentscher, Demokratische Legitimation der Dritten Gewalt (2006); F. Wittreck, Die Verwaltung der Dritten Gewalt (2006).

21 According to Hoffmann-Riem political influence on the selection of federal judges is an important aspect of democratic governance. Hoffmann-Riem (note 17). For a similar argument in other Western democracies see P.H. Russell/D.M. O'Brien, Judicial Independence in the Age of Democracy: Critical Perspectives from around the World (2001).

22 P.-A. Albrecht, Zur richterlichen Unabhängigkeit in Europa – Modelle von Selbstverwaltung und Selbstverantwortung mit zahlreichen weiteren Beiträgen, 4 Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissen-

tion that judicial independence would currently be under any urgent tangible threat, these calls have prompted some political initiatives to challenge ministerial administration of the judiciary and to consider self-administration as a potential alternative.[23] Whether such a change can be reconciled with the exigencies of democracy under the German Constitution is controversial.[24] Article 20, paragraph 2 Basic Law provides that all state authority, including judicial power, shall be derived from the people and thus requires some form of democratic accountability.[25]

B. Structural Safeguards

Due to the high litigation rates in Germany which are among the top rates worldwide the number of judges is high[26] and the judiciary plays a

---

schaft (KritV) 333 (2008). For more details see *infra* at B. I. 3. Current Reform Debate.

[23] See e.g. T. Steffen, Autonomie für die Dritte Gewalt – Erwartungen aus der Politik, KritV 354 (2008); for Schleswig-Holstein: Projekt "Justiz 2010" initiated by the Minister of Justice Uwe Döring, available at <http://www.schleswig-holstein.de/MJAE/DE/Service/Presse/PI/2008/081119mjaeJustiz2010.html>.

Große Anfrage des Abg. Dr. Andreas Jürgens (Bündnis 90/Die Grünen) und Fraktion betreffend "richterliche Unabhängigkeit in einer modernen Justiz" (Drucksache 16/5178) im Rechtsausschuss des Hessischen Landtags am 14.2.2007; Freie und Hansestadt Hamburg – die Justizbehörde, Autonomie: Perspektive für die Justiz?!, Dokument und Bericht der Tagung am 6. Juni 2009 in Hamburg, KritV 225 (2009).

[24] See e.g. Wittreck (note 20), at 127-131; H.-J. Papier, Zur Selbstverwaltung der Dritten Gewalt, NJW 2585 (2002). But see T. Groß, Erwartungen aus deutscher verfassungsrechtlicher Sicht, KritV 347 (2008).

[25] For the democratic legitimacy of judicial selection committees see E.-W. Böckenförde, Verfassungsfragen der Richterwahl: Dargestellt anhand der Gesetzesentwürfe zur Einführung der Richterwahl in Nordrhein-Westfalen, at 71-86 (2nd ed. 1998); T. E. Dietrich, Richterwahlausschüsse und demokratische Legitimation, at 181-256 (2007).

[26] According to the latest figures published by the Federal Government there were 20,101 federal and state judges in October 2009. This means a ratio of about 18 judges at ordinary courts (for civil and criminal cases) per 100,000 habitants. Statistisches Bundesamt, Justiz auf einen Blick, at 42-43 (2008). There was a 4 % reduction in judicial posts between 2000 and 2006, which can be explained in part by a smaller number of cases in some jurisdictions. H. Teetz-

significant role in German society.[27] With the growing importance of fundamental rights the formally bureaucratic role of judges, which were subordinated to their superiors and simply had to apply the law, has since 1949 changed into one of an independent individual guardian of such rights.[28] They enjoy a special status which is different from that of the civil service and protects them from influence on their adjudicatory functions. While all courts are called upon to uphold the constitutionally guaranteed individual rights the Federal Constitutional Court maintains a powerful role of judicial review.[29]

Due to Germany's federal structure the federal government and the states (*Länder*) share the competence to regulate the judiciary.[30] This chapter aims to give a unified description of the German judiciary with the understanding that there are particular variances in individual states and jurisdictions the description of which however is beyond the task of this survey. While federal law provides for a uniform structure of the judiciary, common principles regarding the status of judges, and a common procedural law,[31] state legislation complements these rules by specifying the federal framework provisions and spelling out the legal status of state judges. Since only the highest courts of the different jurisdictions are federal, most courts in the Federal Republic of Germany are state courts. Federal and State courts specialize according to subject-matter jurisdiction.[32]Apart from the ordinary courts which are compe-

---

mann, Tendenzen bei der Personalentwicklung im öffentlichen Dienst, DRiZ 190, at 191 (2010); R. Neumann, Weiter schwindende Richterzahlen, DRiZ 193 (2010); Statistisches Bundesamt, Justiz auf einen Blick, at 43 (2008).

27 For the importance of litigation in Germany see E. Blankenberg, Changes in political regimes and continuity of the rule of law in Germany, in: H. Jacobs (ed.), Courts, Law and Politics in Comparative Perspective, 249 (1996).

28 Bell (note 3), at 109.

29 Künnecke (note 3), at 218.

30 This study focuses on the status of professional judges and therefore does not consider the role and protection of lay judges. According to the Federal Constitutional Court every judge, even those not appointed for life, enjoys a minimum protection of personal independence. Judges may be removed from office before the expiration of their tenure only on the basis of a judicial decision reached on the basis of statutory law. BVerfGE 4, 331, at 344.

31 See Sects. 1-45 and 77-84 Federal Judges Act.

32 Ordinary courts have jurisdiction for civil and criminal cases, whereas there are different courts for administrative, labour, fiscal, social and constitutional litigation respectively. For an account of the German legal system see H.

tent for civil and criminal matters there are separate courts for administrative, labour, social and tax matters.[33] Recent plans for efficiency reasons to merge the jurisdiction for administrative, social and tax matters at the state level have not met the necessary political consent.[34] But over the past decade there have also been various other initiatives to simplify the organization of courts, to rationalize the workflow of courts (e.g. merger of secretariat and registry), to consider new working methods, and the powers of court staff have been widened.

I. Administration of the Judiciary

1. Organs in Charge of the Administration of the Judiciary

The competence for judicial administration in Germany is divided between the federal government for federal courts and the state governments for state courts on their respective territories. Despite variances there is a common scheme of ministerial administration (usually by the ministry of justice) of the judiciary throughout Germany. The law distinguishes between matters relating to judicial administration and matters relating to the status of judges. The management of the courts and the judiciary is in the hands of the competent ministries and judges in managerial positions at the courts. Generally speaking, while the budget of the judiciary and the general court administration are under the supervision of the competent ministries, judges have participatory or consultative competences in matters which are somewhat more closely related to adjudication, such as decisions on the status of judges (promotion and transfer), and a decisive role in judicial discipline.[35] Only with respect to general court administrative matters (e.g. court facilities, record, correspondence etc.) and non-judicial matters is the staff of each court, including the court president, subordinated to the competent

---

Koch/F. Diedrich, Civil Procedure in Germany (1998); P. L. Murray/R. Stürner German Civil Justice (2004).

[33] For a detailed English account see Kommers (note 10), at 140.

[34] Bundesratsdrucksachen 543/04 and 544/04. For the federal level this would require an amendment to Article 95 (1) Basic Law.

[35] For the status of judges see G. Barbey, Der Status des Richters, in: J. Isensee/ P. Kirchhof (eds.), Handbuch des Staatsrechts, Vol. III, at 815-857 (2nd ed. 1996); E. Niebler, Die Stellung des Richters in der Bundesrepublik Deutschland, DRiZ 281 (1981).

ministry of justice.[36] The final decision on the legality of disciplinary measures lies with service courts (*Dienstgerichte*), and thus with the judiciary.[37] Special rules also apply to the process of judicial decision-making, which is exclusively in the hands of judges. Matters which are related to the handling of cases, such as the allocation of cases, are decided exclusively by judges and the executive must not interfere. Before elaborating on the particular institutional settings of judicial administration the following section explains in what way and why the ministerial model differs from judicial administration in other countries.

a) The Underlying Paradigm: The Refusal of Judicial Autonomy

The German model of ministerial judicial administration, like its Austrian and Czech counterparts,[38] differs from those in countries where judges play a more important role in judicial administration. Competences, which in the United States are exercised by the Judicial Conference,[39] still lie with the respective ministries in Germany. Nevertheless the historical bureaucratic structure subordinating the judiciary to the justice ministry has changed, giving a more independent, assertive and self-confident judiciary. This is generally the case with respect to adjudication. This is not to deny instances in which the executive may have tried to influence the judiciary, but generally speaking judicial decision-making is considered to be independent and judges are perceived to be sufficiently forceful to defend their independence against executive manipulation.[40] As the other sections of this chapter will show, the degree of personal judicial independence in all matters relating to adjudication is substantial and sometimes exceeds the freedoms given to judges in other Western countries. Nevertheless there is a debate about whether in structural terms the judiciary should be made more independent.

---

[36] For further details see E. Schilken, Gerichtsverfassungsrecht, at 172-178 (4th ed. 2007).

[37] See *infra* at B. VII. Judicial Accountability: Discipline, Service Supervision, Appraisals, Transfer and Removal.

[38] For the Czech model see Z. Kühn, Judicial Administration Reforms in Central-Eastern Europe: Lessons to be Learned, in this volume, Chapter B.

[39] R. Wheeler, Judicial Independence in the United States of America, in this volume, Chapter B. I. 1.

[40] Standard Eurobarometer 72 – Public Opinion in the European Union, Table of Results, Report, at 40 (2010), available at <http://ec.europa.eu/public_opinion/archives/eb/eb72/eb72_anx_vol1.pdf>.

Contemporary calls by judges for a greater degree of self-administration are based on the fear that administrative competences could be abused by the ministries in order indirectly to influence substantive judicial decision-making.[41] We will come back to this issue later.

In order to understand the current model of ministerial judicial administration on the basis of its constitutional rationale it is important to repeat that the German concept of separation of powers is one of mutual checks and balances. Instead of allocating all matters somehow relating to judges to the realm of judicial competences, the German Basic law distinguishes according to the nature of the relevant task.[42] Since decisions on the status of judges (including judicial selection) and the judicial budget are not considered to be adjudicatory in nature they are not within the exclusive competence of the judicial branch.[43] According to the German Constitutional Court, for example, the withdrawal of disciplinary oversight over lower courts from a court president affects neither substantive nor personal judicial independence, and thus does not infringe upon the relevant constitutional guarantee in Article 97 Basic Law.[44] Pursuant to this understanding administrative matters do not require judicial autonomy. Though the judiciary has consultative competences in administrative decisions which may have an indirect effect on adjudication (e.g. promotion) the politically accountable minister plays a decisive role in judicial selection. In several states he acts together with a judicial selection committee which is composed of members of parliament, judges and a private attorney. The risk that decisions on the status of judges which are considered administrative in nature and thus for the executive to decide might indirectly affect adjudication (e.g. promotion of judges) has been tolerated in the interest of democratic accountability.

b) The Parameters of Ministerial Administration

According to the system of ministerial administration a minister who is accountable to parliament has primary responsibility for judicial ad-

---

41 See *infra* at B. I. 3. Current Reform Debate.

42 H.-J. Papier, Die Richterliche Unabhängigkeit und ihre Schranken, NJW 1089, at 1090 (2001).

43 G. Schmidt-Räntsch, Deutsches Richtergesetz, § 25, at para 11 (6th ed. 2009).

44 BVerfGE 38, 139, at 152.

ministration.[45] Depending on the level of a court, and thus whether it is a federal or state court, this is either the federal Ministry of Justice or the competent state ministry (in most cases also a ministry of justice).[46] The budget of the judiciary which is proposed by the executive is adopted by the legislative branch.[47] The competent ministries exercise considerable control over the policy and organization of the court services. The structure of judicial administration is hierarchical, so that the competent minister appoints and supervises all civil servants who are involved in administration; they are subordinated to the minister. As indicated before, this oversight function is only related to court services and does not extend to judges in their judicial functions. Apart from its responsibility for the state examinations in law, judicial training and the recruitment of new judges, the ministry is responsible for technical matters including court buildings, equipment and administrative staff of the courts.[48]

Over recent decades for financial reasons the influence of the competent ministries has been reduced in the daily operation of judicial administration.[49] A substantial number of administrative matters relating to the administration of courts are handled by higher courts, namely the respective court presidents who are responsible for the organization of the offices of the courts and their staff. Among them are the grant of annual leave, the transfer of judges, and the initiation of disciplinary proceedings. They are subject to ministerial oversight unless the matter is related to judicial decision-making. All other judges are part of the hierarchical structure only with respect to matters outside their judicial functions, that is employment-related matters. They are bound by the

---

45 H. Dreier, Hierarchische Verwaltung im demokratischen Staat, at 129 *et seq.* (1991), M. Jestaedt, Demokratieprinzip und Kondominialverwaltung, at 302 *et seq.* (1993).

46 For the trend to entrust the ministry of justice with the administration of all courts regardless of the subject matter jurisdiction (*Rechtspflegeministerium*) see Wittreck (note 20), at 347, with references to the relevant state laws. See also S. Leutheusser-Schnarrenberger, Rechtspflegeministerium für alle Gerichtsbarkeiten, in: P. Kirchhof/ K. Offerhaus/ H. Schöberle (eds.), Festschrift Franz Klein, 993 (1994). An exception is Bavaria where the competence for judicial administration is divided among the ministries competent for the respective subjects (e.g. ministry of labour).

47 For the federal budget see Arts. 110 (3), 111 and 113 (1) Basic Law.

48 Bell (note 3), at 112.

49 Hoffmann-Riem (note 17), at 516.

decisions of their judicial superior (usually the court president) on the grant of annual leave, equipment, rooms, secretaries and the training of judicial apprentices.[50]

c) Judicial Involvement

Administrative matters which are more closely related to or may affect adjudication involve the competence of judicial organs. In administrative matters and for judicial selection the scope of judicial involvement varies from state to state. Article 98 (4) Basic Law allows but does not mandate federal states to provide that their judges are chosen jointly by the State Minister of Justice and a committee for the selection of judges.[51] The Federal Judges Act includes generally applicable provisions on the status of federal and state judges[52] and some specific basic requirements for institutional arrangements in state judiciary laws.[53] Most importantly, this Act provides for judicial councils which are to be involved in general and social matters relating to judges[54] and for service courts competent to hear disciplinary sanctions, and for the removal and transfer of judges.[55]

d) Court Presidents

As indicated before, court presidents in Germany exercise administrative functions relating to court management.[56] Apart from administrative matters, including the management of the administrative personnel, the workload of the court and communication with the competent ministry regarding organization, equipment and buildings, they also take part in adjudication, usually as presiding judges of a court panel or as single judges of local courts. The number of adjudicatory functions var-

---

50 BGH, NJW 426 (1991); BGH, NJW 905 (2005).

51 For uniform requirements for all courts see Article 98 (1) Basic Law and Federal Judges Act. For further details see Wittreck (note 20), at 335.

52 Sects. 1-45 a Federal Judges Act.

53 Sects. 71-84 Federal Judges Act.

54 Sects. 72-73 Federal Judges Act.

55 Sects. 77-78 Federal Judges Act.

56 Court presidents of third instance courts exercise almost no judicial functions but primarily administrative functions.

ies. With respect to administrative functions court presidents are assisted by senior administrators. In the performance of their administrative functions they are subject to ministerial oversight. The scope of this administrative position is not clearly defined by an overreaching statute; it is composed of numerous more or less important individual tasks, such as for example oversight functions over the judicial and non-judicial personnel of courts (including appraisals), court affairs, the initiation of disciplinary proceedings, the review of complaints, permission for secondary jobs (e.g. teaching), the grant of annual leave, the transfer of judges to other courts. Court presidents thus perform the tasks of an employer, without, however, exercising supervision over adjudication.

e) Judicial Boards

Apart from the participatory rights of the judiciary in judicial selection, which will be elaborated on below,[57] there is a Judicial Board (*Präsidium*) at each court, an institution which historically goes back to a similar institution during the German *Reich*. This form of self-administration is limited to specified tasks which are within the exclusive competence of the board and which must not be interfered with by the executive branch. Each board is composed of the court president and – depending upon the size of court – between four and ten judges elected by their peers at the court for a period of four years.[58] The Judicial Board decides on the composition of the panel of judges, coordinates substitutions, and allocates business for each fiscal year. It has exclusive competences with respect to the allocation of cases and assigns the judges competent to decide in criminal investigations.[59] Before the allocation of these duties all judges of a court have the right to be heard.[60] In order to provide for transparency as a means to protect internal independence the board may open its sessions to the other judges of the court.[61]

---

57 See *infra* at B. II. 2. The Process of Judicial Selection.

58 Sects. 21 a, 21 b Judicature Act.

59 Section 21 e Judicature Act. For more details see *supra* B. I. 1. e) Judicial Boards and Wittreck (note 20), at 355.

60 Section 21 e (2) Judicature Act.

61 Section 21 e (8) Judicature Act.

2. Judicial Councils

There is no single judicial council in Germany responsible for judicial administration generally. As the previous section shows, there are different forms of judicial participation in judicial administration. Nevertheless, self-administration concerns only specific aspects of court operation as well as particular decisions on the status of judges (in particular promotion). These competences are allocated to different judicial organs which operate either at the local court or at the ministerial level.[62] The abovementioned judicial boards have a limited but exclusive competence to decide on the allocation of judicial duties.[63] In addition there are judicial bodies with other competences the scope of which varies among the federal states. Such councils – judicial councils and presidential councils – have participatory and consultative competences in various fields, but the final decision is usually with the competent ministry. By way of distinguishing these institutions, albeit in general terms, judicial councils are competent for personal matters concerning judges in which they have an interest as employees while presidential councils (*Präsidialräte*), by giving expert advice, are involved in matters relating to the judiciary more generally (judicial career).[64] The practical influence of these institutions which depends on the individual ministers and the members of these bodies is difficult to evaluate in the absence of any relevant data or empirical research.[65]

a) Judicial Councils (*Richterräte*)

Pursuant to federal law each state must establish judicial councils with members elected by all judges.[66] Accordingly each court has a judicial council which participates in general and social matters concerning judges (except for matters relating to judicial selection and promotion); the exact scope of competences varies among the federal states. Usually they participate in decisions by the competent ministries by giving their views, while the final decision is regularly with the ministry.[67] This kind

---

62 H. Teetzmann, Selbstverwaltung der Justiz, Rechtsvergleichender Überblick, DRiZ 44 (2003).

63 See above at B. I. 1. e) Judicial Boards.

64 Schmidt-Räntsch (note 43), § 73, at paras. 5 *et seq.*

65 Wittreck (note 20), at 386.

66 Sects. 72, 73 Federal Judges Act. Wittreck (note 20), at 372.

67 Id., at 382-385.

of judicial involvement is best understood in the context of employee participation, which is also relevant in other professions but has its own rules with respect to judges.[68] Examples are social services for judges; continuing judicial education; and claims for recourse against judges.[69] Some federal states even extend the competences of judicial councils to personal matters, such as permitting secondary employment; secondment; probationary positions and disciplinary matters. Judicial councils are usually organized at different court levels as well as at the ministerial level and composed of up to seven members.[70] Depending on the federal state, at first instance courts the councils are composed of one to five judicial members elected by their peers.

b) Presidential Councils (*Präsidialräte*)

Presidential Councils (*Präsidialräte*) have advisory competences with respect to decisions concerning the status of judges.[71] They can be found at the federal level as well as in each state jurisdiction.[72] In the states there is either one judicial council at the higher level of each jurisdiction or a joint judicial council competent for all different subject-matter jurisdictions. In the first case the joint judicial council is composed of judges from all jurisdictions; in the latter case it is composed of a court president as the president of the council and between four and 12 other judges, half of whom must be elected by all judges of the relevant jurisdiction.[73] As a very minimum they participate in the promotion of judges (selection for higher judicial office) by a written statement on the personal and professional qualification of judges nominated for promotion.[74] Some federal states provide for broader

---

68 The councils also participate in councils which are competent for all those working in court services.

69 For further details see Wittreck (note 20), at 377-382.

70 Id., at 373.

71 Sects. 54-55 and 74 Federal Judges Act.

72 For more details see H. Willems, Rechtsstellung und Aufgaben des Präsidialrats, DVBl. 370 (2003); Schmidt-Räntsch (note 43), at para. 75.

73 Section 74 (2) Federal Judges Act.

74 Section 75 (1) Federal Judges Act. D. S. Clark, The Selection and Accountability of Judges in West Germany: Implementation of a Rechtsstaat, 61 Southern California Law Review 1795, at 1821; Bell (note 3), at 113. For more details see *infra* at B. III. 2. Promotion.

competences covering other aspects of the status of judges, such as initial recruitment, appointment to a position for life after the probationary period, transfer and dismissal, initiation and disciplinary decisions.[75] With their purely advisory function they do not have the right to initiate decisions but comment on executive plans for a decision.

c) Judicial Selection Committees (*Richterwahlausschuss*)

Furthermore several states provide for a judicial selection committee which participates in the recruitment and/or promotion of judges.[76] Their role and composition vary considerably, but they are usually composed of a majority of members of parliament and a number of judges plus a private attorney.[77] In some states the judicial members of the committee are elected by their peers; in other states all members are elected by parliament – the judicial members on the basis of nominations from the relevant professional groups. While in the state of Baden-Württemberg the judicial selection committee acts as a mediator if the ministry of justice and the presidential council do not agree, in all other states they select judges together with the competent minister.[78] As will be elaborated below, the judicial selection committee for the election of federal courts plays an even more decisive role.[79]

3. Current Reform Debate

The two main associations of judges, *Deutscher Richterbund* and *Neue Richtervereinigung*, each have elaborated a model to abolish the current

---

[75] For details with further references see Wittreck (note 20), at 365-366.

[76] See also *infra* at B. II. 2. The Process of Judicial Selection.

[77] For a comprehensive survey see T. E. Dietrich, Richterwahlausschüsse und demokratische Legitimation, at 103-133 (2007); J. Riedel, Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Germany, in: G. Di Federico (ed.), Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe: Austria, France, Germany, Italy, The Netherlands and Spain, 69, at 78-79 (2005).

[78] For Baden-Württemberg see Section 43 (5) of the *Land* Judges Act (*Landesrichtergesetz*, LRiG); for Hessen see Article 127 (3) Hessen Constitution; for Rheinland-Pfalz see Section 14 *Land* Judges Act; for Schleswig-Holstein see Section 43 (2) Schleswig-Holstein Constitution.

[79] See *infra* at E. Supreme/Higher Courts.

system of ministerial administration.[80] Instead of the old model of judicial participation both associations ask for more judicial self-governance. According to the *Deutscher Richterbund*'s model, judicial administration (including all decisions on the status of judges and the preparation of the judicial budget) shall be transferred from the ministries to an independent self-governing judicial administrative council in each federal state and for the federation.[81] The council shall be composed of judges and a prosecutor, all elected by a judicial selection council which is composed of seven judges, two prosecutors and ten members of parliament in order to satisfy the exigencies of democratic accountability.[82] A private attorney shall have consultative status in the council. The *Neue Richtervereinigung*'s proposal goes even further. Its aim is to abolish all hierarchical structures by introducing a uniform status for all judges and abolishing promotions.[83] Judicial administration, instead of being done by the ministry, shall be with a council of the judiciary in each state and on the federal level. Furthermore judicial selection committees shall be established which are competent to decide on the recruitment of judges. 2/3 of their members shall be from the respective state parliament. Whether the proposals can be reconciled with Article 98 (4) Basic Law, which provides that the federal states may provide that state judges shall be chosen jointly by the state Minister of Justice and a committee for the selection of judges, is controversial.[84] The *Neue Richtervereinigung*'s draft proposes a constitutional amendment.

---

[80] Deutscher Richterbund, Thesenpapier zur Selbstverwaltung der Justiz: Zwei-Säulen-Modell (2007), available at < http://www.drb.de/cms/fileadmin/docs/sv_modell_070427.pdf >; Neue Richtervereinigung, Justizdemokratie statt Justizhierarchie. Überlegungen eines Utopisten zur Justizorganisation für die Zeit nach dem Jahre 2000 (1997), available at <http://www.nrv-net.de/downloads_publikationen/83.pdf >.

[81] Zwei-Säulen-Modell (id.).

[82] This is to satisfy the requirements elaborated by the Federal Constitutional Court to guarantee democratic accountability with respect to self-administration. According to the court the appointing authority must be composed in such a way that the majority of its members are democratically accountable and their decisions must be taken by a majority of those members. BVerfGE 107, 59.

[83] Justizdemokratie statt Justizhierarchie (note 80), at 2.

[84] For a detailed critique with further references see Wittreck (note 20), at 660-680; Hoffmann-Riem (note 17), at 507. See also U. Berlit, Selbstverwaltung in der Justiz und grundgesetzliche Demokratie, DRiZ 292 (2003).

The suggested reforms are the expression of the judges' professional interests; their representatives have joined forces with judges' associations from Italy, Spain and other European countries, arguing that the German-Austrian model of ministerial judicial administration has been abolished in the rest of Europe.[85] The arguments for self-administration are based on a rather static and isolationist understanding of the separation of powers and an emphasis on institutional independence which differs from the traditional understanding of judicial independence in German legal doctrine.[86] Whether they meet the constitutional requirement of democratic accountability has been questioned.[87] The Federal Constitutional Court held in a different context of public governance that final decisions cannot lie with a self-governing body which is not democratically legitimized, but must lie with a representative of the executive branch who is accountable to parliament.[88] In a case concerning the self-administration of public services it held that the appointing authority must be composed in such a way that the majority of its members are democratically accountable and that their decisions must be taken by a majority of these members.[89]

It is for this reason that the assembly of administrative court presidents in 2009 took an intermediate position. It also called for more judicial involvement in administrative matters (such as in judicial selection and the allocation of the budget), but acknowledged that self-administration in terms of judicial autonomy is irreconcilable with the principle of democratic accountability.[90] The future of the reform will be likely to depend on whether it can be reconciled with this principle. Considering

---

[85] See e.g. T. Schulte-Kellinghaus, Die Gesetzesentwürfe des Deutschen Richterbundes und der neuen Richtervereinigung zur Selbstverwaltung der Justiz – Ein Vergleich im Überblick, KritV 256, at 256-257 (2010).

[86] For the justification of the model advocated by *Deutscher Richterbund* see H. Weber-Grellet, Selbstverwaltung der Justiz – Zwei Säulen Modell des Deutschen Richterbundes, ZRP 153 (2007).

[87] Wittreck (note 20), at 127-131.

[88] BVerfGE 93, 37.

[89] BVerfGE 107, 59.

[90] Selbstverwaltung der Justiz, Gemeinsamer Standpunkt der Präsidentin des Bundesverwaltungsgerichts sowie der Präsidentinnen und Präsidenten der Oberverwaltungsgerichte/Verwaltungsgerichtshöfe der Länder, 23 DÖV 999 (2009).

the functional role of judicial independence for the rule of law,[91] one crucial aspect will be to guarantee judicial accountability because more structural autonomy can only come at the price of more responsibility of the judiciary for its proper functioning.[92]

II. Selection, Appointment and Reappointment of Judges

Germany provides for a career judiciary which is recruited primarily from the highest ranking law graduates, some of whom follow a career path to higher instance courts after several years of judicial experience. The following account focuses on full-time judges.[93] The career path usually starts in first instance courts and leads to appellate courts by way of promotion.[94] Unlike the French recruitment scheme which provides for specified training for judges after law school,[95] in Germany the whole of legal education, including practical training, is the same for all legal professions covering broadly all areas of law.[96] It starts with law school, followed by a state-run examination, continues over a two-year apprenticeship leading to the second state examination as a mandatory precondition to practising law as a judge, lawyer or prosecutor.[97] Despite the central role of the justice ministries in judicial selection the competences of the judiciary in this process are also significant.

---

[91] For the functional nature of this principle see e.g. Wassermann (note 11), at para 17.

[92] Hoffmann-Riem (note 17), at 517.

For a similar argument in the French debate see A. Garapon/H. Epineuse, Judicial Independence in France, in this volume, Chapter D.

[93] Lay judges who participate in judicial panels together with professional judges also benefit from personal independence, but to a lower degree than judges appointed for life. Arbitrary removal of lay judges is impermissible. BVerfGE 27, 312, at 322.

[94] For a detailed account see Riedel (note 77).

[95] Garapon/Epineuse (note 92), Chapter B. II. 1. a) cc).

[96] Legal education aims to provide all future legal professionals with a comprehensive knowledge of German law including civil, criminal and public law. N. Foster, German Legal System & Laws, at 87 (2nd ed. 1996); A. Keilmann, The Einheitsjurist: A German Phenomenon, 7 German Law Journal 293 (2006).

[97] For further details see Keilmann (note 96); Riedel (note 77), at 73; I. v. Münch, Legal Education and the legal profession in Germany, at 47 (2002).

1. Eligibility

Pursuant to federal law the completion of university legal studies[98] with the attainment of the first and second degrees in law is necessary for eligibility as a full-time judge.[99] In between the two a legal apprenticeship (*Referendariat*) as formalized practical legal training to gain experience in different legal professions is mandatory. The trainee clerks for a judge at a civil court, works in the prosecutor's office or a criminal court, in an administrative agency and at a private law firm.[100] While these are all mandatory a final stage can be chosen freely. [101] The whole of legal training is highly competitive, rigorous and selective.[102] Despite repeated efforts to reform the educational scheme in recent decades, the system of uniform legal education which distinguishes between academic and practical training has endured until today.

Additional requirements for the appointment of judges are as follows: the applicant must be a German citizen, must approve the free and democratic constitutional order of the Federal Republic of Germany and must have the necessary social competence for being a judge.[103] Most judges are not chosen from among practising lawyers but from those candidates who have recently passed their second state examination with distinction. This has been criticized, and there has been a demand also to admit successful senior lawyers to the bench.[104] Despite efforts in some states also to appoint legal practitioners with professional

---

[98] At least two of the four years of legal studies need to be carried out in Germany. Section 5 a (1) Federal Judges Act.

[99] Section 5 Federal Judges Act.

As a general rule, pursuant to Article 33 (2) Basic Law "[e]very German shall be equally eligible for any public office according to his aptitude, qualifications, and professional achievements." See also Section 38 (1) Federal Judges Act.

[100] Section 5 b (2) Federal Judges Act.

[101] Section 5 b Federal Judges Act.

[102] Bell (note 3), at 108.

[103] Section 9 Federal Judges Act. Rules on the appointment of state judges are further to be found in the constitutions of the states. See e.g. Article 69 Berlin Constitution; Article 136 Bremen Constitution; Article 63 Hamburg Constitution; Article 127 Hessen Constitution; Arts. 122 (1) and 126 (1) Rheinland-Pfalz Constitution; Article 111 Saarland Constitution.

[104] G. Seidel, Die Grenzen der richterlichen Unabhängigkeit, 2 Recht und Politik 98, at 101 (2000); R. Müller, Unabhängigkeit und Qualität, FAZ, 18 September 2003; L. Jünemann, Rechtsanwälte als Richter, DRiZ 128 (2006).

experience (in particular members of the bar), change has been only gradual and an upper age limit for appointment as a judge continues to be in force in several states. The new remuneration schemes in which judicial salary depends on the length of judicial office does not make judicial posts attractive to experienced lawyers who can earn considerably more in private practice. A significant number of newly appointed judges therefore are young and gain most of their experience after judicial appointment, even though prior experience is solicited and an increasing number of private attorneys are recruited nowadays.[105] Sometimes prosecutors become judges after several years of service.[106] Several law professors work in higher courts part-time.

2. The Process of Judicial Selection

Since only the courts of final appeal are under the responsibility of the federal government most judges are recruited by the states.[107] As a general rule, the initial appointment, the grant of lifetime tenure and the promotion of judges lie with the competent ministry of justice.[108] In some states the recruitment authority has been delegated to the president of the higher regional court (*Oberlandesgericht*). The appointment process for federal courts differs from that applicable to state judges, and even among the states the selection and appointment process varies.[109] In general, the selection process for full-time judges is initiated by an application, and selection is based on competence, suitability and professional performance.[110]

---

[105] For plans to allow more legal professionals to enter the judiciary see Eckpunkte für eine "Große Justizreform", Beschluss der Herbstkonferenz der Justizministerinnen und Justizminister am 25.11.2004 in Berlin, BDVR-Rundschreiben 202 (06/2004).

[106] The probationary period for appointment can also be served as a prosecutor. Section 122 (2) Federal Judges Act.

[107] For the appointment of judges in more detail see S. Khorrami, Das Einstellungs- und Beförderungsverfahren englischer und deutscher Richter (2005); Riedel (note 77), at 80-84.

[108] Wittreck (note 20), at 413; A. Voßkuhle/G. Sydow, Die demokratische Legitimation des Richters, JZ 673 (2002).

[109] The selection of state court judges is regulated by special *Land* laws. See Article 98 (3) Basic Law.

[110] Article 33 (2) and 60 Basic Law; Article 51 Baden-Württemberg Constitution; Article 69 Berlin Constitution; Article 63 (1) Hamburg Constitution; Ar-

While there are states in which the exclusive competence to select and appoint judges lies with the justice ministry,[111] in several states a judicial selection committee has been established which selects candidates together with the competent ministry. [112] As indicated above, these committees are usually composed of members of parliament, judicial members and a private attorney.[113] The judges sitting on these committees are either elected by all judges or by the state parliament from a list of proposals prepared by the judges. Applications are usually first considered by the competent ministry of justice or the president of the higher regional court (assisted by his/her administrative staff) for the purpose of preselection. Then individual interviews are conducted with qualified candidates. Presidential Councils (*Präsidialräte*) assess the personal and professional qualification of candidates, in particular for appointment to higher judicial office. Some states provide for the mandatory participation of these councils; in some states they are able to block appointments.[114]

The initial selection of judges is based to a significant extent on the grades achieved in the two state examinations in which practising lawyers (judges and some members of the bar) examine the candidates and an interview.[115] The procedure and relevance of other criteria of qualification tested during an interview vary from state to state.[116] The applicant should demonstrate intellectual ability and sincerity and must also have social competences necessary for judicial office.[117] Recommendations of senior judges carry weight in the selection process.[118]

---

ticle 29 (2) Niedersachsen Constitution; Article 31 Schleswig-Holstein Constitution.

111 For further details see Wittreck (note 20), at 414. For the composition see above at B. I. 2. c) Judicial Selection Committees (*Richterwahlausschuss*).

112 Article 98 (4) Basic Law provides that Land judges may be chosen jointly by the *Land* Minister of Justice and a committee for the selection of judges.

113 See e.g. Section 46 (1) *Land* Judges Act of Baden-Württemberg. For a comprehensive survey see T. E. Dietrich, Richterwahlausschüsse und demokratische Legitimation, at 103-133 (2007).

114 See also above at B. I. 2. b) Presidial Councils (*Präsidialräte*).

115 Böttcher (note 9), at 1321.

116 In Nordrhein-Westfalen assessment centres play a significant role. Riedel (note 77), at 82-83.

117 Section 9 No. 4 Federal Judges Act.

118 P. L. Murray/R. Stürner, German Civil Justice, at 70 (2004).

Since Article 33 (2) Basic Law guarantees equal access to public office according to aptitude, qualification and professional achievements, judicial selection is subject to judicial review. Those responsible for recruitment shall select the person best qualified for a position. The selection must not be arbitrary, but given the vagueness of the above-listed general criteria they are accorded a margin of appreciation.[119] Some states have elaborated profiles specifying the criteria which are necessary apart from a good grade in the second state examination.[120] In order to evaluate professional competences they consider command of the law and legal methodology, impartiality, and the ability to convince and to conduct hearings. Increasing attention is also given to personal competences, such as ability to decide, natural authority, self-control, sense of responsibility and the ability to cope with the workload, and to soft skills, such as the ability to communicate, to deal with conflicts and to work in a team.[121] Political considerations are not perceived to play a significant role at this point in a judicial career.[122] It is different for promotion and for the selection of judges to the highest level federal courts.[123] As will be explained below, the selection of constitutional court judges, which is organized as a political process involving both chambers of parliament, is considerably influenced by the political parties.[124]

There have been efforts to make the selection process more transparent by means of public advertisement of vacancies which specifies the necessary qualification for the relevant judicial position (particularly those of higher judicial rank). But this is not necessarily a safeguard for objectivity since detailed job descriptions may still be used to cover up other criteria which are in fact relevant for the selection.[125] Unfortunately

---

[119] For promotion see *infra* at B. III. 2. Promotion.

[120] See e.g. for Nordrhein-Westfalen, Justizministerium des Lands Nordrhein-Westfalen, Allgemeine Verfügung betreffend die dienstlichen Berurteilungen der Richterinnen und Richter sowie der Staatsanwältinnen und Staatsanwälte (Beurteilungs-AV), JMBl. NRW 121 (2005).

[121] See Riedel (note 77), at 86-88.

[122] Kommers (note 10), at 145; P. L. Murray/R. Stürner, German Civil Justice, at 70 (2004).

[123] See *infra* at E. Supreme/Higher Courts.

[124] Id.

[125] Wittreck (note 20), at 417.

there are no data which give insights into whether criteria other than merit in practice play a role in judicial appointments.

According to federal constitutional law female and minority candidates must not be discriminated against in judicial selection.[126] Despite the increase in the recruitment of women in the past decade[127] – in most jurisdictions the rate of newly appointed female judges is 50% or above – and an increase in female judges, there is still a significant underrepresentation of women, at only a little over one third of the judiciary (in particular with respect to higher courts[128]) because of the high percentage of male judges recruited in earlier decades. This also applies to other legal professions, such as the bar and public prosecutors.[129] There are no statistics regarding the ethnic composition of the judiciary. Though the judiciary seems to retain its traditional composition of members of the upper middle class with little variance in ethnicity there is virtually no discussion about rendering the composition of the bench more pluralistic.[130]

In terms of political background the judiciary is more pluralistic. Though judges are generally not perceived as political actors, but rather as neutral decision-makers, they are not prevented from being members of a political party.[131] The different political orientations of the judges' associations, *Deutscher Richterbund* and *Neue Richtervereinigung*, show the plurality of political viewpoints of their members, and thus of

---

[126] Pursuant to Article 33 (2) Basic Law "[e]very German shall be equally eligible for any public office according to his aptitude, qualifications, and professional achievements." See also Section 38 (1) Federal Judges Act.

[127] This is due to the high performance rates of women in the relevant exams and to the high attractivity of the judiciary for women (conditions which are family friendly). Neumann (note 26).

[128] The number of female judges at the highest courts is below 25%. Cf. Bundesamt für Justiz, Zahl der Richter, Staatsanwälte und Vertreter des öffentlichen Interesses in der Rechtspflege der Bundesrepublik Deutschland am 31. Dezember 2008, available at <http://www.bundesjustizamt.de>.

[129] Justiz auf einen Blick (note 26), at 42-43. In 2009 the ratio rose to 35.79%, cf. Bundesamt für Justiz (note 128).

[130] According to Kommers the judiciary does not represent the population at large since the majority of judges are descendants of university graduates. This is the result of the education system more generally and appertains also to other professions which require a university degree. Kommers (note 10), at 145.

[131] Section 39 Federal Judges Act allows judges political activities which do not compromise their independence.

the bench more generally.[132] The open attitude to political plurality is considered necessary to ensure that judges can make full use of their civil and political rights. It is also an element of democracy that judges are considered to be citizens and are part of the population at large.[133] Whether this justifies political partisanship for the high ranks of the judiciary is, however, highly controversial. Though there seems to be an equal balance of membership from different political parties (also as a result of the federal system with its varying political majorities), most commentators tend to criticize the influence of political parties on judicial selection because it seems likely to leave out highly qualified judges who are not close to any party.[134] Political influence of the parties on judicial selection does not meet the widely held expectation of judicial neutrality and its traditional distinction between law and politics in Germany.

With the abovementioned reform proposals of the two largest associations of judges there is a demand to remove the competence to recruit and promote judges entirely from the justice ministries.[135] According to the *Deutsche Richterbund*'s proposal the competence to recruit and promote judges is to be transferred to a judicial self-governing body composed of judges and a prosecutor. If the body representing the interest of the judges as employees does not agree with the council's choice the final decision on judicial appointments is to be made by the judicial selection council, which is composed of members of parliament and judges. The alternative proposal by the *Neue Richtervereinigung* provides for a judicial selection committee with a 2/3 majority of members of the state parliament.

There is no additional training requirement once judges are appointed before they take the bench. The practical training during the clerkship (Referendariat) serves as a preparatory phase. Some states provide for short compulsory courses in order to introduce judges to their new tasks; others provide for a short introductory period.[136] In several states the workload for judges is reduced during the probationary period.

---

[132] Böttcher (note 9), at 1324.

[133] Id.

[134] For a critique of the influence of political parties on the composition of the bench see e.g. J. Frowein, Parteien und Verfassungsstaat, FAZ, 13 September 1996, at 44.

[135] See above at B. I. 3. Current Reform Debate.

[136] Riedel (note 77), at 93.

Though there are multiple courses of continuing judicial and professional education at the federal, state and regional levels, as a matter of judicial independence participation is not mandatory.[137]

3. Length of Office and Reappointment

Since Germany provides life tenure for judges until a fixed retirement age there is no system of reappointment. Those candidates who have been selected to become judges start working at the courts immediately. But, as will be explained below, they are subjected to a probationary period of three to five years before being appointed judges for life.

III. Tenure and Promotion

1. Tenure

A central aspect of personal independence is appointment for life until a fixed retirement age.[138] For federal judges the retirement age was raised from 65 to 67 in 2009 together with those of other professions in public service; on the state level the retirement age so far remains at 65 in most *Länder*.[139] With the exception of the Federal Constitutional Court, as a general rule, judges are in permanent full-time position.[140] Only to the extent that there are compelling reasons may judges without a permanent position (who do not enjoy full personal independence) be ap-

---

[137] At the federal level there is the German Judicial Academy (*Deutsche Richterakademie*) with offices in Trier und Wustrau. For a critical appraisal of its work see Riedel (note 77), at 114.

[138] Section 10 Federal Judges Act; Section 15 Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*, VwGO). The age limit is planned to be raised to 67, as for other employees in the public service.

For a different rule concerning the Federal Constitutional Court see *infra* at E. Supreme/Higher Courts.

[139] See e.g. for Baden-Württemberg Section 6 *Land* Judges Act. But see for Nordrhein-Westfalen the Law modifying the *Land* Judges Act (*Gesetz zur Änderung des Landesrichtergesetzes*).

[140] Article 97 (2) Basic Law; BVerfGE 87, 68, at 85.

pointed, such as for the training of permanent judges.[141] Temporary appointment is allowed only on the basis of a legal act and only for functions specified by law.[142] After the completion of legal training and the second state examination candidates are chosen and appointed as judges "on probation" (*Richter auf Probe*) for at least three years.[143] The probationary period seeks to ensure that only judges who in practice prove to be fit for the profession are appointed for life. They are assigned to a specific court, usually a lower court, but may be transferred to other courts.[144] According to federal law the probationary period must not exceed a period of five years in office.[145] With the successful completion of the probationary period (which is the rule in practice) judges are appointed for life. Some judges appointed for life have served their probationary period as a prosecutor.[146]

During the probationary period judges work as independently as those appointed for life on cases assigned to them. With respect to their judicial decision-making they enjoy the same rights as those appointed for life, but with the pending permanent appointment their status is more fragile because they can be dismissed in the event of a negative appraisal. Within the first two years a judge can be dismissed even for reasons unrelated to performance; in the next two years dismissal must be for lack of capacity or a disciplinary offence.[147] The leeway for dismissal thus decreases with the judge's time in office. Dismissal and refusal are both subject to judicial review. Even if a judge is highly professionally qualified lifetime tenure can be refused for insufficient personal integrity; for example, according to the Federal Court of Justice (*Bundesgerichtshof*), if a judge during the probationary trial period exhibits grave shortcomings of character which do not satisfy the high personal exigencies for judges.[148]

---

141 There is also an option to appoint judges with a specific task for two years provided they are on track to receive tenure for life. Section 14 Federal Judges Act.

142 Section 11 Federal Judges Act.

143 Prior professional experience can be taken into account. Section 10 Federal Judges Act.

144 Section 27 (1) Federal Judges Act.

145 Section 12 Federal Judges Act.

146 Section 122 (2) Federal Judges Act.

147 Section 22 Federal Judges Act.

148 BGH, NJW 2828 (2009).

Though incomplete status during the probationary period compromises full judicial independence,[149] it is tolerated in the interest of a functional judiciary.[150] Considering the youth and lack of experience of a great number of newly appointed judges a probationary period is considered necessary to verify that they qualify for lifetime appointment. For those with prior professional legal experience the probationary period can be reduced. Fixed time limits providing that a judge can only be dismissed upon completion of six, 12, 18, 24, 36 and 48 months in office prevents spontaneous *ad hoc* decisions.[151] This is why the Federal Constitutional Court affirmed the constitutionality of the probationary period despite its restriction on judicial independence.[152] Once a judge receives lifetime tenure he must be assigned to a specific court in order to protect his or her personal independence against involuntary transfers, suspension or removal.[153]

2. Promotion

Since most higher court judges are appointed by way of promotion from lower level courts appellate judges usually have trial court experience and have been promoted on the basis of their performance in a prior judicial position.[154] This applies to the appointment of court presidents, of presiding judges who chair collegial panels and appointment to higher courts. Since there are only a limited number of senior posts most judges do not benefit from promotion. But as remuneration is based on age (or on time in judicial office) there are automatic pay rises every two years in the lower grades.[155] The purpose of this model is to ensure pay rises without individual promotions to higher legal office. The first level of judicial remuneration corresponds to the salary of

---

[149] For a critical position on the compatibility of the probationary period with Article 6 ECHR see R. Lippold, Der Richter auf Probe im Lichte der Europäischen Menschenrechtskonvention, NJW 2383 (1991).

[150] Schmidt-Räntsch (note 43), § 12, at para. 2.

[151] Id.

[152] BVerfGE 14, 156, at 163 *et seq.*

[153] Section 27 Federal Judges Act.

[154] Some have had experience as prosecutors, others in the ministry of justice. For a comparative analysis see D. J. Meador, German Appellate Judges: Career Patterns and American-English Comparisons, 67 Judicature 23 (1983).

[155] See *infra* at B. IV. Remuneration.

high-ranking civil servants who have already been promoted several times in order to ensure an adequate level of remuneration without the necessity for promotion.[156] Judges' associations, however, complain that in the higher ranks of the civil service the opportunities for promotion ensure a level of salary which is above that which can be earned by judges.[157] This may require an adjustment in the level of salary, but there is general agreement that the limitation of promotions is necessary to ensure judicial independence. Thus, promotion is limited to such cases in which judges are recruited to a higher judicial post with different functions.

If there is a vacancy posts for higher judicial office are advertised so that qualified judges may apply. The decision on promotion to higher judicial office is made by the same body which is competent for recruitment, usually the justice ministry in cooperation with an advisory judicial organ. Promotion is based on merit, which is evaluated in an intensive process of screening in which the judiciary plays an important role. According to federal law, consultation of the competent Presidential Council (*Präsidialrat*) which represents the judges of a jurisdiction is mandatory.[158] Its role is to assess the personal and professional qualification of judges nominated for promotion based on their prior performance.[159] In some federal states presidential councils may recommend an applicant other than the one selected by the ministry.[160] Though the executive is not formally bound by the council's evaluation of an applicant, in practice a negative vote on the qualification of an applicant has substantial influence on its decision.[161] In order to prevent the promotion of unsuitable candidates, there is in some federal states even a consultative process in case of divergence in which the council can explain its position in order to persuade the ministry to decide dif-

---

156 Böttcher (note 9), at 1322.

157 W. Kiefer *et al.*, Dokumentation zur Richterbesoldung und -versorgung, erstellt von einer Arbeitsgruppe des BDVR, Tatsächliche Entwicklung der Alimentation und der Aufstiegsmöglichkeiten von Richtern im Verhältnis zu anderen Berufsgruppen des öffentlichen Dienstes, available at <http://www.bdvr.de/aaa_Dateien/Besoldung/Besoldung.pdf>.

158 Section 75 (1) Federal Judges Act. For Presidial Councils see above at B. I. 2. b) Presidial Councils (*Präsidialräte*).

159 Section 75 Federal Judges Act. For details see Wittreck (note 20), at 370.

160 Id., at 368.

161 Id., at 369.

ferently.[162] Some federal states provide for a judicial selection committee[163] which decides in cooperation with the minister of justice.[164] In the state of Rhineland-Palatinate, for example, the consent of the judicial selection committee is required.

Qualification and professional performance are assessed on the basis of periodic and/or *ad hoc* appraisals which consider professional competence, including the ability to conduct trials, personal competences, such as the ability to cope with the workload and ability to decide, as well as soft skills, such as respect for the parties and ability to lead discussions.[165] In practice age and time in office play an important role.[166] Prior appraisals by court presidents and their support for an application are of primary significance for promotions.[167] There have been complaints that potential candidates are dissuaded from applying for higher position if they do not receive the support of their court presidents.[168] Also relevant are the job description by the president of the receiving court and the seniority of the candidate.[169] Judges who plan to go for higher judicial office usually work in secondment for a six-month term or longer at a court of higher instance; performance during this period is significant for a judge's later career. It is therefore not unproblematic

---

[162] Id., at 369.

[163] For the composition of these committees see above at B. II. 2. The Process of Judicial Selection.

[164] Section 43 (5)(1) *Land* Judges Act of Baden-Württemberg; Section 2 (1)(1) *Land* Judges Act of Berlin; Section 12 (1) *Land* Judges Act of Brandenburg; Article 63 (1)(1) Hamburg Constitution; Section 14 (1)(1) *Land* Judges Act of Rheinland-Pfalz; Section 10 (1) *Land* Judges Act of Schleswig-Holstein.

[165] Riedel (note 77), at 96.

[166] Wittreck (note 20), at 420.

[167] For a critique see J. Lorse, Personalentwicklung von Richtern – quo vadis?, DRiZ 122, at 126 (2004). See also E. Isermann, Qualifikation der Richter – Voraussetzungen für die Einstellung und Beförderung am Beispiel der niedersächsischen Justiz, 39 Recht und Politik 238 (2003); VGH Mannheim, 58 Betrifft Justiz 70 (1999).

[168] T. Schulte-Kellinghaus, Verwaltungserfahrung von Richtern – Ein Problem bei Beförderungen and den Gerichten, NRV Info Oktober 2006.

[169] K. Beer, Über Ämterpatronage und Personal-Zurichtung der Justiz, 41 Betrifft Justiz 18 (1995); D. Ehlers, Verfassungsrechtliche Fragen der Richterwahl, at 38 (1998).

in terms of judicial independence.[170] An alternative is to work in the justice ministry, as an assistant in one of the federal highest or at an international court. Experience in judicial administration improves chances of promotion because it is considered to demonstrate the competence to lead.[171] With the wide discretion enjoyed by the ministries of justice there is no guarantee that their final decision is not also influenced by reasons unrelated to merit. There is no empirical research in this field, but there have been complaints that political reasons play a role in judicial promotion.[172] As in other civil law systems promotion in Germany thus causes similar problems to those encountered in judicial selection to appellate courts in common law countries.[173]

There is yet another problem for judicial independence. As in other countries which recruit appeal court judges from first instance courts, such as France,[174] there is a risk that judges are penalized for unpalatable judgments in the course of their careers[175] or that judges who hope for promotion deliver judgments acceptable to the executive branch.[176] This is particularly relevant for administrative courts whose role is to decide whether executive action is in accordance with the law.

The appointment procedure for presidents of courts varies from state to state. While some require the election of court presidents from the highest courts by the state parliament,[177] others provide for executive appointment.[178] In practice politics become relevant for these positions. Demands for the judicial election of court presidents with a limited tenure have not found the necessary approval so far.

---

170 M. Wolf, Gerichtsverfassungsrecht aller Verfahrenszweige, at 210 (1987).

171 This has been criticized by some judges because the distribution of administrative tasks is carried out by the ministries so that they are able to influence the careers of judges in the long run. Schulte-Kellinghaus (note 168).

172 H. Kötz *et al*., German Private and Commercial Law: An Introduction, at 49 (1982).

173 Wheeler (note 39).

174 Garapon/Epineuse (note 92), Chapter B. III. 2.

175 K. Dohse, Ausländerrecht und Richterbeförderung. Soziologische Anmerkungen zu einem Einzelfall, 18 KritJ 297 (1985).

176 H. Schimansky, Richterwahl in Nordrhein-Westfalen?, DRiZ 142 (1992).

177 Berlin, Schleswig-Holstein.

178 One example is Bavaria.

As indicated above, the Basic Law provides for equal eligibility for public office according to aptitude, qualifications and professional achievements, so that judges may challenge a negative decision on promotion before a court.[179] If the candidates for a vacant position are equally well qualified, the appointing authority enjoys a wide margin of discretion which may, however, not be exercised arbitrarily.[180] According to the Federal Administrative Court the decision may not be based on any criteria other than aptitude, qualifications and professional achievements.[181] It has elaborated detailed standards for the evaluation of candidates. The decision on promotion must be based on a comprehensive factual assessment of the applicant's qualifications for the new position and on his or her likely success in this higher office.[182] Without being bound by external assessments, the ministry of justice needs to ask for and give due consideration to the assessment of the judicial superiors of the applicant and people who have experienced the performance of the applicant.[183] If several applicants are equally well qualified in an overall assessment the justice minister can focus on a particular aspect, such as experience, breadth of expertise and recent achievements.[184] But reliance on purely statistical data on the cases decided by a judge is insufficient and not in accordance with the principle of judicial independence.[185] If a candidate is obviously best qualified he or she must be appointed.[186] With the elaboration of these standards in its judgment of 4 November 2010 the Federal Administrative Court showed that decisions on judicial promotion are subject to a demanding standard of judicial review. Though a margin of appreciation formally persists, the evaluation procedure is now subject to detailed standards in order to ensure that the decision is exclusively taken on the basis of merit, not on political grounds. In this case the court annulled the appointment of a president of a higher regional court (*Oberlandesgericht*) for undue reasons in the evaluation of the applicants and ordered a new

---

179 Article 33 (2) Basic Law. Regular appraisals are subject to judicial review, too. For details see Riedel (note 77), at 103-109.

180 BVerfG, DVBl. 1524 (2003).

181 BVerwG, 2 C 16.09, Judgment of 4 November 2010.

182 Id., at paras 45, 47.

183 Id., at para 47.

184 Id., at para 46.

185 Id., at para 55.

186 Id., at para 22.

application round.[187] The judiciary thus seeks a critical role in judicial promotions by way of judicial review, a fact which underlines its growing assertiveness *vis-à-vis* the executive branch.

IV. Remuneration

1. Remuneration

In order to ensure personal judicial independence the German Constitutional Court has specified several basic guarantees concerning judges' remuneration and pensions.[188] An adequate income for judges must be provided by law.[189] The level of remuneration must provide the judge and his/her family with a decent living.[190] Higher judicial office requires a higher level of salary. But in order to prevent executive interference with substantive independence the number of different levels for promotion should be limited.[191] Apart from these constitutional requirements the legislative branch enjoys considerable leeway in the design of remuneration plans.[192] There are statutory remuneration schemes for judges at the federal and the state level respectively.[193] These schemes provide for ten different levels of remuneration according to the task and responsibility of judicial offices in order to avoid the earlier model of additional allowances.[194] A fixed percentage for pay rises is enacted annually by statute.[195] The amount is usually realigned to the rise for

---

[187] Id.

[188] BVerfGE 8, 1, at 17 *et seq*; BVerfGE 11, 203, at 215 *et seq*; BVerfGE 44, 249, at 265 *et seq*; BVerfGE 56, 146, at 164 *et seq*; BVerfGE 56, 353, at 359; BVerfGE 61, 43, at 58 *et seq*.

[189] BVerfGE 12, 81, at 88; BVerfGE 23, 321, at 325; BVerfGE 26, 79; BVerfGE 26, 141, at 157; BVerfGE 32, 199; BVerfGE 56, 146.

[190] BVerfGE 107, 257.

[191] BVerfGE 55, 372, 389.

[192] Id., at 392.

[193] For the federal scheme see Section 1 (1) No. 2 Federal Civil Service Remuneration Act (*Bundesbesoldungsgesetz*, BBesG).

[194] BVerfGE 55, 372, 389.

[195] *Bundesbesoldungs- und Versorgungsanpassungsgesetz* (BBVAnpG). With the new competence of federal states to regulate judicial salaries these rises have recently been granted by state statute.

employees in public service. With the low inflation rate and due to general budgetary restraints judicial remuneration has remained almost static since 2000.[196]

As indicated above the amount of salary is predetermined according to the level of judicial office and the age of each judge or his/her time in office. Depending on rank and seniority judicial salary varies greatly.[197] While traditionally the increasing age of a judge led to biannual pay rises, recent salary schemes, such as the federal scheme and those of Bavaria and Hamburg, consider time in office instead of age in order to avoid age discrimination. The schemes of the majority of federal states, however, still retain a model based on age with a biannual rise in salary.

Compared to the income of judges in other European countries, the salary of German judges in their first post is at an average level, while judicial remuneration in the United Kingdom – because of the recruitment of experienced barristers – is at the top of the income scale.[198] Judicial remuneration in Germany is considerably lower than the salary which can be gained in successful private practice with wealthy business clients.[199] For more than a decade the percentage of pay rises for the judiciary has not measured up to those of the bar and in-house lawyers.[200] Nevertheless with its high social prestige and the high level of security,

---

[196] From 2000-2006 the rise averaged annually 0.1%, while it had been at about 3% annually from 1990 to 1999. For a survey of pay rises see Kiefer (note 157), at 91 and Annex, at 136.

[197] The federal scheme for the year 2011 provides for a monthly gross salary for the first judicial grade of between 3,477.73 EUR (R1, newly appointed judges) and 5,634.01 EUR (at least 23 years in office). At the first level of promotion salaries lay between 4,226.01 EUR and 6,142.03 EUR. In higher offices salaries are fixed and do not vary with age. At the second level of promotion, the salary is 6,754.91 EUR after taxes. Presidents of the highest federal courts receive 11,553.09 EUR gross salary. Cf. Federal Civil Service Remuneration Act.

[198] Richtereinkommen im europäischen Vergleich, eine Umfrage der europäischen Richtervereinigung (2001); See also European Commission for the Efficiency of Justice, European Judicial Systems, Edition 2008 (data 2006): Efficiency and Quality of Justice, at 208, available at <https://wcd.coe.int>.

[199] See e.g. Kiefer *et al.* (note 157), at 136.

[200] BDVR, DRB und BDVR: Besoldung der Richter und Staatsanwälte ungenügend, Press Release of 18 August 2008, available at <http://www.bdvr.de/aaa_Dateien/Besoldung/080818Presse.pdf>.

flexibility and independence the judiciary has not lost its attractiveness within the legal profession.

While the remuneration scheme had been uniform for federal and state judges the federal reform of 2006 transferred the competence to regulate the careers, remuneration and pensions of judges to the federal states.[201] Most states now provide for their own scheme, which is still by and large oriented towards the federal scheme but may change in the future. The lack of uniformity has been criticized by judges' associations for the potential threat of cut backs and the danger that the best qualified candidates may prefer to apply to the wealthier federal states in the South of Germany.

Apart from the regular salary federal states pay supplementary grants which vary from state to state. The amount of these payments is uniform for all judges of the same rank in each state. While the earlier payment of a vacation allowance has been by and large abolished for all those working in the public service including judges, there is still a special payment at the end of each year in some states (depending on the state, from 400 EUR to 70% of the basic monthly remuneration).[202] Some states, instead of an annual one-off payment, have raised the monthly salary; others, however, have entirely abolished this bonus. In all federal states there is a supplementary family allowance.

In some federal states the introduction of a performance-related additional allowance, which has already been introduced for the civil service, has been considered in an effort to modernize public administration and to enhance its efficiency.[203] However, this led to fierce opposition by judges' associations who consider such payments in violation of judicial independence because any indicator of performance related to adjudication might influence substantive decision-making.[204] Criticism has also been voiced of the abovementioned reduction of supplementary payments and the low level of pay rises over the past decade, a development which, however, affects not only the judiciary but the public service more generally. Though judges' associations plead for pay rises

---

[201] Article 74 (1) No. 27 Basic Law.

[202] For a survey of pay rises see Kiefer *et al.* (note 157), at 49-50.

[203] W. Hoffmann-Riem (ed.), Reform der Justizverwaltung: Ein Beitrag zum modernen Rechtsstaat (1998).

[204] Deutscher Richterbund, Thesenpapier zu Richterbesoldung (2007), available at <http://www.drb.de/cms/fileadmin/docs/leistungsbesoldung_2007.pdf>.

in accordance with Article 33 (5) Basic Law there are no allegations that judges would be unable to support themselves and their families on their salary. Therefore legal actions alleging a violation of Article 33 (5) Basic Law have been unsuccessful.[205]

2. Benefits and Privileges

Judges enjoy the same benefits as civil servants, so they receive a rise in salary for each child, a small contribution to capital formation as well as health and retirement benefits. Apart from this there are no special rewards for judges beyond remuneration.[206]

3. Retirement

Compulsory retirement age for all federal judges is 67 years, but in most states it is still 65.[207] They may leave office on request from the age of 63 with a reduction in their retirement benefits.[208] The retirement benefits depend on rank and time in office; they are up to 71.75 % of final salary, and thus correspond to those of civil servants.[209]

V. Case Assignment, Transfers and Recusal

Without their consent judges may not be transferred to another court, except for reasons regulated in statutory law and based on a decision given by a judge.[210] With its constitutional guarantee in Article 101 Basic Law each judge sitting on a case must be predetermined before the case is brought to court on the basis of law (*Recht auf gesetzlichen*

---

[205] BVerwG, Az. 2 C 76.08, Judgment of 23 July 2009.

[206] J. Grotheer, Traité d'organisation judiciaire comparée (2004), Part 2, Section 3.

[207] For federal judges see Section 48 Federal Judges Act. In Nordrhein Westfalen it has also been raised to 67 in the Law modifying the *Land* Judges Act.

[208] Section 48 (5) Federal Judges Act.

[209] Section 14 Civil Service Benefits Act (*Beamtenversorgungsgesetz*, BeamtVG).

[210] Article 97 (2) Basic Law; Section 30 Federal Judges Act.

Richter).[211] This requires a specified method of case assignment with pre-set abstract, objective and transparent criteria in order to prevent manipulation.[212] Therefore Germany provides for far-reaching institutionalization of case assignment. These criteria are determined in advance annually for each year and court by the Judicial Board (*Präsidium)* of each court.[213] The board is exclusively composed of judges.[214] Though the court president is a member of the board the taking of decisions by majority vote is intended to protect against biased decision-making. The board assigns judges to each panel, elaborates a scheme for the assignment of cases to the judges of the court or the panels, and determines who will fill in in the event of longer illness or absence. There are different methods of case assignment, i.e. on the basis of the time a case is filed (*Turnus*), the first letter of the accused's last name; the place where a crime was committed or the area of law which is involved in a case (i.e. family matters, traffic matters etc).[215] The Judicial Board is free in its selection of the scheme[216] as long as it is precise and unambiguous;[217] it must determine comprehensively and finally the allocation of all potential future incoming cases.[218] The allocation scheme shall seek even and adequate case distribution.[219] The decision, which is for each year in advance, is accessible to the general public. It may be challenged in court by a judge for the violation of his/her independence.[220] Within each panel of judges (*Kammer*) work shall also be

---

[211] For a comparative analysis of case assignments see P. M. Langbroek (ed.), The Right Judge for each Case: a Study of Case Assignment and Impartiality in Six European Judiciaries (2007).

[212] BVerfGE 95, 322, at 327.

[213] Section 21e (1) Judicature Act.

[214] See above at B. I. 1. e) Judicial Boards.

[215] The courts of appeal distribute the cases to different chambers depending on the court of first instance; or the distribution rotates according to the time an appeal is received.

[216] BGH, NJW 1580 (2000); O. R. Kissel/H. Mayer, Kommentar zum Gerichtsverfassungsgesetz (6th ed. 2010), § 21 e, at para. 78.

[217] Id., at para. 95.

[218] BVerwG, NJW 1370 (1991).

[219] W. Zimmermann, § 21 e GVG, in: T. Rauscher *et al.* (eds.), Münchener Kommentar zur ZPO, at para. 22 (3rd ed. 2008).

[220] Id., at para. 65.

distributed on the basis of a predetermined allocation which is adopted by a vote of all the judges on the panel.[221]

If a case is directed to a judge at will (without following the pre-set criteria) or if a specific case is redistributed the right to the lawful judge is violated and can be challenged by the parties in court.[222] The allocation of a case may be challenged on appeal if it does not follow the predetermined scheme.[223] In a recent case a change to a previously adopted distribution scheme was challenged successfully in court because the decision had not been sufficiently reasoned.[224] Though a scheme may be amended retrospectively in case of significant overload of one judge compared to his/her colleagues or in the event of permanent illness or transfer to another court the board is required to elaborate on its reasons.[225]

If there is concern about the impartiality of a judge the court can be asked to recuse the judge from a case.[226] The motion may be filed by the parties to a civil action, or in the case of a criminal trial by the prosecutor, the accused or an intervening party. A judge on his own motion has to bring to the attention to the court any relationship relevant for recusal.[227] The decision on recusal is made by the competent court. If the court finds that there are reasons to suspect that a judge is not impartial the judge may not participate in the proceedings. But a judge competent to decide a case may not be removed from it if there are no convincing reasons for partiality.[228]

---

221 Section 21 g Judicature Act.

222 BVerwG, NJW 2031 (1987).

223 Section 547 No. 1 Code of Civil Procedure (*Zivilprozessordnung*, ZPO).

224 BGH, NJW-Spezial 377 (2009).

225 Section 21 e (3) Judicature Act.

226 Section 42 Code of Civil Procedure; Section 24 Code of Criminal Procedure (*Strafprozessordnung*, StPO).

227 Section 48 Code of Civil Procedure; Section 30 Code of Criminal Procedure.

228 BVerfGE 31, 145, at 165.

VI. Judicial Conduct Complaint Process

Any person may bring a complaint alleging that a judge has violated his or her duties. It can be lodged with the president of the court and there are no formal requirements for it. The court president must respond to the complaint within a reasonable time, but there is no right to a reasoned decision. In case of a justified complaint disciplinary proceedings may be initiated by the competent authorities. However private parties are not entitled to initiate such proceedings. Judges who have been accused of misconduct may initiate disciplinary proceedings on their own initiative in order to prove their innocence.

VII. Judicial Accountability: Discipline, Service Supervision, Appraisals, Transfer and Removal Procedures

In order to ensure that judges act dutifully in accordance with the rule of law judges are subject to service supervision, provided the principle of substantive independence is guaranteed.[229] Such supervision is conducted by the court president (usually in consultation with the presiding judge who chairs the relevant collegial panel). The underlying rationale for this kind of oversight is to guarantee the right of everyone to access to justice.[230] Oversight includes monitoring as a preventive measure and correction as a repressive measure. Therefore this section is not only about disciplinary sanctions but deals with all forms of oversight including appraisals.

Though oversight is in the hands of the justice ministries, the participation of judicial superiors plays a decisive role. Generally speaking, disciplinary measures in practice are reserved for gross misconduct and verbal excesses.[231] More relevant in terms of accountability are other forms of oversight, such as appraisals for promotion. Though they may also carry negative consequences for a judge, their purpose is more preventive in nature. Some federal states provide in their Judges Acts for regular appraisals of judges from the first ranks of judicial office at in-

---

[229] BVerfG, DRiZ 284 (1975). See also Section 26 (1) Federal Judges Act. H. Grimm, Richterliche Unabhängigkeit und Dienstaufsicht in der Rechtsprechung des Bundesgerichtshofs (1972).

[230] Papier (note 43), at 1091.

[231] See e.g. BGH, NJW 1674 (2006).

tervals of four or five years until the age of 50 or 55. Others provide for periodic appraisals only during the probationary period. Appraisals usually consider aptitude, qualifications and professional performance. There is an additional *ad hoc* appraisal if a judge applies for a higher ranking judicial post. Though appraisals carry the potential of compromising judicial independence they are deemed by the courts and most commentators to be necessary to ensure that promotion is based on qualification and aptitude.[232]

Appraisals consider the legal knowledge and methodology of the subject as well as the handling of cases and the capacity to work under pressure.[233] The accomplished workload (number of cases decided by a judge in comparison to those of other judges[234]) and swift decision-taking may be considered.[235] Delayed hearings and decision-making can be criticized.[236] If other judges are more efficient poor performance rates can be a basis for negative appraisal.[237] Oversight may also be used to ask a judge for more expedient decision-making if there are unreasonable delays.[238] Judges may generally be asked to deal with urgent cases (depending on the statute of limitation) first.[239] In such cases judicial independence is not considered to be compromised. However, in order to ensure that judges are not directed to decide their cases in one way or the other, appraisals must be general and may not criticize decisions in individual cases.[240] They are therefore subject to judicial review.[241]

---

[232] See e.g. BGH, DRiZ 24, at 25 (1992); BGH, NJW 359, at 360-361 (2002); OVG Mannheim, NVwZ 585, at 586 (2005); Wassermann (note 11), at para. 37; S. Haberland, Richterliche Unabhängigkeit und dienstliche Beurteilungen, DRiZ 242 (2009).

[233] BGHZ 57, 344, at 348.

[234] BGHZ 69, 309, at 313.

[235] BGH, NJW 2535 (1984); BGHZ 90, 41, at 45 *et seq.*

[236] BGHZ 90, 41, at 45 *et seq.*; BGHZ 90, 41.

[237] BGH, NJW 419, at 420 (1988).

[238] Id.

[239] Id., at 422. But to ask them to have more than one hearing per week is considered to be in violation of judicial independence. Id., at 423.

[240] BGH, DRiZ 20, at 21 (1991); BGH, NJW 359, at 361 (2002); OVG Berlin, NVwZ-RR 627, at 628 (2004).

[241] BVerfG, NVwZ 1368 (2002).

Judges may be warned or reproached with the performance of their official functions in order to ask for undelayed and orderly execution of their tasks.[242] According to federal statutory law judges are subject to only such oversight as does not compromise judicial independence.[243] If a judge considers a measure of supervision to be in conflict with his or her independence, the matter is referred to a service court (*Dienstgericht*) for decision.[244] It gives final decisions in disciplinary proceedings, on transfer of judges, dismissal, and retirement due to disablement and decides appeals against secondment and on complaints against disciplinary measures allegedly interfering with judicial independence.[245] A judge may also appeal against a non-formal measure which may have a negative impact on the exercise of his or her judicial functions in the future.[246] In the interest of judicial independence the term "disciplinary measures" is interpreted broadly to encompass also measures by the supervisory board having indirect influence on the judicial function.[247] The Federal Service Court (*Dienstgericht des Bundes*), which is part of the Federal Court of Justice (*Bundesgerichtshof*), is competent to hear all disciplinary matters, decide on transfers to other courts and the dismissal of federal judges as well as appeals from state disciplinary courts.[248] While service courts seek to protect judicial independence, other issues which are related to public employment, such as remuneration, and to judicial appointment fall under the jurisdiction of the administrative courts.[249]

Professional oversight extents even to the exercise of judicial functions.[250] The question whether judicial independence has been com-

---

[242] Section 26 (2) Federal Judges Act. A call to speed up is only impermissible if it asks for a workload which cannot be accomplished by other judges. BGH, RiZ (R) 1/09, Judgment of 3 December 2009.

[243] Section 26 (1) Federal Judges Act

[244] Section 26 (3) Federal Judges Act.

[245] Sects. 62, 78 Federal Judges Act.

[246] BGHZ 113, 36.

[247] BGHZ 90, 40, at 48 *et seq.*; BGHZ 93, 238, at 241.

[248] Sects. 61 (1), 62 (2), 77 Federal Judges Act.

[249] Section 71 (3) Federal Judges Act, Section 126 Civil Servants Law (*Beamtenrahmenrechtsgesetz*, BRRG). See BVerfGE 87, 68, at 86.

[250] N. Achterberg, Die richterliche Unabhängigkeit im Spiegel der Dienstgerichtsbarkeit, NJW 3041 (1985); G. Pfeiffer, Zum Spannungsverhältnis richterlicher Unabhängigkeit – Dienstaufsicht – Justizgewährungspflicht, in: A. R.

promised by such oversight is difficult to determine. In order to protect judicial independence while guaranteeing effective access to justice the court has elaborated a detailed framework which distinguishes between an outer sphere which is subject to oversight and an inner sphere of judicial exercise which may not be subject to disciplinary measures.[251] A judge may be criticized only for the formal way he conducts his judicial functions (timeliness, appropriate conduct *vis-à-vis* the parties, orderly proceedings), not for the content of his decision-making. With respect to the core judicial functions, which are functions directly relating to the finding of justice, any interference is impermissible unless it is clearly outside any reasonable interpretation of the law.[252]

Among the protected core functions are judgments and all procedural measures taken in preparation of a decision or subsequently.[253] This includes the maintenance of law and order during hearings,[254] transcripts,[255] recusal,[256] the taking of evidence[257] and the evaluation of potential settlements.[258] The prohibition of directions forbids any kind of oversight which would dictate how to decide a case or how to arrive at a conclusion.[259] Even indirect instructions or psychological influence having an effect on the finding of justice are impermissible.[260] Apart from the legal reasoning of a decision a judge does not have to give an account of his decision-making.[261] In rare cases of a manifestly errone-

---

Lang (ed.), Festschrift für K. Bengl, 85 (1984); H.-J. Papier, Richterliche Unabhängigkeit und Dienstaufsicht, NJW 8 (1990).

251 The distinction between core and outer sphere functions has not gone unchallenged. According to the critics, the distinction is not clear and there should not be an interference with core judicial functions in the case of manifest errors. Achterberg (note 250), at 3045; Schmidt-Räntsch (note 43), § 26, at para 24.

252 Included are optional cognizance and the allocation of cases.

253 BGHZ 42, 163, at 169.

254 BGHZ 67, 184, at 188.

255 Id.

256 BGHZ 77, 70, at 72.

257 BGHZ 71, 9, at 11.

258 BGHZ 47, 275, at 284 *et seq*.

259 C. Hillgruber, Art. 97, in: T. Maunz/G. Dürig (eds.), at para. 21 (2009).

260 BGHZ 42, 163, at 169 *et seq*.; BGHZ 70, 1, at 4; BGHZ 90, 41, at 43 *et seq.*

261 BGH, NJW 2441 (1987).

ous decision by a judge which is contrary to the law intervention has been allowed by service courts.[262] In one case the judge had ordered counsel to be forcibly expelled from the courtroom in violation of the Judicature Act (Sects. 177, 178 Judicature Act).[263] To intervene in extreme cases of obvious misapplication of the law which interfere with the right to due process is considered necessary to uphold the rule of law.[264]

Functions concerning the outer sphere of a judge's activities, which are not directly related to judicial decisions, are subject to oversight.[265] This includes the manner and form of decisions even if the decision itself is in the exercise of a core judicial function.[266] Measures to ensure the orderly course of business are permissible.[267] For example, the timeliness of the setting of a court hearing date may be subject to supervision, with the effect that shortcomings may be mentioned in a judge's appraisal. [268] A judge may also be called upon to explain the excessive duration of court proceedings.[269] To ask him or her to prioritize based on efficiency and in keeping with the rules is allowed, too.[270] However, a judge may not be required to deal with a specific case first.[271] And judges are generally free with respect to the conditions of their work including working hours, so that no one may dictate how they dispense justice.[272]

---

[262] See e.g. BGH, DRiZ 410 (1991); BGH DRiZ 468 (1997). For the critique see Achterberg (note 250).

[263] BGHZ 67, 184, at 187 *et seq*. For a grave case of offensive misconduct *vis-à-vis* a lawyer see also BGH, DRiZ 410, at 411 (1991).

[264] See also BGH, NJW 437 (1977); BGHZ 42, 46, at 147, 150, 163, 169; BGHZ 47, 275, at 285; BGHZ 67, 100, at 184, 187, 271, 276; BGHZ 70, 1, at 4.

[265] BGHZ 42, 163, at 169; BGH, NJW-RR 498, at 499 (2001).

[266] BGHZ 67, 184, at 187; BGHZ 90, 41, at 45.

[267] BGHZ 90, 41, at 45.

[268] BGH, DRiZ 467, at 468 (1997).

[269] BGH, DRiZ 20, at 21 (1991).

[270] BGH, NJW 421, at 422 (1998).

[271] BGH, NJW 1197, at 1198 (1987).

[272] BGHZ 113, 36, at 40; BGH, NJW 3275, at 3276 (2001); BVerwG, DÖV 632 (1981); BGHZ 78, 211, at 213.

Non-judicial functions, such as administrative tasks[273] and private conduct, are not protected by judicial independence and therefore also subject to full supervision, provided they have an impact on a judge's official duty.[274] Also permissible are personal reviews[275] and prosecution for corruption[276] or the perversion of justice,[277] which is extremely rare in practice since it requires intent and a grave violation of the law, such as if a judge, in order to save himself work, fails to grant the right to be heard before a person is deprived of his or her liberty.[278]

Apart from disciplinary measures judges may be held accountable for abusive conduct on the basis of impeachment for infringing fundamental principles of constitutional law.[279] This has not so far been used.[280]

1. Formal Requirements

Judicial oversight falls within the competence of the court presidents and the ministry of justice.[281] Oversight over the judges of the highest state courts lies with the justice ministries. It is part of the administration of the courts, but the judiciary plays a significant role since most serious sanctions can be adopted only by service courts and all means of oversight are subject to judicial review. Only the initial phase is part of the court administration. The judicial superior, usually the president of the court where the judge holds office, investigates the matter.[282]

---

273 See Section 4 (2) No.1 Federal Judges Act.

274 BGH, DRiZ 215 (1977).

275 BVerwGE 62, 135, at 138; BGH, NJW 419 (1988).

276 Section 334 Criminal Code (*Strafgesetzbuch*, StGB).

277 Section 339 Criminal Code. See *infra* at B. VIII. Immunity for Judges.

278 BGH, HRRS No. 725 (2009).

279 Article 98 (2) Basic Law.

280 See below at B. VII. 1. Formal Requirements.

281 For ordinary courts: Section 14 (1) No. 1 and No. 3 und Section 15 Regulation on Court Procedure (*Verordnung für die einheitliche Regelung der Gerichtsverfassung*, GVVO) of 20 March 1935, RGBl. I, 403. For the other jurisdictions: Section 38 Code of Administrative Court Procedure; Section15 (1) Labour Court Act (*Arbeitsgerichtsgesetz*, ArbGG); Section 31 Code of Fiscal Court Procedure (*Finanzgerichtsordnung*, FGO); Sects. 9 (3), 30, 38 (3) Social Court Act (*Sozialgerichtsgesetz*, SGG).

282 Section 63 (1) Federal Judges Act in conjunction with Section 33 (2) Federal Disciplinary Act (*Bundesdisziplinargesetz*, BDG).

Though the law refers to the superior, this does not involve a civil-service-like hierarchical structure.[283] If she/he considers a disciplinary measure to be warranted and necessary she/he can either issue a warning or reprimand[284] or recommend the initiation of judicial proceedings before the judicial service court to the justice ministry.[285] The superior is limited to warnings and reprimands, meaning the criticizing of the conduct of a judge in written form.[286]

Removal from office or reduction of salary can be imposed only by a service court in formal judicial proceedings.[287] This requires violation of the judicial duties laid down in the Federal Judges Act, such as for example the violation of independence or work as a legal expert outside one's judicial duties.[288] Dismissal on the basis of a judicial decision is provided for if a judge is sentenced to at least one year's imprisonment for the commission of a wilful crime; if a judge is sentenced for treason, endangering the democratic legal order or endangering German national security; if a judgment belies a judge's professional capacity for public office or in the case of forfeiture of civil rights pursuant to Article 18 Basic Law.[289]

As indicated above, federal and state judges can be impeached for constitutional infringements by a two-thirds majority decision of the Federal Constitutional Court.[290] The provision, which does not play a role in practice, is to be understood against the background of the experi-

---

283 The powers of the judicial hierarchy are limited. See Bell (note 3), at 125.

284 Section 64 (1) Federal Judges Act.

285 Section 34 (1) Federal Disciplinary Act.

286 Section 6 Federal Disciplinary Act.

287 Sects. 63 (2), 83 Federal Judges Act.

288 Sects. 39, 41 Federal Judges Act.

289 Section 24 Federal Judges Act.

290 Article 98 (2) of the Basic Law reads: "If a federal judge infringes the principles of this Basic Law or the constitutional order of a Land in his official capacity or unofficially, the Federal Constitutional Court, upon application of the Bundestag, may by a two-thirds majority order that the judge be transferred or retired. In the case of an intentional infringement it may order him dismissed." See also Article 127 (4) Hessen Constitution; Article 66 (5) Baden-Württemberg Constitution; Article 138 Bremen Constitution; Article 63 (3) and (4) Hamburg Constitution; Article 40 Niedersachsen Constitution; Article 73 Nordrhein-Westfalen Constitution; Article 123 Rheinland-Pfalz Constitution; Article 36 (2) Schleswig-Holstein Constitution.

ence with the judiciary in the Third Reich.[291] In order to build an independent judiciary committed to the new constitutional order the 1949 Basic Law provides for this kind of accountability. Its purpose is to guarantee that judicial power is exercised in the interest and spirit of the basic constitutional principles. Despite its repressive nature its role in practice is distinctively preventive.

2. Disciplinary Proceedings

There are two phases in formal disciplinary proceedings: the investigation[292] and judicial proceedings before the service court.[293] With respect to federal judges the investigation is conducted by a judge who is appointed by the competent organ of the judicial administration.[294] The judge is free from instructions and is to conduct the investigation independently.[295] Her or his report, together with the evidence collected, is submitted to the administrative department which decides whether the case is to be abandoned or submitted to the competent service court.

3. Judicial Safeguards

As mentioned above, there are comprehensive judicial safeguards with respect to discipline and other forms of oversight so that any oversight measure, including appraisals, views and conduct which affect a judge, is subject to judicial review.[296] If a judge considers his or her independence to be compromised he may ask for a decision by a service court. The Federal Service Court is exclusively composed of judges appointed for life. Three of them are permanent members of the court chosen from among the judges of the Federal Court of Justice and two are judges from the same jurisdiction (civil, criminal, administrative, tax, social or labour).[297] The Judicial Board (*Präsidium*) of the Federal Court

---

[291] R. Wassermann, Richteranklage im Fall Orlet?, NJW 303 (1995).

[292] Sects. 56-66 Federal Disciplinary Rules (*Bundesdisziplinarordnung*, BDO).

[293] Section 63 (1) Federal Judges Act in conjunction with Sects. 67-78 Federal Disciplinary Rules.

[294] Section 56 (2)(1) Federal Disciplinary Rules.

[295] Section 6 (3)(1) Federal Disciplinary Rules.

[296] Section 26 (3) Federal Judges Act.

[297] Section 61 (2) Federal Judges Act.

of Justice selects and appoints the members of the Federal Service Court for a five-year term. The two non-permanent members of the Federal Court of Justice are determined on the basis of a list of candidates submitted by the judicial boards for the federal highest courts, the order of which is binding.[298]

The composition of state service courts, which are competent to hear all matters relating to state judges, is similar.[299] There is, however, one difference: in 2004 the Federal Judges Act was amended to allow the federal states to include members of the bar among the members of a service court.[300] Disciplinary cases are decided by a division of the regional court. Decisions of a state service court can be appealed.[301] Such appeals are usually heard by a special senate of the higher regional court. Reprimands can be challenged in administrative courts.

4. Sanctions

There is an exclusive catalogue of sanctions for misconduct in the exercise of judicial functions. Among them are warnings, reprimands, fines, salary reduction, transfer to a judicial rank with a lower salary, and removal from office.[302] With respect to the performance of their administrative functions judges may also receive a simple notification or disapproval. Furthermore a judge may be barred from performing judicial functions without the termination of her or his status.[303] Without the written consent of the judge this form of removal is permissible only on the basis of a final judicial decision in case of impeachment pursuant to Article 98 (2) and (5) Basic Law, in a judicial disciplinary action, in the

---

[298] Section 61 (3) Federal Judges Act.

[299] Section 77 Federal Judges Act.

[300] Section 77 (4) Federal Judges Act. According to Wittreck the participation of a private attorney does not compromise judicial independence. F. Wittreck, Anwälte als Richter über Richter? – Anmerkungen zur jüngsten Novellierung des Richtergesetzes und der Neubesetzung der Richterdienstgerichte, NJW 3011 (2004).

[301] Section 79 (1) Federal Judges Act.

[302] Section 63 (1) Federal Judges Act in conjunction with Section 5 Federal Disciplinary Rules.

[303] Schmidt-Räntsch (note 43), § 30, at para 9.

interest of administration of justice[304] or upon change of the judicial structure.[305]

5. Practice

Generally speaking, disciplinary sanctions are reserved for serious misconduct by judges, in particular if the right to due process is compromised. Comprehensive judicial review provides for an effective safeguard against the abuse of disciplinary measures. In 2006 only 55 disciplinary proceedings were initiated; given the number of judges this amounts to three in 1,000.[306] There have been ordered a total of 25 sanctions, among them 13 reprimands, three fines, three temporary reductions of salary, one transfer and three dismissals, but no suspension.[307] With a ratio of one in 1,000 judges who were indeed sanctioned, compared to other European countries this is among the smallest numbers of disciplinary sanctions (comparable to Norway, Iceland and Ireland).[308]

Some legal scholars, former court presidents and private attorneys have even complained that judicial accountability in Germany is insufficient, allowing instances of abuse of office or overdue proceedings to go unanswered.[309] This is considered detrimental to the purpose of judicial independence, which is to ensure the rule of law.[310] Though cases in which judges purposely disregard the law are rare, there have been instances where judges have successfully shielded themselves from ac-

304 See Section 31 Federal Judges Act.

305 See Section 32 Federal Judges Act.

306 European judicial systems - Edition 2008 (note 198).

307 Id., at 204.

308 Id., at 208.

309 Seidel (note 104), at 98-100. For the limits of judicial independence see also W. Geiger, Die Unabhängigkeit des Richters, DRiZ 65, at 66 (1979); D. Leuze, Richterliche Unabhängigkeit, 4 DÖD 78, at 81 *et seq.* (2005); H. Schulze-Fielitz, Art. 97, in: H. Dreier (ed.), Kommentar zum Grundgesetz, Vol. 3, at para 15 (2000); K. Redeker, Justizgewährungspflicht des Staates versus richterliche Unabhängigkeit? NJW 2796 (2000).

310 Leuze (note 309), at 81.

countability by claiming judicial independence.[311] According to a former president of the Federal Administrative Court, disciplinary courts tend to protect judges even in cases of abusive conduct.[312] In order to preserve popular trust in the judiciary and the rule of law there have been calls for more accountability, which ultimately led to an amendment to the Federal Judges Act in 2004. In an effort to introduce outside control the statute now allows the federal states to include a private attorney in service courts.[313]

An additional measure to strengthen accountability without compromising judicial independence would be the strengthening of peer accountability, which is still relatively weak. Judges should engage in proactive and critical dialogue among themselves in order to stimulate more self-reflection. One commentator suggested transferring the competence for appraisals to a team of judges composed of judges of the same level and of a higher level of courts with varying composition.[314]

VIII. Immunity for Judges

Apart from disciplinary and criminal accountability, the civil liability of judges for judicial action is also limited in order to avoid indirect influence on adjudication.[315] Judges are protected from civil actions with respect to the exercise of their adjudicatory functions, unless they have committed a criminal offence (privilege of judges).[316] With respect to

---

311 For an illustrative account of such cases see Seidel (note 104), at 98-100. See also R. Herr, Zur "Rechtsblindheit" und zur "Unabhängigkeit" der deutschen Richter/innen, DRiZ 405 (1994).

312 H. Sendler, Blüten richterlicher Unabhängigkeit und Verfassungsgerichtsschelte, NJW 825, at 826 (1996).

313 Section 77 (4) Federal Judges Act. According to Wittreck the participation of a private attorney does not compromise judicial independence. Wittreck (note 300), at 3011.

314 Seidel (note 104), at 102. For the need for a more active approach towards accountability by the judiciary see also W. Hoffmann-Riem, Gewaltenteilung – mehr Eigenverantwortung für die Justiz?, DRiZ 18 (2000).

315 Whether adjudication can at all provide the basis for disciplinary action is contested. O. R. Kisse/ H. Mayer, Gerichtsverfassungsgesetz, § 1 GVG, at para. 202 (4th ed. 2005).

316 Section 839 (2) Civil Code (*Bürgerliches Gesetzbuch*, BGB). BGHZ 50, 19. For further details see Künnecke (note 3), at 230-231. With respect to those

their judicial decision-making judges may only be criminally prosecuted for the perversion of justice.[317] The provision seeks to ensure judicial accountability, however, only with respect to the most serious abuses of judicial office which aim to favour or prejudice a party to a dispute. It is therefore considered a necessary measure to ensure the rule of law.[318] Perversion of justice requires a fundamental violation of the administration of justice, which can only be found if there has been a grave breach of the law committed with intent.[319] It provided the basis for the conviction of some GDR judges after German reunification for the manifest abuse of their judicial office during the SED regime which led to a serious violation of human rights.[320] The low number of convictions since then shows that it is only resorted to in extreme cases.

IX. Associations for Judges

There are several professional associations in Germany, such as the *Deutscher Richterbund* as the largest association and the *Neue Richtervereinigung*, which both include judges and prosecutors from all jurisdictions among their members. Some other associations are addressed to judges of a particular jurisdiction (judges of labour, administrative or social courts).[321] Furthermore, the trade union for services *ver.di* has a section for judges and prosecutors. Judges' associations in Germany do not play the same forceful role as in Italy, Spain and France,[322] but they actively participate in public discussion and have lately been very active

---

decisions which do not fall under Section 839 (2) Civil Code judges often have liability insurance.

317 Section 339 Criminal Code.

318 But see M. Hoenigs, Zur Existenzberechtigung des Straftatbestandes der Rechtsbeugung. Korrelat oder Widerspruch zur richterlichen Unabhängigkeit (2010).

319 BGHSt 32, 363; BGHSt 38, 381, at 383; BGHSt 40, 40; BGHSt 44, 258. For the critique of this doctrine as vague see M. Hoenigs, Der Straftatbestand der Rechtsbeugung: Ein normativer Antagonismus zum Verfassungsprinzip der richterlichen Unabhängigkeit, KritV 303, at 304-305 (2009).

320 For these stringent requirements see BGHSt 40, 30. See also Künnecke (note 3), at 229-230.

321 E.g. *Amtsrichterverband*.

322 Bell (note 3), at 127.

in advocating reform of judicial administration. Their activities seek to guarantee judicial independence, to assist legislation and adjudication, and to represent the professional, economic and social interests of judges and prosecutors. For this purpose they play an active role in the process of legal policy-making by commenting on draft legislation affecting the judiciary and representing their members' interests *vis-à-vis* the ministries of justice, parliaments and the general public. They are regularly heard in the drafting process of new legislation. Though its role is primarily one of a professional association *Deutscher Richterbund* also exercises union-like functions. With respect to judicial remuneration it takes an active role in negotiations with the executive branch. It also organizes events and training opportunities and publishes a journal which includes articles on various issues relating to or of interest to the judiciary and reports on recent adjudications (*Deutsche Richterzeitung*). It also suggests candidates for the judicial selection committee.

X. Resources, Budget and New Steering Models

According to a recent federal survey which comprises data for the state and federal judiciaries, 12.5 billion EUR were spent on the justice sector in 2005.[323] This includes expenses for all courts, prosecution and prisons. This equals 152 EUR per inhabitant.[324] The costs of the courts alone amount to 0.35% per capita GDP.[325] Two thirds of that went on salaries, while costs of buildings and maintenance were 3% of the judicial budget.[326] In 2006 a total of 190 million EUR was spent on computerization.[327] The figure mirrors the high level of computerization of courts.

A current issue with respect to judicial independence is the introduction of modern oversight procedures in judicial administration ("Controlling") and mechanisms to ensure the efficiency of the judicial sec-

---

[323] Justiz auf einen Blick (note 26), at 56.

[324] Id., at 57.

[325] For the year 2006 see European judicial systems – Edition 2008 (note 198), at 38.

[326] Justiz auf einen Blick (note 26), at 57.

[327] European judicial systems – Edition 2008 (note 198).

tor.[328] The main focus of this undertaking has been a reform of the budgetary system and the consideration of the resources needed for judicial services. The plan to use business management techniques in the administration of justice originated in the late 1980s. It is part of a plan comprehensively to modernize public administration in general. Those advocating these reforms concede that judicial independence requires particular adjustments for the justice sector.[329] In some federal states there have been test phases over the past decade, but the initially planned fundamental reforms to improve judicial efficiency have failed.[330]

Efforts to reduce the costs of the judiciary and the planned restructuring of the court work routine have been met by strong opposition from judges' associations.[331] Plans to introduce steering models of cost-efficiency and other measures launched in public administration to modernize public governance are highly controversial, and output oriented measures, such as performance indicators, are difficult to reconcile with judicial independence.[332] This is why current strategies focus on budgeting, planning and decentralizing the administration of the budget.[333] A central element is measuring the costs of each kind of judicial service. The purpose is to elaborate budgets based on the costs which are expected to arise in the courts and to enhance the autonomy of the local court administration by leaving the administration of the local budget to the court presidents. The budgetary responsibility of the courts is sought to be increased.[334] Under the heading of controlling information is gathered and analysed to show the costs of individual activities/proceedings/cases of the courts with the aim of preparing budg-

---

[328] See e.g. U. Mäurer, Justiz – Aufbruch oder Abbruch? – Ressourceneinsatz und Arbeitsleistung der Justiz, DRiZ 65, at 66 (2000); B. Kramer, Modernisierung der Justiz: Das Neue Steuerungsmodell, NJW 3449 (2001); K. F. Röhl, Justiz als Wirtschaftsunternehmen, DRiZ 220 (2000); Hoffmann-Riem (note 203).

[329] J. Dieckmann, Kosten- und Leistungsrechnung – Ein Modell für die Justiz, 1 Recht und Politik 7 (2002).

[330] See e.g. Hoffmann-Riem (note 203); J. Precht, Justizcontrolling (2008).

[331] For a constitutional analysis see Schulze-Fielitz (note 309), at para. 35.

[332] C. Schütz, Der ökonomisierte Richter: Gewaltenteilung und richterliche Unabhängigkeit als Grenzen Neuer Steuerungsmodelle in den Gerichten, at 338 (2005). But see Dieckmann (note 329).

[333] Id., at 7.

[334] Id., at 11.

etary and strategic decisions and enhancing the transparency of spending.[335] Particularly controversial has been the aim of the cost-output analysis to improve the efficiency of the justice sector by showing the costs arising from particular judicial decisions, by allowing comparisons and improving motivation among judges to work efficiently.[336] In order to avoid a direct impact on individual decision-making data can only be collected anonymously, must not be used for the assessment of judges, and the criteria shall be purely quantitative and not qualitative in nature.[337]

In 2005 a new system for the planning of personal demand in the justice sector was introduced in all federal states for all state courts of ordinary jurisdiction (civil and criminal matters) and for prosecutors (PEBB§Y).[338] It measures the average time necessary for classified judicial proceedings. On this basis the number of judges needed in each court is calculated. According to judges' associations the factual workload of judges exceeds these figures which do not adequately take into account difficult cases.[339] They warn that despite a high workload judges are not able to measure up to the calculations with the result of over-lengthy proceedings. Though even the new model showed that the number of judges is below actual demand, it has been more or less unchanged since the 1990s for budgetary reasons. While PEBB§Y was intended to assist budgetary planning in practice the calculated benchmarks also play a role in the distribution of cases, and thus have a direct effect on the individual judge.[340]

---

335 Id., at 8.

336 Id., at 9.

337 Id., at 10.

338 Arthur Andersen Business Consulting GmbH, Gutachten Personalbedarfsberechnungssystem (PEBB§Y), DRiZ 284 (2002).

339 E. Herrler, Zusammenfassung der Ergebnisse des Gutachtens Arthur Andersen über ein analytisches und fortschreibbares Personalbedarfsberechnungssystem (PEBB§Y I) für Richter und Staatsanwälte, available at <http://www.drb.de/cms/fileadmin/docs/zusammenfassung_pebbsy_0708.pdf>.

340 Böttcher (note 9), at 1325.

C. Internal and External Influences

I. Separation of Powers

As mentioned above, the German separation of powers model is one of mutual checks and balances.[341] Instead of isolating the different branches of government institutionally, a functional approach prevails which asks for a separation of judicial from legislative and executive competences. This approach is most visible in the administration of the judiciary, in which the executive still plays an important role since judicial administration is considered to be executive rather than judicial in nature.[342] Judges are prohibited from exercising executive or legislative functions at the same time as judicial functions.[343] However, they may participate in judicial administration, in teaching and research, and in legal state examinations without the need to abandon their role as judges.[344] In order to separate the exercise of judicial functions from those of the other branches of government there are several incompatibility provisions. Employment in a different public service and entry into the armed forces as a soldier regularly result in automatic dismissal.

1. Independence from the Legislature

Judicial independence is constitutionally guaranteed *vis-à-vis* the legislature.[345] But this does not absolve the judiciary from compliance with the law. As stipulated by Article 97 (1), the judge is subject to the law. Parliaments may change statutory law.[346] However, the legislative branch may not interfere with individual cases by enacting case-specific legislation.[347] Neither may parliament adopt decisions which put a judge under pressure to decide a case one way or the other.[348] Though

---

341 Clark (note 74), at 1823.

342 See above at B. I. Administration of the Judiciary.

343 Section 4 Federal Judges Act.

344 Section 4 (2) Federal Judges Act.

345 BVerfGE 12, 67, at 71; BVerfGE 38, 1, at 21.

346 G. Kisker, Zur Reaktion von Parlament und Exekutive auf „unerwünschte" Urteile, NJW 889, at 893 (1981).

347 S. Detterbeck, Art. 97, in: M. Sachs (ed.), Grundgesetz Kommentar, at para. 12 (2nd ed. 1999).

348 Id.

parliamentarians may criticize judicial decisions, this should be done with respect and temperance. A call to boycott the carrying out of a decision would also be impermissible. This, however, does not mean that members of parliament are prevented from criticizing judgments.[349]

Judges are not prevented from being members of a political party as a matter of freedom of speech.[350] But they may not participate actively in politics and popular trust in the independence of the judiciary may not be threatened.[351] If they run for political office they are granted unpaid leave of absence and must give up their judicial post if they are elected to parliament or take office in the executive branch.[352]

2. Independence from the Executive

According to German constitutional law the judiciary shall be free from any interference by the executive in the exercise of judicial functions.[353] Instructions to decide a case one way or the other,[354] adoption of administrative regulations with this intent or any other form of influence,[355] such as organizational entanglement, are impermissible.[356] Members of the executive branch may not simultaneously serve as judges. Several judges, however, work in court administration; and some are temporarily assigned to the ministry of justice. Temporary work in other parts of the executive branch, however, is very rare. Secondment to national or international agencies requires the consent of a judge. A judge may not take part-time office in a municipality.[357]

---

[349] For this issue see R. Mishra, Zulässigkeit und Grenzen amtlicher Urteilsschelte (1997); Kisker (note 346).

[350] See also above at B. II. 2. The Process of Judicial Selection.

[351] Section 39 Federal Judges Act.

[352] Section 36 Federal Judges Act. See also 21 (2) Federal Judges Act.

[353] BVerfG 3, 213, at 224.

[354] BVerfGE 14, 56, at 69; BVerfGE 26, 186, at 198; BVerfGE 27, 312, at 322; BVerfGE 31, 137, at 140; BVerfGE 36, 174, at 185; BVerfGE 60, 175, at 214.

[355] BVerfGE 26, 79, at 92 *et seq*; BVerfGE 55, 372, at 389.

[356] But the merger of the ministry of justice and the ministry of the interior in Nordrhein-Westfalen was not considered to be impermissible by the competent court. VerfGH NW NJW 1243 (1999).

[357] BVerwG, DVBl. 1138 (2000).

Allegations of interference with adjudications by the executive branch are very rare.[358] The high esteem for judicial independence which is usually shared by all parts of the population and the different branches of government provides for an effective safeguard against efforts to direct individual decision-making. Ministers not respecting substantive independence would have to face forceful demands for their resignation. The case is somewhat different with respect to judicial administration. In the context of promotion, which is the primary responsibility of the justice ministries, political affiliations play a role. While judges' associations consider this to be detrimental to judicial independence because it may indirectly affect judicial decision-making, other commentators regard this competence as a necessary element of democratic accountability.[359]

3. Internal Independence

Substantive independence according to the Federal Constitutional Court applies within the judicial branch, too.[360] Pursuant to Germany's civil law tradition judges are not obliged to follow the jurisprudence of higher court. The resulting risk of a lack of uniformity in adjudication is considered a necessary consequence of judicial independence.[361] The only substantive control permissible which seeks unity in adjudication is that exercised by higher courts on appeal.[362] But disciplinary measures which allude to purportedly wrongful decision-making are not allowed (unless in extreme cases of obvious misapplication of the law which seriously interfere with the right to due process).[363]

Only the competent judge or bench has to decide the case on the basis of the applicable law. The judge is protected against internal interventions unless there is a legal mandate to perform such judicial functions. For example, a court president may not change the judgment of a judge

---

[358] Seidel (note 104), at 101.

[359] Wittreck (note 300); R. Geiger, Die Unabhängigkeit des Richters, DRiZ 65 (1979).

[360] BVerfG, NJW 2149, at 2150 *et seq.* (1996).

[361] BVerfGE 87, 278.

[362] With the trend of increasingly limiting appeals, however, the demands for professional judgments based on law increase for courts of first instance.

[363] See above at B. VII. Judicial Accountability.

sitting alone.[364] Neither may he or she pressure a judge to decide a case one way or the other.[365] In practice presiding judges who chair collegial panels within the higher courts play an important role in the adjudication of the relevant division. Though they may not retrospectively change the decisions by the members of the division their influence in the decision-making process is great.[366] Furthermore the indirect influence of court presidents by way of appraisals should not be underestimated. The career of a judge often depends on their support. Though appraisals must not comment on individual cases, judges who seek promotion may be tempted to adjust their decision-making according to the views of their court presidents.[367]

II. Judgments

1. Basis

According to German law judges shall be free in their decision-making and bound only by the law, that is the constitution, legislation and other forms of legal regulation.[368] Though judges may not decide arbitrarily they are not bound by the prevailing interpretation of the law by other courts.[369] Despite its positivist tradition there has been a growing awareness over the past decades that adjudication cannot be traced exclusively to a formal act of law application, but that interpretation of

---

364 BVerfG, NJW 2149, at 2150 (1996).

365 Id.

366 Id.

367 R. Lamprecht, Vom Mythos der Unabhängigkeit, Über das Dasein und Sosein der deutschen Richter, at 157, 207 (2nd ed. 1996).

368 Article 97 (1) Basic Law, Section 25 Federal Judges Act. Decrees are binding if they comply with the constitutional empowerment. BVerfGE 18, 52, at 59; BVerfGE 19, 17, at 31 *et seq*.

369 BVerfGE 87, 278; BVerfGE 78, 123, at 126. For the definition of arbitrariness see BVerfGE 62, 189, at 192; BVerfGE 86, 59, at 62. One exception are judgments of the Federal Constitutional Court which are binding on all other courts. Section 31 (1) and (2) BVerfGG (Law on the Federal Constitutional Court). However judges are bound to provide elaborate reasoning if they do not follow the jurisprudence of other courts. J. Esser, Vorverständnis und Methodenwahl in der Rechtsfindung – Rationalitätsgarantien richterlicher Entscheidungspraxis, 130 *et seq*. (1970).

the law is effected by the values of the decision-maker.[370] Adjudication, however, is not equated to politics. Considering the dominance of statutory law, methodology and epistemological reasoning still play a significant role in the daily business of courts.[371] Though judges are not bound to follow the jurisprudence of higher courts, in practice they consider it to a large degree.[372] Legal doctrine shaped by scholars and courts plays an important role in the decision-making process, in particular if new issues arise. But this does not make adjudication dependent. Independence does not mean neutrality, but implies the freedom not to be bound.

2. Practice

The number of convictions in relation to the total number of accused in 2006 varied from state to state. While Hamburg with 72% had the lowest conviction rate in Germany, Rheinland-Pfalz had 87%. The difference can be explained by variances in prosecutorial practice.[373] In those federal states where minor offences are not brought to court, the conviction rate is higher than in others which are more stringent in prosecuting.[374]

---

370 J. Limbach, Im Namen des Volkes, 96 *et seq.* (1999); R. Wassermann, Die richterliche Gewalt, at 12 (1985); R. Ogorek, Richterkönige oder Subsumptionsautomat (1986); U. Neumann, Juristische Methodenlehre und Theorie der juristischen Argumentation, 32 Rechtstheorie 255 (2001); H.-M. Pawlowski, Einführung in die juristische Methodenlehre der Rechtswissenschaft, at 61 (3rd ed. 1995); G. Hirsch, Rechtsanwendung, Rechtsfindung, Rechtsschöpfung: Der Richter im Spannungsverhältnis von Erster und Dritter Gewalt (2003); M. Eckertz-Höfer, „Vom guten Richter" – Ethos, Unabhängigkeit, Professionalität, DÖV 729, at 737 (2009).

371 See e.g. W. Hassemer, Gesetzesbindung und Methodenlehre, ZRP 213, at 218 (2007); H. Jung, Richterbilder, at 91 (2006); J. Esser, Vorverständnis und Methodenwahl in der Rechtsfindung – Rationalitätsgarantien richterlicher Entscheidungspraxis (1970). For judicial style in Germany more generally see Bell (note 3), at 136-148.

372 Eckertz-Höfer (note 370), at 734-735.

373 Justiz auf einen Blick (note 26), at 14.

374 Id., at 15.

3. Structure

Pursuant to statute a judgment must be in writing and must name the parties and their attorneys, the court including the judges deciding the case, and include the date of the last oral hearing, an operative part, the relevant facts and legal reasoning.[375] The purpose of this provision is to provide transparency and to explain to the parties the reasons for a decision. The court shall summarize and assess the relevant facts, evaluate relevant evidence and explain why it decided the case this way. All relevant legal provisions are to be cited.[376] If a judgment does not meet these requirements it is subject to annulment on appeal.

4. Public Access

Public access to all court hearings including the delivery of the judgment is guaranteed by statute.[377] The purpose is to prevent abuse and to provide a check on the judiciary so that it does not make arbitrary decisions or violate procedural law. Exceptions apply to juvenile proceedings and proceedings where the interest of a party in closed sessions prevails (i.e. disciplinary and family matters). Public access means physical access by the general public and the media. However, broadcasting and photographing during hearings is not allowed.[378] Apart from public access the courts have to provide for the adequate publication of their decisions, but they are free in the choice of the relevant means, such as press releases, publications etc.[379]

All judgments of the highest federal courts and almost all decisions of the highest state courts are published and accessible through commercial databases. The practice of lower courts varies. Judges are free to initiate the publication of their decisions. If a decision is considered of interest for other judges the court president may publish it (including the names of the judges) on behalf of the court.

---

375 For civil suits see Section 313 Code of Civil Procedure. Different rules apply if the defendant refuses to participate in court proceedings or if he or she acknowledges the plaintiff's claim.

376 For more details see G. Musielak, § 313, in: T. Rauscher *et al.* (eds.), Münchener Kommentar zur ZPO (3rd ed. 2008).

377 Sects. 169 *et seq*., 173 Judicature Act.

378 Section 169 (2) Judicature Act. For the need to allow TV broadcasting before the hearing see BVerfGE 119, 309.

379 BVerwGE 104, 105.

III. Improper Influence on Judicial Decisions

There is no evidence of any direct influence on adjudication by government representatives, prosecutors, senior judges or private individuals. Considering the high societal esteem for judicial independence which is also shared by the judiciary itself, it can be expected that any such attempt would be met by strong opposition. Reports about corruption are extremely rare and, if they occur, lead to criminal prosecution.[380]

Nevertheless there are opportunities for indirect influence on adjudication and, as I have indicated above, with the demand for democratic legitimacy the dividing line between proper and improper influence of the political branches of government is not always easy to draw. In what follows I will only summarize the current issues which have been elaborated on in other sections of this chapter. While judges' associations consider the current model of ministerial judicial administration to compromise judicial independence, there are other voices which advocate executive responsibility as a matter of democratic accountability.[381] Among the most controversial issues is the influence of politics on judicial appointments to higher courts.[382] Judges' associations advocate the sole relevance of merit, whereas other commentators consider the involvement of the legislative branch in federal judicial appointments as a necessary means to ensure democratic accountability of adjudication.[383]

Finally the idea of introducing economic steering models has been criticized as potentially harmful to judicial independence.[384] There is considerable pressure on the judiciary to increase efficiency in order to

---

[380] A 2001 news report on the corruption of two judges was one of the rare exceptions of judicial corruption. Korrupte Richter, Der Spiegel 15/2001.

See also C. Guarnieri, Professional Qualifications of the Judiciary in Italy, France and Germany, in: Transparency International (ed.), Global Corruption Report, 56, at 56-57 (2007). For the low rate of corruption in the entire justice sector see also Bundeskriminalamt, Korruption. Bundeslagebericht 2009, available at <http://www.bka.de/lageberichte/ko/blkorruption2009.pdf>.

[381] See above at B. I. Administration of the Judiciary.

[382] See above at B. II. 2. The Process of Judicial Selection; B. III. 2. Promotion and *infra* at E. Supreme/Higher Courts.

[383] Kommers (note 10), at 139-151.

[384] See above at B. X. Resources.

avoid over-long proceedings while avoiding increases in judicial budgets. Whether this compromises independent adjudication in practice is difficult to determine in the absence of relevant data. The practical effects largely depend on whether judges can resist such pressures and give judgments in the interest of justice instead of the dictates of cost-efficiency. Though efficiency is a valid claim, the line is certainly overstepped if courts suffer from a persistent lack of necessary personnel to fulfill their tasks and if quality is traded off in the interest of quantitative efficiency.[385] Though judges try not to be affected by budgetary benchmarks,[386] access to justice will be seriously compromised if they feel compelled to avoid the time-consuming taking and hearing of evidence in the interest of speedy proceedings.

With their increasing attention to economic litigation and prominent criminal cases the media play an ambivalent role nowadays. On the one hand news coverage is an important aspect of transparency and control, and therefore indispensable in modern democracy, but on the other hand it poses a risk of undue influence on adjudication.[387] Today most courts provide press officers who inform and answer the questions of the media. They are experienced with press relations. By providing the press with the relevant information they try to protect judges from direct contacts with the media. Judges are usually able to resist influence from the media.[388] Nevertheless, in the interest of judicial independence harsh and one-sided critique with propagandistic elements and litigation lobbying by parties in the media should be avoided as a matter of media professional ethics.

Whether these informal risks for judicial independence materialize in practice ultimately depends on the judges themselves. This also applies to potential efforts by lobbyists to influence judges when they participate in public or private life outside the courtroom, and to strategic efforts to influence adjudication by the writings of private attorneys and

---

385 For a critical appraisal of the current situation in some courts see J. Berkemann, Die Unabhängigkeit des Richters – Funktion, Auftrag, Moral. Festschrift zum zehnjährigen Bestehen des Verwaltungsgerichts Leipizig 1992-2002, 15, at 25 (2003).

386 Eckertz-Höfer (note 370), at 1325.

387 See V. Boehme-Neßler, Die Öffentlichkeit als Richter? Litigation-PR als Herausforderung für das Recht, ZRP 228 (2009); V. Boehme-Neßler, Unabhängige Richter in der Mediengesellschaft, AfP 539 (2010).

388 Eckertz-Höfer (note 370), at 738.

scholars with the aim of producing prevailing opinions.[389] There is a widely held conviction that judicial independence, apart from structural safeguards, requires a state of mind and strength of character which allow judges to assert themselves against external influences.[390]

According to some commentators the highest risk to judicial independence is posed by the judiciary itself.[391] Court presidents with their assessment competence play a significant role in promotions.[392] Though appraisals can be challenged in court there is a risk that oversight may prompt judges to follow a particular line of reasoning to satisfy their superiors. Accordingly there is a widely held belief among judges that judges in Germany are the most independent in the world, but only if they do not seek promotion.

IV. Security

Compared to foreign countries incidences of judges being threatened or attacked are still rare. Nevertheless there have been lethal attacks which have led to discussion about physical security in courts.[393] These physical attacks are in the majority of cases made by those standing trial or convicts and they are directed not only against judges, but also against prosecutors, witnesses or private individuals including joint plaintiffs. In times of increasing violence the traditional aim of accessibility by the general public requires re-evaluation. Recent attacks have led to heightened security measures, such as security gates with metal detectors.

---

389 Id.

390 G. Pfeiffer, Die innere Unabhängigkeit des Richters, in: W. Fürst *et al.* (eds.), Festschrift für Wolfgang Zeidler, Vol. 1, 81 (1987); Eckertz-Höfer (note 370), at 737.

391 Wittreck (note 20), at 183 *et seq*.; Eckertz-Höfer (note 370), at 738; Seidel (note 104), at 101; W. Hassemer, Für eine Reform der Dritten Gewalt, DRiZ 370 (1998).

392 See above at C. I. 3. Internal Independence and B. III. 2. Promotion.

393 For a survey of attacks on judges and prosecutors see W. Hirth, Sicherheit für Richter und Staatsanwälte, 2 MHR 17 (2005).

D. Ethical Standards

I. Code of Ethics for Judges

The professional duties of judges are laid down in the Federal Judges Act which provides the exclusive basis for any disciplinary measure. Section 39 provides that all judges shall act in a manner which does not compromise their independence. There is no code of ethics for judges which specifies this command. Though a professional judicial ethos has evolved in which judicial independence ranks high, it is one of custom and usually considered to be a matter to be dealt with by each judge individually.[394] Unlike in other European countries the discussion about the need for a code of ethics has only just begun. It has prompted associations of judges to establish working groups.[395] They are, however, reluctant to elaborate a catalogue spelling out specific obligations and prohibitions and prefer instead to stimulate an open dialogue on ethics among judges. According to their views ethics cannot be decreed and a detailed catalogue of obligations could be abused in order to discipline judges. But if judges' associations are successful in their demand for self-administration in the future there will be a need to ensure judicial accountability within the judiciary. In this case a code of ethics may prove a necessary measure, also in order to ensure legitimacy towards the general public. In an effort to guarantee a high quality of adjudication judges have started to hold regular quality circles.

II. Training

There is no mandatory training on judicial ethics before a judge takes office or during his/her tenure. Continuing training is on a voluntary basis and includes among others training sessions on professional and communication skills and working methods, such as, e.g., relations with private attorneys, court experts and the media and witness examina-

---

394 T. Dieterich, Berufsethik und Grundrechte im richterlichen Alltagsbetrieb, Betrifft Justiz 158 (2007).

395 A. Titz, Richtereid und richterliche Ethik, DRiZ 32 (2009); A. Titz, Berufsethos und richterliche Verantwortung – Über den Stand der Diskussion in Frankreich und Europa, DRiZ 98 (2008); M Burghardt, Richterliche Ethik im Netzwerk des DRB, DRiZ 102 (2009); E. Kreth, Die richterlicher Unabhängigkeit: Wahrung einer sich nicht selbst erfüllenden Aufgabe, DRiZ 198 (2009).

tion.[396] New courses also deal with the question of what kind of influence on judicial decision-making is impermissible.

E. Supreme/Higher Courts

I. Federal Highest Courts

The German court system is integrated at the highest level with the following supreme federal courts competent for different subject-matter jurisdictions: the Federal Court of Justice (BGH), the Federal Administrative Court (BVerwG), the Federal Finance Court (BFH), the Federal Labour Court (BAG) and the Federal Social Court (BSG). Their administration and recruitment follow different rules from those applicable to state courts. Particular concerns arise from the selection of federal judges. They are chosen jointly by the competent Federal Minister and a committee for the selection of judges (*Richterwahlausschuss*) consisting of the 16 competent Land ministers and an equal number of members elected by the federal parliament (*Bundestag)*.[397] The judiciary plays an exclusively consultative and thus secondary role in the selection process. Presidential Councils (*Präsidialräte*) evaluate the qualification of candidates but their assessment is non-binding.[398]

The election procedure of the committee has been criticized for its lack of transparency and its politicization because of political deals being made among the parties before the actual election.[399] Proposals for candidates are made either by the committee members or the Federal Min-

---

[396] Riedel (note 77), at 116.

[397] Article 95 (2) Basic Law. Most members of the committee are usually members of parliament with considerable legal expertise. For the procedure see Künnecke (note 3), at 220-222; Judicial Selection Controversy at the Federal Court of Justice, Legal Culture, 2 German Law Journal (2001); Clark (note 74), at 1825.

[398] Section 57 Federal Judges Act. For the role of presidential councils see above at B. I. 2. b) Presidential Councils (*Präsidialräte*).

[399] E. Schmidt-Jortzig, Aufgabe, Stellung und Funktion des Richters im demokratischen Rechtsstaat, NJW 2377, at 2381 (1991); A. Emmerlich, FAZ, 6 February 1986, at 9; B. Erhard, FAZ, 10 February 1986, at 9; B. Erhard, Gedanken zur Wahl der Richter des Bundesverfassungsgerichts und der obersten Gerichtshöfe des Bundes, in: F. Klein (ed.), Der Bundesfinanzhof und seine Rechtsprechung, Festschrift für H. Wallis, 35, at 41 *et seq*. (1985).

ister and forwarded to the competent presidential council which gives its written assessment on the qualification of the candidates. Elections by the committee are *in camera* on a majority vote without public hearings.[400] Though professional qualification (in particular judicial experience) and geographical distribution play a significant role, the ultimate choice is often influenced by the party affiliation of the candidates or their willingness to toe the party line.[401] Usually the parties aim for a proportional distribution. If majorities vary between the states and the federal level this results in more or less equal representation of different political backgrounds. But if a party holds a strong majority in the federal and most state parliaments the selection can be dominated by one party.[402] This led to controversy in 2001 when the Presidential Council held that two judicial candidates for the Federal Court of Justice lacked sufficient experience at a higher regional court and the Federal Judicial Selection Committee elected them notwithstanding.[403]

In response to this case some commentators have asked for a greater voice for the judiciary in judicial appointments in order to avoid politicization.[404] Several members of the judiciary consider the current selection model with the decisive role for executive and legislative powers to go back to a pre-democratic era which insufficiently reflects judicial independence.[405] According to these critics selection should be exclusively based on personal and professional qualification. Others, however, consider the joint responsibility of the executive and legislative branches in federal appointments to be necessary for the democratic accountability of the federal judiciary.[406] They argue that the significant role of the federal supreme courts in shaping the jurisprudence of their respective ju-

---

400 Section 9 Judicial Selection Act (*Richterwahlgesetz*, RiWG).

401 Clark (note 74), at 1825.

402 Künnecke (note 3), at 221.

403 Judicial Selection Controversy at the Federal Court of Justice (note 397).

404 H. Weber-Grellet, Eigenständigkeit und Demokratisierung der Justiz, DRiZ 303 (2003); T. Edinger, Die Justiz muss eine Stimme bekommen, DRiZ 188 (2003); G. Berrram, Von Richtern und Kröten, NJW 1838, at 1839 (2001).

405 See e.g. R. Jäger, Richter müssen Verantwortung übernehmen, Radikale Reformen sind notwendig, Frankfurter Rundschau, 18 September 2003 [cited by Künnecke (note 3), at 222].

406 K. J. Grigoleit/A. Siehr, Die Berufung der Bundesrichter: Quadratur des Kreises? – Zur Frage der Vereinbarkeit von Bestenauslese und Wahlgrundsätzen, DÖV 455, at 456-457, 462 (2002) with further references.

risdictions requires democratic legitimacy in terms of judicial selection which exceeds the requirements for lower courts.[407]

Some even fear that greater involvement in judicial selection would politicize the judiciary.[408] They doubt that the assessment of qualifications by presidential councils is politically unbiased.[409] The controversy shows the persistent dilemma of judicial independence (as a matter of the rule of law) and judicial accountability (as a matter of democracy). On the one hand Article 33 Basic Law requires the selection of the best qualified candidates; on the other hand Article 97 (2) provides for selection by the political branches.[410] The more stringent the standards for qualification are, the less room is left for democratic choices. On the other hand if political considerations prevail qualifications become secondary. It is a constant challenge to balance the two aims in an effort to recruit a democratically legitimate bench which is sufficiently qualified to adjudicate in accordance with the rule of law.

Whether the judiciary should have the decisive role in this process by intervening and prohibiting the appointment of an elected candidate upon the application of a competing candidate remains controversial.[411] Arguably the political branches involved in the selection process should act in a manner which adequately reflects judicial qualifications without giving rise to suspicions of patronage in the first place. Partisanship should not trump judicial qualifications, with the consequence that highly qualified judges are deterred from putting themselves forward as candidates.[412] In Germany public trust in the judiciary is based on the expectation that it is not influenced by party politics in order to ensure fair and impartial proceedings.[413] For this purpose several proposals

---

[407] Kommers (note 10), at 147. According to Bauer the politicization of judicial election ensures that the diversity of the bench reflects the society it serves. F. Bauer, Richterwahl und Gewaltenteilung, DRiZ 401 (1971).

[408] C. Arndt, Richterauswahl für die Obersten Bundesgerichte, Recht und Politik 23, at 24 (2002).

[409] Id., at 25. Judicial Selection Controversy at the Federal Court of Justice (note 397).

[410] Grigoleit/Siehr (note 397), at 456-458.

[411] See e.g. OVG Schleswig-Holstein, NJW 3495 (2001). For a critical appraisal see e.g. Arndt (note 397), at 24.

[412] Frowein (note 134).

[413] Kommers explains that "[a]ny public fixation in Germany on how a judicial nominee might vote in a particular case or in a wide range of cases would be seen as a potential threat to the independence of that nominee." Kommers (note

have been submitted for advertising vacant positions, enlarging the role of the competent presidential council, providing for the transparency of the selection process and specifying the qualification criteria.[414] However, apart from a commitment by the judicial selection committee to reduce the emphasis on political affiliation by giving more consideration to professional assessments of the candidates and some minor procedural changes (i.e. the publication of the time of elections so that candidates can apply) they have not led to a major reform and election remains *in camera*.[415]

Irrespective of whether more reforms are needed the criticism voiced should not, however, lead an outsider to doubt the standard of judicial qualification in Germany. In general the judiciary earns the great respect of the general public and the legal community for its independence and judicial qualification.[416] And judicial independence cannot exclusively be measured by the way judges are elected. Secure tenure, limited disciplinary accountability and a professional ethos of independence are just as important. And the collegial composition of the bench with judges from different political backgrounds in practice usually works as an effective safeguard against biased adjudication.

II. Federal Constitutional Court

Turning now to the Federal Constitutional Court it is necessary to recognize that this court plays a central role in Germany's constitutional democracy. As a constitutional organ it is structurally largely independent of the other branches of government without any ministerial oversight. As a matter of self-administration it draws up its own budget which is approved by the *Bundesrat*, administers its financial resources and appoints all court service personnel. The president of the court heads the court's administration, but fundamental organizational decisions are taken by the full body of judges. Specific rules also apply to

---

10), at 150. See also Judicial Selection Controversy at the Federal Court of Justice (note 397).

414 S. Lovens, Verfassungswidrige Richterwahl?, ZRP 465 (2001); Bundesratsdrucksache 616/01; Grigoleit/Siehr (note 397), at 461-462.

415 Neue Regeln für die Richterwahl, FAZ, 11 April 2003, 2.

416 See e.g. T. Rasehorn, Um die "Bestenauslese" bei der Richterwahl – Eine Erwiderung, 1 Recht und Politik 29, at 31 (2002).

the term of office of the judges of the Federal Constitutional Court which is 12 years without the possibility of re-election. If a judge turns 68 the term expires earlier.[417] The judges of the court may be involuntarily retired or dismissed only pursuant to a plenary court decision which is subject to stringent conditions.[418] No such decision has yet been taken.

The selection of constitutional court judges is a political process. Half the judges of the Federal Constitutional Court are elected by the *Bundestag* (federal parliament) and half by the *Bundesrat* (state chamber).[419] Those elected are appointed by the Federal President.[420] The court is made up of federal judges and other members who may not at the same time hold office in the federal or state governments.[421] Three judges of each of the two senates of the court are elected from among the judges of the five supreme federal courts of justice; in practice most of the remaining five members in each senate are law professors; at least they must have completed both legal state examinations.[422] A two-thirds majority is required for the election of a judge.[423] In order to at-

---

[417] Section 4 Code of Constitutional Court Procedure (*Bundesverfassungsgerichtsgesetz*, BVerfGG).

[418] Section 105 Code of Constitutional Court Procedure.

[419] Article 94 Basic Law, see also Code of Constitutional Court Procedure.

[420] Section 10 Code of Constitutional Court Procedure.

[421] Article 94 (1) Basic Law.

[422] Section 3 (2) Code of Constitutional Court Procedure.

[423] Section 6 (5) and Section 7 Code of Constitutional Court Procedure. They read:

Article 6

(1) The judges to be elected by the Bundestag shall be elected indirectly.

(2) The Bundestag shall, by proportional representation, elect a 12-man electoral committee for the Federal Constitutional Court judges. Each parliamentary group may propose candidates for the committee. The number of candidates elected on each list shall be calculated from the total number of votes cast for each list in accordance with the d'Hondt method. The members shall be elected in the sequence in which their names appear on the list. If a member of the electoral committee retires or is unable to perform his functions, he shall be replaced by the next member on the same list.

(3) The eldest member of the electoral committee shall immediately with one week´s notice call a meeting of the committee to elect the judges and shall chair the meeting, which shall continue until all of them have been elected.

tain this qualified majority the political parties represented in the federal parliament in practice nominate their candidates in turn so that a balance of different political ideologies is represented on the bench.[424] The *Bundesrat* elects the judges directly. But election by the *Bundestag* is made by a parliamentary electoral committee of 12 members who are elected by parliament.[425] Party representation in the committee corresponds to their representation in the whole of the *Bundestag*.[426] Political parties tend to nominate candidates close to their views. Although their influence on the composition of the court is controversial the mode of selection has not been declared invalid by the Federal Constitutional Court.[427] Recent criticism of the election process's lack of

(4) The members of the electoral committee are obliged to maintain secrecy about the personal circumstances of candidates which become known to them as a result of their activities in the committee as well as about discussions hereon in the committee and the voting.

(5) To be elected, a judge shall require at least eight votes.

Article 7

The judges to be elected by the Bundesrat shall be elected with two thirds of the votes of the Bundesrat.

424 A. Voßkuhle, Art. 94, in: H. v. Mangoldt/F. Klein/C. Starck (eds.), Das Bonner Grundgesetz, Kommentar, at para. 8 (6th ed. 2010).

425 Section 6 Code of Constitutional Court Procedure. For the question whether this procedure is compatible with Article 94 (1) and for reform proposals see e.g. S. Koch, Die Wahl der Richter des BVerfG, ZRP 41 (1996).

426 For more details see C. Landfried, The Selection Process of Constitutional Court Judges in Germany, in: K. Malleson/P. H. Russell (eds.), Appointing Judges in an Age of Judicial Power 196 (2006).

427 BVerfGE 40, 356; BVerfGE 65, 153, at 154 *et seq*. On this issue see e.g. W. K. Geck, Wahl und Amtsrecht der Bundesverfassungsrichter, at 31 (1986); K. Kröger, Richterwahl, in: C. Starck (ed.), Festgabe Bundesverfassungsgericht, Vol. 1, 76 (1976); W. Billing, Das Problem der Richterwahl zum Bundesverfassungsgericht (1969); J. A. Frowein/H. Meyer/P. Schneider, Bundesverfassungsgericht im dritten Jahrzehnt (1973); J. Isensee, Bundesverfassungsgericht: Quo vadis, JZ 1085, at 1092 (1996); W. Geiger, Über den Umgang mit dem Recht bei der Besetzung des Bundesverfassungsgerichts, EuGRZ 397 (1983); W. Geiger, Das Bundesverfassungsgericht im Spannungsfeld zwischen Recht und Politik, EuGRZ 401, at 402 (1985). For the recent discussion see e.g. J. Limbach, Zur Wahl der Richter und Richterinnen des Bundesverfassungsgerichts, in: M. Herdegen *et al.* (eds.), Staatsrecht und Politik, Festschrift für Roman Herzog, 273 (2009); H.-P. Schneider/R. Gerhardt, Niemand darf wegen seiner wissenschaftlichen Äußerungen von hohen Ämtern ferngehalten werden, 41 Zeitschrift für Rechtspolitik 220, at 230 (2008); D. Grimm, Wahlverfahren für

transparency has led to a change in procedure, so that the first hearing of candidates was held in 2010. Efforts to change the selection process more profoundly and to give each party represented in parliament a formal right to nominate a judge have not so far found the necessary majority.[428]

F. Conclusion

Generally speaking the German judiciary is perceived to be free from undue influence on its decision-making; popular trust in its independence is high.[429] Serious encroachments on judicial independence and direct interference are isolated events. Nonetheless the role of the judiciary in modern society raises ever new challenges which require continuous efforts and readjustment.[430] One of the major challenges currently is the task of ensuring efficiency without compromising independence. With high litigation rates judges' working conditions have deteriorated over recent decades. The increasing number of cases in which German judicial proceedings have been found to be over-long in violation of the European Convention on Human Rights has led to a discussion on how to speed up trials in accordance with the right to fair proceedings in an independent court.[431] This has resulted in growing

---

Verfassungsrichter, DIE ZEIT, 24 April 2008, at 15. See also Voßkuhle (note 424), Article 94, at paras. 14-15;

[428] For a draft reform see Antrag der Fraktion Bündnis 90/Die Grünen, Bundestagsdrucksache 16/9927; Gesetzentwurf der Fraktion Bündnis 90/Die Grünen, Bundestagsdrucksache 16/9928.

[429] Eurobarometer (note 40), at 40; O. Listhaug/M. Wiberg, Confidence in Politics and Private Institutions in: H.-D. Listhaug/D. Fuchs (eds.), Citizens and the State (1996).

[430] One of these challenges is posed by modern media. Another aspect is the need to recognize that adjudication is made in the interest of society. This requires efforts to improve recipient satisfaction.

[431] Cf. *inter alia* ECtHR, *Sürmeli v. Germany*, Judgment of 8 June 2006, RJD 2006-VII; ECtHR, *Herbst v. Germany*, Judgment of 11 January 2007; ECtHR, *Adam v. Germany*, Judgment of 4 December 2008; ECtHR, *Bayer v. Germany*, Judgment of 16 July 2009; ECtHR, *Rumpf v. Germany*, Pilot Judgment of 2 September 2010, all available at <http://hudoc.echr.coe.int/hudoc/>. For the discussion see K. Redeker, Justizgewährungspflicht des Staates versus richterliche Unabhängigkeit?, NJW 2796 (2000).

pressure on the judiciary. While there is a valid demand that judges may not neglect their duties, new steering models of public management are highly controversial. To claim that the increase in workload should be dealt with exclusively by greater efficiency without any increases in the judicial budget is ill-founded if such measures produce results detrimental to the rule of law.

The discussion about the right means of dealing with the workload have led to a more general debate on whether more fundamental structural changes are necessary and whether the model of ministerial administration should be retained. Regardless of its outcome this issue should not lead an outside observer to presume that under the current model the judiciary is subordinate and that adjudication is dependent on executive control. The traditional strong oversight by the executive has been softened substantially. This is particularly relevant for judicial accountability in which the service courts play a decisive role. Though the justice ministries are responsible for supervision the final say on discipline lies with the judiciary. In other areas, such as in the field of judicial remuneration, a standardized scheme protects against outside influence. Matters which have a potential effect on substantive decision-making, such as case assignment, are left to the judiciary or involve the participation of judges. With respect to judges' careers judicial bodies, presiding judges and court presidents play an important role in the assessment of professional qualifications.[432] A central element of judicial independence is the security of life-time tenure.

To measure the actual degree of independence it is also necessary to consider the soft handling of legislative and executive oversight functions. Not only have old structures been adjusted in the interest of judicial independence, giving the judiciary a considerable role in various fields of administration, but even where provisions for sanctions remain in force, they are applied usually only in exceptional cases of grave judicial misconduct. The operation of institutional and structural safeguards is considerably influenced by great esteem for judicial independence not only by the judiciary but by all relevant sectors and the population at large. The basic value of this principle is undisputed and deeply rooted in the legal culture of all stakeholders which has helped to build a self-confident non-subservient judiciary.[433] Structures which may seem

---

[432] Professional evaluations are done by judges, *Präsidialrat* gives consultative advice and the selection by the ministry is subject to judicial review.

[433] For the importance of a judicial ethos see Papier (note 42), at 1091. For the German legal culture more generally see R. Zimmermann, An Introduction

problematic from an outside perspective in practice are less so in the day-to-day business of the courts due to the high value of independence which is entrenched in Germany's legal culture.[434] The commitment to the rule of law by all relevant actors operates as an effective safeguard of judicial independence. While this is an asset we should also recognize it as a particularity of the German legal system which makes it difficult to advocate the structural settings as a role model for other countries, and even less so for new democracies. The German model works because of a professional ethos which has evolved over time and without which the structures would be prone to abuse.

That there is little room for abuse is also the merit of judicial review. The evolving assertiveness of the judiciary has led to an elaborate jurisprudence which specifies the parameters and scope of judicial independence. Administrative decisions affecting judges are subject to judicial review and the courts now exhibit a tendency to scrutinize more closely even decisions on promotion in an endeavour to ensure that they are exclusively based on merit. As a result of this far-reaching protection of judicial independence judges actually enjoy great freedom in their work plans, even to the point where it has been asked whether privileges such as the free choice of working hours and place of work overstretch the principle of independence.[435]

It is because of the complex interplay of all those factors that the conventional picture of the German judiciary in foreign legal writing as a judicial bureaucracy has not adequately grasped significant developments over the past few decades. Though Germany retains traditional institutional structures the judiciary has managed to rise above the legacy of a subservient bureaucratic judiciary. Despite ministerial administration the judiciary has a status of its own which is distinct from that of the civil service.[436] The judiciary has managed to measure up to its role as a central safeguard of constitutional democracy. Judicial independence nowadays plays an important role in the rule of law in German democracy. Though historical structures have been retained with

---

to German Legal Culture, in: W. F. Ebke/M.W. Finkin (eds.), An Introduction to German Law, 14 (1996).

[434] Kommers (note 10), at 133.

[435] BGHZ 113, 36, at 40 *et seq*. For the critique see Barbey, (note 35), at 828; Schmidt-Jortzig, (note 399).

[436] This is evidenced, for example, by the remuneration scheme which is exclusively for judges.

the bureaucratic model of judicial administration they have undergone significant changes in the interest of judicial independence. Where oversight persists it has been maintained not in the interest of authoritarian control but in that of democratic accountability. With the experience of the Nazi judiciary and the resulting mistrust of the judiciary the founders of the Federal Republic provided for judicial accountability (i.e. impeachment), and self-administration was not even seriously considered.[437] Instead of judicial autonomy, which is foreign to German legal doctrine, a sophisticated model of checks and balances grew up. It emphasizes the instrumental role of judicial independence for the rule of law, and therefore also requires consideration of judicial accountability in case of misconduct. This leads to a delicate balance of independence and accountability.[438] The dichotomy is most evident in judicial selection and judicial administration, two central aspects of the current debate.

Whether the current model is to be retained or whether there is a need to reform judicial administration is controversial. Some commentators prefer to retain the role of the political branches. They even fear that the judiciary has become too independent and call for a reassessment and concentration on the constitutional guarantees.[439] On the other hand judges' associations call for more structural independence and prefer a model of self-administration. They criticize the effect of party politics on judicial selection and want to remove this process from the influence of the justice ministries. In effect the influence of the ministries on judicial selection remains high (even though judges are heard in this process). But complete judicial autonomy and co-optation do not seem to be feasible alternatives. With the recognition that adjudication is not a mechanical process but is influenced in part by the values of the decision-maker it would be inadequate to make the judiciary completely autonomous. Considering the judiciary's significant role in Germany's democracy it will always be the subject of political interest, and even if the selection process is isolated from the political process political considerations are likely to play a role.[440] Instead of denying the relevance of personal values and political convictions it is necessary to identify

---

[437] In an early stage of the Nazi era, in October 1933, 10,000 lawyers took an oath in front of the Leipzig *Reichsgericht* to follow Hitler until the end of their lives and thereby voluntarily subjected their functions to the new leadership.

[438] Kommers (note 10), at 150-151.

[439] Barbey, (note 35), at 828; Schmidt-Jortzig, (note 399), at 2377 *et seq.*

[440] G. Gee, The Persistent Politics of Judicial Selection, in this volume.

them in an effort to represent plurality. It is also important to realize that democracy cannot be reduced to political partisanship but embraces a plurality of values. If there is no trust that this is adequately ensured by the ministers in the selection process there is a need to consider alternative procedures. A feasible option would be to promote a pluralist composition of the bench representing mainstreams of society without, however, neglecting the need for adequate professional qualification.

Finally, another important aspect to be considered if the judiciary is to be made more structurally independent is ensuring that judges continue to perform their duties diligently. Those who demand self-administration should not just consider how the judiciary can be made more independent. In order to ensure that adjudication is made on the basis of the law independence also requires accountability. The future success of any reform will depend among other factors on the willingness of the judiciary to take and effectuate responsibility. Taking seriously the complaint that persistent structures of subordination to judicial superiors (presiding judges and court presidents) compromise internal independence, the answer cannot be an increase in hierarchical oversight. Instead accountability towards society should be strengthened by way of the improved transparency of all administrative court operations including judicial selection. The broader legal profession can play a role in this undertaking as well as the judiciary itself.[441] There will be a need for a more active role to be taken by all judges to ensure judicial quality by means of peer accountability. Eventually this is an area where we can learn from the experience of other countries which, in the face of similar challenges, have started to develop methods of professional accountability.[442]

---

[441] E.g. by a code of conduct.

[442] See G. Di Federico, Judicial Accountability and Conduct: An Overview, in this volume, Chapter B.; R. Wheeler (note 39), Chapter B. VII.; P. H. Solomon, The Accountability of Judges in Post Communist States: From Bureaucratic to Professional Accountability, in this volume, Chapter C.

Judicial Independence in the United States of America

Russell Wheeler

A. Introduction

The United States sees judicial independence differently than many countries. The Council of Europe, for example, says judges should be selected by the judiciary or, if selected by "the government," with guarantees "to ensure that [appointment] procedures […] will not be influenced by any reasons other than […] the objective criteria" of "qualifications, integrity, ability and efficiency".[1] Rhetoric since the United States' founding has also emphasized independence. The Federalist argued that the "complete independence of the courts of justice is peculiarly essential in a limited Constitution",[2] but that view rests alongside a vigorous embrace of judicial accountability to the people and their representatives – accountability for the courts' administration and, to a degree, for their decisions. Balancing independence and accountability has played out in the courts of the states and those of the national government, whose respective judiciaries are summarized in the table.

[1] Council of Europe, Recommendation No. R (94) 12, On the Independence, Efficiency and Role of Judges (Adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies).

[2] The Federalist No. 78 at 464 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233, DOI 10.1007/978-3-642-28299-7_13,

	Federal Judgeships[3]	State Judges (approx.)[4] (50 states, Dist. of Columbia, Puerto Rico)
Appellate	188	1,687
1st Instance (Gen. Juris.)	672	10,000
1st Instance (Lim. Juris.)	880	20,000

State courts have jurisdiction over all cases except those that Congress has assigned to the federal courts – in general, cases in which the United States is a party and cases under federal law[5] – and the bulk of judicial

[3] 28 U.S. Code chapters 1, 3, 5, and 6 and Administrative Office of the U.S. Courts, The Judiciary Fiscal 2010 Congressional Budget Justification at 5.8 (2009). The judicial branch also includes some smaller specialized courts, which are beyond the scope of this chapter. And some executive branch agencies called courts dispose of matters that in many countries are the province of the judicial branch, for example military courts and immigration courts. These judges serve for limited terms. All are important but for space reasons are largely beyond the scope of this chapter.

[4] Conference of State Court Administrators, National Center for State Courts, State Court Organization (published by the Bureau of Justice Statistics of the U.S. Department of Justice), 2005, reports 1,335 intermediate appellate court state judges at 7. I count 352 state supreme court justices, based on an examination of each Supreme Court website, available though the National Center for State Court's "Court Web Site" page, available at <http://www.ncsconline.org/D_KIS/info_court_web_sites.html>. For first instance judges, see Conference of State Court Administrators, Bureau of Justice Statistics, National Center for State Courts, Examining the Work of State Courts 2007 at 13, available at <http://www.ncsconline.org/D_Research/csp/2007_files/Examining%20Final%20-%202007%20-%204%20-%20Overview.pdf>.

[5] Federal and state courts share jurisdiction over civil cases between parties from different states that involve state law. Some criminal acts – selling narcotics and robbing banks, for example – are crimes under federal and state law; state and federal prosecutors decide who will prosecute such cases. Parties may seek U.S. Supreme Court review of any case decided by a federal court of appeal, or by the highest court of a state if it involves federal law. Congress has given the U.S. Supreme Court almost exclusive jurisdiction over its caseload. In recent years, parties have asked the court to hear about 8,000 appeals a year, but the court has agreed to decide on the merits only about 60-70 cases a year, letting the lower court decision stand in all other cases. See Administrative Office of the U.S. Courts, 2008 Annual Report of the Director: Judicial Business of the

work in the United States occurs in state courts.[6] Federal courts' comparatively small number and limited jurisdiction, however, belie their importance. Although the federal and state constitutions have similar protections for speech, press and other civil liberties, plaintiffs often regard federal judges with their good behaviour tenure as better able to protect unpopular political minorities. And Congress has left largely to federal court litigation the implementation of regulatory frameworks that other countries delegate to executive bureaucracies.[7]

B. Structural Safeguards

I. Administration of the Judiciary

1. Organs in Charge of the Administration of the Judiciary

State and federal executive agencies administered the courts until the mid-twentieth century, but in 1939 Congress, at the urging of federal judges and the attorney general himself, reassigned the federal judicial administrative authority of the Justice Department to the federal judicial branch, vesting it in a newly created Administrative Office of the United States Courts, whose director would be appointed by the Supreme Court and that would operate "under the supervision and direc-

---

United States Courts, table A1 at 82 (2009), available at <http://www.uscourts.gov/judbus2008/JudicialBusinespdfversion.pdf>.

[6] In 2006, the state appellate courts received almost 300,000 filings, and the first instance courts received over 100 million cases, including 55.6 million traffic and ordinance violation cases, 22 million criminal cases, 17 million civil cases, almost 6 million domestic relations cases, and about 2 million juvenile cases. Conference of State Court Administrators, Bureau of Justice Statistics, National Center for State Courts, Examining the Work of State Courts, 2007 at 13, available at <http://www.ncsconline.org/D_Research/csp/2007_files/Examining%20Final%20-%202007%20-%202%20-%20Intro.pdf>. By comparison, in 2008, the United States courts of appeals received slightly over 60,000 cases, the district courts (district judges and magistrate judges) received over 267,000 civil cases and 70,000 criminal cases, bankruptcy judges slightly over 1,000,000 cases. Administrative Office of the U.S. Courts (note 5), at 13.

[7] See generally, R. Kagan, Adversarial Legalism: The American Way of Law (2001).

tion" of the Conference of Senior Circuit Judges.[8] That 27-judge body[9] is now called the Judicial Conference of the United States,[10] and the Chief Justice appoints the Administrative Office director after consultation with the Conference.[11] State legislatures followed suit over the next 40 years, so that most courts in most states are subject to some central, judicial administrative entity, either the state chief justice (36 states), supreme court (15 states), or, in one state, a judicial council.[12] In 17 states the executive branch can amend the judicial branch budget request before submitting it to the legislature.[13] The Judicial Conference submits its annual budget request to the President but that is only to ensure that all budget requests for the entire government go to Congress as a single package. The law directs the President to include the judicial branch budget request in the overall budget request "without change".[14] Federal courts have thus had to develop expertise in legislative relations. Successive U.S. Chief Justices, for example, have appointed to the Judicial Conference Budget Committee judges with personal or political ties to key legislators. Like members of the Conference and its other committees, Budget Committee members perform committee work in addition to their judicial duties. One might think that a judge tasked with asking Congress for money would find it hard to be an independent decision maker in a case challenging a Congressional statute, but that has not been a problem because of the understanding that the judiciary, as Chief Justice Earl Warren put it, "can't trade anything with" Congress – such as a favourable judicial decision in return for a generous grant of funds.

---

8 An Act to Provide for the Administration of the United States Courts, and for Other Purposes, 53 Stat. 1223 (7 August 1939). See generally, P. Fish, The Politics of Federal Judicial Administration, esp. chapter 4 (1973).

9 For a more detailed description of this body see *infra* B. I. 2. b) aa) National Judicial Council.

10 28 U.S. Code section 331.

11 28 U.S. Code section 601.

12 Conference of State Court Administrators (note 4), table 12.

13 Id., at table 16.

14 31 U.S. Code section 1105 (b).

2. Judicial Council

Judicial councils have little presence in the United States, certainly as analogues to other countries' councils that administer the courts and select and discipline judges.[15]

a) State Courts

Advisory judicial councils exist in a handful of states, but only Utah's council describes itself as "the policy-making body for the judiciary", with "authority to adopt uniform rules for the administration of all the courts in the state [, and set] standards for judicial performance, court facilities, support services, and judicial and non-judicial staff levels",[16] functions performed in other states by the chief justice or the supreme court. The Utah chief justice chairs the council, which also includes twelve other judges representing the various levels of Utah state courts, a representative of the state bar, and the state court administrator.[17]

b) Federal Courts

aa) National Judicial Council

The Judicial Conference of the United States is a judicial council, although comprising solely judges:[18] the Chief Justice as presiding officer, the chief judges of the thirteen courts of appeal and of the Court of International Trade, who attain their positions based on age and seniority on the court[19], and 12 district judges elected by the judges of each regional judicial circuit. Congress has assigned some tasks directly to the

---

[15] Judicial councils emerged in the United States in the 1920s as advisory bodies of lawyers, professors, and judges mainly to suggest law revisions. Hopes that they would become forceful agencies of judicial administration waned as legislatures vested authority in supreme courts. R. Wheeler/D. Jackson, Judicial Councils and Policy Planning: Continuous Study and Discontinuous Institutions, 2 Justice System Journal 121 (1976).

[16] Utah State Courts website, "Court Governance", available at <http://www.utcourts.gov/knowcts/>.

[17] Id.

[18] 28 U.S. Code section 331.

[19] Id., sections 45 (a)(1) and 258.

Conference – developing rules of procedure, for example[20] or making legislative recommendations.[21] Most of the Conference's authority, though, comes from the many responsibilities Congress has assigned to the Administrative Office of the U.S. Courts to perform under the Conference's "supervision and direction".[22] Examples include preparing annual budget requests and administering the funds appropriated,[23] and establishing personnel rules[24] and statistical reporting requirements.[25] The Conference does not select judges and has only limited disciplinary responsibilities.[26] There is no evidence that the Conference has tried to dictate judicial decisions, but the administrative system, which developed in fits and starts rather than by overall design, reflects some tensions between judicial administration and independence. For example, the Conference's power to supervise the Administrative Office's financial duties lets it determine how many secretaries and clerks judges may hire, but the Conference has no generic authority to issue administrative orders to judges and has resisted proposals that Congress grant it such authority. Conference members are no doubt leery of empowering colleagues to order judges around[27] – telling them when they can take vacations, for example.

Another example is the administrative authority of the Chief Justice, which has expanded well beyond the only duty assigned that office by the Constitution, i.e., presiding over Senate trials of impeached Presidents.[28] For one example, the Chief Justice appoints the 25 Conference committees. Committee recommendations have policy significance, especially in such areas as procedural rules, jury administration, and indi-

---

20 Id., chapter 131.

21 Id., section 331.

22 Id., section 604(a).

23 Id., sections 605 and 604(a)(8).

24 Id., section 604(a)(5).

25 Id., section 604(a)(13).

26 Id., section 355.

27 R. Wheeler, A New Judge's Introduction to Federal Judicial Administration, at 8-9 (2003), available at <http://www.fjc.gov/public/pdf.nsf/lookup/newjudge.pdf/$file/newjudge.pdf>.

28 U.S. Constitution, Article III, section 1. On the evolution of the office, see generally, P. Fish, The Office of Chief Justice of the United States: Into the Federal Judiciary's Bicentennial Decade, The Office of Chief Justice, at 1 (University of Virginia, 1984).

gent defence. The Chief Justice has also become the chief spokesperson for the federal judiciary, for the last two decades using annual Year-end Reports on the Federal Judiciary to press judicial branch needs such as higher judicial salaries.[29] In 2003, Chief Justice Rehnquist rebuked Congress for legislation that he thought intruded too deeply into federal judges' criminal sentencing authority;[30] some judges may have preferred a sterner rebuke.

These roles – important but undefined by the Constitution, statute, or judicial branch regulations – have led a few law school commentators to argue that the Constitution did not give federal judges life tenure in order to endow a single individual with extensive administrative authority subject to no check or term limits.[31] Alternatives, however, are also problematic. Appointing committees does not appear to be a task that the entire Supreme Court would want. Rotating the office among the members of the Court would probably be constitutional – the Constitution contains no specific requirement that the President appoint the Chief Justice separately from other Justices – but the current practice allows Presidents to consider administrative ability as one criterion in filling a vacancy in the office. And although some roles that the Chief Justice now performs could be assigned to a member of the Judicial Conference, one wonders if a lower court judge would have the same clout in the defending the judiciary as does the person who is, in fact, John Marshall's successor.

---

[29] Rehnquist, 2001 Year-End Report on the Federal Judiciary, at 3 (2002), available at <http://www.uscourts.gov/ttb/jan02ttb/jan02.html> and Roberts, 2006 Year-End Report on the Federal Judiciary, (2007), available at <http://www.uscourts.gov/ttb/2007-01/2006/index.html>.

[30] Rehnquist, 2003 Year-End Report on the Federal Judiciary, Part II, Relations between Congress and the Judiciary, available at <http://www.uscourts.gov/ttb/jan04ttb/>.

[31] See, e.g., J. Resnik/L. Dilg, Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States, 154 University of Pennsylvania Law Review 1575 (2006); J. Stempel, Politics and Sociology in Federal Civil Rulemaking: Errors of Scope, 52 Alabama Law Review 529 (2001); R. Wheeler, Chief Justice Rehnquist as Third Branch Leader, 89 Judicature Number 3, at 116 (2005).

bb) Regional Federal Councils

Each of the 12 regional federal circuits also has a judicial council – half district, half circuit judges selected by the judges of the circuit, with the chief circuit judge as presiding officer.[32] Congress has empowered the councils to make "all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit". Councils use their order making authority sparingly and "tend to work informally whenever possible and to tread lightly on all issues that might interfere with the legitimate independence of the judges."[33] Their main functions, and areas where order making authority might be invoked, are to consider complaints of judicial misbehaviour[34] and review individual district court plans in such areas as jury selection and providing attorneys for indigent criminal defendants.[35]

II. Selection, Appointment and Reappointment of Judges

1. Eligibility

European-style judicial careers are unknown in the United States. There are no formal requirements for U.S. federal judges appointed to life tenure judgeships and very minor practice requirements for other federal judicial offices. As explained below, however, there are powerful informal requirements. Formal eligibility requirements for state judges are only slightly stricter that those for federal judges, generally involving minimum years of residency (and occasionally practice) in the jurisdiction, maximum (and some minimum) age limits, and formal requirements for a law degree.[36]

2. The Process of Judicial Selection

Judges world-wide are puzzled by United States judicial selection processes, which they see – with some justification – as threats to inde-

---

32 28 U.S. Code section 332 (a).

33 Wheeler (note 27), at 13-14.

34 See *infra* B. VII. 2. b) Proceedings.

35 Wheeler (note 27).

36 Conference of State Court Administrators (note 4), at tables 5 and 7.

pendent judicial decision-making. But, as noted earlier, the United States has blended, more than many other countries, judicial independence and judicial accountability. Furthermore, partisan clashes that have influenced judicial selection, especially at the Supreme Court and intermediate appellate court level, result, at least in part, from courts' ventures into areas of the law once thought reserved for legislatures. Federal courts have issued decisions on abortion and the proper role of religion in public life. Some state supreme courts have overruled state laws banning same-sex marriage or rendered large awards in product liability cases. These decisions, regardless of one's view of their merits, have had the inevitable effect of making the selection processes more contentious.

a) State Judicial Selection

Eighty nine percent of state judges in the United States obtain or retain their judgeships by the formal methods of partisan or non-partisan popular elections.[37] The judicial independence horror story suggested by this fact is not as dire as it might appear. For one thing, 21 states provide that most of the judges enter office by appointment and keep it through referendum elections. And about 45% of judges serving in elective judiciaries nevertheless come initially to their office, not by election, but by gubernatorial appointment to fill vacancies created by early resignation or death.[38] Those judges can thus stand for election as incumbents. Furthermore, the vast majority of judicial elections are low-visibility and uncontested and turn few judges out of office, blunting fears that elected judges must routinely sacrifice independent decision-making in order to please voters.

Still, even judges who are not in electoral trouble must raise some campaign money, for which they turn principally to the lawyers and parties who practice before them. These problems are most intense at the state appellate court level. From 1999 to 2004 candidates and supporters spent 159.6 million USD (approx. 125 million EUR) for state supreme

---

[37] R. Schotland, New Challenges to States' Judicial Selection, 95 Georgetown Law Journal, at 1077 (2007).

[38] M. Reddick/R. Paine Caufield/M. Nelson, Examining Diversity on State Courts (unpublished paper prepared for April 2009 meeting of the Midwest Political Science Association, Chicago, Illinois, under revision for publication in Judicature).

court elections in which 139 seats were at issue.[39] One manifestation of the heavy spending on judicial elections are television and internet advertisements,[40] which can be viewed online[41] to provide those unfamiliar with the United States courts a revealing indictment of the excesses of state judicial selection. State laws and codes of judicial conduct limit the amount of contributions and contributors to judicial candidates, and bar judges themselves (rather than campaign committees) from fund raising.[42] These rules, though, do not prevent the disturbing picture of contributions that appear to be efforts to influence judicial decisions. A member of the Ohio Supreme Court, which has seen very expensive judicial elections, remarked "I never felt so much like a hooker [prostitute] down by the bus station in any race I've ever been in as I did in a judicial election. Everyone interested in contributing has very specific interests. They mean to be buying a vote. Whether they succeed or not, it's hard to say."[43]

In June 2009, the U.S. Supreme Court held, 5 to 4, in *Caperton* v. *A.T. Massey Coal Co.*[44] that a state Supreme Court justice violated the due process rights of an appellant by participating in the case after the appellee spent several million dollars to defeat that justice's opponent. Most judicial elections don't see spending at these levels, but the four U.S. Supreme Court dissenters worried that the holding would encourage litigation over relatively minor contributions. At the least, states are wrestling again with establishing recusal standards to guide judges who receive campaign contributions and those for whom independent actors

---

[39] Schotland (note 37), at 1080.

[40] Justice at Stake Campaign, The New Politics of Judicial Elections in the Great Lakes States, 2000-2008, at 4 (2008), available at <http://www.justiceatstake.org>.

[41] The Justice at Stake Campaign, a court advocacy group, has posted television ads at <http://www.youtube.com/watch?v=4Du_WEHjMMw&feature=channel_page>. Internet ads can be viewed on the website of the National Center for State Courts <http://www.ncsconline.org/>.

[42] Schotland (note 37), at 1081.

[43] A. Liptak/J. Robert, Campaign Cash Mirrors a High Court's Rulings, New York Times, 1 October 2006, available at <http://www.nytimes.com/2006/10/01/us/01judges.html?_r=1>.

[44] *Caperton et al.* v. *A. T. Massey Coal Co., Inc., et al.*, No. 08-22, 8 June 2009, available at <http://www.supremecourtus.gov/opinions/08pdf/08-22.pdf>.

spend money to support candidates.[45] Those worries could be avoided if states were to stop electing judges, but that is not likely to happen in the foreseeable future.

In fact, a 2002 U.S. Supreme Court decision, *Minnesota Republican Party* v. *White*,[46] has fuelled more contentious elections. The court said, 5 to 4, that prohibiting judicial candidates from stating their positions on legal and political issues violated their free speech rights under the U.S. Constitution. Interest groups have used the decision to pressure judicial candidates to answer questionnaires about such matters as abortion and have sued state judicial discipline bodies for telling candidates that if they answer such questionnaires they must recuse themselves if matters about which they opined as candidates arise in judicial proceedings.[47] A good alternative are judicial performance evaluations, administered in about 20 states, that seek to hold judges accountable for their procedural and process performance rather than their jurisprudential performance. Questionnaires and evaluation commissions assess such things as judges' courtesy to litigants, and clarity and promptness of rulings.[48]

An alternative to judicial elections is appointment by the governor, used for most judges in 21 states.[49] There is an increasing tendency to require the governor to select judges from lists presented by commissions of judges, lawyers, and laypersons. The idea was conceived early in the last century,[50] but not used anywhere until 1942, when Missouri adopted it for some courts (it's sometimes called the *Missouri Plan* or, by proponents, *merit selection*). States created, by constitutional amendment,

---

45 J. Gibeaut, Caperton Capers, Court Recusal Ruling Sparks States to Mull Judicial Contribution Laws, 95 American Bar Association Journal (August 2009), available at <http://www.abajournal.com/magazine/caperton_capers.>.

46 536 U.S. 765 (2002).

47 T. Carter, The Big Bopper: This Terre Haute Lawyer is Exploding the Canons of Judicial Campaign Ethics, 92 A.B.A. Journal, at 30 (January 2006).

48 Institute for the Advancement of the American Legal System, A Blueprint for Judicial Performance Evaluations (2006), available at <http://www.du.edu/legalinstitute/pubs/TransparentCourthouse.pdf>.

49 See, e.g., American Judicature Society, Judicial Selection in the States, Appellate and General Jurisdiction Courts, Summary of Initial Selection Methods, available at <http://www.ajs.org/selection/docs/Judicial%20Selection%20Charts.pdf>.

50 See, e.g., R. Watson/R. Downing, The Politics of the Bench and the Bar, Judicial Selection under the Missouri Nonpartisan Court Plan, at 8-9 (1969).

statute, or sometimes an executive order of the governor, commissions that often include the chief justice serving *ex officio* and lawyers, usually selected by state or local bar associations, and non-lawyers, usually appointed by the governor or the legislature.[51] When a vacancy occurs, the commission presents the governor a slate of proposed nominees. In some states, the governor must select from the list; in others, the governor may reject the list or select individuals not on the list.[52] In most of the states, the list of nominees is released to the public.[53] Almost all these judges, once appointed, must stand periodically for election – either a referendum ("Should Judge X be retained in office?") or a regular election where other candidates may appear.

The commission system is preferable to judicial elections because it promotes judicial quality and transparency by putting judicial selection in the hands of judges, lawyers, and laypersons who are concerned with selecting judges based on merit and by taking the selection process from the control of political parties that select candidates for judicial elections. Referendum elections encourage judicial independence (by lessening the possibility, even if slight, that judges' decisions will be at issue in a free-for-all contested election) while still providing the public some voice in who serves on the bench.

In the last few years, conservative legal groups have attacked the commission system for giving what they say is an oversized role to lawyers generally and plaintiffs lawyers in particular.[54] Furthermore, they claim, based on scattered evidence, that most commission members are Democrats, making it harder for Republicans to get nominated.[55] As part

---

[51] American Judicature Society, Merit Judicial Selection: Current Status, Table 1 (2009), available at <http://www.ajs.org/selection/docs/Judicial%20Merit%20Charts%205-09.pdf>.

[52] Id., Table 2.

[53] Id., Table 3.

[54] See generally, Schotland (note 37).

[55] Three recent publications of the Federalist Society, a conservative legal group, making these arguments are W. Eckhardt/J. Hilton, The Consequences of Judicial Selection: A Review of the Supreme Court of Missouri, 1992-2007 (2007), available at <http://www.fed-soc.org/doclib/20070801_FedSocMissouriWhitePaper.pdf>; S. Elsbeernd, Kansas Supreme Court Nominating Commission Lawyers (2009), available at <http://www.fed-soc.org/doclib/20090211_KSWPFeb2009.pdf>, and B. Fitzpatrick, A Report on the Political Balance of the Tennessee Plan (2009), available at <http://www.fed-soc.org/doclib/20090413_TNWPApril2009.pdf>.

of the attack on the commission plan, the lawyer who won the *White* case[56] has sued the Alaska judicial nominating commission, arguing that it deprives Alaskans of what he says is their federal constitutional right to elect judges.[57] He told a reporter, echoing other charges that the lawyers who comprise most commissions "don't have a special right to vote […] They have the same right that all citizens do, and that is to participate in our elections on an equal basis."[58]

b) Federal Judge Selection

The national insistence on elections to select or retain state judges has not carried over to the federal courts. The formal process for filling federal Supreme Court, appellate court, and district judge vacancies is simple: The President submits nominees to the Senate for confirmation by majority vote.[59] There are, however, extensive informal requirements. For example, no statute requires federal judges to be lawyers, but no President would nominate a non-lawyer. In selecting district judge nominees, Presidents generally defer to recommendations of U.S. senators or other leaders of the President's party in the state of the vacancy. For nominations to the intermediate courts of appeals, Presidents show less deference to such recommendations and give more consideration to ideology, because of the greater law-making role of appellate courts. Supreme Court nominations are pretty much the President's exclusive prerogative, with even greater attention to ideology.

Throughout history, roughly 90% of any President's judicial appointments have been at least nominal members of the President's political party.[60] Furthermore, judges' decisions in ideologically charged cases

---

56 For example, Carter (note 47).

57 The complaint is available at <http://pdfserver.amlaw.com/nlj/Alaska%20compliant.pdf>.

58 A. Bronstad, Alaska judicial nomination commission draws constitutional challenge, National Law Journal, 6 July 2009.

59 United States Constitution, Article II, Section 2. The president "shall nominate, and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law."

60 For the party identification of appointees since Franklin Roosevelt see S. Goldman, Picking Federal Judges, Lower Court Selection from Roosevelt through Reagan, at 58-59, 104-105, 147-149, 189-191, 227-229 (1999) and S.

vary, albeit slightly, based on the party of the President who appointed them.[61] One study found that appellate judges appointed by Democratic Presidents make *liberal decisions* (e.g., for a free speech claim) about 52% of the time, and Republican appointees about 40% of the time, although there are no differences in some areas such as criminal procedure cases.[62]

Still, the selection process is not a serious threat to judicial independence. First, federal judges serve for life, and unlike in some countries, there is no cultural presumption that a judge should decide cases as his appointer would wish. Sharing a jurisprudential outlook with an appointer is different from the appointer's dictating a decision; news that a politician had privately called on a judge to render a particular decision would be a front-page scandal. Second, although there are few formal eligibility requirements, would-be judges go through at least three screenings in addition to Presidents' desire to appoint credible candidates – all of which reduce the chances that unqualified hacks will become federal judges. The Federal Bureau of Investigation looks into prospective nominees' backgrounds, a committee of the American Bar Association assesses their professional qualifications, and the Senate Judiciary Committee undertakes its own investigation. In addition, senators in at least 20 states have appointed screening commissions, most of them bipartisan and including lawyers and non-lawyers, to investigate lawyers who express interest in having the senator forward their names to the White House as possible nominees.[63] These several levels of reviews and investigations all consider, among other things, the subjects' character qualifications.

Goldman/S. Schiavoni/E. Slotnik, Mission Accomplished, 92 Judicature Number 6, at 279, 284 (2009).

[61] C. Sunstein/D. Schkade/L. Ellman/A. Sawicki, Are Judges Political - An Empirical Analysis of the Federal Judiciary (2006); R. Carp/K. Manning/R. Stidham, The Voting Behavior of George W. Bush's Judges: How Sharp a Turn to the Right?, in: S. Kernell (ed), Principles and Practices of American Politics (2006), and C. Sunstein/D. Schkade/L. Ellman/A. Sawicki, The Decision-Making Behavior of George W. Bush's Judicial Appointees, 88 Judicature 20, 27 (2004).

[62] Sunstein et al (note 61), especially at 20-21.

[63] Senators (and a few House of Representative members) who use such commissions are listed on the American Judicature Society's website, available at <http://www.judicialselection.us/federal_judicial_selection/federal_judicial_nominating_commissions.cfm?state=FD>.

Indeed, some extol the appointment process for serving democratic accountability without impinging on judicial independence. The judges the President appoints can gradually change the ideological tenor of the judiciary to reflect the popular attitudes reflected in presidential elections without threatening sitting judges.[64] "This gradual process", said Chief Justice William Rehnquist in 1996, is the "right way to go about putting a popular imprint on the federal judiciary."[65] He didn't mention that, at the time, politicians of both parties were calling for the removal of a district judge who made an impolitic remark about New York police officers, but the reference was unmistakable and the removal calls quickly subsided.[66]

On the other hand, because judges serve for life, no President can effect a complete conversion of the judiciary during two four year terms, a fact that contributes to contentious Senate confirmation battles over the vacancies that do occur. Supreme Court nominations are rarely defeated, but have been contentious for 20 years. Failed nominations are increasing for the courts of appeals; the Senate confirmed almost all of President Eisenhower's nominees (1953 to 1961) but only around 70% of President Clinton's and George W. Bush's nominees.[67] Senators (and perhaps Presidents) who make judgeships dependent on nominees' subtle assurances that they will decide cases in certain ways may lead judges to revise their self-image as independent – not ideological – decision-makers.[68] And, others ask, what about sitting judges who want to be considered for appointment to a higher court? Although undocumentable, there must be some temptation to tailor decisions to please would-be nominators and confirmers.

Bankruptcy and magistrate judges are appointed by the respective courts of appeals and district courts for terms of 14 and eight years re-

---

[64] R. Dahl, Decision-making in a Democracy: The Supreme Court as a National Policy Maker, 6 Journal of Public Law 279 (1957).

[65] W. Rehnquist, Keynote Address: Symposium on the Future of the Federal Courts, 66 American University Law Review 263, at 273 (1997).

[66] J. Newman, The Judge Baer Controversy, 80 Judicature Number 4, at 156 (1997).

[67] R. Wheeler, Prevent Federal Court Nomination Battles: Deescalating the Conflict over the Judiciary, at 5-6 (2008), available on the Brookings Institution website at <http://www.brookings.edu/~/media/Files/Projects/Opportunity08/PB_JudicialPolicy_Wheeler.pdf>.

[68] B. Wittes, Confirmation Wars, at 89-90 (2006).

spectively,[69] through a process that involves a public announcement of the vacancy, specification of criteria, and candidate review and recommendation by a merit selection panel appointed by the court.[70]

c) Judicial Education

State requirements that judges participate in initial and continuing education programs are relatively lax; few states specify even minimal hours of education.[71] Federal judges face no mandatory education, although most, certainly most first instance judges, attend programs funded by the courts' research and education agency, such as a two week initial orientation program and short two or three day continuing education programs.[72]

Some litigants and legislators have expressed concern about education programs offered by private groups with particular jurisprudential and ideological approaches to such matters as environmental regulation. Critics fear such programs could compromise independent decision-making by judges who are unable to perceive alleged biases in the presentations (and who may be grateful for the no-cost programs offered in resort settings).[73] Legislative efforts to prohibit federal judicial participation[74] have failed over objections that judges are able to discern one-sided presentations and that banning attendance may create a slippery slope that could implicate other forms of information reception, even

---

[69] 28 U.S. Judicial Code section 152 (a)(1) (bankruptcy judges) and section 631 (a) (magistrate judges).

[70] Recent announcements by the Eighth Circuit Court of Appeals for a bankruptcy judge vacancy in the Southern District of Iowa, and by the U.S. District Court for the Central District of California a magistrate judge vacancy were published on relevant websites, available at <http://www.mow.uscourts.gov/> and <http://www.cacd.uscourts.gov/>.

[71] Conference of State Court Administrators (note 4), at table 9.

[72] E.g., Federal Judicial Center, 2008 Annual Report, at 5-6, available at <http://www.fjc.gov/public/pdf.nsf/lookup/annrep08.pdf/$file/annrep08.pdf>.

[73] See for example, Community Rights Counsel, Nothing for Free: How Private Judicial Seminars are Undermining Environmental Protections and Breaking the Public's Trust (2000), available at <http://www.theusconstitution.org/page_module.php?id=10&mid=1> (The Community Rights Counsel has become the Constitution Accountability Center).

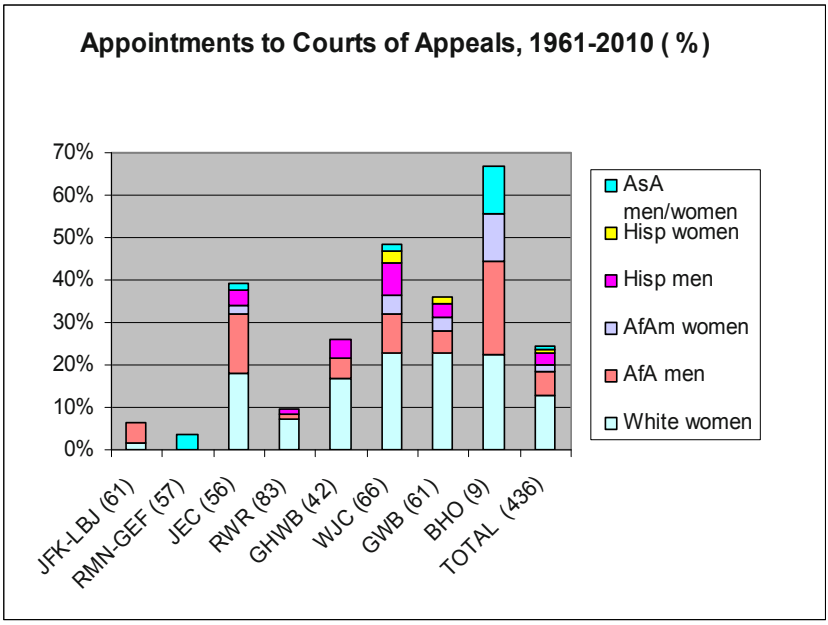
[74] See, e.g., Senate bill 2202, 109th Congress, available at <http://thomas.loc.gov/cgi-bin/query/z?c109:S.2202:>.

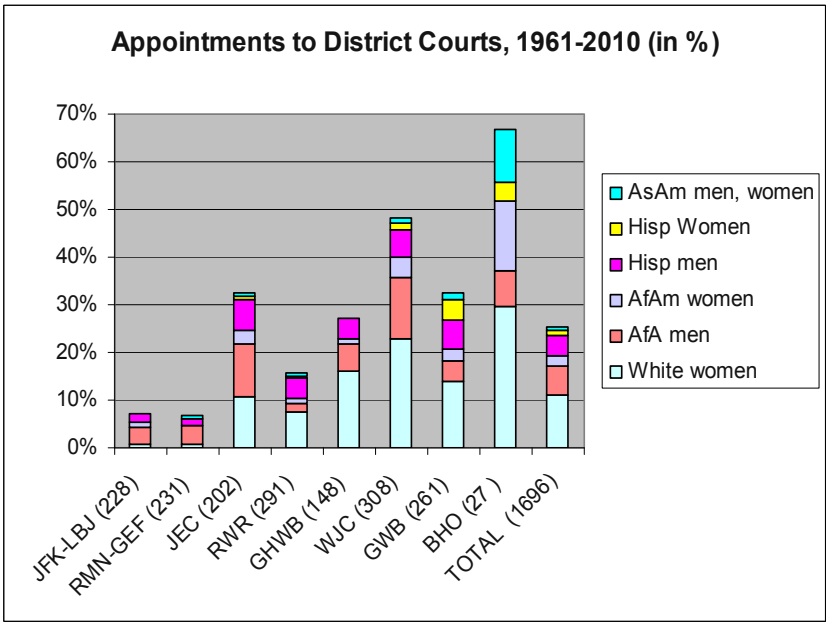
judges' choice of reading materials. The Judicial Conference, though, using its statutory authority to regulate gifts judges receive, requires providers of judicial education to post on the federal court website their sources of funding and content of their programs and requires judges to post on their courts' websites programs they attended.[75]

d) Minority and Gender Representation

There are no formal requirements for gender, ethnic or racial background representation. Historically minorities and women were excluded from the law firm networks that, along with political party participation, smoothed the way for federal judicial nominations. Since Jimmy Carter's administration (1977-1981), however, Presidents (and the members of their political parties who recommend judicial candidates) have sought to diversify the federal bench. The charts below show the percentage of women and minority appointees since the presidency of Dwight Eisenhower (1953-1961), through the administrations of Presidents Kennedy and Johnson (1961-1969), Nixon and Ford (1969-1977), Carter (1977-1981), Reagan (1981-1989), the first President Bush (1989-1993), Clinton (1993-2001), and George W. Bush 2001-2009).

[75] See Judicial Conference Policy on Judges' Attendance at Privately Funded Educational Programs, available at <http://www.uscourts.gov/disclosure.html>.


Appointments to Courts of Appeals, 1961-2010 (%)
70%
60%
50%
40%
30%
20%
10%
0%
JFK-LBJ (61)
RMN-GEF (57)
JEC (56)
RWR (83)
GHWB (42)
WJC (66)
GWB (61)
BHO (9)
TOTAL (436)
AsA men/women
Hisp women
Hisp men
AfAm women
AfA men
White women


Appointments to District Courts, 1961-2010 (in %)
70%
60%
50%
40%
30%
20%
10%
0%
JFK-LBJ (228)
RMN-GEF (231)
JEC (202)
RWR (291)
GHWB (148)
WJC (308)
GWB (261)
BHO (27)
TOTAL (1696)
AsAm men, women
Hisp Women
Hisp men
AfAm women
AfA men
White women

The table below[76] shows the percentages of federal circuit and district judges in various categories in July 2010 according to whether the judges are in active or senior (semi-retired) status. More recent appointees – i.e., those in active status – show more diversity.

	White women	Af Amer men	Af Amer women	Hisp men	Hisp women	As Amer men	As Amer women
Active Judges (756)	21.6%	7.7%	3.8%	5.3%	2.5%	0.8%	0.7%
Senior (510)	6.9%	3.9%	1.0%	2.4%	0.0%	0.4%	0.0%

There has been much debate over whether appointive or elective judicial selection systems produce greater state judicial diversity. American Judicature Society scholars are the latest to answer that question.[77] Unlike research that assessed diversity according to the formal selection methods used in different states, their research assessed diversity according to the actual process that put judges on the bench. As noted, in most judicial election states, vacancies that occur between elections are filled by gubernatorial appointment, either directly or with commission recommendations, with the appointee running as an incumbent in the next scheduled election. Assessing the actual process, the Society researchers found that commission systems produced substantially greater percentages of racial and ethnic minority, and women, judges on supreme courts and greater percentages of minority judges on intermediate appellate courts than did direct gubernatorial appointment, partisan election, or non-partisan elections. Commission systems produced slightly higher proportions of women on first instance courts, but gubernatorial appointment and partisan elections produced greater proportion of minority judges on those courts.

3. Length of Office and Reappointment

There is no formal judicial career in the United States and thus no probationary period before taking office, generally around the age of 40 or

[76] Based on data available in the Federal Judges Biographical Database of the Federal Judicial Center, available at <http://www.fjc.gov>.

[77] Reddick/Paine Caufield/Nelson (note 38).

50.[78] Federal Supreme Court, court of appeals, and district judges are appointed for good behaviour (essentially, for life). Bankruptcy and magistrate judges serve for fourteen and eight year terms and are almost always reappointed after that term by the courts of appeals or district courts (using the same merit selection process as for the initial appointment).[79]

Almost all state judges, by contrast serve for terms, generally in the eight to ten year range for appellate judges and six to eight year range for first instance judges[80] and must face some kind of reappointment or re-election to keep their seats. In states that elect judges, judges run for re-election, either in contested elections or by referendum elections, which are the common form of re-election for judges appointed under commission systems.[81] Almost all states have mandatory retirement ages.

III. Tenure and Promotion

1. Tenure

See discussion immediately above.

2. Promotion

Judicial promotion has a different connotation in the United States than in career judiciaries. First instance judges become appellate judges through the same process as a non-judge. About half the federal court of appeals judges were federal district or state judges when appointed, and increasingly, Presidents have appointed state or term-limited federal judges as federal district judges. 22% of President Eisenhower's 129 district judge appointees were state judges and 13% were public service lawyers (mainly prosecutors), but 49% of President George W. Bush's

---

[78] Goldman et al (note 60).

[79] See text and notes 69 and 70.

[80] Conference of State Court Administrators (note 4), at tables 2 and 3.

[81] See, e.g., American Judicature Society, Judicial Selection in the States, Appellate and General Jurisdiction Courts, Summary of Initial Selection Methods, available at <http://www.ajs.org/selection/docs/Judicial%20Selection%20Charts.pdf>.

261 appointees were state or term limited federal judges and 15% were public service lawyers.[82] Chief Justice Rehnquist worried that the decline in the appointment of private lawyers could make the federal judiciary "too much resemble the judiciar[ies] in civil law countries", which, he said, "[r]easonable people not merely here but in Europe, think […] do not command the respect and enjoy the independence of ours".[83] Whether he was right as to relative degrees of respect and independence, in fact, district judges in the United States, whatever their immediate pre-judicial vocation, spend years in private practice before their initial judicial appointment.

IV. Remuneration

1. Remuneration

Judicial salaries in the United States are comparable to those of other senior government officials. The table shows 2010 federal and 2009 state judicial salaries.

	Federal[84]	State[85]
Chief justice of highest court	224,000 USD	115,000 – 22900 USD
Associate justices, highest court	214,000 USD	116,000 - 218,000 USD
Intermediate appellate court	185,000 USD	105,000 - 207,000 USD
First instance	174,000 USD*	104,000 - 179,000 USD

* Salaries are rounded. Bankruptcy and magistrate judges earn 92% of the salary of district judges.

---

[82] R. Wheeler, Changing Backgrounds of U.S. District Judges: Likely Causes and Possible Implications, 93 Judicature 140, at 141 (2010).

[83] Rehnquist (note 29).

[84] Salaries of Federal Judges, Associate Justices, and Chief Justices Since 1968, posted on the U.S. federal court system website, available at <http://www.uscourts.gov/salarychart.pdf>.

[85] National Center for State Courts, 54 Survey of Judicial Salaries No. 2 (2009), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/judicial&CISOPTR=288>.

Legislatures set judicial salaries, acting, in most states[86] and the federal government, on periodic recommendations by commissions or external bodies comprising appointees of the executive, judicial and legislature branches but they have not necessarily worked well.

For federal judges, the President makes an annual recommendation based on cost of living and other data, but, for reasons explained in the discussion below, Congress always modifies them, if it provides any increase at all.[87] The result has been erratic variations in federal judicial earning power. The chart[88] shows, from 1953 to 2008 the current dollar salary of U.S. district judges (lower line) as well as the actual earning power of those salaries in 2008 constant dollars. The Constitution provides that federal judges' "Compensation […] shall not be diminished during their Continuance in Office,"[89] but "Compensation" has always been understood to mean current wages, not actual buying power. Thus, when Congress in 1969 raised district judges' nominal salary from 30,000 USD (approx. 23,500 EUR) to 40,000 USD (approx. 31,300 EUR), it effected an increase, in 2008 – adjusted (rounded) dollars from 205,000 USD (approx. 160,500 EUR) to 235,000 (approx. 184,000 EUR). It then held salaries at the 40,000 USD level until 1975, but over that period, actual buying power declined from 235,000 to 160,000 USD (approx. 125,300 EUR).

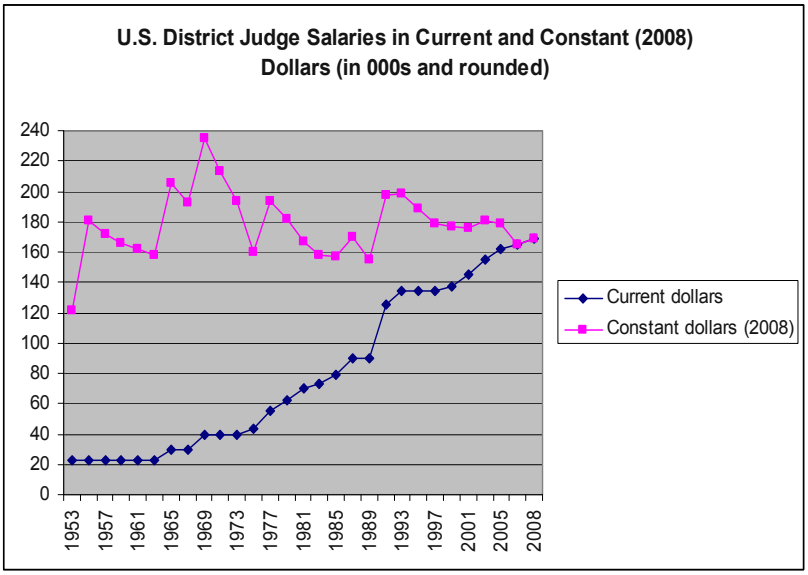
---

[86] Conference of State Court Administrators (note 4), at table 15.

[87] R. Wheeler/M. Greve, How to Pay the Piper: It's Time to Call Different Tunes for Congressional and Judicial Salaries (2007), available on the Brookings Institution website at <http://www.brookings.edu/~/media/Files/rc/papers/2007/04governance_wheeler/04governance_wheeler.pdf>.

[88] Id. at Appendix Table 3, updated to 2008 buying power using the U.S. Department of Labor inflation calculator, available at <http://data.bls.gov/cgi-bin/cpicalc.pl>.

[89] U.S. Constitution, Article III, section 1.



United States judges have long bemoaned their salaries, which are respectable but considerably below those of successful private lawyers, law school deans, or judges in other common-law countries, such as Great Britain, Canada, and Australia.[90] Judges concede that it would be unreasonable (and politically impossible) to pay them the salaries earned by top practitioners, and there is almost no overt evidence that legislators use salaries to punish judges for judicial decisions, certainly on the federal level. One hears occasional hints of such retaliation on the state level – then-Massachusetts governor Mitt Romney refused to approve a 2006 pay raise for the state's chief justice, some thought because a pay raise for a judge who authored a judicial opinion legalizing same-sex marriage would hinder Romney's 2008 presidential hopes[91] – but such hints are rare.

Judges' complain instead that legislatures have simply bungled rational salary setting and that the peaks-and-valleys in their earning power is unfair to judges who took office on the understanding that the legislature would at least raise salaries to reflect increased costs of living. Fed-

[90] Wheeler/Greve (note 87), at 9.

[91] Frank Phillips, How Much is a Judge Worth?, Boston Globe, 25 June 2006.

eral legislators insist on linking their salaries to judicial salaries, mainly for reasons of symbolic equality, even though legislators are reluctant to incur voter wrath by raising their own salaries, thus holding back judicial salaries.[92]

Chief Justices Warren Burger (1969-1986) and Rehnquist (1986-2005) both called regularly for salary increases.[93] Chief Justice John Roberts, and many state chief justices, have also focused on getting their respective legislatures to raise judicial salaries.[94] Chief Justice Roberts noted in his 2007 plea that 38 federal judges had resigned in the previous six years (not all of them, perhaps, for salary reasons). "If judicial appointment […] becomes a stepping stone to a lucrative position in private practice", he warned, "the Framers' goal of a truly independent judiciary will be placed in serious jeopardy".[95] Not stated, but clearly implied, is that judges' decisions might be influenced by how to appear attractive to a potential employer.

2. Benefits and Privileges

Other than standard extra-salary benefits such as full or partial medical insurance and paid vacations, United States judges have few benefits that some judges in some other countries may enjoy. For example, judges, except those in high leadership positions, rarely have cars or drivers, or professional residences, assigned to them.

3. Retirement

There is no mandatory retirement age for United States federal judges appointed for *good behaviour*. They may retire on full salary when they reach 65 and their years as a federal judge plus their age equal 80 (a judge who took office at age 56 could retire on full salary at age 68 (68 + [68-56] = 80)). A judge who retires under this *rule of 80* may continue to serve as a *senior judge*; a senior judge who performs at least one-

---

92 Wheeler/Greve (note 87).

93 I. Molotsky, In Year-End Report, Rehnquist Renews His Call to Raise the Salaries of Federal Judges, New York Times, 1 January 2001, available at <http://www.nytimes.com/2001/01/01/us/year-end-report-rehnquist-renews-his-call-raise-salaries-federal-judges.html>.

94 Roberts (note 29).

95 Id.

fourth the work of an active status judge receives any salary increases that Congress provides to those judges. Judges who do not perform that level of work, or who leave the bench entirely after satisfying the rule of 80 receive the salary they were receiving when they retired. Judges who leave office without satisfying the rule of 80 receive no salary or pension.[96]

Congress devised the rule to discourage judges from clinging to office, despite age-related infirmities, simply to keep their salaries. Along the same lines, Congress has authorized judges who are disabled to retire on full-salary if they have served for at least ten years or half-salary if they have not, if the chief judge of the circuit certifies the disability; and if the circuit judicial council believes a judge is disabled even though the judge refuses to retire, the council may certify a forced disability if the President accepts the certification.[97] These provisions are not used extensively and have not produced charges that either judges or the President has manipulated the provisions to stifle independent decision-making. All 37 states responding to a recent survey reported some kind of contributory retirement plan for state judges, with retirement income seeming to vary in the 60% to 75% of full salary.[98] Almost all state judges face mandatory retirement ages, usually 70.

V. Case Assignment and Recusal

1. Case Assignment

Most federal and smaller first instance state courts assign cases to a judge for the life of a case. Large state courts assign different phases of a case to judges in different *parts* of the court. In either situation, though assignments, managed by court personnel under court rules, are typically random to prevent parties from shopping for judges they believe will look sympathetically on their arguments. Appellate courts typically provide for court personnel to assign judges randomly to panels and assign cases to the panels randomly, or using a weighting scheme, ap-

---

[96] 28 U.S. Code section 371.

[97] Id., section 372.

[98] National Center for State Courts, Judicial Salary Resource Center, Judicial Retirement Information, available at <http://www.ncsconline.org/D_KIS/Salary_Survey/retirement.asp>.

proved by the court, to try to ensure that panels have similar workloads.

2. Recusal

State recusal and disqualification requirements and procedures vary considerably[99] and have been challenged by those to whom the full-bore implementation of *Minnesota Republican Party* v. *White*[100] means that those competing for judicial office should state their views on disputed issues and not recuse themselves when those issues come before them once in office.[101] The infusion of large sums of money into judicial campaigns has created further controversy over recusal standards.

Some states provide attorneys a limited number of peremptory challenges to remove judges without giving reasons. Debate over these provisions pits two concerns: on the one hand, because judges are reluctant to recuse even in cases where they should, attorneys must have some means of forcing them off a case; on the other is a fear that attorneys would force a judge off a case based on race[102] or other inappropriate factors.

Federal judges are not subject to peremptory challenges. The federal disqualification statute directs a judge to "disqualify him/herself in any proceeding in which his/her impartiality might reasonably be questioned," and then identifies specific recusal grounds, such as the judge's or immediate family members' having a financial interest in the case; "financial interest" includes, among other things, "a legal or equitable interest, however small"[103] (i.e., one share of stock). The parties may waive recusal if the conflict arises under the general standard, but not under the more specific grounds.[104]

---

[99] See for example, American Bar Association Judicial Disqualification Project, Report (Draft for Discussion Purposes Only), available at <http://www.ajs.org/ethics/pdfs/ABAJudicialdisqualificationprojectreport.pdf>.

[100] See *supra* B. II. 2. a) State Judicial Selection.

[101] See Carter (note 47).

[102] American Bar Association Judicial Disqualification Project (note 99), at 29.

[103] 28 U.S. Code section 455 (a), (b), and (d).

[104] Id., section 455 (e).

Each May federal judges must disclose their holdings (in dollar ranges) during the previous calendar year. Journalists occasionally match the reports with cases on judges' dockets and find instances in which judges sat on cases that required recusal. Several years ago, for example, two of President W. Bush's nominees to the courts of appeals were derailed, in part based on news reports that they had sat on cases in which they had minor stock holdings – even though an opponent of one nominee conceded that the holdings were too small to conclude that the judge's actions produced personal gain.[105]

The Judicial Conference in 2006 asked circuit judicial councils to order judges to use centrally developed conflict-avoiding software to let judges match parties before them with their holdings.[106] Some courts take the further, sensible step, of posting on their websites a list of attorneys and parties in whose cases judges will not participate.[107]

VI. Judicial Conduct Complaint Process

In the United States, the terms *judicial complaint process* and *judicial discipline process* are used interchangeably.

VII. Judicial Accountability: Discipline and Removal Procedures

1. Impeachment and other Measures to Remove Judges from Office

The U.S. Constitution says that "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high

---

[105] W. Evans, Controversial Bush Judge Broke Ethics Law, 1 May 2006, available at <http://www.salon.com/news/feature/2006/05/01/boyle/index.html>.

[106] Report of Proceedings of the Judicial Conference of the United States, September 2006, at 11, available at <http://www.uscourts.gov/judconf/proceedingsSept06.pdf>.

[107] See for example, the Judges' Conflict Lists on the website of the U.S. District Court for the Northern District of Iowa, available at <http://www.iand.uscourts.gov/e-web/home.nsf/4fd0d6a14cd819e1862573a8004d7a2a/148a544936b9a9b9862573c0000391f4?OpenDocument>.

Crimes and Misdemeanors."[108] State constitutions have similar provisions. The lower house of a bicameral legislature institutes impeachment proceedings and, if it impeaches, the case moves to the upper house for trial.

Judicial impeachments are rare – in the states since 1994, five investigations, two impeachments, and one conviction.[109] Since 1789, Congress has impeached 15 federal judges, convicted seven and acquitted four. Three resigned after impeachment but before or during their trial.[110] Despite the vagueness of the phrase "high Crimes and Misdemeanors", it is generally accepted that judges' rulings, however unpopular, are not grounds for impeachment, this based on the Senate's failure in 1804 to convict a judge who had been impeached for how he described the law to a jury.[111] Impeachments are typically for such things as tax evasion and perjury, as seen most recently with a federal district judge who was convicted in federal court of lying during a disciplinary proceeding about sexual harassment allegations. As he entered prison in June 2009, he offered to resign in June 2010 – so he could earn a year's salary while incarcerated. A quick impeachment produced a resignation.[112]

2. Other Judicial Discipline

A wave of judicial scandals in the 1960s created a search for alternatives to impeachment, which can tie up a legislature for weeks and is not appropriate for misbehaviour that deserves a milder sanction than removal from office.

a) Disciplinary Bodies

Every state has established some type of body such as a *Judicial Inquiry Commission*, *Commission on Judicial Performance*, or *Judicial Stan-*

---

[108] U.S. Constitution, Article II, section 4.

[109] American Judicature Society, Methods for Removing State Judges, available at <http://www.ajs.org/ethics/eth_impeachement.asp>.

[110] Federal Judicial Center, Impeachment, on Federal Judicial History webpage at <http://www.fjc.gov>.

[111] Rehnquist (note 65), at 273.

[112] L. Olsen, Judge Kent Resigns Amid Impeachment Proceedings, Houston Chronicle, 26 June 2009, available at <http://www.chron.com/disp/story.mpl/front/6497788.html>.

dards Commission to receive complaints from individuals alleging judicial misbehaviour or performance-limiting disability.[113] State commissions include judges (often a minority), lawyers, lay persons, and sometimes legislators. Congress initially considered establishing a commission for the federal judiciary, but backed off under opposition of judges who feared it could be used to threaten their ability to decide politically sensitive cases independently. Instead, Congress in 1980 regularized what had been an informal judicial complaint role for circuit judicial councils.[114] Therefore, unlike the state disciplinary bodies, the federal bodies are judges-only.

b) Proceedings

The basic steps in disciplinary proceedings are a screening function to sort complaints that may have merit from the many that do not; investigation of the remaining complaints; imposition of any warranted sanction; and provision for some kind of appeal. Accused judges have the right to examine and seek to rebut evidence. Here is a summary of the statutorily prescribed procedures[115] and implementing rules[116] for complaints against federal judges, with occasional comment about state procedures.

aa) Filing a Complaint, Initial Examination

The 1980 statute authorizes "[a]ny person" – judge, lawyer, citizen, prison inmate, etc. – to complain "that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or […] is unable to discharge all the duties of the office by reason of mental of physical disability".[117] The implementation

---

[113] American Judicature Society, Commission Membership (document) on the Society's Judicial Conduct Organization's webpage, available at <http://www.ajs.org/ethics/pdfs/Commissionmembership.pdf>.

[114] 28 U.S. Code sections 351-364. See Fish (note 8), at chapter 11.

[115] 28 U.S. Code sections 351-364.

[116] Judicial Conference of the United States, Rules for Judicial-Conduct and Judicial-Disability Proceedings (March 2008), available at <http://www.uscourts.gov/library/judicialmisconduct/jud_conduct_and_disability_308_app_B_rev.pdf>.

[117] 28 U.S. Code section 351 (a).

rules supplement this imprecise phrase with some examples, such as using the judge's office to obtain special treatment for friends or relatives or treating litigants or attorneys in a demonstrably egregious and hostile manner.[118] Many litigants try to use the complaint procedure to appeal judicial decisions, but the statute directs the dismissal of any complaint that is "directly related to the merits of a decision or procedural ruling."[119] That mandate requires the disciplinary mechanism to distinguish between legal error, which is not subject to discipline, and possible abuse of the judicial office, such as intemperate remarks directed at litigants.[120]

Between 600 and 800 complaints have been filed in recent years.[121] Litigants make over 90% of the filings (80% of them prisoners), almost all about judicial decisions.[122] On this fact, one might say that complainants are abusing the statute, but that has not been a widely discussed topic nor produced calls to alter the statute.

The complaint goes to the chief judge of the circuit of the subject judge, with a copy to the subject judge. The chief judge may either dismiss the complaint (perhaps after a limited inquiry, provided that the chief judge makes no findings of fact on matters "reasonably in dispute") or appoint a special committee of judges to investigate the allegation and report to the judicial council.[123] Between 2001 and 2005, chief judges appointed committees to investigate nine of the over 3,600 complaints filed, and councils disciplined four of the nine judges.[124] In the state courts, according to the most recent compilation, dismissal rates in the 85% to 95% range predominate.[125] The lower dismissal rate may reflect

---

[118] Judicial Conference of the United States (note 116), Commentary on Rule 3 and Rule 3 (h)(1) ("Misconduct includes but is not limited to […]").

[119] 28 U.S. Code section 352 (b)(1)(A)(ii).

[120] C. Gray, The Line between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability, 32 Hofstra Law Review 1095, at 1245 (2004).

[121] Judicial Conduct and Disability Act Study Committee, Implementation of the Judicial Conduct and Disability Act of 1980, (September 2006), at 21, available at <http://www.supremecourtus.gov/publicinfo/breyercommitteereport.pdfat 25>. Disclaimer: I served as a chief staff member for the committee.

[122] Id., at 23.

[123] 28 U.S. Code sections 352 and 353.

[124] Judicial Conduct and Disability Act Study Committee (note 121), at 29.

[125] American Judicature Society, Judicial Conduct Reporter, Summer 2000.

more state disciplinary problems (because of less rigorous selection processes for many state judges) or more probing state commission investigations, or both.

Some say the tiny fraction of investigated federal complaints means that the disciplinary mechanism is not working, but that is not necessarily the case, based on a study by a committee appointed by Chief Justice Rehnquist in 2004 after Representative James Sensenbrenner, then-chair of the House of Representatives Committee on the Judiciary, warned the Judicial Conference that Congress might withdraw the disciplinary authority it had delegated to the judiciary in the 1980 statute. Sensenbrenner cited his unhappiness with the disposition of a misconduct complain he had filed in another matter.[126] Rehnquist, in part to head off a legislative investigation, appointed the committee to assess the judiciary's administration of the 1980 Act. The committee comprised four judges, Rehnquist's administrative assistant, and, as committee chair Supreme Court Associate Justice Stephen Breyer, the only member of the Court who had experience working as a legislative staff member. The committee reported to Chief Justice Roberts in September 2006.[127]

The committee, using transparent criteria,[128] strictly applied,[129] evaluated several large samples of complaints terminated between 2001 and 2003 to determine whether chief judge and council dispositions accorded with the statute and with implementing regulations. It found a comparatively low 3.4% of sample terminations to be problematic, a finding consistent with an earlier study of complaint terminations.[130] But its analysis of 23 high visibility complaints – those that attracted press attention or legislative interest–yielded a problematic rate of

---

[126] Included in Speech of Rep. Tom Feeney, Congressional Record, 23 March 2004, at E245, available at <http://thomas.loc.gov/cgi-bin/query/D?r108:18:./temp/~r108bbQgOh.>.

[127] Judicial Conduct and Disability Act Study Committee (note 121).

[128] Id., at Appendix E (Committee Standards for Assessing Compliance with the Act).

[129] For example, a chief judge dismissed as frivolous a prisoner's complaint that a judge permitted a young, male, student intern to impersonate him on the bench. The judge told the chief judge that at the time of the hearing he had no intern and his clerk was an older woman. The committee described the allegation as "bizarre" but not "inherently incredible" and said the disposition was problematic because the chief judge did not ask the prosecutor who was in the courtroom at the time to corroborate the judge's response. Id., at 53.

[130] Id., at 95.

about 30%, which it attributed to the greater complexity of the complaints, presenting chief judges and circuit councils with more decisions and thus more opportunity for error. The committee warned that "[p]erceived failure to deal with alleged misconduct in these publicly visible complaints may lead those with valid complaints to conclude that the likelihood that the complaint will be investigated is too low to justify the trouble of filing".[131]

bb) Safeguards

The statute grants the subject judge the right to respond to complaints and present evidence, including compelling the attendance of witnesses and documents. The complainant may appear "if the panel concludes that the complainant could offer substantial information".[132] The chief justice may transfer the investigation to another circuit if necessary to preserve impartiality and the appearance of impartiality.[133]

cc) Investigations

Special committee investigations are rare but sometimes prolonged. After a federal district judge was acquitted in 1982 on federal bribery charges, two judges alleged that there was nevertheless substantial evidence of misconduct. A three-year special committee investigation led to the judge's impeachment and removal from office.[134] (He now serves in Congress.) In July 2009, a judicial council disposed of a June 2008 complaint that a chief circuit judge posted obscene materials on a publicly available website.[135] The chief judge initiated the complaint himself in order to engage the process, and Chief Justice Roberts transferred it to another circuit. The council admonished the judge for carelessness in handling controversial electronic files and recognized corrective action the judge took to remedy the misconduct.[136]

---

131 Id., at 97.

132 28 U.S. Code section 358 (b)(3).

133 Judicial Conference of the United States (note 116), rule 26.

134 M. Volcansek, Judicial Impeachment, at chapters 4 and 5 (1993).

135 Judicial Council of the Third Circuit, Order and Memorandum Opinion, J.C. No. 09-08-90035 (2009), available at <http://www.ca3.uscourts.gov/opinarch/089050p.pdf>.

136 Id.

dd) Sanctions/Appeals

The council may take a range of steps: dismiss the complaint; impose private or public reprimands; suspend case assignments; certify the judge as disabled; or remove bankruptcy and magistrate judges from office, since they're not appointed under the Constitution's *good behaviour* clause, which limits removals to legislative impeachment and conviction. The council may also forward the matter to the Judicial Conference with a recommendation to refer it to the House of Representatives to consider impeachment proceedings. The statute throughout requires notice to the judge and complainant, and authorizes either to appeal a council action to the Judicial Conference, which has established a Judicial Conduct and Disability Committee to act on any appeals.

ee) Transparency

Most disciplinary bodies publish summary data on complaints and their disposition.[137] All written orders – of the chief judge or judicial council dismissing the complaint, or orders imposing sanctions – are public, but an order doesn't identify the subject judge unless it imposes a public sanction.[138] (Names of federal judges who are the subject of newsworthy complaints often find their way into the press.) The Conference's Judicial Conduct and Disability Committee posts selected orders on the judiciary's website "to provide additional information to the public on how complaints are addressed under the Act."[139] State procedures are more transparent. At least as of 2002, 35 states provided that the confidentiality of the process ends once the disciplinary body files formal charges against the judge.[140] The federal statute's implementing regulations direct each court to make available on its website the form for filing a complaint and the regulations themselves,[141] this based on a Breyer committee finding that most courts provided no website information

---

[137] E.g., Administrative Office of the U.S. Courts (note 5), at tables 10 and 11, at 36-37 and tables S-22A and S-22B at 73-77.

[138] Judicial Conference of the United States (note 116), at rules 23 and 24.

[139] Id., at rule 24.

[140] American Judicature Society, Appendix D: When Confidentiality Ceases, January 2002, available at <http://www.ajs.org/ethics/pdfs/When%20confidentiality%20ceases.pdf>.

[141] Judicial Conference of the United States (note 116), at rule 28.

about the complaint procedure, and a companion finding that per judge filings were not higher for courts that provided easy website access.

3. Informal Procedures

Formal disciplinary procedures provide chief judges and others what one judge called a bargaining chip to persuade judges with behavioural problems to consider remedial action or retirement rather than face a disciplinary complaint. Indeed, the sponsors of the federal statute said they expected informal collegial resolution of problems "to be the rule rather than the exception."[142] One chief judge told the Breyer committee that "the formal process interacts with, but does not necessarily govern, the most serious cases".[143]

VIII. Immunity for Judges

Judges generally enjoy immunity for their official actions – generally – but may be subject to criminal prosecution for other actions. Examples include the prosecution of the judge referred to earlier who committed perjury in his testimony in a disciplinary proceeding,[144] as well as garden-variety prosecutions for acts unconnected to judicial duties – such as insurance fraud[145] or state court civil suit against a federal judge who cut down trees in a public space to enhance his residence's view.[146] Actions on the bench can provoke prosecution, such as federal tax evasion and wire-fraud convictions of two state judges who accepted millions of dollars of kickbacks for sending juveniles to private detention centres.[147] The judges are seeking to dismiss federal civil suits on the

---

142 Judicial Conduct and Disability Act Study Committee (note 121), at 100.

143 Id., at 101.

144 Olson (note 112).

145 L. Thompson, Fraud sends Joyce to Prison, Erie (Pa.) Times-Herald, 11 March 2009.

146 J. Langston, Judge Pays Off Debt for Cutting Park Trees, Seattle Post-Intelligencer, 27 May 2006.

147 I. Urbina, Despite Red Flags About Judges, a Kickback Scheme Flourished, New York Times, 28 March 2009.

grounds of judicial immunity,[148] but that effort is unlikely to go far. There are occasional but not widespread assertions of vindictive prosecutions, but the subject is not a major issue in the United States. (Immunity received national attention in 2006 when disgruntled litigants sought plebiscite adoption of a state *Judicial Accountability Initiative Law* (J.A.I.L. for Judges), a crackpot scheme to let special grand juries prosecute judges for almost any judicial decision.[149] It polled much better than expected and was overwhelmingly defeated only after a concerted effort by judges,[150] and the bar, legislature, and business community. Sponsors talk about seeking to pass similar provisions in other states.

IX. Associations for Judges

Judges associations include the American Judges Association (a general membership group of 3,000 judges[151] – a small fraction of the country's over 40,000 judges[152]), the Federal Judges Association, and numerous national and state associations of specialized judges (probate, juvenile, etc.). They conduct educational programs and use reports and legislative testimony to oppose measures that they perceive would weaken judges or impair their effective operation. Some judges are active in national, state, and local bar associations, which can sometimes be more vigorous than judges themselves in protecting judges' legitimate interests because of conventions that discourage judges' involvement in what some regard as political activity. The American Bar Association has been especially prominent.[153]

---

148 M. Rubinkam, Records Preservation Sought in Pa. Judge Scandal, Associated Press, 27 July 2009.

149 Its website is available at <http://www.jail4judges.org/>.

150 P. Lattman, SDO decries JAIL 4 Judges and Other Attacks on Judiciary, Wall Street Journal, 27 September 2006, available at <http://blogs.wsj.com/law/2006/09/27/sdo-decries-jail-4-judges-and-other-attacks-on-judiciary/>.

151 As reported on the Association's website, available at <http://aja.ncsc.dni.us/htdocs/aboutaja.htm>

152 See table at notes 3 and 4.

153 For recent American Bar Association efforts in this regard, see, for example, Justice in Jeopardy, Report of the American Bar Association Commission

X. Resources

Resources vary considerably among courts. Federal courts are better resourced than almost all state courts but neither spends more than one percent of total spending of the particular state, or the federal, government. Because different countries include different items within a judicial budget – U.S. judicial budgets, for example, do not include prosecutors – international comparisons of percentage spending levels are not helpful. Although courts, like any other government agency, usually want more resources than they have, courts in the United States are, in general, adequately funded. To be sure, they feel the pinch during recessions,[154] including the recession that began in 2008 and carried over into 2009, causing state courts to search for ways to offset reductions[155] and seek strategies to stabilize their funding.[156]

Courts, however, sometimes overreact to difficult economic times, in some cases believing judicial independence exempts them from the belt-tightening other agencies must undergo. In 2002, for example, in the midst of a financial turndown, the Kansas chief justice imposed, with no statutory authority, an increase in court fees to make up a shortfall in the judicial system's legislatively-provided budget. She justified the fees based on the court's "inherent power to do that which is necessary to enable it to perform its mandated duties," reasoning that "while there are things the people of Kansas may have to give up in these trying fiscal times, justice cannot and must not be one of them."[157] She didn't explain why justice is exempt from legislatively imposed reductions but not education or health care, for example.

---

on the 21st Century Judiciary, at x-xi, available at <http://www.supreme.state.az.us/ajc/Publications/justiceinjeopardy.pdf>.

[154] See for example, D. Hall/R. Tobin/K. Pankey, Balancing Judicial Independence and Fiscal Accountability in Times of Economic Crisis, 43 Judges' Journal Number 3, at 5 (Summer 2004).

[155] For example, J. Schwartz, Pinched Courts Push to Collect Fees and Fines, New York Times, 7 April 2009.

[156] An Impending Crisis in State Court Funding (editorial), 92 Judicature Number 2, at 52 (2008).

[157] Quoted in G. Webb/K. Wittington, Judicial Independence, the Power of the Purse, and Inherent Judicial Powers, 88 Judicature Number 1, at 12 (2004).

Congress has funded federal courts more generously than the rest of the federal government. The table[158] shows that funds available to the courts have, in percentage terms over the last three decades, risen much more than those available to the government as a whole – over 1,500% versus 711% – or even what Congress provided itself.

Federal Budget Outlays for Selected Years (in millions of dollars)

	1978	1998	2003	2006	2010 (est)	10 over 78	10 over 03	10 over 06
Courts	437	3,459	5,127	5,823	7,159	1538 %	40%	23%
Con-gress	1,064	2,593	3,411	4,128	5,423	410%	59%	31%
All agen-cies	458,74 6	1,652, 685	2,160, 117	2,655, 435	3,720, 701	711%	72%	40%
Cts as % of Con-gress	41%	133%	150%	141%	132%			
Cts. as % of all agen-cies	0.10%	0.21%	0.24%	0.22%	0.19%			

C. Internal and External Influence

I. Separation of Powers

Most judicial branches in the United States deal directly with the legislature rather than through the executive branch on matters affecting court administration.[159] And legislatures have a lot to say about that

[158] Data drawn from Historical Table 4.1 of the president's fiscal 2011 budget document, available at <http://www.whitehouse.gov/omb/budget/Historicals/>.

[159] See *supra* B. I. 1. Organs in Charge of the Administration of the Judiciary.

administration. Subject to constitutional limitations, they create courts, delineate their jurisdiction, prescribe aspects of court operations (such as jury selection and court fees), and determine court budgets. They may help determine who will serve as judges and can remove judges from office. Legislatures are the ultimate authority over judicial rules of procedure, although they typically delegate rule amending to the judiciary.[160] And these broad legislative responsibilities create a legislative oversight role, holding courts accountable for how they spend tax dollars and how they treat court users (typically legislators' constituents).

Legislatures, were they of a mind to, could decimate courts – punishing independent decision-making by impeaching judges, abolishing courts, stripping them of jurisdiction in key areas, or starving them of funds. That they have not done so reflects largely an unwritten understanding, which Professor Charles Geyh calls the courts' "customary independence"[161], meaning that legislatures will not use the heavy artillery in their arsenals, despite occasionally unpopular judicial decisions.

Scholars nevertheless point to six federal court-curbing periods in U.S. history,[162] and state interbranch relations have largely tracked these periods of heightened federal interbranch tensions. The first period began in 1801 when President Thomas Jefferson and his supporters abolished courts that President John Adams and his Federalists had created and stocked with party loyalists. The most recent period ran from roughly 1994 until 2006, leading Chief Justice Roberts to say in 2006 "I don't know a point where the judiciary's stock and stature with the other branches has been as low as it is at this time".[163] When retired Justice O'Connor said "[w]e must be ever-vigilant against those who would strong arm the judiciary" a key legislator shot back, "I think she ought to read the Constitution again […]. We have authority […] they're out of control".[164] The back-story were legislative efforts to limit federal jurisdiction over cases involving religion in public places and abortion, to prohibit federal judges from citing foreign legal sources in their opin-

---

[160] See S. Burbank, Procedure, Politics and Power: The Role of Congress, 79 Notre Dame Law Review, at 1677 (2003-04), and 28 U.S. Code chapter 131.

[161] C. Geyh, When Courts & Congress Collide, at 51 (2006).

[162] See generally, id., especially chapter 2.

[163] Roberts Says Relations Between Branches of Government at Low, Wall Street Journal, 20 October 2006.

[164] T. J. Gilliam, Texas Legislators Take Issue with O'Connor's Warnings, Dallas Morning News, 19 March 2006.

ions, to establish an inspector general to oversee the judiciary, and anger over federal court refusal to review a state court decision terminating life support for a comatose woman who had been medically certified as brain dead after Congress enacted special legislation authorizing the review.[165] Similar jurisdictional restricting efforts arose in state legislatures.[166] The important point is that, as in earlier court-curbing periods, almost none of the threatened federal legislative incursions, certainly none of the serious incursions, came to any fruition.[167] And the budget table above shows that courts funding as a percentage of Congress or all agency funding hit the high-water mark in 2003, when legislative-judicial relations were at about the low-water mark.

II. Judgements

1. Basis

Judicial decisions in common law countries are based on constitutional and statutory law as well as prior judicial decisions. Although critics sometimes charge judges who make decisions with which they disagree with *legislating from the bench*, most observers agree that in the vast majority of cases judges rest their decisions on the law. On appellate courts, especially the Supreme Court, when neither the law nor legislative intent is clear, judges are obliged to look elsewhere in forming a basis for their decision. In the Supreme Court's majority opinion in the *Caperton* case discussed earlier, involving a state supreme court justice's participating in a case in which one of the litigants spent several million dollars to defeat the justice's election opponent,[168] Justice Anthony Kennedy acknowledged "that extreme cases often test the bounds of established legal principles, and sometimes no administrable standard may be available to address the perceived wrong. But it is also true that

---

[165] R. Wheeler/R. Katzmann, A Primer on Interbranch Relations, 95 Georgetown Law Journal 1155, at 1159 (2007).

[166] National Center for State Courts, Court Stripping (January 2008), available at <http://www.gavelgrab.org/?p=135>.

[167] See Hellman, Justice O'Connor and The Threat to Judicial Independence: The Cowgirl Who Cried Wolf?, 39 Arizona State Law Journal (2007).

[168] *Caperton et al.* v. *A. T. Massey Coal Co., Inc., et al* (note 44).

extreme cases are more likely to cross constitutional limits, requiring this Court's intervention and formulation of objective standards."[169]

2. Practice

Data on acquittals in criminal cases are not available systematically. In 2008, of 91,390 federal criminal defendants disposed of, 82,451 were convicted and sentenced.[170] Of those 82,451 convicted, 79,842 pleaded guilty, and of the 2,609 who went to trial, 2,365 were convicted by a jury, not the judge.[171] Similarly, of the 233,826 federal civil actions terminated in 2008, only two percent reached trial, about half of them jury trials.[172]

3. Structure

Most decisions in United States courts, especially in first instance courts, are accompanied by brief, dispositive orders rather than written judicial opinions .because jury verdicts resolved the case. Judges are more likely to issue opinions explaining their decisions when ruling on summary judgment motions,[173] complicated evidentiary questions, or non-jury trials. Courts of appeals increasingly dispose of cases by *unpublished opinions* – a brief explanation of the holding solely for the benefit of the parties. Over 80% of federal appellate court opinions terminating cases on the merits in 2008 were *unpublished*[174] (even though various sources in fact published them until a 2006 rule amendment forbad it, some courts prohibited their citation, arguing that they were adequate for the parties but not suitable as precedents.[175]

---

[169] Id., at 17.

[170] Administrative Office of the U. S. Courts (note 5), at table D-4.

[171] Id.

[172] Id., at table C-4.

[173] See D. Hornby, The Business of the U.S. District Courts, 10 Green Bag Number 4, at 453 (2007).

[174] Administrative Office of the U.S. Courts (note 5), at table S-3.

[175] Federal Rule of Appellate Procedure 32.1, Citing Judicial Dispositions, based in part on a Federal Judicial Center study undertaken for the Judicial Conference Advisory Committee on Appellate Rules, R. Reagan et al, Citing Unpublished Opinions in Federal Appeals (2005), available at <http://www.fjc.gov/public/pdf.nsf/lookup/citrules.pdf/$file/citrules.pdf>.

4. Public Access

Appellate and some first instance judicial opinions are available on court websites and legal reporting services. Court proceedings are open to the press and public unless either party can persuade the judge to close them, a rare event. Case files are available for public inspection (frequently on line[176]) unless the judge seals them (for example, to protect cooperating witnesses or trade secrets). Most state courts permit video coverage of their proceedings, at least in some cases, but the federal courts have steadfastly resisted it. A few federal courts of appeals permit coverage but not the Supreme Court or first instance (district) courts.

Public access to court proceedings, through news media, has been affected by the decline in traditional news outlets. Newspapers struggling for survival assign fewer reporters to cover local courts, which may have an impact on the judicial process. One district judge observed "that the courtrooms are empty more and more, that the only people present are the defendant, his/her lawyer, the prosecutor, and [judges] need the presence of someone like a journalist to make sure that what we are saying is seen, controlled, that there's someone there to monitor."[177] Bloggers and newer forms of the new media are transforming communications by and about courts.[178]

III. Improper Influence on Judicial Decisions

Over 50% of U.S. respondents answered affirmatively to a recent international survey asking if they "described their judiciary/legal system as corrupt". The corresponding figure for Germany was about 15%, the United Kingdom almost 40%.[179] It is not clear how much respondents knew about improper influences on judicial decisions – as opposed to hearing about them, perhaps from television dramas – and how much

---

[176] R. Wheeler/S. Rider, The New Media and the Courts: Judges and Journalists Consider Communications By and About Courts in the Internet Era (2009), at 15, available at <http://www.rehnquistcenter.org/Documents/Post SymposiumFinal.pdf>.

[177] Id., at 24.

[178] Id.

[179] Transparency International, Global Corruption Report 2007, Corruption in Judicial Systems, at 13 (2007).

they were evaluating the broad judiciary/legal system as opposed to the judiciary per se, or distinguishing federal from state courts or courts at different levels. Those figures do not accord with most professional assessments of only limited judicial corruption within the United States, although there are certainly examples. And, of course, one might believe that forcing judges to run for election for office is by definition an improper influence.

New personal communications media enable what some believe is an improper influence on U.S. juries. Lay jurors' role is to decide facts revealed by adversary procedures in court, based on judges' instructions about controlling law. Judges regularly admonish jurors to consider only the evidence presented in court – evidence subject to the adversary process's testing – and not to do their own research about matters at issue. But easy online access through cell phones and personal digital assistants "almost invites people to do extrinsic research" said one prosecutor.[180] Judges have removed jurors and declared mistrials, and one state supreme court by rule has banned all electronic communications by jurors during trial.[181]

IV. Security

Security is not a pervasive problem for judges in the United States, in part because courthouses for the most part are well-secured. Nevertheless, the U.S. Marshall's Service, which provides security to federal judges, reported that threats against federal judges rose in 2009 for the sixth consecutive year to more than 1,300.[182] State judges, whose courts have fewer resources, are even more vulnerable.[183]

---

[180] T. Baldas, Tweeting, Texting, Googling Banned for Mich. Jurors, National Law Journal, 2 July 2009, available at <http://www.law.com/jsp/article.jsp?id=1202431948755>.

[181] Wheeler/Rider (note 176), at 26.

[182] K. Johnson, Marshals Step Up Security as Judicial Threats Rise, USA Today, 29 June 2009, available at <http://www.usatoday.com/news/nation/2009-06-28-judgethreats_N.htm>.

[183] See L. Tong, Judicial Security: Responsibilities and Current Issues (Congressional Research Service Report, 2008), available at <http://www.fas.org/sgp/crs/misc/RL33464.pdf.>.

D. Ethical Standards

I. Code of Ethics for Judges

All states and the federal courts have codes of conduct for judges. Some are binding. Others are advisory. By their nature they speak in general terms. The U.S. Judicial Conference's Code of Conduct for United States judges (i.e., for federal judges) warns that "[m]any of the restrictions in the Code are necessarily cast in general terms, and judges may reasonably differ in their interpretation."[184] Because conduct code admonitions are often vague, the federal and all state courts have created committees of judges (and, in the state committees, usually non-judges) to provide advisory opinions to judges who are unsure whether a contemplated action is consistent with the relevant code.[185] Compliance with a committee advisory opinion is usually a defence if the judge's action leads to a judicial misconduct complaint. The U.S. Judicial Conference's Codes of Conduct Committee, and some state committees, post, with redactions, those advisory opinions that the committee believes are likely to have general relevance.[186]

II. Training

Continuing education about judges' ethical responsibilities is a staple of the judicial education in the United States that is provided by the federal and state courts judicial education agencies. In those states that mandate certain hours of judicial education, ethics is usually the education at issue.

---

[184] Canon 1, Commentary, Code of Conduct for United States Judges (effective 1 July 2009), available at <http://www.uscourts.gov/library/codeOfConduct/Revised_Code_Effective_July-01-09.pdf>.

[185] American Judicature Society, Links to Judicial Ethics Advisory Committees, available at <http://www.ajs.org/ethics/eth_advis_comm_links.asp>. See C. Gray, Advisory Committees Let Judges Look Before they Leap, 42 Judges' Journal 29 (2003) and An Interview with Judge M. Margaret McKeown: Interpreting the Code, The Third Branch, July 2009, available at <http://www.uscourts.gov/ttb/2009-07/article06_1.cfm?WT.cg_n=TTB&WT.cg_s=July09_article06_tableOfContents>.

[186] Published Advisory Opinions, available at <http://www.uscourts.gov/guide/advisoryopinions.htm>.

E. Supreme/Higher Courts

Less noticed than the concern of federal and state supreme court selection battles[187] are proposals to limit U.S. Supreme Court Justices' tenure.[188] Historically, proposals to abolish federal life tenure were driven by ideological hostility to the Court's decisions. The current tenure argument is institutional, *viz.*, that the nation's founders conceived life tenure when judges had much shorter life spans than the several decades and more that Justices now serve, unencumbered by mandatory retirement ages common throughout the world. Most circuit and district judges take senior status shortly after eligibility, usually at or soon after reaching age 65, but Supreme Court Justices as of late keep serving into their seventies and beyond, which limits Presidents' ability to use the appointment process, as Chief Justice Rehnquist said, to put a "popular imprint" on the judiciary.[189] The latest proposal, offered mainly by law professors with diverse jurisprudential and ideological outlooks, calls for regularized Supreme Court appointments every two years, creating in effect a term for each Justice of 18 years.[190] The proposal is now an academic curiosity, although it could become something else if, for example, the Court saw a crisis of several superannuated Justices unable to do their work and refusing entreaties to retire.

F. Conclusion

For the most part, the United States has managed to balance judicial independence with the judicial accountability demanded by its political culture, although that generalization begs of exceptions given the United States' 53 separate judicial systems. That generally successful balancing is true in part because some of the biggest potential threats to independent decision-making have not flowered fully, despite the trou-

---

187 See, regarding state elections, e.g., Schotland (note 37) and as to federal judicial nominations, Wheeler (note 67) and Wittes (note 68).

188 A. Amar et al, Four Proposals for a Judiciary Act of 2009, available at <http://www.scotusblog.com/wp/wp-content/uploads/2009/02/judiciary-act-of-2009.doc> and R. Cramton/P. Carrington (eds.) Reforming the Court, Term Limits for Supreme Court Justices (2006).

189 See *supra* B. II. 2. b) Federal Judge Selection.

190 Amar et al (note 188).

bling spectre of issue-driven and money-fuelled state supreme court elections, contentious ideological battles over the selection of some federal judges, and legislative threats of the last decade, albeit unrealized, to bring courts and judges to heel.

The United States experience shows that by and large judges can make impartial decisions in an environment of accountability, even recognizing occasional lapses. One reason for this judicial independence is a countervailing cultural expectation that judges should in fact decide cases impartially. Another, truth be told, is the relatively low visibility of courts in all but highly controversial cases. If major segments of the population knew more about what courts did, they might be less tolerant of their work.

Also, though, the courts' ability to meet the legitimate demands of popular accountability enhances their capacity to reject illegitimate demands. Transparency in judicial discipline proceedings is one example – especially state judiciary's including non-judges in the process, but as well, the federal judiciary's not "hiding [its] dirty linen in the closet",[191] as one court reform group said praising the 2006 report about the federal judiciary's implementation of the 1980 Judicial Conduct and Disability Act.[192] Engaging the other branches of government is another, as seen in the judges' using personal and political ties to deal in good faith with legislative funders.

Whether there is anything here that other countries might emulate is a difficult question. Specific procedures – advisory committees to interpret vague code of conduct provisions, for example – may be helpful to jurisdictions that do not have them now. Other elements – judicial elections, for example – are viruses that few outside the country want to contract. But to the degree judicial independence depends on a country's political and judicial culture, exportation of one country's experience to another is likely of limited value.

---

[191] Politics and Progress in Federal Judicial Accountability (Editorial), 90 Judicature Number 2, at 52 (2006).

[192] Judicial Conduct and Disability Act Study Committee (note 121).

Judicial Independence in Canada: A Critical Overview

*Fabien Gélinas**

A. Introduction

In Canada, judicial independence is broadly understood as a fundamental principle underlying the constitution. The specific norms that give life to this general principle form a highly complex patchwork of rules and practices which range from unwritten political understandings to constitutionally entrenched legal provisions. The complexity of this patchwork is partly due to a federal structure having been superimposed onto pre-existing constitutional arrangements, the fundamentals of which are largely unwritten.

The source of judicial independence in Canada can be traced back to the British constitutional tradition and particularly to the Act of Settlement of 1701.[1] The historical importance of judicial independence in the Canadian context has been a function of the special role played by the judiciary as an impartial arbiter of the federal system.[2] Since the adoption of the Canadian Charter of Rights and Freedoms in 1982,[3] judicial independence has been enhanced by the renewed role of the judi-

 The preparation of this chapter was made possible by a grant from the FQRSC. The author wishes to thank Mr Vincent Locas for his able assistance.

1 Act of Settlement, 1701, 12 & 13 Wm 3 (UK).

2 *Beauregard* v. *Canada*, (1986) 2 Supreme Court Reports of Canada (S.C.R.) 56, at para. 27 (hereinafter *Beauregard*).

3 Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (UK) (hereinafter the Charter).

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233, DOI 10.1007/978-3-642-28299-7_14, © by Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V., to be exercised by Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Published by Springer-Verlag Berlin Heidelberg 2012

ciary in the defence of individual rights and freedoms against intrusion by any organ of the state.[4]

The aim of this chapter is to provide a critical overview of judicial independence in Canada in terms of both institutional structures and informal practices. The chapter broadly follows a template suggested by the editor,[5] but emphasizes the features which may appear useful as best practices or which may require attention as problem areas.

B. Structural Safeguards

Federal-provincial power sharing in respect of superior courts is an important feature of the Canadian judicial system as contemplated by the Constitution Act, 1867. While section 96 of that Act places control over appointments of Superior Court judges in the hands of the federal government, the provinces enjoy legislative control over the administration of justice in the province under section 92. Superior courts, also known as Section 96 courts, are the only ones whose independence is expressly addressed in constitutional documents. The provinces, however, have created lower courts under section 92 of the Constitution Act, 1867. Even though these lower provincial, or Section 92, courts are under the supervisory jurisdiction of the federally appointed superior courts, they handle the vast majority of cases.[6] Section 101 of the Constitution Act, 1867 gives the Federal Parliament the power to establish federal courts. Under that power, Parliament has notably established the Supreme Court of Canada (hereinafter the "Supreme Court") and what is now called the Federal Court.

---

4 *Beauregard* (note 2), at para. 28.

5 The structure of the chapter thus departs from the way in which the Supreme Court of Canada presents judicial independence, i.e.: as having an institutional and a personal, or individual, dimension, and three components, namely: security of tenure, financial security and administrative autonomy.

6 A historical account of the role of provincial courts can be found in P. H. Russell, Introduction: How We Got There, in: P. H. Russell (ed.), Canada's Trial Courts: Two Tiers or One, 3, at 4-12 (1st ed., 2007); for an empirical study of the distribution of criminal cases between superior and provincial courts, see C. M. Webster/A. N. Doob, Superior Courts in the Twenty-first Century: A Historical Anachronism?, in: P. H. Russell (ed.), Canada's Trial Courts: Two Tiers or One, 57, at 57 (1st ed., 2007).

Structural safeguards vary according to the four broad categories of courts outlined above: Superior (Section 96) Courts (provincial administration and federal appointments and remuneration); Lower (Section 92) Courts (provincial administration and provincial appointments and remuneration); Federal (Section 101) Courts (federal administration and federal appointments and remuneration); and the Supreme Court, a Section 101 court which is in a category of its own.

I. Administration of the Judiciary

One of the features that Canada has retained from its British institutional heritage is an *executive* model of court administration. Formally, in each province, courts are, for the most part, administered as a division of the Ministry of the Attorney General, and not as a separate department or branch of government. Executive administration follows the normal lines of accountability over public funds based on the principle of ministerial responsibility before the legislature. As under the British system, the allocation of responsibilities for court administration has traditionally been mostly a matter of legislative provision. Nevertheless, courts have long considered that a core area of administrative autonomy is constitutionally protected from interference by the political branches, i.e.: the executive and the legislative branches.

1. Organs in Charge of the Administration of the Judiciary

In terms of constitutional requirements, courts are responsible for and have "control over the administrative decisions that bear directly and immediately on the exercise of the judicial function".[7] These decisions relate, for example, to the "assignment of judges", to the "sittings of the courts", to the establishment of "court lists", as well as to the "allocation of court rooms and direction of the administrative staff engaged in carrying out these functions".[8] The definition of administrative autonomy given by the Supreme Court remains open-ended in the sense that it does not provide an exhaustive list of the matters that must remain

---

[7] *Valente* v. *The Queen*, (1985) 2 S.C.R. 673, at 712 (hereinafter *Valente*); see also: *R.* v. *Généreux*, (1992) 1 S.C.R. 259, at 286 (hereinafter *Généreux*).

[8] Id.

under the control of judges.[9] Apart from these core functions, it is widely assumed that the executive model prevails, leaving important administrative areas, such as the establishment of budgets, within the purview of departments of justice or of the Attorney General. Nevertheless, courts are often consulted on most decisions that concern them and, in some cases, enjoy the benefits of memoranda of understanding detailing their agreement with the executive on such matters.[10]

The area of constitutionally protected administrative autonomy has been the object of increasing scrutiny and may be in an evolutionary phase. As early as 1985, the then Chief Justice of Canada publicly took the position that greater administrative autonomy was required as a matter of principle.[11] He noted that, "effectively, the financial and administrative requirements of the judiciary for the dispensing of justice are in the hands of the very ministers who are responsible for defending the Crown's interests before the courts", before stating that "[p]reparation of judicial budgets and distribution of allocated resources should be under the control of the chief justices of the various courts, not the ministers of justice" and that "[c]ontrol over finance and administration must be accompanied by control over the adequacy and direction of support staff".[12] Taking the matter further, the Alternative Models Report commissioned by the Canadian Judicial Council (hereinafter the "CJC") suggested in 2006 that constitutional requirements might have evolved in such a way as to put current practices at odds with constitutional imperatives.[13] In the context of a constitutional reference concerning the remuneration of provincial court judges, the Supreme Court had established that by virtue of a constitutional imperative of depoliticization, "the legislature and executive cannot, and cannot appear to, exert political pressure on the judiciary".[14] Depoliticiza-

---

9 *Mackeigan* v. *Hickman*, (1989) 2 S.C.R. 796, at para. 56.

10 C. Baar/K. Benyekhlef/F. Gélinas/R. Hann/L. Sossin, Alternative Models of Court Administration (Report commissioned by the Canadian Judicial Council, Ottawa: CJC, September 2006), at 12 (hereinafter Alternative Models Report).

11 Address delivered at the Canadian Bar Association Conference in Halifax on 21 August 1985, as quoted in M. L. Friedland, A Place Apart: Judicial Independence and Accountability in Canada, at 179 (1995).

12 Id.

13 Alternative Models Report (note 10), at 69.

14 *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, (1997) 3 S.C.R. 3, at para. 140 (hereinafter *Remuneration Refer-*

tion required the formalization of the relations between the political branches and the judiciary and, thus, in the context of financial independence, the establishment of independent remuneration commissions. The Alternative Models Report found that this has a necessary implication for administrative autonomy.[15] From an institutional perspective, independence is generally taken to depend on the perception of a reasonable and informed person:[16] "the appropriate question is whether a tribunal, from the objective standpoint of a reasonable and informed person, will be perceived as enjoying the essential conditions of independence."[17] From that perspective, it is clear that court administration currently gives rise to *politicized* relationships. "It seems unquestionable", in the words of the Alternative Models Report, "that negotiations over administrative and budgetary matters have the same potential to affect the public perception of judicial independence" as did negotiations over matters pertaining to remuneration.[18] It is quite likely, therefore, that the relevant constitutional norms call for a greater degree of administrative autonomy than what is currently afforded.[19] It remains a matter for conjecture whether and to what extent the political branches will voluntarily divest themselves of their power over court administration.

Concluding on the issue of administration, it should be noted that federal (Section 101) courts enjoy a somewhat higher degree of administrative autonomy. Executive responsibilities in respect of federally appointed judges are partly exercised through the Office of the Commissioner for Federal Judicial Affairs, which oversees the administration of salaries, pensions, and other benefits for federal judges, and through the Courts Administration Service, which places administrative services for the federal courts at arms length from the executive.[20] The Chief Ad-

---

ence). Note that the Court's analysis is focused strictly on appearances; in no way does it suggest the existence of actual political pressures.

15 Alternative Models Report (note 10), at 51.

16 *Valente* (note 7), at 689; *Généreux* (note 7), at 287.

17 *Généreux* (note 7), at 287.

18 Alternative Models Report (note 10), at 52.

19 Id., at 69. It should be noted that the Alternative Models Report also reasons from the perspective of administrative efficiency, management best practices and accountability.

20 See, in respect of the Office of the Commissioner for Federal Judicial Affairs: Judges Act, Revised Statutes of Canada (R.S.C.) 1985, c. J-1, § 74(1)(a) (hereinafter Judges Act). In respect of the Courts Administration Service, see:

ministrator negotiates the size of the budget allocation directly with treasury authorities without interference from the Ministry of Justice, a practice which ensures more financial autonomy.[21] Both the Office of the Commissioner for Federal Judicial Affairs[22] and the Courts Administration Service[23] formalize a certain measure of distance between the executive and the judiciary, whereas provincial courts are usually administered more directly by the Attorney General's department or department of justice.

2. Judicial Council

The CJC was established in 1971 by the federal Judges Act, with the objectives of promoting efficiency, uniformity, and accountability, and of improving the quality of judicial services in all federally staffed courts.[24] The CJC is an independent body chaired by the Chief Justice of Canada, who is the Chief Justice of the Supreme Court. The CJC is composed exclusively of members of the judiciary, specifically, the chief justices and associate chief justices of the federally staffed courts, as well as senior judges from the federal territories.[25] The CJC is notably responsible for handling complaints about judicial conduct.

The Judges Act has equivalents in provincial statute books which establish judicial councils with responsibilities in respect of provincially appointed judges.[26] These provincial councils are entrusted with the pro-

---

Courts Administration Service Act, Statutes of Canada (S.C.) 2002, c. 8, § 2, 7 (hereinafter Courts Administration Service Act). This services the Federal Court of Appeal, the Federal Court, the Court Martial Appeal Court and the Tax Court. The Supreme Court has its own administrative services.

21 See Courts Administration Service Act (note 20), § 7(3). The same may be said in respect of the budget of the Supreme Court.

22 Office of the Commissioner for Federal Judicial Affairs, see <http://www.fja-cmf.gc.ca>.

23 Courts Administration Service; see <http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/CAS/>.

24 Judges Act (note 20), Part II, §§ 59-71.

25 Id. The senior judges are identified in § 59(1)(c).

26 See e.g., in Quebec, the Courts of Justice Act, Revised Statutes of Quebec (R.S.Q.) c.T-16, Part VII, § 279, establishing the *Conseil de la magistrature*. Note that Prince Edward Island, the smallest Canadian province, has not established a judicial council.

motion of high professional standards of conduct, in addition to the investigation of complaints pertaining to the alleged improper conduct of judges. They are generally more diverse than the CJC and include lawyers and members of the general public in addition to judges.[27] The members who are not members *ex officio* are appointed by the government but represent only a minority of the membership.[28]

II. Selection, Appointment and Reappointment of Judges

Canadian judicial appointments generally remain firmly within the purview of the executive branch. Appointments are based largely on merit understood broadly,[29] which includes the potential contribution of the candidate to diversity on the bench.[30] Overt and systematic political nominations are no longer considered acceptable.[31] Partisanship and political patronage in the appointment of judges have certainly decreased over the years, particularly since the establishment of judicial advisory committees in the 1980s. The fact remains, however, that the

---

[27] E.g., id., § 248.

[28] E.g., id., § 249.

[29] Professional competence and overall merit are the organizing criteria for the work of the federal judicial appointments advisory committees detailed in section B. II. 2. The Process of Judicial Selection. The Office of the Commissioner for Federal Judicial Affairs has compiled guidelines for the use of committees based on committee experience. The guidelines include a list of factors to be considered in the assessment of potential candidates, see <http://www.fja.gc.ca/appointments-nominations/assessment-evaluation-eng.html>.

[30] The importance of diversity has been recognized in judicial decisions. See e.g. *R.* v. *S (R.D.)*, (1997) 3 S.C.R. 484, at paras. 38, 119. The Canadian Bar Association recommended that contribution to diversity be included in merit criteria in 2005. Examples include "bilingualism" and "awareness of racial and gender issues". See Federal Judicial Appointment Process (Ottawa: Canadian Bar Association, October 2005), available at <http://www.cba.org/CBA/Submissions/pdf/05-43-eng.pdf>. Statistics on gender parity in the federal judiciary are published by the Office of the Commissioner for Federal Judicial Affairs. See <http://www.fja-cmf.gc.ca/appointments-nominations/judges-juges-eng.html>.

[31] The need for improvement was notably highlighted by the Canadian Bar Association in its Report on the Appointment of Judges in Canada (The McKelvey Report) (Ottawa: The Canadian Bar Association, 1985), available at <http://www.cba.org/CBA/Submissions/pdf/05-43-eng.pdf>.

system relies on the judicious exercise of an executive discretion which is still widely considered absolute. The executive's discretion exists not only in respect of recommendations to the Governor in Council regarding specific appointments, but also in respect of the composition and procedures of the judicial advisory committees that review the files of candidates.

1. Eligibility

All members of the Canadian judiciary come from the legal profession. Under the Judges Act[32] and the Supreme Court Act,[33] a federally appointed judge must have spent at least ten years at a provincial bar before appointment. Interviews by a selection committee are in some cases part of the process, which is detailed below.[34] In the recent past, candidates for appointment to the Supreme Court have been interviewed by parliamentary committees, a practice which remains controversial and has yet to be firmly established.[35]

2. The Process of Judicial Selection

Since 1988, committees managed by the Office of the Commissioner for Federal Judicial Affairs have been responsible for recommendations to the executive leading to federal judicial appointments.[36] These committees study each candidature and communicate their assessment to the Minister of Justice who, in turn, makes a recommendation to the Gov-

---

[32] Judges Act (note 20).

[33] Supreme Court Act, R.S.C. 1985, c. S-26 (hereinafter Supreme Court Act).

[34] See e.g., in Quebec, Regulation Respecting the Procedure for the Selection of Persons Apt for Appointment as Judges, R.Q. c. T-16 r. 5, § 15.

[35] For contrasting positions, see S. Grammond, Transparence et imputabilité dans le processus de nomination des juges de la Cour suprême du Canada, 36 Revue Générale de Droit 739, at 753-754 (2006); and J. Ziegel, A New Era in the Selection of Supreme Court Judges?, 44 Osgoode Hall Law Journal 547, at 549 (2006).

[36] Although Supreme Court judges are also appointed by the Governor General, the process leading to these appointments is separate and currently in flux. See section E. Supreme Court.

ernor General based on the advice of the committee.[37] An appointment is then made by the Governor General[38] in conformity with the recommendation from the Minister of Justice.

The committees are composed of representatives from the relevant provincial bar and the provincial section of the Canadian Bar Association, a federally appointed judge designated by the relevant chief justice, a representative from the law enforcement community and other members designated by the provincial and federal ministers of justice.[39] Candidates must express their interest in a judicial appointment and provide the necessary supporting documentation. Following an assessment of the applications, the committees provide the federal Minister of Justice with lists of candidates with one of two assessments*: recommended* or *unable to recommend*.[40]

Provincial appointments, are, likewise, generally entrusted to the Minister of Justice, Attorney General or Lieutenant-Governor of the province, usually following provincial cabinet consultation and approval. Generally, an appointment is made only after a candidate's application has been considered by a selection committee (typically with representation from the legal profession, the judiciary and the public). The composition and nature of such committees varies from one province to another. The executive is not required to press forward with a candidate

---

[37] Note that appointments to the offices of Chief Justice and Associate Chief Justice, which may be made from outside the ranks of the judiciary, normally proceed on the direct recommendation of the Prime Minister. See Office of the Commissioner for Federal Judicial Affairs, Guidelines for Advisory Committee Members, December 2006, available at <http://www.fja-cmf.gc.ca/appointments-nominations/committees-comites/guidelines-lignes-eng.html#ReportToMinisterOfJustice>.

[38] Constitution Act, 1867, § 96.

[39] Except for the representative of the judiciary, the Minister of Justice appoints all committee members from lists provided by the designated stakeholders.

[40] See Office of the Commissioner for Federal Judicial Affairs, Guidelines for Advisory Committee Members, December 2006, available at <http://www.fja-cmf.gc.ca/appointments-nominations/committees-comites/guidelines-lignes-eng.html#ReportToMinisterOfJustice>.

recommended by the committee but as a rule cannot appoint a candidate who has not been recommended.[41]

Once appointed, judges may choose from a wide range of training courses delivered notably, at the federal level, by the National Judicial Institute, the Canadian Institute for the Administration of Justice, the CJC and the Office of the Commissioner for Federal Judicial Affairs. All of these organizations offer educational activities tailored specifically for judges. They cover all relevant subject matters, legal and otherwise, ranging from cultural sensitivity to case-management, and from ethics to language skills.[42] Language skills are of particular concern in the bilingual environment of federal judicial services. Since 1978, the Office of the Commissioner for Federal Judicial Affairs has been running a language training programme tailored to the specific needs of judges.[43] Judges benefit from such training programmes throughout their career.

3. Length of Office and Reappointment

The issue of reappointment arises in Canada mostly in respect of administrative tribunals and agencies, which are beyond the scope of this chapter.[44] Generally, it does not arise in respect of the courts of law contemplated here. Members of the judiciary, as detailed below, generally enjoy security of tenure to the age of retirement.

---

[41] See, e.g., in Ontario, the Courts of Justice Act, Revised Statutes of Ontario (R.S.O) 1990, c.C-43, § 43; in Quebec, Regulation Respecting the Procedure for the Selection of Persons Apt for Appointment as Judges (note 34), § 9.

[42] For a glimpse of such programmes, see the web site of the National Judicial Institute, available at <http://www.nji.ca/nji/index.cfm>.

[43] See Office of the Commissioner for Federal Judicial Affairs, Judges' Language Training, available at <http://www.fja-cmf.gc.ca/training-formation/index-eng.html>.

[44] Tribunal members are generally appointed for a fixed term, which raises the question of reappointment in light of judicial independence.

III. Tenure and Promotion

1. Tenure

Security of tenure is viewed as a critical aspect of judicial independence in Canada. Full security in this respect means that a judge may sit until the age of retirement and can only be removed for cause, following an independent investigation and parliamentary intervention. In the British tradition, security of tenure is contrasted with political appointment where one serves at the government's pleasure. Security of tenure ensures that judicial decisions are guided by relevant considerations alone, and that fear of removal on the part of judges will not affect their decision-making.

In respect of Superior Court judges, section 99 of the Constitution Act, 1867 provides that they "shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and the House of Commons",[45] and that they "shall cease to hold office upon attaining the age of 75 years". This is complemented by legislation guaranteeing judicial tenure in similar terms for other judges.[46]

---

[45] This section reproduces the relevant portion of the Act of Settlement (note 1).

[46] Federal Courts Act, R.S.C. 1985, c. F-7, § 8; Supreme Court Act (note 33), § 9; Judges Act (note 20), § 8 (a special provision on retirement age applicable to some federally appointed provincial court judges) and § 41.1 (applicable to retiring judges of the Supreme Court of Canada). The governing constitutional provision is section 99(2) of the Constitution Act, 1867. This provision, which on its face concerns Superior Court judges, was applied to Federal Court judges in a Federal Court decision from which the government did not appeal: *Addy* v. *The Queen*, (1985) 2 F.C. 452. The standard of security of tenure that is constitutionally protected in respect of provincial (section 92) courts remains unclear after *Remuneration Reference* (note 14), at para. 106. Legislation regarding provincially appointed judges use the expression "good behaviour" or require cause for removal, and generally provide for retirement at age 70, see e.g., New Brunswick Provincial Court Act, Revised Statutes of New Brunswick (R.S.N.B.) 1973, c. P-21, § 6; Newfoundland and Labrador Provincial Court Act, 1991, Statutes of Newfoundland and Labrador (S.N.L.) 1991, c. 15, § 10; Nova Scotia Provincial Court Act, Revised Statutes of Nova Scotia (R.S.N.S.) 1989, c. 238, § 6; Courts of Justice Act, R.S.O. 1990, c.C-43, § 51.8(1) (Ontario); Courts of Justice Act, R.S.Q. c. T-16, § 86 (Quebec).

2. Promotion

Promotion to the rank of Associate Chief Justice, Chief Justice, or to the ranks of a higher court is a judicial appointment and, therefore, is in the hands of the relevant executive following the applicable procedure. In practice, the majority of judges exercising appellate jurisdiction have had experience as trial judges. Provincially appointed judges considered for a federal appointment are put on a different track whereby the relevant appointment committee does not provide an assessment but is invited to comment on the candidates.[47]

IV. Remuneration

1. Level of Remuneration

Members of the judiciary enjoy a satisfactory level of remuneration which is commensurate with deputy-ministerial level salaries,[48] though it is some distance away from the levels of remuneration found in the higher echelons of private legal practice.[49] The Supreme Court has made it clear that a "basic minimum level" of remuneration is constitutionally guaranteed.[50] "Public confidence in the independence of the judiciary," as the Supreme Court put it, "would be undermined if judges were paid at such a low rate that they could be perceived as susceptible to political pressure through economic manipulation."[51]

Financial security has always been considered a fundamental component of judicial independence in Canada. In *Valente*, the Supreme Court defined financial security as follows:

> "The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary inter-

---

[47] See Office of the Commissioner for Federal Judicial Affairs, Process for an Application for Appointment, available at <http://www.fja-cmf.gc.ca/appointments-nominations/process-regime-eng.html#Expression>.

[48] Deputy-ministerial levels of remuneration are published by the Treasury Board of Canada, Advisory Committee on Senior Level Retention and Compensation, available at <http://www.tbs-sct.gc.ca/rp/adcm11-eng.asp>.

[49] The remuneration of federally-appointed judges is provided in the Judges Act (note 20), §§ 9-24.

[50] *Remuneration Reference* (note 14), at para. 137.

[51] Id.

> ference by the Executive in a manner that could affect judicial independence. In the case of pension, the essential distinction is that between a right to a pension and a pension that depends on the grace or favour of the Executive."[52]

The Supreme Court came back to the issue of financial security in *Beauregard*, where a statute requiring Superior Court judges to contribute to their pension plan from their salaries was challenged. The statute placed judges on the same footing as other Canadians in this respect. In interpreting section 100 of the Constitution Act, 1867, which simply states that the relevant "salaries, allowances and pensions […] shall be fixed and provided by the Parliament of Canada", the Supreme Court recognized that Parliament had the power to alter the retirement plans of judges, but pointed out that this power to set not only pensions but also salaries was not unlimited in view of the principle of judicial independence:

> "The power of Parliament to fix the salaries and pensions of superior court judges is not unlimited. If there were any hint that a federal law dealing with these matters was enacted for an improper or colourable purpose, or if there was discriminatory treatment of judges vis-à-vis other citizens, then serious issues relating to judicial independence would arise and the law might well be held to be ultra vires s. 100 of the Constitution Act 1867."[53]

However, it is in the context of provincial legislation and provincial courts that the Supreme Court found an occasion to expand more fully on financial independence.

The *Remuneration Reference* was the result of a challenge to salary-reduction legislation affecting provincial court judges that was enacted in three provinces: Prince Edward Island, Alberta, and Manitoba. Given that provincial courts routinely hear criminal law cases, those facing trial were in a position to raise the question "whether and how the guarantee of judicial independence in s. 11(d) of the [Charter] restricts the manner by and the extent to which provincial governments and legislatures can reduce the salaries of provincial court judges".[54] The three cases were joined for the purposes of the reference. The Supreme Court established that "the express provisions of the Constitution Act, 1867 and the Charter are not an exhaustive written code for the protection of

---

52 *Valente* (note 7), 704.

53 *Beauregard* (note 2), at para. 77.

54 *Remuneration Reference* (note 14), at para. 1.

judicial independence in Canada", that judicial independence "is at root an unwritten constitutional principle, in the sense that it is exterior to the particular sections of the Constitution Acts".[55]

Where *Valente* had focussed on the individual dimension of financial independence, the *Remuneration Reference* articulated three aspects of the institutional dimension of financial independence. When applied to provincial courts, these aspects are as follows: the salaries of provincial court judges can be reduced, but there is a constitutional obligation to establish independent, effective and objective panels to make recommendations in this regard, which can then only be disregarded on rational grounds; the judiciary cannot engage in negotiations in these matters, collectively or individually, with the executive or the legislature; no reduction can have the effect of taking salaries below the minimum level required by the judge's responsibilities.[56]

The outcome of the *Remuneration Reference* was the establishment of independent provincial remuneration commissions throughout Canada. In view of the constitutional mandate of these commissions, the status of the recommendations they would issue was novel. A legislature or government may decide to depart from a salary recommendation, but it is required to provide rational grounds for doing so; these grounds are then subject to judicial review on a criterion of rationality.[57]

An independent remuneration commission also exists for federally appointed judges.[58] On the basis of representations and expert evidence, these commissions determine the appropriate level of remuneration for

---

55 Id., at para. 83.

56 M. Robert, L'indépendance judiciaire de Valente à aujourd'hui: Les zones claires et les zones grises, at 26 (1st ed., 2003). (Translation by author.)

57 *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Quebec (Attorney General); Minc v. Quebec (Attorney General)*, (2005) 2 S.C.R. 286.

58 The federal system does not contemplate discrepancies between provinces and regions, except for a "northern allowance." See Office of the Commissioner for Federal Judicial Affairs, Considerations which Apply to an Application for Appointment, available at <http://www.fja-cmf.gc.ca/appointments-nominations/considerations-eng.html#Remuneration>. A base increase is provided in the Judges Act (note 20), § 25. Provincial commissions work independently, although their conclusions are normally part of the filings in other provinces. The commissions system would, in theory, allow for a reduction in salaries in case of a crisis affecting government expenditures across the board.

judges over time and make recommendations for the relevant period, which is typically three or four years.

2. Benefits and Privileges

Apart from the pension benefits mentioned below, judges enjoy the advantages of group life insurance, health and dental insurance[59] and receive an allowance to cover various professional expenses. Training and continuing education are also generously provided for.

In terms of honours and privileges, the title *honourable* is conferred upon federally-appointed as well as provincially appointed members of the judiciary. Judges rank above members of the legislature in the ceremonial table of precedence for Canada as well as those of several provinces.[60]

3. Retirement

All judges enjoy a generous pension upon retirement. To take the example of federally-appointed judges, the pension package is worth two-thirds of their salary following as little as 15 years of service.[61] This is a very generous pension plan in the Canadian context.

V. Case Assignment and Recusal

It is the Chief Justice of a court or one of the Associate Chief Justices who is generally in charge of the assignment or, exceptionally, the reassignment of cases.[62] This has long been considered to be at the core of the administrative autonomy that courts institutionally require under the constitutional principle of judicial independence. It has been an area, therefore, in which the executive has had no role to play. Assignments depend on the practice of each court and are often, but not al-

---

[59] Judges Act (note 20), §§ 41.2-41.5.

[60] For the federal table, see <http://www.pch.gc.ca/pgm/ceem-cced/prtcl/precedence-eng.cfm>.

[61] Government submission to the federal Remuneration Commission, reported in the Ottawa Citizen, 8 April 2008.

[62] See e.g., Ontario Courts of Justice Act, R.S.O. 1990, c.C-43, § 75(1)3.

ways, made at random. Account may be taken of the particular expertise and experience of judges as well as their respective workloads. Depending on the relevant requirements of bilingualism, language abilities can play a role in decisions pertaining to assignments.[63] In addition, certain courts have lists or divisions corresponding to subject matter expertise. For example, the Superior Court of Justice of Ontario in Toronto has a commercial list and an estates list.[64] Re-assignments only occur where it is impossible for a judge to proceed to the final determination of a case.

In the common law provinces, recusal (also called disqualification) of a judge is governed by a scant body of case-law.[65] The only codification of the procedure and grounds for disqualification is found in the Quebec Code of Civil Procedure, which broadly reflects what may be called a Canada-wide practice.[66] Judges are expected to make a disclosure and, as the case may be, to recuse themselves of their own motion as soon as they become aware of a situation that would give rise to a reasonable apprehension of bias. Examples of such situations would include a judge having a pecuniary interest in the outcome of the case or a close family, personal or professional relationship with a litigant, counsel or witness, or having expressed views showing a bias toward a litigant.[67] When a party requests the recusal of a judge, it is generally the impugned judge himself who gets to decide whether the alleged grounds for recusal are established and sufficient.[68] This determination is subject to an appeal, as would a decision on an interlocutory matter.[69] As is the

---

[63] Id., § 126(2)1.

[64] See Ontario Superior Court of Justice, Civil Proceedings at the Superior Court of Justice of Ontario, available at <http://www.ontariocourts.on.ca/scj/en/about/civil.htm>.

[65] See generally P. Bryden, Legal Principles Governing the Disqualification of Judges, 82 Canadian Bar Review 555 (2003); G. S. Lester, Disqualifying Judges for Bias and Reasonable Apprehension of Bias: Some Problems of Practice and Procedure, 24 Advocates Quarterly 326 (2001).

[66] Quebec Code of Civil Procedure, R.S.Q., c. C-25, § 234-242.

[67] J.O. Wilson, A Book for Judges (1980), at 234-235.

[68] Bryden (note 65), at 594.

[69] Quebec Code of Civil Procedure (note 66), § 238; with respect to the common law provinces, this practice is outlined in British cases: *Re Pinochet Ugarte*, (1998) House of Lords Journal (H.L.J.) No. 52 (House of Lords); *Locabail (UK) Ltd.* v. *Bayfield Properties Ltd.*, (1999) E.W.J. No. 5918 (S.C.J., C.A., civil div.).

case with other courts, a request for recusal of a Supreme Court judge is also heard by the judge against whom the allegations are made, who then rules on the matter.[70] The Rules of the Supreme Court require that the issue be set out in the Notice of Appeal, before the constitution of the Bench.[71] Apart from situations arising from the recusal procedure initiated by a party and cases of suspension or removal for disciplinary or health reasons, no one can remove an assigned case from a judge without the consent of that judge.

VI. Judicial Conduct Complaint Process

The CJC is responsible under the Judges Act for the review of complaints against members of the federally appointed judiciary.[72] Complaints are treated according to the procedures adopted from time to time for this purpose by the CJC.[73]

A complaint about the conduct of a judge may be filed by anyone. The CJC endeavours to process all complaints, including anonymous complaints. A complaint is first examined by a member of the CJC who decides whether the complaint calls for further investigation. If so, a copy of the complaint and request for comments is notified to the judge in question and the appropriate chief justice. Additional comments may also be requested from the complainant. In cases of serious allegations of inappropriate conduct, further investigation is undertaken, with the assistance of a lawyer where needed. The latter may conduct interviews and prepare a report. The CJC may then appoint an independent counsel to make further inquiries.

The matter may then be entrusted to a panel of up to five CJC members and senior judges for further review. Where the panel finds that the complaint has merit but is not sufficiently serious to require a formal

---

[70] *Arsenault-Cameron* v. *Prince Edward Island*, (1999) 3 S.C.R. 851; B. A. Crane/H. S. Brown, Supreme Court of Canada Practice (2007), at 48.

[71] Rules of the Supreme Court of Canada, § 33(f), available at <http://www.scc-csc.gc.ca/ar-lr/rules-regles/2006/doc-eng.asp#n26>.

[72] Judges Act (note 20), §§ 59-71.

[73] Canadian Judicial Council, Procedures for Dealing with Complaints made to the Canadian Judicial Council about Federally Appointed Judges, 27 September 2002, available at <http://www.cjc-ccm.gc.ca/cmslib/general/conduct_complaint_procedures_en_fr.pdf>.

inquiry, the panel may recommend remedial action, such as counselling, or issue an expression of concern, and close the file. Where the matter is considered very serious or if the complaint was filed by a provincial Attorney General or the Minister of Justice of Canada, an Inquiry Committee will be appointed to hold a public hearing. The Inquiry Committee reports to the CJC, which meets for consideration of the matter and to make a determination, which may involve a recommendation that the impugned judge be removed from office. The complainant is informed of the result by the CJC.

As noted above, the CJC has provincial equivalents with jurisdiction over provincially-appointed judges.[74] These provincial councils are responsible for the promotion of high professional standards of conduct, in addition to the investigation of complaints pertaining to the alleged improper conduct of judges. Provincial councils each have their own procedure for handling complaints.

VII. Judicial Accountability: Discipline and Removal Procedures

1. Formal Requirements

The complaints procedure outlined above is not strictly separate from discipline and removal procedures.[75] This means that anyone can initiate a procedure that can lead to discipline or removal.

2. Disciplinary Proceedings

Although anyone can initiate a procedure by filing a complaint with the CJC, only a procedure filed by a provincial Attorney General or the Minister of Justice of Canada requires the establishment of an Inquiry Committee by the CJC.[76] The CJC can also set up an Inquiry Committee to deal with private complaints that raise very serious issues. An Inquiry Committee is normally composed of three members of the CJC

---

[74] See e.g., in Quebec, Courts of Justice Act, R.S.Q. c.T-16, Part VII, § 279, establishing the *Conseil de la magistrature*.

[75] Judges Act (note 20), §§ 59-71.

[76] The CJA considers less than 200 new cases per year. See CJC, Annual Report 2010-2011, available at <http://www.cjc-ccm.gc.ca/cmslib/ar10-11/CJCannual_10-11_eng.pdf>.

and two members of the relevant provincial bar association. Once set up, the Inquiry Committee holds a public hearing where evidence is adduced and counsel are heard. The Committee reports to the CJC, which meets for consideration of the matter and to make a decision. The CJC may then make a recommendation to the Minister of Justice which is relayed to the Houses of Parliament, that the judge be removed from office.

The CJC follows a two-stage process described in the *Matlow* case.[77] First, it decides whether the judge is "incapacitated or disabled from the due execution of the office of judge" within the meaning of subsection 65(2) of the Judges Act. If so, it then proceeds to the second stage and determines whether a recommendation for removal is warranted. The terms *incapacitated* and *disabled* have been given a broad interpretation.[78] The criterion for a recommendation for removal is in practice the following: "Is the conduct alleged so manifestly and profoundly destructive of the concept of the impartiality, integrity, and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?"[79]

---

[77] Majority Reasons of the Canadian Judicial Council, In the Matter of an Inquiry into the Conduct of the Honourable P. Theodore Matlow, 3 December 2008, at para. 166, available at <http://www.cjc-ccm.gc.ca/cmslib/general/Matlow_Docs/Final%20Report%20En.pdf>.

[78] See *Gratton* v. *Canadian Judicial Council*, [1994] 2 F.C. 769 (F.C.T.D.), at paras. 35-46 (hereinafter *Gratton*).

[79] Report to the Canadian Judicial Council of the Inquiry Committee Established Pursuant to Subsection 63(1) of the Judges Act at the Request of the Attorney General of Nova Scotia (August 1990), available at <http://www.cjc-ccm.gc.ca/cmslib/general/conduct_inq_HartJonesMacdonald_ReportIC_199008_en.pdf>. To date, the Canadian Judicial Council has recommended the removal of a judge on only two occasions. Both resigned before they could be removed by Parliament. In the *Bienvenue* case, the impugned judge made disparaging remarks against women and Jews (see Report to the Canadian Judicial Council by the Inquiry Committee Appointed under Subsection 63(1) of the Judges Act to Conduct a Public Inquiry into the Conduct of Mr. Justice Jean Bienvenue of the Superior Court of Quebec in R. v. Théberge, Ottawa, June 1996, available at <http://www.cjc-ccm.gc.ca/cmslib/general/conduct_inq_bienvenue_ReportIC_199606_en.pdf>). In the *Cosgrove* case, the judge exhibited a bias against the Crown's position (see Report of the Canadian Judicial Council to the Minister of Justice In the matter of section 65 of the Judges Act, R.S. 1985, c. J-1, and of the Inquiry Committee convened by the Canadian Judicial Council to review the conduct of the Honourable Paul Cosgrove of the On-

The CJC's recommendation cannot be appealed.[80] However, the power to remove a judge ultimately lies with the houses of Parliament. A judge who is the object of a recommendation for removal will generally resign, thereby pre-empting the exercise of the power to remove.[81] This procedure is broadly considered to have established an appropriate balance between judicial independence and judicial accountability in the interest of the rule of law.

The provincial councils have similar disciplinary procedures and apply similar, though more detailed and explicit, criteria. Removal normally follows a procedure similar to that outlined above for federally-appointed judges.[82] In Quebec, a recommendation for removal is made by the judicial council to the Minister of Justice, who may seize the Court of Appeal. The Court of Appeal issues a recommendation to the executive, whose decision is ultimately required.[83]

3. Judicial Safeguards

A judge who is the object of disciplinary proceedings is systematically given a full opportunity to be heard. In a recent case, a judge requested and was granted the opportunity to make representations to the CJC after having fully argued his case before the Inquiry Committee.[84]

---

tario Superior Court of Justice, 30 March 2009, available at <http://www.cjc-ccm.gc.ca/cmslib/general/ Report_to_Minister_Justice_Cosgrove.pdf>).

[80] In *Moreau-Bérubé* v. *New Brunswick (Judicial Council)*, (2002) 1 S.C.R. 249, the Supreme Court explored the question of judicial review of decisions made by provincial judicial councils, stating that they deserved a high degree of deference.

[81] See *Gratton* (note 78), at paras. 35-46.

[82] See e.g., in Ontario, Courts of Justice Act, R.S.O. 1990, c.C-43, § 51.8.

[83] Courts of Justice Act, R.S.Q. c.T-16, §§ 95, 279-280. The Supreme Court found this procedure consistent with the constitutional requirement or judicial independence even though it does not involve the legislature, see *Therrien (Re)*, (2001) 2 S.C.R. 3.

[84] Report of the Canadian Judicial Council to the Minister of Justice, In the matter of section 65 of the Judges Act, R.S. 1985, c. J-1, and of the Inquiry Committee convened by the Canadian Judicial Council to review the conduct of the Honourable Paul Cosgrove of the Ontario Superior Court of Justice, 30 March 2009. The text is available at <http://www.cjc-ccm.gc.ca/cmslib/general/Report_to_Minister_Justice_Cosgrove.pdf>.

4. Sanctions

The CJC's only formal power is ultimately to recommend that a judge be removed from office. However, where the matter is not of such a nature as to warrant this recommendation, the CJC may express concerns about the conduct of a judge and recommend remedial action. Provincial councils may generally impose a broader range of sanctions, including a formal reprimand or warning, and may in some cases suspend a judge.[85]

5. Practice

Overall, disciplinary and related procedures run smoothly and there are no reports of unreasonable delays. There are bound to be a certain number of complaints prompted by dissatisfaction with the substantive result embodied in judgments rather than by judicial misconduct, this, in spite of the considerable efforts made by judicial councils to explain, in simple terms, the distinction between an appeal and a complaint about the conduct of a judge. The statistics published by the Quebec Judicial Council give a general sense of disciplinary procedures. Over the past 30 years, 1,835 complaints were filed, 96 were the object of an inquiry, 45 resulted in a reprimand and 4 in a recommendation of removal.[86] Although every complaint is taken into account for the purposes of statistics, the relative publicity of a particular procedure and supporting documentation may depend on the decision of the relevant council.

VIII. Immunity for Judges

Canada follows the common law tradition of granting members of the judiciary broad-ranging immunity from civil liability for acts or omis-

---

[85] See e.g., in Ontario, Courts of Justice Act, R.S.O. 1990, c.C-43, § 56.6(11); in Québec, the Courts of Justice Act, R.S.Q. c.T-16, § 279; in Saskatchewan, Saskatchewan Provincial Court Act, Saskatchewan Statutes (S.S.) 1998, c. P-30.11, § 62.

[86] The statistics are available on the web site of the Judicial Council (the *Conseil de la magistrature du Québec*), at <http://www.cm.gouv.qc.ca/publications_statistiques_du_conseil_magistrature_du_quebec.php>.

sions in the performance of their judicial functions.[87] This is recognized at common law, at least in relation to superior court judges,[88] whose status in this respect is often used as the relevant benchmark for legislation granting immunity to other judges.[89] Although the term absolute has often been used to mark the scope of this immunity, there is no doubt that the standard is sufficiently flexible to allow for liability in exceptional cases. As the House of Lords clarified in the British context, a judge acting in bad faith who would deliberately and knowingly do something he or she is not empowered to do may be liable for damages.[90] In provincial legislation granting immunity without reference to the benchmark of superior courts, immunity is sometimes expressed in relative terms which withhold protection where the act or omission was "malicious" or "without reasonable cause."[91] Apart from the inherent or statutory limitations to judicial immunity, it is widely considered that disciplinary procedures constitute an effective mechanism to prevent abuse on the part of individual members of the judiciary.

IX. Associations for Judges

Members of the Canadian judiciary enjoy the benefits of thriving associations representing their interests at both the federal and provincial levels. These are non profit organizations regulated in the same way as any other non profit organization. They work in concert with the judicial councils in such areas as judicial training and the promotion of judicial independence.

---

87 See *Shaw* v. *Trudel*, (1988) 53 D.L.R. (4th) 481 (C.A. Man.).

88 See *Morier* v. *Rivard*, (1985) 2 S.C.R. 716.

89 See e.g., New Brunswick Provincial Court Act, R.S.N.B. 1973, c. P-21, § 3.1, Newfoundland and Labrador Provincial Court Act, S.N.L. 1991, c. 15, § 32; Nova Scotia Provincial Court Act, R.S.N.S. 1989, c. 238, § 4 A; Courts of Justice Act, R.S.O. 1990, c.C-43, § 82; Quebec Magistrate's Privileges Act, R.S.Q. c. P-24, § 1.

90 *McC.* v. *Mullan*, (1984) 3 All E.R. 908 (HL).

91 Prince Edward Island Provincial Court Act, Revised Statutes of Prince Edward Island (R.S.P.E.I.) 1988, c. P-25, § 11(2); Saskatchewan Provincial Court Act, S.S. 1998, c. P-30.11, § 63 (1). In the latter case, both elements must be proved.

The Canadian Superior Courts Judges Association (CSCJA) has a membership of approximately 1,000 federally-appointed judges. These judges serve on the superior courts and courts of appeal of each province and territory, as well as on the Federal Court of Canada, the Federal Court of Appeal and the Tax Court of Canada. The CSCJA has replaced the Canadian Judges Conference, which had been established in 1979 with a mandate to protect and promote judicial independence, to provide continuing education, to improve the administration of justice, and to promote public understanding of the role of judges. Although membership is voluntary, nearly all federally-appointed judges are members.[92] The CSCJA is funded exclusively through member contributions and has a staff of two. It describes its objectives as follows:[93] the advancement and maintenance of the judiciary as a separate and independent branch of government; to liaise with the Canadian Judicial Council to improve the administration of justice and to complement its functions through conferences, seminars, educational and other programs; to provide a collegial forum to meet and discuss matters of common interest for the purpose of improving the administration of justice; to take such actions and make such representations as may be appropriate in order to assure that the salaries and other benefits guaranteed by s. 100 of the Constitution Act, 1867, and provided by the Judges Act are maintained at levels and in a manner which are fair and reasonable and which reflects the importance of a competent and dedicated judiciary; to concern itself with the provisions of the Judges Act and the procedures it establishes pertaining to complaints, investigations and inquiries concerning the conduct of judges, and to provide appropriate guidelines and assistance to its members in relation to those matters; to play a role in determining policy for the continuing education of judges and in the work of the National Judicial Institute; to seek to achieve a better public understanding of the role of the judiciary in the administration of justice, and in so doing to initiate or support programs of public education and public relations; to monitor, and where appropriate, seek enhancement of the level of support services available to the judiciary, in co-operation with the Canadian Judicial Council;

---

[92] According to the executive director of CSCJA, more than 97% of federally appointed judges were members in 2009 (telephone interview conducted on 13 August 2009).

[93] The objects are quoted from the association's website, available at <http://www.cscja-acjcs.ca/constitution-en.asp?l=2>.

and to address the needs and concerns of supernumerary and retired judges.

There are also a number of active associations at the provincial level that represent provincially appointed judges. Provincial associations are united under the umbrella of the powerful Canadian Association of Provincial Court Judges (CAPCJ). To give a sense of the importance of such associations, it may be pointed out that the CAPCJ participated as intervener in the Canada-wide litigation that led to the groundbreaking advisory opinion rendered by the Supreme Court in the provincial judges' *Remuneration Reference*.[94]

Although it has individual members, the CAPCJ is essentially a federation of provincial and territorial judges' associations. In most provinces and territories, CAPCJ membership of individual judges comes automatically with membership in the relevant provincial association. The CAPCJ was established in 1973. Its membership now includes most of the provincial and territorial judges in Canada, of which there are in excess of 1,000. The objectives of the association are described as follows:[95] to monitor the status of provincially appointed judges; to act as an advisory and consultative body to governments and other agencies involved in reforming the system of justice; to support and to advocate for judicial independence, bilingualism, and respect for equality and diversity; to educate judges across the country and to disseminate information.

The CAPCJ is funded by its membership and by government grants. Even though it has no permanent staff, the association has significant influence over policy, particularly in matters concerning criminal and young offenders and judicial independence. Of note, among the many services it provides, is the National Judicial Counselling Programme, a confidential prevention, assistance and treatment program available to members and their families.

X. Resources

Canada enjoys a good international reputation when it comes to the financial provisions made for the administration of justice. Canada does,

---

[94] *Remuneration Reference* (note 14).

[95] The objects of the association are paraphrased from the association's website, available at <http://www.judges-juges.ca/en/aboutus/index.htm>.

in fact, have a relatively well endowed judicial system when compared to those of a large number of countries, such that office and courtroom facilities may be described as adequate. Yet investment in the judicial system has not always kept pace with past increases in government expenditures and the justification for Canada's reputation in this area may have become less compelling than it used to be.

Recently, the Alternative Models Report commissioned by the CJC drew worrying conclusions from an extensive consultation process involving members of the judiciary and government officials, both federal and provincial. In addition to reports of cuts in subscriptions to court reporters or the number of law clerks, and of unmet demands for additional security, information technology or the renovation of ageing facilities, to give but a few examples, there is a sense that "across the country, court staff vacancies are taking longer to be filled; and when they are filled, full-time experienced staff are often being replaced with part-time inexperienced staff with little training and high rates of turnover". "[T]he sense of being required to do more with less appears to be a widely shared impression across the country."[96]

It is often said that cabinet members in general, and the Attorney General in particular, no longer understand their traditional role of ensuring financial support for the administration of justice, a role made essential by the inability of the judiciary to lobby in such matters – an activity which would be deemed improper and would jeopardize their independence in the eyes of the public.[97] The financial aspect of the administration of justice is the subject of an ongoing debate in Canada. The crux of the problem is not necessarily viewed exclusively as one of envelope size but rather as one of efficiency in the delivery of judicial services within a given envelope. It would appear that greater efficiency is hard to achieve without increasing judicial control over key aspects of the administration of justice. In this respect, a measure of devolution from the political branches to the judicial branch seems, in the mid- to long-term, inevitable.

---

96 Alternative Models Report (note 10), at 19.

97 Id., at 19-20.

C. Internal and External Influence

I. Separation of Powers

The separation of powers is now recognized as a fundamental constitutional principle in Canada.[98] The separation of powers ensures that no branch of government oversteps its bounds and that each shows appropriate deference to the role of the other.[99] In fact, it is in the context of the relations between the judiciary and the political branches that the separation of powers has most often been relied upon. The institutional aspects of judicial independence have been said to be "bound up with" and to "inhere in" the separation of powers.[100] The separation of powers therefore interfaces with and strengthens the now independently recognized constitutional principle of the independence of the judiciary. The fact that discipline is entrusted to the CJC, which is composed exclusively of members of the judiciary and is not subject to interference by the executive, provides a good example of the implementation of this constitutional principle.

With respect more generally to possible pressure from the political branches, it is understood that influence may operate at a level more subtle than that of the blunt threat of removal.[101] Given the discretion which remains with the executive in respect of promotions (which are, as indicated above, treated as new appointments), it is not unthinkable that a judge may be tempted to consider prospects for appointment to a higher court when deciding the outcome of particularly sensitive cases. The Supreme Court has spoken generally of a constitutional imperative of depoliticization, stating, in particular, that "the legislature and executive cannot, and cannot appear to, exert political pressure on the judiciary, and conversely, that members of the judiciary should exercise re-

---

98 *Remuneration Reference* (note 14), at para. 139.

99 See notably *New Brunswick Broadcasting Co.* v. *Nova Scotia (Speaker of the House of Assembly)*, (1993) 1 S.C.R. 319, 389 (per McLachlin J.); *Doucet-Boudreau* v. *Nova Scotia (Minister of Education)*, (2003) 3 S.C.R. 3, at paras. 32-36.

100 *Cooper* v. *Canada (Human Rights Commission)*, (1996) 3 S.C.R. 854, at para. 24. See also *Mackin* v. *New Brunswick*, (2002) 1 S.C.R. 405, at para. 39 (citing the relationship between the institutional dimension of judicial independence and the principle of the separation of powers).

101 P. Russell, The Judiciary in Canada: The Third Branch of Government, at 82-83 (1st ed., 1987).

serve in speaking out publicly […]."[102] This has served, as outlined above, as a rationale for a requirement to establish independent remuneration commissions. The impact of depoliticization on appointment processes and on financial and administrative independence remains to be seen.[103] Meanwhile, the integrity of the system relies quite heavily upon the integrity of the key people in the relevant courts and the departments of justice which administer them.

II. Judgements

1. Basis

Canadian jurisdictions universally recognize that judgments must be based on the facts and the law. Insofar as law and fact are indeed ascertainable in the epistemological sense, it can fairly be said that Canadian courts conform to this requirement. In any case, there are no allegations of direct outside interference by the executive or the legislative branch. Neither are there allegations of undue interference by senior judges. Each decision is the sole prerogative of the sitting judge. Even in higher courts, where cases are adjudicated by panels, it is open to each individual judge to render his or her own opinion after deliberating with the other judges on the panel.

2. Practice

It is doubtful whether reliable conclusions can be drawn about any particular judiciary based on statistics of which way decisions go. Attempts to do this have been made in the context of criminal justice. However, there are many variables which make comparisons perilous, including the structure of the prosecutorial services and practices such as plea bargaining. In the Canadian criminal justice system, conviction will in some cases depend on the verdict of a jury, not a judge. Statistics on ac-

---

[102] *Remuneration Reference* (note 14), at para. 140.

[103] The appointment process in Quebec was recently scrutinized by an independent commission: Inquiry Commission on the Process for Appointing Judges of the Court of Quebec and Municipal Courts and Member of the Tribunal Administratif du Québec (The Bastarache Report) (Québec: Les publications du Québec, 2011) available at <http://www.cepnj.gouv.qc.ca/english.html>.

quittals, therefore, may speak to the overall system rather than to the decisions of members of the judiciary. Statistics Canada, a federal governmental organization, has been keeping track of acquittals in some detail. The latest available numbers are for the year 2009-2010. In that year, there were 403,340 cases in adult criminal courts, resulting in 262,616 guilty verdicts, 13,059 acquittals, 122,807 stays of proceedings and 4,858 "other" outcomes.[104]

3. Structure

Judgments rendered by Canadian courts are generally viewed as coherent and clearly reasoned. Canadian jurisdictions universally recognize that a judgment must state the reasons upon which it is based. Beyond this legal requirement, however, judges often consider that the structure and form of a judgment are at the core of the act of judging and should not, therefore, be interfered with without their consent. This is why efforts at Canada-wide standardization, which have been considerable over the past 16 years, have been spearheaded by the judiciary, not the political branches.

Current best practices in Canada originate in the work of the Judges Advisory Committee (hereinafter the "Committee") of the CJC, which began in 1996. The efforts of the Committee sowed the seeds for standardization with a view to releasing the potential of electronic publication. These efforts were later joined by the Canadian Citation Committee and gave rise to three standards: the *Neutral Citation Standard for Case Law* (1999), the *Canadian Guide to the Uniform Preparation of Judgments* (2002), and the *Uniform Case Naming Guidelines* (2006). These were eventually consolidated into and superseded by a single set of guidelines which has now been endorsed by the CJC. The guidelines, entitled "The Preparation, Citation and Distribution of Canadian Decisions,"[105] are meant to standardize practices concerning the structure of judgments and deal with the organization of all information provided before and after the body of the reasons for judgment. Concerning the reasons for judgment, the guidelines deal with paragraph numbering

---

[104] Statistics Canada, CANSIM, table 252-0045 and Catalogue no. 85-002-X, available at <http://www40.statcan.gc.ca/l01/cst01/legal19a-eng.htm>.

[105] F. Pelletier/R. Rintoul/D. Poulain, Canadian Citation Committee, The Preparation, Citation and Distribution of Canadian Decisions (7 May 2009), available at <http://lexum.org/ccc-ccr>.

(which facilitates neutral citation) as well as with citation to authority and referencing. Courts of law throughout the country are committed in principle to the implementation of these guidelines and standardization is fast becoming a reality.

4. Public Access

By virtue of the open court principle, courtroom proceedings are normally open to the public and court files can be consulted at the relevant courthouses. This principle is deeply embedded and there have been no reports of practical impediments to public and media access.

The publication of judicial decisions has traditionally followed the British model where an editor would be tasked with the selection, preparation and publication of those decisions deemed to be of interest to the legal community and the development of case-law. Practices have varied considerably over time and place, but changes have been precipitated across the board by the fast-evolving realities of electronic publication. The most significant development in this respect was brought about by the Federation of Law Societies of Canada, which in 2001 established the Canadian Legal Information Institute (CanLII), a not-for-profit organization providing access to primary legal sources from all Canadian jurisdictions for both professionals and the general public. CanLII's website is now recognized as the largest openly accessible web-based resource for Canadian legal information.[106] With respect to court decisions, CanLII receives every judgment released for publication by every court of law in Canada and immediately makes it freely accessible and fully searchable on its website.[107] It has been observed that the sheer quantity of legal information now available may in time become a serious problem for the administration of justice.

[106] A brief historical account of CanLII is available at <http://www.canlii.org/en/info/about.html>.

[107] Not every decision available in the court file is released for publication. Each court of law makes its own selection of the judgments that will be proactively released for publication.

III. Improper Influence on Judicial Decisions

In the administration of justice, the exercise of improper influence in all its forms was noticeable in Canada until the 1960's. It is generally thought that the Canadian judiciary is now virtually immune to such practices.[108] Much of this development can be attributed to an evolution in the unwritten understandings and rules that govern the behaviour of political actors and judges. Debate can be said to have shifted to the terrain of institutional arrangements and the appearance of independence. The arrangements that pertain to the administration of justice do place the judiciary at the mercy of the executive branch of government in some key areas of operation and this is problematic where the appearance and not just the reality of independence serves as the constitutional benchmark.

IV. Security

Court security has not been the subject of much contention in Canada, although there have been disagreements over issues of security staff status and budgeting. Legislative provision is made in most jurisdictions to facilitate weapons control and screening of visitors at courthouses.[109] In one famous case, a special, high-security courthouse was built in the vicinity of a detention facility to accommodate the special needs of a planned series of gangster trials which would have posed unmanageable security threats had they taken place in the normal courthouse.[110]

---

[108] Concerning interference by the executive, Peter Russell narrates the cases making up the "Judges Affair" which led in 1976 to a formal statement in the House of Commons by then Prime Minister Trudeau to the effect that cabinet ministers were not allowed to speak to members of the judiciary about pending cases. See Russell (note 101), at 78-81. The statement can be seen as crystallizing a binding constitutional convention.

[109] See e.g., Court Security Act, Statutes of Nova Scotia (S.N.S.) 1990, c. 7 (Nova Scotia); Court Security Act, S.S. 2007, c. C-43.11 (Saskatchewan); Court Security Act, Continuing Consolidation of the Statutes of Manitoba (C.C.S.M.) c. C295 (Manitoba).

[110] See P. Cherry, The Biker Trials: Bringing Down the Hells Angels, at 132-133 (1st ed. 2005).

D. Ethical Standards

I. Codes of Ethics for Judges

The CJC adopted a set of *Ethical Principles for Judges* (hereinafter the "Principles") in 1998.[111] They are meant to provide ethical guidance for federally appointed judges throughout Canada.[112] The Principles are cast at a high level of abstraction and express the "standards towards which all judges strive".[113] The document does offer some relatively detailed guidance in a commentary published with the Principles; but the Principles remain "advisory in nature" and "do not preclude reasonable disagreements about their application or imply that departures from them warrant disapproval".[114] This means that they should not be used as "standards for judicial misconduct".[115]

Codes have also been adopted in some provinces, though they are also cast at a high level of abstraction. Examples include the Code of Judicial Ethics of the British Columbia Provincial Court,[116] and the Quebec Judicial Code of Ethics.[117] The general principles that make up the latter are such that they can easily be reproduced in full here in a footnote.[118]

---

[111] Canadian Judicial Council, Ethical Principles for Judges (1998), available at <http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_1998_en.pdf>.

[112] Id., Statement 1.

[113] Id., Principle 1.

[114] Id., Principles 1 and 2.

[115] Id., Principle 2.

[116] Adopted by the Provincial Judges Association of British Columbia at its Annual General Meeting of 18 September 1976, and by the Judicial Council pursuant to section 13(e) the Provincial Court Act on 3 December 1976.

[117] Judicial Code of Ethics, (1982) C. T-16, r. 4.1, adopted by the Conseil de la magistrature pursuant to section 261 of the Courts of Justice Act (R.S.Q., c. T-16).

[118] A judge (1) should render justice within the framework of the law; (2) should perform the duties of his office with integrity, dignity and honour; (3) has a duty to foster his professional competence; (4) should avoid any conflict of interest and refrain from placing himself in a position where he cannot faithfully carry out his functions; (5) should be, and be seen to be, impartial and objective; (6) should perform the duties of his office diligently and devote himself entirely to the exercise of his judicial functions; (7) should refrain from any activity which is not compatible with his judicial office; (8) when in public,

Like the federal Principles, these codes provide guidance but are not used strictly as rules to measure judicial misconduct.

II. Training

Judges may choose from a range of training courses on such issues as cultural and social sensitivity and ethics. These courses are not compulsory but are available to judges as soon as they are appointed and throughout their judicial career. Training is carried out by a host of non-profit organizations that are largely project-financed, including the National Judicial Institute and the Canadian Institute for the Administration of Justice. These organizations work closely with the various judicial councils, the Office of the Commissioner for Federal Judicial Affairs and the judges' associations to offer programs that meet the needs and requirements of judges. Content and instructors come from a host of sources including universities, law societies, bar associations and the judiciary.

E. Supreme Court of Canada

Brief mention should be made of developments in the mode of appointment of candidates to the Supreme Court. Peter Russell, a noted political scientist, once described Canada to a parliamentary committee as "the only constitutional democracy in the world in which the leader of government has an unfettered discretion to decide who will sit on the country's highest court and interpret its binding constitution."[119] Ex-

---

[…] should act in a reserved, serene and courteous manner; (9) should submit to the administrative directives of his chief judge, within the performance of his duties; (10) should uphold the integrity and defend the independence of the judiciary, in the best interest of justice and society.

[119] P. Russell, A Parliamentary Approach to Reforming the Process of Filling Vacancies on the Supreme Court of Canada, Brief to the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, 23 March 2004, at 1, noting that New Zealand had a similar process, but that a committee of judges advised ministers in respect of judicial appointments. For a recent comparative overview of judicial appointments, see K. Malleson/P. H. Russell (eds.), Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World (1st ed., 2006).

ecutive discretion in the appointment of Supreme Court judges has been the object of increased attention due to recent attempts by successive governments to establish a form of pre-appointment scrutiny of candidates.

There is no sense that appointments to the Supreme Court have been in any way inappropriate. However, there is a public perception that the Supreme Court is a much more important institution in the age of the Charter, a bill of rights adopted in 1982, than had previously been the case.[120] Most likely, there is also a sense that political capital could be gained by creating a public stage for, and involving Parliament in, the appointment process. The various formulae tried by the liberal and conservative governments have been described in detail in the literature and shall not be repeated here.[121] They all involve a parliamentary committee meeting with a candidate, in one case before a live television camera, and acting in a purely advisory capacity. Since the first attempt at reform, the practice has been altered for each and every new appointment. Executive discretion remains intact in law, and attempts at establishing a practice that might effectively constrain that discretion have thus failed for lack of consistency. This will remain a debated topic in Canada for some time to come.

F. Conclusion

Canada enjoys an elaborate and sophisticated understanding of judicial independence built upon a rich constitutional heritage and can serve as a model in many respects. This understanding is still evolving, however, with old practices and rules being challenged by contemporary perspectives, changing requirements and constitutional developments.

Foremost among these developments is the constitutional imperative of depoliticizing the relations between the political branches and the judiciary as stated by the Supreme Court. The central role of the executive in court administration and the appointment of judges is bound to come under increased scrutiny in the years to come. In both cases, judicial independence is at issue because, from the perspective of a reason-

---

120 See generally M. Mandel, The Charter of Rights and the Legalization of Politics in Canada (1st ed., 1989).

121 See e.g., K. Eltis/F. Gélinas, Judicial Independence and the Politics of Depoliticization, section 6, available at <http://ssrn.com/abstract=1366242>.

able observer, the appearance, if not the reality, of an independent judiciary is not fully safeguarded by formal institutions.

III. Transitional Processes in New Member States of the EU

Judicial Administration Reforms in Central-Eastern Europe: Lessons to be Learned

*Zdeněk Kühn**

A. Introduction

While especially in the early communist system judges were pariahs, in post-communism their role was enhanced. Building a rule-of-law state to a certain extent also entails building a lawyers' state. Law is now one of the most prestigious fields of study; the legal profession is increasingly honoured both financially and in terms of prestige. Still, we can easily find that in Central-Eastern Europe the judiciary is one of the least popular professions among the general public; judges are distrusted, often seen as corrupt (which is usually a false image) and inefficient (which is quite often a correct perception).[1] Writing her dissenting opinion in the case relating to judicial salaries, Deputy Chief Justice of the Czech Constitutional Court Eliška Wagnerová said:

> "Generally emphasized distrust of judges which is practised in a substantial part of the society and above all in mass media is not rational; quite the contrary, it is counterproductive. Guarantees of the protection of the citizens' rights are declining. The distrust of judges can be best used for non-constitutional goals by those who are afraid of the strong and independent judiciary, i.e. judges resistant to political pressure and deciding constitutionally regardless of their popularity. On the other hand, no one doubts that it is necessary to

* All opinions in this article are personal views of the author and not of the institutions he works with.

[1] See Z. Fleck, Judicial Independence in Hungary, in this volume, Chapter B. I. 2; see also R. Coman/C. Dallara, Judicial Independence in Romania, in this volume, Chapter F.

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233, DOI 10.1007/978-3-642-28299-7_15,

> punish all those judges who do not comply with the requirements of efficient justice. It is interesting that such measures are, unlike general cuts in judicial pay, very rare. However, this is another story."[2]

In this chapter, I will show the trends in new laws on the judiciary in the 1990s and 2000s in the region of Central-Eastern Europe and introduce the post-communist judges. I will particularly emphasize the countries of the former Czechoslovakia, Poland and Hungary.

B. Institutional Settings

The status of judges in Central-Eastern Europe began to deteriorate soon after World War I, to the extent that some scholars in the region now say that the longest and most stable period of judicial independence in the region was the era between 1867 and 1914, a period when the democratic institutions of the Austro-Hungarian monarchy functioned and the judiciary was guaranteed its independence by his *Imperial Majesty*. New parliamentarian or authoritarian regimes established in the region after 1918 had much less understanding of the need for the independence of the judiciary, because of either a natural autocratic disposition or a natural tendency of politicians in parliaments to claim all important decision making issues for themselves. Thus the judiciary faced serious and similar problems in both democratic inter-war Czechoslovakia and authoritative Poland, Romania or Hungary.[3] After 1945, Central Europe found itself in the Soviet zone of influence in which *popular democracies* were invariably installed. The discourse on the judicial independence and the proper status of the judiciary was immediately interrupted by force. A revived though quite often old-fashioned discourse started in the course of the 1990s after the communist regimes had been finally overthrown.

The independence of judges was proclaimed in the constitutions of all post-communist countries, but its institutional implementations differ. Hungary, in the course of the 1990s, developed a system which gave

---

[2] The judgment Pl.ÚS 13/08 of No. 104/2010 Official Gazette.

[3] Cf. E. Wagnerová, The Position of judges in the Czech Republic, in: J. Přibáň/P. Roberts/J. Young (eds.), Systems of Justice in Transition. Central European Experiences since 1989, 163 (2003) (claiming that "the longest period in which the judges in the Czech lands had the chance to establish themselves as independent was from 1867 to 1918"). This is the opinion I agree with.

judges extensive autonomy.[4] The recruitment of the judiciary including setting all relevant criteria is now entirely up to the Hungarian judges themselves.[5] Consequently, the Hungarian model is one of the most autonomous among European systems in the early 21st century.[6]

Poland[7] and Slovakia[8] implemented a model of shared powers, in which autonomous judicial organs share with the executive authority the recruitment of the judiciary. In Slovakia, a recently established Council is a very problematic and politicized institution, controlled by the judges close to one of the populist political parties. In fact, its activity has divided the judiciary and created a very hostile atmosphere among the Slovak judges. This is combined with disciplinary proceedings against those who do criticize the Council and benefits to those who support the judiciary's new elite. In Poland, the National Council of the Judiciary is the constitutional body which represents the judiciary as the third branch of the government. The Council was established as early as in 1989, and its existence was constitutionally guaranteed in the 1997 Polish Constitution.[9] Among its main functions is to propose judicial candidates to the President based on its co-operation with the court colleges and general assemblies of judges of relevant courts, which assess candidates' qualifications and submit opinions to the National Council

---

4 Fleck (note 1), Chapter B. I. 1.

5 Id., at B. I. 2.

6 On the creation and establishment of this model see also Z. Fleck, Judicial Independence and Its Environment in Hungary, in: J. Přibáň/P. Roberts/J. Young (eds.), Systems of Justice in Transition. Central European Experiences since 1989, 128 (2003); Open Society Institute 2002, Judicial Capacity in Hungary, available at <http://www.eumap.org/reports/2002/content/70>.

7 A. Bodnar/Ł. Bojarski, Judicial Independence in Poland, in this volume, Chapter B. I. 1.

8 For a discussion of the Slovak Judicial Council see A. Bröstl, At the Crossroads on the Way to an Independent Slovak Judiciary, in: J. Přibáň/P. Roberts/J. Young (eds.), Systems of Justice in Transition. Central European Experiences since 1989, 141, at 148 sqq. (2003).

9 Article 186 of the Polish Constitution (proclaiming that the Council shall "safeguard the independence of courts and judges."). For literature in English see E. Letowska, Courts and Tribunals under the Constitution of Poland, St. Louis-Warsaw Journal of Transnational Law 69 (1997).

of the Judiciary through the Minister of Justice.[10] In its first decade of existence, this body has generally been adjudged to be successful.[11]

In contrast, the Czech Republic (together with Latvia) has maintained the most extreme system of centralized management of the courts, performed by the Ministry of Justice. The Czech political elite rejected the very possibility of creating a national council of the judiciary, as well as any important autonomous elements in the judiciary. The proposals to establish such a judicial self-governing body were rejected, primarily with reference to the historical tradition of judicial administration before the communist era. Ironically, the old-fashioned and problematic system is defended just because of its age. In this view, the system has achieved its inherent value because it existed prior to the advent of the communist regime.[12]

Although the principle of judicial independence is guaranteed, the administration of the judiciary, including the selection of judicial candidates, is controlled by the Czech Ministry of Justice. The presiding judges of courts (chief judges) exercise their powers more as the representatives of the Ministry of Justice than as the representatives of the independent third branch of government. This situation is frequently criticized because of problems with the separation of powers and the facility with which the Ministry of Justice can manipulate the judiciary.[13] This criticism is not without merit. For instance, in a recent series of restitution court actions by a Czech aristocrat against the Czech Republic, the Ministry of Justice ordered chief judges to inform the minis-

---

[10] Article 179 of the Polish Constitution. The Minister of Justice has the power to submit candidates to the Council directly, but this seldom happens. See for details Open Society Institute 2002 Judicial Capacity in Poland, 158, available at <http://www.eumap.org/reports/2002/content/70>.

[11] Letowska (note 9), at 69. In 2001, Poland passed two new important laws on the judiciary: Law on Ordinary Courts of 27 July 2001, Dziennik Ustaw (Official Journal) 2001, No. 98, item 1070, and Law on the National Council of the Judiciary of 27 July 2001, Dz.U. 2001, No. 100, item 1082.

[12] In more detail see M. Bobek, The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries, 14 European Public Law 99 (2008).

[13] 'Rozhovory o pravu' (Discussions on the Law), Soudce 5/2002, at 2 (in this interview, the honorary President of the Czech Judicial Union Jan Vyklický criticizes the administration of the judiciary which never functioned properly in the country, and argues that the system is used as a means to deflect blame from the state administration for the frequent delays in judicial proceedings.

try about all actions brought by that person in their courts including the names of judges who were supposed to decide such cases.[14]

C. Difficult Understanding of the Separation of Powers: Attempts of the Czech Executive to Dismiss Courts' Presidents at Will

The Czech Constitutional Court recently criticized interferences by the executive power with the judicial branch. In 2006, the Czech President dismissed the Supreme Court Chief Justice Iva Brožová from her post. He did so without any justification by a letter of one single sentence. The Chief Justice challenged the dismissal before the Constitutional Court, claiming the violation of the principle of judicial independence. The President justified his action by his power to dismiss the chief justice which was implicit in the power to appoint. The Constitutional Court struck down the law which enabled the executive power to dismiss a chief judge from his/her post and criticized the Czech regulation of the judiciary.[15] The Court reasoned, *inter alia*:

> "[O]ne of the basic preconditions to the rule of law is a strong and independent judiciary. In a state which should be considered a law-based state, the judiciary must be regarded as one of three powers which has the same weight as the executive and legislative powers, from which the judiciary must be independent to the greatest degree possible, whereas the judiciary is the only one of the three powers for which especial emphasis is placed on the constitutional protection of its independence. This principle has been broadly embodied in the majority of the world's constitutions; sometimes even in those states where the judiciary was (or is) not actually independent. The danger remains that this principle will remain a mere theoretical edifice, unless it is supplemented in special provisions of the Constitution, or at least in the legal enactments governing the judiciary, by further principles which can be deduced from the constitutions of the majority of Western European states, just as from the most important international documents relating to the issue of the inde-

[14] Cf. the website of the plaintiff, available at <http://www.knize-kinsky.cz>, including legal opinions for the plaintiff (in Czech).

[15] For the best description of the dismissal case and the administration of the Central European judiciaries generally see Bobek (note 12).

> pendence of the judiciary. […] It is an indispensable requirement for safeguarding the independence of the judiciary that the conditions influencing the selection, recruitment, appointment, career advancement or removal from office of judges allow for independence from the executive and legislative powers. […] In spite of the plurality of institutional models for court administration, one can discover common characteristics in [Europe]. [Judicial independence] is guaranteed either by transferring significant powers to the supreme council of the judiciary (Italy, France, and Spain), or by distinguishing judicial administration from state administration within the context of the classic model (Germany and Austria)."[16]

Based on this reasoning the Court rebuffed the argument of the President (supported by the Czech government) that the power to dismiss a chief judge is vested in the hands of the same body which appoints judges:

> "If the President of the Republic is entrusted with the power to appoint the Chief Justice of the Supreme Court, without concurrent action by any other state body, an entirely unlimited power to remove the Chief Justice of the Supreme Court cannot be found in the Constitution's silence. In the situation where the authority to remove the Chief Justice of the Supreme Court is not explicitly mentioned in the Constitution, to adopt an interpretation whereby the President's authority to appoint implicates also the possibility to remove the Chief Justice from office, was in conflict with the constitutionally protected value of the independence of the judiciary and its separation from the executive power. In this system, where the judiciary is not absolutely separated from the executive, the President of the Republic is thus entrusted solely with the authority to install the Chief Justice of the Supreme Court into office, whereas in terms of influencing his performance in office or the termination of that office, no power of the President is envisaged. *A rule which provides that 'he who appoints, may recall' is entirely logical in cases where a direct relationship of superiority and subordination is involved. However, no such relationship exists between the President of the Republic and the Chief Justice of the Supreme Court* (who, ac-

[16] Judgment of the Constitutional Court of 11 July 2006, Pl. US 18/06, quoted from the English version, available at <http://angl.concourt.cz/angl_verze/doc/p-18-06.php>.

> cording to Art. 92 of the Constitution, stands at the head of the highest judicial organ)." (Emphases added.)[17]

I doubt whether this argument would be praised by mainstream Czech legal academia. In fact, the most frequently claimed opinion prior to the Constitutional Court's judgment was the one close to the argument of the dissenting justice Vladimir Kůrka.[18] He rejected the starting premises of the Court's majority that direct control of the executive power over courts' administration is not comparable to standard administrative relations within the executive branch:

> "Thus, the court administration which (in contrast to state administration of courts) the Constitutional Court has been considering, is not, in content and regime, distinguished from state administration nor from administration as such; thus, *it is unjustifiable to assert that the principle of superiority and subordination, which is otherwise characteristic of administration, does not apply within its framework*. It is an untenable notion that where the Ministry performs the administration of courts through its chief judge, the court's chief judge is not in a relation of subordination towards the Ministry […]." (Emphases added.)[19]

The case just mentioned, is more an example of the more troubling problem which involves the power of the courts' presidents. Courts' presidents are the most important actors of the judiciary in the post-communist environment. They *inter alia* allocate judges to relevant

---

[17] Id.

[18] For just one example cf. the article of Charles University Constitutional Law Professor V. Pavlíček, Několik předběžných poznámek k jmenovacím a odvolacím pravomocem prezidenta republiky (Several preliminary notes to the President's powers to appoint and dismiss), 1/2 Lege artis: odborný časopis pro právníky 42 (2006). The article was reprinted in the brochure published in support of the President's action: M. Loužek (ed.), Soudcokracie v ČR: fikce nebo realita? (Judgeocracy in the Czech Republic: fiction or reality?) CEP, 71 (2006). The little brochure was written in order to condemn the Constitutional Court's judgment, which in the view of all authors means the rise of "judgeocracy" (the term invented by President Klaus personally, close to the classic "government of judges" problem). Interestingly, some authors, lawyers close to the President, even call for the return of the communist principle according to which the term of all judges was limited, subject to repeated reappointments after a short period of time. It includes a foreword written by President Klaus personally.

[19] See the dissenting opinion by V. Kůrka to the decision of the Constitutional Court (note 16).

chambers, may decide on temporary relief in cases coming into an individual judge's case load, and may start disciplinary proceedings against their judges. They also have a strong incentive to retain their posts – their position is associated with monetary and non-monetary benefits. Thus it can be said that the one who controls the power to appoint and reappoint (or to dismiss) the presidents, in a system without a strong judicial council, controls the judiciary. Czech politicians are well aware of that. A good example may be provided by the recent Czech amendment to the Judiciary Act.[20] According to the Act, all presidents are appointed by the executive power (the President at the proposal of the Ministry of Justice). They are appointed for a limited period of time – ten years for the Supreme and Supreme Administrative Court's chief justices, seven years for all other presidents. What is important is the possibility of unlimited reappointment without any clear conditions.

The Czech example provides a nice case of a judiciary which has got under the control of the executive branch. The strong role of the courts' presidents combined with their dependence on the executive puts the independence of the judiciary into jeopardy.[21] On the other hand, the earlier situation of strong presidents appointed for life, able to lose their posts only through disciplinary proceedings (the law after the 2006 Brožová case) effectively hindered any change in a possibly dysfunctional court. The possible solutions are multiple. One is setting presidents' terms with no possible reappointment. This is connected with the problem that if the terms are too short smaller courts in particular may soon run out of candidates qualified for the post. Another possibility is to combine reappointment with the involvement of the supreme judicial council. This would effectively (depending on the Council's composition) guarantee the insulation of the process from political pressure.

D. Budgetary Issues

The dilemma of financing the judiciary can be nicely illustrated by the example which is far from being hypothetical: a judge is deciding the case brought by an individual against the state while at the same time

---

[20] See Law 6/2002 Official Gazette, Judiciary Act, as further amended.

[21] The issue of the constitutionality of the law is now pending before the Czech Constitutional Court.

the very same court is in need of money from the state (say to repair a broken roof or to update PCs at the court). The Czech Republic is one of several European states which still grant a monopoly over budgetary issues to the Ministry of Finance. Because there is no supreme judicial council in the Czech Republic, there is no one who would be able to state on behalf of the judiciary an opinion on the proposal of its general budget. The budget is drawn up by the ministry notwithstanding the opinion within the judiciary. The ministry independently distributes money among the courts. The main deficiency of the Czech system is that the judiciary, having no representation, simply cannot articulate its needs and concerns.

In some other states such as Slovakia or Poland, the supreme judicial council participates in drawing up the part of the budget relating to the judiciary.[22] Unlike in the systems with no judicial council (where the judiciary has no *voice*) the opinion of the judiciary is heard during the process of drafting the budget. In Hungary, the supreme judicial council itself prepares the part relating to the judiciary in a budget bill.[23] If the parliament does not agree with this, it must carefully justify its position. After the enactment of the budget the Hungarian council is fully responsible for the distribution of the money within the judiciary.

The problem in the council having too strong a role in drawing up the budget may be the politicization of judicial representation connected with its participation in an area which is traditionally one of party politics. If such competence is granted, judicial representation is condemned to challenge politics and be involved with politicians on a regular basis.[24] This might lead to the inadequate financing of the judiciary if the judicial representation is not active enough or if it does not possess sufficient negotiating *weight*. That is why a reasonable solution seems to be a compromise based on co-operation between the judicial representation and the executive in establishing the budget and supervising how money is used by individual courts (the council's right to be consulted prior to the finalizing of the budget bill, for instance). Co-operation rather than the sole decision-making power being enjoyed by

---

22 Bodnar/Bojarski (note 7), Chapter B. I. 3.

23 Fleck (note 1), Chapter B. I. 2.

24 Cf. similarly the opinion of the President of the German Federal Constitutional Court H.-J. Papier, Zur Selbstverwaltung der Dritten Gewalt, 36 Neue Juristische Wochenschrift 2585 (2002).

either the ministry or the council solves the problem of the accumulation of the power in one organ.

E. Selection of Judges

It can fairly be said that a basic precondition of any democratic judiciary is a transparent process by which one can be appointed a judge. If the process is secret, obscure, and without clear rules, it invites patronage, incompetence, nepotism, and exclusion of all sectors of lawyers. In my opinion, democratic judiciary must be open to anyone regardless of his age (save the minimum age set by the law), race, gender, former profession, class or social origins etc. However, it has been questioned to what extent this can be improved by creating a strong judicial council. With regard to the selection of judges of ordinary courts, the system with strong judicial councils (such as Hungary) and the system with a strong role for the executive (the Czech Republic) do not appear to work very differently. The judicial autonomy which increasingly pervades the post-communist systems seems to support the inclination towards a professional career judiciary. For instance, the judges who exercise decisive functions within the Hungarian judicial system, the most autonomous judicial system in the region and one of the most autonomous in Europe, openly prefer young candidates without experience in other legal professions over candidates with a professional practice outside the bench.[25]

The situation in the Czech Republic, the country with strong influence wielded by the Minister of Justice and no judicial council, is surprisingly going in the same direction. The real power in selecting judges is exercised by presidents of regional courts and the ministry's actual role is rarely more than purely formal. With the few exceptions of several regional courts, no real competition for a vacancy takes place. Instead, a good connection with the court's presidents is what really counts. The result is a perpetuation of the career judiciary model.

Although open politicization of the professional career model combined with extensive judicial autonomy is unlikely, the negative side of this model is the increasing isolation of the judiciary, which is generally considered unaccountable and unresponsive to the needs of practical

[25] Judicial Capacity in Hungary (note 6); Fleck (note 1), Chapter B. II. 1.

life.[26] Moreover, it seems to support the tendency of law courts "to close ranks and resist substantive change", as Zoltán Fleck put it.[27] Facing a uniform perspective on the proper personality of an ideal judge, the judges tend to be very similar in background and ability. Therefore, the judicial system lacks an enriching variety of experiences and insights. Selection of judges is often based on personal networking which tends to cement the existing hierarchies within the judicial system. What is even worse, non-transparent selection often inclines towards choosing relatives of sitting judges,[28] a phenomenon quite well-known in medieval monarchies.

Nowadays, the overall process is openly based on the professional career model of the judiciary, where younger candidates are favoured and older candidates with professional experience outside the judicial branch are disadvantaged, or at least discouraged.[29] This effectively means that at the level of trial courts cases are adjudicated on by the

[26] Critical observers have remarked that, in fact, the six members of the National Judicial Council (out of a total of 15) who are representatives of non-judicial professions constitute the only link that Hungarian judges have to the rest of society. The Hungarian National Judicial Council consists of 15 members: nine judges elected by secret ballot of the Judges' Conference, the President of the Supreme Court (who is also the president of the National Judicial Council), the Minister of Justice, the Attorney General, the President of the Hungarian Chamber of Attorneys, and representatives of the Parliament's Constitutional and Judiciary Committee and Budgetary and Financial Committee. Act on the Organisation and Administration of Courts, LXVI/1997, Article 35. See Judicial Capacity in Hungary (note 6), at 116; Fleck (note 1), Chapter B. I. 2.

[27] See the interview with Z. Fleck, There is a curious alliance of interests, HVG hetilap, 28 June 2006, available at <http://hvg.hu/english/20060628zoltanfleckeng.aspx?s=24h>. Cf. also Z. Fleck, Architekti demokracie (Architects of Democracy), 4 Sociologický časopis (Czech Sociological Review) 601 (2005).

[28] Cf. the country report on Hungary by Freedom House, with further references for Hungary, available at <http://www.freedomhouse.org/template.cfm?page=47&nit=453&year=2008>. Similarly Fleck (note 6), at 129 (discussing the "uncontrolled system tending towards *oligarchization*"). As far as I know, the situation is rather similar in both the Czech and Slovak Republics.

[29] I can recollect from my personal experience, drawn from an interview conducted in 1997 at the Prague Municipal Court that the interviewer, a judge of the court, quite openly told us, all recent graduates, that personally he did not like experienced candidates, as they would be inclined to bring strange things into the judiciary. Facing this experience, I decided to join the legal academia instead.

least experienced lawyers, recent graduates after a short period of preparation. Although it is an old continental tradition, even before communist rule ended the Hungarians began to question to what extent the system might continue to work in this way.[30] In the view pronounced in Hungary three years before the fall of the communist system, a truly independent and reliable judiciary will be created only if the judiciary itself is composed of experienced lawyers who have had substantial life and legal experience off the bench.[31]

The classical continental paradigm of drawing judges from recent law school graduates is now increasingly questioned throughout the region.[32] In my opinion, to some extent this paradigm contributes to the widespread distrust of judges throughout the post-communist region. The situation is slowly changing, mostly by statutory enactments. The minimum age at which a person is qualified to become a judge in the Czech Republic is now 30 (but until 2003 it was 25). In Slovakia since 2000 the minimum age for becoming a judge has been 30.[33] Many judges appointed in the Czech Republic until 2003 were not much older than 25. In 2003, the Czech Minister of Justice (since 2003 Chief Justice of the Constitutional Court) wrote that when he saw "the kids at the Prague Castle who were taking the judicial oath", he became even more persuaded that the Czech legal order must abandon this harmful practice and opt instead for judges with sufficient life experience and at least ten or 20 years of previous legal experience.[34] In the Czech Republic a minimum age of 40 is being considered for the future.[35]

---

30 Cf. critically C. Kabódi, La juridiction est-elle une prestation?, 28 Acta Juridica Academiae Scientiarum Hungaricae 149 (1986).

31 Id. In Kabódi's opinion, a judge dealing with the issues of fact, that is, a judge at the lowest (trial) level, should be an experienced person, not a recent graduate.

32 Id., at 112.

33 Law No. 385/2000 Z.z., § 5(1.a). Cf. in English, CEELI, Judicial Reform Index for Slovakia, June 2002, at 7.

34 P. Rychetský, Reformu justice pro občany, ne pro soudce! (The Reform of the Judiciary for Citizens, not for Judges!), the daily Právo, at 6, 12 April 2003.

35 Koncepce stabilizace justice (The Conception of the Stabilization of the Judiciary), a document of the Czech Ministry of Justice, at 10 (2004), available in Czech at <http://www.epravo.cz>.

The most severe criticism of the present situation has been written by Deputy Chief Justice of the Czech Constitutional Court, Eliška Wagnerová. In her view,

> "Continental Europe has been abandoning exaggerated legal positivism in favour of sociologizing lines of thought which necessarily change the institutional framework. A judge untouched by life is no longer sought after. As the law ceased to be a science about itself but is about life then an exponent of the law must know life."[36]

In my opinion, a judge educated in the continental professional career model is the least suitable person to overcome the dogmatism and formalism typical of the Central European judicial profession. A young lawyer is from the very beginning of his/her professional career moulded by this outmoded system which thinks of itself as a bureaucratic machine and emphasizes formalism over substantive values, simplified solutions over more complex ones. Young Central European judges during the few years of their judicial appointment immediately following largely dogmatic law education at the university encounter nothing other than the mores of their older colleagues. The values of dogmatism and formalism, omnipresent throughout their early professional years, will become firmly internalized because the young judges have never been exposed to anything but formalist and textual law application.[37]

However, if we want the judiciary to be more open to other legal professions the trends towards higher transparency of judicial appointments may be counterproductive if it means a formalized *maths-like* procedure of selection. In fact, too often the tests and exams are set to measure skills of recent law school graduates. Older judges' abilities to perform judicial functions involve value judgements and are hardly to be put into any mathematical formula. One example may be provided

---

[36] Wagnerová (note 3), at 178. It is a translation of the article, which was originally published in Czech.

[37] Cf. this description of the Italian situation: "Law graduates become judges by way of a public examination. Once admitted to the judiciary they enter a bureaucratic culture lacking in a tradition of excellence and hard work. Excessive importance is given to formalities." A. A. S. Zuckerman, Justice in Crisis: Comparative Dimensions of Civil Procedure, in: A. A. S. Zuckerman (ed.), Civil Justice in Crisis. Comparative Perspectives of Civil Procedure, 3, at 24 (1999).

by the Romanian exams organized by the Superior Council of the Magistracy which is openly aimed at law school graduates.[38]

Judicial posts at the high courts in Central Europe are usually filled by career judges who have made the journey throughout the judicial ranks, beginning at the lowest judicial level and ending at the supreme court of the ordinary judiciary after 20 or more years on the bench. Most of these people have never had any career experience other than in the judiciary. This is a typical example of both the Czech and Slovak Supreme Courts, composed almost exclusively of professional career judges. The sole exception is the Czech Supreme Administrative Court, a body much more diverse than a typical post-communist high court, which, in addition to career judges, *inter alia* includes academics, former attorneys, tax specialists, and former public officials.

The Polish high courts, in contrast to a typical post-communist supreme court, have been transformed not just in terms of personnel; they have been changed professionally as well. After the end of communism the Polish Supreme Court and Supreme Administrative Court were restaffed with a considerable number of academics and other *outsiders* to the judicial echelons. Thereby the post-communist Polish judicial system to a considerable degree utilized the Polish academia, not so compromised by the former communist regime as was its Czecho-Slovak counterpart. In the summer of 2003, out of 29 judges of the civil section of the Supreme Court almost one quarter (seven) held professorial rank.[39] One professor of the Warsaw University, himself a judge at the Supreme Court, noted that the composition of the court is shaped by academics, most of them lacking previous judicial experience.[40] One must bear these numbers in mind. They may explain why the Polish high courts often produce different results from their counterparts in other Central European legal systems. The Polish high courts were far more receptive to a new concept of law and a *New Constitutionalism* than the majority of other post-communist high courts.[41]

---

[38] Cf. Coman/Dallara (note 1), Chapter B. II. 1.

[39] According to the data provided by the Polish Supreme Court on its internet page, available at <http://www.sn.pl>.

[40] W. Sanetra, Sąd Najwyższy w systemie wymiaru sprawiedliwości (The Supreme Court in the system of the judiciary), 9 Przegląd Sądowy 3, at 15 (1999).

[41] Cf. in more detail Z. Kühn, Making Constitutionalism Horizontal: Three Different Central European Strategies, in: A. Sajó/Renata Uitz (eds.), The Con-

F. Conclusions

The experience of Central-Eastern Europe shows that selected rather than broad competences of the supreme council of the judiciary work. At the same time, the powers shared between the executive and the representation of the judiciary seem to be preferable to those powers which belong unilaterally to just one branch of the government. On the one hand, judicial councils which are too strong or omnipotent bring with them the tendency to insulate the judiciary from real life and avoid any accountability for the problems within the judiciary (Hungary). On the other hand, too strong an executive equipped with control over influential courts' presidents presents a clear danger of political control over the judiciary, which may be the case even in a relatively democratic system (the Czech Republic).

The judiciary must be effectively insulated from improper influences which may directly or (more often) indirectly touch its decision making powers. However, the ultimate responsibility for the proper functioning of the judiciary must be of a democratic nature connected with political responsibility. The ultimate responsibility includes the power to decide who will be an ideal type of judge (i.e. whether the state wants a purely career model of the judiciary or a career judiciary combined with the frequent appointment of *outsiders*, senior lawyers with experience from elsewhere), make a final decision on the judicial chapter in the state budget etc. That is why this must remain in the executive's or the legislature's hands.

---

stitution in Private Relations: Expanding Constitutionalism, Eleven International Publishing, 217 (2005).

The Drive for Judicial Supremacy

*Cristina E. Parau**

A. Introduction

Great efforts at judicial reform have been made in Central-Eastern European countries (CEE) over the last 20 years. The earliest reforms were driven by the domestic need for foreign investment and the security of contracts and private property rights which investors expect. These domestic motivations were later complemented by those of international organizations, which throughout the 1990s lent money and granted funding to CEE countries on condition that they establish *inter alia* the *rule of law*. Externally motivated influence over judicial reform reached its height under the EU accession process and its conditionality, whereunder candidates aspiring to EU membership must meet the conditions enshrined in the Council of Copenhagen's Criteria of 1993.[1] These also include the rule of law, which is generally supposed to rely on the independence of the judiciary.[2] It is not surprising, then, that judicial independence has become the cynosure of reforming efforts in post-Communist CEE. The European Commission in tandem with

* I would like to thank my interviewees, each one of whom gave their precious time to answer my questions and to the British Academy who funded the Postdoctoral Fellowship without which this chapter might not have been written.

1 European Council in Copenhagen of 21–22 June 1993, Conclusions of the Presidency, SN 180/1/93 REV 1. See also A. Seibert-Fohr, Judicial Independence in EU accessions: The emergence of a European basic principle, 52 German Yearbook of International Law 405 (2009).

2 J. Rios-Figueroa/J. K. Staton, Unpacking the Rule of Law: A Review of Judicial Independence Measures, available at <http://ssrn.com/abstract=1434234>.

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233, DOI 10.1007/978-3-642-28299-7_16,

other international organizations such as the Council of Europe has pursued this goal with a great deal of zeal.

Nevertheless, the trajectori(es) actually taken by CEE judiciaries have not been systematically documented or explained, and their implications for democracy and the rule of law have been scarcely assessed. The literature on post-Communist CEE courts has focused primarily on Constitutional Courts[3]; or on the formal institutions (e.g. judicial appointments) supposed to make for judicial independence.[4] The few studies to date evaluating the judiciary as a whole have too often been written by international organizations with a stake in the current struggles for a certain kind of judicial reform.[5] Scarce are the disinterested studies which give insight into the general trends affecting CEE judiciaries, while accounting for external influences as well.[6]

This chapter aims to supply some of these deficiencies. Believing that the question of the proper role of courts in a democratic society has an irreducible normative dimension that should not be ignored, this chapter develops a normative typology of the relationships that can exist between the judiciary and the elected branches of government and their consequences. This typology, which may be used to assess the nature of any judiciary, is applied to the examination and explanation of the nature of the Romanian judiciary that resulted from the unprecedented reforms of 2003 and 2004. It is concluded that these reforms went far

---

[3] H. Schwartz, The Struggle for Constitutional Justice in Post-Communist Europe (2000); S. I. Smithey/J. Ishiyama, Judicious Choices: Designing Courts in Post-Communist Politics, 33 Communist and Post-Communist Studies 163 (2000); E. S. Herron/K. A. Randazzo, The Relationship Between Independence and Judicial Review in Post-Communist Courts, 65 The Journal of Politics 422, at 422 (2003); W. Sadurski, Rights before Courts. A Study of Constitutional Courts of Post-Communist States of Central and Eastern Europe (2008).

[4] A. E. D. Howard, Judicial Independence in Post-Communist Central and Eastern Europe, in: P. H. Russell/D. M. O'Brien (eds.), Judicial Independence in the Age of Democracy: Critical Perspectives From Around the World 89 (2001).

[5] American Bar Association, Judicial Reform Index for Romania (May 2002); Open Society Institute, Monitoring the EU Accession Process: Judicial Capacity, available at <http://www.eumap.org/reports/2002/judicial/international/sections/overview/2002_j_05_overview.pdf>.

[6] But see A. Magen/L. Morlino (eds.) International Actors, Democratization and the Rule of Law: Anchoring Democracy?, (2009); D. Piana, Judicial Accountabilities in New Europe: From Rule of Law to Quality of Justice (2010).

beyond what was necessary for judicial independence, catapulting the judiciary to supremacy over the democratically elected powers of government. This conclusion has wider implications for democracy in the post-Communist states and for the EU's pre-existing *democratic deficit*.[7]

Why a normative typology? To gauge with probable accuracy just where the developmental paths laid out by reformers are leading, we need a clear general conception of all potential destinations. This is too often missing from various evaluations; indeed, such evaluations are typically biased in favour of the judiciary, with little critical thought given to the overall configuration of judicial institutions in relation to the rest of government. The resulting work is fixated on the maximalist conception of judicial independence, which empowers and insulates judges from check or balance by the political branches, especially by the Executive. Scholars and practitioners alike thus confound an independent judiciary with an autonomous one.[8] But *autonomy* means *law unto oneself*, a problematic formula incompatible with the *rule of law*. It betrays an underlying assumption that judges cannot check and balance the political branches unless they have the upper hand in all cases, while the elected representatives of the people may not challenge or correct judges. This is tantamount to giving judges limitless discretion over the people themselves, who will have no right to any final determination about their own self-government. A discretion so arbitrary ill comports with any form of government that calls itself a *democracy*.

The idea that autonomy is judicial independence is found especially amongst political scientists,[9] who too often view the role of the judiciary almost exclusively from the framework of rational choice theory, a framework derived from economics where preferences are taken as given and not subject to normative criticism.[10] Thus, whether judicial

---

7 D. Marquand, Parliament for Europe (1979).

8 F. Emmert, Editorial: The Independence of Judges – A Concept Often Misunderstood in Central and Eastern Europe, 3 European Journal of Law Reform 405 (2002); see for example J. Priban/P. Roberts/J. Young (eds.) Systems of Justice in Transition: Central European Experiences Since 1989 (2003).

9 See review by S. B. Burbank/B. Friedman/D. Goldberg, Introduction, in: S. B. Burbank/B. Friedman (eds.), Judicial Independence at the Crossroads. An Interdisciplinary Approach, 11 (2002).

reform has succeeded or not becomes theorized in terms of a naked contest for power, with *judicial independence* meaning the power of judges to override the decisions of rival authorities.

This state of affairs stems partly from the fact that what judicial independence is in the ideal continues to elude scholars.[11] Some have become so disaffected as to propose discarding the term altogether.[12] Although the core definition of independence is still essentially contested, a consensus appears to exist among legal scholars at least that judicial independence is at a minimum *decisional independence*, which constitutes the "*sine qua non* of the activity of judging".[13] This means that judges must arrive at their decisions on their own, without others imposing on them their contrary preferences. The *locus classicus* of plain decisional independence, without more, is the English judiciary, the judges of which reach their decisions without undue influence, yet, under the doctrine of parliamentary sovereignty, are neither dominant over nor even co-equal to Parliament or the Crown.[14] Nor has there ever been a rule in the English constitutions requiring the Crown or Parliament to obey any and all judicial decisions.

There is little agreement over whether more than decisional independence is essential or whether other general categories of independence are actually desirable as such. *Structural independence*, for example, is by some considered desirable insofar as formal structures may be used by

---

[10] P. C. Magalhães, The Politics of Judicial Reform in Eastern Europe, 32 Comparative Politics 43 (1999); E. S. Herron/K. A. Randazzo, The Relationship Between Independence and Judicial Review in Post-Communist Courts, 65 The Journal of Politics 422 (2003).

[11] T. L. Becker, Comparative Judicial Politics. The Political Functioning of Courts (1970); S. Shetreet, Judicial independence: New Conceptual Dimensions and Contemporary Challenges, in: S. Shetreet/J. Deschenes (eds.), Judicial Independence: The Contemporary Debate, 590 (1985); S. B. Burbank/B. Friedman (eds.) Judicial Independence at Crossroads: An Interdisciplinary Approach, (2003).

[12] L. A. Kornhauser, Is Judicial Independence a Useful Concept?, in: S. B. Burbank/B. Friedman (eds.), Judicial Independence at the Crossroads. An Interdisciplinary Approach, 45 (2002).

[13] G. Bermant/R. R. Wheeler, Federal Judges and the Judicial Branch: Their Independence and Accountability, 46 Mercer Law Review 835, at 836 (1995).

[14] R. Stevens, A Loss of Innocence, in: P. H. Russell/D. M. O'Brien (eds.), Judicial Independence in the Age of Democracy. Critical Perspectives from Around the World, 155 (2001).

politicians to undermine decisional independence. Lowering judicial salaries may render judges more bribable, which compromises their decisional independence. In such cases insulating the judiciary from the political branches may well be desirable.[15] However, not all structural constraints threaten decisional independence, and some may in fact constitute legitimate checks and balances, as in the US Congress's constitutional power to determine the jurisdiction of the courts.[16]

The vexed question of how much independence is too much becomes even more problematic in the leap from decisional independence to judicial authority over the constitution in general, and thus over the other powers of government. The advocates of such broad authority have endeavoured to justify it by the touchstone that certain "issues, actors and circumstances lead the courts to apply the political question doctrine or its equivalent", whereby the courts place limits (somewhere) on their own jurisdiction.[17] Such a conception, however, assumes that the judiciary itself has plenary power to determine its own jurisdiction, as the political question doctrine "is best understood as a *voluntary allocation* of interpretive responsibility by the Court to the political branches".[18] If such plenary power be controverted, then the question arises: how insulated must the judiciary be, that it may be decisionally independent without having plenary power?

In most accounts it remains unclear where democratic judicial independence ends and what may be termed judicial supremacy begins. This puzzle has led scholars to theorize a tension between judicial independence and democratic accountability.[19] Accountability at a minimum forbids judges to "remain uninformed, become lazy or even corrupt".[20]

---

15 O. M. Fiss, The Limits of Judicial Independence, 25 University of Miami Inter-American Law Review Journal 57, at 59 (1993).

16 S. B. Burbank/B. Friedman, Reconsidering Judicial Independence, in: S. B. Burbank/B. Friedman (eds.), Judicial Independence at Crossroads, 9 (2002).

17 C. M. Larkins, Judicial Independence and Democratization: A Theoretical and Conceptual Analysis, 44 The American Journal of Comparative Law 605, at 619 (1996).

18 S. E. Gant, Judicial Supremacy and Nonjudicial Interpretation of the Constitution, 24 Hastings Constitutional Law Quarterly 359 (1997).

19 M. Cappelletti, "Who Watches The Watchmen?" A Comparative Study on Judicial Responsibility, in: S. Shetreet/J. Deschenes (eds.), Judicial Independence: The Contemporary Debate, 550 (1985).

20 S. Voigt, The Economic Effects of Judicial Accountability – Some Preliminary Insights, available at <http://ssrn.com/abstract=732723>.

Scholars attempting to specify how an independent judiciary might be held accountable have argued that multiple modes are available. Firstly, judges are "legally accountable", in that, except for those on the Supreme Court(s), any judge's decisions are subject to appeal and reversal by higher courts. Secondly, judges are "institutionally accountable" through procedures which determine their appointments, careers and discipline in case of misbehaviour. Thirdly, they are "professionally accountable" to their peers. Fourthly, judges are "managerially accountable" in having to prove that they spend public resources efficiently. Fifthly, judges are (or can be made) "societally accountable" by such means as publication of judicial decisions, which allows members of the public to see for themselves whether the reasons for a decision are arbitrary or not.[21]

However, when subjected to closer scrutiny each of these modes fails. Legal accountability fails in that cases once decided by the highest court cannot be corrected – if the claims made for the finality of judicial review are to be believed. Occasionally, a final decision may be overturned by constitutional amendment, as in *Oregon* v. *Mitchell*, but in most polities the hurdles to amendment are too high for this to serve as a proper check and balance on a highest court.[22] This extreme difficulty of amendment tends to vitiate professional accountability as well, especially if a judge belittles what his peers think of him, or if there is an understanding among judges to pursue activism. Institutional accountability fails, too, especially if judges have life tenure, in that the appointments process does not enable retrospective correction of unjust decisions, which is what *checks and balances* (*viz.* judicial review) chiefly consists of. Impeachment would constitute the remedy in cases of appointment under false pretences. But impeachment is a blunt instrument[23] that takes so much energy to organize, as to disincentivize members of parliament from even trying. Moreover, impeachment

---

21 Piana (note 6).

22 C. N. Tate/T. Vallinder, The Global Expansion of Judicial Power: The Judicialization of Politics in: C. N. Tate/T. Vallinder (eds.), The Global Expansion of Judicial Power, 1 (1995); K. Malleson, The New Judiciary: The Effects of Expansion and Activism (1999).

23 S. Voigt, The Economic Effects of Judicial Accountability – Some Preliminary Insights, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=732723>.

might also be deployed to threaten judges' decisional independence.[24] Managerial accountability fails in that material efficiency does not even remotely touch the morality of judicial decisions. Finally, publishing judicial opinions in writing, while it may be desirable and may alert the public to injustice, leaves it without a mechanism for *redress of grievances*. These modes of accountability are thus unfit as means for what ought to be done and by whom, should the global trend toward governing with judges call for redress.

B. A Normative Typology

The typology presented herein is intended to overcome these conceptual and normative weaknesses. It holds that there are three possible relations that can exist between the judiciary and the elected branches of government: dependency or sub-ordination, co-equality or co-ordination, and supremacy or super-ordination. In addition, borrowing inspiration from Aristotle, who pointed out in *Politics* that the three types of government he identified – monarchy, aristocracy and democracy – could carry on in a virtuous or vicious state, all three types of judiciary situations may be "virtuous" or "vicious". The distinction intended implicates primarily the political culture and society that informs everyone's behaviour from the background, and only secondarily on the personal morality of office-holders, who will always present a mix of virtue and vice.

Classical notions of separation of powers and checks and balances are key elements of this typology. The purpose of separation of powers and checks and balances is not so much to create separate spheres of solutions for each branch of government but to require multiple assents to the exercise of state power against individuals – the multiple assents in question being those of the several separate branches. A check and balance on the judiciary is herein defined as the competence of the democratically elected powers of government to define what in particular is wrong with a particular judicial decision. Redress may entail correcting the decision in detail, nullifying it, or ignoring it in the appropriate case.

The concepts of separation of powers and checks and balances are essentially contested terms and invoking them will be controversial. Some

---

[24] J. Ferejohn, Independent Judges, Dependent Judiciary: Explaining Judicial Independence, 72 Southern California Law Review 353 (1999).

American publicists and many constitutional law judges in post-Communist Europe argue that both concepts are now antiquated and out of touch with reality, as witness the fact that regulatory agencies have taken on legislative powers and judges are making political policies. Thus, these terms should be discarded or reconceived, and we should try and improve the existing framework.[25] If these relatively recent (post World War II) trends are taken for granted it is natural to conclude that the separation of powers and mutual checks and balances do not add up. But the power of judges to make policy is a power taken away from the legislature, and the power of regulatory agencies to make law is a fairly recent *delegation* of legislative power by the legislature itself. These developments might well have been contested sooner and more vigorously, had not the unquestioned belief, that the courts have the last word in all cases of constitutional interpretation conferred on the US Supreme Court the power to legitimize as constitutional blatant corruptions of the separation of powers. In short, such an argument accepts as normal a judicial supremacy which a contesting viewpoint would see as a corrupt form of a more primordial arrangement.

I. The Subordinated Judiciary

The judges of a subordinated judiciary reach their decisions independently, but the range of decisions they are permitted to reach is intrinsically limited by prior decisions made by higher authority. In its *vicious* form, however, a subordinated judiciary is no more than a Potemkin Village, a fraud on the people whereby judges are reduced to mouthpieces of tyrants. Such a judiciary stultifies the whole concept, not merely of separation of powers, but of the judiciary itself. It is typically found in authoritarian regimes and kept in place to serve the regime as a facade of legitimacy.[26] The former Communist judiciaries of CEE with their telephone justice are classic examples.

In their virtuous form, subordinated judiciaries are found in classical parliamentary democracies in which parliament has traditionally been

---

[25] E. L. Rubin, Independence as a Governance Mechanism, in: S. B. Burbank/B. Friedman (eds.), Judicial Independence at the Crossroads. An Interdisciplinary Approach, 56 (2002).

[26] T. Moustafa/T. Ginsburg, Introduction: The Function of Courts in Authoritarian Politics, in: T. Ginsburg/T. Moustafa (eds.), Rule By Law: The Politics of Courts in Authoritarian Regimes, 1 (2008).

supreme, such as those of France and Britain before the advent of the EU.[27] This is virtuous subordination because, although subordinate to another, overriding authority, the judiciary is no deception: a democratic Parliament has legitimacy lacking in a Communist Party, which is a private corporation closed to all who do not serve the Party bosses. A Parliament facilitates the circulation of elites while the Communist Party persecutes all competition. The model of a virtuous subordinate judiciary has, since the rise of Constitutional Courts and the European Union, declined to the extent that some have even declared it dead.[28] Although this may well be the trend, Stone Sweet probably exaggerates how far it has reached to date in Britain; derogation from Parliamentary supremacy is still the exception and not yet the rule in Britain.[29]

II. The Co-Equal Judiciary

Under co-equality the judiciary is co-equal with the elected branches of government. Co-equality precludes the issue of virtue and vice in the relationship between the judiciary and the other branches. This is because the issue arises only in the context of relationships between superiors who dominate their inferiors, and whose domination bears the potential for abuse. Dominance and submission, however, play no part between co-equals, so that the potential for abuse is an issue that never arises.

This being the ideal, co-equality will be discussed at length. The perspective taken may be seen as libertarian, being designed to uphold individual liberty and make it the priority. Co-equality entails a structural bias in the way government works in favour of an outcome which gives people multiple chances of being left at liberty. Co-equality was considered to be the "essential precaution in favor of liberty".[30] Those who believe in co-equality share the view that the judiciary ought to be as much checked and balanced by the elected branches as they in turn are

---

[27] A. Stone Sweet, Governing with Judges. Constitutional Politics in Europe at 20 (2000).

[28] Id., at 1.

[29] Stevens (note 14).

[30] J. Madison, The Federalist Papers No. 47. The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts, available at <http://avalon.law.yale.edu/18th_century/fed47.asp>.

checked and balanced by the judiciary. None of the branches is to be supreme over the others. When the judiciary is not supreme over the other branches of government but simply co-equal with them, the judiciary is to be obeyed always in some things but not in everything. Such a checked and balanced judiciary is independent but not supreme over the other branches of government: it will always reach a decision on its own but it is not always obeyed.

To understand co-equality we must understand what the Framers of the US Constitution of 1878 had in mind when they created the first viable scheme of divided government. The US Constitution of 1787 – and the actual position of the Supreme Court up to the Civil War – is the *locus classicus* of co-equality. Indeed before then, and even after John Marshall declared that "it is emphatically the province and duty of the judicial department to say what the law is", other political institutions, including not only Congress and the President but even the government branches of the States, were active in interpreting the Constitution and their interpretations were perceived as legitimate and authoritative.[31]

Co-equality entails the concepts of separation of powers and checks and balances. These ideas existed before 1787: "[s]o that one cannot abuse power, power must check power by the arrangement of things".[32] The Framers of the US Constitution introduced a pivotal innovation which was to divide sovereignty into three co-equal and co-ordinate parts. Co-ordination – the equality of rank of all three branches – was substituted for Parliamentary sovereignty. This separation of powers was to prevent any one of them from wielding uncontrollable power over the others for any length of time.

Whether there is an infallible criterion for determining which branch should have the last word about what the Constitution means in case of controversy and, if there is one, what its exact content may be is a point that the Founding Fathers did not spell out with perfect clarity.[33] The criterion must have been intuitively so obvious to them that they took

---

[31] K. E. Whittington, Extrajudicial Constitutional Interpretation: Three Objections and Responses, 80 N.C. L. Rev. 773 (2002).

[32] A. M. Cohler/B. C. Miller/H. S. Stone (eds.) Montesquieu: The Spirit of the Laws, at 155 (2004).

[33] And the academic debates on this question, especially those over the last 20 years or more, remain inconclusive to this day.

it for granted and may not have been aware of the incompleteness of their explanations.[34]

The view to the contrary stems from the opinion of Chief Justice of the Supreme Court John Marshall in *Marbury* v. *Madison*. Marshall cleverly obviated counterattack by those in power by the tactic of agreeing with them, deciding in favour of Madison and Jefferson; but in so doing he subtly asserted his supremacy over the other branches of the Federal Government in saying what the Constitution means. The sophistry of this assertion, however, is proved by the records of proceedings of the 1787 Convention kept by James Madison, the primary architect of the Constitution. These decisively refute Marshall's gambit for supremacist judicial review. In "Notes of Debates in the Federal Convention" of 1787 the moment is recorded when the Court's jurisdiction over the meaning of the Constitution was first mooted. Madison himself raised the objection against a general jurisdiction in the Supreme Court over the Constitution: "Dr. Johnson [a delegate to the Convention] moved to insert the words 'this Constitution and the' before the word 'laws' [into Art. III, Section 2, para. I, which had previously stated: 'The judicial Power shall extend to all Cases, in law and equity, arising under [this Constitution], the Laws of the United States, and Treaties made, or which shall be made, under their Authority; […]']. Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising under the Constitution & whether it ought not to be constructively limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department. The motion of Dr. Johnson was agreed to *nem*[*ine*] *con*[*tradicente*] [with nobody contradicting – not even Madison], it being generally supposed [evidently even by Dr. Johnson] that the jurisdiction given was constructively [by the rules of construing statutory language] limited to cases of a Judiciary nature".[35]

The whole Convention, including Dr. Johnson, agreed with Madison's reservations. The Framers were spontaneously unanimous on this, a very rare occurrence on a substantive (not merely procedural) issue: the motion was agreed "no one objecting" [*nemine contradicente*] – not even Madison – it being "generally supposed" – by Dr. Johnson no less than by Madison – that the jurisdiction defined by Dr. Johnson's words,

---

[34] And this is one of the main problems with originalism, the interpretive doctrine which relies on lawgivers' original intent.

[35] J. Madison, Notes on the Debates in the Federal Convention of 1787 reported by James Madison at 538-539 (1840).

which ended up in the Constitutional text, was somehow to be limited and definitely not to be universal. By supposing it to be "constructively limited", the Framers were in effect saying "this is so obvious, it does not need to be spelled out". Clearly, the delegates did not believe they were giving the Supreme Court the power to interpret the Constitution generally.

At their most elementary, Madison's *Notes* prove that the Framers withheld from the Supreme Court "the right to expound the Constitution in all cases". This entails that they confined it to certain cases of which they had a reasonably clear conception. It follows that the Framers positively disempowered the Court to determine the confines of its own interpretive jurisdiction, since if one assumes the contrary – that the Court did have such a power – then it could define it however they pleased. But this would mean that the Framers would have taken power away from the Court with one hand and given it back with the other. A Court which could decide what cases it could decide would stultify the logic of Madison's unanimously supported objection. It seems reasonable to assume that the Framers intended the definition "cases of a Judiciary Nature" – and therewith the limits of Supreme Court's jurisdiction over the Constitution – to rest with any branch *but* the Judiciary. Therefore the limits of the Supreme Court's jurisdiction over the Constitution rests with any branch but the Judiciary. Although the Convention did not define "cases of a Judiciary Nature", common sense would suggest that these are cases where the guilt or innocence of persons subordinate to Federal power is to be *adjudicated*, in contrast to cases of a political nature, where the issue is the boundary between the respective powers of the several branches of the Federal Government. And *Marbury* v. *Madison* was a case of a political nature, in that neither the plaintiff nor the defendant, both officers of the Executive Branch, was subordinate to the Federal power, but both were co-equal to the Supreme Court. It follows that *Marbury's case*, if it had had any merit, should have fallen within the jurisdiction of Congress as Court of Impeachment. And had that Court declined to hear the case, it should have been conclusive in any common law court that it had no merit.

This conclusion is reinforced by the rest of the Constitution, which grants to the Supreme Court only a very confined originary jurisdiction, all further jurisdiction being at the discretion of Congress to define by statute. Therefore all cases of constitutional interpretation not conceded to the Supreme Court by the other branches do not belong to the jurisdiction of the Supreme Court. The Founding Fathers must have taken it for granted that it was obvious that the Supreme Court's juris-

diction is over deciding the guilt and innocence of persons rather than deciding over anything it wants. To them, it seems, this was self-evident common sense.

If the Supreme Court is co-equal with the other branches and not superior, it follows that it has no jurisdiction in determining the powers of the other branches of government: "the several departments [executive, legislature, judiciary] being perfectly co-ordinate [co-equal] by the terms of their common commission, none of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers".[36] In other words, the Supreme Court has no jurisdiction over those who are co-equal to itself (President and Congress); its jurisdiction must be limited to persons subordinate to the Federal power, that is, to "the States and the people" spoken of in the Bill of Rights which immunized them from certain exercises of Federal power.

If we reject Marshall's gambit of supremacy, how then should controversies over the powers of the branches be settled? Who should have the last word? Would not the want of a "single [supreme] authoritative decision-maker" lead to "interpretive anarchy"?[37] Tushnet proposes that in such cases "[t]he Supreme Court's interpretations of the Constitution's requirements prevail in general, unless they are rejected by wide majorities in both houses of Congress in legislation that expresses a reasonable interpretation of the [...] Constitution's requirements".[38] But this is a poorly theorized proposal; as a check and balance it is weak – it is difficult to amass wide majorities on anything, – ill-defined – how *wide* is wide enough? – and lacking legitimacy – the Constitution says nothing of such a proceeding. If co-equality is to be conserved, moreover, the elected Branches would do better to negotiate their powers between themselves. One classic example is the US President's War Powers, in the definition of which the Supreme Court thought it best not to meddle. Yet interpretive anarchy did not ensue; the elected Branches hammered out a *modus vivendi* by themselves.

---

[36] J. Madison, The Federalist No. 49. Method of Guarding Against the Encroachments of Any One Department of Government by Appealing to the People Through a Convention, available at <http://avalon.law.yale.edu/18th_century/fed49.asp>.

[37] L. Alexander/F. Schauer, On Extrajudicial Constitutional Interpretation, 110 Harvard Law Review 1395, (1997).

[38] M. Tushnet, Taking the Constitution Away From Courts at 29 (1999).

If such negotiations fail, the power to decide defaults to the constituent States and people to settle the issue by voting out the incumbent office-holders and electing replacements (or, if satisfied with the *status quo*, by re-electing the incumbents). Thus do constitutional issues become electoral issues as they ought to be under a system of popular sovereignty: "[a]s the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived, it seems strictly consonant to the republican theory, to recur to the same original authority [...] whenever any one of the departments may commit encroachments on the chartered authorities of the others [...]; and how are the encroachments of the stronger to be prevented, or the wrongs of the weaker to be redressed, without an appeal to the people themselves, who, as the grantors of the commissions, can alone declare its true meaning, and enforce its observance?".[39]

This means that under a co-equality regime it is not the case that "anything and everything is justiciable".[40] According to the US Framers, what is justiciable is to be decided by popularly elected representatives. Under co-equality, the correct sequence is the following: first, Parliament legislates; second, the Executive decides whether persons have violated the law and prosecutes those it decides have done so (or exercises its discretion to prosecute them sparingly or not at all); finally, judges are last in line to adjudicate in the cases of prosecution which arise under the law.

Even here, where they are last in line, the courts may not have the last word on what the Constitution means. The classical example of the Executive checking and balancing the Judiciary is Jefferson's nullification of the Alien and Sedition Acts in 1801, which John Marshall's Supreme Court had previously upheld as Constitutional. Jefferson pardoned political allies who had been found guilty under the Acts. The Presidential Pardon is not simply a vehicle of mercy to soften the rigour of the law, but in effect the power to interpret the Constitution. As Jefferson himself put it: "[…] nothing in the Constitution has given [judges] a right to decide for the Executive, any more than to the Executive to decide

---

[39] J. Madison, The Federalist No. 49. Method of Guarding Against the Encroachments of Any One Department of Government by Appealing to the People Through a Convention, available at <http://avalon.law.yale.edu/18th_century/fed49.asp>.

[40] Aharon Barak cited in R. Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism, at 169 (2004).

for them […] The judges, believing the [Alien and Sedition Acts] constitutional, had a right to pass a sentence [on the defendants] […] because that power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the Constitution […] if judges could decide what laws are constitutional […] for the Legislature and Executive also, would make the judiciary a despotic branch".[41]

President Jackson, too, in vetoing Congress's renewal of the national bank charter – an institution which the Supreme Court had held Constitutional – re-asserted the co-equality in the following terms: "[i]t is maintained by the advocates of the bank, that its constitutionality, in all its features, ought to be considered as settled by precedent, and by the decision of the Supreme Court. To this conclusion I cannot assent. Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power, except where the acquiescence *of the people and the States* [emphasis added] can be considered as well settled. So far from this being the case on this subject, an argument against the bank might be based on precedent. One Congress in 1791, decided in favor of a bank; another in 1811, decided against it. One Congress in 1815 decided against a bank; another in 1816 decided in its favor. Prior to the present Congress, therefore, the precedents drawn from that source [i.e. Congress] were equal. If we resort to the States, the expressions of legislative, judicial and executive opinions against the bank have been, probably, to those in its favor, as four to one [i.e. four opinions against it for each one in favour of it]. There is nothing in precedent, therefore, which, [even] if its authority were admitted, ought to weigh in favor of the act before me. [Even] if the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the co-ordinate authorities of this Government. The Congress, the executive and the court, must each for itself be guided by its own opinion of the Constitution. Each public officer, who takes an oath to support the Constitution, swears that he will support it as he understands it, and not as it is understood by others".[42] In other words, any of the branches of government can interpret the Constitution, and no interpreter is permanently supreme over the others.

---

41 Thomas Jefferson cited in Tushnet (note 38), at 15.

42 A. Jackson, President Jackson's Veto Message Regarding the Bank of the United States, July 10, 1832, available at <http://avalon.law.yale.edu/19th_century/ajveto01.asp>.

Those who support what they call a *living* constitution (though they treat its letter as dead) may object to the originalism implied in this discussion of co-equality. Claiming that reliance on original intent has fallen into disrepute, they declare the Constitution freely reinterpretable by judges.[43] The theory of a living Constitution may accurately describe what is actually happening nowadays in the homeland of judicial supremacy; however, it most certainly does imply a legitimacy problem known in Europe as the democratic deficit. This is not that the Constitution may never be amended, but merely that it should be amended in the way provided in the Constitution, that is, by referendum to the States and the people, and not by unelected judges.[44] An infallible sign of judicial supremacy is when judges usurp from the people such a consequential power and fundamental right. Judges can get away with this because the elected branches have come to believe that they have no right to check and balance the judiciary.

III. The Supremacist Judiciary

Judicial supremacy (often misleadingly called "activism") stands in contrast to both subordination and co-equality. The *locus classicus* of virtuous supremacy is the constitution of ancient Israel where the Law of Moses still commanded awe from the people of Israel, including the judges themselves. Thus they faithfully executed judgment according to the Law. The judiciary was supremacist insofar as the judges were the only standing government power in existence. The Executive power was nothing but the *posse comitatus*, the men of the community who voluntarily mustered to execute the judgments of the judges on an *ad hoc* basis. The Hebrew word for judges was *elohim* which literally meant *gods*. This testifies to the social and political position of judges. While it lasted the judges themselves were as much bound by the Law of Moses as the people whom they judged, and this constituted the rule of law.

Supremacist judiciaries in the vicious form "do not confine themselves to adjudication of legal conflicts but adventure to make social policies, affecting thereby many more people and interests than if they had confined themselves to the resolution of narrow disputes […]" (Holland

---

43 R. Dworkin, Law's Empire (1998).

44 A. Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev 849 (1989).

1991:1). Judicial supremacy taken to its logical maximum entails that "[n]othing falls beyond the purview of judicial review. The world is filled with law; anything and everything is justiciable".[45] Judicial supremacy refers to the "[putative] obligation of coordinate [putatively co-equal] officials not only to obey that particular [judicial] ruling but to follow its reasoning in future deliberations".[46] Such judiciaries exercise discretionary power over citizens, the legislature and the administration[47] and are likely to be aware that they are usurping powers which belong to the people or their elected representatives. The Israeli Supreme Court is probably the most extreme instance of judicial supremacy in modern times, closely followed by the US Supreme Court and the European Court of Justice.

A court behaves in a supremacist way when it sets its own boundaries, deciding like a legislature questions belonging to areas of life which ought to be but have not yet been regulated by the real legislature. Of course, in cases where the legislature has regulated a particular area of life, judges may be entitled to clarify the law where its meaning is not clearly spelled out in a context unforeseen by the legislator. Judges may also abuse this office to expand their own power. In both case, nothing would prevent the legislature from intervening to substitute its own interpretation for the Court's, correcting the misinterpretation. Where the Legislature has not at all regulated an area of life, a Court which is co-equal and co-ordinate is obligated to decline to hear the case on the grounds of lack of jurisdiction;[48] otherwise it substitutes itself for the legislature, an encroachment which "ought to be effectually restrained" by the other branches of government.[49]

Regardless of how we may feel about certain contentious issues, courts lack both the practical competence and the legitimate authority to right all wrongs. The issue before us is whether courts have unilateral juris-

---

45 Barak cited in Hirschl (note 40).

46 K. E. Whittington, Extrajudicial Constitutional Interpretation: Three Objections and Responses, 80 N.C. L. Rev. at 774 (2002).

47 K. M. Holland, Introduction, in: K. M. Holland (ed.), Judicial Activism in Comparative Perspective at 1 (1991).

48 T. Pop, Continutul sintagmei 'depasirea atributiilor puterii judecatoresti' [The Meaning of the Syntagm 'Overstepping Judicial Power's Competences'], 10 Dreptul 34, at 42 (1996).

49 J. Madison, The Federalist No. 48. These Departments Should Not Be So Far Separated as to Have No Constitutional Control Over Each Other, available at <http://avalon.law.yale.edu/18th_century/fed48.asp>.

diction to redress all injustices, real or imaginary. Do courts have any right to hear and try cases at law, absent an actual law enacted by Parliament? In setting themselves up, or being set up, as cure for all wrongs, activist judges unconstitutionally reunite in themselves the divided powers of government, annihilating the whole idea of checks and balances. A Constitution is the law regulating a government's own behaviour; therefore, courts must not entertain legal actions brought by private parties who read into the Constitution substantive rights which make claims against other parties' life, liberty or property.

There are many theories about why this strange state of affairs has come about, but most of them rely on rational choice theory which claim that politicians who anticipate being out of office at a future time maximize their utility over all time by setting up a supreme arbiter whose constraint of themselves at the present time is tolerable because of the prospect of their opponents in the future.[50] Although this may explain how judicial supremacy began it is insufficient to explain the inability of contemporary politicians, especially in the USA, to even conceive of turning the tables on the Supreme Court. A full explanation must take into account the sociological dimension, that supremacy has come to be accepted as normal not only among politicians but in popular opinion, especially insofar as this is reinforced by the elite media.

Proponents of judicial supremacy often claim that an activist judiciary is necessary to protect the rights of minorities from the tyranny of the majority. However, this is a logical red herring: the rights of minorities are sufficiently subsumed under the rights of the individual. If a constitution bans slavery, one cannot be enslaved no matter whether the affected party is a member of the minority or of the majority. But the judiciary has no monopoly on protecting minorities; any of the branches of government may do just as well. For example, President Truman desegregated the US Armed Forces by Executive Order in 1948. And in the Presidential election of 1952 the political platforms of both the Republican and Democratic Parties called for desegregation by Act of Congress. Had the Supreme Court never ruled in the case of *Brown vs. The Board of Education* (1954) it is practically certain that the same Congress that enacted the Civil Rights Act (1964) and the Voting Rights Act (1965) would have also enacted a Desegregation Act in the same

---

[50] J. M. Ramseyer, The Puzzling (In)Dependence of Courts: A Comparative Approach, 23 The Journal of Legal Studies 721, (1994); M. Stephenson, When the Devil Turns … :The Political Foundations of Independent Judicial Review, 59 Journal of Legal Studies 59, (2003).

timeframe.[51] Even without express legislation, remedies are available to check and balance the majority. As Jefferson said in his *Notes on the State of Virginia*, "In every case [a jury renders a verdict of guilty, even when the criminal is a slave] … there resides in the Governor the power to pardon".[52] Finally, as the history of the Supreme Court demonstrates, it is a myth that the Court has been a moral entrepreneur in protecting minorities.[53]

Supporters of judicial supremacy, usually the left, justify it by their overarching goal of achieving social justice. But even if courts do side with the angels, a loss of self-government has nonetheless been caused and democracy compromised, as unelected judges have "usurped a decision that should properly have been taken by the people or their representatives".[54] Such a loss only deepens the already existing democratic deficit. Like the Communist Party in CEE judicial activists concern themselves with ends rather than means;[55] and they are all too prepared to trade off the power of the people and their elected representatives for the (questionable) gains of governing with judges.

New democracies all over the world "almost instinctively" turn to the US model of judicial review and constitutionalization of basic rights as "the global model for democratization".[56] The US has been a source of inspiration not only for these ideas but also for separation of powers and checks and balances, principles which have been written in so many of these constitutions. Judicial review as it came to be practised in its more supremacist way after the American Civil War inspired the Austrian jurist Hans Kelsen. Kelsen divided the Supreme Court's constitutional-interpretive jurisdiction from its ordinary appellate jurisdiction. In the early 20th century he invented the concept of a Constitutional Court (CC) based on his observation of the by then corrupt practice of the US Supreme Court (since the US Supreme Court had been intended to be co-equal and co-ordinate). Kelsen may or may not have understood this, or the ideal of co-equality. CCs, then, appear to have been

---

51 Cf. R. Bellamy, Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy (2007).

52 T. Jefferson, Notes on the State of Virginia, (1781).

53 J. Waldron, Judicial Review and the Conditions of Democracy, 6 Journal of Political Philosophy (1998).

54 Id., at 345.

55 K. Jowitt, New World Disorder. The Leninist Extinction (1992).

56 Waldron (note 53), at 335.

based on the pervasive misunderstanding in the US about the Supreme Court's proper role. The idea of the CC caught on first in Europe and later elsewhere in the world. In some cases (Hungary) these Courts have become very powerful, dictating to Parliament that they cannot balance the budget. The idea of a CC is the polar opposite of co-equality. The two cannot co-exist because the CC's prerogative is to be the final arbiter over what the Constitutional means in all cases.

It may not be possible to avoid giving the CC too much discretion, although of course the political culture in which it is embedded will have great influence over the design of the CC in details, and over the behaviour of CC judges. CC is a form which is not compatible with democracy and tends to undermine that which is supposed to be the locus of sovereignty, the people. The CC is roughly in the same position as the *elohim* of ancient Israel. If they are faithful to the Constitution as written and as intended by those who wrote it, they may be counted as virtuous. But once the CC learns to impose its own preferences by dressing them up in the mantle of constitutionality, it ceases to be a mere CC and it sets itself up as a standing Constitutional Convention.

If CCs are inherently supremacist institutions, some might ask *What about established Western European democracies such as France and Germany? They have CCs and yet they are called democratic. Should the CC, which seems to pose no problems for democracy, be abolished for the sake of achieving co-equality?* The problem is that it has become normal for the word democracy to mean something other than democracy. The Western world seems to have democracy but the rise of the regulatory and welfare states as well as of judicial review by the CCs means that the so-called democracies become a mixed system in which democracy is only one element and not necessarily the dominant one.

CCs are relatively new institutions which have spread all over Europe only since WW II, being uncommon before that. Thus they grew up alongside the European Union. Indeed the two phenomena may well be related, and if so the CC may have contributed as much to Europe's democratic deficit as the supranational institutions of the EU have done. The national judiciaries have played a leading role in enforcing the direct effect of EU law in the national system; whether the CCs have played a pivotal role in this development is a matter for further research. If, however, the EU depends on the judiciaries of member-States to keep it together, because Parliaments cannot be counted on to enforce Brussels' Directives all the time, then evidently the EU cannot exist on a basis of democratic consent; hence the democratic deficit. It would follow that domestic judicial supremacy constitutes a key ele-

ment of the democratic deficit, which is usually attributed exclusively to the EU.[57]

If the CCs are a key component of the democratic deficit in Europe this immediately brings with it the question whether they should be abolished for the sake of being replaced with a co-equal and co-ordinate judiciary. *Are CCs such a big problem as would justify going to the trouble of abolishing an institution which is accepted all over Europe? What practical effect would this actually have?* It is because co-equality is difficult to understand and in the past was not properly understood that the CC was invented in the first place and *slotted in* to fill the vacuum created by this nescience. Therefore the abolition of the CC will certainly not cause co-equality automatically to replace it and be understood.

C. What Path for the Romanian Judiciary?

If the reader is wondering what bearing the foregoing discussion has on the practical question of the trajectory taken by post-Communist judiciaries, the answer lies in the wide-openness of CEE to external influences. After Communism fell, drastic changes had to be made in order to construct an authentic judiciary. Some countries preferred shock therapy; in East Germany, for example, all judges who had served under Communism were sacked. Others had to be pushed from behind by external influences. Across the region, judicial reform, as promoted and funded by external donors, has tended to focus mainly on making judiciaries independent in the sense of autonomous from the elected branches of government by various means which will be detailed below. The obsession of making them autonomous has come at the expense of both political and personal accountability.[58] Judiciaries have continued

---

[57] A. Follesdal/S. Hix, Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik, 44 Journal of Common Market Studies 533, (2006).

[58] J. Anderson/D. Bernstein/C. Gray, Judicial Systems in Transition Economies. Assessing the Past, Looking to the Future, available at <http://siteresources.worldbank.org/INTECA/Resources/complete.pdf>.

in many places to remain riddled with many problems, the biggest of which is internal corruption.[59]

A judicial supremacist paradigm dominated the minds of judicial reformers even before they began, a fact which foreclosed alternative types of judiciary, as reformers obsessively traded off all other considerations for supremacy. Reformers surely meant well when they empowered judges, insulating them from the pressures of politicians who in CEE are corrupt, arbitrary and incompetent as a rule. But if such grave defects pollute the rest of the polity, what are the odds of finding freak exceptions in judges? To insulate and to autonomize the judiciary under these circumstances accomplishes nothing but to insulate and autonomize corruption.

Many judges who promote judicial reform believe the only legitimate checks and balances on judges are a careful screening before appointment. But this is no more adequate *qua* check and balance than it would be adequate *qua* democracy to elect MPs for life. What guarantees that upright judges will not be corrupted after appointment? *Power corrupts and absolute power corrupts absolutely*. Other branches of government are needed precisely for this reason – to check and balance the judiciary. Reform-minded activists may be presuming too facilely that no evil consequences will follow the abolition of all checks and balances over the judiciary (other than marginal adjustments to structural conditions like pruning its budget, narrowing its jurisdiction, or vetting judicial appointees). That checks and balances like these are too blunt to correct judicial errors or to restrain judges who overstep their limits (using the constitution, typically, to create their own jurisdiction) is hardly discussed.[60] The idea that cases can arise where the Executive or Legislative may legitimately reverse judicial decisions, or decline to enforce them, is perceived in many quarters as "wicked".[61] Such uncriticalness suggests that mindsets and paradigmatic social constructs are playing a determining role.

---

[59] USAID, Guidance for Promoting Judicial Independence and Impartiality, available at <www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacm007.pdf>.

[60] Author's interviews with more than 50 judicial reformers of CEE, 2009-2010.

[61] Author's email communication with Romanian former Justice Minister (1), 17 September 2009.

External and domestic reformers alike appear to have misconceived the judiciary's fit role and what its independence is for.[62] They appear to hold unwitting normative assumptions which derive from the American judicial paradigm; whether judicial reform in CEE has succeeded or not has been implicitly assessed within the confines of this paradigmatic thinking. But, as shown above, such a paradigm ought not to be so controlling. Contemporary American judges are open to the charge of supremacism for routinely invoking judicial review merely to substitute their policy preferences for those of the people who, putatively sovereign, have become helpless to restrain this abuse. Democracy and/or the rule of law subsisted for centuries, in Britain with a judiciary subordinate to the Crown and in the US with one co-equal before the Civil War. The contemporary *cachet* of judicial supremacy as a panacea for the discontents of democracy is suspiciously unfounded in the longer-term historical record.

With these normative and theoretical points in mind, the chapter now turns to discussing the Romanian judiciary. Here, as in other countries of the CEE region, the politicization of the judiciary was a key feature of the Communist regime. Judges and courts belonged to the Executive and were subordinated to the Communist Party. Their appointment was tightly controlled through the *nomenklatura* system. Separation of powers existed only in name, the absolute control of the judicial, executive and legislative functions being concentrated in the hands of a private corporation, the Communist Party. Telephone justice was the norm; judges were told what decisions to deliver by party apparatchiks communicating with them over the telephone. The prosecution was the dominant partner in the judiciary branch and routinely used as a tool of the Party.[63] The Party permitted the judiciary a very circumscribed degree of independence to deal with matters the Party cared nothing about, such as street crime, divorce, probate of personal property, etc.[64] The war against the class enemy was carried on through special tribunals wherein the Party exercised total control. Very limited judicial review was allowed in a few countries (Hungary, Yugoslavia and Bul-

---

62 Cf. Emmert (note 8).

63 M. Macovei, The Procuracy and Its Problems, 8 East European Constitutional Review 95 (1999).

64 Author's interview with Romanian former President of the Supreme Court, 17 July 2009.

garia), but disregard masquerading as interpretation of the Constitution was the norm.[65]

After Communism radical changes were needed to set up an authentic judiciary. In the case of Romania, at least, these were slowly forthcoming. Some changes were made through the new Constitution, which restructured and reorganized the judiciary, rewrote the Codes, raised the salaries of judges and professionalized judicial training. But the country underwent the most radical reforms in 2003 and 2004 under external influence. Focussing on these reforms, the chapter now proceeds to present evidence for the claim that the Romanian judiciary was purposely launched onto a judicial supremacist path. The checks and balances the elected powers once wielded over judges were abolished. All this was done in the name of judicial independence. But the judicial supremacy that appears to be emerging, in Romania at least, is radically different from judicial supremacy as it exists in the West. The institutional set-up which can allow judges to impose their own policy preferences is in place, but the judiciary is internally too weak to take advantage of these opportunities. Its main weakness appears to be the lack of internal rectitude. Supremacy has the potential to develop in a vicious one where judicial autonomy is combined with internal corruption.

The question of how far one may generalize on the basis of Romania is difficult to pre-judge. On the one hand, Romania appears to be a hard case for the testing of the hypothesis that judicial supremacy has spread to CEE. This is because Romania has experienced one of the harshest Communist regimes and has been ruled for most of the transition period by the reformed Communist Party. This would raise the expectation that the norm of the judiciary's subordination to the parties staffing the Executive and the Legislature might have been stronger than anywhere else in the region. Based on these reasons, if the Romanian judiciary is found to have taken the path to judicial supremacy such an outcome should be all the more expected in other post-Communist countries renowned for their openness to reform (e.g. Hungary, Poland, the Czech Republic).

On the other hand, empirical research has shown that Romania has been particularly open to Western influence. During its negotiations with the EU, Romania became notorious for being very open to influ-

---

[65] R. Weber, The Romanian Constitutional Court: In Search of its Own Identity, in: W. Sadurski (ed.), Constitutional Justice, East and West, 283, at 284 (2002).

ence by the European Commission.[66] Therefore, in contrast with Romania, judicial reform outcomes may differ substantially in countries reputed to be leaders of democratization and EU accession. Countries such as Poland and Hungary have been much more assertive in their negotiations with the EU and may have resisted the imposition of certain preferences. One might expect the reform agenda for countries currently negotiating membership (e.g. Croatia) to have been recast by the Commission in light of the lesson that over-empowering corrupt judiciaries is counter-productive; alternatively, though having learnt, they may yet prefer to pursue the old agenda for reasons yet to be discovered. Further East in the EU aspirant countries (e.g. Georgia, Ukraine) the prospect of membership is remote enough for few changes to the judiciary's relation with the elected branches to be expected. Comparing countries from each of these groups would lay a more solid evidentiary basis for generalizing to the entire region. Further research is therefore necessary to determine whether the outcome of judicial reform identified in Romania is a common feature of post-Communist Europe.

I. The Superior Council of Magistrates

In the 1990s, under external influences especially springing from the EU accession process, Judicial Councils were set up in many post-Communist CEE countries. Judicial Councils, which exist in many democratizing contexts like Latin America, have recently come to scholarly attention; their prevalence is puzzling, given the evidence that they may actually worsen the quality of the judiciary.[67] In Romania the 2003 Constitutional overhaul and the 2004 judicial reform package strongly empowered the Superior Council of Magistrates (SCM), making it virtually autonomous. The SCM was to guarantee judicial independence through being empowered to control judicial appointments and careers, from promotions to disciplining malfeasance. But contrary to the ex-

---

[66] C. E. Parau, Impaling Dracula: How EU Accession Empowered Civil Society in Romania, 32 West European Politics 119, (2009); C. Parau, East Side Story: How Transnational Networks Contested Accession Conditionality, 62 Europe-Asia Studies 1527.

[67] N. Garoupa/T. Ginsburg, Guarding the Guardians: Judicial Councils and Judicial Independence, 57 American Journal of Comparative Law 103, (2009).

pectations of advocates of empowerment and autonomization, the evidence strongly suggests that the SCM has set back the reform effort.

Romanian legal scholars have opined that the Council is now "the most autocratic power in Romania".[68] Even the European Commission, which insisted on its empowerment, has repeatedly criticized its lack of transparency and accountability. In 2008, for example, the Commission publicly stated that "[t]he [...] SCM has been given sufficient resources to operate effectively, but difficulties in improving accountability and ethical standards of its members are of concern".[69]

The SCM is formally unaccountable to the elected branches of government. Whatever power Romania's first Parliament had over the SCM and the judiciary between 1990 and 1992 was shut down as early as 1992 when Romania's first democratic Constitution located power over the judiciary in the Executive. By creating the SCM, the 1991 Constitution created "a veritable government of the magistrates".[70] From this moment on "the influence of the legislature over the judiciary has been in theory radically reduced".[71] The 2003-2004 constitutional and legislative reforms went several steps further. Parliamentary Act 317/2004 transformed the Council into a "unique forum with competence over the career of magistrates".[72] The Chamber of Deputies' former right to withhold consent to the election of SCM members was abolished with the constitutional amendments of 2003. In its place the Senate now elects a mere two of 19 SCM members, but these are not magistrates but inconsequential civil society representatives. It is of scant importance as well that the Justice Minister and the Prosecutor General are members of the Council *ex officio*: they and the civil society representatives put

---

[68] Author's email communication with Law Professor, "Simion Bărnutiu" Faculty Sibiu, 12 October 2009.

[69] Commission of the European Communities, Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism {SEC(2009) 1073} COM/2009/0401 final, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0401:FIN:EN:HTML>.

[70] Law Professor (note 68).

[71] Id.

[72] Romanian Government, Expunere de motive pentru proiectul de lege privind Consiliul Superior al Magistratilor [Reasons for the Bill on the Judicial Council of Magistrates], available at <http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=5547&cam=2>.

together are easily outvoted by the 15 SCM members who are professional magistrates.[73]

That today's SCM is elected by its peers (and merely validated by the Senate) explains the Council's unaccountability before the general public – over whom they exercise the power of judging. This conception of the SCM was a radical departure from Romania's first democratic Constitution of 1991, which had provided that SCM members should be elected for four year terms by the Parliamentary plenary. Back then MPs elected the SCM by choosing between three candidates for each position.[74] The fear that many delegates expressed in the debates on the Constitutional Convention of 1991, that a Judicial Council, especially if made up solely of magistrates, would constitute a third State power insulated from the Executive and Legislative and beyond the reach of ordinary people,[75] appears to have materialized in 2004. Those who rang in this change manifestly intended to annihilate any possibility of judges being checked by the political powers. This had been a perennial concern of the European Commission, which had complained that the SCM was not sufficiently independent of the Justice Ministry.[76]

Not only has the SCM become autonomous from the elected branches, its competences have been greatly expanded, too. Before 2004 its powers had been kept (formally and informally) within narrow bounds. Between 1990 and 1992, before any SCM had been set up, all judges, including the Chief Justice of the Supreme Court, were appointed by the Romanian President with the Senate's advice and consent, as in the USA.[77] After 1992 but before 2004 the SCM had formal power to nominate the candidates for magistracies (judges and prosecutors) for the President's selection, a procedure presided over by the Justice Minister; and to undertake disciplinary action over judicial malfeasance.[78] In

---

[73] Author's interview with Romania's General Prosecutor Laura Codruța Kövesi, 12 October 2009.

[74] M. Macovei, Judicial Capacity in Romania, available at <http://www.soros.org/resources/articles_publications/publications/judcap_20030101>.

[75] A. Iorgovan, Odiseea elaborării Constitutiei [The Odyssey of Drafting the Constitution] at 301 (1998).

[76] B. C. Smith, Models of Judicial Administration and The Independence of the Judiciary: A Comparison of Romanian Self-Management and The Czech Executive Model, 28 Public Administration and Development 85, (2008).

[77] Iorgovan (note 75), at 34.

[78] Romanian Constitution of 1991.

practice the SCM was merely an "appendix of the Justice Ministry",[79] its powers having been further curtailed in 1997 by the then centre-right Justice Minister – to the disappointment of civil society activists who were advocating a stronger Council.[80] The SCM was in practice obligated to consult the Justice Ministry on all proposals relating to judicial nominations and careers; no candidate had any realistic chance of being appointed or promoted if not recommended by the Justice Minister.[81]

The 2004 reform package annihilated this subordination. All power over the nomination, promotion and sanctioning of judges and prosecutors was stripped from the Justice Ministry and transferred to the SCM. The President still confirms judges and prosecutors but can only accept or reject the SCM-sponsored candidates. When these arrangements are combined with life tenure for all judges (except those serving on the CC), the net result is an extreme form of autonomy. The Romanian judiciary might be said to have been transformed into "a Latin European model of a self-governing judiciary".[82]

The self-selection model, whereby judges are elected by their peers, embodies a "maximalist definition of judicial independence" and is characteristic of self-perpetuating institutions like the French Academy or the Harvard Corporation.[83] Maximalism might more accurately be labelled judicial supremacy in that "such self-perpetuating institutions certainly have great autonomy and independence, as they are not formally accountable to anyone nor subject to anyone's direction".[84]

It is telling that the NGOs and international organizations which support judicial empowerment past independence perceived this as a "turning point", in that the "balance of power" between the judiciary and the Executive was "reversed".[85] It is prime evidence that the 2004 reform

---

[79] Author's interview with Romanian former President of the SCM, 13 October 2009.

[80] Piana (note 6).

[81] SCM (note 79).

[82] A. Mungiu-Pipidi, Nations in Transit – Romania available at <http://www.freedomhouse.org/template.cfm?page=47&nit=433&year=2007>.

[83] S. Levinson, Identifying 'Independence', 86 Boston University Law Review 1297 (2006).

[84] Id., at 1302.

[85] Author's telephone interview with the American Bar Association, 2 April 2009.

package set the Romanian judiciary on the path to supremacy, having been pushed in just a few years from subordination to virtual autonomy. But autonomy means "self-law" or "being a law unto oneself". The SCM has been insulated from all regulation by the elected representatives of the people.[86] This in a judiciary is incompatible with the "rule of law, not men".

As with any self-perpetuating institution the only checks and balances left on the judiciary consist of "informal pressures" exerted by their own peers, or by the media.[87] It is too early to tell whether peer-pressure can make for effectual accountability in Romania. Given the prevailing venality of the political culture, the odds must be that it will not. The Council already treats its fellow judges as subordinates. An externally funded NGO which has worked on judicial reform in Romania for many years opined that "while most judges see the Council as a body that should be responsive towards the judges who elected them, the Council no longer performs its mandate as the representative of judges but rather as someone who owns the judiciary, makes the rules for the judiciary, and rules the judiciary".[88] This is confirmed in general by the strongly hierarchical nature of Romanian political culture.

The autonomizing and augmentation of the SCM's power were not accompanied by adequate accountability safeguards, a fact deplored even by advocates of judicial autonomy. The SCM proceeds in secret according to the new 2003 Constitution, which stipulates that its decisions "shall be made by secret vote" (a provision which did not exist in the 1991 Constitution). Contests for certain posts – such as appointments to the Supreme Court – as well as promotions, which the Council now controls, take place behind closed doors.[89] The opacity of the SCM's

---

[86] According to the 2004 law, the SCM was given control even over the budget of the judiciary; however, both elected branches have refused to carry out this provision, and continue to keep the budget under their own control, despite the provisions of the law passed by themselves (but without repealing or amending it). They claim they are waiting for the SCM to "prove itself" by cleaning up judicial corruption.

[87] Levinson (note 83), at 1297.

[88] Author's interview with the director of the Rule of Law Programme South East Europe of the Konrad-Adenauer-Stiftung, 15 July 2009. The view of the person interviewed reflects her personal opinion, and does not necessarily reflect the opinion of the Konrad-Adenauer-Stiftung.

[89] Author's telephone interview with Romanian former Justice Minister (2), 10 September 2009.

control of judicial careers was criticized by the European Commission as late as 2009: "[t]he evaluation system introduced by the SCM to assess the performance of magistrates appears of questionable value. As of 6 May 2009 6258 magistrates (86.79% of the total) had been evaluated, of which 99.8% were awarded gradings falling within the highest, 'very good' band [...] questions raised about the impartiality of the evaluation commissions have also not been addressed".[90]

The European Commission also noted in 2009 that "[...] [lack of] transparency and accountability, including the incomplete publications of agenda items and resulting decisions (especially in disciplinary proceedings) [...] [has led to] disquiet amongst the magistrates they represent [provoking] general assemblies of magistrates around the country opening revocation procedures against some members of the SCM".[91] The SCM might well escape accountability to its peers by backing them against the political branches; e.g., when magistrates went on strike in 2009 the SCM supported them, notwithstanding that the strike was illegal. The Commission itself has suggested as much: "[i]n an apparent reply SCM members have become more vocal in voicing the concerns and complaints of the magistrates they represent leading them into institutional conflict with the executive".[92]

Thus, the institutions required for judicial supremacy are now in place. However, for the time being, the judiciary, including the SCM, is too weak internally to exert its potential. This internal weakness has manifold sources. One is judges' lack of self-confidence and self-assertiveness. They themselves opine that they have an "inferiority complex" in face of the Executive.[93] The Executive in particular, with the help of the media, has cultivated it to some extent. Indeed, judges have identified the media as the main source of pressure over them time after time in various surveys and focus groups: "[m]ore or less all post-1989 governments and Justice Ministers will publicly denounce the judiciary as a whole, talking about how corrupt judges are and how poorly prepared

90 European Commission (note 69).

91 Id.

92 Id.

93 Author's telephone interview with Romanian Court of Appeal judge, 26 June 2009.

they are professionally. A general indictment is the mode and is used as an electoral weapon […]".[94]

Judicial training contributes, too, by reinforcing the idea prevalent under Communism that judges are servants of the State.[95] Romanian legal training still reinforces this construct; even when an opportunity arises which can be exploited to substitute their own policy preferences for those of the elected branches, judges fail to see them: "[t]hey [learn to] […] apply the law very formally and technically […] end[ing] up with a very conservative vision; having been told they must always strictly apply the law. [Romanian legal training] makes you think your role as judge is to apply the law mechanically as if applying mathematical formulae without considering whether the outcome is just or how it will affect the social milieu. They know the Codes and other legal provisions by heart but what is omitted […] leads them to think that their independence is limited strictly by the letter of the law. If young judges start with this idea […] they will not be aware of the power they have […] They are not aware because they have not been exposed to other systems of law so as to understand that the system is created in a certain way, but there are nonetheless opportunities to exercise their discretion".[96]

Another source of weakness is judges' own incompetence.[97] Attempts were made to tackle this problem in 1997, before the advent of the EU. The then Justice Minister (a vice-PM and leader of a key partner in the centre-right coalition) used his leverage to push reforms he judged to matter most in building a professional and un-corrupt judiciary: salaries were increased to reduce the venality of judges; money was spent on upgrading the poor conditions of many courts; and the minimum age for the magistracy was lowered so that younger people could be promoted. Believing that having the right personnel matters most, he introduced more rigorous training and selection procedures for judges and prosecutors: the National Institute of Magistrates was the training

---

[94] Author's interview with Romanian Court of Appeal judge (2), 2 July 2009.

[95] Z. Kühn, Worlds Apart. Western and Central European Judicial Culture at the Onset of the European Enlargement, 52 American Journal of Comparative Law 531, (2004).

[96] Author's telephone interview with Romanian Court of Appeal judge (3), 24 June 2009.

[97] Justice Minister (1) (note 61).

academy set up to filter out inapt and corruptible people.[98] However, the ascendency of the SCM appears to have stalled this element of the reform. Since 2004, when control of the Institute was transferred to the SCM from the Justice Ministry,[99] the former appear to have taken steps to "diminish the role of the National Institute as the key instrument for reforming the justice system".[100]

Judges' deficient professionalism is further undermined by a system of nepotistic rather than meritocratic promotion. The SCM itself, which controls promotions, uses them as a way of controlling its peers: "[t]he other threat is the system of promotion. At almost every promotion session […] points are given to an exam paper, and there were situations where a candidate received additional points after contesting the result. She had initially been awarded 3.75 points but after she contested she received 9.75. The system has problems. At least in the high courts, judges lose their interest […] the system is not meritocratic, so no matter how good you are, you lose your appetite for trying to improve things […] what's the point […] so you don't care anymore about the quality of your work; you attend hearings without having read the file […] there is such resignation everywhere.[101]

Romanian judges are weakened too by their own venality. It is public knowledge in Romania that internal corruption of the judiciary is a serious problem. Romania's corruption was probably the main reason the EU introduced, for the first time at the end of its negotiations with a candidate, the additional safeguard of the Mechanism for Verification and Cooperation. This threatens sanctions if Romania does not reduce judicial corruption.[102] In interviews with the author, judges themselves have acknowledged that the judiciary is corrupt: "[w]hen I began working as a judge 12 years ago [in 1997] it was the norm for judges to speak openly about taking bribes […]. They were openly talking among themselves about how big a bribe they took in order to set a criminal

---

[98] Author's interviews with Romanian former President of the Supreme Court, 10 October 2009 and with the SCM (note 79).

[99] Piana (note 6), at 151.

[100] Minister of Justice (1) (note 61).

[101] Judge 1 (note 93).

[102] Commission of the European Communities, Key findings of the progress report on the Cooperation and Verification Mechanism with Romania MEMO/07/262, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/262&format=HTML&aged=0&language=EN>.

free. I was only a trainee then and it was very shocking to see this. What's worse, they were taking pride in it, showing off to each other".[103]

This venality continues to the present day. According to a former Justice Minister, it does not take much to bribe a Romanian judge.[104] Despite an increase in the magistrates' salaries, corruption continues to "constitute the major obstacle to reforming the judiciary".[105] Petty corruption taints workaday administrative processes connected with an action, " […] when the citizen [wants] to see his file, to obtain the file quicker, he will be tempted to bribe; likewise the lawyer who knows he has to go to court every day and, making the clerks' acquaintance, begins to ask for favours. 'Big corruption' affects the act of judging itself".[106] Although still a problem, open corruption may have diminished compared to its level at the early to mid-1990s, an outcome attributable more to generational change than effective counteraction: "[t]he attitude [towards corruption] is changing also because the generations have changed a little and young judges have another attitude. They tend to avoid obvious forms of corruption such as taking bribes because they have worked much harder and do not want to take the risks. I believe this is how the majority thinks".[107]

Bare-faced influencing of judges in politically sensitive cases has also declined: "[…] obvious ways of corruption that I noticed 12 years ago, I no longer see. It was the norm that any councillor in the Justice Ministry would not hesitate to call a judge to ask him/her to give an account of his/her solution to a case. I remember when I was a trainee [mid 1990s] that my boss called me and asked 'What have you done there, because somebody from the Justice Ministry called and asked for an explanation'. This is no longer happening".[108] Or, "I was under overt pressure from the President of the Court […]. In 1999 – because it was then when it happened – quite a lot of power was concentrated in the hands of the Presidents of the Courts […]. They were the ones distrib-

---

[103] Judge (3) (note 96).

[104] M. Macovei, Anti-Corruption and the Rule of Law, available at <http://www.osce.org/item/26924.html>.

[105] Author's interview with Prof. Simina Tanasescu, Law Faculty, 22 September 2009.

[106] Id.

[107] Judge 1 (note 93).

[108] Id.

uting cases to judges; this no longer happens […]. The Presidents' power is still great, but not as great as it used to be. It has been diluted by legislation over time […]. A computerized system that distributes cases randomly was introduced in 2005, and this has reduced the pressure that Presidents were able to put on lower judges. The President nonetheless remains a high-impact individual in the court".[109]

However, the bare-faced influence-peddling which was normal in the 1990s may merely have been replaced by subtler kinds of pressure: "Corruption has become much more disguised. It takes the form of influence. What I experienced and what some of my colleagues experienced in the early 2000s is that we were called in by our boss and told to decide *this* in such-and-such a way. These are forms of influence that do not involve bribes but in which many acquiesce in. But even these forms of influence have become subtler. Important cases never come before a judge they know does not bend […]. If you refuse you have a very difficult time. Because I did not bend in a case involving intellectual property, which is my specialism, I was marginalised. My boss tried to exclude me from the panel of judges specialising in intellectual property. She could not eliminate me altogether but she made sure that very few cases ended up before me".[110]

Judicial corruption, whether manifested as bribery or as interference by hierarchical superiors, remains a problem serious enough to move the European Commission to fund the fight against it. In 2005 it funded the computerized system which now distributes court cases to Romanian judges randomly. Randomization has reduced the undue influence Court Presidents (and their political masters) had long enjoyed.[111] It is already suspected, however, that the parameters which the randomization is based on are being manipulated.[112]

The very body which the 2003 Constitution made the guarantor of judicial independence, the SCM, appears to harbour corruption. A former Justice Minister stated that "The Judicial Council has not measured up to expectations. It has not had the political will to lead judicial reform. Instead of busying itself with fighting corruption in the judiciary and

---

[109] Judge (3) (note 96).

[110] Judge (2) (note 94).

[111] M. Macovei, Anti-Corruption and the Rule of Law, available at <http://www.osce.org/item/26924.html>.

[112] Author's interview with European Commission senior official, 1 October 2009 and Judge 1 (note 93).

curbing incompetence, the SCM has preferred the *status quo* having disciplined very few judges: only ten to 15 judges between 2006 and 2009 for small bribes of less of €1,000".[113] The European Commission too has repeatedly criticized the SCM for failing to cleanse the judiciary of corruption: "While the […] SCM is well established, it has not yet consistently exercised its full mandate, notably as regards pro-active investigations into disciplinary cases. The Judicial Inspection of the SCM still has to develop guidelines and establish a track-record for ex-officio investigations. The SCM is slow in coming to management and disciplinary decisions. The sanctions it imposes are often inconsequential".[114] The SCM's net influence has come to be seen as risking "divert[ing] the judiciary from its real purpose: serving the public interest".[115] Many opine that "there is not a big difference between the Council and the Justice Ministry".[116]

Romanian judges were already feeling intimidated by those whom they are charged with judging. Until recently politicians could intimidate them with the help of the secret services. In 2005 Justice Minister Monica Macovei disbanded a *Securitate* unit operating inside the Ministry which was gathering inside information on magistrates likely to be embarrassing and/or dangerous to them.[117] Such information had been used to "blackmail and control judges in individual cases".[118] Macovei's political opponents too have admitted that the unit was a "bastion of blackmail and political policing headed by high-ranking officers of *Securitate*".[119]

---

[113] Minister of Justice (2) (note 89).

[114] Commission of the European Communities, Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism COM(2008) 494 Final, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008DC0494:EN:NOT>.

[115] Minister of Justice (1) (note 61).

[116] Author's interviews with Court of Appeal Judge (1), 26 June 2009; confirmed by interview with European Commission senior oficial (note 112).

[117] Minister of Justice (2) (note 89).

[118] Id.

[119] Aurelian Pavelescu, Spokesman of the National Peasant and Christian Democratic Party cited in StiriROL.ro, Aurelian Pavelescu: Monica Macovei incalca legea prin reinfiintarea SIPA, available at <http://stiri.rol.ro/content/view/18587/2/>.

But even if this influence really has been eliminated, secret-service control over magistrates may still be exerted through the SCM leadership. Some judges opine that the SCM leadership is interlocked with former *Securitate*.[120] Further research is needed to corroborate this claim, but if the secrete services do interfere with judges, this is likely to happen with the connivance of the political parties, especially the PSD (ex-Communist Party), which has governed Romania for most of the time since 1989. Miron Mitrea, one of the PSD's leaders, has admitted on public television that politicians use secret-service information against those who pose a significant challenge to them. They do this by "appointing [someone] Chief of [*Securitate*] and then calling on him to render an account".[121] The importance to Romanian politics of controlling the secret services was exposed in October 2009 when the PSD Interior Minister was dismissed by President Basescu, of the centre-right Liberal Democrat Party, which had been forced into a coalition by the 2008 parliamentary elections with the PSD, its main opponent. Commentators opined that the Interior Minister had been dismissed for gathering intelligence that the PSD intended to use against Basescu in the forthcoming Presidential elections of November 2009.

Their dodging high-level corruption cases further evidences that Romanian judges can be bribed or intimidated by those they are supposed to judge. In 2007 the Commission noted: "There has been continued progress in the prosecution of high-level corruption cases […]. However, rigour in prosecution is not reflected by judicial decisions. Data provided on sentences show that penalties on average are not dissuasive and a very high number of these penalties have been suspended in cases of high-level corruption […]. Overall, progress in the judicial treatment of high-level corruption is still insufficient".[122] Little had improved by 2008: "[....] the fight against high level corruption has overall not shown convincing progress since June 2007. As reported then courts continue to deliver lenient sentences and inconsistent sanctions. The key cases concerning high profile politicians show no real progress".[123] Still, little progress appears to have been made as of 2010: "[j]urisprudence in high-level corruption trials remained inconsistent and not dissuasive.

---

[120] Author's email communication with Romanian Court of Appeal judge (4), 9 August 2009.

[121] Miron Mitrea quoted in Evenimentul Zilei, 9 October 2009.

[122] European Commission (note 102).

[123] European Commission (note 114).

High-level corruption trials continued to suffer from procedural delays".[124]

Ironically, it was the Commission which imposed on Romania the formal institutions designed to autonomize the Romanian judiciary. Without such pressure it is highly unlikely that the SCM would have been given so much power and autonomy: "[t]he 2004 reform would probably not have happened without pressure from the Commission and pressures associated with wanting to join the EU […]. Or it might have taken longer, it might not have followed the same path […]. The European Commission was strongly associated with it".[125]

Evidence corroborating this observation may be gleaned from the reform's history. When the Act on the Judicial Council was drafted in 2003-2004, two versions existed. The Romanian Justice Minister, aided (at the behest of PM Nastase) by a highly respected French jurist – a former President of the High Court of Cassation – drafted one version, whereby the Justice Minister retained power to initiate disciplinary proceedings for misbehaving judges; which denied the SCM full autonomy.[126] The French jurist's advice was: "do not transform the CSM in a clone of the Justice Minister, and in a State within a State. If you give it full autonomy you are going to produce an uncontrollable cast".[127] The other version was drafted by the then-President of the Judicial Council, together with a German jurist, a project which the Commission funded. For reasons yet to be discovered, the Commission preferred this version. If one admits that France has an independent judiciary, and that a prominent French jurist was advising the Romanian government, it is hard to avoid concluding that the choice ultimately made was not between independence and dependence but between a judiciary over which the elected branches still retained some checks and balances and a fully autonomous one.

---

[124] Commission of the European Communities, Interim Report from the European Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism COM(2010)113 Final, available at <http://ec.europa.eu/dgs/secretariat_general/cvm/progress_reports_en.htm>.

[125] European Commission (note 114).

[126] Author's interview with Romanian former Minister of Justice (3), 10 October 2009.

[127] Id. and personal correspondence with the former President of the French High Court of Cassation, Pierre Truche.

To ram through a fully autonomous judiciary, the PSD was forced to sacrifice its Justice Minister Stanoiu, who had been resisting Brussels, and replace her, reluctantly, with a more malleable appointee. The PSD leadership was forced to yield to circumstances. Elections at all levels, local, parliamentary and presidential, were impending. Public offices were hotly contested across the board, with the opposition making deep inroads into the PSD's political base. At this crucial moment Members of the European Parliament including the rapporteur for Romania, Emma Nicholson, called for the suspension of negotiations with Romania on an array of grounds, chief among which was precisely the lack of progress towards judicial reform. Under the circumstances the Romanian government could not afford any setbacks to Romania's accession timetable.

II. The Abolition of the Last Check and Balance: *Recurs in Anulare*

The question of the proper role of the courts became a public issue in Romania for the first time in 1995. In 1950 by Decree 92 of the Great National Assembly the Communist Party had confiscated without compensation between 241,068 and 640,000 property units.[128] Unlike in other CEE countries, after the 1989 Parliament, dominated by the ex-Communist Social Democratic Party (PSD), procrastinated in passing a law to regulate how restitution was to be made. An Act providing for restitution of agricultural land was passed in 1991, but another Act sanctioning restitution of residential property became a political football throughout the 1990s as power, slipping from the hands of the PSD, was taken up by a fragmented centre-right opposition.

Despite lacking a firm legal basis, Romanian courts had begun restituting residential property as early as 1994. Certain judges deemed themselves competent to proceed with restitution on the basis of an abstract

[128] C. L. Popescu, Influenta politica in solutionarea proceselor privind dreptul de properitate asupra imobilelor nationalizate in perioada comunista si consecintele acestora in causele impotriva Romaniei aflate pe rolul Curtii Europene a Drepturilor Omului [Political Influence in the Adjudication of Cases Concerning the Right to Property over Immobile Properties Nationalised during the Communist Regime and Their Consequences], 23 Revista Romana de Drepturile Omului 20, (2002); Romanian Academic Society, Property Restitution. What Went Wrong in Romania?, available at <http://www.sar.org.ro/files/330_Policy%20memo34EN.pdf>.

statement of principle in the Constitution, that the State is obligated to uphold the right to private property, and of a Civil Code provision stating that private property rights are inviolable. Neither statement of principle defined with any particularity the rights and duties specifically of parties to restitution claims. Judge-made restitution worked severe injustice on the current tenants of the properties in issue, "[…] creating real social dramas in the whole country […] many of those evicted, some of whom had bought their property from the State [under a post-1989 Parliamentary statute], were old people and pensioners […] many old people were effectively thrown out into the street".[129] In privileging the rights of claimant owners over those of actual tenants who were not at fault in the original confiscation and who had built their lives on these properties, these judges were (arguably) exceeding their powers only to remedy one injustice with another.

The objections of advocates of judicialization notwithstanding,[130] President Ion Iliescu of the PSD was right to prod the General Prosecutor into invoking *recurs in anulare* to check and balance judges for exceeding their powers. This procedure, which is found in many civil law systems under different names, is a check or balance – in Romanian a *path of attack* (*cale de atac*) – which the Executive may exercise by petitioning the Supreme Court to submit the *attacked* judicial decision to a different panel of judges for reconsideration. *Recurs* differs from appeal in that the decision is remanded for reconsideration to the court which originally decided it. The procedure existed under the Communist regime under the name of *recurs extraordinar*. It was relabelled *recurs in anulare* in 1993 when the Codes of Civil and Criminal Procedure were first amended after the fall of Communism, in order to distance it from the Communist past when, like all institutions, it was abused by the Communist Party to oppress its *enemies*.[131] The revisions left the power to exercise *recurs in anulare* with the General Prosecutor, whose appointment was controlled by the Executive through the Justice Minister. The application of *recurs* was restricted by law to a few situations

[129] Author's email communication with Romanian Court of Appeal judge (5), 2 December 2009.

[130] Open Society Institute, Monitoring the EU Accession Process: Judicial Capacity, available at <http://www.eumap.org/reports/2002/judicial/international/sections/overview/2002_j_05_overview.pdf>.

[131] Author's email communication with Romanian former General Prosecutor and Constitutional Court judge, 15 July 2009.

spelt out in the Codes, which included cases when judges exceeded their jurisdiction.[132]

In principle *recurs in anulare* was rightly invoked in these cases, as judges were restituting without jurisdiction from Parliament (which was not given until 2001). The judges in question were making up their own jurisdiction out of constitutional statements of principle conferring no definitive jurisdiction; *viz.* where no *fill in the blank* interpretation is needed. Statements of principle are addressed to those with jurisdiction to legislate according to them; they cannot supersede the separation of powers and its consequence that the judiciary has no legislative jurisdiction. Nor can statements of principle be construed as legislation, as they do not state with particularity what people's rights and duties are. Judges had indeed breached the separation of powers whereby Parliament is the expression of the general will.

The General Prosecutor's *recurs in anulare* succeeded: the Supreme Court decreed that courts may not restitute property without a Parliamentary statute authorizing it.[133] The decision mattered as the lower courts would be guided by it in future cases. But it also had retroactive effect, overruling final decisions to restore which had already been executed. This worked injustice on true owners who had relied on their restituted title to improve or mortgage their property, now to their detriment. Consequently, many cases were appealed to the European Court of Human Rights (ECtHR), which ruled against the Romanian State on grounds of breach of the principle of legal certainty.[134] Since *recurs* resembles appeal and appeal is not held to violate the principle of legal certainty, the trespass may have been that *recurs* was not subject to the same time limitations as appeal. Had it been invoked within the time frame of a statute of limitations, the Supreme Court's decree might not have been impugned by the ECtHR.

Recurs in anulare began to stir up controversy in the EU in the mid-1990s, when the first case of *recurs in anulare* over restitution of property reached the ECtHR, the decisions of which, together with the recommendations of its principal, the Council of Europe, insisted that the Romanian government desist from using *recurs* in this way. The Roma-

---

[132] N. Cochinescu, Organizarea Puterii Judecatoresti in Romania [The Organisation of Judicial Power in Romania] (1997); N. Cochinescu, Totul despre Ministerul Public [Everything about the Public Ministry] (2000).

[133] Popescu (128).

[134] Romanian Academic Society (note 128).

nian government proceeded to ignore them, seeing that neither the ECtHR nor the Council of Europe had coercive power.[135] When Romania opened accession negotiations with the EU in 2000, however, the European Commission weighed in against *recurs*. It became the subject of Brussels' constant criticism, being flagged up in the annual Regular Reports – the Commission's evaluation of accession candidates' progress – as Executive interference with judicial independence. However, *recurs in anulare* was not undermining what mattered most, the judges' independence in decision-making; they had taken the restitution decisions upon themselves, relying on provisions of the Constitution interpreted by them without pressure or undue external influence. It does not undermine judicial independence to invoke a check and balance mechanism which can be deployed only after a judge has already taken his decision.[136]

Recurs was criticized on the ground that the political party in power used it as a tool to achieve the political outcomes it wanted, and that it rested with the discretion of the General Prosecutor who was perceived as an agent of the Executive.[137] Although no statistics exist to prove how often the Supreme Court accepted or rejected petitions for *recurs*, or how often the outcomes reflected the General Prosecutor's line of reasoning, many senior judges opine that *recurs* usually did correct wrong judicial decisions or decisions where judges had overstepped their jurisdiction. Such cases remain uncorrected to this day.[138]

Under pressure from the European Commission to deliver some concrete judicial reforms, the Romanian government abolished *recurs in anulare* by Emergency Ordinance 58/2003. Why they preferred abolition to overhaul is still a matter of conjecture. Clearly *recurs* could have been amended to prevent the worst excesses; for example, legal uncertainty could have been obviated by enacting the same time limits as apply on appeal. The General Prosecutor's discretion was limited by the Supreme Court's own discretion to admit or reject his petition.

On the other hand, the reality in the 1990s was that Supreme Court judges (and other judicial officers *a fortiori*) had been inured by Communism to a political culture wherein prosecutors dominated the judi-

---

135 Minister of Justice (3) (note 126).

136 Constitutional Court judge (note 131).

137 Id.

138 Author's interviews with Romanian Constitutional Court judge, 15 July 2009 (note 131) and with SCM (note 79).

ciary and were feared even by judges. To make matters worse, at that time Supreme Court judges were appointed for six-year terms and were anxious to be reappointed. These influences arguably conspired to make them susceptible to even unreasonable demands of the General Prosecutor. Topping it all, the Supreme Court had been packed by the PSD and was ready, willing and able to accommodate a PSD Minister.

It is surprising, then, that such a Romanian government should take so extreme a step as to abolish *recurs in anulare* outright. Standing at the culmination of its toughest negotiations with Brussels and "under pressure to deliver", Prime Minister Nastase evidently believed the sacrifice would be profitable.[139] Even so, the government dragged its feet over relinquishing *recurs* in criminal cases until 2004, when the pressure from Brussels mounted to an unbearable intensity.[140]

The Commission's motives for pressurizing the Romanian government to abolish *recurs* are currently being researched. Two hypotheses seem plausible. The first is that the Commission did not understand what constitutes judicial independence and the rule of law, or how to bring it about: "[t]he fundamental thinking behind the 1993 Copenhagen Criteria is about the working democracy and state of law and so forth but what I don't think we [the Commission] appreciated early enough in the process was how to address these issues of reconstructing the State. I don't really think that the Commission is particularly well-qualified […] on the judiciary side it is […] difficult because you've got different legal systems in different parts of the EU […] [and] the judiciary is not like a normal branch of the *acquis* where you can say you should do this and this and this. We were trying to dictate what the system has to deliver rather than what the system should be. It does not always work. Firstly because when it comes to judicial reform […] I don't think we appreciated both how difficult and how absolutely critical judicial reform and public administration reform were and these are not areas in which the Commission has a lot of experience. I suspect we did not look around and say 'this looks like the best model'".[141]

Cluelessness opened the Commission wide to the influence of domestic and transnational NGOs and big business, which for their own reasons were lobbying for the abolition of *recurs*. The other hypothesis is that the Commission – or whatever elites may be acting through it – was

---

139 European Commission (note 114).

140 Minister of Justice (3) (note 126).

141 European Commission senior official (note 112).

wittingly pursuing an agenda of consolidating implicit elite control of Europe's putative democracies (which implies that the democratic deficit is no accident). A pivotal tool of implicit control is a judiciary empowered to override popular sovereignty at will. Both hypotheses may be true at the same time; thus, on either assumption, the abolition of *recurs in anulare*, albeit a minor skirmish, is a step in the desired direction nonetheless.

Opinions differ on the consequences of abolition, generally breaking along lines of experience *versus* inexperience in judicial affairs. Abolition was celebrated by advocates of judicial empowerment; older, more experienced judges generally believed it to be a mistake. Abolition had real consequences for real people: certain types of judicial errors remain uncorrected to this day.[142] The ECtHR may in theory have jurisdiction over some of these (but only some), but it can handle only a tiny number of cases, decided only after a lapse of time as long or longer than that complained of respecting *recurs*.[143] The consequences reach far beyond this, though, to touch the meta-judicial issue of what limits ought to be set to the jurisdiction of courts.

The evidence suggests that by 1995 some Romanian judges, at least, had become independent enough boldly to go a step beyond independence. The restitution cases are clear instances of judges confidently, deliberately overstepping the bounds of their power, creating jurisdiction in themselves absent statutory or constitutional warrant. Judges were proceeding on their own unilateral imputations of guilt, without waiting for Parliament to signal general agreement.

The injustices of the universe must be disentangled from questions over the power of judges to unite in themselves both legislative and adjudicative jurisdictions. By decreeing restitution unilaterally, the courts were implicitly creating a law which applied to everybody in the same situation. Different judges in different venues restituting property on their own recognizance according to their own notions risk widely inconsistent outcomes in cases with similar facts. If judges networked with each other to find consensus on a uniform procedure for restitution, they would be acting as a Parliament without popular suffrage – a plain usurpation. A lack of networking would be more legitimate, but would entail inconsistencies which would have to be appealed to the Supreme

---

142 SCM (note 79).

143 Author's interviews with Romanian Constitutional and Supreme Court judges, 2009-2010.

Court for resolution – constituting them a Parliament, again without popular suffrage.

It is the function of Parliament to enact uniform and universal norms with the consent of the governed. Parliament alone enjoys both the democratic legitimacy and the deliberative institutional capacity to decree norms applicable to all. Albeit that *recurs in anulare* was a weak check and balance (the General Prosecutor remaining subordinated to the Supreme Court), its abolition nonetheless evinces an intention to empower the judiciary over the elected branches. The system which replaced *recurs in anulare* did not right this imbalance in powers: currently, except for the Presidential pardon which is hardly ever used, no provision empowers the other branches of government to correct a judicial decision.

An important consequence of this imbalance is the empowerment of the ECtHR over Romania. A decision of the Supreme Court cannot be overruled except by appealing it to the ECtHR or the European Court of Justice. These courts consist of elite judges unelected by popular suffrage. Their appointment by the member-States matters little: the putative "accountability" chain is manifestly unfathomable to the general public. Elite judges are more easily unduly influenced by those who sponsored their appointment, or by the media or peer pressure. The move to empower European supranational courts is symptomatic of a general trend of governing with non-majoritarian institutions and, ultimately, of elite empowerment over the people.[144]

III. The Empowerment of the Constitutional Court (CC)

This section documents the empowerment of the Romanian Constitutional Court (CC) and the abolition of Parliament's former power to overturn its decisions. Many will, no doubt, contest whether a chapter on judicial reform should cover the CC; after all the Romanian Constitution itself does not classify the CC under the judicial power. I would contend in response that the CC's formal classification has little practical effect: it behaves neither as a Parliament nor as an Executive, but as a

[144] C. Lasch, The Revolt of The Elites and The Betrayal of Democracy (1995); R. Bellamy, Democracy Without Democracy? Can the EU's Democratic 'Outputs' Be Separated from the Democratic 'Inputs' Provided by Competitive Parties and Majority Rule?, 17 Journal of European Public Policy 2, (2010).

tribunal handling cases like any other court. This justifies its treatment here.

Under the 1991 Constitution, its powers had been rather tightly circumscribed. The CC had a power of abstract review only upon the application of the President of Romania, the President of either Chamber of Parliament, the Government, the Supreme Court of Justice, or at least 50 Deputies or at least 25 Senators. The Court could undertake concrete review only at the request of a party to a case at law; it enjoyed almost no *ex officio* power to pass judgment on the constitutionality of official acts. Furthermore, Parliament had the power to override the CC's decisions by a two-thirds majority in each of the two chambers. The most consequential augmentation of the CC's powers by the 2003 revision was its new jurisdiction to "solve legal disputes of a constitutional nature between [any] public authorities";[145] i.e. to determine what powers the various officers of the government have. The new Constitution also abolished Parliament's former right to overturn CC decisions. Parliament is now allowed 45 days in which to right a law after the Constitutional Court has declared it unconstitutional.

What appears to have motivated this empowerment was the inability of Romanian politicians to compromise on many of their most fundamental differences. Parliament was becoming increasingly gridlocked by the fragmentation of party power.[146] The underlying dynamic was the gradual erosion of the PSD's grip on Romanian politics in the wake of the 1989 revolution. More and more organized opposition to the PSD's general party line was emerging. Neither the PSD nor the mushrooming opposition was able to tip the scales its own way, and neither side was disposed to compromise. The PSD feared the further erosion of power and the opposition was buoyed by hopes of gaining power in the foreseeable future. The breakup of partisan power in ways which long ago came to be accepted as normal in the West posed dilemmas Romanians were unprepared to cope with immediately. To all sides an empowered CC seemed the way out of the deadlocks with which Romanian politics had become vexed.

This would seem to confirm one of the theories of judicial empowerment, the *divided power* theory, which claims that fragmentation of

---

[145] Art. 146(e), Romanian Constitution 2003.

[146] Author's interviews with Romanian Constitutional Court judge, 12 October 2009 and with former Chief of the EU Negotiations Team, 25 January 2010.

powers causes political elites to delegate to a third party the power to arbitrate.[147] But this theory leaves out of account some of the most interesting questions. *Why would anybody believe that the third party arbiter would be neutral?*, as the theory seems to assume they would believe; and if those who delegate know that the arbitrator is not going to be neutral, *Why do they still prefer such a solution to gridlock nonetheless?* Moreover the theory does not explain why politicians faced with gridlock would prefer a top-down solution to gridlock instead of a bottom-up one.

In stark cultural contrast, contemporary examples of bottom-up solutions to Constitutional controversies (*viz.* those arising from civil society) can be drawn from the US. The classic example is the War Powers Act, which in the wake of the Vietnam War was enacted to strike a bargain between Congress and the President – the Supreme Court having declined to arbitrate between them.[148] The Act regulates the extent of the President's powers to make war without waiting for Congress formally to declare it *per* the Constitution. The bargain as struck came officially from Congress, but the idea and shape of it came from the civil society beyond Congress. Similar examples include the Legislative Veto Act and the Line-Item Veto Act. These were *struck down* from the top by the Supreme Court, although they were viable solutions which had come up from the bottom.[149]

D. Conclusions

The evidence suggests that judicial reform in Romania, at least, has set the judiciary on the path to judicial supremacy. Supremacy is an unnecessary step beyond what is necessary for judicial independence. Most significantly, the reform efforts to date have failed to reform the judiciary's internal weaknesses, especially corruption, and may even have en-

---

147 C. Guarnieri/P. Pederzoli, The Power of Judges. A Comparative Study of Courts and Democracy (2002); T. Ginsburg, Economic Analysis and the Design of Constitutional Courts, U Illinois Law and Economics Working Paper No. 00-25 (2008).

148 Holtzman v. Schlesinger 484 F.2d 1307; Holtzman v. Schlesinger 94 S. Ct. 1935 ('certiorari denied' – this means the Supreme Court affirmed the ruling of the Court of Appeal).

149 Immigration and Naturalization Service v. Chadha 103 S. Ct. 2764.

trenched them. If the potential for vicious judicial supremacy is consolidated, it will undermine the fundamental principles of separation of powers and checks and balances, and with it the fragile democracy which has yet to be popularly embraced. It deepens the European Union's already problematic democratic deficit. Elite empowerment may prove fatal to democracy in the long run.

Judicial reform in Romania has been driven by strategic motives informing the process of EU accession as well as by domestic power struggles. The fact that important reforms would not have happened without pressure from the European Commission, the Council of Europe and the ECtHR suggests that pan-European elites have consciously or unconsciously acted through accession conditionality to empower themselves over the peoples of the accession countries. But EU pressure does not explain everything; internal political dynamics played a role: the empowerment of the Constitutional Court appears to have been driven by domestic motives. Although strategic interests, both domestic and supranational, do contribute to explaining the trajectory taken by judicial reform in Romania, the influence overarching all others appears to be all reformers' misunderstanding of key concepts such as judicial independence, separation of powers, and checks and balances. This has led to a default to the judicial supremacy paradigm, which became the norm in the West long before Eastern enlargement. The origin of such a norm is a question which calls for further investigation.

Judicial Independence in Poland

*Adam Bodnar and Łukasz Bojarski**

A. Introduction

Following 20 years of transformation, Poland has an independent judiciary, in both the constitutional and practical sense. Guarantees of Polish law, although perhaps not perfect with respect to certain issues, provide a general guarantee of independence which is additionally reinforced by guardians of this principle, in particular the National Council of the Judiciary. The Polish judiciary has so-called institutional memory. In 1989 there was no radical clearing out of the justice system of judges who collaborated with the previous system. Thanks to this it was possible to stabilize a legal system immediately after the start of transformation and to make a natural shift in generations of judges and build the principle of independence on a long term basis.

The principle of judicial independence was developed in the jurisprudence of the Constitutional Court since 1989 and in 1997 it was sanctified by numerous provisions of the Constitution. Constitutional provisions, along with different statutes, provide for a relatively stable environment for the development of the judiciary's independence in daily practice. Over the last 20 years there have been a few constitutional cases which touched upon certain issues concerning the independence of the judiciary. The most important one was a case concerning adjudication by probationary judges, which resulted in a serious reform of the judicial appointment system. Overall, those cases were more fine tuning in character than revealing of some structural deficiency.

* The authors would like to thank Katarzyna Gonera, judge of the Supreme Court, and Eva Katinka Schmidt, Rule of Law Officer of OSCE ODIHR, for their invaluable comments on earlier drafts.

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233, DOI 10.1007/978-3-642-28299-7_17,

Analysis of the daily practice of the judiciary shows that it is highly independent. The following are evidence of that: the number of acquittals and the number of occasions on which the legislative and executive branches of government lose a case decided by a court (e.g. cases concerning responsibility of the State Treasury for damages). Despite much criticism and pressure exerted by politicians on the judiciary in 2005-2007 (Poland was ruled at that time by the populist Law and Justice party), decisions issued by courts in most cases were highly independent and were contrary to the wishes of politicians. Nevertheless, the critical statements – combined with the structural inefficiency of the justice system – undermined the public trust in the judiciary. In 2007 we were able to observe change in the atmosphere surrounding the judiciary. The new centre government emphasized its allegiance to democratic values and judicial independence.

This general picture of judicial independence does not mean that the current status of the Polish judiciary is perfect. Judicial independence is not awarded once and for all and is more a continuous process of adapting to changing needs and circumstances. It should also be noted that while judicial independence may be guaranteed, the general performance of courts (and the public perception of courts and their independence) may suffer due to the malfunctioning of the judiciary, e.g. length of proceedings.

Since 1989 Poland has made considerable progress towards the creation of a truly independent judiciary. One of the priorities in the Polish transformation was to ensure that the judiciary was a fully independent third power, and this has largely been achieved. Many guarantees of independence have been elevated to the constitutional level, and the National Council of the Judiciary (hereinafter "NCJ") has acquired a constitutional mandate to safeguard judges' and courts' independence. For the most part, the boundary between the judiciary and the political branches has been clearly defined and accepted. There are significant remaining areas of concern, however, the most important of which are the continuing involvement of the executive power in judicial administration.

The formal guarantees of judicial independence are generally satisfactory. Constitutional guarantees are included in Article 10 of the Polish Constitution,[1] the separation of powers principle; Article 173 of the

[1] The Constitution of the Republic of Poland as adopted by the National Assembly on 2 April 1997, available at <http://www.trybunal.gov.pl/eng/index.htm>.

Constitution, which provides that courts and tribunals shall constitute a separate power and shall be independent of other branches of power; Article 178(1) of the Constitution enshrining the principle of independence of individual judges stating that "judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes." Moreover the Constitutional Court has repeatedly ruled in support of judicial independence.[2]

B. Structural Safeguards

I. Administration of the Judiciary

1. Organs in Charge of the Administration of the Judiciary

Despite the establishment of constitutional guarantees of independence, the executive, in particular the Ministry of Justice (hereinafter "MoJ"), retains considerable administrative and supervisory authority over the organization and affairs of the judiciary. The powers of the MoJ with respect to the judiciary are not defined in the Constitution. They stem from the Act on the Common Courts' System (hereinafter Act on Courts, "AOC").[3] According to Article 9 of the AOC the MoJ exercises administrative supervision over the judiciary. It exercises this power directly or through the supervision service. The supervision activities of the MoJ include: the power to establish courts and court divisions (as well as to abolish them); the power to appoint (and dismiss) Presidents of common courts, however upon the consent of the self-governing bodies of the judiciary or the NCJ;[4] the power to initiate disciplinary proceedings against a judge; the power to appoint administrative directors of courts; the power to issue reproaches (*wytyk*) pointing

---

[2] For example in its judgment of 9 November 1993, No. K 11/93, the Constitutional Court stated that "one of the elements of the principle of the separation of powers and of the foundations of the democratic construction of a law-abiding state is the principle of judicial independence."

[3] Act of 27 July 2001 on the Common Courts' System (*Ustawa z dnia 27 lipca 2001 r. – Prawo o ustroju sądów powszechnych*), Journal of Laws (*Dziennik Ustaw*) of 2001, No. 98, item 1070, as amended.

[4] Please note that the procedure for expressing consent is much more complicated. For the purpose of this study we described it in a simplified form. See *infra* B. I. 2. National Council of the Judiciary.

out inefficiency by judges in the adjudication of a case;[5] the power to revoke any administrative orders; the power to establish internal rules of administration of courts. Supervision by the MoJ is exercised through inspection visits, statistical analysis of courts' performance, the examination of case backlogs, and review of complaints about judges' behaviour or rulings.

The Minister of Justice is responsible before the *Sejm*[6] (questions from the deputies, possibility of vote of no confidence), on the same conditions as other ministers. The Minister might be brought to justice in person before Tribunal of the State (*Trybunał Stanu*) in quasi-penal proceedings for breach of the Constitution and laws which is not a common crime. Supervision over the adjudication function of courts is exercised by the Supreme Court (hereinafter "SC").[7] The First President of the SC submits information to the *Sejm* on the work of the Supreme Court.[8] The information is publicly available through records of sessions of the *Sejm*. The representatives of the Government are also invited to the annual meeting of the SC judges where the First President of the SC makes a presentation summing up the work of the court in the previous year. There is no general requirement to present annual reports on the activities of all courts.

2. National Council of the Judiciary

The NCJ[9] was set up as early as 1989 and it was acting on the basis of amended provisions of the Constitution of 1952 and the statute. The current competences of the NCJ are set out in the Constitution of 1997. According to Article 186 of the Constitution, the role of the NCJ is to safeguard the independence of courts and judges. The NCJ is a *sui generis* organ. It is part neither of the executive nor of the judiciary. It is also not an organ of self-government of judges. It is composed of: the First President of the SC, the Minister of Justice, the President of the

---

5 The procedure for issuing reproaches is described in another part of the chapter. It does not in practice offer a serious threat to judicial independence.

6 *Sejm* and *Senate* are the lower and upper houses of Parliament.

7 Article 7 AOC.

8 Article 10(1) Act of 20 September 1984 on the SC (*Ustawa z dnia 20 września 1984 r. o Sądzie Najwyższym*), Journal of Laws (*Dziennik Ustaw*) of 1984, No. 13, item 48, as amended.

9 See NCJ website at <http://www.krs.gov.pl/index_en.php>.

Supreme Administrative Court (all of them are members of the NCJ while performing the relevant function); representative of the President of the Republic (who may be dismissed at any time and is not a member of the NCJ for a specific term); 15 judges chosen from among the judges of the SC, common courts, administrative courts and military courts (elected for four year terms);[10] four members chosen by the *Sejm* from among its Deputies and two members chosen by the Senate from among its Senators (all of them are chosen to be members of NCJ during their parliamentary term).[11]

The executive does not have a significant influence on the activities of the NCJ. There have been no serious conflicts impacting on the role of the NCJ as the guarantor of judicial independence due to such composition. Although by virtue of constitutional composition the NCJ is not an organ of judicial self-government, due to the daily practice and constitutional culture the NCJ is regarded as such organ. The President and two Vice-Presidents of the NCJ are elected from among the NCJ's members by the NCJ itself.

Members of the NCJ may in general be dismissed by the organs which elected them. In case of judges (constituting the majority of the NCJ members) it is not dangerous to the integrity of the NCJ, since they are elected by different judicial self-governing bodies. Their function is also connected with the type of courts they represent. The powers of the NCJ include the ability to submit motions to the Constitutional Court on matters concerning the independence of the courts and impartiality of judges; the right to present opinions on candidates for judgeships; the ability to request the Disciplinary Spokesman (*rzecznik dyscyplinarny*) to initiate disciplinary proceedings with respect to judges and to appeal against the judgments of disciplinary courts of lower rank; to consider judges' applications for retirement, to consent to the continuing in post of judges who have attained 65 years of age; to consider ap-

---

[10] Article 7 Law on the NCJ provides the power to elect members of the NCJ by different courts. In general, they are elected by general assemblies of judges of relevant courts. As a result, two members of the NCJ are elected from among the SC judges, two members from among the administrative courts' judges; two members from among the appeal court judges, eight members from among regional court judges and one member from among the military court judges. All judges are elected members of the NCJ for a term of four years. The term is renewable only once.

[11] The composition of the NCJ is established in Article 187 of the Constitution.

plications by retired judges to return to judicial post; to appoint the Disciplinary Spokesman of common courts; to give its opinion on the appointment and dismissal of Presidents and deputy Presidents of common courts and military courts; to carry out court inspections or vet the work of a judge whose individual case is subject to consideration by the Council; to give opinions on the remuneration of judges and other opinions regarding the laws on the judiciary; to give opinions on the judicial budget; and to give opinions on candidates for the position of the head of the National School for the Judiciary and Prosecutor's Authority.[12] The NJC also has a right to appoint three candidates to the programme's Council of this School.

Representatives of the NCJ may be invited by parliamentary committee chairmen to meetings of their committees. NCJ representatives taking part in the work of parliamentary committees *de facto* play the role of a representative body for judges. The NCJ has the right to present opinions on all bills concerning the judiciary. It is even the duty of the Parliament to request such an opinion, but its substance is not binding upon the Parliament.[13]

The NCJ performs its duties with the assistance of the Bureau of the Council. The NCJ appoints, from among its members, standing commissions on: disciplinary responsibility of judges, judges' professional ethics and budgetary issues; it may also appoint commissions on other issues. There are numerous tensions between the NCJ and the MoJ concerning its powers and supervision over the judiciary. Those tensions usually result in judgments of the Constitutional Court. Hitherto the Constitutional Court has had to adjudicate on a number of issues directly relevant to judicial independence, and the role of the NCJ, the MoJ and bodies of judicial self-government such as judges' assemblies. For example with respect to the appointment of Presidents and Vice-Presidents of courts the Constitutional Court upheld the legislative

---

[12] Powers are defined by the Act of 27 July 2001 on the National Council of the Judiciary (*Ustawa z dnia 27 lipca 2001 r. o Krajowej Radzie Sądownictwa*), Journal of Laws (*Dziennik Ustaw*) of 2001, No. 100, item 1082, as amended.

[13] Judgment of the Constitutional Court of 24 June 1998, No. K 3/98. The Constitutional Court stated that "the Law on the NCJ in any way does not restrict the freedom of the legislative body to regulate the judiciary. It only assumes that getting knowledge on the position of the NCJ with respect to the draft law may influence the process of reflection by the legislative body and will allow for avoidance of regulations which are not well-thought and well prepared."

change under which judges' assemblies were deprived of the right to disapprove of the Minister's decision to appoint court Presidents (thereby blocking an appointment or dismissal) and were left with purely advisory competences.[14] The Constitutional Court stated that it was only a shift in powers, since the competence to adopt the binding decision ultimately remains among the NCJ's powers. At the same time the NCJ provides sufficient representation of the judiciary, although it is not purely organ of judicial self-government.

Under amendments to the Law on the NCJ introduced in March 2007 judges who at the same time were Presidents or Vice-Presidents of courts could not be members of the NCJ. Under the same amendments, judges who were already elected to the NCJ (and performed those functions) had to choose – they would be either Presidents (Vice-Presidents) of a court or members of the NCJ. It was probable that as a result of those provisions approximately 40% of members of the NCJ would resign and the composition of the NCJ would significantly change before the term in question ended. In the opinion of the Constitutional Court such solutions were disproportionate intrusions into the constitutionally shaped system of election to and the operation of the NCJ.[15] Any such measures, in order to be constitutional, would have to be introduced with effect from the next term of the NCJ. The case is significant, because it was one of the measures introduced by the Parliament which attempted to influence the composition of the NCJ within one term.

With respect to the powers of the NCJ regarding unification of the interpretation of law the Constitutional Court declared that granting the NCJ a power to "inspire and support actions aiming at the unification of the interpretation of law in the case-law of courts" would be an impermissible intrusion into the judicial activities of courts.[16] In particular, there are already certain institutions (such as the SC or the Supreme Administrative Court) the role of which is to ensure the unified interpretation of law. In the judgment of 15 January 2009, the Constitutional Court did not oppose the exercise by the MoJ of general administrative

[14] Judgment of the Constitutional Court of 18 February 2004, No. K 12/03, English summary of the judgment available at <http://www.trybunal.gov.pl/eng/summaries/documents/K_12_03_GB.pdf>.

[15] Judgment of the Constitutional Court of 18 July 2007, K 25/07.

[16] Judgment of the Constitutional Court of 16 April 2008, No. K 40/07.

supervision over the judiciary. [17] In the opinion of the Constitutional Court administrative supervision over the judiciary exercised by the MoJ is necessary in order to verify how the court structure operates. At the same time it is the task of the legislative body to create different safeguards against unnecessary encroachment of the MoJ on the judiciary. In particular, the supervision should never embrace the sphere which is reserved for the impartial judge, operating in an independent court. The MoJ has prepared the relevant amendments to the AOC, which provide for different additional guarantees of judicial independence. However, they have not hitherto come into force. The Constitutional Court also decided that the institution of reproaches (*wytyk*), issued by the MoJ should remain.[18] As long as they do not encroach upon the exercise of the judicial power, they are in compliance with the Constitution. It agreed with NCJ's challenge that the MoJ's power to appoint temporary Presidents of courts (in a situation when such Presidents were not appointed in a proper procedure) may endanger the relationship between the powers.[19] This is possible because there is no legal restriction as regards the maximum period during which one can serve as a temporary President of a court.

The institution of delegation of judges is widely used in Poland. For example a number of judges perform different administrative or conceptual tasks in the MoJ or work in the National School of the Judiciary and the Prosecutor's Office. Some judges are also delegated to adjudicate in courts of equal rank in other locations or in higher courts. The above power is exercised by the MoJ on the basis of Article 77 of the AOC. In a recent judgment, the Supreme Court had to decide whether the power to delegate judges to other courts is a personal power of the MoJ or may be delegated to vice-ministers.[20] In July 2007 one of the panels of the Supreme Court held that it is exception when the executive power interferes with administration of the judiciary and therefore

---

[17] Judgment of the Constitutional Court of 15 January 2009, No. K 45/07. In the opinion of the Constitutional Court, it is obvious that the judiciary has to act in structures which are separated from other branches of power. It should have separate financial resources allowing for its operation, have an internal system of control and the legal ability to protect its prerogatives. It should also have the ability to voice its concerns to other branches of power in order to make the operation of the judiciary more effective.

[18] Judgment of the Constitutional Court of 15 January 2009, No. K 45/07.

[19] Id.

[20] Resolution of the Supreme Court of 17 July 2007, No. III CZP 81/07.

one should limit any possibility of abuse. Therefore, it should be for the MoJ alone to exercise this power. It should be emphasized that a judge's right to be delegated may never be exercised without the consent of a given judge. However, such interpretation caused fear that thousands of trials in Poland would have to be re-opened due to invalidity, as it was common practice for vice-ministers to sign delegations in the name of the MoJ.[21] The Supreme Court resolved this problem in plenary session deciding that such power could also be delegated to vice-ministers.[22]

The Constitutional Court does not in general oppose the practice of delegating judges to other courts.[23] It emphasizes that sometimes it may be necessary to strengthen certain courts so that they can perform their functions more effectively. As regards the delegation of judges to the MoJ (or other government-controlled institutions) the Constitutional Court stated that such practice may raise certain concern (especially if a significant number of judges is delegated). However, in its opinion one cannot claim that it is unconstitutional *per se*. At the same time however, the Constitutional Court quashed provisions allowing judges who are delegated to the governmental administration to perform further adjudicative functions in courts. Such practice was declared contrary to the principle of the separation of powers and was common among judges delegated to the MoJ. Currently, if a judge is e.g. delegated to the MoJ to perform certain functions, at the same time he/she cannot adjudicate on cases. The Constitutional Court also challenged the possibility of delegating judges without their consent. Such possibility existed under the regulations, although delegation without consent was limited in time. In the opinion of the Constitutional Court lack of consent means that any decision of the MoJ may be arbitrary, and thus it could be contrary to the principle of the separation of powers (since the organ of the executive power could impose its will on the independent judge).

Apart from judgments of the Constitutional Court, the division of powers between the NCJ and the MoJ is the subject of constant debate.

---

[21] According to information provided by Gazeta Prawna in years 2003-2006, there were in total 4,590 delegations of judges to perform functions in other courts. Only a few of them were signed by the MoJ. M. Pionkowska, Sędziego może delegować także podsekretarz stanu, 19 November 2007, available at <http://samorzad.infor.pl/sektor/organizacja/ustroj_i_jednostki/artykuly/388048,sedziego_moze_delegowac_takze_podsekretarz_stanu.html>.

[22] Resolution of the Supreme Court, full panel, of 14 November 2007, No. BSA I - 4110 - 5/07.

[23] Judgment of 15 January 2009, No. K 45/07.

In the opinion of the NCJ, the administration of the judiciary should be subject to the supervision of the First President of the SC. In this context, representatives of the NCJ recall the years 2005-2007, when the Minister of Justice was a populist politician whose activities raised concerns as regards the proper exercise of the supervisory functions by the MoJ. Taking into account the above experience the NCJ is concerned that where a politician becomes the MoJ who does not respect the principles of the democratic state ruled by law and the independence of the judiciary, there is a threat to the judicial principle of independence. In the opinion of the NCJ such MoJ could use existing mechanisms to try to influence the activities of the judiciary. It would be safer, then, to give such supervisory competences to the First President of the SC.[24]

3. Budgetary Issues

Formally speaking, courts can act autonomously without the interference of the executive. However the budget for the courts is administered by the MoJ. This issue has been the subject of controversy for many years. The AOC provides for incomplete budgetary autonomy. There is a separate item on common courts in the state budget, which is untouchable. It may be increased or decreased only by way of legislative act. Furthermore, the money allocated to the judiciary cannot be transferred to some other tasks undertaken by the MoJ.

The judiciary also has certain influence in the budget drafting process. Eleven courts of appeal transmit the proposals of lower courts under their jurisdiction to the NCJ, which forwards the formal application to the MoJ. The MoJ weighs the proposal in light of the budgetary capacity of the state budget as a whole. Thus, the MoJ develops the final version of the budget proposal. The Ministry of Finance is obliged to accept the budget proposal of the MoJ without being able to change it. It

---

[24] As is emphasized in the general information on the website of the NCJ, in 2006 the NCJ reacted decisively to every attack on the constitutional principle of judicial independence. In the Position of 8 February 2006 concerning threats to the independence of judges, the Council severely criticized activities of some members of the government, the MoJ in particular, for interfering with the authority of the administration of justice and infringing of judicial independence. The NCJ emphasized, not for the first time, that its actions relating to defending the independence of judges did not mean that it was against the criticism of court judgments: "It is acceptable and needed yet with maintaining proper standards, without insults and threats towards the judges."

can only make comments and review the budget in relation to the balancing of the whole state budget. In the implementation of the budget, it is the MoJ which is responsible for the realization of the budget for the judiciary, and not the Ministry of Finance. After submission to the Parliament, the NCJ is a partner in discussion regarding the budget proposal, without the MoJ acting as intermediary.

The current system, although it guarantees courts and the NCJ a certain level of influence on budgetary issues, is not totally clear and is quite complicated in practice. The division of powers between the NCJ and MOJ in projecting the budget in particular is not clear. Therefore, there are discussions pending about the creation of total financial autonomy for the courts. Such a solution was created for the Prosecutor's Authority, which on 31 March 2010 was separated from the MoJ. The creation of such a system would mean that it would be up to the NCJ to submit a financial plan for the judiciary to the *Sejm* (without the MoJ as intermediary).[25]

The Constitutional Court assessed regulations concerning financial control and audit, to be performed by the Ministry of Finance.[26] The Constitutional Court emphasized that this problem is especially sensitive, due to the division of powers between the executive and judicial branch. The principle of the independence of the judicial branch does not allow for examination by representatives of the executive branch of documents directly related to the exercise of the judicial power, such as documents on exemption from court fees or decisions on granting legal aid. Furthermore, for representatives of the Ministry of Finance to enter the organizational units of the judicial branch and to access documents and other materials, without any time or subject restrictions and without sufficient justification of the need for control, would be a threat to the so-called external appearance of the independence of the justice system. It could lead to the false conviction of citizens that government had an institutional impact on the way the justice system operates. Therefore, the relevant provisions were quashed by the Constitutional Court.

The Constitutional Court also dealt with the problem of the NCJ's budget.[27] Taking into account the special characteristic of the NCJ – an

---

[25] Cf. Sądy chcą mieć autonomię budżetową (Courts want to have budget autonomy), Gazeta Prawna, 12 April 2010.

[26] Judgment of the Constitutional Court of 9 November 2005, No. Kp 2/05.

[27] Judgment of the Constitutional Court of 19 July 2005, No. K 28/04.

organ at the intersection of three branches of government – the Constitutional Court confirmed that the NCJ may not be treated as a part of the judicial branch. Therefore, there was no need for the NCJ to have the same guarantees of independence as the judiciary and that it came under the budget of the Chancellery of the President was in compliance with the Constitution. Nevertheless, since 1 January 2006 the NCJ has had a separate budget and is financed directly from the state budget, without any intermediaries.[28]

4. Internal Administration of Courts

Internal administration of the courts is carried out by their Presidents. They are accompanied by Vice-Presidents and judges presiding over courts departments. The judge presiding over the court department manages the operation of the department as regards the quality and effectiveness of the court's work.[29] The President manages the operation of the court and is responsible for the effectiveness of the court's work, personnel, security measures, adequate organization of work, and training or statistical reporting.[30] The President of a regional court additionally deals with the administration of and general administrative supervision over district courts except for matters passed to the President of the appeal court.

Polish courts may have executive directors (in regional courts and appeal courts) and financial managers (in district courts, however not all of them since it is not obligatory to appoint financial manager). They are appointed by the MoJ upon the motion of the Presidents of district, regional or appeal courts. The competences of directors in courts are not clear cut as regards co-operation (and potential conflict of competences) with Presidents of courts. Therefore, the MoJ in a recent proposal to amend the AOC decided to increase the competences of directors and to delineate the division of powers between them and Presidents. The tasks of directors would be entirely administrative in nature (including the supervision of support staff), while those of Presidents

---

[28] By virtue of Article 231 Law of 30 June 2005 on the public finances (*Ustawa z dnia 30 czerwca 2005 r. o finansach publicznych*), Journal of Laws (*Dziennik Ustaw*) of 2005, No. 249, item 2104.

[29] § 57 Ordinance of the Minister of Justice of 23 February 2007 on Regulation of the internal operation of ordinary courts.

[30] Id., § 32.

would be of an adjudicatory nature (with special emphasis on the supervision of judges and others dealing with adjudication), e.g. controlling the effectiveness of work, the work-load of judges and the divisions of courts, securing the transfer of case-files to other courts in case of need, informing on selection of judges to deal with certain cases. It is not clear whether this proposal will enter into force. In the opinion of the NCJ the reform will lead to the loss by Presidents of courts of any control over court directors and managers. It may be dangerous to the independence of the judiciary. In the opinions of the authors, the threats raised by the NCJ are exaggerated. Depending upon the proper selection of court directors, they may bring a lot of help to the daily functioning of courts.

II. Selection, Appointment and Reappointment of Judges

1. Eligibility

The system of selection and appointment of judges is one of the most discussed problems in Poland which is now undertaking a process of restructuring the current system. These are not just legal, but also intellectual, changes regarding the status of judges among legal professions. Basically, Poland is in the slow process of transforming a judicial career from the decentralized model towards the model of central training resulting in the appointment of young judges.

Judges are appointed by the President of Poland upon the motion of the NCJ, for an unlimited period of time.[31] The Constitution does not provide details as regards the appointment of judges. Rather it includes certain guarantees of judicial independence such as immunity or immovability from office. The AOC provides for three general avenues through which one could become a judge: by following judicial training and passing a judge's exam, by being a judge's assistant or court clerk (*referendarz sądowy*) for a certain period of time and then passing an exam, or by transfer from other legal professions, such as those of prosecutor, attorney, legal advisor or notary. In practice, however, the last avenue to becoming a judge is quite rarely used and is usually applicable to judges of higher courts.

Under Article 61 of the AOC there are the following preconditions to becoming a judge. Polish citizenship and full legal capacity are required,

[31] Article 179 Constitution.

as well as an immaculate character. The applicant must have graduated from the higher legal studies in Poland and obtained the title of *magister iuris* or graduated from foreign legal studies which are recognized in Poland. He or she must be capable from the health point of view to perform the duties of a judge and have the age of at least 29. Furthermore the candidate is required to have passed the judge's exam or prosecutor's exam; and have completed the judicial traineeship at the National School for the Judiciary and the Prosecutor's Authority or worked as a probationary prosecutor for at least three years before applying for the position of a judge. Furthermore, the following are entitled to be appointed to the position of district court judge: judges of administrative courts or martial courts;[32] prosecutors; legal scholars employed at universities or scientific institutions and holding the title of *doktor habilitowany* (which is a second academic degree, after a Ph.D.) in law sciences; attorneys, legal advisors or notaries with at least three years' experience; and advisors and other legal officers of the Office for Legal Representation of the State Treasury (*Prokuratoria Generalna*).[33]

There are additional requirements as regards appointment to higher courts. In general, more years of experience are required for one to be appointed to higher courts.[34] The appointment procedure of the abovementioned representatives of different legal professions is similar to that in the case of any other candidate for the position of judge. Finally, three categories of judicial personnel may apply for appointment as a judge of the district court. They include a judge's assistant (*asystent sędziego*), after six years of working in that position; a court clerk (*referendarz sądowy*) after five years of working in that position; and a probationary prosecutor (*asesor prokuratorski*) after three years of working in that position. With respect to these, there is also a requirement to finish professional training in one of legal professions and to pass the final exam (e.g. attorney's exam), before applying for the position of judge.

---

[32] Poland has a separate structure of administrative and military courts. There are discussions on the abolition of military courts in Poland. However, total abolition would require a change to the Constitution, and therefore this reform is not seriously contemplated. Rather, there is a tendency to restrict the competences of the military courts.

[33] Article 61(2) AOC.

[34] For example, an attorney needs at least six years' experience (including at least three years directly before appointment as a judge) to become a judge of the regional court. As regards the courts of appeal it is eight years.

2. The Process of Judicial Selection

a) General Overview

Every person who meets the requirements for appointment as a judge may propose his/her candidacy for one announced vacant post to the President of the relevant regional court (or President of the appellate court if applying for a post in that court). Vacancies for judges are announced in the official gazette of the Polish state – *Dziennik Urzędowy Rzeczypospolitej Polskiej "Monitor Polski"* – so the information is available to every interested person.

The role of the President of the court is to assess whether all the formal requirements have been met by the candidate. If yes, the President of the court passes the application on to the college of the court (*kolegium sądu*)[35] with an assessment of the candidate's qualifications. The President of the court also determines the date for the general assembly of judges (*zgromadzenie ogólne sędziów*)[36] which will consider the candidacy. He/she has also to notify the Minister of Justice of every candidate for the position of a judge. Before the date of the general assembly of judges, the college of the court assesses a candidacy and gives an opinion. If there is more than one candidate, the general assembly of the judges assesses all candidates at the same meeting. The general assembly assesses candidates by voting and notifies the relevant opinion to the President of the court. The role of the President of the court is then to inform the NCJ, with the intermediation of the MoJ. The MoJ's role is to check whether a given candidate meets the criterion of immaculate character. That is assessed in co-operation with the Supreme Police Commander, within the specified legal procedure. Data are collected as regards any activities of the candidate which could be contrary to the legal order, contacts with criminal groups or groups of social pathology (e.g. prostitution, sexual deviations), as well as circumstances

35 The college of judges of a given court is a special organ dealing with the administration of the court. There are colleges of judges in regional courts (four to eight members) and in courts of appeal (three to five members). They are elected by the general assembly of judges of the relevant courts (organ of self-government) for a two-year term. The college's tasks include e.g. the division of tasks in the court and setting the principles for the division of cases among judges, giving opinions on candidates for judges, or the appointment or dismissal of presidents of courts departments, giving opinions on financial plans, consenting to the delegation of judges.

36 For information on the general assembly of the court see id.

indicating addiction to alcohol or drugs. However, such analysis is not made in a situation when a candidate already works in the office of the judge or prosecutor (and e.g. applies for a higher position).[37]

The Supreme Police Commander, on the basis of collected data, prepares information on the candidate for the MoJ. The MoJ has the responsibility to pass such information on to a relevant candidate. It also submits it, together with all other documents (application, opinions etc.), to the NCJ. The NCJ reviews all the candidates and recommends which are suitable for appointment to a given judicial post. The decision of the NCJ is made by resolution. Following this, the resolution is passed to the President, who has the constitutional power to appoint those recommended by the NCJ to the office of judge. The NCJ prepares separate resolutions on candidates it considered unsuitable and returns them to the MoJ. For a long time these resolutions did not require written justification[38] and the candidate was not entitled to appeal against them.[39] However, the law allowing for such practice was challenged in the Constitutional Court, which stated that the lack of a chance to appeal to the court against resolutions of the NCJ violates the constitutional right to a court.[40] Recommendations issued by the NCJ were considered to be in fact administrative decisions of an individual nature. According to the Constitutional Court they should be the subject of court review. The review should be of only a procedural nature (e.g. the proper counting of votes in proceedings before the NCJ, the taking into account of all the documents presented by the candidate). It is not the role of the reviewing court to replace the decision of the NCJ as to the merits and material assessment of the given candidate. As a result of this judgment, the Parliament has adopted changes to the AOC, according to which it is possible to appeal resolutions of the NCJ to the SC.[41]

The MoJ is entitled to submit a candidate for any judicial post of the common courts directly to the NCJ. In such a case the candidate is not

---

37 Article 58 AOC.

38 Article 21(1) Decree of the President of the Republic of Poland on detailed mode of operation of the National Council of the Judiciary and proceedings before the Council.

39 Article 13(2) Act on the NCJ.

40 Judgment of the Constitutional Court of 27 May 2008, No. SK 57/06.

41 Article 13(2) Law on the NCJ. The relevant amendment was passed on 12 February 2009, Journal of Laws (*Dziennik Ustaw*), No. 54, item 440.

subject to election by the general assembly of judges.[42] Such procedure, in the opinion of the authors, does not endanger judicial independence. First, the power is still in the hands of the NCJ, which has the ultimate decision on any candidate. Second, in practice this procedure is used very rarely. The only pre-condition for such special nomination procedure is fulfilment of the general requirements concerning a given position of judge. It means that the MoJ may try to nominate current judges, prosecutors, members of other legal professions or scholars.

b) The National School for the Judiciary

The National School for the Judiciary and the Prosecutor's Authority (hereinafter "National School"),[43] following recent legal changes connected with the abolition of the institution of probationary judge is currently one of the paths to becoming a judge. The National School is controlled and managed by the MoJ (to resemble the French, Spanish and Portuguese models).[44] Under the Law on the National School[45] a centrally-administered school training future judges and prosecutors was created.[46] Training is organized in the following way. First, the law

---

[42] Article 59 AOC.

[43] The proposal to create the National School was heavily criticized, foremost by institutions proposing other solutions. The following arguments were raised: the best law school graduates would prefer to choose prestigious and rich law firms over starting long apprenticeship without a clear chance of success. The MoJ's control over the National School and the curriculum as well as the joint training of future judges and prosecutors created a danger for judicial independence; graduates of the National School would not have sufficient experience in adjudicating cases, since their training would be mostly theoretical.

[44] Written justification of the draft law on the National School specifically referred to examples of schools in France, Spain and Portugal.

[45] Act of 23 January 2009 on the National School for Judiciary and Prosecutor's Office (*Ustawa z dnia 23 stycznia 2009 r. o Krajowej Szkole Sądownictwa i Prokuratury*), Journal of Laws (*Dziennik Ustaw*), No. 26, item 157.

[46] The Law on the National School also regulated the status of existing apprentice judges. It should be noted that the judgment of the Constitutional Court was issued when a significant number of apprentice judges were in their years of judicial practice. The Parliament could not omit this issue, as it would mean that following entry into force of the judgment those apprentice judges would lose the competence to adjudicate, and cases in their docket would have to be reheard. Furthermore, there were not enough judges to take over their responsibility. Finally, the principle of legitimate expectations should be taken

school graduate has to win the competition and be admitted for "general apprenticeship" which lasts for 12 months. Following the "general apprenticeship", the best applicants may start a "judicial apprenticeship" lasting 54 months.[47] Of this period, 30 months is training which ends with the judges' exam. For the next 24 months they are still associated with the School, but undertake training in local courts, being assistants to judges (*asystent sędziego*) or court clerks (*referendarz sądowy*). They do not, however, exercise a typical judicial function (like the challenged probationary judges). The role of court clerk is to issue court decisions in simple, technical or registry cases. The role of the judge's assistant is to assist and help a judge in performing his tasks. Only after the end of their judicial apprenticeship may they participate in competitions for new judicial appointments. We do not yet know what will be the outcome of activities and training organized by the National School and how many graduates of the School will become judges.

c) Access by Members of Other Legal Professions to the Office of a Judge – Theory vs. Practice

As was mentioned, members of other legal professions have a right under the relevant AOC provisions to apply for vacant judicial positions. In practice, however, it is very difficult for members of professions such as those of attorney, legal advisor or notary to become judges, even if they have high qualifications. There are two major reasons for this problem. Firstly, the practice of appointing judges after they were previously delegated to perform functions in a given court. The problem of the delegation of judges to adjudicate in higher courts before they were officially appointed as judges in higher courts was highlighted by the National Chamber of Control (*Najwyższa Izba Kontroli*, hereinafter

---

into account with respect to apprentice judges and their prospects of a judicial career. Therefore, the Law on the National School shortened the periods of practice required from apprentice judges to be appointed as judges from four years to just one year. In this way, following the entry into force of the Law, the National Council of the Judiciary could start the process of recommendations of apprentice judges for positions as judges. In March, April and early May 2009, hundreds of apprentice judges were appointed by the President to be ordinary judges.

47 Some of them will start the prosecutor's apprenticeship.

"NIK")[48] in its 2001 report.[49] NIK also found that despite the possibility, the appointment of a person from another legal profession to exercise the functions of a judge takes place rarely and represents only a small percentage of all judicial appointments.[50] Secondly, the evaluation of candidates for judges *de facto* privileges those who are already in the judicial *environment* and are not outsiders like attorneys or legal advisors.[51]

aa) Delegation of Judges as a Method of Appointing them to Higher Courts

The practice of delegation of judges implies that judges of lower courts stay in that rank but adjudicate in higher courts. Delegated judges then have a better chance of being appointed to such courts. According to the amendments to the AOC proposed by the MoJ, the rules on delegation of judges should be changed. The MoJ claims that this practice (appointment to higher court only following a period of delegation to adjudicate in that court) is not acceptable. In the opinion of the MoJ such qualification procedure puts at a disadvantage those judges who would like to apply for positions in higher courts but have not had the opportunity of being delegated to such court. If the delegation is supposed to be a measure to check the competence of judges to adjudicate in higher courts, it should be of a general nature and not selective. This is not the case in Poland. Furthermore, the provisions of the AOC do not detail what conditions need to be fulfilled by the judge in order for

---

48 The National Chamber of Control is a special constitutional organ which is tasked with controlling the activities of any branch of power. It is highly independent from any branches of power by virtue of the constitutional guarantees.

49 Information about the results of the check (control) of the performance of the supervision over administrative activity of the courts, Chief Board of Supervision – Department of Public Administration (document No. 150/2001/P00/003/DAE), Warsaw, December 2001, further related to as CBS '2001.

50 One should note, however, that there are cases when courts have problems with recruitment. For instance, the Appellate Court in Warsaw has had such a problem for several years – there were not enough judges willing to be delegated to this court. See *infra* B. II. 2. c) aa) Delegation of Judges as a Method to Appoint them to Higher Courts.

51 See *infra* B. II. 2. c) bb) Access to Judicial Offices by *Outsiders*.

him to be delegated to a higher court. In the opinion of the MoJ, delegation should be used only in exceptional situations (e.g. the strengthening of an overburdened court) and not as a general practice.[52]

Taking into account the need to increase the effectiveness of the justice system, the proposed amendments to the AOC also provide for modification of rules governing so-called horizontal delegation (to a court which is on the same jurisdictional level as the court to which the judge is assigned) as well as delegation to lower courts. Such decisions would be made by the President of the relevant court of appeal, upon the consent of the judge in question and the college of judges (*kolegium sądu*) sitting in a given court. Delegation can be made for an unlimited period of time, but no less than six months. The current practice is to delegate judges for only 30 days. In practice, this period is divided into individual days, and at the same time judges – for a period of several months – were hearing their cases in their courts of origin in the same way, but they merely added to this one or two days per week for adjudication in the court of delegation.

bb) Access to Judicial Office by *Outsiders*

As was mentioned, in practice it is difficult for representatives of other professions (attorneys, notaries, legal advisors) to be promoted as judges. An example of this problem is a recent case decided by the Supreme Court. On 10 June 2009, it decided the case of an attorney with long professional experience who challenged the current practice of restricting the approach to judicial appointments for members of other legal professions.[53] The attorney submitted her application for the position of judge at the Regional Court in Gdansk. In total there were ten candidates (nine of them judges of district courts) for the advertised nine posts. The attorney received a positive opinion from the MoJ. However, she did not receive the recommendation of the majority of judges present at the general assembly of representatives of judges of

[52] Proposal to change the rules on delegation are part of the broader package of reforms to the AoC, proposed by the MoJ, announced on 12 May 2009. Draft law and justification to the law are available at <http://www.ms.gov.pl/aktual/usp_projekt.pdf>; <http://www.ms.gov.pl/aktual/usp_projekt_uzasad.pdf>.

[53] Judgment of the Supreme Court of 10 June 2009, No. III KRS 9/08.

the Gdansk circuit.[54] Later, the NCJ decided not to recommend her to the President for appointment. In her appeal to the SC she claimed that there are no statutory criteria allowing her professional qualifications to be comprehensively assessed in a competition for the position of judge. Furthermore, she indicated numerous procedural mistakes committed by the NCJ when evaluating her candidacy. She indicated that lack of sufficient support for her was a result of the solidarity of members of the judicial community with other judges, and thus the exclusion of members of other legal professions (such as attorneys and legal advisors) from the possibility of successfully applying for judicial positions. She claimed also that her longstanding experience as a judge (she was a district court judge before becoming an attorney) as well as the positive opinion of the judge-evaluator (who assessed her performance as an attorney) were not taken into account.

The SC as a result of review of her appeal found a gross violation of law by the NCJ and remanded the case for re-examination. The SC indicated different procedural mistakes committed at the voting on her application. What is most important, the SC suggested that the NCJ should not limit the number of recommendations of candidates for judges submitted to the President for appointment to the number of free judicial positions. In an *obiter dictum* the SC suggested that it would be rational for the NCJ to offer more candidates and to leave the President with a decision in this matter in order to select the best candidates.

In the opinion of the authors the above opinion of the SC is quite alarming, because in another case the President refused to appoint judges despite the recommendation of the NCJ. Then it was claimed that such a move by the President was a threat to judicial independence, as the decision of the President was discretionary and unreasoned. Thus, following a path suggested by the SC would in fact mean agreeing to give the President a power which he does not have under the Constitution – power to select judges. As a result of the remand the case was reviewed by the NCJ and the attorney was finally appointed as a judge. Nevertheless, the case may be regarded as confirmation of existing practice, which heavily restricts access to the judicial profession for members of other legal professions. Second, it shows the need for amendment of procedures and the creation of a transparent system of recommendations by the NCJ. The creation of such a system is now

[54] Specifically the name of this organ of self government was *Zgromadzenie Ogólne Przedstawicieli Okręgu Sądu Okręgowego w Gdańsku*.

subject to consideration by the MoJ.[55] As of the date of this chapter, the proposed amendments to the AOC are still subject to discussion.

The MoJ proposes to introduce criteria for the assessment of all candidates for judges. It is supposed that the new criteria will have a special impact on candidates coming from other than judicial legal professions. Furthermore, mechanism of selection will be modified. In the draft law the MoJ emphasized that change in the law is caused by the Constitutional Court which declared that the NCJ should have criteria in order effectively and objectively to assess candidates for judges.[56] According to the Constitutional Court neither the AOC nor the Law on the NCJ provided criteria for the assessment of candidates and the only method of selection is provided in resolutions of the NCJ. Such practice does not comply with the constitutional requirement that any matters of crucial importance for the protection of rights and freedoms should be regulated by the statutory act. As a consequence, draft amendments to the AOC provide for detailed criteria of evaluation of judges and candidates for such posts. They are shaped in such manner as to allow adequate comparison of the qualifications of different legal professionals.[57]

Second, the suggested amendments to the AOC provide for the establishment of the Competition Commission, which would be composed of judges of different courts, but also of representatives of other legal professions and academia – in order to provide for a representation of different stakeholders, not just the judicial community.[58] Its role would be to make the preliminary ranking of candidates for a given judicial position, in accordance with the evaluation of their qualifications and

---

[55] On 12 May 2009 the MoJ announced the reform of the AOC. The draft law and justification for the law are available at <http://www.ms.gov.pl/aktual/usp_projekt.pdf> and <http://www.ms.gov.pl/aktual/usp_projekt_uzasad.pdf>.

[56] Judgment of the Constitutional Court of 29 November 2007, No. SK 43/06.

[57] Criteria include professional experience, recommendations, publication, periodical assessments of performance, and disciplinary penalties. The assessment should be made taking into account the specific character of the work performed by the candidate (e.g. quality of legal publication with respect to scholars, quality of legal interventions, court letters etc. with respect to attorneys).

[58] Members of the Competition Commission would be elected by their respective representative organs, e.g. judges by organs of self-government, attorneys by the National Bar Association, prosecutors by the Prosecutor General etc.

other criteria specified in the AOC. Simply, the Competition Commission would evaluate candidates on the basis of all collected documents and opinions, including opinions by the college of the court or the general assembly of judges. Such list with candidates would be then a kind of supplementary material for the NCJ when selecting candidates for judicial positions. The NCJ would not be obliged to comply with the ranking. However, if it decided to deviate from it, it would have to provide additional justification for such a decision.

This proposal was strongly criticized by the NCJ (which in general is opposed to the newest amendments to the AOC proposed by the MoJ). In the opinion of the NCJ the establishment of the Competition Commission would be an encroachment upon the constitutional and statutory powers of the NCJ, as the NCJ would no longer have a real right to propose candidates for judges to the President. The role of the NCJ under this new procedure would be limited to that of a "postman" of the list of candidates for judges compiled by the Competition Commission for the President. The NCJ claims that such shift of power is unconstitutional. It is not certain whether the MoJ will proceed with plans to create the Competition Commission. If it happens, the NCJ will certainly try to challenge the law before the Constitutional Court.[59] In the opinion of the authors, the idea of the Competition Commission is not well thought through. It could work, but only if such Commission were to fit into the structure of the NCJ. Certainly, there is a need to establish clear criteria for judicial appointments, as the current system is not transparent.

The potential resignation by the MoJ from plans to create the Competition Commission does not solve the problem of the implementation of the Constitutional Court's judgment (SK 43/06). The NCJ should have criteria and a procedure for evaluating candidates, clearly established by statute, and regulating in a transparent way access to the judicial profession. It seems that the idea of the Competition Commission could work, but such body should be situated strictly within the NCJ (as an advisory body or panel to the whole NCJ) and not outside it. One should also consider the participation in such a body of representatives

[59] It should be noted that by virtue of Article 191(1) point 2 in connection with Article 186(2) of the Polish Constitution, the NCJ has a power to challenge any laws within the scope of the independence of courts and the impartiality of judges.

of other legal professions (such as attorneys, legal advisors, notaries, or prosecutors) as observers, without a right to vote.[60]

However, even if the NCJ will be better equipped to assess candidates from other professions for judicial positions, there is still a problem of getting positive recommendations from self-governmental bodies of the judiciary (e.g. the general assembly of judges). Practice shows that such bodies may be reluctant equally to assess candidates from a judicial *environment* and members of other legal professions (outsiders). At the same time such opinions play an important role in the later assessment of the candidate by the NCJ.[61]

d) Exercise by the President of the Power to Appoint Judges

Over the years there have been no special concerns as regards the exercise of the power of appointment of judges by the President of Poland. However, following the election of Lech Kaczynski in 2005 as the President of Poland one could identify two major changes in the policy. First, the President considered motions for appointment submitted by the NCJ for extremely long periods of time. It was claimed that the *freezing* of these motions could have an impact on the performance of particular judges and their independence. Because of that, the AOC was amended in 2009[62] to provide that the President has 30 days from the submission of a motion by the NCJ in which to make a final decision as regards the candidate.[63] Second, the President in September 2007 made an unprecedented decision not to appoint five candidates to the position of judges of district courts, and not to appoint four judges of dis-

---

[60] Cf. A. Bodnar, Otwarcie zawodu sędziego na tle wyroku SN z 19.6.2009 r., III KRS 9/08 (Opening of Judicial Profession in the Light of Judgment of the Supreme Court of 19 June 2009, No. III KRS 9/08), in: J. Ignaczewski (ed.), Perspektywy wymiaru sprawiedliwości (Perspectives of the Judicial System), Special additional issue to Monitor Prawniczy No. 3/2010, 26-29, available at <http://www.hfhrpol.waw.pl/precedens/images/stories/file/dodatek_do_MoP_3_2010.pdf>.

[61] Id.

[62] Article 60 Law on the National School of the Judiciary and Prosecutor's Authority, which amended Article 55(2) AOC, passed on 23 January 2009, Journal of Laws (*Dziennik Ustaw*), No. 26, item 157.

[63] This law is currently binding, but was subject to the constitutional challenge by the President to the Constitutional Court. Case No. K 18/09. The case is still pending.

trict courts as judges of regional courts. As far as all the candidates were concerned the process of judicial appointment had been made in accordance with the law. The candidates fulfilled all preconditions required for the relevant positions. In particular they had obtained a positive opinion from the NCJ. The refusal to appoint was made without justification.[64] Neither public opinion nor the candidates had any knowledge of the grounds for refusal. There is no clear regulation on whether the President should justify his discretionary decisions. The refusal raised concerns by the judiciary in Poland and by NGOs because the President used his competence for the first time to block the appointment process.[65] Previously there had been only one situation in which the President of Poland decided not to appoint to a judicial position. But in this case, according to information provided in discussions with the NCJ, the President of Poland only returned the relevant files of the candidate and asked for clarifications. Therefore, the current use of this competence may be regarded as a breach of the established constitutional tradition in Poland. It may be also interpreted as a problem resulting from the lack of transparent, precise and detailed regulations on judicial appointments. Furthermore, the refusal to appoint could be read as a signal to polish judges and candidates that their professional careers may depend upon the political process and executive power. It may have a chilling effect on the judiciary. The process of judicial appointments is crucial to the independence of the judiciary and should not depend upon political influences.[66]

---

[64] The Helsinki Foundation for Human Rights, which supported the legal representation of those not appointed as judges by the President, requested information on the official reasons for the President's decision, but was refused. Also the candidates did not receive such information.

[65] For example, the statement by the Secretary General of the International Commission of Jurists on 25 October 2007, Helsińska Fundacja Praw Człowieka, available at <http://www.hfhr.org.pl/precedens/aktualnosci/oswiadczenie-miedzynarodowej-komisji-prawnikow.html>.

[66] The judicial candidates who were not appointed by the President, with the support of the Helsinki Foundation for Human Rights, started litigation, seeking judicial review of the President's decision. *Inter alia* they submitted constitutional complaints to the Constitutional Court claiming that refusal to appoint judges without giving any justification threatens the principle of independence of the judiciary and the separation of powers. Furthermore, lack of justification of a discretionary decision by the President is contrary to the rule of law principle. For the moment, the constitutional complaints are registered in the Constitutional Court. Importantly, at the beginning of June 2009 the Pol-

The President of Poland's refusal to appoint judges was a subject of concern to the Consultative Council of European Judges (CCJE) of the Council of Europe. In its declaration adopted on 24 November 2008, the CCJE, analysing the above-mentioned decision of the Polish President, referred to its opinions and emphasized inter alia that "while it is widely accepted that appointment [...] can be made by an official act of the Head of State, yet given the importance of judges in the society [...], Heads of State must be bound by the proposal from the Council of the Judiciary".[67] Also, the International Bar Association (IBA) and the Council of the Bars and Law Societies of Europe (CCBE) in 2007 and 2008 reports both emphasized that there is a need to explain this decision thoroughly and that it raises serious implications as regards judicial independence.[68]

The matter of the unappointed judges was referred to the Constitutional Court by the First President of the SC, claiming that there is a conflict of competences between the NCJ and the President as regards the assessment of judicial candidates. The Constitutional Court decided to discontinue proceedings in this case.[69] The Constitutional Court said that this conflict was of a hypothetical nature, as it was impossible to find out what kind of criteria were used by the President when he refused to appoint judges and whether the exercise of his prerogatives by the President was in conflict with the competences of the NCJ.

In the opinions of the authors, the decision of the Constitutional Court is not convincing. It seems that the Court did not want to give a decision in this case, as it would be the first case on conflict of competences. Most probably, the Court did not want to create a new line of jurisprudence on the basis of a case which was not a typical conflict of competences case, but involved many other problems and issues. As long as this case is not fully explained, the President will still retain a power to give decisions on judicial appointments which are not justified and not

---

ish Ombudsman declared that he supported the constitutional complaints and constitutional argumentation used by complainants.

67 Declaration of the CCJE, Helsińska Fundacja Praw Człowieka, available at <http://www.hfhr.org.pl/precedens/images/stories/Pdfy/deklaracja.pdf>.

68 IBA and CCBE, Report Justice under Siege of 2007 and Follow up report of 2008 to Justice under Siege: a report on the rule of law in Poland, available at <http://www.ccbe.org/fileadmin/user_upload/NTCdocument/11_2007_Nov06_Report1_1194344860.pdf>, and <http://www.ibanet.org/Document/Default.aspx?DocumentUid=DF75F80F-A773-410C-A6A8-661F6612D0CC>.

69 Decision of the Constitutional Court of 23 June 2008, No. Kpt 1/08.

transparent. The case of the unappointed judges is still the subject of individual litigation. Currently, the constitutional complaints of those judges are awaiting review by the Constitutional Court.

3. Length of Office and Reappointment

In Poland, judges are appointed for life.[70] This is one of the basic guarantees of their independence. Accordingly there is no system of judicial re-appointment. It is possible for a judge to resign from the profession in order to become an attorney, prosecutor, notary or legal advisor. If such persons then decide to return to the judicial profession they will have to go through the system of judicial appointment once again. Nevertheless, a period of working as a judge may have a certain impact on the assessment of a person's candidacy for the position of a judge. It means that a person returning to judicial office would most probably have better chances to win a competition (provided that previous resignation was not caused by a poor standard of work) than *outsider* candidates. In recent years we have observed an out-flow of judges to other legal professions. The main reasons were salaries, but also dissatisfaction with the general functioning of the justice system or the lack of a clear and objective practice of promotion to higher courts.

4. Training of Future Judges

Training of future judges is currently undertaken (since 2009) within the framework of the National School. The detailed programme of the National School is the subject of legal regulation. It puts more emphasis on training different skills than the training previously organized for judicial candidates. For example, the programme includes such practical training as mock trials. Currently there is only a programme for so-called *general apprenticeship*, as the first group of apprentices started in the autumn of 2009. There is as yet no regulation detailing the programme for the second stage of *apprenticeship* (when candidates assist in courts, but also have specific judicial training).

There are also different educational programmes organized for judges, mainly thanks to EU funds.[71] The National School is responsible for

---

[70] Article 179 Constitution.

[71] Programmes are addressed mostly to ordinary judges and address issues of material or procedural law relevant for a judge's specialization as well as

the coordination of those programmes. In addition there are specific programmes organized for judges by NGOs.[72] The Centre for Information of the Council of Europe is also organizing seminars for judges on standards under the European Convention on Human Rights. Within those educational programmes, judges have an opportunity to make a site visit to the European Court of Human Rights. Seminars are highly appreciated by judges.[73]

5. Regulations Concerning Minority or Gender Representation

There are no special regulations concerning minority or gender representation. However, one should note that there is a constitutional right of equal access by all Polish citizens to public service.[74] In fact, it is commonly claimed that the profession of judge is highly feminized and that currently there are more women than men as judges. The recent study prepared by Foundation Feminoteka shows that there are significantly more women working as judges, Vice-Presidents and Presidents of courts than men. This is especially visible in lower courts. However, men prevail in higher courts, especially in the SC and the Constitu-

---

training on contacts with the media, auto-presentation, psychological training etc.

[72] It is worth mentioning just a few examples: "Courts and Constitution" for judges together with advocates in all appellate circuits, co-organized by "Iustitia", Polish of the ICJ and National Bar Council; "A Journalist in Court" – series of seminars for journalists and judges on the media – judicial collaboration (Iustitia, Stefan Batory Foundation, Helsinki Foundation for Human Rights); many other seminars organized by Iustitia on: mediation, culture and communication in court, Structural reform of the judicial system, many seminars organized by local branches of Iustitia including five seminars in Poznań on "Courts and Judges in the Face of Challenges of the European Integration"; series of seminars for judges on judicial culture, psychology of the courtroom and "stress management", legal reasoning and methods of interpretation, constitutional and international standards in daily judicial practice, language of the courtroom etc. (Helsinki Foundation for Human Rights).

[73] See for example press release on the 18th edition of series of seminars "Application of the ECHR in the domestic legal system", Council of Europe, available at <http://www.coe.org.pl/pl/biuro_informacji_rady_europy/aktualnosci?more=1343274962>.

[74] Article 60 Constitution.

tional Court.[75] Article 32(2) of the Constitution prohibits discrimination for any reason. It means that one may not be discriminated against in access to the judicial profession by reason of race or ethnic origin, disability, sex, sexual orientation etc. In addition Poland is bound by EU anti-discrimination laws which prohibit discrimination due to sex, race or ethnic origin, religion, age, disability and sexual orientation.[76]

6. Latest Developments Regarding the Process of Judicial Appointments – Resolution of the Problem of Probationary Judges

The current system of judicial appointments is still in the process of formation and it is not certain how it will finally stabilize in the future. Major changes in this area were caused by the judgment of the Constitutional Court concerning probationary judges. Until 2009 the most frequently used way to the profession of judge was judicial training, which consisted of two stages – judicial traineeship (*aplikacja sądowa*) and judicial apprenticeship (*asesura sądowa*). There were in general basic steps to be followed in order to become a judge: graduation from the law school, judicial training (*aplikacja sądowa*) lasting for three years, the passing of the judges' exam, practising for at least three years (but up to four years) as a probationary judge[77] (*asesor sądowy*) in a court, and being at least 29 years old.[78] In practice this avenue was used by graduates fresh from law school. Usually they did not practise any other profession before starting the judicial traineeship (*aplikacja*). The candidate for judicial traineeship had to take an examination organized

---

[75] See B. Gessel-Kalinowska vel Kalisz, Czy Temida też była kobietą? (Was Temida also a woman?), available at <http://lex.pl/?cmd=artykul,3055>.

[76] E.g. Directive 2000/43/EC, Directive 2000/78/EC, Directive 2006/54/EC.

[77] The institution of probationary judge originates from the law on the structure of the judiciary of 1928. This institution referred in fact to provisions which were binding in the former Prussia, and on the other hand to secretaries of council (*sekretarz rady*) and court adjuncts (*adiunkt sądowy*) acting in the former Austrian territory. After the Second World War this institution was retained. See: T. Ereciński, J. Gudowski, J. Iwulski, Komentarz do prawa o ustroju sądów powszechnych i ustawy o Krajowej Radzie Sądownictwa (Wydawnictwo Prawnicze LexisNexis), 393, at 394 (2002).

[78] This is a basic overview of the system of judicial appointments, and of course there were many modalities with respect to members of other legal professions, assistants to judges (*asystenci sędziów*) or court clerks/referendaries (*referendarze sądowi*).

by the President of the court of appeal.[79] After the candidate passed the exam, the board of the regional court gave an opinion on him as a probationary judge as well as consent to burden him/her with a judge's duties. One could be a probationary judge for up to four years. The aim was to evaluate the potential judicial candidate. In this period probationary judges had certain guarantees of independence and impartiality. Nevertheless, they were still subject to assessment, since depending on performance, they could get a positive recommendation from the NCJ or not, and they were not yet appointed for life. The probationary judge had the power to adjudicate on cases.[80] In practice, the role of probationary judges was not only to assist judges or be trained, but to act as regular judges and adjudicate on cases in district courts.[81]

As a result of this process, nearly one quarter of the whole judicial personnel in district courts was made up of probationary judges acting as *de facto* judges.[82] In some courts probationary judges constituted even the majority of judicial personnel.[83] At the same time they did not have sufficient guarantees of their impartiality and independence, as they were officially subordinated to the Minister of Justice, and their legal guarantees stemmed from the AOC and not the Constitution. Furthermore, probationary judges were criticized for lacking sufficient independence, professionalism and life experience. The problem remained unaddressed for a long time due to potential disastrous consequences for the justice system and financial advantages resulting from proba-

---

[79] The apprenticeship was regulated by the Ordinance of the Minister of Justice of 25 June 1998 on judicial and public prosecution apprentices (amended).

[80] Article 135 AOC stated that "Minister of Justice may, upon the consent of the college of the regional court, entrust the apprentice judge (*asesor sądowy*) exercise of judicial functions in a district court, for a limited period of time, not exceeding four years."

[81] There were two major reasons for this. First, due to low salaries judges wanted to be promoted to higher courts. However, promotion resulted in fewer judges adjudicating on cases in lower courts. This area was steadily supplemented by apprentice judges. And, second, the exercise of judicial power by apprentice judges was cheaper, as they earned much less than ordinary judges.

[82] As of 2 September 2006, there were 5,237 ordinary judges in district courts and 1,637 apprentice judges, who constituted 23.81% of the judicial adjudicating personnel.

[83] The authors know of a situation where an apprentice judge was the head of the Civil Law Division in the court.

tionary judges working *de facto* as regular judges. Nevertheless, in 2005 the institution of probationary judges started to be questioned in legal literature[84] and then by the litigation of strategic cases before the Constitutional Court.[85] The problem of the status of probationary judges was mentioned in a special report prepared by the International Bar Association's Human Rights Institute (IBAHRI) and the Council of Bars and Law Societies of Europe (CCBE) concerning the threats to the judiciary in Poland,[86] as well as in a report by the Council of Europe Commissioner for Human Rights, who stated that he "was informed by a number of lawyers and judges during his visit that 'probationary judges' (*asesorzy*) were being assigned cases which were beyond their experience and competence. Probationary judges are young trainee judges who were being called to adjudicate complex cases and make difficult decisions, for example, concerning pre-trial detention."[87]

The Constitutional Court decided to abolish the institution of probationary judges.[88] It declared that the status of probationary judges did

---

[84] Adam Bodnar and Andrzej Rzepliński raised concerns regarding the case of criminal charges of paedophilia against Andrzej S., a famous sexologist. It appeared that the case was going to be adjudicated on by a 30-year old apprentice judge in the District Court of Warsaw-Mokotów. Cf. A. Bodnar/A. Rzepliński, Czy asesor powinien orzekać w głośnej sprawie Andrzeja S.?, Rzeczpospolita of 14 July 2005.

[85] Constitutional complaints submitted to the Constitutional Court by AD Drągowski S.A. and by Józef W. Both of them were reviewed jointly under the number SK 7/06.

[86] IBAHRI-CCBE, Justice under Siege: a report on the rule of law in Poland, November 2007, at 28. The IBAHRI and CCBE delegation noted that members of the legal community in Poland are opposed to assessors on the grounds that they are appointed by the Minister of Justice and are therefore considered "political" and "dependent", thereby jeopardizing the independence of the judiciary. However, the IBAHRI and CCBE expressed concern about the implications of the legislation, which appears to bestow judicial powers on persons not suitably qualified for judicial office.

[87] Memorandum to the Polish Government. Assessment of the progress made in implementing the 2002 recommendations of the Council of Europe Commissioner for Human Rights, Strasbourg, 20 June 2007, CommDH (2007) 13, 10.

[88] Judgment of the Constitutional Court of 24 October 2007, No. SK 7/06. The English summary of the judgment, Helsińska Fundacja Praw Człowieka, available at <http://www.hfhrpol.waw.pl/precedens/images/stories/sk7_06_gb_final_2.pdf>.

not guarantee its entire independence from the executive. This institution was therefore not compatible with Article 45 of the Polish Constitution guaranteeing a fair trial before a "competent, impartial and independent court", because probationary judges did not enjoy the guarantees of stability similar to regular judges. The regulation of the status of probationary judge did not provide the minimum and maximum terms of their employment and the exercise of judicial power.[89] Probationary judges may have been recalled during their judicial training. In the Court's opinion, recalling a probationary judge may have been compatible with the constitutional principles if the recalling conditions had been the same as for regular judges. What is more, the provisions of the AOC did not list the specific circumstances which justified such recalling. Moreover, the decision on dismissal of a probationary judge was taken by the MoJ, not by an independent court. The Constitutional Court concluded that, under such regulations, there were insufficient guarantees preventing the recall of probationary judges because of their judicial activity. The exercise of judicial power by people without strong guarantees of independence threatened the public trust in the administration of justice. The Court claimed that citizens who take part in judicial proceedings should perceive these proceedings as compatible with the fair trial requirements. The exercise of judicial power by probationary judges who did not enjoy guarantees of independence and stability similar to those of judges provoked speculation and suspicion undermining the courts' authority and the legitimacy of their judgments. From this point of view, the current status of probationary judges had a harmful influence on citizens' approach to the administration of justice.

On 9 May 2009, the judgment of the Constitutional Court came into force and the institution ceased to exist. By this time, there was a wide discussion on the model of judicial appointments in Poland and the

[89] In this context, the Constitutional Court referred to the ECtHR's judgments in the cases of *Benthem* v. *The Netherlands*, Judgment of 23 October 1985, Series A, No. 097; *Campbell and Fell* v. *United Kingdom*, Judgment of 28 June 1984, Series A, No. 080 and *Sramek* v. *Austria*, Judgment of 22 October 1984, Series A, No. 084. The judgment of the Constitutional Court concerning probationary judges and its rationale was generally supported by the European Court of Human Rights in *Henryk Urban and Ryszard Urban v. Poland*, no. 23614/08, Decision of 30 November 2010, available at <http://hudoc.echr.coe.int/hudoc/>.

Parliament managed to pass a new law on the National School for the Judiciary and Prosecutor's Office (discussed above).[90]

III. Tenure and Promotion

1. Tenure

According to Article 179 of the Constitution judges are appointed for life. The AOC as well as the Constitution provides specific guarantees protecting judges against unfair deprivation of the office, suspension, or delegation to other posts. Such decisions which could be against the will of a given judge may be made only by the court and only in cases specified by law.[91] Before 9 May 2009 the tenure of a judge was preceded by a period as so-called probationary judge.[92] In our opinion the current system of judicial appointments is not sufficiently transparent for external viewers. In the opinion of the authors it is also not fully transparent to candidates. There are some allegations that some promotions depend on personal connections and good relationships with Presidents of the courts. However, such view is difficult to prove and is based on subjective views.

2. Promotion Requirements

In general the system of professional promotion of judges is complicated and not fully transparent. The following issues which are intertwined need to be discussed here: promotion to hold administrative positions in a given court (President and Vice-President of division of the given court, President of the court, visiting judge, or spokesman of the court); horizontal promotion (promotion to higher court judge due to seniority or experience, but still working in the same court); delegation to a higher court to perform judicial functions; and vertical promotion – promotion to a higher court. The system of promotion is intertwined, because very often in order to be promoted to a higher court, a judge

---

[90] Law on the National School of the Judiciary and Prosecutor's Authority of 23 January 2009, Journal of Laws (*Dziennik Ustaw*) No. 26, item 157.

[91] Article 180(2) Constitution.

[92] See the debate and developments described *supra* at B. II. Selection, Appointment and Reappointment of Judges.

must perform certain administrative functions (or be delegated to adjudicate in a higher court).[93]

The system of promotion is generally criticized, as it creates a bureaucratic structure. Its indirect effect is the constant effort of judges to be promoted to higher instances, as it is one of the very few possibilities to get higher remuneration. Because of this fact, the Vice-Minister of Justice Janusz Niemcewicz in 2000 proposed a law reforming the AOC which aimed at replacing the current three ranks of judge (judges of district courts, regional courts and appeal courts) with one rank – judge of common courts (*sędzia sądu powszechnego*). However, this legislative change was blocked and did not come into force.[94] It seems that one of the methods of reforming the justice system in Poland is to decide whether a model of judicial career should be based on stability of the office (i.e. a judge may for his whole life be a judge of a first instance court and there are methods other than promotion to award him and motivate him to work) or on continuous promotion (as it is now). One of the major problems with the promotion system in Poland is that it depends on the wish of the judge to be promoted. Accordingly, there is not a system of indication of judges who should be promoted. Quite otherwise – a judge wishing for promotion has to apply for it.

The decision on promotion to administrative functions is made by a President of a given court. In fact, however, he/she has to obtain an opinion of the college of the given court, which has a crucial meaning in the process of appointment. With respect to the highest judicial administrative positions (Presidents and Vice-Presidents of courts) the MoJ takes the decision, but the appointment requires favourable decisions by the general assembly of judges.[95]

3. Criteria and Assessment

The major problem is lack of specifically prescribed criteria for professional promotion of judges, except for appointment to higher courts (when it is the role of the NCJ to assess the candidate). In consequence,

---

[93] See the comments on delegation *supra* at B. II. Selection, Appointment and Reappointment of Judges.

[94] See comments by Janusz Niemcewicz during a conference organized on 12 May 2010 by the Helsinki Foundation for Human Rights and Forum for Civic Development, entitled "Perspectives of Justice System in Poland".

[95] See comments *supra* A. Executive Summary.

a lot depends on the organs of judicial self-government (general assembly of judges) or the colleges of given courts. Obviously, such criteria as professional performance, disciplinary proceedings, overall assessment of the work (on the basis of the work of visiting judges) or statistics regarding adjudicated cases are taken into account. However, the decision to appoint to certain administrative position is made by secret ballot and is not preceded by a complex evaluation of the candidate on the basis of clearly specified conditions.

4. Transparency of the Process

The process of judicial promotion to higher instances or administrative posts is not sufficiently transparent. Because of this fact, recently the MoJ proposed the introduction of so-called periodic assessments.[96] Periodic assessments were to be made with respect to all judges, and would be one of the means of assessing the performance of the judge for the purposes of future promotion. However, the idea of introducing periodic assessments provoked radical reaction on the part of judges, as a threat to their independence, as well as an unnecessary burden on the judiciary (need to create a new system of assessment and to delegate judges to deal with it). It seems that the MoJ will not support the idea any longer due to judicial protest. In exchange the regular system of visiting judges assessing the work of colleagues is proposed.[97]

5. Horizontal Promotion

"Horizontal promotion" (*awans poziomy*) of judges was introduced by the Law of 29 June 2007 amending the AOC.[98] It provided a possibility for judges with at least 15 years' experience to obtain professional promotion (and higher remuneration) and at the same time not to change

---

[96] Proposed amendments were announced on 12 May 2009. Draft law and justification to the law, Ministerstwo Sprawiedliwości available at <http://www.ms.gov.pl/aktual/usp_projekt.pdf>; <http://www.ms.gov.pl/aktual/usp_projekt_uzasad.pdf>.

[97] See e.g. K. Sobczak, *Minister wycofuje się z ocen sędziów*, Lex, available at <http://lex.pl/?cmd=artykul,5018,title,minister-wycofuje-sie-z-ocen-sedziow>.

[98] Law of 29 June 2007 amending the AOC (*Ustawa z dnia 29 czerwca 2007 r. o zmianie ustawy - Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw*), Journal of Laws (*Dziennik Ustaw*) of 2007, No. 136, item 959.

their place of work (the court in which judge was employed). As a consequence, judges in district courts could be horizontally promoted to be "regional court judges in the district court". Consequently judges in the regional courts could be promoted to be "appeal court judges in the regional court". As a consequence of such horizontal promotion, judges were entitled to the remuneration of judges of regional courts or appeal courts, but they could perform their services in the same place as they did before the promotion.

Before the entry into force of the Law of 29 June 2007 on 1 July 2008 the government changed. The new MoJ did not want to pursue a policy of introducing promotions to *de facto* non-existent positions. Therefore, the MoJ proposed the abolition of horizontal promotion and the introduction of the three grades of financial promotion. For this purpose the law abolishing horizontal promotion has been prepared and passed by the Parliament using the fast track procedure. On 25 June 2008 the Parliament adopted the law abolishing horizontal promotion. However, the Parliament did not manage to pass the law before the entry into force of the Law of 29 June 2007, i.e. 1 July 2008. Therefore, it opened a time window for judges to apply for horizontal promotion. The President opposed the abolition of horizontal promotion and therefore started awarding such promotions, following the entry into force of the Law of 29 June 2007, upon relevant motions of the NCJ. He also vetoed the law abolishing horizontal promotion, however, this was revoked by the Parliament on 19 December 2008 and horizontal promotion was effectively abolished as of 22 January 2009.

The abolition of horizontal promotion and the method of introducing such changes were criticized by many institutions, including the Polish Judges' Association *Iustitia*[99] and the President of Poland. The latter decided in February 2010 to submit a motion to the Constitutional Court challenging the decision of the Parliament to abolish horizontal promotion.[100] Most probably, the President of Poland was interested in supporting horizontal promotion, because first, a relevant law was passed when the Law and Justice party was still at power (and this was the party generally favoured by the President), and second, it was a method of building support among judges, as horizontal promotion

[99] There were many statements concerning this issue made by the Polish Judges' Association *Iustitia*. See e.g. position of 1 March 2009, available at <http://www.iustitia.pl/content/view/425/74/>.

[100] The motion of the President of Poland to the Constitutional Court is registered as K 7/10.

meant increase in remuneration. It was claimed that in fact horizontal promotion is the only method of rewarding judges with long service working in small towns, not having a chance of promotion to higher courts. The MoJ responded that the system of financial promotion should be based on length of service, but should not be connected with the creation of artificial positions.

IV. Remuneration

1. Remuneration

An essential change in the way in which judges' salaries are determined was introduced after 1989. Adequate remuneration for judges was intended to become one of the guarantees of their independence and was elevated to a constitutional principle.[101] However, this has generated controversy concerning the proper level of pay for judges. The profession of judge is an attractive one from an economic standpoint when compared with those of other professionals, such as teachers, whose remuneration is set within the state budget. Moreover, judges are entitled to privileges, including job security and retirement benefits, which other professionals, including legal advisers and lawyers, do not enjoy. The salaries of judges are fully comparable to those of prosecutors, as they are bound up with each other by virtue of legislative provisions. The basic pay of judges of equivalent courts is equal. In addition to basic remuneration, judges may receive functional allowances, which are awarded to court Presidents and Vice-Presidents, visiting judges, judicial training managers, and various other officials. It is difficult to compare judges' remuneration to that of lawyers in private practice (attorneys, legal advisors or notaries). Certainly, there are many private lawyers in major cities who earn much more than judges. However, in smaller towns judges' remuneration in many instances is quite comparable.

The constitutional principle concerning judges' remuneration is very general, and in practice the concept of *remuneration consistent with the dignity of judicial office* is controversial. Because provisions of the Constitution are applied directly unless otherwise provided, many judges have lodged in courts individual claims concerning their level of remuneration. Accordingly they used the court remedy as a method of in-

[101] Article 178(2) Constitution.

creasing their salaries. There were also numerous cases pending before the Constitutional Court which concerned the level of judicial remuneration. Only some of them ended with a judgment. The general principle established in the jurisprudence of the Constitutional Court is that the Constitution does not establish the amount of remuneration for those holding judicial office in an unequivocal manner and cannot form self-evident grounds for judges' claims against the state. The general and simply unspecified nature of the criterion *remuneration consistent with the dignity of judicial office* unambiguously points to the necessity of stating them with greater precision; they must, therefore, be stated more specifically in ordinary legislation.

In the judgment of 18 February 2004, the Constitutional Court dealt with the problem of postponement of increases in judicial remuneration.[102] Due to the serious financial difficulties of the state budget in 2001, the Parliament decided to change the regulations providing for increases in the salary of judges. Those regulations were already adopted, but were waiting to come into force. The Parliament did not delete the new regulations totally, but provided that the introduction of so-called promotion remuneration rates for judges with a certain period of experience would take place later than expected. Also the growth rate would be smaller than previously adopted. The Constitutional Court emphasized the importance of judges' salaries for the proper administration of justice and their special constitutional position. It held that the legislator had a certain level of flexibility in the determination of judges' salaries. However, this flexibility was considered to be constrained by several points of reference. Judges' salaries should significantly exceed average remuneration in the public sector; it should exhibit a long-term tendency to increase at a rate no less than that of average public sector remuneration; be especially protected against exceedingly detrimental fluctuations in the event of serious state budget difficulties; and should not be reduced by way of normative regulations. Due to the fact that the increase had not yet entered into force, the Constitutional Court concluded that such change did not violate the principle of acquired rights and did not find such postponement in increase of salaries as a violation of the Constitution.

One of the most important problems in 2007-2009 was massive protests by judges concerning the level of remuneration. It should be underlined

---

[102] Judgment of the Constitutional Court of 18 February 2004, No. K 12/03, English summary of the judgment, Trybunal Konstytucyjny, available at <http://www.trybunal.gov.pl/eng/summaries/documents/K_12_03_GB.pdf>.

that for the last few years judges' remuneration had not been increased. In their protests, judges demanded a principle that their remuneration would depend on the average salary in Polish business, and any change in the level of average salary would have an immediate consequence for the salary of judges. Second, they wanted a significant increase in the level of remuneration. The methods they used to protest show the level of their desperation. In addition to typical means of protests, such as open letters or declarations, judges started to organize so-called "days without hearings", when they came to courts just to do research and paperwork. As a result of protests on 20 March 2009 the Parliament passed a law increasing the level of remuneration by 1,000 PLN (approximately 250 EUR) for each judge. Moreover, the Parliament has managed to pass the amendments to the AOC which provide for new rules concerning judicial remuneration.[103] The most important points in this regard are that the remuneration of judges of equal status (e.g. district court judges) may be different only as a result of their length of service and the function they held. The basic remuneration of judges is calculated taking into account the average salary in Poland as announced by the Head Statistical Office in Poland, which average is multiplied by different indicative rates; those indicative rates depend upon the position of the judge, length of service and functions. The specific quota of indicative rates is determined in the attachment to the law amending the AOC. The addition for length of service starts to be payable after six years' service. It is equal to 5% of the judge's principal salary and increases by 1% for every additional year of service, up to a maximum of 20%. The MoJ upon consultation of the NCJ is responsible for setting down the functions for which additions to the remuneration are awarded.

These changes may be regarded as an important step in reforming judicial remuneration in Poland. Nevertheless, it does not mean that judges' remuneration is already at a sufficient level. The Polish Judges' Association *Iustitia* as well as many other institutions still claim that the level of judges' remuneration should be increased, especially with respect to lower court judges. Since that time the remuneration of judges has slightly increased. However, the problem still exists. In the opinion of the authors, the major cause of the problem is a discrepancy in remuneration between higher court and lower court judges. Certainly the

---

[103] Law of 20 March 2009 amending the AOC (*Ustawa z dnia 20 marca 2009 r. o zmianie ustawy - Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw*), Journal of Laws (*Dziennik Ustaw*) of 2009, No. 56, item 459.

latter should earn more as the current level of remuneration creates a lot of frustration, including resignation from the judiciary by many young judges. They emphasized that the increase in remuneration which took place in 2009 was only temporary and did not mean the finalization of efforts in this regard. Furthermore, when relevant changes were adopted judges were promised that that was not the end of the process and that the next increases would take place in 2010. However, it seems that currently the Government, due to the financial crisis, is stepping back from this position and is not planning increases in remuneration. Therefore, on 7 September 2009 the Polish Judges' Association adopted a resolution demanding urgent action by the MoJ and undertaking further work on increases in the level of remuneration. There are no specific problems with payment of salaries.

It should be mentioned that one of the ways implemented recently to increase judicial remuneration, which provoked a lot of controversy and discussion, was the "horizontal promotion" (*awans poziomy*) of judges. It was introduced by the Law of 29 June 2007 amending the AOC.[104]

2. Benefits and Privileges

By virtue of the AOC judges have certain financial and other privileges. The most important ones being that social security contributions are not paid out of judicial remuneration. There are additional free working days in addition to those provided under general provisions of the Labour Code;[105] jubilee awards;[106] salaried time off for health reasons – up to six months – upon consent of the MoJ; several benefits and special privileges in the event of health problems and accidents at work; preferential loans for housing purposes; and compensation for travel costs in the event of having to live in a town other than the seat of the court. In

---

[104] Law of 29 June 2007 amending the AOC (*Ustawa z dnia 29 czerwca 2007 r. o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw*), Journal of Laws (*Dziennik Ustaw*) of 2007, No. 136, item 959. See supra B. III. Tenure and Promotion.

[105] Six free working days after ten years of service and 12 additional free working days after 15 years of service.

[106] Jubilee awards are given in the amount of 200% - 400% of basic remuneration – awarded after 20 years of service and after each five year consecutive period (growing every five years by 50%).

the event of a judge's death, the closest family members have a right to a special retirement pension.

3. Retirement

Detailed principles and procedures for determining and paying remuneration and family remuneration to retired judges and prosecutors and members of their families were laid down by ordinance of the MoJ.[107] It sets the remuneration of a judge *emeritus* at 75% of the basic pay received in his/her last post, plus a seniority bonus. A judge must retire upon turning 65 unless the NCJ, acting upon a motion by the judge in question and in consultation with the college of the relevant court, consents to his/her continued service. The length of an extension may vary, but in any case cannot go beyond the age of 70. There are no clear criteria for approving or refusing an extension, and it is therefore possible that judges will receive extensions if the NCJ consents. The NCJ's decision not to extend employment may be challenged in the administrative courts. Again, however, there are no clear criteria as regards the grounds for administrative courts to review the decision. The constitutionality of the NCJ's discretion to decide on retirement was questioned by the President in a petition to the Constitutional Court in 1998. The Constitutional Court stated that the basic question in this case was whether the introduction of that measure of flexibility was compatible with the principle of a judge's irremovability. That would be impermissible if, as during the period of the Polish People's Republic, consent to further judicial service were to be given by a political organ (MoJ), situated outside the organizational system of judicial authority. This provision, however, gives that prerogative to the NCJ, the constitutional task of which is to protect the independence of judges and the composition of which guarantees that a judge's fate is to be decided mainly by other judges. In the opinion of the authors there are no grounds for alleging that the composition, manner of operation or tasks

[107] Ordinance of the Minister of Justice of 16 October 1997 on the detailed rules on retirement benefits (*Rozporządzenie Ministra Sprawiedliwości w sprawie szczegółowych zasad i trybu ustalania i wypłacania uposażeń oraz uposażeń rodzinnych sędziom i prokuratorom w stanie spoczynku oraz członkom ich rodzin z dnia 16 października 1997 r.*), Journal of Laws (*Dziennik Ustaw*) of 1997, No. 130, item 869.

of the NCJ constitute a threat to use that forum to engage in activities violating the principle of judicial independence.[108]

4. Restrictions on Commercial Activity

The AOC provides for detailed restrictions as regards conducting any activity of professional employment outside his/her judicial functions. In fact the only exception which is allowed is employment at the higher school as an academic teacher or researcher. Consent for such employment (as well as undertaking any other activities which may result in earning money) is made by the President of the relevant court with respect to ordinary judges and by the MoJ with respect to Presidents of regional and appeal courts. Any activity undertaken by the judge may not be in conflict with his/her independence and dignity of the office.

The AOC also imposes on judges an obligation to submit a declaration on the state of their property. Such declaration is submitted every year to Presidents of appeal courts (Presidents of such courts submit their declarations to the NCJ). They are subject to revision by appeal courts' colleges. Declarations on property are secret and are not disclosed to the public, except with the judge's consent. There are discussions in Poland whether these provisions should change and provide for disclosure of all such declarations. It seems, however, that changes in law in this regard are not expected soon.

V. Case Assignment and Recusal

Poland does not yet have a computerized system for allocating cases. In general, the current rules do not provide sufficiently transparent and neutral criteria for allocating cases. The college of the regional court (or the college of the appeal court) specifies the general rules for allocating cases to judges, but in non-criminal matters cases are assigned by the chairmen of individual court departments.[109] The chairman is supposed

---

[108] Judgment of the Constitutional Court of 24 June 1998, No. K 3/98.

[109] § 49 Ordinance of the Minister of Justice of 23 February 2007 on Regulation of internal operation of ordinary courts (*Rozporządzenie Ministra Sprawiedliwości z dnia 23 lutegi 2007 r. Regulamin urzędowania sądów powszechnych*), Journal of Laws (*Dziennik Ustaw*) of 2001, No. 98, item 1070, as amended.

to ensure a certain degree of fairness in the internal allocation of cases on account of case differentiation;[110] since the chairman's decisions are discretionary they sometimes lack transparency – the lack of random assignment of civil cases is criticized by the legal community and is raised as one of the problems threatening judicial independence.[111] There is no clear reason why the random selection of cases exists for criminal and not for civil cases. It was the decision of the legislator and certainly one should consider changing it.

In criminal courts cases are assigned to the judges randomly.[112] Two systems apply: incoming cases are assigned to the judges according to the inflow of cases to the given court and the transparent alphabetical list of judges of a given court or by lottery.[113] An exception to the first, generally used system is possible only when a judge is ill or because of some other important cause. If it happens, then it has to be indicated in the minutes of the first hearing of the case.[114] The panel of judges is selected by lottery with respect to cases involving potential sentences of life imprisonment or 25 years' imprisonment. In those cases a lottery is organized upon the motion of the prosecutor or the defence. Both prosecutor and attorney may be present during the lottery.[115] However, judges are not selected randomly with respect to adjudication on security measures (such as pre-trial detention). In such a case the decision on selecting the judge was made by the President of the court which raised concern in 2005-2007, when probationary judges were quite often requested to give decisions on pre-trial detention. One could claim that the President of the court (and one should consider that the MoJ has certain influence over the appointment of Presidents of courts) could have had a certain influence on the selection of probationary judges, who would issue favourable decisions as regards pre-trial detention. The MoJ has certain influence over the appointment of Presidents of

---

110 Id., § 49(1).

111 See comment by W. Żurek, in: T. Wardyński/M. Niziołek (eds.), Independence of the Judiciary and Legal Profession as Foundations of the Rule of Law. Contemporary challenges, 196 (2009).

112 Article 351 Act of 6 June 1997 Code of Criminal Procedure (*Ustawa w dnia 6 czerwca 1997 r. Kodeks postępowania karnego*), Journal of Laws (*Dziennik Ustaw*) of 1997, No. 89, item 555, as amended.

113 Id., Article 351(1), (2) and (3).

114 Id., Article 351(1).

115 Id., Article 351(2), (3).

courts, as organs of the self-government of the judiciary only give their opinion on candidates presented by the MoJ. Only in case of a negative decision by the self-government of the judiciary and the NCJ may the MoJ not appoint a President of the court. This problem of steering cases with the appointment of probationary judges to adjudicate on them does not exist now, as they no longer serve in the judiciary.

Although court Presidents are fairly powerful and have broad supervisory responsibility over administrative matters, there is no evidence of their attempting to influence or supervise judges' adjudication directly. Nevertheless, there is still a certain level of discretion left for the Presidents of courts to decide who will hear cases, in particular regarding the application of security measures.

In general, civil courts have more flexible rules as regards the change of a judge or reassignment of the case than criminal courts. In civil cases the chairman of a court department may change a judge, but only in "exceptional cases" with respect to the rule of "immutability of the bench".[116] In criminal cases, a change of judge may result in the re-opening of proceedings. The decision on re-assignment in criminal cases is made by the President of the court.[117] In general it happens very rarely that judges are re-assigned cases. In criminal cases any re-assignment of a judge means a need to begin the trial once again. Re-assignment happens more often in civil cases, mostly due to the length of proceedings. When the case is pending, the judge may be promoted (or change court) and a new judge needs to be assigned. However, it does not make it necessary to hear the case once again. In all types of proceedings there are two possibilities of recusal of a judge.[118] First, there are listed conditions which should lead to the recusal of a judge (e.g. relative of a party). Otherwise, the proceedings in a case could be invalid. Second, the law provides a general clause which provides for discretionary recusal for situations which create a justified doubt as re-

---

[116] Article 206 Act of 17 November 1964 – Code of Civil Procedure (*Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego*), Journal of Laws (*Dziennik Ustaw*) of 1964, No. 43, item 296, as amended; § 50 Ordinance of the Minister of Justice of 23 February 2007 on Regulation of internal operation of ordinary courts.

[117] Article 350(1) Act of 6 June 1997 – Code of Criminal Procedure (*Ustawa z dnia 6 czerwca 1997 r. – Kodeks postępowania karnego*), Journal of Laws (*Dziennik Ustaw*) of 1997, No. 89, item 555, as amended.

[118] See for instance Arts. 48-54 Code of Civil Procedure and Arts. 40-44 Code of Criminal Procedure.

gards the impartiality of the judge in a given case. Recusal may be moved by the interested judge or party. The decision is made by a panel of three judges from the court in which a given case is adjudicated on, but without the participation of the judge in question. In the event of recusal, the case is transferred to another judge in the same court. If it is not possible to adjudicate it in a given court, then the case is transferred to a court of equal rank.

VI. Judicial Conduct Complaint Process

Ways of giving opinion on judges' work are complaints and motions. By virtue of the Constitution[119] and Code of Administrative Procedure[120] every administrative organ has to review complaints or motion. Anybody may direct complaints or motions to the administrative organ. Complaints lodged in the MoJ and ordinary courts (district, regional and appeal) are dealt with by those institutions. The MoJ publishes "Information about mode of receiving and handling complaints and motions addressed to the MoJ" annually.[121] It includes a section on complaints directed to the MoJ and a section on complaints directed to the courts, both with a general description of the types of complaint, detailed statistical information, examples of particular complaints and information on how complaints are dealt with. For the purpose of reviewing complaints lodged with MoJ there is a special Section of Complaints and Motions. Complaints sent to the Ministry are usually submitted directly by citizens or through various bodies, deputies (MPs) and senators. Complaints considered by the Ministry mostly refer to the contents of judgments, the length of proceedings, the execution of judgments, administrative actions of chairpersons of justice units, the

---

[119] Article 63 Constitution.

[120] VIII "Complaints and motions" – Arts. 221-259 of the Act of 14 June 1960 - Code of Administrative Procedure (*Ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego*), unified text – Journal of Laws (*Dziennik Ustaw*) of 2000, No. 98, item 1071, as amended.

[121] The most recent Information about the mode of receiving and handling complaints and motions addressed to the Ministry of Justice in 2008 as well reports covering previous years, together with detailed statistical tables, may be obtained from the MoJ website at <http://www.ms.gov.pl/ministerstwo/sprawy.php>.

culture of the work of the courts. Most of the complaints – after review – are deemed as unfounded.[122]

Usually as a result of complaints the MoJ may ask for a case-file and review it. The most often used way, however, is to direct a complaint to the entity in question and ask for an explanation. The role of the MoJ is then to assess whether the given answer is satisfactory and addresses all the concerns raised.[123] In 2008, there were 30,145 complaints lodged in the MoJ, half of them referred to other organs. The MoJ found 290 (1.9%) complaints grounded, 31% unfounded and 67% were dealt with in other ways (for instance information was provided).[124] Another group of complaints is directed to courts. They concern similar issues to those directed to the MoJ, such as length of proceedings, content of judgments, execution of judgments, and culture of the work of courts. In 2008 there were 17,626 complaints lodged in the courts. 11% of them were found to be grounded, 72% unfounded and 17% were dealt with differently.[125] In courts the complaints are looked into directly by Presidents and deputy Presidents or appointed inspector judges. Complaints are investigated based on the analyses of the complaint, analyses of the case file, requests for clarification directed to chairmen and supervisors.

In both procedures (within the MoJ and courts) if a complaint is found to be grounded special measures are taken – these include the institution of *administrative supervision* over the particular case from the procedural point of view – meaning the organization of the trial. In cases being supervised periodic reports are prepared by the Presidents of courts reporting on the progress of the case – this does not deal with the substance but with the procedural aspects.[126] Apart from written complaints, complaining in person is possible both in the MoJ and courts. In courts clients are received at fixed times by the President, the Vice-President and inspector judges. Information about hours of reception is clearly displayed. On the basis of the analysis of these data the MoJ draws conclusions and sends them with the data to relevant de-

---

[122] Information for 2008, id.

[123] The authors do not consider this review a threat to judicial independence; it is rarely applied and focuses on administrative elements.

[124] Information for 2008 (note 121).

[125] Id.

[126] Although this procedure makes pressure from the substantive point of view possible, the authors have no information that happens in practice.

partments as well as to Presidents of appellate courts so that they can carry out these recommendations. Written information on the manner of use of the conclusions is to be submitted by them to the MoJ in next reported period. The information about complaints, its analyses and recommendations are also the subject of seminars and training for judges organized by the courts.[127]

One of the most important measures for dealing with the problems of the judiciary is a complaint on the length of proceedings, introduced as a result of the *Kudła* v. *Poland* judgment of the European Court of Human Rights.[128] The Law on the complaint on violation of the right to have a case heard within a reasonable time provides for the ability to complain to a higher court about the length of proceedings.[129] Such court may adjudicate on financial compensation for unduly lengthy proceedings in a case. Regarding the time taken to handle complaints both courts and the MoJ are bound by the terms of the Code of Administrative Procedure.[130] According to the statistics, 6.3% of complaints were handled tardily by the MoJ and 4% by courts.[131]

There are no special sanctions provided as a result of review of complaints. However a complaint may be a ground for giving a reproach to a judge (*wytyk*). This way they may have a certain impact on the promotion of judges as information about a reproach is placed on the file of a judge. In addition, the Presidents of courts, inspector judges or the MoJ may request the opening of disciplinary proceedings against a particular judge as a result of the review of the complaint. The complainant is generally informed in writing about the result of the particular type of complaint.

---

[127] Information for 2008 (note 121).

[128] ECtHR, *Kudła* v. *Poland* [GC], Judgment of 26 October 2000, 2000-XI.

[129] Act of 17 June 2004 on the complaint on violation of the right to hear a case within a reasonable time (*Ustawa z dnia 17 czerwca 2004 r. o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu przygotowawczym prowadzonym lub nadzorowanym przez prokuratora i postępowaniu sądowym bez nieuzasadnionej zwłoki*), Journal of Laws (*Dziennik Ustaw*) of 2004, No. 179, item 1843, as amended.

[130] Act of 14 June 1960 – Code of Administrative Procedure (*Ustawa z dnia 14 czerwca 1960 r. – Kodeks Postępowania Administracyjnego*), unified text – Journal of Laws (*Dziennik Ustaw*) of 2000, No. 98, item 1071, as amended. Without delay, one month as a maximum, two months in exceptional situations (Article 35 of the Code of Administrative Procedure).

[131] Information for 2008 (note 121).

VII. Judicial Accountability: Discipline and Removal Procedures

Disciplinary proceedings against judges are regulated by the AOC[132] and may take place in the case of professional offences, flagrant contempt for legal regulations, or undermining the dignity of the office.[133] Undermining the dignity of the office is defined as "any other behaviour that the judge (unethical, immoral, and scandalous) both in the service and outside service – also in private life, which brings discredit to the position of the judge".[134] When appointed a judge takes an oath to uphold basic standards of ethical behaviour, swearing to uphold the law, conscientiously fulfil his/her duties, impartially mete out justice in accordance with his/her conscience and legal regulations, keep state secrets and be guided by the principles of dignity and honesty.[135] A judge is required, first and foremost, to perform the judicial duties in accordance with the oath. A judge is also obligated, both on and off duty, to uphold the prestige of judicial office and avoid anything which could undermine the dignity of the office or confidence in judges' impartiality. Any violation of the above principles may in fact lead to disciplinary proceedings.

Disciplinary proceedings are instituted by the disciplinary spokesmen. There is one main disciplinary spokesman elected by the NCJ (a four year term) and a number of vice spokesmen, judges elected by the college of each court of appeal[136] and each regional court[137] from among the judges of the same college (a two year term).[138] Re-election is not ruled out by law, and there are no special rules for dismissal. He/she is responsible for all actions in disciplinary proceedings and then for accusing before the disciplinary court (the spokesman after the investigation takes a decision on bringing case to the court and it is a discretionary decision; however the refusal may be challenged in the disciplinary court).[139] The disciplinary spokesman starts the investigation *ex officio*

---

132 Arts. 107-133 AOC.

133 Article 107 AOC.

134 NCJ Information Bulletin No. 14, 2007, at 17, available at <http://www.krs.gov.pl>.

135 Article 66 AOC.

136 There are 11 courts of appeal.

137 There are 45 regional courts.

138 Article 112 AOC.

139 Article 114 (5)-(7) AOC.

or at the request of the MoJ, the President of an appellate court or regional court, the college of such a court or the NCJ.[140] Disciplinary courts are appellate courts in the first instance and the SC on appeal.[141] Disciplinary courts consider cases with three judges sitting on a panel, and are made up from among all the judges of the given court except the President, the Vice-President and the disciplinary spokesman. The judges are appointed to a particular case by lot.[142]

Until a couple of years ago disciplinary proceedings took place behind closed doors but changed rules provide that after the enactment of a new law in 2001 they are open to the public.[143] The defendant may designate a defence counsel from amongst the judges or advocates.[144] Both the defendant and the disciplinary spokesman have the right to appeal against the verdict of a disciplinary court of first instance. In general all rules concerning fair trial are applicable to disciplinary proceedings – relevant provisions of the Code of Criminal Procedure apply to disciplinary proceedings.[145]

Disciplinary sanctions include admonition, reprimand, removal from a post (such as President of the court), transfer to another place, and expulsion from judicial service.[146] Disciplinary proceedings are quite frequently used. There are no detailed data available concerning disciplinary proceedings but the analyses of the relevant documents – reports of the NCJ[147] and SC[148] (which acts as a disciplinary court of appeal) shows that there are about 150 disciplinary cases a year. There is no evidence of abuse of the disciplinary procedures which would endanger the independence of the judiciary. However there are cases which raise doubts as to their grounds. Sometimes the accusing of a judge (especially claiming corruption) by a party may initiate proceedings which

---

[140] Article 114 AOC.

[141] Article 110 AOC.

[142] Article 111 AOC.

[143] Article 116 AOC.

[144] Article 113 AOC.

[145] Article 128 AOC.

[146] Article 109 AOC.

[147] NCJ Information Bulletin No. 14, 2007, at 17.

[148] Report on the activities of the SC – Disciplinary Court for 2008, available at <http://www.sn.gov.pl>.

seem not to be well founded.[149] Due to this problem the Association of Polish Judges *Iustitia* established a special "Team for monitoring Disciplinary and Immunity Procedures" in order to monitor disciplinary cases in which judges feel that their independence may be at stake.[150]

VIII. Immunity for Judges

By virtue of Article 181 of the Constitution judges have immunity, without distinction between official and unofficial actions. In particular, judges may neither be subject to criminal responsibility, nor deprived of their liberty without the consent of the court specified in the statute (disciplinary court).[151] The only exception is the possibility of arrest and detention in a situation where a judge is caught when committing a crime and arrest is necessary for the proper conduct of the proceedings. However, even in such a case, the President of the court in which the judge works should be notified. He/she has the power to order the judge's immediate release.[152] But a judge's immunity can also be lifted by the disciplinary court according to the AOC.[153]

One of the most controversial amendments to the AOC, passed during the term of the Parliament in which the "Law and Justice" party was in power (2005-2007), concerned changes in the procedure for derogation of judicial immunity. In particular, responding to populist arguments that judges stay unpunished if they commit a crime, the amendments to the AOC provided that courts will have to adjudicate on the derogation of judicial immunity within 24 hours after submission of the motion by a prosecutor. The amendments to the AOC, when they were discussed in the Parliament, caused huge outrage in the judicial community and

---

[149] See for instance the description of such a case: M. Ejchart, Udział Helsińskiej Fundacji Praw Człowieka w postępowaniu w sprawie o uchylenie immunitetu sędziemu [Participation of the Helsinki Foundation for Human Rights in Proceedings concerning Deprivation of Judicial Immunity], in: Ł. Bojarski (ed.), Sprawny Sąd. Zbiór dobrych praktyk [Effective Court. Collection of Good Practices], 209 (2008).

[150] The working plan and composition are described at <http://www.iustitia.pl/content/view/451/167/> (14 December 2009).

[151] Article 80 AOC.

[152] Id.

[153] Id.

among legal circles as disproportionate, unnecessary and highly populist. They were compared to the other idea of the then Minister of Justice Zbigniew Ziobro – the introduction of courts able to adjudicate on cases of petty crime within 24 hours. The danger of these changes in the procedure for derogation of judicial immunity was exemplified by the use by the First President of the SC of his prerogative to stand and to present its concerns in the Polish Parliament. He used this prerogative for the first time. Following changes to the AOC, the First President of the SC submitted a motion for constitutional control review to the Constitutional Court. The major claim was violation of the Constitution by the introduction of summary and simplified procedures for consideration of a motion requesting the derogation of judicial immunity and limitation upon access by the judge his/herself to records of proceedings for derogation of immunity. The First President of the SC also claimed violation of the legislative procedure in relation to the law, as the legally required opinion of the SC was not requested at any stage of the proceedings.

The Constitutional Court in its judgment of 28 November 2007 emphasized the value of judicial immunity for the functioning of a democratic state and its importance in a democratic state.[154] It decided to quash the majority of the challenged regulations, for both procedural and material reasons. In the opinion of the Court the very fact of filing a motion requesting the derogation of immunity of a judge may result in harming a judge's reputation. Even if such motion is found to be groundless in the course of follow-up proceedings and the judge regains the power to adjudicate, his/her good reputation and readiness to exhibit independence and firmness have been affected. Such situation was considered to have a *chilling effect* on his/her independence.

[154] Judgment of the Constitutional Court of 28 November 2007, No. K 39/07, English summary of the judgment available at <http://www.trybunal.gov.pl/eng/summaries/documents/K_39_07_GB.pdf>.

IX. Associations for Judges

There are two well-established national[155] associations of judges in Poland: the Polish Judges' Association *Iustitia*[156] (*Stowarzyszenie Sędziów Polskich Iustitia*), and the Association of Judges of Family Courts in Poland (*Stowarzyszenie Sędziów Sądów Rodzinnych w Polsce*). Membership of both associations is voluntary. Those associations are of private character and they are not regulated by any special acts. They are subject to the general law on associations.[157] *Iustitia* was created in 1990 as a private association of judges. Its objectives, as specified in its statute, are as follows: the realization of the principles of rule of law; the strengthening of the independence and impartiality of courts and judges, as well as taking care as regards the authority of judges; the representation of the professional and social interests of the judicial community; pursuance of the full protection of the rights and freedoms of an individual; co-operation with international and domestic organizations of lawyers, especially associations of judges; shaping public opinion; co-operation in the legislative process with the Parliament and other organs, within the scope of *Iustitia*'s objectives. *Iustitia* was the association that was at the forefront of changes in the justice system, provoking discussions, projects and ideas contributing to the continuing reform, as well as to the strengthening of the judiciary as a profession. For example, *Iustitia* was actively engaged in the preparation of the ethical code for judges, in different educational programmes, in the establishment of post-graduate studies on EU law for judges. In the last three years one has been able to observe the evolution in objectives of *Iustitia*, which is connected with the growing number of members, as well as with the greater impact of young judges on the scope of interests of *Iustitia*. Accordingly, *Iustitia* started to be more visible in the claim of the judicial community for higher remuneration, in the organization of protests, in negotiations with the government and lobbying for greater spending on the justice system. Some of the protest methods

---

155 In May 2010 a new association of judges was established – Association of Judges THEMIS. The Association THEMIS aims to be an alternative to the Polish Judges' Association *Iustitia*. However, currently it has quite limited activity as compared to *Iustitia*. There are also some local associations.

156 *Iustitia*, available at <http://www.iustitia.pl/>.

157 Act of 7 April 1989 Law on Associations (*Ustawa z dnia 7 kwietnia 1989 r. Prawo o stowarzyszeniach*), Journal of Laws (*Dziennik Ustaw*) of 1989, No. 20, item 104, as amended.

proposed by *Iustitia* raised serious concerns and protest among the legal community. It seems that *Iustitia* is now in the process of defining its future objectives – to what extent it will act as a guarantor and promoter of best values connected with the judiciary and to what extent it will continue to act as a kind of trade union for the judiciary. *Iustitia* does not have special public subsidies. Generally, it is financed out of the contributions of its members and out of grants obtained for realization of some projects. It does not have a regular staff. Only one person is employed as a director of the office. *Iustitia* currently has 2,839 members in 33 local chapters, as well as two honorary members. Its membership base constitutes approximately 25% of all the judges in Poland. The Association of Judges of Family Courts in Poland was created in 1987. The major source of funding for the Association is the contributions of its members. The Association currently has 220 members who are organized into local chapters.

X. Resources

The Constitution provides that judges shall be provided with appropriate working conditions.[158] Since the new procedure for the adoption of a budget for the judiciary was adopted (see above) one can observe a significant change in the material situation of the judiciary. In general there are no significant problems as regards the technical equipment in Polish courts. Courts are to a great extent computerized, which was not the case even a few years ago (major changes have taken place in last five to six years). In general one can see a major improvement. The standard is still, however, low, as compared to countries which are most advanced in the use of new technologies. The most important example is the procedure for preparing the minutes of any court hearings. There are still courts in which such minutes are handwritten. There is also no system of computerized, electronic voice recording of hearings, although the MoJ is actively working on it and has prepared relevant draft changes to the law on civil procedure which were accepted by the Council of Ministers in February 2010 and will be discussed in Parliament.[159] Another example is court websites. The Helsinki Foundation for Human Rights and the Forum for Civic Development undertook a

[158] Article 178(2) Constitution.

[159] MoJ, available at <http://www.ms.gov.pl/aktualnosci.php#akt100223>.

monitoring project in 2008 on the condition of websites of Polish courts. The project showed that many court websites are made in an unprofessional way, lack important information, are not standardized etc.[160] Polish courts also lack such techniques as the submission of court briefs in electronic form or the scanning of case files and access to them via the web. Basically, all communication with courts (including the submission of pleadings) is made in a traditional way.

Recent appropriations have not provided adequately for the indispensable resources that courts require – in part this is the result of more than four decades of underinvestment. Not many new court buildings were constructed in the post-World War II period (except for the SC); usually old buildings were renovated or other buildings were adapted to meet the needs of courts. In connection with the expansion of judicial competences and the concomitant increase in workload during the 1990s, this produced a constant deterioration in working conditions. In smaller courts usually every judge has his/her own office, but conditions are considerably worse in courts in larger cities; the situation is most critical in Warsaw, where some judges' chambers have had to be converted into courtrooms. As already mentioned above, in 1998 the Helsinki Foundation for Human Rights conducted monitoring on district courts' working conditions and published terrifying results of the dramatic financial and material situation of district courts. Since that time many things have changed and improved. Nevertheless, the recent monitoring of commercial courts undertaken in 2008 (report of 2009) shows that there are still problems in this area.[161] For example, judges complain that some of them do not have their own offices and that sometimes it is quite difficult for them to work in courts. As a consequence they have to take case files home. Judges complain also of a lack

[160] D. Sześciło, E-sądy po polsku. Badanie i ranking stron internetowych sądów okręgowych, apelacyjnych i wojewódzkich sądów administracyjnych (E-courts in Poland. Monitoring and ranking of websites of Polish regional courts, courts of appeal and regional administrative courts), Warsaw 2008. Report is available (in Polish) at <http://www.for.org.pl/upload/File/raporty/Raport_o_e-sadach_FINAL.pdf>. See also the second edition of the report – ranking of best websites of Polish courts, available at <http://www.for.org.pl/upload/File/raporty/Raport_e-sady_II_marzec_2010.pdf>.

[161] A. Bodnar/M. Ejchart (eds.), Sądy gospodarcze w Polsce. Raport z realizacji programu "Monitoring sądów gospodarczych – Courtwatch" (Commercial courts in Poland. Report from implementation of the Program "Monitoring of commercial courts in Poland") (2009). Report is available (in Polish) at <http://www.hfhrpol.waw.pl/pliki/MSG.pdf>.

of sufficiently equipped libraries and access to the newest commentaries, legal books or the legal press.[162]

It seems that the biggest problem of the judiciary in terms of resources is the lack of professional and well-trained staff. Judges do not have enough assistants and secretaries. Sometimes there is only one assistant helping three or four judges. There is a proposal raised by the Helsinki Foundation for Human Rights as well as by *Iustitia* that every judge should have one secretary and one judicial assistant.

The implementation of any changes as regards resources to a great extent depends on money. It is obvious that money spent on the judiciary does not sufficiently take its needs into account (for instance the big issue is low salaries of court staff causing, especially in big cities, problems with attracting well educated candidates). However, the problem is that some of the money is simply wrongly redistributed, as Poland is one of the leaders in Europe as regards the percentage of GDP spent on the judiciary.[163] Many reforms as regards the proper use of resources could be made at local level, without the involvement of the MoJ. There are courts which are exceptional leaders as regards the maximum use of resources, or seeking aid from the local authorities or EU funds. Nevertheless, even such attitudes will not resolve some systemic problems, like lack of staff or not enough computerization.

C. Internal and External Influence

I. Separation of Powers

The formal guarantees of separation of powers and judicial independence are generally satisfactory. Constitutional guarantees are included in Article 10 of the Polish Constitution on the separation of powers principle,[164] Article 173, which provides that courts and tribunals shall con-

---

[162] Id.

[163] According to research done by CEPEJ, Poland is third among all Council of Europe members, spending 0.54%. See Figure 12. Total annual public budget allocated to all courts and public prosecution (without legal aid) in 2006, as a percentage of per capita GDP, in: CEPEJ, European Judicial Systems (2008).

[164] 1. The system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers. 2. Legislative power shall be vested in the *Sejm* and the *Senate*, execu-

stitute a separate power and shall be independent of other branches of power, and Article 178, which formulates the principle of independence of individual judges stating that "judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes" There is also a rich body of jurisprudence of the Constitutional Court, which repeatedly ruled in support of judicial independence as described above. There are a number of instruments thanks to which the judiciary is immune from the influence of the legislative and executive branches. As described above, they include: constitutional separation of powers, participation of the judiciary in preparation of its budget, the role of the NCJ, appointment and promotion, security of tenure and the constitutional guarantee of adequate working conditions and judges' remuneration.

As far as judges' accountability is concerned the system of complaints as well as disciplinary responsibility were described above. The appointment and promotion procedure (and the evaluation function of the NJC as well as in practice of the court President) also includes the element of accountability as discussed above. The judiciary as a whole is accountable as a public body managing the public funds. A special institution – the Supreme Chamber of Control (*Najwyższa Izba Kontroli*) (NIK) – executes control over the spending of public money by the judiciary (as a part of the state budget) and publishes reports.[165] This is the regular procedure and does not interfere with judicial independence.

There are some other methods of ensuring judges' accountability which consist of *administrative supervision over the judiciary*. The supervision is carried out by inspector judges (*sędzia wizytator*)[166] but the MoJ or the NCJ may initiate particular control. Also results of the supervision

---

tive power shall be vested in the President of the Republic of Poland and the Council of Ministers, and the judicial power shall be vested in courts and tribunals.

165 Najwyższa Izba Kontroli, available at <http://www.nik.gov.pl>.

166 Inspector judges work in special court divisions (*wydział wizytacji*) in courts of appeal and regional courts. These divisions are responsible for supervision of the administrative activities of courts, see §§ 14-15 of the Ordinance of the Minister of Justice of 23 February 2007 on Regulation of internal operation of ordinary courts. Inspector judges are nominated by presidents of courts from among the most experienced judges, see §§ 9-11 of the Decree of the Minister of Justice of 22 October 2002 on the mode of performing the supervision over administrative activity of courts full time and not limited to a certain term.

are used by the MoJ in its policy briefs. The Ministry exercises permanent supervision over the Presidents of courts from the administrative point of view, requires detailed performance statistics, points out deficiencies and calls for improvement (this relates mainly to the problem of backlogs in courts, delays and scheduling hearings). As provided by the AOC, supervision actions over the administrative activity of courts are in particular: inspections (*wizytacja*) including of the full range of activity of a court or selected division(s) of that court, as well as the court's work culture; specific inspections (*lustracja*) regarding selected issues arising out of court activity; assessments of the administrative activity of courts, based in particular on analyzes of statistics, lists of *old* cases (defined as cases not decided within three months since being lodged), appellate procedure and the consideration of complaints; inspections regarding the enforcement of judgments; inspection of arrangements for secretariats and office work; and post-inspection meetings and training seminars for judges and other court staff.[167] Supervision actions are performed at first by inspector judges. These actions include: problem and thematic inspections and specific inspections in courts; inspecting (watching) trials and delivering remarks and observations made during them to judges and other court staff; considering the legitimacy of complaints; participation in deliberations and training courses of judges and other court staff; and initiating the explanatory and disciplinary procedures by persons and bodies entitled to do so. Apart from the above, judges may be inspected *ad hoc*. The President of a court may command inspector judges to prepare materials for the assessment of judges on account of an intended motion for the promotion of a judge or received information about the incorrect work of a judge, complaints, or significant delays shown in court statistics.[168] *Ad hoc* inspections may also be initiated by the NCJ.[169]

The inspector judge during his periodic inspection[170] evaluates the activity of the entire court division, checking lists of cases of individual judges if it seems necessary. *Ad hoc* inspection may be a detailed check

---

[167] Article 38(1) AOC and Decree of the Minister of Justice of 22 October. 2002 on the mode of performing supervision of the administrative activity of courts.

[168] Id., Arts. 12-13.

[169] Article 3(1) Act on the NCJ.

[170] At least every four years, § 15 of the Decree of the Minister of Justice of 22 October 2002 on mode of performing the supervision over the administrative activity of courts.

of the work of an individual judge – reading the dossier, files of cases from the judge's list, participation in trials. On the basis of a reading of the well prepared opinion issued by an inspector judge one can point to the following elements, also being the criteria of opinion: the history of the professional career of a judge, starting from graduation; effective time worked during the period in question; the number of cases in the list, including the number of "old" cases; the average monthly caseload; the number of fixed sessions and cases heard during a session; comparative information about the caseloads of other judges in the department, which helps in the assessment of the effectiveness of a judge's work; the number of concluded cases and the manner of their conclusion (including settlement); information about the time spent on preparation of detailed written justifications (reasoning) to rulings and marking cases where delays in the preparation of written justification occurred; the number of judgments appealed against and information about final verdicts – the number of appeals dismissed and the number of judgments quashed with information about reasons for the quashing (sometimes in detail); assessment of the results of work in comparison to that of other judges; information about complaints against the judge and reproaches (*wytyk*) by the President of the court and reproaches within the appellate procedure (both described below); and a general opinion on commitment to work, scrupulousness and reliability, level of preparation of trials, knowledge of the law, logic of thinking and argument, the level of justifications and sometimes an opinion of the person concerning e.g. social sensitivity, manners etc.

Another possibility of ensuring the accountability of judges is a reproach (*wytyk*). When a transgression of efficiency of court procedures is affirmed (e.g. protracted duration, exceeding the deadlines for the elaboration of a legal reasoning) the Minister of Justice and the President of the court may submit a written reproach and demand the removal of the effects of the transgression. The judge whom the reproach concerns may, within seven days, submit a written reservation to the organ which has issued the reproach, which does not exempt him/her from removing the effects of the transgression.[171] Yet another possibility exists within the appellate procedure and relates also to adjudication (instance reproach). If an appellate or regional court, when considering an appeal, finds an obvious breach of the law by the court of first instance (clear and evident breach of a provision of law stemming, for instance, from a lack of knowledge, or a mistake), it reproaches this

[171] Article 37(4) AOC.

breach to the relevant court, irrespective of other entitlements regarding the appeal procedure. Before the reproach, the appellate or regional court may demand an explanation from the judge presiding at the trial at first instance.[172]

II. Judgments

1. Basis

By virtue of Article 178(1) of the Constitution judges in performance of their functions are independent and are bound only by the Constitution and legislative acts. They cannot infer as a basis for their judgment any other sources of law, as e.g. natural law or principles of morality or equity. However, in many cases the statutory provisions use general clauses which allow judges a certain leeway for interpretation and discretion. For example, in criminal cases it is possible to discontinue a case due to the very little harm done to society by the criminal act (*znikoma szkodliwość społeczna czynu*). It is up to the judge to assess whether in a given case this provision may be applicable. An additional basis of decision making is the jurisprudence of higher courts interpreting the legal provisions (however precedents are not formally binding in Poland).

2. Practice

The number of convictions, acquittals, discontinuances of proceedings, and conditional discontinuances of proceedings, publicly available on the Internet website of the MoJ,[173] are the following: the number of convictions in last four years: 2005-2008 is between 90-91%. The number of acquittals is between 2.0-2.3 % (10,000-11,000 cases); the number of discontinuances of proceedings in courts between 2.0-2.4% and the number of conditional discontinuances between 4.6-5.4%. That means in the opinion of the authors that courts exercise their power independently.

---

[172] Article 40(1) AOC.

[173] Statistical information on activities of public prosecutors' offices in 2008 (*Informacja statystyczna o działalności powszechnych jednostek organizacyjnych prokuratury w 2008 r.*), MoJ, available at <http://www.ms.gov.pl/statystyki/statystyki.php>.

3. Structure

There are mandatory elements as regards the text of a judgment. In particular judgments should contain a dispositive part, including the names of the parties, the number of the case etc., the procedural history and factual basis of the case, an overview of applicable provisions and the applicability of provisions to the given case and justification of the final solution of the case.

4. Public Access

The Constitution states that judgments shall be announced publicly.[174] However, it does not mean that all judgments are publicly available. As regards judgments of the SC, only selected judgments are published. Some of them are available on the Internet,[175] some via specialized commercial legal research software. Selected judgments of the SC are also published in special series of different chambers of the SC (e.g. so-called Green Books (*Zielone Zeszyty*) include the most important judgments of the Civil Chamber of the SC).[176] It is possible to access all judgments of the SC by asking employees of the SC library for help or by visiting the SC and accessing the database called SUPREMUS in the SC. Non-governmental organizations claim that all judgments of the SC should be freely available on the Internet, and not just selected ones.

In general, judgments of the district courts, regional courts and courts of appeals are not publicly accessible via the internet. However, some of them are published in specialized commercial legal research software, especially when they concern novel or unique issues. There are also special legal periodicals covering the jurisprudence of the given court circuit (e.g. in Krakow). Furthermore, some courts manage websites where selected judgments are available. Selected judgments are also published on websites of non-governmental organizations (e.g. the Helsinki Foundation for Human Rights) or legal research websites.[177] The

---

[174] Article 45 Constitution.

[175] Sąd Najwyższy, available at <http://www.sn.pl>.

[176] Sąd Najwyższy, available at <http://www.sn.pl/orzecznictwo/index.html>.

[177] E.g. some of the judgments concerning human rights' protection are published on the website of the project *Prawa człowieka w orzecznictwie sądów polskich* (Human Rights in the Case-Law of Polish Courts), available at <http://www.prawaczlowieka.edu.pl>.

most advanced system as regards the availability of judgments is the system of administrative courts. Basically all judgments of Regional Administrative Courts and the Supreme Administrative Court are easily available on the internet; with a powerful and effective search engine (e.g. it is possible to search for words in the justifications of judgments).[178] All judgments of the Constitutional Court are available on its website.[179] There are also other free Internet databases of judgments.[180] Nevertheless the most comprehensive databases of judgments are managed by private legal publishers.[181]

The issue of accessibility of all judgments of Polish courts is widely discussed in NGO circles. They complain that there is no freely accessible programme allowing access to sources of law by every citizen. Furthermore, they claim that all the judgments of Polish courts should be accessible through the web, not just judgments of selected courts.[182] As an answer to those concerns, the Governmental Centre for Legislation (*Rządowe Centrum Legislacji*) in 2009 proposed the creation of a database containing legal acts and case law. This database will include all judgments of the Constitutional Court (which does not bring any additional value, since all those judgments are easily accessible via the website of the Court) as well as the SC.[183] Nevertheless, the creation of such a database (if it happens) does not resolve a basic problem – the accessibility of all judgments of Polish courts on the web.

---

[178] The search engine is available at <http://www.nsa.gov.pl/index.php/pol/NSA/Orzecznictwo/Baza-orzecze%C5%84>.

[179] Trybunal Konstytucyjny, available at <http://www.trybunal.gov.pl>.

[180] For instance Lex, available at <http://www.prawo.lex.pl> – latest judgments (theses only) of the SC, Supreme Administrative Court, appellate courts and the Constitutional Tribunal; website of the SC <http://www.sn.pl> – only selected theses of resolutions of the SC, no search engine.

[181] Wolters Kluwer (managing the "LEX" program, most commonly used in Poland), Lexis-Nexis (the Lex Polonica program) and C.H. Beck (the Legalis program).

[182] E.g. statement by Piotr Waglowski, managing the "Internet and Law" portal, available at <http://www.vagla.pl>, during the conference organized by the Institute of Public Affairs. The report of the conference is available at <http://wiadomosci.ngo.pl/wiadomosci/459875.html>.

[183] Cf. Information by G. Makowski, Access to sources of law will be easier (*Dostęp do źródeł prawa będzie łatwiejszy*), available at <http://wiadomosci.ngo.pl/wiadomosci/470944.html>.

Article 45 of the Constitution guarantees the right to a public trial and is an almost 100% replication of Article 6 of the European Convention on Human Rights providing for some exceptions only for reasons of morality, State security, public order or protection of the private life of a party, or other important private interest. In any case judgments are to be pronounced publicly. In principle, there are no significant problems with participation in hearings, except for lack of sufficient access for the disabled in some of the courts or the improper practice of guards in some smaller courts of requesting the presentation of ID cards at the entrance. The issue of access to court files raised a serious public debate in 2000-2001. The matter was aired after a statement by the Inspector General of Personal Data Protection – Ewa Kulesza, who by interpreting the Act on Protection of Personal Data, came to a conclusion that court files should not be made available to the public since they contain sensitive data and judges who did this would commit violation of the Act[184] and constitutional guarantee of the right to privacy.[185] In reaction to this statement the President of the Regional Court in Lublin banned the showing of court files to the media and the matter caused serious and long lasting discussion with state institutions, organizations for the freedom of the press, as well as court and academic authorities taking the floor.[186] Following this public discussion there were certain amendments introduced into the Polish law which specified more clearly whether case files should be accessible and how. From information from journalists it appears that as a rule they have access to files at each stage of proceedings (with a few exceptions); however, according to the law, they cannot reveal information from the preparatory stage of proceedings before the case gets to court.

Parties to proceedings are informed by court letters and can seek information in court secretariats on the stage their cases have reached, trial dates, judges assigned to their case etc. In some courts there is a spokesmen who prepare a list of cases which may attract the special at-

---

[184] Interview with E. Kulesza, Sensitive commodity, in: Wprost (Straight), 4 February 2001.

[185] Published in monthly magazine *Prawo i Życie* (Law and Life) No. 9/2000.

[186] Position of the Centre for Monitoring of Freedom of Press operating at Association of Polish Journalists; Open letter of 15 January 2001 to the Minister of Justice, available through the website of the Centre <http://www.freepress.org.pl>; Position of National Council of the Judiciary of 17 May 2001 on making court files available to journalists and the presence of a journalist at the trial.

tention of journalists (*Poznań*). Interested journalists are informed on a regular basis about the next hearings or outcomes of proceedings in cases.[187] The public is not informed in the sense of a list of all cases brought to the court but on the doors of session rooms are placed lists of cases to be heard there during the day with information on the names of the parties and the legal regulation which determines the nature of the case. That means that daily schedules are available for the public; however in order to receive more information, like a weekly schedule for instance, one would have to ask court clerks to provide it.

III. Improper Influence on Judicial Decisions

One of the major concerns regarding the independence of the judiciary in Poland was the hostility towards judges and verbal attacks on judges made by politicians of the Law and Justice party in 2005-2007. The Law and Justice party as early as in the political campaign declared that its aim was to have a moral revolution in Poland, and that one of the major changes would concern criminal policy. Therefore, Mr. Zbigniew Ziobro, one of the leading politicians of that party was appointed the new Minister of Justice. The judiciary and legal constraints were seen by this party as an obstacle in their attempt to introduce necessary changes. Therefore the judiciary was strongly criticized for its decisions. One could observe a radical decrease in standards of political manners, which resulted in attacks on the judiciary and also other professions, such as attorneys or medical doctors.[188] As an example, following the great tragedy connected with the collapse of the exhibition hall in Katowice, the Minister of Justice made a statement suggesting that the judge who adjudicated on the case of the insurance policy of the company which owned the exhibition hall was jointly responsible for the tragedy.[189] The former President of Poland, Lech Kaczyński, criticized

---

[187] See Ł. Bojarski (ed.), Efficient court. Collection of Good practises. Part VI Courts and Media (*Sprawny Sąd. Zbiór dobrych prakyk, część VI Sądy a media*), 131 (2008).

[188] See the examples described below as well as reference to some positions of different organizations criticizing this approach.

[189] Cf. B. Wróblewski, Krajowa Rada Sądownictwa kontra Ziobro (National Council of the Judiciary versus Ziobro), Gazeta Wyborcza of 2 October 2006; E. Siedlecka, Sędziowie chcą postawić Ziobrę przed sądem? (Judges want Ziobro to stand in front of the court?), Gazeta Wyborcza of 1 March 2006.

judges, saying that they were irresponsible because of the low penalties awarded and for taking into account the interests of their "corporation" over moral principles.[190] Furthermore, the Prime Minister in a speech concerning claims for restitution of property in former German territories said that judges should follow the national interest and the Polish ratio of state.[191] There were also numerous statements in fact attacking and discrediting the judgments of the Constitutional Court and its judges. Such verbal attacks and criticism were the subject of protest by the judiciary[192] and the NCJ.[193] They were also commented on in the 2007 Report of the IBA and CCBE. One of the recommendations urges the new government "to end immediately the previous government's campaign of hostility against the judiciary, legal profession and prosecution system." [194] Therefore, in 2007, following the elections, one of the most important tasks for the new Minister of Justice was to create a certain level of understanding between the government and the judiciary and to make a so-called "good atmosphere" round the judiciary. It has in fact been achieved. This change in approach was noted in the 2008 follow-up report of the IBA and CCBE on Poland.[195]

In general, we cannot detect any special pressure by the media. The media are in general aware of judicial independence and in daily practice do not try to push courts to make a certain decision. If criticism appears it is usually after the judicial decision is given. We can observe a new phenomenon which is the emergence of Internet websites which

---

[190] "*Nie może być tak, że przekonania pewnej niedużej mniejszości – bo sędziowie są drobną grupą społeczną w stosunku do całości – dominują nad ogólnymi przekonaniami moralnymi, a tak w naszym kraju też jest*" (It cannot be that the convictions of a certain small minority – because judges are a small social group as compared to the whole of society – dominate over general moral convictions; but that is how it is in our country) – Speech by Lech Kaczyński of 29 May 2007, available at <http://www.prezydent.pl/x.node?id=1011848&eventId=11028066>.

[191] Statement of 26 July 2007 by Jarosław Kaczyński in Narty village, where he met families living in flats with unregulated legal status, Polish Press Agency.

[192] Position of the Polish Judges' Association *Iustitia* of 1 September 2007, available at <http://www.iustitia.pl/content/view/291/74/>.

[193] Position of the National Council of the Judiciary of 8 February 2006.

[194] IBAHRI-CCBE, Justice under Siege: a report on the rule of law in Poland (2007).

[195] Follow up report to Justice under Siege: a report on the rule of law in Poland, September 2008, prepared by IBA and CCBE.

aim at the identification of corruption or malpractice in the justice system. Those websites tend to present the different activities of the courts and judges with the use of brutal language and are usually not objective. They belong rather to the margin of public life. Nevertheless, their mere existence is a new thing. They do not pose any threat to the independent judiciary but may rather be seen as public scrutiny over the judiciary, even if also as defamation.

There is an informal influence of more senior judges on decisions. In fact, it was one of the reasons for changing the system of judicial appointments (see the description of the probationary judges problem, above). The influence is not direct, but rather results from a set of different circumstances. The majority of judicial decisions are subject to appeal. This is a result of the two-level court system. At the same time, one of the criteria for assessment of the performance of an individual judge is the statistics of cases that are the subject of successful appeal. Therefore, a judge – when issuing a decision – usually considers how this decision will be assessed by a higher court in the event of an appeal. Such approach may result in opportunistic decisions and may be especially harmful in cases which are not typical and which need special attention. Judges and their individual decisions may also be assessed by so-called inspector judges (*sędzia-wizytator*) as described above. Their role is to review judicial decisions given by the judge. The opinions of inspector judges may have an impact on the promotion of judges. Moreover before the abolition of probationary judges institution, their work was subject to assessment by the President of the court. In most cases, the positive opinion of the President of the court was a precondition for a positive recommendation by the NCJ and appointment by the President to the position of a judge.

There are scholarly publications which emphasize the existence of corruption practices in the judiciary.[196] However, it is difficult to assess their range, as there are only a few cases of identified corruption. Corrupt practices may concern not just judges but also administrative personnel.

Ex parte communications do not take place as a rule. They are not directly prohibited but in general parties do not approach judges out of

[196] A. M. Wesołowska, Korupcja w wymiarze sprawiedliwości – symptomy i kulisy [Corruption in the justice system – symptoms and facts behind the scenes], in: E.W. Pływaczewski (ed.), Przestępczość zorganizowana. Świadek koronny. Terroryzm. W ujęciu praktycznym [Organized Crime. Crown Witness. Terrorism. Practical Aspects], 707 (2005).

court. If they need any information regarding the trial or to have access to the case file they contact the court service office or the secretariat of the particular court section. It is not properly researched but court clients in their complaints to the NGOs or on Internet fora complain that, especially in the smaller courts, lawyers (judges with prosecutors and advocates) spend time together talking about cases they are dealing with. Incidentally we still however see inappropriate relations with prosecutors (during court observation carried out by NGOs and reported by court observers). It still happens, and is a reminiscence of the socialist period, that the prosecutor is already in court room when the case is called and the rest of the parties and audience are waiting outside the court room. It might be seen as treating the prosecution office differently and should be avoided.

IV. Security

In our opinion security in courts in general is getting gradually better. Further improvements are needed, but most of them depend on the architecture of buildings and are not easy to implement. Usually the entry into courts is secured by special security checks and security guards. Security checks may make it clear whether the visitor to the court is carrying a weapon or some other dangerous instrument. However, based on reports of the Helsinki Foundation for Human Rights,[197] one may observe the following concerns: Sometimes security guards are not diligent in performing their tasks. Despite the existence of security checks they do not use them or do not check luggage thoroughly. As a matter of practice judges, prosecutors, court employees, attorneys, legal advisors or trainees in these professions do not go through the security check. They have only to present their professional ID. In our opinion, the identity of the ID holder is not always checked thoroughly. Most of the courts are located in old buildings, which fact prevents the installation of all the possible security measures. It is contemplated (and in some courts it is already done) to make the internal architecture of court buildings so that there are two zones – one is publicly accessible for court visitors; the second would be internal, accessible only to judges and court staff. However, such change requires significant reconstruction and is achievable in only a small percentage of court buildings.

---

[197] See for instance Bodnar/Ejchart (note 161).

From time to time there are incidents concerning physical attacks on judges. They are, however, extremely rare. In September 2009 in Celestynów (near Warsaw) the judge, when performing external activities (a division of property in the house of a divorcing couple) was subjected to a shooting attack by one of the parties to the proceedings (who killed two other people). Following this tragedy, there have been discussions on increasing the level of security for judges. Furthermore, politicians promised to prepare an amendment of the law which would increase imprisonment for an attack on a judge or prosecutor to 14 years. In cases of threats to the judges (which happen very rarely) usually related to organized crime trials, they may also be given personal security. It has happened occasionally in the past, like for instance the permanent personal protection provided by the Government Protection Bureau (*Biuro Ochrony Rządu*) to judge Barbara Piwnik lasting for a couple of months.[198] Such protection may also concern judges' families.

D. Ethical Standards

The NCJ in 2003 adopted a set of professional ethical rules for judges.[199] It is the obligation of the NCJ to enact the set of ethical principles for judges and to ensure their compliance.[200] For this purpose in the event of getting reliable information on professional malpractice, including manifest and flagrant violation of law provisions as well as violation of the "dignity of the office", the NCJ has an obligation to request the opening of disciplinary proceedings.[201] Ethical rules have important authoritative value for judges; they rather have a character of general guidelines and are not practical and detailed. As such they do not provide for any sanction. Where disciplinary proceedings are begun against a judge for an unethical act, the legal basis for finding a disciplinary violation would be legally binding provisions on the status of a judge (such as *dignity of the office*) and not the ethical rules themselves.

---

[198] Na celowniku, Wprost, available at <http://www.wprost.pl/ar/9494/Na-celowniku/>.

[199] Appendix to Resolution No 16/2003 of the National Council of the Judiciary of 19 February 2003, Krajowa Rada Sądownictwa, available at <http://www.krs.pl/main2.php?node=ethics>.

[200] According to Article 2(1) point 8 Act on the NCJ.

[201] Article 2(2) point 8 Act on the NCJ.

Those provisions would be interpreted in accordance with the set of ethical rules. The NCJ has issued a few official interpretations of the ethical rules concerning such issues as using the title of a judge when employed as an academic teacher, prohibition on judges undertaking financial activities, the provision of legal advice by retired judges and sending letters of recommendation by the Presidents of courts concerning judges' children, who failed to obtain enough points in the entrance exams to university recruitment appeal commissions.[202] An additional important source of ethical standards is the body of jurisprudence of the disciplinary courts and especially the Supreme Court as a court of appeal.[203]

Discussions on enacting the set of ethical rules started earlier than the adoption of the set by the NCJ. In particular, the Polish Judges' Association *Iustitia* as early as in 2002 undertook works which resulted in its adoption of the set of principles concerning judges' professional behaviour (*Zbiór Zasad Postępowania Sędziów*).[204] This set was the initiative of members of *Iustitia* and was supposed to be applicable only to *Iustitia* members (in its work the NCJ used *Iustitia*'s document to a great extent). In this sense *Iustitia* was in the forefront of future changes. Both sets of rules were enacted because of the harsh criticism of the judiciary in Poland. Their aim was to indicate that the community of judges is ready to be careful about compliance with ethical rules.

In our opinion it is difficult to assess whether judges are sufficiently trained as regards ethical issues. First of all, the National School for the Judiciary and Prosecutors' Authority began work only in October 2009. Currently, the School's curriculum is being prepared. It will include classes on ethics. However, it is not yet certain to what extent future judges will be taught ethics in the next few years, as the training programme is not ready for them. The review of current continuing education courses for judges who are already on the bench offered by the National School indicates that there are no special classes or seminars on judicial ethics. It seems that this limited approach to ethics is

---

[202] Published by NCJ and available at <http://www.krs.pl>.

[203] A good classification of ethical violations based on jurisprudence may be found in T. Ereciński/J. Gudowski/J. Iwulski, Commentary to Article 107 AOC, in: J. Gudowski (ed.), Commentary to the Act on Common Courts' System (2009).

[204] Wortal Etyki prawniczej i zawodów prawniczych, available at <http://www.etykaprawnicza.pl/images/pdf/zbi%C3%B3r%20zasad%20post%C4%99powania%20s%C4%99dzi%C3%B3w%20-%20iustitia.pdf>.

connected with the current model of education to become a judge: Every trainee or apprentice, before becoming a judge with tenure, was under the supervision of a senior judge. It was in fact the unwritten task of a senior judge (eventually the President of the court or department of the court) to teach basic ethical rules to a future judge. As regards judges coming from other legal professions it is presumed that they know their ethical obligations, as they were members of self-governmental professional corporations with strong deontological principles. Therefore, it is presumed they do not need any special training when they become judges. To conclude, in our opinion the system of ethical education for judges needs serious reconsideration, as it was not seen as a priority for a number of years. Such education of both future judges and those in service should be based on best practices in other countries.

E. Supreme/Higher Courts

It seems that the major problem with respect to the election of judges to the SC or the Supreme Administrative Court is lack of transparency. Public opinion in general does not know (and is not sufficiently informed) when such elections take place, who the candidates are, what their qualifications are and what are the results. The situation with Constitutional Court judges is different, because they are elected by the Parliament. Accordingly they have to take part in the screening by the *Sejm* Committee on Justice and Human Rights. However, the election of judges to the Constitutional Court may become highly politicized. For example, in 2005-2007 leaders of the "Law and Justice" party declared that they were going to "take over" the Constitutional Court by appointing the majority of the judges.

The Helsinki Foundation for Human Rights, the Batory Foundation and the International Commission of Jurists (Polish Section) undertook a project aiming to make the election of judges to the Constitutional Court more transparent.[205] The project is an important success, since this coalition of NGOs requested from candidates disclosure of differ-

[205] The website of the project is available at <http://www.monitoringsedziow.org.pl/>. See also information on the recent monitoring of the new candidate seeking appointment as judge of the Constitutional Court, including the overview of the project, available at <http://humanrightshouse.org/Articles/13902.html>.

ent data concerning their professional qualifications as well as that they answer a set of questions during specially organized meetings. Interestingly some of the candidates treated this request by NGOs very seriously. Some other candidates ignored this initiative. Obviously it did not prevent the *Sejm* from voting in favour of appointing them as judges of the Constitutional Court. Nevertheless, such approach to NGOs' initiative was also symbolic, influencing the assessment of those candidates by the general public.[206] It does not mean, however, that candidates were not obliged to produce any information about themselves. Quite otherwise – they were required to do this by virtue of the Law on the Constitutional Tribunal and the need for the Polish Parliament to assess their candidacy (whether they meet the legal criteria for holding the relevant posts). However, such disclosure is usually not as detailed as requested by independent NGOs or the press.

F. Conclusion

In order to increase the guarantees of judicial independence we think that the following issues should be considered. There is an obvious need for a final decision on whether the MoJ or the First President of the SC should exercise administrative supervision over the courts. The current system, when the MoJ has such administrative supervision, causes important tensions with the NCJ as well as with judges. It is claimed that in a situation of political turmoil the possibility of supervision of administrative activities may lead to a restriction of the independence of courts and improper influence by politicians. We do not claim that one or the other system is better. We only claim that this issue is not finally resolved from the institutional point of view and may create further tensions.

One of the important guarantees of the independence of the judiciary is that of salary. Judges are still underpaid, which results in protests. The recently introduced system of judicial remuneration moves this problem forward from the institutional point of view but the question remains whether politicians will be eager to fulfil their promises. Nevertheless there is a need to increase judicial salaries. Judges should be pro-

[206] See Ł. Bojarski, Wybory sędziów Trybunału Konstytucyjnego (Elections of judges of the Constitutional Court), Institute of Law and Society (2010), available (in Polish) at <http://www.inpris.pl/img/files/raport_wybory_sedziow_tk.pdf>.

vided with sophisticated administrative, office and staff support (court clerks, secretaries, assistants). It will allow them to concentrate only on adjudication and study. Currently, they have to perform many organizational and administrative tasks which make the proper exercise of their function difficult. We suggest also the introduction of the system of automatic allocation of new cases. Only in highly exceptional situations (such as the need of special professional competences on the side of the judge) should there be exceptions and cases could be allocated not automatically. The Polish judiciary is also waiting for a constitutional explanation of the role of the President in the process of judicial nominations. The case concerning the blocking of ten judicial nominations is still pending before the Constitutional Court. The current situation, where the President may refuse the recommendation put forward by the NCJ, puts candidates for judges in a politically vulnerable situation. However, this problem is a part of the bigger issue – the transparency of and clear criteria for judicial promotion. In our opinion, the current promotion system is far from being fully transparent. Furthermore, there are no effective procedures allowing for representatives of other legal professions to join the judiciary. As a consequence, there is no inflow of fresh thinking, other perspectives and experiences into Polish courts, which decreases their capacity for the strengthening of the judiciary.

We also insist on the value of the education of judges as a guarantee of independence. We do not mean by this just education in the National School (preparing for the judges' exam), but also the continuing legal education of judges. In our opinion judges are not sufficiently trained, especially with respect to ethical issues, methodology of work, philosophy of law, and methods of judicial interpretation. As a result, there is a risk that their internal intellectual independence may not be sufficiently guaranteed, which may have a reflection in judgments issued by a particular judge.[207] Therefore, we recommend that the Polish authorities should insist more on providing comprehensive educational programmes to judges – both at the stage of preliminary training and later on – at the stage of exercising the judge's profession. The MoJ and the Polish Parliament when introducing reforms aiming at an increase in the effectiveness of the judiciary should take particular care of constitu-

[207] K. Gonera, Judicial independence as the Foundation of the Rule of Law: The Judge's Internal (Intellectual) Independence, in: T. Wardyński/M. Niziołek (eds.), Independence of the Judiciary and Legal Profession as Foundations of the Rule of Law. Contemporary challenges, Lexis-Nexis, 383 (2009).

tional and practical guarantees of independence. There is a risk that any positive reform in this area may be easily blocked if it encroaches too strongly on the judiciary.

Judicial Independence in Estonia

Timo Ligi

A. Introduction

The independence of the judiciary in Estonia is an interesting case not only because over the last 20 years the country has emerged from being a former Soviet republic to a member of the EU, but in addition because of the constant discussions within the judiciary and society in general about how to organize the administration of the judiciary in a manner which would satisfy the requirements of both independence and effectiveness. From 1991 until 2002 the influence of the executive branch on the administration of the judiciary was quite strong (only the Supreme Court was institutionally independent). With the Courts Act of 2002, which laid down the current system of court administration in Estonia, the institutional independence of the judiciary was increased. Even though the lack of institutional independence was not the main driver for this reform, the introduction of the Council for Administration of the Courts (a majority of its members being judges) as a co-administrator of the judiciary with the Ministry of Justice and the establishment of bodies of judicial self-government definitely increased the structural safeguards. It is noteworthy that this change was achieved most probably due to the influence of the EU on national legislation during the pre-accession period. In addition some noteworthy changes enhancing the personal independence of judges (e.g. a salary increase) and with respect to discipline were adopted in 2002. While previously the Chief Justice of the Supreme Court and the Minister of Justice had the right to commence disciplinary proceedings against judges, currently the only non-judicial organ to have that right is the Chancellor of Justice. Even though there were no indications of the Minister of Justice abusing this right, the change established additional safeguards to avoid any such incidents or accusations.

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233, DOI 10.1007/978-3-642-28299-7_18,

Even though the 2002 reform had positive impacts, since 2006 there have been discussions among judges and politicians on enhancing the institutional independence of the judiciary even further, thereby making the Council (headed by the Chief Justice of the Supreme Court) the sole governing body for the judiciary. This development towards more independence has been a product of a necessity felt from within the judiciary, and the judges together with the Ministry of Justice have been very actively involved in the preparation of the draft laws necessary for the adoption of the reform. Even though at the moment these developments have been put on hold, it is possible that in a few years the court system will be entirely self-governing, thereby acting as a truly separate branch of power equal to the executive and the legislative powers.

The following sections describe and analyze the current state of the independence of the judiciary in Estonia. In order to understand the drivers for change and the reasons behind the current model, some sections also include a description of the previous regulations and practices on the matter or a description of the possible future regulation. It should be emphasized that Estonia is a very small country. The size and the small number of inhabitants (as well as of lawyers and judges) affects the way issues of independence are perceived – a regulation which may work in Estonia may not work elsewhere and *vice versa*. Secondly, it is always important to keep in mind the influences of the Soviet occupation during which the independence of the judiciary was not an issue because it did not exist. History has repeatedly shown in different fields of life that there is a tendency to move from one extreme to another. Therefore, whatever changes are implemented to enhance the independence of the judiciary, its accountability should not be forgotten in post-Soviet countries. The experiences in Estonia have shown that this is possible if developments are taken gradually.

B. Structural Safeguards

According to Article 148 of the Constitution the court system of Estonia consists of: county and city courts, and administrative courts as courts of first instance; circuit courts as courts of appeal; the Supreme Court as the highest court of the state, responsible for cassation proceedings as well as constitutional review. Rules regarding court administration and rules of court procedure are established by law and are not specified in the Constitution.

I. Administration of the Judiciary

1. Organs in Charge of the Administration of the Judiciary

The administration of the Estonian judiciary has over the last 20 years developed through different stages which, for the purpose of better understanding the current administrative system, are described below.

a) Administration by the Executive (Until 2002)

The first stage can be described as the administration of the judiciary by the executive. The framework for the system was set by the Courts Act of 1991[1] which entered into force in 1993. The provisions of this Act were influenced by the system which existed in Soviet Estonia until the re-declaration of independence in August 1991. The role of the Ministry of Justice in the administration of the courts was quite extensive. The Minister of Justice made proposals to the parliament for determining the total number of courts and number judges of first instance and appeal. In addition the Minister determined the territorial jurisdiction and location of and the number of judges in these courts and appointed the chairmen of the courts of first instance and appeal.[2] These proposals and decisions needed the approval of the Supreme Court as well, but the actual administration was done by the Ministry of Justice. The training of judges was also carried out by the Ministry of Justice.[3]

By the end of the 1990s it was evident that the administration of the judiciary was in need of reform.[4] There were different drivers,[5] but

---

1 *Kohtute seadus* (Courts Act), RT (1991), 38, 472.

2 Arts. 16, 18 and 20 of the *kohtute seadus*, RT I (1991), 38, 472.

3 Article 12 of the *Justiitsministeeriumi põhimäärus* (Statute of the Ministry of Justice), RT I (1997), 32, 514; RT I (2002), 41, 260.

4 For example, the explanatory letter of the draft of the new Courts Act stated in 1998: The new draft of the *kohtute seadus* has been elaborated due to the generally accepted need to replace the legislative acts of the transitional period (*kohtute seadus*, *kohtuniku staatuse seadus* (Act of the Status of the Judge), RT I (1991), 38, 473), available at <http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=003674649&login=proov&password=&system=ems&server=ragne11>.

5 There were also other reasons, for example the draft law of the *kohtute seadus* mentions (in addition to the necessity to develop the court system) the need to replace the existing regulations due to the changes that had already

probably the following two problems were the main reasons for reform: first, the inability to attract jurists of high professional competence to become judges, as the salaries and other social guarantees of judges were not satisfactory, which resulted in the inefficient functioning of the system.[6] Second, the internal structure of the court system was outdated[7] as the judiciary was burdened by non-judicial tasks and functions of the executive, such as the administration of different registries (land registry, business registry) and the probation department. The chairmen of county courts were responsible for appointing most of the staff of probation departments and registries (in addition to appointing the rest of the court clerks who support the judges in adjudication, controlling budgetary funds, being responsible for accounting etc.). As a result their performing these executive functions was under review by the Ministry of Justice.[8]

The issue of independence was not the main driver, at least not by itself. As a consequence of other problems, of course, the need for change involved the need for a more independent judiciary, e.g. better social guarantees are also a method of ensuring the personal independence of judges. In addition, judges (especially chairmen of county courts) were involved in performing administrative functions. Therefore the judges

---

taken place in other legislative acts (the *kohtute seadus* of 1991 was adopted even before the current constitution of 1992). The assessment by the author that the two problems mentioned in this document were the main drivers for reform is based on the fact that the changes in the judges' salary system and the reform of the administration of the judiciary and the courts were the two main practical results of the new Court Act; hence it can be assumed that these areas were also the most problematic before the coming into force of the new Act. Also, both issues were regularly mentioned in the pre-accession reports of the European Commission – the low salaries of judges and inability of the courts to attract qualified lawyers in 1999, 2000, 2001 and the administration of the judiciary in 2001 and 2002 (all reports are available at <http://www.riigikantselei.ee/?id=5167>).

6 See *infra* B. IV. Remuneration.

7 The Council of Europe Recommendation No. R (86) 12 concerning measures to prevent and reduce the excessive workload in the courts, available at <http://www.coe.int/t/e/legal_affairs/legal_co%2Doperation/data_protection/documents/international%20legal%20instruments/1Rec(86)1_EN.pdf>, has stressed already in 1986 the necessity to reduce the non-judicial tasks entrusted to judges by assigning such tasks to other persons or bodies.

8 According to Article 35 of the *kohtute seadus* RT (1991), 38, 472.

were more open to the review of the executive branch than they would have been if they had not performed these administrative functions.[9]

The original draft of the Courts Act did not include any major changes in the overall administration of the judiciary.[10] During the discussions in the parliamentary committee a very important change was made to the draft[11] – the Council for Administration of the Courts was introduced. At first it was intended to be the alternative to the Supreme Court in approving the proposals of the Ministry of Justice concerning the territorial jurisdiction of first instance courts and the number of first instance and appeal court judges. During the final discussions in the committee in spring 2002 the jurisdiction of the Council was dramatically increased and the current Article 39 of the Courts Act[12] states that "Courts of the first instance and courts of appeal are administered in co-operation between the Council for Administration of Courts and the Ministry of Justice".

It is difficult to say what exactly led to the increase in the jurisdiction of the Council, but probably the preparations for accession to the European Union were at least one of the reasons. In 2001 the European Commission issued the annual "Regular Report on Estonia's Progress towards Accession" where it stated that "there is a need to further reinforce the institutional independence of the courts particularly in the context of the ongoing court reform. The close administration of the courts (with the exception of the Supreme Court) by the Ministry of Justice, and the courts' limited financial autonomy threaten judicial independence."[13] Just a year later, after the adoption of the new Courts

---

[9] The independence of judges applies usually to the performance of judicial functions. See the Council of Europe Recommendation No. R (94) 12 on the independence, efficiency and role of judges, available at <http://www.coe.int/t/e/legal_affairs/legal_co-operation/administrative_law_and_justice/texts_&_documents/conv_rec_res/recommendation(94)12.asp>.

[10] There were some minor changes, for example the introduction of a stronger court manager who would relieve the chairman of most of the administrative duties, including the managing of probation departments and registries (B. I. 4. Administration on Court Level).

[11] Available at <http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=003674649&login=proov&password=&system=ems&server=ragne11>.

[12] *Kohtute seadus*, RT I (2002), 64, 390.

[13] European Commission, Regular Report on Estonia's Progress towards Accession 2001, at 18, available at <http://www.riigikantselei.ee/failid/EE_Monitoring_Report_2001.pdf>.

Act, the Commission stated in its regular report on Estonia's progress that "[t]he new Courts Act […] is a positive step forward in reinforcing the institutional independence of the courts."[14] The influence of the EU on the court reform of 2000-2002 is therefore quite clear.

b) Administration in Co-operation: 2002 – Present Day

If the period between 1993 and 2002 can be described as "the administration of the judiciary by the executive", then the period from 2002 to date can be described as the administration of the judiciary in co-operation by the executive and the judiciary. This is also the second stage of development for the institutional independence of the Estonian judiciary which is still continuing and is described below.

2. Council for Administration of the Courts and the Ministry of Justice

Since the introduction of the Council for Administration of the Courts as a "co-administrator" with the Ministry of Justice, these organs are responsible for the administration of the first instance courts and courts of appeal, while the Supreme Court administers itself.[15] Co-administration means basically that the Ministry of Justice is still responsible for the everyday running of the courts. This responsibility is delegated in turn down to the court managers[16] who are appointed by the Minister and deal with court administration on the court level. However, in order to make the decisions necessary for the everyday administration of courts (including determining the number of judges, appointing the chairmen etc.) the Ministry of Justice needs the approval of the Council.

The Council is comprised of the Chief Justice of the Supreme Court, five judges elected by the Court *en banc* for three years, two members of the *Riigikogu* (Estonian Parliament),[17] a sworn advocate appointed

[14] European Commission, Regular Report on Estonia's Progress towards Accession 2002, at 23, available at <http://www.riigikantselei.ee/failid/EE_Monitoring_ Report_2002.pdf>.

[15] Article 39 of the *kohtute seadus.*

[16] See *infra* B. I. 4. Administration on Court Level.

[17] They are appointed by the board of the *Riigikogu* (the parliament) and can both be from coalition/opposition or even the same party (as is the case at the moment with Urmas Reinsalu and Ken-Marti Vaher).

by the Board of the Bar Association, the Chief Public Prosecutor or a public prosecutor appointed by him or her, and the Chancellor of Justice[18] or a representative appointed by him or her. The majority of the membership of the Council is therefore drawn from the ranks of judges, and the Minister of Justice or his/her representative has only a right to speak. In addition to the five judges who become members of the Council, the Court *en banc* elects three substitute members (each from a different court level) who have the right to vote when the members are not able to participate in the sessions, thereby guaranteeing the presence of the voice of the judiciary. The mandate of the elected or appointed members of the council is terminated by the election or appointment of new members; however it is possible to be re-elected or re-appointed.

Council sessions are convened by the Chief Justice of the Supreme Court or by the Minister of Justice. The Council is chaired by the Chief Justice of the Supreme Court and the Ministry of Justice organizes clerical support.[19] This clerical support means that in practice most issues discussed by the Council are submitted by the Ministry; Ministry officials also prepare the analysis necessary for making decisions. Members of the Council, of course, can give instructions, e.g. if they deem the analysis prepared by the Ministry insufficient. Clerical support by the Ministry is necessary, because the Council is not an institution – it is not associated with other bodies of the executive or the judiciary, and hence has no staff or budget.

The Council's approval is necessary for, e.g., the determination of the territorial jurisdiction of courts; the determination of the structure of courts; the determination of the exact location of courts and court buildings; the determination of the number of judges in courts and judges in permanent service in a courthouse; the appointment to office and premature release of chairmen of courts; the determination of the number of lay judges; the determination of the internal rules of courts and of the number of candidates for judicial office. In addition the

---

[18] According to Article 1 of the *õiguskantsleri seadus* (Legal Chancellor Act) the Chancellor of Justice is in his or her activities an independent official who reviews the generally applicable legislation of the legislative and executive powers and of local governments for conformity with the Constitution of the Republic of Estonia and the Acts of the Republic of Estonia, RT I (1999), 29, 406.

[19] Article 40 of the *kohtute seadus.*

Council provides a preliminary opinion on the principles of the formation and amendment of the annual budgets of courts.[20]

Judges have viewed the creation of the Council as the first step in creating a court system which is independent of the executive.[21] While being regarded as a positive change in the perspective of judges, they still note that the Council has a small role in the everyday administration of courts and that immediately after its creation there was a conflict between the working practices of the officials of the Ministry of Justice (who prepared the materials for each session of the Council) and the judicial members of the Council.[22] The executive was used to reaching decisions and implementing them at a faster pace than the judiciary. In time, however, the trust of the judiciary in the Ministry has increased as the judges have become more involved in the decisions regarding court administration.[23] Even though in the beginning the executive might have felt hobbled as most of the important decisions required the approval of the Council, it must be stressed that during the seven years of operation the Council, at the initiative of the Ministry, has discussed exhaustively, among other things, issues which are quite unpopular among judges and has after long considerations often given its approval,[24] thereby not hampering the efficiency of court administration, which is important to the executive.

3. Other Bodies of Judicial Self-Government

The Council is only one of the bodies of judicial self-government introduced by the Courts Act of 2002. Even though the rest of them are not involved in the daily administration of courts, they have an impor-

---

[20] Article 41 of the *kohtute seadus.*

[21] J. Laffranque, Kui sõltumatu on Eesti kohtuhaldus?, available at <http://www.transparency.ee/?s=260>.

[22] See a speech given by Judge Ago Kutsar (one of the first members of the Council) at the Court *en banc* in 2006, available at <http://www.nc.ee/?id=555>.

[23] Id.

[24] One of the most vivid examples was the abolition of a circuit court, discussed in the Council on 25 May 2007. The Ministry's proposal was approved by 7 votes to 3. The transcript is available at <http://www.kohus.ee/orb.aw/class=file/action=preview/id=38160/32%5B1%0A%5D.+protokoll+25.05.2007.pdf>.

tant role either by appointing judicial members to the other bodies of self-government or by fulfilling specialized tasks for the effective functioning of the judiciary. The following table gives an overview of other bodies together with their functions. A common denominator for all bodies of judicial self-government is that they do not have their own staff or budget. Clerical support for their activities is provided by the Supreme Court.

Table 1: Bodies of judicial self-government in Estonia

Body	Composition	Tasks
Court *en banc*	All Estonian judges	A "judicial parliament" which convenes once a year to appoint members to other bodies of self-government; to hear the reports of the Chief Justice of the Supreme Court and the Ministry of Justice on the development of the legal system and the judiciary and discuss other matters relating to courts and judges.
Training Council	Two judges of a first instance court, two judges of a court of appeal, two justices of the Supreme Court, and representatives of the Prosecutor's Office, the Minister of Justice and the University of Tartu.	The Training Council is responsible for the training of judges – approves the strategy for the training of judges, the annual training programme and the programme for the judges' examination (prepared by the Supreme Court).
Examination Committee[25]	Six judges, a jurist from the Law Faculty of the University of Tartu, a representative of the Ministry of Justice, an advocate and a public prosecutor.	The Committee is responsible for gathering the information necessary for the selection and appointment procedures; for holding interviews and organizing the exams (*infra* at B. II. Selection, Appointment and Reappointment of Judges).

[25] The examination committee existed also from 1993 to 2002, but it comprised nine judges, a jurist from the Tartu University and a representative from the Ministry of Justice. The judge members were elected by the judges of the same court level at which they worked (Article 10 of the *kohtuniku staatuse seadus*).

Body	Composition	Tasks
Disciplinary Board[26]	Five judges of the Supreme Court, five circuit court judges and five judges of first instance courts.	Adjudicates on disciplinary matters concerning judges (*infra* at B. VII. Judicial Accountability and B. VIII. Immunity).

4. Administration at Court Level

The 2002 Courts Act introduced a stronger court manager. Each court had a manager before the Act, but they were subordinate to the court chairmen who were themselves responsible for all the administrative duties (including the managing of probation departments and registries). The idea was to relieve the chairmen of these duties together with the responsibility, thereby enabling them to devote more time to their actual judicial work – the adjudication of cases.

Since 2002 the court manager has been appointed by the Minister of Justice after a public competition.[27] The law does not stipulate the participation of court chairmen in the appointment procedure, but in practice the chairmen are included in the selection board. This also ensures that the voice of the judges of the court is heard during the appointment of the manager to that particular court. Even though the court chairman is formally also appointed by the Minister of Justice, that is done only upon approval by the Council for the Administration of the Courts, so the discretion of the Minister of Justice in appointing the heads of the court is limited to ensure the participation of the judiciary.

It is possible to appoint the same manager for several courts.[28] In addition they have their subordinate officers dealing with financial management, procurement, human resources etc. The court manager has to have at least a BA degree, but the law does not specify the field or specialty. In practice the current managers have a background in top-level or middle-level management of either public or private institutions

[26] The Disciplinary Board existed also from 1993 to 2002 with the three judges appointed by the Supreme Court (Article 20 of the *kohtuniku staatuse seadus*).

[27] Article 125 of the *kohtute seadus.*

[28] This provision was elaborated when Estonia had 20 first instance courts, most of them with five judges or fewer, so there was no need for a separate manager in each court.

(banks, local government or state agencies). The tasks of the manager include: administering the affairs of the judicial institution; organizing the use of the assets of the judicial institution; the preparation, with the approval of the court chairman, of the draft budget of the judicial institution and submitting the draft budget to the Minister of Justice; controlling the funds of the judicial institution; being responsible for the organization of the accounts of the judicial institution; appointing and discharging court officers. The manager's salary is usually slightly less than that of a first instance judge. The manager is accountable to both the Minister of Justice (concerning the departments for land registry and business registry and the fiscal management of the court) and the court chairmen (e.g. concerning the appointment and work of the court clerks).

Even though a stronger court manager was introduced by the Courts Act of 2002, the court chairman still retained some administrative functions (e.g. approving the draft budget of the court prepared by the court manager) and is still responsible for the administration of justice: He/she exercises supervisory control over the administration of justice pursuant to the requirements, over the performance of their duties by judges and over the forwarding of the data of the courts information system pursuant to the established procedure. The court chairman has the right to demand explanations from judges, inspect compliance with the operations procedure and collect other necessary information. Circuit court chairmen also exercise supervisory control over first instance court judges. In their capacity as supervisor, first instance and appeal court chairmen are themselves under the supervisory control of the Minister of Justice. The latter may demand explanations from a court chairman concerning the administration of justice in a court pursuant to the requirements.[29]

---

[29] Article 45 of the *kohtute seadus*; the law however does not specify what are the requirements of administration of justice. According to the Chief Justice of the Supreme Court these requirements are set out in the strategy document prepared by the judges in 2007 on the principles of the development of the court system (available at <http://www.riigikohus.ee/?id=749>): The court system must ensure: 1) the honest and objective administration of justice; 2) free access to justice and the protection of the rights of natural and legal persons; 3) the administration of justice within a reasonable time (see the speech of the Chief *Justice* at the Court *en banc* on 8 February 2008, available at <http://www.riigikohus.ee/?id=879>. The Chief Justice also explained in that speech that the employer of the judges is the Estonian nation and it is predominantly concerned with the administration of justice within a reasonable time

Immediately after the adoption of the Courts Act there were exhaustive discussions[30] in the Council between the Ministry of Justice and the judicial members on the new role of the court manager. The Ministry favoured a model whereby the manager would be the *de facto* head of the court with all the accompanying responsibilities. The Ministry's model was mostly based on the court administration model of the UK[31] where the judges are relieved of all un-judicial duties, which enables the judges simply to adjudicate on cases. In the end a compromise was reached and most decisions of the court manager dealing with personnel issues or the budget have to be agreed with the chairman.[32] In practice the roles of court managers and chairmen depend largely on the personalities of the office holders. In the case of a proven manager the chairman may take a lesser role in the everyday running of the court, however with a more pro-active chairman the role of the manager may be smaller.

5. Minor Changes to the System: the Merger of County Courts and Administrative Courts in 2006

No further noteworthy changes have been introduced aiming at enhancing the institutional independence of the judiciary since 2002. Still it can be said that the courts have become more "self-managed" and therefore institutionally stronger. The shift happened with the merger of county courts as well as administrative courts in 2006. In order to make the management of courts more efficient the 16 county and city courts were merged into four county courts and the four administrative courts into two. After the merger the smallest court consisted of nine judges. No judge lost his/her job but they were required to hear cases in other buildings belonging to same court (usually within 50 km of their own court). Thereby it became possible to allocate cases more

---

and with the legal certainty of the judgments. In other words the average length of proceedings and the percentage of judgments annulled by the higher courts are the criteria which create the image of the court system. These are the criteria which interest the Ministry of Justice as well.

[30] See the transcripts of the first six sessions of the Council from 2 October 2002 to 10 April 2003, available at <http://www.kohus.ee/38091>.

[31] Probably due the fact that a PHARE project "Enhancing the administrative capacity of the Estonian Court System" was ongoing at the time involving British experts.

[32] As an example see Article 6 of the *Tartu Maakohtu kodukord* Statute of Tartu County Court, available at <http://www.kohus.ee/21553>.

evenly between all the judges of the merged courts and the management of courts became more efficient. Because of a more coherent allocation of cases and resources, the total number of resolved cases increased and the average length of proceedings decreased.[33]

As a side-effect of the reform, the budgets of the merged first instance courts became considerably bigger.[34] Before the merger the budgets of the small courts were so small and tight that even the slightest increase in the number of incoming cases or an increase in maintenance costs during the budgetary year resulted in the need for the court manager to turn to the Ministry of Justice for extra funds. The Ministry usually granted them from its reserve (kept especially for these *surprises*), but it meant that the Ministry was quite heavily involved in the everyday running of the courts and the court managers and chairmen had few opportunities actually to manage the courts. After the reform, as the budgets became bigger, they also became more flexible, and hence the need for the Ministry to be involved in the everyday running of the courts became less. In the long run it meant that bigger courts are stronger and also more independent. This can serve as an example of how the reform of the internal structure of the court system can also enhance the independence of the judiciary. In 2008 the probation departments, which were until then a part of the court system (as separate departments subordinate to the court manager) were merged with the prison service. As since 2002 the probation departments were managed by the court managers and their ties with the judges were practically non-existent, this reform did not particularly affect the independence of the judiciary.[35] It can be argued that because of the reform the court

[33] Statistics available at <http://www.kohus.ee/10925>.

[34] In 2005 the smallest budget of a court was 120,664 EUR (Jõhvi Administrative Court with three judges; the administrative costs of the court were very small because the court shared a court manager with Viru County Court and most of the funds for administrative costs were allocated to the budget of the county court) and in 2006 (after the reform) the smallest budget of a court was 437,272 EUR (Tartu Administrative Court with nine judges), in the previous year only eight out of 20 first instance courts had had a bigger budget. The 2005 budget of the first instance and appeal courts was fixed by *Directive No. 56* of the Minister of Justice (10 March 2005) and the 2006 budget by *Directive No. 20* (31 January 2006), available on request from the Ministry of Justice.

[35] According to Article 4 of the *Kriminaalhooldusosakonna kodukord* (Internal Rules of the Probation Department), RTL (6 January 2006), 3, 40, it was the responsibility of the court manager to ensure that the probation department had enough resources to perform its tasks and that the department used its re-

manager could devote more time to managing the judicial side of the courts and therefore make the judicial system administratively stronger.[36]

6. Preparations for Stage Three: the Future?

Since 2006 there have been discussions among judges and officials of the Ministry of Justice further to establish the court system as a separate power.[37] The initiator was the Chief Justice of the Supreme Court who stated that as long as the task of administering courts is divided between the Ministry of Justice and the Council, it is impossible to identify the single organ responsible for the performance of the task. This is in itself already a problem, but also leads to other questions such as which organ is responsible for securing the necessary resources from the state budget.[38]

A strategy document[39] was prepared by the judges and accepted in 2007 by the Court *en banc*. Based on the strategy document the Ministry of Justice in co-operation with the Supreme Court prepared the draft of the new Courts Act[40] by the beginning of 2009. It was presented to the Parliament in December 2009 but was not adopted by the end of the term of the Parliament in March 2011 and consequently its proceeding was terminated. As of August 2011 the draft has not been re-submitted to the new Parliament but several politicians, including the President of

---

sources in accordance with the intended purpose. In addition, the manager appointed the staff of the probation department and had supervisory powers over the department.

[36] The staff of the probation service constituted about 20% of the total staff of the first instance and appeal courts (the total number of staff in 2007, excluding judges, was 1,045, of whom 209 worked in the probation department (data available from the Ministry of Justice on request)). The court manager was, among other things, responsible for appointing them and annually setting their salaries.

[37] The Chief Justice of the Supreme Court first publicly mentioned the initiative to elaborate a strategy for reform in the speech given at the Court *en banc* in 2006, available at <http://www.riigikohus.ee/?id=550>.

[38] Id.

[39] *Kohtusüsteemi arengu põhimõtted* (The principles of development for the court system), available at <http://www.riigikohus.ee/?id=749>.

[40] The latest version of the draft is available at <http://www.riigikogu.ee/?page=eelnou&op=ems&emshelp=true&eid=866881&u=20110804083223>.

the Parliament, have declared that it is necessary to continue to work on the reform ideas.[41] Therefore, the adoption of the draft – with possibly some changes – is not entirely out of the question. According to the 2009 draft a separate agency for running the courts should be created under the supervision of the Council for Administration of the Courts and thereby the role of the Ministry of Justice in the administration of the first instance courts and courts of appeal would diminish considerably. The competences of the Ministry of Justice in running the courts would be limited to the development of the court information system in accordance with the instructions given by the Court Administration Agency[42] and to providing accounting services for the courts, delivered by a centralized Accounting Agency subordinate to the Ministry of Justice. The registries (land registry and business registry) would be separated from the court structure, leaving the courts dealing with only the adjudication of court cases.

The new Council would consist of 13 members (instead of the current 11) and they would include the Chief Justice of the Supreme Court, six judges elected by the Court *en banc* for three years, two members of the *Riigikogu*, a sworn advocate appointed by the Board of the Bar Association, the Chancellor of Justice or a representative appointed by him or her, the Minister of Justice or a representative appointed by him or her and the Minister of Finance or a representative appointed by him or her. The notable changes compared to the current composition of the Council are the increase in the number of judges – from six to seven, to retain the majority and the inclusion of the Minister of Justice as a member with a right to vote (currently he has only the right to speak). The role of the Minister of Justice would be to represent the executive in the substantive issues regarding co-operation with the court system including co-operation with the prosecution. In addition, as the Ministry of Justice will continue being responsible for the elaboration of the

---

41 See the speech given by the President of the Parliament at the Forum of Judges on May 12th 2011 available at <http://www.riigikohus.ee/vfs/1110/KF-Ergma.pdf>. Indeed, some aspects of the reform package from the 2009 draft have already been adopted with other legislative acts, e.g. the changes to the salary system, see B.IV.1.

42 The Ministry of Justice already has a separate subordinate agency for the development of information systems for the courts, prosecution, prisons, registries etc; therefore it would be sensible to keep on using the expertise of the agency (in design and programming) for the development of the court information system.

draft laws concerning court procedure, the Minister's membership of the Council should help to guarantee his/her awareness of the need for changing the regulations. Further significant changes would be the inclusion of the Minister of Finance to increase that Ministry's awareness of the financial needs of the court system and the exclusion of the Chief Public Prosecutor. Instead the Minister of Justice would represent the other organs of the justice system, including the prosecution.

The composition of the new Council follows some of the views given in the opinion of the Consultative Council of European Judges (the judges have the majority, the judge members are elected by other judges),[43] but not all of them (non-judge members should not be active politicians or members of the executive or the legislature). However, conflict with the aforementioned opinion should not automatically be regarded as a negative feature. The inclusion of the members of the parliament and the executive is more to do with the wish to increase awareness of the work and problems of the judiciary outside the court system and to avoid a situation where the independence of the judiciary actually means the exclusion of the judiciary (e.g. from the budgetary process or the legislative process).

The responsibilities of the Council would also be slightly wider than the current division of authority between the Ministry and the Council, as the role of the Minister of Justice would decrease. So far the Council's approval of the Minister of Justice's decisions has been limited to the decisions regarding the judiciary and has not included decisions regarding the rest of the court staff (court managers, clerks). In the future the Council would, according to the draft, lay down the principles of promotion of court staff, the principles concerning the salaries of court managers and other tasks previously performed by the Ministry of Justice.

The most important change, regarding the work of the Council and its part in guaranteeing the independence of the judiciary, lies in the fact that clerical support for the work of the Council will be guaranteed by the Court Administration Agency subordinate to the Council. The agency will deal with the court administration tasks which are currently performed by the courts' department of the Ministry of Justice (with the exception of IT development and accounting). So far the Estonian

[43] Consultative Council of the European Judges Opinion No. 10 (2007), at <https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2007)OP10&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3>.

courts (with the exception of the Supreme Court) have been administered by organs or agencies of the executive; the creation of the Court Administration Agency subordinate to the Council will give the judiciary the actual means of self-administration and thereby increase their independence.

II. Selection, Appointment and Reappointment of Judges

The selection and appointment of judges is done either by the judiciary or by bodies on which the judicial members have the majority. Therefore there is no threat to independence from outside the judiciary, and even though general principles which should be followed during selection and appointment exist in the law, the current wide and unregulated scope for discretion could be somewhat limited by issuing guidelines or interpretations of the principles set in the law. This would make the processes more transparent to outsiders and silence any implications about the lack of objectivity or fairness which might arise. The same applies to the tenure and promotion of judges – even though the lack of formal requirements for promoting a judge has not been criticized, the dissemination of general profiles by the Supreme Court or the examination committee should be encouraged in order to provide transparency and accountability. There does not exist a reappointment procedure, as judges are appointed for life.[44]

1. Eligibility

A citizen of the Republic of Estonia may be appointed a judge if he or she: has acquired at least a Master's Degree in law; is proficient in the Estonian language at the advanced level; is of high moral character, and has the abilities and personal characteristics necessary for work as a judge.[45] The requirements of a high moral character and the abilities and personal characteristics necessary for the post are set for judges and prosecutors alike. There are no definitions given of these requirements in legislative acts; however practice so far has indicated that if there is a particular characteristic that is not in accordance with these require-

---

[44] See *infra* B.III.1. Tenure.

[45] Article 47 of the *kohtute seadus.*

ments, then it is the excess consumption of alcohol.[46] Further interpretations of the meanings of these requirements are hard to find and the examination committee (which is responsible for implementing the requirements) has not issued any concrete guidelines either.[47] For example, in order to participate in the public competition for a judge's post, the candidate has to fill in an application form prepared by the examination committee,[48] but the questions on the form are quite general – name, date of birth, address, personal identification code, education, university degrees and additional training, publications, spoken languages, marital status, professional career – and it is not possible to narrow down the interpretations of the requirements based on this form.

There is no minimum age for becoming a judge. There is however a maximum age – 67 years.[49] About 37% of judges are male and 63% female. The larger proportion of women amongst judges is due to the fact that during the 1990s judges' salaries were considered to be quite low and many male lawyers decided on the more profitable profession of a barrister instead. During the last decade the proportion of men has slowly increased. In the Supreme Court men have always been in the majority – at the moment there are two female and 17 male Supreme Court justices. Concerning national minorities, there are, as a logical result of the demographic situation, more judges of Russian nationality (with Estonian citizenship) and Russian-speaking judges in the Eastern part of the country where the population is also more Russian. There are however no regulations regarding minority and gender representation, nor has there ever been even a discussion about the need for such a regulation in the judiciary.

The following cannot be appointed as a judge: those convicted of a criminal offence; who have been removed from the office of judge, notary or bailiff; who have been expelled from the Estonian Bar Associa-

---

[46] Altogether three judges have been removed from office on the basis of non-compliance with the requirements of this Article since 1991 and all of them due to circumstances involving alcohol consumption (either during working hours or off-duty, but in a manner which attracts the attention of the public).

[47] One "exception" being a newspaper article from 2000 where a journalist asked a member of the examination committee what does "high moral character mean" and the judge answered that for example a person cannot be a drunkard. Hankewitz, *Kohtunikuks saamise raske tee*, available at <http://www.ohtuleht.ee/index.aspx?id=89618>.

[48] Available at <http://www.nc.ee/vfs/18/kohtunik_ankeet.rtf>.

[49] Article 48 of the *kohtute seadus.*

tion; who have been dismissed from the public service for a disciplinary offence; who are bankrupt;[50] whose professional activities as an auditor have been terminated except termination on the basis of the application of an auditor; who have been deprived of the qualification as a patent agent, except deprivation of qualification on the basis of the application of a patent agent.[51]

In order to be appointed a judge of a first instance court (county or administrative court) a candidate has to undergo a judge's preparatory service if not exempted therefrom[52] and subsequently to pass the judges' examination. Appeal court judges (circuit court) do not have to undergo a judge's preparatory service, but they have to pass the judges' examination and to be regarded as "an experienced and recognized lawyer".[53] Preparatory service for such lawyers is regarded unnecessary and it would make the post less attractive for experienced prosecutors and barristers. For appointment to the Supreme Court, neither the judges' examination nor preparatory service is necessary; the sole requirement is to be regarded as "an experienced and recognized lawyer".[54]

---

50 The probable explanation for this rule lies in the fact that according to Article 173 of the *pankrotiseadus* (Bankruptcy Act), RT I (2003), 17, 95, the debtor is required to transfer the income received from an employment or service relationship, any other similar relationship or from business to the trustee each month. Therefore the social guarantees in place for the protection of the personal independence of the judge (including salary) would have very little actual meaning.

51 Article 47 of the *kohtute seadus.*

52 "A person who has worked as a sworn advocate or prosecutor, except an assistant prosecutor, for two years immediately prior to passing the judge's examination and a person who has worked as a judge earlier and if not more than ten years have passed since his or her release from the office of judge need not have undergone judge's preparatory service." (Article 50 of the *kohtute seadus*).

53 Article 51 of the *Kohtute seadus*; the term experienced and recognized lawyer is not defined in the law; a similar requirement exists for example for the Chancellor of Justice. When analysing the practice since 2002, of the 11 Circuit Court judges or Supreme Court judges appointed without prior judicial experience, five worked as advisors to the Supreme Court, three worked in the Ministry of Justice (all in the legislative department, one as a deputy secretary general and *de facto* head of the department, one as the head of a division and one as an advisor), two were barristers and one was a member of the parliament, a former Minister of Justice and a former barrister.

54 Article 52 of the *kohtute seadus.*

2. Preparatory Service of Judges

Candidates for the offices of county or administrative court judge have to, as a rule, undergo the judge's preparatory service. The purpose of preparatory service is to provide a candidate with the necessary knowledge and experience, and to determine whether the candidate is suited to the position of judge by reason of his or her personal characteristics. A candidate for judicial office is appointed to office by the chairman of the court on the proposal of the judges' examination committee. The judges' examination committee assesses the legal knowledge of the applicants beforehand and conducts an interview with them.[55]

The duration of preparatory service is two years. During that period a candidate for judicial office is involved in the preparation of cases, and he or she may perform the duties of a clerk of a court session and of a law clerk. Most of the preparatory service takes place in the court where he or she is appointed to office. The court chairman shall, on the proposal of the judges' examination committee, appoint a judge to supervise the candidate for judicial office. A part of the preparatory service is carried out in other courts specified in the candidate's preparatory service plan, so that he or she will have undergone preparatory service in a county court, an administrative court and a circuit court. Another part of the preparatory service may also be carried out in the Supreme Court, the Prosecutor's Office or the Bar Association, or in an authority of executive power or a local government authority. A person who is an experienced and recognized lawyer and with regard to whom the judges' examination committee finds without doubt that past experience enables him to assume the office of judge without undergoing preparatory service may be exempted from preparatory service by a reasoned decision of the judges' examination committee. The judges' examination committee may also reduce the preparatory service of a person by up to one year if the person has worked as an advocate or prosecutor, consultant of court (a law clerk in the courts of the first and the second instance), law clerk or judge for at least two years.

Only after someone has undergone preparatory service (unless he/she has been exempted from it) is it possible to apply for a judge's post in the county and administrative courts and take the judges' exam. However, the completion of preparatory service and the passing of the exam

---

[55] Article 61 of the *kohtute seadus.* For more details on the composition and tasks of the examination committee see *infra* under B.II.3. Examination Committee and its Tasks.

do not guarantee a judicial appointment if there are better candidates participating in the particular competition or simply if there are no vacancies. If a candidate passes the judges' examination during preparatory service but is not appointed a judge, the chairman of the court may extend preparatory service at the candidate's request until appointment as a judge, but for no longer than three years from the passing of the judges' examination during preparatory service. If the candidate does not pass the examination during preparatory service, he or she can retake the examination and the preparatory service is then extended until the re-examination but for no longer than six months. If a retaken examination is not passed, the service relationship with the candidate is terminated – he/she is not allowed to re-take it again.[56]

3. Examination Committee and its Tasks

The judges' examination committee is the body responsible for gathering the information necessary for the selection of candidates for preparatory service and for the selection and appointment procedures for judges of all courts. The committee consists of ten members (including six judges elected by the Court *en banc*, a jurist designated by the council of the Law Faculty of the University of Tartu, a representative of the Ministry of Justice, a sworn advocate designated by the leadership of the Bar Association and a public prosecutor designated by the Chief Public Prosecutor) and serves for five years. For each competition or examination the chairman of the committee forms a panel comprising at least five members, three of whom are judges.[57]

During the selection procedure the committee assesses the suitability of the personal characteristics[58] of a candidate for judicial office on the basis of an interview. It may also consider other information concerning the candidate for judicial office which is important for the performance of the duties of a judge, make inquiries and ask for the opinion of the candidate's supervisor.[59] As mentioned at the beginning of this section, the concrete criteria for assessing the "suitability of the personal characteristics of a candidate for judicial office" have not been set down and there is too little existing practice to offer possibilities for a comprehen-

---

56 Arts. 62-64 of the *kohtute seadus.*

57 Article 69 of the *kohtute seadus.*

58 See Arts. 47 and 48 of the *kohtute seadus.*

59 Article 54 of the *kohtute seadus.*

sive interpretation. The interviews are transcribed as are all sessions of the examination committee, but they are not publicly available. A candidate for judicial office must also pass a security check carried out by the Security Police Board before being appointed judge.[60] The security check is necessary in order to enable judges' access to state secrets classified as "top secret" during their performance of judicial tasks.[61]

In addition to the interview, the committee carries out the judges' exam for the candidates to the offices of county court, administrative court and circuit court judges. The judges' examination consists of an oral and a written part. The oral part includes the assessment of the theoretical knowledge of a candidate for judicial office, the written part case analysis. The examination is deemed to be passed if the average grade for the oral as well as the written part of the examination is no lower than five (grades from zero to ten).[62] The examination committee presents all the candidates who have passed the exam to the Supreme Court *en banc* for consideration. The Supreme Court *en banc* has quite a wide discretion, as in addition to the results of the exam it has to consider the suitability of the personal characteristics of the candidate and also the opinion of the full court of the court for which the person is a candidate.[63]

4. Appointment Procedure

Judges are appointed to office on the basis of a public competition. The Minister of Justice announces a public competition for a vacancy for a judge of a county court, administrative court and circuit court. The Chief Justice of the Supreme Court announces a public competition for a vacancy for a justice of the Supreme Court. A competition for a judicial vacancy is announced in the official publication of the state[64] and in several newspapers, on the websites of the Ministry of Justice and the Supreme Court. Once the candidates have submitted their applications,

---

60 Article 54 of the *kohtute seadus.*

61 According to Article 27 of the *riigisaladuse ja salastatud välisteabe seadus* (State Secrets and Classified Information of Foreign States Act), RT I (2007), 16, 77, all judges have access to state secrets.

62 Arts. 66 and 67 of the *kohtute seadus.*

63 See *infra* B.II.4. Appointment Procedure.

64 Available at <http://www.ametlikudteadaanded.ee>.

a list of all the candidates is published in alphabetical order on the website of the Supreme Court.

First instance and appeal court judges are appointed by the President of the Republic on the proposal of the Supreme Court *en banc*. The Supreme Court *en banc* also takes into consideration the opinion of the full court of the court for which the person in question is a candidate. The President's right to appoint such judges is a part of the checks and balances system between the judicial, executive and legislative powers and the right is limited to the candidate the Supreme Court *en banc* decides to propose, so that the appointment procedure does not interfere with judicial independence.

5. Conclusions

The objectivity of the selection and the appointment procedure is by law ensured by the inclusion of a barrister, a prosecutor and the representative of the Ministry of Justice in the examination procedure (as members of the committee). There have been no disputes about the fairness of the procedures either – it is possible to submit a complaint to the administrative court if a candidate finds the examination committee has violated his or her rights, but during the existence of the committee (since 1993) no one has used that right (at the same time there have been complaints to the courts about the examination of candidates for posts of other legal professions like bailiffs and notaries). Still, taking into account the requirements for becoming a judge set by the Courts Act and the possibility of a very wide interpretation of those requirements, the selection procedure could and should be more transparent. In order to ensure that appointments are made exclusively on a candidate's merit and based on his/her qualifications, abilities, integrity, sense of independence, impartiality and efficiency[65] the examination committee or the Supreme Court should publish some additional guidelines or interpretations of the law which clarify the requirements for becoming a judge (especially the meanings of "high moral character" and the "abilities and personal characteristics necessary for working as a judge"). This will make the procedures more transparent and thereby ensure

[65] Consultative Council of the European Judges, Opinion No. 10 (2007), para. 50; available at <https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2007)OP10&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3>.

that in addition to being fair and objective they also seem to society to be fair and objective.

III. Tenure and Promotion

1. Tenure

According to Article 3 of the Courts Act judges are appointed for life. However, a person may be discharged from the office of judge due to unsuitability for office within three years of appointment if the judge has been declared unsuitable by a decision of the Supreme Court *en banc*. To that end, chairmen of courts annually submit their opinions concerning judges of less than three years' service to the judges' examination committee. Upon assessment of suitability for the office of judge, the Supreme Court *en banc* considers the proposal of chairmen of courts or of the Chancellor of Justice (organs entitled to commence disciplinary proceedings), the opinion of the judges' examination committee and other information characterizing the work of the judge (including information about the training record and statistics about judicial work). Again, clarifications and specifications of the requirements and criteria are not given in the law or in any other regulation. The examination committee has however prepared a form[66] for the court chairmen to fill in and submit to the committee annually during the three-year period. The information the committee asks for includes data on the general professional capabilities of judges measured in: the number of cases disposed of compared to the average for the country and the court; the number of judgments overruled/altered by the higher courts; adherence to the terms out set in the codes of court procedure; participation in training; and other important information about the judge's professional abilities (including data collected on the judge during supervision). In addition to the data on the judge's professional abilities, the committee also asks for information on the judge's personal capabilities including abilities, characteristics (e.g. morality) and the judge's ability to get on with colleagues and members of the public. The judges' examination committee holds a session annually, after each service year has passed, at which the judge whose suitability is being assessed is heard.

---

[66] Available at <http://www.nc.ee/vfs/16/arvamus.rtf>.

At least ten days before the suitability of a judge is discussed at a session of the Supreme Court *en banc*, a reasoned proposal of a person or body entitled to commence disciplinary proceedings to discharge the judge from office and the opinion of the judges' examination committee are presented to the judge in question and he/she is allowed to examine the collected materials.[67] Since 2002 only one judge has been discharged from office for unsuitability within three years after appointment. The reason was his behaviour outside working hours.[68]

2. Promotion

There are no formal requirements for appointment to judicial positions in higher courts. For example, service as a judge of a lower court is not mandatory for becoming a judge of a higher court. Furthermore, when one analyzes the practice of appointments to the circuit courts and the Supreme Court since 2002 (when the current Courts Act came into force), service as a judge of a lower court has not necessarily even brought with it success in the competition for a vacant post.[69] Vacant judicial posts of circuit courts and of the Supreme Court are all filled after public competitions, during which the candidates for a circuit court judge's office who have not passed the judges' exam have to take the exam and the examination committee assesses the suitability of all candidates [70]

Despite the absence of formal requirements for being appointed to higher office, the process of selecting judges for higher courts has not been criticized publicly, nor have there been any court cases on the sub-

---

[67] Article 100 of the *kohtute seadus.*

[68] The judge was involved in a conflict while drunk in public and destroyed some property (threw his mobile phone at his adversary's car window). The incident was also covered in the local newspaper. The transcriptions of the decisions of the Supreme Court *en banc* on the assessment of suitability are not publicly available.

[69] There have been 12 competitions for the post of a circuit court judge and seven times a person with no previous experience as a judge has won the competition and only five times has a judge of a county or an administrative court won. There have also been seven competitions for a post at the Supreme Court – on four occasions circuit judges won the competition and on three experienced and recognized lawyers with no previous experience as judges won the competition (data available on request from the examination committee).

[70] See *supra* B.II. Selection, Appointment and Reappointment of Judges.

ject. Still, it is important that at least general profiles containing the specifications of the posts concerned and the qualities required from candidates should be officially disseminated by the Supreme Court or the examination committee in order to provide transparency and accountability over the choice made by the appointing authority.[71]

However, it has to be added that a new draft of the Courts Act has been elaborated according to which in order to become a circuit court judge someone should work as a judge of a county court or an administrative court for at least three years. It does seem, therefore, that according to the new draft Estonia will be moving slightly towards a stricter promotion system and a "career judiciary". The reason behind this is not the lack of transparency of the current selection procedure, but the desire to guarantee a career opportunity for first instance court judges[72] and to ensure that only experienced judges can become circuit court judges. There were even discussions about an idea according to which the post of a circuit court judge should be for a fixed term of five years.[73] However, due to the resistance from the judges participating in the elaboration of the draft the idea was omitted from the current draft of the new Courts Act.[74]

IV. Remuneration

There has been a successful transition from a remuneration package including a low salary and some additional benefits of a questionable nature to a simple and transparent system of social guarantees which provides adequate salaries and pensions for judges together with long vacations as the only additional benefit.

---

[71] Consultative Council of European Judges, Opinion No. 10 (2007): available at <https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2007)OP10&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3>.

[72] Under the current system they have not been preferred in competition with candidates without judicial experience while competing for a circuit court judge's post.

[73] An early version of the draft of the new *kohtute seadus* from 2007; available from the Ministry of Justice on request.

[74] Early versions of the draft law together with the comments of judges received from the Ministry of Justice.

1. Remuneration

For nearly a decade judges' salaries were one of the main areas of dispute between the Estonian judiciary and other branches of power – the executive and the legislative. Until 2002 judges' salaries were by law tied to the salaries of ordinary civil servants[75] which were increased only rarely,[76] whereas the salaries of MPs, the President of the Republic and even the Chancellor of Justice were tied to the average salary of the country and therefore increased automatically as the economy of the newly independent state was developing quite rapidly.[77]

The inequalities in the principles concerning the calculation of salaries and those in the sizes of salaries had quite a lot of negative side-effects. Firstly and most importantly a judicial career was not attractive to competent lawyers and even young jurists. As a result, it was very difficult to find worthy candidates for vacant judges' posts at a time when the state was in desperate need of a new generation of judges after regaining independence and while rebuilding a democracy. Secondly, vacant judges' posts resulted in a bigger workload for those who had been appointed, which in the end meant bigger backlogs and in some regions started to interfere with access to justice.[78] Even though the law provided judges with some additional social guarantees (e.g. a longer holiday and a slightly higher old-age pension) and even with some less conventional social guarantees (e.g. accommodation provided by the state), it was not possible to make the judicial career more attractive for jurists with this comparatively low salary.[79]

---

[75] Article 12 of *Riigikogu ja Vabariigi Presidendi poolt nimetatavate riigiametnike ametipalkade seadus* (Act on the Salaries of Civil Servants appointed by the *Riigikogu* and the President), RT I (1996), 86, 1448; RT I (2002), 21, 117.

[76] Between 1996 and 2002 the highest salary level for civil servants was increased by 16% (approximately 127 EUR); at the same time the average salary increased by about 40% (according to Statistics Estonia, available at <http://www.stat.ee>).

[77] For example, the monthly salary of a county court judge in 2001 was about 919 EUR, while the salary of a minister was about 1,725 EUR, the salary of the Prime Minister was 1,882 EUR, the average salary being 352 EUR, id.

[78] Annual court statistics available at <http://www.kohus.ee/10925>.

[79] A problem also noted by the European Commission, Regular Report on Estonia's Progress towards Accession (1999), available at <http://www.riigikantselei.ee/?id=5167>.

The Courts Act of 2002 tied the salaries of judges, like those of the President of the Republic, MPs, ministers etc, to the average salary of the country. The salary of a county court or administrative court judge became four times the average salary (the same as that of an ordinary MP), the salary of a circuit court judge became 4.5 times the average salary, the salary of a Supreme Court justice became 5.5 times the average salary (the same as for a minister and the Chancellor of Justice) and the salary of the Chief Justice of the Supreme Court became six times the average salary of the country (the same as the Prime Minister's salary).[80] In addition, judges' salaries are about 10%-30% higher than those of prosecutors.[81] In 2009 judges' salaries were reduced twice together with the salaries of the President of the Republic, ministers and other civil servants because of the economic crisis by a total of 17%[82] compared to those in 2008. The budget and salary decreases were approved by the Council for Administration of the Courts in May 2009.[83] However the final decision was made by the Parliament. In his annual speech to the Parliament the Chief Justice also understood the need for cuts; however he stressed three principles which should be kept in mind when discussing the salaries of judges: such salaries should be set by the law; the current salary proportions of the legislative, the executive and the judiciary should be maintained; and judges' salaries must continue to be competitive in the market for competent lawyers.[84]

Despite the decrease which will be in effect until 2012, the salaries of judges (at least four times the average salary) can be deemed sufficient to enable them to provide for their families and also when comparing

---

[80] Arts. 7-12 of the *Riigikogu ja Vabariigi Presidendi poolt nimetatavate riigiametnike ametipalkade seadus*.

[81] Government Decree No. 1, 8 January 2009, *Prokuröride töötasustamine 2009. aastal* (The salaries of prosecutors in 2009), RT I (2009), 6, 36; salaries of prosecutors are set annually by the government.

[82] *Riigi 2009.a teine lisaeelarve seadus* (The second amended budget law for 2009), RT I (2009), 35, 233.

[83] The votes were 4:4, but according to Article 6 of the *kohtute haldamise nõukoja kodukord* (Statute of the Council for Administration of the Courts) the vote of the Chairman of the Council is decisive if the votes are equal. Statute available at <http://www.kohus.ee/orb.aw/class=file/action=preview/id=38089/Kohtute+haldamise+n%F5ukoja+kodukord.rtf>; the transcriptions of sessions are available at <http://www.kohus.ee/38091>.

[84] The speech is available at: <http://www.riigikohus.ee/vfs/869/Riigikohtu%20esimehe%20ettekanne%20Riigikogule%2004_06_2009.pdf>.

the gross salary of a judge at the beginning of his career to the average gross annual salary in most European countries.[85] It should be noted however that according to the current salary system, the difference between the salary of a county court judge and a Supreme Court judge may not be considered large enough when compared to the differences in other European countries, and the salary of a Supreme Court judge should be higher than it is at the moment.[86] From 2001 when the monthly salary of a county court judge was 919 EUR (compared to the 352 EUR average salary in Estonia) it had risen to 2,481 EUR in 2009 (compared to the 790 EUR average salary in Estonia).

In 2012 the salary of a county court judge will be 3,380 EUR as a result of the adoption of the new salary system whereby the salaries of the highest civil servants (including judges, MPs, ministers etc) will be tied to the salary of the President of the Republic.[87] For example, the salary of the county court judge will be 65% of the salary of the President of the Republic (currently 57%), the salary of a circuit court judge 75% of the salary of the President of the Republic (currently 64%), the salary of a Supreme Court justice 90% of the salary of the President of the Republic (currently 79%) and the salary of the Chief Justice of the Supreme Court is equal to the salary of the President of the Republic. Thereby, the responsibilities of higher court judges compared to the county and administrative court judges would be valued more than they are now.

In addition to the standard salary, judges receive additional remuneration for years of service as follows: from the fifth year of employment as a judge – 5% of the salary; from the tenth year – 10% of the salary; and from the 15th year – 15% of the salary. A chairman of a first instance or appeal court receives in addition 15-35% of his or her salary (depending on the size of the court). Judges supervising candidates for judicial office, candidates for assistant judge or university student trainees also receive additional remuneration.[88] Salaries are paid timely.

---

[85] Data from the evaluation of the judicial systems by the CEPEJ (2008), at 185, available at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1041073&SecMode=1&DocId=1314568&Usage=2>.

[86] Id., at 186.

[87] See the Act on the Salaries of the Higher Civil Servants available at <https://www.riigiteataja.ee/akt/108072011045>.

[88] Equal to 5% of the salary of each supervised person (Article 76 of the *kohtute seadus*).

2. Benefits and Privileges

While the ordinary length of holiday in the civil service is 35 days and in the private sector 28 days, for first instance or appeal court judges it is 49 calendar days and for a justice of the Supreme Court 56 calendar days.[89] A relatively high salary, a special pension[90] and a longer holiday are the only social benefits accorded to judges in accordance with the Courts Act. Accommodation provided by the state has not been part of the remuneration package since 2002.

3. Retirement

A person who has been employed as a judge for at least 15 years has the right to receive a pension when he/she attains the pensionable age of 63 years. However, he/she is allowed to continue working until the compulsory retirement age of 68. The amount of a judge's pension is 75% of his/her last salary. Judges who have been employed in the office from a very young age can earn the right to receive a superannuated pension. This right arises for a judge who has been employed as judge for at least 30 years (it is not necessary to attain the pension age), in the amount of 75% of his/her last salary.[91] The pension of a county court judge is about six times more than the average pension and should be sufficient.[92] The practices of judges upon reaching the pension age vary; some judges have continued to work until the age of 68, some have retired between 63 and 68 and some have retired immediately after attaining pensionable age.

V. Case Assignment and Recusal

The rules on case assignment between judges of first instance courts and courts of appeal are prescribed in the division of tasks plan of a particular court. In addition, the plan prescribes, if necessary, the procedures for the formation of court panels and for the substitution of judges. The

---

89 Article 84 of the *kohtute seadus.*

90 See *infra* B. IV. 3. Retirement.

91 Arts. 78 and 79 of the *kohtute seadus.*

92 75% of the last salary of a county court judge would in 2009 have been 1,861 EUR; the average pension in Estonia is 302 EUR.

division of tasks plan is usually prepared by the court chairman together with the managers of court buildings (where the court sits in more than one building) and approved for one calendar year by all judges of the court by a simple majority.[93] During a working year, the full court may amend the division of tasks plan only with good reason.[94] Everyone can access the plan in the court office.[95] Tasks are divided between judges on the basis of the following principles.[96] Each case received by the court for hearing is distributed according to the plan. Cases are distributed between judges at random by the court information system and following the plan (e.g. special rules for the specialization of judges). In the distribution of cases, as many matters as possible are distributed between the judges serving in the court building where the matter will be heard. It is possible however to allocate cases to judges in other buildings belonging to the same court, if it is necessary for achieving an equal workload and is accordingly decided in the plan. The distribution of cases should ensure an equal workload for all the judges within a court. The Council for Administration of the Courts may adopt additional principles. When approving the division of tasks plan, courts are guided by these principles.[97] The system of case assignment has worked satisfactorily without any evidences of misuse.[98]

The rules for removing a judge from a case are set down in the codes of procedure. For example in criminal cases a judge is required to remove him/herself from the proceedings if he/she has previously made a decision or a ruling in the same criminal matter (e.g. during the preliminary investigation) or has previously been involved in criminal proceedings on another basis in the same criminal matter or is or has been a person close to the accused, victim or civil defendant or cannot remain impar-

---

93 The law does not specify who prepares the plan, but as the chairman is responsible for the administration of justice, it is usually his/her task, and in county and administrative courts the court managers may also be included.

94 The criteria are not set down, but cases which have fallen into this category are the long illness of judge, maternity leave, retirement and an increase in the number of all or particular cases.

95 Article 37 of the *kohtute seadus*.

96 Id.

97 So far the Council has not deemed it necessary to adopt these principles.

98 According to the information received from the Ministry of Justice on request during the elaboration of the report.

tial for any other reason.[99] The removal of a judge by him/herself is formalized by a reasoned petition for removal which is included in the criminal file. If a judge does not remove him/herself, a party to the court proceedings may submit a challenge against the judge. If a criminal matter is heard by a judge sitting alone, the judge adjudicates on the challenge him/herself; if the matter is heard by a panel, challenges are adjudicated on by other members of the panel. In the event of an equal division of votes, the judge is removed. A petition of challenge against several judges or the full panel of the court shall be adjudicated on by the same panel of the court by a simple majority. The decision can be appealed to the higher court.

After the removal of a judge, usually a different judge from the same court is appointed to the case according to the principles set out in the division of tasks plan. If the removed judge cannot be replaced in the same court, the chairman of the circuit court refers the criminal matter for hearing by another county court within the territorial jurisdiction of the circuit court. Referral of a criminal matter for hearing by a county court within the territorial jurisdiction of another circuit court shall be decided by the Chief Justice of the Supreme Court.[100]

In civil cases a judge is obliged to remove him/herself if he/she is a participant in the proceedings or a person against whom a claim arising out of the proceedings may be filed, in a matter concerning his/her spouse or cohabitee, a sister, brother or direct blood relative of his/her spouse or cohabite, even if the marriage or cohabitation has been terminated, or in a matter concerning a person who is his/her direct blood relative or other person close to him or her. Furthermore, he/she is obliged to remove him/herself in a matter in which he/she is or has been a representative of or adviser to a participant in the proceeding or in which he/she participated or had the right to participate as the legal representative of a participant or in which he/she has been heard as a witness or expert providing an opinion or participated in pre-trial proceedings, in the lower court instance or in making a decision in arbitration proceedings or if any other circumstances exist which give reason to doubt the judge's impartiality (e.g. a judge has already adjudicated on a similar

---

[99] For example a judge (native Russian) removed herself from the case involving the alleged organizers of the violent demonstrations of April 2007 by the Russians in Tallinn.

[100] Arts. 49-51 of the *kriminaalmenetluse seadustik* (Code of Criminal Procedure), RT I (2003), 27, 166; RT I (2004), 65, 456

case between the same parties).[101] The process of removal is more or less similar to that for criminal proceedings.[102]

VI. Judicial Conduct Complaint Process

There is no uniform complaints procedure set in the law. Complaints against judges can be submitted to the same organs which have the right to commence disciplinary proceedings. There are no limits set on who can complain and there are also no statistics on the total number of complaints. However, there are some rules about the complaints procedure in the internal regulations of the courts. According to the statutes of the courts[103] complaints are forwarded to the court chairman, as he/she has the authority to initiate disciplinary proceedings, if necessary. Complaints about county and administrative court judges can be submitted to circuit courts and their chairmen and complaints about all judges can be submitted to the Chief Justice of the Supreme Court. There are no special sanctions for judges based on complaints. If while investigating the complaint certain circumstances occur which relate to

---

[101] Article 23 of the *tsiviilkohtumenetluse seadustik* (Code of Civil Procedure), RT I (2005), 26, 197.

[102] Analysis of the removal practices of civil judges in county courts and administrative court judges prepared by the Supreme Court in April 2009, available at <http://www.riigikohus.ee/vfs/836/Kohtuniku%20taandamine% 20halduskohtumenetluses.pdf>. The analysis was based on 35 cases from the administrative courts and 15 cases from the county courts for 2006-2008. These numbers may not be the total numbers for such cases in three years as separate statistics is not kept in the information system on removals. The author identified the analyzed cases with the help of a search engine (using "removal" as the search word). According to the conclusions of the analysis civil judges are more likely to remove themselves if the party to court proceedings merely doubts the judge's impartiality. Judges usually explain this by the need not only to be objective but also to seem to be objective. Administrative court judges do not remove themselves so easily and usually require that doubts are substantiated. The analysis concluded that the approach of the administrative courts is more in line with the practice of the European Court of Human Rights, but noted that the removal practices of the courts should be more coherent.

[103] The statutes of all first instance and appeal courts are pretty uniform as they are approved by the Council for Administration of the Courts before they can be adopted (Article 41 of the *kohtute seadus*). An example of a statute of a county court is available at <http://www.kohus.ee/13172>.

the perpetration of a disciplinary offence, the chairman can commence disciplinary proceedings and disciplinary punishments are imposed if the judge is convicted.

VII. Judicial Accountability: Discipline and Removal Procedures

1. Formal Requirements

Disciplinary proceedings start with the preparation of disciplinary charges if elements of a disciplinary offence become evident. Disciplinary proceedings are not commenced if more than one year has passed from the commission of the disciplinary offence or more than six months have passed from the discovery thereof. The following have the right to commence disciplinary proceedings: the Chief Justice of the Supreme Court against all judges; the Chancellor of Justice against all judges; the chairman of a circuit court against first instance judges in his/her jurisdiction; a court chairman against the judges of the same court; the Supreme Court *en banc* against the Chief Justice of the Supreme Court.[104]

2. Disciplinary Proceedings

Disciplinary matters concerning judges are adjudicated on by the Disciplinary Chamber at the Supreme Court, which is comprised of five justices of the Supreme Court, five circuit court judges and five judges of first instance courts. The Supreme Court *en banc* appoints, for a term of three years, the chairman of the Disciplinary Chamber and the members of the Disciplinary Chamber who are justices of the Supreme Court. The other members of the Chamber are appointed by the Court *en banc*. In order to adjudicate on a particular disciplinary matter concerning a judge, the chairman of the Disciplinary Chamber forms a five-member panel consisting of three justices of the Supreme Court, one judge of a circuit court and one first instance court judge.[105] A disciplinary punishment may be imposed on a judge for a disciplinary offence which is either a wrongful act consisting of failure to perform or inappropriate performance of official duties or an indecent act.[106] In

[104] Article 91 of the *kohtute seadus*.

[105] Article 93 of the *kohtute seadus.*

[106] Article 87 of the *kohtute seadus*.

practice the offences are not categorized according to this division and all cases are regarded as disciplinary offences.

The organ which initiates disciplinary proceedings may gather evidence and demand explanations which are necessary to enable it to adjudicate on the matter. After that, it forwards the disciplinary charges and the relevant material to the Disciplinary Chamber, which shall immediately notify the judge against whom the disciplinary proceedings are initiated. The judge in question must receive the disciplinary charges at least ten days before the session of the Disciplinary Chamber and he/she and his/her representative are summoned to the session. At the session, the presiding judge makes a report on the offence in which he/she introduces the disciplinary charge and the judge gives statements with regard to the matter; statements from witnesses and other persons present at the session are heard. Members of the Disciplinary Chamber may question the judge, the witnesses and other persons summoned. After examination of the evidence, the judge has the right to express his/her opinion. Minutes must be taken of sessions of the Disciplinary Chamber.[107]

3. Judicial Safeguards

A judge on whom a disciplinary punishment is imposed may appeal to the Supreme Court *en banc* within 30 days after the decision of the Disciplinary Chamber is pronounced.[108] If the Disciplinary Chamber removes a judge from service during the hearing, the Chamber may reduce the judge's salary for such period by not more than a half. A judge may also appeal to the Supreme Court *en banc* against his/her temporary removal from service or his/her salary reduction within ten days after the judge becomes aware of the ruling. If a judge is acquitted, the reduced portion of salary relating to the temporary removal and the interest provided for by law are paid to the judge.[109]

---

[107] Article 96 of the *kohtute seadus.*

[108] Article 97 of the *kohtute seadus*. It has happened on two occasions since 1994. In one of the cases the decision of the Disciplinary Chamber was amended and the disciplinary sanction imposed mitigated; in the other case the decision of the Chamber was not amended (data received from the Supreme Court on request).

[109] Arts. 95 and 96 of the *kohtute seadus.*

4. Sanctions

The disciplinary punishments are: reprimand; fine in an amount of up to one month's salary; reduction in salary (by not more than 30% and for no longer than one year); removal from office. In addition, if a retired judge does not comply with the duty of confidentiality, his/her judge's pension may be reduced by no more than 25% for no longer than one year at the decision of the Disciplinary Chamber.[110] Only one disciplinary punishment may be imposed on a judge for one and the same offence, but a criminal punishment or a punishment for a misdemeanour imposed for the same act does not preclude the imposition of a disciplinary punishment.

The Disciplinary Chamber may remove a judge from service during the hearing of a disciplinary matter by a ruling of which the Chamber shall immediately notify the judge and the chairman of the court. Upon deciding on the removal from service, the Chamber shall consider the nature and gravity of the disciplinary offence of which a judge is accused. In addition, if there are circumstances relating to a judge which significantly damage the reputation of the court, the Disciplinary Chamber may remove the judge from service until the initiation of disciplinary proceedings is decided. There have not been any discussions concerning the neutrality or the objectivity of disciplinary proceedings in Estonia.

5. Removal from Office

A judge is removed from office:[111] at his/her request (e.g. if a judge wants to become a barrister); if he/she has attained the age of 68; by reason of unsuitability for office within three years after his/her appointment[112]; for health reasons which hinder work as a judge.[113] In order to be released on these grounds a judge has to be considered partially or fully unable to work by a physician and is then entitled to a pension. The size of the pension depends on the degree of his/her ability to work (if the judge is 100% unable, then the pension is for example 75% – the same as for a retired judge); upon abolition of the court or reduction of

110 This punishment has, however, so far not been imposed on anybody.

111 Article 99 of the *kohtute seadus*.

112 See *supra* B. III. Tenure and Promotion.

113 Article 80 of the *kohtute seadus.*

the number of judges – this has happened twice since 1993;[114] if a judge is appointed or elected to a position or office which is not in accordance with the restrictions on services of judges[115] – nobody has so far been discharged on these grounds; if facts become available which according to law preclude the appointment of the person as a judge[116] – nobody has so far been discharged on these grounds either.

Judges of a court of first instance and of appeal are discharged from office by the President of the Republic on the proposal of the Chief Justice of the Supreme Court, the other justices of the Supreme Court by the *Riigikogu* on the proposal of the Chief Justice of the Supreme Court. The Chief Justice himself is discharged from office by the *Riigikogu* on the proposal of the President of the Republic. The decision to remove can be appealed to the Administrative Court like all other decisions of the state. However, this has never happened, and all the other grounds for removal, except unsuitability for office and abolition of the court or reduction in the number of judges, presuppose the will or action of the judge him/herself or are founded on objective criteria (age, health). Removals on grounds concerning unsuitability or abolition of a court/reduction in the number of judges involve an exhaustive procedure during which different bodies within the judiciary (examination committee, an organ entitled to commence disciplinary proceedings, the Council for the Administration of the Courts) need to approve the removal prior to the formation of the proposal by the eligible organ. Probably because of these restrictions there have not been any indications of misuse of the removal procedure.

---

[114] Upon reduction of the number of judges in a county court (one judge was discharged with due compensation) and upon abolition of a circuit court. In the latter case all eight judges were offered the opportunity to continue working in the court system – either in another circuit court or a county court. Five of them decided to continue working as judges and three decided to retire – a special case was created for receiving a judge's pension some years earlier than normal. On both occasions the decision concerning abolition or reduction in the number of judges was discussed and approved by the Council for Administration of the Courts.

[115] The list of positions and offices is set out in Article 49 of the *kohtute seadus.* Nobody has so far been discharged on these grounds.

[116] The list of facts is set out in Article 47 of the *kohtute seadus.* Nobody has so far been discharged on these grounds.

6. Practice

Since 2002 disciplinary proceedings have been initiated on 36 occasions (approximately three per year).[117] As there are 245 judges in Estonia who adjudicate on approximately 60,000 cases per year, this statistic does not indicate any abuse of the right to commence disciplinary proceedings. The small percentage of acquittals – from 1994 about 17% of proceedings ended with an acquittal – indicates that the right to initiate disciplinary proceedings has not been abused. About half of the proceedings have led to demerit remarks or reprimands and a quarter to a fine or reduced salary. There have been only two removals from office, however in 2010 two judges resigned during an ongoing disciplinary proceeding before the Chamber could make a decision. The decisions of the Disciplinary Chamber are published on the webpage of the Supreme Court until the expiry of the punishment.[118]

VIII. Immunity for Judges

Criminal charges against a judge of a court of first instance or of appeal may be brought during his/her term of office only on the proposal of the Supreme Court *en banc* with the consent of the President of the Republic. Criminal charges against a justice of the Supreme Court may be brought during his/her term of office only on the proposal of the Chancellor of Justice with the consent of the majority of the members of the *Riigikogu*. There is no distinction between official and non-official actions. Since 1993, criminal charges against a judge have been brought on six occasions.[119] One of them involved both an offence

---

[117] Data received from the Supreme Court on request.

[118] According to Article 88 of the Courts Act "[a] disciplinary sanction shall expire if the judge does not commit a new disciplinary offence within one year after the entry into force of the decision of the Disciplinary Chamber. The Disciplinary Chamber may also cancel a disciplinary punishment before the prescribed time".

[119] In 2002 criminal charges were brought against a Tallinn City Court judge (judgment of the Tallinn City Court from 24 March 2003), in 2005 against a Viru County Court judge (judgment no. 1-05-1226, 2006, Harju County Court), in 2006 against a Harju County Court judge (judgment no. 1-06-12960, 2008, Viru County Court), in 2009 against a Viru County Court judge (judgment no. 1-09-20331, 2010 Harju County Court), in 2010 against a Viru County Court judge (judgment no. 1-10-3626, 2010, Pärnu County Court) and

committed while on duty (accepting a bribe) and an offence committed off-duty (unlawful deprivation of liberty). The others involved an offence committed while on duty (accepting a bribe). On all of these occasions the judges in question were convicted. There are no mechanisms for avoiding the abuse of immunity, and probably because of a lack of practice there have been no discussions about abuse.

IX. Associations for Judges

The Estonian Association of Judges is a voluntary union of judges founded in 1991, a non-profit-making association and legal person in private law. According to its statute it is funded from members' fees, profits from its publications and other accruals.[120] Estonian judges may be active members of the Association. Currently the association has 192 members including both retired and active judges. About 70% of the active judges are members of the Association.[121] The Association has inter alia the statutory objectives of associating judges within a professional organization, protecting the independence of courts and judges, protecting the individual, the work-related and socio-economic rights and legal interests of judges and shaping and maintaining the high level of professional ethics of judges.[122] The Association has pursued these objectives during its years of operation and it has had an influence on the legislation concerning judges and the functioning of courts, in that it is usually consulted by the Ministry of Justice and the parliament when new drafts of codes of court procedure or the Courts Act are being elaborated. The requirement for consultation has not been set down in any law or other regulation but has become entrenched during the last ten years due to the activity of the Association. A representative of the Association has since its foundation regularly participated in the

---

a Tartu County Court judge (judgment no. 1-10-6732, 2010 Harju County Court).

[120] Article 26 of the *Eesti Kohtunike Ühingu põhikiri* (the Statute of the Estonian Association of Judges), available at <http://eky.just.ee/pohikiri.htm>.

[121] Data available from the website of the association: <http://eky.just.ee/liikmeskond.htm>.

[122] Article 5 of the *Eesti Kohtunike Ühingu põhikiri* (the Statute of the Estonian Association of Judges), available at <http://eky.just.ee/eng/statute.htm>.

work of the Council of Administration of the Courts.[123] In addition, the Association's chairman is a member of the management team of E-File (the information system for the police, prosecution and the courts) and the Association's members belong to the working groups for various types of procedures.[124] The Association itself highlights the activities it undertook to ensure the social guarantees of judges during the elaboration of the Courts Act of 2002.[125] In reality however, the EU pre-accession reports (which since 1999 have stated the importance of social guarantees for judges)[126] and the simple fact that it was difficult to find suitable candidates for vacant judges' posts should be considered a stronger influence during those debates. While in its early years the Association's priority was indeed to stand for the social guarantees of judges, as early as the mid-1990s discussions began within the Association on whether it should be more of a trade union or a professional association.[127] Considering that it is the only association of judges in Estonia, it has inevitably had to take on both functions.

---

[123] It is noteworthy that while for the 2002-2005 period the Chairman of the Association was elected a member of the Council by the Court *en banc*, during the elections of the judicial members of the Council in 2005 the Chairman was not elected and the Chief Justice invited him to the Council meetings informally, without his having the right to vote. In the 2008 elections, both the Chairman and another member of the board of the Association were elected.

[124] A full list of members of the Association in different bodies and committees is available at <http://eky.just.ee/teg_komisjonid.htm>.

[125] According to the history of the Association published on its website: "The draft Courts Act was more widely discussed on the association's initiative with representatives of the legislative and executive powers. The association's pursuits were finally fruitful as important guarantees, for the judges' independence, were secured by the legislation".

[126] See reports from 1999-2003, available at <http://www.riigikantselei.ee/?id=5167>.

[127] This change is visible also in the activities of the Association. Once the satisfactory social guarantees of the judges were set out in the Courts Act of 2002, the Association has devoted more time to taking part in the overall legislative process concerning the courts and the judicial process and to joining other committees and boards (e.g. the E-File management team, the elaboration of the strategic document "The principles of development for the court system" etc.).

X. Resources

First instance and appeal courts participate in the setting of the state budget through the Ministry of Justice, while the Supreme Court represents itself in the budgetary process. Each spring the Ministry of Justice presents the Council for Administration of the Courts with the principles of the formation of the annual budget. The Council provides a preliminary opinion which the Ministry has to take into consideration during the setting of the first instance and appeal courts' budgets. In the first phase the Ministry of Justice prepares a proposal including the budgetary needs of its entire jurisdiction (courts, prisons, prosecution department) for the Ministry of Finance. The Supreme Court prepares and presents its proposal separately. In the second phase the Ministry of Finance analyzes the proposals of all the ministries and constitutional institutions and compares them with the financial position of the state. During budget negotiations between the Ministry of Finance and the ministries and constitutional institutions the final draft of the state budget is formulated for the government to accept, after which it is presented to the parliament.

Immediately after the approval of the budget by the government and before the discussions in the parliament, the courts and the Ministry of Justice have their separate budget negotiations on distributing the budget to the first instance and appeal courts. It is possible to have these negotiations before the final adoption of the budget by the parliament, because usually with coalition governments the budget does not change much during the parliamentary discussions. In these negotiations courts present their individual needs and, based on court statistics and the workload of judges and other circumstances including the opinion of the Council formulated earlier in the spring, the final budgets of individual first instance and appeal courts are set. The Minister of Justice officially approves the budgets of those courts within two weeks after the state budget is passed by parliament.

During any budgetary year, the Minister of Justice may amend the budget expenditure of a court only with good reason after having considered the opinion of the court chairman and the court manager and pursuant to the principles formulated by the Council for Administration of the Courts.[128] According to the principles, the reasons for reducing the court budget include a judicial vacancy; if, due to circumstances not associated with the conduct of the court, it has been possible to save

[128] Article 43 of the *kohtute seadus.*

more than 0.2% of the annual budget of the court; if the procurement mechanisms are reorganized (centralization), the particular expenditure area is no longer part of the court budget or if by accident a larger amount than necessary has been allocated to the budget. In 2009 the budget of the court system was reduced because of the economic crisis, a reason these principles do not mention because the reduction was made by the Parliament and involved reducing the salaries of civil servants in the same proportion.

The heavy involvement of the Ministry of Justice in court budgeting cannot, in itself, be viewed as an automatic threat to the independence of the first instance and appeal courts. Ministries of Justice or other organs of the executive are heavily involved in court budgeting in the UK, Germany, Belgium, France, etc. – countries where the independence of the judiciary is generally not questioned even though the judicial input into the budgetary process is informal or even minimal.[129] In most countries the executive (usually in the form of the Ministry of Finance) is responsible for the preparation of the draft of the state budget. It is therefore not important which organ represents the executive in the budgetary negotiations with the judiciary or which formal procedures exist for proposals by or consultation with the judiciary (although more direct judicial input is regarded as an important requirement); instead the general principles of the budgeting process should ensure that the resources allocated to the courts are sufficient.[130] In Estonia the Supreme Court has the ability to present its proposal directly to the Ministry of Finance and the lower courts present their proposal to the Ministry of Justice. However, the budgets of the lower courts are formed taking into account the preliminary opinion of the Council for Administration of the Courts (where judges are in the majority). Therefore possibilities for judicial input exist.[131]

---

[129] A view shared by the Consultative Council of the European Judges in its Opinion No. 2 on the funding and management of courts with reference to the efficiency of the judiciary and to Article 6 of the European Convention on Human Rights, para. 6, available at <https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2001)OP2&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3>.

[130] Id., paras. 8 and 14.

[131] It is however noteworthy that the Chief Justice of the Supreme Court in his annual speech to the Parliament in June 2009 expressed his regret that the tradition of inviting the Chief Justice to the Cabinet session where the budget

During the last three years the budget of all courts has amounted to about 0.5% of the entire state budget. As a percentage of the per capita GDP the annual public budget allocated to the courts amounted to 0.18%. When compared to that of the other European countries the figure is slightly less than the average.[132] However it is more than e.g. in Italy, the Netherlands, Sweden, Finland, France and the UK, so it would be difficult to label the resources allocated as "insufficient" based on these data.[133]

Salaries (both judicial and non-judicial) form 77% of the budget of the first instance and appeal courts which is a relatively high proportion compared to the average for European countries (65%).[134] According to the Courts Act of 2002 judges' salaries are tied to the average salary of Estonia and because of the economic growth they have grown quite quickly. As the automatic rise in judges' salaries increases the budgets of courts quite a bit each year, it has become more difficult for the Minister of Justice to argue for an increase in the salaries of other court officers or for an increase in maintenance allocations. Therefore the salaries of other court officers are the main cause for concern in terms of resources and budgets of the court system (especially in first instance and appeal courts).

Court facilities and the working environment of the entire court staff have been considerably improved during the last seven years (most of the old court buildings have been renovated or the courts have been moved to new buildings) and can be deemed adequate. Offices (of both judges and other court staff) are equipped with PCs and internet connections. All legal acts and judgments of all courts are accessible through special websites and information systems. When compared to the other European countries the number of non-judicial staff for each judge is quite large (4.3);[135] however the training of non-judicial court

---

of the judiciary is discussed has ceased to exist since the adoption of the *kohtute seadus* of 2002.

[132] Data from the evaluation of the judicial systems by the CEPEJ (2008), at 23, available at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1041073&SecMode=1&DocId=1314568& Usage=2>.

[133] Also, during his annual speech to the Parliament in June 2009 the Chief Justice of the Supreme Court stated that "Estonia has financed its court system in a satisfactory manner".

[134] Id., at 27.

[135] Id., at 122.

staff remains a problem[136] which it is hoped will be addressed when the Training Council acquires the responsibility for the training of non-judicial staff according to the draft of the new Courts Act prepared by the Ministry of Justice and the Supreme Court.[137]

C. Internal and External Influence

I. Separation of Powers

According to Article 146 "[j]ustice shall be administered solely by the courts" and "[t]he courts shall be independent in their activities and shall administer justice in accordance with the Constitution and the laws". These provisions are the main guarantees of the institutional independence of the Estonian judiciary. Article 4 states the principle of the separation of powers.[138] Of course, as in other democratic countries, a system of checks and balances exists in Estonia. The parliament is responsible for appointing the members of the Supreme Court, while for the appointment of the Chief Justice of the Supreme Court the parliament needs a proposal from the President of the Republic. The President appoints first instance and appeal court judges.[139] The government on the other hand is quite heavily involved in the administration of the judiciary[140] as the first instance and appeal courts are administered in co-operation between the Council for Administration of the Courts and the Ministry of Justice.[141] Only the Supreme Court administers it-

---

[136] A view expressed by the Chief Justice of the Supreme Court in his speech to the Parliament in June 2009. Available at <http://www.riigikogu.ee/?page=pub_ooc_file&op=emsplain&content_type=text/html&u=20090721004253&file_id=657606&mnsmk=04.06.2009&fd=04.06.2009>.

[137] See *supra* B. I. Administration of the Judiciary.

[138] The activities of the *Riigikogu*, the President of the Republic, the Government of the Republic, and the courts shall be organized on the principle of separation and balance of powers.

[139] Article 55 of the *kohtute seadus,* RT I (2002), 64, 390; Article 150 of the *Eesti Vabariigi Põhiseadus* (Constitution of the Republic of Estonia), RT I (1992), 26, 349. See *supra* B. II. Selection, Appointment and Reappointment of Judges.

[140] See *supra* B. I. Administration of the Judiciary.

[141] Article 39 of the *kohtute seadus.*

self and symbolizes the separation of powers as a true "constitutional institution".[142]

II. Judgments

1. Basis

According to the Code of Criminal Procedure the sources of criminal procedural law can be laws (the Constitution, the Code and other legislation which provides for criminal procedure), but also the generally recognized principles and provisions of international law, and international agreements binding on Estonia and decisions of the Supreme Court "in issues which are not regulated by other sources of criminal procedural law but which arise in the application of law".[143] So, even though legislation is the main basis for court proceedings and judgments it is not the only one.

2. Practice

According to the court statistics of the Ministry of Justice in criminal cases solved by the county courts 180 defendants were acquitted in 2010 – which is 1.9% of the total number of defendants in cases resolved by the county court. However it should be kept in mind that about 80% of criminal cases resolved by the county courts are heard in the simplified proceedings in which the defendant in most cases has already accepted the conviction (e.g. settlement proceedings or summary proceedings).[144] Therefore the actual rate of acquittal – taking into ac-

---

[142] Estonia has seven constitutional institutions*: Riigikogu*, the President, the government, the Bank of Estonia, the State Audit Office, the Chancellor of Justice and the Supreme Court. These institutions derive their power from the constitution and the term constitutional institution is used to group them and differentiate the aforementioned institutions from the internal bodies of the executive power (ministries, boards and agencies), other legal persons in public law (e.g. universities) and bodies of the local government.

[143] Article 2 of the *kriminaalmenetluse seadustik*.

[144] See Chapter 9 of the *kriminaalmenetluse seadustik*.

count only cases where acquittal is actually possible – is slightly higher, at about 6-7%.[145]

As acquittal rates in most other European countries are also around 5% (Finland 6.5%, France 4.3%, the UK 3.3%, Latvia 1.6%)[146] the Estonian acquittal rate should not be considered as an indication of the strong influence of prosecutors on the judicial process. On the subject of the acquittal rate it should be noted that Estonia adopted the principles of adversarial criminal proceedings with the Code of Criminal Procedure of 2004. The code also laid down several possibilities for the termination of proceedings by the prosecutor in the event of "lack of public interest" (Article 202), "lack of proportionality of punishment" (Article 203) or "on the basis on conciliation" (Article 203(1)).[147] The aim of these possibilities is to ensure that public resources are spent efficiently in criminal proceedings too, and they may also reduce the rate of acquittals in court.

3. Structure

The procedural laws in criminal, civil and administrative matters also regulate how a judgment is to be written. In criminal matters the code gives the main parts of the judgment (introduction, main part and either the conclusion in the judgment of conviction or of acquittal) and what these parts should set out.[148] The Code of Civil Procedure specifically states that a court judgment must be lawful and reasoned.[149] According to Article 442 a judgment consists of an introduction, conclusion, descriptive part and statement of reasons. The Article also gives the contents of different parts of the judgement which are also followed in practice.

---

[145] All statistics in the paragraph are taken from the court statistics gathered by the Ministry of Justice, available at <http://www.kohus.ee/10925>.

[146] E. Guild, F. Geyer, Security versus Justice: police and judicial cooperation in the EU, at 13 (2008).

[147] See Arts. 202-203(1) of the *kriminaalmenetluse seadustik.*

[148] Arts. 311-314 of the *kriminaalmenetluse seadustik*.

[149] Article 436 of the *tsiviilkohtumenetluse seadustik*.

4. Public Access

A court judgment and a court ruling which have entered into force and which terminate proceedings are published on the Internet on the websites of the Supreme Court (Supreme Court judgments and ruling) and the Ministry of Justice (judgments and rulings of the first instance and appeal courts). A published criminal court decision includes the name and personal identification code or, in the absence of the personal identification code, date of birth of the accused, but the names and other personal data of other persons are replaced with initials or characters. A court decision does not disclose the residence of a person. In civil and administrative cases the personal data are not disclosed if the person applies for it before the decision is made.

The court hearing of a matter is held in public unless otherwise prescribed by law. If a hearing has not been declared to be held *in camera* then there are no impediments to public and media access. It is permitted to make transcriptions of and record (in audio) the hearing of a criminal case; for video-recording or any other form of recording (other than audio) it is necessary to get the judge's permission.[150] In civil cases only transcriptions are allowed without the prior agreement of a judge; a judge's permission is necessary for recording (in any form) or photographing.[151] In criminal cases a court may declare that a session or a part thereof be held *in camera* in order to protect a state or business secret, morals or the private and family life of a person, in the interests of a minor or in the interests of justice, including in cases where public access to the court session may endanger the security of the court, a party to the court proceedings or a witness.[152]

In civil and administrative cases the court will declare proceedings or a part thereof closed on the initiative of the court or on a petition of a participant if this is clearly necessary for the protection of national security or public order and, above all, for the protection of a state secret or information intended for internal use, for the protection of the life, health or freedom of a participant in proceedings, a witness or other person, for the protection of the private life of a participant in proceedings, a witness or other person unless the interest of having open proceeding outweighs the interest of protecting private life, in order to maintain the confidentiality of adoption, in the interests of a minor or a

---

150 Article 13 of the *kriminaalmenetluse seadustik*.

151 Article 42 of the *tsiviilkohtumenetluse seadustik*.

152 Article 12 of the *kriminaalmenetluse seadustik*.

mentally handicapped person and, above all, for hearing such person, for the protection of business or know-how secrets if a public hearing is likely to damage an interest deserving substantial protection, for hearing a person obliged by law to protect confidential information or business secrets of persons if the person is entitled by law to disclose such information and secrets in the course of proceedings or for the protection of the confidentiality of messages transmitted by post, telegraph, telephone or other commonly used means.[153]

III. Improper Influence on Judicial Decisions

In Estonia there is very little evidence that judicial decisions are unduly influenced by senior judges, prosecutors, government officials or private interests. During the last ten years there have been six cases where a judge has taken a bribe. On all of these occasions the judge in question was convicted and sent to prison.[154] Even if these cases suggest that there may be some corruption among judges, it is not widespread, nor are special requests, *ex parte* communication, political pressure, media pressure or other improper influences. Even the pre-accession progress reports noted that corruption is a relatively limited problem and exists mainly in local government and to a lesser extent in some state authorities (e.g. the police).[155]

Article 303 of the Penal Code[156] stipulates a punishment of up to five years' imprisonment for the use of violence against a judge or for influ-

---

[153] Article 38 of the *tsiviilkohtumenetluse seadustik*.

[154] See *supra* B. VIII. Immunity for Judges.

[155] See reports from 1999-2003, available at <http://www.riigikantselei.ee/?id=5167>.

The notion in some latter reports (e.g. Report on Freedom House on Estonia for 2009, available at <http://www.freedomhouse.hu/images/nit2009/estonia.pdf>) according to which corruption is an important problem in Estonia is based on cases involving other state organs – involving mostly a particular party and its leaders and three to four local governments (descriptions of those cases can be found from the articles on the webpage of Transparency International, available at <http://www.transparency.ee/?s=522>) – not the judiciary. According to Transparency International, Estonians "overestimate the corruption problem". Transparency International (ed.), Estonians overestimate the corruption problem (2008), available at <http://www.transparency.ee/?s=611>.

[156] *Karistusseadustik* (Penal Code), RT I (2002), 44, 284.

encing a judge in any other manner, with the intention of compelling him or her to act in a manner contrary to the interests of the administration of justice, or in revenge for the performance of his or her duties. The only such case involved a convicted criminal threatening a judge because of the judgment he had reached in his case.[157]

Since beginning of the 1990s there has not been any indication that a member of the executive (or the legislative) branch has somehow influenced a judge in his/her everyday work of adjudicating on court cases. It is noteworthy that in all the public discussions which took place in the form of numerous articles in the daily press and professional journals during the drafting of the Courts Act of 2002 the threat to the independence of the judiciary is mentioned only as a theoretical possibility.[158]

To ensure that the judicial process is not only fair but also seen to outsiders to be fair Article 49 of the Courts Act provides that judges cannot exercise other functions, except for teaching or research. Specifically a judge cannot be a member of the parliament or member of a rural municipality or city council; of a political party; founder, managing partner, or member of the management board or supervisory board of a company; or director of a branch of a foreign company or a trustee in bankruptcy, member of a bankruptcy committee or compulsory administrator of an immovable or an arbitrator chosen by the parties to a dispute. According to the new draft of the Courts Act, a judge would be allowed to be a member of the management board or the supervisory board of a company and act as an arbitrator if the court chairman allowed him/her to. The amendment was initiated by the Ministry of Justice who is simultaneously preparing the new Civil Service Act which gives the same right to other civil servants, too. The reason for the amendment is the Ministry's view that the current regulation hampers the constitutional rights of civil servants and judges. However judges

---

157 Case No.1-08-807 (Viru County Court).

158 See for example the article of the Chief Justice of the Supreme Court. U. Lõhmus, *Kohtuvõimu sõltumatus ja kohtuhaldus* (2001), *Riigikogu Toimetised* (available at <http://www.riigikogu.ee/rito/index.php?id=11815&highlight=märt,rask&op=archive2>). Also, the deputy secretary general of the Ministry of Justice published an article in the biggest daily newspaper (*Postimees*) where he stated that "judges have publicly confessed that during ten years there have been no cases involving the Ministry of Justice intervening in the judicial process". P. Pärna, *Magage rahulikult, kohtunikud*!, 4 January 2001, available at <http://vana.www.postimees.ee/index.html?number=919&op=lugu&id=7459>.

expressed their doubts about this amendment during the elaboration of the draft[159] and this may not make it to the final draft.

IV. Security

The security of court buildings was an important topic in Estonia in 2003-2005 when in a short period two separate attacks took place within court buildings against parties to court proceedings (not judges).[160] In one of the incidents a person took a gun into the court room and managed to shoot two people; in the other a person tried to attack another party with an axe. After these events all court buildings were equipped with metal detectors and special lockers for unsuitable items, and there have been no such incidents since. There have not been any attacks, assaults or threats against judges or their families either during their working hours within court buildings or elsewhere.

D. Ethical Standards

I. Code of Ethics for Judges

The Court *en banc* approves the code of ethics for judges.[161] This obligation was fulfilled at the first session of the Court *en banc* in September 2002.[162] The code includes some quite general provisions such as "[a] judge shall preserve the reputation of integrity and independence of the judiciary" and "[a] judge shall arrange his or her life and activities, including legal activities, so that the threat of a possible conflict with his or her judicial duties is minimal" together with some that are quite practical including for example: "[a] judge shall refrain from political and business lunches and get-togethers with participants in a proceed-

---

159 Table of comments and remarks, 29 April 2009, available on request from the Supreme Court.

160 For more information see newspaper articles about these incidents available at <http://www.ohtuleht.ee/index.aspx?id=140799> and <http://www.arileht.ee/artikkel/274090>.

161 Article 38 of the *kohtute seadus*.

162 Full English text of the *Eesti kohtuniku eetikakoodeks* (Estonian Judges' Code of Ethics) available at <http://www.nc.ee/?id=842>.

ing, if these may prejudice his or her impartiality and may give rise to a conflict of interests. In personal relations with the members of legal profession practicing regularly in court a judge shall avoid situations which could give rise to doubts of favouritism or impartiality or appear as such". The Code also provides that "[a] judge shall not participate in political or profit-making associations as a leader or official thereof. He or she shall not either in speech or in writing support political movements or the candidates thereof and shall not request the support of foundations to these."

II. Training

Failure to adhere to the provisions set out in the code of ethics does not have any direct or indirect consequences, and they are deemed more or less general ethical standards. It is however noteworthy that the oral part of the judges' exam includes questions about the professional ethics of a judge.[163] Since 2003 there has been no training on the professional ethics of the judge (information on earlier possible training was not available).[164]

E. Supreme/Higher Courts

Justices of the Supreme Court are appointed to office by the *Riigikogu* on the proposal of the Chief Justice of the Supreme Court. The Chief Justice of the Supreme Court considers the opinion of the Supreme Court *en banc* and the Council for Administration of the Courts on a candidate. The Chief Justice of the Supreme Court himself is appointed for nine years by the *Riigikogu* on the proposal of the President of the Republic and cannot be reappointed (the former Chief Justice however retains the position of a Supreme Court judge).[165] But the lack of rules for the selection procedure at the Supreme Court *en banc* level (the final instance before the appointment by the President) does give room

[163] According to the programme for the judges' examination, available at <http://www.nc.ee/?id=240>.

[164] The monthly training calendar for judges is available at <http://koolitus.riigikohus.ee>.

[165] Arts. 53 and 55 of the *kohtute seadus.*

for abuse and non-merit-based selection. Even though there have not been any cases where the Supreme Court's selection has been publicly criticized for non-merit based selection, such possibility exists. The lack of rules gives the Supreme Court a flexible tool for personnel policy,[166] and even though the number of annual judicial appointments is quite small (five to eight judges per year), there should be enough practice by now to draw up at least a set of guidelines for the selection procedure. The fact that the lack of rules has not so far been abused does not mean that this cannot happen in the future.

F. Conclusion

Like that in most other post-communist countries, the judiciary of Estonia was administered by the executive (the Ministry of Justice) in the 1990s. As a result of the discussions and debates at the end of the last century and the beginning of the current century on the independence of the judiciary in Estonia, the involvement of the judiciary in issues of court administration increased considerably with the creation of several bodies of self-government including the Council for Administration of the Courts as a co-administrator of the court system. In addition to the improvements in the field if institutional independence, judges' salaries were also increased considerably to offer them the social guarantees necessary for achieving personal independence. In turn, the increase in remuneration has enabled vacant posts among the judiciary to be filled by competent candidates, thereby making the judiciary more effective and institutionally stronger. These steps can be regarded as the main achievements of Estonia so far in safeguarding the independence of the judiciary. While the EU has not perhaps been the initiator of these changes, it has certainly helped to lead them in the right direction.

This has not, however, been the end of Estonian developments, as in 2006 new debates were initiated based on the responsibility issue. If both the Ministry of Justice and the Council are responsible for court administration, then which organ is actually responsible? It is not entirely clear at the moment what will be the end result of these debates, but the development so far suggest that in a couple of years the judici-

[166] See *supra* note 53 – for example the Supreme Court seems to favour its advisors (compared to other non-judicial candidates) when selecting appeal court judges.

ary in Estonia will be established as a separate power administering itself and also bearing the responsibility for doing so. The responsibility issue is an important one, and in that respect, too, the developments in Estonia should be highlighted as the involvement of the judiciary in the administration process has happened gradually. This has, in turn, enabled the judiciary to develop the necessary abilities and skills to be ready when institutional independence is achieved. It should not be forgotten that independence also means that the judiciary must be prepared to make unpopular decisions when administering itself, and the practice in Estonia suggests that judges here are able to do that.

Finally, when elaborating the draft laws necessary for implementing the institutional reform described, the judiciary should pay attention to some other issues as well: namely, the judicial selection and promotion procedures should be made more transparent by the drawing up of guidelines or interpretations of the broad selection principles set down in the law. Secondly, the composition of the current budget and the need for more competent court clerks and judges' assistants (expressed, among others, by the Chief Justice of the Supreme Court) indicates that the salaries of non-judicial staff should be increased and more emphasis should be placed on their training. The competence of assistants, not their number, enables judges to be relieved of their workload and makes the court system more effective, and thereby also more independent.

Judicial Independence in Hungary

Zoltán Fleck

A. Introduction

Judicial independence as a constitutional value and political programme has played a key role during the process of political transformation. The last Minister of Justice before the first free elections took great steps towards an independent judiciary. The minister declared that he had suspended general ministerial supervision over the administration of the courts. In 1989, the Parliament amended the Constitution so that political activity by judges became banned.[1] Until the end of 1989, the independence of the judiciary became constitutionally safeguarded. The ministerial administration remained in operation. The Minister of Justice was responsible for the material condition of courts, including the budget and had the authority to nominate the presidents of county courts after hearing the recommendation of the plenary session of judges. This recommendation by fellow judges was not binding.

In 1992, the Minister of Justice of the right wing government nominated new county court presidents who had not been voted for by the majority of judges. This led to a conflict with the judiciary which demanded a completely new administrative system. Though the Constitutional Court in 1991 affirmed that the earlier ministerial administrative model had guaranteed judicial independence[2] it was postulated that there was a need to reform the administration of the judiciary. In 1993, the Constitutional Court again held that the participation of the Minister of Justice in the selection of judges was not in violation of the Con-

[1] § 48 Act XX of 1949 (Constitution): "Judges may not be members of political parties and may not engage in political activities."

[2] Decision 53/1991 (X 31) AB.

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233, DOI 10.1007/978-3-642-28299-7_19,

stitution. At the same time it explained that according to the Constitution political influence on judicial selection needed to be neutralized by the substantive participation of the judiciary in this process.[3] The 1997 reform was explained officially as a means to greater efficiency and administrative capacity.[4] But the complete separation of judicial administration from executive influence by the revision of the Act on the Organizational and Administrative Structure of Courts reformulated the concept of independence. From this moment judicial independence has meant complete administrative isolation from the executive. The new model institutionalized this idea by giving all authority to govern the judiciary to the National Council of Judges.

In the short analysis below, this chapter paints a critical picture of the present state of the Hungarian court system. During the last two years there have been fierce disputes on the question of judicial administration which culminated in the parliamentary election of the President of the Supreme Court. The new president and the newly elected National Judicial Council (NJC) are fully aware of the problems depicted here.[5] Judicial experts have now finished a detailed and very critical report, but it is not yet available. Most of the changes need parliamentary action; the new leadership, at least partly, seems open to radical change for the sake of efficiency, transparency and greater independence. Reformers can use the results of the few empirical studies on the court administration to bring in the necessary administrative changes.[6]

---

3 Decision 38/1993 (VI 11) AB.

4 1077/1996 (VII 16) Res. of Government.

5 See Origo Itthon, Baka: Baj van az eljárások hosszával, 5 July 2009, available at <http://www.origo.hu/itthon/20090703-baka-andras-a-legfelsobb-birosag-elnoke-interju.html> and Galamus-Csoport, Ha valaki nem sért érdeket, nem tud javítani, 9 March 2009, available at <http://galamus.hu/index.php?option=com_content&view=article &id=3049:ha-valaki-nem-sert-erdeket-nem-tud–javitani&catid=43:cscsernijanos&Itemid=71>.

6 Only three studies can be found on this topic: Z. Fleck, Bíróságok Mérlegen (2008); Eötvös Károly Közpolitikai Intézet, Bírói függetlenség, számonkérhetőség, igazságszolgáltatási reformok, available at <http://www.ekint.org/ekint/ekint.news.page?nodeid=169>; Országos Igazságszolgáltatási Tanácsot, A bírósági reformról, available at <http://www.birosag.hu/engine.aspx?page=OIT_BirosagiReformrol>. To help this process Transparency International Hungary organized a series of professional discussions with judges and judicial leaders on the administrative changes needed, available at <http://www.transparency.hu/igazsagszolgaltatas>.

B. Structural Safeguards

I. Administration of the Judiciary

1. Organs in Charge of the Administration of the Judiciary

According to the Constitution of Hungary (Act XX of 1949) the administration of courts is to be exercised by the National Judicial Council. In fact presidents of the courts also exercise administrative functions such as: providing for the personal and material conditions for the operation of the court, exercising employer's rights, directing the court's financial and economic affairs, and supervising and controlling the administrative activities of subordinate court executives (presidents of courts on lower level).[7] In the administration, the president of the county court is key because "the presiding judge of the county court shall supervise and control the administrative activities of presiding judges of local courts."[8] "The authority of the presidents of the local courts concerning salaries and human resources management and overall employers' rights is to include only court officials, administrative employees and manual labourers."[9] In 1997, the Hungarian Parliament adopted the Act on the Organizational and Administrative Structure of Courts (Act LXVI of 1997) and an act on the legal status and remuneration of judges (Act LXVII of 1997). From this time judiciary has been organized in a completely new way, different from the Hungarian traditions. Traditionally the Hungarian judicial system was similar to the German-type administration by the ministry of justice. The new model is based on the southern European model of judicial self-administration. The National Judicial Council is wholly responsible for the administration of the courts; officially no other branches of power can influence any matters concerning the courts. The Minister of Justice has only one vote in the Council which gives him only a weak position from which to carry out the legal policy of the government.

However, while all issues concerning the judiciary are decided by the NJC, the final parliamentary decision on the state budget is still decisive for the system. Even though the Government cannot alter the budget

---

[7] § 63 Act LXVI of 1997 on the Organization and Administration of Courts (*A bíróságok szervezetéről és igazgatásáról*), available at <http://www.birosag.hu/engine.aspx?page=birosag_english_01_act>.

[8] § 63(2) Act LXVI of 1997.

[9] § 64 Act LXVI of 1997.

plan of the NJC, *Parliament* can decide freely on the proportion of the budget to be voted to it in the course of a fiscal year. Another point where party politics has an influence is in the election of the President of the Supreme Court (who is also the president of the NJC) by a two-third majority of parliament.

2. Judicial Council

The NJC is the only central organ dealing with the administration of the courts.[10] The Council is composed of 15 members: nine judges and five *ex officio* members. The *ex officio* members are the Minister of Justice, the Chief Prosecutor, the President of the Hungarian Bar Association and two members of Parliament (one appointed by the Constitutional and Justice Committee and one by the Budget and Finance Committee). The Chair of the NJC is the President of the Supreme Court who is elected by a two-third vote of Parliament based on the recommendation of the President of the Republic. Judges have a two-thirds majority in the Council, which always decides by a simple majority. Their fellow judges elect the judicial members by a two-round election system. The plenary sessions (all judges of a territory) of the county courts elect one delegate for 40 judges. Then Conferences of delegate judges elect the nine members of the NJC. The elected members of the Council may not be recalled and have immunity so that they may be subject to disciplinary proceeding only upon the prior consent of the Council. A candidate for Council membership shall have at least five years of judicial experience. In practice, judges elect their administrative superiors to the NJC. Of the nine members at least six are administrative leaders of courts, and in particular county presidents.

The National Judicial Council has very broad authority; all central issues of the administration of courts from appointment to supervision and organizational tasks are the responsibility of the NJC. As falling within the upper level of court administration and within its scope of appointment authority the Council directs and supervises the administrative activities of court presidents (county court and regional court presidents). As the responsible body for the budget chapter the NJC draws up the budget proposal which is then put forward to Parliament by the President of the Supreme Court. The Government may not

[10] Official website of the NJC, available at <http://www.birosag.hu/>; English version available at <http://www.birosag.hu/engine.aspx?page=birosag_english_02_national>.

modify the NJC's proposal. The financial independence of the courts is the result of a decision by the Constitutional Court.[11]

The variety of court administration introduced into Hungary by the 1997 judicial reform contained several potential dangers, for example lack of efficiency, decline of trust in judiciary, corruption and ideological bias because of the lack of accountability and objective selection.[12] According to a public opinion poll 46% of respondents agreed that "In Hungary a judicial sentence can be influenced by corruption", only 19% disagreed and 35% chose the 'I do not know' option.[13] The same poll contained a question on political independence: only 29% of the respondents said that the Hungarian judiciary was independent of politics, 35% thought the judiciary was dependent on politics and 37% did not know. In this research, legal professionals were also polled, and even public attorneys gave astonishing answers: 16% of them said that corruption can influence judicial decisions at local level. Of those professionals who answered that corruption was possible, 41% spoke from personal experience. The EBRD-World-Bank Business Environment and Enterprise Performance Survey (BEEPS) showed a serious decline in trust in the judiciary.[14] This, however, does not mean that judicial councils in general operate with poor efficiency and without transparency. But additional guarantees must be institutionalised for equilibrium between autonomy, efficiency and accountability. After having shaken off the executive power, self-administration, protecting professional, organizational (corporative) interests, without the need for any accountability is tending to transform its freedom into an inadequately

---

[11] Decision 28/1995 (V. 19) AB hat, available at <http://www.mkab.hu/index.php?id=hatarozatkereso>.

[12] All the detrimental consequences identified by Michal Bobek have radically appeared in the Hungarian case; see M. Bobek, The Fortress of Judicial Independence and the mental traditions of the Central European judiciaries, 14 European Public Law 99 (2008).

[13] The public opinion poll was ordered by the NJC in 2005, but the results were never published because the NJC decided that these facts could not be communicated to the public. The first publication became possible after the empirical study of administrative documents. Research by Szonda-Ipsos, in: Fleck (note 6), at 255-259.

[14] The World Bank, Hungary – EBRD-World Bank Business Environment and Enterprise Performance Survey (BEEPS), 7 February 2006, available at <http://siteresources.worldbank.org/INTECAREGTOPANTCOR/Resources/BAAGREV20060208Hungary.pdf>.

controllable system.[15] The functioning of the NJC is not transparent enough, since almost half of its decisions cannot be viewed by public or even fellow judges, and non-judicial members of the Council cannot influence the decisions effectively because of the two-thirds majority of elected judges. The two members of the Parliament and the minister have no chance of effectively influencing the actual working of the Council or even informing the Parliament or any other body about the work of the NJC. The annual report by the President of the NJC to the Parliament is very formal, the president cannot be questioned. In practice members of Parliament show very limited interest in the formal report. In order to avoid the danger of lack of accountability judicial council models (self administration) should be complemented and balanced by some new guarantees (for example intra-organizational separation of some functions such as selection, appointment, disciplinary procedure), some authority should be given to the executive (for example responsibilities concerning remuneration), the ombudsman should monitor several aspects of courts (such as complaints, etc.). Currently, however, checks are seriously lacking.

A loss of balance is more likely in legal systems where there are no traditions of self-restraint and where strong institutional checks are traditionally needed to counter such dysfunction. This is especially true for judiciaries which are traditionally educated in "bureaucratic positivism" and conformism by a rigid hierarchy.[16] Bureaucratic mentality makes judicial critics or control over court administration unlikely. Judicial leaders do not expect serious democratic criticism, despite the fact that judges elect the judicial members of the NJC and form opinions on the aptitude of court president.

---

[15] Freedom House, Nations in Transit 2009, at 248 (2009): "In recent years, the judiciary has come under serious criticism, with experts urging reforms to overcome the courts' alienation from society, intolerance of criticism, and lack of transparency and accountability. While there has been no visible improvement, the matter is being more frequently discussed in civil society. Another area lacking transparency is the judiciary's recruitment mechanism. Relatives of judges are reportedly privileged in filling vacancies, and promotions depend on personal connections rather than merit." Available at <http://www.freedomhouse.hu/images/nit2009/hungary.pdf>.

[16] Z. Kühn, Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement, 52 The American Journal of Comparative Law 531 (2004).

Analyzing documents concerning the Hungarian reform process[17] I found that there was insufficient preparation for the new institutional system (no studies on experiences from abroad, lack of prior analysis of potential effects) and that the new, unchecked judicial administration set up in 1997 led to a misunderstanding of judicial independence, namely that independence means the total separation of judicial organization from every power, including the press. Even worse, it made room for the deliberate and efficient professional and institutional enforcement of corporate interests. Administrative leaders of the courts, mainly county court presidents, in the reform process had a casting vote on the direction and details of the organization of the judiciary. After democratization, during the last few years before the reform process (the first half of the 1990s), the external (ministerial) court administration became weak because its operation was riddled with political conflicts and the Ministry of Justice wanted to rid itself of this burden. In this vacuum the traditionally strong presidents of regional and county courts have been further strengthened. This process culminated in the establishment of the codification committee organized by the Ministry, which was composed mainly of the county court presidents. Therefore no efficient means of controlling the traditionally strong middle (county) level administration emerged even during the planning of the new organizational structure.[18]

The influence of regional interest increased still further after the law entered into force. Due to the composition of the Council conflict between central and regional interests cumulated in tension between the Office representing national interests and the judicial members of the Council who represented the views and interests of county court presidents.[19] The Council, sitting only once a month, by nature co-operates with its Office the role of which is to provide for analysis and prepare decisions. The National Judicial Council, in an effort to limit the powers of the Office, tried to *reform* its own administration during the first decade of its operation. It sought to break up the so-called informal,

---

17 See Fleck (note 6).

18 P. Hack, A szervezetek befolyása az eljárási törvény szabályozására, in: Z. Fleck, Bíróságok Mérlegen II, at 279 (2008).

19 There are nine judges sitting on the NJC and five other members. Of the nine judges seven were county presidents until the end of 2009.

bureaucratic power of the Council's Office.[20] The members of the Council tried to solve the conflict by reforms from time to time. But the split power, endangering effective administration, derives from the code of the judicial organizational structure. The *triangular power* consists of the county court presidents, the body of the Council and its Office, and this triangle could not have been even balanced by the good intentions of the President of the Council. Under the documents analysed, common interests are constantly defeated because of the compromises forced by counties' special interests. Sometimes the Office initiated the impeachment of some county court presidents, but the Council refused to decide on it; sometimes the Office tried to reallocate the judicial statuses because of an imbalance in the workload between different regions; court presidents concerned voiced strong opposition and the Council never openly tried to decide against any county interests.[21] In the end, in 2006, the Head of the Office was dismissed and a former county court president was elected to that post. From that moment there were no conflicts between the Head of Office and the county presidents. In the end, the central administration of the judiciary is no more than the sum of the administrations of the 20 county courts, and this particularism is paralyzing the central administration of justice. Any proposals to reallocate sources to provide judges in the country with a more balanced workload or plans to centralize the selection process of judges are doomed to failure.

Another problem is the lack of transparency of the Council's work and court administration: the National Council of Judges has made great efforts to keep the essence of its activity invisible. Even internally, therefore, most judges do not even know the basis for the courts' administration. It is clear that such so-called democratic reforms as the election of the president and the Council's members can be introduced without any risk. As a result of the centre's invisibility and unaccountability, the lower levels of the court system are also invisible: the Office obtains information on the system only through the county presidents' data service. The Office obtains hardly any details on local courts. While blocking the information flow inside the court system is *only* a result of the prevailing power structure, the lack of transparency of the whole system endangers the constitutionality of the judiciary. Rational admini-

---

[20] In 2008, the President of the State did not nominate that person for President of the Supreme Court (and thus for the Council) for an additional period of six years because he recognized that person's role in the conflict.

[21] The only detailed empirical research in this respect: Fleck (note 6).

stration and independence are both in danger, because without transparency and accountability there is no trust in freedom from corruption and exemption from influence, or impartiality. In order to get rid of this trap a definite legislative will is needed: the Council should be deprived of its main means of controlling itself, i.e. the determination of its own rules on publicity. Considering that in this system no other real control works, a special law should be enacted on information and publicity concerning the judiciary.

II. Selection, Appointment and Reappointment of Judges

In the process of political transition nobody questioned the personal continuity of the judiciary; political cleansing was off the political radar, although the Minister of Justice of the first democratic government did not appoint old functionaries as court presidents. Despite this change the effects of the past still influence the organizational culture: judges in high positions today were originally selected by the pre-democratic, distorted system; their mentality, thinking and values strongly mirror the authoritarian past.

Despite detailed regulation on the procedure for the selection of new judges, some crucial elements are lacking: the professionally defined concept of judicial abilities, the obstacle of exerting subjectivity during the process of selection and promotion, the openness of the process. In practice the selection of judges remains subjective; the real decisions are in the hands of the county court presidents. Only county court presidents are in charge of selection; local court presidents are not part of this process.

1. Eligibility

Candidates to be appointed judges should be Hungarian citizens, have no prior criminal record, have the right to vote, have a law degree and have passed the special examination (general state exam, "bar examination"). This "bar exam" is a general precondition to practising as a lawyer, and is to be taken after three years of practice. Candidates must work as court clerks for one year before they apply. There are exceptions: state attorneys, public notaries, legal counsel, civil servants in central state organs who have the "bar exam" must not work as court

clerks before becoming judges. Neither is it mandatory for Constitutional Court judges to have clerked.

The practical training of lawyers is intensive during the clerkship; there is an extended system of inner socialization organized by the court administration and the Hungarian Judicial Academy. Inner (organizational) socialization of young judges gives efficient channels for *teaching* the elements of culture of the organization, traditions, style, mode of operation, unwritten rules of communication, etc. In a system which needs fundamental change, this kind of channel operates as a barrier to change. But there is no specialized training for different areas of the law (for example criminal juvenile law). Though European membership requires that judges know European law and the practice of European courts the learning process is slow, since traditionally post-communist legal culture is strongly positivistic. The council model in itself cannot ensure the efficient education of the judiciary for a new European role, but some important steps were taken: the Judicial Academy, the instructor system.[22] However, education in the abilities, skills and norms of the judicial role, behaviour and ethics is still under-formalized, remained vulnerable to the culture of the organization and the expectations of the respected leadership. It should serve judicial independence if compulsory education were begun for young judges on ethical problems, if essential judicial skills were measured and cultivated with the help of a central and well-defined list of required judicial abilities. During the past two decades since the transformation, the administration of the judiciary could not shape a clear vision of the good judge, a complex measure, which could serve as an ideal. Besides the questionable objectivity of selection this lack damages the accountability and independence of judges. Uncertain rules of behaviour, unclear expectations are risky for judges. In the last two years the Hungarian Academy of Judges has organized courses for young judges on ethical questions.[23]

Applicants who want to become judges after clerkship must take a special examination set by the Central Institution of the Judicial Experts Organisation, which tests the applicants' medical, physical and psychiatric fitness. Candidates should also file a financial disclosure statement. The professional aptitude test is a general test (MMPI, Rorschach) and

---

[22] The European Union gave financial help for the building of a Judicial Academy in 2005. See the website of the Hungarian Judicial Academy, available at <http://mba.birosag.hu/>.

[23] Courses offered by the Academy, see <http://mba.birosag.hu/engine.aspx?page=kozponti_kepzesek>.

not specific to the required abilities of the judgeship. Psychologists some years ago asked judicial authorities to define the required qualities to be measured, but hitherto such definition is still lacking. There are no codified criteria for mental or psychological qualities to be tested. The most important part of the application procedure is the interview with the president of the court.

After some public criticism, a "competitive exam" has been created. The application procedure became centralized and applicants must now take a central test of professional competence. The exam consists of two parts: written and oral; in the written exam candidates answer 15 short test questions and answer two problems in essays. The aim of the short test is to measure the cognitive abilities of candidates to analyse and decide legal issues, the essays are to test knowledge of relevant legal institutions and ability to give reasoned evaluations. The oral exam tries to measure the level of communicative skills, by requiring candidates to answer two complex questions. Candidates can get a maximum of 60 points for both the written and oral exams, 25 points for a *cum laude* legal degree, 30 points for a *summa cum laude* degree, two points for middle level and four point for upper level foreign language proficiency.[24] These exams are organized by the Hungarian Judicial Academy twice a year. The very essence of competitiveness is missing from this system, since the sequence of the results of the exam is not binding on the presidents, who can still nominate candidates with worse results.

2. The Process of Judicial Selection

Selection is formally based on an application procedure. Notices inviting applications specify the requirements and are published in the official gazette. In recent years, however, in some territories nominations have been made without applications.[25] The president of the county court who is vested with powers to nominate applicants consults the competent members of the judiciary, but recommendations have no binding force on him. The president of the court forwards the applications to the National Judicial Council with his/her recommendations. According to the text of the Act on the Legal Status of Judges this cen-

---

[24] *2006. évi 5. sz. OIT szabályzat* (5/2006 Resolution of the NJC).

[25] Eötvös Károly Közpolitikai Intézet, Bírói függetlenség, számonkérhetőség, igazságszolgáltatási reformok, available at <http://ekint.org/ekint/ekint.news.page?nodeid=169>.

tral administration has "the powers to make the final selection without having to abide by the recommendations presented."[26] But in reality the NJC in most cases accepts the recommendations of the presidents of the courts. There is tacit agreement on the personnel policy among the administrators of the judiciary: selection remains in the competence of the respective county presidents.

With the personal interview by the court president as the central element of selection without any formal limits, the system is far from being objective, transparent and does not fulfil the requirement of merit.[27] As the Open Society Institute Report stated in 2002: "The procedure for selecting and promoting judges would benefit from clearer and more standardised criteria; the present lack of transparency and the broad discretion afforded officials involved in the process encourage arbitrariness and even abuse, and may discourage the development of a professional corps of judges."[28] The criteria are not objective and even not known; the presidents of the county courts have full authority in selection; and the process remains secretive and subjective. Most judicial leaders are convinced that their personal experience is the best basis for the selection of judges.[29] This system gives the court administration, in practice the presidents, the opportunity to appoint candidates who will not cause any problems for the administration. In this way court presidents can choose conformist, loyal candidates, and conformity

---

[26] § 9 Act LXVII of 1997 on the Legal Status and Remuneration of Judges (*A bírák jogállásáról és javadalmazásáról*). The texts of the acts can be downloaded from CompLex, Jogszabályok, available at <http://www.complex.hu/jogszabalyok.php>.

[27] P. Hack, A büntetőhatalom függetlensége és számonkérhetősége, (2008); P. Hack/B. Garai, Az igazságszolgáltatási rendszerek átláthatósága, Transparency International (2008), available at <http://www.transparency.hu/files/p/396/6704728524.pdf>. Nations in Transit 2009 (note 15), 248.

[28] EU Accession Monitoring Program, Monitoring the EU Accession Process: Judicial Capacity, Open Society Institute, Budapest, 111 (2002), available at <http://www.soros.org/resources/articles_publications/publications/judcap_20030101>.

[29] This is based on personal interviews with judicial leaders during the research done in 2007.

could be more important than legal and professional skills. It is also the source of the strong nepotistic practice of the Hungarian judiciary.[30]

There are no regulations regarding minority and gender representation. In spite of the fact that some European states try to monitor the social representativeness of their judiciaries, in Hungary the judiciary and the leaders would be very likely to consider such a regulation detrimental to their independence, or at least unnecessary.[31] Traditionally in Hungary the proportion of women in the judiciary is high, because of its relatively low income. This situation began to change due to the salary rises after 1990, but female judges are still in the majority.

3. Length of Office and Reappointment

Although there is no formal reappointment procedure in Hungary judges are subjected to review within the first 12 years of office with the consequence that their term of office can be terminated on the basis of their unsuitability. The chapter on "Evaluation of a judge's performance" in the Act on the Legal Status and Remuneration of Judges (Act LXVII of 1997) says that the performance of a judge appointed for an indeterminate term shall be evaluated on two occasions following his appointment at six yearly intervals.[32] This procedure aside, evaluation must be undertaken if a motion of unsuitability is lodged against a judge or if a judge himself requests an evaluation.

Evaluations shall include an inspection of the material, procedural and administrative aspects of the activities of a judge concerning only cases which have been definitively concluded. The evaluation is ordered by the president of the county court (by the president of the high court of appeal or the Chief Justice of the Supreme Court in the case of judges of high courts of appeal or of the Supreme Court) and must be completed within 60 days. The judge under evaluation is to be given a copy

[30] On biased selection and „judicial families", see: Hack (note 27); Fleck (note 6). In the public news, see Index, Lomnici örökségét nehéz lesz eltakarítani, 30 May 2008, available at <http://index.hu/belfold/lomnici7917/>.

[31] K. Malleson, Diversity in the judiciary: The case for Positive Action, 36 Journal of Law and Society 376 (2009). The proportion of women judges at local courts is 71.4%, at county courts 68%, at regional courts 61% and on the Supreme Court 61.9%. See Országos Igazságszolgáltatási Tanácsot, Parlamenti tájékoztatók, available at <http://www.birosag.hu/engine.aspx?page=OIT_ParlamentiTajekoztatok>.

[32] Act LXVII of 1997 on the Legal Status and Remuneration of Judges.

of the written evaluation at least 15 days before the results of the evaluation are presented. The judge in question may, until the results are presented, comment on the process and the results. The result of the evaluation is expressed as a three-rate system: the performance of a judge may be excellent, acceptable or unacceptable. If the judge disagrees with the rating, the president of the court will, at that judge's request, solicit the opinion of the panel (professional division) of the court. If the judge's performance is rated unacceptable, and the president of the court does not overrule the rating within 15 days, the judge may seek a remedy at the court. The evaluation is based on loosely defined grounds: the ability to discern the essence of a case and to deliver decisions, thoroughness, diligence, working capacity, case and time management skills, trial preparation skills, ability in managing and conducting hearings and trials, relationship to parties, clarity of recording, timeliness.[33]

The details of the evaluation process are regulated by a decree of the National Judicial Council. The evaluation shall include at least 50 concluded cases and the evaluator must attend court for two to three whole days to get a detailed picture of the work of the judge under evaluation. After the evaluation of a judge appointed for a fix term, the judge can be dismissed if the result is negative (unacceptable). In this case the president of the court will not appoint him/her for an indeterminate term.[34] If the evaluation of a judge appointed for an indeterminate term is that his work is unacceptable, the following procedure must be used: "the president of the court shall make a written request for the judge to resign from office within thirty days."[35] "If a judge's performance is rated as unacceptable, he may seek a remedy in court unless the rating is overruled by the competent president judge within 15 days from the date when the evaluation was presented."[36] There are no official statis-

---

[33] §§ 47-56 Act LXVII of 1997 on the Legal Status and Remuneration of Judges; *OIT szabályzat a bíró munkájának értékelési rendjéről és a vizsgálat részletes szempontjairól* (5/1998, NJC Resolution on the Evaluation of Judges), available at <http://www.birosag.hu/engine.aspx?page=OIT_dontesei>.

[34] "The service relation of a judge shall be terminated [...] b) at the end of the judge's initial appointment and if a motion has not been lodged for his appointment for an indeterminate term", § 57 Act LXVII of 1997.

[35] § 54 Act LXVII of 1997 on the Legal Status and Remuneration of Judges.

[36] § 53(4) Act LXVII of 1997 on the Legal Status and Remuneration of Judges. The Constitutional Court declared that this regulation is compatible with the Constitution, see 951/E/2001 AB.

tics on the frequency of findings of unsuitability and the real causes of judicial resignation.[37] Once the two six-year evaluations have taken place, there is no provision for any more compulsory (ordinary) evaluation; any further evaluation (extraordinary) takes place only in the case of an allegation of unsuitability. If the first evaluation before appointment for an indeterminate term results in a finding of unsuitability, the consequence is simply non-appointment.[38] Where the finding of unsuitability is made on the second evaluation (in the case of a judge appointed for an indeterminate term) the result is dismissal. The judge may challenge the determination in the Labour Court. There are no official data on the proportion of dismissals, but they are said to be very rare.

The transparency of the evaluation process is poor;[39] the president of the court has broad discretion over the process, there is no independent body monitoring it, and in the end judges can challenge the final decision on suitability in court. Apart from the lack of transparency and the uncontrolled authority of the presidents of the courts, which limit the fairness of the process, the most important defect of the selection and evaluation system is the lack of detailed criteria for judicial competence. This is not only problematic for judges who receive a negative evaluation for subjective reasons. It is also detrimental to the judicial system as a whole. Due to the lack of clear norms and expectations of suitability, it is difficult to get rid of effectively unsuitable judges.

III. Tenure and Promotion

1. Tenure

After the exam candidates serve as court clerks for at least one year. Thereafter they can apply for a judgeship. For the first three years judges are hired for a fixed term; after three years an evaluation must be

---

[37] In 2008, 25 judges resigned from office; see data of the National Council of Justice of Hungary, available at <http://www.birosag.hu/engine.aspx?page=OIT_ParlamentiTajekoztatok>.

[38] In 2008, four judges left the judiciary after the end of the fixed term; the causes are not reported. *Az OIT elnökének tájékoztatója 2009*, available at <http://www.birosag.hu/engine.aspx?page=OIT_ParlamentiTajekoztatok>.

[39] The Official gazette publishes only the terminations of tenure, but no information is available on the real reasons.

carried out. Depending on the result of this evaluation judges are appointed for an indeterminate term.[40] "The performance of a judge appointed for an indeterminate term is evaluated on two occasions following his appointment at six-yearly intervals."[41]

If a judge is evaluated as unsuitable after the three-year probationary period, the president of the court can dismiss him/her without giving any reasons by simply not submitting his/her name for an appointment. Judges appointed for a fixed term have full authority, but their status during the first three years is not permanent; it is dependent on the result of the evaluation. At the end of this probationary period the judge's overall performance is evaluated. Judges have no opportunity to challenge the decision before a court.[42] The term of office of a judge who has not requested appointment for an indeterminate term or who has been evaluated as unsuitable shall terminate on the last day of the third year following the date of the original appointment.[43]

The tenure of judges is guaranteed by the Constitution: "Judges may only be removed from office on the grounds and in accordance with the procedures specified by law."[44] A judge's tenure may be terminated in the case of voluntary resignation, permanent inability to perform judicial functions, final conviction for a criminal offence, a disciplinary penalty, retirement, loss of citizenship, election or appointment to a political or administrative post incompatible with a judicial post.

---

[40] Before the state exam lawyers work for three years in the courts as "junior clerks"; after the exam and before appointment, they serve as court clerks for at least another year.

[41] § 50 Act LXVII of 1997 on the Legal Status and Remuneration of Judges.

[42] Unlike in this case a finding of unsuitability in the evaluation of judges appointed for an indeterminate period can be challenged before a court.

[43] "The service relation of a judge shall be terminated at the end of the three years term of the judge's initial appointment and if a motion has not been lodged for his appointment for an indeterminate term." § 57(1) Act LXVII of 1997 on the Legal Status and Remuneration of Judges.

[44] § 48(3) Act XX of 1949 (Constitution).

2. Promotion

There are no formal and standardized criteria regulating promotion.[45] Judges with aspirations for promotion may apply for posts if the president of the higher court invites applications for vacant posts. The invitations are issued without listing any professional criteria. The judicial college (civil, criminal or administrative panel of the higher court) forms an opinion on the candidate but this opinion has no binding force on the president. Transparency and objectivity are absent from this process; the promotion is unpredictable, and opens doors for subjectivity and conformity. According to the evaluation of the selection and promotion process by the Office of the NJC, there are no normative criteria for promotion, and there is no unified competition system.[46] This way, without detailed formal criteria, the process of promotion is based on conformity or personal connections and may have an effect on the decision making of judges who seek promotion or a career.

IV. Remuneration

1. Remuneration

Remuneration and salary ensure the basic material conditions for judicial independence. During the transition to democracy it became generally accepted for the salary of judges to be an essential part of judicial independence. In the 1990s judges' social status emerged and the prestige of this profession became much higher. Judgeship is now attractive to lawyers, the salary is comparable to that of other legal professionals in the public sphere, although generally lower than that of lawyers in the higher echelons of the private sector. The salary of judges is similar to that of state prosecutors. The basic salary of judges is similar to that of the state secretaries of Government. Court executives are entitled to executive allowances. According to the text of the Act on the Status of Judges: "The remuneration of judges shall reflect the gravity of their responsibilities and the dignity of their office, and it shall be sufficient to ensure their independence. Judges shall be provided the conditions nec-

---

45 P. Hack, A büntetőhatalom függetlensége és számonkérhetősége, Magyar Közlöny Lap és Könyvkiadó (2008); Fleck (note 6).

46 12.197/2007 OIT Hiv. Letter from the Head of the Office to EKINT. Quoted by Hack/Garai (note 27), at 16-19.

essary to enable them to carry out their duties effectively."[47] The level of the basic salary (basic grade) is determined annually by the Act on the Budget, and it cannot be lower than it was in the previous year. There is a system of continuous, automatic increases: in any three-year period a judge's basic salary must increase according to a pre-established multiplication factor ranging from 1 to 1.55. Beside the basic salary every judge is entitled to different additional forms of compensation, stated as a fixed percentage of the basic salary. Every judge is entitled to a regular supplementary allowance ranging from ten to sixty per cent, depending on the level (local, county, regional, supreme) of the court. Judges on the same level and of the same age receive the same salary.

The basic salary (first level) of judges in 1998 was 104,000 HUF (370 EUR); in 2006 it was 339,000 HUF (1,190 EUR); and in 2009 it further increased to 356,000 HUF (1,250 EUR). With the regular supplements a judge with ten to 12 years' experience earns about 500,000 HUF (1,760 EUR), which is on the level of a high government official. One month's extra salary is guaranteed by the law every year; on reaching 25, 30, 35 and 40 years of service judges receive an anniversary bonus. The other extraordinary allowances (bonus), which are dependent on the decisions of the county court presidents, are increasing from 3,200 million HUF (11 million EUR) per year (2002) to more than 7,000 million HUF (25 million EUR) per year (2006). This kind of bonus has no written or standardized criteria; it depends on the decision of the president and the actual financial situation of the county. There is an opportunity on two occasions during tenure for special promotion (one salary grade) for professional excellence by recommendation of the division. The fact that all bonuses and the special promotion depend on the will of the administration of the court can be a potential threat to independence, since the term "professional excellence" is not defined. Reduction in the pay of a judge may be imposed only by disciplinary sanction. If a judge is transferred (with his/her consent) to a lower position his/her entitlements must remain in effect.

2. Benefits and Privileges

Judges are civil servants/public employees, and as such they are entitled to health insurance, social security and retirement benefits like any

[47] § 25 Act LXVII of 1997 on the Legal Status and Remuneration of Judges.

other civil servant. There is no special tax, insurance and retirement system for judges. Supplementary payments are guaranteed for meals, clothing and foreign language training. Such payments are based on legal regulation and granted equally. Other benefits, such as housing, social and recreational support, depend on the financial situation and are granted by the president of the court. Support for housing or flat conversion is dependent on the decision of the administration.[48]

The president of the court (exercising an employer's rights) may authorize a judge to work outside the court building except on trial days. This authorization can be revoked on the production of written reasons. The National Judicial Council may award the titles of "honourable county court judge", "honourable high court judge" and "honourable Supreme Court judge" for professional excellence after six years of practice.

3. Retirement

The retirement system, like remuneration in general, does not have a direct impact on judicial independence, although some old judges regularly argue for increasing the pension.[49]

There is no special pension system or scheme for judges; they are entitled to the same retirement pension as any other employee. At 70, the mandatory retirement age for judges is higher than the general age limit. The service of a judge shall also be terminated if the judge requests to retire before he/she reaches the mandatory age limit. The retirement pension is currently about 40-50% lower than the salary received during the final years of service. Those judges who did not benefit from the new system of remuneration suffered as a result of this reduction because their standard of living fell drastically after retirement. Currently there is lobbying by some old judges in chief executive functions for a special retirement system for judges.[50] The logic of this lobbying is based on the special situation of those judges who are currently retired or retire in the next few years, because the basis for their pensions was a

---

[48] In 2008, 115.9 million HUF (408,000 EUR) were given for 71 judges.

[49] See Magyar Bírói Egyesület, Tájékoztató az EAJ ülésére a magyar helyzetről, available at <http://www.mabie.hu/node/45>.

[50] Magyar Bírói Egyesület, Gondolatok a magyar bírák érdekképviseletének helyzetéről, available at <http://www.mabie.hu/node/46>.

much smaller salary than is now the case. This problem will diminish in time. There is no restriction on employment after retirement.

V. Case Assignment and Recusal

According to the Act on the Organization and Administration of Courts all persons shall have the right not to be deprived of their legally appointed judge.[51] There is no general system of automatic case assignment, although some courts use automatic assignment in some professional subfields. The Act on the Organizational and Administrative Structure of Courts provides for the general principle that the case distribution rules of the courts shall consider the magnitude of cases, the amount of work a case requires, and the chronological order of cases.[52] The presidents of the courts (in a county court the president or the head of the college) must determine the order of case assignment. These orders specify and categorize the fields and determine the sequence of assignment according to specialization. The president or his/her designee, in higher courts the head of the college, then individually assigns incoming cases according to these rules. It is regularly argued *against* random assignment that strong specialization and the uneven professional quality of judges are the two main obstacles to automatic assignment.[53] On the other hand, the individualized assignment of cases might be challenged as intransparent and based on subjective factors. There are strong historical experiences on the impact of case-assignment on decisions; it was one of the channels through which political influence could be brought to bear.[54] Choosing a judge to influence according to substantive preferences is still not impossible. In exceptional circumstances (if the judge is absent from the bench for more than 45 days or is carrying a disproportionate workload) the president or court leader authorized to allocate cases may reassign a case to another judge.

There are two cases in which judges may withdraw from a case: objective if the judge has any conflict of interest in the case (the most com-

---

[51] § 11 Act LXVI of 1997 on the Organizational and Administrative Structure of Courts.

[52] § 11(5) Act LXVI of 1997.

[53] See Országos Igazságszolgáltatási Tanácsot, A bírósági reformról, available at <http://www.birosag.hu/engine.aspx?page=OIT_BirosagiReformrol>.

[54] Z. Fleck, Jogszolgáltató mechanizmusok az államszocializmusban (2001).

mon category of objective cause is being the relative of any party), and subjective, when the judge decides that he cannot act impartially. The subjective cause of impartiality is determined by the judge himself. In the last year there were some cases in which the accused threatened the judge, who asked for reassignment for this reason. In such a case the president of the court must accept the judge's request to withdraw. But in the case of any complaint of lack of impartiality by the parties in the case, withdrawal is not compulsory if the judge denies that he/she is biased. There is no opportunity to challenge the court president's decision.

VI. The Process of Investigating Complaints about Judicial Conduct

The system of complaint other than disciplinary process is only loosely regulated by the order of the National Judicial Council.[55] Complaints from the public (in reality from the parties) are answered by the president of the court, but there is no clear and detailed rule on the openness of and time limits governing this process. The resolution of the National Judicial Council does not contain an obligation to answer such complaints.[56] It is thus possible for the president to use information about complaints against judges, for example in the evaluation process. As a consequence of the complaint there may be disciplinary proceedings if the president of the court so decides. On the other hand, serious complaints have no guarantee of official handling. There is no official information on the quantity of complaints, but one can estimate them at several thousand. Some years ago, the Ombudsman and the President of the Supreme Court agreed on the complaints addressed to the wrong place, because the ombudsman's office received hundreds, but this office has no authority over the courts.[57]

---

[55] 15/1999 Resolution of NJC On the System of Handling Complaints.

[56] Id.

[57] Citizens are sending hundreds of complaints against judges and courts to the Ombudsman. See Jogi Fórum, Együttműködési megállapodást kötött a Legfelsőbb Bíróság elnöke és az általános ombudsman, 10 October 2007, available at <http://www.jogiforum.hu/hirek/16775>. *Beszámoló az állampolgári jogok országgyűlési biztosának tevékenységéről* (2007), available at <http://www.obh.hu> (Report on the activity of the ombudsman).

VII. Discipline and Removal Procedures

1. Formal Requirements

Disciplinary proceedings may be initiated by the National Judicial Council against any judges appointed to administrative positions by the Council, and are initiated by the President of the Supreme Court against judges of the Supreme Court, and the presidents of county and high courts of appeal in all other cases.[58] The decision to initiate disciplinary proceedings is not mandatory; complaints of just any kind cannot start the automatic procedure, it depends on the decision of the authorized persons (president of the court) or organization (NJC). There are two categories of professional misconduct: when a judge violates the obligations of his service (for example by omitting to note a sentence down in writing in due time) or when the lifestyle or behaviour of a judge is likely to harm or jeopardize the prestige of the judiciary (scandalous conduct in public).[59]

2. Disciplinary Proceedings

There is no separate disciplinary court in Hungary. First instance disciplinary tribunals are established at the county courts and high courts of appeal. Judges are held accountable at the same court at which they perform their duties; disciplinary judges are their fellow judges who serve as judges in other cases also. Because of the high relevance of the disciplinary procedure for the independence of judges, a separately organized disciplinary tribunal should give much stronger guarantees of impartiality. The Supreme Court runs disciplinary tribunals at the first and second instances. The members of the disciplinary tribunal are elected for six years by the plenary session of judges. Candidates must have at least five years' experience as judges. The disciplinary tribunal sits as a three-member panel formed by its presiding judge. An investigating officer (selected from among the judges of the tribunal by a pre-ordered rota) makes the preparations for the proceedings and investigates the circumstances for the purpose of establishing the facts by means of interrogations, gathering of evidence and inspection of documents. Within 15 days he prepares a report which is the basis for the panel's decision on the initiation or suspension of the proceedings. The em-

---

[58] § 64 Act LXVII of 1997 on the Legal Status and Remuneration of Judges.

[59] § 63 Act LXVII of 1997.

ployer (the president of the court or the National Judicial Council) must notify the judge affected immediately after the panel decides to open formal proceedings.[60] Such proceedings may not be initiated more than three months after the day on which the judge was informed or more than three years after the alleged misconduct took place. The proceedings before the disciplinary tribunal are not open to the public; data on disciplinary proceedings are confidential.

3. Judicial Safeguards

Judges undergoing disciplinary proceedings may be represented by another judge or attorney, and may ask questions and present arguments. If there is any doubt about the impartiality of the investigating officer or any other members of the disciplinary tribunal, the judge undergoing proceeding may file a motion for their withdrawal. This motion shall be heard by another panel designated by the president of the disciplinary tribunal. If another panel cannot be formed or the withdrawal motion concerns the president of the tribunal, the second instance (disciplinary panel of the Supreme Court) shall decide. A disciplinary decision at first instance may be appealed within 15 days. The appeal court can affirm or overrule the first instance decision, or can dismiss the case. If there has been a serious procedural violation which cannot be remedied the appeal court can annul the decision at first instance by an order to reopen the case.

4. Sanctions

If the disciplinary panel does not dismiss the case it can dismiss the judge from office, impose disciplinary penalty, or issue a warning instead. The disciplinary sanctions are: reprimand, censure, demotion by one salary grade, dismissal from executive office, or a motion for (definitive) dismissal from office. Since disciplinary proceedings and any information on them are not open to the public, there is no information on which offences typically attract the different sanctions. The disciplinary penalty imposed shall remain in effect for one year in cases of cen-

---

[60] § 65 Act LXVII of 1997 on the Legal Status and Remuneration of Judges: "The employer shall immediately notify the judge affected when disciplinary proceedings are initiated. If disciplinary proceedings are requested by an entity other than the NJC, the NJC shall also be notifed."

sure. Censure is a *moral* reproach, more severe than a reprimand since it has consequences for promotion and premiums. In the case of demotion by one salary grade or dismissal from executive office the disciplinary penalty shall remain in effect for two years; for three years in the case of dismissal from office.[61] Judges serving disciplinary penalties may not be promoted, appointed to executive office, transferred to a higher salary grade, granted a title to a higher office, or receive premiums or bonuses.[62] If a judge commits a less serious offence the disciplinary tribunal may abstain from initiating disciplinary proceedings provided that the misconduct did not have detrimental consequences or caused only moderate damage. In this case the employer (president of the court or NJC) can issue a written warning and the judge can still request disciplinary proceedings, which cannot be refused.[63]

5. Practice

According to the official statistics the disciplinary procedure is not used frequently.[64] Eight to 12 disciplinary proceedings have been initiated annually and the same number of written warnings without disciplinary proceedings; very few disciplinary procedures are brought against judges in a leading position.[65] Most cases concern neglect of administrative duties. Since there are no independent disciplinary courts the disciplinary procedure regarding judges is open to abuse. First instance disciplinary forums sit at the county courts (under the leadership of the county president who has all the administrative authority over judges). The presidents of the county courts can initiate disciplinary proceedings (regional presidents and the president of the Supreme Court

---

61 § 79 Act LXVII of 1997.

62 § 81 Act LXVII of 1997 on the Legal Status and Remuneration of Judges.

63 § 64(3) Act LXVII of 1997 (in this case) "the employer shall issue a warning to the judge instead of initiating disciplinary proceedings."

64 Official information by the President of the NJC for the Parliament, available at <http://www.birosag.hu/engine.aspx?page=OIT_ParlamentiTajekoztatok>.

65 In 2008, presidents of the county courts ordered 21 disciplinary procedures against judges, five of them were in higher administrative positions under the county presidents. Statistics are reachable in the annual report of the President of the NJC to Parliament, available at <http://www.birosag.hu/engine.aspx?page=OIT_ParlamentiTajekoztatok>.

against judges of those courts).[66] Disciplinary proceedings are not public, and all we are allowed to know is the basic data on the number of such proceedings.

VIII. Immunity for Judges

Criminal proceedings, proceedings for petty offences and coercive measures may be initiated against a judge only with the consent of the authority vested with powers to appoint, except for *flagrante delicto* cases (where the police catch the offender in the criminal act, for example shop-lifting). Judges may waive their privilege of immunity in civil infraction proceedings. Judges are exempt from civil liability for acts undertaken in the performance of their duties; instead the Office of the NJC provides compensation for damage arising out of official conduct by judges (in 2007 24 million HUF [84,400 EUR]). Judges are financially liable for their wilful or grossly negligent conduct or breach of the service obligations to their employer.

IX. Associations for Judges

There are several associations of judges; they are voluntary, organized according to specialization. The task of the associations is to represent the interests of their members. The Hungarian Association of Judges is the biggest, but does not represent the whole judiciary. Though the leaders of the Association from time to time declare that they represent most of the judges, they do not publish any official data on membership. The politics of this Association are very close to the interests and opinions of the administrative leaders of the courts. The budget of the Association of Judges is not guaranteed by legal Act; it depends on the will of the NJC.

The Hungarian Association of Judges has the competence to initiate proceedings concerning judicial ethics and the decisions of the ethical board are published in the Association's gazette. This role of the Association is highly controversial because it lacks prestige and general ac-

---

[66] For a detailed picture see Z. Fleck, Hungary, in: Open Society Institute-CEU Press, Monitoring the EU Accession Process, Judicial Independence 2001, 188.

ceptance.[67] A better solution would be an Ethical Code for Judges laid down by Parliamentary Act.

The leaders of the judiciary (for example the county court presidents, the President of the Supreme Court) do not welcome alternative associations. They are afraid that such associations could criticize their work. So far the freedom of opinion of judges has been restricted by means of the ethical procedure before the Hungarian Association of Judges.[68] Though judges are prevented only from releasing information to the press on any case over which they are presiding, and thus may comment on judicial administration or leadership,[69] they are reluctant to speak out on these topics.

X. Resources

The overall budget has in the last decade increased from 20 to 70 Billion HUF a year (70.2 to 245.7 million EUR), but still there are some court buildings awaiting repair. There are significant differences in material conditions between regions and court levels. The National Judicial Council is authorised to decide on the allocation of resources. It is questionable whether it is rational and effective to leave this task in the hands of the NJC because the Council lacks any formal responsibility. The staffing average is low (under two per judge); judges have too great an administrative burden.

---

[67] The Hungarian Association of Judges issued an Ethical Code of Judges and organized an ethical committee. Only judges can start ethical proceedings against fellow judges. Magyar Bírói Egyesület, Az Országos Bírói Etikai Tanács ügyrendje, available at <http://www.mabie.hu/orszagos-biroi-etikai-tanacs/ugyrend>. For the critics of this practice see Eötvös Károly Institute, available at <http://www.ekint.org/ekint/ekint.news.page?nodeid=222>.

[68] One highly controversial ethical procedure was initiated against a judge who issued a petition to the Constitutional Court and criticized some administrative acts of the President of the Supreme Court.

[69] § 28(2) Act LXVII of 1997: "A judge shall not be permitted to publicly comment on any case that is in progress or has been concluded, particularly cases over which he has presided." § 29 Act LXVII of 1997: "Judges may not release any information to the press, radio or television on any case over which they preside."

C. Internal and External Influence

I. Separation of Powers

The separation of powers is guaranteed in Hungary and the judiciary is even isolated from any other branches of government.[70] The Government cannot influence the effectiveness of the judicial administration. Though the President of the Supreme Court (who is also the president of the National Judicial Council) must report annually to the Parliament, he cannot be questioned by members of Parliament.

The current structure of the judiciary in Hungary shows that a mechanical separation of power, a complete isolation from other branches without guarantees of accountability and constitutional tools of control, can jeopardize the proper function of judicial power. As indicated before, the central administration is strongly paralyzed by insufficient control of the county administration. According to empirical studies compromises among county presidents dominated the decisions of the NJC, proposals challenging these interests were doomed to failure.[71] Strong evidence of this administrative weakness is the sheer formality of the reports submitting to the NJC by the presidents of the county courts. This originates in the fact that county presidents are not only one-man leaders of county courts but also take part in central administration. They are often members of the Council and additionally there are several partially formal or even informal channels of influence such as consultative meetings or meetings of county (and regional) court presidents, and in practice there is no real chance of any decision without their consent. The main approach is that the country's judiciary is the sum of the counties' judiciary and no other interests outside the counties are taken into account. All the administrative, economic powers and competences over judges are split between the Council and the county presidents. The National Judicial Council with its majority of county presidents formally controls the county administration. According to my research experience there are no consequences arising out of any administrative failure or anomaly. Therefore, it is not sur-

---

[70] § 50(4) Act XX of 1949 (Constitution): "Administration of the courts shall be exercised by the National Council of Justice; self-government bodies for the representation of judges shall also participate in such administration."

[71] A. Varga, Az intézmény kapcsolatrendszere, in: Országos Igazságszolgáltatási Tanácsot, A bírósági reformról, available at <http://www.birosag.hu/engine.aspx?page=OIT_BirosagiReformrol>; and Fleck (note 6).

prising that exact conditions of leaders' competence and special aptitude tests for leaders are lacking. During codification and also thereafter, it was evident that incapacity (inaptitude) of the leaders is considered unthinkable. According to a court leader who took part in the codification process: "a judge who has reached a chief position cannot be unsuitable, the question of incapacity cannot be posed, it is nonsense."[72]

II. Judgments

1. Basis

According to the Constitution judges are independent and answerable only to the law,[73] but also to the uniformity decisions of the Supreme Court (abstract guidelines on disputed issues), which are mandatory for judges.[74] The decisions of higher courts have persuasive effect, the practice of the Supreme Court cannot be avoided, although officially it is not binding. The logic of conformity, recognized as a usual consequence of continental career-type judgeship, works effectively. According to some research on judicial practice, Hungarian court judgments – like those of other post-communist states – are formalistic; judges are reluctant to apply general principles or rules of the Constitution directly. Decisions rarely use Constitutional Court decisions and the judgments of European courts.[75] Judges predominantly use a linguistic interpretation, legal arguments concentrate on the lower level of the legal system. Due to this judicial *textualism*, quotations from decisions of the Constitutional Court or the European Court of Human Rights are only ornaments; the practice of these courts does not play a decisive role in the reasoning of judgments.[76] The transition from a formalistic

---

[72] This document is quoted in Fleck (note 6), at 96.

[73] § 50(3) Act XX of 1949 (Constitution).

[74] § 47(2) Act XX of 1949 (Constitution): "The Supreme Court shall assure the uniformity of the administration of justice by the courts and its resolutions concerning uniformity shall be binding for all courts."

[75] M. Matzak/M. Bencze/Z. Kühn, Constitutions, EU Law and Judicial Strategies in the Czech Republic, Hungary and Poland, 30 Journal of Public Policy 81 (2010).

[76] M. Bencze, *Díszítőelem, álcázóháló vagy tartóoszlop? A magyar büntetőbírói gyakorlat viszonya az alkotmányhoz* (Attitudes of Hungarian judges

model of judicial reasoning to a principle-based adjudication is still problematic because of the educational legacies of the judiciary.

2. Practice

According to statistics the ratio of pending cases has not decreased despite the fact that the number of judges and the judicial budget have significantly increased.[77] There were no changes in the disproportionate size of the judicial workload which adversely affects the effectiveness of judicial staff and continually flouts the right to an equal opportunity for justice. Comparing the workload of the different county courts, there are significant differences in every type of procedure or court level. This not only causes lack of effectiveness and is wasteful but is also unjust. According to my analysis, this situation arises mainly for two reasons. First, the Council's measures are insufficient: a backlog in any county or panel is expected to be resolved mainly by rearrangements, rewards for extra work and increasing the number of judges (extensive tools). This system works without any checking of county presidents' administrative work and inefficiency is not sanctioned sufficiently. The second reason is that the workload should be based on the measurement and declaration of the performance and capacity of judges.[78] In this matter there is no significant development. There is no objective measurement of judicial activity. State-level increases in efficiency are hindered by the approach under which county events are considered to be local issues and any interference is forbidden.

It is difficult to give the exact ratio of acquittals to accusations. Verdict contents are not part of the statistics. But the office of public prosecution often proudly announces that the effectiveness of accusation is over

towards the constitution in criminal cases) 3 Fundamentum 5 (2007), available at <http://157.181.181.13/dokuk/07-03-01.pdf>.

[77] See Appendix.

[78] Scoring the complexity of cases, standardizing the minimum scores accomplished by individual judges, regular evaluation of judges, courts and administrative units. For an international example see: Court of Appeal of Rovanieri, Finland, How to assess quality in the courts? Quality Benchmarks for Adjudication are a means for the improvement of the activity of the courts, available at <http://www.oikeus.fi/uploads/6tegx.pdf>.

95%.[79] Judgments are independent but accusation by a prosecutor still has dominant effect on the judicial procedure.

3. Structure

The requirements concerning the structure of judicial decisions are partly in the Acts on proceedings,[80] partly unwritten. Because the judiciary does not welcome the publication and open criticism of the decisions,[81] the reasons often lack clarity and logic; the language is mostly technical and hard for ordinary people to understand.[82] There is no regular analysis of judgments by legal scholars, thus there is no effective feedback to judges, and communication between judges and academic is underdeveloped. Professional periodicals do not publish analysis of judgments or judicial practice.[83]

4. Public Access

Before 2005 only a selection of the high court decisions were published in order to ensure uniform application. Due to a new law all decisions of the Supreme and High Court of Appeals with their preliminary deci-

---

[79] Official press release of the Public Prosecution, Eredményesebb a Legfőbb Ügyészség, available at <https://hirkozpont.magyarorszag.hu/hirek/ugyeszseg20070405.html/RatingWindow?struts.portlet.mode=view&struts.portlet.action=%2FratingPortlet%2FrenderDirect&action=e&windowstate=normal&struts.portlet.eventAction=true&mode=view>.

[80] Act III of 1952 on Civil Procedure (*A polgári perrendtartásról*); Act XIX of 1998 on Criminal Procedure (*A büntetőeljárásról*).

[81] Magyar Narancs, A főbíró és a nyilvánosság - védőkar, 21 September 2006, available at <http://www.mancs.hu/index.php?gcPage=/public/hirek/hir.php&id=13633>.

[82] Without open access and free criticism of sentences, judges are not open enough to clear reasoning which can be understood by the public. There are disputes in Hungary on the legitimacy of the public criticism of sentences, the dominant opinion of the judiciary is highly restrictive on this issue. (Examples: Fleck (note 6)).

[83] Z. Fleck (ed.), *Igazságszolgáltatás a tudomány tükrében* (Adjudication in the mirror of the science) (2010), available at <http://www.eotvoskiado.hu/jogtudomany/7067-igazsagszolgaltatas-a-tudomany-tukreben.html>.

sions must be published electronically.[84] This system is working, although it is not wholly usable for systematic search. Most court decisions are not yet published. In general the proceedings are open, the judge may order closed proceeding for ethical reasons or to maintain the privacy of any party in the case. But in these cases the act of giving judgment must be open. In practice judges often try to get rid of media, there are some known cases where judges simply sent journalists out of the courtroom.[85] Judges are not allowed to speak about pending or concluded cases outside the courtroom. Some legal scholars and civil organizations are lobbying for a new decree on judicial information and publicity.[86]

III. Improper Influence on Judicial Decisions

Although direct evidence is rarely uncovered influence by prosecutors, government officials, senior judges and private individuals is not completely eliminated.[87] Though there are no proven cases of corruption, there are accusations that such cases exist. According to an unpublished professional survey, 46% of the respondents agreed with the statement that a judicial sentence might be biased by corruption.[88] It is more as-

[84] Act XC of 2005 on Freedom of Electronic Information (*Elektronikus Információszabadságról*).

[85] On the judicial ban on journalists, see Mozgó Világ Online, available at <http://www.mozgovilag.hu/2002/02/febr5.htm>. On the analysis of the practice of the Act on the Freedom of Electronic Information see Eötvös Károly Intézet, Elemzések – Bírósági ítéletek az interneten, available at <http://www.ekint.org/ekint/ekint.news.page?nodeid=283>.

[86] The Ombudsman has also urged a new Act on the openness of the judiciary: Az állampolgári jogok országgyűlési biztosának, Jelentése : az OBH 1439/2009. számú ügyben, available at <http://www.obh.hu/allam/aktualis/pdf/200901439.pdf>.

[87] For living and exposed cases of corruption see Index, Az ügyész lefeküdt a vádlottal, 30 July 2009, available at <http://index.hu/belfold/2009/07/30/az_ugyesz_lefekudt_a_vadlottal/>; HVG, Törlesztési részletek, 15 July 2009, available at <http://hvg.hu/hvgfriss/2009.29/200929_ADoSSAGBA_KEVEREDETT_GYuLAI_BIRo_Torlesztes.aspx>; and HVG, Irányított felszámolásban segédkezett egy lehallgatott biro, 24 September 2009, available at <http://hvg.hu/itthon/20090924_iranyitott_felszamolas.aspx>.

[88] The survey was ordered by the NJC, but the results were not published by it. Fleck (note 6); Hack/Garai (note 27).

tonishing that more than 10% of state attorneys said the same. Any public criticism of judicial sentences or judicial practice by politicians is sharply refuted by the President of the Supreme Court or the NJC. In some cases public or scientific criticisms were also refuted. In different media critics of particular decisions or of the practice of the judiciary are growing, but there are no signs of illegal influencing.[89]

The internal independence of a sitting judge cannot be convincing if the power of his/her principals, the administrative power, is uncontrolled. Especially when every decision concerning his/her status as an employee is concentrated in one hand. At this time even well prepared judges can be landed in difficulty by using essential (e.g. awarding, preferencing, assigning cases) and seemingly not so essential (e.g. attendants, workroom) decisions of employers. The judges' status should be re-thought, but also more sophisticated requirements would be expected for the better protection of their rights.

IV. Security

Every court building is equipped with security measures (security service, electronic entrance system). In recent years some assaults have occurred: in 2008 there were 19 bombing threats and 16 threats or insults to judges. These threats were not serious enough to necessitate security protections for the judges or their relatives. Judges or their presidents of court usually do not bring charges against the offender. Some court presidents argue that public criticism of judicial decisions should be banned because it would lead to a diminishing trust by the public in the judiciary, as evidenced by the threats and assaults on judges.[90]

---

[89] There was strong public criticism of the duration of the process: Világgazdaság Online, Gazdasági perek: hosszú út az igazságig, 8 February 2008, available at <http://www.vg.hu/kozelet/jog/gazdasagi-perek-hosszu-ut-az-igazsagig-305311>. For clear examples of miscarriage of justice, see P. Kende, Nesze neked igazság! A Kulcsár ügy. Hibiszkusz (2009), available at <http://www.kende.hu>.

[90] <http://www.eorsilaszlo.hu/eorsilaszlo.hu/ei/eicikk/01934.doc>.

D. Ethical Standards

I. Code of Ethics for Judges

After a long discussion, the Association of Hungarian Judges accepted the text of the Code of Ethics for Judges.[91] This Code consists of 19 very general standards on judges' behaviour in their professional and private life (for example: respect for fellow judges, politeness, political neutrality, openness to learning, etc.). These standards are binding on all judges in Hungary, but the decisions of the Council of Ethics are anonymous and do not reveal the name of the judge who has behaved unethically. The Council of Ethics organized by the Association decides whether particular behaviour of a judge is unethical. These decisions are published, without the name of the accused, in the official Gazette of the Office of the National Judicial Council. There are no other consequences arising out of the decision. It can be criticized that this process is not sufficiently separate from the administrative leaders of courts and that the autonomy of the ethical process is questionable.[92] The Association of Judges and the ethical process can be used by court presidents against those judges who are critical of acts of the administration.

II. Training

According to the Act on the legal status of judges, "judges shall be entitled and required to participate in training provided free of charge for maintaining proper levels in sentencing practices."[93] The training is organized by the Hungarian Judicial Academy, a special organ of the Office of the National Judicial Council. Training for court clerks organized by the Academy is mandatory. There are also courses on judicial ethics. All other training organized for judges and executive leaders is

---

[91] A Magyar Bírói Egyesületnek a bírói viselkedés irányelveit meghatározó Etikai Kódexéről, available at <http://www.birosag.hu/engine.aspx?page=jogszabalyok_tara>.

[92] Eötvös Károly Intézet, Állásfoglalások – Levelezés a Magyar Bírói Egyesület elnökével, available at <http://www.ekint.org/ekint/ekint.news.page?nodeid=222>; 168 Óra Online, A bíró, akit megvádoltak, 18 December 2007, available at <http://www.168ora.hu/itthon/a-biro-akit-megvadoltak-8983.html?&lm=2>.

[93] § 32 Act LXVII of 1997 on the Legal Status and Remuneration of Judges.

not mandatory, not connected to promotion and evaluation, and there is no credit system which could be a basis for such connection. Judges can apply for different training sessions but their participation is dependent on the president of the court. Recently there have been more courses on extra-legal information and knowledge, but the main focus is on changes in the written law. The Academy is financed by the NJC, the curriculum is also approved by the NJC. The Academy has created a study board consisting of some executive leaders of courts and some university professors, but it has no formalized authority.

E. Supreme/Higher Courts

There are no special rules on the selection and promotion of high court or Supreme Court judges; here too the process needs more objectivity and transparency.[94] There are no clear normative and general criteria for promotion and selection. The college of judges votes on the candidates, but the result is not binding. Only the President of the Supreme Court has special status. "Based on the recommendation made by the President of the Republic, the Parliament shall elect the President of the Supreme Court […]. A majority of two-thirds of the votes of the Members of Parliament is required to elect him/her".[95] The President of the Supreme Court is the President of the National Judicial Council. Some experts criticize this solution because of the unclear representation of organizational interests. There is no clear demarcation line between the interests of the Supreme Court and of the judiciary as a whole.[96] Cur-

[94] For example, the decision of the NJC on the promotion of the presiding judge in the so called Mór case was widely disputed. See Hírszerző, Főbíró lesz a móri ügyben valószínűleg hibázó Varga Zoltán, 26 June 2008, available at <http://www.hirszerzo.hu/cikk.fobiro_lesz_a_mori_ugyben_valoszinuleg_hibazo_varga_zoltan.70735.html>. Mór was one of the biggest failures of Hungarian criminal adjudication, but some months later this judge applied for a seat on the Supreme Court, although there had not been any clearances regarding the professional mistakes done. See also Index, Kaiser Ede és Hajdu László szerencséje, 22 October 2008, available at <http://index.hu/velemeny/jegyzet/mor081022/; Jogi Fórum, Kulcsár-ügy – Tóth Mihály: Egy ítélet hatályon kívül helyezése kudarc a bíróság számára, 11 December 2009, available at <http://www.jogiforum.hu/hirek/22204>.

[95] § 48 Act XX of 1949 (Constitution).

[96] Országos Igazságszolgáltatási Tanácsot, A bírósági reformról, available at <http://www.birosag.hu/engine.aspx?page=OIT_BirosagiReformrol>.

rently the President of the Supreme Court (Chief Justice) has a powerful impact on the whole administration of the courts as the President of the National Judicial Council and as the representative of the third branch. When in 2008 the mandate of the former Chief Justice expired, Parliament elected the new Chief Justice only in the fifth round (the Parliament could not elect the President of the Supreme Court because a lack of political consensus). The Supreme Court is responsible for the uniform application of the law, and for this purpose it lays down guidelines. The harmonization procedure seems to be ineffective; according to some professionals there are problems with uniformity. Criminal judgments are very different throughout the country; there are huge differences in sentencing levels.[97] In one county 85.7% of the sentences in theft cases imposed imprisonment, in another county only 16.7% did. The Supreme Court is the only organization responsible for the uniform application of the law, but the process of gathering information on judicial practice is weak, and uniformity guidelines which are mandatory for judges sometimes cannot answer the most important challenges.[98] More than 70% of judgments become definitive after the first instance. In 2008, 1,185 criminal cases and 4,230 civil cases reached the Supreme Court; in the same year, more than 374,000 cases were begun. The Hungarian Supreme Court's Criminal Panel issued six unity decisions in 2009 based on the analysis of judicial practice. The Civil Panel issued two unity decisions in the same year.[99]

F. Conclusion

During the political transition judicial independence had a symbolic strength as one of the most important values of the rule of law. Constitutional and legal guarantees were built into the judicial organization to depoliticize the judiciary. The concept of judicial independence acquired a new meaning in the 1990s: the organizational autonomy of the

[97] M. Bencze/A. Badó, Területi eltérések a büntetéskiszabási gyakorlat szigorúságát illetően Magyarországon, in: Fleck (note 83). B. Mátyás/B. Attila, Területi eltérések a büntetéskiszabási gyakorlat szigorúságát illetöen Magyarországon, available at <http://jog.unideb.hu/tanszekek/jogszoc/tse/jogszoc_a_bunteteskiszabasi_gyakorlat_kutatasa-08-09-1.pdf>.

[98] Sz. Navratil, A jogegységi eljárás vizsgálata. Az ellentétes bírósági joggyakorlat felismerése, in: Fleck (note 83), at 149.

[99] Jogegységi Határozatok, available at <http://www.lb.hu/joghat.html>.

third branch became the central element of the concept. The overall judicial reform of 1997 created a strong separation of powers but did not create the guarantees of transparency, efficiency and quality. Thus the most important curb on judicial independence became the unbalanced and uncontrolled system of judicial administration. The administration by judicial council gives a rather negative model: separation and irresponsibility and lack of control measures question the accountability of the judiciary and also the independence of judges.

Though accession to the European Union played a role in the reform of the justice sector, the new model of judicial administration was the result of an internal process. European Union membership as a political aim has pushed politicians to demonstrate the independence, objectivity and efficiency of the judiciary, the clear separation from a past full of political influence. Among these motivations for changing the judicial administration, efficiency turned to be the most important. The new administrative model made in 1997, however, was motivated by inner forces. There are no signs of any European advocacy of judicial self-administration.

During the summer of 2007 a small group of researchers began an empirical study of the Hungarian judicial administration and judicial practice.[100] The aim of this group was to gain an overall picture of the administration of the courts, to analyze the judicial practice of the Supreme Court and the application of constitutional rules, the decisions of the Constitutional Court and the European Court of Justice by the judges of lower courts. In order to portray the organization we used document analysis: all the inner, not open documents (decisions, statistics, preliminary notions, etc.) of the National Judicial Council of Hungary from its inception were examined. This information provided an overall picture of the efficiency of the court administration, and the web of organizational, corporate and some personal interests which effectively hinder any rational central action. Even before this research, the Hungarian version of judicial administration had been criticized for its poor administrative capacity, its inclination to operate in secret, the over-representation of corporate interests, and the fragmentation of administrative ability due to the central role of county-court presidents.[101] Judicial leaders, however, strongly rejected these allegations. This institutional closeness has structural causes, mainly the ill-founded

---

[100] Z. Fleck, Bíróságok Mérlegen I-II, 361, at 393 (2008).

[101] Z. Fleck, Judicial Independence and its Environment, in: J. Priban/P. Roberts/J. Young (eds.), Systems of Justice in Transition, at 121 (2003).

organizational system and insufficient responsibility for judicial administration.

The most important lesson of the Hungarian situation is that a radical administrative change can be a tool for preserving detrimental elements of the unconstitutional past. Independence, efficiency, accountability as guiding principles of judicial reform must be more important than mere organizational autonomy; powers, including judicial power, must be controlled and balanced. The judicial council model in this form cannot fulfil the expectations of the modern rule of law. Future reforms of the judicial system must cure the lack of an efficient central administration. Interest groups and alliances developed in very recent years would obstruct any attempt to eliminate the uncontrolled power of the county court presidents. But without this overall reform effectiveness, transparency, or rational administration could not be achieved.

Changing the membership structure of the Council could be a logical and simple solution. The presidents of the county courts should be barred from election to the NJC by reason of the fact that they are ordered and controlled by the NJC itself. This change, however, would be insufficient according to the experiences of the first decade and by reason of the inherent problems in the structure itself. In continental legal systems as well as in Hungary hierarchy is quite dominant in court circles. It means that there is no difference if instead of a county president one of his employees is elected onto the Council. Under proposed new legislation a two-thirds majority of judges could be required on the Council if some decisions are to be made by qualified majority. This change, however, would prevent the enforcement of the interest of county presidents only a little.

New and *healthy* administration is prevented from developing by these deeply rooted relationships, so we will have to take a more difficult path when we rethink the Council's competences. Checks and balances should be introduced into the judicial system itself, but the situation must be avoided in which the administrative authorities could hinder the independence of judiciary. But it is by no means necessary for each competence to be given to one single body. We do not have to cast the model of inner (judicial) administration aside in order to curtail the Council's authority. Clear European experience emerged that a mixed system with divided competences is more suitable for judicial effectiveness and independence. Judicial councils have authority over the status of judges (selection, promotion, discipline) and the Ministry of Justice is responsible for other administrative issues. The Supreme Court has a constitutional obligation to ensure uniformity of adjudication. In the

present situation in Hungary the National Judicial Council is the only administrative organization, which means that it has full competence over everything; in this case the composition of the council should reflect the different levels of the judiciary and presidents of county and regional court should be excluded. The Supreme Court stands apart from an administrative point of view (the NCJ has no competence over the Supreme Court) and this, together with the fact that its president is at the same time the president of the Council, is quite questionable.

The regional courts (high courts of appeal) should also be integrated into the administrative system. This does not at all mean that the oligarchy of county presidents should be complemented by one of regional presidents. A re-establishing of the powers and competences would require many more changes. A remarkable precedent in England and Wales[102] is that judge-appointing and other kinds of bodies operate as independent institutions with different powers and competences. Such models of shared competences in judicial administration could also inform future reforms in Hungary in an effort to build an efficient, independent and at the same time accountable judiciary.

[102] Constitutional Reform Act 2005.

G. Appendix[103]

The following data on the workload of judges and the basic output of the system provide information on the efficiency of the administration and the overburdening of judges working in some counties. The huge differences in workload created unjust working conditions for judges.

1. Workload of Courts

	New cases			New non-litigious cases	Litigious cases pending by the end of the year			
	Local	county	Sum		Local	county	sum	Litigious cases pending for more than 2 years at local level
1995	319264	16221	335485	441438	178941	23646	202587	12499
2005	321051	31832	390011	837147	156063	31932	187995	11034
2006			384753	958564			183636	11127

2. Number of Judges and State Expenditure for Courts

	Number of judges	State court expenditure in Million forints
1995	2208	9207
2005	2814	64141
2006	2818	64279
2007	2818	70280

[103] Data from: Fleck (note 5).

3. Pending Cases by one Judge – Inequality of Workload

PENDING CASES OF ONE JUDGE IN 2006							
County	Local penal	Local civil	Second instance appealed criminal	Second instance appealed civil	Second level first instance criminal	Second level first instance civil	average
Bács-Kiskun	156,38	140,52	92,78	42,07	9,82	95,52	89,52
Baranya	66,28	105,41	24,97	50,82	12,22	57,91	52,94
BAZ	69,81	120,98	158,35	80,86	24,92	82,68	89,60
Békés	32,32	63,69	53,79	81,96	17,33	55,63	50,79
Csongrád	136,5	94,25	109,56	48,75	32,92	69,82	81,97
Fejér	143,75	152,75	88,19	81,07	36,41	82,4	97,43
Főváros	187,98	172,49	280,5	268,19	41,38	198,49	191,51
Győr-Sopron	142,6	142,89	101,56	109,15	69,17	101,95	111,22
Hajdú-Bihar	150,49	107,3	162,76	102,57	20,91	96,45	106,75
Heves	60,08	103,2	60,92	47,13	11,72	115,04	66,35
Jász-Nagykun-Szolnok	70,55	91,23	94,46	33,91	22,09	63,29	62,59

Komárom-Esztergom	92,8	134,64	137,07	34	29,31	128,57	92,73
Nógrád	102,41	92,12	80	67,71	12,11	91,4	74,29
Pest	216,94	194,49	110	125,72	26,51	187,03	143,45
Somogy	36,57	103,76	65,95	127,37	25,35	99,02	76,34
Szabolcs-Szatmár	87,42	129,39	104,67	61,61	16,5	67,5	77,85
Tolna	39,17	98,34	53,33	30,91	11,59	46,15	46,58
Vas	74,02	95,48	47,04	80,31	13,94	63,38	62,36
Veszprém	110,66	113	179,68	71,55	27,06	94,77	99,45
Zala	72,51	121,24	102,68	125,64	13,26	96,05	88,56
Country average	124,22	136,38	137,57	132,56	26,7	132,82	115,04
Maximum	*216,94*	*194,49*	*280,5*	*268,19*	*69,17*	*198,49*	*191,51*
Minimum	*32,32*	*63,69*	*24,97*	*30,91*	*9,82*	*46,15*	*50,79*
Difference of extreme values	*184,61*	*130,81*	*255,53*	*237,28*	*59*	*152,34*	*140,72*

Judicial Independence in Romania

*Ramona Coman and Cristina Dallara**

A. Introduction

As in many recent democracies of Central and Eastern Europe, in Romania the process of judicial reform and modernization is still ongoing. Judicial reform began *de jure* after the collapse of the communist regime, when a new Constitution (1991) and a new Law on the Organization of the Judiciary (Law no. 92/1992) were adopted. The new democratic Constitution condemned the basic principles of the communist regime "in an attempt to break away from the strong procuracy and weak judiciary that characterized the system under Ceausescu".[1] New constitutional and legislative provisions stipulate that judges shall be independent and subject only to the law. However, in spite of these formal legislative, institutional and constitutional changes, judicial independence was still a myth rather than reality.

After the collapse of communism, the importance of the judicial institutions in the transition process has many times been highlighted by Romanian political elites. But, ten years after the fall of the communist regime, judicial reform, and in particular the independence of the judiciary, has suddenly become the main problem of Romanian democracy

* Although the authors share responsibility for the whole chapter, Ramona Coman wrote paragraphs A, B.I.2, B.II.1, B.II.2, B.II.3, B.III.1, B.III.2, B.III.3, B.IV.1, B.IV.2, B.IV.3, B.V, B.VII.4, B.VIII, B.IX, B.X, C.I, C.II.1, C.II.2, C.II.3, C.III, D.I, D.II, E. Cristina Dallara wrote paragraphs B.I.1, B.VI, B.VII.1, B.VII.2, B.VII.3, B.VII.5, C.II.4, C.IV. Both authors wrote paragraph F.

1 M. J. Trebilcock/R. Daniels, Rule Of Law Reform And Development: Charting the Fragile Path of Progress, at 162 (2008).

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233, DOI 10.1007/978-3-642-28299-7_20,

and the miracle solution to any kind of social, political and economic problems.[2] During the 1990s, several cases of political interference with the judiciary were reported by Romanian newspapers and by various international or Romanian organizations.[3] Even the beginning of the EU enlargement pre-accession strategy in 2000 did not offer sufficient leverage[4] to persuade Romania to go ahead with judicial reform; this, in spite of the European conditionality which, in terms of pressure, was quite strong.[5] Though requiring the Eastern States to adopt extensive structural reforms in order to increase the efficiency of their judicial systems, the European institutions have criticized the acceding countries for the slow pace of the reforms. In its opinion on Romania's application for membership of the European Union, the European Commission pointed out that "the Romanian judicial system is not working satisfactorily".[6] Consequently, it was recommended that a series of measures be adopted in order to reinforce the independence of the judiciary: to ensure "the independence of the judiciary from the executive", and therefore to reduce "the significant influence that the Ministry of Justice has over judicial appointments",[7] "to improve the statute of

---

2 R. Coman, Media, Justice and Politics or how the Independence of the Judiciary Became an Issue on the Romanian Political Agenda, in: R. Coman/J.-M. De Waele (eds.), Judicial Reforms in Central and Eastern European Countries, 157, at 163 (2007).

3 A. Demsorean/S. Parvulescu/B. Vetrici-Soimu, Romania: Vetoed Reforms, Skewed Results, in: A. Magen/L. Morlino (eds.), International Actors, Democratization and the Rule of Law. Anchoring democracy?, 87 (2009); A. E. D. Howard, Judicial Independence in Post-Communist Central and Eastern Europe, in: P. H. Russell/D. M. O'Brien (eds.), Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World, 89 (2001); G. Pridham, Romania and EU membership in comparative perspective: a post accession compliance problem? The case of political conditionality, Perspective on European Politics and Society 168, at 168 (2007).

4 D. Piana, Judicial Accountabilities in New Europe – From Rule of Law to Quality of Justice, at 122 (2009).

5 C. Dallara, Uniunea europeana si promovarea rule of law in Romania, Serbia si Ucraina, Reformele sistemelor judiciare şi politici anticorupţie, at 129 (2009).

6 Commission of the European Communities, Agenda 2000 – Commission Opinion on Romania's Application for Membership of the European Union, DOC/97/18, at 15 (15 July 1997).

7 Commission of the European Communities, Rapport régulier 1999 de la Commission sur les progrès réalisés par la Roumanie sur la voie de l'adhésion,

magistrates and prosecutors", and "to clarify the statute of the National Institute of Magistracy".

In Romania, as in other European countries, *magistrate* is a generic term which refers to both judges and prosecutors. Since the collapse of communism, the powerful role of prosecutors inherited from the communist regime has been maintained. An example which speaks for itself is that during the 1990s, "the Prosecutor general had had the exclusive authority to appeal final judgments passed by courts in criminal trials", "when the courts exceed their jurisdiction".[8] After 1990, the legacies of the past were still present within Romanian society. The confusion between the prosecutors' and judges' roles was maintained, not only in the legal framework but also in judicial culture. Therefore, the long and difficult reform of the judiciary in Romania was a matter of establishing new borders between political, administrative and judicial institutions: the Ministry of Justice (MoJ), the Superior Council of Magistracy, the Public Ministry with regard to the careers, recruitment, and appointment of judges and prosecutors. A new institutional design improving both the independence and accountability of the judiciary was and still is the top priority at the domestic level.

Steps in the attempt to ensure the independence of the Romanian judicial system have been made since 1996.[9] But, according to the president of the Romanian Association of Magistrates, "the 1997 modifications of the law on judicial organization have extended the Minister's role and competence well beyond the administration of justice, offering him out of proportion powers and prerogatives. As the Minister of Justice, who is a member of the government, is a politician, the risk of mixing the political and administrative factors into the judicial activity appears as unavoidable."[10] Only in 2003 was the process of judicial reform partially resumed.[11] A Judicial System Reform Strategy was adopted in September 2003 to comply with the external criticisms from the Euro-

---

at 13 (1999), available at <http://ec.europa.eu/enlargement/archives/pdf/key_documents/1999/romania_fr.pdf>.

[8] M. L. Macovei, The Procuracy and its Problems, East European Constitutional Review No.1/2, at 2 (1999).

[9] Efforts at reform took place under Valeriu Stoica, Minister of Justice and member of the National Liberal Party.

[10] V. Costiniu, Report on the Roundtable discussion on the ABA – CEELI Judicial Reform Index Report from Romania, at 6 (2002).

[11] At that time the executive was run by Adrian Nastase.

pean Union and the European Court of Human Rights.[12] It sought to establish new divisions between the judiciary and the political branches in post-communist Romania. In 2003, the main concerns of the magistrates were the authority of the Ministry of Justice over the selection, promotion and evaluation of judges, the "provisions allowing politicians and senior bureaucrats to be appointed judges without passing standard examination,"[13] as well as the "poor working conditions,"[14] and the "political pressures". The main structural issues affecting the independence of the judiciary were the lack of separation of powers, of financial autonomy of courts, the involvement of the executive in the appointment and promotion of judges, and the lack of a legal culture.[15] International, European and domestic actors continued to criticize the supervisory powers of the Ministry of Justice over the judiciary and to require the consolidation of an old Romanian institution, founded in 1909 and recreated in 1991: the Superior Council of Magistracy.

The Romanian governmental authorities, in spite of their willingness to join the European Union, failed to progress in this field or to pass significant pieces of legislation relating to judicial independence. The Romanian Constitution institutionalized a powerful Superior Council of Magistracy in charge of the careers, appointment, promotion and evaluation of magistrates, but *de facto* all these competences were by the Ministry of Justice. From the adoption of the first post-communist Law on the Organization of the Judiciary in 1992 until the adoption, in 2004, of a new legal framework for judicial organization, the status of judges and prosecutors and the Superior Council of Magistracy, the political debate within the Romanian Parliament was dominated by those who believed that the Ministry of Justice and the Superior Council of Magistracy should have shared powers with regard to the careers of magistrates.[16]

---

[12] See e.g. the Judgment of the European Court of Human Rights of 28 September 1999 in the case of *Dalban* v. *Romania* which found a violation of Article 6 of the European Convention; see ECtHR, *Dalban* v. *Romania*, Judgment of 28 September 1999, RJD 1999-VI.

[13] Open Society Institute, Judicial Capacity in Romania, at 171 (2002).

[14] C. Danilet, Dinauntru – din viata unui judecator care asteapta reforma, Dilema Veche, at 2 (2004).

[15] Open Society Institute, Monitoring the EU Accession Process: Judicial Independence, at 358 (2001).

[16] R. Coman, La carrière publique de la consolidation des garanties d'indépendance de la justice. Un phénomène social et politique dans la Roumanie

The lack of any real political commitment and the quarrels among major political leaders slowed the process.[17] In 2003, because of the timetable of accession to the EU, the Judicial Reform Strategy included some organizational changes in the structure of the Superior Council of Magistracy: the extension of the mandate of the members of the Superior Council of Magistracy from four to six years and the inclusion of two additional members representing civil society. However, the Judicial Reform Strategy, appreciated by the European Commission, failed to achieve the expected results relating to the independence of the judiciary.[18]

A turning point occurred when a package of laws (Laws on the Superior Council of Magistracy, Law on the Organization of the Judiciary and Law on the Statute of Magistrates) was enacted in June 2004, following the amendment of the Romanian Constitution in 2003. The new rules amending the Law on the Organization of the Judiciary (Law no. 92/1992) aimed at transferring to the Superior Council of Magistracy most of the competences previously exercised by the Ministry of Justice. The new Minister of Justice took various initiatives concerning judicial reform, including making further changes concerning the National Anticorruption Department and the creation of a National Integrity Agency to verify the source of MPs' and ministers' assets. These initiatives were perceived by the European Commission as a real commitment to fighting corruption and preserving the independence of the judiciary.[19] However, despite the executive's initiative, in 2005 judicial reform seemed to fail because of the resistance of the Constitutional Court and the Superior Council of Magistracy.[20] Following consultation with stakeholders a revision of the so-called three-law package on justice reform (Laws on the Superior Council of the Magistracy, on the

---

post-communiste, doctoral thesis, Université libre de Bruxelles, at 299-305 (2008).

17 Until the end of 2004, the domestic response to the European pressure remained entrapped in the political conflicts rooted in the personal fighting among prominent leaders. Demsorean/Parvulescu/Vetrici-Soimu (note 3), at 87.

18 Piana (note 4); Dallara (note 5), at 129.

19 Commission of the European Communities, Romania 2005 Comprehensive Monitoring Report, SEC (2005) 1354, at 10 (2005), available at <http://ec.europa.eu/enlargement/archives/pdf/key_documents/2005/sec1354_cmr_master_ro_college_en.pdf>.

20 Dallara (note 5), at 140; Demsorean/Parvulescu/Vetrici-Soimu (note 3), at 92.

Organization of the Judiciary and on the Statute of Magistrates) was submitted by the Government to Parliament in June 2005 and adopted after a vote of confidence. In early July, the Constitutional Court issued a controversial majority ruling that four articles were unconstitutional. At the end of 2005, the three-law package was finally enacted, although lacking some important amendments annulled by the Constitutional Court.[21] Approval of the laws was appreciated by the European Commission. At the end of the 2006, the EU concluded that Romania was moving in the right direction[22] – notwithstanding some persistent problem with the implementation of the approved laws – and agreed on accession for January 2007. According to the European Commission, the three laws contain "many positive elements, and the legal framework now offers sufficient guarantees for magistrates' personal and institutional independence".[23]

However, after 2007, judicial reform stalled for political reasons.[24] With EU accession, one of the most powerful incentives for judicial reform was lost,[25] so that the will for judicial reform dramatically decreased.[26] EU accession at least initiated the legislative reforms. In the current implementation stage this incentive is less compelling.[27] At the European level, Romanian judicial reform is still a priority. Although there have been some positive signals in this field, results are difficult to demon-

---

21 Dallara (note 5), at 143.

22 Commission of the European Communities (note 19), at 10.

23 Id.

24 The frequent change of Minister of Justice between April 2007 and the end of 2008 and the alleged involvement of many political leaders in corruption contributed to the stalling of judicial reform.

25 American Bar Association, Promoting the rule of law – United States Agency for International Development (USAID) – Romania, Final report (2008).

26 Piana (note 4); Dallara (note 5); Pridham (note 3), at 168.

27 In addition, since Romania is a Member State of the EU, political elites are sceptical about external interventions and about EU powers and critiques relating to the Romanian problems. Commission of the European Communities, Decision of 13 December 2006 establishing a mechanism for co-operation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, C (2006) 6569 final.

strate.[28] In 2008, Romanian civil society complained about the political inferences in the activity of the judiciary and about the ineffectiveness of the Superior Council of Magistracy.[29]

Judicial reform in Romania is a complex issue. Thus, the aim of this chapter is modest. Our intention is less to evaluate the functioning of the judicial institutions than to offer a comprehensive picture of the main changes and the current difficulties that exist relating to the independence of the judiciary in a post-communist democracy.

B. Structural Safeguards

I. Administration of the Judiciary

1. The Romanian Judiciary

The Romanian judiciary is organized on four levels of courts: local courts, tribunals (at the county level), courts of appeal and a High Court of Cassation and Justice. Judgments of the court of first instance can be appealed on facts and on law. According to the Constitution (Article 126(3)) the High Court of Cassation and Justice shall procure the unitary interpretation and implementation of the law by the other courts of law, according to its competence. There is also a Constitutional Court in Romania which has a two-fold jurisdiction: the examination of laws before their promulgation by the President, and the examination of laws already in force when their constitutionality is challenged before ordinary courts. Specialized courts have been set up to handle matters relating to minors and family, commercial, administrative-fiscal, labour and social insurance issues.

Nowadays, the following courts are in place in the country:

---

[28] European Commission, Interim Report from the European Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism, COM(2010)113 final, at 2 (2010).

[29] Trust for civil society in Central and Eastern Europe, Initiativa pentru o justitie curata. Raport privind starea justitiei si lupa impotriva coruptiei/Initiative for a clean justice. Report on the state of the judiciary and the fight against corruption, at 10 (2008).

– 188 first instance courts,
– 42 tribunals (with full competences, one in each district and one in Bucharest),
– three tribunals for commercial matters,
– one tribunal for family and juveniles matters,
– 15 courts of appeal.

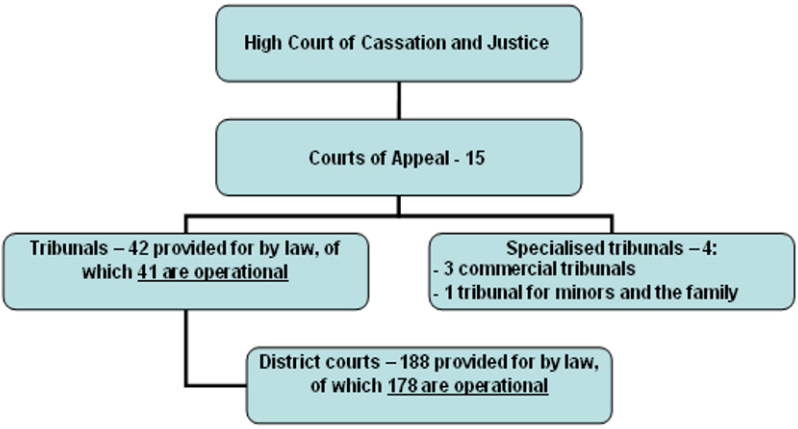


Figure 1:[30] The organization of justice in Romania

The courts of first instance have general jurisdiction. A decision handed down at the level of courts of first instance may be challenged on appeal at the next court level. The means of judicial review regulated by law are: first instance, appeal and second appeal (*recurs*).

[30] European Judicial Network, Organisation of justice – Romania, 21 September 2007, available at <http://ec.europa.eu/civiljustice/org_justice/org_justice_rom_en.htm>.

The Civil Procedure Code[31] provides only one appeal for cases involving small value claims. Whereas, for complex cases, one appeal may be brought on matters pertaining to the facts of the case and the interpretation of the law, a second appeal is allowed only on matters of law. Within the courts of appeal, tribunals, and some first instance courts with a high volume of activity there are specialized sections and panels for civil, commercial[32] and criminal matters, juvenile offenders, administrative and fiscal, labour and insurances cases.[33]

The following elements of judicial independence are guaranteed by both the Constitution and the laws on the judiciary: Judges are independent and obey only the law. All career decisions regarding judges are made by an independent body, the Superior Council of Magistracy. The judges decide on their own competence to try cases. Only courts may review court decisions.[34]

2. The Administration of the Judiciary

a) The Role of the Ministry of Justice

The 1991 Romanian Constitution recreated the Superior Council of Magistracy as a central institution for the administration of the judiciary. It is formally in charge of appointing, promoting, and dismissing magistrates. But despite the new constitutional and legislative provisions, in practice the Ministry of Justice fulfilled most of the functions of the Superior Council of Magistracy, which did not exercise its competences effectively during the first decade after the collapse of communism. While the Constitution was a step forward in establishing a new, democratic, institutional framework, the Law on the Organization of the Judiciary – adopted in 1992 – effectively represented a setback. Though the statute which regulated the relationship between the Minister of Justice and the Superior Council of Magistracy nominally reiterated the constitutional principle of judicial independence, it effectively

---

31 *Codul de Procedura Civila al Romaniei* (Civil Procedure Code of Romania), enacted on 26 July 1993 and modified with the emergency ordinance nr. 42/2009 titled "Modifies to the Civil procedure code".

32 Including bankruptcy.

33 European Commission for the Efficiency of Justice (CEPEJ), Scheme for Evaluating Judicial Systems: Romania, (2007), available at <http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2008/romania_en.pdf>.

34 Title III Chapter VI Section 1 Arts. 124-130 Constitution of Romania.

denied it.[35] It introduced a transitional period before the Superior Council of Magistracy could start to fulfil its functions. This transitional period allowed the Ministry of Justice to keep all its administrative and disciplinary powers, inherited from the pre-communist period and develop its practices accordingly.

In 2004, when the Law on the Organization of the Judiciary was amended, this balance of power was reversed so that the powers of the Ministry are now significantly reduced. Since then, the Ministry of Justice has had only the competence to administer the judiciary as a public service, ensuring its good organization and providing the budgetary resources. The overall courts' budget is administered by the Ministry. The following institutions function under the authority of the Ministry of Justice: the National Administration of Penitentiaries, probation services, the National Trade Register Office and the National Institute for Forensic Expertise.

b) Judicial Council (*Consiliul Superior al Magistraturii*)

Created in 1992, the Superior Council of Magistracy is the institution in charge of guaranteeing the independence of the judiciary, being the only body competent with regard to the careers of judges and prosecutors in terms of appointment, professional evaluation, promotion, disciplinary sanctioning and dismissal from office. A judge or prosecutor who considers that his/her independence, impartiality or professional reputation is being affected in any manner, may address the Superior Council of Magistracy. At present, the laws ensuring the proper functioning of the Superior Council of Magistracy and of the judiciary are the Romanian Constitution of 1991 (as amended in 2003); Law no. 303/2004 on the Status of Judges and Prosecutors, as amended by Law no. 247/2005 and as amended by the Government Emergency Ordinance no. 100/2007 and subsequently by Law no. 97/2008; Law no. 304/2004 on the Organization of the Judiciary, as amended by Law no. 247/2005; Law no. 317/2004 on the Superior Council of Magistracy, as amended by Law no. 247/2005.

One of the major changes of the 2004 reform is that the Superior Council of Magistracy now functions as a full-time body. It is composed of 19 members: nine judges and five prosecutors, elected by the general as-

[35] R. Coman, Reforming the Judiciary in a Post-communist democracy, communication presented at the Istituto di Ricerca sui Sistemi Giudiziari, (December 2009).

semblies of judges and prosecutors, two representatives of civil society and three *de jure* members – the President of the High Court of Cassation and Justice, the Minister of Justice and the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice (*Parchetul pe langa Inalta Curte de Casatie si Justitie*). The president and vice-president of the Superior Council of Magistracy do not exercise their role as a judge or prosecutor during their one year term of office. The members of the Superior Council of Magistracy do not act as judge or prosecutor in court rooms. All members of the Superior Council of Magistracy (the elected magistrates) will be full-time from 2010.

The Superior Council of Magistracy ensures professional competence and the observance of professional ethics in the course of the professional careers of judges and prosecutors. It also co-ordinates the activity of the National Institute of Magistracy (NIM) and of the National Court Clerk School. The Superior Council of Magistracy has two sections: one for judges and one for prosecutors. These sections function as courts for judges and prosecutors to try disciplinary breaches of duty. When the Superior Council of Magistracy acts in this capacity, the Minister of Justice has no right to vote. The Council's functions are divided between the Plenum and different Sections. While the Plenum is competent with respect to evaluation, recruitment, training, examination, the judicial code of ethics, and the functioning and organization of the courts and prosecutors' offices, the sections are mostly concerned with magistrates' careers.

Disciplinary action against judges is exercised by disciplinary boards of the Superior Council of Magistracy, composed of one member of the Superior Council of Magistracy Section for Judges and two inspectors from the Service of Judicial Inspection for Judges, which is also a section of the Superior Council of Magistracy. For disciplinary action against prosecutors the disciplinary board is composed of one member of the Superior Council of Magistracy Section for Prosecutors and two inspectors from the Service of Judicial Inspection for Prosecutors, which is also a service in the Superior Council of Magistracy. In sum, the Plenum of the Superior Council of Magistracy proposes to the President of Romania the appointment and removal from office of judges and prosecutors, except for junior judges and prosecutors; appoints junior judges and prosecutors; is concerned with the promotion of judges and prosecutors; has the right to remove junior judges and prosecutors from office and fulfils any other duties laid down by laws and regulations.

In 2008, the Plenum of the Superior Council of Magistracy had 36 sessions and issued 1,495 decisions, relating mainly to admission to magistracy, evaluation, training and examinations relating to judges' and prosecutors' careers, the organization and operation of courts and prosecutors' offices, the activity of the Superior Council of Magistracy, the NIM and the National School of Clerks adoption.[36]

However, in spite of the quite well-developed legislative framework, the Superior Council of Magistracy is a much disputed institution in Romania. In this respect, the European Commission noted that the Superior Council of Magistracy "has not yet consistently exercised its full mandate, notably as regards pro-active investigations into disciplinary cases". "The Superior Council of Magistracy is slow in coming to management and disciplinary decisions. The sanctions imposed are often "inconsequential."[37] Therefore, the Council "has to take steps to foster the transparency and efficiency of the judiciary and to improve its own accountability". From the Commission's point of view, the Council still needs to develop "credibility with the judiciary by offering sustainable solutions to staffing and management deficiencies".[38]

In early 2010, the members of the Superior Council of Magistracy elected a new president of the institution. Judges and prosecutors overwhelmingly voted as their new leader for Judge Florica Bejinaru, from Mehedinti Courthouse, who was accused by the former Minister of Justice, Monica Macovei, of having been a collaborator with the communist secret police. Her election is being challenged by the Romanian Magistrates' Association. Both the Romanian Magistrates' Association and the National Judges' Union declared that Florica Bejinaru does not have the moral right to lead the Council. Some domestic NGOs contested the results of the elections within the Superior Council.

A new Superior Council of Magistracy has taken office in January 2011. In its annual Report, the European Commission highlighted that "pro-

---

[36] Superior Council of Magistracy, Raport privind activitatea Consiliului Superior al Magistraturii în anul 2008/Activity Report of the Superior Council of Magistracy in 2008, at 4 (2008).

[37] Commission of the European Communities, Rapport de la Commission au Parlement européen et au Conseil sur les progrès réalisés par la Roumanie au titre du mécanisme de coopération et de vérification, COM(2008) 494 final, at 4 (2008).

[38] Id., at 5. See also Commission of the European Communities, Report on Progress in Romania under the Co-operation and Verification Mechanism, COM (2010) 401 final, at 3-4 (2010).

gress in a number of areas relevant for the Co-operation and Verification Mechanism will depend on the Council's commitment to judicial reform during the next period".[39] Its full establishment is delayed pending legal challenges and partial re-elections. The Council started its activity with 16 members only.

II. Selection, Appointment and Reappointment of Judges

Generally speaking, judges and prosecutors are recruited from legal professionals who, after the completion of their law studies, are required to complete specialized studies at the National Institute of Magistracy and are appointed on the basis of the results of their graduation from that institution.

1. Eligibility and Training of Judges

According to Law no. 303/2004 on the Status of Judges and Prosecutors, the admission of judges and prosecutors to the magistracy takes place by way of competitive examination, based on professional competence, aptitude and good reputation. Candidates must be bachelors of law. Aptitude, knowledge and competences are tested in several consecutive exams from admission to the NIM through graduation to completion of probation. The tests of the examination are meant to select candidates with the following competences: a good knowledge of the main law branches and institutions; the capacity to interpret and apply legal provisions; and a logical, structured way of thinking.

Persons applying for admission to the NIM have to meet the following formal requirements for eligibility: Romanian citizenship; permanent residence in the country; full legal capacity; a bachelor of law degree; no criminal or fiscal record; the medical and psychological ability to exercise these offices and proficiency in the Romanian language. Among the professionals who are eligible are lawyers, notaries, legal advisers, and legal staff working with the Parliament, Presidential Administration,

[39] European Commission, Report from the Commission to the European Parliament and the Council on progress in Romania under the Co-operation and Verification Mechanism, COM(2011) 460 final, at 5 (2011).

Government, Constitutional Court, Ombudsman, Court of Auditors or Legislative Council with at least five years' seniority.[40]

The Superior Council of Magistracy, through the National Institute of the Magistracy, organizes the following competitions and exams: the competition for selection of magistrates; the capacity exam for judges and prosecutors after probation; the promotion exam for executive positions for judges and prosecutors; the exam for appointments of appeals judges and presidents of courts and prosecutors at the level of tribunals, court of appeal, as well as the Public prosecutors' offices affiliated to them; the exam for leading positions for judges and prosecutors at the level of first instance courts and the prosecutors' offices affiliated to them.

The selection process is composed of three main phases. The first step is admission to the National Institute of the Magistracy (NIM), the second is the graduation of technical and practical exams after the completion of studies at the NIM, and the third is the capacity examination. An alternative way to enter the magistracy is by competitive examination, organized in exceptional circumstances when there are not enough sitting magistrates.

The admission test consists of a series of questions (100) on civil law, civil procedure law, criminal law, criminal procedure law, judicial organization and the case law of the European Court of Human Rights. The second part of the competition is focused on logic reasoning while the last part takes the form of an interview by which the selection committee tests the aptitude and motivation of the candidates as well as their views on aspects relating to the profession's code of ethics. To pass the exam, candidates have to achieve a minimum 8.00 average (the maximum average being 10.00) and to have in each of the four subjects a mark of no less than 5. Candidates are admitted according to the number of places available and in decreasing order of the averages achieved. The competitive exam for admission is held annually on the date and at the location set by the National Institute of the Magistracy, with the approval of the Superior Council of Magistracy. The admissions board, the board which draws up the subjects and the board which considers objections are all appointed by the Superior Council of Magistracy, upon a proposal from the NIM (Article 15(5) Law no. 303/2004). At

[40] Council of Europe, Questionnaire "B" on the Role of Training Institutions in Recruitment and Initial Training of Judges and Prosecutors: Reply by Romania, at 1, available at <http://www.coe.int/t/dghl/cooperation/lisbonnetwork/questionnaires/Romania-reply-B.pdf>.

the end of the two-year study programme at the institute the *auditors of justice*[41] pass a theoretical and practical final exam verifying whether the knowledge necessary for discharging the office of judge or prosecutor has been acquired.

Those who have graduated from the National Institute of the Magistracy are appointed by the Superior Council of Magistracy to the position of junior judges and junior prosecutors, based on their general average marks, obtained by adding the three average marks from the end of each year of study and from the examination for graduation from the NIM (Article 21(1) Law no. 303/2004). The graduates of the NIM are obliged to work for a period of six years as judges or prosecutors (Article 20) in exchange for their training. They may be appointed only to first instance courts or, as the case may be, to the prosecutors' offices affiliated to those (Article 21(2)).

During the one year probationary period judges or prosecutors who are in charge of co-ordinating junior judges or, as the case may be, junior prosecutors shall draw up quarterly individual evaluation reports on the acquisition of practical knowledge specific for the activity of judge or prosecutor. This report is required and taken into account when candidates present for the capacity exam which follows the probationary period. It aims to test theoretical and practical knowledge, by both written and oral examination. Theoretical tests aim to examine knowledge of the Romanian constitutional order, the main legal institutions, the functioning of the judiciary and its institutional setting as well as the Code of Ethics for judges and prosecutors. The practical examination is focused on specific legal cases which candidates should be able to resolve.

Before the reform of 2004, the work of the NIM was strongly criticized by both candidates and international organizations. At that time, the work of the Institute was subordinated to the Ministry of Justice (MoJ).

[41] Candidates who pass the NIM exam.

Candidates for the NIM and Romanian journalists complained about flaws in the capacity exams, about the topics for examination, the material conditions and corruption.[42] After 2004, the organization of the NIM changed. According to one author, "the Institute lived a radical transformation, when it was shifted from the control of the MoJ to the control of the Superior Council of Magistracy".[43] Formerly an executive-based institute, it then became an independent institute, linked to the Council.

2. The Process of Judicial Selection

In Romania, as in many European States, the Superior Council of Magistracy plays an important role in the process of recruitment of judges and prosecutors. Judges and prosecutors who pass the capacity examination are appointed by the President of Romania, on a proposal from the Superior Council of Magistracy. This is a non-discretionary process which depends only on the grade obtained in graduation. As described above, admission to the magistracy and initial professional training for the office of judge or prosecutor is entrusted to the NIM, with the approval of the Superior Council of Magistracy. The Superior Council of Magistracy decides annually on the number of trainees to be taken on by the NIM, taking into account the number of vacancies for judge and prosecutor positions as well as of new posts to be set up (Article 15(4) Law no. 303/2004). The competitive examination for admission to the NIM takes place annually in the August – September period.

Since the entry into force of the new laws on the independence of the judiciary, the NIM, the Superior Council of Magistracy and, if required by the new rules, the Ministry of Justice keep candidates informed about the rules and requirements of the competitions organized.

---

[42] ZIUA, INM, cuibusor de spagi centralizate, (13 August 2001).

[43] Piana (note 4), at 153.

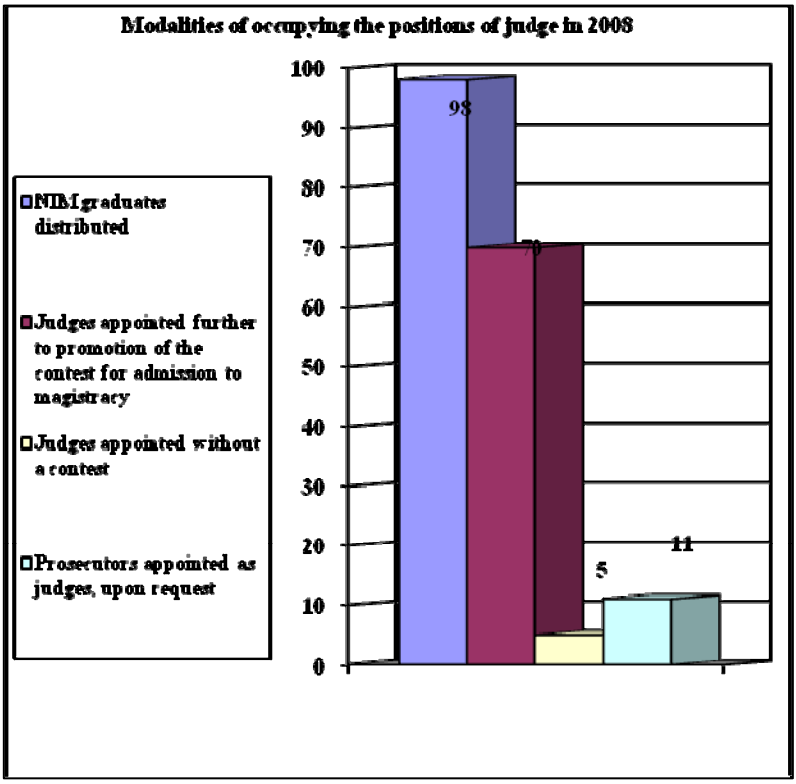


Figure 2[44]

However, the competitions organized by the NIM have been criticized both before and after the adoption of the new laws on the independence of the judiciary. In a report evaluating the state of the judiciary in Romania in 2006, the Society for Justice (SoJust) – a large Romanian association including judges, students, and members of the academic community – listed a series of problems related to the practical organization

[44] Raport Privind Activitatea Instanţelor de judecată în anul 2008, at 43 (2008), available at <http://www.csm1909.ro/csm/linkuri/11_01_2010__29650_ro.doc>.

of the exams, the content of the bibliography,[45] to the opacity of the psychological criteria and the refusal of the president of the Superior Council to publish the results of the psychological test.[46] Another problem highlighted both by the Ministry of Justice before 2004 and by representatives of magistrate members of SoJust is the gap between the need of the judicial system in Romania for new judges and prosecutors and the small number of bachelors of law able to pass the competitions required for admission to the magistracy.[47] Another point of criticism on which the representatives of SoJust focused relates to the selection criterion of "good reputation", as the meaning of this word lacks clarity. Even if the candidates are invited to prove their "good reputation", the members of the Society for Justice consider that it is impossible to verify the information provided.

A new transparent and objective procedure has been drawn up by the NIM based on: transparency/publicity, objectivity, independence from political criteria, and the involvement of trainers and auditors of justice in the decision-making process. The selection procedure publicizes the intention to recruit trainers by advertising in central newspapers and posting advertisements on the NIM website, the creation, by decision of the NIM Scientific Council, of a candidate selection commission made up of one of the NIM directors, an NIM trainer, the NIM educational sciences/pedagogy specialist and a representative of NIM graduates (for full-time trainers).[48]

Most of the problems complained of by candidates and presented in a Report produced by the Society for Justice[49] – irregularities concerning examination topics, the bibliography, the exam questions, organizational matters – have been resolved by the Superior Council of Magistracy. The work of the National Institute of the Magistracy is improving as both the Institute and the Superior Council of Magistracy try to resolve the irregularities constantly complained of by candidates.

Legal provisions on equal opportunities between women and men exist both in the Romanian Constitution and in ordinary legislation such as

---

45 I.e. a list of works, books, and articles the candidates need to know for the exams.

46 Society for Justice (SoJust), The Justice System in Romania, Independent report (September 2006).

47 Id.

48 Council of Europe (note 40).

49 SoJust (note 46), at 119.

in the Labour Code.[50] Concerning gender representation, in 2005, according to the statistics provided by the Superior Council of Magistracy, the number of judges was estimated at 3,988 (70% women) and 2,129 prosecutors (55% men).[51] In its 2002 report on judicial reform in Romania the American Bar Association pointed out that "although women make up more than fifty percent of the judiciary, there is some evidence to suggest that they are proportionally underrepresented in leadership positions."[52] The ABA report also stated that "ethnic minorities are apparently underrepresented in the judiciary."[53] In 2005, a regulation adopted by the Superior Council of Magistracy with respect to examinations for the promotion of judges and prosecutors provided that in a constituency where a minority represents 50% of the population, priority would be given to candidates who knew the language spoken by the majority of the population of the constituency.[54]

3. Length of Office and Reappointment

After the probation period and successful completion of the capacity exam judges are appointed to permanent positions without the need for reappointment.

III. Tenure and Promotion

1. Tenure

The probationary period for judges is one year. It is intended to develop their practical skills and serves as a basis for their final evaluation.[55] During this period junior judges take on the responsibility of or-

---

[50] Romania Labour Code (*Codul muncii*) Law no. 53/2003 as amended by the Government Emergency ordinance no. 100/2007 and subsequently by Law no. 97/200.

[51] Superior Council of Magistracy, press release (2005).

[52] American Bar Association, Judicial Reform Index for Romania, at 10 (2002), available at <http://www.abanet.org/rol/publications/romania_jri_2002.pdf>.

[53] Id.

[54] Article 30(6) Law no. 303/2004 on the Status of Judges and Prosecutors.

[55] On the probationary period and the ensuing capacity exam see also *supra* B. II. 1. Eligibility and Training of Judges.

dinary judges at the lower level courts. The probationary period ends with the capacity exam which determines their final appointment. With their appointment judges in Romania then obtain life time tenure. They retain their positions until the mandatory retirement age which will be discussed below (see *infra* B. IV. 3. Retirement). However a judge or a prosecutor may be suspended when criminal action has been initiated against him or if he suffers from mental illness. According to Article 65 Law no. 303/2004, judges can be removed from office in the event of resignation, retirement, transfer, professional incapacity, and disciplinary sanction, or the final conviction of a judge or prosecutor for an offence. The removal from office of judges and prosecutors shall be ordained by decree of the President of Romania, on a proposal from the Superior Council of Magistracy.

2. Promotion

The question of promotion within the magistracy was a matter of concern before 2004, and was constantly being brought up by the Romanian Association of Magistrates. For years, higher positions had been filled without there being a genuine selection process, the main grounds for selection being subjectivity (on a political basis in particular). Now, according to the relevant legal provisions,[56] promotion is based on objective factors such as professional qualifications and experience. Judges and prosecutors who meet the minimum requirements of length of service in the magistracy,[57] who were rated *very good* at the last evaluation, and have not been the subject of disciplinary sanction in the past three

[56] Superior Council of Magistracy (SCM) Decision no. 621 of September 2006, published in the Official Journal, part I no. 825, 6 October 2006.

[57] According to Article 5(1) of the Regulation on magistrates' promotion to executive offices, adopted by the Superior Council of Magistracy (SCM) Decision no. 621 of September 2006, published in the Official Journal, part I no. 825, 6 October 2006, judges and prosecutors should meet the following minimum requirements of length of service: a) 5 years' service in the office of judge or prosecutor for promotion as judge in a tribunal or specialized tribunal and prosecutor in a prosecutor's office attached to a tribunal or specialized tribunal; b) 6 years' service in the office of judge or prosecutor for promotion as judge in a court of appeal and as prosecutor in a prosecutor's office attached to it; c) 8 years' service in the office of judge or prosecutor for promotion as prosecutor in the Prosecutor's Office attached to the High Court of Cassation and Justice. When calculating the length of service, the period when a judge or prosecutor was a practising lawyer shall also be taken into account.

years may participate in the exam for promotion to vacant executive offices. A report from 2006 produced by SoJust states that once the system changed, major difficulties appeared. For instance, at present, there is a certain parallelism: some courts have judges who have passed complex tests – management, human resources and communication – others judges whose abilities have not been tested. "At the beginning of 2008, 140 leading positions (president and vice president) were vacant at local courts, tribunals, specialized tribunals, courts of appeal and the Military Court of Appeal."[58]

3. In-Service Training

According to Piana "the Romanian judicial training has been institutionalized, when the National Institute for Magistrates was created. The programs of initial and in-service training exhibit an impressive modernization. They included the bulk of the Roman civil law tradition (substantial and procedural law), several courses on EC law and on the European Court of Human Rights jurisprudence, together with a course delivered each year since the 2004 on media e communication."[59]

Therefore, besides the general obligation on magistrates to participate in a type of training, the Law on the Status of Judges and Prosecutors (Law no. 303/2004) provides for two situations in which in-service training is compulsory: the first concerns magistrates who are rated *unsatisfactory* or those who are rated *satisfactory* in two consecutive evaluations, who are required for a period of three to six months to attend special courses organized at the NIM (Article 41(1)-(2)); the second concerns magistrates who are appointed to the profession by competitive examination for admission to the magistracy (Article 33(13)).[60] Consequently, the law on the status of magistrates provides that, after being appointed magistrates, the former candidates for the magistracy are required to attend, for six months an in-service training course at the NIM. Apart from these particular situations, training is also compulsory for magistrates who are going to work for a specialized court.

---

[58] Superior Council of Magistracy (note 36), at 30.

[59] Piana (note 4), at 78.

[60] Council of Europe, Questionnaire "C" the Role of Training Institutions in the In-Service Training of Judges and Public Prosecutors: Reply by Romania, at 1, available at <http://www.coe.int/t/dghl/cooperation/lisbonnetwork/questionnaires/Romania-reply-C.pdf>.

The reform of the Romanian judicial system presupposes the creation of specialized courts in the fields of commercial law, administrative and fiscal law, labour law, and that of justice for minors and family law. The magistrates who are to work in such courts will be required to participate in a special training programme at the NIM.[61]

In-service training is carried out by combining several methods/types of training. On the one hand, there are in-service training seminars, conferences, workshops in which there is a direct interaction between NIM trainers and the participating magistrates.[62] On the other hand, for financial reasons the NIM has conceived other types of training to replace or complement classic ones, responding to magistrates' professional development needs or wishes. New solutions, such as: distance learning, posting training materials on the NIM website, the NIM printing manuals and other publications and distributing them to magistrates, the creation of discussion forums, etc., have been found and applied.[63]

In 2004, the NIM organized 112 in-service training seminars for 1,460 magistrates, in the following fields: commercial law (20), justice for minors (6), labour law (15), the European Convention on Human Rights (10), administrative and fiscal law (4), criminal law and criminal procedure law (19), competition law (5), environmental law (1), ethics and deontology (10), the relationship between magistrates and the mass media (1), intellectual property (2), judicial co-operation (4), EC law (10), Law no. 544/2001 concerning access to public interest information (2), the training of trainers (2) and teaching skills (1).[64]

IV. Remuneration

1. Remuneration

For the work they do, judges and prosecutors are entitled to remuneration laid down in relation to the level of the court or of the prosecutor's office, to the office held, to the length of service in the magistracy and to other criteria provided in the law. The salaries and bonuses of judges

---

61 Id.

62 Id.

63 Id.

64 Id.

and prosecutors are laid down by a special law adopted by the Romanian Parliament or another legislative act. Article 1 Law no. 50/1996 on magistrates' salaries provides that salaries are fixed taking into account "the role, the responsibility, the social importance, the complexity, and the specificity of each job, as well as magistrates' education and the proficiency."

The amount of remuneration of the magistrates was one of the main issues discussed in the Romanian Parliament after the collapse of communism. Even though judicial salaries have been considered high compared with those for other public functions, salaries of judges lagged behind those granted to members of the executive and of the parliament. In addition, judges' salaries were no longer considered competitive compared to those of other governmental sectors once the Government raised the salaries of mayors, prefects and members of the Parliament. Because of this, one of the main problems faced by the Romanian magistracy in the 1990s was that many judges and prosecutors left the magistracy for better paid jobs. Beginning in 1996 (Law no. 50/1996 of 21 June 1996), salaries were increased in several stages, magistrates being "the best remunerated personnel working for a public institution in Romania."[65]

In 1997, in order to counter corruption and increase the prestige of the profession, the Romanian government increased salaries for judges. In April 2005, the salaries of magistrates were increased by 8%.[66] In 2006, the *gross annual salary* of a first instance judge/public prosecutor at the beginning of his/her career (with in-service experience of zero to six months) was approx. 4,056 EUR while the gross annually salary of a judge of the Supreme Court or of the highest appellate court was between 17,653 EUR and 20,152 EUR.[67] In 2009, the president of the High Court of Cassation and Justice earned 6,500 EUR a month (including benefits), while the minimum wage was 263 EUR a month and a junior judge earned as much as a senior hospital doctor (600 EUR).[68]

---

[65] Demsorean/Parvulescu/Vetrici-Soimu (note 3), at 96.

[66] European Commission for the Efficiency of Justice (CEPEJ), Answer to the Revised Scheme for Evaluating Judicial Systems 2004 Data: Romania, (2006), available at <http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2006/Romania.pdf>.

[67] Id., at 27.

[68] The Financial Times, State has few options in face of judges' strike, 28 September 2009.

In 2009, salaries within the magistracy were still a matter of concern for the Romanian political representatives.[69] The Romanian President and the former Prime Minister, however, declared that magistrates' salaries were "offensive".[70] The President of the Superior Council of Magistracy in 2009, on behalf of judges and prosecutors, without requiring any "privileges", demanded "compensation for all the obligations, incompatibilities, prohibitions and a decent salary status to ensure their independence".[71] The same year the Minister of Justice admitted that the Ministry was in debt to magistrates to the tune of some 300 million EUR.[72] According to his declaration, salaries could not be paid because the agreement between Romania and the International Monetary Fund on new debts would be endangered if they were. In this context, in June 2009, the President refused to pass the government's emergency ordinance granting various increases in salaries to judicial personnel. The president sent the law back to Parliament for re-examination because of the current financial crisis and stated that he preferred the payment of these amounts to be suspended.[73] The decision was heavily criticized by the head of the Romanian Magistrates' Association who feared that legal authority in Romania would be discredited.[74]

---

[69] Criticism in this respect was expressed as early as in 2006 by the main Romanian political parties.

[70] Antena 3, Basescu intoarce la Parlament sporirea salariilor magistratilor, 5 June 2009; Mediafax, Basescu: Cresterea salariilor magistratilor prin hotarare judecatoreasca este un abuz, 8 January 2009.

[71] Press Release of Judge Viorel Andreies, President of the Superior Council of Magistracy, 13 May 2009.

[72] NewIn, Ministerul Justitiei este dator magistratilor 300 de milioane de euro, 14 April 2009, available at <http://www.realitatea.net/catalin-predoiu---ministerul-justitiei-este-dator-magistratilor-cu-300-de-milioane-de-euro_495992.html>.

[73] Nine O'Clock, press releases: The shades of discrimination, 31 June 2009, available at <http://www.nineoclock.ro/index.php?issue=4663&page=detalii&categorie=frontpage&id=20090531-501428>; Single law, yet discriminating, 26 April 2009, available at <http://www.nineoclock.ro/index.php?issue=4663&page=detalii&categorie=frontpage&id=20090426-501404>; Anomalies, 14 July 2009, available at <http://www.nineoclock.ro/index.php?issue=4663&page=detalii&categorie=frontpage&id=20090714-501459>; Assuming the discord, 14 September 2009, available at <http://www.nineoclock.ro/index.php?issue=4663&page=detalii&categorie=frontpage&id=20090914-501503>.

[74] Id.

Comparing themselves with their European colleagues and evoking the stress factor and the inadequate working conditions, Romanian magistrates claimed for higher bonuses and incomes. In September, they went on strike (between 9 AM and noon) because they were not given the 50% bonus for neuro-psychic strain. The Romanian President declared that the magistrates' protest was illegal, while the former Minister of Justice, Monica Macovei, said that "judges managed to gain some money through 'blackmail' but lost public respect in return".[75] As a matter of fact, the magistrates' protests as well as their demands for bonus rises were criticized not only by politicians but also by journalists who emphasized the need for "solidarity" in a period when the country's public finances were severely affected by the crisis. In order to make the voice of ordinary citizens heard, the Romanian newspaper *Evenimentul Zilei* gathered signatures from some 3,000 people, outraged by the magistrates' protest and calling for "justice to respect the law".[76]

The magistrates' protest should be related to the domestic debates provoked by the draft *Single Law on Wages*. One of the conditions raised by the IMF for granting the loan requested by the Romanian Government was the drafting of two laws: the *Single Law on Wages* and the *Single Law on Retirement* in order to avoid laws which enforced discriminatory wages and retirement laws which were "even more discriminatory".[77] These drafts fomented dissatisfaction and tensions between professional categories in the State sector. The law provides that the ratio between minimum and maximum salaries can be 1:12.[78] The coefficients are established taking into account the responsibility of each job, 1 representing the lowest salary and 12 the salary of the President of Romania. Various professional groups highlighted the fact that the coefficients assigned were discriminatory and that the *Single Law*

---

[75] EUObserver, Romanian judges paralyse country in month long strike, 28 September 2009, available at <http://euobserver.com/9/28727>.

[76] Id.

[77] Nine O'Clock, Single Law, yet discriminating (note 73).

[78] European network of legal experts in the non discrimination field, News Report: Romanian Law on unitary salary of personnel paid from public funding is to be adopted as a result of the engagement of responsibility by the Government before the Parliament, at 2, available at <http://www.non-discrimination.net/content/media/RO-19-RO-FLASH%20REPORT_Law%20on%20salary%20in%20public%20sector.pdf;jsessionid=D97CC73905FC2554F70FC707FF88453A>.

on Wages showed that some professional categories (magistrates for instance) were more important than other (doctors, teachers etc.). At the beginning of September 2009, the Government (led by Emil Boc) decided to engage its liability before the Parliament by requesting a confidence vote. The opposition parties filed a motion of censure which was not passed. The opposition parties challenged the law before the Constitutional Court and the decision is expected after the presidential elections (end of November 2009). The law[79] entered into force in November 2009.

The salary system in the public sector should be reformed in 2011. According to the provisions of this new law, the chairmen of the Supreme Court of Justice and the Superior Council of Magistracy and the General Prosecutor (like the speaker of the Chamber of Deputies and the chairman of the Senat) have their salaries set at 11.70 of the minimum wage. A judge or a prosecutor (with at least three years' seniority), a military judge with a military tribunal or a military prosecutor with a prosecution office in a military tribunal will each be paid 4.5 of the minimum wage.

2. Benefits and Privileges

According to the President of the Superior Council of Magistracy, the only source of income for magistrates is their salary. Apart from remuneration, pursuant to Article 79 Law no. 303/2004, judges and prosecutors are insured for professional liability. They receive annual paid leave of 35 working days as well as medical leave. They are also entitled to paid leave for specialized studies, and for preparing for and sitting for the capacity and degree examination. They are entitled to rent residential property owned by the government. Judges and prosecutors are annually entitled to six free first class national return tickets, for rail travel, vehicular, sea and air transport or the value of 7.5 litres of fuel/100 km for six national return voyages if they travel by motor vehicle. For outstanding merit in their work, judges and prosecutors may be granted the *Judicial Merit* Diploma.

Until 2000, judges received salary top-ups to compensate them for burdens specific to their job. The bonuses contributed to significant public sector wage inflation and, for this reason, in 2000 "top-ups for judges

---

[79] Law no. 330/2009, published in the *Monitorul Oficial*, Part I, no. 762, 9 November 2009.

were abolished as their salaries began to outstrip those of the rest of the public sector".[80] In these conditions, individual judges have sought rulings from their colleagues saying that their exclusion from the bonus is discriminatory. In fact, bonuses were not cut, but included in salaries after the entry into force of Governmental Ordinance 83/2000.[81] Trials in the Courts of Appeal *obliged* the Finance Ministry to pay full salaries. As indicated before, in September 2009, magistrates went on strike because they had not been given the 50% bonus for neuro-psychic strain. But, according to the Minister of Justice, Catalin Predoiu, "this bonus is not expressly provided by law; it was won by magistrates and auxiliary staff through court rulings".[82] The Constitutional Court ruled the granting of bonuses unconstitutional. The Court in its decision emphasized that in recent years the courts had found in favour of magistrates asking for bonuses for *anti-corruption activities*, *specialization*, *danger* and *loyalty*.[83] The Constitutional Court stated that wage and bonus rises could not be decided by courts and highlighted that most of the decisions already given were based on laws no longer in force.

3. Retirement

Pursuant to Article 82 Law no. 303/2004, "judges […] having at least 25 years length of service, shall enjoy, upon reaching the age of 60 years, a service pension, amounting to 80% of the average of gross income with any other benefits for the last month of activity before the date of retirement". Judges may remain in office at the latest until the age of 70, which is the mandatory retirement age provided for by law. After the age of 65, in order to remain in office magistrates need the endorsement of the Superior Council of Magistracy.

---

80 The Financial Times (note 68).

81 Decision 838 of the Romanian Constitutional Court, 27 March 2009.

82 SEEUROPE.Net, Magistrates continue protests, demand Justice Minister's resignation, 8 July 2009, available at <http://www.seeurope.net/?q=node/17653>.

83 Decision 838 of the Romanian Constitutional Court, 27 March 2009.

V. Case Assignment and Recusal

In the past, case files were distributed to the judges by the president of the court or of one of the court's sections. With the instruments designed to increase the integrity of the judiciary, from 2005 all institutions in the country were provided with an IT and software system (ECRIS) specialized in the random assignment of cases to judgment panels. The random distribution of cases is implemented within all the courts, but the system has been criticized by various actors. In 2008, a Romanian NGO – the Institute for Public Policies – published a study which showed that half the magistrates interviewed about the implementation of this system considered that it could be easily rigged.[84] According to SoJust, since the computer keeps no record of the pending workload of each judge, but only of new cases, a situation may arise where a judge who already has several or more difficult cases to try will be overloaded because he is also assigned[85] some new cases, as the computer is unable to make the necessary distinction. For this reason, SoJust considers that the software should be used for the random assignment of judges not of cases. At the beginning of 2009, the Romanian Minister of Justice also declared that the software used was being "manipulated" by judges and prosecutors.[86]

VI. Judicial Conduct Complaint Process

Any person can take a complaint against a judge to the Superior Council of Magistracy (SCM), the only organ entitled to take disciplinary measures against judges.[87] The SCM is the only institution able to receive complaints about judges' conduct.[88] The administrative investiga-

---

[84] SoJust (note 46), at 87.

[85] Id., at 86.

[86] Mediafax, Predoiu: Am informaţii că sistemul de la instanţe care repartizează dosare este manipulat, 8 January 2009, available at <http://www.mediafax.ro/social/predoiu-am-informatii-ca-sistemul-de-la-instante-care-repartizeaza-dosare-este-manipulat-3717327>.

[87] A. Demsorean/S. Parvulescu/B. Vetrici-Soimu, Evaluating EU democratic rule of law promotion, Country Report Romania (2005), available at <http://iis-db.stanford.edu/pubs/21246/Romania_Ammended_Report_Oct_15.pdf>.

[88] For the ensuing disciplinary procedure see *infra* B. VII. 1. Formal Requirements.

tion undertaken by inspectors may not exceed a period of 60 days. For complaints which do not involve a disciplinary procedure the maximum period for resolving the issue is 30 days.

VII. Judicial Accountability: Discipline and Removal Procedures

1. Formal Requirements

The institution authorized to initiate disciplinary proceedings against judges or prosecutors is the Discipline Commission within the Judicial Inspection Service, which reports to the Plenum of the Superior Council of Magistracy. The Commission may be notified about disciplinary transgressions or may act *ex officio* (Article 45(4) Law no. 317/2004 on the Superior Council of Magistracy). A preliminary investigation is mandatory in order to establish the facts and their consequences, and the circumstances under which they took place.

According to Article 45(1) Law no. 317/2004, disciplinary actions are to be undertaken by the discipline commissions of the Superior Council of Magistracy. Judges and prosecutors are liable to be disciplined for violation of their professional duties, as well as for acts which affect the prestige of justice pursuant to Article 98 Law no. 303/2004. Among the offences which may lead to such procedure are a) violations of legal provisions for mandatory declarations of wealth, interests, incompatibilities and interdictions regarding judges and prosecutors; b) intervention in the resolution of requests; c) carrying out political activities in public or expressing political opinions in the exercise of their professional duties; d) failure to observe the secrecy of judges' deliberations; e) absence from work; and f) failure to observe the provisions on random case assignment (Article 99 Law no. 303/2004). The President of the Superior Council of Magistracy in 2009 declared that disciplinary proceedings should concern not just their professional duties but also magistrates' behaviour in their free time. In 2008, most of the complaints brought to the Superior Council of Magistracy concerned issues relating to judgments and the handling of criminal investigations.

The incompatibilities of offices are set out in Article 5 Law no. 303/2004 on the Status of Judges and Prosecutors. The offices of judge, prosecutor, assistant magistrate and judiciary assistant are incompatible with any other public or private office. Office-holders are obliged to make annual statements on their own responsibility mentioning whether their spouses, relatives or relations by marriage up to and in-

cluding the fourth degree, fulfil a legal office or perform a legal activity or activities of criminal investigation or research, as well as where they work. They are obliged to make an authenticated statement regarding whether or not they are agents or collaborators of the intelligence services, such as political police. They cannot be operative employees, including undercover officers, informers or collaborators, of the intelligence services. Judges and prosecutors are forbidden to: perform commercial activities, either directly or through intermediaries; perform arbitration activities in civil, commercial or other litigation; be associates in a commercial company or be members of the management, administration or control bodies of civil companies, commercial companies, including banks or other credit institutions, insurance or finance companies, national companies or autonomous administrations; or be members of an economic interest group. They cannot be members of political parties or political groups, nor perform or participate in any activities of political nature. Judges and prosecutors are obliged to refrain from expressing or revealing their political opinions. They cannot publicly express their opinions on pending trials or cases of which the prosecutor's office has been notified. This list of disciplinary offences for judges and prosecutors also includes: repeated and imputable failure to comply with the provisions of the law on the speedy resolution of cases; unjustified refusal to file petitions, conclusions, or memoranda submitted by the parties during the trial; unjustified refusal to fulfil the duties of the office; recurrent and unjustified absence from work; a disrespectful attitude towards colleagues, lawyers, witnesses, petitioners, and disrespect of the provisions on the random distribution of cases.[89]

2. Disciplinary Proceedings

When criminal action has been initiated a judge or a prosecutor may be suspended. The suspension of judges and prosecutors shall be determined by the Superior Council of Magistracy. Even though, in 2004, competence for disciplinary measures changed from a cooperative system between the Ministry of Justice and the Superior Council of Magistracy to the exclusive competence of the latter, in 2009, the President of the Superior Council of Magistracy denounced "the inspection activity taken by the Ministry of Justice and Citizens' Freedom to certain

[89] D. Cavallini, Judicial discipline: different approaches in five EU member states, in: R. Coman/C. Dallara (eds.), Handbook on Judicial Politics (2010) (forthcoming).

courts, concerning issues related to the work of the Superior Council of Magistracy".[90]

The decision on disciplinary sanctions lies with the Superior Council of Magistracy. The Council is composed of two committees which investigate infractions and abuses, one for judges and another for prosecutors. The Statute of Magistrates sets out magistrates' civil, penal and disciplinary responsibility for injury resulting from improper or unjust rulings. A new law adopted in 2006 amended the provisions of the Criminal Procedure Code and makes action against magistrates mandatory for errors made in criminal trials, such as abuse of power and error in judgments.[91]

According to the provisions of Law no. 303/2004 on the Status of Judges and Prosecutors as amended by the Government Emergency Ordinance no. 100/2007 and subsequently by Law no. 97/2008, judges and public prosecutors shall be liable from the disciplinary point of view for violations of their duties, as well as for actions affecting the prestige of the institution. The list of the violations can also be found in the report published by the European Commission for the Efficiency of Justice (CEPEJ)[92] on Romania: violation of the provisions concerning declarations of assets, declaration of interests; the incompatibilities and interdictions relating to judges and prosecutors; interventions for the resolution of petitions regarding the satisfaction of personal interests or interests of family members or of other persons, as well as interference with another magistrate's activity; carrying out political activities in public or expressing political convictions in the exercise of a magistrate's duties; failure to respect the secrecy of deliberations or the confidentiality of paperwork of such nature; repeated and imputable failure to comply with the provisions of the law on the speedy resolution of cases; unjustified refusal to file the petitions, conclusions, memoranda or papers submitted by the parties to a trial; unjustified refusal to fulfil the duties of the office; completing paperwork in bad faith or with gross negligence; delayed completion of paperwork for imputable reasons; repeatedly being absent from work without leave; having a disrespectful attitude towards colleagues, lawyers, witnesses, or petitioners

---

[90] Press Release of Judge Viorel Andreies (note 71).

[91] Transparency International Romania, Corruption and deficiencies in the Romanian justice system – Selection from Global Corruption Report 2007: Corruption in Judicial System, at 4 (2007).

[92] CEPEJ (note 66), at 29.

in the exercise of their duties; failure to respect the provisions regarding the random distribution of cases.

3. Judicial Safeguards

As described by the European Commission for the Efficiency of Justice (CEPEJ)[93], disciplinary proceedings start with a preliminary investigation which is carried out by inspector judges or inspector prosecutors within the Judicial Inspection Service. The preliminary investigation establishes the facts and their consequences, the circumstances under which they were committed, the presence or absence of guilt, and any other conclusive data.

During the preliminary proceedings hearing of the accused is mandatory in order to allow him/her a proper defence. The refusal of the judge or prosecutor under investigation to make declarations or to appear for the investigations is to be stated in a written report, and shall not prevent the investigation from being concluded. The judge or prosecutor under investigation shall be entitled to be informed about all the facts found during the investigation and to request evidence in his/her defence. The result of the prior investigation of the disciplinary action shall be notified to the competent disciplinary section within the Superior Council of Magistracy.

In the disciplinary proceedings before the sections of the Superior Council of Magistracy, it is mandatory to call the judge or prosecutor against whom the disciplinary action is being brought. The judge or prosecutor may be represented by another judge or prosecutor, or may be assisted or represented by a lawyer. The judge or prosecutor and, as the case may be, his/her representative or lawyer shall be entitled to study all the file documents and may wish to produce evidence in his/her defence. The sections of the Superior Council of Magistracy are to close the disciplinary action by means of a decision which in the main includes the following: a description of the action constituting a disciplinary offence and its legal classification; the sanction applied and the legal reasoning behind it; the reasons for which the arguments of the investigated judge or prosecutor were rejected; the legal procedure and the time limit for challenging the decision; and the court competent to review it.

---

[93] Id., at 30.

4. Sanctions

According to Article 100 Law no. 303/2004, the disciplinary sanctions which may be imposed on judges and prosecutors are: a warning, a reduction of initial gross monthly salary by up to 15% for a period of between one month and three months, disciplinary transfer and exclusion from the magistracy. Judges can also be removed from office as a disciplinary sanction pursuant to Article 65 Law no. 303/2004. The removal from office of judges and prosecutors shall be ordained by decree of the President of Romania, on a proposal from the Superior Council of Magistracy.

5. Practice

Most of the notifications registered with the Discipline Commissions for judges and prosecutors in 2008 were complaints addressed to the Superior Council of Magistracy. Other notifications were registered by the judiciary inspectors. In 2007, the Discipline Commission for judges initiated 11 disciplinary actions. According to the data published in the European Commission for the Efficiency of Justice – Scheme for evaluation judicial system in 2007,[94] the section for judges received seven sets of disciplinary proceedings (four were effectively proceeded with and three led to an acquittal)[95] and applied three sanctions of disciplinary warning (two sanctions for committing disciplinary breaches provided for by Article 99(k) Law no. 303/2004 and one sanction for committing the disciplinary breach provided for by Article 99(g) Law no. 303/2004). In one case the sanction was the reduction of the monthly gross salary (for committing the disciplinary breach provided for by Article 99(h) Law no. 303/2004).[96]

Between 2005 and 2008, a total of seven judges and 14 prosecutors were suspended and two judges and four prosecutors removed from office. In 2008, only 16 cases were resolved out of 3,000 complaints. In 2009, after the appointment of a new president of the Superior Council of Magistracy and after the criticism expressed by the European Commission in relation to the work of the institution,[97] the number of cases re-

94 CEPEJ (note 33), at 13.

95 Id.

96 Id.

97 Commission of the European Communities (note 37), at 4.

solved by the Disciplinary Commission of the Superior Council of Magistracy seemed to be higher.

VIII. Immunity for Judges

In Romania there is no immunity for judges. Therefore, judges are subject to criminal proceedings just like everyone else. Any person may notify the Superior Council of Magistracy, either directly or through the persons in charge of courts or prosecutors' offices, of the inappropriate activity or conduct of judges or prosecutors. According to the Law no. 303/2004 on the Status of Judges and Prosecutors, judges and prosecutors are civilly, disciplinarily and criminally liable in accordance with the law.[98] They can be held in custody or under preventive arrest but only with the approval of the Superior Council of Magistracy.[99] The State's liability for any prejudice caused as a result of a judicial error is established and it does not absolve magistrates (judges and prosecutors) who exercised their office in bad faith and serious negligence of liability.

IX. Associations for Judges

Formally established at the beginning of the 1990s, the Romanian Association of Magistrates (AMR) has done little in the first decade since the collapse of communism. Created in 1992, the association became more active in 2003 because of the support of some Bucharest based NGOs.[100] Together they established various coalitions aiming at dealing with specific policy issues relating to the functioning of the judicial institutions. But once the Association of Magistrates issued statements on behalf of the "Romanian judges and prosecutors", various voices contested this representational role. It was stated many times that the association represents all judges and prosecutors, but in reality the number of members was not very high. The Association includes only 638 judges and 414 prosecutors[101] out of 3,988 judges and 2,129 prosecu-

98 Article 94 Law no. 303/2004 on the Status of Judges and Prosecutors.

99 Article 95(1) Law no. 303/2004 on the Status of Judges and Prosecutors.

100 R. Coman, Réformer la justice dans un pays post-communiste – Le cas de la Roumanie (2009).

101 SoJust (note 46), at 96.

tors.[102] Membership is voluntary. There is no legal provision regulating this kind of association (apart from Law no. 305/2008 which regulates associations in general). Each association has its own statute and aims.

Some regional associations of magistrates do a significant amount of work. One is the Association of Magistrates in Iasi, which "is placed in a total opposition to AMR".[103] There are other regional associations (in Dâmbovița, Bihor, Timiș) involved in organizing seminars and conferences at the local level and in providing continuous education and training to their members. The work of the associations of judges in Romania has attracted mixed views. One NGO, the Society for Justice, even held: "In Romania there is no true judicial body, and hence, no true spirit of association".[104]

In spite of a lack of financial and human resources, the Romanian Association of Magistrates, the association called the Society for Justice (an association which also includes journalists, professors, students, et al.) and other Romanian NGOs, monitor judicial reform, the work of the Superior Council of Magistracy, and the fight against corruption. To what extent do they have an influence on matters concerning the judiciary? What could be said without exaggeration is that where these associations are successful is in creating and helping to clarify the terms of the public debate relating to the functioning of the judicial institutions and the reform proposals. These organizations promote political discourse, including a set of policy ideas. This discourse points to the need for change by explaining the flaws in Romanian democracy, by introducing and clarifying the principles of liberal democracy and by framing the domestic political agenda. They nourish the debate by cultivating the alternative and by thinking patterns in the societies in which they live.[105] They also identify problems and put them on the political agenda.

---

[102] Data provided by the SCM in 2005.

[103] Id., at 97.

[104] SoJust (note 46), at 94.

[105] R. Coman, Romanian civil society, twenty years after the collapse of communism – A loud voice in domestic politics?, paper presented at the UACES conference, Budapest, 8-10 May 2009.

X. Resources

The working conditions within the magistracy were one of the major issues on the political agenda in 2004 when the Romanian Association of Magistrates required the consolidation of the guarantees of independence of the judiciary. Judges and prosecutors deplored the poor working conditions. As the Open Society Institute stated in 2001, the "working conditions – including buildings, offices, access to adequate infrastructure and modern technologies – remain at a very low standard, hampering the effective administration of justice and encouraging corruption".[106] On behalf of the magistrates, the Romanian Association of Magistrates representing judges and prosecutors made the criticism that court buildings were inappropriate, equipment old, the archives and courts small and overcrowded.[107]

In 2009, the President of the Superior Council of Magistracy notified the Constitutional Court of "a legal conflict of a constitutional nature, between the judicial authority, represented by the Council and the executive authority, represented by the Ministry of Justice and Citizens' Freedom".[108] The President of the Council pointed out that the conflict concerned "the serious impairment of the judiciary's independence through a chronic lack of financing of the system, the repeated postponement of the deadline for transferring the court's budget from the Ministry of Justice and Citizens' Freedom to the High Court of Cassation and Justice". The statement of the President of the Superior Council of Magistracy pointed out that "the courts don't have money for subpoenas for several weeks now, that the utilities were not paid for several months and that in some courts and prosecutors' offices, judges and prosecutors are gathering money in order to buy supplies".[109] From this point of view, the situation is due to the fact that "the stamp duties collected by the courts have been transferred to the budget of the city halls, which have no relation to the courts and prosecutors' offices".[110]

---

106 Open Society Institute (note 15), at 358.

107 Romanian Association of Magistrates, Statement on the Judicial Reform, 11 February 2004.

108 Press release of Judge Viorel Andreies (note 71).

109 Press release of Judge Viorel Andreies (note 71).

110 Id.

However, the "stamp duties will cover approximately 68-70% of the judiciary's needs".[111]

C. Internal and External Influence

I. Separation of Powers

The principle of separation of powers was clearly expressed in the revised Romanian Constitution of 2003.[112] The Superior Council of Magistracy is the guarantor of the independence of the judiciary. In spite of a legal provision which guarantees the separation of powers, representatives of judicial institutions and associations constantly denounced "the pressures over the magistracy". According to the Romanian Association of Magistrates, 2009 was an electoral year and therefore the judiciary was "again the political subject mostly discussed. Judges are declared corrupt when they render decisions that are not convenient to political representatives". The Romanian judiciary and the magistrates "[…] face the accusations and denigrations by the President and Prime Minister of Romania, by politicians involved in electoral campaigns."[113] From their point of view, the judiciary is "the cause of the economic crisis." According to the President of the AMR, "the last method" used by the political institutions to put pressure on the magistracy consists of drafting a sole remuneration law, as, according to the Romanian President and the Prime Minister, judges and prosecutors have "offensive salaries and pensions",[114] which need to be reduced.

Under Article 131 of the Constitution, the Public Ministry is charged with the duty to represent the general interests of society and to defend the legal order, as well as the individual rights and freedoms. Public

---

[111] Id., Stamp duty is payable on most judicial claims, the issue of certificates and licenses, and documentary transactions which require authentication. Judicial stamp duty is levied on claims and requests filed with courts and the Ministry of Justice, depending on the value of the claim.

[112] Title I Article 1(4) Constitution of Romania.

[113] Romanian Association of Magistrates, Open letter to the European Association of Judges (2009), available at <http://www.asociatia-magistratilor.ro/comunicate-de-presa/arhiva/47-scrisoarea-in-limba-engleza-adresata-asociatiei-europene-a-magistratilor?format=pdf>.

[114] Id.

prosecutors pursuant to Article 132 of the Constitution shall carry out their activity in accordance with the principles of legality, impartiality and hierarchical control, under the authority of the Minister of Justice. But the Ministry of Justice supervises the public prosecution's activity only with regard to general criminal strategies and administrative problems and issues. The Superior Council of Magistracy supervises prosecutors from the disciplinary point of view. The competences are distributed among prosecutors territorially and according to the kind of crime at issue.[115] Prosecutors are subject to hierarchical supervision. Within one specific public prosecutor's office there is a chief, one to three deputy chiefs and the working prosecutors who investigate. The chief prosecutor has hierarchical powers with regard to case assignment, and general and legal supervision of the work within the office. He is competent to confirm official documents and also performs managerial functions.[116]

II. Judgments

1. Basis

One of the major problems that the judiciary is currently facing, which also endangers the credibility of the judicial system, is inconsistency in the application of the current legislation. As one NGO complained: "Despite several attempts to standardize the system of jurisprudential interpretation, Romanian justice is inconsistent, with many unpredictable decisions and differing legal interpretations indifferent courts – and sometimes in the same court".[117] Jurisprudential interpretation has been a matter of concern for many years, denounced and criticized not only by international actors, but also at the domestic level by citizens, judges, journalists and politicians.

---

[115] C. Dallara/M.Velicogna, Appendix: Summary reports, in: M. Fabri. (ed.), Information and Communication Technologies for Public Prosecutor's Office, at 285 (2008).

[116] Id.

[117] Transparency International Romania (note 91), at 3.

2. Practice

As the Figure below shows, the Superior Council of Magistracy collects general statistics on the number of proceedings for each year.

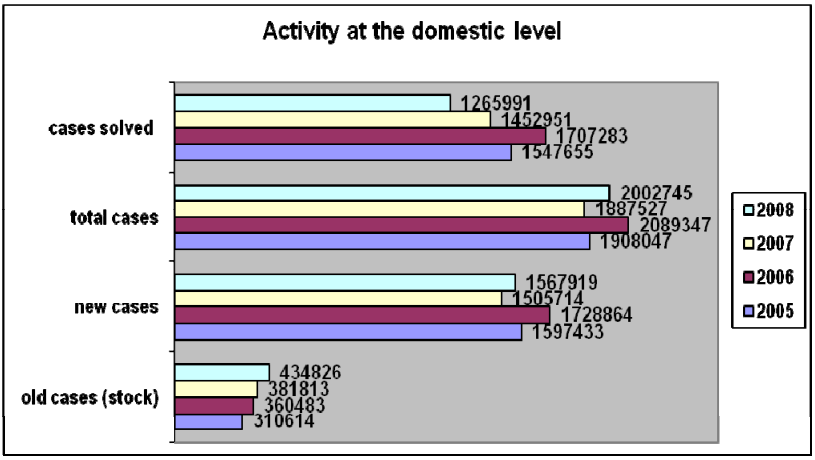


Figure 3:[118] Activity between 2005 and 2008

3. Structure

Court judgments in Romania are structured as follows: They start with a preamble, followed by the reasoning of the judgment and conclude with the operative part. According to the Society for Justice, "there are few judgments organized or structured on an argument- or a number-basis […] This drafting method is not specific to Romanian judges; the rule of thumb consists of the presentation of all the matters, without using numbers or paragraphs; hence, one cannot make any reference to any previously mentioned matter or paragraph. Moreover, the justification for a judgment is quite often no more than a useless description of all the procedural acts developed by the parties or by the court, followed in the end by the dry quotation of the applicable legal text".[119]

[118] Raport Privind Activitatea Instanțelor De Judecată În Anul 2008, at 1 (2008), available at <http://www.csm1909.ro/csm/linkuri/11_01_2010__29650_ro.doc>.

[119] SoJust (note 46), at 126.

Hence, SoJust recommends that the manner in which judgments are being drafted, which is somewhat obsolete and old-fashioned, should be revised in order to facilitate review of the legal reasoning as well as to refer to the relevant sections by indicating the item or the paragraph in question. A new structure would also facilitate the reading and understanding of the judgment, as well as its examination by those subject to the law.[120] Finally, the proposal also hopes to improve the perception of Romanian judgments by other European courts.

4. Public Access

Article 127 of the Constitution of Romania provides for the publicity of the debates, stating that all proceedings shall be held in public, except for the cases provided for by law. The decisions of the Highest Romanian Court of Cassation from 2003 through today may to a certain extent be accessed online on the Court's website. They are all in Romanian and often only their summaries are available. However, the search may be done by subject matter or by typing words contained in the text of the decision.[121] There is no official collection of judgments.

III. Improper Influence on Judicial Decisions

Improper influence over the judiciary is still a matter of concern in Romania. Both national and international actors expressed their worries as regards the frailty of the political will for the fight against corruption, as well as the reduced pace of reform. According to the Romanian Academic Society, a Romanian NGO, criminal justice has been subject to tough pressures having as its main target the intimidation and obstruction of investigations into politicians.[122] In the last two years, many European observers have stated that after EU enlargement the progress made by the Romanian authorities in improving the functioning of the judiciary has been quite modest. In 2008, a Belgian prosecutor, the European advisor on judicial politics, was quoted in the *Economist* as

---

[120] Id., at 88.

[121] D. Neacşu, Doing legal research in Romania, GlobaLex report (2005), available at <http://www.nyulawglobal.org/globalex/romania.htm>.

[122] Romanian Academic Society, Public Statement of the Initiative for a Clean Justice, 24 June 2007.

saying: "instead of progress in the fight against high-level corruption, Romania is regressing on all fronts […] if the Romanian anti-corruption effort keeps evaporating at the present pace, in an estimated six months' time Romania will be back where it was in 2003".[123] The 2008 evaluation by the European Commission of progress in this field pointed out that "changes still have to produce practical results for Romanian citizens".[124] In 2008, Romanian MPs rejected a request to launch a corruption investigation against the former Prime Minister, who led the government between 2000 and 2004 and against the Transport Minister in his government. The Romanian Parliament's vote provoked strong reactions both at the European and at the domestic level. Many observers (representing the Romanian NGOs involved in the promotion of the rule of law) declared that this parliamentary vote reveals once again that there is no real commitment in the fight against corruption.[125] Therefore, the Initiative for a Clean Justice demanded "all the responsible political parties and politicians not to take the risk of making Romania vulnerable to EU sanctions and not to leave the impression that anyone who dares investigate a Minister will be sacked once an opportunity emerges".[126] The fight against corruption remains a top priority. In spite of the "significant steps" taken to improve the efficiency of judicial procedures, "several important high-level cases of corruption remain delayed in court for several years".[127]

IV. Security

In Romania there have rarely been reported cases of judges being attacked by virtue of their office; there has been no case of a judge being killed. The general climate for judges and judicial officials is peaceful

---

123 The Economist, Corruption in Romania: In denial, 3 July 2008.

124 European Commission (note 6).

125 The Romanian civil society complained that they were "witnessing the transformation of parliamentarians into judges and of the judicial committee into an extraordinary court"; The Economist (note 123).

126 ZIUA, Civil society wants Daniel Morar to continue to rule National Anti-Corruption Department, 29 July 2009.

127 European Commission, Report from the Commission to the European Parliament and the Council on progress in Romania under the Co-operation and Verification Mechanism, COM(2011) 460 final, at 3 (2011).

and secure, unlike in other states.[128] Generally judges in Romania are not subject to violence or attacks.[129] Anyway, the Romanian state provides the legal framework to protect judges and their families from eventual threats. Judges could also be provided with protection by the State Department in charge of this duty. While the courts are sitting, security is assured by a police officer at the disposal of the presiding judge. In practice, it often happens in civil sessions that the police officer is not present; but in criminal sessions the police officer is usually present. If arrested defendants are on trial, there are also supplementary prison guards.[130]

D. Ethical Standards

I. Code of Ethics for Judges

A Code of Ethics was approved by Decision no. 144 of 26 April 2005, issued by the Superior Council of Magistracy.[131] The document establishes the standards for magistrates' conduct in accordance with the honour and dignity of their profession. The code gives guidance to judges and prosecutors alike, which, according to SoJust, is "totally unacceptable" as the two professions are different in nature.[132]

According to the opinion expressed by some members of the professional associations of judges in a meeting organized in 2008 between the leading team of the Superior Council of Magistracy and the representatives of the professional associations of magistrates in Romania,[133] there

---

[128] Demsorean/Parvulescu/Vetrici-Soimu (note 87), at 73.

[129] Konrad Adenauer Foundation (ed.), Rule of Law, The KAF Democracy Report, at 232-233 (2006).

[130] Parvulescu/Vetrici-Soimu, Country Report Romania, at 8 (2005). Paper presented at the conference: "Europeanization and Democratization: The Southern European experience and the perspective for new member states of the enlarged Europe", 15-18 June 2005, Center of European Excellence of the University of Florence.

[131] Superior Council of Magistracy Decision no. 144 of 26 April 2005.

[132] SoJust (note 46), at 20.

[133] Report of the meeting organized on 26 May 2008 between the leading team of the Superior Council of Magistracy and the representatives of the pro-

is currently an inconsistency concerning violation of the judicial code of ethics in the sense that, although the present Code "still provides for disciplinary liability in case of violation" regarding magistrates' disciplinary liability, nevertheless, Law no.303/2004 on the Status of Judges and Prosecutors, as subsequently amended and supplemented, provides that a violation of the Code does not constitute a disciplinary offence. In spite of this, the Superior Council of Magistracy also investigates violations of the judicial code of ethics. Some judges propose that the solution would be the establishment of an *ad hoc* Ethics Commission competent to consider violations of the judicial code of ethics.[134]

II. Training

Training on judicial ethics was mainly provided by USAID through the CEELI office in Bucharest[135] and in cooperation with the Stability Pact.[136] CEELI organized six two-day seminars on judicial ethics in collaboration with the NIM. A total of 164 judges took part.[137] As the CEELI documents show, in advance of each seminar the CEELI staff sent those attending reference materials including the code, relevant legislation and comparative materials to familiarize them with the types of questions they would be asked to address. At the beginning and at the end of the seminars, the participants were tested to assess their increased knowledge about the code of ethics' provisions, as well as an evaluation of the seminar itself.[138]

---

fessional associations of magistrates in Romania, available at <http://www.csm1909.ro/csm/linkuri/12_12_2008__19291_en.doc>.

[134] Id., at 11-13.

[135] American Bar Association – Europe and Eurasia Program, available at <http://www.abanet.org/rol/europe_and_eurasia/romania.html>.

[136] The Stability Pact for South Eastern Europe was launched in 1999 by the European Union as a conflict prevention strategy of the international community for the countries of South Eastern Europe promoting peace, democracy, respect for human rights and economic prosperity; see <http://www.stabilitypact.org/about/default.asp>.

[137] USAID-Romania, Promoting the rule of law, Final Report, at 11 (2007), available at <http://pdf.usaid.gov/pdf_docs/PDACL266.pdf>.

[138] Id.

E. Supreme/Higher Courts

The Romanian High Court of Cassation of Justice is the highest court of appeal, and acts mainly as the third level of jurisdiction in a significant number of cases, in civil, commercial and criminal matters, and a court of appeals, as the second level of jurisdiction, in most contentious administrative and fiscal matters. The selection and appointment procedure previously described applies to all judges in Romania, from first instance courts to tribunals, courts of appeal, and the High Court of cassation and justice. Proposals for appointment to all these courts, as well as the promotion and transfer of, and sanctions against judges fall within the exclusive competence of the Superior Council of Magistracy, under the terms of its organic law. According to the Romanian Constitution, the Constitutional Court consists of nine Judges, appointed for a term of office of nine years, which cannot be prolonged or renewed (Article 142). Three Judges are appointed by the Chamber of Deputies, three by the Senate, and three by the President of Romania.

F. Conclusion

The adoption of a new legislative framework in order to set up a new institutional framework took a long time. In Romania in the last 20 years, in spite of constitutional provisions empowering the Superior Council of Magistracy, the Ministry of Justice still effectively performed most of its tasks. The powers of the Minister of Justice to replace judges, to order them how to perform their duties, and to impose judicial decisions were removed only in 2004. Since the new legislative reform, Romanian judges have considered that the existing institutional framework guarantees their internal and external independence. The institutional outcome of this public policy is the result of a process of hybridization between the ambiguities of a principled idea (the independence of the judiciary), domestic requirements and other European experiences in this field.[139]

[139] Coman (note 100), at 235.

The Eurobarometer published in 2006 shows the low level of trust Romanians have in the judicial system (26%).[140] The functioning of the Romanian political and judicial institutions is considered by the greater Romanian public to be corrupt, inefficient and useless. Various complaints have been addressed by Romanian citizens to the European Commission reporting shortcomings in the functioning of the judiciary.[141] Romanian citizens consider that the domestic institutions do not deal with existing problems. At the beginning of the 1990s the predominant question concerned the restitution of private property. Nowadays the complaints are concerned with the length of proceedings, corruption within judicial institutions, the professional incompetence of judicial investigators and the failure to enforce existing laws.[142]

What are the most pressing issues of judicial independence depends on the point of view of the actors who express them. For the European Commission, the institutional framework put in place should be consolidated by implementing and enforcing it. For domestic political institutions and some NGOs, the Superior Council is not yet able effectively to accomplish its mission. What could be said without subjectivity is that the Superior Council has not yet acquired much work experience of the promotion, careers, sanctioning and recruitment of magistrates. The Reviews which are published by the Superior Council of Magistracy show that since the implementation reform which began in 2004, various problems have been faced. The Council should have a more pro-active approach to the main standards to be reached: the quality of justice, the efficiency of judges, reputation, to name only some examples. In 2004, Romania took a step forward: an institutional framework which implements the principle of independence of the judiciary was put into place. The formal and institutional guarantees of the independence of judges are therefore consolidated. The remaining question is to what extent the Superior Council of Magistracy is able to be the guarantor of independence. The independence of the judiciary is not a goal in itself, but a precondition for delivering objective judgments. The principle has an instrumental dimension. The following years will be crucial for the implementation of judicial independence,

---

[140] Eurobarometer 66, Public opinion in the European Union, Autumn 2006, National Report Executive Summary, Romania, at 4, available at <http://ec.europa.eu/public_opinion/archives/eb/eb66/eb66_ro_exec.pdf>.

[141] Coman (note 100).

[142] România Libera, Victimele soferilor inconstienti sunt batjocorite de justitie, 6 January 2009.

even if this is no guarantee that problems will be solved. It is important therefore to focus more on the work of the Romanian Superior Council of Magistracy in the implementation of the reform in order to assess to what extent the institution performs its functions.

For judicial independence to thrive, Romania, like any other country, "must provide an appropriate judicial environment".[143] Among the main obstacles to the functioning of judicial institutions one could mention *the lack of a legal culture* supporting the rule of law and the need for *more investment* in court infrastructures. *Judicial training* is important, as well as the formation of a skilled judiciary which lives up to its responsibilities with respect to the rule of law. The negative image of the Romanian judiciary could be changed *only from inside* by increasing the *professional and ethical standards of judges and prosecutors*. Confidence in the judicial institutions is very low and citizens seriously think that the only solution to a case is to take the law into one's own hands. The functioning of the Romanian judiciary depends on the capacity of the Superior Council of Magistracy to fulfil its constitutional duties, and in particular to improve the evaluation mechanisms for judges and prosecutors and to foster *accountability*. In order to establish an independent and stable judiciary, able not only to detect and sanction conflicts of interests and to combat corruption, but also to solve cases within a reasonable timeframe, the European Commission invited Romania to take action in order *to strengthen the transparency and the accountability of* the *Superior Council of Magistracy*. In this respect, the Council should have a more *pro-active approach* not only to human resources but also to *disciplinary measures*. Since 2004 the principle of the independence of the judiciary has been understood in Romania as being synonymous with increasing the powers of the Superior Council of Magistracy. As a matter of fact, this principle has been interpreted as a need to reduce the political power (of the Ministry of Justice) over the magistracy, neglecting the fact that independence and accountability are the two faces of a single coin. Trust in the judicial institutions depends on their jurisprudence, still contradictory[144] and incon-

---

[143] Dick Howard, Judicial Independence in Post Communist Central and Eastern Europe, in: P. H. Russel and D. O'Brian (eds.), Judicial Independence in the age of Democracy, Critical Perspectives from around the World, 89, at 104 (2001).

[144] European Commission, Report from the Commission to the European Parliament and the Council on progress in Romania under the Co-operation and Verification Mechanism, COM(2009) 401 final, at 6.

sistent, "with many unpredictable decisions and differing legal interpretations" (sometimes in the same court).[145] Improving accountability remains a challenge both for political and judicial institutions in Romania.

[145] Transparency International Romania (note 91), at 2.

IV. Obstacles for Transition in Post-Soviet States

Judicial Reforms in Post-Soviet Countries – Good Intentions with Flawed Results?

Angelika Nußberger

A. Transformation and Beyond – Two Decades of Judicial Reform in Post-Soviet Countries

I. The Early 1990s – Reform Full of Enthusiasm

It may be assumed that at the beginning of the 1990s enthusiasm about changing the world for the better was shared by many people in the post-soviet countries. *Glasnost* and *perestroika* were understood as driving forces behind new approaches in law, economy and society. When the spirit of reform gained momentum, the concept of *pravovoe-gosudarstvo* (State based on the rule of law) swept away all efforts to invent a new type of socialist State discussed under the heading *socialisticheskoe pravovoe gosudarstvo*.[1] Almost from the very beginning of Gorbachev's reforms the role of the judiciary was regarded as an important factor in the process of transformation. Thus the "improvement of

[1] G. Brunner, Die Sowjetunion: ein „sozialistischer Rechtsstaat"?, in: E. Schlüchter/K. Laubenthal (eds.), Recht und Kriminalität. Festschrift für Friedrich-Wilhelm Krause zum 70. Geburtstag, 177 (1990); G. Brunner, Von der „sozialistischen Gesetzlichkeit" zum „sozialistischen Rechtsstaat" – Anmerkungen zur aktuellen Rechtsentwicklung in der Sowjetunion, Sowjetpolitik unter Gorbatschow. Die Innen- und Außenpolitik der UdSSR 1985-1990, at 47 (1990); G. Brunner, The Soviet Union on Its Way to a Rechtsstaat? 2 Stellenbosch Law Review 15 (1991); F.-C. Schroeder, Wandlungen und Konstanten der „sozialistischen Gesetzlichkeit", Recht in Ost und West 358 (1989).

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233, DOI 10.1007/978-3-642-28299-7_21,

the role of the courts in the system of socialist democracy"[2] had been included in the reform ideas summarized in the famous ten *1988 theses* which marked a new beginning in socialist thinking and paved the way for further changes.[3] As regards the judiciary the acceptance of the principle of *separation of powers* can be considered to be the decisive breakthrough. It was first enshrined in the declarations of sovereignty adopted at the end of the 1980s and the beginning of the 1990s.[4]

Whereas the first amendments to the Soviet Constitution concerning the judiciary had been rather modest, changing only some details but not the system as a whole,[5] subsequently the reforms quickly gained momentum. The vague idea about deficiencies of *telephone justice* was replaced by a clear diagnosis of structural flaws. It was well understood that judges who were given the role of puppets in a power play between the Communist Party and the procuracy could never be a cornerstone in a State based on confidence and rule of law. The reform documents written at the beginning of the 1990s are impressive signs of the *new spirit*. They reflect a somewhat revolutionary mood such as the *Conception on Judicial Reform* in the RSFSR, adopted by the Supreme Soviet on 24 October 1991, i.e. shortly after the putsch against Gorbachev and shortly before the collapse of the Soviet Union:

> "The return of our Fatherland to the fold of the civilised world makes it necessary to accompany the political and economical transformation by a legal reform. The State which has ceased to be an instrument of suppression in the hands of a totalitarian regime becomes democratic in order to perform a heroic act of self-denial and to change from a politicised to a law-based State."[6]

---

[2] *Resolyutsii XIX Vsesoyuzhnoy konferentsii KPSS, prinyaty 1 iyulya 1988 goda* (Pravda, 27 May 1988), KPSS, 15 Resolutions and Decisions of the Congresses, Conferences and Plena of the Central Comitee 652.

[3] Pravda, 27 May 1988.

[4] Declaration of State Sovereignty of Belarus (1990), Point 7; Declaration of State Sovereignty of the Russian Soviet Federative Socialist Republic (1990), Point 13; Constitutional Law on State Sovereignty of the Republic of Kazakhstan (1991), Chapter 3, Article 9; Declaration of State Sovereignty of the Ukraine (1990), Chapter III.

[5] Cf. the comment on the first constitutional reform implementing the 1988-theses: G. Brunner/C. Schmidt, Die sowjetische Verfassungsreform vom Dezember 1988, Osteuropa Recht 77, at 92 (1989).

[6] *Kontseptsiya Sudebnoy Reformy v. RSFSR*, 1992.

Similar conceptions were also adopted in other post-soviet countries.[7] Therefore it may be assumed that there were good intentions at the beginning of the reform period. It was considered to be both a desirable and an attainable aim to rebuild the judiciary and to guarantee a right to fair trial to everybody.

Reform was not just theoretical in the beginning. There were many positive signs of real changes to be observed. One turning point in Russia can be seen in the first decision of the newly created Constitutional Court declaring a presidential decree on the creation of a new *Super Ministry* comprising State security and domestic policy null and void as it was understood to violate the Constitution.[8] Such a courageous decision of judges against the executive was unheard of in Russia up to then.[9] The list of relevant changes not only in Russia but also in other post-soviet countries is long. The improvements in the situation of the judiciary were visible. This relates above all to constitutional changes. Although the independence of the judiciary had already been enshrined in the Soviet Constitution,[10] the new post-soviet Constitutions contained a broad range of new concrete guarantees. The election and accountability of the judges before the people[11] were generally abolished. Regulations prohibiting pressure on judges or the removal of judges

---

7 Cf. e.g. Concept Paper on Judicial and Legal Reform in Ukraine, adopted by Parliament in 1992 (cf. R. Kuybida, Report on the Independence of the Judiciary in Ukraine, on file with ODIHR, Chapter A.), Concept of Judicial and Legal Reform of Belarus (Official Journal of the Supreme Council of the Republic of Belarus, 1992, No. 16, Article 270).

8 Decision of the Russian Constitutional Court 14 January 1992, *Vedomosti S'ezda Narodnyich Deputatov RSFSR i* v. *Russian Federation*, No. 6, 1992, Pos. 247 (Constitutionality of the presidential decree of 19 December 1991 "on the Creation of a Ministry for Security and Internal Affairs of the RSFSR").

9 A. Nußberger, Ende des Rechtsstaats in Russland?, 31 Schriftenreihe der Kölner Juristischen Gesellschaft 4 (2007); T. Schweisfurth, Der Start der Verfassungsgerichtsbarkeit in Rußland, EuGRZ 281 (1992).

10 Article 155 of the Soviet Constitution: "Judges and people's assessors are independent and subject only to the law."

11 Article 152 of the Soviet Constitution: "All courts in the USSR shall be formed on the principle of the electiveness of judges and people's assessors. […] Judges and people's assessors are responsible and accountable to their electors or the bodies that elected them, shall report to them, and may be recalled by them in the manner prescribed by law."

without reason were inserted.[12] The sound financing of the courts was provided for on the basis of the Constitution.[13] Yet, many provisions in the constitutions did not live up to the reform-orientated demands, e.g. the reluctance to guarantee life-long tenure to judges.[14] In addition, there were many institutional changes such as the introduction of administrative courts, for example in Ukraine, a step which other post-soviet countries were reluctant to take. New institutions such as lawyers' organizations and judicial councils were introduced.[15] One important element was the creation of constitutional courts, a model which was accepted more or less universally in the post-soviet time, although

---

[12] Cf. e.g. Article 84 of the Georgian Constitution: "(1) A judge shall be independent in his/her activity and shall be subject only to the constitution and law. Any pressure upon the judge or interference in his/her activity with the view of influencing his/her decision shall be prohibited and punishable by law. (2)The removal of a judge from the consideration of a case, his/her pre-term dismissal or transfer to another position shall be permissible only in the circumstances determined by law. (3) No one shall have the right to demand from a judge an account as to a particular case. (4) All acts restricting the independence of a judge shall be annulled"; cf. also Article 120 of the Russian Constitution: "(1) Judges shall be independent and submit only to the Constitution and federal law"; Article 121: "(2) The powers of a judge may be ceased or suspended only on the grounds and according to the rules fixed by federal law"; Article 122: "(1) Judges shall possess immunity. (2) A judge may not face criminal responsibility other than according to the rules fixed by federal law."

[13] See e.g. Article 124 Russian Constitution: "The courts shall be financed only from the federal budget and the possibility of the complete and independent administration of justice shall be ensured in keeping with the requirements of federal law"; Article 130 of the Constitution of the Ukraine: "The State shall ensure funding and proper conditions for the functioning of courts and the activity of judges. Expenditures for the maintenance of courts shall be allocated separately in the State Budget of Ukraine."

[14] See e.g. Article 86 Georgian Constitution: "A judge shall be designated on the position for a period of not less than ten years."

[15] A. Vashkevich, Judicial Independence in the Republic of Belarus; T. Ligi, Judicial Independence in Estonia; Z. Fleck, Judicial Independence in Hungary; N. Hriptievschi/S. Hanganu, Judicial Independence in Moldova; A. Bodnar/Ł. Bojarski, Judicial Independence in Poland; R. Coman/C. Dallara, Judicial Independence in Romania; O. Schwartz/E. Sykiainen, Judicial Independence in the Russian Federation, all in this volume, Chapters B. I. 2.; R. Kuybida, Report on the Independence of the Judiciary in Ukraine, on file with ODIHR, Chapter B. I. 2.

its concrete realization and the tasks given to the newly established courts differed considerably.

II. Two Decades Later – Resignation and Little Hope

Thus it cannot be denied that the good intentions led to changes. Nevertheless, it is evident that the spirit of reform came to a halt as early as in the middle of the 1990s. For the situation in Russia the comments of judge Sergej Pashin who had been the central figure in the reform movement in the judiciary under Yeltsin are revealing:

> "The romantic period of judicial reform came to an end in 1996 when the bureaucracy adapted the democratic achievements in the organisation of the courts to its needs. The organs of judicial self-administration became the executors of the will of the judicial establishment and the presidents of the courts attained that their life-long stay in power was legally fixed. The democratic reforms hardly touched upon the procuracy, the organs of the interior and State security as if they had not even changed their names. […] The second wave of changes came at the beginning of this century. The final result was that the judicial system once again had taken the role of an appendix to State power. Adjudication was transformed more and more into a managed activity of reckoning, as it had always been."[16]

The worsening of the situation of the judiciary is generally parallel to the tightening of political freedom in a country. This is especially true for Belarus where the turn-round was triggered by the constitutional reform in 1996.[17] Major judicial reforms in Russia were linked to Putin's initiative to build up the so-called *vertical of power*.[18] In Moldova the re-election of the Communist Party in 2002 was accompanied by the dismissal or the refusal to prolong the mandate of many judges.[19] The political process in Kirgizstan strengthening authoritarian leadership in

---

16 Quoted in G. Ilicev, Izvestija, 26 October 2004.

17 Opinion of the Venice Commission on the Amendments and Addenda to the Constitution of the Republic of Belarus, CDL-INF (1996) 008, Point 2, lit. a.

18 Federal Law No. 159-FZ (11 December 2004), Sobranie zakonodatel'stva Rossyiskoy Federatsii (SZRF) No. 50, Pos. 4950; Federal Law No. 2-FZ (2 June 2009), SZRF 2009, No. 23, Pos. 2754.

19 Hriptievschi/Hanganu (note 15), Chapter B. II. 3.

the last years of the Akajev regime as well as under Bakiev led to major changes in the judiciary which even translated into constitutional changes.[20] Super-presidential systems in central Asian countries did not leave much room for judicial independence.

Despite the differences between the judicial systems in the post-soviet countries it can be said that two decades after the beginning of the reforms the judiciary is not perceived to be as independent as it was hoped to be. Independence of the judiciary continues to be a goal of further reforms and is not considered an achievement of the reforms of the past.[21] Yet, it has to be admitted that the enthusiasm about quick and fundamental changes was at best naïve. What has grown over centuries cannot be changed within a few years, especially if the political wind often blows from the wrong side.

B. The Difficult Task of Ground-breaking Reforms

I. Wrong Assumptions

The debate on the independence of the judiciary often seems to be based on the assumption of a dichotomy between "dependence" and "independence". Yet, it has to be admitted that there will rarely be a fully independent or a fully dependent judiciary. "Independence" comprises many subjective and objective factors. Independence can be understood as freedom from outside pressure, but also as complete neutrality and detachment from any influence whatsoever.[22] There are

---

[20] M. Kachkeev, Die Stellung des Richters im Recht Kasachstans und Kirgistans – Vergleich zu allgemein anerkannten rechtsstaatlichen Postulaten, at 157 sqq. and 171 sqq. (2007).

[21] Cf. the National Development Strategy in Moldova for the years 2008-2011 in which independence of the judiciary is proclaimed as a Medium Term goal (cf. the Law on the approval of the National Strategy for Development, Monitorul Oficial Nos. 18-20, 29 January 2008 (cf. Hriptievschi/Hanganu (note 15), Chapter A.); Speech of President Medvedev at the Russian Judges Congress (2 February 2008).

[22] Cf. W. Hoffmann-Riem, Richterliche Unabhängigkeit in Zeiten struktureller Veränderungen der Justiz, in: R. Pitschas/A. Uhle (eds.), Wege gelebter Verfassung in Recht und Politik: Festschrift für Rupert Scholz zum 70. Geburtstag, 499, at 503 (2007); T. Milej, Die verfassungsrechtlichen Grundlagen

many forms of dependency such as economic dependency, pressure from the media or subconscious influences from factors such as the judges' social or ethnic origin. Judges considered as being impartial and objective according to the standards of one legal system can be considered as dependent and biased according to stricter standards in another legal system.[23] Therefore, the independence of the judiciary is not a status, but a process. This is especially true for countries having to struggle with a difficult heritage with a view both to mentality and to institutional structures.

In this context it may be helpful to draw a comparison with the debate in human rights law on the differences between *political rights* and *social rights*. In the classical doctrine it was assumed that the former can be realized immediately, whereas the implementation of the latter needs time and money and can be achieved only gradually. According to the codifications of international human rights the right to fair trial is qualified as a political right.[24] Nevertheless, it bears all the characteristics of a social right as it presupposes large and continuous investments in infrastructure and human resources, a fact which was first taken into account by the European Court of Human Rights in its famous *Airey* decision in 1979.[25] Although in the reform process policy makers were aware of the costs of building up an independent judiciary,[26] they were not courageous enough to break with the tradition of false promises. Guaranteeing an *independent judiciary* on the constitutional level – almost in the same wording as before in the Soviet system[27] – was a

---

für ein faires Verfahren in Strafsachen und die Entwicklung des gesamteuropäischen Verfassungsrechts, at 234 (2007).

[23] A famous example in this context would be affiliation to a political party. In some legal systems (e.g. in Germany) this is considered not to be a relevant factor, in others (e.g. in Hungary) it is deemed to be not acceptable.

[24] Whenever there are different codifications for political and social rights (e.g. the International Covenant on Political and Civil Rights v. the International Covenant on Economic, Social and Cultural Rights; the European Convention on Human Rights v. the European Social Charter), the right to fair trial forms part of the "political and civil rights".

[25] ECtHR, *Airey* v. *Ireland*, Judgment of 9 October 1979, Series A, No. 32, para. 24.

[26] There is a first hint about "investments" in Gorbachev's reflections on the judiciary back in 1988 when he mentioned that the number of judges had to be increased, *supra* note 2.

[27] *Supra* notes 10 sqq.

promise which could not be fulfilled. On the other hand, a constitutional guarantee to only gradually (re)build an independent judiciary within a certain time frame would have been too modest and too honest, and thus unthinkable in the political power play. Yet, starting out with a false promise which everybody could easily identify as such endangered the credibility of the reforms from the very beginning.[28]

Furthermore, it was naïve to focus only on the pressure on the judiciary from the Communist Party and the executive, especially the central government and the regional administration. Although these were very important aspects which characterized the picture of *telephone justice* in communist times this approach was too narrow. Mighty pressure groups existed and exist in many other forms. Thus, new forms of dependence can always replace the traditional ones. What is generally deplored in post-soviet countries is the dependence of the judiciary on the presidential administration as well as the existence of hierarchical structures within the judiciary, not leaving enough room for the independent adjudication of individual cases. The caller may change, but the telephone calls continue.

It is also a deception to expect real independence to be conceived and welcomed as progress by everybody. On the contrary, for those in power independent judges constitute a risk. This may explain some retroactive reforms restricting *too much independence*. Thus under Yeltsin the Supreme Judicial Qualification Collegium had been composed only of judges. Because of complaints of *judicial corporatism* the composition of this body was changed and one representative of the presidential administration included. It is this person who now seems to have the final say in the process of promotion and election, thus re-establishing a link between the Presidential administration and the judiciary.[29] Admonitions to strengthen the independence of the judiciary may be sincere, but they may also be lip-service.

Last but not least, the possibility of change was probably overestimated. Poor acquittal rates, powerful *prokurors*, weak judges needing supervision and instruction are not random phenomena of the Soviet system of justice. Rather these elements are deeply rooted in a culture characterized by mistrust in justice based on legal textbooks – the

---

[28] On the problem of „maximalist" constitutional guarantees see A. Nußberger, Verfassungstransfer von Ost nach West. Illusion, Desillusion, Chancen für die Zukunft?, 60 Osteuropa 9 (2010).

[29] Schwartz/Sykiainen (note 15), Chapter B. I. 2.

writings of Leo Tolstoy and Fyodor Dostoevsky are powerful witnesses to this spiritual approach.[30] The ideological heritage remains an important factor as well: authoritarian ruling is justified by the wish to keep together a huge empire; the progress of the State is considered to be more important than the well-being of the individual; criminals are outcasts who do not deserve special attention; commanding is preferred to advising; control from above is considered to be more efficient than control from below.[31]

II. Negative Influences from Outside

Judicial reforms were initiated at the same time as all the other reforms in the political and economic sector. Although they were considered to be important, in allocating financial means they were not a priority.[32] Thus the enthusiasm for reform was drastically reduced as a result of continuous under-financing of the courts in all the post-Soviet countries. As a matter of fact, the situation of the judiciary was deplorable in the 1990s with judges not receiving any salary for months, with court building having to be closed because of holes in the roofs and lack of heating in winter.[33] No judge can work without paper, telephone and electricity. The best reform plans will be mocked if basic needs cannot be covered. Financial shortages in the initial period of restructuring the judiciary thus discredited the ideas of the reformers in the eyes of the general public.

Furthermore, the political situation at the beginning of the 1990s was such as to make it difficult to be really *neutral*. Although there were many facets in the political debate there was a general opposition between those who wanted change and adaptation to the West and those who wanted restoration of the Soviet era. This fight is most visible in the development of the Russian Constitutional Court in the early years.

---

30 M. Mommsen/A. Nußberger, System Putin, at 82 sqq. (2007).

31 C. von Gall, Die Konzepte „staatliche Einheit" und „einheitliche Macht" in der russischen Theorie von Staat und Recht, at 199 sqq. (2010).

32 In Ukraine, e.g. financing of the courts was carried out on the residual principle (R. Kuybida, Report on the Independence of the Judiciary in Ukraine, on file with ODIHR, Chapter A.); the situation was similar in Central European countries, cf. Bodnar/Bojarski (note 15), Chapter B. I. 3.

33 Mommsen/Nußberger (note 30), at 98 sqq.

It was torn between two antipodes, a conflict which finally erupted in the assessment of Yeltsin's revolutionary decree and triggered the violent fight between the Supreme Soviet and the President in September 1993. The damage done to public trust in this newly established institution cannot be underestimated.[34]

Judges have to take decisions based on law. If the law is unclear and confusing their task gets very difficult. In the situation of legal chaos brought about by the so-called "war of laws" between the centre and the Republics in the late Soviet Union, by the reform laws too hastily enacted and not coordinated with existing laws, by the lack of coherence between laws and directives, the judiciary will always be exposed to the reproach that they decide in an arbitrary way.

Last but not least, the education system was not such as to produce well-trained new judges able to live up to the demands of the reformers. The deficiencies of the education system thus contributed to the perception that all the reforms were no more than wishful thinking.[35]

III. Resistance from Inside the Judiciary

The factors impeding judicial reform came not only from outside, but also from inside the judiciary. Generally, judges remained in their posts. Personal continuity would translate into persistence of perceptions and ideas inherited from the past. Furthermore, it was also a challenge to abolish privileges such as material goods provided to judges. Such changes were difficult to implement – a problem which has not been overcome even 20 years after the beginning of the reforms.[36] The same is true for the strong position of the court presidents who would fight

---

[34] A. Nußberger, Entwicklung der Verfassungsrechtsprechung in Russland, in: A. Nußberger/T. Morščakova/C. Schmidt (eds.), Verfassungsrechtsprechung in Russland. Dokumentation und Analyse der Entscheidungen von 1992-2007, 43, at 51 sqq. (2009).

[35] Cf. e.g. G. Mouradian, Judicial Independence in Armenia, in this volume, Chapter B. II. 3. b.).

[36] Cf. the vague wording in the Recommendations of the Venice Commission: "Bonuses and non-financial benefits for judges, the distribution of which involves a discretionary element, *should be phased out*." (Conclusion No. 8, emphasis added), Report on the Independence of the Judicial System (CDL-AD(2010)004 (16 March 2010)).

against all efforts to diminish their power.[37] Resistance to reforms from inside the judiciary concerned institutional changes as well. This is evidenced, for example, in Russia by the struggle between the Constitutional Court and the Supreme Court as well as between the Supreme Court and the Arbitrazh Court.[38]

C. Taking Progress Seriously

The reasons for the failure of substantial and credible judicial reforms in the post-soviet countries are complex. It is necessary to distinguish between three different aspects: first, it is possible to discern general structural problems linked to the role of the judiciary. In this context a process of trial and error is unavoidable; *best solutions* simply do not exist. Second, problems can be explained as directly linked to the heritage of the past and thus specific to post-communist countries; that is why the time factor sometimes may also play an important role in changing what is considered to be deficient. Last but not least, one cannot gloss over the factor of misuse of power. The better and more transparent the structures and institutions the less the actors will be prone to bypass limitations. Nevertheless, misuse of power will always remain possible.

I. Justification of Trial and Error

Although the principle of separation of powers is almost universally accepted, its practical implementation shows some dilemmas and structural problems. Trial and error may be unavoidable in order to find tailor-made solutions. Reforms of reforms need not always be interpreted as an indication of a turn-round in the general policy oriented towards more judicial independence, but may be necessary steps in a complicated process. In relation to specific questions it is not possible to define what the correct solution is, but different factors have to be weighed in order to find an acceptable compromise.

---

[37] Schwartz/Sykiainen (note 15), Chapter B. VII. 2.

[38] Id., Chapter B. VII. 4.; W. Burnham/A. Trochev, Russia's War Between the Courts: The Struggle over the Jurisdictional Boundary between the Constitutional Court and Regular Courts, 55 American Journal of Comparative Law 381 (2007).

This is evidenced by the difficulty in setting up detailed international standards on the judiciary. Although quite a few efforts have been undertaken by various political bodies[39] and interested groups,[40] beyond the general human rights guarantees[41] there are no universally accepted binding conventions. The recent discussions in the Commission for Democracy through Law (Venice Commission) on standards for Europe showed once more the divergence and controversy of the different approaches even within the European countries.[42] In this context it was also debated how far it was possible and necessary to distinguish between standards for the "new democracies" and the "old democracies". On the one hand such an approach was deemed to be unacceptable as it would contradict the assumption of a common European heritage.[43] On the other hand it had to be admitted that some models worked well in Western European countries based on long-standing

---

[39] Cf. e.g. the Basic Principles on the Independence of the Judiciary endorsed by the United Nations General Assembly in 1985, available at <http://www2.ohchr.org/english/law/indjudiciary.htm>; the Recommendation (94)12 of the Committee of Ministers on the Independence, Efficiency and Role of Judges (13 October 1994) which is currently under review, available at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=534553&SecMode=1&DocId=514386&Usage=2>; European Charter on the Statute of Judges, approved at a multilateral meeting organized by the Directorate of Legal Affairs of the Council of Europe in July 1998, available at <http://medel.bugiweb.com/usr/charte%20eng.pdf>.

[40] Opinion No. 1 of the Consultative Council of European Judges on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges, available at <http://www.venice.coe.int/site/main/texts/JD_docs/CCJE_Opinion_1_E.htm>; Bangalore Principles of Judicial Conduct of 2002 adopted by the Judicial Group on Strengthening Judicial Integrity, available at <http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf>.

[41] Article 6 European Convention of Human Rights, Article 10 Universal Declaration of Human Rights, Article 14 International Covenant on Civil and Political Rights.

[42] Cf. the elaboration of four different versions of the "Report on the Independence of the Judicial System" before the adoption of the final version in 2010 (CDL-AD(2010)004 (16 March 2010)), available at <http://www.venice.coe.int/docs/2010/CDL-AD(2010)004-e.asp>.

[43] Cf. the Statute of the Council of Europe in which the member countries refer to "the ideals and principles which are their common heritage" in the preamble.

traditions although they were not in line with best-model practices advocated for countries rebuilding an independent judiciary.[44]

1. Administration of the Judiciary and Determination of the Budget

The exercise of administrative functions, as a rule, implies discretion. Therefore democratic legitimation – be it direct or indirect – is a precondition for the decisions taken. On the contrary, the exercise of judicial functions is bound by law only. The administration of the judiciary, which comprises for example decisions concerning the building of court premises, decisions concerning the allocation of offices to judges, and the definition of court vacations, is characterized by discretion, but at the same enables the proper functioning of the judiciary. If exercised by the judges themselves, it may be criticized that they assume responsibilities for which they lack legitimacy. Moreover they are generally not well prepared for managerial tasks. If exercised by the State authorities the independence of the judiciary may be seen to be in danger as this power may easily be used as a lever to exert control.

Convincing solutions to this problem are lacking. In Russia, for example, the relevant functions were transferred from the Ministry of Justice to the Judicial Department within the Supreme Court, a model which was considered to be a big step in the right direction. In practice, however, although the Ministry of Justice had lost its influence, it was substituted by the Presidential Administration. The court administrators who were appointed by the Judicial Department did not take over managerial responsibilities, but tended to execute the courts' chairpeople's orders. So the whole system neither enhanced independence nor reinforced professional administration.[45] In Moldova it was planned to integrate the Judicial Administration within the Supreme Council of

---

[44] Cf. the wording in the Draft Report on the Independence of the Judicial System (23 March 2009), CDL (2009)055: "To sum up, it is the Venice Commission's view that at least in *new democracies* it is an indispensable guarantee for the independence of the judiciary that decisions on the appointment and career of judges be taken by an independent judicial council." (No. 27, emphasis added). In the final report (16 March 2009, CDL-AD(2010)004) the relevant text reads as follows: "To sum up, it is the Venice Commission's view that it is an appropriate method for guaranteeing for the independence of the judiciary that an independent judicial council have decisive influence on decisions on the appointment and career of judges."

[45] Schwartz/Sykiainen (note 15), Chapter B. I. 1.

Magistrates, but in the end a "public institution subordinated to the Ministry of Justice" was created.[46] New solutions have to be tried out – best practice does not exist. Similar problems arise in the context of the determination of the budget. As this forms part of a political negotiation process, courts are not well equipped to take part, whereas other actors may not adequately respect the needs of the judiciary.

2. Composition of Self-administrating Bodies

Another difficult problem is the composition of the bodies of self-administration. If there are only judges, fears of judicial corporatism arise as the judges may lose sight of the context in which they have to operate and may take decisions which are not accepted by society as a whole. If, on the other hand, representatives of other branches of power cooperate in decision-making the role of the judges may be drastically reduced. This is especially true if the judges are in the minority.[47] Therefore there is a strong tendency to require a majority of judges for the independent judicial councils or comparable bodies. According to the Report of the Venice Commission in all cases the council should have a pluralistic composition with a substantial number, if not the majority, of members being judges.[48] In practice, however, it may already block the whole mechanism if one member of the executive, especially of the Presidential Administration, exerts pressure and dominates the decision-making process.[49] Therefore there is no *ideal* mix in the composition of judicial councils. It is difficult to find the right balance between self-governance and corporatism.

---

[46] Cf. Hriptievschi/Hanganu (note 15), Chapter B. I. 1. with reference to Section II, *Regulamentul Departamentului de Administrare Judecătorească* (Regulation of the DJA), annex I to the Government's decision no. 1202 of 6 November 2007 regarding the approval and the structure of the DJA, Official Gazette nos. 178-179 of 16 November 2007.

[47] R. Kuybida, Report on the Independence of the Judiciary in Ukraine, on file with ODIHR, Chapter A.; Hriptievschi/Hanganu (note 15), Chapter B. I.; Vashkevich (note 15), Chapter B. I.; Mouradian (note 35), Chapter B. I.; Bodnar/ Bojarski (note 15), Chapter B. I.; Ligi (note 15), Chapter B. I.

[48] Cf. the recommendation (No. 32) of the Venice Commission in the final Report (note 36).

[49] Cf. Schwartz/Sykiainen (note 15), Chapter B. I. 2.; Vashkevich (note 15), Chapter B. I. 1.

3. Immunity of Judges

Reforms of reforms can also be observed in defining the judges' constitutional status in so far as immunity from criminal prosecution is concerned. Here, too, we can observe a dilemma. If the judges are not immune, they can be prevented from adjudicating on important cases by concocting false criminal charges and arresting them. On the other hand, misuses of the immunity regulations were pervasive especially in the early 1990s as many criminal transactions were hidden in judges' bags. The legislator had to react and to reduce the scope of immunity.[50] Still, it remains difficult to define the right balance. The Venice Commission suggests functional – but only functional – immunity.[51]

4. Soft Criteria in Selecting and Promoting Judges

There are many different mechanisms for selecting judges. No model can be ideal. Here, too, the dilemma is to legitimate the judges' far-reaching decisions. The models oscillate between the extremes: *judicial corporatism* on the one hand and *politicised elections* on the other hand. It is difficult to justify the idea that the process of selection should be left to the judges exclusively. But it is also doubtful in how far politicians or members of the administration should have influence. This is all the more true as not only the competence and intellectual capacities of the judges, but also their moral qualities and character are considered to be decisive.[52] As practice has shown in many countries it is even very difficult to organize the examinations in such a manner as to produce comparable results. The assessment of moral qualities will always remain subjective, even if the criteria applied are systematized on the basis of psychological research.

---

[50] Schwartz/Sykiainen (note 15), Chapter B. VIII.; Ligi (note 15), Chapter B. VIII.; Bodnar/Bojarski (note 15), Chapter B. VIII.; Mouradian (note 35), Chapter B. VIII.; Vashkevich (note 15), Chapter B. VIII.; Hriptievschi/Hanganu (note 15), Chapter B. VIII.

[51] Report on the Independence of the Judicial System (note 36) Conclusion 10.

[52] After long discussions the comments of the Venice Commissions (note 36) remain rather vague: "It is essential that a judge have a sense of justice and a sense of fairness. However, in practice, it can be difficult to assess these criteria. Transparent procedures and a coherent practice are required when they are applied" (at para. 25).

The same intrinsic problems are linked to the definition of judicial ethics. The use of vague and broad terms is unavoidable. If the ethical codex is used for far-reaching decisions in disciplinary procedures, misuse is difficult to avoid. Against this background it may seem to be recommendable to *test* judges and to nominate them first for a probationary period, and only if successful for life. Yet, this mechanism has proven to be misused in order to select the judges who are the most loyal to the authorities. Here, too, the results of such a mechanism largely depend on the legal culture in the given country.

5. Remuneration of Judges

In every profession it is necessary to motivate those doing the work to perform their duties in the best way possible. As a rule, financial incentives and promotion to higher posts are used to create a spirit of competitiveness. For the judiciary it is considered to be an essential prerequisite for independence to pay the same salary to all judges performing the same duties irrespective of the speed and quality of their work.[53] Otherwise it would be necessary to determine who might assess and evaluate differences in the judges' performance. Therefore motivation can be linked only to promotion to higher courts or courts deciding on cases which are more interesting. In this context the same organizational and substantial problems arise as in the process of selection of judges.

It is also difficult to determine the level of judges' salaries. They should be attractive to good specialists. Nevertheless, salaries which were too high would distort the general wage structure. Therefore the Venice Commission advises guaranteeing a level of remuneration which "corresponds to the dignity of their office and the scope of their duties".[54] Yet, as experience has shown, it would be naïve to believe that raising salaries would diminish corruption, although the low salaries in com-

---

[53] The discussions within the Venice Commission (see above note 36) have revealed that in France excellent performance of judges can be financially remunerated. Therefore the conclusions are quite weak: "Bonuses and non-financial benefits for judges, the distribution of which involves a discretionary element, should be phased out"; Report on the Independence of the Judicial System (note 36) Conclusion 8. This wording is also a tribute to the special situation in the process of transition (see *infra*).

[54] Report on the Independence of the Judicial System (note 36) Conclusion 7.

munist times were always interpreted as a reason for the ability *to buy* a judge.

6. Specialization within Chambers

Court systems are organized in very different ways. Whereas in Germany, for example, there are five different branches of courts (administrative courts, financial courts, social courts, labour courts and courts of general jurisdiction), other judicial systems are not diversified.[55] Whatever the general structure of the system may be, the problem of specialization and fair distribution of workload within in the chambers remains.

According to one model it is the Court President or the President of the chamber who has the right to assign the different cases to the judges. This contradicts the model of the *gesetzlicher Richter* favoured by countries such as Germany or Austria. This means that the right to fair trial is violated not only if the case is not brought to the competent court, but also if the individual judge adjudicating on the case has not been determined in advance. According to another model the automatic distribution of all the cases irrespective of work-load and specialization of the judges is preferable. The advantage of this system is its transparency and the exclusion of arbitrariness. Yet, it can lead to an unfair or inefficient distribution of cases.[56] This dilemma cannot be solved adequately. The Venice Commission tries to lead the way: "[a]s an expression of the principle of the natural or lawful judge pre-established by law, the allocation of cases to individual judges should be based on objective and transparent criteria established in advance by the law or by special regulations on the basis of the law, e.g. in court regulations. Exceptions should be motivated."[57]

---

[55] For example Albania, Azerbaijan, Belgium, Canada, England and Wales, Georgia, Hungary, Kazakhstan; Moldova, Montenegro, Poland, and Spain.

[56] See T. Müller-Graf, "Sehende" Richter braucht das Land, Neue Zürcher Zeitung, 27 October 2009, an article based on the situation of the judiciary in Switzerland.

[57] Report on the Independence of the Judicial System (note 36) Conclusion 16.

7. Critique of the Judiciary

It is very difficult to criticize the real problems of the judiciary both from outside and from inside as all sort of criticism might be seen as undermining the authority of the judiciary. The European Convention on Human Rights explicitly allows for a restriction of the freedom of expression "for maintaining the authority and impartiality of the judiciary" (Article 10, para. 2). *Kudeshkina* v. *Russia,* decided by the European Court of Human Rights in 2009, clearly illustrated the problems. In this decision the Court states that issues concerning the functioning of the justice system "constitute questions of public interest, the debate on which enjoys the protection of Article 10", but it emphasizes at the same time "the special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a law-governed State, must enjoy public confidence if it is to be successful in carrying out its duties."[58] Nevertheless, it considers the harsh criticism of the Russian judge Kudeshkina of the judicial system in Russia to be justified as "her statements were not entirely devoid of any factual grounds […], and therefore were not to be regarded as a gratuitous personal attack but as a fair comment on a matter of great public importance."[59]

Nevertheless, it cannot be denied that any fundamental critique of a judicial system alluding to corruption or to other important deficiencies is situated at a thin borderline between the legitimate exercise of the freedom of expression and an attack on the authority of the judiciary. Furthermore, it is difficult to find a neutral instance in such cases. In all those matters trial and error have to be accepted. Even the recommendations given on the basis of best-practice models remain open and vague and do not indicate any clear way to go.

II. Transitional Solutions in Transitional Judicial Systems

Whereas every judicial system is confronted with the structural problems listed above some problems are more specific to countries having to overcome the Soviet heritage. Although it is true that almost 20 years have passed since the dissolution of the Soviet Union many of those problems are still part of the everyday life of judges in post-soviet

---

[58] ECtHR, *Kudeshkina* v. *Russia*, Judgment of 26 February 2009, para. 86, available at <http://hudoc.echr.coe.int/hudoc/>.

[59] Id., paras. 86-95.

countries. Thus it seems to be very difficult to overcome the informal traditions of interaction between the judiciary and the executive. Another problem which pervades all post-soviet countries is the low acquittal rate, which shows the strong bias of the judiciary in favour of the *prokuratura*. Success is still measured in the number of overrulings of judgments. As acquittals tend to be overruled in higher courts, judges remain reluctant to acquit those accused by the *prokuratura*. What also remains precarious is the composition of the judiciary. The statistics do not need any further comment: For example in Russia in 2008 367 judges were charged with disciplinary offences and 56 judges removed. These numbers are shocking either way: if the disciplinary procedures were justified they show the corruption within the judiciary. If they were not justified, they are a clear sign of misuse of the instrument of disciplinary procedure. The situation is similar for example in Ukraine, where 422 judges were removed between 2006 and 2009.[60]

Experience has shown that it is not easy to renew the judicial personnel and to infuse a new spirit into the system, probably because of the dysfunctioning of the selection procedures and the explicit and implicit pressure on newcomers. As long as the judges at the top of the hierarchy are not considered inspiring role models of courage and independence it is difficult to imagine fundamental change.

D. Intentional Blocking of Reforms

It is true that the flaw results of the reforms after 20 years can be partly explained by structural dilemmas and by a difficult heritage having to be overcome. Yet, it has also to be realized that the reforms were not always conducted with goodwill. Some reforms can be called "fake reforms". Sometimes the rules are arbitrarily set aside, and sometimes the influence of the executive on the judiciary is even openly admitted. Even conscious abuses are not rare. An example of a fake reform may be the definition of transparent procedures for the selection of judges with the intention of directing the whole process from behind in an invisible manner. The most elaborate structure of the selection process is useless if the real decisions are taken behind the curtains in the Presidential Administration. Thus, the existence of a selection commission

[60] R. Kuybida, Report on the Independence of the Judiciary in Ukraine, on file with ODIHR, Chapter B. VI.

within the Presidential Administration not envisaged by law thwarts the whole process, especially if the procedure before this commission is confidential and the discretion unfettered. This seems to be a persistent flaw in the reformed judicial systems in post-soviet countries. The same is true for reforms pretending to apply democratic rules but leaving the decision-making power with a body which is not democratically elected, but composed of appointed members such as the Federation Council in Russia. It can also be considered a fake reform if the judiciary is removed from the influence of the regional authorities, but their indirect influence persists because of many other *channels*. Whereas in those cases lip service is paid to the aim of creating an independent judiciary, in other cases the real intentions are not even hidden. An example would be the definition of a complex selection procedure in which the President has an arbitrary power of veto, such as in Armenia. Lack of goodwill is also evident in the application of the norms if publicity for trials is theoretically assured but the court rooms are full of security officers in plain clothes, journalist are accredited in an arbitrary manner, small court rooms are chosen for important trials, incorrect announcements are made and classified documents are included in the files in order to have a pretext for excluding the audience.[61]

Conscious abuses can also be seen in the changing and retrospective application of age limits in order to get rid of unwanted judges. The same applies to measures reorganizing courts in order to transfer unwanted judges to other, often remote courts, or the arbitrary refusal to prolong the terms of judges appointed for a first period of five years. One of the factors complained of most often is the misuse of the position of court president, as presidents have a lot of discretionary power which can easily be used as link to the executive.

E. Results

Against this background it may be asked if the results could have been better after 20 years. But the question could also be turned round: could the results have been worse? The complexity of the whole process must not be underestimated. Reforms of the judiciary are no more than a small part of the colourful mosaic of modernization of countries which

[61] Schwartz/Sykiainen (note 15), Chapter C.II. 4.; Vashkevich (note 15), Chapter C. IV.

had no or almost no tradition of an independent judiciary. Despite all the criticism it is important to stress that there were periods of relative freedom such as the early phase of constitutional jurisprudence in Russia when truly far-reaching and courageous decisions were taken, especially in the field of human rights, which paved the way for the elaboration of new legislation in the field of criminal law and criminal procedure law.[62]

Many positive developments can be highlighted. Thus criticizing the lack of independence of the judiciary is no longer a taboo. On the contrary, the deficiencies are understood as an important social problem and are accorded a prominent place on the reform agenda. Many parts of the reform such as the reform of the Soviet court structure[63] and the reform of procedural laws have already been accomplished. New judicial bodies such as high judicial councils or constitutional courts contribute to greater public awareness of the problems linked to the judicial profession and the courts in general. In some countries life tenure of judges has been introduced.[64] Financing has been improved on the basis of targeted programmes;[65] systems of remuneration have been improved.[66] Benefits have been annulled, even if that was met with hostil-

---

[62] T. Morščakova, Verfassungsgerichtsbarkeit – ein Neubeginn in Russland, in: A.Nußberger/T. Morščakova/C. Schmidt (eds.), Verfassungsrechtsprechung in Russland. Dokumentation und Analyse der Entscheidungen von 1992-2007, 1 (2009).

[63] Cf. the introduction of administrative courts in Ukraine, R. Kuybida, Report on the Independence of the Judiciary in Ukraine, on file with ODIHR, Chapter A.

[64] In Russia until recently, judges were first appointed only for three years. In 2008, Medvedev criticized this system of making the judges completely dependent; in 2009 it was changed (Schwartz/Sykiainen (note 15), Chapter B. II. 3.). In Georgia the new draft of the changes to the Constitution envisages the introduction of life-long tenure for all judges with the exception of the Supreme Court Judges (cf. Draft Opinion on the Draft Constitutional Law on Amendments and Changes to the Constitution of Georgia, CDL (2010)062).

[65] Cf. the targeted programme in Russia from 2002 to 2006 which was continued until 2011 (Schwartz/Sykiainen (note 15), Chapter B. IV. 1.).

[66] Cf. Ukraine where the disparity in the remuneration of judges on the different hierarchical levels of courts was reduced significantly (R. Kuybida, Report on the Independence of the Judiciary in Ukraine, on file with ODIHR, Chapter B. IV. 1.).

ity by those concerned.[67] Automatic assignment of cases has started.[68] Decisions have been computerized.[69] In Ukraine the disparity in the remuneration of judges on the different hierarchical levels of courts has been reduced significantly. The probationary period for judges in Armenia has been abolished.[70]

On the other hand there are also examples of changes worsening the situation, such as the abolition of the election of the President of the Russian Constitutional Court who will now be nominated by the Federation Council on the basis of a recommendation of the President.[71] Deeply rooted structures persist, such as the dominant role of the *prokuratura* in the judicial system and the domination of the lower-ranking courts by the Supreme Court on the basis of so-called general rulings *explaining* to all other courts how to interpret the law. Yet, it would probably be naïve to expect trust in the courts to be brought about by structural reforms. According to the biblical saying, "You will recognize them by their fruits", it is much more important for the courts to take visible courageous and well-founded decisions proving their independence. Decisions such as those in the *Gongadze* case[72] or in the *Sovtransavto*[73] case discredit the judiciary as a whole. Fortunately, the European Court of Human Rights as *outside player* could help to find out what really happened in those cases and throw some light on the abuse of power by both the executive and the judiciary. At the same

---

67 E.g. in Russia privileges such as 50% exemption from communal payments, total exemption from income tax, and the provision of an apartment to every newly appointed judge were abolished (Schwartz/Sykiainen (note 15), Chapter B. IV. 2.).

68 E.g. it was started in Russia for Arbitrazh courts (Schwartz/Sykiainen (note 15), Chapter B. V.).

69 Cf. e.g. Ukraine where a Unified Register of Court Decisions was introduced (R. Kuybida, Report on the Independence of the Judiciary in Ukraine, on file with ODIHR, Chapter A.).

70 Cf. the situation in Armenia, Mouradian (note 35), Chapter B. III. 1.

71 Article 23 of the Federal Law on the Constitutional Court of the Russian Federation; see Y. Safoklov, Die neuen Regelungen der Ernennung des russischen Verfassungsgerichtspräsidenten, Festigung der Machtvertikale oder Stärkung des Präsidenten, at 303 sqq. (2010).

72 ECtHR, *Gongadze* v. *Ukraine*, Judgment of 8 November 2005, available at <http://hudoc.echr.coe.int/hudoc/>.

73 ECtHR. *Sovtransavto* v. *Ukraine*, Judgment of 25 July 2002, Series A, No. 260.

time the decisions of the ECHR also help to anchor the concept of *fair trial* in the legal cultures of the post-soviet countries.[74]

To sum up, it might be said that, despite all efforts and impressive achievements in the process of reforming the judiciary, too many of the reforms are *half-way reforms*. They show where to go, but do not really lead the way to the aim. There is consensus that a lot more needs to be done. Recommendations reflecting good practice generally[75] as well as recommendations responding to the specific problems in the former Soviet States[76] are necessary and helpful instruments. More importantly courageous court decisions should help to gain respect from those concerned as well as from outside observers. A series of convincing decisions in intricate cases will do more for confidence in the judiciary than two decades of piecemeal reforms.

---

[74] *Kudeshkina* v. *Russia* (note 58); ECtHR, *Pronina* v. *Ukraine*, Judgment of 18 July 2006, available at <http://hudoc.echr.coe.int/hudoc/>; ECtHR, *Plakhteyev and Plakhteyeva* v. *Ukraine*, Judgment of 12 March 2009, available at http://hudoc.echr.coe.int/hudoc/.

[75] Cf. the Report on the Independence of the Judicial System of the Venice Commission (note 36).

[76] See e.g. Kyiv Recommendations on the Judicial Independence in Eastern Europe, South Caucasus and Central Asia, in this volume, Annex 1.

The Accountability of Judges in Post Communist States: From Bureaucratic to Professional Accountability

*Peter H. Solomon, Jr.**

A. Introduction

Both the impartiality and the discretion of judges in the bulk of post-communist states are limited by the system of bureaucratic accountability inherited from the Soviet era and left largely intact to this day. Bureaucratic accountability refers to the accountability of judges to their superiors in the judicial hierarchy (both court presidents and judges on higher courts) and is manifested in both the power of court presidents and the evaluation of judges. The Soviet and post Soviet version of the bureaucratic accountability of judges results in an extreme form of internal dependence, in which the material well being and careers of individual judges depend upon how their superiors regard their work, including how they decide particular cases. Recognized and acknowledged by scholars within the Russian Federation and abroad, this crucial compromise with judicial independence is found in all the countries of the Commonwealth of Independent States and to a considerable degree in many (but not all) new members of the European Union.[1] It is

* The author would like to thank Harold Epineuse, Zoltan Fleck, Marina Kurkchiyan, Daniela Piana, Anja Seibert-Fohr, Timo Ligi, Vadim Volkov, and participants in the conference *Pravo i Pravoprimenenie* (Law and Law Enforcement), St. Petersburg, April 2010, for comments on an earlier draft, and Sarah Flemig, Jessica Gingrich-Lawton, Elena Maltseva, and Alexei Trochev for research assistance.

[1] T. Morshchakova, Kontrareforma – ugroza i realnost, 52 *Svravnitelnoe konstitutsionnoe obozrenie* 3, 61 (2005); M. A. Krasnov/E. A. Mishina,

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233, DOI 10.1007/978-3-642-28299-7_22,

time, I argue, for this kind of judicial bureaucracy and the internal dependence of judges to be softened and balanced to a degree by a form of professional accountability.

It is important to recognize that the independence of both the judiciary institutionally and individual judges, though aimed at facilitating impartial adjudication, cannot or should not be absolute. As figures who exercise power, judges ought to be held accountable for the quality of their work (handling trials, writing judgments), for its efficiency, and for their personal rectitude. This despite the fact that many, if not most, mechanisms of accountability do infringe upon independence. The challenge is to find a good balance.[2]

One must also recognize that all states of the civil law world have career judiciaries, organized hierarchically and marked by a kind of judicial bureaucracy.[3] Traditionally these judges have been encouraged to aim for consistency and equity rather than creativity or originality in their rulings.[4] Within the civil law world, however, there are now major differences in the way that judicial bureaucracies function and their impact on the independence of individual judges. As we shall see, these differences include the way that judges are evaluated, the uses of those evaluations, and more generally the role of court presidents or chairs in managing judges on their courts. The recent experience of Western Europe suggests that bureaucratic accountability of judges can take a

---

Otkrytye glaza Rossiiskoi femidy (2007); E. Abrosimova, Ocherki Rossiiskogo sudoustroitva: reformy i rezultaty (2009); O. Schwartz/E. Sykiainen, Judicial Independence in the Russian Federation, in this volume, Chapter B. VII.; A. K. Gorbut, et al (eds.), Transformatsiia Rossiiskoi sudebnoi vlasti. Opyt kompleksnogo analiza, Chapter 3 (2010); P. H. Solomon, Jr., Informal Practices in Russian Justice: Probing the Limits of Post-Soviet Reform, in: F. Feldbrugge (ed.), Russia, Europe, and the Rule of Law, 79 (2007).

2 P. H. Russell, Toward a Theory of Judicial Independence, in: P. H. Russell/D. O'Brien (eds.), Judicial Independence in the Age of Democracy: Critical Assessments from Around the World, 1 (2001).

3 One of the first scholars to use the concept of bureaucracy with regard to a civil law judiciary was G. Di Federico. See his The Italian Judicial Professor and its Bureaucratic Setting, The Judicial Review, part 1, 40-57 (1976).

4 J. H. Merryman, The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America, (3rd ed., 2007); see also F. Contini/R. Mohr, Reconciling Independence and Accountability in Judicial Systems, 3 Utrecht Law Review 26 (2007).

more benign form than is characteristic of the post Soviet and post communist world.

A further possibility is that bureaucratic accountability can be balanced or made consistent with elements of professional accountability.[5] To be sure, the idea of accountability to other judges as a group, not to speak of a legal profession, is associated more with the common law world than with civil law countries. But there are indications that judges in some countries of the civil law tradition (in Western Europe) do form a professional group, sharing an ethos and marked by particular values and skills. There may be a craft of judging that judges learn through early training, that is maintained through the activities of associations and analyses of decisions found in journals, and that may even be reflected in the evaluations that constitute mechanisms of bureaucratic accountability.

This chapter examines the experience of civil law countries in Western Europe with bureaucratic and professional accountability of judges as a way of discovering options for reform in Russia and other post communist countries. The chapter starts with a short exposition of the state of bureaucratic and professional accountability in the Russian Federation; proceeds to analysis of both of types of accountability in France, Italy, and Germany; examines the extent to which countries of Eastern Europe have moved from the post communist pattern to that found in most of Western Europe; and then considers other factors that might contribute to the softening of bureaucratic and strengthening of professional accountability in post communist states.

B. The Russian (Post Soviet) Model of Judicial Accountability

Russian judicial bureaucracy is marked by the power that chairs of courts exercise over rank and file judges and by a system of evaluating

---

[5] Another version of the concept of *professional accountability* and its place within a typology of different forms of accountability was developed by D. Piana in Post-Bureaucratic Judges after Communism: Rule-Based or Efficiency-Based Professionalism in CEEC Judicial System?, unpublished (2009). See also her book Judicial Accountabilities in the New Europe: From Rule of Law to Quality of Justice (2009).

judges that encourages loyalty and conformity with informal norms.[6] The chairs of courts, who serve for two six year terms, are bosses with full administrative responsibility for the work of their courts. Most of them personally run their courts, managing personnel, approving expenditures, and performing administrative tasks, leaving little time for judging. They do not delegate major responsibilities to court administrators. The rank and file judges rely upon their chairs for good references (when possible promotion is at stake); for help with perks that affect their well being (apartments, access to day care, and vacation packages, if not also discretionary benefits), and for not initiating disciplinary proceedings against them that could lead to their removal. Although theoretically judges have security of tenure, the grounds for dismissal are so vague that chairs have the wherewithal to start proceedings against any judge who displeases them. At the same time, the chairs are engaged in exchange relationships with officials in their districts or regions, some of whom help to support the courts, and on occasion need to do favours for powerful clients. For the most part, chairs are still able to direct cases to particular judges, even in courts where random case assignment has been introduced, and the absence of a normative framework on case distribution feeds public perceptions of wrong doing.[7]

One way that regular judges can meet the expectations of their chairs is through good statistical evaluations. Since the late 1930s, judges have been expected in the USSR and most of its successor states to come up with good numbers in statistical evaluations of performance. Some of the statistical indicators relate to efficiency – percentage of cases completed within the legal time limits, size of backlogs – concerns where Russia proved to be ahead of its time. But other indicators relate to the actual content of the judge's decisions, including the number and percentage of decisions left intact by higher courts, that are neither changed nor returned for a new trial (stability of sentences) and in criminal cases also the number of acquittals. By all accounts, the evaluation of performance of judges in Russia, not to speak of other CIS countries, remains primarily quantitative; at least, the quantitative indi-

---

[6] Lydia F. Müller, Judicial Administration in Transitional Eastern Countries, in this volume, Chapter C. I.

[7] Solomon (note 1).

cators matter a lot, not only for individual judges but also for the reputation of the court and its chair.[8]

What matters most is not the fact of evaluations, including statistics recording how well a judge anticipates the wishes of higher court judges, but the way those evaluations are used. In the Russian Federation statistics on judicial performance may matter for the benefits that a judge receives (both extra payments and the help rendered by the chair in obtaining an apartment or access to daycare) and for the reference letter supplied by the chair for a possible promotion. Moreover, negative numbers (such as more than a handful of acquittals in a year) have been known to lead to efforts to get a judge released.[9] After all, a court's reputation for acquittals could cause the chair of the court trouble with the leaders of the local procuracy office, for whom acquittals remain a mark of incompetence.

While obtaining good statistical indicators constitutes an official and open mark of a good judge and a basis for promotion, a successful judge is also expected to co-operate with the occasional request from the chair of her court about the handling of particular cases that matter to powerful persons (a link in the delivery of telephone law). The failure to co-operate with requests may not lead to reprisals, but it may well set limits on the chances of promotion for a particular judge.

The system in Russia of managing judges – encouraging them to decide cases quickly, to anticipate the views of the higher court, and to do the chair's bidding – seems to serve the interests of both the leaders of the judiciary and their clients in politics and business. However, this version of bureaucratic accountability also does violence to the principle of the independence of the individual judge and frustrates the capacity of trial court judges to decide all cases impartially.

While Russia has an extreme form of bureaucratic accountability, professional accountability of judges in that country is underdeveloped. The majority of judges come to the courts either from law enforcement (police or procuracy) or from work as court secretaries, and many of them obtain their law degrees at night. They do not receive special judicial training, say according to the model of the *Ecole de la Magistrature* in Bordeaux, which has had considerable influence on the education of

---

[8] Id. See also Polozhenie o poriadke raboty kvalikatsionnykh kollegii sudei (utv.22 March 2007), Vestnik vysshei kvalifikatsionnoi kollegii sudei RF, 2007, no. 2, available at <http://www.vkks.ru/ss_detale.php?id=8345>.

[9] Schwartz/Sykiainen (note 1), Chapter C. III.; Solomon (note 1).

judges in Central and Eastern Europe.[10] The Academy of Justice has failed thus far to fulfil its original mission in providing such training. Moreover, the short courses that judges take every five years focus mainly on catching up with changes in material or procedure law of the Russian Federation. Too few of them deal with international law (or the European Courts), legal argumentation, judicial ethics, or broad understandings of law (*pravo*) that go beyond legal positivism and a narrow version of legality (*zakonnost*).[11]

Nor are there any independent associations of judges, unions or otherwise. The institutions of judicial self government (congresses, conferences of judges, councils of judges) do give judges opportunities to meet and exchange views on collective interests, but they are dominated by the same chairs of courts that supervise rank and file judges in their work lives. The effectiveness of the councils of judges is further limited by the absence of financial resources (these are not dues based organizations), and their dependence upon the good will of the chairs of regional courts and the Supreme Court (and the analogous *arbitrazh* courts), which provide *ad hoc* funding.[12]

Until recently only a handful of the decisions of judges were published, and not necessarily with the names of the judges who authored them. The development of databases, and support from the Targeted Program for the Development of the Courts, 2007-2011 and help from the World Bank will gradually change this. Right now, most decisions of the *arbitrazh* courts are available electronically; the decisions of courts of general jurisdiction are supposed to follow.[13]

Finally, there is little discussion of what makes a good judge or cultivation of the relevant qualities and skills. The main journal for judges *Sud'ia* has only recently begun discussion of policy issues (in addition

---

[10] D. Piana, Unpacking Policy Transfer, Discovering Actors: The French Model of Judicial Education Between Enlargement and Judicial Cooperation in the EU, 5 French Politics 33 (2007).

[11] Akademiia pravosudiia: website available at <http://www.raj.ru> and curricular materials for 2005 and 2006.

[12] P. H. Solomon, Jr./T. S. Foglesong, Courts and Transition in Russia: The Challenge of Judicial Reform Chapter 4 (2000); Schwartz/Sykiainen (note 1), Chapter B. I. 2.

[13] P. H. Solomon, Jr., Assessing the Courts in Russia: Parameters of Progress under Putin, 16 Demokratizatsiya: The Journal of Post-Soviet Democratization, 63 (2008).

to articles on legal issues, cases and personal matters), and does little to construct a model of the good judge. The practice from Soviet times of giving awards to judges has largely faded, although the Moscow association of jurists *Femida* does give awards for unusual service. But there does not seem to be a place where judges learn what makes an excellent written judgement as opposed to one that is satisfactory or about the skills involved in running a courtroom well. The handbooks for judges are filled with normative material that they might need to consult, and deal little with the craft of judging. Nor did the Russian Federation have vehicles for making judges feel part of a larger legal profession. An All-Russian "Association of Russian Lawyers" was established in December 2005 and includes some judges on its board, but it has not developed a mass membership or forums to encourage discussion of substantive issues by representatives of different legal careers.[14]

C. Bureaucratic Accountability in Western Europe

The organization of judicial careers in some, but not all, countries of Western Europe before World War II shared such familiar features of the Russian system as powerful court presidents (albeit usually constrained from influencing decisions of judges) and evaluations that included statistics on output as well as efficiency (e.g. France). But in the second half of the 20th century, in a time of growing pan European concern about rights and rights protection, the situation changed. By start of the new millennium hardly any country in Western Europe even recorded the rates of reversal of judges, and the emphasis in evaluation of judges usually focused on *the skills of judges* even more than their efficiency (despite pressure from the public management circles). There is also a tendency toward transparency; at least the formal criteria of evaluation are set down in laws or regulations;[15] and often the judges assessed have a right to appeal. In some countries the power and role of court presidents has also been greatly reduced.

---

[14] Schwartz/Sykiainen (note 1), Chapter B. IX.

[15] Roger Errera, The Recruitment, Training, Evaluation, Career and Accountability of Members of the Judiciary in France, in: G. Di Federico (ed.), Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe: Austria, France, Germany, Italy, The Netherlands and Spain, 43, 63 (2005).

The civil law country that has done the most to develop a benign and positive approach to the evaluation of judges and management of judicial careers is Germany, parts of whose experience with judicial reform (for example its constitutional and administrative courts) has served as a model for other countries in the civil law world including in Eastern Europe. We start by examining the German pattern of judicial accountability. We then consider how more traditional countries like Italy and France have also adjusted their systems of bureaucratic accountability. Finally, we inquire into pan European trends and the ways that courts in some countries have helped to oppose attempts by governments to extend accountability measures in ways detrimental to judicial independence.

As in other civil law countries most judges in Germany spend their working lives as judges.[16] After completing a legal education common to all jurists and a period of practical training, potential judges (along with future prosecutors and advocates) must pass a stiff competitive exam, and do a period of relevant internships, followed by a second exam.[17] Only then does a probationary period as a judge begin, followed by a lifetime appointment and the possibility of promotion to a higher court for a small minority of judges. The specific procedures for promotion and evaluation vary from one state (*Land*) to another (most judges work for courts at the level of the *Land*), but there are common features.[18]

Throughout the judicial career until the age of 50 judges are subject to periodic evaluation, early on at two or three year intervals, later every four to five years. While these evaluations matter for possible promo-

---

[16] See A. Seibert-Fohr, Judicial Independence in Germany, in this volume, Chapter B. III. 2.

[17] See id., Chapter B. II. 1.

[18] See also J. Riedel, Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Germany, in: G. Di Federico (ed.), Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe: Austria, France, Germany, Italy, The Netherlands and Spain, 69 (2005); and J. Bell, Judiciaries within Europe: A Comparative Review, Chapter 3, at 3 (2006). See also D. Kommers, Autonomy versus Accountability: the German Judiciary, in: Russell/O'Brien (note 2), at 131; M. Kunnecke, The Accountability and Independence of Judges: German Perspectives, in G. Canivet, et al (eds.), Independence, Accountability and the Judiciary, 217 (2006); D. Clark, The Selection and Accountability of Judges in West Germany: Implementation of a *Rechtsstaat*, 61 Southern California Law Review 1797 (1988).

tion (appointment to a higher court), they do not affect the salaries of judges, which are subject to automatic raises as long as the judge remains in the lower grades.[19] There are no special benefits or perks.

The evaluations of judges are conducted in the main under the lead of the president of the regional court (for judges on both local and regional courts), with the assistance of other judges whom he might appoint to perform particular tasks, such as reading and assessing judgements made by the judge in question, checking the files and the statistics on efficiency, and inquiring about the judge from lawyers and other judges. The chair himself is expected to attend at least one trial to observe how the judge in question manages the courtroom. The criteria, which are set down in detail in laws and regulations in each of the *Länder*, are entirely skills oriented and include four types of competence: "professional competence (e.g knowledge of substantive and procedural law, ability to conduct trials); personal competence (e.g. ability to cope with the work load, ability to decide, openness to new technologies), social competence (e.g. ability to mediate, respect for concerns of parties, ability to lead constructive discussions), and competence to lead (administrative experience, ability to lead and instruct teams)".[20] Some *Länder* even provide a system of scoring (with points), and some call for a prognosis of future performance.

The person evaluated has a series of rights and protections. Usually, he/she is shown a copy of the draft evaluation before it is finalized as well as afterwards; then he/she has the right of appeal to an administrative superior, and finally to the Judicial Service Court of the *Land* or to an administrative court. Not only does the evaluation stress skills and use more qualitative indicators than quantitative, it does not and is not allowed to deal with the content or quality of actual decisions, individually or as a group. In the words of Johannes Riedel, the author of a detailed study of judicial evaluation in Europe, in Germany "the Constitution forbids any kind of evaluation that weights, marks, and values the correctness and quality of judicial decisions".[21] Moreover, according to Section 26 of the Federal Judges Act "judges are subject to service inspections only in so far as their independence remains unaffected".[22] This is taken to mean that a court president must never criticize a judge

---

19 See Seibert-Fohr (note 16), Chapter B. IV.

20 Riedel (note 18), at 96.

21 Id., at 98.

22 Translation by Riedel. Id.

for the way he/she applied the law, and that evaluations must deal only with *the outer order of judicial business* and not its core, or how the law is applied.[23] For their part, the presidents of courts must exercise caution not to cross this line in their interactions with other judges. The Judicial Services Courts have forbade presidents from making any remarks that might influence the future performance of judges, even on matters of case management and efficiency.[24]

The strict limits on how court presidents may interact with rank and file judges reflects the strong value that post War German jurists and politicians have placed on the independence of the individual judges (as opposed to the judiciary as a whole).[25] One commentator has suggested that this emphasis so constrains the presidents of courts that they have lost the capacity to give instructions to rank and file judges on matters related to particular cases (as opposed to court administration), and with these matters at least the German court presidents come closer to the common law model of *primus inter pares* than the dominant figure (boss) normally associated with court heads in the civil law world.[26] While the concern in Germany with the individual independence of the judge as opposed to collective independence of the judiciary does not typify the civil law tradition of the past, there are signs that it is starting to influence other countries (even though the German model of court administration has less influence).

There are, to be sure, dissenting voices. A maverick judge in Berlin points out in his memoirs that to advance from a lower court to a higher one does require a degree of conformity with the expectations of superiors, or that the judge "creates no waves". But this same judge stresses that as a local court judge without any ambitions to move beyond this post, he had a lot of leeway. "He could decide cases based upon his conscience and the law. He could write judgements, not in the

---

[23] See also A. Seibert-Fohr, Constitutional Guarantees of Judicial Independence in Germany, in E Riedel/ R. Wolfrum (eds.), Recent Trends in German and European Constitutional Law, 267, 271 (2006).

[24] Riedel (note 18), at 98-107.

[25] Clark (note 18).

[26] Correspondence with Anja Seibert-Fohr, 19 March 2010. Dr. Seibert-Fohr also questioned whether Germany still had a bureaucratic judiciary. Its form of "intra-organizational accountability" (to use a term coined by Daniela Piana) may be more corporate than bureaucratic.

bureaucratic German that was customary but using elegant and descriptive prose [...].” In short, he had considerable personal independence.[27]

For a contrast, consider the situation with the evaluation of judges in Italy,[28] a country where rank and file judges are major stakeholders. With good representation on the Supreme Council of Magistrates, a powerful body in Italy, ordinary judges have succeeded in assuring that the regular evaluations of their performance in practice affect neither their rank nor their pay.[29] To be sure negative evaluations would have that effect, and achieving weaker than normal statistical indicators of efficiency could serve as grounds for a negative assessment, but for 40 years such assessments have been a statistical rarity. When the indicators are substandard, extenuating circumstances are noted, and as rule no action taken against the judges in question.[30]

Many judges (and prosecutors) have pushed for the elimination of evaluations, but instead the legislature produced a new 2007 law that specifies criteria and procedures for assessment.[31] The new law calls for a skills based approach and highlights four aspects of performance – capacity, productivity, diligence and motivation. Clearly concerns with efficiency are reflected in the new system, but according an informed observer it has not resulted in an increase in negative evaluations, and the pattern of generalized promotions (regarding salary, pension and exit benefits) has continued through 2009.[32] Of course, evaluations might still matter for appointments to higher courts.

Absent from the discussions over the reform of judicial evaluation in Italy was any consideration of assessing the content of judicial decisions and their fate at higher courts. It was taken for granted that such a practice would violate the principle of judicial independence. Since 2005, the formal aspects of a decision (how it was written or argued) could be

---

27 S. R. Levitt, The Life and Times of a Local Court Judge in Berlin, 10 German Law Journal 169, at 197 (2009) .

28 G. Di Federico, Judicial Independence in Italy, in this volume, Chapter B. III. 2.

29 Id.

30 G. Di Federico, Recruitment, Professional Evaluation, Career and Discipline of Judges and Prosecutors in Italy, in: Di Federico (note 18), at 127; Di Federico (note 28), Chapter B. III. 2.

31 Di Federico (note 28), Chapter B. III. 2.

32 Id.

subjected to criticism in an evaluation, but as of early 2010 this had not happened.[33]

France makes a useful case, because this country has over the post World War II period moved slowly with changes to many aspects of its legal institutions (such as criminal procedure).[34] The administration of courts in France looks traditional in comparison with Germany, but as we shall see, France has moved away from the practices most deleterious to judicial independence, such as overly powerful court presidents and excessive reliance on statistical indicators.

France remains a model for the judicial career. It is the country that founded the first serious school for judges, the *Ecole de la Magistrature* (School for Magistrates), in 1958, a body that has had considerable influence on the spread of judicial education in post communist Eastern Europe.[35] France continues to manage its courts with the help of powerful court presidents, who handle case assignment on the basis of objective criteria like specialization (there is no random allocation)[36] and who supervise evaluations that matter not only for promotions (to get into the group of judges eligible for promotion known as the promotion table) but also for merit based bonuses.[37] An informed observer indicates that merit based bonuses started only in the past decade under the influenced public management pressures and that presidents of courts often thwart the system by giving the same or a similar rating to all their judges.[38]

---

33 Correspondence with Giuseppe Di Federico. See also Di Federico, Recruitment, Professional Evaluation, Career and Discipline of Judges and Prosecutors in Italy (note 30), at 157.

34 S. Field, A Tale of Two Reforms: French Defence Rights and Police Powers in Transition, 6 Criminal Law Forum 473 (1995); J. Hodgson, Hierarchy, Bureaucracy, and Ideology in French Criminal Justice: Some Empirical Observations, 29 Journal of Law and Society 227 (2002).

35 A. Bodnar/Ł. Bojarski, Judicial Independence in Poland, in this volume, Chapter B. II. 2.; R. Coman/C. Dallara, Judicial Independence in Romania, in this volume, Chapter B. I. 2.

36 A. Garapon/H. Epineuse, Judicial Independence in France, in this volume, Chapter B. V.

37 Id., Chapter B. IV.

38 Id., Chapter B. IV. 2; R. Ererra, The Recruitment, Training, Evaluation, Career and Accountability of Members of the Judiciary in France, in: Di Federico (note 18), at 43; Bell (note 18), Chapter 2; D. M. Provine, Courts in the Political Process in France, in: H. Jacob, et al (eds.), Courts, Law, and Politics in

However, at least starting with new rules on evaluations established in 1993, judges in France faced a skills based assessment that features four criteria – general professional ability (capacity to decide, to listen, to exchange views with others, to adapt to new situations); legal technical skills (capacity to use one's own knowledge, capacity to decide); organizational skills (capacity to lead a team, manage a court), and other (working capacity, professional relations with other institutions).[39] Moreover each assessment must include an interview, and the judge may challenge the evaluation to a higher authority (the Commission on Advancement). The president of the court of appeal is responsible for the evaluation but relies on the help of others.[40]

It appears, then, that France has modernized its approach to judicial evaluation, by deserting quantitative indicators and emphasizing the demonstration of skills. During the Fourth republic (especially 1945 to 1958), the review of judges by the Superior Council of Magistrates included *inter alia* statistical data on the number of hearings a judge had conducted and the share of her decisions that were overturned by a higher court. I do not know when this practice ended (it may have been as early as 1959), but it does appear that reviews of statistical indicators have not been considered for some decades and that French judges today would consider it highly inappropriate.[41]

As I stated above, the trend in Europe overall (reflected in countries like Austria, Belgium, the Netherlands, and Sweden) is to use skills based assessment of the actual work of judges, done transparently and with the possibility of appeal, and with little or any reference to quantitative indicators.[42] At the same time, courts in some countries have experienced pressure for a managerial evaluation of courts and judges to match what is happening in other parts of government, for example un-

---

Comparative Perspective, Chapter 3 (1996); A. Garapon, French Legal Culture and the Shock of Globalization, 4 Social and Legal Studies 493 (1995); communication from Harold Epineuse, 2 April 2010.

[39] Garapon/Epineuse (note 36), Chapter B. III. 2.

[40] Errera (note 15), at 63.

[41] E. Bloch, Le Conseil Supérieur de la Magistrature: De la Constitution du 2 Octobre 1946, in: J.-P. Royer (ed.), Etre Juge Demain: Belgique, Espagne, France, Italie, Pays-Bas, Portugal et R.F.A., 194 (1983).

[42] B. Allemeersch/A. Alen/B. Dalle, Judicial Independence in Belgium, in this volume, Chapter B. III. 2.; J. Nergelius/D. Zimmermann, Judicial Independence in Sweden, in this volume, Chapter B. III. 2.

der the influence of the doctrine of New Public Management.[43] Both Finland and Italy stand as examples, although judges in Italy have insisted that the results based management be applied only to administrative tasks and not to the core of judicial work. The most dramatic example comes from Spain, where the Judicial Council accepted the idea of giving judges bonuses who handle 20% more than the anticipated number of cases. However, the various judges associations complained, and the Supreme Court of Spain declared all the regulations invalid in part as a violation of the economic independence of the courts and also as a violation of the rule that judges' salaries must be based on objective and equitable criteria.[44]

D. Professional Accountability

One way to reduce the deleterious influence of bureaucratic accountability of judges in civil law countries, apart from making judicial evaluations more benign, is to strengthen an alternative source of accountability, namely accountability to other judges (one's peers). This approach assumes that the values that matter to the judiciary as a whole differ somewhat from those supported in the traditional hierarchical management of career judiciaries, or that the judiciary in a particular country respects the new values emphasized in reformed systems of judicial evaluation, such as the skills of judging.

A prominent role for professional accountability of judges is found especially in common law countries, where judges do not pursue careers in the judiciary but come to the courts as part of careers as lawyers.[45] But professional accountability is not absent from the civil law world, and arguably has grown within Western Europe during the past 50 years.

In an idealized abstract view, professional accountability assumes a set of values shared by a significant part of the judiciary of a country. Those values should include a notion of what constitutes a very good or

---

43 Piana, Post-Bureaucratic Judges (note 5).

44 Contini/Mohr (note 4).

45 F. Gélinas, Judicial Independence in Canada: A Critical Overview, in this volume, Chapter B. III. 2.; S. Turenne, Judicial Independence in England and Wales, in this volume, Chapter B. III. 2; R. Wheeler, Judicial Independence in the United States of America, in this volume, Chapter B. III. 2.

excellent judge, starting from a set of skills that might constitute a craft and extending possibly to commitments or values that adjudication might serve. The abstract view also assumes that these values are defined, cultivated, propagated and reinforced in a number of ways. These may include (1) specialized training for judges; (2) the activities of associations of judges; and (3) the publication and discussion by fellow jurists of the judgements or decisions of judges. Possibly the conception of a good judge shared by judges themselves might find reinforcement in society and external sources, whether in the media or through biographies of judges, of which there are a considerable number for France and Germany.

At this point I do not have material at hand on the actual views of judges in Western Europe about themselves, their roles and missions.[46] I assume that in most countries there is agreement that a good judge is one who demonstrates a particular set of skills that include not only capacity to apply law but also to deal with people, manage a courtroom, and write effective judgments – if only because these skills are now stressed in judicial training and evaluation. Whether judges in a given country also share an understanding of the purpose of their work, a sense of mission, or even an ideology, is less certain and depends upon the cultural context and historical accident. For example, there are indications that in Germany many judges share a society wide commitment to the *Rechtsstaat* in its post war understanding, which puts a premium on the protection of rights and the independence of the individual judge.[47]

It is also possible that judges in a country may identify in meaningful ways with a reference group of peers that goes beyond their own group. If judges have regular interactions outside of court with lawyers, and if the level of lateral entry into the judiciary from advocates is more than

---

[46] Two studies that offer insights into the self perceptions of judges on regular courts in France and Italy are H. Epineuse/D. Piana, Evaluation de la formation des magistrats en France et en Europe. Bilan et perspectives (2008), and M. Sapignoli, Qualità della giustizia i indipendenza della magistratura nell'opinione dei magistrati italiani (2009). The former reveals that two thirds of judges in France are proud of the judiciary and demonstrate high levels of self-confidence and pride. There is also a study of the mindsets of judges on the Constitutional Court of Germany: S. S. Flemig, Access to Justice and Political Ideology: A Jurimetric Analysis of Constitutional Complaint Admissions to the German Federal Constitutional Court, M. Phil. Thesis, Oxford University (2009).

[47] Clark (note 18).

minimal, then judges may look to a larger legal profession as peers. Even more likely in the new larger Europe is a situation where sustained interaction between judges of one country with judges from other countries may make transnational judiciary a relevant reference group.[48]

We can comment on the ways the craft of judging and other relevant values may be developed and expressed. The first, and perhaps most important of these mechanisms, is the education of judges, particularly in special training programs but also in earlier university and in later mid career venues. The French model of judicial education, with its two plus years of training organized at and through the *Ecole de la Magistrature*, has spread to many countries of southern and eastern Europe.[49] Combining classroom experience and internships, French style judicial training has the potential for socializing judges into a set of ideals about the role and content of judging, involving both skills and larger purposes. But the realization of this potential depends upon the actual content of the programs. In the French example what began in 1958 as training focused upon knowledge of the details of the law and practical needs of particular work settings has matured into a program that teaches a variety of other skills needed by judges and exposes them as well to such subjects as judicial ethics and the demands of both constitutional and pan European law, with their corresponding emphasis on the protection of rights and need to scrutinize national legislation (notwithstanding the tradition of legal positivism).[50]

A second mechanism for the setting out and reinforcing of the portrait of a good judge, and at the same time a means of exposing judges to the scrutiny of their peers, lies in the publication and critical discussion of judgements and verdicts. The publication of judicial decisions, with the names of the judges who wrote them, allows any member of the judiciary, not to speak of lawyers and the public, to examine how and how well particular judges write decisions, including the quality of legal analysis, the arguments, and opinion writing more generally. In addition, discussion in legal journals of particular decisions or trends in decision making on particular issues, gives judges feedback on a core part of adjudication from their immediate peers (fellow judges) and fellow jurists (especially scholars). The practices of publishing court judgments

---

48 See Piana, Judicial Accountabilities (note 5), chapter 5.

49 Piana (note 10).

50 Garapon, French Legal Culture (note 38).

in Western Europe vary from country to country, but two trends may be discerned. First, every country publishes most or all of the decisions of its top courts, and often important decisions from courts at all levels, usually with the names of the judges who wrote them.[51] Secondly, there is a tendency, facilitated by the contributions of computer technology, for expansion in the share of decisions published and their overall accessibility. Clearly, court decisions placed on websites or databases without restricted access are more widely available than decisions published in expensive and heavy physical volumes.

A third way that judges may develop common values and also come to know more about each other's perspectives on law and policy is through the activities of judges' associations, the main form of collective professional life beyond individual courts.[52] If judges also participate in broader associations, so much the better, but this is not a common practice within the civil law world. There is a trend toward more lateral entry in the judiciary, but the bulk of judges in all Western European countries still pursue judicial careers.[53]

Associations of judges, even unions, are especially common and well developed in France and the Latin countries of Europe, but they are found elsewhere too. In France there are at least two unions of judges in general covering 60% of judges, a conservative union with three fifths of the members and a progressive one with nearly a third, in addition three specialized associations (for young judges, family judges, and investigating magistrates).[54] Note that the Bar association is also fragmented.[55] The French division of the main associations (unions) of judges along political lines is common as well in southern Europe and reflects to historical tension between the conservatism that characterized the centralized hierarchical management of judges and the inclina-

---

[51] R. Kiener, Judicial Independence in Switzerland, in this volume, Chapter C. II. 4.; R. de Lange, Judicial Independence in The Netherlands, in this volume, Chapter C. II. 3.

[52] Garapon/Epineuse (note 36), Chapter B. IX; de Lange (note 51), Chapter B. IX; Allemeersch/Alen/Dalle (note 42), Chapter B. IX; Di Federico (note 28), Chapter B. IX; Nergelius/Zimmermann (note 42), Chapter B. IX; Kiener (note 51), Chapter B. IX.

[53] de Lange (note 51), Chapter B. II.

[54] Garapon/Epineuse (note 36), Chapter B. IX.

[55] Id.

tions of many of the young judges, including students at the schools of judges.[56]

In 1985 the progressive associations of judges in various countries formed a common "European Federation of Progressive Judicial Associations", which now comprises 15 judges associations from 11 countries: Germany, Belgium, France, Spain, Portugal, Italy, Greece, Poland, the Czech Republic, Cyprus and Romania. Associational activity in many of these countries is marked by meetings and seminars, and the issuing of publications often with involvement of scholars. The exchange of ideas and occasional adoption of policies no doubt influences the thinking of the member judges and may reinforce particular ideas about the judicial role.[57]

Beyond the world of judges themselves societies can develop a notion of a good judge, even making judges into heroes. One mark of this is the publication of biographies (and autobiographies) of judges, which happens in large numbers in common law countries and in reasonable numbers in Western Europe. In Russia (and I expect the post communist world generally), there are hardly any biographies of judges.[58]

In short, in the late 20th and early 21st centuries judges in most Western European countries functioned in an environment likely to nourish a professional identity, marked at least by a sense of craft if not also a mission. Arguably, the more that judges identified as professionals, the more they cared about standing among fellow judges if not also jurists

---

56 Di Federico (note 28), Chapter B. IX.

57 C. Guarnieri, Courts and Marginalized Groups: Perspectives from Continental Europe, 5 International Journal of Constitutional Law 187 (2007).

58 Within Russia, even more than other civil law countries, there is no public image of the good judge, not to speak of the hero judge or judge as a great person. If one looks for biographies of judges in Russia, one finds almost nothing. Was there any judge in 20th century Russia who attained the status and reputation of Anatolyi Koni in the 19th? The absence of the genre of judicial biography in Russia is telling. As of spring 2009, the catalogue of the Library of Congress included 332 different biographies of American judges, including 175 addressed to young readers. Most deal with justices of the US Supreme Court, but not all. Arguably, the US has a unique tradition of judges as great men. But the same library of congress has 35 biographies of judges from France, 21 from Germany, 17 from Canada, 31 from Australia, and 11 from Israel. From Russia I found two modest autobiographies by Soviet judges (Terebilov and Anashkin) and the odd study of the prerevolutionary judge Koni.

more generally, which in turn might well involve a different mixture of values from those supported by the traditional bureaucratic hierarchy.

E. Accountability of Judges in the New Members of the European Union

We have discovered a stark contrast between the situation in Western European countries, where bureaucratic accountability of judges now takes a benign form that does not harm judicial independence and where there is nascent professional accountability, and the situation in post Soviet countries. In between, geographically and perhaps culturally, are East European countries that have left a communist period behind and are now members of the European Union. Many of these states, especially in the Visegrad and Baltic groups,[59] have undertaken judicial reform, and this raises the question of the extent to which their systems of bureaucratic accountability have changed since communist times and been balanced by professional accountability. Here we consider the experience of Poland, Hungary and Estonia.

In Poland 20 years after the end of communism one finds a continuation of the extreme form of bureaucratic accountability found in the USSR (but also in France before World War II). The Chair or president of the court is a powerful figure who handles case assignment and manages the evaluation of judges, along with inspectors from the Ministry of Justice, which is still powerful *vis-à-vis* the courts despite the presence of a Judicial Council.[60] Until 2009 and the implementation of an earlier decision of the Constitutional Court, Poland had apprentice judges under constant assessment by judges from the higher courts, who were barely able to render decisions on their own. They were replaced by probationary judges with terms of two to four years, only a small improvement over the apprentice system. More important, all judges are subject to periodic evaluation that includes not only efficiency measures but also data on the fate of their decisions at higher courts. According to an informed observer the use of appeal data in assessing trial court judges "may result in opportunistic decisions and may be especially harmful in cases which are not typical and which

---

[59] See T. Ligi, Judicial Independence in Estonia, in this volume.

[60] Bodnar/Bojarski (note 35), Chapter B. I.

need special attention."[61] Moreover, judge inspectors are allowed to review the decisions of a judge whenever the court president requests it, whether in connection with potential promotion or signs of trouble.

At the same time, Poland has barely started putting into place mechanisms for the development of professional accountability, but there are promising developments. Training at the new National School, which started in 2009, did emphasize the acquisition of skills, in part because of help from European Union programs and the School of Magistrates in France. But the publication of decisions remained in rudimentary form, with most decisions remaining inaccessible even to lawyers let alone the public.[62] Poland does have an admirable association of judges with one quarter of Polish judges as dues paying members.[63] Known as "Iustitsiia" and founded in 1990, the organization has emerged as a strong promoter of not only the interests of judges but also improvements in the courts, including judicial independence, and it has stood at the centre of discussions of progressive change.

Hungary has moved the administration of the judiciary from the Ministry of Justice to a Judicial Council, but retained the hierarchy below, and the chairs of courts remain very powerful figures, who handle most case assignment and can determine the fate of individual judges.[64] Evaluations occur at years six and 12 and follow regulations issued by the Judicial Council that prescribe reviews by another judge on the same court (appointed as *disciplinary judge*) of at least 50 cases conducted by the judge under evaluation, a process that takes two to three days. In practice, formal indicators including statistics matter a lot. According to a well placed observer, the evaluation does not reach the human or professional aspects of adjudication but pays more attention to efficiency and procedural accuracy.[65] Conformity with higher court decisions is important in the evaluations, although the rate of reversal does not appear in the current form used by evaluators. Moreover, the

---

61 Id., Chapter B. VI. See also Judicial Independence in Poland, in: Monitoring the EU Accession Process: Judicial Independence (2001).

62 Bodnar/Bojarski (note 35), Chapter C. II. 4.

63 Id., Chapter B. IX.

64 Z. Fleck, Judicial Independence in Hungary, in this volume, Chapter B. V.; Z. Fleck, Judicial Independence and its Environment in Hungary, in: J. Priban, et al (eds.) Systems of Justice in Transition: Central European Experiences since 1989, 121 (2003); correspondence with Zoltan Fleck.

65 Correspondence with Zoltan Fleck.

form does include a section on skills, which include focus, decision making ability thoroughness, capacity to handle workload, and people skills. In short, bureaucratic accountability for judges remains strong, but is not as detrimental to judicial independence as is the case in Poland.

The groundwork for professional accountability, however, is not as promising. The training of judges at the Judicial Academy deals only a little with skills, ethics, or international law. Most of the training for candidate judges and veterans focuses on the content of Hungarian law. There is some publication of decisions electronically (only from upper courts such as regional appeals courts and only through 2005), but it is not subject to easy searches.[66] For the most part it is necessary to know the registration number of a case to gain access to it. It is possible to search by the name of the judge, but not by the type of case or legal issues involved. This situation is, however, a matter of criticism. There are several associations of judges, all voluntary and organized by specialization.[67] The largest of these, the Hungarian Association of Judges, is closely aligned with, if not dominated by, the leaders of judiciary, and does not provide a channel for new thinking or discussion of major change. The budget for the association comes from the National Judicial Council. There is little discussion of cases or judicial practice in Hungarian law journals, and judges tend to be hostile to criticism from journalists and fellow jurists alike.

Estonia may have moved further than Poland and Hungary from Soviet style bureaucratic accountability, but the process is not fully complete and reflects in part the country's small size.[68] Candidate judges spend two years working at courts before passing an exam and starting a three year probationary period as a judge with annual assessments by the court chair. Officially these assessments, and assessments connected with potential promotion later on, include the old statistics, including the number and percentage of judgements that remain unchanged on appeal, but informed sources say that the leaders of the judiciary (Supreme Court) give little weight to these data.[69] The evaluation process at all stages includes assessment of skills (for example exams require judges to analyze hypothetical cases) and the personalities of candi-

---

66 Fleck (note 64), Chapter C. II.

67 Id., Chapter B. IX.

68 Ligi (note 59), Chapter A.

69 Id., Chapter B. III. 2.

dates. The most dramatic change relates to the role and power of the chairs of courts. The Court Act of 2002, influenced by advice from the EU, introduced into Estonia a strong court manager designed to relieve the chair of most of his administrative work, including supervising the staff of the registries, composing the budget (now only checked by the chair), and case assignment done through mixture of random distribution and distribution according to specialty.[70]

In Estonia some key mechanisms of professional accountability were already in place. All decisions were published on the sites of either the Supreme Court or the Ministry of Justice, identifiable and searchable by the responsible judge.[71] Moreover, Estonia had an association of judges that was self supporting, included 70% of judges, and was active in defending the interests of judges and promoting improvements in the administration of justice.[72] There was, however, no school for judges and it was unclear to what extent the initial training at courts cultivated a broad understanding of law as opposed to simple practical skills.

Estonian experience suggested that in smaller countries personal relations and informal practices loom large. Where all judges know each other, the formal structures of careers and evaluations matter less than the reputations that judges develop as they do their work.

F. Other Contributing Factors

The emergence in the post communist world of forms of accountability for judges that do not threaten but can even nourish the independence of individual judges is not an isolated process but connected to other factors or kinds of change. Three factors that can contribute to the process are: (1) mental transitions of judges away from a strict positivist or formalist approach to judging and the readiness of judges to engage in constructive disagreement; (2) the development of a new relationship between judges and prosecutors based on mutual respect and recognition of the differences in their roles; and (3) the emergence of a relatively autonomous profession of advocates, whose members align with judges in the effort to make the administration of justice more fair and autonomous. Each of these changes took place in one or more West

---

70 Id., Chapter B. V.

71 Id., Chapter C. II.

72 Id., Chapter B. IX.

European countries historically and contributed to the replacement of subservient technocrats with judges who were courageous and had a sense of mission.

At least three different close observers of post communist judicial reform in Central and Eastern Europe agree that institutional changes in these countries have not been matched by a mental transition among judges or even jurists in general.[73] Much of the problem lies in the attachment first of the communist and then of the post communist judiciary to an extreme formalist or positivist approach to law and adjudication that characterized Western Europe in the 19th century but then declined and lost its force in the 20th century. This happened not only in Germany and other countries influenced by the way that fascist governments twisted formal laws to serve unjust purposes, but also in France, where a formalist facade combined with a reality of goal oriented adjudication. The shift also reflected the development in Europe of international law with its emphasis on the content of law grounded in rights as opposed to normative acts of the state.

As long as judges in post communist countries "seek refuge in mechanical and formalistic interpretation of law", they will remain "subservient technocrats" out of touch with the new norms of Europe and the international legal order.[74] Sometimes, as in the Czech Republic, new Constitutional Courts provide regular court judges with a fresh approach that sometimes shock them. Yet, the attachment to legal formalism often leads to an "inability to grasp the complexity of hard cases", where following the letter of the law can lead to absurd results.[75]

There is a connection between the absence of mentally independent judges, marked by "courage, morality, knowledge and responsibility", and the persistence of the extreme form of bureaucratic accountability with its emphasis on conformity of trial court judges with the higher

---

[73] Z. Kühn, Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement, 52 American Journal of Comparative Law 531 (2004); M. Bobek, The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries, 14 European Public Law 99 (2008); A. Kashanin, Vliianie gospodstvuiushchego pravoponimaniia na sostoianie i prestizh iurdicicheskoi professii, in: E. A. Mishina, Kakovo eto – byt iuristom?, at 24-57 (2010).

[74] Bobek (note 73).

[75] Kühn (note 73), at 553.

courts.[76] The change in mentality or judicial ideology away from formalism that occurred in parts of Western Europe made the concern with stability of sentences obsolete, for the good judge was meant to show imagination in dealing with hard cases. Moreover, the judge whose decision was overruled by a higher court has not necessarily made a mistake, but instead offered a different, but valid point of view. For post communist states to develop accountability of judges that does not threaten their independence requires that judges abandon extreme formalism and absorb a new post-positivist approach, thereby overcoming decades of isolation from Western legal thought. They need to understand law and its sources in new ways.

The relationship between procurators and judges struck Russian judicial reformers 20 years ago as a key obstacle to powerful independent courts. The authors of the 1991 Conception of Judicial Reform in the RF actually treated judicial and procuratorial power as a zero sum game. In their view, the supervisory powers of the procuracy, not only over courts themselves but also the right to inquire into the legality of any aspect of public life through general supervision, was bound to weaken the courts.[77] Whether this was necessarily so at the macro level, it was clear that at the level of the trial judges they were considered to be participants in the fight against crime and expected to serve the interests of the procuracy and law enforcement more generally. In fact, with the establishment of new adversarial trial procedures in the 2001 Criminal Procedure Code, judges in Russia tried to ensure that procurators were prepared for trial and had the evidence to convict; and often continued to treat advocates as potential troublemakers.[78] The well known accusatorial bias and its reflection in the extremely low rate of acquittals

---

[76] Bobek (note 73), at 108. In Latin America, a similar attachment to legal formalism has been used by judges for good and for ill depending upon the country and the time. Thus, in Argentina in 1976-1983 the Supreme Court exploited formalist interpretation to resist an authoritarian leader, while in Chile under Pinochet, the opposite occurred. See M. J. Osiel, Dialogue with Dictators: Judicial Resistance in Argentina and Brazil, 20 Law and Social Inquiry 481 (1995); L. Hilbink, Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile (2007).

[77] S. A. Pashin, Kontseptsiia sudebnoi reformy v Rossiiskoi Federatsii, 109 (1992). For an English translation see 30 Statutes and Decisions 7 (1994).

[78] P. H. Solomon, Jr., The Criminal Procedure Code of 2001: Will It Make Russian Justice More Fair?, in: W. Pridemore (ed.), Ruling Russia: Law, Crime and Justice in a Changing Society, 77-100 (2005).

was connected to the deference given by judges to procurators and their needs.

The realization of individual judicial independence in post communist states required a new relationship between judges and procurators, one based on equality rather than deference and mutual respect for each other's roles and functions, something that should be taught throughout legal training. In some countries, especially France and the Latin countries of Europe, prosecutors are actually part of the judicial corps, *magistrates* who work for shorter or longer periods in the prosecutorial role.[79] The combining of prosecutors and judges in the same structures may help them develop mutual respect and understand the differences between each other's roles. It would be useful to determine whether any of the new member states of the EU from the post communist world have developed new productive relations between judges and prosecutors.

Finally, the broader legal profession, including especially the advocates, can itself make a contribution to the development of independent judges, if only to make courts into institutions where liberal causes can be pursued. A strong and autonomous defence bar may well align with judges in the pursuit of judicial autonomy, as was the case in 19th century France, 19th century Germany, and the USA in the 19th and 20th centuries. Terrence Halliday, Lucien Karpik and Malcolm Feeley contend that the fight for political liberalism has been most successful when led by an alliance of lawyers and judges, or what the authors call "the legal complex", a pattern that they observe in Spain, Hong Kong, Korea and Taiwan.[80] In other countries the two groups are split in their aspirations and in others still they act together to block progressive change. The stories of judges and lawyers co-operating in the pursuit of liberalism show how an autonomous and strong bar can help to advance the cause of judges, in common or civil law countries alike. To be sure, the bar is more likely to be strong and autonomous in common law countries, but there are examples in the civil law world (Germany). A strong bar that has some autonomy from the state can prove useful in the development of non threatening forms of judicial accountability.

---

[79] Di Federico (note 28), Chapter A.; Garapon/Epineuse (note 36), Chapter A.

[80] T. C. Halliday/L. Karpik/M. M. Feeley (eds.), Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Liberalism, at 3-10 (2007).

Where advocates are part of strong and autonomous bars, it is especially useful to have a lateral entry into the judiciary, a process through which some new judges enter the judiciary in mid career, after some years of legal practice, as opposed to coming early on from law enforcement or administrative work at the courts. While the judicial career still dominates in Western Europe, there is trend in some countries (such as France) for an increasing share of new judges to enter the judiciary after years in private legal practice.[81]

G. Conclusion

We have seen how the system of bureaucratic accountability that reached its acme under Soviet and communist rule promoted the dependence of individual judges on their chairs and higher court judges, and even facilitated as well dependence on external actors. We have seen as well how this system continued in post-Soviet Russia, and to a considerable degree in post communist Poland and Hungary. The process of softening the impact of statistical evaluation including of judgements overturned and developing evaluation of the skills of judges, along with building an alternative form of accountability grounded in professional solidarity, had started in some post communist countries but barely begun in many others.

In order to move the administration of justice in post communist countries to a new plane, and make the independence of individual judges a reality, reformers need to reduce the impact of judicial bureaucracy. The role of chairs of courts should be reduced with managerial powers shifted to court administrators. The evaluation of judges must be performed fairly and transparently, and it should emphasize skills demonstrated by judges and eliminate entirely consideration of the content or stability of verdicts and sentences. Evaluations should not be used in the delivery of salary increases and bonuses, and should serve as only one of the factors in decisions about promotion. At the same time, the mechanisms that support accountability to one's professional peers (other judges and/or lawyers) should be strengthened, including training of judges, the publication of decisions, and the organization of judges' associations.

---

[81] Garapon/Epineuse (note 36), Chapter B. II. 1.; de Lange (note 51), Chapter B. II. 1.

To achieve the desired result of independent judges who use their discretion in principled ways will require that most if not all of these steps be taken together. If statistical indicators are no longer used, but chairs of courts retain excessive power over rank and file judges, the consequences may prove minimal. Likewise, should bureaucratic accountability be significantly reduced without a comparable growth in professional accountability and an attachment among judges to the value of delivering impartial justice, the resulting gains in individual independence could be abused.[82] In short, cultural change needs to occur as well structural, but without new perspectives among politicians as well as judges, there would be no real attempt to reduce the impact of judicial bureaucracy.

Since context matters a lot, every effort should be undertaken to strengthen factors that might contribute to a better functioning and more autonomous judiciary. These include moving away from a formalist or positivist view of law; striking a new relationship between procurators and judges; and mobilizing lawyers to help with the task of promoting the independence of individual judges.

[82] Marina Kurkchiyan warned of this possibility in a personal communication (28 May 2010).

Judicial Administration in Transitional Eastern Countries

Lydia F. Müller

A. Introduction

One of the biggest challenges for countries in transition in the process of setting up an independent judiciary is to establish an appropriate system of judicial administration. Particularly challenging in this regard is balancing judicial independence on the one hand with judicial accountability on the other, as well as establishing mechanisms for ensuring transparency. As evidenced in this contribution, these two major challenges are particularly noticeable with regard to the two key organs of judicial administration in Eastern Europe, the South Caucasus and Central Asia – judicial councils and court presidents. This article will thus focus on these two organs and shed light from a comparative point of view on judicial councils and court presidents in Ukraine, Moldova, Georgia, Armenia, Azerbaijan and Kazakhstan. Also included here will be two other important States of this region which share with the other States the problem of balancing the power of court presidents, but have not established comparable judicial councils. Instead, they have set up qualification collegia (Russia) or qualification commissions (Belarus), which partly fulfill the same tasks as judicial councils in other States.

Judicial councils, which emerged during the last 15 years all over Eastern Europe, the South Caucasus and Central Asia, constitute organs of administration or self-administration.[1] As this analysis will show, the

[1] Armenia introduced its judicial council e.g. in 1995: G. Mouradian, Independence of the Judiciary in Armenia, in this volume, B. I. 2.; the Ukrainian High Council of Justice was introduced by the Constitution in 1996; see also Закон України Про Вищу раду юстиції (Law on the High Council of Justice,

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233, DOI 10.1007/978-3-642-28299-7_23, Published by Springer-Verlag Berlin Heidelberg 2012

focus of their work is generally not on organizational and budgetary questions but on judges' careers and discipline.[2] Albeit to different degrees, all of them have competences with respect to judges' appointment, promotion and dismissal and perform functions in disciplinary proceedings against judges. In addition, some are involved in waiving judges' immunity or have a say in their professional evaluation. Years after their introduction, however, it has to be noted that the Central Eastern European neighbours of the countries examined in this article which have very strong judicial councils experience a risk of lacking accountability.[3] In this context, one can argue that there is a potential risk for those States among the eight which have particularly strong councils of facing the same lack in the long run by failing to perform the balancing act between guaranteeing judicial independence on the one hand, and, on the other, ensuring that judges are to be held accountable. In contrast, weak councils or the relevant bodies in Russia and Belarus are at risk of being directly or indirectly influenced by the executive. This article thus seeks to analyze both situations in order to develop possible alternatives which satisfy both needs – the need for independent bodies to administer the judiciary without at the same time risking administrative isolation and loss of accountability.

In addition the question of appropriate composition remains a central issue for all administrative bodies. Since judicial councils have so far been mainly seen through the lens of judicial independence, authors,

---

1998), available at <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=22%2F98-%E2%F0>; the Kazakh judicial council was introduced e.g. in 2001, D. Kanafin/N. Kovalev, Report on the Independence of the Judiciary in Kazakhstan, on file with the OSCE, Chapter B. I. 2.

2 For administrative issues in a narrow sense, such as providing technical, financial and logistic support to the courts, there are in most of these States special bodies called the Judicial Department (Russia and Armenia), the Department of Judicial Administration (Moldova), the Committee on Judicial Administration (Kazakhstan) or the State Court Administration (Ukraine). They either belong to the judiciary (usually at the level of the Supreme Court) or the executive (Ministry of Justice) or are separate executive bodies or bodies of judicial self-government, as in Armenia.

3 The consequences of strong judicial councils can be seen e.g. with regard to Central-Eastern European Countries, such as Hungary. See for more details Z. Fleck, Judicial Independence in Hungary, in this volume, Chapter B. I. 2. Yet, similar developments are to be expected when looking to the strong councils of Ukraine, Moldova and Georgia. See also C. E. Parau, The Drive for Judicial Supremacy, in this volume, Chapter C. IV.

courts and international actors[4] strongly urged that councils should be composed of a majority of judges as the only feasible option for reaching an independent judiciary. In other countries of this region, judicial councils consist of only a minority of judges. As evidenced by the analysis in this article, however, it is necessary to rethink both approaches.

In order to regain public trust in the administration of the judiciary and in its independence in general, it is furthermore necessary to search for new ways of increasing transparency in the daily work of councils and in the process of their formation. To date, regardless of how powerful they are, all judicial councils, and the relevant organs in Russia and Belarus, still face a considerable lack of transparency.[5]

Another important issue in the administration of the judiciary in the Eastern region is the variety of functions of presiding judges. Particularly jeopardizing of judicial independence is the power of heads of courts to affect the professional lives of judges in many different ways, including the power to assign cases to the judges of their courts. The power of court presidents to evaluate the judges of their courts, which impacts on the remuneration of those judges and may also trigger disciplinary sanctions, also threatens judicial independence. That being not a new phenomenon but a left-over from the Soviet era, it is high time to reconsider the powerful role of court presidents in order to establish a stable system for the administration of the judiciary which guarantees judges' independence. In this regard, it is also necessary to rethink the manner in which they are selected and appointed. This contribution thus concludes with recommendations for a possible new conceptualization of the role of court presidents and for a different way of selecting appropriate candidates for this office.

---

[4] See e.g. a recent judgment of the Hungarian Constitutional Court which states that (only) because of the majority of judges in the Hungarian judicial council, it is in accordance with judicial independence as guaranteed by the Hungarian Constitution: 97/2009 (X.16.), Decision on the Composition of the National Judicial Council, MK 2009 Nr. 146; for the involvement of the EU and the Council of Europe, see *infra* notes 10 and 11.

[5] See *inter alia* Report on the Independence of the Judiciary in Georgia, on file with the OSCE, Chapter B. II. 2. and Chapter F.

B. Judicial Councils and Other Bodies of Judicial Administration

Following decades without any independent judiciary during Soviet times,[6] many countries of Eastern Europe, the South Caucasus, and Central Asia in the first years after the fall of the iron curtain experienced the strong involvement of the Ministry of Justice in the administration of the judiciary.[7] Driven by the will to detach the judiciary from the executive, the strong involvement of the Ministry of Justice has been subsequently (at least partly) replaced by an increasing influence of judicial councils on the administration of the judiciary.[8] Judicial councils, however, are not a new phenomenon. Their introduction followed trends in other States all over the world which have already established judicial councils with varying degrees of power.[9] Furthermore, the institution of judicial councils was strongly advocated by the European Union (EU) in those Eastern countries which aimed to join the EU[10] and by the Council of Europe, namely by the Commission for Democracy through Law (Venice Commission).[11]

---

[6] See e.g. D. Kochenov, EU Enlargement and the Failure of Conditionality, at 258 (2008); D. R. Koslovsky, Towards an Interpretive Model of Judicial Independence: A Case Study of Eastern Europe, 31 University of Pennsylvania Journal of International Law 203, at 208, 209 (2009); F.-C. Schroeder, Der Aufbau des Rechtsstaats in der Ukraine, 51 Jahrbuch für Ostrecht 97 (2010).

[7] See e.g. Mouradian (note 1), Chapter A.; O. Schwartz/E. Sykiainen, Judicial Independence in the Russian Federation, in this volume, Chapter B. I. 1.; T. Ligi, Independence of the Judiciary in Estonia, in this volume, B. I. 1. a); Kochenov (note 6), at 260 *et seq*., referring mainly to Central and Eastern European States.

[8] But see the Estonian experience where a judicial council was introduced in 2002 which in the first years shared the responsibility for judicial administration with the Ministry of Justice. Only very recently has a new draft been developed which reduces the role of the Ministry of Justice in the administration of the judiciary. Instead a special agency for court administration acting under the judicial council is envisaged: Ligi (note 7), Chapter B. I. 6.

[9] N. Garoupa and T. Ginsburg speak about over 60% of countries of the world which have some form of judicial council in comparison with only 10% thirty years ago: N. Garoupa/T. Ginsburg, Judicial Councils and Judicial Independence, 57 American Journal of Comparative Law 103, at 105 (2009).

[10] See Ligi (note 7), B. I. 2; A. Seibert-Fohr, Judicial Independence in European Union Accessions: The Emergence of a European Basic Principle, 52

Besides judicial councils, and the relevant organs in Russia and Belarus, all of the eight countries examined in this article have mixed systems of judicial administration, also including other organs of judicial administration or self-administration such as judicial departments,[12] general meetings of judges or additional qualification commissions in States where a judicial council constitutes the crucial administrative organ.[13] In Armenia, there is even an additional council of court chairpersons.[14] Furthermore, a more or less influential part of judicial administration is run by the executive.

As the following section will show, it is nevertheless possible to distinguish roughly between two groups: first, there are countries with a strong judicial council, which runs a considerable part of the administration of the judiciary. These are Georgia, Moldova and also Ukraine, although the judicial administration of the last is not centered round

German Yearbook of International Law 405, at 425 (2010); Kochenov (note 6), at 259 *et seq.*; Parau (note 3), Chapter C. IV.

[11] At least for judges' careers and discipline the Venice Commission consistently strongly recommends judicial councils: See e. g. Venice Commission, Draft Report on the Independence of the Judicial System: Part I: The Independence of Judges, CDL (2009) 055, para. 27 (23 March 2009); however, in Venice Commission, Judicial Appointments, CDL-AD (2007) 028, paras. 25, 26 (22 June 2007), it made clear that this did not necessarily mean that all administrative issues should be in the hands of a judicial council. The recommendation of the Venice Commission mainly relates to judicial councils for judicial appointments, promotion and discipline. By way of comparison, see Venice Commission, Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine, CDL-AD (2010) 003, paras. 99, 108, 120, 123 (16 March 2010). For the establishment of judicial councils also for tasks of judicial (self-)administration see the Parliamentary Assembly of the Council of Europe, Allegations of politically motivated abuses of the criminal justice system in Council of Europe member states, Res. 1685 (2009), paras. 4.2.4., 5.4.1. (30 September 2009).

[12] See *supra*, note 2.

[13] See for example R. Kuybida, Report on the Independence of the Judiciary in Ukraine, on file with the OSCE, Chapter B. I. 2.

[14] This article, however, aims to focus on judicial councils, and for Russia and Belarus on judicial qualification collegia and commissions. Where necessary, it will also refer to the role of the other two branches in the administration of the judiciary, in particular where they impact on judicial councils, or qualification collegia and commissions. For more detailed information on other organs of administration or self-administration in these States see the Reports on the Independence of the Judiciary in different countries in this volume.

one judicial council but has a complex system of different organs of administration and self-administration.

Second, there are countries such as Azerbaijan, Armenia and Kazakhstan, which have (*de facto* or even *de jure*) weak judicial councils or countries such as Russia and Belarus which do not have a comparable council at all. Instead, Russia and Belarus established other systems of judicial administration with qualification collegia (Russia) or qualification commissions (Belarus). In States with weak or no councils, a particularly strong part of the administration of the judiciary is furthermore run by the State President and court presidents.

The next section describes the functions and composition of judicial councils, qualification collegia and commissions in both groups of States. Besides the challenge of finding the right balance of functions accorded to judicial councils, a second problem which can be identified is how judicial councils and their equivalents in Russia and Belarus should be made up. Finally, as evidenced by this analysis, one of the most pressing issues with regard to judicial administration in all eight States still remains the finding and implementing of effective measures to increase transparency in the daily work of councils, qualification collegia and commissions.

I. Concentration of Powers within Judicial Councils

Besides some influence on budgetary questions, judicial councils in Georgia, Moldova and Ukraine have, first of all, many competences in determining judges' careers. The most important role in the selection and appointment of candidates for judicial office and the promotion and dismissal of judges is played by the judicial council of Georgia which is *entirely* responsible for judges' careers.[15] The Moldovan judicial council generally has only the right to propose candidates to the President or Parliament for appointment, depending on the court level. It has, however, a special competence to force the President or the Parliament to appoint a proposed candidate by repeating its proposal based on a two-thirds majority.[16] The same system applies to promotion and

[15] Report on the Independence of the Judiciary in Georgia, on file with the OSCE, Chapter B. II. 2.

[16] N. Hriptievschi/S. Hanganu, Judicial Independence in Moldova, in this volume, Chapter B. II. 2.

the unlimited transfer or dismissal of judges, presidents or vice-presidents of courts. The Ukrainian High Council of Justice[17] nominates judges for appointment. The appointment itself is made, as in most other States of Eastern Europe, the South Caucasus and Central Asia, by the President of the State.

Besides judges' careers, the strong judicial councils of the first group have large powers with regard to judges' discipline, criminal prosecution and ethics. The Georgian council is responsible for the initiation, prosecution *and* decision in disciplinary proceedings against judges.[18] The same strong role in disciplinary matters is played by the Moldovan judicial council.[19] The Ukrainian High Council of Justice is responsible for the initiation of disciplinary proceedings only against judges of the Supreme Court and judges of the higher specialized courts but at the same time serves as an appeal court for disciplinary actions brought against judges of any other level and plays a significant role with regard to judges' dismissal.[20]

While at first glance a judicial council which has as much power as possible may be a promising tool for establishing an administrative system

---

[17] It should be highlighted that there are two judicial councils in Ukraine: the High Council of Judges, comprising 20 members, is composed heterogeneously. Furthermore, there is a Council of Judges which used to be composed of 77 members, all of them coming from the judiciary. The latter is especially criticized because it mainly comprises heads of courts and is, therefore, called the *Council of Heads of Courts*: Kuybida (note 13), Chapter B. I. 2. With the entry into force of the new Law No. 2453-VI „Про судоустрій і статус суддів" (Law on the Judiciary and the Status of Judges), adopted by the Ukrainian Parliament on 7 July 2010, available at <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi> the members of the Council of Judges have been reduced to 11 (all still coming from the judiciary), see Art. 127 para. 2 of the new Law. An English version of the law was published by the Venice Commission: Venice Commission, Opinion No. 588/2010, CDL (2010) 084 (24 September 2010). Whenever I refer to a judicial council in Ukraine I mean the High Council of Justice.

[18] Albeit that different people are responsible within the council (the council has the right to initiate disciplinary proceedings; its secretary conducts the preliminary inquiries; the council decides on the indictment; a disciplinary panel composed of members of the council, which are excluded from the sessions of the council dealing with disciplinary matters, tries the case): Report on the Independence of the Judiciary in Georgia, on file with the OSCE, Chapter B. VII. 1., 2.

[19] Hriptievschi/Hanganu (note 16), Chapter B. VII. 1., 2.

[20] Kuybida (note 13), Chapter B. VII. 1., 2.

which safeguards judicial independence to the greatest extent possible, in particular from executive interference, experiences in other States have revealed that a council which carries out many functions at the same time risks becoming uncontrollable. The lack of accountability in terms of a control mechanism can in turn jeopardize the independence of judges.[21] This said, the accumulation of power just evidenced with regard to Moldova, Georgia and Ukraine has to be considered rather critically. What can be observed from Central-Eastern European countries, namely Romania and Hungary, is a struggle with particularly powerful councils which are criticized for lacking accountability.[22] Even though a similar assessment cannot yet be made with regard to Moldova, Georgia and Ukraine, the trend towards strong councils with comprehensive competences for various fields of judicial administration is noticeable and raises concerns. Judicial councils in Moldova, Georgia and Ukraine, responsible both for appointing and promoting judges *and* for initiating and conducting disciplinary proceedings including the final imposition of sanctions on these very same judges, risk lacking accountability in the long run. As was pointed out, judicial councils in these States cannot just wield considerable influence over who is going to fill a judicial post but currently also have the power to dismiss the very same judges, or at least recommend their dismissal. The same precarious accumulation of power that is at risk of lacking accountability becomes apparent when one looks at only one aspect of the various competences, e.g. disciplinary proceedings. In this regard, the strong councils simultaneously perform tasks of initiation, prosecution and judgment on disciplinary offence allegedly committed by a judge. In order to avoid similar developments to those with which their neighbouring Central and Central-Eastern European States have to cope, the

---

[21] See for the Hungarian experience Fleck (note 3), Chapters B. I. 2., F.; Less drastically but still stressing the need for more accountability of the strong judicial council: R. Coman/C. Dallara, Judicial Independence in Romania, in this volume, Chapters B. I. 2. and F.; see also Parau (note 3), Chapter C. IV.

[22] See Fleck (note 3), Chapters B. I. 2., F.; Coman/Dallara (note 21), Chapters B. I. 2. and F.; Commission of the European Communities, Report from the Commission to the European Parliament and the Council: On Progress in Romania under the Co-operation and Verification Mechanism, COM (2008) 494 final, at 1, 4, 5 (2008); Commission of the European Communities, Report from the Commission to the European Parliament and the Council: On Progress in Romania under the Co-operation and Verification Mechanism, Technical Update, COM (2010) 401 final, at 7, 8; Parau (note 3), Chapter C. IV.

competences concentrated in strong judicial councils should be distributed among different organs.

There are two conceivable ways of achieving the distribution of powers. First, sub-organs to the council which already exist, for example, in Moldova could be strengthened. Thereby, some functions could be shifted to different smaller bodies within one and the same council.[23] As the Moldavian experience has shown, however, these sub-organs are dependent on the council. Currently, in Moldova, the council needs to validate all decisions which the special sub-organ for disciplinary matters has adopted and serves as an appeal authority against decisions of the disciplinary board. This important authority of the council vis-à-vis the sub-organ is accompanied by several further competences of the council, in that every member of the council has the right to initiate disciplinary proceedings and is responsible for applying sanctions. Even though the independence of such a substructure could be strengthened by abolishing, for instance, the power of the council to validate decisions,[24] the body will remain a mere sub-organ and, therefore, in one way or another dependent.

It would seem more convincing, therefore, to take another step: this article advocates introducing more independent organs separate from the council instead of sub-organs to the very same council. These separate bodies could take on some of the responsibilities of councils, whereas the latter would be limited to e.g. the selection and appointment of judges. Concrete steps in this regard were recommended by experts at the OSCE Expert Seminar on Judicial Independence in Eastern Europe, South Caucasus and Central Asia.[25] A consensus was reached that the power of judicial councils needed to be divided off and exercised by different bodies rather than having a concentration of powers in one organ.[26] Once this necessity is established, different options are feasible. First, judicial councils could, as the author suggests, concentrate on just

---

[23] See also Fleck (note 3), Chapter B. I. 2., who also calls for an intra-organizational separation of some functions. He even goes to such lengths as to require the movement of some power (e.g. remuneration) again away from the council and instead to the executive in order to establish checks and balances.

[24] Hriptievschi/Hanganu (note 16), Chapter F.

[25] OSCE Expert Seminar on Judicial Independence in Eastern Europe, South Caucasus and Central Asia – Challenges, Reforms and Way Forward, Kyiv, 23 – 25 June 2010.

[26] Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, in this volume, Annex 1, para. 2.

one aspect, e.g. judges' careers, namely their selection, appointment and promotion. The concrete competences of the council in this regard will certainly differ between the States. Yet, it is important to emphasize that this concentration on judges' careers should not exclude the two other branches of power from the process of selection, appointment and promotion; in order to provide for checks and balances rather than isolating this key task, the legislative and executive branches should be involved in determining judges' careers without playing the decisive role. By stating this, the author aims only at confining the competences of the council to these issues and excluding it from other administrative questions, first and foremost from disciplinary proceedings. While this body is restricted to only one instead of different tasks, it could in turn have rather large competences in the field it is limited to. An interesting example again comes from Moldova, where the judicial council can, as stated above, force the President or Parliament (depending on the court level) to appoint a certain candidate;[27] however, the authority to have a certain candidate accepted is possible only if a candidate meets the approval of two-thirds of the council members.

Limitation of the powers of judicial councils therefore means first and foremost restricting the council to one aspect of judicial administration, but with large competences. As a second option, unlikely to be as effective, judicial councils may be included in different aspects of judicial administration, but to a lesser degree. By way of example, councils in disciplinary proceedings would not be competent both to investigate and to decide on a case.[28]

Even though one could argue that a system with different organs for different aspects of judicial administration might result in a confusing situation, as can currently be seen in Ukraine,[29] this does not defeat the

---

[27] Hriptievschi/Hanganu (note 16), Chapter B. II. 2.

[28] Kyiv Recommendations (note 26), para. 5.

[29] The current Ukrainian system is rather confusing with two councils and a wide range of organs of judicial-self-governance. See Kuybida (note 13), Chapter B. I. 2. Rightly, this raised the criticism that it is complex and confusing and needed to be simplified, Venice Commission, Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine, CDL-AD (2010) 003, paras. 97, 108, 122, 123 (16 March 2010). Despite the criticism, the confusing system was not changed with the new law adopted by the Ukrainian Parliament in July 2010. Cf. only Arts. 113-128 of the Law on the Judiciary and the Status of Judges. See *supra*, note 17. For the reaction of the Venice Commission, see Venice Commission, Joint Opinion on the Judicial System and the Status of Judges of Ukraine, CDL-AD (2010) 026, para. 93 and 127 (18 October 2010).

recommendation to distribute administrative competences among different organs. The current problems in Ukraine do not date back to the variety of administrative organs as such, but to overlapping competences between the different organs, the fact that there are two judicial councils, one being an organ of self-governance, the other an administrative organ, and the additional existence of many different self-governance organs which are difficult to distinguish. What is recommended in this article is the clear separation of different administrative aspects rather than of different levels of jurisdiction, as is currently the case in Ukraine.[30] Furthermore, there should be no more than three different organs in order not to lose transparency. Without doubt, the wrong reaction to a confusing system would be to transfer even more aspects of judicial administration to one judicial council, and thereby strengthen this organ even further.[31] Having analyzed the particular threats which go along with strong councils and having regard to the confusing current situation in Ukraine, a feasible option can only be to establish clear and transparent structures with a small number of organs carrying out different aspects of judicial administration and without overlapping powers.

---

[30] In disciplinary proceedings, for instance, the Council of Judges is responsible for the initiation of disciplinary proceedings against judges of the lower courts whereas the High Council of Judges instigates those against Supreme Court and higher specialized court judges. The same is true for the disciplinary proceedings as such: the Higher Qualification Commission conducts and decides on proceedings against local and appeal court judges and the High Council of Judges on those against Supreme and higher specialized court judges. See Kuybida (note 13), Chapter B. V., but also for recent changes Art. 85 of the new law (formerly the High Qualification Commission was responsible only for appeal court judges and another qualification commission for local courts), see *supra*, note 2.

[31] Venice Commission, Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine, CDL-AD (2010) 003, paras. 97 *et seq.* (16 March 2010). It has to be noted, however, that the Venice Commission made this recommendation under the precondition that Ukraine changes the composition of its High Council of Justice. This was clarified by the Venice Commission in: Venice Commission, Joint Opinion on the Law on the Judicial System and the Status of Judges of Ukraine, CDL-AD (2010) 026, para. 126 (18 October 2010).

II. Dominance of the State President and Ministry of Justice over the Administration *de jure* and *de facto*

In States of the second group which either have weak councils or lack a comparable council, the influence of the State President, the Ministry of Justice or other representatives of the executive branch on the administration of the judiciary is (still) immense. Functions which are carried out by judicial councils in Georgia, Ukraine and Moldova are in these States mostly fulfilled by the executive. Judicial councils, in contrast, are either *de jure* equipped with large competences but *de facto* weak, as in Azerbaijan, or have even by law no real impact on most administrative issues, as in Armenia, or are organized as a mere advisory body of the President like the Kazakh council.[32]

Although the judicial council in Azerbaijan is by law the sole organ ensuring the administration of all courts and by law has broad powers in the matters of organization, selection of judges and judges' discipline and immunity, it is seen as being in practice under the covert control of the executive.[33] This dependence on the executive is explained first by the strong impact of the executive on and the lack of transparency in the process of constituting the council as well as by the fact that it is chaired by the Minister of Justice.[34]

In Armenia, the Ministry of Justice had a strong influence on the appointment of judges until the reforms in 2005. Nowadays, the State President plays an influential role concerning, in particular, judicial ap-

---

[32] It should be emphasized that the Georgian judicial council was also a mere advisory organ of the Georgian President until 2007; Cf. Report on the Independence of the Judiciary in Georgia, on file with the OSCE, Chapter B. I. 2.

[33] UN Human Rights Committee, Considerations of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding observations of the Human Rights Committee, Azerbaijan, UN Doc. CCPR/C/AZE/CO/3, para. 12 (13 August 2009); Report on the Independence of the Judiciary in Azerbaijan, on file with the OSCE, Chapter B. I.

[34] The Minster of Justice is himself an *ex officio* member *and* Chairman of the Council and appoints three more members, among them two of the nine judges. One member of the Council is appointed by the Presidential Administration, so in total one third of the 15 Council members are members of the executive or at least appointed by them. Furthermore, members who should by law be nominated by the Association of Judges are effectively not nominated by this self-governance body because it exists only formally. Report on the Independence of the Judiciary in Azerbaijan, on file with the OSCE, Chapter B. I.

pointments. Moreover, the administrative tasks are shared between the three self-governance bodies,[35] and, very importantly, the highest judge in the country, the Cassation Court Chairman. In contrast, the judicial council does not have, either by law or in practice, a real impact on judicial administration but plays rather a weak role. The sole field in which it has some influence is disciplinary and removal proceedings against judges. In the selection of judges, it only conducts interviews and compiles a list for appointment by the President and nominates candidates for the position of court president and cassation court judge. Yet, according to the Armenian author, this is a mere formality since candidates are in practice negotiated in the inner circle of the Presidential administration with the participation of the Cassation Court Chairman.[36] In contrast to the strong Moldavian council which must give its consent to the lifting of judges' immunity, the Armenian council must seek the consent of the President.[37]

The Kazakh council can be characterized as being even weaker than the Armenian one as it is merely an advisory and dependent body of the President. It is only to a minor degree involved in selection matters as it has the right to recommend candidates to the President for appointment, is engaged like councils in other States of this region in lifting the immunity of judges and approves the extension of the term of office of judges who have reached retirement age. The Kazakh Council therefore has not only limited authority compared with judicial councils in the other five States at issue in this article. Even in areas where it has a say it is limited to recommendations (selection) and approval (extension of the term of office of judges). All important administrative matters are determined by very strong court presidents, appointed by the State President, and by a special body called the Committee on Judicial Administration. While the latter is by law located at the Supreme Court and has further territorial departments at provincial and district level, it is in practice under the control of the President. This is evidenced for example by the fact that the competences of the Committee are regulated by presidential decree and not by parliamentary law and its chairperson is chosen by the State President.[38] Hence, the President of Ka-

---

35 These are the General Meeting of Judges, the Council of Court Chairmen and the Judicial Department.

36 Mouradian (note 1), Chapter B. II. 3.

37 Hriptievschi/Hanganu (note 16), Chapter B. VIII.; Mouradian (note 1), Chapter B. VIII.

38 Kanafin/Kovalev (note 1), Chapter B. I. 1.

zakhstan has significant influence on the administration of the judiciary, not just because the council is completely dependent on him and he has the power to appoint and dismiss all council members,[39] but also in an indirect manner through court presidents and the Committee on Judicial Administration.

In Belarus and Russia, the Presidential Administration has great impact both formally and informally on the entire process of judicial administration. One example is the selection of the head of the (at least technically) main administrative body in Russia, the Department of Justice. Even though the Department of Justice is organized as a body within the Supreme Court and thus formally belongs to the judiciary, the Presidential Administration is (although unofficially) involved in the negotiation process leading to the selection of the head of this important administrative body.[40]

Qualification collegia which exist at federal (Supreme Qualification Collegium) and regional level are more comparable with judicial councils in other States than the Russian Federation Council of Judges and its regional equivalents. The latter do exist but are much bigger than judicial councils in other States,[41] do not comprise representatives of different branches and institutions but only judges, and meet only a few times per year. Instead, qualification collegia exercise some of the functions of councils in other States and play a role with regard to judges' selection, appointment and promotion as well as discipline. Yet, on the one hand, they face executive influence due to their composition.[42] On the other hand, court presidents as well as further executive actors have the final and crucial say in all matters which have first been determined by qualification collegia. This can be demonstrated by looking at one central competence of qualification collegia – the selection of judges. They do not play a minor role in this respect as they establish examination commissions, appoint the members thereof and recommend candidates for judicial positions to the court presidents, however all appointments of judges are dependent on the veto power of court presi-

---

39 Id., Chapter B. I. 2.

40 Schwartz/Sykiainen (note 7), Chapter B. I. 1.; A. Nußberger, Judicial Reforms in Post-Soviet Countries – Good Intentions with Flawed Results?, in this volume, Chapter B. III.

41 At central level, the Russian Federation Council of Judges comprises e.g. 126 judges, Schwartz/Sykiainen (note 7), Chapter B. I. 2.

42 For further details see below B. III.

dents. If the respective head of court disagrees with the decision of the qualification collegium, e.g. if the candidate he/she supported is rejected, he/she enjoys the right to ask the qualification collegium to retract its recommendation. Consequently, according to the authors of the chapter on judicial independence in the Russian Federation, qualification collegia confirm their previous decision very rarely when being asked to retract it or tend in practice directly to recommend only those candidates who are supported by the head of the court which has the vacancy.[43]

What is more, the Human Resources Department of the Presidential Administration issues the final recommendation to the State President for appointment following a confidential procedure and the final decision on appointment is in the discretion of the President.[44] Against this background and bearing in mind all the steps and powerful actors which follow a recommendation made by a qualification collegium, it cannot be characterized as being an independent key organ for judicial selection.

In contrast to most other countries, in Belarus the Ministry of Justice (and its local departments) is still very influential concerning the administration of the judiciary. The Ministry of Justice is still responsible for technical and property maintenance and financial, logistical and staffing services to district and oblast courts, and logistical, technical and property maintenance services to the judicial self-governing bodies. Furthermore, the President plays a crucial role in the administration of the judiciary through the Main Department for Relations with Legislative and Judicial Bodies of the Presidential Administration. The President himself has the power to appoint and dismiss judges and award qualification ranks, and may thereby have an impact on the remuneration of judges.[45] Moreover, the fact that the head of each local executive has a veto right on the nomination or reappointment of judges even further demonstrates the executive influence on the appointment of judges. However, as in Russia, there are also qualification commissions in Belarus which have a say in the selection of judges despite the predominance

---

[43] Schwartz/Sykiainen (note 7), Chapter B. II. 2. with further references for this assessment.

[44] Id. with further references for this assessment.

[45] A. Vashkevich, Judicial Independence in the Republic of Belarus, in this volume, Chapter B. I. 1.; II. 2.; IV. 1.

of the executive.[46] Yet, it should be noted that they can only take non-binding decisions while the final and binding decision always remains within the executive.

Based on these findings, two central observations have to be highlighted as regards countries with weak councils or qualification collegia and commissions. First, the weakness of these organs arises from their composition and the manner in which and by whom members are chosen. This problem will be discussed in more detail and recommendations will be made in the next section. The second observation refers to their relative powerlessness to influence judicial administration. As was shown however, their powerlessness is in many cases not caused by their lack of competences. Apart from a few issues, such as e.g. the non-binding nature of decisions of qualification commissions in Belarus or the veto power of court presidents in Russia over recommendations made by qualification collegia, which certainly need to be regulated anew by law, the problem is more their lack of practical influence than the competences they have by law. These observations, however, should not lead to the conclusion that the responsibility of these organs should be extended to additional aspects of judicial administration but that their particular functions should be strengthened.[47]

It is necessary to advance the role these bodies play in the practice of judicial administration. As the analysis has shown, the weakness they face is connected with informal interferences by the executive branch with the activities of these councils or collegia and commissions. Therefore, an important step would be to strengthen their independence of the executive by way of transparent procedures. A possible option would be to establish both control mechanisms in order to foster transparent decision-making processes and new bodies to take over some of the responsibilities from the executive branch. This analysis corresponds with recommendations which were made by the authors from Russia and Belarus. For Russia, Schwartz and Sykiainen recommended introducing further and new independent institutions, mainly to review and control, in particular, the fulfillment of duties by court presidents and to reform qualifications collegia in terms of composition and trans-

---

[46] These qualification commissions which exist at different court levels are composed of nine members (two representatives of the Ministry of Justice and seven judge members). Id., Chapter B. I. 2.

[47] As the above analysis of judicial administration in Georgia, Moldova and Ukraine showed, comprehensive powers of judicial councils might give rise to issues of lack of accountability and can thus create new problems.

parency concerning the assessment criteria and selection procedures.[48] Vashkevich even called for the establishment of a judicial council in Belarus, which should in his view possess the exclusive right to nominate candidates for judicial office.[49]

The distribution of competences and the establishment of different heterogeneous bodies, suggested above for strong councils, thus are also valid for countries with weak councils or no comparable councils. While for the first group of States this was recommended in order to distribute responsibilities to different organs rather than increase the concentration of power on only one organ, with regard to States with weak or no comparable council this recommendation aims at reducing the influence of the executive and fostering transparency.

III. Composition of Judicial Councils, Qualification Collegia and Commissions

A core problem in all eight countries which are at issue in this article is the question of the composition of the judicial council or qualification collegium or commission. There are three different models so far: first, in some countries such as Georgia, Armenia and Azerbaijan the council is now composed of a majority of judges selected by the judicial community, which has been seen as a goal reached to strengthen the council's independence and thereby judicial independence in general.[50]

Second, in other countries such as Moldova the judicial majority on the council has been abolished since Moldova experienced a risk of judicial corporatism because of the majority of the members being judges. Similarly, in Russia, where qualification collegia were formerly comprised only of judges, they were criticized for judicial corporatism.[51] This risk causes problems, in that the council cannot properly fulfill its function

---

48 Schwartz/Sykiainen (note 7), Chapter F.

49 See for more details Vashkevich (note 45), Chapter B. II. 3.

50 Report on the Independence of the Judiciary in Georgia, on file with the OSCE, Chapter B. I. 2.; Mouradian (note 1), Chapter B. I. 2.

51 Schwartz/ Sykiainen (note 7), Chapter B. I. 2.; P. H. Solomon, Putin's Judicial Reform: Making Judges Accountable as well as Independent, 11 Eastern European Constitutional Law Review 117 (2002); P. H. Solomon, Threats of Judicial Counterreform in Putin's Russia, 13 Demokratizatsiya 325, at 327 and 328 (2005).

as a watchdog on judges but becomes a powerful organ which no longer holds judges accountable. In order to counter-balance the lenient application of measures against judges by their colleagues sitting in the council, Moldova has equalled the number of judges and non-judges on the council.[52] Similarly, the composition of the Russian qualification collegia, formerly composed only of judges, was revised and now includes also public representatives and one representative of the President's office.

Third, there are States where judicial councils, such as the Kazakh Council, contain only a minority of judges. Others, such as the Ukrainian High Council of Justice, after recent legislative changes, will be composed of a narrow majority of judges. However, only three out of 20 members and the Supreme Court Chairman, as an *ex officio* member, will be elected by judges. These councils are at risk either of being dominated by the executive or of remaining merely advisory organs of the President, like the Kazakh Council.

Therefore, the composition of judicial councils remains a dilemma. Bearing in mind the risks which Moldova experienced with a judicial majority,[53] the author recommends abandoning the view that only councils composed of a majority of judges are feasible for establishing an independent judiciary. It may be the first step in detaching the administration of the judiciary from the executive branch but it is not the right way to safeguard judicial independence in a sustainable manner. Nor is a minority of judges to be recommended as it creates problems of executive dependence. This article therefore argues for a balanced composition, following the Moldovan example. This would avoid both extremes, either councils or qualifications collegia which become uncontrollable due to their having too many judges as members, or judicial councils acting under a strong executive influence.

---

[52] Hriptievschi/Hanganu (note 16), Chapter B. I. 2; American Bar Association (ABA ROLI), Judicial Reform Index for Moldova, Volume II, at 67, 68 (2007).

[53] The assessment of the Russian situation before March 2002 and thus of the motivation behind the changes made to the composition of the Russian qualification collegia (with the effect that they became more balanced) has been analysed in different ways: the first view is that the changes, although displeasing judges, were introduced to balance accountability and independence (Solomon (note 51)); the second is that the real aim was to re-establish presidential control over the qualification collegia (Nußberger (note 40), Chapter B. III.).

Certainly, a balanced composition does not entirely prevent the council or qualification collegium from being improperly influenced. However, even though the Moldovan authors saw a risk of increasing political influence on the council because of the higher number of non-judges in the council, they nevertheless welcomed the new balanced composition as a step in the right direction.[54] They made clear that their concerns as to increased political interferences relate not to the new balanced composition but to the integrity of the members. The same applies to the criticism expressed by the Russian authors whose main concern about the inclusion of public representatives and one representative of the State President in the collegia is the manner in which the non-judicial members are selected, which gives rise to increased political influence.[55] In the end, it is not the reduced number of members being judges that causes stronger political interference but the question whether the members have or lack personal integrity,[56] and the manner in which the members are chosen. However, that a closed system of judges judging the judges is a risk factor for judicial corporatism was clearly evidenced by the experiences of Moldova and arguably of Russia.[57] Therefore, despite the abovementioned criticism, a balanced composition seems to answer best the analyzed dilemma as it enables States to cope with both extremes – judicial corporatism on the one hand and executive dependence on the other.

Furthermore, representation of judges of *all* levels in the council, qualification collegia or commission can be identified as still being insufficiently implemented in many of these States. This requirement is essential in two respects: first, in order to guarantee that the judiciary is rep-

---

[54] Hriptievschi/ Hanganu (note 16), Chapter B. I. 2. Correspondence with the Moldavian author N. Hriptievschi on 10 August 2010.

[55] Schwartz/ Sykiainen (note 7), Chapter B. I. 2.

[56] Measures to promote the personal integrity of the members of the council, collegium or commission may include strict incompatibility rules to reduce conflicts of interest (see recently Venice Commission, Joint Opinion on the Law on the Judicial System and the Status of Judges of Ukraine, CDL-AD (2010) 026, para. 126 (18 October 2010)), or obligatory full-time membership (see in this regard the amendment of the conditions of membership of the judicial members of the Moldavian council now serving on a full-time basis. That step was evaluated positively by the Moldavian authors, cf. Hriptievschi/ Hanganu (note 16), Chapter B. I. 2.).

[57] See for different assessments of the former Russian situation and of the change in the composition of March 2002, *supra*, note 53.

resented at large, thereby avoiding the fact that only higher court judges determine relevant questions concerning the judiciary but including *voices from the local benches*. Secondly and even more importantly, most councils fulfill functions of control over court presidents, who are particularly strong in Eastern Europe, the South Caucasus and Central Asia. In order for them to fulfill this watchdog function properly, court presidents should not be part of the council. In particular in Ukraine, the Ukrainian Council of Judges, which is to be distinguished from the High Council of Judges, is largely composed of heads of courts, which jeopardizes the Council's control over heads of courts.[58] Some States, such as Armenia and Russia, have already laid down provisions in this regard excluding court presidents from the relevant organ.[59] Instead of excluding court presidents *per se* from the council or qualification collegium or commission, States should follow the Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, namely include court presidents, but only under the precondition that they resign from that position when appointed to the relevant body.[60] That way, the experience and knowledge of court presidents could be used in the work of the council, collegium or commission, but at the same time there would be the safeguard that these organs do not hesitate to control court presidents (where they have this function). Moreover, the risk that other judicial members of the council

---

[58] Kuybida (note 13), Chapter B. I. 2., Chapter F.

[59] Mouradian (note 1), Chapter B. I. 2.; Schwartz/ Sykiainen (note 7), Chapter B. II. 2; Kazakhstan has excluded court presidents from the Kazakh Republican and Provincial Disciplinary Committees, see Kanafin/Kovalev (note 1), Chapter B. VII. 2. In Ukraine, the President of the Supreme Court, presidents of higher specialized courts and of appellate courts, and their deputies cannot be elected or appointed to qualification commissions responsible for judges' selection and responsibility, see Kuybida (note 13), Chapter B. I. 2.

[60] Kyiv Recommendations (note 26), para. 7. Note that the Venice Commission is also of the opinion that court presidents should not be excluded entirely from the bodies of self-government, yet for a different reason. In the view of the Venice Commission complete exclusion may tend to create a confrontational atmosphere. It recommends therefore the inclusion of court presidents (as court presidents) in such bodies but without the right to vote: Venice Commission, Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine, CDL-AD (2010) 003, para. 107 (16 March 2010).

might feel intimidated by court presidents sitting on the council would be reduced.[61]

Moreover, the process of selection of members for the council needs to be reconsidered. If members of the council, even though they are judges, are selected and appointed by representatives of the executive, the council is at risk of being indirectly under the influence of the executive.[62] In order to make the judicial council stronger and less dependent *de facto* on the executive, authors in States with weak councils called for the stronger participation of the judicial community (lawyers, law professors, legal NGOs) as well as more transparency in the process of selecting members for the council.[63] *De facto* dependence through the manner in which members of these bodies are chosen was also identified as one of the most pressing issues concerning the Russian qualification collegia. The Russian authors advised the creation of a new credible, neutral and independent body or commission for the selection of judges, separate from the qualification collegia. The judicial members of this new organ should be the most experienced judges instead of those judges closest to regional governors. Public representatives should be chosen with the help of NGOs which should (unlike at the present time)[64] have a real and not just a formal say in choosing public representatives. They also recommended the exclusion of the Presidential representative altogether in order to reduce the direct influence of the President on the new organ. Yet, with regard to a balanced composition, which the author of this contribution considers to be the best option, there should also be one or two members appointed by the executive, however chosen in a transparent procedure and, once appointed, free from direct instructions by the appointing organ.[65] The

---

[61] Due to statements by experts of this region in the Working Group on Judicial Administration at the OSCE Expert Seminar on Judicial Independence in Eastern Europe, South Caucasus and Central Asia – Challenges, Reforms and Way Forward, Kyiv, 23 – 25 June 2010, notes on file with the author.

[62] Report on the Independence of the Judiciary in Azerbaijan, on file with the OSCE, Chapter B. I.

[63] Id., Chapter F.

[64] Schwartz/Sykiainen (note 7), Chapter B. I. 2.

[65] Schwartz/Sykiainen pointed to the fact that the person selected by the President for the qualification collegia is usually the Presidential envoy to the relevant federal circuit. As a consequence, this person is acting as a representative of the President, possesses relevant information e.g. on candidates for the

Belarusian author who advocated the introduction of a judicial council also suggested that the judicial members should be elected by the judicial community.[66]

Finally, the question of the council's chairmanship is of crucial importance, as the right to determine the chairperson can be misused to retain indirect influence on the council. Such person leads the deliberations in the council, and may hence influence the outcome and in some States also has the key role of communicating the opinion of the council to further organs.[67] Bearing in mind this central position, the council should not be chaired by the executive itself, nor is it recommended for the executive to choose a person for this position or for the position to be assigned automatically to a certain office holder, such as e.g. the president of the highest court. All three systems can currently be found in the Eastern region. In Armenia and Georgia until 2005 and 2007 respectively the judicial councils were even chaired by the State President himself. Now, they are presided over automatically by the head of the highest court, a model which is quite widespread in Eastern States.[68] In Azerbaijan, the development seen in its neighbouring States, has not yet been undertaken. Its *de jure* strong but *de facto* weak council is still chaired by an executive figure, namely the Minister of Justice.[69] In Kazakhstan, the President of the State appoints any person to this position, a fact which increases the dependence of the whole council on the State President.[70]

To decrease the dependence of the chair on any particular person or branch of power, this article recommends the Moldovan model of the chairperson of the council being elected by the council members themselves by secret and majority vote.[71]

---

bench and is therefore a direct channel of presidential influence on the qualification collegia: Schwartz/ Sykiainen (note 7), Chapter B. I. 2., II. 2., III. 2.

66 Vashkevich (note 45), Chapter B. II. 3.

67 See e.g. Mouradian (note 1), Chapter B. I. 2.

68 Report on the Independence of the Judiciary in Georgia, on file with the OSCE, Chapter B. I. 2.; Mouradian (note 1), Chapter A. and Chapter B. I. 2.

69 Report on the Independence of the Judiciary in Azerbaijan, on file with the OSCE, Chapter B. I.

70 Currently this function is carried out by a former member of the Presidential Administration, Kanafin/ Kovalev (note 1), Chapter B. I. 2.

71 For this recent Moldovan development see Hriptievschi/Hanganu (note 16), Chapter B. I. 2., notes 27 and 34 of their contribution. The same consensus

IV. Lack of Transparency

Even though increasing transparency is an essential tool for regaining public trust in the administration of the judiciary,[72] hitherto, in almost all countries, a lack of transparency in the work of judicial councils or qualification collegia or commissions can be identified. This deficiency is to be noted in all eight States. Most of them deliberate behind closed doors, vote secretly and do not give reasons for decisions which has generally raised the criticism of politically motivated decisions.[73] In order to address the problem of lack of transparency, access to the proceedings of the council or qualification collegium or commission, and thereby the ability to scrutinize e.g. the selection process should be granted to the public. In addition, more information on its activities, the results of deliberations and reasons for its decisions should be made available to the public by publication of them. The same recommendation applies to the advertising of vacant positions and the date of com-

---

was reached by experts at the OSCE Expert Seminar on Judicial Independence in Eastern Europe, South Caucasus and Central Asia – Challenges, Reforms and Way Forward, Kyiv, 23 – 25 June 2010, see Kyiv Recommendations (note 26), para. 7. See also the recommendation by the Kazakh authors that the chair of the council be elected from among the council members. Their recommendation was, however, that the judiciary at large, namely the Congress of Judges, elect him/her from among the council members in order to make the chairperson more accountable to the whole judiciary: Kanafin/Kovalev (note 1), Chapter F.

[72] See *inter alia* Report on the Independence of the Judiciary in Georgia, on file with the OSCE, Chapter B. II. 2. and Chapter F.; V. Autheman/S. Elena, Global Best Practices: Judicial Councils, Lessons Learned from Europe and Latin America, IFES Rule of Law White Paper Series (Editor: Keith Henderson), available at <http://www.ifes.org/publication/eae6b5d089d0b287174df2742875b515/WhitePaper_2_FINAL.pdf>.

[73] See for example Mouradian (note 1), Chapter B. II. 1., 2., III. 2. who describes the selection and promotion process in the judicial council as non-transparent, held *in camera* and the concrete interview procedure format as not being predetermined, depending on the discretion of the members of the judicial council and of a subjective nature; Report on the Independence of the Judiciary in Azerbaijan, on file with the OSCE, Chapter B. I.; Report on the Independence of the Judiciary in Georgia, on file with the OSCE, Chapter B. II. 2., III. 1. note 35 and Chapter F.; Hriptievschi/ Hanganu (note 16), Chapter B. II. 2; Schwartz/Sykiainen (note 7), Chapter B. II. 2., III. 2. and Chapter F. For transparency in the structure and operation of judicial councils being one of the key issues see also Autheman/Elena (note 72).

petitions to recruit candidates. These should be published on the relevant website and/or relevant professional journals and newspapers.[74] As a kind of best practice, countries could consider the Georgian step of inviting international organizations to attend the selection interviews in the council or in the qualification collegium or commission.[75] Even more far reaching recommendations call for the involvement of civil society in monitoring the councils', qualification collegia's or commissions' activities *inter alia* through the periodic reporting of their activities to civil society bodies.[76] All these measures can of course only effectively increase transparency if they are both prescribed by law and implemented in practice.

C. Court Presidents

Apart from judicial councils or other relevant organs in Russia and Belarus, in all countries of this region court presidents play a particularly strong role in the administration of the judiciary.[77] Two main challenges can be identified in this respect: first, the problem of the concentration of functions fulfilled by court presidents, including the problematic task of assigning and reassigning cases to the judges of their court; and second, finding the right organ for the selection and appointment of heads of courts.

---

[74] Georgia has recently improved its system in this respect, Report on the Independence of the Judiciary in Georgia, on file with the OSCE, Chapter B. II. 2.

[75] Report on the Independence of the Judiciary in Georgia, on file with the OSCE, Chapter B. II. 2.

[76] Autheman/Elena (note 72), at 16; a similar recommendation of periodic reporting in order to increase the transparency and thereby also the accountability of the relevant administrative body was also made by experts during the discussions in the Working Group on Judicial Administration at the OSCE Expert Seminar on Judicial Independence in Eastern Europe, South Caucasus and Central Asia – Challenges, Reforms and Way Forward, Kyiv, 23 – 25 June 2010, notes on file with the author. These experts, however, recommended regular reports of the council/qualification collegia/commissions to the Parliament.

[77] See also Nußberger (note 40), Chapters B. III., V. and C. VIII.

I. Formal and Informal Concentration of Powers in Presiding Judges

Particularly in States with weak or without a comparable council court presidents exercise a wide variety of functions. They perform significant competences in the fields of court management[78] and of oversight of judges by supervising the "quality of adjudication of cases", as in Belarus,[79] and by monitoring their compliance with "rules of work discipline", as in Armenia.[80] Furthermore, they evaluate the quality of judges' performance, and the practice of informal deliberations with judges before they deliver a judgment is widespread. Judges prefer deliberating with their court president on how to decide a certain case in advance so as not to displease him/her and hence be given a negative evaluation.[81] In Ukraine, Belarus and Moldova, presiding judges are furthermore involved in awarding bonuses or qualification ranks to the judges of their courts and hence also have an influence on judges' remuneration.[82]

However, particularly immense is their influence in the field of judges' careers, discipline and case assignment. Concerning judges' careers there are two main problems: one is related to the decisive influence of court presidents in the selection process, which is especially true for those States without a comparable judicial council, namely Russia and Belarus. Their legal systems provide for veto rights for court presidents in the selection process, which in practice leads to a situation in which a candidate will not succeed if she or he is not supported by the court president (either by the one with the vacancy as in Russia or by the

---

78 Even though Russia tried to limit the competences of court presidents in this field which was regarded as atypical for court presidents and introduced special court administrators, in practice, court administrators mainly execute the orders of the court presidents instead of replacing them. What is more, these court administrators are recommended for this position by the relevant court president and subordinated to the latter. See Schwartz/Sykiainen (note 7), Chapter B. I. 1.

79 Vashkevich (note 45), Chapter F.

80 Mouradian (note 1), Chapter B. VII. 3.

81 See e.g. id., Chapter C. I. 2; Schwartz/Sykiainen (note 7), Chapter C. II. 1.; Report on the Independence of the Judiciary in Azerbaijan, on file with the OSCE, Chapter C. II. 1.

82 Kuybida (note 13), Chapter B. IV. 1.; Vashkevich (note 45), Chapter B. III. 2.; Hriptievschi/Hanganu (note 16), Chapter B. III. 1.

oblast level court president as in Belarus).[83] Notwithstanding, considerable influence of court presidents on the selection of candidates for a judicial position can also emerge in countries with a strong council, albeit rather as a *de facto* phenomenon than as authorized by law: court presidents in Ukraine *de facto* influence this process to a high degree, in that a candidate will not be appointed to a court without the personal patronage of the court president.[84]

The second main concern with regard to court presidents' impact on judges' careers is their role in the promotion of judges. The authority of court presidents in several of the eight countries in evaluating judges has been already mentioned above. These evaluations later become crucial for the organs responsible for the promotion of judges. In other countries, court presidents take an even more active part in the process of promotion. In Russia, for instance, court presidents have veto rights on the promotion of lower level judges to higher level courts, recommend judges for the position of court president and decide on promotions within the court.[85] In Ukraine, there are almost no legal regulations on the promotion of judges and therefore court presidents again *de facto* fill the gap: candidates for promotion depend once more (as for initial appointment) on the personal patronage of their court presidents.[86]

The role of court presidents in disciplinary proceedings is particularly extensive in countries which do not have a comparable judicial council such as Russia and Belarus, as well as Kazakhstan where the council is a mere advisory organ of the State President. In these three countries, the disciplinary competences of court presidents are considered powerful means whereby the judges of their courts are kept obedient and loyal. Court presidents do not have just the right to initiate disciplinary pro-

---

[83] Schwartz/ Sykiainen (note 7), Chapter B. II. 2.; Vashkevich (note 45), Chapter B. II. 2.

[84] Kuybida (note 13), Chapter B. II. 2.

[85] Schwartz/Sykiainen (note 7), Chapter B. III. 2.

[86] Kuybida (note 13), Chapter B. III. 2. It has to be noted that the new law (*supra*, note 17) has in fact not solved the problem. See the Venice Commission's assessment "However, the Law leaves the door open to political considerations in the promotion of judges […]. It is striking that the question of promotion of judges is hardly regulated at all." Venice Commission, Joint Opinion on the Law on the Judicial System and the Status of Judges of Ukraine, CDL-AD (2010) 026, paras. 67-70 (18 October 2010).

ceedings (Belarus[87], Kazakhstan[88]) or at least submit an application to open disciplinary proceedings to the relevant organ which generally tends to support such request (Russia[89]). They at the same time take the final decision in disciplinary proceedings (Belarus)[90] or may at least be present during meetings of the relevant organ and give explanations (Russia).[91] In Belarus, the president of the highest court (Supreme Court or Supreme Economic Court) serves, furthermore, as a court of appeal against the disciplinary decisions of court presidents of all other courts.[92]

A major problem which all countries of the CIS region (except Moldova) face is the influence of court presidents on the independence of the individual judge through their *de jure* or at least *de facto* authority to assign cases to the judges of their courts. This residual aspect of Soviet-era tradition allows court presidents actively to interfere with and influence the outcome of court proceedings by keeping some judges overloaded, others occupied with only a few cases, some with politically sensitive ones, others with less interesting cases. In some States such as Russia and Ukraine there are even no or no clear and coherent rules on case assignment. In these States, court presidents took over this task *de facto* or, in other words, have never given it up since

---

87 The President of the Supreme Court/ President of the Supreme Economic Court has even the right to initiate disciplinary proceedings against all judges of courts of general jurisdiction/economic courts: Vashkevich (note 45), Chapter B. VII. 1.

88 Kanafin/Kovalev (note 1), Chapter B. VII. 1. The authors of the Kazakh Report came (*inter alia* because of court presidents' role in disciplinary proceedings) to the conclusion that judges in Kazakhstan are completely subordinated to the presidents of their courts who were described as supervisors of their judges.

89 In Russia, these broad powers of court presidents in disciplinary proceedings were appealed to the Constitutional Court; however in the Decision of February 2008 these powers were declared not to conflict with constitutional provisions. The legal provisions would provide for further considerations by the qualification collegia and secret voting by them. See Schwartz/Sykiainen (note 7), Chapter B. VII. 2. for further references.

90 Vashkevich (note 45), Chapter B. VII. 2.

91 Schwartz/Sykiainen (note 7), Chapter B. VII. 2.

92 Vashkevich (note 45), Chapter B. VII. 3.

Soviet times.[93] In Georgia, there are rules requiring assignment in alphabetical order. However, since each assignment needs the approval of the court president, he/she can make exceptions to the general assignment rule.[94] Kazakhstan has even introduced special computer software for the random assignment of cases; yet, experts claim that it does not function properly and does not work transparently.[95] Moldova is the only State out of these eight to have established a truly random system; court presidents retained the power to interfere only by reassigning a case in circumstances prescribed by law.[96] In some other States such as Ukraine, Russia and Armenia, reform efforts were made but have not so far been effectively and finally achieved;[97] in others such as Azerbaijan and Belarus no reform steps seem to have been taken at all.[98] The reason for this *de facto* or even *de jure* situation was partly seen in the

---

[93] Schwartz/Sykiainen (note 7), in this volume, Chapter B. V.; Kuybida (note 13), Chapter B. V. For the situation in Ukraine see also an interview with the former appeal court judge Jurij Wasilenko, broadcast on the German radio channel „Deutschlandfunk" on 29 May 2010: F. Kellermann, Blinde Justitia: Das korrumpierte Rechtssystem in der Ukraine, at 13, available at < http://www.dradio.de/download/120458/>; it has to be noted, however, that the new Ukrainian Law (*supra*, note 17) provides for the introduction of an automatic case-flow and case assignment system.

[94] Report on the Independence of the Judiciary in Georgia, on file with the OSCE, Chapter B. V.

[95] Kanafin/Kovalev (note 1), Chapter B. V.; this assessment corresponds to statements made by a Kazakh expert and lawyer in the Working Group on Judicial Administration at the OSCE Expert Seminar on Judicial Independence in Eastern Europe, South Caucasus and Central Asia – Challenges, Reforms and Way Forward, Kyiv, 23 – 25 June 2010. According to her, even though there is a computer-based system, it can be manipulated easily and no technology can change a certain mentality and remedy the lack of political will (notes on file with the author).

[96] However, the Moldavian system has also not fully been implemented according to the Moldavian authors, see for further details Hriptievschi/Hanganu (note 16), Chapter B. V.

[97] Schwartz/Sykiainen (note 7), Chapter B. V.; Mouradian (note 1), Chapter B. V.; Kuybida (note 13), Chapter B. V.; for Ukraine see also USAID, Combating Corruption and Strengthening Rule of Law in Ukraine, available at <http://pdf.usaid.gov/pdf_docs/PNADK565.pdf>.

[98] Vashkevich (note 45), Chapter B. V and see also recommendation in Chapter F; Report on the Independence of the Judiciary in Azerbaijan, on file with the OSCE, Chapter B. V.

broad powers enjoyed in these countries by court presidents who were not willing to relinquish it.[99] In Armenia, for instance, the Council of Court Chairmen consisting only of court presidents was mandated to define a procedure of case assignment which has still not been done.[100] A lack of resources, such as e.g. the lack of computerization of the courts and funding in general, forms an additional obstacle to the full implementation of a random case assignment system.[101]

As was demonstrated, the comprehensive powers of court presidents are one of the most pressing issues and constitute a structural deficiency in the countries of Eastern Europe, the South Caucasus and Central Asia. Against this background, it is essential to limit the power of court presidents over the administration of the judiciary which jeopardizes the daily independent decision-making of every individual judge. Consequently, as a starting point, the powers of court presidents have to be above all constrained by law. This change of legal provisions, it is hoped, would in the long run go along with changing the *de facto* situation concerning informal practices. If judges do not have to fear displeasing their court president because he/she will later be the only person to conduct a discretionary evaluation of them and hence have an impact on their remuneration, there is no need to discuss decisions informally before they are taken.

Arguably, this should lead to the conclusion that court presidents' competences should be limited to representative functions and control over court staff,[102] and that they should be excluded in particular from any form of direct determination of judges' careers. However, the information court presidents have is indispensable for certain issues such as the evaluation of judges. In order to achieve both the prevention of an accumulation of power and the inclusion of court presidents in relevant decisions where their knowledge is essential, some tasks should be performed by a new board composed of the court president and other members. This would give court presidents a voice without leaving crucial questions such as evaluation to the discretion of the individual head of court.[103] Another feasible option in the same vein was put forward by the authors of the chapter on judicial independence in the Russian Fed-

---

99 See also Nußberger (note 40), Chapter B. V.

100 Mouradian (note 1), Chapter B. V.

101 Id.; Kuybida (note 13), Chapter B. V.

102 Cf. e.g. Kuybida (note 13), Chapter F.

103 See Kyiv Recommendations (note 26), para. 30.

eration. Instead of including court presidents on a board and thereby securing control through the other actors sitting on the same body, they proposed the establishment of control mechanisms for decisions of court presidents from the outside. They argued for the subjection of all cases of possible influence by court presidents e.g. on the outcome of disciplinary proceedings to an independent investigation, e.g. a special Parliamentary commission or a Special Prosecutor.[104]

The sensitive issue of case assignment should not be exclusively decided by the court president. Instead, either it should be carried out by a random computer-based system or a board should be established at each court which assigns and reassigns the cases following a clear procedure and transparent criteria which need to be regulated by law. This board could also include the court president, but only among others. This way, the members of the board would serve as mutual watchdogs of whether every single assignment was in compliance with the predetermined criteria and procedures.[105]

II. Selection and Appointment of Court Presidents

Given the key role court presidents play (even if limited in the future as recommended in this article), a major challenge in all these States is the question of who selects and appoints the heads of courts in order to safeguard judicial independence from interferences by the other two branches, but also from improper influence from within the judiciary itself.

Except in the countries with strong judicial councils, court presidents are appointed or at least nominated by the State President. This gives cause for concern, as a State President can have a great influence on judges through the relevant head of court. Taking a different approach, in Georgia, Ukraine and Moldova, the judicial council plays a decisive role in selecting and/or appointing court presidents. In Georgia, all court presidents except those of the Supreme Court are exclusively chosen and, in Georgia and Ukraine, appointed by the judicial council. In Moldova, the judicial council only proposes candidates either for election by the legislature or appointment by the President (depending on

---

[104] Schwartz/Sykiainen (note 7), Chapter F.

[105] Mouradian (note 1), Chapter F. made a similar recommendation for the reassignment of cases.

the court level).[106] However, criticism of these selection modes was also raised. In Georgia for instance, the selection is carried out by the council, in the absence of competition among the judges, behind closed doors and allegedly politically dominated. Moreover, the Georgian council has been criticized for failing to take into account *voices from the local benches*.[107] In Ukraine, until the most recent legislative changes, the Ukrainian Council of Judges, unfortunately itself mainly composed of judges holding administrative positions, was competent to appoint heads of courts; thus, in fact, presidents of courts in Ukraine were appointed by judges of the Supreme Court, higher specialized courts, and presidents of other courts.[108] With the adoption of the new Law on the Judiciary and Status of Judges, the High Council of Justice was given the authority to appoint the heads of courts.[109]

In the light of the indirect executive impact on judges through the appointment of heads of courts and given that councils do not constitute an appropriate alternative for selecting court presidents, the best option would be to have court presidents elected by the judges of the same court.[110] In that way, the executive dependence of court presidents would be reduced, decentralization of power fostered and the whole process of determining the leading figure of each court would be made transparent through election.

D. Conclusion

This analysis has demonstrated that the manner in which the judiciary is administered is a core element for achieving an independent judiciary. Whether judges will be in a position to deliver the courageous judgments which are necessary for trust in the courts to be achieved[111] will depend on their independence, for which an appropriate judicial administration is crucial. In order to achieve this aim, countries in transi-

---

106 Hriptievschi/Hanganu (note 16), Chapter B. III. 2. and Chapter E.

107 Report on the Independence of the Judiciary in Georgia, on file with the OSCE, Chapter B. III. 2.

108 Kuybida (note 13), Chapter B. III. 2.

109 Art. 20 para. 2 of the new Law, see *supra*, note 17.

110 See Kyiv (note 26), para. 16, Schwartz/Sykiainen (note 7), Chapter F.

111 See Nußberger (note 40), Chapter E.

tion, such as the eight States of Eastern Europe, the South Caucasus and Central Asia which have been at issue in this contribution, have to work on two important aspects: the functions of the key administrative organs and their composition. As the above analysis has shown, the balancing of independence and accountability and an increase in transparency should be at the heart of future reform steps with regard to the functions and composition of judicial councils, qualifications collegia and commissions, as well as with regard to court presidents. As evidenced, these three principles have not yet been sufficiently addressed in the countries of Eastern Europe, the South Caucasus and Central Asia.

As was demonstrated by a look at the three countries which have particularly strong councils, it cannot be a feasible reform step to balance the three core elements to make one organ as independent as possible without at the same time having regard to the principle of accountability and transparent control mechanisms. Instead of the powers over every aspect of judicial administration being further vested in one judicial council,[112] administrative tasks should be distributed to different organs. This would answer the need for both independence and accountability and guarantee a higher degree of transparency.

For countries with weak or no councils which face a considerable lack of transparency, allowing the executive to exert *de facto* influence and impeding the establishment of credible administrative organs, it became clear that three steps would be advisable: first, the already existing organs need to be reformed by increasing their practical impact which is reduced by a lack of transparency in the manner in which they are constituted and function. Second, as for States with strong councils, it is also recommended that those with weak or no comparable council establish one or two new organs to take over responsibilities from the executive in the administration of the judiciary. And, third, appropriate legislative steps should be taken where this still seems to be necessary; for instance instead of non-binding decisions, qualification commissions in Belarus or the council in Kazakhstan should be finally enabled to take binding ones; another example is the veto rights of Russian court presidents provided for by law, which need to be abolished. Hence, for all eight States, the reform of the existing council combined with the introduction of a limited number of new bodies responsible

[112] As promoted by the Venice Commission: Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine, CDL-AD (2010) 003, paras. 97, 108, 122, 123 (16 March 2010).

for other aspects of administration is to be recommended to make the whole system more transparent and regain public trust.

Without limiting the extensive powers of court presidents, it will not be possible to safeguard judges' daily independent decision-making against interferences by court presidents. It may, however, not be the best option to confine their role only to representative functions and control over court staff. Their knowledge should be used where it is necessary together with the necessary checks to prevent abuse. However, not only must the extensive powers of court presidents be restricted, but also a decentralized selection mode must be introduced. By effectively implementing the reform steps suggested in this essay, the transitional countries examined here would be able to solve some of the most pressing structural problems which jeopardize the present day independence of judges in the Eastern region and further distance themselves from the heritage of the Soviet era.

Judicial Independence in the Russian Federation

Olga Schwartz and Elga Sykiainen

A. Introduction

Over the last 15 years, Russia's legal system has undergone a fundamental restructuring, a process which is continuing. Currently, the legal framework for the operation of courts is mainly comprised of the Constitution of the Russian Federation (RF) of 1993,[1] the Federal Constitutional Law on the Justice System (1996),[2] procedural codes regarding civil (2003), criminal (2001), and *arbitrazh* (2002) matters and the federal law on the Justices of the Peace (1998).[3] The RF Constitution explicitly provides for an independent judiciary to protect the rights and freedoms guaranteed by it, and the international obligations entered into by the RF. Among other things, it enshrines an independent judiciary as a branch of state,[4] guarantees judges' independence and subordinates them only to the Constitution and federal laws.[5] The federal judicial power in Russia has three branches or court systems: constitutional

---

1 *Konstitutsiya Rossiiskoi Federatsii, Moskva, "Juriditcheskaya literatura"*, 25 December 1993, English translation available at <http://www.legislationline.org/documents/section/constitutions>.

2 *Federalny Konstitutsionny Zakon ot 30 dekabrya 1996 "O Sudebnoi Sisteme Rossiiskoi Federatsii" No. 1-FKZ*, Sobranije zakonodatel'stva Rossiskoi Federatsii, 6 January 1997, No. 1, st. 1.

3 *Federalny Zakon "O mirovykh sudiakh" No. 188-FZ*, Sobranije zakonodatel'stva Rossiiskoi Federatsii, 17 December 1998, No. 50, st. 6270.

4 Article 10 Russian Constitution.

5 Article 120 Russian Constitution.

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233, DOI 10.1007/978-3-642-28299-7_24,

courts, courts of general jurisdiction and *arbitrazh* (commercial) courts.[6]

In spite of all necessary safeguards and structures being in place judicial independence, integrity and competence are widely perceived as unsatisfactory, by both the authorities and the public.[7] The overall lack of

[6] The Constitutional Court of the RF is vested with the responsibility for constitutional review. Also there are a number of "constitutional"/"charter" courts in Russian regions which are RF subject level (regional) courts but they do not form a unified court system with the Constitutional Court. These courts review regional legislation for compliance with regional constitutions/charters. Courts of General Jurisdiction handle all criminal cases (including misdemeanours which are called "administrative offences") and all civil cases to which an individual (except an entrenpreneur) is a party, with the Supreme Court at the top overseeing the Courts of General Jurisdiction. The latter comprises supreme courts at the level of the subjects (republics, regions (oblasts) etc.) of the RF, district and city courts, including military courts and Justices of the Peace (JP). All courts of general jurisdiction except JPs are federal, JPs are the RF subject level (regional) courts. The institution of JP, the first level judicial entity at the community level, is relatively recent in Russia (1998), and represents in some ways a return to the pre-Soviet justice system. Today JPs are professional judges and it is possible to have an appeal (*de novo*) review of their decisions in the district court, and then have a cassation review at the court of the RF subject (regional level). Arbitrazh [commercial] Courts are also federal courts with the Supreme Arbitrazh Court at the top administering the arbitrazh court system. They handle all commercial and administrative disputes to which businesses (legal entities or individual entrepreneurs) are parties. These court systems are independent of each other from an organizational perspective and are guided by independent sources of procedural law in the administration of justice but share the structure of professional bodies with defined decision-making functions, described below (B. I. 2. Judicial Council and Other Bodies of Judicial Community).

[7] In his address to the VII All-Russia Congress of Judges President Medvedev pointed out that being *de jure* independent lots of judges are not independent *de facto* and in many cases make their personal choice not to be in favour of delivering fair and objective decisions. See <http://archive.kremlin.ru/appears/2008/12/02/1631_type63374type63376_210020.shtml>. A survey conducted in 2008 by INDEM Foundation demonstrates that only 8% of the respondents absolutely trust Russian courts and 33.8% are close to it – answer "more likely". See A.K.Gorbuz/ M.A.Krasnov/ E.A.Mishina/ G.A.Satarov, Transfomatsiya rossiiskoi sudebnoi vlasti. Opyt kompleksnogo analiza (2010). According to the results of the survey conducted by Levada Center in 2009 more than 60% of the respondents think that Russian courts cannot protect an individual against the State's arbitrariness, 56% of those surveyed think that the

confidence in the judiciary in Russia seems to be due in part to rising expectations, in part to judges' knowledge gaps in the wake of rapid and large-scale adoption of new laws and, importantly, in part to perceived judicial corruption, ineffectiveness, non-transparency and patronage in judicial appointments compounded by the lack of an effective judicial disciplinary process. Judicial competence is at issue too: under-trained and lacking consistent access to latest legislation and case law, judges are often unable to apply the relevant law and precedents, leading at best to decisional unpredictability and lack of confidence and, at worst, creating opportunities for corruption. Overall, the reform focus has mainly been on legal modernization, and somewhat less on capacity-building and mindset change. Not surprisingly, these reforms have only begun to re-orient Russian jurisprudence and the judiciary to the growing needs and rising expectations of a vibrant economy, a pluralist society and a democratic polity.

This chapter tries to describe the comprehensive picture showing the current situation of judicial independence in Russia, and to reveal both positive changes brought about by judicial reform especially in terms of improvement of the legislative framework, and also negative examples of law enforcement practice, strong informal traditions of interaction between the judiciary and executive and within different levels of the court system itself which greatly influence the status of judicial independence in Russia. It analyzes the experience of the Russian Federation in its first 18 years and concludes with some recommendations for the improvement of the existing situation of judicial independence. It is mainly focused on lower level federal courts (district courts of general jurisdiction and regional *arbitrazh* courts) but references to other elements of the judicial system will be made if necessary in the context.

B. Structural Safeguards

I. Administration of the Judiciary

1. Organs in Charge of the Administration of the Judiciary

One of the main steps in Russian judicial reform which started in 1991 when the Concept of Judicial Reform was adopted by the Supreme So-

---

courts are totally corrupted – See yearbook Obschestvennoye mnenie (2009). See also <http://www.kommersant.ru/doc.aspx?DocsID=1412499>.

viet (Council) of the Russian Federation[8] was to achieve the courts' administrative independence from the executive. Financial support for court operations became an increasingly important mechanism in ensuring the independence and autonomy of the judiciary. Because of that the courts started fighting for overall control over their financing, allocation and management of human resources etc. from the very beginning.

The 1996 Constitutional Law "On the Judicial System"[9] repealed the previous system of oversight of the courts of general jurisdiction[10] by the Ministry of Justice and provided for the creation of the Judicial Department within the Supreme Court modelled on the Administrative Office of the U.S. Courts. This is a purely administrative body consisting only of administrative staff. Judges working for the Judicial Department are retired judges now holding administrative positions within the Department. At the same time it is completely independent of the executive branch. It is not responsible to any executive body, but only to the RF Supreme Court and the RF Council of Judges.[11] The Judicial Department at the RF Supreme Court was set up in 1998 and therewith judicial power at least formally took control over the financing of federal courts of general jurisdiction. Today, the Judicial Department plays a key role in the administration of the judiciary. It is now responsible for the personnel, organizational and resource support of all federal courts of general jurisdiction below the Supreme Court and also for the salaries and personal records of JPs. In addition it provides for the logistical needs of the bodies of the judicial community.[12] It negotiates their budgets with the Ministry of Finance and the Parliament.

---

[8] *Kontseptsiya sudebnoi reformy, Isdanie Verkhovnogo Soveta*, 1992.

[9] *Federalny konstitutsionny zakon ot 30 dekabrya 1996 "O Sudebnoi Sisteme Rossiiskoi Federatsii"*.

[10] Both the RF Constitutional Court and the Supreme *Arbitrazh* Court, being established from scratch in the beginning of the 1990s, provided for administrative and financial departments within their structure right away.

[11] There are still discussions within the legal community, especially among law scholars, as to which branch of power it ought to be attributed to, but formally it belongs to the judicial power because from the structural point of view it is a Supreme Court operational unit.

[12] See, W. Burnham/ P. B. Maggs/ G. Danilenko, Law and Legal System of the Russian Federation, at 57 (2004).

The Supreme *Arbitrazh* Court is responsible for the administration of the lower *arbitrazh* courts and their budgets.[13]

Though control over the budget by the judicial power, once adopted by the government, is extremely important it is not free from influence from the executive, which still has an important say in the allocation of the budget. The budget is divided into different budget lines which are subject to *negotiation* before the Parliamentary approval of the Law on the Budget. Both Supreme Courts (*Arbitrazh* and General Jurisdiction) and the Judicial Department negotiate with the Ministry of Finance, Ministry of Economic Development and, later, with the Duma Budget Committee on every single budget line, and this is still a source of influence. In order to remedy this shortcoming a fixed percentage of the budget being allocated to the courts every year could eliminate such a possibility.

The structure and functions of the Judicial Department are specified by Federal Law.[14] According to Article 1 of this Law organizational support for the operations of the courts shall involve human resource, financial, logistical and other activities intended to create suitable conditions for a sound and independent administration of justice. At the same time, Article 4 of the Federal Law states that the Judicial Department is designed to promote judicial independence and self-governance but shall not interfere with the administration of justice, that being the exclusive prerogative of judges. The Judicial Department is not considered to be one of the bodies of judicial self-governance; it is just supporting the operations of such bodies from a financial and logistical point of view. It has its Central Office in Moscow and regional branches in all 83 constituent entities (regions) of Russia. The Department is headed by the Director General who is appointed and removed from his/her position by the Chairman of the Supreme Court with the consent of the Council of Judges. Deputies of the Director General are appointed and removed from their positions by the Chairman of the Supreme Court upon the recommendation of the Director General. Formally the President of the RF, the Ministry of Justice and other executive organs have no influence on the Judicial Department. In practice this is true with regard to the Ministry of Justice and other execu-

---

[13] Supreme Arbitration Court, available at <http//:www.arbitr.ru>.

[14] Law on Judicial Department within the Supreme Court (*Federalny Zakon "O Sudebnom Departamente pri Verkhovnom Sude Rossiiskoi Federatsii" No. 7-FZ*), Sobranije zakonodatel'stva Rossiiskoi Federatsii, 8 January 1998, No. 2, st. 233.

tive bodies, but certainly is not the case with the President and Presidential Administration. The candidacy of the Director General of the Judicial Department is informally negotiated with the Presidential Administration before appointment.[15] Also some pressure could be exerted by the Ministry of Finance and Ministry of Economic Development during the *budget negotiations*.

In order to provide for logistical and technical support within the courts the position of court administrator in the courts of general jurisdiction has emerged to act as a liaison between a particular court and the system of bodies of the Judicial Department.[16] Court administrators in this system are appointed by the Judicial Department or its regional branch on the recommendation of the court chairperson and subordinated to both the court chairperson and the relevant Judicial Department branch. Unfortunately in practice court administrators are not performing their main function – relieving the courts' chairpersons of managerial responsibilities. They are mainly executing the orders of courts' chairpersons – taking care of building maintenance, judges' vacations (distribution of travel packages, purchasing tickets etc.), sometimes also procuring necessary equipment. The position of court administrator was also established in the *arbitrazh* court system, but in this system they really play the role of the Head of Staff and enjoy some managerial authority. Also in this system they are not subordinate to two bodies.

With the establishment of Russian Academy of Justice, responsible for judges' and court staff training and professional development, which was founded by both the Supreme Court and Supreme *Arbitrazh* Court, the judiciary also gained the control over its human resources' preparation and continuous training which previously belonged to the Ministry of Justice.[17]

---

[15] One may compare laws and articles regarding the appointment of the Director General (available at <http://www.kadis.ru/daily/?id=31894>; <http://www.nabo.nm.ru/file/71.doc>; <http://www.buryatlaws.ru/index.php?ds=1003269>) and conclude that the Director is not independent from the Presidential Administration.

[16] See Arts. 17-19 Law on the Judicial Department.

[17] The Russian Academy of Justice is a training and scientific institution established in 1998 by Presidential decree (*Ukaz Prezidenta Rossiiskoi Federatsii ot 11 maija 1998 No. 528 "O Rossiiskoi Akademii Pravosudija"*) for the purposes of the training and professional development of judges and court staff and also for the organization of scientific research in the field of the judiciary. Be-

2. The Judicial Council and Other Bodies of the Judicial Community

A number of new institutions were created in the early 1990s to strengthen the co-ordination and management of the judicial function, and to support the independence of the Judiciary. According to the Federal Law "On the Bodies of the Judicial Community" in the RF of 2002,[18] these are: the All-Russia Congress of Judges (and regional conferences of judges); the RF Council of Judges (and regional councils of judges); and the Supreme Judicial Qualification Collegium (and regional Judicial Qualification Collegia). The All-Russia Congress of Judges is the largest body which is composed of representatives of courts of all levels and jurisdictions, elected by regional conferences of judges. It has the mandate to represent the whole judicial community. The Congress meets every four years, when it elects and appoints the members of the RF Council of Judges. The All-Russia Congress of Judges has provided channels for discussion of a wide range of issues affecting the judicial profession, including, for example, a recently adopted judicial Code of Ethics. The Congress has the power to adopt decisions regulating the activities of the judiciary (except those falling under the competences of the Supreme Judicial Qualification Collegium), especially professional ethics. These decisions are binding on all judges. Regional conferences of judges acting on the regional level have the same responsibilities within the region. All 83 Russian regions convene their judicial conferences, which elect and appoint regional councils of judges and regional qualification collegia which have the same powers and responsibilities within each region.

The RF Council of Judges (CJ) consists of 126 judges representing both federal and regional courts, all three court systems and all levels of court systems (including JPs at the community level). Special quotas for representation of different court systems and levels in the Council of Judges are set in the Federal Law.[19] The Council of Judges' members serve for a four-year term on a part-time basis until the next Congress of Judges, but may be re-elected. The Council of Judges elects its chair-

---

fore that these functions were carried out by the Russian Legal Academy at the Ministry of Justice. The Russian Academy of Justice was founded by both the Supreme Court and Supreme *Arbitrazh* Court, see <http://www.raj.ru/ru/index.html>.

[18] *Federalny zakon ot 14 marta 2002 "Ob Organakh Sudeiskogo Soobschestva"*, Sobranije zakonodatel'stva Rossiiskoi Federatsii, 18 March 2002, No. 11, st. 1022.

[19] Article 8 Law on the Bodies of the Judicial Community.

person and deputy chairpeople from among its members which may serve in this capacity for only two consecutive four-year terms. A member of the Council of Judges could be released on his/her own initiative or dismissed for having committed a disciplinary offence. It meets at least twice a year in plenary session; its more compact working structure, the Presidium, meets at least four times a year. The Council of Judges oversees the work of the Supreme Court's Judicial Department on matters of court organization and human and material resources, and issues relevant recommendations. Representatives of the Council of Judges participate in the preparation of the draft law on the federal budget. It also represents the judicial community before other bodies of state power, convenes the Congress of Judges, elects 18 of the 29 members of the Supreme Judicial Qualification Collegium (SJQC), gives its consent to the appointment of the Director General of the Judicial Department, hears the annual reports of the Director General of the Judicial Department, develops recommendations on enhancing the activities of the bodies of the judicial community and disseminates best practices. Regional Councils of Judges are established by regional conferences of judges on the RF subject (regional) level (including JPs at the community level). They have the following powers: between the regional conferences of judges considering all matters within the jurisdiction of the conferences except the election of Judicial Qualification Collegia and hearing their reports; convening the regional conferences of judges; and electing judges to the Judicial Qualification Collegia to replace those who have resigned between the regional conferences.[20]

The Supreme Judicial Qualification Collegium is responsible for examining candidates, certifying promotions and conducting disciplinary proceedings for federal judges except regional and district court judges. The Supreme Judicial Qualification Collegium and its regional counterparts in Russia are in no way more important for the organization of the judiciary than the CJs and do not have more influence and functions. The functions of the CJs are much broader; they identify the policy of the judicial community and actually form Judicial Qualification Collegia. In a way Judicial Qualification Collegia are the CJ units to which the judicial community delegates powers in the field of appointments, promotions and disciplinary proceedings. Appointments and promotions of and disciplinary proceedings relating to regional and district court judges are the responsibility of the Judicial Qualifications Collegia of the RF regions.

---

[20] Article 10 Law on the Bodies of the Judicial Community.

During the first years after their establishment in 1993 under President Yeltsin[21] the Qualification Collegia were composed only of judges, a fact which appeared to create an absence of social control over judicial activities and led to complaints of judicial corporatism. Passed in the year 2002 the Federal Law "On the Bodies of Judicial Community"[22] established the new order of formation of qualification collegiums, adding public representatives and one representative of the President into their structure. Now 18 of the 29 members of the Supreme Judicial Qualification Collegium are elected by judges from among themselves by means of such judicial community body as the RF Council of Judges; ten members, being public representatives (mainly legal scholars), are appointed by the Federation Council (the upper house of the Federal Assembly of Russia) and one member by the President. The same quotas are used by the regions, but regional collegia consist of 21 members of whom 13 are representatives of the judiciary elected by regional conferences of judges, seven are public representatives appointed by regional parliaments and still one represents the President, usually the Presidential Envoy to the relevant federal circuit.

Broadening collegia to include non-judges answered the critics of judicial corporatism and assured that, at least in appearance, judges are accountable not only to their peers but also to society. But many observers think that this change reduces the scope of judicial autonomy, and increases the role of the executive in approving and reconfirming judges.[23] We tend to agree with foreign observers because public representatives even formally appointed by the legislature are strongly influenced by the executive (e.g. Presidential Administration/regional governors). The order of recommendation of candidates for vacancies among public representatives is regulated by the Federation Council Standing Orders and the standing orders of regional legislative bodies

---

[21] See Supreme Soviet (Council) Resolution of 13 May 1993 On Approval of the Regulation on Judicial Qualification Collegia and the Regulation on Personnel Certification of Judges (*Postanovlenije Verkhovnogo Soveta Rossiiskoi Federatsii ot 13 maja 1993 No. 4960-1 "Ob utverzhdenii Polozheniya o kvalifikatsionnykh kollegiyakh sudei i Polozheniya o kvalifikatsionnoi attestatsii sudei"*, Vedomosti S'ezda narodnykh deputatov Rossiiskoi Federatsii i Verkhovnogo Soveta Rossiiskoi Federatsii, 17 June 1993, No. 24, st. 856).

[22] *Federalny zakon ot 14 marta 2002 "Ob Organakh Sudeiskogo Soobschestva"*.

[23] See, for example R. Sakwa, Russian Politics and Society (4th edition, 2008).

accordingly.[24] Candidates applying for vacancies among public representatives in the Supreme Judicial Qualification Collegium are recommended by civic organizations (NGOs) dealing with legal aid and human rights defence, university faculty (teaching staff) and the staff of scientific legal institutions. Preliminary discussions on the candidates recommended and the preparation of the list of candidates to be approved take place at the meeting of the Federation Council Committee for Legal and Judicial Matters.[25] The procedure looks completely independent but in practice the list of candidates is first informally agreed upon with the Presidential Administration/regional governors/Presidential Envoy. Sometimes the Presidential Administration or regional governors even informally *suggest* some civic organization or university faculty to recommend this or that candidate.[26]

The overall task of the bodies of the judicial community (the Congress of Judges, the Council of Judges; and the Judicial Qualification Collegium) is to promote further improvement in the judicial system and court procedures, protect the rights and legal interests of judges, participate in personnel, resource and organizational support for the courts' activities and maintain the authority of the judiciary.[27] These bodies have contributed to some extent to greater public and government awareness of the judicial profession and the courts and their related concerns. However, these bodies for a long time depended for their existence on *ad hoc* funding. Both the Supreme Court and Supreme *Arbitrazh* Court delegated some of their resources and personnel to supporting the activities of the bodies of the judicial community. The new Law on the Bodies of the Judicial Community,[28] which in 2002 replaced the Resolution of the RF Supreme Soviet (Council) of 1993 pre-

---

[24] *Reglament Soveta Federatsii Federal'nogo Sobranija Rossiiskoi Federatsii, priniyat Postanovleniem Soveta Federatsii Federal'nogo Sobranija Rossiiskoi Federatsii 30 janvarja 2002 No. 33-SF s posleduyuschimi izmenenijami I dopolnenijami*, available at <http://council.gov.ru/about/agenda/ch3/item283.html>.

[25] Similar provisions are envisaged in the standing orders of regional legislative bodies.

[26] See for example Human Rights Institution analytical document, available at <http://www.hrights.ru/text/b16/Chapter12.htm>.

[27] Article 4 Law on the Bodies of Judicial Community.

[28] *Federalny zakon ot 14 marta 2002 "Ob Organakh Sudeiskogo Soobschestva"*.

viously regulating this matter,[29] made the Judicial Department at the Supreme Court and its regional branches responsible for the organization of the conditions necessary for the functioning of the bodies of the judicial community, but this provision is not enough. Budget allocations in support of these activities are still not adequate or are spent inappropriately and ineffectively. Consequently the bodies of the judicial community suffer from a shortage of operational staff and basic resources for their effective functioning.[30] The Council of Judges' ability to advance substantive discussion of draft legislation, or about the improvement of the courts, for example, is hampered by inadequate access to information including the inadequacy of court information and statistics, and knowledge about good practices in judicial reform.[31] Any impact which these bodies may have is also limited by the lack of mechanisms for disseminating their findings and thereby promoting further dialogue within the judiciary.

---

[29] *Postanovlenije Verkhovnogo Soveta Rossiiskoi Federatsii ot 13 maja* (note 21).

[30] See for example the Information on the Activities of the St. Petersburg Council of Judges, available at <http://www.gvs.spb.ru/sovet_sudei/security/spravka_po_pismy_klebanova.htm>. The Council of Judges is revealing such problems as the absence of a special unit within the Judicial Department branch responsible for the functioning of the bodies of the judicial community, a shortage of staff responsible for such activities, inadequate financing of the programme aimed at establishing the psychological testing of judicial candidates. See also the interview with the Chairman of the Kamchatsky region Council of Judges Georgy Iliin, available at <http://pda.kamchatka.arbitr.ru/press/smi/194.html>. In this interview Mr. Iliin claims that the Judicial Department branch of the Kamchatsky region is spending the budget allocation for the support of the bodies of the judicial community ineffectively, making inappropriate expenditures.

[31] See for example VII Congress of Judges Resolution of 4 December 2008 (*Postanovleniji VII Vserossiiskogo S'ezda sudei Rossiiskoi Federatsii ot 4 dekabrya 2008 "O sostojanii sudebnoi sistemy RF i prioritetnykh napravleniyakh jejo razvitija I sovershenstvovaniya"*) where the measures are described to implement the Federal Law on Access to the Information on Court Activities. All the problems with access to court information and best practices are revealed there; available at <http://www.ssrf.ru/ss_detale.php?id=801>.

II. Selection, Appointment and Reappointment of Judges

1. Eligibility

In Russia formal qualification requirements for appointment to the judiciary are very limited, which is the subject of constant criticism by the judicial community.[32] The procedure of judicial selection and appointment is stipulated in the law.[33] The selection of applicants for judicial office is to be performed on a competitive basis and to be merit based.[34] Any citizen of the Russian Federation having received high legal education, being no less than 25 years old and having the necessary professional experience for the level of court where there is a vacancy has a right to take the qualification examination for judicial office. For example, in order to take the examination to serve as a judge of the *arbitrazh* court of a regional entity, of the constitutional (charter) court of a regional entity, of a district court of general jurisdiction, and also as a Justice of the Peace, a citizen needs to have a work record in the legal profession of no fewer than five years.

A qualification examination for judicial office must be conducted by an examination body. Regulations on Examination Commissions to conduct Qualification Examination for a Judicial Position were adopted by the Supreme Judicial Qualification Collegium in 2002.[35] Special ten- to sixteen-member examination commissions in charge of testing candidates' legal knowledge and professional preparation are established, attached to the regional qualification collegia of judges and the Supreme Qualification Collegium. Under the Law the members of examination commissions are appointed by their respective regional qualification

---

[32] See, T. S. Foglesong, The Dynamics of Judicial (In)Dependence in Russia, in: P. H. Russell / D. O'Brien (eds.), Judicial Independence in the Age of Democracy: Critical Perspectives from around the World, 62 (2001); P. H. Solomon Jr./T. S. Foglesong, Courts and Transition in Russia: The Challenge of Judicial Reform (2000).

[33] Arts. 4-6 Law on the Status of Judges, adopted on 26 June 1992, with further amendments (*Zakon RF ot 26 ijulia 1992 "O Statuse Sudei v Rossiiskoi Federatsii"*), Vedomosti S'ezda narodnykh deputatov Rossiiskoi Federatsii i Verkhovnogo Soveta Rossiiskoi Federatsii, 26 June 1992, No. 30, st. 1792.

[34] Article 5 Law on the Status of Judges.

[35] *Polozhenie ob examinatsionnykh komissiyakh po priemu kvalifikatsionnykh examenov na dolzhnost sudii, utverzhdeny VKKS 22 maja 2002 goda*, Vestnik Vysshego arbitrazhnogo suda RF (Vestnik VAS RF), 2002, No. 9.

collegia of judges.[36] Examination commissions shall be formed of most experienced judges; it is also possible to include legal scholars and university law professors on the commission.[37] The number of commission members shall be set by the relevant qualification collegium of judges, but judges shall form not less than three-quarters of the commission members.[38] The personal composition of the commission is approved by the relevant qualification collegium of judges according to the nominations made by court chairpeople of the appropriate level (Chairmen of the Supreme Court and Supreme *Arbitrazh* Court for the Supreme Judicial Qualification Collegium, chairpeople of the RF subject (regional) level courts of general jurisdiction and *arbitrazh* courts for a regional qualification collegium of judges).[39] The chairperson of the examination commission, his/her deputies and the secretary to the commission are selected by the relevant qualification collegium of judges from among the commission members.[40] So, according to the legislation currently in force, judges of different specializations nominated by court chairpeople dominate in those commissions. Legal scholars usually but not necessarily form the rest of the commissions, and even if they are included, they are also selected by the relevant qualification collegium of judges according to the nominations made by court chairpeople. The examination commission tests the candidates on their legal knowledge (autonomously without direct interference by the qualification collegium) and also first checks the eligibility criteria which, if the candidate passes the examinations, will be further verified by the relevant qualification collegium during the selection process (see below).

During the two-hour oral examination the candidate has to solve two cases from judicial practice, write a draft outline of the judgment (if the examination commission considers it necessary to introduce this written test), and answer three questions from various branches of law in accordance with the position the candidate is going to occupy and determined by the examination commission itself depending on the level of the position.[41] During the examination candidates are allowed to use

---

36 Article 5(4) Law on the Status of Judges.

37 Para. 2.2 Regulations on examination commissions.

38 Id., para. 2.3.

39 Id., para. 2.4.

40 Id., para. 2.5.

41 See id., Part 4.

legal texts like codes, laws, instructions of the Supreme Court Plenum The degree of differentiation in testing the candidates depends on the will and the capacity of judicial chiefs (e.g. commission chairs) to prepare separate examination questions and update them.[42] Such a state of things leads to arbitrariness in the selection process, as examination commissions do not adhere to uniform tests introduced all over Russia but use different examination questions which are incomparable in terms of the level of complexity and consistency which depends on *regional specifics* – the capacity of the relevant examination commission. Also, as was mentioned above, on the decision of the examination commission, a written exercise involving the preparation of a court document may be added to the examination, but the regulation does not oblige the commission to do so. It indicates the absence of any interest on the peers' part in the actual professional capabilities of the candidate e.g. his/her ability to draft sound procedural documents. The result of the examination is to be determined by the majority vote of the members of the examination commission and announced on the same day. The Regulations on examination commissions set parameters for evaluating the examinations, but no clear criteria, and the evaluation process is completely subjective.[43] It is possible to conclude from the above that the whole first stage of candidates' selection lies completely in the hands of the judiciary. Such situation definitely may lead, and in fact leads, to the abuse of their powers by examination commissions and qualification collegiums themselves as they base their assessment of the candidate on the examination results as well. As you can see below[44] qualification collegia of judges enjoy almost unlimited authority in the selection of candidates.

---

[42] See A. Trochev, Judicial Selection in Russia, in: K. Malleson/ P. H. Russell (eds.), Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World, 375 (2006).

[43] See for example id. See also the Address of the Chairman of the Supreme Judicial Qualification Collegium to the VI All-Russia Congress of Judges in 2004 (*Doklad Predsedatelya Vyshei kvalifikatsionnoi kollegii sudei Rossiiskoi Federatsii V.V.Kuznetsova na VI Vserossiiskom S'ezde sudei*) where he mentioned one examination commission which evaluated positively the results of the candidate who could not then at the meeting of qualification collegium explain the difference between the courts of general jurisdiction and *arbitrazh* courts. Available at <http://www.vkks.ru/ss_detale.php?id=24>.

[44] *Infra* B. II. 2. The Process of Judicial Selection.

Answering constant criticism concerning the organization and procedures in judicial examination commissions the Supreme *Arbitrazh* Court recently developed a draft law on judicial examination commissions which tackles quite a number of the abovementioned shortcomings of the current legislation. It envisages a new system of examination commissions, consisting of two sections, one headed by the Supreme Arbitrazh Court and the other by the Supreme Court of the Russian Federation. This pattern seems to be designed to raise the standards of the judicial examinations, because the two sections would be separated from one another and the examinations of the judges of the commercial (or arbitrazh) courts would be organized by the Highest Examination Commission of the Supreme Arbitrazh Court and a number of related regional examination commissions. The draft provides for a considerable centralization of the selection process, for there would be only seven regional examination commissions throughout Russia, each covering several regions, districts and republics of the Russian Federation. The requirements of the judicial examinations would be increased by a much more precise assessment scheme. In addition to the three theoretical questions and the two practical assignments, there would be an obligatory written test to draft a procedural document. The composition of the examination commissions would be based on elections and also comprise representatives of the Association of Russian Lawyers, of notaries and chambers of advocates. In any case, the judge-members of the examination commissions would predominate, but notaries, advocates and university professors would have the chance to be present as well. In this way, the draft takes a step forward in the direction of more centralization, more public participation, and raised standards by stringent requirements of the judicial examinations. It is important to add that the draft states that the commissions will not be held responsible for the decisions they have taken in individual cases. This provision may reinforce the independence of the examination commissions.

In terms of eligibility criteria, apart from higher legal education judicial applicants shall not have committed any "compromising acts" nor suffer from certain diseases, the list of which is compiled by the Council of Judges.[45] All three requirements are very questionable. The notion of higher legal education could be interpreted in different ways – for example after Russia joined the Bologna process the Supreme Judicial Qualification Collegium clarified that a bachelor's degree is not suffi-

[45] Trochev (note 42), at 387.

cient for applying for a judicial position,[46] but the Ministry of Education holds a different opinion. This issue has yet to be regulated by law. In the absence of official regulations it is possible for the Supreme Judicial Qualification Collegium to manipulate the notion of "high legal education" by means of such *clarifications*, declaring, for instance, that only diplomas of higher educational establishments having state accreditation in Russia could be accepted, or excluding diplomas of certain educational establishments like Police Academies because their curriculum does not include the whole list of necessary subjects, or introducing additional requirements to diplomas obtained in foreign countries, including CIS countries.[47]

The notion of "compromising acts" is very broad and also makes abuse possible. In the later (2001) version of the Law on the Status of Judges the provision about not committing "compromising acts" was eliminated as a requirement, but in practice this is still a subject for consideration by the Judicial Qualification Collegia.[48] According to the law[49] Judicial Qualification Collegia play a key role in the evaluation of the listed requirements and even give clarifications to the examination commissions on these matters. There is no official explanation for this notion but the practice of qualification collegia developed a certain approach – it could be a previous criminal record,[50] involvement in do-

---

[46] Clarifications given by the Supreme Judicial Qualification Collegium to subject level judicial qualification collegia on its meeting of 18 March 2004 (*Raz'yasneniya i recomendatsii Vysshei Kvalifikatsionoi Kollegii Sudei predsedatelyam kvalifikatsionnykh kollegii sudei sub'yektov Rossiiskoi Federatssii ot 18 marta 2004)* Vestnik VAS RF, 2004, No. 6.

[47] See for example the article of the Head of Examination Commission of the Supreme Judicial Qualification Collegium professor Valentine Ershov. V. V. Ershov, Ekzamentsionnye kommissii: bol'shoi potentsial i serioznye problemy, available at <http://www.vkks.ru/ss_detale.php?id=97>.

[48] See for example the Regulations on the Order of Work of Qualification Collegiums of Judges (*Polozhenije o poryadke raboty kvalificatsionnykh kollegii sudei ot 22 marta 2007 goda*, Vestnik Vysshei kvalifikatsionnoi kollegii sudei Rossiiskoi Federatsii (Vestinik VKKS RF), 2007, No. 2(21)) where the requirement to produce a reference from the last place of work containing among other things an evaluation of moral qualities of the nominee still exists.

[49] *Federalny zakon ot 14 marta 2002 "Ob Organakh Sudeiskogo Soobschestva"*.

[50] See for examples clarifications given by the Supreme Judicial Qualification Collegium at its meeting 13-17 January 2003 to the questions sent from regional qualification collegia of judges, para. 13 on how the previous criminal re-

mestic violence, alcohol or drug abuse, tax evasion etc. Such facts if discovered are evaluated by the qualification collegia in the presence of the nominee, but still the lack of an exact interpretation of the notion leaves much space for arbitrariness.[51] For example, according to the Regulations on the Order of Work of Qualification Collegiums of Judges[52] even the fact of a previous criminal record of close relatives of the nominee shall be discussed separately to decide if it "compromise[s] judicial authority". These Regulations were amended following the legislative changes and the notion of "compromising acts" was excluded accordingly, but the requirement to evaluate all the information on the candidate in terms of the possibility of "compromising judicial authority" still remains as it remained in the Judicial Code of Honour and now exists in the Code of Judicial Ethics,[53] which replaced the Code of Honour in 2004. The same grounds are used by the Supreme Court in consideration of appeals against the decisions of regional qualification collegia of judges. For example, in the case of *M.* v. *Qualification Collegium of Judges of Dagestan Republic* (decision of 7 June 2006)[54] the Supreme Court declared that "the judge shall possess high interior culture, such qualities as moral integrity, benevolence, tolerance, civility, equability of mind, so it is necessary to request the information on previous criminal record not only of the candidate him/herself but also his/her close relatives as previous criminal record definitely prevents the appointment to judicial position." At the same time in *S.* v. *Qualification Collegium of Judges of Bryansk Region* (decision of 2 August

cord of the candidate should be verified, available at <http://www.vkks.ru/ss_detale.php?id=7>.

[51] See for example the review by the Supreme Judicial Qualification Collegium of the appeals against the decisions of regional qualification collegia (*Obzor praktiki rassmotreniya del ob osparivanii reshenii kvalifikatsionnykh kollegii sudei*, Vestnik VKKS RF, 2007, No. 1(7)). One of the most frequently used grounds for rejection of a candidate was "such behavior that does not allow to evaluate moral qualities of the candidate as being high enough for judicial position".

[52] *Polozhenije o poryadke raboty kvalificatsionnykh kollegii sudei ot 22 marta 2007* (note 48).

[53] *Kodeks sudeiiskoi etiki, utverzhden VI Vserossiiskim s'ezdom sudei 2 dekabrya 2004*, available at <http://www.ssrf.ru/ss_detale.php?id=13>.

[54] *Opredelenije Sudebnoi kollegii po grazhdanskim delam Verkhovnogo Suda Rossiiskoi Federatsii po dely No. 20-G06-3 ot 7 ijunia 2006*, available at <http://supcourt.consultant.ru/cgi/online.cgi?req=doc;base=ARB;n=30986;div=ARB;mb=ARB;opt=1;ts=8CC0974F6E52F3F9F4C02EE2A0147D02>.

2006) the Supreme Court stated that charging the candidate and his close relative (brother) with administrative responsibility for traffic accidents (tickets for speeding and crossing red lights) is not a sufficient ground for rejecting the candidate.[55]

A mandatory medical examination of the candidate is also questionable as the list of diseases prepared by the Ministry of Healthcare is to be approved by the Council of Judges. The Council of Judges may manipulate this list, changing it when necessary. Also the list of medical institutions allowed to conduct medical examinations of the candidates and to issue appropriate certificates is still lacking, leaving room for subjectivity.[56] All three criteria (higher legal education, not having committed compromising acts, not suffering from certain diseases) could be interpreted in a way which helps to get rid of unwanted candidates.[57] As for the notion of the work record in the legal profession and how it should be assessed, it is at least regulated by law[58] so abuse and arbitrariness in using this criterion are less likely.

Recent amendments to the Status of Judges Law of 25 December 2008[59] demonstrate an attempt to remedy the abovementioned deficiencies, at least by mentioning such additional criteria as the absence of previous

---

[55] *Opredelenije Sudebnoi kollegii po grazhdanskim delam Verkhovnogo Suda Rissiiskoi Federatsii po delu No. 83-G06-11 ot 2 avgusta 2006*, available at <http://supcourt.consultant.ru/cgi/online.cgi?req=doc;base=ARB;n=37865;div=ARB;mb=ARB;opt=1;ts=8AE408EB1F815E9B77474C722C7287EC>.

[56] See Ershov (note 47).

[57] See for example the Address of the Chairman of the Supreme Judicial Qualification Collegium V. V. Kuznetsov to the VII All-Russia Congress of Judges on 2 December 2008 (*Doklad Predsedatelya Vysshei kvalifikatsionnoi kollegii sudei Rossiiskoi Federatsii V. V. Kuznetsova na VII Vserossiiskom s'ezde sudei*) where he urges the introduction of certain organizational and legal mechanisms for the evaluation of the personality of candidates, setting out not only the rules of such evaluation but also "guarantees against subjectivity in taking the decisions on personnel matters", available at <http://www.vkks.ru/second.php?columnValue=6>. See also V. Mitjushev, O nekotorykh osnovanijakh k otkazu v rekomendatsii na dolzhnost sudii, available at <http://www.yurclub.ru/docs/other/article110.html>; *Obzor praktiki rassmotreniya del ob osparivanii reshenii kvalifikatsionnykh kollegii sudei* (note 51).

[58] Article 4(1) Law on the Status of Judges.

[59] *Federalny zakon ot 25 dekabrya 2008 "O vnesenii izmenenii v otdel'nyje zakonodate'nyje akty Rossiiskoi Federatsii v svyasi s prinyatijem Federalnogo zakona "O protivodeistvii korruptsii"*. Sobraniye zakonodatel'stva Rossiiskoi Federatsii, 29 December 2008, No. 52 (part. 1), st. 6229.

convictions and also current suspicion or accusation of committing a crime; the absence of a court declaration that the candidate is incapable or has limited capacity to function; the absence of registration with a narcological or psychoneurologic dispensary in connection with the treatment of alcoholism, narcomania, toxicomania, chronic and long-term mental disorders. But this remedy is inadequate as it still leaves room for arbitrariness in the interpretation of the notions of "high legal education", "compromising acts" and still refers to "any other diseases impeding the exercise of a judge's authority" which are included in the list mentioned above.

Unfortunately among the peer judges there can be hardly found a sign of interest in candidate's mindset or psychological predisposition to such kind of job. Some regional judicial qualification collegia, before deciding to recommend a candidate, test the nominee on the following eight criteria: professionalism, susceptibility to conflicts, leadership, physical development, accessibility, self-control, IQ, and moral qualities. Such tests are introduced just as an experiment; they are voluntary and of a non-binding nature. They are really voluntary in practice; the candidate in question can decide whether or not to participate in such a test and nothing will happen to him/her in the case of refusal, but the candidates themselves like these psychological tests with hundreds of questions because they allow subjective judgements on the "moral qualities" to be hidden behind a veil of "objective scientific criteria".[60]

This experiment was initially conducted in 11 regions and its results were highly evaluated by the Council of Judges Presidium in 2002 and by the VI All-Russia Congress of Judges in 2004. In December 2002 the Judicial Department issued Recommendations on Experimental Use of

[60] See, M. Kleandrov, Status sud'i (2000); N. V. Materov, Ob uluchshenii podbora kandidatov na dolzhnosti sudei, Vestnik VAS RF, 2003, No. 12, p. 95; J. Mikhalina, Buduschie sud'i budut risovat' nesuschestvujuschikh zhivotnykh, Gazeta, 24 December 2002; V. Perekrest, Isobretajutsya isoschrenneishiye sposoby vnedreniia v sudebnuyu sistemu, Izvestiya, 25 September 2003, available at <http://www.izvestia.ru/community/article38899>. See also, Recommendations on Experimental Use of Psychological Testing of Judicial Candidates adopted by the Order of Director General of the Judicial Department of 17 December 2002 No. 147 (*"Rekomendatsii po experimental'nomu ispol'zovaniyu metodov psikhodiagnosticheskogo obsledovaniya kandidatov na dolzhnosti sudei", utv. Prikazom General'nogo direktora Sudebnogo Departamenta pri Verkhovnom Sude RF ot 17 decabrya 2002 goda No. 147)*, available at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=EXP;n=371595;div=LAW;mb=LAW;opt=1;ts=BA70657EC318B905DA5101FA2D6A2CB9>.

Psychological Testing of Judicial Candidates. Since then several regional courts and regional branches of the Judicial Department (for example in the Pskov region) have employed psychologists who both give psychological support to the employees and sit with examination commissions conducting psychological testing of candidates. According to the Judicial Department Director General Alexander Gusev, the results of testing provided by psychologists are reliable and are confirmed by future judicial performance.[61] Anyway this is not a solution to the problem – most of the criteria used, for example leadership and self-control, are subjective. The solution could be to spend money on developing a theoretically substantiated model of testing and then mandatorily introduce it nation-wide. As was recognized at the VII All-Russia Congress of Judges (December 2008)[62] existing legislation does not provide for the exact criteria of moral and ethical qualities of the candidate and the mechanism for the evaluation of his/her system of values which leads to the selection of improper candidates, as the Judicial Qualification Collegia practice demonstrates (e.g. the number of judges recently charged with disciplinary responsibility and removed from office).[63] The Congress concluded that such criteria and mechanisms should be developed promptly.[64]

---

[61] As of now 42 psychologists are employed by the courts of general jurisdiction of the RF subject (regional) level and regional branches of the Judicial Department. In 16 RF subjects 100% of candidates for judicial positions pass psychological testing. Within the period of 2003-2008 17,000 candidates undertook such tests; figures provided by Mr. Gusev at internet-conference held on 30 March 2009, available at <http://www.garant.ru/action/conference/206653/>.

[62] *Postanovleniji VII Vserossiiskogo S'ezda sudei Rossiiskoi Federatsii ot 4 dekabrya 2008* (note 31).

[63] In 2008, for example, 367 judges were charged with disciplinary offences, and 56 judges were removed from office. See Results of the Activities of the Supreme Judicial Qualification Collegium in 2008 (*Rezul'taty dejatelnosti Vyshei Kvalificatsionnoi kollegii sudei Rossiiskoi Federatsii i kvalificatsionnykh kollegii sudei sub'ektov Rossiiskoi Federatsii v 2008 godu*), available at <http://www.vkks.ru/ss_detale.php?id=4713>.

[64] *Postanovleniji VII Vserossiiskogo S'ezda sudei Rossiiskoi Federatsii ot 4 dekabrya* (note 31).

2. The Process of Judicial Selection

The RF Constitution stipulates that the President appoints judges to federal courts and nominates judges of the Constitutional Court, Supreme Court and Supreme *Arbitrazh* Court for appointment by the Federation Council (upper chamber of the Parliament).[65] All the appointments are made according to the recommendations of the court chairpeople of the relevant judicial branch and level. Their recommendations are based on a positive report on the candidate made by judicial qualification collegia (see below). As to the court chairpeople themselves they are recommended by court chairpeople of relevant higher courts individually and appointed under the same procedure (by the President himself or by the Federation Council, according to the court level).

Until recently the only exception in terms of appointment of a court chairperson was made with regard to the Chairman of the RF Constitutional Court who was elected by the Constitutional Court judges from among themselves by secret ballot. But this provision of the Law on the Constitutional Court was recently abolished by the amendment introduced under the influence of the Presidential Administration.[66] The official reason for introducing this amendment was to bring the legislation on the Constitutional Court into line with the Law on the Status of Judges. From July 2009 the Constitutional Court Chairman and his/her deputies are to be nominated by the President and approved by the Federation Council.

The issue of whether the model of executive appointment interferes with the principles of judicial independence and separation of powers is still widely discussed among legal scholars. Such appointment procedure was initially chosen in order to make judges independent of the regional authorities. For this reason too most of the judges in Russia are declared federal. But this procedure brings a serious threat of dependence on the Presidential Administration in terms of both initial appointment and promotion.

Justices of the Peace are appointed by the regional legislature also after having passed examinations conducted by examination commissions

---

[65] Arts. 83 and 128 Russian Constitution.

[66] *Federalny konstitutsionny zakon ot 2 ijunya 2009 goda No. 2-FKZ "O vnesenii izmenenii v Federalny konstitutsionny zakon "O Konstitutsionnom Sude Rossiiskoi Federatsii"*, Sobraniye zakonodatel'stva Rossiiskoi Federatsii, 8 June 2009, No. 23, st. 2754.

and security checks, and following recommendation by the qualification collegia.[67] In the regions qualification collegia also play an important role in selecting and recommending candidates, and according to the analysis produced by the Supreme Judicial Qualification Collegium the selection of regional judges is the main source of subjectivity and arbitrariness as the number of appeals against such kinds of decisions demonstrates.[68] The legislature has discretion in appointment and is not bound by the recommendation of the relevant qualification collegium. All the candidates are invited to the plenary session of the legislative body, they are officially introduced, the documents collected by the qualification collegium on each of the candidates are distributed among the MPs, so the candidates can be questioned by MPs in order for the latter to form their final opinion.[69] But in practice this procedure is very formal and the legislature mainly approves the candidates recommended by the qualification collegium.[70] Judges of the constitutional (charter) courts of the regions are to be appointed in the order prescribed by the appropriate laws of those regions. As of now in the regions where such courts exist their judges are also appointed by the legislature.

After passing the qualification examinations a citizen has a right to apply to the relevant regional Qualification Collegium for a recommendation for a vacant judicial position (vacancies are announced publicly in the media). Such procedure applies to all courts except the Supreme Court or Supreme *Arbitrazh* Court where candidates turn to the Supreme Qualification Collegium. The responsible regional Qualification Collegium of Judges in its terms of reference considers all the applications for the position in question, taking into account the results of the

---

[67] *Federalny zakon ot 17 dekabrya 1998 "O Mirovykh Sudiyakh v Rossiiskoi Federatsii"*, Sobraniye zakonodatel'stva Rossiiskoi Federatsii, 21 December 1998, No. 51, st. 6270.

[68] See *Obzor praktiki rassmotreniya del ob osparivanii reshenii kvalifikatsionnykh kollegii sudei* (note 51).

[69] This procedure is borrowed by regional legislators from the Federation Council Standing Orders.

[70] See for example the Council of Judges of St Petersburg, St Petersburg Social Organization for Human Rights Protection "Citizens' Watch", Peace Justice. Availability and Efficiency (*Sovet Sudei Sankt-Peterburga, Sankt-Peterburgskaja Obschestwenaja Prawosashchitnaja Organisazija "Graschdanski kontrol", Mirovoy sud. Dostupnost i effectivnost*), available at <http://www.cisr.ru/files/projects/MirSud_broshure.pdf> at 37-45.

qualification examination, and makes a decision about recommending one candidate. The Qualification Collegium has a right to request background checks on the judicial candidates and their close relatives (parents, siblings, and children) from the police, customs, and state security agency.[71] Officially these checks are necessary to verify information on education, work record and overall background submitted by the candidate.[72] The law makes it mandatory for the agencies named to perform the necessary checks and provide the information requested.[73] Such information as the previous criminal record of the candidate or his/her immediate family members, a long history of domestic violence, alcohol or drug abuse, tax evasion, problems with customs or inappropriate contacts registered by the security agency would disqualify a candidate. Since December 2008 a candidate has also had to produce information concerning his/her personal income, property and debts and financial obligations and those of his wife /her husband and his/her under age children, and failure to comply with this requirement or producing false information may also disqualify a candidate. Anyway, all the results of these checks are never announced to the candidate. The Law does not say anything about the ability to disclose the information received to the candidates or about the necessity to withhold this information, so the decision is taken purely arbitrarily by the Qualification Collegium. The Regulations on the Qualification Collegia Order of Work allow a candidate to familiarize him/herself with the materials gathered by the Qualification Collegium, but this concerns only the results of verification of the information provided by the candidate. The candidate has a right to be present at the meeting of the relevant Qualification Collegium where his/her recommendation is discussed and to give explanations if necessary after one of the members of Qualification Collegium reports on the information collected on the candidate so far.[74] Candidates also have the right to be present during the exchange of opinions between the Qualification Collegium members, but the whole procedure of evaluation and voting on them is confidential, and the candidates themselves are not allowed to be present. Only the results of the collegium's deliberations are made public, but without de-

---

[71] Article 5(7) Law on the Status of Judges, Article 21(12) Regulations on the Order of Work of Qualification Collegia of Judges.

[72] Article 5(7) Law on the Status of Judges.

[73] Article 5(7) Law on the Status of Judges.

[74] Article 22(3) Regulations on the Order of Work of Qualification Collegia of Judges.

tails of the division of votes.[75] This certainly affects the fairness and objectivity of the procedure itself, and, moreover it does not contribute to the transparency of and public trust in the selection procedure. Judges on several occasions tried to challenge the manner in which the Qualification Collegium takes its decisions on appointment and promotion.[76] On 24 March 2009 the Constitutional Court of the RF, after consideration of the application of judge Vladimir Ragozin, *arbitrazh* court of the Republic of Komi, ruled that the Qualification Collegium's decision to dismiss a nominee "cannot be arbitrary", "it shall contain reasons and grounds" for the decision taken.[77] This decision applies not only to the appointment of judges, but also to their promotion and to taking disciplinary measures against them, and contributes to further transparency of the Qualification Collegium's activities. It has a wider impact on judicial independence, through demanding more transparent selection and promotion.

With regard to the regional Qualification Collegia it is also important to mention that there exists a kind of supervisory role of the Presidential appointee to them. His/her powers are not officially stipulated this way but, as the President plays the crucial role in appointment, his appointee in many cases regulates the process. He/she provides confidential information on the candidates to which only Presidential apparatus may have access, supports some candidates etc.[78] As in the regional Qualifi-

---

[75] Article 18 Regulations on the Order of Work of Qualification Collegia of Judges.

[76] See, for example, Decision of the RF Supreme Court of 4 October 2005 in the case of *Fursov* v. *Supreme Judicial Qualification Collegium* where the Court ruled that the decision of the SJQC cannot be reversed on the grounds of lacking justification because the Court has no jurisdiction over the decision-making process in the SJQCs, the selection procedure is an exclusive power of the SJQCs and nobody can interfere with it. Decision available at <http://www.vsrf.ru/stor_text.php?id=7294992>.

[77] *Postanovlenije Konstitutsionnongo Suda Rossiiskoi Federatsii ot 24 marta 2009 goda No. 6-P "Po delu o proverke konstitutsionnosti polozhenii punkta 8 statii 5, punkta 6 statii 6 Zakona Rossiiskoi Federatsii "O statuse sudei v Rossiiskoi Federatssii" i punkta 1 statii 23 Federalnogo Zakona "Ob organakh sudeiskogo soobschestva v Rossiiskoi Federatsii" v svyazi s zhaloboi grazhdanina Ragozina"*, Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii, 2009, No. 2.

[78] See for example V. Soloviov, Sudebhuju sistemu neobkhodimo vychischat, available at <http://treli.ru/newstext.mhtml?Part=17&PubID=17796>. "According to the members of the Supreme Judicial Qualification Collegium and Presidential Commission on Preliminary Consideration of the Candidates to

cation Collegia Presidential envoys perform the functions of the Presidential appointees their opinion becomes crucial.

The decision of the Qualification Collegium is directed to the chairperson of the court which has the vacancy and if the chairperson agrees with the decision he/she will introduce the candidature for further consideration in the order prescribed by law.[79] It means that all necessary documents concerning the candidate are submitted for consideration to the Human Resources Department of the Presidential Administration before the necessary Decree of Appointment can be prepared and submitted to the President for signing (for JPs necessary documents shall be submitted to regional legislature). If the court chairperson disagrees with the decision, under recent (2001) amendments to the Law on the Status of Judges he/she enjoys the right to ask the Qualification Collegium to retract its recommendation, and this veto power (which can be overridden by two-thirds of Qualification Collegium's members) is one of the most effective remedies of rejected candidates (strengthening the internal dependence of a judge on the court chairperson). This procedure shows that the court chairpeople unofficially play the leading role in the selection process in spite of the fact that they are not allowed to sit in the Qualification Collegium. In fact the Qualification Collegium tends to recommend those candidates who are supported by the chairperson of the court which has the vacancy.[80] On being asked by court chairpeople to retract their recommendations Qualification Collegia very rarely confirm their previous decisions. For example in 2004 court chairpeople disagreed with 42 positive recommendations made by Qualification Collegia and as a result only eight positive recommendations were confirmed. In 2005 it was 11 out of an initial 37 recommendations.[81] It is also possible for the rejected candidate to appeal the re-

---

the Positions of Federal Judges where Boev [representative of the Human Resources Department of the Presidential Administration] participates, [...] at every meeting he finds some documents and starts explaining what this or that candidate 'is guilty of'. Nobody questions the sources of this information; is it reliable or just gossip, and everybody vote 'as requested'".

[79] Arts. 5 and 6 Law on the Status of Judges.

[80] See for example an analysis of the appointment procedure, available at <http://www.moscow-faq.ru/all_question/science/2009/March/16226/53039> and Nekonstitucionny otkaz sudey, available at <http://www.yurhelp.ru/news511.html>.

[81] See I. B. Mikhailovskaya, Kvalifikatsionnye kollegii sudei kak organ vnutrisistemnogo upravlenija, available at <www.igpran.ru/public/publiconsite/Mihailovskaya.doc>.

jection in a regional level federal court of general jurisdiction (for the Supreme Qualification Collegium the Supreme Court) and the court can overturn the rejection, but the court cannot reopen the competition and order the Qualification Collegium to retract its recommendation.[82] Also it is not clearly stated by federal law or sub-legislative normative act whether or not such a challenge would have a suspensory effect on the final appointment of another candidate.

In the middle of the 1990s there was a period when regional authorities played an important role in judicial selection.[83] Under the 1996 Law on the Judicial System[84] regions regained a potentially decisive voice in judicial appointments. Before an application for a judicial appointment of any kind reached the President's office, it had to pass the scrutiny of the regional legislature, thus giving the latter an effective veto. That led to potentially dangerous situations.[85] President Putin concluded that regional consent in selecting federal judges was redundant and suggested

---

[82] See T. Morshchakova, Kommentarii k zakonodatel'stvu o sudebnoi sisteme Rossiiskoi Federatssii, at 123 (2003).

[83] In the middle of the 1990s, after some of the Russian regions "refused to accept the new system of judicial appointments and started appointing judges to their high courts and even passed laws, including constitutions that legitimated these practices, … President Yeltsin responded to that potential constitutional crisis seeking the consent of the regional governors for the new procedures and signing bilateral treaties between the federal government and several regions which established the appointment of judges as an area of joint jurisdiction." A. Trochev/P. H. Solomon Jr., Courts and Federalism in Putin's Russia, in: P. Reddaway/R. W. Orttung (eds.), The Dynamics of Russian Politics, Vol. 2, 91, at 93 (2006).

[84] *Federalny konstitutsionny zakon ot 30 dekabrya 1996 "O sudebnoi sisteme v Rossiiskoi Federatsii"*.

[85] For example, the head of the Moscow City Court could not be appointed for more than a year because the candidates supported by the Presidential Administration could not pass the Moscow Duma. After all the debates the compromise figure of the City Court judge Olga Egorova was selected. She was not the best candidate for this position and turned out to be a very *difficult* person for both court employees and the Supreme Court leadership because in a very short term she gained an absolute power over the court. This example shows how the tension between regional and federal authorities prevents the selection of the best candidate for an important judicial position and leads to long-term vacancies and final compromises which are not always adequate.

removing it despite opposition from several regions.[86] The package of amendments signed in 2001 changed the 1992 Law on the Status of Judges and the 1996 Law on the Judicial System and removed the legislatures of the regions from the process of appointing and promoting federal judges. Nevertheless regional governors used informal channels to lobby for their judicial nominees, while the Presidential Administration quickly became overloaded.[87] Unfortunately the Administration did not succeed in its task of overcoming this influence (and it seems that it never actually tried hard to succeed) but sometimes when trying to get rid of a particular governor special attention is paid to preventing his/her cronies from getting on the bench. The *informal channels* mentioned above for the regional governors could mean good personal relations with the relevant court chairperson (or negotiating with him/her – promising support in providing flats for judges etc.), or a personal relationship with the Presidential envoy/members of the Presidential Administration.

Anyway as of now the approval of the Human Resources Department of the Presidential Administration is one of the most important steps in judicial selection. In 1994 for the first time a special Commission on Preliminary Consideration of the Candidates to the Positions of Federal Judges was established which helps the Department in the selection and assessment of candidates. The existence of such a commission is not envisaged by law; it is introduced by the Presidential Decree and functions on the basis of that Decree.[88] This Commission is composed only of people appointed by the President. As of now the composition of the commission is set by the 2008 Decree.[89] It consists of 26 members of whom 13 are public officials of the executive (including representatives

---

[86] M. Kurmanov, Judicial System in Russia: A Perspective from Tatarstan, in: T. Fleiner/R. Khakimov (eds.), Federalism: Russian and Swiss Perspectives, 66 (2001).

[87] Trochev (note 42), at 385.

[88] *Ukaz Prezidenta Rossiiskoi Federatsii ot 4 ortyabrja 2001 No. 1185 "O Komissii pri Prezidente Rossiiskoi Federatsii po predvaritelnomu rassmotreniju kandidatur na dolzhnosti sudei federalnykh sudov"*, Sobranije zakonodatelstva Rossiiskoi Federatsii, 10 October 2001, No. 41, st. 3938.

[89] *Ukaz Presidenta Rossiiskoi Federatsii ot 16 sentyabrja 2008 No. 1362 "Ob utverzhdenii sostava Komissii pri Prezidente Rossiiskoi Federatsii po predvaritelnomu rassmotreniju kandidatur na dolzhnosti sudei federalnykh sudov"*, Sobranije zakonodatelstva Rossiiskoi Federatsii, 22 September 2008, No. 38, st 4272.

of the Presidential Administration, the Ministry of the Interior, the Federal Security Service, the Tax Service). It also includes the Chairmen of the Supreme Court, the Supreme *Arbitrazh* Court, the Council of Judges and the Supreme Judicial Qualification Collegium, the Director General of the Judicial Department, three representatives of the Parliament, three prominent law scholars, the heads of the Presidential Councils for the Improvement of Justice and on the Development of Civil Society and Human Rights. The procedure used by this Commission is also set by the Presidential Decree. It is completely confidential and the candidate is not allowed to be present during the Commission's deliberations, but, as with the procedures used by the qualification collegia, the Commission has a right to request necessary information on the candidate from relevant state agencies. As a result of deliberations the Commission issues its recommendations to the President. The President must appoint (or reject) the candidate within two months of receiving the necessary documents from the relevant court chairperson. He has unlimited discretion on this issue and does not have to follow the recommendations of either the relevant qualification collegium or his own Commission. In practice the President quite often does not appoint a recommended candidate.[90] This decision is final and cannot be overruled. The President is not obliged to give reasons for his decision and actually none of them has done so.[91]

After President Putin came to power the number of rejected candidates started to grow.[92] Peter Solomon claims that after President Putin in-

---

[90] See the Address of the Chairman of the Supreme Judicial Qualification Collegium to the VI All-Russia Congress of Judges in 2004 (note 43) where he mentions that in the period of January-November 2004 alone the President has rejected 57 candidates.

[91] See V. Mitjushev, O nekotorykh osnovanijakh k otkazu v rekomendatsii na dolzhnost sudii, available at <http://www.yurclub.ru/docs/other/article110.html>. The author quotes the report of the Chairman of Lipetsk regional level court of general jurisdiction on the results of court activities in 2006 posted on the court website: "In 2006 our candidate supported by regional Qualification Collegium of Judges and the Supreme Court was not appointed by President Putin. We do not know the real justifications for that but we presume that happened because close relatives of the candidate are practicing lawyers."

[92] See for example the Resolution of the Council of Judges of 28 November 2003, No. 28 (*Postanovlenije Soveta Sudei Rossiiskoi Federatsii ot 28 nojabrja 2003 No. 28 "O nekotorykh voprosakh, svyazannykh s naznachenijem sudei federalnykh sudov obschei jurisdiktsii i arbitrazhnykh sudov"*) where the Coun-

troduced the institution of Presidential envoys to federal circuits the practice was established of negotiating on candidates for judicial positions with these envoys and obtaining their support before introducing such candidates to the Presidential Administration.[93] The Presidential envoys became an additional channel for the governors (or other important players) to convey their views on the candidates to the Presidential Administration. Presidential envoys never officially admitted their informal relationship with the governors. But in those regions where strong opposition to the governor exists there is a possibility for such opposition also to influence the envoy and gain support for its candidates.

As regards the appointment of judges to the highest courts – the Constitutional Court, the Supreme Court and the Supreme *Arbitrazh* Court – it is necessary to mention that the checks and balances between the President who recommends the candidates and the Federation Council which actually appoints the judges, envisaged in the Constitution, are not working. Due to amendments to electoral legislation in the Putin era the President has the competence to appoint the governors of the federation subjects personally and therefore has a strong influence on the composition of the Federation Council, which as a consequence is implicitly controlled by the President. This becomes even more evident with the adoption of amendments to the Law on the Constitutional Court changing the manner of appointment of the Constitutional Court Chairperson.[94] In order to be sure of getting *the right* chairperson the President changed the manner of his/her appointment from election by other Constitutional Court judges to appointment by the Federation Council.

In order to avoid the impression or reality of being a potential "black box" of the appointment process, this stage of the selection and appointment process (e.g. consideration by the Presidential Administration) should be regulated in more detailed manner by federal law. For example, the rejection criteria of the Presidential Administration, the

---

cil states that in 2002-2003, 30% of proposed candidates were rejected by the President, available at <http://www.ssrf.ru/ss_detale.php?id=114>.

[93] P. Solomon, Pravo i gosudarstvennoje upravlenije: chto otlichaet Possiju?, 67 Sravnitelnoe konstitutsionnoe obozrenije 80, at 87 (2008).

[94] *Federalny konstitutsionny zakon ot 2 ijunya 2009 goda No. 2-FKZ "O vnesenii izmenenii v Federalny konstitutsionny zakon "O Konstitutsionnom Sude Rossiiskoi Federatsii"*.

obligation to give reasons and the legal remedies against the final decision should be fixed in the law.

As can be seen from the above the appointment process is complicated by the roles played by several participating institutions. Thus, the process is less transparent than it might be. It is not transparent at all towards both the public and the judge/s in question, and was never perceived as fair and objective. Nothing concerning the selection procedure is announced to the public, and even information given to the judges in question is very limited. Former First Deputy Chairman of the Supreme Court Vladimir Radchenko on several occasions proposed the following solution which could be of interest – widely publishing biographies of the candidates for judicial positions (as happened in Soviet times) in order for the public also to have an opportunity to express their opinion on future judges they are going to deal with, for example to post this information on the website of the relevant court, but his proposals were not supported by the judicial community.[95] Currently the selection procedure is mostly controlled by the judiciary itself, especially by court chairpeople (if not supported by the court chairperson the candidate will never make it even through the qualification collegium), and in part by the executive – regional governors and Presidential Administration. It is necessary to mention that the relevant provisions of the Status of Judges Law, regulating the procedure for the selection and appointment of judges, were fully enforced from the beginning and the system mostly works as it should according to those provisions, so the main problem is in informal relationships, the almost unlimited powers of court chairpeople[96] and new relations established between regional governors and Presidential envoys. Therefore the transparency of the appointment process would be increased by reducing the number of decision-takers, by eliminating the 'side-veto' pow-

[95] See for example V. I. Radchenko, Mnenije o nizkom reitinge nashikh sudov ne vpolne spravedlivo, available at <http://www.supcourt.ru/vscourt_detale.php?id=4883&w[]=Радченко>.

[96] See for example T. Morschakova, Printsip nezavisimostu i mekhanizm zavisimosti. "Judges are appointed by the President but it is not the President himself who takes care about their career. The human resources structure of the Presidential Administration receives proposals of judicial qualification collegia which recommend candidates for positions as judges and court chairpeople. But such recommendation will get to the Presidential Administration only if it is agreed upon with the relevant court chairperson including the Supreme Court Chairman." Available at <http://www.gazeta.ru/comments/2005/03/31_x_261669.shtml>.

ers of chairmen and by clearly giving priority to the judicial qualification collegia.

Until recently no preliminary training was required for appointed judges before they took the bench. At the same time it was absolutely clear that the preparation of students and candidates for the position of judge needed a more systemic approach than now exists in the Russian Federation, one which took into account the new system of Justices of the Peace and the absence of a probationary period for federal judges. The existing structures and opportunities found within the legal educational system of the Russian Federation do not fully meet the requirements of this concept. At the VI All-Russia Congress of Judges in 2004 the decision was taken to develop a draft law on the introduction of such training at the Academy of Justice. It was proposed to introduce a one-year training course of which six months would be spent in academic training and six months in internship with an experienced judge. But because of the additional budgetary means required such proposal was not supported by the Ministry of Finance and its consideration was postponed. Anyway nobody has officially rejected this idea and recently the Legal Department of the Presidential Administration charged with further promotion of judicial reform again started working on this issue.[97] The draft law introduced to the Duma in 2008 was revived in 2010 with some changes aimed at reducing the costs, adopted and signed into law on 1 July 2010.[98] Under this Law introducing relevant amendments to the Law on the Status of Judges, a newly appointed federal judge shall undergo professional training in a higher educational establishment providing for higher legal education and additional professional training of judges, and also have a traineeship with the court. The overall length of professional training (both in the higher education es-

[97] See for example the interview conducted with the Chairman of Tiumensky regional level court of general jurisdiction of 24 November 2009, Anatoly Sushinsky, Osnovnye napravlenija razvitija suda. "In principle the decision was taken to allocate additional resources for the Academy of Justice to train candidates for judicial positions". Available at <http://oblsud.tum.sudrf.ru/modules.php?name=press_dep&op=1&did=112>. See also article S'ezd sudei – vzglyad iz oblasti, available at the website of Sverdlovsk regional level court of general jurisdiction, at <http://www.ekboblsud.ru/press_det.php?srazd=3&id=76&page=1>: "Unfortunately there is still no decision on special training for judicial candidates but it is under consideration and will be taken soon".

[98] *Federalny zakon ot 1 ijuliya 2010 No. 135-FZ "O vnesenii izmeneniya v statiju 20-1 Zakona Rossiiskoi Federatsii "O statuse sudei v Rossiiskoi Federatsii"*, 7 July 2010, Rossiiskaya gazeta, Federalny vypusk No. 5226.

tablishment and in court) shall not exceed six months. The order and exact terms of professional training are to be established by the Supreme Court and the Supreme *Arbitrazh* Court respectively. Unfortunately this newly adopted Law provides for additional professional training only for those judges who are already appointed to the bench, while a better solution could be in the preliminary preparation of candidates before they take the bench.

There are also no regulations regarding minority and gender representation in Russian courts. As regards minorities the Russian Constitution speaks only about national minorities and provides for the protection of their rights, but there is no special law on the protection of national minorities. In practice national minorities are protected in Russia in terms of their language, culture and traditions. No special representation is provided for them.[99] The same is true for women. Special representation was provided for them at the bodies of state power in Soviet times and women felt insulted by that, so now we do not have any quotas for them. Traditionally women form about three-quarters of the Russian judiciary.[100] On the lower level (JPs, district courts) women fill three-quarters of the positions, including women chairpeople. On the higher level this distribution changes dramatically, and at the RF Supreme Court there are only 20 women judges (out of 118 excluding Military Department) and no women among the five deputy chairpeople. Such situation could be explained by the fact that men are not interested in routine and in a not highly paid job in the lower courts which does not guarantee promotion. They work for the police and the prosecution, and after having the necessary experience apply directly for judicial positions in higher courts with a view to promotion to the Supreme Court. This situation could be remedied by raising the pres-

---

[99] See for example R. Abdrakhmanov/ G. Pugatcheva, Perspektivy federalizma v Rossii. "Unfortunately Russia still lacks efficient mechanisms for taking into consideration the interests of national minorities at the federal level. … The absence of mechanisms of institutional representation of ethnical interests has the most negative effect on the national groups living beyond their national communities." Available at <http://federalmcart.ksu.ru/publications/pugach1.htm>.

[100] Information published by Federal Statistical Service of Russia suggests that as of 1 January 2008 in the Russian judiciary and prosecution service the proportion of women employees equals 78% and men employees 22% – see *Zhenschiny i muzhchiny Rossii. Statistichesky sbornik, Moskva* (2008), available at <http://www.gks.ru/wps/portal/!ut/p/.cmd/cs/.ce/7_0_A/.s/7_0_3D4/_th/J_0_69/_s.7_0_A/7_0_3CK/_s.7_0_A/7_0_3D4>.

tige of lower judicial positions and changing the Russian tradition of giving preference to men in promotion.

3. Length of Office and Reappointment

While a three-year-probationary period for federal judges was abolished recently, Justices of the Peace (regional judges) are first appointed (elected) for a term prescribed by the appropriate law of the regional entity but for no more than five years. They are then reappointed (re-elected) for the term prescribed by the appropriate law of the regional entity but for no less than five years.[101] As the regional entities have all chosen the system of reappointment, the situation is worse for JPs than for federal judges. JPs come under the scrutiny of the legislature many times during their career, and this generates a great incentive for them to co-operate with and not offend local political officials. As JPs' courts are the lowest level of the judicial system of general jurisdiction, in order to be reappointed JPs must demonstrate loyalty to the relevant federal district and regional level court chairpeople, and to the regional legislature.

Upon reappointment the performance of judges is evaluated and considered in accordance with the provisions of the Regulations on the Order of Work of Qualification Collegia of Judges.[102] The relevant Qualification Collegium studies the references (characterizations) issued by the court chairperson and reflecting the assessment of a judge's professional activities, his/her general proficiency and moral qualities; and information on the number of cases disposed of by the judge in last three years, on the quality of his judgments, on the number of overrulings or dispositions of cases in breach of the time limits set by law and the reasons for them. These criteria of judicial performance have an adverse effect on judicial independence, as in multiple reappointments a JP completely depends on the court chairperson issuing relevant character references and the higher level court (appeal instance) in charge of overrulings.

---

[101] Article 11 Law on the Status of Judges. In fact the legislation of all regional entities stipulates that the first appointment of JPs be for a three-year term and reappointment for five years (for example Moscow and St. Petersburg).

[102] Article 22(3) Regulations on the Order of Work of Qualification Collegia of Judges.

III. Tenure and Promotion

1. Tenure

Article 121 RF Constitution and the Law on the Status of Judges stipulate that the tenure of judges in the Russian Federation is not limited by any term except in certain cases provided for by federal laws. As of now these cases are the appointment of JPs;[103] both federal and regional judges have mandatory retirement age of 70;[104] for judges of constitutional/charter courts of regional entities different mandatory retirement ages could be set by the legislation of those regional entities.[105]

Until recently federal court judges[106] were first appointed to the office for a three year term, after which they could be appointed without limitation of term until they reached the mandatory retirement age. The probationary period made judges appointed for the first time completely dependent on court chairpeople, as it was up to them whether or not to recommend a judge for reappointment until mandatory retirement age. After three years in office those judges were to pass the fresh scrutiny of their bureaucratic and political masters. No formal reasons for refusal to reappoint were required. It was possible just to announce that the judge was not fulfilling his/her tasks properly. So judges appointed for the first time were forced to display loyalty to the chairperson – namely by issuing verdicts and rulings in accordance with the adjudicative preferences or policy *line* he/she embraced and supports. There is anecdotal evidence of instances where probationary judges seeking formal appointment had allegedly been intimidated by the chairperson under the threat of an appointment not being recommended.[107] Addressing the VII All-Russia Congress of Judges in 2008 President Medvedev criticized the probationary term and promised to initiate necessary amendments to the Law on the Status of Judges to

---

[103] Article 11(3) Law on the Status of Judges. In fact the legislation of all regional entities stipulates the first appointment of JPs for a three-year term and reappointment every five years (for example Moscow and St. Petersburg).

[104] Article 11(1) Law on the Status of Judges.

[105] Article 11(4) Law on the Status of Judges.

[106] Except Constitutional Court, Supreme *Arbitrazh* Court and Supreme Court justices.

[107] See, for example, I. B. Mikhailovskaya, Kvalifikatsionnye kollegii sudei kak organ vnutrisistemnogo upravlenija, available at <www.igpran.ru/public/publiconsite/Mihailovskaya.doc>.

eliminate it. A law eliminating the probationary term for judges was introduced to the Duma rather quickly after his address, adopted by the Duma on 23 June 2009 and signed into law by the President on 17 July 2009. Such step certainly increases judicial independence and eliminates the practice of displaying loyalty to the court chairperson during the probationary period, but this amendment concerns only federal judges; the tenure and retirement age of regional judges are still under the control of the regional legislator.[108]

Another substantial threat to the security of judicial tenure was made by recent reforms setting a mandatory retirement age for judges. When the Law on the Status of Judges was adopted in 1992 judges were guaranteed life appointments. There was initially no upper age limit, although judges of the Constitutional Court could only serve a maximum of 15 years. In late 2001, the retirement age was fixed at 65 for all judges, with the exception of the court chairpeople, for whom it was 70. In breach of the constitutional provisions this amendment had retroactive effect and was applied even to those judges who were initially appointed for life. It was a political decision driven by the Presidential Administration to get rid of some unwanted judges in higher courts, especially Constitutional Court judges, who were about 65.[109] After this was done the President suggested raising the retirement age for all judges to 70, and that was quickly done.

Judges in the RF are irremovable[110] and may not be transferred to another position or to another court without their consent. Furthermore, their powers cannot be suspended or terminated in any way other than on the grounds and in the order stated by the Law on the Status of Judges, namely only by the decision of the Qualification Collegium of Judges for various reasons prescribed by law.[111] Those reasons include both objective (for example the election of a judge to a legislative body, inability to perform judicial duties for a long time because of his/her

---

[108] See *supra* B. II. 3. Length of Office and Reappointment.

[109] See for example Zamestitel Predsedatelya Konstitutsionnogo Suda Tamara Morschakova rezko kritikuet normy novogo zakona o statuse sudei, svyazannye s novymi pravilami ikh otvetstsvennosti, available at <http://old.polit.ru/documents/428081.html>. "In winter [2002] the Duma passed a law which according to common perception could be called a "personal law" against Morschakova, forcing her to leave the [Constitutional] Court the same year".

[110] Article 12 Law on the Status of Judges.

[111] Arts. 13 and 14 Law on the Status of Judges.

state of health or other valid reasons in connection with state of health, reaching the retirement age) and subjective (agreement of a Qualification Collegium of Judges about charging a judge with criminal responsibility or the imprisonment of a judge, performing some activities incompatible with judicial office[112]) circumstances. "Other valid reasons" are not explained in the Law, but the practice suggests that among such reasons could be the necessity of taking intensive care of dependants, resignation from military service for a military court judge because of the state of health etc.[113] In practice such reasons are not used against the judge's will; mainly the judges themselves claim these reasons and provide the necessary justification, but this happens very rarely.[114]

2. Promotion

The following formal requirements are laid down for one to become a judge in a higher court.[115] To serve as a judge of the Constitutional Court of the Russian Federation a citizen must have reached the age of 40 and have a work record in the legal profession of at least 15 years; to

---

[112] A judge shall not work as an arbitrator or mediator, be a member of a political party, be involved in business or other paid activities except scientific work and teaching, or be a board member in a foreign NGO (Article 3(3) Law on the Status of Judges).

[113] See for example the Decision of the RF Supreme Court dated 19 April 2006 in *Vladimir Bozrov* v. *Supreme Judicial Qualification Collegium* where the Supreme Court ruled that discharging a military judge from military service (on the ground that his state of health is incompatible with military service but does not prevent him from performing judicial functions) actually prevents the judge from performing his/her functions as a military judge and could be regarded as a "valid reason" for termination of his/her powers in office under Article 14(2) Law on the Status of Judges. *Reshenije Verkhovnogo Suda Rossiiskoi Federatsii ot 19 aprelija 2006 No. GKPI06-322*, available at <http://www.supcourt.ru/stor_text.php?id=7370960>.

[114] See for example the results of the activities of the Supreme Judicial Qualification Collegium and regional qualification collegia of judges in 2008 (*Rezul'taty dejatel'nosti Vyshei kvalifikatsionnoi kollegii sudei Rossiiskoi Federatsii i kvalifikatsionnykh kollegii sudei sub'ektov Rossiiskoi Federatsii v 2008 godu*), available at <http://www.vkks.ru/print_page.php?id=4713>. The powers of only two judges were terminated under Article 14(2) Law on the Status of Judges in 2008. Both judges claimed resignation on the ground of incompatible state of health.

[115] Article 4 Law on the Status of Judges.

serve as a judge of the Supreme Court of the Russian Federation and of the Supreme *Arbitrazh* Court of the Russian Federation a citizen must have reached the age of 35 and have a work record in the legal profession of no fewer than ten years; to serve as a judge of the RF subject (regional) level court of general jurisdiction, of the district (naval) military court, or of the federal *arbitrazh* court of a district a citizen must have reached the age of 30 and have a work record in the legal profession of no fewer than seven years. If he/she meets these formal requirements a judge of a lower level court or another representative of the legal profession on his/her own initiative may apply for a position in higher level court, but in order to be promoted he/she needs to gain support from both the relevant court chairperson and the Presidential envoy to the relevant federal circuit.[116]

The process of promotion as well as the appointment process is not fully transparent even in relevant legislative provisions. When there is a vacancy in any court of a level higher than the trial level, the announcement is published in specialized journals and in popular newspapers of a corresponding level. Those applicants for the position who are already judges do not need to take the qualification examination again. According to the Law the results of the qualification examination are valid for three years, and once a judge is appointed for the whole period of his/her judicial career.[117] This cannot be regarded as an appropriate rule as the content of the examination questions and tests depends on the level and jurisdiction of the court which has the vacancy, so it could be good even for those who are judges already to test their professional ability to work in a court of a higher instance or different jurisdiction (there are quite a few cases of judges moving from courts of general jurisdiction to *arbitrazh* courts).

The process of promotion is similar to the initial selection and appointment of judges. The Qualification Collegia conduct a merit-based selection of candidates.[118] In addition to the criteria mentioned above, candidates must have a spotless reputation, no previous criminal record

---

[116] See Solomon (note 93).

[117] Article 5(5) Law on the Status of Judges.

[118] Article 5 Law on the Status of Judges (with regard to selection for judicial office in general). There is no legislative provision regulating the subject of promotion but it is presumed by the legislator that the most professional and experienced judges will be promoted.

and the necessary moral qualities.[119] The main requirement for the application is the character reference of the judge-candidate given by the superior judge, usually the chairman of his court, reflecting the work of the last three years. As regards the content of such reference, paragraph 11 of the Regulations on the Order of Work of Qualification Collegia of Judges stipulates that the information about the work of the last three years shall concentrate on the statistical data on the judges' adjudication: how many cases has the judge decided and what was the quality of his decisions. The quality is mainly assessed on the answers to the following questions: how many of his decisions have been overruled by the courts of the next level and how many of his decisions have not been delivered in due time. The Qualification Collegium, as with first time appointees, considers all the applications of the candidates for promotion, and takes a decision about recommending one candidate. Where there are several candidates, in comparing applicants who are already judges with applicants who have no judicial experience judges, in practice, enjoy priority. The decision taken is directed to the chairperson of the court which has the vacancy and where the chairperson agrees with the decision he/she will put the candidate forward to the Presidential Administration for further consideration.[120] As with first-time appointees the court chairperson has a right to disagree with the decision taken by the Qualification Collegium and ask it to retract its recommendation.[121]

The same process applies to the appointment of court chairpeople and deputy chairpeople. Their promotion depends very much on the chairpeople of the superior courts who wield substantial influence over the careers of their fellow judges as they forward to the Supreme Court or Supreme *Arbitrazh* Court Chairmen the recommendations from the judicial qualification collegia for the chairpeople of lower courts. Supreme Court and Supreme *Arbitrazh* Court Chairmen forward the recommendations to the President.[122] As with ordinary judges, all court chairpeople and deputy chairpeople[123] are appointed by the President

[119] On measuring moral qualities see *supra* B. II. 2. The Process of Judicial Selection.

[120] See the section on judicial selection, *supra* B. II. 2. The Process of Judicial Selection.

[121] Article 5(9) Law on the Status of Judges.

[122] Article 6(1) Law on the Status of Judges.

[123] Except for the Supreme Court, Supreme *Arbitrazh* Court and Constitutional Court.

after review by the appropriate Qualification Collegium, by the Supreme Court (for a court of general jurisdiction) or the Supreme *Arbitrazh* Court (for an *arbitrazh* court) and two departments within the Presidential Administration. The chairpeople of the Supreme Court and Supreme *Arbitrazh* Court are nominated by the President after review by the Supreme Qualification Collegium and appointed by the Federation Council. Since 2002 the Presidential envoy for the federal circuit in question has acquired a role in the approval of nominations in the relevant Judicial Qualification Collegium. Court chairpeople and deputy chairpeople are appointed for six years, renewable for a further six-year period, and may serve for only two consecutive terms. Previously (before the reforms in 2001) they were appointed without any limitation of time. The amendment made court chairpeople themselves more dependent on the chairpeople of higher courts and the Presidential Administration.

Promotion within the same court (from a *simple judge* to the head of the Civil or Criminal Division, deputy chairperson or chairperson) is totally dependent on the court chairpeople. All judges interested in promotion within the same court need to appear obedient and show loyalty to the court chairperson. The impact of chairpeople in their discretion to nominate or *present* candidates for promotion among already employed judges is great. Promotion depends on the judge meeting the expectations of the chair of the court and of the judges of higher courts.[124] Some chairpeople admit that they use *unofficial* sources of information to make background checks on judges before deciding on their promotion.[125] Among such *unofficial* sources could be informal chats with the judge's colleagues or materials received from known police or security service officers. From the point of view of the experts surveyed by the London think-tank, Russian Axis,[126] the most widespread instruments by means of which the executive authorities influence and bring pressure to bear on judges are, among others, especially relevant for the heads of the key courts and include confidential cooperation with the Kremlin or the special services; and linkage of the political loyalty and *correct behaviour* of judges with passing decisions to promote judges.

---

[124] Trochev (note 42), at 398.

[125] Id.

[126] See <http://www.russianaxis.org/>.

We offer just two examples of the role and importance of support (or absence thereof) from the court chairperson and Presidential Administration: In 2005 Anton Ivanov, the Supreme *Arbitrazh* Court Chairman, appointed Yelena Valyavina as his deputy in the court. She had been his first deputy in the St. Petersburg city justice department in the 1990s. Valyavina, like Ivanov, had no experience in court work, and Dmitry Fursov, a Moscow Region *arbitrazh* court judge with far better qualifications (Doctor of Law, ten years' experience as an *arbitrazh* court judge), was rejected. He protested her appointment to the Supreme Court but unsuccessfully. In the reasoning for its ruling the Supreme Court stated that it had no jurisdiction over the legitimacy of the decision-making process within the Qualification Collegium as the Law on the Status of Judges does not require the members of the Collegium who voted against the nominee to explain their position.[127] Therefore, until the recent ruling of the Constitutional Court on the application of Vladimir Ragozin,[128] the Supreme Court would only decide whether due process had been guaranteed to the nominees, and in this case all necessary procedures were strictly followed by the Supreme Qualification Collegium. In July 2009, relevant amendments were introduced into the Law on the Bodies of Judicial Community requiring justification of the decisions taken by judicial qualification collegia.[129]

In May 2008, the ex-chair of Moscow Regional Court Svetlana Marasanova posted an open letter on the web where she stated that she had been refused reappointment for the next six year term as a court chairperson because she did not express the necessary level of *obedience* to Valery Boyev, an official of the Presidential Administration Human Resources Department in charge of judicial appointments. On several occasions she had refused to comply with his orders and when she applied for the next term in office, despite the fact that no formal reasons for refusal could be found (she had necessary experience, law degree and was far from the statutory age limit) she was not reappointed. Several other

---

[127] *Reshenije Verkhovnogo Suda Rossiiskoi Federatsii ot 4 oktyabrja 2005 goda No. GKPI05-1119 po zajavleniju Fursova D.A*, available at <http://www.vsrf.ru/stor_text.php?id=7294992>.

[128] *Postanovlenije Konstitutsionnongo Suda Rossiiskoi Federatsii ot 24 marta 2009* (note 77).

[129] *Federalny zakon ot 24 ijulia 2009 goda No. 210-FZ "O vnesenii izmenenii v statju 23 Federalnogo zakona "Ob organakh sudeiskogo soobschestva v Rossiiskoi Federatsii"*, Sobranije zakonodatel'stva Rossiiskoi Federatsii, 27 July 2009, No. 30, st. 3736.

members of Moscow Regional Court had the same experience with Boyev and suffered as a result of taking their own independent position with regard to some cases, Marasanova wrote in her letter.[130]

Despite constant criticism the practice of manipulating promotions in favour of preferred candidates still exists. In June 2011, Chairperson of Leningrad Regional Court Irina Lodyzhenskaya was refused reappointment without any formal reason. Instead Mikhail Shevtchuck, former head of the Leningrad regional branch of the Judicial Department, received the necessary recommendation. Unofficially some members of the judicial community claimed that Mr. Shevtchuck "had one big advantage in the competition – he studied at the St. Petersburg State University together with President Medvedev". Public member of the Supreme Judicial Qualification Collegium, professor of the St. Petersburg State University Law School Valery Moussin refused to comment on the justifications for the decision in *Vedomosti* newspaper saying that the reasoning used by the Supreme Qualification Collegium enjoys the same protection as the secrecy of judges' deliberations during the trial and cannot be announced publicly.[131]

IV. Remuneration

1. Remuneration

The remuneration of judges in the RF consists of an official salary, additional payments for those judges who were awarded special ranks by the Qualification Collegia and for length of service, plus 50% of the official salary for the specific labour conditions (this could be working on the territories of extreme North, territories recovering from radiation contamination, etc.), which shall not be reduced.[132] Under the Law the

---

[130] Available at <http://treli.ru/newstext.mhtml?Part=20&PubID=17794>.

[131] A. Kornya, Strogo po kursu, Vedomosti, 29 June 2011, No. 117. Available at: < http://www.vedomosti.ru/newspaper/article/262970/strogo_po_kursu>.

[132] Article 19 Law on the Status of Judges. Furthermore, judges holding the scientific degree of Candidate of Law (equivalent to a Ph.D) or the academic title of an assistant professor receive an additional payment of 5% of the official salary, and judges who hold the degree of Doctor of Law or the academic title of professor receive an additional 10% of the official salary. Judges holding the honorary title of Merited Lawyer of the Russian Federation receive an additional payment in the amount of 10% of the official salary.

level of basic salary for a judge is set according to the position occupied in percentage to the salary of the Chairmen of the Supreme Court and Supreme *Arbitrazh* Court. The salary of a judge cannot be less than 50% of the salaries of the Chairmen of the Supreme Court and Supreme *Arbitrazh* Court or less than 80% of the salary set for the chairperson of the court the judge is working in. The system of salary supplements based upon a judge's rank or "qualification class" remained in the RF.[133] Advancement within the ranks depends upon the higher court's review of a judge's performance, including statistical indicators of performance such as the soundness of decisions (their not being overruled on appeal). In short, far too much of the remuneration package received by individual judges falls outside normal salary and depends upon a judge's maintaining good relations with the chair of the court and meeting performance expectations, including expectations relating to the substance of their decisions, and stability of decisions at higher instance courts Stability is given when the percentage of this judge's decisions being overruled is relatively small, decisions he/she renders in average are "stable".

During the 1990s, the salaries of judges at all levels improved somewhat at first, but then remained stable in the face of surges of inflation.[134] The sharp decline in tax revenue collected by the federal government undermined its capacity to support the courts. The Ministry of Finance often sequestered the funds allocated to the courts, so they received even less than the inadequate sums assigned to them in the state budget. In the absence of the minimum funding necessary to operate their courts most chairs in 1997 and 1998 sought and obtained supplementary funding from regional and local governments and even from private sponsors.[135] The key instrument for achieving the modernization of the court system and the main source of the increase in judicial salaries was the 44.9 billion rouble (1.14 billion EUR) Governmental Federal

---

133 Article 19 Law on the Status of Judges.

134 For example, the salary of a district (trial) judge in that period was about $105 (75 EUR) per month. That was too low even for Russia as compared with civil servants. At the same period an average member of the Duma staff received about $300 (226 EUR) per month, see Report of the Council of Europe Expert Working Group on Reforming Judicial System in the Russian Federation prepared under the framework of the Cooperation Program between the Council of Europe and the Russian Federation, 8 March 1996, at 35.

135 See Solomon Jr./Foglesong (note 32).

Targeted Programme (FTP) for 2002-2006.[136] The FTP sought to achieve: greater independence for judges; the enhanced prestige of the courts; greater accountability of judges; the upgrading of the professional standards of judges, court staff and the Supreme Court's Judicial Department; consistent implementation of the constitutional principles of justice; the development of the material-technical basis of the courts and the JD; and the creation of an effective information and communication system for the judiciary. Under the FTP 28.167 million roubles (714,225 EUR) were allocated to increasing judicial salaries. The figures for 2006 (the starting salary of a district court judge was 29,700 roubles (approx. 753.60 EUR) and that of a Supreme Court judge was 70,047 roubles (approx. 1,777.69 EUR)[137] were much more comparable with the salaries of civil servants at the same level and even close to what a private lawyer may receive on the open market. It was enough to support the family of even a single parent.

The 2007-2011 FTP for the Development of the Judicial System in Russia, approved by the RF Government on 21 September 2006, is largely a continuation of the previous FTP with a budget of 48.4 billion roubles (1.228 billion EUR).[138] It envisages the preparation of new legislation to increase transparency and judicial accountability, including by introducing obligatory declarations of income and assets for judges, improving the information technologies used in courts and raising the effi-

---

[136] *Federal'naya tselevaya programma "Razvitie sudebnoi sistemy v Rossiiskoi Federqatsii 2002-2006", utverzhdennaya Postanovleniyem Pravitelstva RF No. 805 ot 20 nojabrya 2001*. Sobranije zakonodatel'stva Rossiiskoi Federatsii, 3 December 2001, No. 49, st. 4623.

[137] Report by the Council of Europe's Commission for the Efficiency of Justice (CEPEJ), European Judicial Systems (2006), published on 5 October 2006, available at <http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2006/CEPEJ_2006_eng.pdf>; an indication of the rise in salaries comes from the Vedomosti newspaper 1 December 2004 article (*Sladkaya pilulija: samostoyatel'nost sudei sokratitsya a zarplata vyrastet,* Vedomosti, 1 dekabrya 2004, No. 221) mentioning the monthly salaries of judges in 2004: that of a district court judge was about $978 (736 EUR), of a Supreme Court Justice about $1,470 (1,107 EUR) and of a Supreme Arbitration Court Justice about $1,133 (853 EUR). Article available at <http://www.vedomosti.ru/newspaper/article/2004/12/01/84170>.

[138] *Postanovltniye Pravitelstva Rossiiskoi Federatsii No. 583 ot 21 sentyabrya 2006 ob odobrenii Federal'noi Tselevoi Programmy "Razvitiye sudebnoi sistemy Rossiiskoi Federatsii 2007-2011*, Sobranije zakonodatel'stva Rossiiskoi Federatsii, 9 October 2006, No. 41, st. 4248.

ciency of court activities. 2.025 million roubles (51,380.31 EUR) are reserved for a further increase in judges' salaries.

As a result of both FTPs judges' salaries were quadrupled in comparison with 2001 level. This is quite enough for a judge to support his/her family on, especially in the regions, and even for big cities like Moscow or St. Petersburg this is higher than the average salary. Now salaries are paid on time[139] and increased regularly together with those for civil servants. A decision on increasing judges' and civil servants' salaries is usually taken by the Government after the setting of new minimum wages taking into account the inflation rate. Salaries now vary from 15–20,000 roubles (approx. 450 EUR) for JPs to 35–40,000 roubles (881-1,014 EUR) for Supreme Court Justices. They also vary from region to region, but they are still not sufficient to attract experienced legal professionals, especially in the capitals. That a judge should be well paid has another objective – it is one of the guarantees of judicial independence, including independence from other sources of income, and a demonstration of high standing of the judicial function. From this point of view it is still not a decent salary for a judge compared with the salaries of his/her European and American colleagues. There is a big difference between the ability to support a family and having a decent living as a judge. Also, because of the financial crisis since 2007 the real level of judges' allowances has started to decrease. As was stated in the Resolution of the VII All-Russia Congress of Judges of 4 December 2008, "[t]he real level of judges' allowances has been steadily decreasing since 1 January 2007. An insignificant [in terms of the inflation rate] increase in salaries due to the FTPs does not compensate for the decreasing purchasing value of the rouble because of inflation and does not provide for decent financial conditions for judges and their families."[140]

---

[139] *Postanovleniji VII Vserossiiskogo S'ezda sudei Rossiiskoi Federatsii ot 4 dekabrya* (note 31).

[140] Id.

2. Benefits and Privileges

In 2002, some of the benefits which previously existed[141] were annulled (for example 50% exemption from communal payments, total exemption from income tax, the provision of a flat to every newly appointed judge) and some were replaced by monetary payments – instead of free use of means of transport judges started to receive monetary compensation for travel expenses or free tickets. At the same time such benefits as free medical care or free use of a sanatorium resort were retained. In any case there was no corresponding increase in salaries so the real income of judges decreased. It certainly affected their independence as they became more dependent on the remaining benefits which were still granted (or not) by local authorities. In order to improve the situation the first FTP for 2002-2006 was introduced, but despite the significant increase in judicial salaries, even in 2006, when the FTP was completed and there was no longer direct local financing, informal manipulation of perks still existed.[142]

---

[141] Because of the financial situation back then, the Law on the Status of Judges adopted in 1992 provided for additional benefits for judges (home telephone, free places in children's pre-school institutions, medical services, free sanatorium or resort treatment, etc.) as it was obvious that decent salaries for judges could not be granted. Furthermore, in 1996, in order to maintain decent living conditions for judges, the federal law "On Additional Guarantees of Social Protection of Judges and Court Personnel" (*Federalny zakon "O dopolnilel'nykh garantiyakh gosudarstvennoi zaschity sudei i rabotnikov apparata sudov" ot 10 yanvaria 1996 goda*, Sobraniye zakonodatel'stva Rossiiskoi Federatsii, 15 January 1996, No. 3, st. 144) was passed. But the allocation of the listed benefits was sometimes at the discretion of court chairpeople and sometimes of government officials and higher court judges; see also: P. H. Solomon Jr., Courts in Russia: Independence, Power and Accountability, in: A. Sajo (ed.), Judicial Integrity, 225, at 236-237 (2004).

[142] See for example A. Ermoshenkov, Korruptsiya – mat' porydka, Polit.ru, 20 November 2009. "Additional […] perks for judges […] are widely used by corrupt businessmen and city mayors. […] Judges became so used of those "baitings" that the scale of justice has been transformed into market weight-scale". Article available at <http://www.politrus.ru/2009/11/20/%d0%ba%d0%be%d1%80%d1%80%d1%83%d0%bf%d1%86%d0%b8%d1%8f-%e2%80%94-%d0%bc%d0%b0%d1%82%d1%8c-%d0%bf%d0%be%d1%80%d1%8f%d0%b4%d0%ba%d0%b0/>. See also the results of the Expert Survey conducted by the Center for Political Technologies in October 2009 which examined the status and problems of the Russian Judiciary. "One of the judges claimed that he is not using benefits available for him as he does not want to be

The new FTP for 2007-2011 also sets targets *inter alia* for the provision of free housing for judges – 2,672 million roubles (67,784.49 EUR) are allocated for this purpose.[143] This demonstrates that additional benefits still exist and are still necessary. Unfortunately in Russia even if one has enough money it is sometimes difficult to have access to several kinds of important services including securing places in the kindergartens, access to the best places of resort etc. In order to have access to these services you need to obtain *useful acquaintances* which could be obtained by court chairpeople and local authorities easily. This makes judges dependent on a good relationship with both.

3. Retirement

A retired judge with 20 years of service as a judge has the right at his or her choice to receive the ordinary pension he/she is eligible for or an untaxable, monthly allowance for life of not less than 80% of the salary paid to a judge occupying the same position at the time the retired judge applied for the allowance. For a judge who resigned having less than 20 years' service before reaching the necessary age limit for retirement and who has reached the age of 55 (50 for women judges) the amount of the monthly allowance for life is calculated proportionally to the number of years served.[144] A judge who retires with more than 20 years' service shall have his/her life monthly allowance increased by 1% for each year worked beyond 20 years but shall not receive more than 85% of the salary paid to a judge occupying the same position.

A judge who has reached the age of 60 (55 for women), with no fewer than 25 years' service in the legal profession, including at least ten years as a judge, shall have the right on retirement to receive the life monthly

dependent on different circumstances." Survey available at <http://www.politcom.ru/9307.html>.

[143] Of this amount 514.3 million roubles (13.059 million EUR) were allocated for *arbitrazh* court judges and staff members, 110.7 million roubles (2.805 million EUR) for the Supreme Court Justices, and 2,047 million roubles (51,847.62 EUR) for the courts of general jurisdiction judges and staff members and staff of the Judicial Department and its branches.

[144] Article 15(5) Law on the Status of Judges. For retired judges who have worked in the regions of the Extreme North and equivalent areas for no fewer than 15 and 20 calendar years respectively, the monthly life maintenance shall be allocated and paid, taking into account the district coefficient of monthly wages, Article 19(1)(3) Law on the Status of Judges.

allowance in the full amount.[145] A judge who has retired or been retired with at least 20 years' service as a judge instead of 25, or who has become an invalid during his/her term of office and has asked to move his/her permanent residence to another area shall be provided with comfortable housing in the form of a separate flat or of a house at the expense of the federal budget in addition to life maintenance.[146]

In practice retired judges always get the pensions and benefits they are entitled to, as they are not dependent upon the goodwill of chairpeople or representatives of the authorities. They are paid automatically upon the judge reaching the retirement age and supervised by both the Judicial Department and the Ministry for Social Care. The monthly life maintenance is more than enough to support the judge and much higher than the average pension in Russia – when the average pension is 3,000-5,000 roubles (about 76.12-126.873 EUR), a judge receives 30,000-45,000 roubles (about 761.109-1,141.83 EUR). Also the retired judge retains the benefits he/she was entitled to before retirement, including free medical care and free use of sanatorium treatment.

Even a retired judge still retains the status of a judge and membership of the judicial community, so he/she needs to observe the Judicial Ethics Code. A retired judge may be subject to disciplinary proceedings for the same offences as an active judge (violation of the Law on the Status of Judges or the Code of Judicial Ethics) and if a judge is dismissed as a disciplinary sanction, such judge shall no longer be entitled to monthly life maintenance, but only to the general pension which is much lower.[147]

V. Case Assignment and Recusal

Everyone has a right "to have his or her case examined by the court and judge to whose jurisdiction it is assigned by law."[148] Subject-matter jurisdiction in the Russian system mainly concerns the allocation of cases between the different court systems. In general this jurisdiction is set

---

[145] Article 19(1)(2) Law on the Status of Judges.

[146] Article 19(4) Law on the Status of Judges.

[147] See the analysis made by the Supreme Qualification Collegium regarding the practice of the reappointment of judges, paras. 5.1, 5.2, available at <http://www.vkks.ru/ss_detale.php?id=2>.

[148] Article 47(1) Russian Constitution.

out in the Constitution[149] but is further developed in the Law on the Constitutional Court and procedure codes. A separate set of rules concerns the allocation of a case to a particular court within a given system and also the determination of the venue.[150] The RF Constitutional Court has declared that any transfer of a case to a different court may be made only on grounds laid down by specific procedural rules, such as where all the judges of a court have been disqualified from participation in the case. [151] Russian legislation prohibits any disputes between courts over jurisdiction, and any case transferred from one court to another by the higher instance court pursuant to the procedures established by law must be unconditionally accepted by the court to which it was transferred.[152]

But despite this strong stand against arbitrary changes in courts, the manipulation of assignments of cases either away from or towards particular judges in a court flourishes. Assignments of cases are not random. The court chairperson decides who gets the newly filed case. Such powers were never envisaged in the legislation, either in Soviet times or in modern Russia, but such practice has existed since Soviet times and court chairpeople are not eager to give it up. As two World Bank experts observed: "There is a widespread practice that the Chairman of a court and/or the heads of kollegiias or divisions within the courts, assign the cases to the judges as they like and without regulations for predictable criteria. We heard a Chairman judge say "After having read a new case I'll know to which judge I'll give it." It is not necessary for us

---

[149] Arts. 125, 126 and 127.

[150] See, W. Burnham/ P. B. Maggs/G. Danilenko, Law and Legal System of the Russian Federation, at 380-381 (2004).

[151] Ruling No. 9-P of 16 March 1998 (*Postanovlenije Konstitutsionnongo Suda Rossiiskoi Federatssii ot 16 marta 1998 goda No. 9-P "Po delu o proverke konstitutsionnosti statii 44 Ugolovno-protsessualnogo kodeksa RSFSR i statii 123 Grazhdanskogo protsessualnogo kodeksa RSFSR v svyazi s zhalobami ryada grazhdan"*), Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii, 1998, No. 3.

[152] Article 36 Criminal Procedure Code, Article 33 Civil Procedure Code, Article 39 *Arbitrazh* Procedure Code (*Ugolovno-protsessualny kodeks Rossiiskoi Federatsii ot 18 dekabrya 2001 No. 174-FZ,* Sobranije zakonodatelstva Rossiiskoi Federatsii, 24 December 2001, No. 52 (part I), st. 4921, *Grazhdansky protsessualny kodeks Rossiiskoi Federatsii ot 14 noyanrya 2002 goda No. 138-FZ*, Sobranije zakonodatelstva Rossiiskoi Federatsii, 18 November 2002, No. 46, st. 4532; *Arbitrazhny protsessualny kodeks Rossiiskoi Federatsii ot 24 ijulya 2002 goda No. 95-FZ*, Sobranije zakonodatelstva Rossiiskoi Federatsii, 29 July 2002, No. 30, st. 3012).

to underline that this practice undermines the appearance of individual independence of judges".[153] This observation was made in 2002 but nothing has changed in this field since then. Unfortunately there is no legal provision concerning case assignment within courts. According to the Instruction on Workflow Management in District Courts issued by the Judicial Department all cases received shall be promptly passed to the court chairperson for distribution.[154] Civil actions received by post shall be distributed among the judges according to their specialization and the venues they are assigned to according to the decision of court chairperson.[155] Under the Standing Orders of the Supreme Court case assignment within the particular Division is performed by the chairperson of this Division.[156] Only the Standing Orders of *Arbitrazh* Courts provide for the possibility of random assignment of cases using electronic means if such means are available in the relevant *arbitrazh* court.[157]

In our opinion the situation is getting even worse in the absence of a sound and precise description of the jurisdiction of any single judge. The judge is assigned to a court but there is no further determination of his/her subject or territorial jurisdiction within the jurisdiction of the particular court. Because of that, except for Justices of the Peace (who are assigned to judicial sub-districts by regional legislation), an average user of the court system cannot decide if the judge is a proper one, i.e. to whose jurisdiction the case is assigned by law as is provided for by

---

[153] W. Fuhrmann/W. Bowring, Diagnostic Review of the Court System in Russia, Int'l Bank for Reconstruction and Development, at 5 (2002). This is a report prepared under the World Bank project in Russia which had limited distribution as a conference paper and never was published.

[154] Para. 2.7. *Instruktsija po sudebnomu deloproizvodstvu v raionnom sude. Utverzhdena Prikazom General'nogo Direktora Sudebnogo Departamenta pri Verkhovnom Sude Rossiiskoi Federatsii ot 29 aprelija 2003 goda No. 36*, available at <http://www.rg.ru/2004/11/05/sud-instrukcia.html>.

[155] Id., para. 3.4.

[156] Para. 4.2. *Reglament Verkhovnogo Suda Rossiiskoi Federatsii, utvershden Postanovlenijem Plenuma Verkhovnogo Suda Rossiiskoi Federatsii ot 22 dekabrja 2009 goda No. 29*, available at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=95709>.

[157] Para 31(6) *Reglament arbitrazhnykh sudov Rossiiskoi Federatsii, utverzhden Postanovlenijem Plenuma Vyschego Arbitrazhnogo suda Rossiiskoi Federatsii ot 5 ijunya 1996 v redaktsii 2009*, available at <http://www.arbitr.ru/_upimg/D68D41C1B72218C14648D6D38425A3D8_РЕГЛАМЕНТ.pdf>.

the Russian Constitution and the European Convention on Human Rights.

The absence of a normative framework for the allocation of cases feeds public perceptions of undue influence. Case-flow management procedures including the automated allocation of cases would address this problem, as well as help to alleviate the burden of cases and delays in the courts, a critical problem exacerbated by the sharp increase in litigation over the last decade. The *arbitrazh* court system has already started to implement such procedures widely,[158] and several courts of general jurisdiction are testing these procedures with the support of foreign development partners.[159] But even the allocation of cases in individual courts by chairpeople could be done according to objective criteria. These could be subject-matter jurisdiction according to the specialization of the judge, or selection of venue as is already done unofficially in second instance courts (judges called *supervisors* hear appeals only against decisions of those lower courts which are situated in the territory assigned to them).[160]

A court chairperson still has the ability to reassign a case once it has been assigned to a judge (also not officially provided by law).[161] These practices provide a means for a court chairperson to manipulate the outcome of a case. As such, they should be regarded as no less violations of the right to a tribunal determined by law than the arbitrary

---

[158] See paras. 6.17 and 6.18 Instruction on Workflow Management in *Arbitrazh* Courts of the Russian Federation issued by the Supreme *Arbitrazh* Court (*Instruktsija po deloproizvodstvu v arbitrazhnykh sudakh Rossiiskoi Federatsii. Utverzhdena Prkazom Vyshego Arbitrazhnogo Suda Rossiiskoi Federatsii ot 25 marta 2004 goda No 27*), available at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=59876;div=LAW;mb=LAW;opt=1;ts=08542F62CB643259E02EF12377D938AC>.

[159] "Russian-American Judicial Partnership" Project (2000-2008) supported by USAID, "Russian-Canadian Judicial Partnership" Project (1999-2007) supported by CIDA.

[160] See the instructions on workflow management in the courts of general jurisdictions and *arbitrazh* courts.

[161] See for example *Juridicheskii forum "Territoriya prava"*, available at <http://www.terraprava.ru/showthread.php?666-%CF%E5%F0%E5%E4%E0%F7%E0-%E4%E5%EB-%EE%F2-%EE%E4%ED%EE%E3%EE-%F1%F3 % E4%FC%E8-%E4%F0%F3%E3%EE%EC%F3.>. See also: Open Letter of former Moscow City Court Judge Olga Kudeshkina, Onkrytoe pis'mo Prezidenty RF V. V. Putinu, available at <http://www.grani.ru/Society/Law/m.85956.html>.

transfers between courts which the Constitutional Court condemned.[162] Cases should not be transferred from individual judges except in accordance with clearly established procedures and for reasons established by law, such as conflict of interest, ill-health, etc.

As regards recusal, all three procedural codes (criminal, civil and arbitrazh) contain similar provisions on the necessity for a judge to disqualify him/herself from the case. Among such provisions are the following: if the judge has no jurisdiction to consider the case; if he/she is a party to the case or has been or may be summoned as a witness in the case; if he/she previously participated in the case as a party, representative of a party, expert, interpreter, investigator, prosecutor or court clerk; if he/she is related to a party, representative of a party, prosecutor or investigator; if he/she is a relative of a judge sitting on the same panel; if other circumstances exist giving reason to believe that the judge has a personal interest, direct or indirect, in the case or is otherwise biased.[163] On the same grounds a judge may be challenged by participants to the proceedings.[164] The manner in which the decision on the motion for recusal is taken depends on the type of proceedings. Within criminal and civil proceedings such motion is decided by the same judicial panel which is hearing the case. If the panel consists of three judges the decision is taken in the deliberation room in the absence of the judge in question. If the case is heard by a single judge he/she decides on the motion him/herself.[165] Arbitrazh procedure differs in terms of deciding on the challenge of a single judge. If a single judge is challenged the decision is taken by the chairperson of the relevant court or one of his/her deputies.[166]

VI. Judicial Conduct Complaint Process

There are no official procedures for complaints from other judges, lawyers and the public other than discipline and removal procedures. As to

---

[162] Ruling No. 9-P of 16 March 1998 (note 151).

[163] Article 61 Criminal Procedure Code, Article 16 Civil Procedure Code, Article 21 *Arbitrazh* Procedure Code.

[164] Article 64 Criminal Procedure Code, Article 19 Civil Procedure Code, Article 24 *Arbitrazh* Procedure Code.

[165] Article 65 Criminal Procedure Code, Article 20 Civil Procedure Code.

[166] Article 25 *Arbitrazh* Procedure Code.

unofficial procedures some court chairpeople collect compromising facts against unwanted judges such as oral (non-registered) complaints from other judges, lawyers or the public in order to use them if the opportunity arises. For example in practice it is possible to use this information in preparing the judge's character reference for promotion or awarding a new rank.[167] Sometimes a complaint against a judge received from a member of the public becomes a perfect reason for the chairperson to settle old scores with that judge. Existence of such practices could be caused by the fact that procedures for dealing with abovementioned complaints are informal and not officially regulated. Some formalizing could prevent abuse, but anyway this function should not be assigned to the court chairperson.

VII. Judicial Accountability: Discipline and Removal Procedures

1. Formal Requirements

Until 2001, the legislation of the Russian Federation did not provide for a mechanism of charging judges with disciplinary responsibility. Immunity from disciplinary responsibility was included in overall judicial immunity by the Law on the Status of Judges. This caused certain criticism which served as an occasion for legislators to make amendments. A new package of amendments introduced by President Putin in 2001 provided for the disciplinary responsibility of judges and the procedures for charging judges with such responsibility.[168]

Only the court chairperson or the appropriate body of the judicial community can submit an official application to initiate disciplinary proceedings (mainly on the basis of a complaint received).[169] Another way to initiate disciplinary proceedings is by complaint submitted by

---

[167] See Open Letter of former Moscow City Court Judge Olga Kudeshkina (note 161). See also I. B. Mikhailovskaya, Kvalifikatsionnye kollegii sudei kak organ vnutrisistemnogo upravlenija, available at <www.igpran.ru/public/publiconsite/Mihailovskaya.doc>.

[168] According to Article 12(1) Law on the Status of Judges as amended on 15 December 2001, a judge can be charged with disciplinary responsibility and receive a disciplinary penalty for committing disciplinary offences such as violation of the Law on the Status of Judges or the Code of Judicial Ethics (before 2004: the Code of Judicial Honour).

[169] Article 22(1) Law on the Bodies of Judicial Community.

individuals, governmental officials or governmental agencies to the Qualification Collegium directly.[170] Any individual, even not a participant in court proceedings, may submit a complaint to the Qualification Collegium. If the individual was involved in a car accident with a judge and was assaulted by the latter, or saw a judge drunk in a bar he/she may report this to the Qualification Collegium. All complaints, except for anonymous ones, containing information on the commission of a disciplinary offence by a judge, shall be accepted for further investigation by Qualification Collegium. Such procedure is certainly open to unjust and unfounded allegations, but it is up to the Qualification Collegium to conduct the necessary investigations and reject unfounded allegations.

The description of offences which may lead to disciplinary proceedings is very vague and gives room for arbitrariness.[171] As the practice of the Qualification Collegium suggests it could be a substantial breach or a pattern of breaches of procedural norms; improper conduct in court, especial rudeness towards the parties; improper conduct in everyday life; involvement in the kind of activities that are prohibited for judges, such as for example entrepreneurial activities, work as an arbitrator or adjudicator, membership of managerial bodies of foreign NGOs etc. In 1993 the Decision of the Supreme Court Plenum recommended that Qualification Collegia consider red tape in the disposal of cases as an activity discrediting honour and dignity of a judge which may lead to the termination of his judicial powers.[172] This decision gave Qualification Collegia an even wider discretion in the removal of those judges who became unwanted by the judicial community.

2. Disciplinary Proceedings

When a court chairperson submits a request for disciplinary proceedings against a judge he/she must already have investigated the allega-

---

[170] Article 22(2) Law on the Bodies of Judicial Community.

[171] See Article 12(1) Law on the Status of Judges (violation of the Law on the Status of Judges or the Code of Judicial Ethics adopted by All-Russia Congress of Judges).

[172] *Postanovlenije Plenuma Verkhovnogo Suda Rossiiskoi Federatsii ot 24 avgusta 1993 goda No. 7 "O porjadke rassmotrenija ugolovnykh i grazhdanskikh del sudami,"* available at <http://www.supcourt.ru/vscourt_detale.php?id=917>.

tions of misconduct him/herself.[173] Certainly there are doubts about the possibility of an investigation conducted by a court chairperson being unbiased and also collecting exculpatory information, but on the other hand the JQC would not accept the materials for consideration if there were no information in support of the allegations.[174] The Qualification Collegium may also carry out an additional investigation by forming special commissions, and if a court chairperson submits false information and his/her request is rejected by the Qualification Collegium this is not good for the reputation of the court chairperson him/herself. A court chairperson may manipulate personal references of the judge submitted to the Qualification Collegium and in many cases this is true, but the law provides a remedy for that – the Collegium may summon other witnesses to testify about the personality of the judge in question.[175] Such power of the court chairperson can be regarded as an additional lever with which to manipulate judges because in many cases the Qualification Collegium tends to support requests made by the court chairperson[176] and even if not it is possible for the court chairperson to frighten a judge by the initiation of disciplinary proceedings and keep him/her obedient. The Supreme Judicial Qualification Collegium acknowledged that in some cases court chairpeople did not want to initiate disciplinary proceedings even if the results of the investigation conducted indicated grounds for them.[177] The powers of a court chairperson to investigate complaints against a judge, to submit requests to conduct disciplinary proceedings and to be present at the Qualification Collegium's meetings where disciplinary matters are heard and give his/her explanations if necessary were appealed against at the Constitutional Court; however in the Decision of 28 February 2008 these pow-

---

[173] Article 22(1.1) Law on the Bodies of Judicial Community.

[174] See for example Y. V. Romanets, Obobschenije praktiki primenenija kvalifikatsionnymi kollegijami sudei zakonodatel'stva o privlechenii sudei k disciplinarnoi onvenstvennosti, available at <http://www.vkks.ru/ss_detale.php?id=1>.

[175] Article 22(1)(2) Law on the Bodies of Judicial Community.

[176] According to the Results of the activities of the Supreme Judicial Qualification Collegium and regional qualification collegia of judges in 2008 (*Rezul'taty dejatel'nosti Vyshei kvalificatsionnoi kollegii sudei Rossiiskoi Federatsii i kvalificatsionnykh kollegii sudei sub'ektov Rossiiskoi Federatsii v 2008 godu*) 367 judges were charged with disciplinary responsibility in accordance with the requests of court chairpeople and only 137 requests were rejected. Available at <http://www.vkks.ru/print_page.php?id=4713>.

[177] Romanets (note 174).

ers were declared not to be in contravention of constitutional provisions "because relevant legal provisions as they are designed [providing for further consideration of the materials by the Qualification Collegium, secret voting in the Qualification Collegium and reflecting the results of voting in the minutes] do not give room for court chairpersons to use this procedure in order to put illegal influence on the members of qualification collegiums and the judge him/herself and make judges dependent while administering justice."[178]

If the Qualification Collegium considers the materials submitted not to contain information in support of the allegations made it will reject such materials and not work on them further. There is always a question whether an accused judge should have the right to have his/her name cleared in a decision which acquits him/her but the mere proceedings in the Qualification Collegium make the case public as opposed to simple rejection and judges prefer the complaints to be dropped without the initiation of further proceedings.[179] When the complaint is dropped this already means that the judge's name is clean as there was no official accusation.

As a consequence of an individual complaint, the Qualification Collegium may conduct the investigation itself or send the complaint to the chairperson of the relevant court. If conducting direct investigations the Qualification Collegium forms a special commission consisting of some of its members, members of the council of judges, the Collegium's staff and public representatives. The formation of such a commission especially with the participation of public representatives is a guarantee against any possible bias of the Qualification Collegium. The latter may

---

[178] *Postanovlenije Konstitusionnogo Suda Rossiiskoi Federatsii ot 28 fevralja 2008 goda No. 3-P "O proverke konstitutsionnosti ryada polozhenii statei 6.1 i 12.1 Zakona Rossiiskoi Federatsii "O statuse sudei v Rossiiskoi Federatsii" i statei 21, 22 i 26 Federalnogo zakona "Ob organakh sudeiskogo soobschestva v Rossiiskoi Federatsii" v svyazi s zhalobami grazhdan G.N.Belusovoi, G.I.Ziminoi, Kh.B.Sarkitova, S.B.Semak i A.A.Filatovoi"*, Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii, No. 3, 2008.

[179] See for example the interview with the Chairman of the Qualification Collegium of Judges of Primorsky territory Igor Popov "Not every offence even if committed shall inevitably lead to the initiation of disciplinary proceedings. If the offence is insignificant, does not affect human rights, the adequate measure will be just discussing the offence among the judges of particular court". I. Popov, Kadrovoi problem v sudeiskom soobschestve net – suschestvuet lish' problema vybora dostoineishikh is dostoinykh, Interviyu 30 April 2008, available at <http://deita.ru/?news,,,,109849>.

also involve other judges, members of court staff, Judicial Department staff, law enforcement officers and civil servants of other governmental agencies in the investigation.[180] The relevant provision does not define how many members, which branches of powers etc. shall be represented in the commission – it means that those representatives could be involved in the verification of certain information and does not necessarily mean that they would become members of the commission. As regards public representatives the amendment on the formation of such a commission was introduced in December 2008[181] and no interpretation has so far been given of who could be regarded as such a representative.[182]

Materials on alleged disciplinary offences committed by a judge are considered at a meeting of the Qualification Collegium of the appropriate level (the Supreme Qualification Collegium for judges of the RF Supreme Court and Supreme *Arbitrazh* Court, and a regional Qualification Collegium for all other judges). The head of the Collegium decides on the people to be invited to and heard during the meeting. The decision on which people to invite is completely within the discretion of the Qualification Collegium Chairperson. Court chairpeople and deputy chairpeople, the leadership of the Judicial Department at the Supreme Court and its branches, chairpeople and deputy chairpeople of relevant councils of judges and other qualification collegia have a right to be present at the meetings and express their opinion on the subject matter but have no right to participate in the voting.[183] The decision on the alleged violation and appropriate sanctions is taken by more than half of the members present. A decision on the removal of a judge must be taken by two-thirds of the members present. This goes for regional and supreme Qualification Collegia. Separate minutes on every case

---

[180] Article 27(2) Regulations on the Order of Work of Qualification Collegiums of Judges.

[181] *Federalny zakon ot 25 dekabrja 2008 goda No. 274-FZ "O vnesenii izmenenii v otdelnyje zakonodatelnye akty Rossiiskoi Federatsii v svyazi s prinjatiem Federalnogo zakona "O protivodeistvii korruptsii"*, Sobranije zakonodatelstva Rossiiskoi Federatsii, 29 December 2008, No. 52(1), st. 6229.

[182] It is possible to conclude that it should be people other than public representatives who are members of the Qualification Collegium, as they are named separately. The practice suggests that it could be members of regional public chambers (consultative bodies formed of civil society representatives in every region and on the federal level) or law scholars.

[183] Article 21 Law on the Bodies of Judicial Community.

heard shall be prepared and available for both the judge in question and the person who made the request in three days and shall contain all necessary information on the course of the meeting.[184]

3. Judicial Safeguards

The judge against whom the allegations were made has a right to review the materials collected beforehand and submit his/her objections and comments. Such judge has a right to submit a motion on the witnesses he/she would like to invite to the hearing and to be present during the meeting and give his/her explanations. The judge in question also has the right to be represented including by defence counsel.[185] The judge shall be duly informed of the date and time of the meeting within the time necessary for him/her to appear at the meeting.[186] The absence of the judge or his/her representative who has been duly informed of the time and place of the meeting does not preclude the hearing proceeding in his/her absence. Procedures in a Qualification Collegium are mainly public except for the voting. The Qualification Collegium meeting may be closed to the public by a decision of the Qualification Collegium taken by a simple majority of votes if personal information or state secrets are to be revealed. The meeting may be also closed on the judge's motion or the justified motion of the Prosecutor General where the issue of possible criminal responsibility of a judge could be discussed. In any case the decision is pronounced publicly and then published on the website of the relevant Collegium.[187]

Decisions taken by regional Qualification Collegia may be appealed to the Supreme Qualification Collegium or to the court of general jurisdiction at the regional level. Both ways are used – it is up to the complainant, and mainly depends on the confidence the judge has in the bodies of the judicial community and the courts of general jurisdiction. A decision of the Supreme Qualification Collegium is appealed to the RF Supreme Court. A decision on the suspension or termination of ju-

---

184 Article 22(3) Law on the Bodies of Judicial Community.

185 Article 16(4) Regulations on the Order of Work of Qualification Collegiums of Judges.

186 Article 28(3) Regulations on the Order of Work of Qualification Collegiums of Judges.

187 Article 4 Regulations on the Order of Work of Qualification Collegiums of Judges.

dicial powers by a regional Qualification Collegium, charging the judge with disciplinary responsibility, termination of the allowances and the benefits of his/her retirement may be appealed by the judge in question to the RF Supreme Court directly. Appeal must be submitted within ten days after the receipt of a copy of the Collegium's decision by the judge in question.[188]

Since 12 March 2010 it has been possible to appeal the decisions of qualification collegia on the termination of judicial powers by reason of the commission of a disciplinary offence to the newly established Judicial Disciplinary Tribunal.[189] The Chairmen of the Supreme Court and Supreme *Arbitrazh* Court enjoy the right to appeal to this Tribunal against the decisions of relevant qualification collegia by which their requests for termination of judicial powers by reason of the commission of a disciplinary offence were rejected.[190] This new body is envisaged as an independent tribunal on disciplinary matters.[191] It is formed of three judges of the Supreme Court and three judges of the Supreme *Arbitrazh* Court. The chairmen and deputy chairmen of both courts and members of the Supreme Judicial Qualification Collegium cannot be members of the Tribunal.[192] Only judges aged between 40 and 65 with no fewer than five years' service in the relevant supreme court can be nominated to the Tribunal.[193] Judges for the Tribunal are delegated at the relevant Plenums of the supreme courts on a competitive basis by secret ballot.[194] It may seem that the introduction of this tribunal is a new step on the way to strengthening judicial independence. For a long

---

188 Article 31 Regulations on the Order of Work of Qualification Collegiums of Judges.

189 *Federalny zakon ot 9 nojabrya 2009 goda No. 246-FZ "O vnesenii izmenenii v otdelnye zakonodatelnye akty Rossiiskoi Federatsii v svyazi s sovershenstvovanijem zakonodatel'stva o disciplinarnoi otvetstvennosti sudei"*, Sobranije zakonodatelstva Rossiiskoi Federatsii, 9 November 2009, No. 45, st. 5264.

190 Article 26 Law on the Bodies of the Judicial Community as amended in November 2009. The provision came into force on 12 March 2010.

191 Law on the Judicial Disciplinary Tribunal of 9 November 2009 (*Federalny konstitsionny zakon ot 9 nojabrya 2009 goda No. 4-FKZ "O Disciplinarnom sudebnom prisutstvii"*), Sobranije zakonodatelstva Rossiiskoi Federatsii, 9 November 2009, No. 45, st. 5261. Came into force on 12 March 2010.

192 Article 2 Law on the Judicial Disciplinary Tribunal.

193 Article 3 Law on the Judicial Disciplinary Tribunal.

194 Article 4 Law on the Judicial Disciplinary Tribunal.

time law scholars fought for the creation of such an institution but the idea was that it should replace qualification collegia with regard to disciplinary matters, relieving the collegia of such responsibilities. Establishment of the tribunal in its existing capacity was mainly done for the Chairman of the Supreme *Arbitrazh* Court to feel satisfied as he was never happy about the need for *arbitrazh* court judges to appeal against qualification collegia decisions to the courts of general jurisdiction. Anyway the Tribunal has already been operating for more than a year, and in 2010 has considered 32 cases, among which ten complaints by judges and one complaint by a court chairman against qualification collegia decisions on the early termination of judicial powers were upheld and 21 rejected. During the first six months of 2011 the Tribunal has considered 15 cases among which six complaints by judges were upheld.[195]

4. Sanctions

There are only two sanctions which may be used by Qualification Collegia – admonition and early termination of judicial powers. The decision on termination of judicial powers may be taken only upon the request of the court chairperson or a body of the judicial community.[196] These sanctions shall be imposed by the appropriate Qualification Collegium. Admonition is oral and is also reflected in the Collegium's decision. After that the admonition is entered into the judge's personal record. There are no rules on how many admonitions may be pronounced before the (same or other) violation may lead to a termination of powers. The Law only suggests that if in the course of one year after the disciplinary sanction is imposed the judge does not commit a new disciplinary offence, he/she shall be considered as if no disciplinary sanction had been imposed.[197] The list of sanctions is very short. The Regulations on the Collegium's activities only contain a provision according to which admonition shall be imposed if the disciplinary of-

[195] See Disciplinary Tribunal website, available at <http://dsp.sudrf.ru/>.

[196] Such bodies as the All-Russia Congress of Judges, conferences of judges of the regional entities, meetings of all judges within the individual court, the Council of Judges of the Russian Federation, councils of judges of the regional entities, the Supreme Qualification Collegium, qualification collegia of the regional entities are regarded as bodies of the judicial community and any of them can make a request.

[197] Article 12(1)(2) Law on the Status of Judges.

fence is not serious enough for early termination of judicial powers.[198] The absence of a fully fledged scale of sanctions does not allow the Qualification Collegium to assess the gravity of a disciplinary offence and the judge to recognize this gravity or seriousness and understand whether he/she is close to the termination of powers.

This position was recently confirmed by the RF Constitutional Court in its judgement of 20 July 2011 on the application of Angelica Matiushenko, former judge of Preobrazhensky district court of Moscow. In this judgement the Constitutional Court pointed out the necessity to broaden the list of disciplinary sanctions for judges, and to clarify the nature of disciplinary offences and grounds for charging judges with disciplinary responsibility.[199] A respective draft law on broadening the list of sanctions was recently introduced to the State Duma.

The other difficult issue here is that any violation of the Code of Judicial Ethics may be regarded as a disciplinary offence.[200] In the Russian context such possibility gives rise to abuse and arbitrariness especially on the part of court chairpeople. Any violation or even alleged violation of the Code of Judicial Ethics by a judge gives a court chairperson a good opportunity for the manipulation of and putting pressure on that judge.

5. Practice

The Russian disciplinary system is so open to abuse because the grounds for charging a judge with disciplinary responsibility were defined very broadly, as were the procedural rules for the Qualification

---

[198] Article 28(8) Regulations on the Order of Work of Qualification Collegiums of Judges.

[199] *Postanovleniye Konstitutsionnogo Suda Rossiiskoi Federatsii ot 20 ijulya 2011 goda po delu o proverke konstitutsionnosti polozhenii punktov 1 i 2 statii 3, punkta 1 statii 8, statii 12.1 Zakona Rossiiskoi Federatsii "O statuse sudei v Rossiiskoi Federatsii", statei 19, 21 i 22 Federalnogo zakona "Ob organakh sudeiskogo soobschestva v Rossiiskoi Federatsii" i statei 1-4, 7 Kodeksa sudeiskoi etiki v cvyasi s zhaloboi grazhdanki Matiushenko A.V.* Available at <http://www.ksrf.ru/News/Pages/ViewItem.aspx?ParamId=894>.

[200] Article 12(1.1) Law on the Status of Judges "For committing a disciplinary offence [a violation of the norms of the present Law, as well as of the provisions of the Code of Judicial Ethics approved by the All-Russia Congress of Judges], the judge, with the exception of the judges of the Constitutional Court of the Russian Federation, may be charged with the disciplinary responsibility."

Collegia's hearings. This gave room for further interpretation and clarification of the procedure by internal rules of the judicial community, and the Regulations on the Work of Qualification Collegia were adopted by the Supreme Qualification Collegium in a way convenient for the judicial community. Further grounds for the arbitrary dismissal of judges are insufficiently transparent proceedings in qualification boards competent to dismiss judges.[201] The voting in Qualification Collegia is secret and till recently justifications for the decision were never published; sometimes the only justification was "according to the results of the voting".[202] In June 2009 the Supreme Court Chairman and the Head of the Supreme Qualification Collegium described to the Special Rapporteur of the Committee on Legal Affairs and Human Rights of the Council of Europe's Parliamentary Assembly that the poor performance of the judge, such as problems with delays, as well as "insufficient quality (such as several judgments having been quashed by a higher court)" is the main ground for disciplinary proceedings.[203] As such performance is mainly assessed by the court chairperson and also by a higher court chairperson in terms of the overruling rate, it provides court chairpeople with substantial levers to manipulate judges and keep them subordinate.

The statistics of the Qualification Collegia's performance show a steady increase in the number of judges charged with disciplinary responsibility. While in 2003 there were only 292 judges charged with disciplinary responsibility (all in the courts of general jurisdiction),[204] in 2004 there were already 323 (296 in the courts of general jurisdiction and 27 in the

---

[201] See P. Solomon Jr., Assessing the Courts in Russia: Parameters of Progress under Putin, 16 Demokratizatsiya 63 (2008).

[202] See for example Decision of the RF Supreme Court of 4 October 2005 in *Fursov v. Supreme Qualification Collegium of Judges (Reshenije Verkhovnogo Suda Rossiiskoi Federatsii ot 4 oktyabrja 2005 goda No. GKPI05-1119 po zajavleniju Fursova D.A.)*, available at <http://www.vsrf.ru/stor_text.php?id=7294992>.

[203] Report of June 2009 by the Special Rapporteur of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (PACE), Doc. 11993 Provisional version – as adopted by the Committee on 23 June 2009, para. 81, available at <http://www.docstoc.com/docs/7701039/COE-Report--Russian-Judicial-Reform>.

[204] *Obzor rezultatov dejatelnosti kvalifikatsionnykh kollegii sudei RF za 2003 god*, available at <http://www.vkks.ru/ss_detale.php?id=16>.

arbitrazh courts).[205] According to the report of the Supreme Qualification Collegium's Head to the VII All-Russia Congress of Judges,[206] in the years 2005-2008 1,514 judges were charged with disciplinary responsibility; of these the powers of 286 were terminated early (seven by the Supreme Qualification Collegium).

There are many examples indicating an abuse of disciplinary procedures, especially by court chairpeople, but here are just some of them: a former judge at the Moscow City Court, Mr. Sergei A. Pashin, a renowned legal expert who was in charge of judicial reform in the Presidential Administration under President Boris Yeltsin, was himself twice fired and reinstated as a judge. The first time he was accused of non-observance of procedural rules when he, being in chambers for the preparation of a judgment, visited a conference during the weekend and allegedly broke the secrecy of deliberations, and the second time he was accused of commenting on the case of another judge on the radio. The real grounds for his dismissal were his independence and 8% acquittal rate.[207] On both occasions he was reinstated by the Supreme Court which declared that the disciplinary procedures had been misused by the Moscow City Qualification Collegium and there were no grounds for early termination of his powers. The judge in question maintains that he owes his reinstatements to the fact that then Russian state agent before the European Court of Human Rights (ECtHR) had warned the authorities that an application to that Court by the dismissed judge might well succeed.[208]

Another former judge, Mrs. Gratchova, had worked as a judge for 19 years and had always had excellent professional assessments, which is why she was about to be promoted to the rank of deputy chairperson of her court. She had declared a local election void for several violations of the law. During the hearing, she had been threatened by a lawyer for the winning candidate that she would have "great problems."[209] A new

---

[205] *Obzor rezultatov dejatelnosti kvalifikatsionnykh kollegii sudei RF za 2004 god*, available at <http://www.vkks.ru/ss_detale.php?id=130>.

[206] Available at <http://www.vkks.ru/second.php?columnValue=6>.

[207] See Report by the Special Rapporteur of the Committee on Legal Affairs and Human Rights of the PACE (note 203). See also interview of Sergei Pashin to Human Rights Watch, available at <http://www.hrw.org/russian/reports/russia/1999/torture/topicb3.html#footnote244>.

[208] Id.

[209] See Report by the Special Rapporteur of the Committee on Legal Affairs and Human Rights of the PACE (note 203).

chairman appointed to her court shortly thereafter began *harassing* her and withdrew his predecessor's support for her promotion. He also began to overburden her with criminal cases (in which she had no experience), in addition to her existing load of civil cases. Health problems ensued, as well as a trumped-up charge brought by the lawyer who had previously threatened her, concerning a small reward of 3,000 roubles (76.12 EUR) she received from the Mayor of the town of Korolyov for her hard work during the elections.[210] She was accused of receiving remuneration from sources other than scientific work or teaching in violation of the Law on the Status of Judges. She felt that the procedure concerning her case in the Qualification Collegium was grossly manipulated.[211] The Head of the Moscow Region Qualification Collegium admitted in her report to the regional conference of judges in 2008 that many of her colleagues thought that the sum was too small and the offence not grave enough to be punished by the termination of judicial powers, but she insisted that the judge in question was experienced enough to understand that it was prohibited and accepted the reward intentionally.[212] After refusing an offer to allow her to resign at her own request (thus maintaining her pension rights), the judge was finally dismissed. After she lost all her internal appeals against the dismissal, she has now lodged an application with the ECtHR. Meanwhile, according to the dismissed judge, the new chairperson of the district court appointed in 2008 has severely criticized the methods used by the former chairperson of her court.[213]

A final example is the dismissal of Judge Kudeshkina in 2004 for making a series of controversial statements.[214] Her dismissal was confirmed by the Supreme Qualification Collegium and by the Supreme Court. But on 24 February 2009 in *Kudeshkina* v. *Russia* the ECtHR found a

---

[210] Id., para. 72.

[211] Id., para. 73.

[212] Available at <http://www.mosoblsud.ru/ss_detale.php?id=1182&columnValue=5&CATEGORY_2>.

[213] Report by the Special Rapporteur of the Committee on Legal Affairs and Human Rights of the PACE (note 203).

[214] For example, she called the Moscow City Court, where she served as a judge, "an institution for settling political, commercial and other scores."

violation of Article 10 European Convention on Human Rights which guarantees freedom of expression.[215]

According to the expert opinion submitted by the RF Institute for Legislation and Comparative Studies to the Constitutional Court in connection with the case of Angelica Matiushenko "the Qualification Collegia may dismiss one judge but give admonition to the other for commission of the same offence."[216] In private conversation with the *Kommersant* newspaper correspondent one of the Constitutional Court judges admitted that "[j]udges could be persecuted or, to the contrary, protected by the Qualifcation Collegium under the pressure exerted upon its members by court chairpersons or Presidential representatives in the Collegium whose presence itself is questionable in terms of judicial independence. If the Qualificiation Collegia members were not afraid of losing their status and privileges they would render other decisions", he said.[217]

It is obvious that disciplinary matters are by nature so different from the task of selecting candidates for judicial office that it is advisable to separate this function from those involved in the recommendation of candidates for judicial office. Since the independence of judges in office can easily be at stake when confronted with allegations of misbehaviour, the body which decides disciplinary matters should consist of judges alone. The disciplinary and ethical assessment of the work of a judge requires the experience of judges. It also requires a higher degree of legal protection.

VIII. Immunity for Judges

Article 122 Constitution provides that judges possess immunity and criminal proceedings may be brought against a judge only in accordance with the procedure established by federal law. This provision could be understood as meaning that as a starting point a judge has immunity for both official and non-official actions, if nothing else is stated

---

[215] ECtHR, *Kudeshkina* v. *Russia*, Judgment of 26 February 2009, available at <http://hudoc.echr.coe.int/hudoc/>.

[216] A. Poushkarskaya, Konstitusionny Sud provel raboty nad oshibkami sudei i ne nashel iz'yanov v pravilakh ikh uvol'neniya, Kommersant, 21 July 2011, No. 132. Available at: <http://www.kommersant.ru/doc/1682771>.

[217] Ibid.

in federal laws. The current version of the Law on the Status of Judges further makes it clear that a judge cannot be charged with any responsibility for his/her opinion or decision made while administering justice if there is no sentence in legal force which establishes his/her guilt of an abuse of his/her powers.[218] In 1992, when this Law had just been adopted, it provided for complete judicial immunity for both official and non-official actions from any liability except the possibility of civil and criminal liability in special circumstances, and then only after receiving the consent of the Qualification Collegium. At that time the Law clearly stated that a judge could not be charged with disciplinary or administrative responsibility. A judge could be indicted only by the Prosecutor General or a person acting in his/her capacity after the appropriate consent of the Qualification Collegium had been obtained.

However, on 18 December 2001 President Putin signed a package of measures which formed a new cornerstone in the relationship between the judiciary, governmental institutions and the public. The measures consisted of amendments to three laws: On the Judicial System, On the Constitutional Court and On the Status of Judges. Despite strong opposition from the judiciary, the broad immunity from prosecution previously enjoyed by judges has been limited. According to the initial proposal judges could be indicted on criminal charges or face administrative sanctions for both official and non-official actions demonstrating constituent elements of a relevant offence at the request of the Prosecutor General[219] following the decision of a panel of three Supreme Court judges or judges of a regional level court of general jurisdiction, depending on the position of the judge in question. After some debate and Putin's intervention it was agreed to provide judges with additional protection where criminal charges were brought against them by requiring the additional (to the panel of three judges') consent of the relevant Qualification Collegium to any charges (also for both official and non-official actions).[220] This additional layer involves judges' peers in protecting them from unfounded harassment by the ex-

[218] Arts. 10 and 16 Law on the Status of Judges.

[219] With the creation of the Investigative Committee of the Prosecutor's General Office in 2007 the Chairman of the Investigative Committee was charged with making requests to indict a judge on criminal charges.

[220] The argument of those opposing the proposal was that the judicial community is already involved in the decision-making process by means of the panel of three judges, so there is no need for the participation of the qualification collegia.

ecutive. For administrative sanctions, however, the order remained as previously proposed (at the request of the Prosecutor General[221] following the decision of the panel of three Supreme Court judges or judges of a regional level court of general jurisdiction depending on the position of the judge in question). Qualification Collegia are not involved in charging judges with administrative responsibility. As a result judges received more protection from criminal charges than earlier (by the introduction of a panel of three judges), but it was applicable more broadly, and not just in exceptional circumstances. This two-tier system of protection was questioned on several occasions especially by the Office of the Prosecutor General, but the answer of the Supreme Qualification Collegium representatives was always as follows – the panel of three judges verifies the documents submitted by the prosecution to validate the reasons for bringing criminal charges, but Qualification Collegia work with the judge him/herself and are capable of recognizing a trumped-up case against a judge maintaining his/her principal (compelling) stand on the judgment. However the executive is still fighting for the simplification of the procedures described above. On 29 January 2010 the Duma adopted in its first reading amendments to Article 16 Law on the Status of Judges introduced by the President according to which criminal charges may be brought against a judge following a decision of the Constitutional Court. The consent of the relevant Qualification Collegium of Judges would not be required.[222] But after the first reading the concept of the draft changed dramatically, and in the final version which was signed into law on 29 March 2010[223] the panel of three judges was excluded and the previous system of charging judges with criminal responsibility was restored.

As regards the civil liability of judges, they are absolutely immune to it and if any civil damage occurs as a result of the illegal activities of a judge when considering a criminal case (illegal imposition of detention as a preliminary restraint measure, illegal conviction) it is compensated

---

[221] *Kudeshkina* v. *Russia* (note 215).

[222] See Gosduma uprostila privlechenije k otvetstvennosti sudei, available at <http://www.vz.ru/news/2010/1/29/371015.html>.

[223] *Federalny zakon ot 29 marta 2010 No. 37-FZ "O vnesenii izmenenii v statiju 16 Zakona Rossiiskoi Federatsii "O statuse sudei v Rissiiskoi Federatsii"*, Sobranije zakonodatel'stva Rosiiskoi Federatsii, 10 April 2010, No 14, st. 1557.

by the State (from the federal budget) regardless of the judge's guilt.[224] Any other injury inflicted in the course of the administration of justice is compensated by the State only if inflicted intentionally and the judge's intention is proven by the court judgment.[225] Recently, under pressure from the Council of Europe and the ECtHR which delivered its first pilot judgment against Russia, a Law on compensation for violation of the right to a trial in a reasonable time was adopted.[226] Under this Law a person is entitled to monetary compensation if his/her right to a trial in a reasonable time or the execution of a judgment in a reasonable time is violated by state officials (judges, investigators, bailiffs). In this case compensation is also paid by the State out of the federal or regional budget, but financial authorities then have a right to recourse against the relevant official.

IX. Associations of Judges

There are no official associations of judges in the RF. As compared to the countries of Western Europe and USA Russia does not have the diversity of judicial associations. Only the bodies of the judicial community (see above) which are sometimes called "judicial trade unions" could be named as the most powerful judicial association. Recently the Russian Public Chamber[227] initiated the setting up of an association of judges involved in juvenile justice. Since juvenile justice experiments are introduced in only a few regions, less than 1% of judges will be members of the association.

---

[224] Article 1070(1) Civil Code of the Russian Federation (*Grazhdansky kodeks Rossiiskoi Federatsii. Vtoraya chast*) Sobranje zakonodatelstva Rossiiskoi Federatsii, 29 January 1996, No. 5, st. 410.

[225] Article 1070(2) Civil Code.

[226] *Federalny zakon ot 30 aprelya 2010 No. 68-FZ "O kompensatsii za narousheniye prava na sudoproizvodstvo v razoumny srok ili prava na ispolnenije sudebnogo akta v razoumny srok*, Sobranje zakonodatelstva Rossiiskoi Federatsii, 15 May 2010, No. 18, st. 2144

[227] The Public Chamber (*Общественная палата*) is a state institution with 126 members which was suggested by Putin in September 2004, following the Beslan school hostage crisis. It was created in 2005 to analyze draft legislation and monitor the activities of the parliament, government and other government bodies of Russia and its Federal Subjects; see <http://www.oprf.ru/>.

There are associations in which lawyers including judges organize themselves voluntarily. The biggest one is the All-Russia Public Organization "Association of Russian Lawyers", created in December 2005. President Medvedev heads the Board of Trustees for the Association in his capacity as a lawyer, as he was delegated to this Board before the elections. Several high-ranking judges representing both the system of courts of general jurisdiction and *arbitrazh* courts are members of the Central Council of the Association. The main objective of the Association is to consolidate the Russian legal community in order to promote legal reforms in Russia.[228] As the Association has branches in all the regions (about 150 offices), it has recently established a regional network of consulting offices providing free legal aid to citizens. Moreover, there are smaller public associations at regional level, like for example the Moscow Lawyers' Club[229] founded in 1995. The main objective of the Club is to promote legal reforms in Russia, and support the improvement of the judicial system and law enforcement agencies. It is constantly organizing discussions and exchanges of views on issues of public significance.

The Club also issues a magazine "New Justice" and awards an honorary prize "Themis" for contribution to the development of the democratic society and the rule of law (not only in Russia but abroad as well). None of these associations has real influence in practice on matters concerning the judiciary. The Association of Russian Lawyers is the most powerful as it is an all-Russia association close to the President but its sphere of interests currently lies mainly in raising standards of legal education etc. The budgets of both associations consist of membership fees, contributions by the founders and charitable donations, and they are big enough to fulfil their objectives.

X. Resources

In Russia the financial independence of the judiciary used to be and still is a serious problem. While the Constitution declares that courts shall

---

[228] According to its Charter (available at <http://www.alrf.ru/content/about/docs>) the Association is involved in legal drafting and legal drafts assessment, support to legal education, the explanation of current legislation to the citizens, and delivers information in electronic and printed media and electronic networks. It is also trying to raise the standards of legal education in Russia.

[229] See <http://www.femida.ru/club/>.

be financed solely out of the federal budget and financing shall ensure the conditions for the complete and independent administration of justice in accordance with federal law,[230] this constitutional provision has been difficult to implement in Russia.

At the beginning of the 1990s the courts were dramatically underfinanced *inter alia* because of the sequestration mechanism, and the condition of their buildings reflected their lowly place in the hierarchy of governmental agencies. The situation changed when the Vice-Chairman of the RF Supreme Court, Vladimir Radchenko, proposed at the Council of Judges' meeting that the budget item on court financing be protected.[231] Subsequently the Federal Law "On Court Financing in the Russian Federation"[232] was adopted on 10 February 1999, providing for the realization of the constitutional provision on direct federal financing of courts and protecting the courts' budget from sequestration. Several additional guarantees provided in this law include the financing of courts according to the standards authorized by the federal law and assignment of a separate budget line to each of the branches of judicial authority; the interaction of the RF Government in the course of the development of the draft court finance budget with the chairpeople of the RF Constitutional Court, the Supreme *Arbitrazh* Court, the Supreme Court and the Council of Judges; the opportunity for court representatives (Council of Judges members) to participate in the discussion on the federal budget in the Federal Assembly, and the requirement that the All-Russia Congress of Judges or the Council of Judges consent to any reduction in the size of the annual budget allocated for the financing of the courts. It is necessary to point out that, since the passing of this law, the courts are no longer suffering from the same lack of finance as in 1990s, at least the basic needs of the judiciary are satisfied and, moreover, some governmental targeted programmes are approved in order to provide for the additional allocation of funds to cover most urgent needs of the judiciary.[233] Nowadays, in these times of global fi-

---

[230] Article 124 Russian Constitution.

[231] See the Resolution of the RF Council of Judges of 31 October 1997 (*Postanovlenije Soveta Sudei Rossiiskoi Federatsii ot 31 ortyabrja 1997*), available at <http://www.ssrf.ru/ss_detale.php?id=21>.

[232] *Federalny Zakon "O finansirovanii sudov v Rossiiskoi Federatsii" No. 30-FZ*, Sobranije zakonodatel'stva Rossiiskoi Federatsii, 10 February 1999, No. 7, st. 877.

[233] Federal targeted programs for the development of judicial system in Russia 2002-2006 and 2007-2011.

nancial crisis the Law is again of great significance as it still provides guarantees against reductions in the size of the judicial budget.

The most dramatic and significant contribution by the Putin government to judicial reform lay in the dramatic increase in the funding of the courts, a process initiated in the Federal Targeted Programme for the Development of the Judicial System, 2002-2006[234] (more than 44 billion roubles (1.116 billion EUR)) and continued in the analogous programme entitled "Development of the Court System for 2007-2011".[235] The new level of spending did much to improve the courts. The first Programme supported significant expansion in the staff of courts of general jurisdiction, with the establishment of the position of clerk or judicial assistant; the repair of many court buildings; the provision of more bailiffs to improve court security and steps toward the computerization of the courts. The second (current) programme continues elements of the first one (improvement of court buildings; computerization), but it adds to them a battery of measures to make courts more open and transparent and raise public trust in them.[236] With the introduction of the FTPs mentioned above, the situation as regards court premises also started to change and many new court buildings were erected. As those results were assessed by the VII Congress of Judges in its Resolution of 4 December 2008,[237] the FTP had improved significantly the material and technical maintenance of federal courts including the construction and renovation of court buildings and premises and their computerization.

But the VII Congress of Judges in the same Resolution emphasized that court finance is still insufficient. The budget allocation for the judicial system in the Budget Law for 2009 with Perspectives for 2010-2011 amounts to only 70-80% of the budget request submitted. Some budget lines, such as social guarantees, communication services, material and technical maintenance and the maintenance of information systems, are covered only as to 35-40% and future increases in tariffs of natural mo-

---

[234] *Federalnaya tselevaya programma "Razvitie sudebnoi sistemy v Rossiiskoi Federqatsii 2002-2006", s izmeneniyami, vnesennymi Postanovleniyem Pravitelstva RF No. 49 ot 6 fevralya 2004* (note 136).

[235] *Postanovltniye Pravitelstva Rossiiskoi Federatsii No. 583 ot 21 sentyabrya 2006 ob odobrenii Federal'noi Tselevoi Programmy "Razvitiye sudebnoi sistemy Rossiiskoi Federatsii 2007-2011"* (note 138).

[236] See *infra* C. II. 4. Public Access.

[237] *Postanovleniji VII Vserossiiskogo S'ezda sudei Rossiiskoi Federatsii ot 4 dekabrya* (note 31).

nopolies (communications, electricity) are not taken into account. Many court hearings, especially in civil cases, are still held in judges' chambers which do not allow the public to be present. And, finally, Russia remains a world based on exchange relationships and, even with better financial support, most chairs of courts need to have good relations with local officials and notables. Informal practices still facilitate the occasional intervention of powerful persons in cases which matter to the courts.[238]

The situation is even worse with the Justices of Peace. Current laws regulating JPs provide that the federal government is responsible for their salaries, while the respective regions are responsible for all other costs, such as of accommodation, equipment, staff support and communications.[239] As not all the regions are equally developed and their budgets differ a lot JPs are basically faced with two situations – in the regions which are subsidized JPs may have obsolete equipment, poor premises, lack of communication facilities; in the rich regions staff members may receive much higher salaries than the judges.[240] Because of that there are proposals to amend the Law on the JPs to make all JP-related expenditures a federal responsibility.

C. Internal and External Influence

I. The Separation of Powers

The Chapters of the Russian 1993 Constitution describing the powers of the legislative and executive branches do not contain any provisions which can be interpreted as allowing those branches to interfere with the administration of justice. Furthermore, Arts. 118 and 120 Constitution[241] guarantee that justice shall be administered only by courts of law and judges shall be independent and obey only the Constitution and federal law. So according to the law judges are not accountable to any state bodies or officials.

---

[238] See Solomon Jr. (note 201).

[239] Article 10 Federal Law on Justices of the Peace.

[240] See interview with the Minister of Justice of Tatarstan, Sudy mirovye – problemy obshestvennye, available at <http://www.rt-online.ru/articles/244_25320/59557/>.

[241] Russian Constitution.

Since President Putin started to make his "administrative vertical" stronger, more and more evidence has been found that the Russian judicial authorities are becoming increasingly subordinated to the Kremlin administration and correspond less and less to the international standards of independence of judges.[242] An example is the 2001 package of measures dealing with the introduction of disciplinary responsibility for judges, limiting their broad immunity from prosecution, and limiting the tenure of court chairpeople in all courts except the Constitutional Court to two consecutive six-year terms. These amendments were mainly aimed at introducing another impediment to judicial independence and made judges even more dependent on the court chairpeople and the executive. Passed in the year 2002, the Federal Law on the Bodies of Judicial Community established a new procedure for the formation of qualification collegia, adding public representatives and one representative of the President into their structure. President Putin, in a speech to the V All-Russia Congress of Judges, warned that "the independence of judicial power must not be transformed into the personal independence of judges."[243] He did not trust the Qualification Collegia and wanted to have more control over the judiciary.

Dmitry Medvedev from the very beginning of his political career demonstrated his commitment to legal and judicial reform. Even before the elections in his remarks at the Krasnoyarsk Economic Forum in February 2008 he said that "In the coming four years, the key priority of our work will be to ensure genuine independence of the judicial system from the executive and legislative [branches of] power, and secure support for its professional work, as well as justice and equal access to justice for everyone".[244] Sworn in as President in May 2008 Medvedev's first moves while in office were cabinet and administration reappointments which highlighted a new focus on tackling economic crime and revamping the judicial system. He made several attempts to improve the situation concerning illegal influences on the judiciary, for example he fired the former Head of the Human Resources Department of the Presidential Administration, Victor Ivanov, after information came to

---

[242] See Open Letter of former Moscow City Court Judge Olga Kudeshkina (note 161).

[243] See Vystuplenije Prezidena Rossiiskoi Federatsii V.V.Putina na V Vserossiiskom s'ezde sudei 27 nojabrya 2000 goda, available at <http://archive.kremlin.ru/appears/2000/11/27/0000_type63374type63376type82634_28419.shtml>.

[244] Sudebnaya sistema Rossii dolzhna poluchit nezavisimost ot vlastei, available at <http://www.regnum.ru/news/957748.html>.

light about his staff manipulating judicial appointments, but several uncoordinated efforts[245] could not influence the situation significantly so the results of rather segmental actions mentioned above were somewhat mixed.

II. Judgments

1. Basis

According to Article 120 Russian Constitution judges shall be independent and subject only to the Constitution and the federal law. All procedure codes contain a provision stating that all judgments shall be delivered based on the body of evidence presented and that such evidence shall be evaluated according to the law and the judge's conscience.[246] The Law "On the Status of Judges" and the various procedure codes provide established procedures for the administration of justice, and thus constitute one of the guarantees of judicial independence in decision-making. The procedure codes prohibit any influence being brought on the judge's decision in a case.[247] The procedures for examination of a case by a judge and for writing the judgment in the privacy of the deliberation room alone or in the presence only of the other judges considering the case are among such protections from direct influence. The procedural rules also limit the scope of review performed by higher courts. No other court can remove a case from a trial court until the trial is over and judgment has been delivered. The RF Criminal Code provides for criminal responsibility for obstruction of justice. Obstruction of justice by a government official in the form of giving judges directions is regarded as an aggravating circumstance.

At the same time a tradition preserved from Soviet times is the wide use of interpretations of law given in the decisions of the Plenum and Presidium issued by both Supreme Courts for giving directions to lower courts. The Supreme Court of the RF as well as the Supreme *Arbitrazh*

---

[245] Hiring new staff for the Human Resources Department of the Presidential Administration, supporting new initiatives on revealing improper outside contacts, on declaring judges' income, etc.

[246] Article 17 Criminal Procedure Code, Article 67 Civil Procedure Code, Article 71 *Arbitrazh* Procedure Code.

[247] Article 14 Criminal Procedure Code, Article 8 Civil Procedure Code, Article 5 *Arbitrazh* Procedure Code.

Court publish samples of their rulings, as well as *explanations* on matters of judicial practice, but the selection of these matters does not follow any formal procedure, resulting in a certain arbitrariness in the issues given prominence at any given time. Moreover, *ad hoc* judicial explanations handed down to the lower courts often end up becoming matters of doctrine in the sentencing practices of lower court judges.

The hierarchical subordination of the Russian courts, while a vestige of the top-heavy bureaucratization of the soviet era, remains powerfully in effect, both in institutional procedures and in entrenched practices and expectations.[248] In spite of constitutional provisions and legislation, the independence of the lower courts is therefore still a distant goal. The higher courts are perceived to influence the decisions of the lower courts at all levels, from the methods of appointment of judges to procedural issues in case management and policy guidelines regarding case resolution. Higher court judges, court chairpeople and even the bodies of judicial self-governance (such as the Qualification Collegia) all exert influence on the conduct of judges in the lower courts (a pervasive culture of conformity). For example, the practice of having informal *consultations* with the court chairperson and the *supervisor*[249] at the second instance court before giving judgment is widespread in Russia.[250] In order to maintain a good performance record and being afraid of their decisions being overruled judges prefer to ascertain the expectations of the higher court on the outcome of the case well in advance. The informal

---

[248] It becomes obvious when analyzing the Soviet Law "On the Judicial System of the Russian Soviet Federal Socialistic Republic" on 1981 and the Federal Law "On the Judicial System of the Russian Federation".

[249] See for example the Report on the results of the activities of Leninsky district court of the city of Kursk for 2008, available at <http://lensud-kursk.ru/content/view/298/145/>. It mentions the participation of the judge supervisors in the presentation of the report. See also the Decision of the Supreme Court of 27 September 2006 No. GKPI 06-1003 in *Larissa Artemieva* v. *Qualification Collegium of Judges of Altai territory* (*Reshenije Verkhovnogo Suda Rossiiskoi Federatsii ot 27 sentyabrja 2006 No. GKPI 06-1003 po zajavleniju L. A. Artemievoi*) where the following extract from the article published in the newspaper Komsomol'skaya pravda Altaya on 11 April 2006 was cited: "Before delivering a judgment in a case […] every judge […] consults with his/her supervisor in the higher instance court", available at <http://www.supcourt.ru/stor_text.php?id=7427586>.

[250] See, for example, interviews by several judges given to Human Rights Watch, available at <http://www.hrw.org/legacy/russian/reports/russia/1999/torture/topicb3.html>.

practice of assigning *supervisors* for lower courts in the higher courts started in Soviet times. The initial purpose was to assign the consideration of appeals against decisions given by certain lower courts to certain judges of the higher court in order to streamline court practice, but later judge *supervisors* were charged, also informally, with additional functions with regard to lower court judges such as conducting roundtables and other training events for them, consulting them as necessary etc.

2. Practice

Many factors contribute to a lack of independence in the way decisions are taken by judges in modern Russian courts. The system is concentrated on severe punishment, with little or no public control over state repression. The image of abuse is so widespread that 59% of respondents to an October 2007 poll by the Yuri Levada Analytical Center on the observance of human rights in Russia believed that torture is used in Russia to browbeat suspects into admitting their guilt.[251] According to the statistics collected at the ECtHR, in the ten years following Russia's ratification of the European Convention on Human Rights (1998) 579 judgments were delivered by the ECtHR against Russia, among which were 363 judgments on the violation of the right to a fair trial.[252] Unfortunately, despite recent reforms, an accusatorial, rather than adversarial, system persists to some extent in the thinking of the judiciary, and the abovementioned violations contribute greatly to the outcomes of cases. Judges largely still feel themselves to be a part of the governmental machine fighting crime, and tend to agree with the prosecution in most cases.[253] Despite the provisions of the new Criminal Procedure Code adopted in 2002, securing the presence of a public prosecutor at every trial, about 60% of criminal cases are heard in the absence of a public prosecutor, compelling judges themselves to cover gaps in preliminary

[251] Levada-tsentr Moskva, Obschestvennoe mnenije – 2007, available at <http://www.levada.ru/sborniki.html>.

[252] European Court of Human Rights: Facts and Figures 1998-2008, available at <http://www.echr.coe.int/NR/rdonlyres/65172EB7-DE1C-4BB8-93B1-B28676C2C844/0/FactsAndFiguresENG10ansNov.pdf>.

[253] See for example interview with the Chief Editor of Russian Newsweek, Michail Fishman, given to the Russian News Service on 10 August 2009, available at <http://www.rusnovosti.ru/guests/visitor/32730/45300/>.

investigation and perform other unnatural tasks.[254] The Soviet relic of "return to further investigation" – a process which permitted judges to grant investigators a second attempt to gain a conviction rather than grant an acquittal – was also abolished as a result of the adoption of the new Criminal Procedure Code, but judges tend to support the prosecution. Overall, acquittal rates in Russian courts, which were extremely low in Soviet times, have remained so during the period beginning in the early 1990s. Indeed, conviction rates in criminal cases remain extremely high, at 99% for the entire country (of the cases disposed of). In some courts acquittals were almost non-existent. For example, in the years 2006-2008 the percentage of acquittals remained at 0.9%.[255]

The expansion of jury trials, introduced in 1993 on a pilot basis in nine regions, could be regarded as a solution to that. Jury trials are seen as significant as they involve citizens in the legal process. Despite the facts that the jury option is not available in district or JP courts and that jury trials account for a relatively small number of the overall cases (about 1% of the total), when a jury trial does take place the likelihood of acquittal rises. For example, the percentage of acquittals in jury trials in 2008 was 16.5% compared with 0.9% of acquittals by the bench.[256] Such a phenomenon is due to the fact that low acquittal rates play a role in promotion and ranking decisions. The criterion of *stability of judgments* is regarded as one of the most important in assessing judges' performance.

About one-third of acquittals decided in jury trials are overruled on appeal to the Supreme Court and the accused are remanded for a new trial. Measures attempting to reign in the scope of trial by jury were also mooted in February 2004, following a series of high profile acquittals in cases of alleged violations of national security interests.[257] In civil

---

[254] I. Petrukhin, Istorichesky ocherk dejatelnosti prokuratyry, 11 Otechestvennye zapiski 27 (2003).

[255] 8,700 people out of 918,000 convicted in 2006, 8,500 out of 916,000 in 2007 and 8,400 out of 914,000 in 2008. *Obzor dejatelnosti federalnykh sudov obschei jurisdiktsii i mirovykh sudei v 2008 godu*, available at <http//:www.cdep.ru>.

[256] Id.

[257] For example, the physicist Valentin Danilov was acquitted by a jury of spying for China. His acquittal was however overturned on appeal in 2003 and he was sentenced to 14 years' hard labour in 2004, see <http://www.gazeta.ru/2003/12/29/fizikadanilo.shtml>. Another example is the case of the re-

cases loyalty is mainly demonstrated to regional authorities. For example, the Mayor of Moscow, Yuri Luzhkov, never lost a case on Moscow territory. Overall in 2008 Russian courts of general jurisdiction of all levels granted 3.2 million claims by the tax authorities out of 3.3 million and rejected 17,000 out of 32,000 claims of misconduct of state officials.[258]

3. Structure

Both Criminal and Civil Procedure Codes set specific requirements for how a judgment is to be written. A judgment in a criminal case shall be legal, valid and fair.[259] It shall contain an introductory part, a descriptive-reasoning part and an operative part.[260] Among the requirements set for the descriptive-reasoning part of a judgment convicting the accused are a description of the criminal act found by the court to be proved, with an indication of the place, time and method of its commission and the nature of the guilt, the motives, the objectives, and the consequences of the crime. The judgment shall also describe the evidence on which the court's conclusions regarding the defendant are founded and the reasons for which other evidence was disregarded by the court. It must indicate mitigating or aggravating circumstances, and if a part of the charge is deemed unfounded or if the nature of the crime is found to be incorrectly determined, it must specify the grounds and reasons for altering the charge. The court when resolving all the issues relating to imposing criminal punishment, releasing from it or from actually serving it, or the application of other measures shall also specify the reasons for the decisions taken. A judgment of acquittal must set out the substance of the charge brought, the circumstances of the case established by the court; the evidence serving as the basis for acquitting the defendant; the reasons explaining why the court has found unreliable or insufficient the evidence serving as the basis for the allegation

searcher Igor Sutyagin who was accused of spying for the US, see <http://news.bbc.co.uk/hi/russian/russia/newsid_3572000/3572300.stm>.

[258] See the Report on the work of trial courts of general jurisdiction considering civil cases for 12 months of 2008 *(Otchet o rabote sudov obschei jurisdiktsii po pervoi instanssii o rassmotrenii grazhdanskikh del. 12 mesjatsev 2008 goda)*, available at <http//:www.cdep.ru>.

[259] Article 297 Criminal Procedure Code.

[260] Arts. 304-309 Criminal Procedure Code.

that the defendant is guilty of committing the crime; the reasons for the decision on a civil action if brought within the criminal proceedings.

Judgments in civil cases shall also comprise an introductory part, a descriptive part, a reasoning part and an operative part, and among the requirements for the descriptive and reasoning parts are: the descriptive part shall contain a reference to the plaintiff's claims, the objections of the defendant, and the explanations of other people participating in the case. The reasoning part shall state the facts of the case as determined by the court, the evidence on which the court based its conclusions and the arguments by which the court denounces different pieces of evidence, and the laws in accordance with which the court operated.[261]

Unfortunately these requirements are not always observed in practice and judgments are not always coherently and clearly reasoned. This is particularly the case in the courts of general jurisdiction. The RF Supreme Court has on several occasions pointed to the necessity of reasoning judgments clearly.[262] In a decision of the Plenum of the RF Supreme Court of 1996 as amended by a decision of 2007[263] the Supreme Court admitted that the courts were still demonstrating deficiencies and making mistakes in using the requirements for the structure and content of a judgment set by Criminal Procedure Code. The Supreme Court emphasized that the courts had to reflect their findings with due reasoning in the descriptive-reasoning part of the judgment. Poor reasoning of judgments is due to two factors – sometimes it is necessary to cover up improper influence on the judge,[264] but mainly this happens

---

[261] Arts. 195 and 198 Civil Procedure Code; similar requirements apply to *arbitrazh* court decisions: See Article 170 *Arbitrazh* Procedure Code.

[262] Decision of the Plenum of the RF Supreme Court No. 23 of 19 December 2003 "On Civil Judgement" (*Postanovlenije Plenuma Verkhovnogo Suda Rossiiskoi Federatsii No. 23 ot 19 dekabrya 2003 "O sudebnom reshenii"*). Available at <http://www.vsrf.ru/print_page.php?id=4729>.

[263] Decision of the Plenum of the RF Supreme Court No. 1 of 29 April 1996 as amended by the Decision No. 7 of 6 February 2007 "On Criminal Judgement" (*Postanovlenije Plenuma Verkhovnogo Suda Rossiiskoi Federatsii No. 1 ot 29 aprelya 1996 v redaktsii Postanovleniya Plenuma No. 7 ot 6 fevralya 2007 "O sudebnom prigovore"*). Available at <http://www.vsrf.ru/print_page.php?id=944>.

[264] See for example A. Sultanov, O probleme motivirivannosti sudebnykh aktov tcherez prizmu postanovlenii Evropeiskogo suda po pravam tcheloveka, 5 September 2009, available at <http://library.by/portalus/modules/internationallaw/readme.php>. "In unjust judicial acts you can easily see […] that they are

because of a lack of adequate training. Many young judges are just incapable of construing a proper judgment. As a result of weak reasoning the parties' chances of appealing decisions are substantially reduced.

4. Public Access

Judicial institutions in Russia are typically not accustomed to being scrutinized by society, and the existing control mechanisms are very weak. There is a lack of mechanisms as well as of any predisposition for sharing experiences and information among judicial agencies and within institutions. Currently, a very limited number of judicial decisions are published, and these are mainly available to the judicial profession. Such decisions are published in the Collections of Judicial Practice of both Supreme Courts and Bulletins of those courts, but as a rule they are not published in full; just the relevant part of the reasoning. Sometimes in order to give the reader an overview of the matter not just the decision of the Supreme Court is published, but also a part of the decision of lower court which was appealed against.[265] The decisions of the Plenum and Presidium of both Supreme Courts are also published in legal databases. The Soviet-era system had a very limited requirement for disseminating legal information or judicial decisions. Russia's transition to democratic governance and a market economy, however, has exponentially increased the need for the publication of laws and judicial policy decisions, given the explosion of legislative and institutional changes in recent years. Several successful pilot projects on the publication of judgments delivered by courts of general jurisdiction of different levels on the web supported by donor organizations[266] did not completely resolve the problem of courts' transparency, as until recently Russia lacked uniform legal regulations on the openness and transparency of judicial information, so judges could easily refuse publication of their decisions.

---

not reasoned, they contained falsified arguments of the parties, or just ignore those arguments".

[265] Available at <http://www.vsrf.ru/second.php>; <http://www.arbitr.ru/as/pract/>.

[266] World Bank Legal Reform Project (1996-2005), available at <http://www.worldbank.org>; Open Society Institute (OSI) "Law" Program (1995-1999), available at <http://www.amursu.ru/osi/kkk.doc>.

Addressing the VI Congress of Judges (2004), President Putin pointed to judicial transparency as one of the priority activities. As a result, the Supreme Court and the Judicial Department introduced a new State Automated System, *Justice*, which provides for courts' computerization and automatization, including the creation of all level court decision databanks posted on the SAS *Justice* portal. In addition, the *arbitrazh* courts have begun to publish their decisions on their websites. The databank of the *arbitrazh* courts is now fully operational and contains more than six million decisions by the courts of all levels. The bank is accessible through the courts' websites as well as through information mini-booths placed in the public zone of every court. As regards the courts of general jurisdiction the databank is still under development and mainly contains Supreme Court decisions and decisions of the regional level courts.

One of the main ideas behind promoting a *new wave* of judicial reform in Russia was to make courts more transparent and independent of outside pressure. The draft law "On Securing Access to Information on Courts' Activities" was signed into law on 22 December 2008. The Law regulates access to information on a court's activities by the general public and the mass media, the content of such information and its volume, the means by which such information is distributed and the rights of users as well as of the courts in the information exchange process. The Law provides for access to any kind of information on court activities except classified information or information about the personal life of citizens. This information may be published by means of open court hearings, in the mass media and on the Internet on relevant court websites. The courts must also provide information in writing to citizens upon request. A separate article is dedicated to the placing of court decisions on the websites. All court decisions must be published with a few exceptions.[267] The Law came into force in July 2010. Special training is also provided to judges and court press officers in terms of communication with the mass media. The current Federal Targeted Programme "Development of the Court System" for 2007-2011 mentioned above[268] also includes the development of court websites and databases, which are to include the written decisions in most cases and information about the courts and their work and the extension of the new posi-

[267] Those dealing with state security, revealing information about family life, sexual abuse or compulsory psychiatric treatment of a person shall not be published.

[268] See *supra* B. X. Resources.

tion of press secretary of the court (press secretaries are now found even in some district courts).

As regards the formal procedural requirements concerning the openness of court proceedings, the RF Constitution guarantees that the examination of cases in all courts shall be open.[269] Examinations *in camera* shall be allowed only in cases envisaged by the federal law. According to the procedural codes *in camera* trial may be held pursuant to a reasoned ruling of the court (a decree of the judge) involving crimes committed by people under 16 years of age, sexual or other crimes, in order to prevent the disclosure of state or other secrets protected by law, involving information about intimate aspects of the lives of people participating in the proceedings or information degrading their dignity, and in instances when it is necessary to ensure the safety of those participating in the proceedings, their family members or loved ones. Judgments shall be delivered in public. For *in camera* trial, only the operative part of the judgment may be read out, pursuant to a reasoned ruling of the court.[270] Only about 0.2% of civil cases and 1% of criminal cases are heard *in camera*.[271]

But in practice the abovementioned requirements are frequently abused, especially in high profile criminal trials.[272] In order to arrange for *in camera* hearings the investigator may include one or two classified documents in the case file. They may be irrelevant to the case but their mere existence allows the prosecution to ask for *in camera* hearings and have such motion granted.[273] Also even if the hearings are open they may be assigned to a very small courtroom or to a judge's chambers where there is not enough room for the public.[274] Sometimes, espe-

---

[269] Article 123(1) Russian Constitution.

[270] Article 241 Criminal Procedure Code, Article 10 Civil Procedure Code, Article 11 *Arbitrazh* Procedure Code.

[271] Report of RF Supreme Court Chairman Vyacheslav Lebedev to the VII All-Russia Congress of Judges in 2008, available at <http://www.ssrf.ru/ss_detale.php?id=827>.

[272] See for example PACE Resolution 1418 (2005), The circumstances surrounding the arrest and prosecution of leading Yukos executives, available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta05/ERES1418.htm>.

[273] Id.

[274] See for example the Report on Monitoring Voronezh courts of general jurisdiction prepared by Interregional Human Rights Group "Voronezh/Chernozemie" (*Mezhregional'naya Pravozaschitnaya Gruppa "Vo-*

cially where the preliminary investigation was conducted by the security service, the service arranges for its officers (dressed in civilian clothes) to occupy the whole courtroom, not allowing anybody else to be present. In many courts, especially regional-level and RF Supreme Courts, it is impossible to enter the building without a subpoena or special pass obtained from a court official. Journalists in such courts are allowed in only if they are accredited to the court and have asked for access well in advance. This is envisaged in the new law on access to court information; however it is not mandatory. Certainly if accredited and if they have asked for access in the prescribed order journalists have no problem with access to court hearings, but court officials (press secretaries) have discretion in accreditation. They may choose their journalists and reject those they think could *cause problems*.[275]

III. Improper Influence on Judicial Decisions

The Russian Ombudsman, Vladimir Lukin, in his recent Report on observing human rights in Russia comes to the conclusion that Russian courts are very dependent in practice on both money and power. Courts frequently give very questionable decisions, and this is closely connected with the judges' mentality.[276]

Corruption is widespread among the judiciary. According to a survey in 2008 30.2% of entrepreneurs surveyed declared that it is possible to win any dispute in court with the aid of bribes and 36.7% declared that bribery exists in the courts. 21% of entrepreneurs and 16% of householders surveyed stated that they faced corruption in the courts.[277] According to the statistics of the Prosecutor's General Office 23 judicial

---

ronezh/Chernozemie" Monitoring "Otkrytost i spravedlivost sudov goroda Voronezha"), (2007), available at <http://www.irhrg.ru/files/4.pdf>.

[275] See A. Richter, Normy informatsionnogo prava i glasnost sudoproizvodstva, available at <http://www.svobodainfo.org/info/page/?tid=633200007&nd=458216431>.

[276] A. Kolesnichenko, Upolnomochenny po pravam cheloveka Vladimir Lukin "Na praktike nash sud – zavisimy", Novye Izvestiya, 25 April 2006, available at <http://www.newizv.ru/news/2006-04-25/45283/>. See also the sociological survey carried out by the foundation INDEM in 2008 within the Ford Foundation project "Institutional and social analysis of the judicial system of the RF", available at <http//:www.indem.ru>.

[277] Sociological survey carried out by the foundation INDEM (note 276).

officials were convicted of bribery in 2008.[278] Tamara Morshchakova, a former Constitutional Court judge, explained that "[c]orruption is when a judge makes a decision under some kind of pressure, and that is not only bribes. The main source of pressure is requests by the authorities."[279] Recent statements suggest that the *telephone justice* well known in the Soviet system still exists.[280] State agencies try more and more frequently to use the so-called "administrative resource"[281] in resolving their disputes in court.[282] Judges complain that government officials call them in order to influence the outcome of the case, and state officials themselves do not even hide the fact.[283] This is how the situation in terms of influence from regional executives was described by the Member of the Parliament from the Tatarstan Republic: "[…] I dare to state that the main problem [of judicial power] is its dependence on other branches of power. Roughly speaking one call from Shaimijev [then Tatarstan President] is enough for Tatar courts to take such decision as necessary for him. I am not saying this with reproval, this is a mere fact.

---

[278] *Genprokuratura: V 2008 godu za vzyatki osuzhdeno 9 tysjach tchelovek*, available at <http://spb.rbc.ru/topnews/28/01/2009/276956.shtml>.

[279] A. Medetsky, Judicial Reform Headed for Duma, Moscow Times, available at <http://www.cdi.org/russia/johnson/9277-7.cfm>.

[280] See for example the opening address of the Head of Federal Anti-Trust Service Igor Artemiev to users of the new website of his Service in which he acknowledged that "telephone justice" undoubtedly exists and that it is a pity that society puts up with it: I. Artemiev, Nashi reshenija budut osnovany na sudebnoi praktike, available at <http://www.fas.gov.ru/article/a_9494.shtml>.

[281] "Administrative resource" became a common notion in Russia and means the use of administrative powers by public officials in order to obtain the necessary decision.

[282] See, for example A. Konstantinov, Mantija, skryvajuschaja iz'jany, 8 Almahakh "Nevolja" 24 (2006). Also available at <http://www.index.org.ru/nevol/2006-8/konst_n8.htm>.

[283] Resolution of the Council of Judges Presidium of 30 March 2006 No. 95, On the Forms of Judges' Reaction to the Requests of Citizens and Government Officials Concerning Pending Cases (*Postanovlenije Prezidiuma Soveta Sudei Rossiiskoi Federatsii ot 30 marta 2006 goda No. 95 "O formakh reagirovanija sudei na obraschenija grazhdan i dolzhnostnykh lits po delam, nakhodyaschimsya v proizvodstve sudov"*), available at <http://www.ssrf.ru/ss_detale.php?id=224>.

[…] There was a strong dependence on the executive and it still exists."[284]

In 2008, Yelena Valyavina, First Deputy Chairperson of the Supreme Arbitrazh Court, testified as a defence witness in a libel action filed by Valery Boyev, an adviser on personnel appointments at the Presidential Administration, against the radio news programme host, Vladimir Solovyov. In open hearings she admitted being subject to external pressure. She told Moscow's Dorogomilovsky District Court that Boyev said she would not be reappointed to her post if she refused to change her position on a particular case he was interested in.[285]

Another example is the case of a criminal court judge at a district court in Moscow, Mr. Melichov, who was put under strong pressure to refrain from rejecting applications for pre-trial detention, and from *occasionally* pronouncing acquittals. After many tribulations, he ended up being dismissed – on the strength of complaints lodged by the chair of the Moscow city court (not his own court's chair). Following the reorganization of the Moscow courts in 2003/2004, he was one of 13 judges whose names were omitted from the presidential decree assigning all judges to their new courts. That means that those 13 judges were not officially dismissed within the disciplinary procedure and were not assigned to the new courts following the reorganization. In fact the reorganization procedure consisted in merely renaming the courts and was abused by the Moscow City Court chair in order to get rid of unwanted judges. After three months, the abovementioned judges were finally heard by the Qualification Collegium and ten judges were invited to step down voluntarily, in exchange for receiving 80% of their salary for life. The criminal court judge in question was the only one who refused this offer, as he thought he had nothing to fear: he had committed no violations of the law, his assessment before his confirmation for life tenure was excellent; and the small number of judgments the Moscow City Court chair had found too *soft*, which dated back as far as 1998, had all come into legal force (i.e. had not been appealed, or had been upheld). He had even won his first appeal against the decision of the Qualification Collegium. Upon his reinstatement, he was again re-

---

[284] I. Gratchev, Nitchego kardinalnogo v sudebnoi reforme net, Interview expertnomu kanalu Opec.ru, available at <http://www.opec.ru/comment_doc.asp?d_no=18064>.

[285] See O. Pleshanova, Sud vysshego dostoinstva. Rossiiskaya sudebnaya sistema vpervye priznala, chto na nee davili is Kremlya, Kommersant, 13 May 2008.

moved at the request of the Moscow City Court chair and lost his further appeals. His case is still pending before the ECtHR.[286]

As a result of the shortfalls in federal funding of the courts in the 1990s, a practice of obtaining discretionary and unregulated funding from local governments became a standard necessity for many courts. This dependence of the courts on local sources of funding opened the door to extraneous influence on judges by representatives of local government or private interests. Although no formal *quid pro quo* has ever been attached to these funds, the threat to judicial independence is clear, and polls of judges conducted by international experts some years ago revealed that in some cases specific demands informally accompanied the provision of funds. Incidents involving "private investments" in the regional and district courts are numerous, in clear contravention of the financial requirements set by the Constitution.[287] An added threat from this practice is that it potentially undermines the system of checks and balances on the local governments and transparency in the legal prosecution of authorities when such cases arise.

A former Moscow City Court judge claimed that even prosecution and law enforcement agencies may influence the judge greatly. "For example, if these agencies do not like the judge they will not secure the defendant's presence in court even if the defendant is in detention. The witnesses will not show up and their presence will not be secured as well. The next step is to accuse a judge of red tape and lodge a complaint with court chairperson who can easily arrange for termination of the judge's powers despite the fact that this is not his fault."[288]

Moreover, judges complain that not just governmental officials but *powerful* individuals call them in order to influence the outcomes of cases.[289] In addition, the absence of clear rules prohibiting *ex parte* con-

---

[286] Report by the Special Rapporteur of the Committee on Legal Affairs and Human Rights of the PACE (note 203).

[287] See, for example, Foglesong (note 32); Solomon Jr./Foglesong (note 32).

[288] Interview given by Sergei Pashin to Human Rights Watch, available at <http://www.hrw.org/russian/reports/russia/1999/torture/topicb3.html#footnote244>.

[289] Resolution of the Council of Judges Presidium of 30 March 2006 No. 95, On the Forms of Judges' Reaction to the Requests of Citizens and Government Officials Concerning Pending Cases (*Postanovlenije Prezidiuma Soveta Sudei Rossiiskoi Federatsii ot 30 marta 2006 goda No. 95 "O formakh reagirovanija sudei na obraschenija grazhdan i dolzhnostnykh lits po delam, nakhodyaschim-*

tacts provides a legal basis for such influence to take place. This legal gap makes illegal influence easier to bring to bear. The other important thing is that influences may be indirect, formed by informal practices and attitudes. Back to 2006 the situation became so alarming that the Presidium of the Council of Judges adopted a recommendation for judges to record all "out-of-procedure" contacts on a dictaphone.[290]

As far as the mass media are concerned, they cannot be listed among the powerful sources of influence on judicial decisions, but judges complain that the mass media when informing the public about judicial hearings are actually independently assessing the evidence and making conclusions as to the guilt of the defendant, preparing public opinion for the outcome of the case.[291]

President Medvedev in his address to the VII Congress of Judges in 2008 stressed: "We must think how to transform the Russian judicial system to encourage citizens to make a choice in its favour." He wanted to hold consultations with the judges on measures to make the courts more independent, including steps to protect judges from outside pressure and to give them better training. The solution here is complex. Certainly judges must be protected from internal and external influences by their high status, decent living conditions, including salaries, security of tenure and career, but these are objective factors. Subjective factors e.g. the mentality of judges, are much more important. Judges must feel themselves to be independent, and this can be achieved only by better selection and training. The whole judicial corporation must change internal attitudes and stop reproducing poorly educated and obedient judges who are easily manipulated.

IV. Security

The Law on the Status of Judges has since 1992 stipulated that a judge, members of his/her family and his/her property are under the special protection of the State. Bodies of the Ministry of Interior are obliged to

---

sya v proizvodstve sudov"), available at <http://www.ssrf.ru/ss_detale.php?id=224>.

[290] Id. See also A. Kostiukovsky, Allo, Femida, Argumenty i Fakty, 26 April 2006.

[291] See A. S. Beznasjuk, Otkrytost pravosidija emu zhe na polzu, available at <http://www.vkks.ru/print_page.php?id=96>.

undertake measures necessary for ensuring the security of a judge and his/her family, and the safety of his/her property, if they receive an appropriate application from a judge. A judge has a right to keep and carry an official firearm, which must be given him/her by the body of the Ministry of Interior in accord with the procedures set out in the Arms Law of the RF.[292] But no implementation mechanism for those guarantees was provided at the time the Law was adopted. At the same time, in 1995 alone 16 attempts on the life and health of judges or court employees were recorded, as were 36 work-related threats, 37 incidents of serious material losses by judges, eight fatalities (including suicide), 15 thefts of case files, and 93 instances of harm to the court through arson and theft.[293]

The response to this situation was the new Law "On State Protection of Judges, Officials of Law Enforcement and Control Agencies" dated 20 April 1995,[294] finally authorizing the police to issue judges with service revolvers whenever they felt threatened and authorizing the police protection of judges in general, but lack of funding and bureaucratic obstacles prevented its implementation. Another response followed in the establishment in 1997 of a new service of bailiffs under the Ministry of Justice,[295] one branch of which was charged with guarding court buildings and helping to secure the attendance of witnesses at trials.[296] But the creation of this service has not improved judges' sense of security. As the Council of Judges emphasized in 2004 the results of an analysis of emergency events for the period 2001-2003 give rise to serious concern.[297] Five judges and two members of their families were killed dur-

---

[292] Article 9 Law on the Status of Judges.

[293] *"Analiticheskaya spravka po chrezvychainym proisshestviyam v organakh yustitsii i sudakh Rossiiskoi Federatsii za period s 1994 po 1998 god vkluchitel'no"*, unpublished, Moscow (1999). Quoted by Peter H. Solomon in Solomon Jr. (note 141), 225.

[294] *Federalny zakon "O Gosudarstvennoi zaschite sudei, dolzhnostnykh lits pravookhranitelnykh i kontroliruyuschikh organov", No. 45-FZ*, Sobranije zakonodatel'stva Rossiiskoi Federatsii, 20 April 1995, No. 17, st. 1455.

[295] *Fedralny zakon "O sudebnykh pristavakh" No. 119-FZ*, Sobranije zakonodatel'stva Rossiiskoi Federatsii, 21 September 1997, No. 30, st. 3590.

[296] See Solomon Jr. (note 141).

[297] Decision No 122 of 29 April 2004 "On the Practice of Implementing Federal Law "On State Protection of Judges, Officials of Law Enforcement and Control Agencies" (*Postanovleniie Soveta Sudei RF No 122 ot 29 aprelya 2004 goda "O praktike vypolneniya trebovanii Federal'nogo zakona ot 25 aprelya*

ing this period. Since 1 January 2003 five cases of violence against judges of *arbitrazh* courts and members of their families have been registered. In spite of the fact that investigation of these crimes was under the control of the Prosecutor General of the Russian Federation, none of them was solved.[298] The number of various interferences with the property of courts and judges is growing steadily. In 2003 alone, 12 cases of threats of terrorist acts in court buildings and the surrounding area, and eight cases of arson were registered.[299] Protection of premises occupied by JPs is poor.[300] At its meeting in 2004 the Council of Judges decided to prepare legislative proposals directed at the creation of the service of departmental protection of buildings of federal courts of general jurisdiction and maintenance of personal safety of judges of courts of general jurisdiction and members of their families instead of using bailiff service protection, and to request the Prime Minister to allocate additional means for the maintenance of appropriate safety of judges and the protection of buildings of federal courts. Unfortunately this proposal was not supported due to the lack of resources. Meanwhile there were several attacks on judges in Krasnodar, Chelyabinsk, Karachaevo-Cherkessk and Kemerovo.[301]

Currently, the situation did not improve. In 2007-2009 several high-profile murders within the judicial community took place. In October 2007, Judge Valentina Svirina was killed in Novosibirsk. On 13 April 2008 Deputy Chairperson of Ingushetiya Republican Supreme Court Khassan Yandiyev was shot dead. On 10 June 2009 another Deputy Chairperson of Ingushetiya Republican Supreme Court Aza Gazgireeva was shot dead. Also several cases of arson in court buildings were recorded in the same period, the latest being in January 2008 in Chelyabinsk where several premises of JPs were burned as well as case files.[302]

1995 goda No. 45-FZ "O gosudarstvennoi zaschite sudei, dolzhnostnykh lits pravookhranitel'nykh I kontroliruyuschikh organov" v chasti obespetcheniya bezopasnosti sudei federalnykh sudov, sudei arbitrazhnykh sudov, a takzhe mirovykh sudei"), available at <http://www.ssrf.ru/ss_detale.php?id=119>.

298 Id.

299 Id.

300 Id.

301 A. Besmenov/ E. Dobrynina/ I. Isotov/ M. Klariss/ T. Pawlowskaya/ A. Pilischwili/ S. Titow, Kogo sudia boitsya?, Rossiiskaya gazeta, 2 November 2005, available at <http://www.rg.ru/2005/11/02/sudji.html>.

302 Available at <http://www.argumenti.ru/publications/5812>.

In total more than 200 judges and members of their immediate families were murdered and 500 suffered from bodily injury inflicted in 2007-2009.[303] On 12 April 2010 Moscow City Court judge Eduard Chouvashov was shot dead allegedly for hearing a case against a group of nationalists (skinheads). According to the Chairperson of Moscow City Court Olga Egorova during the first nine months of 2010 13 Moscow City Court judges applied for personal protection because of different threats to their lives.[304] The VII All-Russia Congress of Judges acknowledged that the level of personal security of judges and their immediate family members does not correspond to the crime rate and the level of terrorist threat, especially in the Southern Federal Circuit. The Congresses of Judges on several previous occasions drew the attention of the Bailiffs' Service to this situation but still nothing is done in terms of providing 24-hour security for court buildings and judges.[305]

D. Ethical Standards

I. Code of Ethics for Judges

The Code of Judicial Ethics was adopted by the VI All-Russia Congress of Judges in 2004. It regulates a judge's conduct in his/her professional and private activities, binding every judge in the RF, no matter his/her position, as well as retired judges who retain the title of the judge and membership of the judicial community. These are general standards, and the Code does not provide for any practical guidance. A violation of the Code can constitute a disciplinary offence.[306] As was

[303] F.-C. Schroeder, Russlands Richter unter Druck, Der Tagesspiegel, 29 December 2009. Russian version available at <http://www.inosmi.ru/russia/20091229/157288379.html>.

[304] A. Sokovnin, Sudei berut pod zaschitu, Predsedatel Mosgorsuda rasskazala o professional'nykh riskakh, Kommersant, No. 175 (4475), 22 September 2010, available at <http://www.kommersant.ru/doc.aspx?DocsID=1508075>.

[305] Available at <http://www.ssrf.ru/ss_detale.php?id=826>.

[306] Article 12(1) Law on the Status of Judges as amended on 15 December 2001.

mentioned above, the use of disciplinary sanctions is not well regulated and much is left to the discretion of Qualification Collegia.[307]

II. Training

There is no obligatory training on judicial ethics for judges or candidates. Such training on an *ad hoc* basis is delivered by the Supreme Qualification Collegium and other judicial bodies. That means that the Supreme Judicial Qualification Collegium from time to time convenes meetings of regional Qualification Collegia where it explains the disciplinary practice to them. Members of regional councils of judges also from time to time conduct training seminars for judges on the application of the Code of Ethics.[308] Donor organizations which spend money for the development of CIS and Eastern European Countries also conduct regional ethics workshops and conferences, take delegations of Russian judges abroad to see how their foreign colleagues establish ethical standards and observe them, and have helped the Council of Judges to establish a Committee on Ethics.[309] This Committee was established by the RF Council of Judges Resolution of 23 November 2005[310] in order to clarify ethical standards and give practical guidance on their observance at judges' request, and also in order to review current practices of application. On some crucial topics, for example on the practice of dealing with individual complaints against judges in the courts, the Committee prepares reports to the Council of Judges which are then discussed at the Council's meetings.

---

[307] See *supra* B. VII. Judicial Accountability: Discipline and Removal Procedures.

[308] See for example T. Birjukova, Ucheby mnogo ne byvaet, available at <http://femidakursk.ru/content/view/113/128/>.

[309] "Russian-American Judicial Partnership" Project (2000-2008) supported by USAID; American Bar Association Central and Eastern European Law Initiative (1992-2008) supported by USAID; Russian-American Rule-of-Law Consortium (1995-current) supported by USAID and Open World Program of the US Library of Congress; Partnership with the Supreme *Arbitrazh* Court of the US Russia Foundation for Economic Advancement and the Rule of Law (USRF) 2009-current.

[310] *Postanovlenije Soveta Sudei Rossiiskoi Federatsii ot 28 Noyabrja 2005 goda "Ov sozdanii Komissii Soveta Sudei Rossiiskoi Federatsii po etike"*, available at <http://www.ssrf.ru/ss_detale.php?id=107>.

E. Supreme/Higher Courts

As explained above the independence of higher courts is even more in trouble as they are closer to regional and federal government, their jurisdiction includes high profile cases which may be of interest to the executive, judges of such courts have to pass higher scrutiny to be appointed.

F. Conclusion

Although many changes made to the status of judges reflect improvements or themselves improve the administration of justice in the RF, they do not by themselves produce a fully fledged legal order. One would need in addition a shift in the attitudes of public officials, if not also the public itself, towards the law, including respect for the law as a good in itself rather than simply a means of pursuing one's ends. An instrumental approach to law dominated Soviet culture, but law served as an instrument mainly of the ruling party. In post-Soviet Russia law has become an instrument of a variety of powerful individuals and groups, but an instrumental approach to law still predominates.[311]

Clearly, the emergence of truly independent and effective courts requires changes in the broader culture and in the informal practices which connect to the work of the courts and help to shape its impact and meaning. In order to improve judicial independence in Russia it should be ensured that undue pressure is not exerted on the judiciary, especially in high profile economic and political cases. All cases of officials' involvement in seeking to influence the outcomes of cases should be duly investigated. The judiciary must receive adequate tools to resist such pressure, including an immediate clear ban on *ex parte* contact – any form of contact with a judge about a case pending before that judge in the absence of all parties to it. This can be assured by both legislative amendments and, primarily, a shift in the mindset of judges. We do not think that the solution proposed by the Supreme *Arbitrazh* Court Chairman Ivanov to report such contacts can change anything. It should be rooted in judicial culture not to take such contacts into account. A new system of training candidates for judicial positions should

[311] See P. H. Solomon Jr., Law in Public Administration: How Russia Differs?, 24 Journal of Communist Studies and Transition Politics 115 (2008).

be introduced. Also the system of judicial training for existing judges should be changed in order to pay more attention to changing their mindset toward greater independence and a better understanding of their role as independent arbiters of disputes, especially in disputes between the State and the citizen. Individual judges should be trained to be prepared to overcome influence from the executive. Well institutionalized training would make the system of mentors in higher instance courts unnecessary. Judges have to learn how a judgment is to be reasoned properly.

The political branches' ability to exert financial influence over the judiciary through manipulating the budget should be eliminated, or at least minimized. One of the proposed solutions can be taken from the U.S. experience – to make the judicial budget a fixed percentage of the state budget, to present the budget to the legislature for approval with a minimum of non-transferable line itemization. The Government should ensure adequate salaries and conditions of service for judges in order to allow suitably qualified and experienced legal professionals to occupy judicial positions.

In order to improve public perception of the judiciary the possibility of a public awareness campaign on the role of the judiciary should be considered. The experience of the implementation of the World Bank loan shows that special programmes on TV, social advertising and the simulation of trials on TV work well.[312] Also it is possible to print and disseminate special brochures and leaflets. The public should be educated about the propriety and the necessity of judges standing up to officials or powerful private interests when they act illegally.

Consideration should be given to expanding the effort to publishing court decisions in electronic form and increasing overall transparency of judicial activities by publication of the court schedule and calendar on their websites. Also strengthening by means of additional training judges' ability to write reasons for their decisions which make clear that there are bases for them should be then considered. The more a judge's decision demonstrates how a given decision flows directly from a careful consideration of all the factors in the case and the existing law, the more trusted it can be. On important questions of law, judges should also be required to research the published decisions of their colleagues to ensure consistency of interpretation of the law.

---

[312] Implementation Completion Report on Legal Reform Project, available at <http//:www.worldbank.org>.

Candidates for judicial positions should be recruited mainly from legal practitioners and their qualifications should be reviewed and approved by a credible, neutral and independent body or commission. It could be a commission separate from the Judicial Qualification Collegia. Such commission should be formed of the most experienced judges instead of those closest to regional governors. It is possible to add several public representatives but they must be really delegated by the public, through NGOs or other voluntary public organizations. Presidential representatives must be excluded. The activities of such a commission should be transparent in terms of assessment criteria and selection procedures.

The examination procedure for future judges and the activities of the Qualification Collegia as a whole should be made open and transparent; e.g. examinations as to legal knowledge should take the form of anonymous written testing including testing in the preparation of legal documents; and the procedures for hearings before the Collegia should be formalized.

A more transparent system should be adopted for the appointment of court chairpeople: the U.S. procedure of the selection of court chairs by means of elections by the rest of the judges should be considered (Russia had such system already with respect to the Constitutional Court until the relevant amendments in July 2009). The court chairs' influence should be reduced, which means that in no way should court chairpeople be dependent on the executive and be permanently afraid of losing their jobs.

Final decisions disciplining or removing judges should be subject to regular independent and objective review. The current proposed solution is the introduction of the Judicial Disciplinary Tribunal. All cases of possible influence of court chairpeople on the outcome of disciplinary proceedings should be subject to independent investigation conducted either by a special Parliamentary commission or by the Special Prosecutor if the U.S. experience is to be followed. While Qualification Collegia no longer have court chairpeople with voting rights on them, those judges still try to influence their members. Perhaps a system by which a special committee of randomly selected judges decides such cases should be established, with their identities withheld from court chairpeople.

Finally more attention should be paid to ensuring the physical security of judges and court buildings. The 2004 proposals of the Council of Judges on placing bailiffs under the control of the court system or creating an independent protection institution within the Judicial Depart-

ment should be taken into consideration. Unfortunately there have hitherto been no such plans in the current Presidential Administration.

Judicial Independence in the Republic of Belarus

Alexander Vashkevich

A. Introduction

Between 1922 and the early 1990s Belarus was part of the Soviet Union, in which the notion of "judicial power" did not exist.[1] It was understood that government power was indivisible, and that the people exercised that power through Councils of Deputies, who elected judges.[2] The courts were not independent and judges were subordinated to the governing bodies of the Communist Party.[3] In Belarus the principle of the separation of powers was introduced for the first time only in 1990 in the Declaration of State Sovereignty of the Republic of Belarus.[4] In 1992 the Parliament of Belarus approved the Concept of Judicial and Legal Reform, which envisaged a vast agenda of changes to the judicial system.[5] In 1994 a new Constitution of the Republic of Belarus was adopted, which established the principle of the separation of powers, and incorporated the notion of the judicial branch of government and recognized its independence. Under Article 109 of the Constitution,

---

1 V.N. Dubovitskiy, Executive power in the Republic of Belarus: the notion and the system of agencies, at 32 (2006) (Исполнительная власть в Республике Беларусь: понятие и система органов).

2 Constitution of the Soviet Union. Political and legal commentary, at 368-370 (1982) (Конституция СССР. Политико-правовой комментарий).

3 There was a famous short saying in Soviet times: "Courts are independent and subordinate only to the law and […] to the District Committee of CPSU".

4 Official Journal of the Supreme Council of the Republic of Belarus, No.31, Article 536 (1991) (Ведамасці Вярхоўнага Савета Рэспублікі Беларусь).

5 Official Journal of the Supreme Council of the Republic of Belarus, No.16, Article 270 (1992).

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233, DOI 10.1007/978-3-642-28299-7_25,

"[t]he judicial power of the Republic of Belarus is vested in the courts."[6] Article 110 of the Constitution declares that "during the administration of justice judges are independent and subordinate to the law alone. Any interference in the judicial process of administration of justice is prohibited and punishable under law".[7]

It is necessary to bear in mind that in reality the balance of powers between the organs of government in Belarus is distorted, and power is concentrated in the hands of the President. According to the Venice Commission, a false semi-presidential regime with strong Presidential influence (sometimes implying total control) on all other bodies of the State was established after the referenda of 1996 and 2004.[8] Some Belarusian authors call the existing form of government "overpresidential" (сверхпрезидентская).[9] As Professor L. Golovko states, and I share his opinion, "a truly independent judiciary can, under no conditions, exist under authoritarian political regimes", and therefore any hope of establishing a Western-type independent judicial system in such a country is mere illusion.[10]

B. Structural Safeguards

The judicial system of Belarus consists of three pillars: 1) the Constitutional Court, which is composed of 12 judges and exercises the functions of constitutional control;[11] 2) the courts of general jurisdiction

---

[6] The Constitution of the Republic of Belarus of 1994 (with subsequent amendments), at 141 (2006). (Конституция Республики Беларусь 1994 года (с изменениями и дополнениями)). The Constitution was adopted as a result of national referenda of 24 November 1996 and 17 October 2004.

[7] Id., at 142.

[8] Venice Commission, G. Malinverni, Comments on the amendments to the Constitution of the Republic of Belarus as proposed by the President of the Republic, CDL(1996)074; Venice Commission, Opinion on the Referendum of 17 October 2004 in Belarus adopted by the Venice Commission at its 60th Plenary Session, CDL-AD(2004)029 (Venice, 8-9 October 2004).

[9] M. Chudakov, Constitutional process in Belarus (1447-1996), at 282 (2004) (Конституционный процесс в Беларуси (1447 – 1996 гг)).

[10] Prospects of establishing independent judiciary in the Republic of Uzbekistan. Legal Policy Research Center, at 3 (2009).

[11] Id., at 142. Article 116 of the Constitution of the Republic of Belarus.

which adjudicate on civil, criminal and administrative cases; and 3) economic courts which administer justice in business (economic) disputes.[12] The system of courts of general jurisdiction is organized into three tiers and is structured according to the administrative division of the country, i.e. is based on the principle of territorial jurisdiction. The lowest tier is represented by 142 district and city courts,[13] as well as by six inter-garrison military courts.[14] The second tier includes six oblast courts and Minsk city court, as well as the Belarusian Military Court. At the top of the system of courts of general jurisdiction stands the Supreme Court, which consists of the Chairman, First Deputy Chairman, all deputy chairmen (currently 4) and judges.[15]

---

[12] The system of economic courts is a two-level system. The first level comprises seven courts, which function in each of the six oblast capitals and in the city of Minsk. At the top of the economic court system is the Supreme Economic Court, which functions through five specialized chambers. 1) The first instance chamber; 2) The bankruptcy chamber; 3) The chamber reviewing the legality of decisions made by inferior economic courts (the "*nadzor*" instance); 4) The tax law chamber; and 5) The administrative cases chamber.

[13] Available at <http://www.supcourt.by/cgi-bin/index.cgi?vm=d&vr=system&vd=2&at=0&m1=5>.

[14] Organizationally and structurally military courts are integrated in the system of courts of general jurisdiction. There are a total of 40 military judges in Belarus. V.O. Sukalo, Judicial reform in the Republic of Belarus, Judicial reforms in CIS countries, at 10 (2005) (Судебная реформа в Республике Беларусь, Судебные реформы в странах СНГ).

[15] There are four specialized chambers in the Supreme Court – the civil chamber, the criminal chamber, the intellectual property chamber and the military chamber. The Plenary Session of the Supreme Court consists of the Chairman of the Court, all his deputies and, *ex officio*, the chairmen of the six oblast courts, Minsk city court and Belarusian Military Court. Arts. 45, 50 of the Code of the Republic of Belarus on the Judiciary and the Status of Judges (Кодекса Республики Беларусь о судоустройстве и статусе судей), National Registry of Legal Acts of the Republic of Belarus *(Национальный реестр правовых актов Республики Беларусь)* No.107 (2006), 2/1236. No.4 (2007), 2/1292. No.5 (2010), 2/1629.

I. The Administration of the Judiciary

1. Organs in Charge of the Administration of the Judiciary

The most influence on the judiciary in Belarus is exercised by the executive branch, and in particular by the Ministry of Justice (hereinafter the MoJ) and its local departments in the city of Minsk and in the six oblasts. These local departments are called Departments of Justice and subordinated, on the one hand, to the MoJ, and to Minsk city and oblast Executive Committees on the other hand. The MoJ is a centralized government agency subordinate to the Government- Council of Ministers,[16] and on issues set down in the law, directly to the President of Belarus. According to Article 5.1 of the Statute of the MoJ, the Ministry is responsible for implementing government policy in the field of justice. Under Article 5.11 of the Statute, the Ministry is responsible for: technical and property maintenance and the provision of financial, logistical and staffing services to oblast courts, Minsk city court, district and city courts as well as to the agencies of the MoJ; the organization of the professional development of judges and employees of courts and agencies of the MoJ; the provision of logistical and staffing services to the Belarus Military Court and inter-garrison military courts; and the provision of logistical services and services related to technical and property maintenance to judicial self-governing bodies- the Assembly of Judges of the Republic of Belarus, the National Council of Judges (hereinafter NCJ) and the Qualification Commissions of Judges (hereinafter QCJ).[17] The Collegium of the Ministry consists of 12 people – the Minister, the First Deputy Minister and all deputy ministers (cur-

[16] The Council of Ministers is the central body of state administration accountable to the President and responsible to the Parliament. It consists of the Prime minister, his deputies, ministers and some other officials and has to administer the system of subordinate bodies of state administration and other executive organs; elaborate the basic guidelines of domestic and foreign policy, ensure the implementation of the Constitution, the laws, decrees, edicts and instructions of the President; repeal acts of ministries and other central bodies of state administration; etc. (Arts. 106-107 of the Constitution).

[17] Resolution of the Council of Ministers No.258 of 22 February 2008, Concerning amendments to the Council of Ministers Resolutions No.1605 of 31 October 2001, and No.986 of 31 July 2006, National Registry of Legal Acts of the Republic of Belarus, No.54.5/26856 (2008).

rently three) are members *ex officio*, some heads of the key departments of the Ministry are also included.[18]

General power to administer and coordinate the judiciary is vested in the President of the Republic of Belarus .This power is exercised *inter alia* through the Main Department for Relations with Legislative and Judicial Bodies of the Presidential Administration.[19] The competence of this structure is regulated by internal documents of the Presidential Administration. This Department is in charge of the preparation of all acts of the President devoted to the judicial system, including those concerning the nomination and dismissal of judges and awarding them with qualification ranks.[20] Therefore it deals with all documents relating to prospective candidates for a judicial career, conducts interviews with them before appointment, prepares decrees and edicts of the Head of the State on the nomination and dismissal of all judges, on awarding, reducing and depriving them of qualification ranks, prepares all major conferences of judges in which the President takes part.

The legislative branch of government influences the judiciary in three ways. Firstly, the Parliament enacts laws which regulate the status of judges (e.g. the Code of the Republic of Belarus on the Judiciary and the Status of Judges) and the procedure of trying cases (e.g. the Code of Civil Procedure, the Code of Criminal Procedure, the Code of Economic Procedure and the Code of Administrative Offences Procedure and Execution). Secondly, the Parliament at the suggestion of the President[21] annually adopts the law on the state budget, which is prepared by the Ministry of Finance; it has a separate budget line for the judiciary and should "provide the opportunity of effective and independent realization of justice".[22] Thirdly, the Parliament has the right to pro-

---

18 Id.

19 Ordinance of the President of the Republic of Belarus No.213 of 28 May 2003, Concerning the Reorganization of the Main Department for Relations with Legislative and Judicial Bodies, National Registry of Legal Acts of the Republic of Belarus, No.61.1/4630 (2003); No.26,1/5309 (2003).

20 A.N. Kramnik, Course of the Administrative Law of the Republic of Belarus, at 322-323 (2nd ed. 2006) (Курс административного права Республики Беларусь).

21 Article 95(1) of the Budget Code of the Republic of Belarus, National Registry of Legal Acts of the Republic of Belarus, No.183.2/1509 (2008) (Бюджетный Кодекс Республики Беларусь).

22 Article 190 of the Code of the Republic of Belarus on the Judiciary and the Status of Judges.

nounce amnesty[23] and does so frequently, which raises criticism from members of the judiciary.[24]

2. Judicial Council

A Judicial Council in the traditional sense does not exist in Belarus. The functions attached to this body in other European countries are divided in Belarus between the President, the Supreme Court, the Ministry of Justice, the National Council of Judges (NCJ) and the Qualification Commissions of Judges. The NCJ and its Chair are elected by the Assembly of Judges of the Republic of Belarus from among the judges of the Constitutional Court, the courts of general jurisdiction; and the economic courts (who have been working as judges for at least three years). The Council is empowered to: convene the Assembly of Judges of the Republic of Belarus; consider pertinent issues concerning the functioning of the judiciary, as well as issues relating to the legal, financial and social status of judges; discuss issues relating to case law and the improvement of legislation; discuss legislative bills and drafts of other regulations which concern the organization of the judiciary, or the administration of justice, or the functioning of the courts and the status of judges; examine legislative bills and drafts of other regulations concerning the functioning of the judiciary; study and disseminate best examples of the functioning of judicial community bodies in Belarus and come up with recommendations on the improvement of their operation; address government agencies and other organizations, as well as public officials on issues within their competence; represent judges in government agencies, non-governmental organizations and international organizations; file legal actions to protect the honour, dignity and reputation of judges.[25] Information on the activities of the NCJ is not available. This is evidence of the complete secrecy of its work or (more likely) of its purely decorative role which leads to the conclusion that it has no impact on the judiciary.

The system of Qualification Commissions of Judges (QCJ) includes the Qualification Commission of judges of the Supreme Court, commis-

---

[23] Article 97(2) of the Constitution of the Republic of Belarus.

[24] R. Rud, A professional must be honest (Профессионал должен быть искренним), available at <http://www.sb.by/?area=content&articleID=624 47>.

[25] Arts. 159-160 of the Code of the Republic of Belarus on the Judiciary and the Status of Judges.

sions of judges of every oblast and Minsk courts (they fulfil the functions of the QC at the lower level courts), the commission of military courts and the commission of economic courts. Each of them consists of nine members, including two representatives of the MoJ or its local departments. Of course, representatives of the MoJ are subordinated to the Ministry when fulfilling the function of members of QCJ, but they are in the minority. The other seven members are judges of different courts, though the Code on the Judiciary stipulates the possibility of election of "representatives of legal science and other specialists in the field of law".[26] Only the QCJ of the Supreme Court exclusively includes judges of that court. They are elected for four years by the Plenary Session of the Supreme Court, the conference of judges of oblast court, the Plenary Session of the Supreme Economic Court, and the conference of judges of military courts, and there are no legal obstacles to their re-election. The legislation is silent on their dismissal, but in practice when they retire they can be replaced by new member of the commission elected in the way described above. Briefly, these commissions are responsible for keeping high standards of professional and moral quality of judges, for strengthening the guarantees of their independence and they are in charge of the process of judges' nomination, promotion, dismissal, immunity and disciplinary sanction.[27] The main difference between QCJs in Belarus and Judicial Councils in some other countries is the non-binding character of their decisions and the total absence from their ranks of representatives of legal science, bar association and legislative power. Maybe that is why the UN Special Rapporteur on the independence of judges and lawyers emphasized in his recommendations the need to establish an independent judicial council in Belarus.[28]

---

[26] Section 3, Arts. 171 and 173 of the Code of the Republic of Belarus on the Judiciary and the Status of Judges.

[27] Arts. 169-175 Code of the Republic of Belarus on the Judiciary and the Status of Judges.

[28] E/CN.4/2001/65/Add.1 para. 121.

II. Selection, Appointment and Reappointment of Judges

1. Eligibility

According to the Constitution of Belarus 'the grounds for electing (appointing) judges and removing them from office shall be determined by the law'.[29] The law in question is the Code on the Judiciary, which sets out the requirements for candidates for the position of a judge.[30] A person is eligible for the position of a judge, if that person: has reached 25 years of age; possesses knowledge of the Belarusian and Russian languages; has graduated from university with a degree in law; has at least three years of professional experience calculated in accordance with the rules determined by the Government of the Republic of Belarus or by a designated government agency;[31] has good moral character; and has successfully passed a qualification examination for the position of a judge. A candidate for the position of judge of oblast-level or the Minsk city court or Belarusian military court must have served as a judge for at least three years; judges of the Supreme Court and Supreme Economic Court must have served as a judge for at least five years .A person may not be appointed as a judge if that person: has been convicted of a crime by a court verdict which has entered into force; is incapable of performing the duties of a judge for health reasons, the fact of which has been confirmed by a medical statement;[32] or has been limited in his or her legal capacity or incapacitated by decision of a court which has entered into force. In addition to the requirements described supra, it should be noted that judges may not be members of political parties or

---

[29] Article 111(2) of the Constitution of the Republic of Belarus.

[30] Article 94 of the Code of the Republic of Belarus on the Judiciary and the Status of Judges.

[31] The rules for determination of professional experience are laid down by the MoJ. Resolution of the Ministry of Justice of the Republic of Belarus No.70 of 18 December 2008, Concerning the rules for determining professional experience, necessary to be eligible for the position of a judge in a court of general jurisdiction or in an economic court, National Registry of Legal Acts of the Republic of Belarus. No.3 (2009), 8/20123 (О порядке исчисления стажа по специальности, необходимого для кандидата на должность судьи общего или хозяйственного суда).

[32] The list of illnesses which result in a person's inability to perform the duties of a judge is maintained by the Ministry of Health. The Order of the Minister of Health No.294 of 18 April 2006, Concerning medical services to judges (О медицинском обеспечении судей).

other public associations which pursue political goals.[33] All these criteria are checked during the process of judicial selection, are clear and leave no room for arbitrary decisions.

2. The Process of Judicial Selection

The process of selecting candidates for judicial positions is rather lengthy and complicated. It is regulated in detail by resolutions of the Council of Ministers[34] and the MoJ,[35] and consists of several steps.

The first is becoming enlisted in the so-called "reserve groups", which are formed according to the principle of no discrimination on the basis of sex, nationality and belief.[36] The two key persons who are in charge of selection for these groups are the Chairman of the oblast court and the Head of the oblast Department of Justice. They have to agree to include a person on the list, and both of them have the informal right of "veto",[37] however the decision is always taken by the collective bodies mentioned below. The majority of the prospective candidates are known to both of them, as they are usually recruited from the court staff, such as secretaries of the court proceeding (i.e members of the

---

[33] Article 36(2) of the Constitution of the Republic of Belarus.

[34] Resolution of the Council of Ministers of the Republic of Belarus No.150 of 6 February 2007, Concerning the enactment of the Instruction on the establishment of and organization of work with the reserves of judges for general jurisdiction and economic courts, National Registry of Legal Acts of the Republic of Belarus No.41,5/24702 (2007) (Об утверждении Инструкции о порядке формирования и организации работы с резервом кадров судей общих и хозяйственных судов Республики Беларусь).

[35] Resolution of the Ministry of Justice No.22 of 8 April 2008, Concerning the enactment of the Instructions on the conditions and procedure of management of files pertaining to the appointment (removal) of judges of general jurisdiction courts and to the award of qualification ranks, National Registry of Legal Acts of the Republic of Belarus No.97, 8/18625. No.279, 8/19799 (2008) (Об утверждении Инструкции об условиях и порядке прохождения материалов о назначении на должность (освобождении от должности) судей общих судов Республики Беларусь, присвоении квалификационных классов).

[36] Article 6 of the Instructions on the establishment of and organization of work with the reserves of judges for general jurisdiction and economic courts (Инструкция о порядке формирования и организации работы с резервом кадров судей общих и хозяйственных судов Республики Беларусь).

[37] The instruction which regulates the process is silent about the appeal procedure.

court staff responsible for ensuring that trials are ready to proceed), court bailiffs, heads of the court chancellery, Chairman's assistants, etc. Sometimes court staff of the district courts are proposed for consideration by the chairmen of the relevant courts. Sometimes candidates are chosen from the staff of the local prosecutor's office and in some cases they are former members of the bar association.[38] Individual assessment and selection are based on competence.[39] Competence is determined by the theoretical and practical education of the person in question, his/her personal qualifications and experience from previous work. References from employers and C.V.s are also taken into account, as well as the results of the interview conducted by department of justice heads and court presidents and their deputies.[40] The lists of reserves for the positions of judges of district and city courts are examined and approved by the Collegium of the MoJ; judges of higher courts and deputy presidents and presidents of courts at the joint session of the Collegium of the MoJ and Presidium of the Supreme Court.

The second step is to pass a qualification examination designed to "assess the level of professional knowledge and skills, as well as professional, moral and psychological qualities of persons, running for the position of a judge".[41] Examination is usually oral. For example, candidates for the position of judges of economic courts have to answer questions from different branches of the law (civil law, tax law, administrative law etc.) and solve two practical cases. Moreover, the candidate can be asked to prepare a draft of a court procedural document in written form.[42]

The judges' qualification examination is organized by Examination Commissions, which are composed of highly qualified[43] representatives

---

38 Interview with a senior court President.

39 Article 7 of the Instructions on the establishment of and organization of work with the reserves of judges for general jurisdiction and economic courts (Инструкции о порядке формирования и организации работы с резервом кадров судей общих и хозяйственных судов Республики Беларусь).

40 See ibid. and the interview with the senior court President.

41 Article 96(1) Code of the Republic of Belarus on the Judiciary and the Status of Judges.

42 Article 3.1 of the Order No.20 of the Chairman of Supreme Economic Court from 16 April 2008 (unpublished).

43 They are usually from the Supreme Court, but the Examination Commission created by the Supreme Economic Court includes judges from three different economic courts.

of the MoJ (in practice the Deputy Minister of Justice in charge of the court system) and other legal professionals (one criminal law professor is a member of the Commission created by the Supreme Court).[44] The composition of Examination Commissions, the procedure for holding qualification examinations and the examination questions are determined by the Presidents of the Supreme Court and the Supreme Economic Court.[45] Deputy Presidents of the Supreme Court and Supreme Economic Court serve as Chairs of Examination Commissions and representatives of the MoJ perform the functions of Deputy Chairs.[46] Members are nominated for an indefinite period but from time to time the composition is changed at the discretion of the President of the Supreme Court and the Supreme Economic Court.[47]

Having successfully passed the qualification examination (up to one quarter of participants usually fail) the applicant becomes eligible for registration as a candidate for judge, thus taking another step towards selection. The results of the examination are valid for two years.[48]

The third step is a decision on the registration of a person as a candidate for judge which is taken by the Qualification Commission of Judges created in oblast-level and Minsk city courts, as well as in military and economic courts.[49]

The fourth step towards becoming a judge is the completion of a special training programme which can take place only if a court has a judicial vacancy and the competent QCJ recommends one of the candidates for judge, registered at that court, for that vacancy and for the special training programme. Unfortunately, according to the recent amendment to the Code on the Judiciary, some categories of candidates (those who have at least three years' professional experience within the court sys-

---

[44] There are six members (five of them are judges) of the Supreme Economic Court Examination Commission and nine members (seven of them are judges) of the Supreme Court Examination Commission.

[45] Article 96(5) Code of the Republic of Belarus on the Judiciary and the Status of Judges.

[46] Id.

[47] See for example: Order No.33 of the Chairman of Supreme Economic Court of 7 May 2009 (unpublished).

[48] Article 96 Code of the Republic of Belarus on the Judiciary and the Status of Judges.

[49] Article 97 Code of the Republic of Belarus on the Judiciary and the Status of Judges.

tem, MoJ apparatus, prosecutor's office or bar association) can skip the training programme if a joint decision is issued by either the Supreme Court and the MoJ (for the courts of general jurisdiction) or the Supreme Economic Court and MoJ (for the economic courts).[50] In its decision of 22 December 2009 the Constitutional Court of Belarus stressed that this provision "should be applied only in exceptional cases".[51]

The conditions and the procedure for the special training programme are set out in a Resolutions of the MoJ adopted jointly with the Supreme Court and the Supreme Economic Court.[52] The special training includes up to three weeks of theoretical education at the Judicial Training Institute[53] and up to eight months of traineeship in one of the district or city courts of Belarus which has a vacancy for a judge. As part of the traineeship, the trainee judge is present during trials, drafts judicial writs and studies how the work is organized in the court and in the department of Justice. Trainee judges also take part in the analysis of case law and perform other functions relating to the study of judges' work and attaining specific practical skills. Further, trainee judges must undergo a final training course at the Judicial Training Institute designed to cement the knowledge they have received throughout their theoretical education and traineeship. During the final course trainee

---

[50] Article 98(2) Code of the Republic of Belarus on the Judiciary and the Status of Judges.

[51] National Registry of Legal Acts of the Republic of Belarus, No.18, 6/826 (2010).

[52] Resolution of the Ministry of Justice No.32 of 11 May 2007, Concerning the special training programme for judges of courts of general jurisdiction of the Republic of Belarus (О специальной подготовке на должность судьи общего суда Республики Беларусь), National Registry of Legal Acts of the Republic of Belarus No.120,8/16451(2007); Resolution of the Ministry of Justice and Plenum of the Supreme Economic Court No.51/11 of 10 August 2007, Concerning the special training programme for judges of economic courts of the Republic of Belarus, National Registry of Legal Acts of the Republic of Belarus No.212,8/16995 (2007) (О специальной подготовке на должность судьи хозяйственного суда Республики Беларусь).

[53] The Institute is part of the Belarusian State University but has its own budget and a certain level of independence which is higher than that of the other faculties. It is independent of the Executive, but it closely cooperates with the Supreme Court and Republican Prosecutor's Office. Some senior judges and prosecutors are part time lecturers at the Institute.

judges must take part in seminars and roundtable discussions and take tests and examinations and defend a graduation paper.

Successful completion of the special training programme means the start of the final stage of the nomination process which includes the examination of the candidate's documents by various agencies, including, *inter alia* QCJ, which issues an opinion on whether or not to recommend the candidate for the vacancy; the chairperson of the oblast-level or Minsk city Executive Committee, who must agree to the proposed candidate for judge; a joint session of the Collegium of the MoJ and the Presidium of the Supreme Court, which, having reached a positive decision, draft a joint statement of the Minister of Justice and President of the Supreme Court and prepare a draft of Presidential Decree on the appointment of the candidate to the position of judge. The joint statement and the draft Decree are then sent to the Administration of the President. Before the appointment the candidate has an interview with the Deputy Head of the Presidential Administration.[54]

Judges of district and city courts, inter-garrison military courts and specialized courts, oblast-level and Minsk city courts and of the Belarusian Military Court are appointed by the Head of State following a joint proposal of the MoJ and the President of the Supreme Court. Judges of oblast-level and Minsk city economic courts and judges of specialized economic courts are appointed by the Head of State pursuant to the joint proposal of the MoJ and the President of the Supreme Economic Court; and Supreme Court judges and judges of the Supreme Economic Court by the Head of State with the consent of the Council of the Republic (the upper house of the National Assembly of Belarus). Six judges of the Constitutional Court of the Republic of Belarus are appointed by the President and six by the Council of the Republic.[55] The President has full discretion whether or not to appoint the candidate proposed. However, information on whether candidates proposed by the QCJ were rejected by the President and were thus not appointed is limited. According to the Belarusian Helsinki Committee, in 1999-2000 six candidates approved by QCJ were rejected.[56]

---

[54] A. Petrash, The court system in action, 8 Judiciary in Belarus 15 (2005) (Судебная система в действии).

[55] Article 84(8-10) of the Constitution of the Republic of Belarus; Article 99 of the Code on the Judiciary and the Status of Judges.

[56] H. Pogoniajlo/A. Hulak, Court and Human Rights, available at <http://www.belhelcom.org/?q=ru/node/2407> (Суд и права человека).

The Constitution of Belarus contains a general prohibition on discrimination.[57] As already mentioned, lists of candidates for the position of judge are formed according to the principle of non-discrimination on the basis of sex, nationality and beliefs. Special legal regulations dealing with guarantees of minority representation in the judicial system do not exist. Moreover, "no one may be compelled to define or indicate one's ethnic affiliation."[58] In practice, representatives of minority nations (e.g. Poles, Ukrainians, Jews or Russians) do work as judges. In practice judges are appointed according to the principle of gender equality. Thus, in January 2010, 53.2 % of judges were women.[59] There are 23 local courts of general jurisdiction in Minsk oblast and nine of them have female Presidents,[60] 25 local courts of general jurisdiction in Vitebsk oblast and 12 of them have female Presidents.[61] Out of six oblast courts two are headed by women.[62]

3. Length of Office and Reappointment

According to the Code on the Judiciary, "judges shall be appointed for a term of five years and may be reappointed for a new term or for life".[63] Judges who are appointed to the bench for the first time are appointed for five years. The decision on the reappointment of judges or their appointment for life is based on the results of their previous term. In particular, according to Resolution of the MoJ No.22 of 8 April 2008, a detailed file is prepared on each judge. The file contains information on the last two years of the judge's work and for the year in which the judge is seeking reappointment. The file includes the following information: the number of cases and case materials handled by the judge, including those which were handled in violation of deadlines established by law; the complexity of cases heard; the number of judg-

---

57 Article 22 Constitution of the Republic of Belarus.

58 Article 50(1) Constitution of the Republic of Belarus.

59 Available at <http://www.minjust.by/ru/actual?id=502>.

60 Available at <http://www.supcourt.by/cgi-bin/index.cgi?vm=d&vr=sostavraion&vd=5&at=0&m1=5>.

61 Available at <http://www.supcourt.by/cgi-bin/index.cgi?vm=d&vr=sostavraion&vd=1&at=0&m1=5>.

62 Available at <http://www.supcourt.by/cgi-bin/index.cgi?vm=d&vr=sostav&vd=1&at=0&m1=5>.

63 Article 99(4) of the Code on the Judiciary and the Status of Judges.

ments appealed, reversed and modified; all cases where the judge was disciplined; the judge's participation in the promotion and explanation of legislation; and the judge's workload, i.e. the total number of criminal, civil and administrative cases and other materials handled by the judge.[64] Additionally, the file must contain all the documents which were submitted at the time of the judge's initial appointment to the bench, including once again the approval of the Head of the executive of the relevant region.[65] In practice, the number of judgments appealed against, reversed and modified is important for the evaluation of judges; they should have as low a percentage of such cases as possible.[66] This fact is problematic in terms of substantive independence. The opinion of the Chairman of the Court and the Qualification Commissions of Judges can also be taken into consideration. However, the final decision whether to nominate a judge for life is taken by the Administration of the President.[67] Of course, the opinion of the MoJ and its local structures is also taken into account.[68]

Unfortunately, according to some judges there has recently been a tendency to reappoint judges after their probationary term for another five year term. For example, according to the Ordinance of the President of the Republic of Belarus No. 34 of 13 January 2009 52 judges of general and economic courts were appointed and only seven of them without

---

[64] Attachment No.10 to the Instruction on the conditions and the procedure of management of files pertaining to the appointment (removal) of judges of general jurisdiction courts and to the award of qualification ranks (Инструкция об условиях и порядке прохождения материалов о назначении на должность (освобождении от должности) судей общих судов Республики Беларусь, присвоении квалификационных классов).

[65] Article 12 of the Instruction on the conditions and the procedure of management of files pertaining to the appointment (removal) of judges of general jurisdiction courts and to the award of qualification ranks.

[66] See for example the interview with the Chairman of one of the best, according to the MoJ, Belarusian courts who told the correspondent that "[…] we have very few reversed judgments. If this occurs, the fact is a subject of evaluation of the work of staff."; T. Kudritskaja, Managerial Success, 4 Judiciary in Belarus 8 (2009). (Управленческий успех).

[67] Interview with the Chairman of a local court. See also H. Pogoniajlo/A. Hulak, Court and Human Rights, available at <http://www.belhelcom.org/?q=ru/node/2407>.

[68] Interview with the Chairman of a local court.

limitation of term.[69] The next Ordinance No. 164 of 31 March 2009 gives the same picture: 24 judges appointed for five years and only two without limitation;[70] and Ordinance No 401 of 30 July 2009 shows 26 for a limited term, seven without limitation.[71] The Code on the Judiciary as well as other legal acts is silent about the circumstances or conditions for a judge to be appointed for another five year period only, and this loophole places even more discretion in the hands of the executive. Thus the decision on nomination for life or for five years is left entirely to the discretion of the President and Presidential Administration. This may have a negative impact on the substantive independence of judges because they may be prone to adjust their judgments to satisfy presidential interests. The President, however, favours a limited term of office as an incentive for the proper functioning of the judiciary.[72]

Evaluating the current procedure for judicial selection, it has been argued that it "gives a good opportunity to come to know their professional and personal qualities".[73] However, the main subject of criticism is the excessive complexity of the procedure and lack of clear regulation of it in law.[74] It may take up to one year or more to fill a vacancy. So in practice there were situations where at a certain court there were several vacancies and therefore the remaining judges were overburdened with cases. Some authors approve of the higher standards that are applicable

---

[69] Available at <http://www.supcourt.by/cgi-bin/index.cgi?vm=d&vr=ukaz&vd=193&at=0&m1=5>.

[70] Available at <http://www.supcourt.by/cgi-bin/index.cgi?vm=d&vr=ukaz&vd=194&at=0&m1=5>.

[71] Available at <http://www.supcourt.by/cgi-bin/index.cgi?vm=d&vr=ukaz&vd=199&at=0&m1=5>.

[72] In his speech at the second Congress of judges the President asked whether "the principle of life nomination of judges makes some of them weakened. A judge, who was appointed for the first time, has worked for five years and has shown himself from the best side. This is good. But whether it is right to appoint him for life after that? My opinion – it is wrong. And don't be offended. We violated the conceptual principle of the functioning of branch of power. In our country neither Members of the Parliament nor President are nominated for life." Second Congress of judges of the Republic of Belarus at 29 (2002) (Второй съезд судей Республики Беларусь).

[73] E.A. Dubrovin, Judicial independence and its organizational and legal guarantees, at 69 (2009) (Судейская независимость и ее организационно-правовые гарантии).

[74] Id.

to candidates for judges according to the Code on the Judiciary but propose raising the maximum age limit for all judges to 70 years.[75] Certainly a problem is the non-binding character of decisions of the Qualification Commissions of Judges. They can recommend a candidate but there is no guarantee that he or she will be appointed, as this depends on the decision of the MoJ. Moreover, if a candidate would not be approved by the Head of the executive of the region (the latter is nominated by the President) he will never have the opportunity to be a judge, which is a direct violation of the principle of the separation of powers. This is a revival of the old soviet unwritten, but strictly obeyed rule when all more or less important nominations had to be approved by the first Secretary of the ruling Communist Party of the relevant region. Moreover, the main role at the final stage of judicial selection remains, once again, with the executive. It goes without saying that a person disloyal to the existing political regime would never have a chance of being nominated. While being more or less transparent towards the candidate in question (who has the right to see the documents dealing with the assessment of his or her candidature) the process of judicial selection is lacking in transparency towards the public at large. Court vacancies are never announced publicly.

The appointment procedure should be seriously improved and become more transparent. For example, an obligatory announcement of the vacancy in a newspaper or legal journal published by the Supreme Court can make the procedure more competitive and transparent. As there is no specialized agency monitoring the process of judicial appointment and no special supervisory body, one of the possible solutions would be to create a body similar to the Polish National Judicial Council, which is, according to article 186 (1) of the Polish Constitution, the organ safeguarding the independence of courts and judges.[76] The Council would be composed of judges (at least 50% of the Council's composition), elected by the judicial community, and representatives of the executive, appointed by Head of State, as well as representatives of both

---

[75] I.I.Martinovich, Problems of modernization of judicial system in Belarus in the post-soviet period /Judicial reforms in CIS countries, at 26-27 (2005) (Проблемы модернизации судебной системы Беларуси в постсоветский период, Судебные реформы в странах СНГ).

[76] Polish Constitutional Law. The Constitution and selected statutory materials. Bureau of research. Chancellery of the Sejm. Warsaw, at 72 (2000). See also A. Bodnar/Ł. Bojarski, Judicial Independence in Poland, in this volume, Chapter B. I. 2.

chambers of the Parliament. It would be advisable to appoint the Minister of Justice, the President of the Supreme Court and the President of the Supreme Economic Court to the Judicial Council *ex officio*. The competence of the Council would include the exclusive right to propose to the President of the Republic of Belarus candidates for judicial office in the courts of general jurisdiction and the economic courts. It would be practical if the Council were to propose at least two candidates per judicial vacancy. It is necessary to establish the rule that the Head of the State has an obligation to nominate the chosen candidate for a term provided by law.

III. Tenure and Promotion

1. Tenure

The majority of judges who have served in office for five years are appointed for life. In that case they have guaranteed tenure, and cannot be removed to other positions or to other courts without their consent. Thus, all active judges of the Supreme Court have been appointed for life. As of the beginning of 2009, out of the total of 960 judges of general jurisdiction courts, 684 were appointed for life and 276 were appointed for a first, and (or) reappointed for another five-year term.[77] Unfortunately, there is a tendency to reappoint judges after their probationary term for another five year term.[78]

Moreover, there is a special category of judges who "fulfil the obligations of a judge" who is on maternity leave.[79] The procedure for the nomination of such judges is the same as that described in the previous section. Sometimes in practice this position is filled by a retired judge but sometimes that is how a young judge starts his or her career. These judges have the same rights and duties as regular judges with one exception: return of the colleague from maternity leave is the legal basis for their release,[80] unless they are appointed to another vacancy at the same court or another court. To my mind this is a violation of the principle of

---

[77] Interview with a Supreme Court Judge.

[78] See *supra* B. II. 3. Length of Office and Reappointment.

[79] According to the Labour Code the term of maternity leave is up to three years.

[80] Article 100(4) of the Code on the Judiciary and the Status of Judges.

irremovability of judges and this norm of the Code should be changed. Since judges are subject to the requirements of the Law "On Civil Service in the Republic of Belarus", they may remain in office until the age of 65, unless the Constitution or other laws provide otherwise,[81] as for example, for judges of the Constitutional Court the Constitution lays down the age limit of 70 years.

2. Promotion

The decision to register a judge for promotion to higher positions is made by the Qualification Commissions of Judges during the process of judicial assessment which is designed objectively to evaluate the level of their professional knowledge and qualities and their ability to apply them during the administration of justice.[82] Judicial assessments are conducted on a regular basis, but they may also be conducted *ad hoc*. Regular judicial assessment is conducted after six months of taking office and then every five years. *Ad hoc* judicial assessment is usually conducted before promotion to the position of president or deputy president of a court or to a higher court. Assessment of judges of oblast-level and Minsk city courts and presidents, deputy presidents and judges of district and city courts and specialized courts is conducted by QCJ of oblast-level and Minsk city courts pursuant to the joint request of Presidents of oblast-level/Minsk city courts and Heads of Departments of Justice of oblast-level/Minsk city Executive Committees.[83]

The President of the court in question must draft a profile of the judge of his or her court who is subject to the assessment. The profile must include full and objective evaluation of the judge's professional conduct, his or her professional and ethical qualities and the assessment of his or her level of professional aptitude.[84] In practice important criteria for the evaluation are the following: the number of cases and case materials handled by the judge, including those which were handled in violation

---

[81] Article 41(1) of the Law of the Republic of Belarus No.204-3 14 June 2003, On Civil Service, National Registry of Legal Acts of the Republic of Belarus No.70, 2/953 (2003); No.120, 2/1053 (2004); No.78, 2/1208 (2006); No.14,2/1413 (2008); No.184,2/1506 (2008) (О государственной службе в Республике Беларусь).

[82] Article 102 Code on the Judiciary and the Status of Judges.

[83] Article 104(3) Code on the Judiciary and the Status of Judges.

[84] Article 104(9) Code on the Judiciary and the Status of Judges.

of deadlines established by law; the complexity of cases; the number of judgments appealed against, reversed and modified; all cases where the judge was disciplined; the judge's participation in the promotion and explanation of legislation, through the publication of articles in state newspapers on new or existing legislation, participation in legal programmes on radio or TV and public lectures on legislation. A judge who is dealing with more complicated cases would be promoted more quickly than others. The same is true with criminal law cases: a more experienced judge would deal with more serious, grave crimes or the most dangerous crimes which are punishable severely, with up to a life sentence. Hence he is more likely to be promoted than his younger colleague who deals with less dangerous and less complicated crimes. There is widespread opinion that a judge should avoid the situation where his judgments are being appealed against or reversed, as this is still regarded as a result of the poor quality of his or her work (as in Soviet times).[85]

Depending on the level of professional knowledge and experience of the judge subject to the assessment, and depending on the position he or she holds, the QCJ may propose to award him/her the next qualification rank or a higher qualification rank which he or she would normally be eligible for or decide that there are grounds for reducing his/her qualification rank (a higher qualification rank means a higher salary). It may also recommend that the President of the court in question reward the judge (for example with an honourable Diploma or a bonus) or register the judge in the reserve list for promotion to higher positions.[86] The rules governing the procedure of registering judges in the reserve lists for promotion to higher positions are set out in a resolution of the Council of Ministers.[87]

According to Article 7 of that Resolution, "[t]he primary criteria for registering a candidate in the reserves include: the judge's performance in the position held; professional and personal qualities of the judge, and the judge's potential to perform duties in the new position; testing results and results of the last judicial assessment; comments of persons who work with the judge directly; the candidate's age and the state of

---

85 Interview with judges of local, oblast and Supreme courts.

86 Article 105 Code on the Judiciary and the Status of Judges.

87 Resolution of the Council of Ministers of the Republic of Belarus No.150 of 6 February 2007, Concerning the enactment of the Instructions on the establishment and organization of work with the reserves of judges for general jurisdiction and economic courts.

the candidate's health".[88] Some judges evaluate the promotion process as objective and fair, but some of them strongly disagree with the opinion that appealed or reversed judgments are always a result of poor quality of work. Moreover, there is an opinion that "obedient" judges are promoted more quickly than others.[89] However, no research on this subject is available and no sociological survey has been conducted. The process of promotion is not fully transparent, and there are examples of unusually meteoric judicial careers.[90]

IV. Remuneration

1. Remuneration

In the beginning and middle of the 1990s judges' remuneration was not sufficiently high resulting in the abandonment of the judicial profession and the loss of its prestige. However, since then a range of measures has been undertaken to raise judges' salary scales and improve their working conditions.[91] Between 2002 and 2008, the amount of money provided from the state budget to the judiciary increased more than 3.8 times.[92] Because of the high inflation rate in Belarus there is a regular increase in salaries for all civil servants, including judges. Of course, the

---

88 Id.

89 Interview with former President and judges of local court.

90 A. Kazakevich, The Judicial Power in Belarus: Analysis from the Perspective of Political Science, at 122 (2009) (Институт судебной власти Беларуси: политологический анализ).

91 For example see Ordinance of the President of the Republic of Belarus No.625 of 4 December 1997, Concerning the improvement of remuneration of judges and the improvement of asset, technical and staffing situation of the courts of the Republic of Belarus, Collection of Decrees and Ordinances of the President and Resolutions of the Government of the Republic of Belarus No.34 Article 1070 (1997) and No.19 Article 501 (2003), National Registry of Legal Acts of the Republic of Belarus, No.133, 1/5113 (2003) (Об упорядочении оплаты труда судей, материально-техническом и кадровом обеспечении судов Республики Беларусь). See further Ordinance of the President of the Republic of Belarus No.195 of 3 April 2008, Concerning some social and legal guarantees for military personnel, judges and prosecutors,, National Registry of Legal Acts of the Republic of Belarus No.83 (2008), 1/9603, No.248, 1/10104; (Юстыцыя Беларусі. 2005.No.5.C.23-24); and 5 The Judiciary of Belarus 23 (2005).

92 4 The Judiciary of Belarus 13 (2008) (Юстыцыя Беларусі).

decisive factor here is the growth of national GDP. Decisions to raise salaries for civil servants are taken by the Head of State. Currently, according to what judges say, their remuneration is substantially higher than that of teachers or medical workers, it is paid without delay, and, taking into account all additional privileges and benefits, it is quite sufficient for a decent standard of living.[93] The income of a senior judge is higher than that of a law professor, though some business lawyers can get more. The remuneration of judges, like that of other civil servants, consists of position-based salary, bonuses for qualification rank and seniority, as well as premiums and other payments in accordance with the law (e.g. judges with an academic degree, such as a Ph.D., receive a monthly bonus in accordance with the law). The law dictates that the size of position-specific salaries of judges of general jurisdiction and economic courts shall be determined by the Head of State as a percentage of the salary of the President of the Supreme Court and President of the Supreme Economic Court.[94] These amounts are set out in an unpublished special addendum to the Presidential Ordinance.[95]

The grounds for and procedure of awarding qualification ranks to judges (highest, first, second, third, fourth and fifth) are regulated by the Code on the Judiciary. The amounts of bonuses for qualification ranks and seniority are determined by the Head of State. The awarding of qualification ranks, reduction in qualification ranks and deprivation of qualification ranks of judges of general jurisdiction and economic courts (except for the president, deputy presidents and judges of the Supreme Court and Supreme Economic Court) is performed by the President of Belarus upon a joint request of the President of the Supreme Court/Supreme Economic Court and the Minister of Justice. Such joint request must contain the relevant findings of the correspond-

---

[93] Interview with the judges of local, oblast, Supreme and economic courts.

[94] Article 48(4-6), The Law of the Republic of Belarus No.204-3 of 14 June 2003, On Civil Service.

[95] Ordinance of the President of the Republic of Belarus No.625 of 4 December 1997, Concerning the improvement of remuneration of judges and the improvement of asset, technical and staffing situation of the courts of the Republic of Belarus, Collection of Decrees and Ordinances of the President and Resolutions of the Government of the Republic of Belarus, 1997, No.34, Article 1070. No.19, Article 501, National Registry of Legal Acts of the Republic of Belarus, 2003, No.133, 1/5113 (Об упорядочении оплаты труда судей, материально-техническом и кадровом обеспечении судов Республики Беларусь).

ing QCJ.[96] According to information from the Supreme Court QCJ, there were no cases of deprivation or reduction of qualifications ranks in 2007 and 2008.[97] The award of qualification ranks is based on the length of service of a given judge and the decision of the relevant QCJ, so the abuse of this power by the executive is unlikely. However, in the future when the economical situation becomes more stable and inflation is lower it would be better to regulate judicial salaries by an act of Parliament. Moreover, it is preferable to have all legal enactments dealing with judges' remuneration accessible to tax-payers.[98]

2. Benefits and Privileges

In addition to monetary compensation for their work, judges are entitled to a variety of other benefits, including the right to improve their housing conditions before other registered persons in line (people who are officially registered as "in need of improving housing conditions" can get housing for half the price compared with the free market).[99] Moreover, judges are entitled to expedited subsidized loans for the construction (reconstruction) or purchase of housing.[100] Judges requiring

---

[96] Article 109(1 and 5) of the Code on the Judiciary and the Status of Judges.

[97] Available at <http://www.supcourt.by/cgi-bin/index.cgi?vm=d&vr=kolleg1&vd=8&at=0> and <http://www.supcourt.by/cgi-bin/index.cgi?vm=d&vr=kolleg1&vd=9&at=0&m1=4>.

[98] The same problem of secrecy arises with the salaries and other allowances of Belarusian Members of Parliament. See A.Vashkevich, The legal status of the members of the National Assembly in the Republic of Belarus, in G. Manssen (ed.), Die verfassungsrechtlich garantierte Stellung der Abgeordneten in den Ländern Mittel- und Osteuropas, 199 (2009).

[99] Para. 1.11, Ordinance of the President of the Republic of Belarus No.195 of 3 April 2008, Concerning some social and legal guarantees for military personnel, judges and prosecutors, National Registry of Legal Acts of the Republic of Belarus No.83, 1/9603, No.248, 1/10104 (2008) (О некоторых социально-правовых гарантиях для военнослужащих, судей и прокурорских работников).

[100] Section 3, subpara. 1.10, para. 1, Ordinance of the President of the Republic of Belarus No.185 of 14 April 2000, Concerning the extension to citizens of subsidized loans for the construction (reconstruction) or purchase of housing, National Registry of Legal Acts of the Republic of Belarus, No.38 1/1172 (2000);. No.100, 1/3137 (2001); No.37, 1/5373 (2004); No.2, 1/6115 (2005); No.223, 1/8874 (2007), No.29, 1/9411, No.83, 1/9603. No.133, 1/9730, No 172, 1/9873, No.248, 1/10104 (2008), No.70, 1/10539 (2009) (О предоставлении

improvement of housing conditions are entitled to rent housing for the term of their office from the state housing fund. All these benefits are very important, as the most acute problem for young professionals is lack of housing. As the organs of local executive power are responsible for the distribution of these benefits, there is always room for influence on the judge. In Minsk oblast some judges have been on the waiting list for state housing for more than three years, though theoretically they should get it in six months.[101] Judges are also entitled to mandatory state insurance covered by the state budget.[102] Judges earn annual paid leave of between 30 and 36 calendar days.[103]

3. Retirement

Like other civil servants, judges are entitled to retirement and a pension, which is substantially higher (several times) than the average pension received by regular citizens. The amount as an absolute figure is rather modest (between 200 and 300 EUR)[104] and at the same time is higher than the average income of working people (at the end of 2009 around 250 EUR).[105] In order to retire, judges must have completed a certain number of years of professional experience (30 years for men and 25 years for women), of which they have to have served as judge for at least 20. Constitutional Court judges must have at least four years' experience as judges.[106] Retired judges are eligible for a full pension once they reach a certain age (60 years for men and 55 years for women).[107]

гражданам льготных кредитов на строительство (реконструкцию) или приобретение жилых помещений).

[101] L.Junchik, How Justice is Managing. Republic, 29 November 2007 (Как вершится правосудие, Рэспубліка.29.11.2007).

[102] Article 129 Code on the Judiciary and the Status of Judges of the Republic of Belarus.

[103] Article 50(1-2) Law of the Republic of Belarus No.204-3 of 14 June 2003, On Civil Service.

[104] Interview with a retired judge.

[105] Available at <http://www.belstat.gov.by/homep/ru/indicators/doclad/2010_1/pril/8.pdf>.

[106] Article 52(4) Law of the Republic of Belarus No.204-3 of 14 June 2003, On Civil Service.

[107] Article 54(1) Law of the Republic of Belarus No.204-3 of 14 June 2003, On Civil Service.

V. Case Assignment and Recusal

According to the Code on the Judiciary and the Status of Judges, the burden of assigning incoming cases lies on the President of the relevant court[108] or on the Deputy President of that court if the President is temporarily absent.[109] For instance, Article 2.1 of the Regulation on the President of the District and City Court and of Inter-Garrison Military Court establishes that the court president must assign criminal, civil and administrative cases and other case materials based on the complexity of the cases, their volume, and the qualifications of the judges, their experience and workload. A similar provision is set out in the Regulation on the President of Oblast Level Court, Minsk City Court and Belarusian Military Court.[110] This system of assigning cases has drawn criticism from some legal scholars, who claim that it may negatively affect the independence of judges.[111] It leaves room for abuse of this power by the President of the court and is highly undesirable. Under exceptional circumstances (for example, the serious illness of the judge) the President of the court can reassign a case to another judge.

A judge who becomes aware of circumstances which rule out his or her participation in a criminal case must remove him- or herself from the case.[112] For example, according to Article 77 of the Criminal Procedure Code, a judge may not participate in a criminal case if he or she is a victim, plaintiff, or respondent or witness; if he or she participated at an

---

[108] Arts. 32, 37 and 47 Code on the Judiciary and the Status of Judges.

[109] Arts. 33, 38 and 49 Code on the Judiciary and the Status of Judges..

[110] Resolution of the Ministry of Justice No.32 of 30 June 2005, Concerning the enactment of the Regulation on the president of district and city court and of inter-garrison military court of the Republic of Belarus and of the Regulation on the president of oblast level court, Minsk city court and Belarusian Military Court, National Registry of Legal Acts of the Republic of Belarus No.109, 8/12845 (2005); No.165, 8/15107 (2006) (Об утверждении Положения о председателе районного (городского), межгарнизонного военного суда Республики Беларусь и Положения о председателе областного, Минского городского, Белорусского военного суда Республики Беларусь).

[111] Dubrovin (note 73), at 35.

[112] Article 76(2) Criminal Procedure Code of the Republic of Belarus; L.L.Zaitseva, Criminal Procedure Code of the Republic of Belarus with the review of amendments and practice of their application/author of review, at 127 (2008) (Уголовно-процессуальный кодекс Республики Беларусь:с обзором изменений и практики применения).

earlier stage in the criminal case as expert, translator, interrogator, investigator, public or private prosecutor, court secretary, court clerk, defence attorney, lawful representative of the accused or defendant, or other party; if he or she is a relative of the public or private prosecutor (i.e. victims of certain minor crimes, who are entitled to prosecute the offender), investigator, interrogator, defendant, victim, plaintiff, respondent, defence attorney or representative; or if there are other grounds for believing that the judge has a direct or indirect personal interest in the outcome of the case. Judges who are relatives may not sit on the panel reviewing the same criminal matter.[113]

Similar provisions are contained in the Civil Procedure Code,[114] and may also be found in the Code of Administrative Offences Procedure and Execution[115] and the Code of Economic Procedure.[116] If such circumstances exist, the judge must withdraw him- or herself from the case. Based on the same circumstances, a motion to remove the judge from the case may be filed during court proceedings by the public or private prosecutor, defendant, defendant's legal representative or defence attorney, or by the victim, plaintiff, respondent or by their representatives.[117] If the motion was brought before the beginning of the trial, the President of the court makes a decision. If the motion was made during the trial, the decision is taken by the judge him/herself if he/she is the only judge in the case or by other judges if the court consists of several judges.[118]

VI. Judicial Conduct Complaint Process

The legislation of Belarus does not contain a special procedure for reviewing complaints filed against a judge by other judges, lawyers or the public. These people may complain about a judge's conduct to the

---

[113] Id., at 128.

[114] Arts. 32-36 Civil Procedure Code of the Republic of Belarus, available at <http://www.pravo.by/webnpa/text.asp?RN=hk9900238>.

[115] Article 5(1) Code of Administrative Offenses Procedure and Execution, available at <http://www.pravo.by/webnpa/text.asp?RN=hk0600194>.

[116] Article 34 Code of Economic Procedure of the Republic of Belarus, available at <http://www.pravo.by/webnpa/text.asp?RN=hk9800219>.

[117] Article 79(21) Criminal Procedure Code of the Republic of Belarus.

[118] Article 80 Criminal Procedure Code of the Republic of Belarus.

President of the relevant court or to the Ministry of Justice.[119] The public may also leave a written complaint in the book of complaints, which is available in every court. Such complaints are carefully considered and if necessary a disciplinary investigation is opened on the demand of the President of the relevant court. The complainant will always receive a written answer to his complaint.[120]

VII. Judicial Accountability: Discipline and Removal Procedures

1. Formal Requirements

The grounds and the procedure for disciplining judges and removing them from office are regulated in detail by the Code on the Judiciary and the Status of Judges[121] and by MoJ Resolution.[122] The following have the prerogative to initiate disciplinary proceedings: the President of the Republic of Belarus in relation to all judges; the President of the Supreme Court/ President of the Supreme Economic Court in relation to all judges of courts of general jurisdiction/economic courts; the Minister of Justice in relation to judges of general jurisdiction and economic courts, except for Presidents, Deputy Presidents and judges of the Supreme Court and Supreme Economic Court; the Presidents of oblast-level and Minsk city courts, and the Belarusian Military Court in relation to judges of the respective courts, district, city courts, and specialized courts; the Presidents of oblast-level and Minsk city economic courts and specialized economic courts in relation to judges of the respective oblast-level and Minsk-city courts and specialized economic courts; the Heads of Departments of Justice of oblast-level and Minsk

---

[119] The Law on Appeals of Citizens and Legal Persons. National Registry of Legal Acts of the Republic of Belarus, No.83, 2/1852 (2011) (Закон об обращениях граждан и юридических лиц).

[120] Interview with President of local court and judge of the local court.

[121] Chapter 11-12 Code on the Judiciary and the Status of Judges.

[122] Resolution of the Ministry of Justice No.89 of 27 December 2007, Concerning the enactment of Instructions for the procedure of triggering disciplinary proceedings against judges by officials of the Ministry of Justice system, National Registry of Legal Acts of the Republic of Belarus, No.18-19,8/17800, No.265.8/19726 (2008) (Об утверждении Инструкции о порядке возбуждения дисциплинарного производства в отношении судей должностными лицами органов юстиции).

city Executive Committees in relation to judges of the respective district and city courts and judges of specialized courts.[123]

A judge may be disciplined for: violation of the law during the administration of justice; violation of the Judicial Code of Ethics; and failure to comply with the court's internal rules and procedures, or for the commission of other service-related wrongdoing.[124] Overruling or amendment of a court decision does not trigger the disciplinary accountability of the judge who participated in its pronouncement, unless it was determined that the judge intentionally gave an unlawful ruling.[125]

2. Disciplinary Proceedings

Disciplinary proceedings against judges of general jurisdiction and economic courts, except for disciplinary proceedings for violations of courts' internal rules and procedures, are handled by the relevant Qualification Commission of Judges. Thus, the QCJ of the Supreme Court has jurisdiction to hear disciplinary actions against judges of the Supreme Court (except for the President of the Supreme Court), and against presidents and deputy presidents of oblast-level and Minsk city courts, the Belarusian Military Court and against members of the Qualification Commission of the Supreme Court (its own members), and Qualification Commissions of oblast-level and Minsk city courts, and military courts. The QCJs of oblast-level and Minsk city courts have jurisdiction over disciplinary actions against judges of oblast-level, Minsk city courts, and against judges of district and city courts.[126]

The person initiating disciplinary proceedings must first scrutinize the information about the disciplinary offence committed by the judge by way of receiving from that judge and other persons written statements, and by way of collecting and examining case materials. The judge subject to disciplinary proceedings has the right to present additional explanations and file motions to conduct additional investigations. A re-

---

[123] Article 115 Code on the Judiciary and the Status of Judges.

[124] For example, this can be absence during working hours or delay in the production in time of the documents prescribed by law (for instance, a copy of the sentence should be given to the accused and his lawyer no later than five days after it is passed).

[125] Article 111(2) Code on the Judiciary and the Status of Judges.

[126] Article 114(2-3) Code on the Judiciary and the Status of Judges.

fusal to grant the motion must be communicated to the judge in writing. Refusal by the judge to give written explanations does not prevent the commencement of disciplinary proceedings.[127] The directive (order or decision) to initiate disciplinary proceedings must contain the reasons triggering the proceedings. The directive (order or decision) is then sent, along with the necessary documents, to a relevant QCJ. The directive (order or decision) may be recalled by the initiating person before the QCJ commences the disciplinary proceedings. The judge in relation to whom the directive (order or decision) is being recalled has the right to request the QCJ to proceed with the examination of disciplinary charges.

Before the start of disciplinary proceedings, the Chair of the QCJ may appoint one of the Commission members to conduct additional investigations of the grounds for bringing disciplinary charges against the alleged wrongdoer.[128] When additional investigation is ordered, the limitation period laid down in Article 113 of the Code shall be suspended.[129] Pursuant to the request of the Chair of the QCJ members of relevant courts and Departments of Justice of Executive Committees may also take part in such additional investigation. To conduct the investigation the Commission may request additional documents and files.[130]

As a result of disciplinary proceedings the QCJ may issue a decision of a non-binding nature on the finding of grounds for enforcing disciplinary sanctions such as notice, reprimand, warning on inadequate compatibility with the requirements of the position occupied, reduction of qualification rank for a period of up to six months, removal from the bench, or the dropping of the disciplinary charges.[131] The finding of the QCJ is adopted by simple majority of votes of its members who took part in the disciplinary proceedings. The finding must be in writing and

---

[127] Article 116(1) Code on the Judiciary and the Status of Judges.

[128] Article 116(3-7) Code on the Judiciary and the Status of Judges.

[129] Article 113(1) Code on the Judiciary and the Status of Judges reads: "A judge may be subject to disciplinary proceeding no later than two months after the disciplinary misconduct was identified, excluding the time of illness or annual leave, but no later than six months after the misconduct was committed, and based on results of investigation organized by competent organs-no later than two years after the disciplinary misconduct was committed".

[130] Article 116(9-10) Code on the Judiciary and the Status of Judges.

[131] Article 118(1) Code on the Judiciary and the Status of Judges.

signed by the Commission Chair and the members.[132] The materials relating to the disciplinary proceedings along with the Commission's finding are then sent to the President of the relevant court, who will make a final decision. The decision on the imposition of reduction of qualification rank for up to six months or removal from the bench is made by the Head of the State.

The Presidents of the relevant courts or the President of Belarus may take one of the following decisions: to impose disciplinary sanctions proposed by the QCJ or to drop disciplinary charges. Court presidents have discretion with regard to disciplinary proceeding, and this may be problematic from the point of view of judicial independence. This situation shows the excessively prominent role of the court presidents (and to some extent their deputies) in the Belarusian judicial system: they can initiate disciplinary proceedings and at the same time they have the decisive final word on them. At the same time the very strong influence of the executive on disciplinary proceedings is also problematic from the point of view of judicial independence.

A copy of the decision on disciplinary accountability must be sent to the judge against whom the decision was issued and to the person who brought disciplinary charges within three days of its issue. If the decision has been issued against a judge of the Supreme Court or Supreme Economic Court, a copy of the decision must be also submitted to the President and to the Council of the Republic of the National Assembly. A copy of the disciplinary decision is attached to the judge's personal record.[133]

3. Judicial Safeguards

The judge against whom disciplinary proceedings were instituted enjoys all procedural safeguards laid down in the law. Such safeguards include: the right to file motions for additional investigation; the right to present written statements;[134] the right to participate in the hearing of the case by the Qualification Commission of Judges;[135] the right to legal

---

[132] Article 118(2 and 4) Code on the Judiciary and the Status of Judges.

[133] Article 119(4) Code on the Judiciary and the Status of Judges.

[134] Article 116(1) Code on the Judiciary and the Status of Judges.

[135] Article 117(2) Code on the Judiciary and the Status of Judges.

counsel;[136] and the right to appeal decisions imposing a disciplinary sanction.[137] All these rights are used in practice, including the right to appeal.[138] Decisions on the imposition of disciplinary sanctions issued by presidents of oblast-level and Minsk city courts and by presidents of Belarusian Military Court and oblast-level and Minsk city economic courts and specialized economic courts may be appealed by the judge against whom such decisions were issued or by the person who initiated disciplinary proceedings to the President of the Supreme Court and the President of the Supreme Economic Court respectively. Decisions on the imposition of disciplinary sanctions issued by the President of the Supreme Court and the President of the Supreme Economic Court may be appealed by the judge or by the initiator to the Presidium of the Supreme Court and the Presidium of the Supreme Economic Court respectively.[139]

Unfortunately, Belarusian law contains a provision which runs counter to the procedure of disciplining judges described above, even though it has never been applied in practice. According to Article 122 of the Code on the Judiciary, on the grounds set out in that Code, the President of the Republic of Belarus may impose any disciplinary sanction on any judge without initiating disciplinary proceedings. In such a case the judge may provide explanations as to his or her alleged misconduct.

4. Sanctions

The range of disciplinary sanctions includes: notice; reprimand; warning about inadequate compliance with the requirements of the position occupied; lowering of qualification rank for a period of up to six months; removal from the bench. The sanctions are imposed according

---

136 This right is guaranteed to every person by Article 62 of the Constitution ("Everyone shall have the right to legal assistance to exercise and defend his rights and liberties, including the right to make use, at any time, of the assistance of lawyers and one's other representatives in court, other state bodies, bodies of local government, enterprises, establishments, organizations and public associations, and also in relations with officials and citizens.") According to an Interview with a Supreme Court Judge, this right is used in practice during disciplinary proceedings.

137 Article 121 Code on the Judiciary and the Status of Judges (Кодекса Республики Беларусь о судоустройстве и статусе судей).

138 Interview with a judge who is a former member of the QCJ.

139 Article 121 Code on the Judiciary and the Status of Judges.

to the nature, gravity and consequences of misconduct, and taking into account the judge's personality and the degree of fault.[140]

5. Practice

In 1999, 40 judges were disciplined and one was sentenced to eight years in prison for bribery.[141] At a press conference which took place on 11 February 2009, President of the Supreme Court Mr. V. Sukalo admitted that "there are a good deal of citizens' complaints concerning judicial misconduct, both during trial and outside the courtroom. There are instances of violation of the Code of Judicial Ethics".[142] In 2009, 111 disciplinary proceedings were instituted[143] and 103 judges were disciplined.[144] According to the QCJ of the Supreme Court, 102 disciplinary proceedings were instituted against 97 judges in 2008.[145] Four judges were disciplined twice, and one judge was sanctioned three times. 82 judges were disciplined in 2007, 83 judges in 2006 and 106 in 2005. Disciplinary proceedings were instituted by the President of the Supreme Court of the Republic of Belarus against 11 judges; by the Minister of Justice of the Republic of Belarus against nine judges; by Presidents of oblast-level and Minsk city courts against 35 judges; and by Heads of Departments of Justice against 47 judges.

As a result of 102 disciplinary proceedings, disciplinary sanctions were imposed on 87 judges in 2008 (compared to 73 judges in 2007), including 18 presidents and deputy presidents of district court or 21% of all disciplined judges. Court presidents decided to drop ten disciplinary charges against judges on the ground that the QCJ deemed it unnecessary to impose disciplinary sanctions on those judges and decided not

---

140 Article 112 Code on the Judiciary and the Status of Judges.

141 M. Dziabela, This year Femida's servants worked calmly and efficiently, Zviazda (newspaper) , 4 February 2000 (Слугі Феміды летась працавалі спакойна і аператыўна, Звязда).

142 The President of the Supreme Court listed the flaws in the functioning of the judiciary, available at <http://www.dw-world.de/dw/article/0,,4020966,00.html>.

143 L. Junchik, Where is justice going?, Republic Newspaper, 4 February 2010. (Л. Куда движется правосудие?, Рэспубліка).

144 Available at <http://www.sb.by/post/96296>.

145 Available at <http://www.supcourt.by/cgi-bin/index.cgi?vm=d&vr=kolleg1&vd=9&at=0&m1=4>.

to proceed beyond discussion of misconduct at the session of the Commission. Presidents of oblast-level and Minsk city courts agreed with such findings of the QCJ, which are not binding. As a result of disciplinary proceedings, three judges were removed from the bench. Ten judges of district courts were warned about their inadequate compliance with the requirements of their judicial positions. Reprimands were imposed on 46 judges and notices were issued in relation to 34 judges.[146]

Rather than evidencing abuse of administrative powers by the executive and court presidents, the relatively high rate of disciplinary proceedings (every tenth judge was disciplined) shows the lack of proper training and sometimes low ethical standards of judges (the number of complaints by the population about their rudeness in 2009 more than doubled those in 2008).[147] However, the possibility of potential abuse in this sphere is quite high, as court presidents enjoy broad administrative powers and theoretically could use them, if necessary, to get rid of any unwanted judges.

VIII. Immunity for Judges

There is no differentiation between the immunity for official and that for non-official actions of judges. The immunity of judges is guaranteed by the Code on the Judiciary and the Status of Judges, which states that "judges are immune throughout their term on the bench. The immunity of a judge includes the immunity of the judge's home, office, means of transport and communication, correspondence, property and documents. A judge or lay assessor (*народный заседатель* – people's assessor) may not be held accountable in any way for statements or decisions made during the administration of justice, unless he is found guilty of committing a crime against the interests of the service by a court verdict".[148]

In addition, on 12 December 2006, the Criminal Procedure Code of the Republic of Belarus was amended by the addition of detailed provisions regulating the procedure of bringing criminal charges and applying measures of pre-trial restraint, as well as the procedure of conducting

146 Id.

147 Junchik (note 143).

148 Article 87 Code on the Judiciary and the Status of Judges.

investigatory activities against judges and other persons with immunity. In particular, the decision on initiating a criminal case against a judge or the decision to declare a judge as a suspect or accused in a criminal case initiated against others must be issued by the Prosecutor General or by the person acting in that capacity. Before issuing such a decision the Prosecutor General or the person acting in his capacity must obtain the consent of the person who appointed the judge or of the agency which elected the judge.[149] A judge may not be apprehended or otherwise deprived of his liberty without the consent of the person who appointed him or of the agency which elected him, except for cases of treason or other grave crime or when the judge was arrested at the crime scene. The agency under the authority of which the judge was arrested must immediately and in writing inform the President of the Supreme Court or the Supreme Economic Court, as well as a relevant QCJ and the MoJ.[150] The personal search of a judge is prohibited unless the judge was apprehended at the crime scene.[151] If, pursuant to the Criminal Procedure Code, consent is given to initiate a criminal case against a judge or lay assessor, or declare him or her suspect or accused, or to detain him or her before trial, then a simultaneous decision of the Head of the State[152] must be issued suspending such judge or lay assessor from the bench.[153] The Supreme Court of the Republic of Belarus has exclusive jurisdiction over criminal cases brought against judges.[154] Thus, the immunity of judges does not seem to be a problem in Belarus, and there are no examples of abuse in this respect.

IX. Associations for Judges

There are no judicial associations in Belarus. At the same time, the Code on the Judiciary and the Status of Judges contains a special chapter entitled "Bodies of Judicial Community". According to Article 143 of the Code, such bodies include the Assembly of Judges of the Republic of Belarus, the National Council of Judges, Conferences of Judges of

149 Article 468-2(5) Criminal Procedure Code of the Republic of Belarus.

150 Article 468-3(4-5) Criminal Procedure Code of the Republic of Belarus.

151 Article 468-4(2) Criminal Procedure Code of the Republic of Belarus.

152 Article 123 Code on the Judiciary and the Status of Judges.

153 Article 87(4) Code on the Judiciary and the Status of Judges.

154 Article 269(1), Criminal Procedure Code of the Republic of Belarus.

oblast-level and Minsk city courts, the conference of military court judges and the conference of economic court judges. Other bodies of the judicial community include the QCJ of the Supreme Court, the QCJs of oblast-level and Minsk city courts, the QCJ of military court judges and the QCJ of economic court judges. These bodies are established in order to perform functions which in other countries are usually attributable to judicial associations. Such functions include upholding the authority of the judiciary; ensuring that judges abide by the requirements of the Constitution, other laws and of the Judicial Code of Ethics during the exercise of their profession and in their private life; the protection of rights and lawful interests of judges; the promotion of safeguards of judicial independence and immunity of judges; and the improvement of the judiciary and the administration of justice.[155]

The Assembly of Judges of the Republic of Belarus is the highest body of the judicial community, representing the interests of the judiciary as a whole. It is composed of Constitutional Court judges, judges of general jurisdiction and economic courts and retired judges, all of whom are members of the Assembly *ex officio*. As a rule, it meets once every four years. If necessary, the Assembly may be called together for an extraordinary session.[156] The Assembly is competent to consider pertinent issues of the functioning of the judiciary, as well as issues relating to the legal, financial and social status of judges; to discuss legislative bills and drafts of other regulations which concern the functioning of courts, including the status of judges and issues relating to staffing and the organizational and financial maintenance of courts; to elect the National Council of Judges and its Chair; and to consider other issues relating to the functioning of the judiciary.[157] Hitherto, the Assembly of judges has been convened twice – in 1997 and in 2002. No written or oral information is available on why it was not convened in 2006 or later; however, a conference of judges was convened in 2008 under the auspices of the President of Belarus and more than 400 judges were present.

The National Council of Judges was created by decision of the first Assembly of Judges.[158] The Assembly also adopted the Statute of the NCJ

---

155 Article 144 Code on the Judiciary and the Status of Judges.

156 Article 151 Code on the Judiciary and the Status of Judges.

157 Article 153 Code on the Judiciary and the Status of Judges.

158 Decision of the first Assembly of judges of 5 December 1997, Concerning the National council of judges, First Assembly of judges of the Republic of Belarus. Documents and materials, at 145 (1998) (О Республиканском совете судей).

and decided that it should be composed of 26 members (all of whom were elected by the Assembly). The NCJ may form standing or *ad hoc* commissions, which are its working entities in the main areas of its activities. As a rule, issues to be addressed by the NCJ should be prepared by the commissions.[159] Although according to the Code on Judiciary sessions of the NCJ are held at least twice a year,[160] no information about such events can be found either on the website of the Supreme Court or in the Journal of the Supreme Court . It seems that in practice the only active organs of the judicial community are the QCJs. This fact only proves the serious weakness in or almost lack of the system of real judicial self-governance.

X. Resources

In the early and mid 1990s, courts in Belarus experienced serious problems with equipment. In particular, courts lacked computers and stationery. For example, in 2002 89 of around 150 courts completely lacked computer equipment.[161] In March 2009 the Minister of Justice stated in his interview for the Respublica newspaper that "all judges in the country have computers and all courts are equipped with photocopying machines. Almost everywhere there are court vehicles which make it possible efficiently to deliver justice and enforce court decisions in any town of a court district."[162] Judges confirm this information.[163] The Ministry of Justice statement continues: "In terms of court buildings, their condition remains unsatisfactory. Ten of them were built before the war and some of them at the beginning of the twentieth century. Several courts do not have separate buildings at all. For instance, the court of Volozhinskiy district is located in the local police building. Many court buildings require a capital renovation".[164] When asked (research was done in 2007-2008) about the level of resources provided for maintenance, equipment, etc. in their court, only 1.4% of judges an-

[159] Article 162(2-4), Code on the Judiciary and the Status of Judges.

[160] Article 163(1) Code on the Judiciary and the Status of Judges.

[161] Available at <http://www.justbel.info/2006-2/art2.htm>.

[162] Available at <http://www.respublika.info/4711/topic/article29722/>.

[163] Interview with the former President of the local court and with a judge of the local court.

[164] Available at <http://www.respublika.info/4711/topic/article29722/>.

swered that it was high, 15.1% rather high, 45.2% evaluated it as middling, 21.9% as rather low, and 16.4 as low.[165] There is a big difference in the working conditions of judges depending on where the court building is situated. There are some good new buildings with proper facilities and there are older ones without adequate space. There are no complaints about the quantity of the staff. Every judge has a secretary; presidents and deputy presidents have additional staff at their disposal. However, some judges complained[166] that not every court has a good legal library, and according to the recent report of the Minister of Justice only every fifth court has access to the Internet.[167] In November 2007 in a newspaper interview the President of one of the local courts complained that the salaries of the court staff were insufficient and that this led to a high staff turnover.[168]

C. Internal and External Influence

I. Separation of Powers

According to Article 110 of the Constitution of the Republic of Belarus, "[d]uring the administration of justice judges shall be independent and subordinate to the law alone. Any interference in the judicial process of the administration of justice is prohibited and punishable under law". This guarantee has been incorporated into every procedural code of Belarus, including the Criminal Procedure Code,[169] the Civil Procedure Code,[170] the Economic Procedure Code[171] and the Code of Administrative Offences Procedure and Enforcement.[172] Legal guarantees

---

165 Dubrovin (note 73), at 126.

166 Interview with the former President of the local court and with a judge of the local court.

167 Available at <http://www.minjust.by/ru/actual?id=502>. The report is no longer accessible through the website, but the author is in possession of a paper copy.

168 Available at <http://respublika.info/4403/roundtable/article21654/>.

169 Article 22 Criminal Procedure Code.

170 Article 11 Civil Procedure Code.

171 Article 7 Economic Procedure Code.

172 Article 2(13) Code of Administrative Offences Procedure and Enforcement.

of judicial independence are enshrined in more detail in the Code on the Judiciary and the Status of Judges. Thus, it is guaranteed by the process of their appointment (election or confirmation), the procedure of suspension and removal from office, immunity, the procedure of trying cases, the secrecy of the judge's deliberation before the delivery of judgment and the prohibition of demands for such secrecy to be lifted, accountability for contempt of court and for interference in the court's activities, as well as by the creation of adequate organizational and technical conditions for the functioning of the judiciary. Any influence on judges or people's assessors in order to prevent thorough, full and objective examination of the case or in order to achieve the pronouncement of an unlawful decision of the court is punishable under law.[173]

The Criminal Code contains several guarantees of judicial independence. More specifically, Article 390 establishes that any interference in order to prevent thorough, full and objective examination of the case or in order to achieve the pronouncement of an unlawful judgment, decision or writ of court is punishable by deprivation of the right to hold certain positions or to engage in certain activity, or by arrest for up to six months, or restriction of liberty for up to five years, or imprisonment for the same term.[174] Articles 388 and 389 of the Criminal Code establish criminal responsibility for the use of force or the threat to use force against a judge.[175] The Code on Administrative Offences imposes liability for contempt of court by way of evasion of court process, that is failure to appear in court when summonsed without good reason, or by way of failing to comply with orders of a presiding judge, or by way of disturbance of public order during a court hearing, as well as by way of other actions indicating clear disrespect for the court. It is punishable by a fine of between eight and 50 base amounts or by administrative arrest.[176]

So, theoretically, during the administration of justice judges are not subordinate or accountable to anyone, and a lot of legislative guarantees are set in the legislation. However, in practice these safeguards are not entirely respected and the judiciary is under the strong influence of the

---

[173] Article 85 Code on the Judiciary and the Status of Judges.

[174] Available at <http://www.pravo.by/webnpa/text.asp?RN=hk9900275>.

[175] Id.

[176] Article 24(1) Code on Administrative Offences (Кодекс Республики Беларусь об административных правонарушениях).

executive power, whereas the legislative branch in Belarus is too weak to threaten judicial independence.[177] The main channels of violation of the principle of the separation of powers are heavy influence of the executive on the process of nominating, disciplining and dismissing of judges. As elaborated above, problematic issues are: the Head of the local executive's right of veto on the nomination or reappointment of a judge;[178] most of the organs responsible for the initiation of disciplinary proceedings are executive ones; the QCJ responsible for the conduct comprises two representatives of the MoJ, members of the Departments of Justice can request to take part in the investigation, part of the sanction is decided by the President of Belarus, the President of Belarus has the right to impose any disciplinary measure on any judge even without initiating disciplinary proceedings. An additional threat to the separation of powers comes from the deciding role of the executive in the determination of the living conditions and financial status of judges.[179]

II. Judgments

1. Basis

According to the Constitutional guarantee, during the administration of justice judges are independent and subordinate to the law alone.[180] The term "law" is interpreted broadly both in the doctrine and in its practi-

---

[177] On the legal status of the Belarusian parliament see A.Vashkevich, The Republic of Belarus: The Road from the Past to the Past in: Andras Sajo (ed.), Out of and Into Authoritarian Law, at 275-280 (2003).

[178] The creation of peace and circuit (inter-district) courts and the introduction of court circuits and precincts the borders of which were different from the borders of administrative districts would facilitate the elimination of the dependence of courts on local executive bodies. According to the Venice Commission, "in a new democracy […] it would seem preferable to avoid such a link between administrative division and court organization to make it more difficult for the administration to exert undue influence on the courts." See Venice Commission, Opinion on the draft law of Ukraine on the judicial system, CDL-INF (2000) 005 (10 February 2000).

[179] E.g. decisions on the salaries of judges and on awarding and lowering of qualification classes are taken by the President of Belarus; the distribution of state housing is the prerogative of local authorities (for local court judges) and of the Administrative Department of the President for high court judges.

[180] Article 110(1) of the Constitution of the Republic of Belarus.

cal application.[181] Article 7 of the Code on the Judiciary and the Status of Judges reads: "Judges shall render justice based on the Constitution of the Republic of Belarus and laws and regulations enacted in accordance therewith."[182] In practice, when issuing judgments, judges take into account Resolutions of the Plenum of the Supreme Court and Resolutions of the Plenum of the Supreme Economic Court, which contain clarifications on the application of law.[183] According to some sources, there is a category of cases in which the real decision is taken not by the judge himself but by the executive, and the role of the judge is only to legitimize the decision. For example, an anonymous judge says during the interview that "[…] there can be a call from the local executive organ to solve a certain problem […]" and an anonymous procurator: "if there is a directive from the top, a judge can do very little […] in any case he will adopt the required decision, his task – to interpret legal acts in the necessary way".[184]

One problematic issue in relations between higher and subordinate courts of general jurisdiction is the "principle of zonality".[185] It means that at least two "zonal judges" (from oblast court) are assigned to each court of local level: one for the civil chamber and one for the criminal chamber. Each zonal judge is obliged to study the activities of the court he or she is assigned to and give practical assistance in the application of the law to judges of that court. Moreover, appeals (either complaints by a convicted person or protests by a prosecutor) against decisions of "zonal" court are considered, as a rule, by the panel which includes the corresponding zonal judge. One of the ways of giving practical assistance in the application of the legislation is to consult these "zonal judges", including in discussions of specific cases before the judge at the

---

181 A.G.Vasilevich, The Constitution of the Republic of Belarus (scientific and practical commentary), at 397 (2000).

182 Article 7(1) Code on the Judiciary and the Status of Judges.

183 Article 51(1) Code on the Judiciary and the Status of Judges.

184 Kazakevich (note 90), at 136-137.

185 This principle is discussed in detail in: E.V. Dubrovin, Report and recommendations of the Project national expert, Project "Promotion of a wider application of international human rights standards in the administration of justice in Belarus". Conference "Effective functioning of the judiciary"on 30 March 2009, at 9-11 (2009) (Отчет и рекомендации национального зксперта проекта, Проект "Содействие более широкому применению международных стандартов в области прав человека в процессе отправления правосудия в Республике Беларусь").

moment. Here a question arises about the duty of the judge of a district (city) court to pass a judgment which would correspond to the received consultations. Formally, the judge can ignore them. However, in the event of an appeal (either a complaint by a convicted person or a protest by a prosecutor) against such judgment it is very likely that such appeal would be considered by a panel of judges which includes the corresponding zonal judge. As a rule, such zonal judge acts as the rapporteur on the case and other members of the court's panel either do not examine cases coming from "other zones" or do not examine them sufficiently.[186] Thus, as the judge the local judge disagreed with is on the reviewing panel, the likelihood of the overruling or amendment of even, at first sight, a lawful and grounded decision essentially increases. If the zonal judge recognizes the correctness of such judgment, it will mean that he or she also recognizes his or her error. As was emphasized earlier, the percentage of overruled (amended) judgments plays an important role in assessing a judge's performance in Belarus. Hence zonal judges are also *de facto* supervisors of "their" judges at the lower instance courts. Thus, zonal judges' advice to judges of lower courts on pending cases should be considered a violation of the independence of the latter, because in practice the judgment turns out to be based not only on the law, but also on the private opinion of higher court judges.

According to some authors, in such a state of affairs, "a member of a higher court assigned to a certain territory is responsible for the quality of the legal proceedings conducted by courts of this territory, and at the same time the assessment of the quality of the courts' work depends on him or her through the overruling or amendment of judgments in appellate jurisdiction".[187] Thus, the practice which has developed of relationships between higher and lower courts of general jurisdiction according to the "zonality" principle does not provide for the proper independence of judges. Moreover, the activity of zonal judges can result in judges of district (city) courts developing dependant attitudes and in a decrease in the level of personal responsibility in decision-making, to which L. L. Zaytseva draws attention.[188]

---

[186] I.L.Petrukhin/G.P.Baturov/T.G. Morshchakova, Theoretical basics of the effectiveness of justice, at 221 (1979) (Теоретические основы эффективности правосудия.Петрухин).

[187] Y.I. Stetsovskiy, The Judicial Power, at 68 (1999) (Судебная власть).

[188] A.A. Danilevich/I.I. Martinovich (eds.), The Judiciary, at 147 (2002).

2. Practice

Only sporadic judicial statistics are available in free access. Overall, the Belarusian judiciary is characterized by a small percentage of acquittals. In 2007, courts of general jurisdiction heard 65,311 criminal cases, sentencing 70,996 people and acquitting 164.[189] In 2008, general jurisdiction courts tried 62,800 criminal cases, sentencing 68,531 people and acquitting 191. Cases against 1,033 people were dropped in the courts of first instance.[190] In 2009, the court heard 59,106 criminal cases, sentencing 62,064 people. 187 people were acquitted. Cases against 2,699 people were dropped.[191] Every acquittal is considered to be the result of poor quality work by the procurators' office and for many judges (especially at the local level where all representatives of law enforcement agencies know each other well) it is not easy to deliver such a judgment. As former Supreme Court Justice stated in an interview, "each acquittal is a most vulnerable judicial decision and it is closely connected with the personal courage of every judge."[192]

3. Structure

The procedural law contains detailed regulations about the content of judgments. In particular, Article 350 of the Criminal Procedure Code sets out requirements, including that court judgments must be well-founded. "The judgment is considered well-founded if it is pronounced on the basis of only such evidence as was presented to court, which was thoroughly, fully and objectively examined by the court during the court hearing. The Court judgment must be reasoned. The judgment is considered reasoned if it details the evidence on the basis of which the court has decided the case, and gives reasons for the court's decisions."[193] According to Article 360 of the Criminal Procedure Code the

---

[189] Available at <http://www.supcourt.by/cgi-bin/index.cgi?vm=d&vr=stat&vd=2&at=0>.

[190] Available at <http://www.supcourt.by/cgi-bin/index.cgi?vm=d&vr=stat&vd=3&at=0&m1=5>.

[191] Available at <http://supcourt.by/cgi-bin/index.cgi?vm=d&vr=stat&vd=4>.

[192] A.Tretjuk, In the name of the Republic of Belarus. Belaruskaja gazeta (newspaper) of 17 January 2000 (Именем Республики Беларусь, Белорусская газета.17 января 2000).

[193] Article 350(2)-(3) Criminal Procedure Code.

reasoning part of a judgment of conviction must describe the crime the commission of which the court has found to have been proven, including the description of the place, time and method of its commission, the level of *mens rea*, the motive for and the goals and consequences of the crime. The judgment must contain the evidence on the basis of which the court has found the defendant guilty, and reasons for which the court rejected other evidence. It must also describe mitigating and aggravating circumstances. If some of the criminal charges were found to be unsubstantiated or if the crime was wrongfully qualified, the judgment must include the grounds and reasons for amending the charges. The court must also provide reasons for each of its decisions relating to the selection of the criminal sentence.

Article 352 of the Criminal Procedure Code lists 16 points which must be addressed in a court judgment.[194] The Criminal Procedure Code also contains provisions which regulate the structure and the content of acquitting judgments.[195] Provisions concerning the content of court judgments in civil cases are contained in the Civil Procedure Code.[196] Violation of the provisions described above may result in the overruling of a judgment, and therefore they are usually followed in practice. At the same time the quality of reasoning in many decisions is very poor[197] and the problem of "copy and paste" judgments is typical of the Belarusian judiciary. There are several reasons explaining this, including the absence of a course on legal writing and analysis in the universities' curriculum, insufficient special training, too many assigned cases[198] and, last but not least, lack of access to all court decisions (see next section).

4. Public Access

One of the shortcomings of the Belarusian judicial system is the lack of any legislative requirement to publish the texts of court judgments. Only decisions of the Constitutional Court are published in official sources, such as the National Registry of Legal Acts of the Republic of

---

194 Article 352(1) Criminal Procedure Code.

195 Arts. 362-363 Criminal Procedure Code.

196 Arts. 300, 302-309 Civil Procedure Code.

197 Interview with several members of the bar association.

198 According to the Chairman of the Supreme Court every judge decides approximately 94 cases (including civil, administrative and criminal) per month. See <http://www.sb.by/post/96296/>.

Belarus, the Official Journal of the Constitutional Court of the Republic of Belarus and official website of the Constitutional Court. The official publication of the Supreme Court, the Judicial Herald (Судовы Веснік), contains only selected judgments of the Intellectual Property Chamber of the Supreme Court, decisions of Supreme Court chambers and Resolutions of the Presidium of the Supreme Court, as well as selected resolutions of presidiums of oblast-level and Minsk city courts in cases heard in the cassation and *nadzor* (supervision) instances. Back in 2001 the President of the Constitutional Court, Professor G. Vasilevich, suggested publishing the judgments of all courts in the Republic of Belarus, if at least one party to the case insisted on such publication.[199] This proposal, however, was never implemented.

Article 114 of the Constitution of the Republic of Belarus reads: "The trial of cases in all courts shall be public. The hearing of cases in closed court session shall be permitted only in the instances specified in law and in accordance with all procedural rules".[200] Closed session is permitted in criminal cases only in the interests of maintaining state secrets or other secrets protected by law, or for the trial of crimes committed by persons under the age of 16, or for the trial of sexual crimes or other crimes in order to prevent the disclosure of intimate aspects of the lives of trial participants or information which would humiliate them, and in cases where this would be necessary to protect the safety of the victim or witness or other participant in the criminal process or members of his/her family or close relatives or other people they reasonably consider close.[201] The openness of pre-trial proceedings is not regulated by law and pre-trial proceedings in practice are not open to the public.[202]

In some cases journalists and other interested persons experience difficulties in attending open trials. Such difficulties result from the fact that most courtrooms are designed to accommodate 35-40 people (up to 70 in the Supreme Court's largest courtroom), and if there are more people wishing to attend, police officers limit entry. Such situations occurred during the hearing of high-profile cases involving prominent politicians,

---

[199] G.A. Vasilevich, Highest courts: issues of judicial independence, 2 Official Journal of the Constitutional Court of the Republic of Belarus 135 (2001) (Суды высшей инстанции: вопросы судебной независимости).

[200] The principle of public trial is also enshrined in Article 17 of the Civil Procedure Code.

[201] Article 23 Criminal Procedure Code.

[202] Interview with a former president of a local court.

such as the case against the former Prime Minister of Belarus, Mikhail Chigir,[203] or the current proceedings against Mikalai Autukhovich.[204] As the Belarusian Helsinki Committee informs us, sometimes a judge will decide to hold the proceedings in his or her small personal room even if the courtroom is available.[205] This is a clear example of abuse of the right to public access. Moreover, according to the International Commission of Jurists, courts fail to admit representatives of human rights organizations to court sittings.[206]

III. Improper Influence on Judicial Decisions

In an anonymous poll of judges of the district and city courts of Belarus (2007-2008) respondents were asked whether they experienced attempts at unlawful influence on the content of their judgments in the course of their tenure. Of all the respondents 34.2% said "yes" and 65.8% said "no". Of those who responded positively, 64% stated that such attempts came from officials of the executive branch, and 20% pointed to law enforcement agencies.[207] As to the level of safeguarding of judicial independence in Belarus, 2.7% believed that it was "high"; 15.1% "rather high"; 57.5% "average"; 11.5% "rather low"; 5.5% "low"; and 8.2% of judges found the question difficult to answer.[208] According to Dr. Kazakevich, "violation of the principle of judicial autonomy is of a systematic and continuous nature". However, such violations are characteristic of a rather small category of cases not exceeding 0.5% of the total number of cases heard.[209] This category of cases includes criminal cases against opposition leaders, appeals filed against decisions of elec-

---

[203] M. Dziabela, This year Femida's servants worked calmly and efficiently, Zviazda (newspaper), 4 February 2000 (Слугі Феміды летась працавалі спакойна і аператыўна, Звязда).

[204] Available at <http://www.charter97.org/en/news/2010/3/10/27158/>.

[205] Interview with a Belarusian Helsinki Committee representative.

[206] International Commission of Jurists (ICJ), Belarus – Attacks on Justice 2005, 11 July 2008, available at: <http://www.unhcr.org/refworld/docid/48a57efc0.html>.

[207] Dubrovin (note 73), at 126.

[208] Id.

[209] Kazakevich (note 90), at 136-137.

tion commissions, and bankruptcy cases against socially important enterprises.[210]

The level of public trust in the judiciary has grown over the past few years. According to the results of a national poll held in June 2009, 47.9% of respondents trust the courts, while 36.9% do not trust them and 15.2% found it difficult to answer the question.[211] In March 1999, only 22.3% trusted the courts.[212] The steady increase in the number of people going to the civil courts may also serve as an indirect indicator of increased public trust in the judiciary. Over the last five years the number of civil cases heard on the merits rose from 162,000 to more than 330,000 cases in 2009.[213] As a result of the stringent supervision of judicial conduct and the substantial improvement in judges' financial status corruption in judicial ranks is rather rare. An issue of serious concern in relations between higher and subordinate courts of general jurisdiction is the "principle of zonality".[214]

IV. Security

According to Article 128 of the Code on the Judiciary and the Status of Judges, judges and lay assessors are subject to state protection according to the provisions of a special law. Such special Law was enacted in 1999 and guarantees the following protection measures which may be applied to judges: personal protection and the protection of their home and property; the provision of weapons, special means of personal protection and means of signalling alert; ensuring the confidentiality of information; temporary placement in a safe place; change in the nature or place of employment or education; relocation to another place of residence; a change in passport information and the substitution of documents; and disguise. Depending on the nature and imminence of the threat several protection measures may be triggered together.[215] The life

---

[210] Id., at 138-144.

[211] Available at <http://www.iiseps.org/data.html>.

[212] Available at <http://www.iiseps.org/bullet99-1.html>.

[213] Available at <http://www.sb.by/post/96296/>.

[214] See *supra* C. II. 1. Basis.

[215] Article 6 of the Law Concerning the State Protection of Judges, and Officials of Law Enforcement and Controlling Agencies, National Registry of Legal

and health of those protected are subject to mandatory state insurance, which is covered by the state budget. Damage caused by the destruction of or damage done to property belonging to those protected or their close relatives as a result of the professional activities of those protected shall be compensated in full in accordance with the special legislation of the Republic of Belarus.[216] As a mechanism of the implementation of these guarantees, the Council of Ministers of the Republic of Belarus enacted a Resolution which contains detailed regulation of the mandatory insurance of judges.[217] In order to ensure judges' personal safety and prevent possible interference in the process of the administration of justice, judges may prohibit the media from showing them on television or publishing their pictures during the press coverage of trials.[218]

The police are in charge of the maintenance of public order in court buildings.[219] In practice, police officers are on duty round the clock and check the identification documents of all visitors in most first instance courts and in all higher courts of the country. Under the Rules of Conduct of Visitors of Economic Courts enacted by the President of the Supreme Economic Court, visitors to all economic courts must undergo screening by special equipment and, if necessary, personal search and the searching of luggage (suitcases, handbags, folders etc.) by military personnel of the Security Service and members of the Security Department of the Ministry of the Interior. Economic court visitors must also present a valid passport or other identification document. Visitors

---

Acts of the Republic of Belarus, No.2, 2/115 (2000) (О государственной защите судей, должностных лиц правоохранительных и контролирующих органов).

[216] Article 23 the Law Concerning the State Protection of Judges, and Officials of Law Enforcement and Controlling Agencies.

[217] Resolution of the Council of Ministers of the Republic of Belarus No.1372 of 17 October 2006, Concerning the Enactment of the Rules and condition of mandatory state insurance of judges, National Registry of Legal Acts of the Republic of Belarus, No.179, 5/24073 (2006) (Об утверждении Положения о порядке и условиях обязательного государственного страхования судей).

[218] Resolution of the Ministry of Justice No.21 of 7 April 2006, Concerning the procedure of delivering information on the functioning of courts of general jurisdiction of the Republic of Belarus for publication in the Mass Media, National Registry of Legal Acts of the Republic of Belarus, No.60, 8/14275 (2006) (О порядке предоставления информации о деятельности общих судов Республики Беларусь для освещения в средствах массовой информации).

[219] Article 188 Code on the Judiciary and the Status of Judges of the Republic of Belarus.

may not bring into economic courts firearms, other offensive weapons, chemical substances, explosives, alcoholic beverages or other items prohibited by the Security Service (or the Security Department of the Ministry of the Interior), or items the possession or use of which may endanger the safety of others. Those refusing to undergo the screening of their luggage or present a valid passport or other identification document may not be allowed into the economic court building.[220] In several situations which involved criminal cases with a large number of defendants accused of very serious crimes, trials were held in pre-trial detention facilities when there was information on possible danger.[221] Cases of threats to or infringement on the life and health of judges are very rare. In the period from 1985 to 1996, two people were found guilty of threatening judges and people's assessors and five people were convicted of verbally assaulting judges.[222] In the period from 2003 to 2006, four people were found guilty of threatening judges and lay assessors and no one was convicted of physical violence against judges or lay assessors.[223]

D. Ethical Standards

I. Code of Ethics for Judges

The Code of Ethics for Judges of the Republic of Belarus was adopted by the First Assembly of judges of the Republic of Belarus on 5 December 1997.[224] Some of the rules established by the Code are of a general nature and some provide practical guidance for working procedures. According to the Code, during the administration of justice the judge must be guided by law and his or her conscience. The judge must, throughout all of his or her conduct, promote respect for the Constitu-

---

[220] Available at <http://www.court.by/print/regional-courts/mogilev/about/e0a980b32148d1c2.html>.

[221] See for example <http://www.naviny.by/rubrics/criminal/2009/06/02/ic_Arts._123_162924/print/>.

[222] A.I. Lukashov/E.A. Sarkisova, Issues pertaining to the application of criminal law, at 414 (1998) (Вопросы применения уголовного закона).

[223] Dubrovin (note 73), at 88.

[224] It was never adopted by the Parliament and thus does not have the force of a law.

tion and be an example of obedience to the law. He or she should conduct him- or herself in such a manner as to cement the public trust in his or her independence, objectivity and impartiality during the administration of justice. The judge must not allow any influence on his or her administration of justice by anyone, including senior judges of higher courts, other public officials regardless of their position or rank, or colleagues, relatives, friends or acquaintances. The judge may not, by his or her conduct, create an impression that anyone is capable of influencing the judge. He or she shall exhibit tolerance, respect and politeness towards the parties, witnesses and other participants in court proceedings. The judge may not in any way express (verbally or by gestures or mimics) his or her attitude towards any of the participants in court proceedings. He or she shall not ignore violations of ethical rules by court staff in relation to court visitors or trial participants.[225] Article 89 of the Code on the Judiciary and the Status of Judges requires that all judges shall strictly comply with the Code of Ethics for Judges.[226] The consequences of not adhering to the ethical standards – unfortunately, violations of ethical standards often take place in practice, according to the Chairman of Supreme Court[227] – is the initiation of disciplinary proceedings.

II. Training

To be appointed to the bench, judges usually have to undergo a mandatory special training programme of up to one year, which includes a theoretical course at the Judicial Training Institute. The course lasts between one and two months. The training course involves the passing of examinations on the culture of court proceedings, which includes issues of judicial ethics and judicial culture.[228] The specific training syllabus is

---

[225] Available at <http://www.supcourt.by/cgi-bin/index.cgi?vm=d&vr=sezd1&vd=0&at=0&m1=4>.

[226] Article 89(4) Code on the Judiciary and the Status of Judges.

[227] Available at <http://www.sb.by/post/96296/>.

[228] Resolution of the Ministry of Justice No.32 of 11 May 2007, Concerning the special training programme for judges of courts of general jurisdiction of the Republic of Belarus, National Registry of Legal Acts of the Republic of Belarus, No.120,8/16451(2007); Resolution of the Ministry of Justice and Plenum of the Supreme Economic Court No.51/11 of 10 August 2007, Concerning the special training programme for judges of economic courts of the Republic

designed by the Judicial Training Institute and the courses are taught by the Institute's professors. The training programme is fully funded from the state budget.

E. Supreme/Higher Courts

Since November 1996 the Constitutional Court has been considered a part of the Belarusian judicial system.[229] The procedure for appointing judges to the Constitutional Court seems problematic from the point of view of judicial independence. Six judges are nominated by the President, and there is no requirement for him to engage in consultations with members of the judiciary or the wider legal community in order to ascertain the most appropriate candidates. As the UN Special Rapporteur on the independence of judges and lawyers observes, this procedure lacks transparency and is not based on clearly defined, publicly available criteria.[230] The President also appoints the Chairperson of the Constitutional Court, who has the exclusive right to propose to the Council of the Republic (second chamber of Parliament) candidates for the other six positions on the Constitutional Court. In practice only six candidates were proposed for the six positions; thus, no real elections took place. This further increases the President's influence over the composition of the court and means that the Constitutional Court cannot be seen to be independent of the executive. Moreover, according to the Decree of the President of Belarus, Chairmen of Constitutional, Supreme and Supreme Economic Courts as well as their Deputies must annually undergo a medical check-up in the health clinics of the Administrative Department of the President. The President determines the exact timing of a check-up and those who fail to present themselves at the specified time "should be brought to disciplinary responsibility."[231]

---

of Belarus, National Registry of Legal Acts of the Republic of Belarus, No.212,8/16995 (2007) (О специальной подготовке на должность судьи общего суда Республики Беларусь;О специальной подготовке на должность судьи хозяйственного суда Республики Беларусь).

[229] Before it was placed by the Constitution among the bodies of state control and supervision.

[230] E/CN.4/2001/65/Add.1, para. 111.

[231] National Registry of Legal Acts of the Republic of Belarus, No.7, 1/41 (1999); No 117,1/1874 (2000); No125, 1/4135 (2002); No 82,1/8458, No 108,1/8547 (2007).

F. Conclusion

Since the enactment of the Constitution of 1994, a whole range of laws have been adopted in Belarus containing legal guarantees of the principle of judicial independence, the most prominent of which is the Code on the Judiciary and the Status of Judges. New procedural codes, the Law "Concerning the State Protection of Judges and Officials of Law Enforcement and Controlling Agencies", the Code of Ethics for Judges and some other laws and regulations have also come into force. Financial guarantees of judicial independence have been improved significantly and judges' salaries have been increased, which has resulted in a better judiciary. While at the end of the 1990s only 22% of judges had over ten years of professional experience, in 2009 this number reached 60%.[232]

At the same time, the level of independence of judges does not meet the level of judicial independence in some European states and in the United States of America. Reports of international and domestic non-governmental organizations,[233] documents of the UN Human Rights Committee and the report of the UN Special Rapporteur on the independence of judges and lawyers all contain statements of violations of judicial independence in Belarus and provide examples of such violations. [234] For example, in paragraph 11 of its Concluding observations on the fourth periodic report of Belarus, the UN Human Rights Committee stated that the procedures relating to tenure, disciplining and dismissal of judges at all levels did not comply with the principle of the independence and impartiality of the judiciary.[235] According to the Chairman of the Supreme Court, one of the most pertinent problems is that the system of general jurisdiction courts remains under dual subordination, i.e. to the Ministry of Justice, which is an agency of the executive branch of government, and the Supreme Court, which is the highest court of the judicial system. Funding, motivation and staffing of courts are vested in the Ministry of Justice, while the Supreme Court is

[232] Respublica newspaper, 12 March 2009 (Рэспубліка. 12 марта 2009 года).

[233] See for example <http://www.spring96.org/files/book/2008_analytics_en.pdf>.

[234] E/CN.4/2001/65/Add.1.

[235] CCPR A/53/40 (1998).

responsible for the quality of justice.[236] However, it is much more important that the creation of a genuinely independent judiciary is impossible under an authoritarian political regime with a superpresidential form of government. Nevertheless, even taking into account this obstacle, implementation of the following recommendations of Belarusian legal scholars and practitioners, and unrealized provisions of the Concept of Judicial and Legal Reform could strengthen the independence of judges. Of course this is not a panacea and by itself cannot cure all the Belarusian judicial ills.

The creation of peace and circuit (inter-district) courts and the introduction of court circuits and precincts the borders of which would be different from the borders of administrative districts is desirable, as this would facilitate the elimination of the dependence of the courts on local executive bodies.[237] According to the Venice Commission, "in a new democracy […] it would seem preferable to avoid a link between administrative division and court organization to make it more difficult for the administration to exert undue influence on the courts".[238]

Following the examples of Poland[239] and some other European countries, it is recommended that the High Council of Justice of the Republic of Belarus be created.[240] The competence of the Council would include exclusive right to nominate candidates for judicial office in the courts of general jurisdiction and economic courts to the President of the Republic of Belarus, who should retain the competence of formal appointment, but with a limited right to refuse candidates.[241] The inde-

---

[236] V.O. Sukalo, Judicial reform in the Republic of Belarus, Judicial reforms in CIS countries, at 14 (2005) (Судебная реформа в Республике Беларусь, Судебные реформы в странах СНГ).

[237] Martinovich (note 75), at 19-20.

[238] Venice Commission, Opinion on the draft law of Ukraine on the judicial system, CDL-INF (2000) 005 (10 February 2000).

[239] On the legal status of the Polish Council of Justice see in detail A. Vashkevich, Basics of the Constitutional Law of the Republic of Poland, at 176-179 (2007) (Основы конституционного права Республики Польша).

[240] See *supra* B. II. 3. Length of Office and Reappointment.

[241] A similar recommendation was made by the UN Special Rapporteur on the independence of judges and lawyers: The Government must establish by law an independent judicial council for the selection, promotion and disciplining of judges, in order to conform with principle 10 of the Basic Principles on the Independence of the Judiciary, paragraph 1.3 of the General Principles of the European Charter on the Statute for Judges of 1998 and paragraph 3 of the

pendence of the judiciary cannot be implemented without a strong and influential association of judges, based on voluntary membership, free of executive influence and with the necessary resources.

It is advisable to introduce the system of the election of court presidents by court judges instead of appointment by the President, and to introduce a rather short maximum term of presidency.[242] It is also recommended that Article 122 of the Code on the Judiciary and the Status of Judges be repealed, as, while never having been implemented, it allows the President of Belarus to impose "any disciplinary measure on any judge without initiating disciplinary proceedings". Such power of the Head of State does not accord with the principle of the independence of the judiciary. It is advisable to return to the practice according to which after the five-year probation term a judge should have tenure for the rest of his working life.

In future the system of case assignment by court presidents should be replaced by one of the systems adopted in European countries. Such power of court presidents, currently laid down in the law, as "supervision of the quality of adjudication of cases" should be repealed because the exercise of such power poses a risk of violation of the principle of the independence of judges.[243] The same needs to be done with the discretionary power of court presidents to bring other judges to disciplinary proceedings. The principle of "zonality" governing the relations between lower and higher courts should be abolished. Also it would be advisable to end the procedure of "approving" candidates for judges by chairpersons of oblast-level and Minsk city Executive Committees as it constitutes a violation of the principle of internal independence.

Mandatory publication of all court judgments would become an important guarantee of the independence of judges. In implementing this recommendation attention should be paid to the experience of Ukraine, where on 1 June 2006, the Law "Concerning Access to Court Decisions" entered into force.[244] The working conditions of judges should

---

Budapest Conclusions on the Guarantees of the Independence of Judges – Evaluation of Judicial Reform. The executive may be involved in the formal process of appointment, but may not otherwise be involved in the selection, promotion or disciplining of judges; para 121(a), E/CN.4/2001/65/Add.1.

242 Dubrovin (note 73), at 95-96.

243 Dubrovin (note 185), at 8-9.

244 Available at <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=3262–15>.

be further improved, free access to web resources should be granted. The salaries of judges should be raised and the granting of state housing free of charge should be abolished in order to comply with Resolution 1685 (2009) of the Parliamentary Assembly of the CoE.[245]

A separate question which needs serious discussion and has a negative impact on the independence of the judiciary is the lack of proper legal education at Belarusian universities. The almost complete lack of access to the foreign legal literature and legal journals and an unbalanced curriculum (it is impossible to explain why it is necessary to study the "Basics of higher mathematics" in the law faculty, and at the same time to ignore courses on legal writing and legal analysis) leads to serious problems with the quality of future judges and prosecutors. It goes without saying that it is much easier to manipulate people without proper education and integrity. Section 2 of Article 98 of the Code on the Judiciary, which provides an opportunity to skip the special judicial training, should be abolished.

[245] Resolution 1685 (2009) of the Parliamentary Assembly, para 3.1.3. : "[…] salaries and allowances must permit judges and their families not to depend on the provision of housing and other amenities by executive authorities."

Judicial Independence in Moldova

*Nadejda Hriptievschi and Sorin Hanganu**

A. Introduction

The independence of the judiciary has been and still is an issue of major concern in Moldova. The inclusion of the guarantee of the independence of judiciary among the major government strategic documents is perhaps the best evidence of the problems faced. Hence, an inefficient judiciary and the persistence of corruption are one of the weaknesses mentioned in the National Development Strategy for 2008-2011[1] and ensuring the independence of the judiciary is stated to be a medium term goal; a Strategy for consolidating the judiciary was approved by the Parliament on 19 July 2007.[2] The Plan of Action for 2007-2010 to implement this strategy lists among the main objectives ensuring the effective independence of the judiciary. It includes the following main measures for enhancing the independence of the judiciary which are yet to be implemented: consolidating the role of the *Consiliul Superior al Magistraturii* (The Superior Council of the Magistracy – SCM) in the

* The authors would like to thank Dumitriţa Bologan and Mihaela Vidaicu, staff attorneys at ABA ROLI Moldova, for valuable comments on the draft.

1 *Lege No. 295 din 21.12.2007 pentru aprobarea Strategiei naţionale de dezvoltare pe anii 2008-2011* (Law on the approval of the National Strategy for Development), *Monitorul Oficial* (Official Gazette) nos. 18-20 of 29 January 2008.

2 *Hotărîre No. 174 din 19.07.2007 pentru aprobarea Strategiei de consolidare a sistemului judecătoresc şi a Planului de acţiuni pentru implementarea Strategiei de consolidare a sistemului judecătoresc* (Parliament decision no. 174 of 19 July 2007 on the approval of the Strategy for consolidating the judiciary and of the Action Plan for implementing the Strategy for consolidating the judiciary) Official Gazette nos. 136-140 of 31 August 2007.

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233, DOI 10.1007/978-3-642-28299-7_26,

selection, appointment and promotion of judges, carrying out an analysis of the Constitutional norms on judicial appointment and the composition of the SCM with a view to excluding political influence in the appointment procedures and the *ex officio* membership of the SCM of the Minister of Justice and the Prosecutor General.

Other important measures provided for in the plan have already been carried out, such as making the judges' function as SCM members a full-time one (this was implemented with the election of the new SCM in late 2009), and adopting the Judge's Code of Ethics and the Regulation on random assignment of cases. The latter must be adjusted to reflect the computer-based Integrated Case Management System (ICMS), which was developed to simplify and ensure the random assignment of cases, still not implemented in all courts.

A review of the legislative framework in order to ensure the independence and impartiality of the judiciary was also set out as a priority in the Moldova – EU Action Plan for 2005-2008.[3] The Council of Europe PACE Monitoring mechanism for Moldova still includes the need to guarantee the independence of the judiciary, increase the effectiveness and professionalism of the courts, and eliminate corruption within the system.[4]

This chapter outlines the major issues which affect the independence of the judiciary in Moldova, both positive and negative, regarding the law and practice. It looks primarily at the district and appellate courts, referring to the Supreme Court of Justice (SCJ) where relevant. The chapter does not include an analysis of the Constitutional Court. It primarily focuses on problems relating to the administration of justice, where the executive plays a far-reaching role. The chapter refers to the system of selection, appointment and promotion of judges, which still depends on the executive and political branches and severely undermines the independence of the judiciary. Amendments were made to reduce executive and political influences in the process of selection, appointment and promotion, but time is needed for these changes to be effectively implemented, as the mentality of subordination to executive or political groups (be it Government or opposition) has still not been overcome.

---

[3] EU-Moldova Action Plan, section 2.1(2).

[4] Report Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), Co-rapporteurs: J. Durrieu/Socialist Group/E. Vareikis, Honouring of Obligations and Commitments by Moldova, Group of the European People's Party, Doc. 11374, para. 93, 14 September 2007.

The chapter briefly reflects on the funding of the judiciary, which is both severely underfinanced and inadequate regarding the budget-making process, making the judiciary dependent on the executive branch. Issues of lack of effective accountability mechanisms, including poor transparency, poor access to and quality of judicial decisions, lack of peer pressure on and public scrutiny of the judiciary, perceptions of widespread corruption and low confidence in the system are characteristics of the Moldova judiciary and briefly reflected in this chapter. Finally, the chapter ends with a series of recommendations to various stakeholders in Moldova. It refers mainly to the state of affairs up to the end of 2009 and includes some brief notes about the immediately announced plans related to judiciary of the new Government,[5] installed at the end of September 2009 and major events relating to the independence and accountability of the judiciary during the first half of 2010. While most of the conclusions are based on facts known before the end of 2009, the developments in 2010 lead the authors to emphasize the need for accountability mechanisms which are crucial to making the independence of the judiciary an asset. The judiciary in Moldova has gone through different stages of reform, mostly haphazard and not fully implemented. It is hoped that the reforms will continue in a more comprehensive way, building on the few positive achievements and adding the other missing pieces of the reform.

B. Structural Safeguards

I. Administration of the Judiciary

1. Organs in Charge of the Administration of the Judiciary

The *Consiliul Superior al Magistraturii* (SCM) is responsible by law for the administration of the judiciary. The law defines it as "an independent body, created for the organization and functioning of the judiciary, and is the guarantor of the independence of judiciary. The SCM exer-

[5] Mainly the *Programul de activitate al Guvernului Republicii Moldova „Integrarea Europeană: Libertate, Democrație, Bunăstare pentru 2009 – 2013"* (Government's activity program for 2009 – 2013), available at <http://www.gov.md>.

cises the judiciary's self-administration".[6] However, the SCM does not yet have full powers and capacity to provide organizational and financial support to the district and appellate courts. By law, the Ministry of Justice is responsible for providing organizational, technical, material and financial support to district and appellate courts.[7] In 2006, a draft law was prepared to create a Department of Judicial Administration (DJA) within the SCM to take care of organizational, material and financial activity of the courts. The President did not promulgate the law, arguing that these competences should remain with the Ministry of Justice, which was "already well equipped logistically and legally for this kind of activity". The President also claimed that the SCM was already playing an important role, since the day-to-day funding of the courts was approved by parliament on the proposal of the SCM. The DJA was finally created as a "public institution subordinated to the Ministry of Justice, with the status of a legal entity, financed from the state budget, which is responsible for providing organizational, administrative and financial support to the district and appellate courts".[8] The main functions of the DJA are to set up the maximum amount for expenses, collect the draft budgets from the district and appellate courts, and present them to the Ministry of Justice and the SCM for analysis and approval, keep judicial statistics, monitor the secretarial works of the courts, and make proposals on the number of staff of courts' apparatus for approval by the Ministry of Justice.[9]

---

6 Article 1 of *Legea no. 947 din 19.07.1996 cu privire la Consiliul Superior al Magistraturii* (Law on Superior Council of Magistrates), Official Gazette nos. 186-188 of 22 August 2003 (republished).

7 Article 23(2) of *Legea no. 514 din 06.07.1995 cu privire la organizarea judecătorească* (Law on Judicial Organization), Official Gazette no. 58 of 19 October 1995.

8 See the *Hotărârea Guvernului no. 670 din 16.06.2007 cu privire la crearea Departamentului de administrare judecătorească* (Government decision regarding the creation of the Department for Judicial Administration), Official Gazette nos. 86-89 of 22 June 2007.

9 Section II, *Regulamentul Departamentului de Administrare Judecătorească* (Regulation of the DJA), annex I to the Government's decision no. 1202 of 6 November 2007 regarding the approval and the structure of the DJA, Official Gazette nos. 178-179 of 16 November 2007.

The DJA started functioning on 1 January 2008,[10] but it struggled with different issues which impeded its proper functioning, such as a high staff turnover, as well as the involvement of its staff in inappropriate activities for its mandate, such as representing the Ministry of Justice in courts, reporting on different strategies and programmes relating to the judiciary, which raise serious concerns regarding its ability to carry out its tasks.[11] The SCM has repeatedly called for the relocation of the department to the SCM.[12] By means of the powers retained by the DJA, the Ministry of Justice has retained important functions in the administration of the judiciary from the organizational and funding perspectives. The Minister of Justice is an *ex officio* member of the SCM. Besides the Ministry of Justice, the executive power may have some influence on the judiciary via the *ex officio* membership of the Prosecutor General of the SCM, which has been debated in the Strategy consolidating the judiciary, but which has not yet been addressed. The Government provides the courts, through local public administration authorities, with the buildings, transport and other facilities, which cannot be withdrawn without the SCM consent.[13]

The budget-making process for the judiciary is problematic from the following main perspectives: the legal framework is unclear regarding the competences of the Ministry of Justice and the SCM; the procedure by which the judiciary budget has to be approved by the Parliament is not clear[14] and the budget-making process is not tailored to any objective indicators such as the court caseload, but usually based on the previous year's expenditures. For example, in terms of budget drafting and submission, since 2004/2005 appeal and district courts have been responsible for their own budget management instead of the Ministry of

---

[10] For a brief description of the Department, its history and structure see the Department's website <http://www.justice.gov.md/ro/administrare-judecatoreasca/> (in Moldovan).

[11] A. Cocîrță, *Reforma Justiției in contextul implementării Planului de Acțiuni UE – Moldova* (Judiciary Reform in the Context of EU-Moldova Action Plan Implementation), ADEPT, at 50 (2009).

[12] Superior Council of Magistrates Activity Report for 2008, available at http://www.csm1909.ro/csm/index.php?cmd=01&lb=en.

[13] Article 23(3) and (4) of the Law on Judicial Organization.

[14] Although the Constitution provides that the Parliament needs to adopt the budget, the law on the state budget does not set out the procedure to be followed for the judiciary budget.

Justice.[15] However, the budget for the district and appellate courts has continued to be drafted by the Ministry of Justice, taking into account the proposals of the courts, which had to integrate all costs and be submitted to the Ministry of Finance within the limits set by the latter. In practice, the main role in budget making belonged to the Ministry of Finance.[16] The budget for 2009 was for the first time approved by the Parliament, on the proposal of the SCM, rather than the Ministry of Justice to the Ministry of Finance as it used to be.[17] This has been hailed as an improvement by the judiciary,[18] although the procedure is still not properly regulated, the amount of the budget is still not appropriate and a clear methodology or share of the State budget or gross domestic product is still not determined. The lack of SCM human resources to work on budget proposals is also a problem, which is expected to be solved through the incorporation of a DJA in the SCM.[19]

The problems with judicial funding in general, including the budget-making process, have been acknowledged and a Concept Paper on Judiciary Funding was adopted to address these issues.[20] The Concept Paper acknowledges the problems relating to the budget-making process for the judiciary, including the overlap of the SCM and Ministry of Justice's competences. The paper provides the following measures to address this problem: first, the carrying out of a study regarding the opportunity to amend the legislation in order clearly and in an exhaustive man-

---

15 ABA ROLI, Judicial Reform Index for Moldova, Volume II, at 3 (2007).

16 W. Marchlewski/V. Ionita/I. Munteanu/D. Lozinski, Funding of Judiciary in Moldova, Center for Legal and Political Studies in Moldova, at 21 (2005).

17 However, the draft was still prepared by the DJA.

18 Interview with Nicolae Clima, ex-Chairman of the SCM, 28 August 2009.

19 Report on the SCM activity for 2007, available at <http://www.csm1909.ro/csm/linkuri/04_06_2008__15636_en.pdf >.

20 *Conceptia privind finantarea sistemului judecatoresc* (Concept Paper on Judiciary Funding), approved by Parliament Decision no. 39 of 18 March 2010, Official Gazette nos. 72-74 of 14 May 2010. The draft concept paper was prepared by the Ministry of Justice and the SCM, with the support of the Millennium Challenge Corporation, Moldova Governance Threshold Country Program funded by the US Government and managed by the United States Agency for International Development (USAID). Moldova Governance Threshold Country Program (MGTCP), a two-year initiative funded from year to year by the US Government through the Millennium Challenge Corporation (MCC) and managed by the United States Agency for International Development (USAID).

ner to delineate the competences of the Ministry of Justice and the SCM, and second, to prepare the draft legislation to amend the current legislation, if necessary.

2. Judicial Council

Currently the SCM has 12 members, elected for a mandate of four years,[21] three of whom are *ex officio* members – the President of the Supreme Court of Justice, the Minister of Justice and the Prosecutor General; five members are elected from among the judges by secret ballot by the General Assembly of Judges of Moldova and four members are elected from among the *profesori titulari* (teaching professors) by the Parliament by a simple majority, on a proposal from at least 20 members of Parliament.[22] This amendment came into force only after the election of the new composition of the SCM in October - November 2009;[23] hence no conclusions can be yet drawn as to the impact of this amendment on the independence and effectiveness of the SCM. The amendment to the composition of the SCM, equalizing the numbers of

---

[21] Except for *ex officio* members. The mandate of a member of the SCM is withdrawn by the body which elected the person in this capacity. Where the mandate of a member of the SCM has ended, the election or appointment of a new member takes place within 30 days from the date the vacancy arose, according to the procedure for the election or appointment of a member (Arts. 9, 12 and 13 of the Law on Superior Council of Magistrates).

[22] See Article 3 of the Law on Superior Council of Magistrates, Article amended by Law no. 306 of 25 December 2008, Official Gazette nos. 30-33 of 13 February 2009. The new composition of the SCM shall be applied from the moment a vacancy arises in the SCM which was created according to law no. 174 of 22 July 2005, Official Gazette nos. 107-109 of 12 August 2005, according to which the SCM had 12 members: seven judges elected by the General Assembly of Judges, three *ex officio* members, and two other members, one proposed by the majority and one by the opposition, elected by the Parliament with at least a 2/3 majority from among the teaching professors.

[23] The mandate of the ex-SCM expired in 2009 and elections were organized for the five judge-members of the SCM by the General Assembly of Judges of Moldova. On 31 October 2009 the first round of elections was organized, at which only three judges were chosen. On 28 November 2009 a second round of elections was organized to elect the other two judge-members of the SCM. The Parliament elected four teaching professors as members of the SCM on 27 November 2009. The SCM elected its Chairman by secret ballot on 10 December 2009.

judges and non-judges, appointed by the Parliament, and two *ex officio* members representing the Ministry of Justice and the Prosecution Office, is a debatable one. On the one hand, it raises concerns about potential political influence over the SCM through appointed non-judge members.[24] On the other hand, the information note to the draft law presented the amendment as a measure to "reduce the corporative risk in the administration of judiciary".[25] We do not consider the alteration of the composition of the SCM, *per se*, an adequate response to "reducing the corporative risk in the administration of judiciary", as long as other measures are not taken to increase judicial accountability. Moreover, the mere fact that someone is a professor does not rule out his/her affiliation with the judiciary as a result of other factors (previous experience, family connections, professional interests etc.). However, in the context of recent political changes, the composition of the new SCM and its Disciplinary Board, both elected at the end of 2009, proved that the increase in non-judge members was a good decision to reduce judicial corporatism, although not sufficient.[26] Hence we view

---

[24] The amendment annulled the previous requirement for a qualified majority of two-thirds of the elected MPs to vote for the teaching professors, which makes it easier for the dominant political force to elect them without consulting the other parties. In addition, the manner and the speed with which this amendment was passed are somewhat telling of a hidden purpose behind it. The amendment was passed in a very short time, at the initiative of the ex-President (the respective president was also the head of the Communist party which held a majority in the Parliament), without the consultation process usually required for such significant changes (A. Cocîrță, Judiciary Reform in the Context of EU-Moldova Action Plan Implementation, ADEPT, at 47 (2009). Superior Council of Magistrates Activity Report for 2008, available at <http://www.csm1909.ro/csm/index.php?cmd=01&lb=en>). The previous government exercised a big influence on the SCM, as outlined below, even with a composition of prevailing judges and hence if the Government policies are not changed, the influence through non-judges can be even higher.

[25] The previous SCM (2005 - November 2009) and the Disciplinary Board, both composed of more judges than non-judges, were criticized for leniency in applying disciplinary sanctions and for lack of transparency regarding disciplinary procedures. See for example ABA ROLI, Judicial Reform Index for Moldova, Volume II, at 73 (2007).

[26] This conclusion is based on two main decisions, one adopted by the SCM and one by the Disciplinary Board. In the first case, the decision of the SCM no. 125/10 of 23 March 2010 regarding the appeal from the Disciplinary Board decision of 5 March 2010 concerning judge Dorin Popovici (available at <http://www.csm.md/files/Hotaririle/2010/125-10%20hot_r_re.pdf>), the SCM

the change in its composition with the current *ratio* between judges and non-judges as an appropriate one. A few years of investment in the judiciary (financial and human resources), proper performance of the SCM, its Judicial Inspection and Boards and correct Government policies should ideally "clean" the judicial system of the improper influences and inadequate judges, placing the judiciary on an equal footing with other powers and increase public confidence in the judiciary. As long as there are suspicions regarding the integrity of judges and members of the SCM, as well as Governmental and other external interference with the judiciary, the exact composition of the SCM does not really matter. A positive recent amendment to the functioning of the SCM concerns the suspension of the judges[27] elected by the General Assembly of Judges from their activity as judges during the period of their service with the SCM.[28] This amendment will allow its members to

quashed a decision of the Disciplinary Board which reprimanded a judge for grave violations when examining administrative cases, including arrests, within the police commissariats in April 2009. The SCM found that the disciplinary sanction applied by the Disciplinary Board was too lenient and decided to apply the gravest sanction, which is removal of the judge. (Interesting enough, five judges and one professor on the Disciplinary Board voted for reprimand, while four professors for removal (they signed also a separate opinion). All professors on the SCM voted for removal.) The second decision referred to is the decision of the SCM no. 280/19 of 22 June 2010 regarding the appeal from the Disciplinary Board decisions of 21 May and 11 June 2010 concerning the three SCJ judges Ion Muruianu (president of the SCJ), Vasile Ignat and Vasile Cherdivara (available at <http://www.csm.md/files/Hotaririle/2010/280_19.pdf>). In this case, the judges agreed to hear an extraordinary appeal not provided for by law. The Disciplinary Board applied disciplinary sanctions to all three judges, including the removal of the president of the SCJ. However, the SCM overruled the Disciplinary Board's decision and threw out the disciplinary proceedings against all three judges. The decision's main argument is that disciplinary proceedings may not be used against judges whose decisions have not been quashed/annulled in judicial proceedings before a higher court, otherwise it would mean interference with the judiciary. This is a striking decision where the SCM in practice limited the scope of disciplinary proceedings (interestingly enough, professors and judges voted for it and against it, e.g. two separate opinions were issued, one signed by a judge, chairman of the SCM and one by a professor).

27 Five out of 12 members of the SCM.

28 This amendment, introduced by Law no. 306 of 25 December 2008, will enter into force only with the new composition of the SCM. Previously, the judge members of the SCM were not full-time, and even the previous Chairman of the SCM, Nicolae Clima, started working full-time only in March 2008. The

focus on their tasks as members of the SCM on a full-time basis[29] and hence enhance the ability of the SCM to exercise its mandate fully.[30]

The main competences of the SCM, particularly relevant to judicial independence, are in the areas of judges' careers (most importantly, the SCM makes proposals to the President/Parliament regarding the appointment, promotion, transfer or dismissal of judges, presidents or vice-presidents of courts); the initial and continuing training of judges (the SCM appoints judges to teach at the National Institute of Judges; approves the strategy for judges' initial and continuing training; examines and gives its opinion on the National Institute of Justice's regulation on admission procedure, curriculum and course syllabi for initial and continuous judges' training; as well as the composition of the examination boards for admission and graduation; and examines the appeals from the decisions/opinions adopted by the Qualification Board); judges' ethics and discipline (the SCM examines citizens' complaints relating to judges' ethics; examines the appeals from decisions of the Disciplinary Board; applies disciplinary sanctions to judges; validates the decisions (opinions) issued by the Qualification and Disciplinary Boards); and administration of the courts (the SCM hears the Ministry of Justice's information regarding organizational, material and financial support for the courts; approves the Regulation regarding case assignment in courts; examines, confirms and proposes the draft budget of the courts; presents an annual report on the courts' activity to the Parliament and President; and other competences which may be provided for by law).[31]

There are three other bodies which operate within the SCM: the Disciplinary Board, the Qualification Board and Judicial Inspection. The Disciplinary Board examines disciplinary cases against judges. It is created within the SCM with the purpose of examining cases of disciplinary liability of judges. It is composed of ten members[32] (five judges – two

current Chairman of the SCM is Dumitru Visterniceanu, previously a judge at the SCJ.

29 The only permitted activity outside the SCM is scientific and/or didactic activity.

30 Interview with N. Clima, ex-Chairman of the SCM, 28 August 2009.

31 The detailed functions of the SCM are determined by Article 4 Law on the SCM.

32 Members of the SCM and of the Qualification Board, as well as presidents and vice-presidents of the courts, cannot be members of the Disciplinary Board.

from the Supreme Court of Justice, two from the appellate courts and one from the district courts – and five teaching professors), who are appointed for a mandate of four years, with a maximum of two consecutive mandates. The judges are elected by the judges' assemblies of the various courts; two of the teaching professors are appointed by the SCM and three by the Minister of Justice.[33] The change in the composition of the board and the election of the head of the board from among the professors proved good, judging by the quality of the board's decisions in 2010. However, this may be solely due to the personality of the head and a few other members of the board, not necessarily to the balance between judges and non-judges. Moreover, given the fact that all decisions of the board are subject to appeal to the SCM and later to the court, we appreciate the current *ratio* between judges and non-judges to be appropriate.

The Qualification Board ensures the selection of candidates to the position of judges,[34] as well as assessing the level of professional qualification of judges. It is composed of 12 members[35] (six judges – two from the Supreme Court of Justice, two from the appellate courts and two from the district courts – and six teaching professors), who are appointed for a mandate of four years, with a maximum of two consecutive mandates. The judges are elected by the Judges' assemblies of the relevant courts, called by the SCM; three of the teaching professors are appointed by the SCM and three by the Minister of Justice.[36] These

---

[33] Law on Disciplinary Board and Disciplinary Responsibility of Judges. The respective composition of the Disciplinary Board was introduced by Law no. 306 of 25 December 2008 and entered into force in 2010, after the current Board was elected, following the end of the 2009 elections of a new SCM. Previously, the Disciplinary Board was composed of nine judges, three from each of the levels of jurisdiction: district courts, appellate courts and Supreme Court of Justice.

[34] See below on selection procedures; after the creation of the National Institute of Justice, the Qualification Board selects only 20% of candidates for the positions of judges.

[35] Arts. 2 and 3 *Legea no. 949 of 19.07.1996 cu privire la colegiul de calificare şi atestarea judecătorilor* (Law on Qualification Board and Attestation of Judges), republished in Official Gazette nos. 170-172 of 8 August 2003.

[36] The current structure is a result of changes put into operation in accordance with the Law on the Qualification and Attestation of Judges at the end of 2008, alongside the changes to the SCM and Disciplinary Boards, which were implemented in 2010. Previously, the Qualification Board was composed of

changes, somewhat similar to those relating to the SCM and the Disciplinary Board, are controversial among judges: if some claim that faculty professors are more impartial during the examination process, others claim that professors are far removed from the practical aspects of judges' work and hence the increase in their number is not practical. In addition, the three teaching professors appointed by the Ministry of Justice may be more prone to executive influence. We consider the change in composition of the Qualification Board, equalizing the number of judges and non-judges, to be an acceptable one, as the presence of professors should ensure a good balance between theory and practice in the examination and assessment of judges. The nomination of three professors by the Ministry of Judges and three by the SCM seems to offer sufficient guarantees regarding the independence of this body. As to the fears regarding the theoretical focus of the professors, the SCM is at liberty to choose three professors who are at the same time judges. Members of both Disciplinary and Qualification Boards are not full-time members and work on *pro bono* basis in their capacity as members of these boards, retaining their salaries at their main places of work.[37]

Judicial inspection, composed of five judge-inspectors working full-time, is a unit within the SCM. Judge-inspectors are selected through competition held by the SCM for a four-year mandate and can serve a maximum of two consecutive mandates. Any person who is licensed in law, has a minimum of seven years' experience in the legal field and has a good reputation is eligible for the position of inspector-judge. The main competences of judicial inspection are to: check the organizational activity of the courts; examine citizens' petitions regarding judges' ethics which are submitted to the SCM, mandatorily requiring the written explanation of the judge complained of; verify the Prosecutor General's requests regarding the SCM's consent to initiate criminal proceedings or carry out other procedural actions regarding judges which require the SCM's consent; examine the reasons for refusals by the President or Parliament to appoint or promote a certain judge; examine the cases referred to it by the SCM in response to judges' requests to defend their professional reputation and independence.[38]

---

nine judges, elected by the Judges' Annual Assembly, and three teaching professors, selected by the SCM.

[37] Article 2 Law on Disciplinary Board and Disciplinary Liability of Judges; Article 2 Law on Qualification Board and Attestation of Judges.

[38] Article 7(1) Law on the SCM, as amended by Law no. 115 of 17 June 2010, Official Gazette nos. 117-118 of 17 June 2010; *Regulamentul cu privire la*

Opinions differ about the SCM's effectiveness and competences. The most common opinion refers to a lack of clarity regarding the role of the SCM in the appointment and promotion of judges, where the President and Parliament hold over-broad powers.[39] Also criticized are the dependence on and duplication of competences with the Ministry of Justice (especially through the Department of Administration of the Judiciary), the Prosecutor General's membership of the SCM and his/her power to initiate disciplinary procedures,[40] and the failure of the SCM to become a truly independent body, guarantor of the judiciary's independence, and capable of ensuring the self-administration of the judiciary.[41] On the contrary, two judges interviewed for this chapter said that the previous SCM[42] was the most independent and effective SCM Moldova had ever had, especially contrasting it to the previous situation when the Chairman of the SCM was the same person as the President of the Supreme Court of Justice, but in need of further strengthening of the full-time staff and financial resources. The role of the SCM in disciplinary proceedings is subject to review in our opinion. The SCM validates all decisions taken by the Disciplinary Board, having the competence to annul or apply new sanctions. Practically every decision of the Disciplinary Board is reviewed by the SCM, which has the same nature

organizarea, competența și modul de funcționare a inspecției judiciare (Regulation on the Organization, Competence and Functioning of the Judicial Inspection), approved by SCM decision no. 321/13 of 11 October 2007. The judicial inspection was due to be created by 1 January 2008. However, it was created much later, due to lack of interest from potential candidates (including of the low salary, which is the equivalent of that of a judge of the appellate courts) and various changes in the competition procedure by the SCM (A. Cocîrță, Judiciary Reform in the Context of EU-Moldova Action Plan Implementation, ADEPT, at 53 (2009)). The judicial inspection started functioning on April 2009 with three judges on board (Interview with ex-chairman of the SCM, 28 August 2009).

39 Cf., *infra* B. II. 2. The Process of Judicial Selection.

40 Including for the adoption of an intentionally wrong decision.

41 See also the conclusions of *Masa rotundă internațională, Reforma sistemului de justiție în Republica Moldova. Standarde europene și realități naționale* (The International Roundtable, Judiciary Reform in Moldova. European standards and national realities), organized by PRISA, Chișinău, 15 June 2009, presentations and conclusions, available at <http://www.prisa.md/uploads/brosura_20.pdf>.

42 Referring to the 2005-2009 one, when judges were in the majority on the SCM.

as the Disciplinary Board – an extra judicial body, with more or less similar composition. Given the broad competences that the SCM has in the administration of the judiciary, we would recommend limiting its role in disciplinary proceedings and assigning full competence to the Disciplinary Board, the decision of which should be subject to direct appeal to a court. In the current procedure, the decisions of the Board are subject to appeal to the SCM, then to the Court of Appeal and then to the SCJ, providing four levels of jurisdiction, higher even than the court system (three levels).

The new Government, installed at the end of September 2009, included judiciary reform as one of its priorities, and aims among others to bring a substantial change to the structure of SCM as proposed, namely to include two chambers, one of judges and one of prosecutors, and to redefine the role of the SCM in the appointment of judges.[43]

[43] *Programul de activitate al Guvernului Republicii Moldova „Integrarea Europeană: Libertate, Democraţie, Bunăstare"* (Government's activity program "European Integration: Liberty, Democracy, Wellbeing"), 2009-2013, available at <http://www.gov.md>. As for the Government's proposal to create a bicameral SCM, one for prosecutors and one for judges, we have reservations regarding its adequacy for Moldova for the following main reasons. Firstly, the reform of both judiciary and prosecution is substantial and needs enormous investment, both financial and intellectual, which would be problematic if merged under the auspices of one body. Secondly, the prosecution office has major problems both internally and in the way it is perceived. Due to its extremely wide powers, especially fought for by the leadership of the prosecution, the prosecution office still has not found its place in the Moldovan legal system; many prosecutors give the impression of being a super power as seen in many trials (e.g. judges' preferential treatment of prosecutors when late or there is not enough space in the judge's office, or judges' bias towards the arguments of the prosecutor). Many judges are also not yet accustomed to the different role of the prosecution. Again merging these two reforms may negatively affect the implementation of initially good intentions. As long as the Prosecution Office has its own Council, we do not see that the suggestion for a two-chamber SCM is justified. On the contrary, the Prosecutor General should be excluded from the SCM.

II. Selection, Appointment, and Reappointment of Judges

1. Eligibility

The law on the judge's status provides that those who possess only the citizenship of the Republic of Moldova,[44] have their residence in Moldova and meet the following general requirements: legal competence (full civil capacity); licence in law; graduation from the National Institute of Justice (NIJ);[45] no criminal record and a good reputation; knowledge of the official language; ability to carry out the job from the medical perspective, evidenced by the medical certificate issued by a specialized commission, are eligible to compete for judges' posts.[46]

The law provides for an exception to the requirement of having graduated from the NIJ, allowing those who have worked for at least the past five years in certain legal positions[47] and who have passed *examenul de capacitate* (qualification examination) administered by the Qualification Board to put themselves forward. The number of vacancies for this category of candidates is determined by the SCM and cannot exceed

---

[44] The Parliament annulled this requirement on 23 December 2009, *Legea No. 127 din 23.12.2009 pentru modificarea unor acte legislative* (Law on amending several legislative acts), Official Gazette nos. 197-200 of 31 December 2009. This criterion, applied for a series of public officials, was discriminating against citizens with dual citizenship, preventing them from applying for relevant positions. It was challenged in the ECtHR by two candidates for parliamentary elections who were prevented by the relevant law from becoming MPs, if elected, due to their dual citizenship. The ECtHR ruled in favour of the applicants, finding the requirement to hold exclusively citizenship of Moldova to be in violation of Article 3 of Protocol No. 1 (See for details *Tănase v. Moldova,* Judgment of 27 April 2010, available at <http://hudoc.echr. coe.int/hudoc/>).

[45] This requirement came into force in spring 2009, after the first round of graduation at the NIJ (which was created only in 2007).

[46] Article 6 *Legea No. 544 din 20.07.1995 cu privire la statutul judecătorului* (Law on the Judge's Status), republished in the Official Gazette nos. 117-119 of 15 August 2002.

[47] Such as a member of Parliament, a member of the Court of Accounts, a teaching professor of law (*profesor titular de drept*) in accredited institutions of higher education, prosecutor, investigator, criminal investigation officer, lawyer, parliamentary advocate, notary, legal consultant, assistant (*referent*) to the judge, enforcement officer (*executor judiciar*), consultant at the court or court clerk, as well as a legal position in the apparatus of the Constitutional Court, SCM or public authorities – Article 6(2) Law on the Judge's Status.

20% of the total number of vacancies in a three-year period.[48] This provision is problematic as it leaves a window for admitting candidates who have not qualified through the training course in the NIJ, but only taken the qualification examination, which is perceived by some judges as not rigorous enough.[49] We consider this provision acceptable from the point of view that it allows admission to the judicial profession of people who initially or for a minimum five-year period followed another legal profession, thus providing for diversity within the judiciary. On the other hand, the implementation of this provision has so far been problematic from the following perspectives: it has allowed candidates who have not undergone practical training to become judges (the qualification examination is mostly a theoretic exercise); legal education in Moldova is still struggling with quality, especially the long distance education, so relying only on graduate studies in law and five years' legal experience is not enough to be accepted as a judge. The qualification examination must be improved and accompanied by a short traineeship with the NIJ or a judge to remedy these shortcomings. The SCM could also consider increasing the threshold of legal experience, e.g. from five to ten or 15 years, which should ensure better prepared candidates. Candidates for judges' positions at the appellate courts or Supreme Court of Justice should have judicial experience of at least six and ten years, respectively.[50]

The 2003 changes to the criminal procedure provided for a new category of judges – called *judecători de instrucție* (investigative judges) – responsible for exercising judicial control over the pre-trial phase of criminal proceedings. Besides the general requirements for district court judges, the candidates for investigative judges were to have needed a minimum of five years' legal experience as a prosecutor or criminal investigator or three years as a judge. This provision was later annulled. However, before its annulment it already had a negative impact, as the majority of investigative judges are former prosecutors, which has a direct impact on their neutral position as judges.[51]

---

48 Article 6(1) and (2) Law on the Judge's Status.

49 See *infra* B. II. 2. The Process of Judicial Selection.

50 Article 6(3) Law on the Judge's Status.

51 Soros Foundation – Moldova, Criminal Justice Performance from a Human Rights Perspective: Assessing the Transformation of the Criminal Justice System in Moldova, at 54 (2009), available at <http://www.soros.org/initiatives/brussels/articles_publications/publications/report-criminal-justice-20091130/report-criminal-justice-20091130.pdf>.

Two of the eligibility criteria for judges are particularly problematic in our view: the expression "licensed in law" should be clarified in line with the amendments to the legal education system after the Bologna process; the requirement regarding the medical certificate is vaguely worded, with no clarifications of how it is to be applied (i.e. if a candidate can be rejected because of his medical situation). The requirement of "good reputation" can also leave room for subjective judgement of the SCM when selecting candidates (see below on the process of selection). At the same time, this is a necessary requirement. In order to avoid subjectivism the SCM must always explain how this requirement has been interpreted, where the candidate is refused on this ground.[52] The law previously required one to have reached a minimum age of 30 before being able to apply for a judge's position. While 30 may be too old, many legal professionals by then having chosen another profession and hence the number of interested qualified candidates being reduced, the SCM should study this aspect in order to identify whether an age or legal experience requirement is appropriate prior to being admitted to the NIJ as a means of ensuring a better quality of candidate and consequently of judge. This point is raised by some legal professionals, especially regarding the very young and inexperienced candidates currently studying at the NIJ.[53]

2. The Process of Judicial Selection

The process of selection consists of several stages: admission to the NIJ (for 80% of judges to be admitted to the system); graduation from the NIJ or passing the qualification examination for candidates exempted from undergoing the NIJ course and examination; review of the candidate's file by the SCM and selection for appointment by a simple majority of votes; appointment of the candidate by the President or Parliament.[54] In case the candidate was refused appointment by the President there may be a repeated proposal of the candidate by the SCM, with a

---

[52] In the interview with the ex-Chairman of the SCM (28 August 2009), he mentioned that all reasons for rejecting a candidate are brought to the attention of the rejected candidate, but not made public.

[53] ABA ROLI, Judicial Reform Index for Moldova, Volume III, at 12 (June 2009).

[54] The President appoints the district and appellate court judges. Judges of the Supreme Court of Justice are appointed by the Parliament. All proposals for candidates are made by the SCM.

qualified majority of two-thirds of the votes. The President is then obliged to appoint the candidate proposed by the SCM. Judges of the Supreme Court of Justice are appointed by the Parliament on the proposal of the SCM. As with the appointment of district and appellate court judges by the President, the Parliament shall appoint the candidate repeatedly proposed by the SCM.[55]

a) Admission to the NIJ

The NIJ was created in 2007 as a public institution entrusted with the training of candidates for judges' and prosecutors' positions and the professional development of judges and prosecutors, as well as other persons involved in the justice system (e.g. court clerks and enforcement officers[56]).[57] It is an independent body, managed by an Executive Director and a Board of 13 members, of whom seven are judges appointed by SCM, four prosecutors, one the representative of the Ministry of Justice and one a representative of academia.

Admission to the NIJ is solely via competition, organized by the NIJ. The number of available positions for competition is approved annually by the NIJ Board, in coordination with the SCM and the General Prosecutor's Office (GPO), depending on the real needs and available means.[58] The eligibility criteria for candidates willing to apply for the NIJ are similar to the criteria for candidates for judges' and prosecu-

---

[55] Article 9 *Legea no. 789 of 26.03.1996 cu privire la Curtea Supremă de Justiție* (Law on the Supreme Court of Justice), republished in Official Gazette no. 196-199 of 12 September 2003.

[56] Candidates for judges' and prosecutors' positions, admitted to the NIJ according to the set procedures; judges, prosecutors, enforcement officers and court clerks are *ex officio* beneficiaries of the NIJ. Others who contribute to the delivery of justice/are involved in the justice system can be NIJ trainees on a contractual basis – according to Article 10.1 *Statutul Institutului Național al Justiției* (Statute of the NIJ), approved at the NIJ Board meeting of 6 June 2007, available at <http://www.inj.md>.

[57] Article 2(1) *Legea No. 152 din 08.06.2006 cu privire la Institutul Național de Justiție* (Law on the National Institute of Justice), Official Gazette no. 102 of 7 July 2006.

[58] Arts. 1.2. and 1.3. *Regulamentul cu privire la organizarea concursului de admitere în Institutul Național al Justiției* (Regulation on the Competition for Admission to NIJ), approved at the NIJ Board's meeting of 6 June 2007, available at <http://www.inj.md>.

tors' positions. The admission competition consists of two tests: a written test (those who fail will not proceed further) and an oral test. The written test consists of *test-grilă de evaluare* (a multiple-choice test) for the following four disciplines: civil law, civil procedure, criminal law and criminal procedure. The oral test is meant to assess the skills of the candidates in interpreting and applying the law, their intelligence level and critical thinking, as well as professional skills, which includes solving two hypothetical cases: one civil and one criminal.[59] So far there have been three admissions to the NIJ. In each of 2007, 2008 and 2009 ten candidate judges were admitted (only nine graduated from the first class).[60] Once admitted to the NIJ, students receive a scholarship equal to 50% of the salary of a district court judge. The initial training course for judges is 18 months long and includes both theoretical and practical courses (including five months' traineeship within a court). The vast majority of subjects included in the curriculum are legal ones and several deal with subjects such as ethics, IT, foreign languages and psychology.[61] Taking into account the complexity of the initial training delivered to NIJ students, the period of 18 months is considered insufficient and it is recommended to be extended to at least 24 months.[62] The trainees of the NIJ must undertake an apprenticeship within a district court of a total length of 20 weeks. In the court a tutor is appointed who guides the trainee and supervises his/her learning plan and offers continuous support.[63] Supervising judges do not receive any remuneration for this job, nor is their caseload reduced during the initial period of apprenticeship, which usually requires significant time from the supervising judge. These aspects have to be remedied in order to ensure a meaningful apprenticeship.[64]

---

59 Id., Article 4.1.

60 Information available at <http://www.inj.md>.

61 A. Cocîrță, Judiciary Reform in the Context of EU-Moldova Action Plan Implementation, ADEPT, at 53 (2009).

62 G. Oberto/M.-L. Cavrois/J. Dias Duarte/D. Liiv, Expertise on: Law on Superior Council of Magistrates, Law on Supreme Court of Justice, Law on Judicial Organization, Law on the Judge's Status, Law on the National Institute of Justice (revised edition), at 13 (2006).

63 Traineeship curricula for the candidates to the position of judge, 3rd Semester, Adopted in September 2008 by NIJ Board, available at <http://www.inj.md/files/u1/Stagii_Judecatori.doc>.

64 Interview with a district court judge, 13 April 2009.

b) Graduation from the NIJ or the Qualification Examination

On the completion of their studies, students must pass a graduation examination consisting of two stages: written and oral. The written test consists of solving a theoretical multidisciplinary test, which includes questions from all disciplines studied at the NIJ. The oral test consists of verifying the practical knowledge of certain disciplines studied at the NIJ.[65] The candidates for appointment (the 20% who are exempted from the duty to undergo NIJ studies and the graduation examination) must pass the qualifying examination administered by the Qualification Board. The qualifying examination includes both oral and written parts.[66] The oral part covers subjects such as civil, criminal, administrative, constitutional and labour law: civil and criminal procedure; the status of judge; and judicial organization. Candidates receive up to ten points for each answer and must achieve at least 70% of the total number of points to pass the examination. The written part requires candidates to draft two procedural documents resolving hypothetical cases.

Perceptions of the qualifying examination vary. Some judges consider that it is not rigorous enough, which leads to the selection of judges who are not highly qualified. Others consider the examination appropriate, but the ensuing process of selection too subjective.[67] Others complained that it is sometimes carried out *pro forma* and the Board already has a candidate in mind despite the exam results.[68] A Supreme Court of Justice judge considers the qualification examination too theoretical, and not good at assessing the qualities needed to be a judge.[69]

---

[65] Arts. 7.3.-7.5. *Regulamentul privind formarea inițială și absolvirea* (Regulation on Initial Training and Graduation), approved by the NIJ Board, 21 June 2007.

[66] Article 20 *Regulamentul privind formarea inițială și absolvirea* (Regulation on Initial Training and Graduation), approved by the NIJ Board, 21 June 2007, available at <http://www.inj.md>.

[67] ABA ROLI, Judicial Reform Index for Moldova, Volume II, at 25 (2007).

[68] ABA ROLI, Judicial Reform Index for Moldova, Volume III, at 23 (2009).

[69] Interview with a Supreme Court of Justice Judge, 28 December 2009.

c) Review of the Candidate's File by the SCM and Selection for Appointment

All judges' positions are filled by way of competition. Both graduates of the NIJ and candidates applying on the basis of their work experience submit their documents[70] to the SCM, which is responsible for making the selection and proposing judges for appointment. Graduates of the NIJ participate in the competition for a judicial vacancy on the basis of their graduation certificates, according to their average NIJ graduation grade. That is the arithmetic average of two grades: the general average grade for semesters at the NIJ and the average grade in the graduation examinations.[71] The candidates with the necessary work experience participate in the competition based on the results of the qualifying examination.[72]

Public perceptions of the correctness of the SCM selection procedure and proposals for appointment are not very positive. In a journalistic investigation, the newspaper Ziarul de Gardă concluded in 2008 that the selection process in the SCM is not perceived as transparent and merit-based, but rather as depending on either personal connections or other influences on the process. According to this perception, the appointment of judges in Chişinău (capital of Moldova) seems to be particularly flawed. The article further refers to a few examples of judges selected by the SCM for appointment who have lower marks/grades at the qualification examination than others; one allegedly was even caught in the act of bribery, a case which was never fully examined and clarified. Moreover it was pointed out that it is not clear what role the chronological order plays, as it had occurred that candidates were appointed although there had been others still waiting for appointment who had taken the exam in a preceding year. The article raised these issues with the chairman of the SCM, who responded that candidates are voted on by the SCM by secret ballot, taking into account several factors, and

---

70 Article 10 Law on the Judge's Status requires the following documents to be submitted by the candidate judge: *curriculum vitae*, the copy of the diploma and certificate of graduation from the NIJ (where relevant), a copy of the *carnet de muncă* (work certificate), criminal record, medical certificate, the income and property declaration, and a letter of reference from the last place of work or study.

71 Article 7.13 Regulation on Initial Training and Graduation at NIJ.

72 Qualification examinations are organized twice a year, or when necessary an additional examination can be organized, in accordance with Article 17 Law 9 on the Qualification Board and Attestation of Judges.

who denied the allegations of political preferences, personal connections or corruption in the selection process or in the qualification examination.[73]

In 2009, the appointment of the first NIJ graduates also proved controversial. The NIJ graduates were given priority in 14 vacant positions at the first hiring competition organized since they became eligible. However, only two graduates accepted the positions located in or near Chişinău. At the next competition organized by the SCM, the NIJ graduates again refused to accept the proposed positions, mainly because of location.[74] This controversy is mainly due to unclear legislation, e.g. Article 18 of the Law on NIJ provides for the obligation of NIJ graduates to participate in the competition for judicial positions, but does not deal with the obligation to accept the proposed position. Article 18(2) provides that graduates may choose judicial posts in the decreasing order of their graduation marks/grades (e.g. the highest chooses first, etc.) and Article 18(4) mentions that the NIJ Council can request graduates to repay the grant received if they fail to take part in the competition without valid reasons. According to Article 18(2) the graduation examination is valid for three years. Thus the law itself is vague and does not oblige NIJ graduates to accept the available positions within a certain time, as it provides only for the term of validity of the graduation examination. The SCM has reportedly sent a request to the Parliament to clarify the expression "shall take part in the competition" and further intends to require the NIJ to seek repayment of the grant from candidates who refuse to accept positions.[75] One additional caveat to this conflict is the fact that the SCM organized competitions early in 2009, where some vacancies for Chişinău were filled, and the NIJ graduates felt this was unfair; the SCM should have waited to organize the competition for both NIJ graduates and other graduates.[76]

Irrespective of the outcome of the first NIJ graduates' appointments, the legal framework obviously needs clarification, including the procedure for scheduling competitions vacancies by the SCM, to reduce the

---

[73] Z. de Garda, *Ajunge judecator cel care are bani în pungă sau spete late* (Who has money and support, becomes a judge), available at <http://www.zdg.md/investigatii/ajunge-judecator-cel-care-are-bani-in-punga-sau-spete-late>.

[74] ABA ROLI, Judicial Reform Index for Moldova, Volume III, at 23 (2009).

[75] Id.

[76] ABA ROLI, Judicial Reform Index for Moldova, Volume III, at 24 (2009).

complete subjectivity in announcing the competitions. The problem with filling positions outside Chişinău will always be present, so the SCM must come up with a more flexible system of either rotating judges within the system or giving some attractive benefits to judges in courts located far from Chişinău.

d) Appointment of the Candidate by the President or Parliament

The SCM is responsible for nominating a candidate for appointment by the President or by the Parliament. The President appoints judges of district courts, the appellate courts, the Economic Circuit Court and the Military Court. Judges are initially appointed for a period of five years and then until they reach the retirement age of 65. The Parliament appoints judges of the SCJ.[77] Between 2003 and 2005, the President was able to refuse to appoint a candidate without having to give reasons, and his refusal to appoint meant dismissal of the judge. The appointment procedure was slightly improved in 2005, reducing the President's discretion in the appointment of judges: "The President may reject a candidate only once, and only upon discovery of 'incontestable proof' of the candidate's unsuitability for the position, the candidate's violation of the law or legal procedures concerning a candidate's appointment."[78] The President's refusal is usually accompanied by a confidential letter sent to the SCM and the judge in question, in which the reasons for refusal are outlined.[79]

Although significantly improved, the law still lacks clarity regarding the criteria and data checked by the President or Parliament upon confirming a proposed candidate, which reduces the role of the SCM in the process of selection and appointment of judges.[80] Even the chairman of the SCM acknowledged the gap in the law and said he only assumed that the President's office looked at the candidate's history, checking with the secret services, prosecutor and police office from the region the candidate came from.[81]

---

77 Article 11(1) and (2) Law on the Judge's Status.

78 Article 6(2) Law on the Judge's Status.

79 Interview with Nicolae Clima, ex-Chairman of the SCM, 28 August 2009.

80 Similar concerns were raised in the Council of Europe recommendations: Report Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (note 4), para. 104.

81 Interview with Nicolae Clima, ex-Chairman of the SCM, 28 August 2009.

e) Repeated Proposal of the Candidate by the SCM

If a candidate is rejected by the President, he/she can ask the SCM to propose him/her again. The decision is taken by two-thirds of the SCM members. Upon the repeat proposal of the SCM, the President is obliged to appoint the candidate within 30 or exceptionally 45 days.[82] The SCM made use of these legal provisions in 2007 and 2008 and for the second time proposed candidates for appointment to the president,[83] for example in 2008, five judges were rejected by the President, of whom three asked to be proposed again and only one was accepted and proposed by the SCM.[84] From the review of the SCM decisions in 2009 we concluded that the reasons included in the SCM decisions are vaguely drafted and one cannot assess clearly the reasons for or against accepting a nomination. The secret voting procedure by the SCM members, who are not required to give any reason for their vote, adds to the obscurity.

No legislation relating to the composition of the judiciary discriminates against ethnic or religious minorities or on the basis of gender,[85] but there are also no regulations providing for the adequate representation of such people. *De facto*, most of the major ethnic minorities are represented in the judiciary,[86] although the percentage of ethnic Ukrainian, Russian and Gagauz judges is less than half their percentage in the population at large.[87] Assessment of gender representation among judges shows that approximately 35% of judges are women, with a higher proportion in the Supreme Court (40%), appellate courts (47%) and the Constitutional Court (50%).[88]

---

[82] Article 11(3) and (5), as amended by Law no. 174 of 22 July 2005.

[83] See for example, decision of the Supreme Council of Magistracy, no. 1/1 of 22 January 2009 regarding the activity of the SCM in 2008.

[84] SCM activity report for 2008.

[85] ABA ROLI, Judicial Reform Index for Moldova, Volume II, at 26 (2007).

[86] National Office of Statistics of the Republic of Moldova, Moldova in Numbers: A Statistical Summary 2006.

[87] Although they are present as a minority in Moldova, there is no judge of Roma origin.

[88] ABA ROLI, Judicial Reform Index for Moldova, Volume III, at 28 (June 2009).

3. Length of Office and Reappointment

Judges who are appointed as such for the first time are appointed for a period of five years. After the expiry of that period judges are appointed until the *plafonului de vârstă* (retirement age) of 65.[89] The initial five-year period makes judges quite vulnerable to external influences, particularly from the executive branch which appoints them, as they may risk not being re-appointed. This has been criticized by many experts and institutions, especially after the 2002 process of "mass cleansing" reported by the Moldovan Association of Judges, during which seven judges lost their posts and the President refused to renew the mandates of 57 other judges.[90] The system of initial appointment for five years and only thereafter appointment until retirement age is also placing judges in a position of dependence on the executive and legislative branches. The Government representative at the Human Rights Committee hearing in 2009 acknowledged this as a problem and disclosed the Ministry of Justice's plans to change it, arguing that it had not yet been done because it required changes to the Constitution, which is a long and complex procedure.[91]

---

[89] Article 11(11) Law on the Judge's Status.

[90] International Commission of Jurists, Moldova: The Rule of Law in 2004, Report of the Centre for the Independence of Judges and Lawyers, Annex I, at 6 (2004); *Declarația Parlamentului privire la starea justiției în Republica Moldova şi măsurile necesare îmbunătățirii situației în domeniul justiției* (Parliament Declaration regarding the state of affairs in the Judiciary and the measures necessary for improving the situation in the judiciary), adopted by Parliament decision no. 53 of 30 October 2009, Official Gazette nos. 160-161 of 6 November 2009 also refers to the "elimination from the judiciary, in 2002-2003, of a considerable number of honest and qualified judges, based on political criteria, and promotion of candidates obedient to the government". One of the deputies and ex-president of a district court in Chişinău, Ion Pleşca, mentioned that 84 judges had been dismissed for no reason (transcript of the Parliamentary hearing of 30 October 2009, available at <http://www.parlament.md/news/plenaryrecords/30.10.2009/>).

[91] UN Human Rights Committee hearings on 13 October 2009.

III. Tenure and Promotion

1. Tenure

As mentioned above, judges are appointed initially for a five-year term, and then appointed until the retirement age of 65. The process of proposing judges for reappointment is not seen as transparent, particularly for courts based in Chişinău.[92] Besides the entry rules, described above, judges are also subject to continuous attestation throughout their tenure. Initially, judges appointed for the first time (first five years before being appointed until the retirement age) must pass an *atestarea* (evaluation or attestation examination) administered by the Qualification Board within six months of their appointment. Further, judges must pass attestation examinations every three years to confirm their qualification grade, unless they have the superior qualification grade.[93] Apart from these cases, judges pass an attestation examination in the following cases: the award of a qualification grade or of a superior one, a proposal to appoint to the position of judge until retirement age,[94] participation in the competition for judicial post in another court, or the position of president or vice president of a court.[95] Where the judge is not carrying out his/her duties properly or is not improving his/her professional qualifications, he/she can be asked to pass an attestation examination earlier than after the three-year period, but not more often than once a year.[96] Qualification grades are awarded to candidates who have passed the attestation examination administered by the Qualification Board. The proposal to award qualification grades is made by the president or vice-president of the court, or the president of the higher court.[97] There are six qualification grades (superior, first, second, third, fourth and

---

92 Interview with a district court judge, 13 April 2009. The ABA ROLI Report of 2009 also refers to sources indicating irregularities in the process of advertising judicial vacancies outside Chişinău. (ABA ROLI, Judicial Reform Index for Moldova, Volume III, at 23 (2009).

93 Concerning the different grades see below in this section.

94 *Plafonului de vârstă*, in Romanian (appointment until retirement age).

95 Article 23(1)-(3) Law on the Qualification Board and Attestation of Judges.

96 Article 23(4) Law on the Qualification Board and Attestation of Judges. Examples of cases where this provision has been applied are unknown to the authors.

97 Article 23 Law on the Qualification Board and Attestation of Judges.

fifth), depending on function, work experience, professionalism and experience. The superior qualification grade is awarded by the President of the country, while the others are awarded by the Qualification Board. The qualification grades are awarded in the following way. The superior grade is awarded to the president and vice-president of the SCJ, and depending on working experience as a magistrate and great professionalism to other SCJ judges. The first grade is awarded to the judges of the SCJ, assistant judges of the Constitutional Court, presidents and vice-presidents of appellate courts, The second grade is awarded to appellate court judges; the third grade to appellate court judges, presidents and vice-presidents of district courts; the fourth and fifth grades to the presidents, vice-presidents and judges of district courts.[98]

The main criticism regarding the qualification grades relates to the manner in which they are designed by law, namely that judges of district courts can achieve only the fourth and fifth grades, judges of the appellate courts can achieve at the most the second qualification grade. Hence, unless a judge is promoted to a higher court, he/she cannot rise in qualification grades irrespective of his/her work experience. This system negatively affects judges' incentives to increase their professionalism.[99]

Before he/she can pass the attestation examination, the president of the court or the SCM member prepares the candidate's *caracteristică* (characteristics),[100] analyzing his/her professional and moral qualities and professional activity, and a recommendation, which are submitted to the Qualification Board.[101] The official criteria for measuring the performance of the judiciary are the completion of criminal proceedings in a reasonable time; the quality of the criminal proceedings; reduction in

---

[98] Article 29 Law on the Qualification Board and Attestation of Judges.

[99] Interview with a district court judge, 13 April 2009.

[100] A sort of recommendation or reference letter, of a slightly outdated format.

[101] Article 24 Law on the Qualification Board and Attestation of Judges. For presidents of courts, these documents are prepared by the president of the hierarchically superior court. For SCJ judges these documents are prepared by the President of the SCJ and presented to the SCM. *Regulamentul privind modul de organizare şi desfăşurare a atestării judecătorilor* (Regulation on the Organization and Holding of the Attestation of Judges), approved by SCM decision no. 318/13 of 11 October 2007 mentions that these documents are prepared by the SCM apparatus.

the number of cases in the backlog at the end of the quarter and at the end of the year; prompt handing down of final sentences and judgments; enforcement of the provisions of the Instruction regarding secretarial work within District Courts and Appeal Courts; lack of well-founded complaints regarding the behaviour and activity of a court's judges; and other statistical data regarding the court.[102]

These criteria are not clearly spelled out anywhere, nor are they clear in practice. "Judges perceive that the quality of their performance is predominantly measured by the number of appealed, contested or annulled judgments. As such numbers may be influenced by a variety of factors which have nothing to do with an individual judge's performance, this is not always an entirely appropriate measure."[103] The biggest source of discontent among judges is the manner in which statistical data are collected for criminal cases, as they do not distinguish between annulled and amended cases. Even if the superior court has only changed the sentence, without requalification, this still impacts negatively on judges' performance figures. Thus judges consider the opinion/advice of higher court judges, to avoid the negative consequences of a high overruling rate. Acquittal rates seem to have an influence on judges' performance as well, judges being reluctant to order acquittals for fear that they may be suspected of corruption and because of prosecutors' automatic right to appeal acquittals.[104] A new tool for measuring the performance of leaders and court managers was developed, which would allow the SCM to assess the performance of courts based on three elements of case management: the rate at which cases are solved; the examination in legal terms; and the duration of pending cases.[105]

The attestation examination is administered by the Qualification Board. The candidates must answer orally five questions from the following subject areas: civil law, civil procedure, criminal law, minor offences (contravention) law, criminal enforcement law, other areas (prosecution, Bar, organization of judiciary, etc.), constitutional law, criminal procedure law, labour law, family law, land law, environmental law, housing

---

[102] Soros Foundation (note 51), at 55. Information sent by the Supreme Council of Magistrates: Letter of 7 May 2008, Legal Parliamentary Commission and the attached statistical reports and responses to the specific questions.

[103] Id., at 55.

[104] Id., at 50 and 53. See more details on this in section C. II. 2. Practice.

[105] SCM activity report for 2009, approved by CSM decision no. 120/10 of 23 March 2010, available at <http://www.csm.md/files/RAPOARTE/Raport%20justitia%202009.pdf>

law, ECHR procedure and case law.[106] The attestation examination of a judge starts with the presentation of the reasons for attestation, the judge's personality and professional activity, other materials annexed, followed by the candidate judge's responses to the five questions. Members of the Qualification Board can ask any other question, within the limits of the subject areas for the judge's attestation.[107] After the judge has given his/her answers, the Qualification Board withdraws for deliberation. The following are considered in the decision on the judge's attestation: besides the level of professional knowledge (the attestation examination): work experience, the results of professional activity, organizational capabilities, scientific titles and other merits, as well as the terms and conditions of the qualification grades.[108] The final decision is taken by simple majority. In the event of equality of votes, the decision comes down in favour of the candidate.[109]

The Qualification Board takes one of the following decisions: award of the qualification grade or of a superior qualification grade, retention of the existing/awarded qualification grade, postponement of the attestation,[110] and downgrading.[111] In the last case, if the judge has the lowest qualification grade or no qualification grade, the Qualification Board makes a proposal to the SCM to remove him/her.[112] If the judge was subject to attestation for appointment until retirement age, the Qualification Board can propose to the SCM the candidate's appointment or dismissal, if he/she did not pass the attestation.[113] The Qualification

[106] *Tematica pentru examenul de capacitate şi atestarea judecătorilor* (Subject Areas for Qualification and Evaluation Examination of Judges), approved by SCM decision no. 339/13 of 11 October 2007, available at <http://www.csm.md/>. Investigative judges shall answer five questions from the following subject areas: criminal and criminal procedure law, minor offences (contravention) law, enforcement law, ECtHR procedure and case law.

[107] Regulation on the Organization and Holding of the Attestation of Judges, at 16.

[108] Id., at 20.

[109] Id., at 21.

[110] When the judge does not know the answer to the question or the answers are evaluated as unsatisfactory by the Qualification Board, it can decide to postpone the attestation for a maximum period of six months. Id., at 17.

[111] Article 25(1) Law on Qualification Board and Attestation of Judges.

[112] Article 25(2) Law on Qualification Board and Attestation of Judges.

[113] Regulation on the Organization and Holding of the Attestation of Judges, at 19.

Board's decision can be appealed to the SCM within seven days. A decision which is not appealed within this time limit is sent to the SCM for validation.[114]

The SCM shall, within a month of receiving the relevant materials, take one of the following decisions: to validate the decision, amend it and adopt a new decision, or overrule it and end the procedure. During this procedure, the SCM may question members of the Qualification Board or the judge concerned.[115] Where the Qualification Board's decision is amended or overruled and a new one is adopted, the SCM can award the judge another qualification grade or apply a disciplinary sanction in accordance with the law. Where the superior qualification grade is being offered or the judge is being removed or dismissed, the SCM presents the proposal in question to either the President or Parliament, depending on the grade and court involved.[116] The same rules regarding refusal, repeated proposal and automatic second appointment by the President apply as for the appointment of judges.[117]

The practice of the last four years shows that the Qualification Board has not made any recommendation to dismiss a judge for poor performance at the attestation examination, as in cases of poor performance the Board extended the attestation period and the judges usually passed the second examination.[118] Some judges consider the attestation examination inadequate, testing their theoretical knowledge, rather than being a useful exercise for improving their professionalism.[119] Other judges consider the attestation examination a good and worthwhile process, criticizing the qualification ranking system that gives the sole authority to the President to award superior rankings because of potential political influence on the judiciary.[120] As to the examination of the judge's professional activity, at the moment there is no clear system of assessing the individual judges' performance; usually the factors taken

---

[114] Id, at 22.

[115] Article 21(3) Law on the SCM.

[116] Article 21(4) and (5) Law on the SCM.

[117] Article 16 Law on Judicial Organization.

[118] ABA ROLI, Judicial Reform Index for Moldova, Volume III, at 60 (2009).

[119] Interview with a district judge, 13 April 2009 and with an SCJ judge, 28 December 2009.

[120] ABA ROLI, Judicial Reform Index for Moldova, Volume III, at 60 (2009).

into account are workload, the number of overruled decisions, and the number of disciplinary proceedings. The SCM has prepared a regulation on performance measurement for judges, which should fill this gap.[121]

2. Promotion

Judges can be promoted in three ways: as presidents or vice-presidents of courts, to a higher court and through award of a higher qualification grade (which can be done in connection with the first two). For all these types of promotion judges need to pass the attestation examination.[122] The rules of the attestation examination and the procedure are as described in the previous section, with specifics for the attestation of candidates for presidents and vice-presidents of district and appellate courts, explained below. The filling of positions of presidents and vice-presidents of the district and appellate courts, as well as the promotion of judges to hierarchically superior courts or other courts is done on the basis of a competition organized by the SCM.[123] Candidates for these must attach references regarding their professional and moral qualities and information regarding their activity in the past three years, which are sent to the Qualification Board.[124]

Presidents of district and appellate courts are appointed by the President on the proposal of the SCM) based on the results of the attestation examination. The attestation examination for filling vacancies in posts of presidents and vice-presidents of courts consists of an examination

---

121 Interview with an SCJ judge, 28 December 2009.

122 ABA ROLI, Judicial Reform Index for Moldova, Volume II, at 79 (2007).

123 *Regulamentul privind modul de organizare şi desfăşurare a concursului pentru suplinirea posturilor vacante de judecător, de preşedinte sau vicepreşedinte al instanţelor judecătoreşti, de promovare în instanţele ierarhic superioare* (Regulation on the Competition for Filling in the Vacancies for Position of Judges, Presidents or Vice-presidents of Courts, for Promotion to Hierarchically Superior Courts), adopted by the SCM decision no. 63/3 of 1 March 2007, amended by decision no. 103/5 of 2 April 2009.

124 The candidates who have passed the attestation examination in the past 12 months and who have not been subject to disciplinary sanctions are directly admitted to the competition, without being required to pass the attestation examination again (Regulation on the Competition for Filling in the Vacancies for Position of Judges, Presidents or Vice-Presidents of Courts, for Promotion to Hierarchically Superior Courts, at 16, 21 and 22).

which has two parts: an evaluation in the areas of civil law, civil procedure, criminal law, criminal procedure, administrative law, constitutional law, labour law, land law, housing law, family law, legislation on the organization and functioning of the judiciary, national case law, ECtHR procedure and case law; and an evaluation of psychological abilities, the candidate's ability to take decisions and assume responsibilities, present a project regarding the exercise of the functions specific to the position for which he/she is applying, identification of managerial and communication skills and the use of human resources. The relevant abilities and skills can be assessed, apart from by means of the hypothetical cases solved by the candidate during the examination, by means of a written project which can be presented by the candidate before the Qualification Board hearing.

After the examination, the Qualification Board takes the decision to propose the candidate for the position or to reject him/her, the latter decision being appealable to the SCM within seven days. An unappealed decision is submitted to the SCM for validation.[125] Judges are promoted or transferred for an unlimited period by the President of the country or the Parliament[126] at the proposal of the SCM and only with the judge in question's consent. Temporary promotions and transfers, e.g. to replace a suspended, transferred or detached (i.e. while serving on the SCM, NIJ or Disciplinary Inspection) judge or one who has reduced his/her workload, are decided by the SCM. The process of promotion is largely seen as transparent as far as the competition is concerned. What seems to be raising concerns and discontent among some judges are the poorly reasoned decisions of the SCM in some cases and the *ex officio* appointment by the President or the Parliament, respectively, which should be a mere formality in a rule of law based state and is not so yet in Moldova.

---

[125] Regulation on the Organization and Holding of the Attestation of Judges, at 25-29.

[126] Depending on the court to which the judge is promoted, e.g. judges are promoted to the Supreme Court of Justice by the Parliament, the rest by the President.

IV. Remuneration

1. Remuneration

Judges' salary is not adequate and is a major complaint permanently raised by judges, as well as a concern raised by independent experts[127] as it is a factor inviting corruption and other inappropriate behaviour. Salaries are established by law. First instance judges receive 4,200 lei (approx. 260 EUR) gross, those in appellate courts 5,200 lei (approx. 325 EUR) and in the Supreme Court of Justice 6,000 lei (approx. 375 EUR).[128] Compared to other branches of government, judges get smaller salaries than ministers and members of Parliament, who receive 7,100 lei (approx. 457 EUR). Moreover, even compared with other functions, judges' salaries are insufficient. For example, ordinary prosecutors in a territorial prosecution office get 3,800 lei (only 400 lei or approx. 26 EUR less than a district court judge), prosecutors in the General Prosecutor's Office receive a minimum of 3,800 lei (approx. 245 EUR) and more, depending on their rank.[129]

These figures are intended only as a few examples to convey two main messages: (1) judges' salaries in Moldova are inadequate, but this is firstly due to the general characteristic of poor salaries for all public officials in Moldova and (2) besides the general low salary scales, judges' salaries are also lower than or comparable to those in other branches of power. According to some reports, initially the Law on the salary system for the budgetary sector provided judges with similar salaries to those of ministers and members of Parliament, but the President refused the promulgation and so the draft was amended to include smaller

---

[127] A. Cocîrță, Judiciary Reform in the Context of EU-Moldova Action Plan Implementation, ADEPT, at 59-60 (2009); Report Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), Co-rapporteurs: J. Durrieu/Socialist Group/ E. Vareikis, Honouring of Obligations and Commitments by Moldova, Group of the European People's Party, Doc. 11374, para. 105, 14 September 2007; W. Marchlewski/V. Ionita/I. Munteanu/D. Lozinski, Funding of Judiciary in Moldova, Center for Legal and Political Studies in Moldova, at 23 (2005).

[128] Annex 3 *Legea no. 355 of 23.12.2005 cu privire la sistemul de salarizare în sectorul bugetar* (Law on the Salary System in the Budgetary Sector), Official Gazette nos. 35-38 of 3 March 2006.

[129] The figures are extracted from the annexes to the Law on the Salary System in the Budgetary Sector.

salaries for judges.[130] Judges' salaries have not been increased since 2005. Moreover, since 2003 judges have earned a flat rate, irrespective of the number of years of experience, with some insignificant increases for the three qualification grades (100 lei or 8 EUR per grade).[131] According to a recent survey, 96% of judges believe their salaries do not fairly reward them for the work they do.[132] Judges' poor salaries are one of the factors which deter the best candidates from embracing this profession, especially given the opportunities offered by the non-governmental sector and international organizations working in Moldova, as well as scholarships abroad with very few candidates returning to the judiciary.[133]

2. Benefits and Privileges

According to the law on the status of judge, judges benefit from 30 days' paid leave annually.[134] Judges and members of their families benefit from free basic medical insurance and the judge benefits from mandatory state life assurance, health and goods insurance, covered out of the state budget.[135] The law on the status of judge originally provided for the right to certain living space, so-called social housing, for judges, alongside a series of public officials. This provision was annulled by the Parliament in December 2009.[136]

---

[130] ABA ROLI, Judicial Reform Index for Moldova, Volume II, at 57 (2007).

[131] Interview with N. Clima, ex-Chairman of the SCM, 28 August 2009.

[132] CBS-AXA Sociologic Investigations and Marketing Centre for the Moldova Governance Threshold Country Program, Moldova Court Public Monitoring Survey, carried out between 26 February and 27 March 2008.

[133] No statistical data are offered; the statement is based on the authors' experience. The issue is also mentioned in ABA ROLI, Judicial Reform Index for Moldova, Volume II, at 14 (2007).

[134] The annual leave increases as follows: two days for judges with less than five years' judicial experience, five days for five to ten years' experience, ten days for ten to 15 years' experience and 15 days for over 15 years' experience (Article 29 Law on the Judge's Status).

[135] Arts. 31 and 33 Law on the Judge's Status.

[136] Law no. 90 of 4 December 2009, Official Gazette nos. 187-188 of 18 December 2009. The main reasons given by the Ministry of Justice, which submitted the draft amendment, was the unequal treatment of certain public officials who were provided with a right to social housing, the lack of resources for implementation, the pilot ECtHR judgment in *Olaru and others* v. *Moldova*

3. Retirement

Judges who are 50 years old and have at least 20 years' experience, of which at least 12 1/2 were spent as a judge, have the right to retire and receive a pension which equals 55% of the average judge's salary. For each full working year beyond 20 years, the pension is increased by 3%, but reaches no more than 80% of the average judge's salary. After retirement a judge has the right to continue working (no time/age limit) and to receive both a full pension for work experience and a full salary.[137] This provision means *de facto* that such judges receive almost double salary. While this is appreciated, given the efforts made during a judge's career, it would be more appropriate to raise salaries payable during the judicial term, instead of rewarding only judges over 50. This issue is also mentioned in the Concept Paper on Judicial Funding as a potential area for revision in order to increase the available resources for the judiciary, and salaries in particular.

V. Case Assignment and Recusal

The general principle of case assignment is random assignment of cases, which was first provided for by the Criminal Procedure Code in 2003 and in 2006 introduced as a principle relevant for all courts.[138] The SCM has further adopted a decision which describes how random assignment of cases is to be done for criminal and civil, administrative and eco-

---

which found a systemic problem with non-enforcement of decisions regarding the provision of social housing to certain categories of public officials (Judgment of 28 July 2009, available at <http://hudoc.echr.coe.int/hudoc/>, entered into force on 29 October 2009, which provided a period of six month within which the state must set up an effective domestic remedy which secures adequate and sufficient redress for non-enforcement or delayed enforcement of final domestic judgments concerning social housing in line with the Convention principles as established in the Court's case law).

[137] Article 32 Law on the Judge's Status. The authors have received an indication that the percentage of judges taking advantage of this right is not high.

[138] See Article 344 *Codul de Procedură Penală* (Criminal Procedure Code), Law no. 122 of 14 March 2003, Official Gazette nos. 104-110 of 7 June 2003. Article 6/1 Law on Judicial Organization, random assignment principle was introduced by the Law no. 247 of 21 July 2006, in force since 10 November 2006.

nomic cases.[139] The decision in question defines the random assignment principle as the "random assignment of cases independently of the will of the president or vice-president of the court". Exceptions to the random assignment of cases are cases when the judge cannot objectively take the case.[140] The procedure of reassignment is not clearly regulated, apart from that it is permitted only in the case of the serious illness of the judge who is supposed to receive the case according to the rule, or other justified reasons which need to be explained in the court decision on the transfer of the case in question to another judge.[141] Thus the only requirement we could identify for derogation from the established method of assignment is the decision of the president of the court, attached to the case file, explaining why it was assigned in derogation from the general rules. Although random assignment of cases has been provided for some time already, and breaches of this principle constitute disciplinary misconduct,[142] practice shows that this principle is not fully implemented in all courts.[143]

A computer-based Integrated Case Management System (ICMS) was developed to improve and ensure the random assignment of cases.[144] To date the system has reportedly been installed at all district and appellate courts, after a period of piloting and testing. However it is not yet fully

---

139 SCM decision no. 68/3 of 1 March 2007 on *Regulamentul privind repartizarea aleatorie a cauzelor în instanţele judecătoreşti* (Regulation Regarding Random Assignment of Cases in Courts), which provides for a cyclical method of case assignment, i.e. the case files are registered in the order of arrival and are accordingly assigned/distributed by the president or vice-president to the judges in alphabetical order.

140 Article 6/1 Law on Judicial Organization.

141 Article 344 CPC.

142 Article 22(1) l. f) Law on the Judge's Status.

143 Interview with a district judge, 13 April 2009; interview with two SCJ judges, on 21 May and 28 December 2009. The issue is also mentioned in Judicial Reform Index for Moldova, ABA Rule of Law Initiative, Volume II, at 74-75 (2007).

144 The ICMS was developed within the Moldova Governance Threshold Country Programme, a two-year initiative funded by the US Government through the Millennium Challenge Corporation and managed by the United States Agency for International Development (USAID), which ended in 2009. The Programme transferred the maintenance of the ICMS to the Centre for IT under the Government, which continues to work with the SCJ on the adaptation of the ICMS (Interview with an SCJ judge, 28 December 2009).

implemented, some presidents of courts still facing difficulties with the program.[145] It has not yet been fully adapted for the specific needs of the SCJ.[146] However, the Criminal Procedure Code has not yet been amended to provide for the automatic assignment of cases, providing still for the rotation method of assignment.

A judge can be removed from a case if he/she files a motion to abstain from examining the case in question or one of the parties files a motion of recusal of the judge.[147] Such motions are examined on the same day by another judge or panel of judges from the same court,[148] or within ten days by the hierarchically superior court if another panel of judges cannot be constituted in the same court.

VI. Judicial Conduct Complaint Process

Citizens can complain about judges' ethics to the SCM, which is responsible for examining such petitions.[149] Petitions should be examined within 30 days, and those which do not require additional examination immediately or within 15 days from the day of registration.[150] Since the creation of the judicial inspection, it is responsible for examining peti-

---

[145] SCM Activity Report for 2009.

[146] The biggest difficulty with the implementation of the ICMS at the SCJ is the lack of an option automatically to exclude judges who are barred from appearing on a certain panel (for various reasons, such as previous participation on the case, familiar relations with one of the parties, etc.). The decision was taken for 2010 to continue the previous method of case assignment, in parallel with the ICMS system and to develop the latter (Interview with an SCJ judge, 28 December 2009).

[147] The detailed reasons are provided in Arts. 50 and 51 Civil Procedure Code, and Arts. 33 and 34 Criminal Procedure Code.

[148] Judges who are not recused can be included in the panel to examine the motion of recusal.

[149] *Regulamentul privind soluţionarea petiţiilor de către Consiliul Superior al Magistraturii* (Regulation Regarding the Examination of Petitions by the SCM), approved by the SCM decision no. 142 /10 of 27 June 2006. Note: This regulation should be amended to bring it into line with the provisions relating to the Judicial Inspection.

[150] Para. 6 Regulation Regarding the Examination of Petitions by the SCM.

tions submitted to the SCM relating to judicial ethics.[151] Judicial inspection's main tasks are to analyze, verify and control specific areas of courts' activity as indicated by and under the control of the SCM. In this respect it verifies the organizational activity of courts regarding the receipt of applications/complaints, random case distribution, respect of legal terms and other issues relating to the delivery of justice. It verifies the petitions/complaints addressed to the SCM regarding judges' activity or ethics, in which case the SCM will inform the judge about the complaint and the petitioner about the results. Judicial inspection verifies how efficient at managing court presidents and deputy presidents of courts are.[152] If the SCM concludes that a judge may have committed a disciplinary offence, it may initiate disciplinary proceedings.

There are neither rules for, nor any prohibition on, other judges, lawyers or prosecutors to submit complaints about judicial conduct. The SCM has reported that in 2008 it received 2,068 petitions and complaints, out of which seven disciplinary proceedings were initiated regarding nine judges.[153] In 2009, judicial inspection received 2,016 petitions, of which 1,653 were rejected and 124 admitted, 66 of which referred to judges' conduct.[154] The decisions regarding the outcomes of disciplinary proceedings are published, but the responses to petitions only in rare cases where the SCM considers it necessary for informing other courts about a certain problem.[155] Petitions' examinations and the decisions relating to them are not disciplinary proceedings and decisions governed by the rules explained below.

---

[151] Article 4(3) let. a) and Article 7/1(6) let. b) Law on the Superior Council of Magistrates.

[152] Article 12 *Regulamentul cu privire la organizarea, competent si modul de functionare a inspectiei judiciare* (Regulation regarding the organization, competence and function of Judicial Inspection), approved by SCM decision no. 321/13 of 11 October 2007.

[153] SCM decision no. 1/1 of 22 January 2009 on SCM activity in 2008.

[154] SCM activity report for 2009. It is not specified whether and how many disciplinary proceedings were initiated as a result of the admitted petitions.

[155] Assessment based on the review of the SCM decisions available at <http://www.csm.md>: no decision regarding petitions was published in 2008; nine decisions were published in 2009.

VII. Judicial Accountability: Discipline and Removal Procedures

1. Formal Requirements

Any member of the SCM has the right to initiate disciplinary proceedings against judges. Disciplinary proceedings against members of the SCM and of the Disciplinary Board can be initiated by at least three members of the SCM.[156] The Disciplinary Board conducts the disciplinary proceedings/investigation and adopts a decision, which must be validated by the SCM. The law provides for a long list of actions which constitute disciplinary offences, namely:

> "failure to act impartially; deliberate or negligent failure to interpret or apply legislation uniformly, unless this is justified by the changed judicial practice; interference with the activity of another judge or influence of authorities, institutions or public officials for solving certain requests, request or acceptance of solving personal interests or of the family members otherwise than according to the procedure prescribed by law; disclosure of information regarding deliberations or other confidential procedures; engaging in public activities with political character; failure to implement the requirement regarding random assignment of cases; failure to examine the pending case within the prescribed terms, if it is imputable to the judge's conduct; failure to comply with the requirements to submit an income and property declaration; unjustified refusal to perform a job-related duty; failure to draft the judgment and present copies to the trial participants within the prescribed term; unjustified absences or failure to be present during the work schedule; undignified attitude towards colleagues, lawyers, experts, witnesses or other trial participants during the exercise of job-related duties; systematic or grave breach of judicial ethics; failure to report to the SCM by the president of the court about the disciplinary offences of the judges; use of judge's position to obtain unjustified favours; engagement in extrajudicial activities without the SCM authorization; publicly agreeing or disagreeing with the colleagues' decision in order to interfere with their work; breach of other provisions regarding the incompatibilities and interdictions regarding judges; annulment or amendment of a judgment by a higher court can constitute disciplinary offence if the judge has deliberately decided the case contrary to the

---

[156] Article 10 Law on Disciplinary Board and Disciplinary Liability of Judges.

law or did so negligently, causing the persons essential material or moral damages".[157]

In July 2010, the Parliament adopted several amendments to the Law on the status of judges, including regarding disciplinary proceedings.[158] A few disciplinary offences were added, such as "breach of an imperative legislative norm", "failure to publish a court judgment on the web through the Integrated Case Management System (ICMS), due to reasons imputable to the judge", "issuing of a judgment which was later recognized by the ECtHR as a judgment which violated the fundamental human rights and liberties", and "failure to respect the schedule of court hearings with no good reason." We welcome the introduction of the breach of an imperative norm as a disciplinary offence, as this will give the chance to depart from the dangerous practice adopted by the SCM of not examining any complaint regarding a judge whose judgment has not been quashed by a higher court.[159] At the moment that decision was taken,[160] there was no such disciplinary offence provided for in the law; the ground for initiating the disciplinary offence was "deliberate or negligent failure to interpret or apply legislation uniformly, unless this is justified by the changed judicial practice",[161] which does not entirely fit the case. It is hoped that this provision will allow the Disciplinary Board/CSM to examine any complaint regarding the conduct of a judge which falls into the disciplinary domain, irrespective of

---

[157] Article 22 Law on the Judge's Status. This provision was declared unconstitutional by the Constitutional Court, decision no. 28 of 14 December 2010, the main argument being the non-interference with the judicial act and the independence of judges to decide individual cases.

[158] *Legea pentru modificarea si completarea unor acte legislative* (Law on amendment of some legislative acts), no. 152 of 8 July 2010, not published yet.

[159] Cf., *supra* note 28 and B. I. 2. Judicial Council for details on a case where SCM took this approach.

[160] The decision of the SCM no. 280/19 of 22 June 2010 regarding the appeal of the Disciplinary Board decisions of 21 May and 11 June 2010 concerning three SCJ judges: Ion Muruianu (president of the SCJ), Vasile Ignat and Vasile Cherdivara (available at <http://www.csm.md/files/Hotaririle/2010/280_19.pdf>).

[161] This text was appealed to the Constitutional Court as being too intrusive into the judiciary, affecting its independence. We do not consider it unconstitutional or interfering with judicial independence, as it is limited to deliberate or negligent failure, which is quite difficult to prove. The decision of the Constitutional Court is pending.

whether the decision was or was not annulled. Otherwise, the current interpretation by the SCM ignores a wide range of instances of judicial misconduct. As regards failure to publish court judgments, we think this was a premature amendment, as currently the ICMS is not working properly in all courts[162] and it will not have immediate application, but frustrate judges unnecessarily. We also do not think that failure to respect the schedule of court hearings should constitute a disciplinary offence, but the phrase "with no good reason" should be a sufficient guarantee against misuse of this ground. Similarly we are concerned that "issuing of a judgment which was later recognized by the ECtHR as a judgment which violated fundamental human rights and liberties" is too restrictive if applied literally, as there may be cases which imply different interpretations of the law or controversial issues with no clear answer. A few other positive changes were made. Thus, instead of "systematic or grave breach of judicial ethics" "breach of Judge's Code of Ethics" was introduced. Similarly, "engagement in extrajudicial activities without the SCM authorization" was changed to "breach of norms related to incompatibilities and interdictions concerning judges".

2. Disciplinary Proceedings

A judge can be held liable for disciplinary misconduct within six months from the detection of the disciplinary offence, but not later than one year from its commission.[163] Where as a result of a final decision of a national or international court it appears that a judge has committed a disciplinary offence, then the disciplinary sanction can be applied within one year from the date on which the national or international decision became final.[164] Once the disciplinary proceedings are initiated (by one or three members of the SCM), the SCM member who initiated them or the judge-inspectors (upon receipt of a petition) must do a preliminary check of the grounds for the judge's disciplinary liability and request his/her written explanations. Further, the materials which

---

[162] See SCM Decision *Hotararea cu privire la implementarea in continuare a Programului Integrat de Gestionare a Dosarelor (PIGD) si a inregistrarii audio a sedintelor de judecata* (Decision regarding the implementation of the ICMS and of audio recording of trials) no. 322/21 of 6 July 2010.

[163] Article 11 Law on Disciplinary Board and Disciplinary Liability of Judges.

[164] *Legea pentru modificarea si completarea unor acte legislative* (Law on amendment of some legislative acts), no. 152 of 8 July 2010, not published yet.

constitute evidence in the disciplinary proceedings, before their examination, are presented to the judge. If the Disciplinary Board concludes that additional checks are necessary, it requests the principal judge-inspector to nominate a judge-inspector to supplement the information obtained during the preliminary check. If necessary, additional documents and materials are requested, including the court files examined by the judge under investigation where the judge has allegedly committed breaches of the law.[165]

The disciplinary case is examined within a month of when it was sent to the Disciplinary Board or, as the case may be, to the SCM.[166] At least two-thirds of the members of the Disciplinary Board must be present to examine the disciplinary case.[167] The SCM member who initiated the proceedings does not vote on the decision in the case. The Board decides whether to invite others to the hearing besides the judge concerned, *ex officio* or at the judge's request.[168] The Board adopts one of the following decisions: to apply a disciplinary sanction; to reject the proposal to apply a sanction and dismiss the proceedings; or to refer the materials to the SCM for it to begin a case to terminate the judge's powers.[169] The Board will dismiss the disciplinary proceedings in the following cases: lack of reasons for holding the judge liable; expiration of the term within which the judge can be held liable for a disciplinary offence; where disciplinary sanction is not opportune, and when it considers it sufficient merely to examine the materials in a hearing and inform the judge of the outcome.[170]

---

165 Article 14 Law on Disciplinary Board and Disciplinary Liability of Judges.

166 Article 16 Law on Disciplinary Board and Disciplinary Liability of Judges.

167 Article 15 Law on Disciplinary Board and Disciplinary Liability of Judges.

168 Article 18 Law on Disciplinary Board and Disciplinary Liability of Judges.

169 Article 19 Law on Disciplinary Board and Disciplinary Liability of Judges. The decision regarding the proposal to terminate a judge's powers is similar to the procedure regarding the proposal to remove a judge. Analysis of decisions on the SCM's website suggests that no such decisions were taken in 2008 and 2009.

170 Article 19(4) Law on Disciplinary Board and Disciplinary Liability of Judges.

A decision of the Disciplinary Board which is not appealed is sent to the SCM for validation within seven days from its adoption. The validation procedure is similar to the one described under the section on validating the decision of the Qualification Board. In order to remove a judge, the SCM presents the proposal to the President or Parliament, depending on the grade and court.[171] The SCM's decision can be appealed to the Chişinău Court of Appeal by any interested person within 15 days of its communication.[172]

The main criticism of the disciplinary proceedings mechanism lies in the way this is provided for by law: the SCM has the authority to initiate the proceedings, and the SCM also has the authority to review appeals against the Disciplinary Board's decision, and finally the SCM is the one which validates the Disciplinary Board's decision. For fairness and effectiveness of disciplinary proceedings, the procedure should be revised to increase the Disciplinary Board's powers or to exclude the mandatory appeal stage to the SCM, prior to the decision being subject to court examination. Some judges also critique the right of any member of the SCM, including the *ex officio* members, the Prosecutor General and the Minister of Justice, to initiate disciplinary proceedings, as they might use this means to pressure a certain judge.[173] We support the concerns regarding the right of the Prosecutor General to initiate disciplinary proceedings. The right of the Minister of Justice to initiate disciplinary proceedings, especially in light of the experience in 2010, should be maintained. The Minister of Justice has responsibilities in the administration of justice and thus should have the right to initiate proceedings, which is well balanced by the procedural guarantees (she/he does not participate in the examination of the case in question but merely presents the case).

3. Judicial Safeguards

The judge against whom disciplinary proceedings have been initiated and whose case is examined has the following safeguards: he/she is in-

---

171 Article 21(4) and (5) Law on the SCM.

172 Article 25 Law on the SCM.

173 ABA ROLI, Judicial Reform Index for Moldova, Volume III, at 67 (2009).

formed of the proceedings and is asked for written explanations;[174] after the preliminary check the disciplinary materials are presented to him/her and he/she can give explanations, present evidence and request additional checks;[175] if the person who initiated the proceedings retracts before the case is sent to the Disciplinary Board, the judge can request examination of the case and the Disciplinary Board or the SCM are obliged to examine it.[176] The judge must be present and heard during the examination of the case and can be assisted by a lawyer (the Disciplinary Board can hear the case only with the judge present except when the latter is absent without reasons);[177] during the examination of the case the judge can at any time submit requests or provide additional explanations and can request the Board to hear other people;[178] the disciplinary case is examined only within the limits of the accusation detailed in the decision initiating the disciplinary proceedings.[179] The judge concerned by the disciplinary proceedings or the person who initiated them can appeal the decision of the Disciplinary Board to the SCM within ten days.[180] The SCM's decision can be appealed to the Chişinău Court of Appeal by any interested person within 15 days from its communication.[181] This appeal procedure is both cumbersome and inadequate, as it allows a panel of one or three judges to review the decision taken by ten people, including five judges. It would be more appropriate if the appeals in disciplinary proceedings were subject to review by a panel of the SCJ of at least seven judges. The decision of the Court of Appeal is subject to appeal to the SCJ.

---

174 Article 12(1) Law on Disciplinary Board and Disciplinary Liability of Judges.

175 Article 12(2) Law on Disciplinary Board and Disciplinary Liability of Judges.

176 Article 13 Law on Disciplinary Board and Disciplinary Liability of Judges.

177 Article 17(1) Law on Disciplinary Board and Disciplinary Liability of Judges.

178 Article 18(3) Law on Disciplinary Board and Disciplinary Liability of Judges.

179 Article 18(4) Law on Disciplinary Board and Disciplinary Liability of Judges.

180 Article 23 Law on Disciplinary Board and Disciplinary Liability of Judges; Article 22 Law on the SCM.

181 Article 25 Law on the SCM.

4. Sanctions

The Disciplinary Board can apply one of the following disciplinary sanctions: warning, reprimand, severe reprimand, demotion, recommendation for removal and recommendation for removal from the position of court president or vice-president.[182] When applying the disciplinary sanction the Disciplinary Board takes into account the character of the disciplinary offences, their consequences and gravity, the judge's personality, the judge's degree of fault and other circumstances which require attention.[183]The disciplinary sanction is applied within six months from the date the subject act was detected but not later than a year from the date it was committed,[184] or within a year of a decision of a national or international court which indicates that the judge committed a disciplinary offence becoming final.[185] Until the disciplinary sanction has expired or has been annulled, the judge is not eligible for promotion.[186]

The Disciplinary Board can only propose the removal of a judge and removal from the position of court president or vice-president to the SCM. Further the SCM submits the proposal for removal of a judge to the President or the Parliament (depending on how the judge was appointed).[187] The law states that the procedure of removal of a judge and the appeal from this decision are established by law;[188] however no details are provided. The law states only the grounds on which the judge can involuntarily be removed: professional incapacity; any disciplinary offence provided for in Article 22(1) Law on the Judge's Status, as outlined above; entry into force of a final judgment convicting the judge of a crime; loss of Moldovan citizenship; violating the prohibition against

---

[182] Article 23 Law on Disciplinary Board and Disciplinary Liability of Judges.

[183] Article 19(3) Law on Disciplinary Board and Disciplinary Liability of Judges.

[184] Article 23(2) Law on Disciplinary Board and Disciplinary Liability of Judges.

[185] *Legea pentru modificarea si completarea unor acte legislative* (Law on amendment of some legislative acts), no. 152 of 8 July 2010, not published yet.

[186] Article 24 Law on Disciplinary Board and Disciplinary Liability of Judges.

[187] Article 25(2) Law on the Judges' Status.

[188] Article 25(3) Law on the Judges' Status.

holding other office or engaging in non-judicial activities;[189] ill-health resulting in inability to perform the relevant duties, evidenced by a medical certificate; entry into force of a final judgment establishing the judge's incapacity or limited legal capacity.[190] The law was recently amended to provide as follows: "A judge shall be dismissed when the judge has committed a disciplinary offence that affects the image/reputation of the judiciary or when the judge has committed repeatedly a disciplinary offence provided for in Article 22."[191]

Although the reasoning behind this amendment is understandable, namely to increase judicial accountability, we consider this provision too vaguely formulated, which can lead to misuse of it to dismiss judges, as it is hard to distinguish between disciplinary offences which affect and which do not affect the image/reputation of the judiciary. This must either be interpreted by the legislator or later developed through SCM/Disciplinary Board case law.

Another new provision states that in cases when the presidents (deputy presidents) of district or appeal courts, without good reasons, do not fulfil the tasks assigned to them according to the Law on judicial organization or the obligation to report to the SCM disciplinary offences committed by judges, they shall be dismissed. The same provisions ap-

---

189 Restrictions for judges provided in Article 8 Law on the Judge's Status include the following: holding of another public or private function/office, except scientific or teaching activity; being a member of Parliament or a member of the local public administration, being a member of a political party or other socio-political organization or engaging in political activities, contributing to activities contrary to the judge's oath; engaging in entrepreneurial activities; providing written or verbal consultations in disputable issues, engaging in any activity related to his/her job if there is a conflict of interest between his/her interest and public interest of doing justice, unless the judge has informed the SCM in writing about the conflict; the judge cannot express his/her opinion on current internal politics in any of the written publications or audiovisual appearances; the judge cannot provide information to the press about pending cases except through the judge responsible for public relations.

190 Article 25(e)-(j) and (l) Law on the Judge's Status.

191 Article 23(2) *Legea pentru modificarea si completarea unor acte legislative* (Law on amendment of some legislative acts), no. 152 of 8 July 2010, not yet published. See also the changes mentioned *supra* VII. 1. Formal Requirements.

ply to the president or deputy presidents of the SCJ for not fulfilling the tasks set according to the Law on the SCJ.[192]

5. Practice

Here are some numerical conclusions based on the available statistics: within the 2001-2006 period a total of 47 disciplinary proceedings were initiated, which ended as follows: nine warnings, 14 reprimands, three severe reprimands, five proposals for removal of a judge and 16 proceedings having been dismissed.[193] In 2007, four judges were removed and nine judges sanctioned for breaches of judicial ethics and unprofessional conduct.[194] In 2008, seven disciplinary proceedings were initiated against nine judges (names were made public) and the actions of 12 judges (names were made public) were discussed by the SCM without disciplinary proceedings being initiated.[195] In 2009, 25 disciplinary proceedings were initiated against 27 judges, which resulted in the following sanctions: warning – 27%; reprimand – 37%; severe reprimand – 9%; dismissal/removal from office – 9% and procedures dismissed – 18%.[196] Although the number of disciplinary proceedings has increased compared to previous years, we do not consider this a frequent use of disciplinary proceedings given the scale of violations, particularly ethical ones, mentioned in several reports.[197] However, we must also acknowledge that lack of comprehensive data on the number of initiated proceedings, the decisions of the Disciplinary Board and the final outcomes of the disciplinary proceedings impeded us in a thorough analy-

---

[192] Article 23(3) *Legea pentru modificarea si completarea unor acte legislative* (Law on amendment of some legislative acts), no. 152 of 8 July 2010, not published yet.

[193] ABA ROLI, Judicial Reform Index for Moldova, Volume II, at 72 (2007).

[194] N. Clima, ex-Chairman of the SCM, Report on the SCM activity for 2007.

[195] SCM decision no. 1/1 of 22 January 2009, regarding the SCM activity for 2008.

[196] SCM Activity Report for 2009.

[197] See in particular the OSCE Mission to Moldova Trial Monitoring reports, 2006 (<http://www.osce.org/documents/mm/2006/11/24340_en.pdf>), 2007 (<http://www.osce.org/documents/mm/2008/06/31833_en.pdf>) and the 2009 final report (<http://www.osce.org/documents/mm/2010/07/45526_en.pdf>), as well as the SCM activity reports for 2007 and 2008 reports acknowledging the highlighted problems.

sis of the decisions and a detailed assessment.[198] The ABA ROLI assessment of 2009 notes some improvements in terms of transparency of disciplinary proceedings, the publication of the decisions in the SCJ's Ethics Bulletin, the SCM becoming more active in enforcing the Judicial Ethics Code, the SCM applying more severe sanctions than the Disciplinary Board suggested in several cases.[199] It is expected that with the Judicial Inspection becoming fully operational, disciplinary proceedings will also improve and better achieve their goals.[200] The activity of the Disciplinary Board, in its new composition,[201] is also promising. The decisions taken so far are all published on the SCM website, are well reasoned and the Board seems also to be more active, e.g. in the first half of the year 15 proceedings were initiated against 17 judges.

VIII. Immunity for Judges

A judge is not liable for opinions expressed while exercising his/her official duties or for judgments made in his/her official capacity, unless the judge is found guilty of a criminal abuse through a final judgment.[202] The judge can be criminally liable for deliberately pronouncing an illegal judgment, sentence or decision.[203] Criminal investigations against judges, even not related to their official duties, can be initiated only by the Prosecutor General, with the consent of the SCM[204] and of the President or the Parliament (depending on who appointed the

[198] The decisions of the SCM are accessible for 2010, 2009 and 2008, however not all decisions of the Disciplinary Board have yet been made public for previous years, only since 2010 have all decisions been published on the SCM website.

[199] One of the main criticisms of the disciplinary procedures was the reluctance of the Disciplinary Board and the SCM to sanction their colleagues, which seems to be slightly improving.

[200] ABA ROLI Judicial Reform Index for Moldova, Volume III, at 66-67 (2009).

[201] Effective since March 2010.

[202] Article 19(3) Law on the Judge's Status.

[203] Article 307 *Codul Penal* (Criminal Code), adopted by Law no. 985 of 18 April 2002, Official Gazette nos. 128-129 of 13 September 2002, entered into force on 12 June 2003.

[204] Which, according to Article 23 Law on the SCM, shall decide on the basis of the principle of judge's inviolability.

judge).[205] A judge cannot be apprehended, brought to court by force, arrested, searched, except cases of a flagrant offence, or charged with a crime without the consent of the SCM and the President/Parliament.[206] Similarly, judges have considerable immunity from liability for administrative offences. A judge can be sanctioned for an administrative offence only by the court, with the SCM's consent. A judge who is apprehended on suspicion of having committed an administrative offence shall be immediately set free after identification.[207]

Public opinion on judges' immunity in Moldova is split, opinions varying from considering it too wide, others considering it essential for protecting judicial independence.[208] In 2007, two legislative drafts were proposed to simplify the procedure of initiating criminal proceedings against judges without the mandatory consent of the SCM, the President and the Parliament respectively.[209] The Centre for Analysis and Prevention of Corruption (CAPC) found that during the period from 2002 to 2007 the Prosecutor General submitted 18 requests to initiate a criminal investigation, in 13 of which the SCM gave its consent and in 3 cases refused to initiate disciplinary proceedings.[210] The CAPC proposed to do away with the President/Parliament's consent to initiating criminal proceedings, do away with the double consent of the SCM to further action and the SCM's consent to *contraventional* (administrative) proceedings, which we support. Neither the draft laws, nor the CAPC's suggestions have been accepted; the law was not amended regarding the criminal and contravention responsibility. In 2008 and 2009,

---

[205] Article 19(4) Law on the Judge's Status. This requirement was subject to a debate, when the Ministry of Justice prepared a draft law which provided for the initiation of a criminal investigation only after "informing" the SCM. The proposal was severely criticized by the SCM as an attempt to undermine the independence of the judiciary (N. Clima, ex-Chairman of the SCN, Report of the SCM activity for 2007).

[206] Article 19(5) Law on the Judge's Status.

[207] Article 19(6) Law on the Judge's Status.

[208] ABA ROLI, Judicial Reform Index for Moldova, Volume II, at 64 (2007).

[209] No. 1642, 26 April 2007 and no. 1719, 3 May 2007, available at <http://www.parlament.md/lawprocess/drafts/>.

[210] Centre for Analysis and Prevention of Corruption, Case Study on the Exclusion of the Immunity of Judges to Criminal and Contraventional Liability, October 2007, available in English at <http://www.capc.md/ro/publications/>.

the Prosecutor General reported three acts of criminal liability which have been accepted by the SCM.[211]

A judge's immunity from material liability has been significantly curtailed lately, and this is still a very hot topic in the country. The state is subject to material liability for any prejudice caused by errors committed in criminal proceedings by law enforcement agencies or the courts.[212] As a response to the rising number of condemnations of Moldova by the ECtHR in 2006 the Parliament amended the Law on the Government Agent, providing for the ability of the State to recover the damages paid by it as a result of a condemnation of Moldova by the ECtHR or agreed through a friendly settlement, from any person whose activity, intentionally or through grave negligence, led to the violation in question.[213] The Parliament has further increased the material liability of judges, providing for State compensation for infringements caused through judicial errors to the fundamental rights and freedoms under the Constitution and international treaties to which Moldova is a party (irrespective of whether or not there was an ECtHR decision). A person can only sue the state for compensation. After having paid the damages in accordance with a final judgment, the state can bring an action for damages against the judge who, in bad faith or by grave negligence, committed the judicial error which caused the injury. The recourse can, however, be initiated only with the consent of the SCM.[214] The law differentiates between criminal other proceedings, requiring the party injured by infringements of fundamental rights and freedoms which occurred in a civil case to seek compensation only after obtaining a final court judgment stating that a decision of the judge caused the in-

---

[211] ABA ROLI, Judicial Reform Index for Moldova, Volume III, at 62 (2009).

[212] Article 53(2) Constitution, adopted on 29 July 1994, entered into force on 12 August 1994, Official Gazette no. 1 of 18 August 1994.

[213] Article 17 *Legea no. 353 din 28.10.2004 cu privire la Agentul guvernamental* (Law on the Governmental Agent), Official Gazette nos. 208-211 of 19 November 2004. The Governmental Agent is obliged to inform the Prosecutor General and the SCM about any case of condemnation or friendly settlement where Moldova must pay damages. The Prosecutor General shall submit a claim for recovery of the damages within a year of the date the payment term was established by the ECtHR or of the friendly settlement.

[214] Article 21/1(1)-(4) and (6) Law on the Judge's Status, introduced by Law no. 247 of 21 July 2006.

fringement, and that the judge is criminally accountable for the decision.

The amendment regarding material liability of judges has been severely criticized by the SCM, which considers it an additional infringement of the (non-binding) UN Basic Principles on the Independence of the Judiciary.[215] The legal community is also split regarding the institution of recourse against judges for ECtHR violations, some considering it a necessary tool for increasing their responsibility, others considering it as a tool for interference with them,[216] while still others fear it may make judges more inclined to decide in favour of individuals in similar cases, to avoid cases being taken to the ECtHR and so as not to risk potential personal liability for an adverse ECtHR decision.[217] The practice to date shows that the action for damages as a result of an ECtHR ruling was not used in a significant number of cases. According to a Free Europe report, until July 2009 the Prosecutor General had initiated only five actions of damages following 140 judgments pronounced against Moldova.[218] The actions in question concern two cases of non-enforcement of court judgments regarding re-employment by an ex-minister, two cases of torture by police officers and a procedure to ensure by force the presence of a suspect in court.[219] In a recent interview on radio Vocea Basarabiei on 6 October 2009, the new Minister of Justice announced that only in one case was a judge fined 500 EUR.[220]

---

[215] N. Clima, ex-Chairman of the SCM, Report on the SCM activity for 2007.

[216] The authors' random interviews with lawyers and the four judges interviewed for this chapter.

[217] ABA ROLI, Judicial Reform Index for Moldova, Volume III, at 70 (2009).

[218] V. Zaharia, Procedure of Regress in Minor Cases Against Moldova, Radio Free Europe, 13 July 2009, available at <http://www.europalibera.org/content/article/1775952.html>.

[219] Id.

[220] Interview with Alexandru Tănase, Minister of Justice, Vocea Basarabiei Radio, Show of 6 October 2009, 19.35.

IX. Associations for Judges

Judges have the right to create or become affiliated with *sindicate* (trade unions) or other organizations to represent their rights, professional development and protect their status.[221] There is one Association of Judges of Moldova, created in 1994 as a non-governmental association of judges, non-political and autonomous, aiming at consolidating the judges' efforts to protect their rights and interests, improve the judiciary and judges' professionalism, and ensure the State's effective guarantee of judicial independence according to UN principles and the Universal Declaration of Human Rights.[222] Membership of the association is voluntary, with an estimated 93% of all judges being members of the Association.[223] While it was started by the "ideologists and promoters of judicial and legal reform in Moldova" as a truly representative organization of judges, it lost much of its authority after 2001 when the communist government came to power.[224] By 2006, the Association had become quite passive, losing its importance to the SCM, which became more independent and efficient in representing judges' interests.[225] The Association is still alive, but not very active and no longer a significant player in representing judges' current problems. Its main activities are limited to the organization of annual contests for the best judge, publishing a professional journal *Themis*, and organizing various petitions on behalf of judges.[226] The Association was initially funded by international donors and started having financial difficulties when the main support project[227] was closed after 2006.[228] The Association is still struggling with funding. It is funded mainly from the membership fees,

---

221 Article 14(3) Law on the Judge's Status.

222 Statute of the Association of Judges of Moldova, 17 March 1999.

223 ABA ROLI, Judicial Reform Index for Moldova, Volume III, at 65 (2009).

224 Freedom House Moldova & Open Society Justice Initiative, Monitoring the judicial independence in the Republic of Moldova, at 35 (2003).

225 ABA ROLI, Judicial Reform Index for Moldova, Volume II, at 76 (2007).

226 Interview with a district court judge, 13 April 2009.

227 UNDP funded project, in cooperation with a judicial organization from the Netherlands (ABA ROLI, Judicial Reform Index for Moldova, Volume II, at 76 (2007)).

228 ABA ROLI, Judicial Reform Index for Moldova, Volume II, at 76 (2007).

which constitute 1% of a judge's salary, and occasionally from international donors.

X. Resources

The judiciary is severely affected by lack of resources.[229] It has not been funded properly since the very beginning of judicial reform, funding being one of the major failures of the reform.[230] An assessment of the funding of the judiciary in 2005 concluded that Moldova has the lowest spending on the judiciary *per capita* in Europe; compared to other states in Europe, the salaries of Moldovan judges as compared to the average salary are the least attractive; judicial costs' share of the State budget was reduced by 25% in the period 1998-2003.[231] In 2004, judicial costs' share of budgetary expenses was 0.73%, in 2005 0.75%, in 2006 0.78%.[232] After years of pressure, in 2007 the Ministry of Justice declared that a goal was to set a fixed percentage of the budget for the judiciary of up to 1% of the state budget from 2010 (in a step-by-step manner it was supposed to increase to 0.8% in 2008 and 0.9% in 2009), aiming gradually to increase it to 1.5 - 2%, which would be necessary for the proper functioning of the courts.[233] However, in 2007 it was still at about the same level as the previous year, or even slightly lower, at 0.77% (in 2006 it was 0.78%), in 2008 it was 0.74%,[234] in 2009, it was

---

[229] The analysis in this section refers to the district and appellate courts' budget.

[230] See for details on the judiciary budgets for 1997–2003: Freedom House Moldova & Open Society Justice Initiative, Monitoring the judicial independence in the Republic of Moldova, at 35 (2003).

[231] W. Marchlewski/V. Ionita/I. Munteanu/D. Lozinski, Funding of Judiciary in Moldova, Center for Legal and Political Studies in Moldova, at 21 (2005).

[232] Draft Concept on Judiciary Funding, SCM decision no. 380/18 of 28 October 2008 on the Draft Concept on Judiciary Funding. Note: These figures refer only to the budgets of the district and appellate courts.

[233] Report Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), Co-rapporteurs: J. Durrieu/Socialist Group/E. Vareikis, Honouring of Obligations and Commitments by Moldova, Group of the European People's Party, Doc. 11374, 14 September 2007.

[234] Draft Concept on Judiciary Funding, not published.

0.75% and in 2010 it is 0.55%.[235] The absolute figures of the budget may have increased or decreased *de facto*, depending on the actual State budget, but these figures are not looked at here. The fact remains that the set goal of a fixed amount of 1% from the state budget has not yet been achieved, due to both lack of sufficient financial resources and the political will of the previous government to look for solutions to increasing the funding for the judiciary.[236]

Office and courtroom facilities do not provide an adequate working environment. The OSCE Trial Monitoring Programme for 2006-2008 observed inadequate court buildings, buildings in disrepair, with poor acoustics, lacking space and necessary equipment and facilities such as public facilities, lack of separate entrances or waiting rooms for victims and witnesses, problems with the heating in winter.[237] The report further noted a high percentage of hearings held in judges' offices,[238] as opposed to courtrooms, due to an inadequate number of courtrooms or the preference of judges or court clerks.[239] Judges' offices are usually small, accommodating only a few trial participants, so that holding hearings there negatively affects the solemnity of court procedures, the ability of all trial participants and the public to attend the hearing, and other procedural rights of defendants and victims. Two out of five

---

[235] SCM activity report for 2009.

[236] The new Government, in line with the declared priority to support the independence of the judiciary and the rule of law, has set a budget for district and appellate courts for 2010 equal to that allocated for 2009, available at <http://www.justice.gov.md/ro/news-ministr/9959/>, which is a positive sign, given the reduction in the state budget for other public institutions due to the global financial crisis and the financial problems Moldova is facing as a result of the 2009 parliamentary elections.

[237] Final Report, Trial Monitoring Programme in Moldova, OSCE Mission to Moldova, at 7-8 (2009), available at <http://www.osce.org/documents/mm/2010/07/45526_en.pdf>.

[238] Final Report, Trial Monitoring Programme in Moldova, OSCE Mission to Moldova, at 8 and 27-29 (2009), available at <http://www.osce.org/documents/mm/2010/07/45526_en.pdf>.

CBS-AXA Sociologic Investigations and Marketing Centre for the Moldova Governance Threshold Country Program, Moldova Court Public Monitoring Survey, carried out between 26 February and 27 March 2008, found that members of the public reported that half of court hearings are held in judges' offices.

[239] Final Report, Trial Monitoring Programme in Moldova, OSCE Mission to Moldova, at 8 and 27-29 (2009), available at <http://www.osce.org/documents/mm/2010/07/45526_en.pdf>.

judges and two out of three court employees reported that they do not have access to the Internet and only 47% of the judges surveyed use the Internet to access the database[240] of Moldovan legislation.[241] A major project addressing these issues is the Moldova Governance Threshold Country Programme, which has so far renovated three courts – Comrat, Rezina and Ungheni district courts – which will serve as a model for the entire court system of how courts can be sustainably renovated to increase public convenience, transparency and efficiency.[242] The programme also undertook a detailed assessment of the physical condition and suitability of all court facilities in Moldova and presented it to the Ministry of Justice and the SCM to help them further determine objectively the capital budget required for the court system.[243]

The Concept Paper on Judicial Funding,[244] adopted in 2010, is an attempt to set a roadmap for addressing the problems in the system. The

---

[240] Database developed and maintained by a private company which is regularly updated and well maintained, with both legislation and judicial practice. However, this database is costly (300 EUR for a subscription and 35 EUR for monthly updates). The internet-based, government-maintained database is a very good tool. It is free of charge. However, it is not updated as promptly as the other one and does not contain the judicial practice component.

[241] CBS-AXA Sociologic Investigations and Marketing Centre for the Moldova Governance Threshold Country Programme, Moldova Court Public Monitoring Survey, Executive Summary, carried out between 26 February and 27 March 2008. In the same survey, the environment of judges' offices and conditions of courtrooms was evaluated negatively by most judges, employees and lawyers (between 40% and 50%, depending on the group, rated the courtroom environment negatively and between 25% and 48% rated the dignity of judges' offices negatively). The public was more satisfied with the courtroom environment – 37% evaluating it as "good" and "very good", and 42% as acceptable and 59% agreed that judges' offices also afforded an appropriate level of dignity in which to conduct hearings.

[242] CBS-AXA Sociologic Investigations and Marketing Centre for the Moldova Governance Threshold Country Programme, Moldova Court Public Monitoring Survey, Executive Summary, carried out between 26 February and 27 March 2008.

[243] Interview with Cristina Malai, Team Leader, Judiciary Component, Superior Legal Adviser, Moldova Governance Threshold Country Programme, 26 September 2009.

[244] *Conceptia privind finantarea sistemului judecatoresc* (Concept Paper on Judiciary Funding), approved by Parliament Decision no. 39 of 18 March 2010, Official Gazzette nos. 72-74 of14 May 2010

concept reflects the general assessment of the mechanism of judicial funding and defines the current problems relating to the funding of the system,[245] provides a roadmap with six broad measures to be taken in order to address the problems highlighted[246] and describes the anticipated results and risks of failing to implement them. Before adoption the concept paper was positively assessed by the SCM.[247] The Concept Paper identified clearly the major problems relating to judicial funding. It remains to be seen what will be implemented and how.

C. Internal and External Influence

I. Separation of Powers

The Constitution declares that the legislative, executive and judicial powers are separated and collaborate in the exercise of the prerogatives they have, according to the Constitution, and that judges are independent, impartial and immovable.[248] The Law on judicial organization declares that judicial power is independent, separate from the legislative and executive powers, has separate attributions, exercised through the courts, and in conformity with the principles and provisions of the Constitution and other laws.[249] The law on the status of judge states that judges are independent, impartial and immovable and are subordinated only to the law.[250] Further the law provides for a series of safeguards regarding judges' independence through the judicial process (fair

[245] Such as insufficient funding; overlapping competences in budgeting; an unclear procedure for adopting the judicial budget; lack of objective and transparent criteria for adopting courts' operational and capital budgets, inadequate financial management of courts.

[246] Such as increasing the judicial budget; improving the legal framework on drafting and administering the judicial budget; developing objective criteria for drafting the operational and capital budgets of the courts; management of the IT systems for the courts; development of performance indicators and use of statistical reports, the establishment of stimulation measures and sanctions relating to performance; the consolidation of courts and the MoJ's capacity for financial management, internal auditing and public acquisitions.

[247] SCM decision of 28 October 2008.

[248] Arts. 6 and 116(1) Constitution.

[249] Article 1 Law on Judicial Organization.

[250] Article 131 Law on the Judge's Status.

trial) requirements, procedures for appointment, suspension, resignation and dismissal of a judge, judges' inviolability, confidentiality of deliberations and the prohibition on their disclosure, accountability for lack of respect towards the court, judges and interference with the examination of cases, allocation of adequate resources for the functioning of the courts, the creation of organizational and technically favourable conditions for courts' operation, material and social insurance of judges, and other measures provided by law.[251] The Superior Council of Magistrates was created as a guarantor of the judiciary's independence.[252]

While these safeguards are declared and, formally, judges are not accountable to any state bodies and officials, in practice these safeguards are not entirely respected as regards various aspects and the judiciary is not entirely separate from the Legislative and Executive. The status of the judiciary was reduced in particular during 2001-2008, when the executive and legislative branches were dominated by one political power. Both previously and during this period the independence of the judiciary was only declared by the other two branches of Government, without being accompanied by appropriate investments in legislative, political, financial, administrative, material and human resources changes.[253] The reform of the judiciary which started in 1994 and then continued through another major, though quite different, wave in 2002 was never implemented holistically, but rather in a "piecemeal" process of reforms[254] which is part of the reason for their failure to build a truly independent judiciary in Moldova hitherto. Moreover, the Government reforms focused mainly on changing laws and writing regulations, and less on attitudes, which is equally important for the success of the reform.

The procedure of the appointment and reappointment of judges by the President or Parliament, depending on the court, was radically changed

---

[251] Article 17 Law on the Judge's Status.

[252] Article 1 Law on Superior Council of Magistrates.

[253] Implementation of EU – Moldova Action Plan, February 2005 – January 2008, ADEPT and Expert-Group, at 70 (2008).

[254] Observation noted also in Report Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), Co-rapporteurs: J. Durrieu/Socialist Group/E. Vareikis, Honouring of Obligations and Commitments by Moldova, Group of the European People's Party, Doc. 11374, para. 102, 14 September 2007.

under the Communist government in 2002-2003,[255] which, even if subsequently improved,[256] laid the ground for a dependent judiciary. Also since 2001-2003 a check of the candidate's background has been introduced prior to appointment by the President/Parliament, which basically means a check by the security forces.[257] This check was still used in 2009, with no clear criteria.[258]

These issues are extremely important in understanding the current state of affairs in the Moldovan judiciary. Although positive legislative changes have been passed since 2005 to limit the powers of the President and strengthen the powers of the SCM in appointing judges, the practice of gross political and executive interference during 2001-2004 has deeply affected the public's and the judges' own perception of the independence of the judiciary. All subsequent reforms made little sense in a context in which many new judges were appointed on a wave of dismissals, as their approach towards the judge's role *vis-à-vis* the other powers, especially the executive, was already distorted. The lack of any

---

[255] The amendments of 21 March 2003, Law no. 140, allowing the President to refuse the appointment of a judge without giving reasons, led to the dismissal of the judge in question. Reportedly, the government at that point had made several appointments and dismissals even before the entry into force of the relevant amendments. See for details: Freedom House Moldova & Open Society Justice Initiative, Monitoring the judicial independence in the Republic of Moldova, at 10-11 (2003). See also the Council of Europe Commissioner for Human Rights conclusion that: "It follows that the present Presidential practice on appointment and re-appointment of judges does not provide sufficient rule of law guarantees and seems therefore arbitrary. It is even more so because appropriate procedures for the dismissal of corrupt judges actually do exist in the domestic legal order and have been successfully applied on some occasions by the Supreme Judicial Council. It is thus urgent that the Presidential practice be revised in order to safeguard judicial independence and the rule of law, and in accordance with the European Charter of Judges and with international obligations resulting from Article 6 of the ECHR", in CommDG (2003), 7. The Commissioner for Human Rights, 3rd Annual Report January to December 2002, to the Committee of Ministers and the Parliamentary Assembly.

[256] The amendment of 22 July 2005 requested the President to give reasons for the refusal to appoint a judge and provided the SCM with a right to make a repeated proposal of a candidate which the President was obliged to accept.

[257] International Commission of Jurists, Report of the Centre for the Independence of Judges and Lawyers, Moldova: The Rule of Law in 2004, at 28 (2004).

[258] Interview with the former chairman of the SCM, 28 August 2009.

proceedings taken against officials interfering with judicial appointments has further embedded the culture of the submission of the judiciary to other branches of power. Perhaps this is the reason why, although legislative amendments have been passed, we hear even in 2009 allegations of irregularities and political interference with the selection and appointment of judges, and do not see any valid arguments and facts which would refute these allegations.

Another potential area of friction in terms of judicial independence and the separation of powers is the composition of the SCM, the independence of which may decrease due to there being a number of political appointees equal to the number of members elected by judges.[259] However, as referred to in more detail in the section on the composition of the SCM, the experience so far shows that this was a rather good change.

Judicial funding is also a problem which severely affects judicial independence, namely insufficient funding compared to that of other branches of power; delays in implementing the declared reforms, such as the transfer of the judicial police from the Ministry of Internal Affairs to the Ministry of Justice, equipping courts with information technology equipment, a lack of continuous training until 2009, low salaries for court personnel, which affects their professional level and thus the functioning of courts, and others.[260]

Another area of friction is the poor political and legal culture of other branches of the government, both executive and in particular the legislative. Members of the executive and MPs continue to write letters to judges on particular cases, in response to citizens' complaints addressed

---

[259] There were serious allegations also regarding the independence and impartiality of the SCM prior to 2005. Both due to the initial predominance of non-judges members and the exercise of the functions of the president of the SCJ and the chairman of the SCM by the same person, seen by many as a representative of the Government at the relevant times (Freedom House Moldova & Open Society Justice Initiative, Monitoring the judicial independence in the Republic of Moldova, at 19 and 37 (2003)). After the 2005 amendments, the SCM has gained more independence and confidence. Some judges consider the current SCM (until most recent changes in 2008) the most professional and independent SCM since its creation, particularly due to the fact that more than half the members were judges (Interview with an SCJ judge, 21 May and 28 December 2009).

[260] Implementation of EU – Moldova Action Plan, February 2005 – January 2008, ADEPT and Expert-Group, at 70 (2008).

to them.[261] For example, in one case an MP asked the judge to speed up the examination of the case and inform him of the results. Even if the MP had no interest in the particular case, the appropriate action would have been to reply to the complainant that the MP has no right to interfere with the judiciary and explain the legal avenues for appealing the court's decision or complaining about the judge's behaviour to the SCM.[262] Such incidents denote a complete lack of appreciation on the part of the legislature and the executive of the safeguards of the judiciary.

II. Judgments

1. Basis

Judgments should be based on law, as this is one of the obligations of a judge,[263] and a main principle of holding trials.[264] There are serious allegations that judgments in Moldova are not always based on law but are influenced by various factors, such as executive power, political influence over the judiciary and perceptions of corruption.[265] Bribery is of

---

[261] Interview with an SCJ judge, 28 December 2009. See also *infra* C. III. Improper Influence on Judicial Decisions.

[262] Interview with an SCJ judge, 28 December 2009, who admitted several similar instances. It seems that SCM members raise these issues individually with the relevant government officials but rarely make them public (as for example SCM decision no. 10/205 of 5 June 2008 *cu privire la inadmisibilitatea imixtiunii în înfăptuirea justiției* (Regarding the Inadmissibility of Interference with the Judiciary)).

[263] Article 15(1) Law on the Judge's Status.

[264] See for example Arts. 7 and 384 Criminal Procedure Code; Arts. 12, 239 and 241 Civil Procedure Code, Law no. 225 of 30 May 2003, entered into force on 12 June 2003, Official Gazette nos. 111-115 of 12 June 2003.

[265] See for example ABA ROLI, Judicial Reform Index for Moldova, Volume III, at 77 (2009), referring to inadequate influence of the executive branch over the judiciary, political interference with the judiciary and the public's perception about corruption. See Euroforum Consortium, Civil Society for a European Moldova, An Independent Report by Thirteen Representatives of Civil Society in Moldova (On the occasion of the European Commission's Report of 4 December 2006 and the second anniversary of the signing of the Moldova-European Union Action Plan), 2007, referring to political pressure. See also V. Gribincea, Comments on the Implementation of the EU-Moldova Action Plan,

great concern regarding the Moldovan judges. According to a recent survey, approximately half the people going to court in Moldova each year compromise the case in which they are involved by a bribe; 41% of people in general say it is "very likely" that a person could solve a problem by a bribe to a judge.[266] Analysis of some ECtHR case law against Moldova suggests that "it became very difficult to win an important judicial trial that affects the interests of the executive or of the political elite".[267] In criminal cases, the prosecutor's recommendation carried much more weight than the rights of the defendant.[268] Interviews with judges suggest the judgments are routinely appealed, which

---

on a series of ECtHR judgments which prove how difficult it is to win cases that affect the interests of the executive or the political elite and the cases used by the executive to intimidate inconvenient people, such as *Oferta Plus SRL* v. *Moldova*, Judgments of 19 December 2006 and 12 February 2008, available at <http://hudoc.echr.coe.int/hudoc/> (arrest and criminal investigation of the applicant's CEO with the purpose of intimidating the applicant in the proceedings before the ECtHR and the subsequent disregard by the Plenary of the Supreme Court of Justice of the judgment of 19 December 2006) and *Cebotari* v. *Moldova*, Judgment of 13 November 2007, available at <http://hudoc.echr.coe.int/hudoc/> (arrest and criminal investigation of the applicant because he refused to testify as required by the accusation). See also Freedom House, Freedom in the World – Moldova (2008).

[266] J. Redpath, Victimization and public confidence survey. Benchmarks for the development of criminal justice policy in Moldova, Soros Foundation - Moldova, Imprint Plus SRL, December 2010. Electronic version available at <http://www.soros.md/files/publications/documents/Victimisation%20Survey.pdf> (in English and Romanian).

[267] V. Gribincea, Comments on the Implementation of the EU-Moldova Action Plan, referring to the following ECtHR cases: *Megadat.com SRL* v. *Moldova,* Judgment of 10 April 2008, available at <http://hudoc.echr.coe.int/hudoc/> (unjustified withdrawal of a licence to provide internet services issued to the biggest internet provider of Moldova, a company owned by a political leader of the opposition), *Dacia SRL* v. *Moldova,* Judgment of 18 March 2008, available at <http://hudoc.echr.coe.int/hudoc/> (unjustified and discriminatory annulment of the privatization of a hotel in Chişinău, which was subsequently returned to the state), *Stepuleac* v. *Moldova,* Judgment of 6 November 2007, available at <http://hudoc.echr.coe.int/hudoc/> (arbitrary arrest of a businessman by the employees of the Ministry of Internal Affairs, with the apparent purpose of withdrawing the licence of the applicant's company to provide security services).

[268] Bureau of Democracy, Human Rights, and Labour, 2008 Human Rights Report: Moldova, 25 February 2009.

is an indicator of a low level of public trust in their legality, especially in the district courts. The perfunctory way in which appellate courts deal with these appeals, often altering judgments speedily with no written reasons, tends to support the culture of appeal.[269] The high number of appeals and overruled judgments could also be an indicator of the legality of the judgments, which seems not to be well respected in Moldova.[270]

2. Practice

Statistics on acquittals may also suggest that judgments in Moldova are not entirely based on law, with an average of as little as 2% of acquittals,[271] unless the prosecution is of such high quality as to ensure that 98% of criminal cases are proved "beyond any reasonable doubt". Evidence however points to a different reason, namely judges' reluctance to acquit for fear of being perceived as corrupt.[272] Another explanation, which needs to be further researched, is the pressure exerted on judges by the Prosecution Office not to acquit, as acquittals are interpreted by the prosecution as a negative indicator of its success. Thus the policy is to appeal almost every acquittal.[273]

---

[269] Soros Foundation (note 51).

[270] A judge's professional activity is evaluated at every attestation, taking into account the number of decisions amended or overruled on appeal and in cassation. The main criticism on the part of district court judges regarding this procedure is the superficial examination of cases at appeal and cassation, so that often only the sanction is changed, not the qualification itself, but that is not taken into account. Moreover, for criminal cases there is no difference between amending the sentence and overruling decisions, compared to civil cases, the latter being considered a fairer system (Interview with a district court judge, 13 April 2009).

[271] Statistical data of the Prosecutor General Office, in 2007 out of 11,710 judgments 226 or 1.9% were acquittals and in 2006 out of 12,581 judgments 258 or 2% were acquittals.

[272] Soros Foundation (note 51), at 50.

[273] Prosecutor General Activity Report for 2007; Soros Foundation (note 51), at 51.

3. Structure

The structure of judgments is prescribed by law. For example criminal judgments must have three parts: *introductivă* (introductory), *descriptivă* (descriptive) and *dispozitivă* (the ruling). The law further explains what should be included in each of these parts, with the specific characteristics for the rulings for conviction, acquittal and dismissal judgments.[274] Civil judgments have four parts: introductory, descriptive, reasoning and ruling.[275] These rules are not clearly observed in practice, the major problem being the poor quality of the reasoning in judgments.[276] Insufficient reasoning of decisions to remand in custody or prolong detention is one of the most common violations of the ECtHR by Moldova. The ECtHR noted "with concern the recurring nature of the problems concerning the relevance and sufficiency of reasons for remand in the case of Moldova".[277] The SCM had also acknowledged the problems with the reasoning of judgments after recently examining several pre-trial arrest warrants issued by investigative judges, who tend to recite the law rather than give reasons for the warrant.[278] Poor reasoning of pre-trial judgments and ill-founded judgments are also among the main reasons for Moldova's condemnation at the European Court of Human Rights.[279]

---

[274] Arts. 392 - 396 Civil Procedure Code.

[275] Article 241 Civil Procedure Code.

[276] For example, the 2007 Judicial Reform Index also noted that judgments are often poorly reasoned, ABA Rule of Law Initiative, Judicial Reform Index for Moldova, Volume II, at 76 (2007).

[277] ECtHR, *Mușuc* v. *Moldova*, Judgment of 6 November 2007, para. 43, available at <http://hudoc.echr.coe.int/hudoc/>.

[278] SCM decision no. 35 of 26 February 2009, on the Prosecutor General's notification regarding some breaches of the criminal procedure legislation during the issue and prolongation of pre-trial arrest warrants.

[279] Parliamentary hearings regarding cases before the ECtHR against Moldova, their enforcement and the prevention of human rights violations, Bulletin of the Parliament, no. 3 (2008).

4. Public Access[280]

The Law on Judicial Organization requires judicial decisions to be pronounced publicly and the decisions of all courts to be published on their websites.[281] Judicial decisions are published through the ICMS, launched for district and appellate courts in January 2009 (the programming of the ICMS in the SCJ only began in January 2009).[282] The regulation excludes the following judicial decisions from publication on the website: those in cases relating to minors, in cases which contain information which is a State secret, commercial secret or information disclosure of which is prohibited by law, decisions regarding adoption, as well as decisions in sexual offences cases. Depending on the information relating to the parties' property, inheritance, private life and other information which should be protected, the court can replace the names of the parties or other trial participants by their initials or can exclude information about them, such as the date, place and year of birth, place of work and positions held, home address, legal address, data about their property, car number plate etc.

Judges are divided on the issue of publishing decisions, some considering this a useful tool for improving the quality of decisions, while other

---

[280] This section refers to the public, including media, where specific information relating to the media is available, it is specified.

[281] Article 10 Law on Judicial Organization, as amended by Law no. 258 of 29 November 2007. The SCM has adopted a regulation on the publication of judicial decisions on the web (SCM decision no. 472/21 of 18 December 2008 on *Regulamentul privind modul de publicare a hotărîrilor judecătoreşti pe pagina web* (Regulation on the Publication of Judicial Decisions on the Web)), which entered into force on 1 July 2009, explaining the responsibilities of the judge, the court clerk and the Centre for Legal Information in the process of publishing judicial decisions (the Centre for Legal Information is a public administration body, subordinated to the Ministry of Justice, responsible for ensuring the accessibility of the courts' web page) (of the Regulation on the Publication of Judicial Decisions on the Web, at 5). All court judgments should be published as soon as suitable conditions are created but the database must start no later than with 1 January 2010. In 2008 the websites of Chişinău Court of Appeal (<http://ca.justice.md/>) and the Supreme Court of Justice, (<http://www.csj.md>) were launched. By the end of 2009 websites had been created for all, according to the CSM activity report for 2009.

[282] Threshold Quarterly, Status Report, Moldova Country Program Millennium Challenge Corporation, July 2009, available at <http://www.mcc.gov/mcc/bm.doc/qsr-moldova.pdf>.

view it as an additional way of pressurizing judges.[283] We consider the publication of court decisions on the web to be an effective tool for improving the quality of decisions; however the current method of publishing the decisions is not sufficiently user-friendly, e.g. does not have a good search engine by type of case and judge. Before the adoption of the requirement for publishing decisions, the majority of judicial decisions were not published and in many courts could be accessed by third parties only with the permission of the president of the court. Moreover, third parties had to justify/explain to the court presidents what they needed the information for. This practice contravened the Law on Access to Information,[284] which required government information, including information held by the courts, to be made available to the public (except for State secrets, confidential business information, personal data and other confidential information).[285] This practice may still continue, even if the law is changed, if the SCM does not thoroughly monitor the implementation of the law. To date, not all decisions have been published.[286]

As regards public access to court hearings, this right is guaranteed by the Constitution,[287] the Law on Judicial Organization,[288] the Criminal Procedure Code[289] and the Civil Procedure Code.[290] Exceptions to the general rule of holding trial hearings in public are allowed in criminal cases by a reasoned court order in cases prescribed by law.[291] The media

---

[283] Soros Foundation (note 51), at 53.

[284] *Legea no. 982 of 11.05.2000 privind accesul la informaţie* (Law on Access to Information), Official Gazette no. 88-90 of 28 July 2000.

[285] ABA ROLI, Judicial Reform Index for Moldova, Volume II, at 83 (January 2007).

[286] See the SCM decision *cu privire la implementarea in continuare a Programului Integrat de Gestionare a Dosarelor (PIGD) si a inregistrarii audio a sedintelor de judecata* (implementation of the Integrated Case Management Programme and audio recording of court hearings) no. 322/21 of 6 July 2010.

[287] Article 117.

[288] Article 10.

[289] Article 18.

[290] Article 23.

[291] Article 18(2) Criminal Procedure Code provides that "[…] in respect of morality, public order, or national security; protection of the interests of minors or the private life of parties to the proceedings; or special circumstances indicating that publicity may damage the interests of justice". In civil cases, closed hearings can be held by a reasoned order of the judge in order to protect infor-

are reportedly usually given access to hearings, except in cases of a political nature. There are no specific regulations yet regarding the access of the media to court proceedings.[292] In practice, public access to court hearings is not yet routinely accepted in courts. For example, the OSCE Monitoring Report has noted the problematic practice of judges declaring closed hearings without proper reasoning, and in cases of victims of human trafficking without consulting them on the issue.[293] Public access to certain hearings is also hindered by far-reaching legislative provisions, for example hearings on preventive arrests or home arrest are closed (held *in camera*) by law.[294] The Criminal Procedure Code further provides for an additional exception to the general principle of public hearings, providing that "the president of the trial hearing may limit the access of the public to the hearing, taking into account the conditions in which the case is examined".[295] This provision is quite vaguely worded, giving unlimited powers to the president to limit public access to the hearing. Indeed, the OSCE Trial Monitoring Programme noted the tendency of some judges to declare hearings closed when the presence of monitors was not desired and the tendency of judges to declare close hearings in cases of trafficking without consulting the victims.[296] Access to public hearings is often restricted owing to limited space in judges'

---

mation including state secrets, commercial business information or other information which cannot be disclosed according to the law. Also, the court can declare the hearing closed in order to prevent disclosure of information which relates to intimate aspects of life, which may harm the dignity, honour or professional reputation of a person or in other circumstances which could damage the interests of the trial participants, public order or morality – Article 23(2)-(3) Civil Procedure Code.

[292] ABA ROLI, Judicial Reform Index for Moldova, Volume III, at 77 (2009).

[293] Final Report, Trial Monitoring Programme in Moldova, OSCE Mission to Moldova, at 74 (2009).

[294] Article 308(2) Criminal Procedure Code. This provision is a debatable one. While it may have some value for ensuring the defendant's presumption of innocence or the secrecy of pre-trial investigation when at the pre-trial stage, as some specialists and judges claim, we consider this provision is flawed by its absolute prohibition of public access to such hearings, and this very fact is one of the reasons for the bad practice of poorly reasoned decisions on arrest or prolongation of arrest: see also *Muşuc* v. *Moldova* (note 277), para. 43.

[295] Article 316(4) Criminal Procedure Code.

[296] OSCE Trial Monitoring Programme for the Republic of Moldova Final Report, OSCE Mission to Moldova, at 7-8 and 51 (2009).

offices, where a high percentage of hearings are held due to lack of courtrooms and the preferences of judges or court clerks.[297] Information about future hearings is still not routinely posted and updated in all courts, as required by law.[298]

III. Improper Influence on Judicial Decisions

This section is to be read together with the one on separation of powers and practice of judgments. Several reports referred to the influence of "telephone justice" over the decisions taken by judges or cases being "taken under control" (*luat la control*). The 2003 Freedom House Moldova/Open Society Justice Initiative report described the practice of "taking under control" of certain case files which were of interest to the Communist leaders or state authorities, a practice that implied an instruction chain from the President's office, Government or Parliament to the SCJ or SCM, and further to the court presidents and finally the judge deciding on the case in question.[299] In 2004, the International Commission of Jurists concluded that "the odious practice of 'telephone justice' has indeed returned to Moldova".[300]

In 2006, the OSCE monitors noted, surprisingly, that some judges interpreted the presence of the monitors as an indication that the case was "taken under control", sometimes cautioning the parties that "this case is complicated and hence was taken under control. We are being monitored and therefore need to do everything as the Code requires".[301] This is an odd example of a judge interpreting mere monitoring as some sort of control, which says a lot about the extent to which judges feel free in doing justice. Recent interviews with judges confirm that "telephone

---

[297] Id., at 28-29.

[298] Id., at 50-51.

[299] Freedom House Moldova & Open Society Justice Initiative, Monitoring the judicial independence in the Republic of Moldova, at 82 (2003).

[300] International Commission of Jurists, Report of the Centre for the Independence of Judges and Lawyers, Moldova: The Rule of Law in 2004 (2004).

[301] OSCE Trial Monitoring Programme for Moldova, OSCE Mission to Moldova, 6-month analytic report: "Preliminary Findings on the Experience of Going to Court in Moldova", at 31 (2006), available at <http://www.osce.org/documents/mm/2006/11/24340_en.pdf>.

justice" is still practised in Moldova.[302] The SCM has also acknowledged several instances of undue influence over the judiciary. For example, in 2008 the SCM adopted a decision noting the interference of a member of the parliamentary staff with a hearing on appeal in an administrative case. The head of the Parliament Legal Department mentioned in an information note that "the district court has applied incorrectly the cited legal provisions, which denoted the incompetence of the panel of judges, or the fact that this judgment is affected by some other influences. I believe the hierarchically superior courts will re-establish the legality, while the incompetent or tendentious judges will bring their explanations to the Disciplinary Board of the SCM".[303] In a survey of 151 judges, 19.2% of the respondents mentioned the influence of politics and the administration over the judiciary as one of the main impediments of a competent judiciary.[304]

Besides the legislative and executive powers, the parties to a trial may also influence judges, often by means of bribes.[305] In this respect, the SCM has issued a decision prohibiting trial participants and their representatives access to judges' offices except for the purpose of attending the trial hearings."[306] The OSCE Trial Monitoring report noted, however, that this decision is not being respected in practice and the parties continue to enter judges' offices before the hearing, without any explanations being offered to the other party. The report also noted the prosecutorial bias among some judges, who either treated the prosecutors preferentially or engaged in active questioning of the parties, taking the role of a prosecutor.[307] Lately there has been a feeling that some judges may be under the influence of certain groups, outside government pow-

---

[302] Soros Foundation (note 51), at 50.

[303] SCM decision no. 10/205 of 5 June 2008 *cu privire la inadmisibilitatea imixtiunii în înfăptuirea justiției* (Regarding the Inadmissibility of Interference with the Judiciary).

[304] V. Zubco, Presentation on Guaranteeing the Independence and Transparency of the Judiciary, Key Condition for the Rule of Law in a State, International Roundtable, Judiciary Reform in Moldova. European Standards and National Realities organized by PRISA, Chişinău, 15 June 2009, presentations and conclusions available at <http://www.prisa.md/uploads/brosura_20.pdf>.

[305] ABA ROLI, Judicial Reform Index for Moldova, Volume II, at 79 (2007).

[306] See the SCM decision no. 351/14 of 15 November 2007.

[307] OSCE Trial Monitoring Programme for the Republic of Moldova, Final Report, OSCE Mission to Moldova, at 58 (2009).

er. It is premature to come to any conclusions on this yet, but it is certainly an area that needs attention.

Public perception of the Moldovan judiciary reflects relatively little trust. For example in a recent public opinion survey about judges, although the judiciary rated more highly than the police and the prosecution, "less than half of Moldovans (47%) were prepared to say they agree that the judiciary passes fair and correct judgments. Some 23% were unwilling to answer this question".[308] Low public trust may be for different reasons, including the widespread perception of corruption in the system. Thus, in another recent survey, "18% of judges, 6% of employees and 20% of lawyers reported that they have been offered bribes or favours to influence the outcomes of legal procedures. The public believe that corruption is high among all players in the judicial system with prosecutors and judges the most corrupt. Eight percent of citizens reported offering bribes or favours at least once to influence the results of trials, and 14% have witnessed someone offering a bribe."[309] Freedom House has also concluded that there is still evidence of bribery and political influence among judicial and law enforcement officials.[310] The SCM has declared its readiness to prevent and stop corruption. In 2008 the SCM approved the charges against one judge suspected of corruption and those against five judges charged with taking illegal decisions.[311]

Some judges argue that the media are unprofessionally reporting on issues of corruption within the judiciary, which contributes to negative perceptions by the public. For example the media do not follow cases from beginning to end, do not attend SCM hearings, although they are held in public, where they could get more information on the outcomes of proceedings initiated.[312]

Perhaps the lack of independence and professionalism among some judges led them to act absolutely inappropriately during the post-

---

[308] Soros Foundation (note 51), at 49 and 50.

[309] CBS-AXA Sociologic Investigations and Marketing Centre for the Moldova Governance Threshold Country Program, Moldova Court Public Monitoring Survey, carried out between 26 February and 27 March 2008.

[310] Freedom House, Freedom in the World – Moldova (2008), <http://www.freedomhouse.org/template.cfm?page=22&year=2008&country=7449>.

[311] SCM Report of Activity for 2008 (note 12).

[312] Interview with a district court judge, 13 April 2009, and an SCJ judge, 28 December 2009.

election events of April 2009, during which police apprehended and arrested at least 674 people under various charges, according to the data collected by the Crisis Group.[313] For the first time in the history of independent Moldova, judges held hearings in the police commissariats, with grave violations of fair trial standards which included conducting hearings *in camera*, a lack of lawyers, issuing unreasoned decisions, issuing decisions based only on police reports, not reacting to signs of ill-treatment of defendants, and others.[314] Some critics say the judges who admitted grave violations acted thus because of an order either from the SCM or from the executive branch and did not have the courage to disobey.[315] To date one judge has been dismissed for the violations that he admitted during the examination of administrative cases relating to the events of April 2009, and the mandates of two investigative judges have not been renewed for similar reasons. Although two human rights NGOs[316] submitted a complaint regarding 13 judges who examined administrative and criminal cases relating to the events of April 2009 (including the three mentioned above, who had already been removed at that time), the SCM found that there were elements of disciplinary offences in the actions of three judges, but a disciplinary sanction could not be applied due to the time bar (one year since the action was committed). As regards five judges, the SCM found that the alleged violations were not substantiated.[317] In response to the allegations of external influence on the judiciary, in 2010 the Ministry of Justice proposed an amendment to the Law on the status of judges, namely to introduce an obligation on judges to notify the president of the court and the SCM immediately in writing of any attempt to influence them in the process

---

[313] Soros Foundation – Moldova, Entrenching Impunity – Moldova's Response to Police Violence during the April 2009 Post-Election Demonstrations, at 9 (2009), available at <http://www.soros.md/docs/Publication_1_en_ro.PDF>.

[314] Id., at 67.

[315] See for example the interview with a former MP and the President of the Bar Association, 11 November 2009, in the programme "The truth about April events" on Jurnal TV.

[316] Moldovan Institute for Human Rights and Promolex

[317] SCM decision *cu privire la activitatea unor instante judecatoresti (judecatori) in cadrul examinarii materialelor administrative legate de evenimentele din aprilie 2009* (regarding the activity of some courts (judges) within the examination of administrative cases related to April 2009 events) no. 193//13 of 26 April 2010.

of examining a case.[318] However, this provision was not accepted by the Parliamentary Legal Commission. This provision is a necessary one that ought to be introduced.

IV. Security

Judges and members of their families, including their property, benefit from state protection. At the request of the judge or president of the court, the law enforcement bodies are obliged to take all the necessary measures to ensure a judge's and his/her family members' security and their goods' integrity. Attempts on the life and health of a judge, the destruction or deterioration of their goods, threats of murder, the violent way in which goods are destroyed, defamation or insult to the judge, as well as attempts at the life and health of close relatives (parents, husband, wife, children), are punishable by law.[319] The judge has the right to be protected by the law enforcement bodies using protection tools.[320] Disclosure of security measures applied to judges or other trial participants constitutes a criminal offence.[321]

The judges we interviewed for the purpose of this chapter said that these measures are rather declaratory, as there are insufficient resources appropriately to ensure judges' security. Even security in courts is still not ensured throughout the country. The judiciary should have judicial police, provided by the Ministry of Justice, with the main tasks of ensuring the security of court premises and assets, judges and other trial participants; public order on court premises and during court hearings; the forcible removal to court of those who refuse to appear willingly; the verification of those entering and leaving the court, including conducting personal examinations in accordance with the law and other tasks provided for by law. Although the judicial police should have been transferred to the Ministry of Justice some time ago, that has not

---

[318] Article 5(1) Draft law on amending some legislative acts, 2010, available at <http://www.justice.gov.md/ro/examinare-guvern/>.

[319] For example, murder of or injuries to people relating to their carrying out of official or civil duties constitutes an aggravating circumstance.

[320] Article 27 Law on the Judge's Status.

[321] Article 316 Criminal Code.

yet been done.[322] The main reason seems to be the problems of transferring equipment from the Ministry of Internal Affairs to the Ministry of Justice. The interim solution suggested by the Government was for the courts to contract individually with a state-owned security company. This has been done by very few courts.[323] In practice there are one or two police officers in each court, busy with helping to bring witnesses and other trial participants to court, rather than ensuring judges' security. To date, only two courts in Moldova have benefited from metal detectors. Only a few threats have been reported. Recently, a person sentenced to imprisonment attempted to blow himself up in the Chişinău Court of Appeal, but was stopped in time. Judges we interviewed for this chapter mentioned cases when they felt under threat, but they did not use the official procedures of requesting state protection as they were sure it would not be forthcoming for lack of resources.[324]

D. Ethical Standards

I. Code of Ethics for Judges

There is a new Code of Ethics for Judges, approved by the SCM on 29 November 2007, which entered into force on 1 January 2008. In 2009, a new edition of the code and comments on each article of the code were published, with the support of the Moldova Governance Threshold Programme. This publication, besides the code and the comments, also includes the practice of the Disciplinary Board and of the SCM regarding the use of ethical norms in various cases of misconduct, as well as case scenarios from the USA and some general decisions of the SCM relating to the ethical norms and international acts on judicial ethics.

Systematic or serious breaches of judicial ethics, recently amended to "breach of the norms of the Judges' Code of Ethics", constitute disci-

---

[322] Article 50(1) Law on Judicial Organization, amended on 21 July 2006, which provided that the judicial police shall be transferred from the Ministry of Internal Affairs to the Ministry of Justice not later than 1 January 2010.

[323] ABA ROLI, Judicial Reform Index for Moldova, Volume III, at 53 (2009).

[324] Interview with a district court judge, 13 April 2009; and with two SCJ judges, 21 May and 28 December 2009; interview with the ex-chairman of the SCM, 28 August 2009.

plinary misconduct, capable of leading to the application of any of the disciplinary sanctions. The judicial inspection examines complaints regarding judicial ethics and presents the analysis, information note and draft decisions to the SCM for validation. The SCM may decide only to discuss the alleged misconduct and inform the judge about that, without applying the disciplinary sanction if the misconduct is not significant enough.

II. Training

Judicial ethics are taught at the NIJ, within both the initial and continuous training programmes. Judicial ethics is mandatory for NIJ students. The NIJ has so far been supported both by public and international donor funding. In spite of the existence of the Code of Ethics and disciplinary proceedings, ethical violations are not the exception. One of the reasons may be the tradition that judges are quite isolated from any external societal control, often behaving like the "kings" of their courtrooms. Recently mass media and human rights NGOs became more active in monitoring the judiciary, exposing various violations which happen in courtrooms. We appreciate this as a positive trend able to contribute to increasing both the quality and accountability of judges in Moldova.

E. Supreme/Higher Courts

The Presidents and vice-presidents of courts, presidents and vice-presidents of the panels and judges of the Supreme Court of Justice are appointed by the Parliament on the proposal of the SCM. As with the appointment of district and appellate court judges, the Parliament must appoint any candidate repeatedly proposed by the SCM.[325]

[325] Article 9 Law on Supreme Court of Justice, no. 789 of 26 March 1996.

F. Conclusion

Judicial independence in Moldova is severely affected both institutionally and by individual judges who do not think of themselves as independent. The general public's level of trust in the justice system remains low.[326] The Superior Council of the Magistracy, which went through different reforms and especially personnel reforms, was again changed at the end of 2009 and currently has an equal number of judges and non-judges, which should be a measure for reducing judicial corporatism, but may also have the potential of affecting its independence. So far the first has been more the case. The clause allowing 20% of judges to be accepted within a period of three years, without being requested to undergo the National Institute of Judges training, leaves room for accepting less appropriate candidates unless the qualification examination procedure is changed. The procedure of nomination and reconfirmation by the President and Parliament still leaves room for undue influence over the judiciary. Financially the judiciary is still not adequately resourced, as regards the salaries of both judges and auxiliary personnel, court buildings and equipment and the budgetary process. The system of random distribution of cases is not yet implemented in all courts.

The behaviour of some individual judges, noted in many of the SCM decisions, civil society and international organizations' reports, denotes a lack of independence and understanding of the judges' role in a democratic society.[327] The conclusion noted back in 2003[328] regarding the main obstacles to reforming and ensuring the independence of the judiciary, namely lack of patience, perseverance and will of the political class, and lack of understanding of their role among many judges, is, regrettably, still valid. Judges who do not see themselves as independent, irrespective of governmental or other political or group interests, and do not act accordingly, are the biggest threat to judicial independence.

The change of government in 2009 and the inclusion of judiciary reform on the political agenda should be an opportune moment for addressing

---

[326] Barometer of Public Opinion of July 2009: only 27.1% of the population has „a lot" and „some" trust in the justice system, available at <http://www.ipp.md/libview.php?l=en&idc=156&id=452&parent=0>.

[327] SCM Report of Activity for 2008 (note 12); OSCE Trial Monitoring Programme for the Republic of Moldova (note 296); Soros Foundation – Moldova (note 313), at 67-69.

[328] Freedom House Moldova & Open Society Justice Initiative, Monitoring the Judicial Independence in the Republic of Moldova, at 45 (2003).

many of the institutional problems currently being faced. However, both the Government and society should be aware that time is crucial for building a truly independent and professional judiciary through comprehensive measures, targeted both at institutional framework and at the quality, behaviour and attitudes of judges themselves. Among positive reforms already initiated or in development one could mention the creation in 2006 of an independent NIJ as a specialized institution responsible for the initial and continuous training of judges, prosecutors and other legal specialists. As a new institution, the NIJ needs continuous support in strengthening institutional capacity and in designing and delivering training activities.

There have been many reports and even Government strategies and plans regarding the judiciary, as mentioned in the introductory part of this chapter. Some of these are very good. Our general recommendation would be to review the existing documents, extrapolate the good recommendations and continue their implementation, alongside continuous monitoring. More specific recommendations can be made to the Government (Ministry of Justice); the Superior Council of Magistrates; the Supreme Court of Justice; judges; and the media and human rights NGOs.

The Government should review the judicial appointment procedure to remove the initial five-year period which undermines judges' independence or to reduce it to three or two years. It should also reduce the President's and Parliament's power of veto over candidates proposed by the SCM. The composition and nomination of the SCM should also be reviewed to allow for representation by judges of different levels, and exclude the Prosecutor General from the SCM.

The current judges' qualification grades structure does not allow all types of grades to be awarded to judges of the district and appellate courts, which is not motivating judges to advance their qualification grades. Consequently these should also be revised.

There is no clear cut solution regarding the best scenario for administering the judiciary. However, the current structure and relationship between the Department of Administration of Judiciary and the SCM is not efficient. Hence the Government is encouraged to examine the possible scenarios and take a decision whether or not to transfer the Department of Administration of Judiciary to the SCM. Irrespective of the decision, the budget-making process regarding the judiciary should be made clearer and streamlined.

The goal of increasing the judicial budget (district and appellate courts), with separate lines for operational and capital costs, is long overdue and should be implemented, otherwise no reforms will take effect. Similarly the remuneration policy for judges needs revision, to include an increase in salary and the provision of a bonus depending on experience. The retirement policies for judges must be revised to avoid the ability to draw both a pension and a salary. This should freeze funds for increasing the salaries of judges.

Judicial disciplinary proceedings need revision in order to improve efficiency and provide a similar number of levels of jurisdiction as for ordinary cases. Namely, it is recommended to remove the competence of the SCM in validating every Disciplinary Board decision and assign to the SCM only the competence to examine appeals against the Disciplinary Board's decisions or allow direct appeal to a court from the Disciplinary Board's decisions. It is also recommended to review the competence of the court of appeal to examine appeals against SCM/Disciplinary Board decisions by providing either an increased panel of judges or assigning this competence to a Panel of at least seven judges of the SCJ.

The SCM is encouraged to publish and distribute widely in the media all requests, letters and other forms of pressure on the judiciary by the executive and legislative branches, as well as other groups. This will be a good tool for educating the other branches of power about judicial independence and separation of powers. The SCM should encourage judges to inform the SCM of any attempts to influence them in the process of examining a case and the SCM should take actions in every case. Ignoring such influence only increases unnecessary pressure and frustration among judiciary. The SCM is strongly encouraged to review judicial statistical data collection and analysis to ensure that the data reflect accurately the workload of judges. The forms of reporting by judges should differentiate between overruled and amended decisions at the appeal stage. Statistical data on the courts' workload, properly analyzed, is important and should be used for budgetary planning purposes.

The current system of attestation of judges is outdated and does not seem to be helping judges to improve their professional skills and abilities, but is rather a routine exam for checking knowledge. Therefore the SCM is encouraged to develop a system of professional evaluation of judges to replace the outdated attestations.

Although the SCM website was considerably improved, there is still room for improving it to allow for the searching of decisions by subject

matter. Otherwise the main purpose of making the SCM activity transparent and decisions accessible is not really reached. In 2010 the SCM started publishing all Disciplinary Board decisions and SCM validation decisions. This is a good development that needs to be continued. Again, the way these decisions are published and possibilities for searching these decisions need further improvement to make them accessible. It is also recommended that the SCM decisions appealed to the court be flagged or otherwise a notice made about that. The SCM should also publish details about complaints submitted regarding judges' behaviour – by type of complaint, by the type of complainant, and the outcome of the proceedings, the exact number of proceedings. The Judges' Code of Ethics should be disseminated among legal practitioners in order to encourage them to alert the SCM in the event of breaches.

The SCM should dedicate special attention to monitor the implementation of the random distribution of cases in different courts to assess the extent to which the current system responds to the stated goals. There have been considerable investments regarding the random distribution of cases, but breaches continue, even at higher courts.

Similarly to the way the SCM decisions are published, the system of publishing court decisions (of all levels of jurisdiction) on the web needs a serious revision to allow searching by type of case and by judge. The current system is not user friendly. The judicial system should also improve the manner of working with the media and the general public. Especially since the developments in 2010, when mass media became more interested in issues related to judiciary, it has become clear that many Moldovan judges and court personnel lack the skills necessary for dealing with the media and the public. The SCM should organize courses for judges on how to deal with the mass media and the public. Spokesperson for each court should be assigned, where it has not been yet done so.

The Supreme Court of Justice should streamline its activity to devote sufficient time to analyze the judicial practice and issue recommendatory decisions to ensure uniform judicial practice and so reduce the unpredictability of the judicial act. These recommendations should not be treated as mandatory for the lower courts judges, who can take different decisions if well motivated and explained the need to depart from the current practice.

All stakeholders, including individual judges, shall take all relevant measures to combat corruption among the judiciary, which is a major

concern and impediment to building a truly independent and professional judiciary.

The judges are strongly encouraged to revive the Association of Judges of Moldova to represent the interests of judges and be a professional check on the actions of the SCM, as well as a forum for discussing inappropriate judicial behaviour. Peer pressure should be the main engine behind increasing judges' professional and ethical standards. If judges will not get organized themselves and push for quality among judiciary, external pressure will inevitable happen and the Government will have more reasons to interfere.

The media and human rights NGOs are encouraged to continuously monitor the judiciary and expose ethical and other violations. Such oversight should be exercised in a professional manner and with respect for the procedures and rights of the parties.

Independence of the Judiciary in Armenia

*Grigor Mouradian**

A. Introduction

Since Armenia proclaimed independence in 1991, two rounds of attempts have been made to come closer to the European standards in the areas of the rule of law and the judiciary. In 1995, the adoption of Armenia's new Constitution marked the creation of a three-tier system of courts of general jurisdiction, as well as the Constitutional Court.[1] The 1995 Constitution suffered from a lack of the balance of powers and essentially created a super-presidential system under the cover of a *semi-presidential republic*. In the judiciary, the President was the head of the Council of Justice and in fact dominated it. Moreover, the candidacies of the majority of judges were approved by the Council of Justice upon recommendation by the Minister of Justice, who, too, played a key role within the judiciary.

With a view to addressing these and other deficiencies, in 2005 significant amendments were introduced into the Constitution, which were aimed, in particular, at strengthening the independence of the courts.[2]

---

* This chapter reflects the legal framework as of September 2010.

1 The judiciary of Armenia comprises the courts of general jurisdiction (first instance courts), the appellate courts (second instance), and the Cassation Court (the supreme court), as well as specialized courts. The Administrative Court is the only specialized court which functions currently. The Cassation Court is also the supreme (second and final) instance for the Administrative Court. The Constitutional Court, as the highest body of constitutional justice, is not a part of the judiciary within the meaning described above.

2 See Constitution of Armenia (with amendments), Official Bulletin of the Republic of Armenia 2005 (special edition), 5 December 2005 (*ՀՀ Սահմանադրություն (փոփոխություններով), ՀՀ պաշտոնական տեղեկագիր*

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233, DOI 10.1007/978-3-642-28299-7_27,

While retaining the power to appoint judges, the President was nonetheless deprived of the ability to rely on another body of the executive power, i.e. the Ministry of Justice, and the latter no longer plays any role in the appointment of judges. Moreover, the President is no longer the head of the Council of Justice.

After the Constitution was amended, a number of laws were adopted with a view to achieving high standards of the rule of law. Some of the measures implemented included the considerable strengthening of the Constitutional Court, the creation of an Administrative Court, the adoption of a Law on Administrative Procedures, and the enactment of a Judicial Code which thoroughly regulates all of the main spheres of activities of general jurisdiction and specialized courts. All the problems relating to the independence of the judiciary, with very few exceptions, have been solved by legislation. Nevertheless, the main problems relating to the *factual independence* of the judiciary have unfortunately persisted.

Gauging the independence of the judiciary is an extremely difficult task in countries where the legislation on the judiciary is generally adequate, with just a few deficiencies, while the analysis of the actual situation reveals a completely different picture. Collecting the necessary information, even the simplest, at times requires an incredible effort, which often does not yield a comprehensive outcome. On the one hand, official circles conceal information in order artificially to maintain an image that corresponds to the legislative standard, while on the other, the opposition press publishes all types of accusations, often unverified and twisted facts, though they might essentially reflect the reality, were it not for the unprofessional and biased argument and exaggeration which accompany them. All that is left is to rely on experience and common sense, as well as the few available credible sources, of course. Some assessments, which *prima facie* may seem too biased, are in fact based on many years' interaction with representatives of the judiciary. Besides, they fit well within the framework of the general situation in Armenia.

The majority of the problems arise because of the lack of political will on the part of the supreme leadership to enforce the laws on the judiciary, the absence of a well-balanced political landscape in which opposition opinion would be reckoned with and the opposition would have some functions of control, the persistent *de facto* dominance of the ex-

---

2005 [հատուկ թողարկում]). Unofficial English version on the website of the Parliament, available at <http://parliament.am/parliament.php?id=constitution&lang=eng>.

ecutive power in the structures of power, widespread corruption, including political corruption and corruption in all the spheres of public life, the weak authority of the judiciary, and impunity for manipulation of justice. All these problems are addressed to varying degrees in the body of this chapter.

B. Structural Safeguards

I. Administration of the Judiciary

1. Organs in Charge of the Administration of the Judiciary

A key principle of the functioning of the judiciary in Armenia is its autonomy.[3] Hence, the judiciary can function only on the basis of self-governance. The self-governing bodies of the judiciary are the General Meeting of Judges of the Republic of Armenia and the Council of Court Chairmen.[4] The *General Meeting of Judges* is the highest self-governance body of the judiciary, which is convened, as a rule, annually. The General Meeting may discuss any matter relating to the normal functioning of the judiciary. It also elects the judge members of the Council of Justice. Its decisions prevail over those of the Council of Court Chairmen.[5]

The Council of Court Chairmen is a standing self-governing body of the judiciary, which resolves essential ongoing issues, and in particular makes mandatory resolutions for the Judicial Department, confirms the list and number of post for the judicial servants (i.e. civil servants within the judiciary), establishes the procedure for retraining for judges and judicial servants, confirms the budgetary proposal presented by the Judicial Department, and defines the process of case assignment in first instance and appellate courts.[6] It elects an Ethics Committee and a

---

[3] Article 9(1) JC of the Republic of Armenia (JC), Official Bulletin of the Republic of Armenia, Yerevan, 2008 (*ՀՀ դատական օրենսգիրք, ՀՀ պաշտոնական տեղեկագիր, Երևան, 2008 թ.*). Unofficial English version available at <http://parliament.am/legislation.php?sel=show&ID=2966&lang=eng>. The English version does not correspond to the actual version of law.

[4] Article 70(2) JC.

[5] Article 71 JC.

[6] Cf. Article 72 JC.

Training Committee from among its members. The Ethics Committee is the first instance for reviewing disciplinary misconduct. The Ethics Committee has the right to file motions asking the Disciplinary Committee of the Council of Justice to initiate disciplinary proceedings, if misconduct is established.[7] All the members of the Training Committee are also members of the Judicial School Governing Board.[8] Beside its other powers, the Training Committee establishes the programme requirements for retraining of judges and judicial servants.[9] Apart from these bodies, the Council of Justice enjoys extensive powers under the Constitution in the judicial field (see the section below). It is not a judicial self-governance body, but this constitutional body, as will be described in the special chapter below, fulfils an important function of forming the corps of judges.

The Constitution also stipulates that the normal functioning of the legislative, executive, and judicial powers shall be ensured by *the President of the Republic*.[10] This clause cannot be considered a stand-alone power of the President extending beyond his concrete powers exhaustively listed in the Constitution, few of which concern the judiciary and, as a rule, cannot be exercised autonomously. Nevertheless, as will be illustrated below, the President's *de facto* role in the formation of the judiciary, if not its governance, is far from being nominal.

It is also worth mentioning *the Judicial Department*, which is in a sense the executive apparatus of the judiciary. It ensures that the decisions of the Council of Court Chairmen are carried out, it presents the budgetary proposal to the Council and provides material and technical support to the courts. As the Council of Justice does not have any personnel apart from its members the Judicial Department also performs the task of providing the Council of Justice with staff. The Judicial Department is a self-governance body of the judiciary, which is not included in the structure of any other body. All the judicial servants (in Armenia, judges are not judicial servants) including judges' assistants, research fellows, the administrative personnel, and the judicial instructors (bailiffs) are employees of the Judicial Department.[11]

---

7 Article 154 JC.

8 Article 177(1/3) JC.

9 Article 178(1/3) JC.

10 Article 49(2) Constitution.

11 Article 194 JC.

Finally, court presidents play an important role in administering their respective courts. This role[12] sometimes goes beyond mere administration and may be of concern, as described in other sections below.

2. Judicial Council

The judicial council is called the Council of Justice in Armenia. The Council of Justice was set up in 1995 by the then new Constitution of the Republic of Armenia.[13] It is a constitutional body with the primary functions of participating in the appointment of judges in general and in specialized jurisdiction courts, applying disciplinary sanctions against judges, and initiating their removal from office. The Council of Justice compiles and presents to the President of the Republic for approval a List of Judicial Candidates and the Official Promotion List of Judges, based on which appointments are made; issues opinions on the candidacies; nominates candidates for the chairman and other judges of the Cassation Court and the specialized courts; at the request of the President of the Republic, issues opinions on matters of pardon; applies disciplinary sanctions in respect of judges; presents proposals to the President of the Republic on terminating the powers of a judge; presents proposals to the President of the Republic on obtaining the latter's consent to the arrest of a judge, the filing of charges against a judge, or applying court-ordered administrative sanctions in respect of a judge.[14]

The Council of Justice consists of 13 members, including nine judges and four law academics. The judge members of the Council are elected by an *in camera* vote in the General Meeting of Judges of the Republic of Armenia for a five-year term[15] on the basis of the following quotas

---

[12] Supervision of work discipline by the Chairmen of all courts: general jurisdiction Courts (Article 25(1/2) JC), Administrative Courts (Article 38), appellate courts (Article 49(2)) and the Cassation Court (Article 61(3/7)).

[13] Cf. H. Khachatryan, First Constitution of the Republic of Armenia (*Г. Хачатрян, Первая Конституция Республики Армения*), at 256-257 (2001).

[14] Article 95 Constitution. This provision concerns administrative infringements for which sanctions are applied directly by the court based on applications by administrative bodies, or for violations of traffic rules, and the like.

[15] The powers of judge members of the Council of Justice are considered prematurely terminated by law only in case of termination of powers of judges (Article 101 JC). The Judicial Code does not establish a prohibition on repeated election, and the nominee of the councillor can be nominated again for election for the next five-year term.

set by the Judicial Code of the Republic of Armenia: two members of the Council from courts of general jurisdiction in the City of Yerevan; two members from courts of general jurisdiction in the regions of Armenia; one member from the Civil Appellate Court; one member from the Criminal Appellate Court; one member from the Administrative Court; and two members from the Cassation Court.[16] A judge who has at least five years' judicial experience and in the last five years has not been subjected to a disciplinary sanction may be elected as a judge member of the Council of Justice. A court chairman and a chamber chairman of the Cassation Court may not be members of the Council of Justice.[17] Two law academics are to be appointed by the President of the Republic of Armenia and two others by the National Assembly (parliament).[18] The sessions of the Council of Justice shall be chaired by the Cassation Court Chairman,[19] who himself shall not have the right to vote. However, this is compensated for by some wide powers. In particular, the Cassation Court Chairman enjoys the right to propose candidates to the President of the Republic for the appointment of judges, and he is also *ex officio* the Chairman of the Council of Court Chairmen and the General Meeting of Judges.

The composition of the Council of Justice fits within the system of checks and balances enshrined in the Armenian Constitution as an element of the separation of powers. The majority of votes in the Council belong to judges elected by the General Meeting of Judges, which allows the Council to be fully autonomous in exercising its powers and not to depend on the will of the legislative and executive branches. In practice, though, relative to the scope and nature of his powers, the Cassation Court Chairman has a disproportionately strong influence over the selection of the judge members of the Council. As was mentioned, the Cassation Court Chairman, being *ex officio* the Chairman of the General Meeting of Judges and of the Council of Court Chairmen,[20] is able to use his real influence especially on court chairmen, obtain

16 Article 94(1) Constitution and Article 99(1) Judicial Code.

17 Article 98 JC.

18 Unlike those of the judge members of the Council of Justice the powers of law academics are discharged at the moment of the termination of a term of the incumbent President or the National Assembly.

19 The Cassation Court Chairman is selected by the Council of Justice and appointed by the President of the Republic (see *infra* B. III. 2. Promotion).

20 The Ethics Committee of this body, as was mentioned above, is the first instance for reviewing disciplinary misconduct.

their agreement to candidates, including those who are nominated to the positions of members of Council, before they are included in the ballot papers for the secret vote. In addition, the activities of judges actually depend on the Cassation Court, which by its final judgments may state that the lower instance courts have committed grave errors and by doing so reveal grounds for disciplinary charges against the judges involved.

The Cassation Court Chairman, like other bodies, has the right to instigate disciplinary proceedings. As many judges are involved in corruption they are concerned about the possible sanctions, so this ensures the loyalty to the opinion of the respective chairman. The corruption in the system, penetrating throughout the entire hierarchy of the judiciary, allows ensuring the actual influence on the solution of problems even there, where independence is crucial.[21]

II. Selection, Appointment, and Reappointment of Judges

1. Introduction: Brief Description and Assessment

The selection and appointment procedure for judges in Armenia is very complicated. It varies according to the different judicial levels. Generally it is as follows.[22] The candidates for a post as judge take the qualification examination and are interviewed by the Council of Justice. The most successful candidates are included in the official qualification list by a decree of the President of the Republic based on a proposal from the Council of Justice. The candidates who have been included in the list automatically attend the Judicial School. They complete their studies at the Judicial School, as a rule, after they pass the mandatory seven-month training, including the examinations and the following trial period in different courts. After the candidate has successfully completed his trial period, the Judicial School Governing Board declares him a graduate of the Judicial School (the law makes no provision for gradua-

[21] About corruption and dependence, cf. Bertelsmann Transformation Index 2010-Armenia Country Report, at 9 (2009), available at <http://www.bertelsmann-transformation-index.de/>.

[22] Describing the procedures, the details referring to the differences in requirements for judge candidates of different court levels are omitted. The procedure described is based on the provisions on the selection and appointment of judges in first instance courts.

tion exams). When there are vacancies, the Judicial School graduates are nominated to the President of the Republic by the Cassation Court Chairman on behalf of the Council of Justice, in the sequence prescribed by law (see below) – after reserve and redundant judges. The appointment of judges is made by decree (decrees) of the President of the Republic.

According to the author, the list of judge candidates and the official promotion list of judges are compiled by an insufficiently transparent and unreasonably varying procedure. The Judicial Code provisions which regulate this procedure are often not worded in a logically coherent manner and are artificially complicated and difficult to understand. The legislator used the same provisions in several articles, adding some specific peculiarities which can be revealed by means of supreme effort, and this was done instead of grouping together the general provisions concerning the selection and appointment procedure for judges, and assigning special norms regulating peculiarities. The systematic sequence, which is very important for the perception of the procedure of the selection and appointment of judges as well as that of its every component, is lost and the provisions concerning the whole procedure proved to be incoherent and somehow diluted.

2. Eligibility

a) Requirements for Candidates for the Positions of Judges in General Jurisdiction (First Instance) Courts

To be appointed to the position of a general jurisdiction court judge, a candidate must be included in the List of Judge Candidates (official qualification list). The following two groups of aspirants may be included in the List: aspirants who score the highest number of points in the qualification exam conducted on a competitive basis;[23] and ex-judges who, without taking the qualification exam, have served as judges for at least two years during the last ten years, or incumbent prosecutors, investigators, and advocates, who have worked in such capacity for at least two out of the last three years.[24]

Participation in the qualification exam is open to citizens of the Republic of Armenia, who are 22-60 years old and have obtained in the Re-

[23] Article 115(1) and (2) JC.

[24] Article 118(1) and (2) JC.

public of Armenia a Bachelor's degree or a *specialist with diploma* degree in higher legal education, or have obtained a similar degree in a foreign state, provided that they have a command of the Armenian language; have not been removed from the Judicial School, and meet the criteria on compatibility with the office. A person's behaviour is incompatible with the position of a judge, if he or she has been convicted of a crime, regardless of whether the conviction has expired or been removed; has had his criminal prosecution terminated for any reason other than acquittal; is currently subject to criminal prosecution; has a physical handicap or illness which hinders his appointment to the position of a judge; or has not completed mandatory military service, with the exception of persons who were exempted from such service or had such service deferred.[25]

b) Qualification Examination and Interview Procedure

In practice, the qualification examination involves the drafting of two judicial acts (a decision and a judgment) in a civil and a criminal case over two days. The qualification examination is defined and carried out by the Judicial School.[26] The interview with the Council of Justice prior to inclusion in the List of Judge Candidates is mandatory for candidates for judges' posts in general jurisdiction courts[27] but subject to the discretion of the Council of Justice (exercised *in case of need*) for judges' posts in specialized and higher courts.[28] Neither the law nor the Council of Justice has prescribed any criteria for conducting this interview. There is no interview procedure format. Every concrete case depends on the discretion of members of the Council. In practice the interview may be conducted in the form of questions and answers on various topics concerning the candidate. Often, a candidate is asked again about matters of substantive and procedural law, his or her desire to work in the capital city or the regions, and also about the candidate's *curriculum vitae*, and the like. The interview is held during a session of the Council of Justice. In accordance with the general rule, all the Council's sessions are *in camera*, except for disciplinary proceedings when the judge him-

25 Article 115(4) in conjunction with Arts. 119(1) and 185 JC.

26 Article 175(1) JC.

27 Article 117(1) JC. With the exception of candidates who are included in the list without taking the qualification examination.

28 Arts. 131(1), 137(5), 139(3) JC.

self demands a public trial if the disciplinary proceedings are instigated against him.[29]

Serious doubt is caused by the Council of Justice's interview procedure, for which no criteria have been established in order to make it more or less predictable. Particular concerns are associated with the ability of the members of the Council of Justice to fail a candidate who has successfully passed the qualification examination by asking him or her tricky questions. The mere fact that, in addition to the examination, a candidate may later be compelled to answer questions about law relativizes the examination results. The author knows personally of cases in which people who passed the qualification examination with distinction later failed the interview. According to the author, the second, oral examination introduced as an interview, contradicts the meaning and objectives of law; moreover neither the law nor the Council of Justice has prescribed any criteria for conducting this interview. The logic of law is: the qualification examination reveals the candidate's professional skills, and the interview his/her personality traits. In some cases, the interview, which, in the author's opinion, should serve to reveal the personal qualities of a candidate, such as honesty, integrity, politeness, a sense of fairness, and the like, may potentially become an insurmountable obstacle for candidates who do have the required qualities. The interview in the Council of Justice appears to be of a subjective nature. That is why the examination and the interview should no longer be of equal value (see the section about recommendation), giving decisive importance to the examination in the compilation of the list of candidates. It is also necessary to elaborate a transparent procedure for the interview which will allow the personal traits necessary for judicial work to be revealed.

c) Judicial School[30]

People who, based on the results of the qualification examination and the interview, or in some cases without the qualification examination (prosecutors, advocates, investigators), have been included in the List of Judge Candidates, with the exception of ex-judges, automatically become enrolled at the Judicial School, where they undertake a manda-

---

[29] Article 109(2) JC. Information about the practice is inaccessible at the moment of working at this chapter.

[30] Under the Judicial Code the Judicial School was founded on 1 January 2008.

tory seven-month training period. Prosecutors, advocates, and investigators included in the List of Judge Candidates without taking a qualification examination[31] take an individual training course in the Judicial School, which they must complete in no more than two years. One of the key problems of the educational system of Armenia is its corrupt nature.[32] According to the author, within the general context of the situation in the education sphere, the Judicial School, too, is affected by corruption. Moreover, according to information received by the author of this chapter, some of the pupils of the School are the children of senior officials who are in a position to exert influence on the teachers in the School.

3. The Process of Judicial Selection

a) Initiation

The procedure of selecting candidates for a judge's post is launched if, as of 1 September of the current year, the total number of people who graduated or are currently studying in the Judicial School does not exceed 12. The Cassation Court Chairman shall, no later than 10 September, publish an announcement on the forthcoming qualification examination with a view to supplementing the list of judicial candidates.[33]

b) Powers of the Judicial School

Based on the results of the qualification examination, but not later than 20 November of the current year, the Judicial School Governing Board shall present the results of the 16 aspirants who scored the highest total number of points in the qualification examination.

---

[31] The qualification examination is not provided for these categories, but they should undergo the interview in the Council of Justice if the Council considers it necessary for the case in point.

[32] In 2003, the then Head of the Government apparatus (at present – the member of the Constitutional Court) M. Topuzyan and the then Counsellor to the President of the Republic on corrupt activity confessed that the educational and public health structures are the most corrupt in Armenia. See Հայկական ժամանակ, 18 November 2003 N 206, available at <http://www.armtimes.com/Arkhiv/November/18.11/18.11.03.html>.

[33] Article 115(1) JC.

c) Obligation of State Bodies to Communicate Detractive Information about Candidates

State bodies and officials which have information on a judicial candidate (including confidential information) which casts doubt on the person's reputation and ability properly to exercise judicial powers must, within two weeks of publication, communicate such information to the Council of Justice. The Judicial Department shall ensure that the information received is made available to all the members of the Council of Justice, the Cassation Court Chairman, and the Minister of Justice.[34]

d) Powers of the Council of Justice

The Council of Justice shall examine the merits of the nominated candidates in its session and invite them to an interview.[35] To supplement the List of Judge Candidates with the names of the nominated candidates, the Council of Justice shall conduct a secret ballot. Based on the result, a list of the ten candidates with the largest number of votes shall be compiled.

e) Powers of the President of the Republic

The list of candidates shall be presented to the President of the Republic no later than 15 December. No later than 25 December, the President of the Republic shall issue a decree approving the list compiled by the Council of Justice, containing only those candidates acceptable to him.[36] The law does not prescribe any limitations on the President regarding the minimum number of candidates he must approve. The President has the power not to approve the whole list or one or some candidates proposed for inclusion in the list. In practice, there are no cases in which the President has rejected the proposed candidates.

---

34 Article 116(1) and (2) JC.

35 Article 117(1) JC.

36 Article 117(1), (2), (4) JC.

f) Nomination and Appointment of Candidates to the Positions of Judges in General Jurisdiction (First Instance) Courts

When a judicial vacancy occurs in a general jurisdiction court, the Cassation Court Chairman shall, on behalf of the Council of Justice, nominate candidates to the President of the Republic for the purpose of appointment from those included in the list. The law prescribes the following order for nominating candidates. Priority is first given to incumbent judges who have expressed a wish to take up the vacant position, reserve judges, judges whose posts became redundant, followed by ex-judges[37] and incumbent prosecutors, advocates, and investigators. The graduates of the Judicial School are the last (fifth) in this order to be nominated by the Cassation Court Chairman, provided that there are no other candidates. When choosing between Judicial School graduates, the total points of each graduate are taken into consideration. Nominations are made in descending order of total credits gained at the time of graduating from the Judicial School.[38]

Prior to nominating a candidate to the President, the Council of Justice shall conduct *an open vote on whether or not* the Cassation Court Chairman has complied with the aforementioned *procedure for the selection of candidates*. If it has been complied with, then the Council of Justice shall issue a positive conclusion. The Cassation Court Chairman shall nominate the candidates to the President of the Republic only if there is a positive conclusion of the Council of Justice on the procedure.[39] Thus, the Council of Justice determines whether or not the procedure has been complied with, but does not itself nominate candidates for appointment to the position of judge. So far, the Council of Justice has in no case issued a negative conclusion about compliance with the procedure by the Cassation Court Chairman.

Under the Constitution, the procedure of appointing judges of general and specialized courts must be balanced between the Council of Justice and the President of the Republic. On the one hand, the Cassation Court Chairman nominates candidates for appointment based on a positive conclusion by the Council of Justice, while the Council of Jus-

---

[37] *Ex-judges* are not a mass phenomenon as may seem at first sight because of the frequency with which this category is mentioned in the law. They are judges who changed their work voluntarily for different reasons and now want to return to the Judiciary. Such cases rarely occur in practice.

[38] Article 122(1) JC.

[39] Article 123(9) JC.

tice itself nominates candidates to the President for the positions of all court chairmen (including the Cassation Court Chairman) and of judges of the Cassation Court. As the head of state and the executive power (exercised jointly with the Government) the President has no right to select and appoint judges, yet he is not bound by the nomination of the Council of Justice and has the right *without any basis whatsoever* to turn down a candidate at the stage of his inclusion in the List of Judge Candidates and the Official Promotion List of Judges. Moreover, at the stage of the appointment of judges of general jurisdiction courts the President may decline to act during fortnight term before the offer of an appointment. In this case the candidacy of the judge is considered rejected. Moreover his name is deleted from the list.[40] The President does not have the power to reject nominated candidates for other courts' judicial posts (specialized, appellate and Cassation).[41]

Despite the 2005 constitutional reforms aimed at reforming, among other things, and significantly strengthening the Council of Justice, it has only a nominal role in the selection of candidates for the position of judge, because many, if not most, of the candidates undergo preliminary selection and screening not in the frameworks of the procedure established by law, but rather in an inner circle deep inside the Presidential Administration, often with the involvement of the Cassation Court Chairman, after which they are formally nominated as candidates for judges' posts by the Council of Justice or the Cassation Court Chairman acting on behalf of the Council of Justice. Thus, following the tradition of the 1995 Constitution, the President of the Republic continues to play a dominant role in the formation of general and specialized jurisdiction courts through officials in his administration, though he is no longer the head of the Council of Justice and has no relationship to it with the exception of appointing two of its members. The difference is that the Cassation Court Chairman plays a significant role in the selection of candidates now, as opposed to in the past, when such a role was played by the Minister of Justice. Corruption displays, according to the public, also take place at the appointment of judges. In particular, according to the report of Transparency International on the national system of legality, at that time there was a popular opinion in society that the determinant at the appointment and promotion of judges was not

40 Cf. Article 123(10) JC.

41 Cf. Arts. 130(7), 143(7), 148(6) JC.

their dignity, but bribery and nepotism.[42] There are reasons for the persistence of such perception, despite the constitutional and legislative innovations.[43]

4. Mandatory Training of Candidates for Judge Positions

All those included in the List of Judge Candidates, with the exception of ex-judges, become enrolled at the Judicial School.[44] Their studies include special courses on substantive and procedural law. At the end of each subject course, students take an exam the purpose of which is to evaluate the theoretical knowledge and practical skills gained.[45] The examination procedure is determined by the teachers. The exams may include theoretical questions, tests, assignments, or even virtual court proceedings in some cases. If a student's score in the examination is lower than the minimum score set by the Judicial School Board for passing such course, the student is not allowed to pass the trial period and is removed from the Judicial School.

At the end of their studies, students undergo a trial period[46] which they must pass at different court levels. Only a judge may be a mentor during the trial period, which shall consist of various stages. At the end of each stage, the mentor issues a written report covering the student's practical and moral characteristics displayed during the trial period, including a positive or negative evaluation of the trial period.[47] The trial period lasts 14 days. Eight days are taken up with practice in general jurisdiction courts (first instance), and six days in specialized courts (in practice only in the Administrative Court). The students have a differ-

---

[42] Cf. National Integrity Systems Transparency International Country Study Report (*Օրինականության ազգային համակարգ. Թրանսպարենսի Ինթրնեշնլ միջազգային հակակոռուպցիոն կազմակերպության ուսումնասիրության հաշվետվություն: Հայաստան 2003, Եր., 2004 թ, էջ 45*), English version available at <http://www.transparency.am/publication.php?id=10&l=en>.

[43] See *infra* note 135, in part relating to interviews about corruption (Transparency International).

[44] Article 182(1) JC.

[45] Article 189(1) JC.

[46] A little absurd denotation in the law, chosen for the description concerning short-term practice in various courts.

[47] Arts. 187, 190, and 191 JC.

ent mentor[48] in each court. The legal requirement of Article 190(2) JC for a trial period also in appellate courts and the Cassation Court has not yet been achieved in practice, for reasons unknown to the author.

Prosecutors, advocates, and investigators included in the List of Judge Candidates must pass an individual training course at the Judicial School within a maximum period of two years.[49]

Upon completing their studies, those students do not take graduation exams. If a positive evaluation has been received for each stage of the trial period, the Judicial School Governing Board shall total the scores in earlier exams and declare the student a graduate of the Judicial School.[50]

According to survey findings,[51] the qualifications of judges in Armenia are generally not low, though some problems of qualification arise in the general jurisdiction (first instance) courts. The survey refers, in particular, to some part of the first instance judges considering civil cases. Their own practical skills are insufficient and consequently at times their decisions are not structured accurately, suffer from muddle in the statement of facts, actual and legal questions are not clearly enough demarcated, and this makes decisions vulnerable to criticism, and obscure. A principal cause of it is, in particular, shortcomings in judicial education in Armenia, insufficient attention being paid to developing practical skills, and also the existence of corruption in this sphere.[52]

However it is necessary to highlight that in the opinion of survey respondents, the majority of judges, at least in the capital city of Armenia, have the necessary qualification and could be good judges were they not subjected to and yielding to undue influence.[53] Corruption, the illegal influence in fact of the executive power on judges' conclusions, the negative role court chairmen play, the poor level of solidarity among judges in counteracting illegal influence, their low self-esteem – are es-

---

48 Data provided by the Judicial School in January 2010 from an anonymous source.

49 Article 120(2.2) JC.

50 Article 192 JC.

51 See ABA, The Judicial Reform Index for Armenia (2008), at 14.

52 As a basis of these conclusions author assumed his own supervision as a co-organizer of numerous courses of improvement of qualification of judges with the assistance of the German lawyers devoted to a method of work of the judge in civil procedure such as technique of relation (*Relationstechnik*).

53 Cf. Judicial Reform Index (note 51), at 14.

sential factors, which disrupt its authority and interfere with the achievement of true independence of judicial authority, irrespective of the professional level of the judicial corps.

5. Gender Balance and Minority Representation: Legal Provisions and Practice

Under Article 117(3) JC, when compiling the list of judge candidates, gender balance shall be taken into consideration. If the number of judges of either sex is less than 25% of the total number of judges, then at least five places shall be safeguarded in the list for candidates of that sex. In 2007, according to data provided by the Council of Justice, female judges accounted for 22.3% of the total number of judges. In 2008, the number fell to 21.8%.[54] Thus, despite the legislative safeguards of representation in the list of judges, the number of incumbent female judges is somewhat lower than the minimum required by law for the List of Judge Candidates. Hence, the safeguard is not fully implemented in practice, and men have some advantage in the appointment of judges. Low numbers of female judges at higher courts also suggest that women are less frequently promoted to these career posts. Yet, one cannot claim with certainty that this practice is the result of intentional gender discrimination against women.[55] In the author's opinion, the problem can be partly explained by an insufficient number of the women with the necessary qualifications for positions as judges in superior courts.[56] Moreover, considering the workload of courts, especially the Cassation Court, women do not willingly choose to work there, preferring to stick to their traditional role in the family.

Armenians constitute about 97.9% of Armenia's population.[57] Other than the provisions on equality of rights and the ban on discrimination, the law does not contemplate any other specific safeguards for the rep-

---

54 Id., at 19.

55 Id., at 19. Whereas according to this report, there were no female judges at the Cassation Court at the time, the Cassation Court now has three.

56 At present only three of 17 judges of the Cassation Court are women, data available at <http://www.court.am/?l=lo&id=29&mode=common_court>.

57 See National Statistical Service of the Republic of Armenia, Results of the 2001 Population Census of the Republic of Armenia, Table 5.1. (*ՀՀ ազգային վիճակագրական ծառայություն, ՀՀ 2001 թ. մարդահամարի արդյունքները, աղյուսակ 5.1.*), available at <http://www.armstat.am>.

resentation of national minorities in the judiciary. The share of religious minorities is about 5.3%, of which about 4% are representatives of other Christian denominations. According to the official website of the judiciary, in 2007 and 2008 there were no judges belonging to national or religious minorities in Armenia.[58]

III. Tenure and Promotion

1. Tenure

Article 96 of the Constitution provides that all judges in Armenia are *irremovable* and shall serve in office until they reach the age of 65. No probationary trial period is stipulated for judges. However, there is a trial period for students of the Judicial School. It is the final stage of their education at the School. Thus, in Armenia there is no legal basis for or tradition of appointing judges to a position requiring a trial period or any other condition after the acknowledgement of appointment (reappointment).

The provisions of the Constitution and the laws regarding the irremovability of judges are, in general, complied with in practice.[59] The irremovability of judges, stipulated by Art. 96 of the Constitution and the Judicial Code of Armenia as a key safeguard of their independence, is also reflected in a judge's right to serve in office until retirement age in the court and in a court of the judicial instance to which he or she was originally appointed. Therefore, the transfer of judges may be of concern in practice: the transfer of judges is permitted only in exceptional cases with the consent of or based on an application by the judges themselves. It is permitted only in respect of first instance courts, with the exception of cases in which court chairmen are transferred to a judicial position within the relevant court. The transfer is implemented, in particular, in the form of an exchange of positions of judges of different courts of the same instance, transfer of the court chairman to the position of a judge of a corresponding court, the temporary assignment of the judge to the other court. The law permits transfer in exceptional cases with the consent of the judge concerned or, in case of a court chairman, directly based on his application. No information is currently

---

[58] Official website of the judiciary, available at <http://www.court.am>; see also Judicial Reform Index (note 51), at 20.

[59] Id., at 38.

available about how the legal clauses about *exceptional* cases are to be interpreted.[60] On the question of what is to be considered exceptional, the Cassation Court Chairman has a wide discretion. It is mitigated by the mandatory requirement to obtain the judge's consent; however, given the lack of *de facto* independence of judges and the fact that the majority of the members of the Council of Justice, the body which decides these matters, are influenced by the Cassation Court Chairman (according to the author's private conversations with some judges), serious doubt arises whether the Council of Justice can indeed counterbalance the Cassation Court Chairman. At least one case is known in which the transfer procedure was used, formally in line with the reorganization of the judiciary, against the Criminal Chamber Chairman of the Cassation Court, who had fallen into disgrace. At first, he was formally, transferred to the position of the chairman of a (lower-standing) Criminal Appellate Court, based on his own application, after which he was transferred to the position of a first instance court chairman.[61] Consequently, if it was not difficult to obtain the consent of a judge of the highest court in order to lower his rank significantly, judges of inferior courts are even less protected and more easily persuaded to consent. So, in February 2009 two opposition newspapers reported that the chairman of one of the first instance courts of Yerevan had confirmed to the media that he had suggested that all eight judges of that court write applications for transfer to other courts. Moreover he had referred to instructions of the chairman of the criminal chamber of the Cassation Court. Judges were shocked by the information, but obediently wrote their applications.[62] It is known that transfers of judges have occurred in fact. The further details are inaccessible to the author at present.

Concerning the possibility of transferring a person from the position of a court chairman to that of a judge is, in the current circumstances, a legalized instrument for exerting pressure on court chairmen who have fallen into disgrace, though the intended purpose of this mechanism is to facilitate the transition of leading judges who may be tired of mana-

---

[60] According to information provided by the Judicial Department, there have so far been no cases of reappointing judges under the exceptional procedure.

[61] See Հայկական ժամանակ, Haykakan gamanak, 10 January 2007, available at <http://hzh.am/Arkhiv/2007/January/10.01/10.01.07.html>.

[62] See Հայկական ժամանակ, Haykakan gamanak, 11 February 2009; Հրապարակ, Hraparak, 10 February 2009.

gerial and administrative functions to the positions of ordinary trial judges and thereby to ensure the renewal of the court leadership.

Before the Judicial Code was amended by the law dated 7 April 2009, even greater concern was caused by the wording in the Code concerning the temporary assignment of judges to other courts. Decisions on temporary assignment were made solely by the Cassation Court Chairman; reserve judges of higher courts could be assigned to lower courts without any regard for their specialization. Such assignment was at times the only way to solve the problem of providing additional judges for certain courts which faced a disproportionately heavy workload. The Cassation Court Chairman had the right to suspend the powers of judges at their primary workplace. Eventually, these provisions were challenged before the Constitutional Court, which questioned the legitimacy of the assignment purpose and found this legal wording to contradict, in particular, the provisions of the Constitution on the right to an effective judicial remedy, the prerogatives of the President, and the separation of functions between general jurisdiction and specialized courts.[63] The Constitutional Court, having analyzed the practice of applying this norm by the Cassation Court Chairman, has held that the constitution of specialized criminal courts which are able to function only if they are reinforced by judges of the unspecialized courts is meaningless, as then the overall goal of specialization in criminal matters cannot be achieved.[64] In first place, this was a consequence of the ill-considered creation of first instance specialized criminal courts.[65] It followed that the exceptional transfer of unspecialized judges turned into a rule, and the powers of the judges appointed by the President of the Republic were curtailed by the Cassation Court Chairman. Thus, the sense of specialization was lost, as specialized courts were constantly reinforced with judges of general jurisdiction courts which had also been recognized as inadmissible by the Constitutional Court. The provisions concerned were significantly amended[66] and assignment decisions are now taken by the Council of Court Chairmen with due respect for court specialization and their belonging to the same instance. Moreover, assignments of higher-instance judges to lower courts are no

---

[63] See ՍԴՈ-782, ՀՀ պաշտոնական տեղեկագիր 2008/71(661) (Decision No. 782 of the Constitutional Court of Armenia dated 2 December 2008, Official Bulletin of the Republic of Armenia 2008/71(661), 10 December 2008).

[64] Id., at point 8.

[65] These courts have since been abolished.

[66] See The Judicial Code of Armenia dated 7 April 2009 N76-H.

longer permitted, and the powers of assigned judges at their primary workplace are not suspended.[67]

2. Promotion

a) Necessary Conditions for Promotion

Only judges included in this Official Promotion List of Judges may be appointed as judges of specialized appellate courts and, in some cases, also judges of the Cassation Court. Inclusion in the list is a mandatory requirement in addition to meeting the criteria for the position of a judge described above.[68] The List is compiled by the Council of Justice and presented to the President of the Republic for approval.[69] It shall, by decision of the Council of Justice, include people with considerable work experience prescribed by law for general jurisdiction court judges and with professional work experience, that is Judges who have at least three years' work experience in a specialized court and have not been subject to disciplinary sanction, or ex-judges who have five years' judicial work experience in the last eight years. The latter requirement also applies to prosecutors, advocates and investigators.[70] The Judicial Code does not include requirement about the absence of disciplinary sanctions for ex-judges, prosecutors, advocates, or investigators. By all appearances, any disciplinary sanction imposed on a judge is no longer taken into account after the expiry of two years.

The Official Promotion List also includes appellate court judges who have at least five years' experience, no disciplinary sanctions in the form of warnings or severe reprimands, as well as those who have worked as judges, prosecutors, advocates or investigators for at least ten of the last 15 years.[71] The law in this case also does not include the requirement about the absence of disciplinary sanctions. Law academics (as candidates for the positions of appellate court judges) may be included in the

---

67 See Article 14 JC.

68 See *supra* B. II. Selection, Appointment and Reappointment of Judges. This implies that they do not take a new qualification examination. The interview refers to the Council of Justice's discretion in the case in question.

69 The list consists of two parts: the Judges' Promotion List for specialized courts and the Judges' Promotion List for appellate courts.

70 Arts. 136 and 137(1) JC.

71 Article 138(1) JC.

list if they have a *doctor habilitatus* degree and have permanently taught law in higher educational institutions or permanently worked in a scientific institution for the last five years.[72] Hence, a person without practical work experience as a judge, prosecutor, advocate or investigator may not aspire to become a judge in the appellate or cassation courts, with the exception of law academics. Therefore, those who graduated from the Judicial School cannot immediately be appointed to judicial positions in the appellate or cassation courts without first being appointed to a first instance court.

The inclusion of a new candidate in the Official Promotion List (or the compilation of new one) is realized if the last one is exhausted, or there are no more than five judges left in the specialized courts section,[73] or no more than two in the appellate courts section.[74] In these cases the Cassation Court Chairman shall publish a declaration about compilation (inclusion) of the Official Promotion List on the judiciary's official website. For a period of two weeks judges can put in their applications to the Council of Justice to be included in the Official Promotion List.[75] The Council of Justice shall consider the applications during a period of ten days, and if necessary invite the candidates for interview. After this procedure the candidates shall be included in the list by secret ballot. The list shall be presented to the President of the Republic for approval. The President of the Republic has the right to reject the offered candidates. If the President does not act, the candidates nominated by the Council of Justice shall be considered rejected.[76] If a candidate included in the Promotion List has not been appointed to a judicial position of the relevant court within five years he shall be removed from the list. The Council of Justice shall take this decision based on the proposal of the Cassation Court Chairman. Removal from the list is not an obstacle to reapplication for the purpose of inclusion in the list.[77]

---

72 Article 139(1) JC.

73 Article 137(3) JC.

74 Article 138(2) JC.

75 Arts. 137(4) and 138(3) JC.

76 Arts. 137(9), 138(8), 139(4) JC.

77 Article 140 JC.

b) Objective and Discretionary Criteria

The official promotion of judges depends on both objective and discretionary criteria. Work experience in the position of a judge and the absence of disciplinary sanctions deemed serious under law are objective criteria. Moreover, the law stipulates a number of discretionary criteria that must be taken into consideration, which are to varying degrees subjective. Thus, when compiling the Official Promotion List of Judges and voting on appointment to a higher judicial office, members of the Council of Justice must take into consideration the following qualities: the professional knowledge of a judge, including the judge's professional activities and professional and post-university education; the judge's professional reputation; his work skills; the quality of judicial acts done by the judge; the judge's respect for the reputation of the judiciary and judges; compliance with the Judicial Code of Conduct; oral and written communication skills (based on the minutes of court sessions and the judicial acts done by the judge); the judge's participation in educational and professional training programmes; the judge's participation in the self-governance of the judiciary; the judge's participation in law and legislation development projects; his attitude towards colleagues during the performance of judicial duties; and the organizational skills of the judge.[78] There are no criteria for assessing someone against the aforementioned criteria. The Council of Justice may collect appropriate information either on the basis of documents (judicial acts and protocols) or through an interview with the candidate for inclusion in the Official Promotion List (such interview is at the Council of Justice's discretion).

In promotion, as in the appointment of judges, conforming to the established criteria is not sufficient. According to the author's observations, official promotion is largely influenced by the Cassation Court Chairman. Besides, the higher the court, the more personal loyalty to the highest executive authorities is required, and this is not among the qualities stipulated by law. It is not sufficient to meet the criteria prescribed by law. Of course, one cannot assert that the unwritten criterion of personal loyalty is significant in all cases of judicial promotion; however, it is certainly relevant for judges of the highest court, i.e. the Cassation Court.

The complex and cumbersome procedure of official promotion is bound in discretionary criteria, and the possibility of their inconsistent

78 Article 135 in compliance with Arts. 137(6) and 138(5) JC.

application is rather high. The law does not contain any requirements on the obligation of the Council of Justice to *follow its past practice*. Therefore, no one can realistically count on his aspiration to be promoted on the basis that he considers himself worthy of promotion. The unreasoned decision of the President of the Republic (i.e. his inaction) to reject a candidate nominated by the Council of Justice for inclusion in the Official Promotion List cannot be challenged. Like the appointment procedure for first instance judges, the promotion procedure of judges is also non-transparent to the public, as all court hearings of Council of Justice concerning these questions are *in camera*.[79]

c) Nomination and Appointment Procedure for Appellate Court Judges

If a vacancy emerges in an appellate court, the Cassation Court Chairman shall nominate a candidate from the Official Promotion List of Judges to the President of the Republic for appointment following the same procedure as that prescribed for first instance court judges.

d) Appointment to the Positions of Cassation Court Judges and the Chairman

The procedure of nominating judges to the Cassation Court is different in that the Council of Justice itself, rather than the Cassation Court Chairman, enjoys the right to nominate candidates to the President of the Republic for appointment.[80] The chairmen of appellate courts, chambers chairmen and judges of the Cassation Court and all those included in the Official Promotion List of Judges are without fail included in the secret ballot for Cassation Court Chairman nomination in the Council of Justice. The Council of Justice nominates to the President of the Republic the candidate with the highest number of votes. If the President of the Republic does not make an appointment within a fortnight, the promotion procedure begins again.[81]

---

79 Article 109(2) JC.

80 Article 148(6) JC.

81 Cf. Arts. 151 and 125 JC.

IV. Remuneration

1. Remuneration of Judges

At the end of 2008, the official basic rate of pay for judges was increased significantly (to, on average, double).[82] At the moment, the situation is such that even judges of first instance courts receive a salary which is somewhat higher than that of the President of the Republic. The salary of a Cassation Court judge is about 1.5 times higher than that of the President of the Republic. Therefore, by Armenian standards, the judicial salary is *the highest* of all officials'. It is about 900 EUR for general jurisdiction (first instance) court judges, about 1,035 EUR for specialized court judges (15% higher than the basic rate of pay for first instance judges), about 1,170 EUR for appellate court judges (30% higher), and about 1,350 EUR for Cassation Court judges (50% higher).[83]

The considerable increase in judges' salaries in 2008 pursued the aim of strengthening the independence of the judiciary and boosting the fight against corruption. The aim was only partially achieved, because higher wages alone are not enough to curb judicial corruption, not to mention that the increase was insufficient, though extraordinarily high in comparison with the general remuneration system for senior officials. Nonetheless, one can assert with confidence that the current salary level is sufficient for one to lead a rather dignified life without purchasing real property or items of very high value. Delays of payment of wages have not been observed.

The decision on the rate of pay for judges is taken by the parliament, i.e. the National Assembly of the Republic of Armenia in the form of a law. For the period which followed acceptance of the Constitution in 1995, the Parliament regularly reconsidered official salaries of judges – in 1996, 1998, 2002, 2004 and 2008. Except for the last increase, all pre-

---

[82] See law 9(5) About the State Budget PA on 2009 in aggregate from Article 75 JC, Official Bulletin of the Republic of Armenia 2008/71(664), 26 December 2008 (*ՀՀ պաշտոնական տեղեկագիր, 2008/74 (664), 26.12.2008 թ.*).

[83] The amounts are presented in Euro equivalent at the reference exchange rate of the Central Bank of Armenia and exclude the differentiated bonuses for career length. The basic rate (judges first instance general jurisdiction courts) is provided on a separate line in annual laws on the budget. The salary of other judges (Administrative Court, Appellate Courts and the Cassation Court) is defined according to the resulting scale of extra charges provided in Article 75 JC, on the grounds of the base rate (see id.).

vious increases were connected with an increase in salaries for all officials of high rank. Until the last increase the official salary of judges, nevertheless, did not correspond to their status and this provoked criticism from the judicial corps and some statesmen.[84]

2. Benefits and Privileges

In addition to the official pay rate, judges are paid a supplement for their experience as a judge: 2% for each of the first five years (a total of 10%), and 5% for the sixth year and each year thereafter.[85] Another benefit is the long periods of leave: judges are entitled to regular annual paid leave lasting 30 working days.[86]

3. Retirement

Judges who have at least ten years' work experience as judges and have retired after reaching age 65 or because of inability to work or an illness which hinders their performance are paid a pension of 75% of the official salary for judges minus the sum of the total (regular) pension awarded to citizens[87] when they reach retirement age.[88]

---

[84] Cf. Judicial Reform Index (note 51), at 35. See also Հայոց աշխարհ, Hayots Ashkharh, 24 March 2004 (Article with rigid criticism of ex-Minister of Justice D. Harutunyan and member of Constitutional Court F. Tokhyan about the insufficient size of the salary of judges).

[85] Article 75(2.5) JC.

[86] Article 76(1) JC. Cf. under Article 159(1) Labour Code, the duration of leave is normally 28 calendar days.

[87] The retirement pension stipulated by the Law on State Pensions is normally rather low, around 60 EUR. This amount is to be deducted from the sum which is equal to 75% of a judge's official pay.

[88] Article 2.1 Republic of Armenia Law on Putting the Judicial Code into Effect, with amendments dated 26 May 2008. See Official Bulletin of the Republic of Armenia, 2008/39 (629), 25 June 2008 (*ՀՀ պաշտոնական տեղեկագիր*).

V. Case Assignment and Recusal

1. Case Assignment Powers

The procedure of case assignment between first instance court judges and the procedure of forming judicial benches (each made up of three judges) in appellate courts is defined by the Council of Court Chairmen.[89] Currently, only the procedure of case assignment in first instance general jurisdiction courts has been defined. In the other courts (Administrative, appellate and Cassation), case assignment is mainly performed as in the past, i.e. by the court chairman. The chairmen of corresponding courts in practice try to be guided by a rule of equal case assignment, considering the workload of judges. Nevertheless the danger of arbitrary decisions, caused by the exercise of personal favour by chairmen and the corruption risks connected with it, remains in such system.

Pending a decision of the Council of Court Chairmen on this matter, the power to define the procedure for forming judicial benches in appellate courts (originally, a power of the Council of Court Chairmen) has been temporarily delegated to the Chairman of the Council of Court Chairmen, who is *ex officio* the Cassation Court Chairman.[90] From the viewpoint of law, temporary delegation by the Council of Court Chairmen of its legally-prescribed power to form judicial benches in appellate courts, which is intended to ensure the objective review of cases, is perplexing and dubious in terms of the law (information about practice could not be obtained). Despite attempts to create a random case assignment system in Armenia, it has still not been fully established.[91] Some elements of such a system, including sequential numbering and the territorial principle, are already in place. However, they apply only in relation to first instance general jurisdiction courts. Besides, given the unlimited influence of court chairmen on the staff who must accept cases at the initial stage and transfer them to the

---

[89] Article 72(3.19) JC.

[90] Data provided by the Judicial Department in August 2009 from an anonymous source.

[91] See Հայոց աշխարհ, Hayots Ashkharh, 24 March 2004, which mentions anti-corruption measures and gives as an example the establishment of an objective order of case assignment in courts. The chairman of the higher administrative court of the *Bundesland* of Hessen/Germany, Wolfgang Reimers, came to a conclusion about the necessity of introducing such system for the Administrative Court, however any steps to this direction have not yet been undertaken.

judges, this limited system can hardly be considered a genuine system of random case assignment. In reality, though, court chairmen continue, as a rudiment of the Soviet-era tradition, to exert considerable influence on case assignment. A court chairman can almost always get a case assigned to the *right* judge, as he is in complete control of the supervision of the administration of courts, registering complaints and other references to the court, and being the first to be informed about the receipt of a complaint. Court chairmen benefit from the fact of insufficient regulations, and even lack[92] of any legislation on the procedure of case assignment.[93] In this way, they manage in some cases to avoid problems with the executive power when claims are lodged against the latter, or when cases concern the interests of influential officials or companies and organizations affiliated to them.[94] The assignment of a case to the judge who is favoured by the court chairman may sometimes pursue the aim of getting a share of the supposed bribe, thereby feeding corruption.[95]

---

[92] Reference is made to specialized, Appellate and Cassation Court.

[93] The court chairmen could refer to the general power on maintenance of the normal functioning of courts headed by them (see, particularly, Article 25(1/1) of Judicial Code). This power itself does not give the right for case assignment as its order is established by the Council of court chairmen. However, as the Council has carried out this power only partially (only in general jurisdiction courts of first instance, and that is not accurate), the legal, but not legitimate, basis of such case assignment (in a view of the constitutional requirement about the right to a lawful judge) can serve the above-stated general power.

[94] The dependence of courts on the high-ranking officials of executive power is a well-known fact in Armenia. However, concrete proof or confirmation in the form of prosecution of dependent judges or, even more so, of officials especially interfering with their activity cannot be found. And still there is no doubt about the credibility of this fact, though it does not refer to all judges. It refers to the developed system of unwritten rules and to settled illegal practice. See Transparency International report (note 42), at 46, and also the Article in Հայկական ժամանակ, Haykakan gamanak, 10 July 2004, in which the words of one judge about a complete dependence of judicial authority from executive in a context of disposition of judges to satisfy even unreasonable motions of investigators for arrest application are quoted. See also *supra* note 21.

[95] Cf. Judicial Reform Index (note 51), at 46. According to the Transparency International Report, 84% of the citizens interrogated by this organization, 92% of businessmen and even 88.5% of government officials consider that corruption occurs in courts, and citizens believe that courts are the most corrupt institutions, see id., at 47. These data have not lost any urgency because the

There has long been discussion of the possibility of introducing an automated system of random case assignment. In September 2007, with the support of the World Bank, such a system was piloted in seven courts. It was planned to finalize implementation in all the courts by January 2008.[96] However, despite the lack of any technical obstacles (the financial support of the World Bank is available, operation is easy, and so on), such system has still not been introduced in the computer network of the judiciary.[97] One has to wonder why. A possible answer is that courts are not sufficiently computerized in the regions of Armenia. However, it is obvious that, despite some efforts and the rather favourable logistical conditions, the judiciary has still not been able to reach the relevant standards in terms of safeguarding *the right to a lawful judge* stipulated by the Constitution of Armenia and other legal instruments. It is one of the most glaring shortcomings of the Armenian judiciary. In the opinion of the author, the principal cause is the unwillingness of court chairmen, to whom the law assigns the definition of the procedure of case assignment, to give away their power over individual assignment, which allows them actually to dominate other judges.

2. Procedure of Case Assignment between First Instance General Jurisdiction Court Judges

The assignment of cases between judges in general jurisdiction courts is performed with due regard for the specialization of judges based on a territorial (*zoning*) principle in civil cases and sequence numbering in criminal cases. In general jurisdiction courts, judges are divided into two categories based on their specialization: civil case judges and criminal case judges. The specializations of judges are decided annually on the basis of special decisions of Council of Court Chairmen which contain a list of judges in different sections with their specialization. Certainly, the specialization is not very restrictive in general jurisdiction

framework conditions of corruption remain, and there is no essential progress in the sphere of corruption control. Cf. also with the declaration of the Anti-corruption centre of Transparency International in Yerevan, 9 December 2009, English version available at <http://www.transparency.am/docs/09.12.09-eng.pdf>.

[96] Cf. Judicial Reform Index (note 51), at 62.

[97] Data provided by the Judicial Department in August 2009 from an anonymous source. According to this information, the computerization of all courts in Armenia is already complete.

courts and judges if necessary consider cases regardless of it. Each civil case judge is assigned a part of the court's territory[98] (blocks or streets), provided that the territory assignment rotates every year. All disputes arising in this territory are considered by him.

All judges have a seal containing the name of the court, the name of the judge, and the sequence number of the seal. Cases should be assigned between criminal case judges on the basis of a match between the number of the incoming case and the sequence number on the judge's seal. The office of the court (the division responsible for the correspondence and procedures) shall assign a case a number, according to the date on which the case comes in from the prosecution. In practice, according to the data received from two regional courts, an employee of the current court (office) reports to the court chairman about the incoming criminal case, and the court chairman directs the case to one of the judges. The judge who has received the case gives it a sequence number which does not necessarily coincide with the number of the judge's seal. The case is then registered in office by this number. Thus, if these data reflect an overall situation, the legal regulations are simply not being carried out, and any *ex ante* objective case assignment of criminal cases does not exist. The fact that judges adhere to such practice and the unwillingness of the Council of Court Chairmen over many years at last to execute the existing rules and to establish a really objective order of case assignment indirectly confirm the thesis about illegal limitation of the independence of judges by the court chairmen.

3. Grounds and Procedure for Transferring a Case to another Judge

A case shall be transferred to a different judge if a judge is absent (due to illness, leave, and the like) or there are legally-prescribed obstacles to the review of the case by such judge. A typical obstacle would be the lack of impartiality of the judge, which serves as a basis for self-withdrawal. Judges formally cannot be recused: either a judge declares his self-withdrawal or the parties to the proceedings file a motion requesting the judge to withdraw. A judge's removal from the case irrespective of his will is possible only in the case of a successful appeal

[98] The territory of a community or several communities (a community is the smallest unit in the administrative-territorial structure of Armenia), which is subject to the jurisdiction of the respective general jurisdiction court.

against a judge's refusal to withdraw.[99] Such appeal is decided by the higher court.[100] A case may also be transferred to another judge in view of the difficult nature of the case or a judge's workload. A case is transferred by instruction of the chairman of the relevant court.[101]

VI. Judicial Conduct Complaint Process

The procedure for reviewing complaints about the conduct of judges outside the framework of disciplinary proceedings and the procedure of termination of powers is not regulated enough in terms of how such complaints should be lodged. It is unclear who may be an interested party and within what time period such complaint can be filed. In theory, such a complaint may be lodged by any interested person. Moreover, no deadlines have been set for the review of such complaints by the Ethics Committee of the Council of Court Chairmen, which is the competent authority to review complaints. A key problem is the lack of transparency in the review of such matters, as well as the disproportionately onerous difficulties associated with the acquisition of information or at least statistics on the practice. In this area, one can often encounter an insurmountable obstacle in the form of an obsession to conceal even the most basic information, despite the fact that individual decisions of a more significant body – the Council of Justice on disciplinary matters – including even the names of judges and the sanctions applied in respect of them can be found in the electronic database of legal acts.

The Ethics Committee of the Council of Court Chairmen organizes the hearing of the matter based on information from external sources or, in some cases, at its own initiative.[102] The law does not define who can inform the commission about violations. In practice these are basically

---

[99] In Armenia, the removal cannot be formally declared. Judges declare the removal themselves or participants in legal proceedings can act by way of a motion for the withdrawal of the judge.

[100] For general jurisdiction courts it is the appellate court. In administrative proceedings, the possibility of appealing against a judge's refusal to withdraw is not stipulated.

[101] Sub-paragraphs 1.2(2), 1.3(2), and 1.5 of the 10-L Decision of the Council of Court Chairmen dated 10 April 2009.

[102] Article 154(1) JC.

the participants in court proceedings.[103] The following are the grounds for reviewing a complaint: First, a judge has violated the rules of work discipline, provided that such violations are neither grave nor regular. Second, a judge has violated the rules of judicial conduct, provided that such violations are neither grave nor regular. Third, a judge has received a gift the value of which exceeds the permitted cap.[104] And fourth, information about a judge's income has been received from the judge, and arouses suspicion.[105]

The law does not stipulate a formal procedure for the review of complaints about the conduct of judges. It only requires the judge in question to be involved in the review of the complaint or the review of a matter at the initiative of the Ethics Committee.[106] The materials received by the Committee are sent in advance to the judge, and he or she is informed of the time and place of the complaint review. This procedure does not stipulate any sanctions, because its purpose is to find facts which would enable disciplinary proceedings to be initiated. Consequently, the Ethics Committee will limit itself to the review of the matter, if it does not discover grave or regular violations or concludes that the information about gifts or the judge's income declaration is inaccurate. Otherwise, the Ethics Committee files a motion asking the Disciplinary Committee of the Council of Justice to initiate disciplinary proceedings.

---

[103] Information provided by the Council of Court Chairmen in January 2010 from an anonymous source.

[104] Reference is made to gifts received from one person during the same calendar year, the value of which exceeds 250,000 Armenian drams (about 500 EUR), or if the total value of such gifts (received from different persons) received during a calendar year exceeds one million Armenian drams (about 2,000 EUR). See Article 95(3) JC. Naturally, the establishment in the law of admissible limits for gifts does not mean the legalization of gifts for realization of judicial powers, which do not exceed these limits. This is forbidden (Article 95(1) JC). However the law does not extend restriction on a number of the cases concerning a judge's private life, in particular, on the receipt of gifts, usually given out on public actions, to the gifts received within the limits of usual hospitality, on gifts from relatives or friends if they correspond to the character and size of mutual relations (Article 95(2/1), (5), (7) JC). In total, the law itemizes nine such cases. The list is exhaustive.

[105] Article 154 in conjunction with Arts. 95(3) and (4), and 96 JC.

[106] Article 154(1) JC.

In 2007, the Ethics Committee reviewed 13 complaints about the conduct of judges, of which eight were rejected due to the discovery of no violations, one was not admitted for review because of the initiation of disciplinary proceedings, and two others led to findings of violations and the taking of *appropriate measures*.[107] The fate of the remaining two complaints is unknown. Complainants are not told what infringements have been found and what decisions were made. In practice the complaints are considered in a month. Those who made the complaint are informed of the results of the consideration if they make an additional inquiry.[108] It was impossible to obtain data for other years, including 2008 and 2009.

VII. Judicial Accountability: Discipline and Removal Procedures

1. Formal Requirements

a) The Right to Instigate Disciplinary Proceedings

The *Minister of Justice* and the *Disciplinary Committee of the Council of Justice* have the right to instigate disciplinary proceedings against first instance and appellate court judges.[109] The Disciplinary Committee consists of Council of Justice members appointed for a one-year term by rotation. It is composed of two judges and one law academic. The Council of Justice members rotate according to their date of election or appointment to the Council.[110] Disciplinary proceedings against Cassation Court judges may be instigated by the *Cassation Court Chairman* and, upon motion by the Ethics Committee of the Council of Court Chairmen, by the *Disciplinary Committee of the Council of Justice*.[111] The Disciplinary Committee of the Council of Justice, upon motion from the Ethics Committee of the Council of Court Chairmen, has the

[107] Data provided by the Judicial Department in August 2009 from an anonymous source.

[108] Data provided in January 2010 by an anonymous source within the Council of Court Chairmen.

[109] Article 155(1) JC.

[110] Cf. Article 106(1) JC.

[111] Article 155(2) JC.

right to file disciplinary proceedings against the Cassation Court Chairman.[112]

Disciplinary proceedings may be instigated on the basis of applications by interested persons[113] or public administration bodies; or upon motion filed by the Ethics Committee of the Council of Court Chairmen, at the initiative of the abovementioned bodies or officials who have the right to initiate disciplinary proceedings, and also in cases when the Cassation Court has revealed obvious and grave infringements of the law in judicial decisions of inferior courts or when an international court condemns Armenia for infringement of international law committed by its judicial bodies.[114]

b) Grounds for Instigating Disciplinary Proceedings

The typical grounds for instigating disciplinary proceedings are judges' grave and regular violations of laws, rules of conduct, and work discipline. Those grounds are exhaustively listed in the law and include the following: an obvious and grave violation of a provision of substantive or procedural law in the administration of justice;[115] regular and grave violations of work discipline;[116] regular and grave violations by the judge of the Code of Conduct;[117] the judge's performance of activities which are incompatible with the office of judge under the Constitution and the Judicial Code; the judge's failure to carry out the decisions of the Council of Court Chairmen; the failure of a judge who is a member of the Council of Justice to participate in the activities of the latter; the judge's refusal to provide explanations in the framework of disciplinary proceedings; the judge's refusal to mentor the trial period of a student of the Judicial School; the judge's failure to appear at a medical check-up for an illness which hinders the performance of judicial powers; the

---

112 Article 155(3) JC.

113 The law does not specify a circle of people which can put in the application for instigation of disciplinary proceeding. This obviously refers to any person informed about the facts of the violations. In practice, first of all, these are the participants in court proceedings.

114 Cf. Article 155(5) JC). This particularly relates to decisions of the European Court for Human Rights.

115 Article 153(2.1 and 2.2) JC.

116 Article 153(2.3) JC.

117 Article 153(2.4) JC.

judge's failure to carry out the duties of a court chairman; and the judge's failure to participate in the mandatory training courses of professional development;[118] failure to notify the Ethics Committee of the Council of Court Chairmen of any interference with his judicial activities of administering justice or exercising other powers stipulated by law.[119] The quashing or changing of a judicial act shall not *per se* give rise to disciplinary liability.[120]

2. Disciplinary Proceedings

a) Competent Authority

The Council of Justice is the competent authority for reviewing the disciplinary misconduct of judges and make decisions thereon. In such cases, the Council of Justice acts as an *ad hoc* tribunal which applies the provisions of the Administrative Procedure Code of the Republic of Armenia insofar as they do not contradict the Judicial Code. It means, among other things, that the *inquisitional principle* applies when establishing the facts of the case. The official who instigated the proceedings carries the burden of proof, and the benefit of the doubt shall be given to the judge.[121]

b) Proceedings

Disciplinary proceedings shall consist of two stages: the preliminary and main stages. Prior to the case being transferred to the Council of Justice, the preliminary review is conducted by the official or body which instigated the proceedings.[122] Thus, if the proceedings are instigated by the Disciplinary Committee, it carries out the preliminary consideration. Upon termination of the preliminary consideration, the body or person who has instigated disciplinary proceedings is obliged to substantiate the conclusion about disciplinary violation with evidence. Only after such conclusion is made can the initiator of discipli-

118 Article 153(2.5) JC.

119 Article 153(2.6) JC.

120 Article 153(3) JC.

121 Article 158 JC.

122 Article 156 JC.

nary proceeding apply to the Council of Justice with the petition to file disciplinary proceedings against the judge.[123]

In the Council of Justice, which conducts only the main stage of the review and makes the decision, the procedure has been very much assimilated to that in court proceedings. After hearing the person who instigated the disciplinary proceedings, the Council of Justice hears the explanations of the judge regarding each of the facts implicating him. If the proceedings have been instigated by the Disciplinary Committee, one of its members reports on the conclusion to the Council of Justice on the instructions of the Committee.[124] If the judge admits that he has committed an offence, the Council of Justice moves to make a decision on the application of sanctions. If the judge denies that he has committed an offence, the Council of Justice moves to examine the evidence. After the case materials have been examined, the Council of Justice hears the pleadings of both sides, after which it adjourns to the consultation room to make its decision.[125]

c) Deadlines

The preliminary proceedings may not last longer than six weeks, with the exception of cases in which the judge is absent. The duration of disciplinary proceedings may be extended for a term equal to the term of the judge's absence.[126] The main proceedings in the Council of Justice shall be carried out *within a reasonable period of time*.[127]

d) Decisions

The decision of the Council of Justice shall be made in the consultation room. If the disciplinary proceedings were instigated by the Disciplinary Committee of the Council of Justice, then its members shall not participate in making the decision. The decision shall be made by an open vote of the Council of Justice members.[128] The decision shall be

123 Article 156(6) JC.

124 Article 159(1) JC.

125 Article 153(3)-(8) JC.

126 Article 156(1) JC.

127 Article 158(4) JC.

128 Article 161(2) JC.

promulgated within 15 days. It is published in the official journal of the Republic of Armenia and on the official website of the Republic of Armenia's judiciary.[129] The Council of Justice may take one of the following decisions: to apply a disciplinary sanction stipulated by the Judicial Code in relation to a judge, or to discontinue the disciplinary proceedings.[130] In making its decision, the Council of Justice shall take into consideration the *proportionality* of the disciplinary sanction applied to the offence committed by the judge, namely the degree of guilt, pending sanctions against the same judge, the personal character of the judge, the consequences of the offence, and other circumstances characterizing the judge.[131]

Improper conduct is reviewed in the same way as other disciplinary misconduct of judges. The only difference is that some forms of improper conduct are reviewed beyond the framework of the disciplinary proceedings by the Ethics Committee of the Council of Court Chairmen, because they are not considered violations which ought to trigger disciplinary sanctions.[132]

3. Judicial Safeguards

Judges enjoy a number of procedural safeguards enabling them to take part in the proceedings and actively defend their position. In particular, they have the right to become familiar with the case materials, to ask questions, to file objections, to provide explanations, to file motions, to present evidence, to take part in the examination of evidence, and to have an advocate. Moreover, by law, judges also enjoy other safeguards of fair trial stipulated by Article 19 Armenian Constitution and Article 6(1) ECHR.[133] Given the facts of misconduct regularly alleged by the opposition mass media and public organizations[134] disciplinary pro-

---

[129] Article 163(2) and (4) JC.

[130] Article 161(4) JC.

[131] Article 157(4) JC.

[132] See Paragraph 1 of Section VI regarding gifts and the filing of the income declaration.

[133] Article 160 JC.

[134] See the following publications: Statement of Human Rights Organizations from 9 December 2009, available at <http://www.transparency.am/docs/hr-eng.pdf>; B. Grisha, How the investigator accused father of raping daughter, Transparency International, 14 January 2010, available at <http://www.trans

ceedings against judges are applied infrequently. However, this is not evidence of either a strong legal culture among judges or their compliance with the requirements of lawfulness. In practice, the reputation of the judiciary in Armenia is very poor. Lack of trust in the judiciary is widespread.[135] This is due to the inability of many judges to withstand undue external pressure, which often leads to such nonsense as attempts made in judgments to legalize unlawfully-obtained evidence.[136]

---

parency.am/media.php?id=1268&l=en>; Whether there is a sanction on listening 30 April 2004 (*Գաղտնալսումների սանկցիա կա՞*, "*Առավոտ*"), available at <http://www.aravot.am/2004/aravot_arm/April/30/aravot_news.htm>; Verdict in the pocet of policemen 22 May 2002 (*Դատավճիռները ոստիկանների գրպանում են*, "*Առավոտ*"), available at <http://www.aravot.am/2002/aravot_arm/May/22/p04.htm>; Arrest is a gun in hands at the inspector 10 July 2004 (*Օհանյան Արմինե. Գալանքը թնդանոթ է քննիչի ձեռքին*, "*Հայկական ժամանակ" N 127./ Ohanyan Armine*); The price of blood 24 thousand dollar, 2 August 2005 (*Արյան գինը՝ 24 հազար դոլար*, "*Առավոտ*"), available at <http://www.aravot.am/2005/aravot_arm/August/2/aravot_news.htm>; see also collection of Articles of the one opposition newspaper journalist, published in the form of a book and reflecting his long-term experience of dialogue with Justice, a consequence and Public Prosecutor: R. Minasyan, Verdict "In the name of Republic of Armenia" (2003) (*Ռուզան Մինասյան. „Դատավճիռ „Հանուն Հայաստանի Հանրապետության."- Եր., 2003*).

[135] Some key facts which explain this attitude to the courts, especially criminal courts, can be found in Human Rights' Defender of the Republic of Armenia, 2008 Annual Report, at 135-145 (2009) (*ՄԻՊ տարեկան զեկույցը 2008 թ. ընթացքում ՄԻՊ գործունեության և երկրում մարդու իրավունքների ու հիմնարար ազատությունների խախտման մասին, Երևան, 2009 թ.*). The public opinion is sceptical also to the possibility of a decrease in corruption in courts. Transparency International Poll Archive, Public survey of 28 November 2008 about the impossibility of a reduction of corruption in courts despite the judicial salary increase, available at <http://www.transparency.am/poll_archive.php>.

[136] See the judgment of the European Court of Human Rights in *Harutyunyan* v. *Armenia*, Judgment of 28 June 2007, Application No. 36549/03. It is worrying that the first instance judge who decided the criminal case relied on evidence obtained by coercion and justified the acts of the police as pursuing "the purpose of ensuring disclosure of the truth," while the appellate and Cassation Court judges upheld the conviction on formal grounds. The European Court found a violation of the right to a fair trial under the European Convention. Based on the judgment of the European Court, the first instance judge in question was subjected to a disciplinary sanction in the form of a severe repri-

Moreover, the instigation of disciplinary proceedings is often selective, and sometimes pursues the aim of reproving those judges least loyal to the executive power.[137] Consequently, the extensive safeguards of a fair trial in the Council of Justice, which are enshrined in the law, are not always applied in practice. Some judges believe that the mere threat of disciplinary proceedings in certain cases is used as an instrument of pressure to obtain a court decision which is favourable to senior executive officials or large private companies affiliated with them.[138] Given the current degree of involvement of a large number of judges in corruption,[139] the mere threat of a sanction plays a *preventive* role for the purpose of ensuring the personal loyalty of a judge to the executive power. A problem similar to the issue of *non-grave* violations of so-called work discipline subject to the jurisdiction of the Ethics Committee of the Council of Court Chairmen is the supervision by the court chairmen of judges' compliance with rules of work discipline and the possibility of applying disciplinary sanctions against judges for grave and regular violations of such rules.

4. Sanctions

The law stipulates the following sanctions: a) warning; b) reprimand, which is to be combined with depriving the judge of 25% of his salary

---

mand, while the higher court judges got off with *only a scare*. For details, see the Judicial Reform Index (note 51), at 45.

137 See the case of Atohanyan, who had his powers terminated because of one acquittal judgment made by him in the case of a major businessman who was charged with crimes immediately after he accused the heads of the customs administration of corruption. For details of the grounds of termination of his powers see Council of Justice Decision AK-7-O-19 dated 12 October 2007 (*12.10.2007 թ. ԱԽՆ ԱԽ-7-Ո-19 որոշումը* /).

138 Under the administration of the former President, according to some data which could be considered rather credible, there was a practice of *educational conversations* with judges in the administration, which sometimes became not very friendly, to say the least. The author has no information about such practice in the current Presidential Administration.

139 Clearly, there are absolutely no statistical data on this matter. However, corruption, in the opinion of the public at large, affects the majority of judges (see, for instance, surveys on this issue conducted in the frameworks of the Judicial Reform Index (note 51), at 51, with reference to the Corruption Perception Index for 2006). See also *supra* note 21.

for a six-month period; c) severe reprimand, which is to be combined with depriving the judge of 25% of his salary for a one-year period; or d) filing a motion requesting the President of the Republic to terminate the judge's powers.[140] The Council of Justice shall file a motion requesting the termination of the judge's powers only if the grave disciplinary offence or the regular disciplinary misconduct by the judge is incompatible with the position of judge.[141] In this case, the President of the Republic is not bound by the motion of the Council. If, within two weeks of receiving the Council of Justice's motion to terminate a judge's powers, the President of the Republic does not do so, then the motion shall be considered rejected, and the judge shall be considered to have been subjected to sanction in the form of a severe reprimand.[142] A decision of the Council of Justice applying a disciplinary sanction is final and not subject to appeal. It may be reviewed only on the basis of new evidence based on a motion from the official who instigated the disciplinary proceedings or the judge against whom the sanction was applied, including a sanction terminating his powers.[143]

---

[140] Article 157(1) JC.

[141] Article 157(3) JC.

[142] Article 166 JC.

[143] Article 164 JC. If the decision is positive, the judge may be reinstated in his position by the President of the Republic, even if his position has already been refilled. In the latter case, he becomes a *redundant judge* with all the rights pertaining to the status of a judge, save for the right to administer justice (because it is factually not possible).

5. Practice

Disciplinary Proceedings against Judges during 2005-2007[144]

	2005	2006	2007	2008	2009
Total number	6	19	16	11	10
Warning	1	11	5	1	5
Reprimand	2	1	1		2
Severe reprimand	2	1	2		1
Termination of powers	1	0	2		0
Discontinuation of proceedings	1	8	6		2

6. Termination of Judicial Powers on a Ground Unrelated to Disciplinary Liability

a) Initiation of Proceedings to Terminate the Powers of a Judge

The law stipulates the possibility of terminating the powers of a judge in certain cases provided by law which are not related to the judge's disciplinary misconduct. The right to initiate proceedings to terminate the powers of a judge on these grounds is vested in the Council of Justice, and the power to file a motion with the Council of Justice on this matter is reserved for the Cassation Court Chairman.[145] If the relevant grounds exist, he is to propose that the President of the Republic termi-

[144] The table is taken from the Judicial Reform Index (note 51), at 44-45. Data for 2008-2009 provided by an anonymous source. Data for 2008 are incomplete.

[145] Article 167(1) and (2) JC.

nate the powers of the judge, and in this case the President does not enjoy discretionary powers. He has to accept the proposal of the Council of Justice and terminate the powers of the judge.

b) Grounds for Termination of Powers

The powers of a judge shall be terminated on grounds unrelated to disciplinary proceedings, if: due to temporary inability to work, the judge has been unable to perform his official duties for more than four consecutive months, or for more than six months during a calendar year; a final court judgment has proved that the judge was appointed to his position in violation of the requirements of law; a judgment convicting him of an offence has become final, or his criminal prosecution has been terminated for any reason other than acquittal; he has for two consecutive years failed to pass annual training programmes; after appointment, he acquired a physical handicap or illness which hinders his appointment to a judicial position.[146] Hitherto, only one judge's powers have been terminated by reason of disability. The law does not provide for the possibility of disciplinary proceedings for the termination of powers. This means that the Council of Justice delivers this decision not as an *ad hoc* court and without basing itself on the rules of administrative court proceedings.

c) The Decision of the Council of Justice

In execution of its decision, the Council of Justice moves the President of the Republic to terminate powers of the judge. Such motion is definitive, comes into force from the moment of declaration and is not subject to appeal. These decisions are published in the official bulletin of the Republic of Armenia and on the judiciary's website.[147]

VIII. Immunity for Judges

Under the Constitution and the laws, judges enjoy immunity from prosecution for their official and even partly unofficial actions. Immunity does not depend on whether the judge acted officially or unoffi-

[146] Article 167(1) JC.

[147] Article 111(6) JC.

cially. He or she may not be arrested, involved as a defendant, or subjected to a court-ordered administrative sanction without the consent of the President of the Republic given on the basis of a proposal by the Council of Justice,[148] and a judge may also not be arrested, with the exception of cases in which the arrest is performed at the time of or immediately after the commission of a crime. In such cases, the arrest of a judge shall be immediately communicated to the President of the Republic and the Cassation Court Chairman.[149] A judge may not be apprehended[150] either.[151]

During his execution of official duties a judge may not be subjected to civil liability for damage inflicted as a consequence of improper performance, unless the damage was inflicted as a consequence of an intentionally-performed act.[152] Even a manifestly unfair judgment made by the judge may not trigger his criminal prosecution unless the act has been quashed by a higher court.[153] Thus only the Cassation Court enjoys the right (incidentally, by consideration of appeals) to establish the fact of the delivery of an illegal decision, a fact which can serve as ground not only for criminal prosecution of the judge, but for instigating disciplinary proceedings against him/her.[154] The delivery of a knowingly illegal judicial act is provided for by Article 352 Criminal Code. According to the author's data, received from lawyers, this article is rarely applied.

The consent of the President of the Republic to the motion of the Council of Justice (see the first paragraph of the current section) is necessary. During his/her term of office and after its termination, a judge may not be interrogated as a witness about a case tried by him/her.[155] In practice, the immunity of judges is respected.[156] No abuses of immunity have been found, either.

---

148 Article 97(3) Constitution and Arts. 13(3) and 168-170 JC.

149 Article 97(3) Constitution and Article 13(2) JC.

150 Taking to a police station or another similar body by force, typically for a personal identity check.

151 Article 13(5) JC.

152 Article 13(8) JC.

153 Article 13(6) JC.

154 Cf. Article 155(5/1) JC.

155 Article 11(5) JC.

156 See the Judicial Reform Index (note 51), at 41.

IX. Associations of Judges

The Association of Judges was founded in April 1997. All 216 judges of the general jurisdiction and specialized courts of Armenia are members of the Association,[157] even though membership is not mandatory. It may be an indication of the formal nature of membership of this organization. Its authorized purposes, in particular, are: assistance in the formation of the legal democratic state, in the development of an independent judicial system, the protection of the interests of the members, assistance in the protection of human rights etc.[158] A special law on the Association does not exist. The Association at this stage does not exert much influence over matters of the judicial community.

The Association, in general, is active in publishing a special journal of the judiciary and disseminating legal literature among its members. The organization's financial dependence on foreign sponsors casts doubt on its autonomy. The fact that the Association of Judges, despite rather active educational work, does not so essentially influence the activity of its members is the result, in general, in the author's opinion, of structural and functional deficiencies in the independence of the judiciary (see, in particular, the final section of this chapter). Among other reasons it is possible to mention the lack of time the majority of judges have for public work and the insufficiency of its own means which narrows the sphere of independent activity.

X. Resources

The Judicial Code prescribes that the courts' budgetary proposals, prepared by the Judicial Department and approved by the Council of Court Chairman, shall contain all the expenditures necessary for safeguarding the normal functioning of the courts.[159] Existing court buildings were renovated or new courts with modern amenities were built in the capital city and some regions of Armenia in recent years with con-

---

[157] Data provided by the Judicial Department in August 2009 by an anonymous source.

[158] Common data about Association of Judges see Judiciary website, available at <http://www.court.am/?l=en&id=173>.

[159] Article 64(5).

siderable financial support from foreign donors;[160] these courts largely meet international standards.

A separate office shall be allocated to each judge.[161] Information on the adequacy of the working environment of judges in practice is not available to the author. Relative to 2005, the financing of courts grew significantly in 2008-2009. In 2009, it almost doubled relative to 2005 and rose by 28.14% over that in 2008.[162] The availability of computer equipment, in particular, in court buildings and courtrooms is adequate in both Yerevan and the regions.[163]

C. Internal and External Influence

I. Separation of Powers

1. Mechanism of Protecting Judges from Undue Influence by the Other Branches of Power

The independence of judges is emphasized twice in the Constitution of Armenia.[164] Various laws which elaborate on the Constitution thoroughly regulate different aspects of independence and prescribe the unlawfulness of interference in the activities of the courts. A judge is obliged not to allow vested interests, public dissatisfaction, or the fear of being criticized to influence him.[165] A judge must withdraw from a case if he has knowledge of circumstances which may cast doubt on his impartiality.[166] Any interference in the activities of a judge is impermis-

---

[160] Notably, in the framework of the judicial reform projects of the World Bank, owing to which fourteen court buildings were fully renovated or built.

[161] Article 81(1) JC.

[162] See the state budgetary laws for 2005, 2008, and 2009. Official Bulletin of the Republic of Armenia, 2005/3 (375), 17 January 2005; 2007/63 (587), 17 December 2007; 2008/74 (664), 26 December 2008.

[163] Data provided by the Head of the Judicial Department, M. Martirosyan in January 2010.

[164] Articles 94(1) and 97(1).

[165] Article 90(3.3) JC.

[166] Article 91(1) JC.

sible and shall be subject to criminal prosecution.[167] A judge must immediately inform the Ethics Committee of the Council of Court Chairmen about any interference with his activities. If the Ethics Committee finds that the judge's activities have been interfered with, it must petition the competent authorities to hold the guilty ones liable.[168] Moreover, failure to notify the Ethics Committee of any interference with his activities triggers disciplinary liability for the judge.[169] The law prescribes the permitted cap on gifts which a judge may receive, as well as the requirement that a judge compile an income and property declaration for himself and persons affiliated with him. Exceeding the permitted cap on gifts or the provision of inaccurate data in the declaration is a ground for reviewing the matter in the Ethics Committee of the Council of Court Chairmen.

In practice, the sometimes thorough safeguards of the independence of the courts which are prescribed in the Constitution and the laws and preclude any undue influence on judges are rarely, if ever, implemented in real life. The lack of independence in fact of general jurisdiction and specialized courts is rather a systemic, fundamental shortcoming of the Armenian judiciary.[170] It is impossible to recall a single case of criminal prosecution of any official for interfering in the activities of judges, although such interference, judging by numerous reliable signs, does take place.[171] It happens in different forms of pressure being put on judges in

---

[167] Article 11(3) JC; Article 332 Criminal Code. Criminal Code of the Republic of Armenia. Official Bulletin of the Republic of Armenia, 2003/25 (260), 2 May 2003 (*ՀՀ քրեական օրենսգիրք, ՀՀ պաշտոնական տեղեկագիր. 2003/25 (260)*). The sanction for interference may be in the form of either a penalty or deprivation of liberty for a maximum term of four years.

[168] Article 11(4) JC.

[169] Article 153(2.6) JC.

[170] Notably, judges themselves usually deny allegations of influence on them; however, in private conversation, many of them do admit that the Armenian judiciary is not independent. See also the Judicial Reform Index (note 51), at 50. This logical inconsistency speaks for itself, illustrating the judges' fear of disclosing details which they ought to have reported to the Ethics Committee of the Council of Court Chairmen.

[171] See The extraordinary report of the Human Rights Defender, About the maintenance of the right to fair trial in the Republic Armenia, at 17 (2009) (*Մարդու իրավունքների պաշտպանի արտահերթ հրապարակային զեկույցը „Արդար դատաքննության իրավունքի ապահովումը Հայաստանի Հանրապետությունում," Եր., 2009*). The Human Rights Defender on the basis of the situation analysis in criminal justice comes to the conclusion that the

cases which concern the vital interests of senior executive officials or private persons affiliated with them.

The practical readiness and ability of the judiciary to withstand pressure should be questioned, because it is impossible to recall a single case of prosecution following undue pressure.[172] According to the information available to the author of this chapter, the Ethics Committee of the Council of Court Chairmen has almost never petitioned the competent authorities to hold liable those guilty of interference in the activities of the courts. It is difficult to tell whether or not judges have addressed the Ethics Committee in this respect. In an atmosphere in which an appeal to public opinion is not a method of self-defence given the low reputation of courts, and judges' trust in higher-standing colleagues is undermined due to the loyalty of the latter to the powers that be,[173] it is difficult to expect that the vast majority of judges would actively resist undue influence. To them, the risk would be disproportionately high and would amount to heroism, while the expectations are minimal. To comply with the basic requirements of the law, they would essentially need their own good reputation, the active support of public opinion and, most importantly, the solidarity of higher-ranking colleagues. In the absence of these three factors, even the best safeguards would become dead letters.

2. Accountability of Judges to Other State Bodies

Judges are legally not accountable to anyone.[174] In practice, according to the author's observations and information received from lawyers during periodic seminars which are organized for them also by the author, however, they often consult the court chairmen about the outcome of cases or get explicit or implicit instruction from them as to how to decide a case. This does certainly not apply to all cases, but only to those which touch upon the material interests of the powers that be

courts in Armenia have not yet been released from an attachment to bodies of criminal prosecution and continue to come under the influence of the Public Prosecutor. See also *supra* notes 21, 62.

[172] In 2006, the Association of Judges in public reproved the Office of the General Prosecutor, which in turn had earlier criticized the judiciary, data available at <http://www.court.am/?l=en&id=173>.

[173] See *infra* C. I. 2. Accountability of Judges to Other State Bodies.

[174] Article 11(2) JC.

or persons affiliated with them. Such instructions are often not even needed, because some judges have become skilled at patterning their behaviour in such cases and can determine with almost absolute certainty *the direction of the wind*. If their gut feeling lets them down, they can make a timely appeal to the court chairman or secure the support of a higher court in advance. The fact that court chairmen and higher-court judges act as self-appointed judicial bosses,[175] persisting in the Soviet-era tradition, seriously undermines the independence and reputation of the judiciary, which finds itself in the vicious circle of its own defencelessness for this reason, among others. A key problem is also the supervision of work discipline performed by court chairmen.[176] Non-grave violations of the work discipline are within the jurisdiction of the Ethics Committee of the Council of Court Chairmen, and the grave and regular violation of such rules involves disciplinary accountability. While requiring that judges honour the procedural deadlines and perform the procedural actions in a timely fashion is a justifiable restriction of their freedom to devise their work schedules, imposing an obligation analogous to the requirements of the Labour Code to be physically present at the workplace[177] and to be supervised in this sense by the court chairmen amounts to a serious restriction of judges' creative freedom in Armenia, a factor which unreasonably limits their independence and forces justice to fit the standards of executive officials and hired employees.

According to his private conversations with some judges the author came to the conclusion that this power of the court chairman sometimes leads to petty faultfinding; for instance, a short delay after the lunch break, though the power is not frequently exercised. Nonetheless, if the chairman of any court has a strained relationship with any of the judges in the court for whatever reason, including personal, the probability that the Chairman will scrupulously exercise this power to

---

[175] See *supra* note 62.

[176] This power is enjoyed by the chairmen of all courts: General Jurisdiction Courts (Article 25(1/2)), Administrative Courts (Article 38), Appellate Courts (Article 49(2)) and the Cassation Court (Article 61(3/7)).

[177] This duty in the Judicial Code is not allocated directly. The Judicial Code also does not contain any provision about the application of the labour legislation to judges. Nevertheless such duty follows from the provisions of the JC establishing a disciplinary responsibility for violation of a work discipline (see in particular, Arts. 153(2/3) and 154(1) JC).

the detriment of the judge, according to the author's observations, rises exponentially.

II. Judgments

1. Basis

The legal bases for judicial decision-making in Armenia are the Constitution, international treaties ratified by the Republic of Armenia, and the laws of the Republic of Armenia (adopted by the parliament or in a referendum).[178] The interim conclusions in other sections of this chapter address various aspects of the question whether judicial decisions are made in practice exclusively on the basis of laws or also under the influence of other factors. All judicial acts done regarding the merits of a case must be in writing and be reasoned (have a *reasoning* section).[179]

The author's own experience of dialogue with first instance court judges considering civil cases has already been discussed in this chapter. It is necessary to note again that the decisions of some of these judges in particular suffer from illegibility, repetitions, insufficient validity and the mixing-up of fact and law and insufficient differentiation between relevant circumstances and those which have no bearing on the decision.

The final part of a substantive judicial act shall be promulgated in an open session of the court, with the exception of decisions in adoption cases.[180] The full text of the judicial act shall be provided to the parties to proceedings. Everyone has the right to become familiar with judicial acts which have become final, with the exception of acts made as a result of a court hearing *in camera*.[181] Judicial acts of the Cassation Court as to the merits of a case must be published in the official bulletin of the Republic of Armenia and on the official website of the judiciary. The Council of Court Chairmen shall define the procedure for publishing

---

178 Article 8 JC.

179 See, for instance, Article 132 Civil Procedure Code, Article 112 Administrative Procedure Code, and Arts. 369-371 Criminal Procedure Code.

180 Article 20(3) JC.

181 Article 20(4) JC. The bases for carrying out court hearings *in camera* are listed more exhaustively in the Constitution: "For reasons of protection of public morals, a public order, state security, private life of participants of trial or interests of justice […]" (Article 19(2).

judicial acts of other courts.[182] To the author's knowledge, such procedure has yet to be approved by the Council of Court Chairmen. According to data given to the author by lawyers, in practice there are essential difficulties in learning about judicial acts of other courts even if they come into effect, although the law (as specified above) guarantees their general availability.

In practice, there are usually no obstacles to access by the public and the mass media to court hearings. In rare cases which draw strong public interest, judges have intentionally misinformed the mass media representatives about the time of the court hearing in order to prevent journalists from rushing to the court.[183] A connected problem is that the courts, with the exception of the Cassation Court, do not have clerks or judges responsible for relations with the mass media.

2. Practice

Official statistics on acquittals could not be found on the website of the judiciary. The information obtained by the author of this chapter for 2006-2007 unfortunately does not contain the percentage of acquittals in the total number of judgments. Nevertheless, it is presented here. In 2006, there were five acquittals in respect of five people. In 2007, there were 11 acquittals in respect of 13 people. In 2008, judgments were passed in 2,431 of the 2,994 cases received by the courts. There were only 11 acquittals in respect of 11 people.[184] Thus, acquittals account for a negligible share of the total number of judgments (less than 0.5% in 2008), which, in conjunction with other factors, illustrates the inculpatory bias of criminal justice.[185]

III. Improper Influence on Judicial Decisions

The interim conclusions in the previous sections of this chapter have addressed different aspects of improper influence on judges. It should

---

[182] Article 67 JC.

[183] Cf. Judicial Reform Index (note 51), at 54.

[184] Data provided by the Judicial Department in August 2009 by an anonymous source.

[185] Partial acquittals were intentionally ignored for the purposes of this chapter. In 2008, there were 18 such.

only be added that the influence of the prosecution office on courts has grown in recent years, in part due to the arrival of new leaders in the Cassation Court, who have a more *friendly* predisposition to it.[186]

Inculpatory bias (i.e. tendency to take the side of the prosecution) is observed in both the adjudication of criminal cases as to the merits and the decisions on pre-trial detention as a preventive measure.[187] Despite the ban prescribed by law,[188] the author's private conversations with judges suggest that *ex parte* communications remain rather widespread. Judges often interact with one party through the medium of their assistants. Bribes are sometimes transferred through assistants, but more frequently the bribe intermediaries are the lawyers for the parties.

As has already been mentioned above, corruption penetrates the entire judicial system of Armenia. Corruption also affects students – future lawyers – and also applicants for the post of judge.[189] The government officially proclaimed the struggle against corruption a long time ago, but it is still not having essential results. Moreover, citizens are sceptical about these efforts.[190]

IV. Security

The security of judges on court premises is ensured by the Service of Judicial Bailiffs, which comes under the Judicial Department.[191] A judge and his family members enjoy the special protection of the state. In the event of threats against the judge or his family members, or the residen-

---

186 Cf. Reports of the Human Rights' Defender (notes 135, 171).

187 The decision to detain in Armenia is made by a judge within 72 hours of the initial arrest (Article 16(3) of the Constitution). See id., at 137 et seq., about the ease and predisposition of judges to cite only the arguments of the prosecution in making such decisions.

188 Article 90(6) JC.

189 See *supra* note 32.

190 See Transparency International Poll Archive, Survey findings of 30 November 2009 about consequences of the government's second anticorruption strategy. According to 61.22% of those interrogated, corruption remains at its former level, and 20.41% consider that it will increase notwithstanding the government's strategy. Only 4.08% trust in the possibility of an essential decrease in corruption.

191 Article 213(1.1) JC.

tial and office space occupied by a judge, if the judge or court so requests, the competent state authorities shall immediately undertake all necessary measures to ensure security.[192] Judges have the right to keep and carry registered arms and special protective equipment.[193] First, this means the granting of police protection and the revealing and prevention of real threats of safety. Violence or threats made to judges or those close to them is a criminal offence.[194]

Serious problems connected with the security of judges have not arisen in Armenia. Threats against judges are rarely expressed; in case of need, police protection is provided.[195] One might even assume that the reason is the lack of factual independence of judges. Resorting to threats or extreme measures in respect of judges makes no sense, because the decision required can be obtained from most of them by means of *soft* pressure which can be exerted by the senior leadership of the structures that are directly or indirectly responsible for ensuring the security of judges. Autonomous organized crime groups capable of threatening judges have not been observed.

D. Ethical Standards

I. Code of Ethics for Judges

The Judicial Code contains a number of general and specific ethical rules regulating various aspects of judicial conduct, including conduct outside their official capacity (chapter 12 JC). These rules concern the activities incompatible with the status of a judge, as well as key matters such as *ex parte* communications, conflicts of interest, and the like. The provisions of the law were elaborated in the Judicial Code of Conduct adopted by the Council of Court Chairmen and the Association of Judges in 2005 on the basis of the Bangalore Principles of Judicial Conduct. The consequences of not adhering to the ethical rules are described above (disciplinary proceedings and review of the complaint/case by the Ethics Committee of the Council of Court Chairmen).

---

192 Article 84(2) JC.

193 Article 84(1) JC.

194 Article 347.1 Criminal Code.

195 See Judicial Reform Index (note 51), at 37.

II. Training

Since 2007, the Judicial School has conducted ethics courses for incumbent judges. The courses address both the ethical rules set out in the Judicial Code and the Judicial Code of Conduct adopted by the Association of Judges in 2005. Apparently, all judges in Armenia have already taken part in these courses.[196] Moreover, in 2008, the Council of Court Chairmen decided to include the judicial ethics course in the mandatory curriculum for judge candidates and in the mandatory curriculum of professional development for incumbent judges.[197] However, it is difficult to tell whether judges base their conduct on these rules. Violations of some of the ethical rules were discussed earlier in this chapter.

E. Supreme/Higher Courts

The most serious problem relating to the selection and appointment of judges of the Cassation Court (the highest court of appeal for general jurisdiction and specialized courts) is the consideration of the unwritten rule concerning personal loyalty to the incumbent authorities.

F. Conclusion

I. Positive Assessments

The adoption of amendments to the Constitution and of a number of key laws mentioned in the Introduction to this chapter would, subject to their application in practice, support tangible progress towards a state truly governed by the rule of law. The unprecedented and unmatched substantial increase in the official pay rates of judges at the end of 2008 can be considered a significant step towards ensuring the independence of judges and reducing corruption. It is still premature to measure the impact of this change on curbing corruption. However, it should be noted that such steps should be coupled with substantial measures against so-called political corruption, i.e. undue influence on

---

196 Id., at 2.

197 Data provided by the Judicial School in August 2009 from an anonymous source.

judges by the political power with the aim of obtaining the required decisions in return for guarantees of immunity for bribe-taking and other unlawful activities. Otherwise, the long-term objectives will not be achieved. First, it is necessary to eliminate the actual involvement of the executive power in the sphere of appointment and promotion of judges, and also genuinely to counteract any external influence on them.

A very positive trend is the construction of new court buildings, the renovation of old ones, and the fitting out of courts with computers which contain an electronic database of legal acts. The creation of the Judicial School where students obtain post-university education, though short, pursues, among others, the aim of making the judicial selection procedures more objective. By guaranteeing a chance of appointment to the best graduates, it will enable the courts to be staffed with competent and dedicated professionals.

II. Negative Assessments

The procedures of the selection and appointment of judges suffer from major shortcomings. The strong influence of the Cassation Court Chairman, his extensive discretionary power to select candidates for appointment without any limitation whatsoever in practice, and his *de facto* power to fail any candidate in the interview in the Council of Justice are impermissible, and the President's power to refuse to include a candidate in the list of judges without giving any reasons, in the opinion of the author of this chapter, does not correspond to the amended Constitution and must be revised. Moreover, the procedure has been artificially made very cumbersome and, partly for this reason, is not transparent enough. The number of female judges does not correspond to the requirements of law concerning quotas for female candidates in the lists of judicial candidates. Moreover, the present situation must be changed, as not a single representative of a national minority is currently working in the Armenian judiciary.

The power to supervise judges' compliance with the so-called rules of work discipline enables court chairmen to exercise petty-minded meddling in courts and unreasonably limits judges' creative freedom and, thereby, their independence. The case assignment system, despite some efforts, still does not prevent the arbitrary will of court chairmen from being revealed, thereby failing to ensure the necessary safeguards of the right to a lawful judge. The selective use of disciplinary proceedings casts serious doubt on the genuineness of fair trial guarantees; the Cass-

ation Court Chairman's influence on members of the Council of Justice makes the collective nature of the Council a mere formality.

Fundamental shortcomings of the judiciary include its corrupt nature, poor self-esteem, the inculpatory bias in criminal cases, and inability to withstand undue influence and instructions of the powers that be. Based on the foregoing, the independence of the Armenian judiciary can be characterized as something which is guaranteed by law, but not (yet) implemented in practice.

III. Recommendations on Strengthening the Independence of the Judiciary

1. Genuine Efforts

Systemic measures are needed to change the current situation, and these require first and foremost the will of the senior leadership of the executive power. Some of the key steps taken to date need to be supplemented with genuine, rather than declaratory, measures to counter corruption, starting from the exercise of self-restraint in not giving undue instructions to judges. The basic precondition for this purpose is execution of the laws concerning judicial authority, in particular, removing and holding responsible those officials who interfere with judges' activity. It is necessary to strengthen independence and renew the professional personnel in the body responsible for the control of such infringements – in the Public Prosecutor's Office. It may seem like utopia for the time being, but is possible in the future.

2. Recommendations de lege ferenda

It is necessary, in the framework of the selection and appointment procedure for judges, to regulate the procedure for conducting interviews in the Council of Justice by precluding the possibility of posing professional (legal) questions to aspirants. The absence of rules gives an extralegal character to this procedure; and, most importantly, the permissibility of legal questions in the interview contradicts the logic of the examination, making the first, qualifying (written) examination meaningless.

The interview should be conducted on the basis of a special psychological test aimed at revealing that candidates have the personality traits that judges need. It is necessary also to establish an accurate, transparent and

predictable order in the interview procedure. The interview results should also be evaluated on a grading scale. Thus the total points necessary for inclusion in the list of judges should for instance come as to two thirds from the examination evaluation and as to one third from the interview. Moreover, it is necessary to preclude the President being able to refuse to include a candidate in the list of judges without giving any reasons and to prescribe the right to contest such decisions. Moreover, it is necessary for the Council of Justice and the President to be bound by their own past practice, with some exceptions. Exceptions should concern only those cases in which due to prevailing public interests (change in a legal or factual situation), these bodies intend henceforth to take other discretionary decisions.

The possibility of appeals should be prescribed in cases of refusal to include a candidate in the Official Promotion List or refusal to appoint a judge candidate to a higher court. The role of the Cassation Court Chairman should be brought into line with the essence of the constitutional amendments. His powers to select and nominate candidates for appointment should be transferred to the Council of Justice. Moreover, the *ex officio* combination of the functions of the Chairman of the General Meeting of Judges and those of the Chairman of the Council of Court Chairmen and the Council of Justice should be prohibited.

Classes in the Judicial School should end, rather than start, with a qualification exam. Entrance to the Judicial School should become accessible to any graduate of an advanced law school on a competitive basis, under condition of sufficient independence of the Judicial School in the organization of an admission examination and the transparency of this examination to the public. The qualification examination should complete the training process, and the best graduates should be invited for interview in the Council of Justice. One year's practice (at least) in courts of different levels should be part of the training. It is necessary also to prescribe a longer period of training there, with an exception only for practising lawyers and law academics.

The Council of Court Chairmen should prescribe a case assignment system for all courts which will be based on objective criteria (drawing lots, an automatic system, or the like). Moreover, the reassignment of cases in some instances should be done not by the court chairman, but rather by a body made up of several judges of the court in question.

To increase the chances of a judge having his report of undue influence on him reviewed, it is necessary to give judges the power to take such cases to the General Meeting of Judges and to give the General Meeting the power to make an autonomous appeal demanding that the compe-

tent authorities punish those found guilty. The concept of work discipline and the Court Chairmen's power to supervise compliance with rules of work discipline should be excluded from the Judicial Code. It is necessary to prescribe the judge's right to determine his own work schedule in line with the procedural deadlines and to inform the Court Chairman thereof.

Judicial Independence in Kyrgyzstan and Kazakhstan: A Legislative Overview

Maksat Kachkeev

The newly independent states of Kyrgyzstan and Kazakhstan have, since gaining their independence in 1991, experienced a number of judicial reforms,[1] which reflect global acceptance of the rule of law principles in general and the principle of judicial independence in particular. The independence of judges is necessary to protect the individual from arbitrary interference with his rights, and an independent judge acts as a neutral mediator in private-law disputes. Crucial indicators of judicial independence are the manner of the selection and recruitment of judges, their term of office and the reasons for their removal from office.[2] As this overview will show, there are still major flaws in these matters which make the judiciary largely dependent on presidential powers.

[1] See also M. Kachkeev, Die Stellung der Richter in Kirgistan and Kasachstan (Status of Judges in Kyrgystan and Kazakhstan) (2007).

[2] See also General Comments Nr. 13 of the Human Rights Committee, HRI/GEN/1: "In particular, States parties should specify the relevant constitutional and legislative texts which provide for the establishment of the courts and ensure that they are independent, impartial and competent, in particular with regard to the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the conditions governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative".

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233, DOI 10.1007/978-3-642-28299-7_28,

Part I: Judicial Independence in Kyrgyzstan

A. Introduction

The new Constitution of the Kyrgyz Republic, which was approved by the referendum on 27 June 2010,[3] explicitly enshrines judicial independence by laying down that a judge must obey only the Constitution and the law.[4] Furthermore, the Constitution prohibits anyone from asking a judge for an account of any case.[5] The Law on the Status of Judges lays down the rules on judicial independence without explicitly mentioning either the executive or the legislative branch of government. According to that Law the courts must dispense justice on their own account, independently of any outside influence.[6] Judges must carry out their duties impartially, without showing preference of any bodies, persons or parties participating in the trial. Any Law or legal act which challenges the independence of a judge is also not allowed.[7] From a theoretical perspective, the definition of "judicial independence" is very important, for its components are intended to buttress the judiciary against the influence of other branches of power. The Law on the Status of Judges specifies the following elements: the dispensing of justice exclusively based on the law; the prohibition of any interference in a judge's work; the irremovability of judges; the immunity of judges; the provision of social and material guarantees; and the functioning of bodies of judicial self-administration.[8] Since the communist era efforts have been made to reduce government dominance over the judicial branch. Gradually structures have been established which are designed to reduce the influence of the State president and to involve the judiciary in judicial administration. An important step was the guarantee of lifetime appointments after an initial appointment for five years. Nevertheless there are

---

3 After his overthrow on 7 April 2010 the President flew out of Kyrgyzstan. The new Interim Government overruled the Constitution of 23 October 2007 and declared constitutional reform. The new Constitution of the Kyrgyz Republic was approved in the Referendum on 27 June 2010. Hereinafter the new Constitution will be referred to as a main source.

4 Article 94 (2) of the Constitution.

5 Article 94 (3) of the Constitution.

6 Article 3 (3) of the Law on the Status of Judges.

7 Article 3 (3) of the Law on the Status of Judges.

8 Article 11 (1) of the Law on the Status of Judges.

still flaws in the current system which require further improvement, such as in the selection process and disciplinary proceedings.

B. Structural Safeguards

I. Administration of the Judiciary

1. Organs in Charge of the Administration of the Judiciary

In Kyrgyzstan the administration of the Judiciary is exercised by different organs. While, according to the new Kyrgyz Constitution adopted on 27 June 2010, the Council on the Selection of Judges (*Sovet po otboru sudej*) is responsible for the selection process, the Council of Judges deals with disciplinary proceedings in respect of a judge. The old organ for the selection of judges, the National Council of Judges mentioned in the Law on the Status of Judges, was abolished with the adoption of the new constitution. Thus, there are some inconsistencies with regard to the body responsible for the selection of judges between the new Constitution and the Law on the Status of Judges, which has not been revised in accordance with the new constitutional provisions. The Judges' Congress (*S'ezd sudey*) is more of a decorative body, which includes all the judges of the republic from all levels of the court hierarchy.

The Judicial Department is an organ of judicial administration in terms of its organizational and financial support for judicial activity. In accordance with its statute the Judicial Department is a state agency embedded in the judicial branch and responsible for the material-technical support of local courts' activities.[9] Another area of responsibility is the enforcement of judgments. In terms of material support the Judicial Department carries out the drafting of budgets specifying a pre-set budget allowance for all local courts, the Council of Judges, the National Council of Justice (or the Council on the Selection of Judges, according to the new Constitution), the Judges' Congress and the Judicial Department itself.[10] The collection of statistical data together with human resources issues also come within the area of the Judicial Depart-

[9] Para 1 of the Provision on the Judicial Department.

[10] Para 4 of the Provision on the Judicial Department.

ment's responsibility.[11] The Judicial Department, moreover, has some mediatory functions as regards liaison between courts and state organs.

2. The Council of Judges

The Law on Judicial Self-Administration stipulates the Council of Judges and the Congress of Judges as the main bodies responsible for judicial self-administration.[12] According to that law this can be described as a complex of measures to organize the judicial community, allowing it to resolve matters of internal activity through special organizations of self-administration.[13] The main body of judicial self-administration is the Congress of Judges, which must be convened not less than once every three years.[14] The Council of Judges is a body of judicial self-administration which acts in the intervals between the Congresses. The Council of Judges is accountable to the Congress of Judges and its members are to be elected by simple majority of the Congress for a three-year term of office. The Council of Judges consists of 15 members representative of the judicial community.[15] An important stipulation is that the Chairmen of the Constitutional and the Supreme Court and their deputies are not permitted to be members of the Council of Judges.[16] The main area of the Judicial Council's responsibility is the protection of judges' rights. That is achieved by the way in which disciplinary measures against a judge are handled.[17]

With respect to judicial appointments the National Council of Justice was responsible for selecting judges for both the Supreme Court and local courts according to the repealed Constitution, which dated from 2007.[18] The main task of that organ was the selection of judges for vacancies on the bench. It consisted of 16 members: four from the judiciary, four from the legislative branch, four from the executive power and

---

11 Id.

12 Article 1 (2) of the Law on Judicial Self-Administration.

13 Article 1 (1) of the Law on Judicial Self-Administration.

14 Article 6 of the Law on Judicial Self-Administration.

15 Article 8 (2)-(3) of the Law on Judicial Self-Administration.

16 Article 8 (6) of the Law on Judicial Self-Administration.

17 Article 2 (9) of the Law on Judicial Self-Administration.

18 Article 84 (4) of the Constitution of 2007.

four from NGOs.[19] Certain doubts about the true independence of the Council arose from the fact that the entire list of possible members was subject to approval by the president of the republic.[20] The new Constitution therefore created a new body of judicial selection, the Council on the Selection of Judges, so that the National Council of Justice could be abolished.[21] The Council of Judges, the ruling coalition in the parliament and the parliamentary opposition each elect one third of this organ from representatives of judicial and civil society.[22] Since the new law on the Council on the Selection of Judges has not yet been passed, the National Council of Judges still remains the main body for the selection, appointment and reappointment of judges.

II. Selection, Appointment and Reappointment of Judges

1. Eligibility

The Kyrgyz Constitution and the Law on the Status of Judges regulate judicial selection. According to the Constitution a citizen of the Kyrgyz Republic must be no less than 30 but no more than 65 years old in order to be appointed as a judge of a local court.[23] In addition to this requirement, the possession of higher legal education and not less than ten years' professional experience are also required.[24] The specific requirements for appointment can be found in the Law on the Status of Judges. It is important to note that the amendments to this Law dating from 19 January 2010 raised a new obstacle in the selection process. That occurs because of the introduction of the requirement of a so-called "certificate" of additional education and the passing of the examination upon graduation which is necessary for admission to the further selection process.[25] This certificate can be obtained at the Educational Centre of Judges (*Uchebnyi Zentr Sudei*), set up especially for this purpose. The certificate is valid for three years. The educational and

---

19 Article 6 (1) of the Law on the National Council of Justice (still in force).

20 Article 6 (2) of the Law on the National Council of Justice.

21 Article 95 (4) of the Constitution.

22 Article 95 (7) of the Constitution.

23 Article 94 (8) of the Constitution.

24 Id.

25 Article 17 (2) of the Law on the Status of Judges.

organizational process (such as the development of the curriculum and the appointment of its head) of the Educational Centre is organized under the supervision of the Council of Judges. This requirement is obligatory for people who have had no judicial experience, and cannot be seen as objective because the Constitution explicitly states that general university legal education is all that is needed. Furthermore, the additional legal courses for potential judges are regulated by a statute passed not by the parliament but signed and approved by the president of the republic. The lack of the highest standard of legitimation by the parliament can lead to the arbitrary handling on the part of the executive of such a sensitive process as the selection of judges. People with a criminal record and those who have been dismissed from judicial office on the ground of "flawed" behaviour are not eligible.[26] Professional experience can be defined according to the list of judicial professions approved by the president of the republic.[27]

2. The Process of Judicial Selection

Prior the amendments to the Law on the Status of Judges the judicial selection process consisted of two main parts: the qualifying examination and an interview.[28] With the introduction of the additional education into the selection process the qualifying examination was abolished. The recruitment process begins with the advertising of a vacancy for a particular position.[29] The interview is conducted by the National Council of Justice (now the Council on the Selection of Judges).[30] Neither the Law on the National Council of Justice nor the Law on the Status of Judges contains any specific provisions about the procedure for, the subject of or any other particulars regarding the conduct of the interview. The Law on the Status of Judges mentions only that the interview shall be carried out by means of a procedure defined by the National Council of Justice. Acting judges with not less than five years' professional experience on the bench and those who have successfully

---

[26] Article 17 (3) of the Law on the Status of Judges.

[27] Id.

[28] Article 18 (2) of the Law on the Status of Judges.

[29] Article 18 (4) of the Law on the Status of Judges.

[30] The Law on the National Council of Justice is currently still in force and the Law on the new Council on Selection of Judges has not yet been passed. Therefore the National Council is referred to.

completed the Educational Centre of Judges' examination and have a valid certificate are exempt from interview.[31] Upon being given the results of the interview the members of the National Council (Council on the Selection of Judges) vote and take a decision about candidates for further appointment for the bench.[32] The final decision, however, is taken by the president of the republic.[33] The president has the right to reject the relevant candidate, and in such case the National Council (Council on Selection of Judges) must recommend a new candidate from among those who took part in the selection process.

Compared to that under the old constitutional provisions the selection process has made real progress and has been crucially improved. The old 1993 Constitution made the legal department of the president's administration solely responsible for the recruitment process. Nonetheless the executive power, in the person of the president, still has a certain lever with which to influence the selection process. It comes into play by the nomination of the National Council's (Council on the Selection of Judges') members and by the final appointment of the relevant candidate, where the President still has a right to reject the relevant candidate.[34]

3. Length of Office and Reappointment

Positive steps were taken in respect of length of office. According to the old constitutional provisions local court judges were appointed by the president for a term of seven years.[35] The need to be reappointed by the president and the resulting dependence of judges on the president's office brought judicial independence into question. The 2007 Constitution[36] stipulated – and the new Constitution of 2010 retained the provision – that a judge shall be appointed for the first time for five years and, once reappointed, until retirement age, i.e. life tenure.[37] As mentioned above, according to the new Constitution of 2010, the president

---

31 Article 21 (1) of the Law on the Status of Judges.

32 Article 21 (3) of the Law on the Status of Judges.

33 Article 22 of the Law on the Status of Judges.

34 Article 22 (2) of the Law on the Status of Judges.

35 Article 80 (2) of the Constitution of 5 May 1993.

36 Article 83 (6) of the Constitution of 2007.

37 Article 94 (8) of the Constitution.

is responsible upon the suggestion of the Council on the Selection of Judges (according to the Law on the Status of Judges which is still in force, the National Council of Judges) for appointments in both cases.[38]

III. Tenure and Promotion

As mentioned above ordinary judges are appointed until retirement age if they survive their first term of appointment. Judges can be promoted only from ordinary judge to court chairman. The old constitutional provision envisaged that the chairmen of local courts would be appointed by the President at the suggestion of the National Council of Justice for a period of five years.[39] This took place by way of public competition following the advertising of a vacancy in a local newspaper.[40] The new Constitution changed this procedure and stipulated that the chairmen of local courts should be elected by the members of the relevant court.[41] Since the Law on the Status of Judges has not yet been amended in accordance with the new Constitution, there are still no specific regulations with regard to this issue.

IV. Remuneration

1. Remuneration

The conditions of remuneration are regulated in the Law on the Status of Judges.[42] A judge's salary is provided from the state budget. Adequate remuneration is crucial in terms of the further prevention of corruption. The Achilles' heel of judicial independence from the executive lies in the fact that the president determines the conditions of payment at the suggestion of the Council of Judges.[43] The old 2007 Constitution stipulated that the president should be responsible for the "definition of

38 Id.

39 Article 83 (6) of the Constitution of 2007.

40 Article 24 of the Law on the Status of Judges.

41 Article 94 (8) of the Constitution.

42 Article 32 of the Law on the Status of Judges.

43 Article 32 (1) of the Law on the Status of Judges.

wage conditions of civil and municipal servants".[44] This took place by means of presidential decree, which explicitly set out the amount of remuneration payable to judges of all levels. The new 2010 Constitution vests neither the executive nor the legislative with the power to settle wage conditions for civil servants including judges. An important issue appears to be a provision that the salary of a judge cannot be reduced during his term of office. This prevents improper influence being exerted on the judiciary by the manipulation of salary conditions.

2. Benefits and Privileges

There are two main issues in terms of judges' privileges. One concerns living conditions and the other insurance issues. The Law on the Status of Judges stipulates that each judge should be provided if necessary with an official residence or with money to compensate him for rental costs.[45] The official residence shall be located within easy reach of the location of the relevant court. Every judge is insured for both medical and life insurance purposes at the expense of the state.[46] In the event that a bodily injury incurred during the execution of a judge's office prevents him from carrying out his professional activity the judge has the right to monthly pecuniary compensation for the injury.[47] In the event of a judge's death in office his family has a right to lump sum compensation. Depending on his length of service each judge is entitled to additional annual leave of from two to six days.[48]

V. Judicial Accountability: Discipline and Removal Procedures

1. Formal Requirements

Disciplinary proceedings are regulated by the Law on the Status of Judges and can be initiated in three cases. The first is upon a complaint made by a natural or legal person. The second case arises where a state authority or the chairman of the relevant court makes a disciplinary ac-

---

44 Article 46 (1) of the Constitution of 2007.

45 Article 32 (2) of the Law on the Status of Judges.

46 Article 33 (1) of the Law on the Status of Judges.

47 Id.

48 Article 34 of the Law on the Status of Judges.

cusation against a judge. Disciplinary proceedings can be initiated upon a special court ruling passed by the next higher court, which is problematic in terms of internal independence.[49] The main body responsible for the implementation of disciplinary proceedings is the Council of Judges.

The offences leading to disciplinary proceedings are also set out in the Law on the Status of Judges. The main ground for initiating disciplinary proceedings is a disciplinary offence.[50] A disciplinary offence according to the Code of Ethics is a dishonourable action which may not be criminal but is clearly incompatible with the "sonorous title" of judge and includes the making of "wrongful" sentences, decisions and orders.[51] It is worth mentioning that the list of offences leading to the initiation of disciplinary proceedings is quite long and not overly exact. Such an offence can be defined as any action which does not sit well with the irreproachable conduct expected of a judge.[52] Any other activity not compatible with the office of chair serves as another identification of a disciplinary offence.[53]

It is necessary to turn our attention to the definition and classification of "irreproachable conduct".[54] According to the Law on the Status of Judges such conduct has a broad definition and is notable for the vagueness of its features. This can be for instance "strict law and Constitution observance", which is actually a ground for revision by a higher court. On the other hand the definition of "irreproachable conduct" contains such moral categories as responsibility "for observing the Code of Ethics" or "avoiding the whole of what can disgrace the authority or dignity of the judge or raise doubt about his fair, conscientious and impartial dispensing of justice". Further "irreproachable conduct" includes the observation of the secrecy of the consultation room and work regulations. The obligation "to resist all attempts of unlawful interference in the exercise of justice activity" and "to use all efforts for the resolution of a conflict of interest" seems to be most controversial in this regulation.

---

49 Article 29 (1) of the Law on the Status of Judges.

50 Article 28 (1) of the Law on the Status of Judges.

51 Para. 8 of the Code of Ethics.

52 Article 28 (1)of the Law on the Status of Judges.

53 Id.

54 Article 6 (1) of the Law on the Status of Judges.

2. Disciplinary Proceedings

As mentioned above, the Council of Judges is the main body responsible for the conduct of disciplinary proceedings. Disciplinary proceedings are to be initiated no later than six months after the offence was discovered but also no later than three years after the offence was committed.[55] The Council shall nominate a commission composed of its members, which shall conduct the official investigation within a period of one month.[56] During the course of the investigation the commission must interview both the relevant judge and the person who made the complaint or must carry out any other actions necessary to collect all the information about the causes and circumstances which led to the filling of the complaint. Upon completion of the investigation, the commission must submit a report providing, among other things, a preliminary memorandum of guilt or innocence, which must be submitted to the Council of Judges.[57] The relevant judge must be acquainted with the materials relevant to the disciplinary proceedings.[58] The Council of Judges shall decide further whether sanctions will be applied or the proceedings terminated.[59]

3. Sanctions

There are two types of sanctions which can be applied to the relevant judge: (1) a disciplinary penalty and (2) premature dismissal from office.[60] In turn, there are two types of disciplinary penalty: admonition and reprimand. It should be noted that a reprimand and premature dismissal from office can be imposed for the commission of two offences: (1) harsh law and Constitution enforcement; and (2) the neglect of the judge's responsibility "to observe the Code of Ethics" or "to avoid anything which could disgrace the authority and dignity of the judge or raise a doubt about his fair, conscientious and impartial exercise of justice".[61] This shows that the Court of Justice has a high degree

55 Article 28 (1) of the Law on the Status of Judges.

56 Article 29 (2) of the Law on the Status of Judges.

57 Id.

58 Article 29 (3) of the Law on the Status of Judges.

59 Article 29 (4) of the Law on the Status of Judges.

60 Article 28 (2) of the Law on the Status of Judges.

61 Article 28 (4) of the Law on the Status of Judges.

of discretion in whether to impose the extremely severe measure of premature dismissal, or a milder sanction, like reprimand. An admonition should be imposed in the case of the other offences provided for by the definition of "irreproachable conduct" mentioned above. Where such offences are repeated within a period of one year, a reprimand shall be applied to the relevant judge. And subsequently, if such an offence has been again committed within the same period of time, the judge must be dismissed from office.[62] The president, upon a request of the National Council of Justice based on the decision of the Council of Judges, makes the decision about the premature dismissal of a judge.[63] The Law on the Status of Judges leaves open the question whether the president has the right to reject the decision of the Council of Judges or is bound by it.

4. The Code of Ethics as a Part of the Disciplinary Responsibility

The Code of Ethics was passed at the V. Congress of Judges in 2006. This document establishes the ethical principles of a judge's behaviour, which include both legal aspects of his professional activity such as observation of the Constitution and moral characteristics such as tolerance, politeness and respect towards the parties.[64] Further, the Code of Ethics stipulates the responsibilities of judges in fulfilling their duties, which include impartiality, conscientiousness and also the obligation "to improve professional qualification and to maintain skills at proper level". Also a judge must keep professional secrets and may not make any public statements or comments on pending cases before the entry into legal force of the judgment. Extra-occupational activity is also covered by the Code of Ethics, so that any other paid activity except for scientific, academic or creative activity is prohibited.[65] More important is the judge's responsibility to avoid any personal relationships which could cause damage to the image of a judge. The Code of Ethics is crucial, because adherence to it is an important part of the definition of "irreproachable conduct", the violation of which may lead to the initiation of disciplinary proceedings and subsequently to premature dismissal from office. The Code of Ethics expands even the definition of the "dis-

---

62 Id.

63 Article 28 (5) of the Law on the Status of Judges.

64 Para 2 of the Code of Ethics.

65 Para 6 of the Code of Ethics.

ciplinary offence" by explicitly including wrongful sentences, decisions and orders.

VI. Security

If a judge's life is threatened, the state must provide him with adequate security measures. This obligation can be fulfilled by, for instance, providing him with personal security, arming him, transferring him to another court or transferring him to a secure location.

Part II: Judicial Independence in Kazakhstan

I. Administration of the Judiciary

1. Organs in Charge of the Administration of the Judiciary

The Constitution of the Republic of Kazakhstan defines the Supreme Judicial Council as the main organ of judicial administration. The old provisions, which included the repealed Laws on the Supreme Judicial Council and the Qualification Chamber of Justice, shared out the competences as regards the recruitment of judges by reason of their affiliation to the different levels of the court system – district, regional or Supreme Court. During the old regime the Supreme Judicial Council was responsible for the recruitment of the regional and Supreme Court judges; the Qualification Chamber of Justice selected the judges for district courts. By the new Law on the Supreme Judicial Council the recruitment and selection process was centralized in that organ. The new Law "On Supreme Judicial Council" was adopted by the Kazakh Parliament on 5 January 2009.

2. Supreme Judicial Council

Since the President of the Republic is responsible for the final appointment of a judge the Law on the Supreme Judicial Council contains an explicit provision that that body is designed to support the President when exercising his constitutional power on the formation of the judi-

cial system.[66] The Law unfortunately left the President with the competence to appoint the Council's members at his sole discretion.[67] This new provision can be considered a backward step from the old Law on the Supreme Judicial Council,[68] which contained a clear and explicit rule that it had to be composed of representatives of the Judiciary,[69] the Executive (Minister of Justice) and the Legislative branch.[70]

3. Committee on Judicial Administration

The Committee on Judicial Administration is responsible for the technical and organizational support of the courts' activities and also for the enforcement of judgments.[71] The Statute regulating its activity explicitly particularizes the Committee as a body attached to the Supreme Court,[72] and therefore all proposals should be made by the Committee only with the approval of the Supreme Court's Chairman. These decisions relate to such issues as the setting up, reorganization and abolition or state financing of courts.[73] The crucial impact of the executive is by way of the person of the president because, according to the Law on the Judicial System and the Status of Judges he/she is responsible for the setting up, reorganization and abolition of the courts.[74] Another sensitive point, which increases the Executive's influence on the Committee's activity, is the fact that the Chairman of the Committee is appointed and dismissed by the president on the suggestion of the Supreme

---

66 Article 1 of the Law on the Supreme Judicial Council.

67 Article 3 of the Law on the Supreme Judicial Council.

68 The Law on the Supreme Judicial Council of 28 May 2001 (annulled by the new Law on the Supreme Judicial Council of 17 November 2008).

69 Chairmen of the Constitutional Council and the Supreme Court, two judges of the Supreme Court, two judges from the provincial and district courts.

70 Two members of the Senate.

71 The activity of the Committee is regulated by the Statute confirmed by the president's decree of 12 October 2000.

72 Para. 1 of the Statute on the Committee on Judicial Administration.

73 Para. 11 of the Statute on the Committee on Judicial Administration.

74 Paras 6 and 10 of the Law on the Judicial System and the Status of Judges of 25 December 2000.

Court's Chairman.[75] On that score there are substantial doubts about the institutional independence of the Committee.

II. Selection, Appointment and Reappointment of Judges

1. Eligibility

The Constitution states that a citizen of the Republic of Kazakhstan who has reached the age of 25, passed the qualification examination and has not less than two years' work experience in the legal sphere is eligible to be appointed as a judge. The Constitution stipulates explicitly that other requirements may be laid down by the legislation. Such a requirement is probationary training at a court and a subsequent recommendation with a positive response from the relevant court. The new Law on the Supreme Judicial Council of November 2008, which entered into force in January 2009, amended the eligibility requirements by adding new criteria for candidates for the bench. Such criteria are a medical check-up and a special inspection.[76] The latter is conducted by the secret services in order to establish whether any crimes have been committed by the candidate. Another important amendment was the introduction of the so-called "Specialized" Master's Degree Programme in addition to already completed legal education. Candidates who are graduates of this programme are excused probationary training at a court.

2. The Process of Judicial Selection

As mentioned above, the Supreme Judicial Council is the main body responsible for the judges' recruitment and selection process. After the reform of 2009 the Qualification Panel of Justice, which had been responsible for the primary recruitment and selection process, was abolished. The Supreme Judicial Council, or more precisely its Qualification Commission, has been authorized to exercise this competence. The Commission consists of five legal scholars appointed by the Supreme Judicial Council and three Judges sent by the Judicial Jury.[77] The Com-

---

[75] Para. 15 of the Statute on the Committee on Judicial Administration.

[76] Article 29 of the Law on the Supreme Judicial Council.

[77] Article 10 of the Law on Supreme Judicial Council.

mission is responsible for conducting the examination of candidates. The new Law on the Supreme Judicial Council contains a regulation which expressly prohibits those dismissed on account of "impugning action or breach of the law during the conduct of official duties" from being admitted to the qualification examination.[78]

The qualification examination is the first level of the selection process. Candidates who have successfully passed the qualification examination shall be included in the reserve pool of judges. The next step on the path of appointment as a judge is probationary training at a court.[79] This is aimed at permitting the candidate to learn the peculiarities of the judiciary and to acquire the necessary practical and organizational skills. The length of the training depends on the candidate's previous experience, but should be of no less than three months and no more than one year. The court chairman plays a crucial role during the process of training by making decisions on the length of the training, the candidate's work plan and about a training supervisor. Upon the completion of training the candidate must prepare a report, which shall be submitted to the full court. The full court will appraise the report and submit the opinion to the Supreme Judicial Council. Thereupon the Council will put the relevant candidate to the President for the purpose of further appointment.

3. Length of Office and Reappointment

A judge is appointed until she/he reaches the age of 65. In extraordinary circumstances the term of office can be extended by the Chairman of the Supreme Court with the consent of the Supreme Judicial Council.[80] The appointment of chairmen of courts and divisions of courts is made by the president of the republic upon the recommendation of the Supreme Judicial Council for a period of five years. The Law on the Judicial System and the Status of Judges does not contain any details on the selection process for candidates.

---

78 Article 12 of the Law on Supreme Judicial Council.

79 Regulation on Probation Training at Court of 26 June 2001.

80 Para. 34 (1) of the Law on the Judicial System and the Status of Judges.

III. Tenure and Promotion

According to the Law on the Judicial System and the Status of Judges, Kazakh judges are appointed "on a regular basis" i.e. with life tenure.[81] The chairmen of the district and regional courts are appointed by the President upon a proposal from the Supreme Judicial Council for a period of five years. In order to be promoted to the bench at a regional court a candidate must comply with the necessary requirements for district judges and moreover have work experience in the legal sphere of not less than 15 years or five years as a judge.[82]

IV. Remuneration and Privileges

The Kazakh Law on the Judicial System and the Status of Judges postulates the material security of judges and the prohibition of its reduction as one of the key guarantees of judicial independence. But nevertheless this issue lies within the competence of the President, who determines the salaries of judges in accordance with his constitutional competence to set up the financing and remuneration system for public sector workers.[83] In that case the Kazakh legislation does not draw any distinction between government workers and judges.

The question of the provision of housing is answered in the sense that judges should be provided with residential space from state budget resources no later than six months after their entry into office.[84] Furthermore after ten years of living in the residence allocated, a judge has a right to buy it at depreciated value. Judges and members of their families are also provided with medical services in relevant health care institutions.[85]

As mentioned above, a judge's retirement age is 65, but in an extraordinary case it can be extended for a period of no more than five years. The Chairman of the Supreme Court with the consent of the Supreme Judicial Council is responsible for that matter. However, the pension

---

81 Article 24 of the Law on the Judicial System and the Status of Judges.

82 Article 24 of the Law on the Judicial System and the Status of Judges.

83 Article 44 (9) of the Constitution.

84 Article 51 of the Law on the Judicial System and the Status of Judges.

85 Article 53 of the Law on the Judicial System and the Status of Judges.

provision is about 200 USD, which is able to cover only essential needs and remains inadequate as a result.

V. Judicial Accountability: Discipline and Removal Procedure

1. Formal Requirements

The Statute on the Disciplinary Board of the Republic and the Regions establishes a legal framework for disciplinary proceedings in Kazakhstan.[86] The following offences can lead to the initiation of legal proceedings: (1) an offence against the law, (2) an impeachable offence, and (3) gross breach of labour discipline. Against court and tribunal chairmen disciplinary proceeding may also be initiated on the ground of inadequate fulfilment of their official duties.[87] The key body responsible for the initiation of disciplinary proceedings against all judges of the republic is the republican disciplinary board.[88] Members of the republican disciplinary board are elected at a plenary session of the Supreme Court from among its judges for a period of two years.[89] The regional disciplinary boards have the right to initiate disciplinary proceedings against the judges of the relevant regional court and district courts situated in their region.[90] The members of regional disciplinary boards are elected at a plenary session of the relevant regional court from among its judges also for a period of two years.[91] While the number of members of the republican disciplinary board cannot be fewer than seven, the Statute on the Disciplinary Board of the Republic and the Regions puts the number of members of regional disciplinary boards at no fewer than three but no more than seven.

---

86 Affirmed by the President's Decree N. 643 of 26 June 2001.

87 Article 39 of the Law on the Judicial System and the Status of Judges.

88 Article 41 of the Law on the Judicial System and the Status of Judges.

89 Para 4 of the Statute on Disciplinary Board of the Republic and the Regions.

90 Article 41 of the Law on the Judicial System and the Status of Judges.

91 Id.

2. Disciplinary Proceedings

The main positive difference between Kazakh disciplinary proceedings and Kyrgyz ones is that the proceedings themselves have two levels – that of the regional disciplinary boards and the disciplinary board of the republic. While the regional disciplinary boards are responsible for disciplinary proceedings against judges of district and regional courts,[92] the republican disciplinary board performs the function of disciplinary body for judges of the Supreme Court and the chairmen of the regional courts.[93] The republican disciplinary board also deals with claims against decisions of the regional disciplinary boards. The Law on the Judicial System and the Status of Judges leaves it open whether there is an appeal against a judgment of the republican disciplinary board which has been made as first instance.

3. Sanctions

The following sanctions can be applied to a relevant judge: (1) admonition, (2) reprimand, (3) reduction in rank, (4) dismissal of a district or regional court chairman from office as chairman, and (5) premature dismissal.[94] The breaches of duty which lead to premature dismissal are similar to those set out in the Kyrgyz legislation, and include (1) failure to observe the Constitution (2) failure to observe "the judges' ethic" while performing his official functions and off duty and failure to "avoid anything which may disgrace the authority and dignity of a judge or raise doubt about his objectivity and impartiality", (3) failure to "resist all attempts of unlawful interference in the administration of justice", and (4) failure to keep the secrets of the consultation room.[95] The decision about the premature dismissal of a judge should then be considered by the Supreme Judicial Council and confirmed by the President.

---

92 Article 43 of the Law on the Judicial System and the Status of Judges and para 10 of the Provision on the Disciplinary Panel.

93 Id.

94 Article 40 of the Law on the Judicial System and the Status of Judges.

95 Article 28 of the Law on the Judicial System and the Status of Judges.

4. Judicial Jury

Due to amendments of the Law on the Judicial System and the Status of Judges of 2007[96] a new organ supervising judges' activity, the so-called Judicial Jury, was set up. The Judicial Jury is responsible for the identification of "professional suitability",[97] so the decision of the Judicial Jury, unlike decisions of the republican and regional disciplinary bodies, can serve as a ground for the termination of a judge's authority.[98] Proceedings against a judge before the Judicial Jury can be initiated upon a decision of a plenary session of the Supreme Court or regional courts.[99] The new regulation on the Judicial Jury has aroused criticism for two reasons. Firstly, the Statute on the Judicial Jury defines as "professional unsuitability" such factors as "poor performance while meting out justice" and having collected two or more disciplinary sanctions.[100] In such a manner the Statute on Judicial Jury expands the regulations on premature dismissal regulated by the constitutional Law on the Judicial System and the Status of Judges. Secondly, the Statute was affirmed by presidential decree, which can be regarded as a sign of continuing institutional subordination of the judiciary to the executive.

Part III: Conclusion

The judicial reforms in Kyrgyzstan and Kazakhstan demonstrate an ambivalence towards the independence of judges in those countries. The bodies of judicial administration have been set up, but their independence can be jeopardized by the executive, because their members are appointed by the President. The disciplinary procedure, namely premature removal from office, can also be viewed as alarming. The presence of such formal grounds for dismissal from office as "breach of the law" or non-observance of the Code of Ethic, which open a wide field for further abuses from disciplinary bodies, leads to a great deal of judicial dependence.

---

96 Constitutional Law No. 199-III of 11 December 2006.

97 Article 38 (1) of the Law on the Judicial System and the Status of Judges.

98 Article 34 of the Law on the Judicial System and the Status of Judges.

99 Article 38 (1) of the Law on the Judicial System and the Status of Judges.

100 Para 15 of the Statute on the Judicial Jury.

The general constitutional background in this context is of very substantial importance. The development of the political system and its constitutional framework in Kyrgyzstan, Kazakhstan and in Central Asia as a whole was drifting very far towards giving the president enormous power, compared with all other actors in the constitutional process. The Kazakh Constitution entrusted the president, for example, with the arbitration "of the concerted functioning of all branches of state powers and responsibility of the institutions of power before the people".[101] This constitutional regulation empowers the president indirectly to exert enormous influence on the judiciary as well. This occurs mostly through the president approving statutes regarding the selection process as well as disciplinary proceedings.

The development of the constitutional process in Kyrgyzstan since its independence also reflects the general tendency to strengthen the dominant presidential power. The old Kyrgyz Constitution of 2007 also had the regulation about the arbitration competence of the President, which allowed him to provide "concerted functioning and cooperation of state organs and their responsibility before the people".[102] A paradigm shift in that sense took place after the revolution of 7 April 2010 and the ensuing constitutional reform. The new Kyrgyz Constitution of 27 June 2010 crucially established a new system of power balances in that region. The president's competence was drastically curtailed in favour of the parliament and the government. The constitutional regulation about the president's role as arbitrator between the branches has also been abolished. On the other hand the dismissal of 26 judges (among them seven Supreme Court judges) on 28 July 2010 due to their affiliation with the old regime after the changeover of power must be considered alarming. Such occurrences undermine the confidence of citizens in state power in general and in the judiciary in particular. This case shows very clearly that the judiciary is not in a position to act as an independent actor in the tempestuous political process, and demonstrates quite distinctly the fragile and subordinate status of the judiciary.

---

101 Article 40 of the Kazakh Constitution.

102 Article 42 of the Kyrgyz Constitution of 2007.

V. Conclusion: Judicial Independence in Transition

Judicial Independence – The Normativity of an Evolving Transnational Principle

Anja Seibert-Fohr

Considering the vast differences between the states studied in this volume the question arises whether there is any common ground for the meaning of judicial independence which warrants transnational conclusions. There are voices in academic literature contesting the notion of judicial independence as a legally binding principle, on both the national and international levels, and qualifying it as mere rhetoric with varying meanings.[1] This chapter challenges this hypothesis by demonstrating the existence of some shared normative denominators.[2] Based on a contextual analysis it identifies common concerns and strategies

[1] For the assertion that there is a myth of a common European theory of judicial independence see D. Smilov, EU Enlargement and the Constitutional Principle of Judicial Independence, in: W. Sadurski et al. (eds.), Spreading Democracy and the Rule of Law, 313, at 316-334 (2006). Martin Shapiro described the concept of judicial independence in his study of English courts as "ambiguous and misleading": M. Shapiro, Courts: A Comparative and Political Analysis, at 125 (1981). For divergent views on the meaning and normativity of judicial independence in the US context see S. B. Burbank/B. Friedman (eds.), Judicial Independence at the Crossroads: An Interdisciplinary Approach (2002). For an empirical challenge of judicial independence in the United States see e.g. G. N. Rosenberg, Judicial Independence and the Reality of Political Power, The Review of Politics, at 54, 369-398 (1992).

[2] For the general question when comparative analysis is feasible see V. C. Jackson, Constitutional Engagement in a Transnational Era, at 161-183 (2010). According to her analysis a transnational engagement is feasible if the nature of the domestic issues is not finally settled and not particular just to one country and if there is a comparability of contexts.

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233, DOI 10.1007/978-3-642-28299-7_29,

which have become transnational.[3] Nevertheless there are variances in the implementation of the principle which need to be considered.

To show this unity in diversity the next section gives a comparative account of current developments and problems encountered at different stages of transition to democracy. Without negating differences in the particular arrangements, it identifies common parameters which can be traced back to shared legal, political and social experiences. Looking at a particular stage of transition it is possible to recognize some common problems as well as similar trends. With its context-sensitive comparative analysis of the country studies the chapter highlights shortcomings in the current protection of judicial independence which have been identified in these studies and pertain to a plurality of states demanding further attention in the future. This common ground warrants a transnational perspective facilitating a dialogue between the various countries in their search for solutions.

The chapter calls for a new conceptual engagement with the meaning of judicial independence. It argues that there have been legal, social and political developments in all countries – in particular a changing role of law and accordingly of the judiciary, which requires a fresh look at the meaning of judicial independence, both domestically and transnationally. The purpose of this undertaking is not to impose allegedly ideal solutions but to give room for exchange and to assist in informed decision-making in rule of law reform.[4] In order to inform the transnational dialogue about feasible alternatives in such reforms the lessons learned in individual transitional processes become relevant. These lessons are not about the transplant of best practices but about demystifying alleged role models and avoiding theoretical assumptions which have proved to be ill-founded in practice.

Finally considering the current approach by international actors in rule of law transitions the chapter identifies flaws and calls for a more solid conceptualization of judicial independence at the international level which is also informed by the experience of the countries studied in this book. With the comprehension gained from comparative analysis a more contextual approach is advocated which cautions against generat-

---

[3] For the terms see id., at 1 (footnote 12).

[4] In questions about constitutional design the role of comparative constitutional study is to figure out what to avoid rather than to generalize about how to design a constitution or how to interpret it: V. C. Jackson, Methodological Challenges in Comparative Constitutional Law, 28 Penn St. Int'l L. Rev. 319, at 321 (2009-2010).

ing rigid detailed international benchmarks for the structure of the judiciary. This does not negate the normativity of the judicial independence principle on the international plan but pleads for more efforts to find the right balance between functional and contextual approaches in the interpretation of a principle which has found universal recognition in various human rights documents. Applying a multi-level governance concept, it is argued that the international principle, despite an overlap, should not be equated with particular domestic notions of judicial independence. The international norm should be seen in its functional role of promoting fair trial standards. Conceptualizing judicial independence as a functional principle which provides for an obligation of result rather than of means helps to identify it as an international norm which nevertheless gives room for diverse and context-specific implementation. Comparative law can play an important role in this exercise, not only to identify the common core in order to develop a truly international principle but also as a caveat not to corrupt the validity of the concept by reading notions into it which are not commonly agreed on.

I. Judicial Independence in Different Stages of Transition

Considering different stages of transition to democracy we were able to identify problems which are shared by countries in similar stages.[5] This is not to deny that some problems are country-specific nor to ignore issues which are common to the larger community of states. Nevertheless there are generic issues which are intrinsically related to progress in democratic governance more generally and some problems can be traced back to a shared historical legacy.

1. Obstacles for Transition in Post-Soviet States

Though it is important to acknowledge that there are considerable differences in the advance of judicial independence among the states which

[5] For a definition of transition to democracy see L. Morlino, The Two 'Rules of Law' between Transition to and Quality of Democracy, in L. Morlino /G. Palombella (eds.), Rule of Law and Democracy: Inquiries into Internal and External Issues, at 39, 41 (2010).

gained independence after the end of the Soviet Union[6] some of the remaining issues concern the persistent influence of the executive on the judiciary,[7] a phenomenon which historically goes back to communist rule where the judiciary under the concept of unity of state power was not recognized as a separate power but subordinated to executive control.[8] Though telephone justice no longer plays the role it used to, the mechanisms of control have become more subtly hidden behind a fa-

---

[6] Compare for example N. Hriptievschi/S. Hanganu, Judicial Independence in Moldova and M. Kachkeev, Judicial Independence in Kyrgyzstan and Kazakhstan, both in this volume. In Moldova there have been several stages of reform. Recent reforms have introduced full-time membership for members of the Superior Council of the Magistracy, random case assignment and a code of ethics: N. Hriptievschi/S. Hanganu, Judicial Independence in Moldova, in this volume, Chapter A. A major advance in the Russian Federation was the introduction of lifetime appointments for judges and the rise in judicial salaries. See O. Schwartz/E. Sykiainen, Judicial Independence in the Russian Federation, in this volume, Chapters B. III. 1. and B. IV. In Armenia, too, judicial remuneration was increased substantially in 2008: G. Mouradian, Independence of the Judiciary in Armenia, in this volume, Chapter B. IV. 1. For lifetime appointments in Kazakhstan see M. Kachkeev, Stellung der Richter in Kirgistan und Kasachstan: Eine Analyse vor dem Hintergrund der allgemein anerkannten rechtsstaatlichen Prinzipien und der historischen Entwicklung der Justiz in diesen Ländern, at 195 (2007).

[7] See Schwartz/Sykiainen (note 6); A. Vashkevich, Judicial Independence in the Republic of Belarus, in this volume; Kachkeev (note 6), Part 1 Chapters B. I. 2. and IV. 1.; Mouradian (note 6), Chapters C. I. 1. and F. In Moldova the influence of the executive in the judicial appointment process has been criticized: Hriptievschi/Hanganu (note 6), Chapter A. See also Kachkeev, Stellung der Richter in Kirgistan und Kasachstan (note 6), at 171, 209.

[8] E.g. as early as in 1992 Jowitt argued that the Leninist legacy left deep authoritarian cultural roots and this would be likely to lead to cultural pressures for the centralization of power: K. Jowitt, New World Disorder: The Leninist Extinction (1992). Tolz, Orttung and Carter suspected that the statist political culture would lead to a strong executive and the weakening of institutions designed to control the executive: V. Tolz, Russia: Westernizers Continue to Challenge National Patriots, RFE/RL Research Report, 1 (49); R. Orttung, The Russian Right and the Dilemmas of Party Organization, 44/3 Europe-Asia Studies 445 (1992); S. Carter, The CIS and after: The Impact of Russian Nationalism, in: L. Cheles/R. Ferguson/M. Vaughan (eds.), The Far Right in Western and Eastern Europe, at 174 (2nd ed. 1995). But see S. I. Smithey/J. Ishiyama, Judicious Choices: Designing Courts in Post-Communist Politics, 33 Communist and Post-Communist Studies 163, at 177 (2000).

çade of formalism and legality.[9] There have been considerable changes in the structures of judicial administration,[10] most of them providing for some kind of involvement by the judiciary in judicial councils (e.g. Georgia's High Council of Justice, the Council of Justice in Armenia and Moldova's Superior Council of the Magistracy),[11] qualification collegia (Russian Federation) and qualification commissions (Belarus).[12] Nevertheless, in a great number of Eastern OSCE participating states the judiciary is still considered by the general public as part of executive state power.[13] Allegations about unofficial political involvement in the operations of the judiciary and a culpatory bias in criminal cases remain pervasive.[14] Angelika Nußberger in her comparative analysis of judicial reform in post-Soviet countries shows that despite initial advances there have been subsequent setbacks which are due to the continuance of authoritarian leadership structures.[15]

---

[9] Vashkevich (note 7); Kachkeev (note 6); Mouradian (note 6), Chapters C. I. 1.

[10] Major changes in the Russian Federation concerned the changes in control over judicial discipline and the control of judicial administration more generally. See Schwartz/Sykiainen (note 6). In Moldova an important change was made with the establishment of the Superior Council of the Magistracy which is competent to deal with different aspects of a judicial career including selection, training, ethics and discipline: Hriptievschi/Hanganu (note 6), Chapter B. I. 2.

[11] Id., Chapter B. I. 2.; Report on the Independence of the Judiciary in Georgia, on file with the OSCE, Chapter B. I. 2.; Mouradian (note 6), Chapter B. I. 2.

[12] For the different models see L. F. Müller, Judicial Administration in Transitional Eastern Countries, in this volume, Chapter B.

[13] Nußberger points e.g. to persistent authoritarian structures in Kyrgyzstan and to allegations that in the Russian Federation again the judiciary is only an "appendix to state power": A. Nußberger, Judicial Reforms: Good Intentions with Flawed Results?, in this volume, Chapter A. II. See also Mouradian (note 6), Chapter A. But see the Moldavian model of judicial administration in which the Superior Council of the Magistracy already plays an important role with respect to all aspects of a judicial career: Hriptievschi/Hanganu (note 6), Chapter B. I. 2.

[14] This primarily concerns judicial selection including promotion and the influence of prosecutors. See Hriptievschi/Hanganu (note 6), Chapter A.; Mouradian (note 6), Chapter C. I. 1.; Report on the Independence of the Judiciary in Georgia (note 11), Chapter B. I. For low acquittal rates see Schwartz/Sykiainen (note 6); Vashkevich (note 7), Chapters C. II. 2.

[15] Nußberger (note 13), Chapters A. I. and II.

a) Executive Control Despite Formal Modernization

While at first sight complex legislation appears to provide for checks and balances between the executive and the judiciary in post-Soviet countries,[16] a closer look reveals that in the administration of the judiciary it is often the executive which has the final say without being limited in its decision-making.[17] In the Russian Federation, for example, notwithstanding the involvement of qualification collegia, examination commissions, and court chair people, it is the Human Resources Department of the Presidential Administration which is the most important in judicial selection.[18] In this procedure which is set out in detail by Olga Schwartz and Elga Sykiainen's country study in this volume, the President of the Russian Federation has unlimited discretion whether he follows the recommendations of the qualification collegium or his own Commission.[19]

In the context of disciplinary proceedings the statutory provisions leave wide discretion for substantive decision-making by the executive branch, (e.g. Belarus).[20] Generally, the description of offences which may lead to disciplinary proceedings is very vague.[21] Also in other areas, complaints about strong informal traditions of interaction between the judiciary and the executive branch remain an issue.[22] Even where

---

16 For the allegation that the real situation is disguised by a legal façade of judicial independence which is merely declaratory but not real see Mouradian (note 6), Chapters A. and F.

17 For a critique see Nußberger (note 13), Chapter D. For the decisive role of the President of the Republic in Armenia see Mouradian (note 6), Chapter B. II. 3. e). In Moldova the Superior Council of the Magistracy proposes judicial candidates but it is the President (district and appellate court judges) or the Parliament (Supreme Court judges) which decides on judicial appointments. Due to criticism the discretion of the President has been reduced and the Council may overrule a presidential veto by a 2/3 majority: Hriptievschi/Hanganu (note 6), Chapter B. II. 2. e).

18 See Schwartz/Sykiainen (note 6), Chapter B. II. 2.

19 The latter is the Commission on Preliminary Consideration of the Candidates to the Positions of Federal Judges: see id.

20 Vashkevich (note 7), Chapters B. VII. 2. and C. I.

21 See Article 12(1) Law on the Status of Judges (violation of the Law on the Status of Judges or the Code of Judicial Ethics adopted by All-Russia Congress of Judges). See also Schwartz/Sykiainen (note 6), Chapter B. VII. 1.

22 Id., Chapter A. Apart from the influence of the federal administration the influence of regional politicians in tenured appointments, promotions and the

independent institutions formally seem to exist, in practice the power of the executive to nominate individual members to these bodies influences their substantive work,[23] or candidacy is informally negotiated with the Presidential Administration in advance.[24]

An example of a complicated regulatory framework in which presidential administration ultimately prevails can be found in Belarus. As Alexander Vashkevich's analysis in this book shows, the process of judicial selection as regulated by detailed resolutions of the Council of Ministers[25] and the Minister of Justice[26] is complicated by a number of different steps. A number of different institutions are involved, such as the Chairman of the oblast court, the Head of the oblast Department of Justice, the Collegium of the Ministry of Justice, Examination Commissions (which also include judges and other legal professionals) as well as the Qualification Commission of Judges and the Judicial Training Insti-

---

distribution of bonuses as well as close ties to the prosecution have been criticized. Solomon (note 22), at 236.

[23] For the influence of the executive on judicial nominations in the Supreme Judicial Qualification Collegium see R. Sakwa, Russian Politics and Society (4th ed., 2008). According to the authors of our study even the members of the Judicial Qualification Collegia formally appointed by the legislature are strongly influenced by the Presidential Administration and regional governors. See Schwartz/Sykiainen (note 6), Chapter B. I. 2.

[24] For example, the candidacy of the Director General of the Judicial Department within the Supreme Court, which is modelled on the Administrative Office of the U.S. Courts, is informally negotiated with the Presidential Administration before appointment: Schwartz/Sykiainen (note 6), Chapter B. I. 1.

[25] Resolution of the Council of Ministers of the Republic of Belarus No.150 of 6 February 2007, Concerning the enactment of the Instruction on the establishment and organization of work with the reserves of judges for general jurisdiction and economic courts, National Registry of Legal Acts of the Republic of Belarus No.41,5/24702 (2007) (Об утверждении Инструкции о порядке формирования и организации работы с резервом кадров судей общих и хозяйственных судов Республики Беларусь).

[26] Resolution of the Ministry of Justice No.22 of 8 April 2008, Concerning the enactment of the Instructions on the conditions and procedure of management of files pertaining to the appointment (removal) of judges of general jurisdiction courts and to the award of qualification ranks, National Registry of Legal Acts of the Republic of Belarus No.97, 8/18625; No.279, 8/19799 (2008) (Об утверждении Инструкции об условиях и порядке прохождения материалов о назначении на должность (освобождении от должности) судей общих судов Республики Беларусь, присвоении квалификационных классов).

tute.[27] Nevertheless the final decision lies entirely with the Administration. Regardless of numerous earlier examinations the Deputy Head of the Presidential Administration conducts an additional interview with the candidate before appointment.[28] Despite elaborate nominal guarantees of judicial independence in the Code on the Judiciary and the Status of Judges also in disciplinary matters and the dismissal of judges in practice, the influence of the executive is high.[29]

In Armenia, despite the Constitutional reform of 2005 and considerable changes in legislation reducing the influence of the executive on the administration of the judiciary, the factual independence of the judiciary as described by Grigor Mouradian in his study is still inadequate.[30] Also there the procedures of judicial selection and promotion are highly complex and artificially cumbersome, to the detriment of transparency.[31] At the end of the nomination procedure it is the President of the Republic who can refuse to appoint without giving reasons.[32]

In reaction to criticism of such models of judicial selection, there have been efforts in Moldova to reduce the role of the political branches in the appointment of judges so that the discretion of the President to refuse candidates nominated by the Superior Council of the Magistracy is limited and can be overruled by a two-thirds majority of the Council.[33] Nevertheless, according to the study by Nadejda Hriptievschi and Sorin Hanganu, executive control over the administration of the judiciary remains an issue even there.[34] It is the persistent executive discretion which leads all the studies on Eastern Europe, the South Caucasus and Central Europe comprised in this volume to call for more specific criteria for judicial selection and promotion and for a transparent procedure

---

27 For a detailed survey see Vashkevich (note 7), Chapter B. II. 2.

28 A. Petrash, The Court System in Action, 8 Judiciary in Belarus 15 (2005) (Судебная система в действии).

29 Vashkevich (note 7), Chapter C. I.

30 Mouradian (note 6), Chapter A.

31 For the procedure see id., Chapters B. II. 3. and III. 2.; for the critique see id., Chapter F. II.

32 Id., Chapter B. II. 3. e).

33 Hriptievschi/Hanganu (note 6), Chapters B. II. 2. d)-e).

34 Id., Chapter F.

which requires those responsible for judicial appointments to give reasons for their decisions.[35]

b) Strategies for Change

The pervasive influence of the administration perpetuates the general perception that the judiciary is still related to executive control. It is a reason for the continuing distrust in the judiciary[36] and the low social profile of judges in post-Soviet countries.[37] More generally, the executive influence on the judiciary shows an understanding of the rule of law which gives priority to law enforcement in the sense of a law and order paradigm, a concept regularly to be found in authoritarian regimes.[38] With the commitment of the OSCE participating states to ensure the democratic rule of law the success of future implementation strategies will depend largely on whether states will succeed in changing this interpretation into a rule of law concept of limited state power which serves the protection of individual rights *vis-à-vis* the government.[39] The involvement of all relevant players is essential to break the vicious circle of judicial dependence and public distrust[40] and to accom-

---

[35] Mouradian (note 6), Chapters B. II. 1. and F. III. 1.; Hriptievschi/Hanganu (note 6), Chapter B. II. 2.; Schwartz/Sykiainen (note 6), Chapters B. II. 2. and F. For the lack of transparency in Belarus see Vashkevich (note 7), Chapters B. II. 3. and B. III. 2.

[36] See e.g. Hriptievschi/Hanganu (note 6), Chapters A. and F.; Mouradian (note 6), Chapter B. VII. 3. See also Report on the Independence of the Judiciary in Georgia (note 11), Chapter F. According to the results of the national public opinion survey conducted in Georgia in June-July 2009, approximately 80% of respondents either completely or mostly distrust the judiciary.

[37] For the weak and low status of judges in the Russian Federation see Solomon (note 22), at 232.

[38] For the need to conceptualize the rule of law in the context of democracy see G. O'Donnell, Why the rule of law matters, 15/4 Journal of democracy 32 (2004).

[39] A. Seibert-Fohr, The Challenge of Transition, in this volume, Chapter A. For the notion of limited government see also B. Z. Tamanaha, On the Rule of Law: History, Politics, Theory, at 137 seq. (2004).

[40] For the need to engage all legal actors on behalf of rule of law reforms see T. C. Halliday, The Fight for Basic Legal Freedoms: Mobilization by the Legal Complex, in: J. J. Heckman/R. L. Nelson/L. Cabatingan (eds.), Global Perspectives on the Rule of Law, 210, at 216 seq. (2009).

plish a paradigmatic shift from the Soviet legacy of executive control over the judiciary to a judiciary which controls the government to ensure the protection of fundamental rights.

An essential part of the problem is the persistence of hierarchical structures.[41] They not only pertain to executive control but also to the lack of internal independence within the judiciary.[42] The dominant role exercised by court presidents (i.e. in case assignment, discipline and judicial selection including promotion[43]) and higher courts as well as the persistence of informal connections[44] combined with a wide discretion in administrative decision-making (most particularly in judicial selection and discipline)[45] leads to pervasive structures of subordination[46] and judges' lack of assertiveness. Old dependencies have been replaced by new ones[47] and power vacuums which arose at an early stage of limiting executive rule have readily been filled by court presidents and higher

---

[41] Solomon describes the judiciary in the Russian Federation as a strong "bureaucratic judiciary" in which the pursuit of a judicial career calls for conformity to the norms of the judicial corps: Solomon (note 22), at 238.

[42] Nußberger (note 13), Chapter B. I. Mouradian (note 6), Chapter C. I. 2.

[43] See Müller (note 12), Chapter C. I. For the influence in Armenia of the Cassation Court Chairman in judicial selection, tenure and promotion see Mouradian (note 6), Chapters B. II. 3. a) and f), B. III. 1. and 2.

[44] Müller (note 12), Chapter B. II.

[45] The lack of transparent criteria for judicial selection has been criticized as giving grounds for informal connections and political influence. See e.g. Schwartz/Sykiainen (note 6), Chapter B. II. 1.; Report on the Independence of the Judiciary in Georgia (note 11), Chapter B. II. 2. For the vague description of offences which may lead to disciplinary proceedings and give room for arbitrariness see Schwartz/Sykiainen (note 6), Chapter B. VII.

[46] In Moldova the persistent judicial mentality of subordination to the executive and other political actors has been criticized: Hriptievschi/Hanganu (note 6), Chapters A. and F.

[47] One example is the influence of regional politicians in tenured appointments and promotion in the Russian Federation. Local governments influence bonuses in judicial remuneration: Schwartz/Sykiainen (note 6), Chapter C. III. See also Nußberger (note 13), Chapter B. I. Another concern is corruption: Mouradian (note 6), Chapter B. I. 2. For Kazakhstan see <http://www.transparency.org/news_room/in_focus/2008/cpi2008/cpi_2008_table>. In Belarus corruption decreased with the rise in remuneration for judges: see Vashkevich (note 7), Chapter C. 3.

courts.[48] Peter H. Solomon, Jr. shows in his chapter on the accountability of judges in post-communist states that structural dependence is aggravated by the prevailing scheme of bureaucratic accountability.[49]

There have been voices justifying the strong hierarchical structures in large countries, such as the Russian Federation, in the interest of consistent jurisprudence. They point to the fact that in several countries early reform steps rendering the judiciary more independent gave rise to conflicting judicial decisions aggravating the actual situation. Nevertheless, this experience should not be used to turn back reform. Though the objective of rendering adjudication more coherent and predictable as a matter of legal certainty is indeed an important aspect of the rule of law, it does not require hierarchical structures. Instead more attention should be given to judicial capacity building. As the Russian country study shows – and this also applies to other countries in the region – reforms so far have mainly focused on legal modernization, and somewhat less on capacity-building and mental change.[50] An essential means to enable the judiciary in future to adjudicate on the basis of the law is a profound legal education and continuing training on new laws for all judges.[51] Wide publication of decisions and legal scholarship collecting and systematizing jurisprudence can help the judiciary in its undertaking to develop coherent adjudication. It is also crucial to foster the emancipation of judges individually so that their decision-making cannot be interfered with by other judges.

An additional challenge is to protect the judiciary from undue outside influence including corruption[52] without compromising the need for accountable efficient adjudication. This will require more transparency in

---

[48] In the Russian Federation the court chairpeople of the superior court wield important influence in promotion: Schwartz/Sykiainen (note 6), Chapter B. III. 2.

[49] P. H. Solomon, Jr., The Accountability of Judges in Post Communist States: From Bureaucratic to Professional Accountability, in this volume, Chapter B.

[50] Id., Chapter A.

[51] Nußberger pleads for a renewal of the judiciary which so far has been prevented by dysfunctional judicial selection and the absence of role models in the judiciary. Nußberger (note 13), Chapter C. II.

[52] For serious allegations of corruption see Hriptievschi/Hanganu (note 6), Chapter A.; Mouradian (note 6), Chapter A.

judicial administration, in court operations[53] and more openness in adjudication.[54] Efforts in legal education are necessary to ensure a high-capacity judiciary which is able to assert itself against external influence on adjudication, to sustain and fulfil its judicial functions.[55]

It is against this background that the *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* which are annexed to this book were developed by a group of experts to assist countries in the region in their efforts to improve judicial independence. The document is based on our comparative analysis which identified common concerns in this region, most of which go back to their common communist legacy.[56] Accordingly it addresses the following three aspects: judicial administration with a special focus on judicial councils and the role of court presidents; criteria and procedure for the selection of judges; and the question how properly to balance the accountability of judges while maintaining independence in adjudication. The document also draws from experience gained by other countries in their post-communist transitional processes.[57]

The relevant substantive considerations for the recommendations are elaborated on by Peter H. Solomon, Jr. and Lydia F. Müller in their chapters in this book.[58] All parts of the document are recommendatory in nature and make various proposals for the domestic implementation of judicial independence without claiming to represent a uniform stan-

---

[53] See Nußberger (note 13), Chapter C.; Hriptievschi/Hanganu (note 6), Chapters A. and B. I. 1.; Mouradian (note 6), Chapters B. II. 1., III. 2. b) and VI; Müller (note 12), Chapters B. IV. and D.

[54] Moldova provides for the publication of court decisions as a measure to improve the quality of judicial decision-making, but actual practice still lags behind this standard: Hriptievschi/Hanganu (note 6), Chapter C. II. 4.

[55] One of the major changes throughout the CIS was the increasing importance of adjudication. While adjudication played a minor role under communist rule the judiciary now needs to measure up to the increasing role of the law and the increased demand in dispute resolution which involves complex litigation: Solomon (note 22), at 238-241.

[56] The country studies on post-Soviet states together with other state reports commissioned by the ODIHR provided the basis for our comparative analysis, which in turn was the starting point for the Kyiv conference with experts from the entire region.

[57] The country studies of part III and IV provided valuable insights and advice, which entered the Kyiv Recommendations.

[58] Solomon (note 49) and Müller (note 12).

dard for implementing judicial independence generally.[59] Taking into account the differences in the judicial systems in the region, they identify alternative means of implementation and are formulated so as to allow for context-specific considerations.

2. Transitional Processes in New Member States of the EU

Turning now to the transformation process of the new EU member countries from Central and Eastern Europe (CEE), it is beyond doubt that reforms have gone a long way to leaving behind the communist legacy of judicial dependence.[60] Common denominators of these reforms were the extension of judicial tenure until a fixed retirement age, the protection of judges from removal and rises in the level of remuneration.[61] Lustration, however, remained exceptional.[62] Most countries, like their civil law counterparts in Western continental Europe, retained the model of a career judiciary which predominantly recruits young law graduates and fills the upper ranks of the judiciary by way of promotion.[63]

As the Estonian example illustrates, various structural reforms in the administration of the judiciary were undertaken to make the judiciary more independent – some of which were influenced by the European

---

[59] See the preamble to the document which invites OSCE Participating States to review the ideas and guidance contained in the Kyiv Recommendations.

[60] For the relevance of judicial independence for EU enlargement see A. Seibert-Fohr, Judicial Independence in EU Accessions: The Emergence of a European Basic Principle, 52 German Yearbook of International Law 405 (2009).

[61] See Z. Fleck, Judicial Independence in Hungary; R. Coman/C. Dallara, Judicial Independence in Romania; A. Bodnar/Ł. Bojarski, Judicial Independence in Poland; T. Ligi, Judicial Independence in Estonia, all in this volume, Chapters B. III. 1., IV. 1., 3. and B. VII. Despite rises, however, the level of remuneration as compared to that of legal professionals in private practice is still considered to be insufficient. See Bodnar/Bojarski, Chapter F.

[62] Id., Chapter A. On how to deal with lustration see R. G. Teitel, Transitional Justice (2002).

[63] See Fleck (note 61); Coman/Dallara (note 61); Bodnar/Bojarski (note 61); Ligi (note 61), Chapters B. III. 2. For recent efforts in Estonia to move to a career judiciary see Ligi (note 61), Chapter B. III.

Union before accession.[64] This has been a continuous process since then. While the first phase of reforms introduced new laws and structures, more recently it has often been by way of judicial decisions which refine current structures in an effort to ensure judicial independence. For example, in 2009 the status of probationary judges was abolished in Poland in consequence of a judgment of the Constitutional Court which declared the potential influence of the executive on adjudication to be in violation of the constitutional guarantee of judicial independence.[65]

a) Enhancing Institutional Independence

Though with varying degrees the reforms in EU candidate states from Central and Eastern Europe early on aimed for more institutional independence for the judiciary. While Poland,[66] Estonia[67] and Slovakia,[68] for example, implemented a model of shared powers, in which judicial organs share responsibility for judicial administration with the executive authority, other countries have gone further in establishing judicial self-governance. Since 2001 Slovakia has had a judicial council with wide competences with respect to judicial selection and discipline.[69] In Ro-

[64] Id., Chapters A. and B. I. 2. For the influence of the EU on domestic legal changes see A. Magen/L. Morlino (eds.), International Actors, Democratization and the Rule of Law: Anchoring democracy? (2008); R. Coman/J.-M. De Waele (ed.), Judicial Reforms in Central and Eastern European Countries (2007). With respect to Romania see R. Coman, Réformer la justice dans un pays post-communiste – Le cas de la Roumanie, at 235 (2009).

[65] Judgment of the Constitutional Court of 24 October 2007, No. SK 7/06. The English summary of the judgment, Helsińska Fundacja Praw Człowieka, is available at <http://www.hfhrpol.waw.pl/precedens/images/stories/sk7_06_gb_final_2.pdf>. For more details see Bodnar/Bojarski (note 61), Chapter B. II. 6.

[66] Id., Chapter B. I. 1.

[67] Ligi (note 61), Chapters B. I. 1. and 2. More recently, there have been efforts in Estonia to establish a system of judicial self-governance. See id., Chapter B. I. 6.

[68] Article 141a of the Constitution of the Slovak Republic which authorizes the Judiciary Council to e.g. present to the President of the Slovak Republic proposals for candidates for judicial appointment and to decide on the assignment and transfer of judges and to elect members of disciplinary senates. Id., para. 4.

[69] For a discussion of the Slovak Judicial Council see A. Bröstl, At the Crossroads on the Way to an Independent Slovak Judiciary, in: J. Přibáň/P.

mania a new legal framework for judicial organization was established by transferring to the Superior Council of Magistracy most of the competences previously exercised by the Ministry of Justice.[70] Ramona Coman and Cristina Dallara in their country study explain that the Council is now the central institution for the administration of the judiciary charged with judicial selection, promotion and discipline, whereas the Ministry of Justice has competences only with respect to organizational and budgetary matters.[71] Hungary has gone the furthest in establishing a model of judicial self-administration which is exclusively exercised by the National Judicial Council.[72] The 1997 reform completely separated judicial administration from executive influence. These systems of self-administration were modelled on their Latin counterparts in Southern Europe, such as Italy and Spain which opted for the separation of the judiciary in the aftermath of dictatorship.[73]

b) Judicial Autonomy versus Shared Competences in Judicial Administration

Among the few countries which resisted the European Commission's advocacy for self-administration of the judiciary[74] was the Czech Republic, which went back to the Austrian-German model of ministerial administration with judges appointed by the President of the Republic

---

Roberts/J. Young (eds.), Systems of Justice in Transition. Central European Experiences since 1989, 141, at 148 seq. (2003). For recent developments see M. Bobek, The Administration of Courts in the Czech Republic: In Search of a Constitutional Balance, 2 European Public Law 251, at 258 (2010).

70 Law on the Organization of the Judiciary (Law no. 92/1992). See Coman/Dallara (note 61), Chapter B. I. 2. b).

71 Id., Chapters B. I. 2. a) and b).

72 Fleck (note 61), Chapter B. I. 1.

73 The Italian Constitution of 1948 provides that all decisions concerning judges are within the exclusive competence of the Superior Council of the Magistracy. See Arts. 104-107 Italian Constitution and G. Di Federico, Judicial Independence in Italy, in this volume, Chapters B. I. 1. and 2.

74 In its 2002 Report the Commission of the European Communities noted progress as regards self-administration in the Czech Republic and welcomed efforts to establish judicial councils: Commission of the European Communities, Regular Report on Czech Republic's Progress Towards Accession 2002, SEC 1402, at 22 (2002).

upon nomination by the Minister of Justice.[75] But unlike what was expected, we have learned from the country studies in this book that the actual state of judicial independence cannot be measured by the degree of judicial autonomy.

Despite the executive's powers over the administration of the judiciary in the Czech Republic, courts there have been successful in rejecting governmental initiatives compromising judicial independence.[76] For example, in 2006 the Constitutional Court invalidated the dismissal of the Supreme Court Chief Justice by the Czech President, arguing that this was in conflict with the constitutionally protected principle of judicial independence.[77] By a gradual process an increasingly emancipated judiciary (in particular the Constitutional Court[78]) has limited the executive's control powers over the judiciary without however invalidating its responsibility for judicial administration in general.

Arguably a gradual evolution which is driven by a genuine process of mutual checks and balances is in the long run more sustainable than the *ad hoc* establishment of a new structure which lacks the necessary substantive support.[79] The Polish study in this book shows that tensions between the Minister of Justice and the National Council of the Judiciary as regards their respective competences in the administration of the judiciary could be mitigated by a number of Constitutional Court and Supreme Court decisions which helped to refine the model of shared competences and elaborated important safeguards for judicial independence.[80] On the contrary the approach of imposing self-governing

---

[75] Z. Kühn, Judicial Administration Reforms in Central-Eastern Europe: Lessons to be Learned, in this volume, Chapter C. See also §§ 118-174a Law 6/2002 Official Gazette, Judiciary. In Latvia too the Ministry of Justice is the central organ in charge of court administration.

[76] Bobek (note 69), at 259-267.

[77] The judgment of the Constitutional Court of 11 July 2006, Pl. US 18/06, quoted from the English version, available at <http://angl.concourt.cz/angl_verze/doc/p-18-06.php>.

For more details about the case see Kühn (note 75), Chapter C.

[78] For the role of the Polish Constitutional Court in strengthening judicial independence through its jurisprudence see Bodnar/Bojarski (note 61), Chapters A. and B. I. 2.

[79] Timo Ligi in his study argues that the Estonian reforms show that a gradual development is preferable to radical changes which overemphasize judicial autonomy to the detriment of accountability. Ligi (note 61), Chapters A. and F.

[80] Bodnar/Bojarski (note 61), Chapters B. I. 2. and II. 6.

structures without significant external control taken in Bulgaria and Romania was less successful. Despite fundamental structural changes in these countries there are persistent flaws in the guarantee of judicial independence, as evidenced by the European Union's post-accession monitoring under the Co-operation and Verification Mechanism.[81]

Though Romania established a Superior Council of the Magistracy as a central institution for the administration of the judiciary which is charged with judicial appointments, dismissals and promotion,[82] there are still serious shortcomings in the administration of the judiciary. The Council has been criticized by the Commission of the European Communities as an insufficient protector of judicial accountability to the detriment of public trust in the judiciary.[83] In its 2010 Report on Romania to the European Parliament and the Council the Commission stressed the importance of judicial integrity, and therefore criticized the inadequate accountability of judges for abuse of their office.[84] In the country itself the Superior Council of the Magistracy and the highest level of the judiciary are alleged to be influenced by the old nomenclature, to defend their own interests and prevent the modernization and renewal of the judiciary.[85] The establishment of a judicial council did not automatically protect against one-sided political influence.[86] Such

[81] See e.g. Commission of the European Communities, Report on Progress in Romania under the Co-operation and Verification Mechanism [SEC(2010) 949], [COM(2010) 401] final, at 3-4 (2010).

[82] For further details see Coman/Dallara (note 61), Chapter B. I. 2. a).

[83] Commission of the European Communities, Rapport de la Commission au Parlement européen et au Conseil sur les progrès réalisés par la Roumanie au titre du mécanisme de coopération et de vérification, [COM(2008)494] final, at 4 (2008).

[84] Commission of the European Communities, Report on Progress in Romania under the Co-operation and Verification Mechanism [SEC(2010) 949], [COM(2010) 401] final, at 3-4 (2010).

[85] S. R. Roos/C. Rebega, Anticorruption Policies in the Justice System, available at <http://www.kas.de/wf/doc/kas_18410-1522-19-30.pdf?100513101357>. For a similar observation with respect to Hungary see Z. Fleck, Architekti demokracie (Architects of Democracy), 4 Sociologický časopis (Czech Sociological Review) 601 (2005). Cited by Kühn (note 75), Chapter E.

[86] Kühn describes the Slovak Council as a politicized institution controlled by judges close to one of the populist political parties: Kühn (note 75), Chapter B. M. Bobek speaks of the "hijacking" of the judicial council "by the old Communist judicial elites and sealing-off of the institution behind a veil of judicial independence": Bobek (note 69), at 268.

shortcomings demonstrate that powerful institutions of self-governance do not necessarily guarantee a well-functioning judiciary. Quite to the contrary, as Zoltán Fleck concludes in his chapter, "[t]he most important lesson of the Hungarian situation is that a radical administrative change can be a tool for preserving detrimental elements of the unconstitutional past".[87]

It is interesting to observe that there are concerns by several scholars that in some CEE countries the judiciary has become too independent.[88] In Romania the strike by judges in 2009 against a public sector pay law introduced to deal with the financial crises together with court decisions securing judges' privileges in remuneration have been conceived rather as measures of protecting self-interests than as a means to protect independent adjudication.[89] The comprehensive autonomy of the judiciary in Hungary has been criticized as not bringing about the intended improvement in the administration of justice. Noting flaws in the efficiency, transparency and independence of the Hungarian judiciary[90] Zoltán Fleck ascribes these deficits which are detrimental to the rule of law to the absolute separation of the judiciary from the political branches and the concentration of powers in the National Council of Judges which cannot be held accountable.[91] He advocates instead a mixed system which distributes competences among different institutions as more suitable for judicial effectiveness and independence.[92]

c) The Need for Structural Refinement

Zdeněk Kühn, too, in his chapter observes a continuing need to refine current models in Central-Eastern Europe. This is irrespective of the

---

87 Fleck (note 61), Chapter F.

88 See C. Parau, The Drive to Judicial Supremacy, in this volume; see Fleck (note 61). See also W. Osiatynski, Paradoxes of Constitutional Borrowing, 1 I. CON 244, at 263-265 (2003); F. Emmert, Editorial: The Independence of Judges – A Concept often Misunderstood in Central and Eastern Europe, 3 European Journal of Law Reform 405. But see K. Bárd, Judicial Independence in the Accession Countries of Central and Eastern Europe and the Baltics, in: A. Sajó (ed.), Judicial Integrity, 265, at 310 (2004); Solomon (note 22), at 232.

89 For details see Coman/Dallara (note 61), Chapter B. IV. 1.

90 See also Fleck (note 61), Chapters A. and B. I. 2.

91 Id., Chapters B. I. 2. and C. III.

92 Id., Chapter F.

particular institutional arrangements for judicial administration countries have chosen.[93] Though the authors of the study on Poland, Adam Bodnar and Łukasz Bojarski, give a positive appraisal of the Polish reforms since 1989[94] they repeatedly criticize the lack of set criteria and transparency in judicial selection and appointments, as well as in case assignments, and advocate the broader accessibility of all court decisions including those of lower courts.[95] In Estonia, too, according to Timo Ligi's analysis in this book judicial selection and promotion should be more transparent and guided by more detailed criteria.[96]

Despite considerable reforms there is a persistent distrust in the judiciary throughout the region, not just in those countries retaining an executive model of judicial administration like the Czech Republic, but also in Hungary and Romania which introduced powerful judicial councils.[97] In both cases it is the continuing powerful role played by court presidents which jeopardizes judicial independence,[98] but also the lack of coherence in adjudication, corruption and allegations of arbitrariness.[99] It is significant that in countries which have gone furthest in introducing judicial self-governance criticism is particularly fierce.[100]

To ensure more efficiency and greater reliability of adjudication without jeopardizing judicial independence fine-tuning and balance are

---

93 Kühn (note 75), Chapter C.

94 Bodnar/Bojarski (note 61), Chapter A.

95 Id., Chapters B. II. 2., III. 4., C. II. 4.

96 Ligi (note 61), Chapters B. II. 5. and III. 2.

97 Kühn (note 75), Chapters A. and B.; Coman/Dallara (note 61), Chapter F. For the role of court presidents in Poland see Bodnar/Bojarski (note 61), Chapter B. 5.

98 Id., Chapter C.

99 For shortcomings in the fight against judicial corruption see Coman/Dallara (note 61), Chapter C. III. For the lack of trust in the Romanian judiciary see Trust for civil society in Central and Eastern Europe, *Initiativa pentru o justitie curata. Raport privind starea justitiei si lupa impotriva coruptiei*/Initiative for a clean justice. Report on the state of the judiciary and the fight against corruption, at 10 (2008); Eurobarometer 66, Public opinion in the European Union, Autumn 2006, National Report Executive Summary, Romania, at 4, available at <http://ec.europa.eu/public_opinion/archives/eb/eb66/eb66_ro_exec.pdf>. For allegation of corruption in Hungary see Fleck (note 61), Chapter C. III.

100 For a critique of the Romanian model see Parau (note 88), Chapter C. IV.; for a critique of the Hungarian Model see Fleck (note 61), Chapter B. I. 2.

needed.[101] The authors of this book prefer more checks and balances over judicial autonomy[102] and call for the separation of different functions in judicial administration which should be exercised by a council, the government and potentially an ombudsperson.[103] One lesson learned is that council members should not at the same time exercise the function of court president because this may compromise the control function of a council.[104] If a judicial council is entrusted with oversight functions it needs to exercise its responsibility actively to ensure judicial accountability for abuse of powers, and in particular identify and sanction conflicts of interests, combat corruption, and ensure the right to a fair trial within a reasonable time.[105] In an effort to ensure their accountability deliberations of the council should be public and there should be remedies against decisions by a council. Despite the plea to limit executive control and to enhance the role of the judiciary in judicial administration there is a need for democratic accountability in terms of the responsibility of the democratically legitimized branches of government for the budget and for the basic criteria for judicial selection.[106]

---

[101] Kühn advocates a balance between democratic accountability and elements of judicial self-administration: Kühn (note 75), Chapter F. In Poland in an effort to ensure judicial efficiency and accountability judges are subject to a detailed individual review by inspector judges. Bodnar/Bojarski (note 61), Chapter C. I.

[102] Parau (note 88), Chapter D.; Fleck (note 61), Chapter B. I. 2. Timo Ligi cautions against a tendency to move from judicial dependence to another extreme of independence which neglects judicial accountability. Ligi (note 61), Chapter A.

[103] Kühn (note 75), Chapters B. I. 2.and F.; Hriptievschi/Hanganu (note 6), Chapter B. I. 2. See also Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, in this volume, Annex 1, paras. 2-6.

[104] Fleck (note 61), Chapter B. I. 2. In order to remedy the strong influence of higher court judges a fixed number of Council members should come from first instance courts (excluding acting court presidents). For the recent change in Moldova suspending judicial members of the Council from their activities as judges while they are working as full-time Council members see Hriptievschi/Hanganu (note 6), Chapter B. I. 2.

[105] Coman/Dallara (note 61), Chapter F.

[106] Kühn (note 75), Chapters B., C. and D.

d) Capacity Building

The need for new structural reforms is only one part; another which requires attention is individual capacity building.[107] As mentioned above, a recurrent issue in several CEE countries is a lack of internal independence.[108] As evidenced by the persistent dominance of court presidents whose powers are not limited to administration but either *de jure* or *de facto* extend to such broad fields as evaluation, promotion, discipline and case assignment, the hierarchical structure under the former communist regime persists to a certain degree.[109] Here too this is regardless of whether a country has introduced a model of self-administration, such as Hungary,[110] or retained an executive model of court administration, such as the Czech Republic.[111] The hierarchical structures are supported by the models of promotion and evaluation which perpetuate patterns of subordination. In addition the often deplored formalism, as under the former communist regime,[112] helps judges to waive personal responsibility by resorting to an excessive form of legal positivism.[113]

Though the lack of internal independence requires structural changes it also necessitates more assertiveness to be exercised by judges themselves and the capacity to take more individual responsibility in order to overcome the traditional perception of judges as civil servants and

---

[107] Fleck (note 61), Chapter B. II. 1.

[108] See e.g. Bodnar/Bojarski (note 61), Chapter C. III.

[109] For the role of court presidents in Poland see Bodnar/Bojarski (note 61), Chapter B. V.

[110] See Fleck (note 61), Chapters B. I. 1., 2., II. 2. and VII. 1.

[111] See Kühn (note 75), Chapter E.

[112] See E. Blankenberg, Independence and Accountability of the Judiciary – Two Sides of a Coin: Some Observations on the Rule of Law in Central Europe, in: A. Sajó (ed.), Judicial Integrity, 207, at 222-223 (2004).

[113] D. Galligan/M Matczak, Empirical Study on Judicial Discretion in Polish Administrative Courts Deciding Business Cases, in: R. Coman/J.-M. De Waele (eds.), Judicial Reforms in Central and Eastern European Countries, 227, at 248-249 (2007). For the legal culture and judicial methodology prevailing in post-Communist Europe see Z. Kühn, Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement, 52 American Journal of Comparative Law 531 (2004).

bureaucrats.[114] Judges need to build an ethical and moral leadership and should be more responsive to external demands.[115] The traditional recruitment of young law graduates without practical experience has been identified as a source of the often deplored formalism and the lack of willingness to take responsibility in East Central and Southeast Europe.[116] In response the minimum age for judges has been raised in the Czech Republic, Slovakia and Poland in order to ensure that more experienced and potentially more self-confident candidates reach the bench.[117] Nevertheless, in practice access to the bench by legal practitioners is impeded, for example in Poland due to the influence of judges on judicial selection.[118]

Apart from legal reforms a need has been identified in the region to improve judicial education at university in order to strengthen analytical competences and the ability to reason. There is also a need to continue judicial education after appointment to increase professional and ethical

---

[114] For a plea for mental transition of the Central European judiciary see M. Bobek, The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries, 14 European Public Law 99, at 99 (2008).

[115] Osiatynski (note 88). A similar argument was made in the context of Latin America. See L. Hammergren, Do Judicial Councils Further Judicial Reform? Lessons from Latin America, Carnegie Endowment for International Peace, Rule of Law Series No. 26 (2006), available at <http://carnegieendowment.org/files/wp28.pdf>. For the need to re-educate judges not only in terms of technical training, but so that they learn to take the interests of fellow citizens into account, see S. Holmes, Judicial Independence as Ambiguous Reality and Insidious Illusion, in: R. Dworkin (ed.), From Liberal Values to Democratic Transition, Essays in Honor of János Kis, 3, at 8-9 (2004). Holmes calls for the socialization of judges in norms of deference and proud independence. Instead of freeing the judges from any kind of accountability their dependence should be re-organized so that they are subordinated to publicly known laws enacted by elected representatives: id., at 6.

[116] Kühn (note 75), Chapter E. See also Bobek (note 113); S. R. Roos, Watchdog and Cooperation Partner, 2010/03 D+C 108 (2010), available at <http://www.inwent.org/ez/articles/167506/index.en.shtml>. For a study on formalism in Poland and an analysis of its reasons see Galligan/Matczak (note 113), at 227; Osiatynski (note 88).

[117] Kühn (note 75), Chapter E. The minimum age in Poland is now 29 years. Bodnar/Bojarski (note 61), Chapter B. II. 1. In Moldova too there have been concerns that judicial candidates are too young and inexperienced. Hriptievschi/Hanganu (note 6), Chapter B. II. 1.

[118] Bodnar/Bojarski (note 61), Chapter B. II. 2. c).

standards of judges and to render adjudication more coherent and predictable.[119] New institutions, such as the National School for the Judiciary and Prosecutors' Authority which was established in Poland in 2009, are intended to harmonize legal education by a model of central training instead of the decentralized earlier model and to build capacities which strengthen individual decision making on the basis of the law.[120] The success of such models of centralized judicial training remains to be evaluated.

To sum up, though institutional changes are readier to be accomplished, the establishment of new organs, such as judicial councils, has not automatically brought about the values and behavioural changes which are necessary to build an independent judiciary. On the contrary, the overemphasis on structural changes and judicial autonomy in some CEE countries has led to an empowerment of the higher ranks of the judiciary, leaving a vacuum or giving rise to new ways of exercising political influence[121] or external private pressure by economic interests, organized groups, or in some places even the mafia.[122] One lesson learned is that the initial conviction that the structural separation of the judiciary from the executive branch and self-administration would bring about the rule of law has proved illusionary and detrimental to responsible adjudication. The risk of other forms of leverage (apart from executive influence) was insufficiently reflected in early reforms.

Those countries which have opted for mixed systems of judicial administration, such as Poland, where competences are divided between the Minister of Justice and the National Council of the Judiciary which is neither part of the judiciary nor of the executive branch,[123] and Estonia[124] have attracted less criticism than those which have introduced ju-

---

[119] See e.g. Coman/Dallara (note 61), Chapter F. This is also relevant for post-Soviet states: see Kyiv Recommendations (note 103), at para. 19. For the importance of ethical standards and corresponding training in response to public criticism of the judiciary see Bodnar/Bojarski (note 61), Chapter D.

[120] Id., Chapter B. II. 2. b). In Moldova too there has been a National Institute of Justice since 2007: Hriptievschi/Hanganu (note 6), Chapter B. II. 2. a). For the National Institute of Magistracy in Romania see Coman/Dallara (note 61), Chapter B. II. 1.

[121] Fleck (note 61), Chapter B. I. 2.; Coman/Dallara (note 61), Chapter A.

[122] Osiatynski (note 88), at 265.

[123] Bodnar/Bojarski (note 61), Chapter B. I. 2.

[124] Ligi (note 61), Chapter A.

dicial self-governance. In any case, transfer of power requires capacity-building so that it can be exercised diligently.[125] But it cannot be expected that a deferential judiciary will turn into a strong and responsible entity overnight. Whereas under communism – where law played a secondary role and the real issues were not decided by courts – the judiciary was trained to avoid responsibility by resorting to legal formalism, now with the increasing importance of law in democracy there is a need to build competences so that judicial power can be exercised in a responsible and effective way.[126] Therefore calls for greater transparency in judicial administration and more training, including on judicial ethics, to enhance the accountability of judges and to reduce legal formalism are common to the CEE region.[127]

3. Current Issues in Established Democracies

a) New Challenges in Old Traditions

All the country studies in this volume including those of established democracies describe an evolutionary development. Ensuring a democratic rule of law requires a continuing need to respond to challenges by identifying new mechanisms of protection. Thus there is a continuous reform process even in the Western participating countries of the OSCE.[128] While countries in transition from authoritarianism to democracy have to cope with an overwhelming executive branch, the search for adequate mechanisms to protect the judiciary from undue influence continues in older democracies too. Though it is important to recognize that judiciaries in Western countries differ in their historical evolution, in the tasks they perform and the way they do so, their struc-

---

[125] Id., Chapter F.

[126] This is why the Kyiv Recommendations apart from structural changes also advocate a new approach to judicial training: see note 103, paras. 17-20.

[127] For the repeated call for more transparency see Bodnar/Bojarski (note 61), Chapter E. For the criticism that the judiciary protects its own corporate interests to the detriment of accountability see Osiatynski (note 88), at 264.

[128] See e.g. A. Garapon/H. Epineuse, Judicial Independence in France, in this volume, Chapters A. and F.; S. Turenne, Judicial Independence in England and Wales, in this volume, Chapter A.; B. Allemeersch/A. Alen/B. Dalle, Judicial Independence in Belgium, in this volume, Chapter F.; R. de Lange, Judicial Independence in The Netherlands, in this volume, Chapter A.

tural setup and their external and internal perception there are common issues and challenges which affect all of them.[129] For example, the traditional means of opening proceedings to the general public in times of empty courtrooms (apart from those cases which attract large media attention) no longer provides the transparency it used to. At the same time, as print media coverage declines so does an important check on the judiciary.[130] Instead new technologies become more relevant. The increasingly powerful role of such media[131] necessitates the taking of new approaches to fostering transparency without compromising independent decision-making.[132]

With the increasing relevance of law in our society, the rising number of cases and the complaint of over-lengthy proceedings the question of how to ensure efficiency is at the forefront of current debate.[133] All countries of the Western hemisphere are confronted with the challenge of identifying new steering mechanisms without compromising independent adjudication.[134] However, an increasingly managerial approach undertaken by the executive carries the risk of giving rise to new pressures on the judiciary at the expense of independent decision-making.[135] In several countries complaints about the functioning of the judiciary have prompted governments recently to revise legislation in an effort to provide more control and to enhance efficiency, which on the other

---

[129] For the difference in history, task, organizational structure and values and their impact on the character of each judiciary see J. Bell, Judiciaries within Europe, at 350-383 (2006).

[130] R. Wheeler, Judicial Independence in the United States of America, in this volume, Chapter C. II. 4.

[131] Turenne (note 128), Chapter C. III.

[132] For the Judicial Communications Office in England see id., Chapter F.

[133] See e.g. Allemeersch/Alen/Dalle (note 128), Chapter B. X; A. Seibert-Fohr, Judicial Independence in Germany, in this volume, Chapter B. I. 3. In response to the current debate the CoE Committee of Ministers in 2002 established the European Commission for the Efficiency of Justice (CEPEJ), available at <http://www.coe.int/t/dghl/cooperation/cepej/default_en.asp>

[134] See e.g. de Lange (note 128), Chapter A. In Belgium a workload measurement has been introduced by the judiciary. Allemeersch/Alen/Dalle (note 128), Chapter B. X.

[135] Garapon/Epineuse (note 128), Chapter F. See also H. M. Watt, Quelques Remarques d'Ordre Comparatif sur la Notion d'Accountability Appliquée à la Justice, in: G. Canivet/M. Andenas/D. Fairgrieve (eds.), Independence, Accountability, and the Judiciary, 236, at 238-239 (2006).

hand have led to complaints by the judiciary about the detrimental effects of such steps on their independence.[136]

Among the noticeable developments in Western judiciaries is a decline in the difference between common law and civil law countries in terms of recruitment.[137] While traditionally there was an apparent distinction[138] between the common law model of judicial selection – which recruited judges of all levels of the judiciary from among the experienced bar without a formal mechanism of promotion[139] – and the civil law model of recruiting young law graduates for a judicial career,[140] there have been considerable changes in both, moving them somewhat closer – a trend which reflects the changing role of judges in both systems and

---

[136] In Italy since 2007 a new law has provided for regular professional evaluations. D.Lgs. no. 160/2006. See also Di Federico (note 73), Chapter B. III. 2. a). In 2006 a new law on judicial discipline was adopted in order to make disciplinary proceedings more effective and rigorous: D.Lgs. no. 109/ 2006. Di Federico (note 73), Chapter B. VII. 1. In France several recent scandals have given rise to a new institutional reform focusing on the accountability of judges and the efficiency of the judiciary. Garapon/Epineuse (note 128), Chapter A. One of these is reducing the number of judicial members of the *Conseil Supérieur de la Magistrature* in favour of more lay members. Garapon/Epineuse (note 128), Chapter B. I. 2. a). In Belgium in an effort to enhance judicial accountability the justice reform of 1998 introduced an evaluation scheme for all judges seeking promotion or having managerial functions. However, the organization of the scheme has been criticized as bureaucratic and excessively time-consuming. Allemeersch/Alen/Dalle (note 128), Chapter B. VII. 6.

[137] For a critical view on the distinction between civil law and common law countries in comparative judicial studies see Bell (note 129), at 382.

[138] For the distinction between what they call the "professional judiciary" in the common law tradition and the "bureaucratic judiciary" associated with the civil law tradition see C. Guarnieri/P. Pederzoli, The Power of Judges: A Comparative Study of Courts and Democracy, at 66-68 (2002).

[139] In Canada under the Judges Act federal judges must have spent at least ten years at a provincial bar before appointment. F. Gélinas, Judicial Independence in Canada: A Critical Overview, in this volume, Chapter B. II. 1. In the United States judges generally take office around the age of 40 or 50. Wheeler (note 130), Chapter B. II. 3.

Though Sweden does not formally provide for a career judiciary it primarily recruits young law graduates: see J. Nergelius/D. Zimmermann, Judicial Independence in Sweden, in this volume, Chapter B. II. 2.

[140] For example in Italy judges are still between 25 and 30 years of age when they enter the judiciary: Di Federico (note 73), Chapter B. III. 1.

accordingly the exigencies for their professional qualification. In England and Wales recent changes in the recruitment of judges described by Sophie Turenne in her study marked a greater recognition of a judicial career[141] with a distinctive profile for judges to be appointed. Higher court judges are increasingly recruited from lower level courts without, however, giving up the requirement of prior advocacy.[142] Also in the United States half of the current federal judges at the court of appeals were federal district or state judges when appointed. Increasingly Presidents have appointed state or term-limited federal judges as federal district judges.[143] In the Canadian practice, the majority of judges exercising appellate jurisdiction have had experience as trial judges.[144] With the emergence of a judicial career there is a risk that career considerations may play a role in the decision-making of judges seeking office in higher courts. It is for this reason that in England and Wales the need for an appraisal structure which does not compromise judicial independence has been identified.[145] Here the same problems are about to arise in judicial appointments as in the context of formal promotions in civil law countries.

At the same time there have been significant changes in the recruitment schemes in civil law countries. Several continental European countries have recognized that judges should not be exclusively recruited from among young law graduates. Some countries provide for a minimum age limit,[146] others allow experienced lawyers also to enter the judiciary.[147] Antoine Garapon and Harold Epineuse in their study on France reveal efforts over the past two decades to allow legal professionals to enter the judiciary in an attempt to diversify the judicial body.[148] With

---

[141] For the recognition that judges have a specific role which requires more than being a good barrister see K. Malleson, The New Judiciary: The Effects of Expansion and Activism, 79-81 (1999).

[142] Bell (note 129), at 313. See also Turenne (note 128), Chapter B. II. 2. c). In Estonia there have also been efforts to move to a career judiciary with a recent draft law requiring judicial expertise to become an appellate judge: Ligi (note 61), Chapter B. III.

[143] Wheeler (note 130), Chapter B. III. 2.

[144] Gélinas (note 139), Chapter B. III. 2.

[145] Turenne (note 128), Chapter F.

[146] In The Netherlands, for example, the minimum age for judges is 30: de Lange (note 128), Chapter B. II. 1.

[147] Allemeersch/Alen/Dalle (note 128), Chapter B. II. 1.

[148] Garapon/Epineuse (note 128), Chapters B. II. 1. a) and 2. b).

the *Loi organique* of 5 March 2007 the number of attorneys, clerks and law professors eligible for judicial recruitment has been raised to a quarter of all judges entering the second rank.

These are only some of the current issues illustrating the continuous search for adequate mechanisms to ensure that the constitution and work of the judiciary responds to new developments. But they do not disguise that even in established democracies there is a risk of political influence on adjudication. The Fortis case in Belgium, which Benoît Allemeersch, André Alen and Benjamin Dalle describe in their study, is only one example of where a government had an interest in the outcome of the proceedings and was alleged to have undue contacts with the prosecution and judges.[149] Though political pressure could not be established, the ensuing parliamentary investigation identified shortcomings in the separation of the judiciary from the executive.[150] This case, which is only exemplary and by no means relevant just for Belgium, shows that the implementation of judicial independence requires continuous efforts by all relevant actors even in established democracies. The difference from authoritarian regimes is the fact that in a functioning democracy such cases attract public attention and are subject to official inquiry which, as in the case of Belgium, identifies shortcomings and makes recommendations for future reform efforts.

b) The Increasing Emphasis on Formal Guarantees and Structural Independence

There is a significant trend in several established democracies to ensure judicial independence not only by way of convention but also by way of formal guarantees and fixed procedures. In Belgium, for instance, where judicial independence has been an unwritten constitutional principle for more than 160 years, it was formally incorporated into the constitution in 1998.[151] Also in England and Wales where judicial inde-

[149] Allemeersch/Alen/Dalle (note 128), Chapter A.

[150] Commission of Inquiry, Parliamentary Documents: House of Representatives 2008-2009, No. 52 1711/007, at 68, 70-71, available at <http://www.dekamer.be>.

[151] Article 151 of the Belgium Constitution provides that "Judges are independent in the exercise of their judicial duties": Amendment to the Constitution of 20 November 1998 (Belgian State Gazette, 24 November 1998). For prior elements of this guarantee in the Constitution see Allemeersch/Alen/Dalle (note 128), Chapter A.

pendence has been a longstanding convention since the Act of Settlement 1700 with the guarantee of judicial tenure *quamdiu se bene gesserint* (during good behaviour)[152] the Constitutional Reform Act 2005 formalized the duty of government ministers to uphold the continued independence of the judiciary[153] and introduced formal safeguards, such as new mechanisms for appointing, training and disciplining judges.[154] Efforts have been made to specify the notion of merit as a prerequisite for judicial selection[155] and to introduce greater formality in disciplinary proceedings.[156] Irrespective of the debate whether these changes were indeed necessitated by flaws in actual practice the stronger emphasis on the separation of powers and reducing the role of the executive in judicial selection gave rise to structural and institutional changes, as evidenced by the new Judicial Appointments Commission. Also the previous model of judicial administration was changed, so that while the Lord Chancellor is still responsible for the administrative functioning of the courts, the Lord Chief Justice is now responsible for the judicial function of the courts (Concordat).[157] Both are informed and advised by the Judges' Council for England and Wales as a body representing the views of the judiciary.[158]

The traditional model of executive court administration has been increasingly questioned also in Canada by a demand for greater administrative autonomy of the judiciary.[159] As early as in 1985, the Supreme Court of Canada held that courts should have control over administrative decisions bearing on the exercise of the judicial function, such as assignment of judges and sittings of the courts, according to the Canadian

---

152 Act of Settlement, 1701, 12 & 13 Wm 3 (UK).

153 Section 3 CRA.

154 Turenne (note 128), Chapter A.

155 Section 63(2) and (3) CRA. For the criteria applied by the Judicial Appointments Commission – intellectual capacity, personal qualities, an ability to understand and deal fairly, authority and communication skills, and efficiency – see Turenne (note 128), Chapter B. II. 1. c).

156 Id., Chapter B. VII.

157 Id., Chapter B. I. 1.

158 Id., Chapter B. I. 2.

159 See e.g. C. Baar/K. Benyekhlef/F. Gélinas/R. Hann/L. Sossin, Alternative Models of Court Administration (Report commissioned by the Canadian Judicial Council), at 69 (2006).

Constitution.[160] Fabien Gélinas in his Critical Overview of Judicial Independence in Canada describes the development since then, in which the relevant constitutional norms of judicial independence[161] are no longer considered to be satisfied by the traditional institutional arrangements.[162] With the call to ensure institutionally that courts are perceived to be independent in the view of a reasonable and informed person[163] the Supreme Court in the late 1990s recognized a need for depoliticization and required the formalization of the relations between the legislative and executive branch and the judiciary.[164] This has led to the establishment of independent remuneration commissions and may also affect other areas in the future, such as the preparation of judicial budgets and the appointment of judges.[165]

In Western civil law democracies there have also been efforts to limit executive control, and a number of them have established judicial councils.[166] While the *Conseil Supérieur de la Magistrature* was created in France as early as on 30 August 1883 for judicial discipline,[167] Italy and Spain established judicial councils as a means to ensure the rule of law after the end of dictatorship.[168] In other countries the reorganization of

---

[160] *Valente* v. *The Queen*, 2 S.C.R. 673, at 712 (1985); *R.* v. *Généreux*, 1 S.C.R. 259, at 286 (1992).

[161] Section 11(d) of the Canadian Charter of Rights and Freedoms.

[162] Gélinas (note 139), Chapter B. I. 1.

[163] *Valente* v. *The Queen* (note 160), at 689; *R.* v. *Généreux* (note 160), at 287.

[164] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 3 S.C.R. 3, at para. 140 (1997).

[165] Gélinas (note 139), Chapters B. I. 1. and F.

[166] For this development worldwide see N. Garoupa/ T. Ginsburg, Guarding the Guardians: Judicial Councils and Judicial Independence, 57 Am. J. Comp. L. 103 (2009). For a critical appraisal of judicial councils in Latin America see Hammergren (note 115).

[167] Arts. 64 and 65 of the French Constitution provide the CSM with the power to assist the President in maintaining the independence of the judiciary; to appoint judges; and to ensure the discipline of magistrates. For further details see Garapon/Epineuse (note 128), Chapter B. I. 2. b).

[168] Article 105 of the Italian Constitution of 1948 provides that all decisions concerning judges and prosecutors including recruitment, assignment, removal, promotion and discipline are within the exclusive competence of the Superior Council of the Magistracy (*Consiglio Superiore della Magistratura*). For a description of the role of judicial councils in South Europe see C. Guarnieri, Ap-

judicial administration has been more recent, as for example in The Netherlands where the Council for the Judiciary was introduced in 2002 with competences over recruitment, promotion, assessment, training and salaries.[169] In Belgium the High Council of Justice was established in order to strengthen judicial independence *vis-à-vis* the executive branch while ensuring judicial accountability.[170] As an autonomous body separate from the executive, the legislative and the judiciary, it started to exercise its authority with respect to recruitment, training and oversight in 2000 with the result that the executive model of court administration has been changed into a mixed system of executive power and intervention by an independent institution to ensure more objectivity in judicial selection instead of the prior politicized appointments, and to improve the quality of judicial services.[171] Regina Kiener's study on Switzerland also shows a stronger separation of powers by reducing the influence of the other branches of government on the judiciary, as evidenced by a trend towards judicial self-administration at cantonal level.[172]

In the Nordic Countries there have been efforts to transfer managerial functions traditionally exercised by the Ministries of Justice and the courts to an independent administrative organ in an effort to render the administration of the judiciary more effective. Joakim Nergelius and Dominik Zimmermann in their study show that the Swedish reform has also led to changes in neighbouring countries.[173] While the Swedish *Domstolsverket* in 1975 was the first of its kind in Nordic countries, it has served as a model for other Scandinavian states, such as Norway[174] and Denmark (with the *Domstolsstyrelsen* which is more independent

---

pointment and Career of Judges in Continental Europe: The Rise of Judicial Self-Government, 24 Legal Studies 169 (2004).

169 de Lange (note 128), Chapter B. I. 2.

170 The High Council of Justice's two commissions are composed of an equal numbers of judges (and members of the Crown Prosecutor's Office) and members appointed by the Senate with a two thirds majority of the votes cast: Allemeersch/Alen/Dalle (note 128), Chapters B. I. 2. and A.

171 Id., Chapters B. I. 1.-2. and II. 2.

172 R. Kiener, Judicial Independence in Switzerland, in this volume, Chapter B. I. 1.

173 Nergelius/Zimmermann (note 139), Chapters A. and B. I. 2.

174 The *Domstoladministrasjonen* was established in 2001 as an independent body in charge of the central administration of the ordinary courts in Norway.

of the government than its Swedish counterpart).[175] Finland is the only country in this region where judicial administration remains in the hands of the Minister of Justice. But while the Southern model of Judicial Councils provides for broad competences including concerning a judicial career, the Nordic countries provide for yet a different organ which proposes candidates to the government for appointment as judges.[176]

These developments taken together exhibit an increasing concern for the separation of powers and for structural safeguards in the Western hemisphere in an effort to reduce executive influence by means of administrative oversight and to keep public confidence in the judiciary. In general the influence of the Ministries of Justice has been limited and new administrative bodies have been established instead. But this trend should not be misunderstood as evidence of an emerging model of administrative autonomy by the judiciary. While the common translation as judicial councils may suggest that there is a uniform process of establishing administrative institutions run by the judiciary, it is important to note that most institutions which have been established for the administration of the judiciary are not only independent of the executive and legislative branch but also separate from the judiciary.[177] Self-administrative organs, such as the Superior Council of the Magistracy in Italy with exclusive competences with respect to all aspects of the judicial career including recruitment, promotion, training, evaluation, transfer, discipline and oversight of courts, are exceptional.[178] And considering the flawed experience with the Italian model of exclusive self-administration described by Giuseppe Di Federico in his study[179] and the repeated concern about judicial corporatism in other European countries,[180] it is difficult to understand why it is sometimes described as a standard for other countries in Europe.[181]

---

175 *Lov om Domstolsstyrelsen*, Lov no. 401 of 26 June 1998.

176 The Judicial Appointments Council submits recommendations to the Minister of Justice for all judicial appointments: Nergelius/Zimmermann (note 139), Chapter B. II. 2. a).

177 See e.g. Allemeersch/Alen/Dalle (note 128), Chapter B. I. 2.

178 Di Federico (note 73), Chapter B. I. 2.

179 Id., Chapters B. I. 2. and F.

180 Garapon/Epineuse (note 128), Chapter F.; Fleck (note 61), Chapters B. I. 2. and F.; Coman/Dallara (note 61), Chapter B. I. 2. a.; Hriptievschi/Hanganu (note 6), Chapter B. I. 2.; Schwartz/Sykiainen (note 6), Chapter B. I. 2 (with re-

As our comparative analysis shows, the different areas of judicial administration are usually divided up among different organs in Western democracies. There is no common scheme regarding the competences of these bodies. In several countries administrative competences are shared between the executive and judicial branches. While administrative matters which are considered to have a bearing on adjudication are removed from the executive role, other matters either are left to the Ministry of Justice (e.g. Germany) or are under shared responsibility.[182] An example of a co-operative model can be found in England and Wales where a partnership between the government and the judiciary provides for a system of consultation and joint decision-making between the Lord Chief Justice and Lord Chancellor in areas such as judicial discipline and court management.[183]

Apart from matters such as case assignment and sittings of courts, there is no transnational agreement as to which matters of judicial administration are case sensitive and thus reserved to the judiciary only. The same divergence can be found with respect to membership of judicial councils. Whereas two thirds of the Italian *Consiglio Superiore della Magistratura* are judges,[184] the Belgian High Council of Justice has half of its members appointed by the Senate and the other half are magistrates.[185] In France, too the composition of the French judicial council was modified so that judges no longer make up the majority of its members.[186]

---

gard to the Russian model of Qualification Commissions). See also Guarnieri/Pederzoli (note 138), at 55 with further references.

[181] See Opinion no. 10 of the Consultative Council of European Judges (CCJE) on the Council for the Judiciary at the service of society, paras. 16-18, 41-42 (2007); P.-A. Albrecht/J. Thomas, Strengthen the Judiciary's Independence in Europe! International Recommendations for an Independent Judicial Power (2009).

[182] See e.g. Gélinas (note 139), Chapter B.I. and Seibert-Fohr (note 133), Chapter B. I.

[183] See Turenne (note 128), Chapter B. I. 1. a).

[184] Di Federico (note 73), Chapter B. I. 2. a).

[185] Allemeersch/Alen/Dalle (note 128), Chapter B. I. 2. In Sweden the members are appointed by the government and judges are in the minority: Nergelius /Zimmermann (note 139), Chapter B. I. 2.

[186] Article 31 of the *Loi Constitutionnelle* no. 2008-724 of 23 July 2008.

c) Causes of Change

Though there are still considerable differences in the roles played by the judiciaries in Western democracies[187] their evolution in recent decades to some extent shows a common trend.[188] Structural changes which Western judiciaries have undergone in the 2000s, most obvious in the constitutional reforms of the United Kingdom (2005) and France (2008), are evidence of a broader transitional phenomenon which reflects the shifting role of law in Western democracies, and with it the role of the judiciary more specifically.[189] The changes concern the subject area of law which has been broadened considerably, and consequently the perception of the nature of law and the role of judges more generally.[190]

(1) The Impact of Civil Rights on Judicial Independence

It may not be particularly noteworthy in a country such as the United States, where judicial review goes back to the Supreme Court's legendary *Marbury* v. *Madison* decision of 1803,[191] but some countries, such as England with the Diceyan concept of parliamentary sovereignty and France with its emphasis on the *volonté générale* since the French Revolution, have experienced paradigmatic developments over the past decades.[192] With the growing relevance of individual rights as a means of limiting governmental powers both countries have changed their consti-

---

187 Bell (note 129), at 353.

188 Guarnieri/Pederzoli (note 138), at 1-13.

189 Even in Sweden where the judiciary has traditionally played a secondary role, its importance has increased recently because of the European Convention of Human Rights: Nergelius/Zimmermann (note 139), Chapters A. and F.

190 S. B. Burbank, What Do We Mean by "Judicial Independence"?, 64 Ohio St. Law Journal 323, 337 (2003).

191 *Marbury* v. *Madison*, 5 U.S. 137 (1803), 5 U.S. 137 (Cranch). Nevertheless, the scope of judicial review developed over time and increased significantly with the Warren Court's civil rights and liberties jurisprudence.

192 The degree of this change is still very controversial. While some authors consider these changes to be radical, others try to consider them as reflecting previous constitutional paradigms. See e.g. C. Forsyth, Judicial Review and the Constitution (2000).

tutional setup.[193] Individual rights are used not only to interpret parliamentary legislation as before, but also as a means to scrutinize statutes for their compatibility with individual rights. In France the latest step in this development was taken in the constitutional reform of 2008.[194] It changes the role of the Constitutional Council (*Conseil Constitutionnel*) by allowing it to pronounce on the compatibility of a law (after its entry into force) with French civil rights if the question is posed in a legal action and referred to it by one of the highest courts.[195]

In England, too, the role of the courts has changed over the past decade. Though the Human Rights Act 1998 does not allow the invalidation of legislation, it gives courts in the United Kingdom the competence to make a declaration of incompatibility.[196] With these reforms increasing the role of the judiciary there have been demands to introduce institutional and procedural guarantees to ensure judicial independence against potential political reprisals. In the United Kingdom the Constitutional Reform Act 2005 led to a formally stronger separation of powers by changing the role of the Lord Chancellor and the establishment of the Judicial Appointments Commission.[197]

Several Western European country studies in this book show that this, in part, is due to the influence of European human rights on the domes-

---

[193] For the changing role of national parliaments see K. S. Ziegler/D. Baranger/A. W. Bradley (eds.), Constitutionalism and the Role of Parliaments (2007). For the impact of what he calls the "rights revolution" on the transformation of European judicial culture and the judge's role see Mitchel de S.-O.-l'E. Lasser, Judicial Transformations: The Rights Revolution in the Courts of Europe (2009).

[194] This marks only the latest step in a development since the beginning of the Fifth Republic in which courts have increasingly resorted to French and European civil rights to scrutinize parliamentary legislation.

[195] Article 61-1 de la Constitution, introduced by Article 29 *Loi Constitutionnelle no. 2008-724 of 23 juillet 2008 de modernisation des institutions de la V^e^ République (1), Journal Officiel De La République Française, 24 Juillet 2008, p. 11890; Loi organique no. 2009-1523 du 10 décembre 2009 relative à l'application de l'article 61-1 de la Constitution.*

[196] Sect. 4 Human Rights Act 1998.

[197] K. Malleson, Modernizing the Constitution: Completing the Unfinished Business, in: G. Canivet/M. Andenas/D. Fairgrieve (eds.), Independence, Accountability, and the Judiciary, at 145 (2006).

tic legal system.[198] Roel de Lange, for example, in his study on The Netherlands explains that the guarantee of independent courts in Article 6 European Convention on Human Rights and its interpretation by the European Court of Human Rights had an important impact on the reorganization and reorientation of the Dutch judiciary, as evidenced by the establishment of the Council for the Judiciary with competences over aspects of judicial administration affecting judges, such as recruitment, promotion, assessment, training and salaries.[199]

The influence of civil rights on the concept of judicial independence can also be seen in Canada. Recent changes in the administration of the judiciary can be traced back to the adoption of the Canadian Charter of Rights and Freedoms in 1982. Both the formal recognition of the right to due process before an independent court[200] and the changing role of the judiciary in defence of individual rights against the government[201]

---

[198] In England one of the arguments for the stronger separation of powers in the CRA was the jurisprudence of the European Court of Human Rights in *McGonnell* v. *United Kingdom* (2000) 30 EHRR 289 and in *Findlay* v. *United Kingdom* 24 EHRR 221 (1997). See also S. Shetreet, The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges, 10 Chicago J. of International Law 275, at 319-324 (2009).

But there was also a strong political motivation behind the reform of 2005. M. Loughlin, Grundlagen und Grundzüge staatlichen Verfassungsrechts: Großbritannien, in: A. v. Bogdandy/P. Cruz Villalón/P. M. Huber (eds.), 1 Handbuch Ius Publicum Europaeum 217, at 266 (2007). For the influence of Article 6 ECHR and Article 14 ICCPR on the Belgian legal order see Allemeersch/Alen/Dalle (note 128), Chapter A. For the influence of European standards for the independence of judges on French legal reforms see Garapon/Epineuse (note 128), Chapter A. For the influence of the European Convention on Human Rights on the separation of powers in Sweden see Nergelius/Zimmermann (note 139), Chapter F.

For the influence of European human rights on the domestic constitutional order generally see A. Seibert-Fohr, Richterbestellung im Verfassungswandel – Der Einfluss des Individualrechtsschutzes auf Funktion und Auswahl oberster Richter in Europa, 49 Der Staat 130, at 137-140 (2010).

[199] de Lange (note 128), Chapter A.

[200] Section 11(d) Canadian Charter of Rights and Freedoms. Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, Chapter 11 (UK).

[201] Gélinas (note 139), Chapter A.

have led the Supreme Court to recognize the need to protect the judiciary against political influence by way of institutional changes.[202] On the whole it is a mix of different but interrelated factors, a stronger individualism combined with the growing emancipation of the judiciary supported by political actors in terms of constitutional and structural changes, which leads to an increasing trend in Western democracies to formalize judicial independence in an effort to limit the influence of the political branches of government on the judiciary.[203]

(2) Changing Perceptions on the Nature of Law and the Role of Judges

With the changing content of law in modern democracy and the changing perception of its role in society the function of the judiciary has been altered more generally.[204] While the positivist *bouche de la loi* and *en quelque façon nulle* interpretation of Montesquieu's *De l'Esprit des Lois*[205] led to a formal conceptualization of the role of judges in the 19th Century, there has been a considerable development since then in civil law and in common law countries.[206] In most Western democracies – though to varying degrees – the perception that adjudication is to be

---

[202] *Valente* v. *The Queen* (note 160), at 712; *R.* v. *Généreux* (note 160), at 286; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* (note 164), at para. 140.

[203] For the role of political and economic elites in the emergence of what he calls "juristocracy" see R. Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (2004).

[204] For an early analysis of the changing role of the judiciary see M. Cappelletti, The Judicial Process in Comparative Perspective (1989). For the changing role and the expanding powers of the judiciary and its effects on judicial training, appointments and evaluations see Malleson (note 141). For an empirical analysis of how different models of selection, training, and organization of the judiciary have an effect on its political role in a particular system see Guarnieri/Pederzoli (note 138), at 18.

[205] For the erroneous interpretation of Montesquieu's qualification as a mechanical interpreter of the law see R. Ogorek, Richterkönig oder Subsumbtionsautomat? Zur Justiztheorie im 19. Jahrhundert (1986).

[206] For the fading difference between common and civil law more generally see B. S. Markesinis, Foreign Law and Comparative Methodology: A Subject and a Thesis (1997).

understood as the mechanical exercise of pure application is fading.[207] In civil law countries, such as Germany, the judiciary, despite the persistence of ministerial judicial administration, is not perceived to be bureaucratic in nature.[208] The constitutional guarantee of judicial independence has led to significant changes in all aspects of the administration which are related to adjudication. With the emphasis on internal judicial independence traditional hierarchical structures have been replaced in favour of a growing individual emancipation of judges.[209] This is not to deny persistent flaws but to show that the old stereotypes of bureaucratic *versus* professional judiciaries no longer adequately grasp the situation at hand.[210]

The changing perception on the nature of law and the role of judges affects the conceptualization of judicial independence and its implementation in both civil and common law countries. The above-described changes in the recruitment of judges in Western civil and common law countries indicate this development. While civil law countries have been moving away from the bureaucratic model of recruiting exclusively young law graduates in an effort to increase professional and arguably real life experience, there is a process of developing a judicial career in common law countries which emphasizes the importance of judicial experience, a development which could be explained by the increasing relevance of statutory law in common law jurisdictions. The increased emphasis in England and Wales on the regular training of judges with its focus on practical skills and ethical standards shows the emergence of a profession which requires particular competences distinct from those of the general legal profession.[211]

In the long run the recognition that adjudication transcends the exclusive formal application of the law requires an even more comprehensive reflection on the legitimation of judicial power. In order to determine

---

[207] Shapiro (note 1), at 155; A. Garapon, Une Justice 'Comptable' de ses Décisions?, in: G. Canivet/M. Andenas/D. Fairgrieve (eds.), Independence, Accountability, and the Judiciary, 241, at 250-251 (2006); Guarnieri/Pederzoli (note 138), at 187.

[208] Seibert-Fohr (note 133), Chapter B. I. 1.

[209] For the dismantling of the traditional hierarchical structures see Guarnieri/Pederzoli (note 138), at 148.

[210] For the terminological distinction and the assertion that judiciaries in democratic countries can be placed on a continuum defined at either end by these two types see Guarnieri/Pederzoli (note 138), at 66.

[211] Turenne (note 128), Chapter B. I. 4.

the appropriate scope of judicial independence the precise meaning of "on the basis of law" which independent adjudication is directed to needs to be reconsidered. From a legal realist perspective, positivist notions of "neutrality" no longer adequately reflect the meaning of independence. If adjudication cannot exclusively be traced back to an act of parliament (statute) which has been democratically legitimized there is a need to legitimize the exercise of judicial power by additional means. To be clear, adjudication is different from lawmaking as exercised by the political branches.[212] But for the interpretation of abstract values, such as in constitutional adjudication, the reliance on substantive legitimation by referring to the democratic legitimation of the applied constitutional provisions is not able by itself to legitimize the role played by judges. If we recognize the impact of extrajudicial influences on adjudication it is important to distinguish between appropriate and inappropriate means and degrees of influence. In order to avoid bias there needs to be some balance of different perspectives and the plurality of the bench becomes relevant.

II. Judicial Independence in the Age of Judicialization: The Way Forward

It is important to note that the growing importance of the judiciary is a phenomenon not only of established democracies but of all countries studied in this volume. Some of the above-described problems experienced by new EU member countries from Central and Eastern Europe, such as continuing formalism and lack of internal independence, are related to the changing role of the judiciary and demonstrate the need to find adequate ways to defend its independence. These flaws are due to the fact that during communism these countries did not experience the same evolutionary development in the role of the law and the judiciary which gradually took place in Western democracies. Now their judiciaries all of a sudden need to measure up to the new exigencies which came with the transition to a different mode of governance and the increasing role of law resulting from EU accession. This requires a new look at the meaning of judicial independence and its implementation, a

---

[212] According to Friedman judiciaries are "within politics, but not of politics". B. Friedman, History, Politics and Judicial Independence, in: A. Sajó (ed.), Judicial Integrity, 99, at 101 (2004).

process which we have described above as requiring fine-tuning and time.

Also the changes in established democracies are only the beginning of a necessary broader reconceptualization. The outcome of this evolution is yet to be finally settled. Current concerns to refine and specify the notion of merit and to diversify the judiciary[213] are evidence of a continuing effort to identify the role of the judiciary in a pluralist democracy. As the English reform with the establishment of the Judicial Appointments Commission shows, there is a concern that the judiciary should be more representative of society at large in terms of social pluralism in order to enhance the legitimacy of the judiciary and public trust.[214] It is part of a broader modernization of governance in which the judiciary is conceived as a public service requiring a consumer-based approach.[215]

At the same time the increasing relevance of individual rights as a limiting factor for the exercise of governmental power requires a new positioning of the judiciary within the constitutional order. With the growing relevance of human rights and constitutionalism the judiciary has ventured into areas traditionally considered to be political in nature.[216] This in turn has created new risks of external leverage. The traditional law and politics divide of legal positivism in Europe no longer works as it used to, and clashes between political powers and the courts arise, at times prompting the executive to reassert powers or to use its competences to influence jurisprudence.[217] Consequently, as described above, there have been calls in several countries to protect the judiciary from

---

[213] According to Guarnieri the quest for a representative judiciary is the result of the declining image of judges as "*bouche de la loi*": C. Guarnieri, Le Contrôle Informel, in: G. Canivet/M. Andenas/D. Fairgrieve (eds.), Independence, Accountability, and the Judiciary, 405, at 407-408 (2006).

[214] For the development in France see Garapon (note 207), at 244-245.

[215] Bell (note 129), at 376; P. H. Russell, Jr., Conclusion, in: K. Malleson/P. H. Russell, Jr. (eds.), Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World, 420, 422 (2006).

[216] For the judicialization of politics see e.g. C. N. Tate/T. Vallinder, The Global Expansion of Judicial Power: The Judicialization of Politics, in: C. N. Tate/T. Vallinder (eds.), The Global Expansion of Judicial Power, at 1 (1995); Guarnieri/Pederzoli (note 138), at 186-188. For the changing nature of law requiring new means of responsibility see M. Cappelletti, Who Watches the Watchmen? – A Comparative Study on Judicial Responsibility, in: S. Shetreet (ed.) Judicial Independence: The Contemporary Debate, 550, at 553, 573 (1985).

[217] Russell (note 215), at 422.

political influence by way of structural changes, most notably in terms of recruitment, which emphasize the separation of powers in a sense of strict separation.

On the other hand there are still countries which give the political branches of government a decisive role in judicial selection. As a matter of democratic legitimacy of the judiciary countries such as the United States, Switzerland and Germany retain models of judicial selection in which judges are selected by elected organs or elected directly by the population.[218] Regina Kiener in her study explains the fact that a considerable number of judges in Switzerland are elected by popular vote for a limited term of office as deeply rooted in the Swiss constitutional principle of democratic accountability.[219]

With the growing emphasis on institutional independence of the judiciary in Europe, those models are increasingly criticized.[220] The Council of Europe's advisory body on constitutional matters (the European Commission for Democracy through Law) in its 2007 Report on Judicial Appointments said, "International standards in this respect are more in favour of the extensive depolitization of the process".[221] However, taking the depolitization argument too far carries with it the risk that judicial power lacks the necessary legitimacy. Graham Gee in his chapter on judicial selection warns that depolitization in the recruitment of judges may lead to a situation in which an open and balanced democratic process is replaced by unacknowledged unilateral political influence on adjudication.[222] After all, with the increasing role of the ju-

---

[218] Wheeler (note 130); Kiener (note 172); Seibert-Fohr (note 133), Chapters B. II. 2.

[219] Kiener (note 172), Chapters A. and F.

[220] P.-A. Albrecht/J. Thomas, Strengthen the Judiciary's Independence in Europe! International Recommendations for an Independent Judicial Power (2009); CoE Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Allegations of politically motivated abuses of the criminal justice system in Council of Europe member states, para. 4.2.4., Doc. 11993, 7 August 2009.

[221] Venice Commission, Opinion No. 403 / 2006, Judicial Appointments, Report adopted by the Venice Commission at its 70th Plenary Session, CDL-AD(2007)028, at para. 3 (22 June 2007).

[222] G. Gee, The Persistent Politics of Judicial Selection, in this volume, Chapter H. For the assertion that judicial appointments always have a political dimension regardless how the process is constructed see Russell (note 215). He argues that in an age where judges play a prominent role in governance it is nei-

diciary in politically sensitive matters, political interest in judicial appointments is likely to increase and will find its way in irrespective of the method of appointment.[223]

More generally the current discussion about the role and legitimation of the judiciary is about how to balance democracy and the rule of law in cases of conflict which all liberal democracies face.[224] While traditionally the rule of law and democracy have been thought of as mutually reinforcing, the question now increasingly arises how one should deal with them in cases of conflict (e.g. when parliamentary laws are challenged in court on the basis of the constitution). What we see in England, for example, is a debate about whether parliamentary sovereignty is being gradually replaced by constitutional supremacy.[225] Traditionally there the rule of law was considered to be a corollary of parliamentary sovereignty.[226] Over time it has developed into a principle of itself with equal significance.[227] The current debate about judicial review shows the struggle in the conceptualization of law within the traditional political constitution. There are divergent views on the role of the judiciary in the English democracy.

In this respect it differs from countries such as the Federal Republic of Germany where after the experience of the *Dritte Reich* constitutionalism was conceptualized in 1949 as a limit on democratic governance.[228] The United States as the country with the oldest tradition of judicial review has developed its own way of dealing with constitutionalism and

---

ther possible nor desirable to have complete independence from a country's politics: id., at 429.

[223] For different types of political influence on judicial appointments see id., at 422-426.

[224] This is not to advocate communist notions requiring adjudication to be politically legitimized, but to deal with cases in which democracy and the rule of law conflict. For the inevitable tension between judicial power and democracy and how to reconcile them see Guarnieri/Pederzoli (note 138), at 150-160, 191-196.

[225] See e.g. *Secretary of State for the Home Department* v. *Roth*, 1 CMLR 52, at 71 (2002).

[226] A. V. Dicey, Law of the Constitution, 81915, Chapter 4.

[227] M. Loughlin, Grundlagen und Grundzüge staatlichen Verfassungsrechts: Großbritannien, in: A. v. Bogdandy/P. Cruz Villalón/P. M. Huber (eds.), 1 Handbuch Ius Publicum Europaeum 217, at para. 83 (2007).

[228] Seibert-Fohr (note 133), Chapter A.

democracy.[229] Despite continuing frictions US federal practice is characterized by some form of self-restraint by the political branches and the judiciary, rather than by a dogmatic venture of balancing abstract constitutional principles.[230] All three examples show that in liberal democracy the dichotomy is insoluble in the end and can only be balanced in one or the other way.[231] It is a matter of taking liberal democracy seriously to leave these conceptual decisions and the fine-tuning of democracy and the rule of law with the countries individually, provided fundamental rights are guaranteed.

III. Balancing Independence with Accountability

1. Accountability in Transitional Countries

For the question of how to build an independent judiciary in the aftermath of an authoritarian regime a crucial and probably the most challenging aspect is the search for adequate mechanisms to balance judicial independence and judicial accountability.[232] In transitional countries

---

[229] For the continuing debate about the role of the Supreme Court in American democracy see e.g. A. M. Bickel, The Least Dangerous Branch (2nd ed. 1986). Karlan advocates a negative conceptualization of judicial independence which emphasizes the freedom from interference and notes that a positive reading in the sense of judicial autonomy is likely to conflict with accountability and other important values. P. S. Karlan, Judicial Independence, 95 The Georgetown Law Journal 1041, at 1059 (2007).

[230] According to Geyh customs by the political actors ("customary independence") play a decisive role in balancing judicial independence with accountability: C. G. Geyh, Customary Independence, in S. B. Burbank/B. Friedman (eds.), Judicial Independence at the Crossroads: An Interdisciplinary Approach, 160, at 162-163 (2002).

[231] According to Russell there will always be some form of political influence on judicial appointments. But it needs to be balanced against judicial independence: Russell (note 215), at 426.

[232] As the example of Moldova shows, there is a continuing effort to draft and refine mechanisms in order to balance independence and accountability: Hriptievschi/Hanganu (note 6), Chapter A. For judicial accountability in new democracies see S. Gloppen/R. Gargarella/E. Skaar, Democratization and the Judiciary: The Accountability Function of Courts in New Democracies (2004). More generally, for the tension between judicial accountability and independence and the need for balance see e.g. Cappelletti (note 216), at 550; P. Hack, In-

analyzed in this book there has been a strong push for judicial independence in the early stages of transition. While communist legal tradition provided for strong executive control over judges, efforts were made to build an independent judicial branch in the early 1990s. A vital step in this undertaking was to introduce unlimited tenure.[233] In Russia, starting with the judicial reform in 1991, steps were taken to give courts administrative independence from the executive.[234] New institutions, such as the All-Russia Congress of Judges, the RF Council of Judges and the Supreme Judicial Qualification Collegium and relevant regional bodies, were established to support judicial independence.

But the Russian experience shows that in the process of transition sooner or later there is a point where judicial accountability is demanded. With the argument that the judiciary still lacked the necessary trust from the population and to combat judicial corruption the 2001 reforms then sought to make the judiciary more accountable with the result that new dependencies arose.[235] In the course of drafting this reform the Russian government considered, for example, abolishing the lifetime appointment of judges in favour of a non-renewable 15-year term, a proposal which attracted fierce opposition from leaders of the judiciary, with the result that the system of lifetime judicial appointments was retained and a mandatory retirement age was set. But the 2001 package of amendments introduced disciplinary responsibility for judges,[236] and a more powerful role of the Presidential Administration

troduction, in: A. Sajó (ed.), Judicial Integrity, 1, at 8 seq. (2004). For the difficulty in translating judicial accountability and for an effort to define it as a responsibility vis-à-vis society see Garapon (note 207), at 241- 242.

[233] See Fleck (note 61), Chapter B. III. 1.; Coman/Dallara (note 61), Chapter B. III. 1.; Bodnar/Bojarski (note 61), Chapter B. III. 1.; Ligi (note 61), Chapters B. III. 1., IV. 1., 3. and VII.; Mouradian (note 6), Chapter B. III. 1.; Vashkevich (note 7), Chapter B. III. 1; Hriptievschi/Hanganu (note 6), Chapter B. III. 1.; Kachkeev (note 6), Chapter B. III. 1.; Schwartz/Sykiainen (note 6), Chapter B. III. 1.

[234] See Schwartz/Sykiainen (note 6), Chapter B. I. 1.

[235] For the reasons behind the 2001 reform see P. H. Solomon, Jr., Putin's Judicial Reform: Making Judges Accountable as Well as Independent, 11 E. Eur. Const. Rev. 117 (2002).

[236] According to Article 12(1) Law on the Status of Judges, as amended on 15 December 2001, a judge can be charged with disciplinary responsibility and receive a disciplinary penalty for committing disciplinary offences such as violation of the Law on the Status of Judges or the Code of Judicial Ethics (before 2004: the Code of Judicial Honour).

in the administration of the judiciary was implemented by the 2002 Federal Law "On the Bodies of Judicial Community".[237] It revised the composition of the qualification collegia by adding public representatives with a law degree (e.g. legal scholars) and a Presidential representative.[238] The analysis of this reform shows the detrimental effects it had on judicial independence.[239]

While in the Eastern OSCE Participating States executive control over the judiciary still prevails to the detriment of judicial independence,[240] in those transitional countries of Central Eastern Europe where judicial independence has been conceptualized in terms of judicial autonomy the balance has tipped to the detriment of judicial accountability.[241] As outlined above, in some EU acceding states the urge for judicial independence has led to fundamental structural changes at times at the expense of efficiency, thus giving rise to allegations of judicial corporatism.[242] Though it seemed plausible after the end of the communist era to dissolve executive control by establishing new actors with autonomous competences, this was done without considering the need to ensure the accountability of these newly established bodies.

The experience of these countries demonstrates that while judicial independence and accountability on first sight may seem to be mutually exclusive, both are relevant aspects of the rule of law. Independence from external leverage alone does not guarantee the right of due process unless adjudication is made effectively on the basis of law. In those countries which have relied on a strong role of the judiciary in judicial administration including evaluations and discipline, our studies show that there have been serious complaints about the functioning of the ju-

---

[237] *Federalny zakon ot 14 marta 2002 "Ob Organakh Sudeiskogo Soobschestva"*.

[238] Id. According to Art. 11 para. 8 the public representatives must neither hold public office nor be part of the bar. See also Schwartz/Sykiainen (note 6), Chapter B. I. 2.

[239] See id., Chapters A., B. I. 1., 2., and II. 2.; Nußberger (note 13), Chapters A. II.; Müller (note 12), Chapter A., B. I.

[240] Id., Chapter B.

[241] For an overview of the different means of accountability and their introduction in EU accession countries see D. Piana, Judicial Accountabilities in New Europe: From Rule of Law to Quality of Justice, at 89 (2010).

[242] Fleck (note 61), Chapter B. I. 2.

diciary as a result of a reluctant approach towards accountability.[243] In Romania, for example, the length of proceedings, corruption within judicial institutions and insufficient enforcement of the law have been criticized.[244] It is not difficult to predict the negative consequences on the rule of law if citizens think, as the authors of the country study indicate, that the only way to deal with a dispute is to take the law into one's own hands.[245] Against this background Vicki C. Jackson's call not to overstate the polarity of accountability and independence because they can be mutually reinforcing becomes real.[246] The authors of several country studies therefore agree in their call for self-governing bodies to develop an active approach towards accountability in order effectively to guarantee judicial independence.[247]

One of the lessons to be learned from the analysis of transitional processes in this book is the insight that from an early point of transition on it is necessary to take a holistic approach which not only adequately reflects judicial independence but also considers adequate mechanisms of accountability. Sequencing these steps chronologically by first providing for judicial autonomy and leaving accountability to be considered at a later point is shortsighted and likely to be detrimental to judicial independence. In situations where judicial accountability has been insufficiently contemplated in the initial phase of reform there is a consider-

---

[243] Di Federico (note 73), Chapters B. VII. 1. and F.; Fleck (note 61), Chapters B. I. 2, II. 1., VII. 2., C. I. and F., both in this volume. According to Bárd there are almost no criminal or disciplinary proceedings against dishonest and clearly incompetent judges in the new EU members: Bárd (note 88), at 312.

In Belgium too there is currently a discussion on how to improve accountability in the face of the reluctance of court presidents to initiate disciplinary proceedings: Allemeersch/Alen/Dalle (note 128), Chapter B. VII. 5., X., and C. I. Concern about the autonomy of the judiciary shielding it from any kind of external or internal responsibility was voiced as early as in 1985 by Cappelletti: Cappelletti (note 216), at 573-574.

[244] Coman/Dallara (note 61), Chapter F. with further references.

[245] For this perception and the low level of trust in the judiciary in Romania see id., Chapter F.

[246] V. C. Jackson, Judicial Independence: Structure, Context, Attitude, in this volume, Chapter II. For the assertion that independence and accountability are two sides of the same coin see S. B. Burbank, The Architecture of Judicial Independence, 72 S. Cal. L. Rev.. 315, at 339 (1999).

[247] Coman/Dallara (note 61), Chapter F., also Di Federico (note 73), Chapters B. VII. 1. and F.; Fleck (note 61), Chapters C. I. and F.

able risk that at some later point the pendulum will swing back, giving rise to renewed calls by the executive for more control, such as in some post-Soviet states in the early noughties.[248] In these situations hierarchical structures are likely to be reactivated and disciplinary measures reinstated as the traditional means of accountability. Since conventional concepts of accountability, however, can easily be abused in furtherance of political objectives, and thus to the detriment of judicial independence, there is a need to consider instead new means of accountability in order to legitimize judicial power.[249]

For this reason, having identified the prevailing mechanisms of "bureaucratic accountability" as a major obstacle to judicial independence in post-Soviet countries Peter H. Solomon, Jr. in his chapter on accountability of judges in Post-Communist States advocates accountability grounded in professional solidarity.[250] Instead of the hierarchical control exercised by court presidents with respect to evaluations, promotions, discipline and case assignment, he advocates the softening of bureaucratic accountability. For example in order to reduce the negative impact of evaluation on its internal independence, the judiciary should not be concerned with the content of judicial decisions or with reversal rates, should be transparent and subject to appeal.[251]

Furthermore, mechanisms should be developed which support the accountability of judges to their peer judges and the legal profession more generally. Among the steps Solomon advocates are the training of judges in the craft of judging in order to develop a set of common val-

---

[248] Not only in Russia, but also in Kazakhstan the idea emerged in 2001 to stop lifetime appointments: Kachkeev (note 6).

[249] Trebilcock and Daniels distinguish between operational accountability which concerns the formal functioning of the judiciary (transparent case handling, use of resources), decisional accountability which is about the quality of decision-making (transparency and appeals) and behavioural accountability which is concerned with judicial misconduct (corruption, bias, abuse of office etc.) M. J. Trebilcock/R. J. Daniels, Rule of Law Reform and Development: Charting the Fragile Path of Progress, at 63-64 (2008). For different typologies see Cappelletti (note 216), at 557 and 570-575; C. G. Geyh, Rescuing Judicial Accountability from the Realm of Political Rhetoric, 56 Case W. Res. L. Rev. 911 (2005-2006); R. A. Macdonald, The Acoustics of Accountability: Towards Well-Tempered Tribunals, in: A. Sajó (ed.), Judicial Integrity, 141, at 177 (2004). Piana (note 241), at 29-31.

[250] Solomon (note 49), Chapter B.

[251] Id., Chapter G.

ues and cultivate the necessary skills of the profession, the organization of judges' associations to support those values and to offer opportunities for exchange and the publication of reasoned decisions and their critical discussion in law journals.[252] Capacity building by judicial training is an important aspect of balancing independence and accountability because it helps judges to fulfil their adjudicatory functions and to protect themselves from undue influence.[253] It is for this reason that donor activities have increasingly focused on the training of judges and the activation of those parts of the population who could exercise oversight functions, such as the bar, non-governmental organizations and the general public. Accountability can work only if the watchdog is willing to fulfill its role and capable of so doing.[254]

Apart from post-Soviet countries Peter H. Solomon, Jr. also considers new members of the European Union.[255] There, too, he notes flaws despite considerable changes in the administration of the judiciary. They are related to the powerful influence of court presidents on the work of judges (by way of case assignment) and their careers (by way of content-based evaluations).[256] His call to enhance professional accountability corresponds to the frequent assertion in these countries of the need for judges to assume responsibility and enhance integrity by developing and effectuating a common professional standard for judicial performance.[257]

---

[252] Id., Chapter D.

[253] Guarnieri asks for judicial training which emancipates and frees the judge from subconscious loyalties without rendering him/her distant from society: Guarnieri (note 213), at 413.

[254] See K. E. Henderson, Global Lessons and Best Practices: Corruption and Judicial Independence: A Framework for an Annual State of the Judiciary Report, in: G. Canivet/M. Andenas/D. Fairgrieve (eds.), Independence, Accountability, and the Judiciary, 439, at 459-460 (2006).

[255] For a detailed analysis of new EU member countries see D. Piana, Judicial Accountability in New Europe: From Rule of Law to Quality of Justice (2009). For the issue whether there is a need for more accountability in CEE countries see also Bárd. He attributes the low public esteem for the judiciary to the excessive caseload and insufficient funding for the judiciary, and therefore rejects calls for more accountability: Bárd (note 88), at 311.

[256] Solomon (note 49), Chapter E.

[257] Coman/Dallara (note 61), Chapter F.; Bobek (note 69), at 252. For the importance of integrity see A. Sajó, Judicial Integrity (2004); Osiatynski (note 88), at 264.

2. Accountability in Established Democracies: Between Modernization and Regress

The question of how to balance judicial independence with accountability is evidently relevant also in established countries.[258] Apart from the above-discussed question of how to legitimate judicial power in the selection process, there is a need for accountability if judges abuse their powers while in office. In civil law countries which historically have relied on repressive means of accountability as a characteristic of the hierarchical structures of the judiciary,[259] the demand for internal independence of each judge individually in his or her decision-making has led to significant changes modifying the modes of accountability. It is this experience that Peter H. Solomon, Jr. has turned to in his search for adequate means of judicial accountability for transitional states. His analysis shows that Western civil law countries have modernized their approach to accountability by way of lighter forms of bureaucratic accountability, for example by means of skills-based instead of content-based evaluations.[260]

As evidenced by our country studies, disciplinary measures in established democracies are usually restricted to the most serious neglect of judicial duties, including abuse of authority and status (e.g. corruption), and clear cases of partiality and severe infractions of the dignity of office (such as theft, perjury and drug abuse).[261] Efforts are made in several countries to specify judicial misconduct and formalize disciplinary proceedings.[262] At the same time judicial safeguards including the right to judicial review are in place to ensure due process guarantees for

---

[258] See e.g. Wheeler (note 130), Chapter A.; Garapon/Epineuse (note 128), Chapters A. and B. VII. 5.; Allemeersch/Alen/Dalle (note 128), Chapter B. X.; Turenne (note 128), Chapter A.; Di Federico (note 73), Chapter F.; de Lange (note 128), Chapter B. VII. 2.

[259] Guarnieri (note 213), at 408-409.

[260] Solomon (note 49), Chapter C. For the current discussion in Belgium see Allemeersch/Alen/Dalle (note 128), Chapter B. VII. 6.

[261] Kiener (note 172), Chapter B. VII. 1.; Garapon/Epineuse (note 128), Chapter B. VII. 2.; Wheeler (note 130), Chapter B. VII. 1., 3. b) aa); Allemeersch/Alen/Dalle (note 128), Chapter B. VII. 1.; Turenne (note 128), Chapter B. VII. 2.

[262] Di Federico (note 73), Chapter B. VII. 1. For the recent reform process in England see Turenne (note 128), Chapter B. VII. For Belgium see Arts. 404 seq of the Judicial Code and Allemeersch/Alen/Dalle (note 128), Chapter B. VII. 1.

judges accused of misconduct.[263] Most established democracies agree that the interpretation and application of law (the content of judicial decisions) is not subject to any control except for appeal and judicial review.[264] *Substantive accountability* is usually limited to transparency and legal remedies.[265] Instead of the content it is the manner and form of decisions which are subject to additional forms of oversight (*procedural accountability*). Formal criteria are relevant in considering the process of how judges perform their duties.[266] For example in those jurisdictions of the United States where judicial performance evaluations exist in the context of judicial reelection, they are intended to hold judges accountable for their procedural and process performance rather than their jurisprudential performance.[267] They consider such issues as clarity and promptness of rulings and courtesy to litigants. Another example of formal instead of substantive accountability measures can be found in Belgium where the discipline cannot be based on the content of adjudication.[268] In an effort to guarantee the right of the accused to due process within a reasonable time judges are held accountable in disciplinary proceedings for significant delays in the handling of files.[269]

Apart from procedural accountability with respect to judicial decision-making judges are accountable in their managerial capacities (*administrative accountability*). It is in the interest of good governance to provide for transparency[270] and to formalize administrative procedures by

---

[263] Id., Chapter B. VII. 3.; Gélinas (note 139), Chapters B. VII. 2. and 3.; Turenne (note 128), Chapter B. VII. 2.; Garapon/Epineuse (note 128), Chapter B. VII. 3.; Seibert-Fohr (note 133), Chapter B. VII. 3.; Di Federico (note 73), Chapter B. VII. 3.; Nergelius/Zimmermann (note 139), Chapter B. VII. 1.; Kiener (note 172), Chapter B. VII. 3.; Wheeler (note 130), Chapter B. VII. 2. b).

[264] See e.g. Garapon/Epineuse (note 128), Chapter B. VII. 2.; Allemeersch/Alen/Dalle (note 128), Chapter B. VII. 1.; Wheeler (note 130), Chapters B. VII. 1. and 3. b) aa); Gélinas (note 139), Chapter B. VII. 5.

[265] This, however, does not rule out informal means of oversight. Academia and the broader legal profession play an important role in providing the judiciary with feedback as an incentive to reflect profoundly on decision-making.

[266] Turenne (note 128), Chapter B. VII. 2.

[267] Wheeler (note 130), Chapter B. II. 2.

[268] Allemeersch/Alen/Dalle (note 128), Chapter B. VII. 1.

[269] Id., Chapter B. VII. 5.

[270] Malleson (note 141), at 235.

way of pre-established norms.[271] While accountability with respect to adjudication is limited in order to ensure substantive judicial independence, the same restrictions do not apply to the oversight of purely administrative functions. Here the rationale that oversight may have a negative impact on the due process rights of litigants does not hold to the same degree.[272]

The studies in our book show that in practice removal and other disciplinary measures are very rare in Western countries.[273] Though one should be aware that formal removal may be and indeed at times is bypassed by pressure to resign,[274] none of our studies identifies such instances. There have even been complaints that the court presidents are reluctant to use their powers to initiate disciplinary proceedings.[275] In Belgium a decreasing faith in the capacity of the judiciary to hold judges accountable for misconduct has led to claims for more transparency and external participation in judicial discipline.[276] In France public complaints about judges as a self-protecting profession have resulted in a recent reform giving citizens a right to bring an action against a judge if the claim passes muster with a qualified committee.[277] The effects of this reform on judicial independence remain to be seen.

While there have been recent efforts in some states to increase accountability to a certain degree, the role of hierarchical oversight within the judiciary and by the executive all in all has been reduced in Western civil law countries over the past 50 years. Alternative means of account-

---

[271] Unfortunately in practice, however, a lack of oversight over judges with managerial responsibilities has been deplored: J. Resnick, Managerial Judges, 96 Harv. L. Rev. 376, at 378 (1982).

[272] But administrative accountability must not be used to influence adjudication. Admittedly the line is a fine one not always easy to establish.

[273] See for example the table in Di Federico (note 73), Chapter B. VII. 5. For the rare use of disciplinary measures see also Nergelius/Zimmermann (note 139), Chapter B. VII. 2.; Gélinas (note 139), Chapters B. VII. 1. and 5.; Turenne (note 128), Chapter B. VII. 4.

[274] In countries such as England and the United States if a case of judicial misconduct is established judges often resign before the final adoption of disciplinary measures: Wheeler (note 130), Chapters B. VII. 1. and 3.; Turenne (note 128), Chapter B. VII.

[275] Garapon/Epineuse (note 128), Chapter B. VII. 5.; Allemeersch/Alen/Dalle (note 128), Chapter B. VII. 5.

[276] Id., Chapter B. VII. 5.

[277] Garapon/Epineuse (note 128), Chapters B. VI. and VII. 5.

ability have become more relevant in established democracies which go beyond the traditional canon of evaluations, recusal, discipline and complaints procedures.[278] While civil lawyers traditionally tend to think in terms of repressive means of accountability, lately means of accountability which "give account" by disclosing information and justifying decisions have attracted increasing attention.[279] These measures differ from *post hoc* means in that they are pro-active. Instead of sanctions and liability they focus on incentives for judges to fulfil their responsibilities. With this preventive role they are arguably less likely to conflict with judicial independence.[280] Public access to judicial proceedings and judgments is particularly relevant in this context. The increasing concern about transparency in judicial decision-making and administration (including selection, promotion, discipline and budget) underlines the role played by society at large as the recipient of accountability, a development which reflects the democratic conceptualization of the rule of law.[281]

Finally, the legal profession itself plays a role in modern accountability mechanisms. Though accountability *vis-à-vis* other judges and the broader legal profession is usually associated with common law countries, means of professional accountability are increasingly relevant also

---

[278] Garapon (note 207), at 241.

[279] For a general discussion of the term accountability see e.g. R. Mulgan, Accountability: an Ever-Expanding Concept?, 78 Public Administration 555 (2000); J. Koppell, Pathologies of Accountability: ICANN and the Challenge of "Multiple Accountabilities Disorder"(2005); R.W. Grant/R. O. Keohane, Accountability and Abuses of Power in World Politics, 99 American Political Science Review 29 (2005).

[280] According to Hammergren, the need for the judiciary to explain and justify its actions will make it less likely to err in the first place: L. Hammergren, Judicial Independence and Judicial Accountability: The Shifting Balance in Reform Goals, in US Agency for International Development, Office of Democracy and Governance, Guidance for promoting Judicial Independence and Impartiality, 149, at 150 (rev. ed. 2002). Guarnieri warns that informal control can be detrimental if unbalanced, and therefore calls for a multiplicity of control mechanisms: Guarnieri (note 213), at 413.

[281] Cappelletti called this a "consumer-oriented model". Cappelletti (note 216), at 575. See also Watt (note 135), at 235-237; Garapon (note 207), at 242, 249. It is this understanding which has led several countries to introduce citizens' complaints: G. Di Federico, Judicial Accountability and Conduct: An Overview, in this volume, Chapter E. I.

in civil law.[282] Our analysis shows that innovations are spreading across borders.[283]Among the means which have attracted growing attention in several countries of the entire OSCE region are judicial codes of conduct as an expression of a common professional ethos. Giuseppe Di Federico in his chapter illustrates this trend. [284] Though codes of ethics can also be used as a basis for discipline he emphasizes their preventive role which should further be strengthened in the future.

3. Lessons for Future

To sum up, balancing judicial independence and accountability is an important but difficult task in guaranteeing the democratic rule of law for every country in the OSCE region. It requires early attention in the transitional process and continues also to engage established democracies. Our analysis of countries in different stages of transition shows that public trust in the judiciary can serve as a litmus test in this balancing endeavour.[285] After all, in democracy it is in the name of the people that justice is rendered. Public acceptance is indispensable for the rule of law and legitimacy requires the capacity of judges to maintain public confidence.[286]

If public trust is low it can be either for the reason of too much independence at the expense of accountability (e.g. Romania) or for the reason of too much accountability *vis-à-vis* the executive at the expense of judicial independence (e.g. Belarus). In both cases reform is necessary in order to find a better equilibrium. But flaws in public confidence should not be abused as an excuse for the executive to reassert control

---

[282] Solomon (note 49), Chapter D. For informal control generally see L. M. Friedman, The Legal System: A Social Science Perspective (1975). For the increasing role of "informal" control mechanisms in civil law countries see also Guarnieri (note 213), at 409-411, 414; R. Reed, Le Contrôle Informel: L'institution Judiciaire, les Judges et la Société, in: G. Canivet/M. Andenas/D. Fairgrieve (eds.), Independence, Accountability, and the Judiciary, 401 (2006).

[283] Di Federico (note 281), Chapter A.

[284] For the growing importance of codes of conduct see id., Chapter A.

[285] Di Federico advocates measures to improve the capacity of judges to maintain public trust and confidence in their independent efficient adjudication in order to ensure accountability without influencing judicial decision-making: Di Federico (note 281), Chapter A.

[286] Id., Chapter A.

over the judiciary. In those countries in which public mistrust is based on executive control over the judiciary there is evidently no need further to increase accountability *vis-à-vis* the executive branch, as this would even aggravate the situation at hand. Instead it is necessary to reduce executive oversight and identify alternative means of accountability. In countries where public acceptance of the judiciary is compromised due to a lack of accountability there is a need to provide for adequate means of accountability in order to prevent judicial misconduct. This is because independence is not a privilege but involves responsibility.

In established democracies too there is a continuous process of balancing independence and accountability. These processes are characterized by action and reaction. The more powers the judiciary accrues with respect to judicial administration the higher are usually the demands for accountability.[287] The development in France, for example, shows that the decline of hierarchical structures, greater independence and an increasing role for judges led to claims for more judicial accountability of judges as a counterpart to their increased judicial role and in reaction to the mistrust of the judiciary fuelled by recent scandals.[288] Recent steps have led to new fears about encroachments on judicial independence which may ultimately lead to claims for more self-administration. But this, as Antoine Garapon and Harold Epineuse in their analysis point out, requires that the competent organs assume their responsibilities, work transparently and develop a culture of accountability in an effort to win public trust.[289]

All this underlines that independence cannot come at the expense of accountability. On the contrary, the stronger the urge for structural independence the stronger are the demands for responsible governance.[290] The experience in new EU member countries from Central and Eastern Europe, described above, affirms that only if judicial councils fulfil their function as watchdogs can the rule of law be furthered. For this purpose it is necessary for self-governing organs to take an active approach towards responsibility by holding judges accountable for judicial mis-

---

287 Malleson (note 141), at 236.

288 Garapon/Epineuse (note 128), Chapter A.

289 Id., Chapter D.

290 According to Karlan the more positive the notion of judicial independence becomes the more it conflicts with the value of accountability: Karlan (note 229), at 1059.

conduct and increasing the transparency of their work. In each judicial reform it must be acknowledged that increased competence can come only at the price of corresponding accountability. This applies to established democracies and those countries in transition to democracy. Since in the latter case the transfer of administrative responsibilities (e.g. control over resources) may overburden a judiciary and make it more fragile[291] it is questionable whether for these countries comprehensive judicial autonomy is desirable in the first place.

IV. The Role of International Actors in Rule of Law Transitions

While most reform strategies in former communist states were developed in the early phase of transition, the vast experience gained since then gives all those involved in rule of law activities the opportunity to reconsider these strategies and to refine the approaches in order to aid further reforms. At the same time these insights may inform rule of law initiatives elsewhere, however, with the caveat not to rush into conclusions without considering and comparing the relevant context. With the avowal that it is not within the purview of my expertise to engage in empirical research the following observations which we made in the course of our study seem to correspond to observations made elsewhere. It is hoped that together they will spur academic interest in further studies. In any event they show that there is a need for international actors involved in rule of law assistance to reconsider current strategies. Our findings indicate that the belief of some CEE countries, advocated by the European Union, that institutionalizing the judiciary would automatically strengthen judicial independence in the interest of democracy and the rule of law has proved ill-founded. Judicial empowerment alone is not enough because there is always a risk that old elites will remain in power and that corporate interests will evolve. Experience also shows that rapid change is unsustainable and flaws in original reforms, for example, the insufficient consideration of accountability mechanisms, have led to drawbacks.

---

[291] According to Trebilcock and Daniels procedures to ensure responsible resource management by the judiciary have been lacking in several developing countries: Trebilcock/Daniels (note 249), at 63.

1. Judicial Independence and Democratization

Though judicial independence is a necessary element of democratization,[292] it cannot compensate for a lack of democracy in the first place.[293] The experience of neo-authoritarian regimes, such as in Belarus, shows that the guarantee of judicial independence without a firm commitment to democracy and a certain degree of stability in transition is worthless. Judicial independence ultimately requires a non-authoritarian context.[294] The circularity of this finding (no judicial independence without democracy, no democracy without judicial independence) may be disillusioning at first sight but it argues for a concerted approach in which democracy and the rule of law are addressed simultaneously. Building judicial independence is an evolutionary development which takes time and requires continuing efforts even in established democracies. As Leonardo Morlino in his comparative sociological research pointed out, "the rule of law unfolds with the development of democracy".[295]

While institution building is one aspect of rule of law reform its success depends ultimately on political will,[296] acceptance in society and the involvement of all relevant actors.[297] Since effective adjudication requires

---

[292] For the instrumental value of the rule of law for democracy see e.g. L. Morlino, Democracy Between consolidation and Crisis: Parties, Groups and Citizens in Southern Europe (1998).

[293] For a similar argument see C. Larkins, Judicial Independence and Democratization: A Theoretical and Conceptual Analysis, 44 Am. J. Comp. L 623 (1996); T. Carothers, Rule of Law Temptations, in: J. J. Heckman/ R. L. Nelson/ L. Cabatingan, Global Perspectives on the Rule of Law, at 17 (2010). According to Ginsburg quite often transition to democracy precedes the development of an independent judiciary, and courts are more likely to strengthen democratic consolidation after transition: T. Ginsburg, The politics of courts in democratization, in: id. at 175.

[294] According to Morlino empirical research analysing transitional countries should apply an empirical definition of the rule of law which is different from the parameters for measuring judicial independence in consolidated democracies: Morlino (note 5), at 40.

[295] Id., at 61.

[296] See T. Carothers, Promoting the Rule of Law Abroad: In Search of Knowledge, 4 (2006); Larkins (note 293), at 625; Holmes (note 115), at 11.

[297] For suggestions on how to engage the legal profession in rule of law reforms see T. C. Halliday, The Fight for Basic Legal Freedoms: Mobilization by the Legal Complex, in: J. J. Heckman/R. L. Nelson/L. Cabatingan (eds.), Global Perspectives on the Rule of Law, at 210 (2010).

the co-operation of the other branches of government at the implementation stage,[298] it is necessary to consider how political power can be induced to embrace judicial independence in its own interest.[299] Apart from structural, institutional and legal changes, rule of law reform will succeed on the long run only if it is complemented by social change.[300] Social norms and a belief in the legitimacy of the judiciary are highly relevant for a real commitment to judicial independence.[301] Though international actors can play a supporting role in this development they cannot compensate for the lack of domestic initiative.[302]

2. Rule of Law Assistance Strategies

Developing judicial independence is just one aspect of the rule of law. It must be complemented by other means, such as, for example, efforts to ensure access to the courts and their efficiency.[303] There is a wealth of literature considering rule of law building strategies.[304] Magen and Mor-

---

[298] Holmes (note 115), at 5.

[299] Id., at 10.

[300] B. R. Weingast, Why Developing Countries prove so resistant to the Rule of Law, in: J. J. Heckman/R. L. Nelson/L. Cabatingan (eds.), Global Perspectives on the Rule of Law, 28 (2010).

[301] For the relevance of social norms for rule of law transition more generally see M. Levi/ B Epperly, Principled Principals in the Founding Moments of the Rule of Law, in J.J. Heckman/ R. L. Nelson/ L. Cabatingan (eds.), Global Perspectives on the Rule of Law, 192, at 208 (2010).

[302] Holmes (note 115), at 12.

[303] Measures to achieve these goals may even compete at times. For the experience in South America see L. A. Hammergren, Envisioning reform: improving judicial performance in Latin America, 213 seq. (2007).

[304] See e.g. E. G. Jensen/T. Heller (eds.), Beyond Common Knowledge: Empirical Approaches to the Rule of Law (2003). For lessons learned in rule of law promotion see T. Carothers, Promoting the Rule of Law Abroad: In Search of Knowledge (2006). For a critical analysis of rule of law reforms in the aftermath of the communist regime see A. Czarnota/M. Krygier/W. Sadurski (eds.), Rethinking the Rule of Law after Communism (2005); R. Coman/J.-M. De Waele (eds.), Judicial Reforms in Central and Eastern European Countries (2007); A. Czarnota/M. Krygier/W. Sadurski (eds.), Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders (2006); Piana (note 241). For impact assessments with respect to Central and Eastern Europe see M.

lino found in their empirical research on South-East and Eastern European States that a process of anchoring rule of law is successful if it comprises: continuous conditionality actions, the creation of opportunities, the perception of opportunities by different elites and citizens, the weakening of veto players, a shift in the cost-benefit balance, rule adoption, more substantive transformations, rule implementation and related monitoring, and eventually rule internalization if cultural factors change.[305] Analysis of rule of law reforms by the World Bank advocates a long time strategy which works together with actors of change, such as young judges, civil society as a watchdog, lawyers and bar associations and ombudspersons where they exist.[306] According to our observations it is necessary to enhance the social status of judges and to build self-confidence, while at the same time weakening veto players, such as in the context of former communist states court presidents, the executive branch and prosecutors. The importance of capacity building by judicial training as well as transparency of adjudication and judicial administration in building confidence in the justice sector has been elaborated on above.[307] The need for external actors to coordinate their ac-

---

Dietrich/R. N. Blue/Management Systems International, Inc., Rule of Law Assistance Impact Assessment: Ukraine (2002); M. Dietrich/R. N. Blue/Management Systems International, Inc., Developing the Rule of Law in Ukraine: Achievements, Impacts, and Challenges – A Retrospective of Lessons Learned for the Donor Community Ten Years After Independence (2002); M. Hageboeck/M. Dietrich/L. Hasse/Management Systems International, Inc., Rule of Law Assistance Impact Assessment: Kazakhstan, Kyrgyzstan and Uzbekistan (2002); J. A. Leeth/S. Chernev/Management Systems International, Inc., Rule of Law Assistance Impact Assessment: Armenia (2000); Richard A., Judicial Reform Activities Evaluation for Kazakhstan, Remias (2005).

[305] Magen/Morlino (note 64), at 256.

[306] K. Samuels, Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt, Social Development Papers, No. 37, Conflict Prevention and Reconstruction Unit, World Bank, Washington, at 19-21 (2006).

[307] However, capacity building alone is insufficient. It is necessary to ensure that they achieve the results they were intended for. Furthermore training needs to be complemented by incentives for judges to make use of these capacities. L. Hammergren, Toward a more results-focused approach to judicial reform, in: XI Congreso Internacional del CLAD sobre la Reforma Del Estado y de la Administración Pública, Ciudad de Guatemala, at 5 and 6 (2006).

tivities, to continue their presence, to follow up and evaluate the outcome is almost a truism.[308]

Rule of law promotion activities of external actors usually involve: legal education and training of judges (including the drafting of training curricula, manuals for judges and other publications to supplement education), developing new court administration structures, computer programs for case distribution and management, legislative support, helping government officials to understand their role under new laws, legal information for the general public to enhance transparency, improve the reputation of the judiciary and facilitate access to justice, public information about the laws and institutions which seek to guarantee judicial independence, information on new laws to the judiciary, the bar and other legal professionals, help for the publication of judgments including in new media, assistance to judicial libraries, campaigns to build a new public image of the judiciary and to raise awareness of dispute resolution, capacity building for local partners (including law schools, judges' and lawyers' association, legislators, the media and special interest groups) and developing public relations strategies for the judiciary.[309]

3. The Need for (Re)conceptualization

It is not within the purview of this book to elaborate further on and evaluate empirical strategies, but rather to consider the substantive conceptualization of judicial independence domestically and transnationally. This is particularly pressing because one of the criticisms voiced in the rule of law assistance literature is that rule of law reform projects lack a common conceptual basis and suffer from insufficient substantive expertise of the donors[310] and insufficient analysis of the real issues.[311] With a solid conceptualization of what donors should seek in terms of

---

[308] K. Samuels, Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt, Social Development Papers, No. 37, Conflict Prevention and Reconstruction Unit, World Bank, Washington, at 16-17 (2006).

[309] For a survey of concrete activities worldwide by different international actors see id., at 28-38.

[310] Id., at 16-17.

[311] Hammergren (note 307).

judicial independence, the search for concrete strategies will, it is hoped, be facilitated.

In the next section I will show the need for a proper conceptualization with respect to Europe. There have been flaws in the interpretation of judicial independence by several European institutions which led to drawbacks in rule of law reforms in CEE countries. The lessons learned counsel for a reconceptualization by the European Union and the Council of Europe. They may also be relevant for rule of law reform strategies elsewhere.

a) The European Union's Concept of Judicial Independence

Judicial independence has been a relevant precondition for EU accession for countries from Central and Eastern Europe as an element of the rule of law, and continues to be so in the negotiations with South-East European states. There is very little normative guidance in the EU on what is meant by judicial independence and how to implement it prior to accession.[312] With the unspecified concept of democracy, the rule of law and respect for human rights (the Copenhagen criteria for accession), the European Commission turned to the European Convention on Human Rights in an effort to refine the standard of judicial independence.[313] During accession negotiations additional guidelines for judicial reforms have gradually been developed which consider conditions of service and tenure to be a matter of personal independence, substantive independence in adjudication and structural independence. Since I have elaborated on this elsewhere,[314] it suffices to encapsulate

[312] Seibert-Fohr (note 60), at 417-419.

[313] European Council in Copenhagen of 21–22 June 1993, Conclusions of the Presidency, SN 180/1/93 REV 1, available at <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/72921.pdf>; for an explicit reference to the European Convention on Human Rights when it comes to the interpretation of the rule of law in the context of EU accession see also Council of the European Union, Council conclusions on the follow-up to the Noordwijk conference: the rule of law of 28 May 1998, Bulletin EU 5-1998 (en): 1.3.58, paras. 3-4, available at <http://europa.eu/archives/bulletin/en/9805/p103058.htm>.

[314] For a detailed account and analysis of the Commission's approach see Seibert-Fohr (note 60), at 419-430. For the meaning of those three concepts in German doctrine see A. Seibert-Fohr, Constitutional Guarantees of Judicial Independence in Germany, in: E. Riedel/ R. Wolfrum (eds.), Recent Trends in German and European Constitutional Law. German Reports Presented to the

here that the Commission has advocated a model of judicial self-administration in the accession negotiations in order structurally to separate the judiciary from the executive.[315]

This emphasis on structural independence must be seen in a broader European context. As the following account of a different institution, the Council of Europe, shows, the activities of the European Union are part of pan-European efforts to achieve the isolation of the judiciary from the political branches of government, not only in terms of substantive interference with adjudication but also in terms of judicial administration. This effort is reflected in several soft law documents from the Council of Europe.

b) The Council of Europe's Approach

The European Court of Human Rights leaves a margin of appreciation to the states as to how to organize judicial administration.[316] It accepts judicial appointments by the executive as long as there are formal guarantees protecting judges from interference with their adjudication.[317] But the Council of Europe's Committee of Ministers has gone further. In its Recommendation on the Independence, Efficiency and Responsibilities of Judges of 2010 it provides that "the independence of individual judges is safeguarded by the independence of the judiciary as a

---

XVII. International Congress on Comparative Law, Utrecht, 16 to 22 July, 267, at 270-275 (2006). See also S. Shetreet, Judicial Independence: New Conceptual Dimensions and Contemporary Challenges, in: S. Shetreet (ed.) Judicial Independence: The Contemporary Debate, 590, at 623-636 (1985).

315 In its 2002 Report the Commission of the European Communities noted progress as regards self-administration in the Czech Republic and welcomed efforts to establish judicial councils: Commission of the European Communities, Regular Report on Czech Republic's Progress Towards Accession 2002, SEC 1402, at 22 (2002).

316 ECtHR, *Belilos* v. *Switzerland*, Judgment of 29 April 1988, Series A, No. 132, para. 66; *Campbell and Fell* v. *The United Kingdom*, Judgment of 28 June 1984, Series A, No. 80, para. 79; *Sramek* v. *Austria*, Judgment of 22 October 1984, Series A, No. 84, paras. 38, 41.

317 ECtHR, *Ninn-Hansen* v. *Denmark*, Decision of 18 May 1999; *Filippini* v. *San Marino*, Decision of 26 August 2003, both available at <http://hudoc.echr.coe.int/hudoc/>.

whole".[318] It thereby introduced the notion of institutional independence which goes beyond personal and substantive independence.

With respect to recruitment and promotion the document advises that the authority deciding on the selection and career of judges should be independent of the executive and legislative powers.[319] In the case of executive or parliamentary appointment an "independent and competent authority drawn in substantial part from the judiciary […] should be authorised to make recommendations or express opinions which the relevant appointing authority follows in practice".[320] The Council of Europe's advisory body on constitutional matters – the European Commission for Democracy through Law (Venice Commission) – also recommends States to consider the establishment of an independent judicial council with a substantial proportion, if not a majority, of judicial members, which will have a decisive influence on the appointment and career of judges including discipline.[321] This is part of the advocacy for self-governing bodies of the judiciary in the Council of Europe more generally. For example in a recent resolution the Parliamentary Assembly criticized Germany for its model of judicial administration which is basically in the hands of the justice ministries (with the exception of matters relating to adjudication). It called on Germany to consider setting up a system of judicial self-administration by establishing a judicial council with an important role in the careers and discipline of judges.[322]

---

[318] 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), available at <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1707137&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>, at para. 4.

[319] 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), available id., at para. 46.

[320] Id., at para. 47.

[321] Venice Commission, Report on the Independence of the Judicial System Part I: The Independence of Judges, Adopted by the Venice Commission at its 82nd Plenary Session, CDL-AD (2010) 004, at para. 32 (16 March 2010).

[322] Parliamentary Assembly of the Council of Europe, Resolution 1685 (2009). Allegations of politically-motivated abuses of the criminal justice system in Council of Europe member states, adopted 30 September 2009, para. 5.4.1. and para. 4.2.4.

These soft law documents to some extent have been influenced by the work of the Consultative Council of European Judges (CCEJ) as an advisory body of the Council of Europe which is composed exclusively of judges.[323] The Council summarized its previous opinions in the so-called "Magna Carta of Judges".[324] The title "Magna Carta" is obviously chosen in reference to the Great Charter of the Liberties of England and shows the self-image of this body of judges. It stipulates that the judiciary shall be involved in all decisions which affect the practice of judicial functions (organisation of courts, procedures and other legislation).[325] Each state shall create a Council for the Judiciary composed either exclusively of judges or of a substantial majority of judges or a similar body independent of legislative and executive powers and endow it with broad competences.[326]

A similar approach was already reflected in the so-called "European Charter on the Statute for Judges" which is not a formal Council of Europe instrument but a document adopted at a conference in 1998 with participants from European countries and two international judges' associations. It envisages that "[i]n respect of every decision affecting the selection, recruitment, appointment, career, progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within

---

[323] See e.g. Consultative Council of European Judges, Opinion No. 1 (2001) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges, CCJE (2001) OP N 1, available at <https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=C CJE(2001)OP1&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3>, at para. 45 (2001); Consultative Council of European Judges, Opinion No. 10 (2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society, available at <https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CCJE(2007)OP10&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3>, at paras. 8 and 12 (2007).

[324] Consultative Council of European Judges, Magna Carta of Judges, available at <https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CCJE-MC(2010)3&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864> (2010).

[325] Id., at para. 9.

[326] Id., at para. 13.

which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary".[327]

c) The Case against Judicial Autonomy

Considering the influence of judges in the CCEJ of the Council of Europe it may not come as a surprise that advocacy of structural independence and judicial autonomy has become so prominent in CoE soft law documents, but neither does it reflect a broad pan-European consensus, nor does actual practice argue for it. Though our above analysis shows a common trend in Europe to limit executive influence, there is no reason to postulate a model of administrative autonomy. On the contrary, considering the experience with self-governing bodies in countries such as Romania and Hungary, the continued unqualified advocacy of judicial councils composed in the main of judges with broad competences ranging from judicial selection to discipline is unwarranted. As indicated above, a lesson which can be learned from our comparative analysis is that judicial councils which are independent of the other branches of government and have autonomous powers are not necessarily a guarantee of the rule of law.[328]

It is also important to note that several structural changes which have been implemented in recent years have been founded on the *appearance* of independence and impartiality.[329] Exclusive reliance on appearance

---

[327] European Charter on the Statute for Judges, at para. 1.3 (1998), available at <http://www.venice.coe.int/site/main/texts/JD_docs/Charter_E.pdf>.

[328] See above at "The Increasing Emphasis on Formal Guarantees and Structural Independence".

[329] For Canada see e.g. *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* (note 164), at para. 140. Its interpretation of the independence principle goes back to the common doctrine on recusal which is based on the notion that "justice must not only be done but also be seen to be done". See *R.* v. *Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, [1923] All ER 233. The European Court of Human Rights also considers for its analysis under Article 6 ECHR whether the court presents an appearance of independence. See e.g. *Campbell and Fell* v. *The United Kingdom* (note 316), para. 78; *Sramek* v. *Austria* (note 316), para. 42; *Belilos* v. *Switzerland* (note 316), para. 67. For the increasing relevance of this criterion in Strasbourg cases see L. F. Müller, Judicial Independence as a Council of Europe Standard, 52 German Yearbook of International Law 461, at 470-471 (2009).

may in the long run lead to the complete isolation of the judiciary. The reference to the separation of powers to advocate judicial autonomy and self-administration including recruitment also carries the risk of isolation and empowerment of the judiciary which lacks the necessary checks.[330] It is doubtful whether this conceptualization of judicial independence adequately reflects modern notions of the separation of powers in the sense of mutual checks and balances.[331]

Even autonomous judicial bodies risk being politicized, and the old belief in the neutrality of the judiciary is prone to be challenged in times of judicialized politics, as evidenced in Italy.[332] This is affirmed by other research in this field. Carlo Guarnieri in his work on judicial self-governance in Italy, Spain and Portugal found out that judicial self-governing bodies have opened up a different channel of political influence. Instead of reducing political influence on the judiciary the structural changes in these countries have merely altered the way in which political influence is exercised.[333] It is a similar observation which led Mauro Cappelletti as early as in 1985 to observe that the absence of external and internal controls on the Italian judiciary might be considered "less fearful than one of dependency from the political power; it is not, however, necessarily less damaging".[334]

The lop-sided influence of judges on the conceptualization of judicial independence at the European level requires critical attention because it involves the risk of shielding the judiciary from accountability and misinterpreting judicial independence as a freedom from government. For this reason the "Magna Carta of Judges" is to be regarded with suspicion. It is the image of judicial independence as a liberty which is ill-founded. Not only is the judiciary itself part of the government, but judicial independence has the purpose of protecting the individual (not the judiciary) in his or her right to due process. In this respect the rise

---

330 For the call not to "overinflate" claims for judicial independence at the expense of accountability see Malleson (note 141), at 235. She considers independence as a duty of the judiciary which is in the interest of litigants.

331 For a comparative analysis of the separation of powers concept see L. E. de Groot-van Leeuwen/W. Rombouts (eds.), Separation of Powers in Theory and Practice, An International Perspective (2010).

332 See e.g. C. Guarnieri, Judicial Independence in Latin Western Europe, in P. H. Russell, Jr./D. O'Brien (eds.), Judicial Independence in the Age of Democracy – Critical Perspectives from around the World, 111, at 115 (2001).

333 Guarnieri (note 168), at 184-185.

334 Cappelletti (note 216), at 574.

of judicial networks which has been noted also in other contexts[335] should be viewed critically, especially if such networks are involved in the representation of their own interests.

The current emphasis within the Council of Europe on judicial autonomy risks overemphasizing judicial independence at the expense of democratic legitimacy.[336] Unfortunately there is not a single reference to democracy in the Council of Europe's Recommendation on the Independence, Efficiency and Responsibilities of Judges.[337] The trend towards specifying structural mechanisms on the international level as standards for the implementation of judicial independence is problematic also because it risks an over-concern with structural independence at the expense of other means.[338] Judicial independence depends on judicial ownership. Formal independence is ineffective if the judiciary behaves deferentially and does not assert its independence.[339] As indicated above, the analysis of CEE states shows that persistent flaws are not due to a lack of structural safeguards, but to an excessive formalism and a need of the judiciary for reorientation more generally. Experience in post-Soviet countries shows that structural changes and formal guarantees can help authoritarian regimes to hide behind a façade of judicial independence.

While our critique of judicial empowerment is mainly based on the analysis of transitional processes in some Southern and Central-European states, it seems to be pertinent also in other contexts outside Europe. Stephen Holmes has observed elsewhere that in transitional settings judicial independence is often identified with judicial self-

---

335 A.-M. Slaughter, A New World Order, 65, at 102 (2004).

336 For a similar concern see P. H. Russell, Jr., Toward a General Theory of Judicial Independence, in: P. H. Russell, Jr./D. O'Brien (eds.), Judicial Independence in the Age of Democracy – Critical Perspectives from around the World, 1, at 14 (2001).

337 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), available at <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1707137&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

338 According to Russell structural independence is no guarantee of personal independence. He argues that the last word in working out the concept's practical meaning should not be given to judges: Russell (note 336), at 7.

339 Id.

governance, but that self-monitoring has not led to favourable experiences because of the persistence of the corporate self-interest of the judiciary.[340] He criticized "halfway reforms", which free the judiciary from authoritarianism without adapting it to democracy.[341] As in some CEE countries which opted for self-administration, so in Latin America, according to Linn Hammergren, experience shows that nowadays courts are considerably more independent but far less accountable for their performance.[342] In an effort to develop a more balanced approach Hammergren advocates those involved in rule of law assistance not just to consult with judges.[343]

V. Contextualism and Diversity Rather than Rigid 'Best Practices'

Apart from the conceptual insights gained from the experience in Central and Eastern Europe there is a more general lesson to be learned for future legal reforms strategies. It is the caveat against the unreflected advocacy of legal transplants.[344] Though in the aftermath of communism it may have been plausible for some CEE countries to consider for their reforms independent judicial councils which had been introduced in Italy, Spain and Portugal after the end of dictatorship in order to protect the judiciary from political influence, such transplants did not automatically achieve what the European Union had hoped for.[345] This is evidenced in the continuing post-accession monitoring under the Co-operation and Verification Mechanism in Romania and Bulgaria. As I have explained above, experience in these countries shows that transfer of power can work only if the judiciary is able and willing to take con-

---

[340] Holmes (note 115), at 8.

[341] Id., at 9.

[342] Hammergren (note 307); Hammergren (note 303). See also Russell who argues that the last word in working out the concept's practical meaning should not be given to judges: Russell (note 336), at 23.

[343] Hammergren (note 307).

[344] For this term see A. Watson, Legal Transplants: An Approach to Comparative Law, 1974.

[345] For a similar criticism see Osiatynski (note 88), at 263-265. He argues that by transplanting Western guarantees of judicial independence to CEE countries the judiciary there was rendered too independent.

trol over itself. Implementing self-governance structurally without building the corresponding capacities was therefore insufficient.

What is even more problematic is the current effort to consider such mechanisms to be a generally applicable standard for all CoE states. While the Venice Commission was initially cautious in stating that established democracies provide for different mechanisms,[346] more recent Council of Europe pronouncements including those of the Venice Commission are intended to give uniform recommendations for all member states. But considering the low level of trust in the judiciary in Italy and Spain,[347] it is questionable why their models of judicial administration should be role models for countries such as England, Sweden and Germany where the judiciary is organized differently. Each model is different and needs to be understood as a result of different historical developments in its country.[348] It is one thing if a country in a process of change responds to public demands and new challenges by gradually modifying its traditions. But as long as the right to due process is not compromised it is questionable whether there is a need for a uniform international standard on structural independence.[349]

---

346 Venice Commission, Opinion No. 403/2006, Judicial Appointments, Report adopted by the Venice Commission at its 70th Plenary Session, CDL-AD (2007) 028, paras. 44-50 (22 June 2007). More recently, however, the distinction between old and new democracies has been abandoned: Venice Commission, Report on the Independence of the Judicial System. Part I: The Independence of Judges, CDL-AD (2010) 004, para. 31-32 (16 March 2010).

347 Standard Eurobarometer 72 – Public Opinion in the European Union, Vol.2, Report, at 40 (2010), available at <http://ec.europa.eu/public_opinion/archives/eb/eb72/eb72_vol2_en.pdf>.

348 J. Bell, Judicial Cultures and Judicial Independence, in 4 Cambridge Yearbook of European Legal Studies 47, at 59 (2001).

349 According to Burbank, Friedman and Goldberg there are different ways to ensure judicial independence, not just one single correct answer: S. B. Burbank/B. Friedman/D. Goldberg, Reconsidering Judicial Independence, in: S. B. Burbank/B. Friedman (eds.), Judicial Independence at the Crossroads: An Interdisciplinary Approach, 9, at 35 (2002).

1. The Relevance of the Socio-Political Context for Judicial Independence

Since the principle of judicial independence operates in context it is necessary to study first the historical, social and political circumstances and to identify advances and flaws in its practical guaranteeing before developing a strategy. [350] As John Bell explained in his work on judiciaries within Europe, the judiciary is part of a wider social activity to which it relates.[351] It has to negotiate its place within the separation of powers; it interacts with litigants and with society by way of dispute resolution; and it is related to the larger legal community. The scope of independence is shaped by these relations,[352] whereas each of these sociological dimensions of the judiciary is influenced not only by formal arrangements but also by the prevailing circumstances in each country.[353] The way judicial independence is guaranteed depends on the judicial culture of a country which reflects its particular historical experiences.[354] John Bell demonstrated this by comparing judicial administration in Sweden and England with that in Spain. While the Spanish opted for a model of self-administrative, judicial administration in Sweden and England is traditionally more closely linked to the executive.[355] Though the balance of powers is more in favour of the other branches of government in the latter countries, the relationship of the judiciary to the other branches is characterized by a pattern of co-operation.[356] Both, the Swedish and the English judiciary over a long period have acquired a standing of inherent authority which helps to protect them

---

[350] Bell (note 348), at 60.

[351] Bell (note 129), at 350.

[352] For the multiple relationships see Russell (note 336), at 11-13. For the influence of the political branches on the meaning of judicial independence see Geyh (note 230), at 162-163.

[353] For the need for a broader perspective which considers the wider context in which courts and judges operate see also Burbank/Friedman/Goldberg (note 349), at 35.

[354] Bell (note 348), at 50-60. See also Bell (note 129), at 374-377.

[355] This does not mean that judicial self-governance epistemologically is the necessary reaction to authoritarian rule, but in the case of Spain and Italy the establishment of judicial councils was in reaction to early dictatorship.

[356] Bell (note 129), at 375. See also Nergelius/Zimmermann (note 139), Chapters A. and C. I.

against undue influence.[357] It may be counterintuitive for outsiders but the prominent role of the judiciary in external public activities – Swedish judges frequently participate in legislative reform committees and play an important role within the administration[358] – has contributed to this respect which helps to ensure judicial independence.[359] This example demonstrates that one should not rush to conclusions without considering the broader context in which a judiciary operates.

More important than considering just structural safeguards is it to look at real practice, the underlying paradigms and the different means in their contextual interplay.[360] Ultimately the practice of judicial independence rises from a culture of mutual respect and restraint.[361] Provisions which at first sight may be considered to be harmful to judicial independence, such as parliamentary power to decide on the removal of judges in Canada, in the United States and in England and Wales, in practice are not so because this power is exercised only very rarely in case of serious misconduct in these countries. [362] In the United States, for example, the Senate traditionally does not consider unpopular judicial decisions to be a basis for impeaching judges. It excludes them from the ambit of "high crimes and misdemeanours" for which a judge can be removed because it considers inclusion to be incompatible with judi-

---

[357] Bell (note 129), at 375.

[358] Nergelius/Zimmermann (note 139), Chapter C. I.

[359] See Bell (note 348), at 57.

[360] For the caveat not to measure judicial independence only by formal arrangements see Burbank/Friedman/Goldberg (note 349), at 22, with reference to J. M. Ramseyer, The Puzzling (In)dependence of Courts: A Comparative Approach, Journal of Legal Studies, 23, at 721 (1994). For the call not to permit formal structures to obscure actual practice see Burbank (note 190), at 337.

[361] Bell (note 129), at 375. According to Ramseyer in the United States the reason that judges upon appointment are insulated from political control is the mutual cooperation of the political parties: J. M. Ramseyer, The Puzzling (In)-dependence of Courts: A Comparative Approach, Journal of Legal Studies, at 23, 721, 742 (1994). Stephenson argues that support for judicial independence requires that a political system be sufficiently competitive, judicial doctrine be sufficiently moderate and that the political parties be both sufficiently risk-averse and forward-looking. M. C. Stephenson, When the Devil Turns... the Political Foundations of Independent Judicial Review, 32 J. Legal Stud. 59 (2003).

[362] Turenne (note 128), Chapter B. III. 1.; Gélinas (note 139), Chapters B. III. 1. and B. VII. 5., Wheeler (note 130), Chapter B. VII. 1.

cial independence.[363] This custom shows that structures which may from a rational abstract point of view be prone to undue influence can work in practice if they are based on a solid understanding of judicial independence by all relevant actors, that is the executive, legislative and judicial branches, as well as the general public, media and the bar.

Another example can be found in Germany where it is not possible to conclude from the prevailing executive model of judicial administration that the rule of law is guaranteed to a lesser degree than in Italy with its model of judicial self-governance.[364] This is not to deny persistent flaws in the guarantee of judicial independence in Germany, but to show that structure alone is no guarantee. A sincere commitment to the rule of law embedded in the culture of a society may be even more important.[365] While the Venice Commission in its 2007 study still recognized this by explaining that in some "older democracies" executive appointment systems "may work well in practice and allow for an independent judiciary because the executive is *restrained by legal culture and traditions*, which have grown over a long time [emphasis added]",[366] this insight has faded in its 2010 Report on the Independence of the Judicial System with its uniform call on *all states* to consider establishing an independent judicial council or similar body for judicial appointments.[367] The Commission failed to explain why it has shifted its focus from a contextual consideration to a uniform perspective.

---

[363] Geyh describes this customary practice as a form of "customary independence": Geyh (note 230), at 162-163.

[364] Seibert-Fohr (note 133), Chapter B I.

[365] Jackson (note 246), Chapter A. For the significance of the values of judges and other powerful political actors see also C. Cameron, Judicial Independence: How Can You Tell It When You See It?, in: S. B. Burbank/B. Friedman (eds.), Judicial Independence at the Crossroads: An Interdisciplinary Approach, 134, at 138-140 (2002).

[366] Venice Commission, Opinion No. 403/2006, Judicial Appointments, Report adopted by the Venice Commission at its 70th Plenary Session, CDL-AD (2007) 028, para. 5 (22 June 2007).

[367] Venice Commission, Report on the Independence of the Judicial System Part I: The Independence of Judges, Adopted by the Venice Commission at its 82nd Plenary Session, CDL-AD (2010) 004, para. 32 (16 March 2007).

2. The Case against Uniform Structural Standards

It is for the reason of contextualism that Vicki C. Jackson in her chapter of this book cautions against an overemphasis on structures and against developing detailed best practices guides to judicial independence with the aim of incorporating them into rigid constitutional rules.[368] She reminds us of the complexity of the process of advancing judicial independence which involves a variety of structural and legal approaches with complex interactions between different features. Means which have been adopted in various countries in the interest of judicial independence, such as with respect to judicial selection, tenure, salaries, recusal, decisional authority, case assignment, legal reasoning, discipline, immunity, physical security, administrative autonomy and training measures, seen in isolation are not necessarily an indicator of judicial independence because they work differently depending on the historical, legal and social context in each country.[369] One should not generalize by rigid specifications about which structural arrangements are consistent with judicial independence because this often cannot be determined in the abstract.[370] Pointing to the diversity of safeguards to be found worldwide she demonstrates that different packages of structural features are able to guarantee judicial independence. Instead of generic answers there are different options leading to similar results. Features which may be considered problematic in one country are not so in a different context because they are balanced by other measures. For example, in countries like the United States, where judicial selection is in the hands of the political branches in order to legitimize judicial power, there are mechanisms such as the guarantee of lifetime tenure which protect judges against outside influence while in office. Here, too, the need to balance independence and accountability comes into play, which is yet another reason for the diversity of mechanisms.[371] In other words, depending on the prevailing constitutional framework not only

368 Jackson (note 246), Chapter III.

369 Id., Chapter I. 14.

370 For a critical view on best practices see e.g. F. Kratochwil, How (Il)liberal is the Liberal Theory of Law?, in: L. Morlino/G. Palombella (eds.), Rule of Law and Democracy: Inquiries into Internal and External Issues, 187, at 200 (2010). He advocates room for choice instead of "tutelage" and "expertocracy".

371 Jackson (note 246), Chapter III.

do the means of influence vary, but also the checks to ensure responsible adjudication.[372]

Though it is likely that those who consider the necessary safeguards of judicial independence are guided by the experience of their own legal order, one should be cautious in converting these into international standards. What may be considered to be an essential element of judicial independence in one country may not be so in its neighbours. For example, in Germany Article 101 (1) 2 Basic Law provides that the judge sitting on a specific case must be predetermined before the case is brought to court on the basis of law (*Recht auf den gesetzlichen Richter)*.[373] This requires a specified method of case assignment with pre-set criteria. This is also the rule in Belgium[374] and in Italy, where every three years the presidents of each court have to prepare a very detailed organizational plan setting out the criteria for the assignment of cases to the individual judges.[375]

But neither in France nor in common law countries is there a similar right to a natural judge pre-established by law. In France the head of each court assigns the cases to individual judges based on a judge's area of expertise and availability, but there is no random system of case assignment.[376] In England the presiding judge decides by whom each case will be heard according to the experience and the specialization of a judge.[377] Neither of our studies considered the relevant practice in France and England to be problematic. It is thus difficult to see why judicial independence should be considered to be guaranteed at a lower level in these two countries than in Germany only because of the absence of a formal case assignment system. This is not to deny that in transitional countries where executive influence has been high, channelled through court presidents, a system of random case assignment

---

372 For example in countries where the bar traditionally plays an important role in the judicial system professional accountability has been more prominent than in civil law countries where a similar trend is only starting to gain grounds.

373 Seibert-Fohr (note 133), Chapter B V. For the historical development of this principle see Shetreet (note 314), at 617-620.

374 Allemeersch/Alen/Dalle (note 128), Chapter B. V.

375 Di Federico (note 73), Chapter B. V.

376 Garapon/Epineuse (note 128), Chapter B. V.

377 Turenne (note 128), Chapter B. V.

may be feasible.[378] But if there is no tangible risk of manipulation in the first place there is no ground to transplant such mechanisms to other countries.

Nonetheless the Venice Commission in its 2010 Report on the Independence of the Judicial System strongly recommended to all members of the Council of Europe "that the allocation of cases to individual judges should be based to the maximum extent possible on objective and transparent criteria established in advance by the law or by special regulations on the basis of the law, e.g. in court regulations".[379] Apart from the fact that this entails an unwarranted generalization, it may even be only a pyrrhic victory creating yet new problems. Our study on The Netherlands shows, for example, that though the Constitution in Article 17 provides that no one may be prevented against his will from being heard by the courts to which he is entitled to apply under the law, the distribution of cases is not as rigid as the provision may suggest. In the event of overload judges can be assigned on an *ad hoc* basis and cases can be reallocated.[380] In other words, strict rules may only appear to be a solution, while in reality the real issue, namely how to balance judicial independence and judicial efficiency, remains unsolved.

VI. Judicial Independence in International Law: Unity in Diversity

As we now turn to the question about a legally binding international norm of judicial independence and what it entails, it is important to clarify the following.[381] The above appraisal that it is not possible to identify an ideal model of implementing judicial independence in the sense of a one size fits all and that there is a need to know the individual situation at hand in order to develop tailored recommendations for re-

---

[378] There is, however, evidence that even in those countries which have introduced random case assignment, it is manipulated. See Kachkeev (note 6), Part II Chapter V., as well as Hriptievschi/Hanganu (note 6), Chapter B. V.

[379] Available at <http://www.venice.coe.int/docs/2010/CDL-AD(2010)004-e.pdf>, at para. 81.

[380] de Lange (note 128), Chapter B. V.

[381] For the mutual influence of domestic and international notions of judicial independence see Shetreet (note 198).

form should not be misunderstood as negating the existence of an international principle of judicial independence in the sense of a basic requirement. There are several international legal norms guaranteeing judicial independence, such as Article 14 International Covenant on Civil and Political Rights, Article 6 Convention for the Protection of Human Rights and Fundamental Freedoms, Article 8 American Convention on Human Rights and Article 26 African Charter on Human and Peoples' Rights which are legally binding for their States Parties.[382] Countries tend to diverge in the implementation of this principle. However this is not to deny the validity of the principle, but to emphasize that its practice in a given country requires attention to the historical and political context in which it operates.[383]

1. Judicial Independence as a Functional Concept

In order to interpret the meaning of "independent and impartial tribunal" in the international human rights conventions one should not rely only on the literal meaning of independence. Though a literal reading may help to identify potential threats by identifying dependencies,[384] there is a risk that independence is understood in terms of absolute independence, which is neither possible to realize nor desirable.[385] To avoid such misconceptions it is necessary to interpret the term in its context and in the light of its object and purpose.[386] It is important to

---

[382] Article 14 International Covenant on Civil and Political Rights (ICCPR), United Nations General Assembly Resolution 2200A [XX1]. 16 December 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) (entered into force 23 March 1976); Article 6 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), ETS 5; 213 UNTS 221; Article 8 American Convention on Human Rights (ACHR), OAS Treaty Series No. 36, 1144 UNTS 123, 9 ILM 99 (1969); Article 26 African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

[383] Bell (note 348), at 60.

[384] Russell (note 336), at 6-9; Burbank/Friedman/Goldberg (note 349), at 12.

[385] Bell (note 129), at 375; Guarnieri/Pederzoli (note 138), at 37; Russell (note 336), at 14; S. Levinson, Identifying 'Independence', 86 Boston University Law Review, 1297, 1307 (2006).

[386] Article 31 (1) Vienna Convention on the Law of Treaties, 1155 UNTS 331.

note that judicial independence is not an end in itself but a means to an end,[387] a means to protect the right to due process. For this the notion of substantive independence, that is protection against influence on adjudication, is central. It is in the interest of those whose rights and obligations are determined in a legal action and those who are subject to criminal charges that adjudication is made on the basis of law. As a matter of substantive judicial independence judges may not be subject to coercion, pressure, threats, instructions, interferences, inducements (including corruption), or other indirect means of influence on their adjudication with respect to the interpretation of the law.[388] This has been recognized not only by the Human Rights Committee with respect to Article 14 ICCPR but also by the European Court of Human Rights with respect to the similar guarantee in Article 6 ECHR.[389] It requires that adjudication may be influenced neither by the executive nor the legislative branch of government.[390] Any duty for courts to ask for and abide by the interpretation of the executive branch is incompatible with the independence of the judiciary.[391] The executive branch of government must have the opportunity neither to revise court decisions nor to decide that judgments should not be implemented.[392] Substantive independence also involves internal independence *vis-à-vis* judges not competent to decide a case. A significant safeguard for adjudication made on

---

387 This has been repeatedly stressed in the domestic realm: see e.g. K. Eichenberger, Die richterliche Unabhängigkeit als staatsrechtliches Problem, at 83 (1960); Burbank (note 190), at 326-330; Karlan (note 229), at 1059.

388 Para. 2 of the Basic Principles on the Independence of the Judiciary, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985).

389 For a more detailed analysis of the ECHR's jurisprudence see L. F. Müller, Judicial Independence as a Council of Europe Standard, 52 German Yearbook of International Law 461 (2009).

390 ECtHR, *Ringeisen* v. *Austria,* Judgment of 16 July 1971, Series A, No. 13, para. 95; id., *Piersack* v. *Belgium,* Judgment of 1 October 1982, Series A, No. 53, para. 27; *id., Beaumartin* v. *France,* Judgment of 24 November 1994, Series A, No. 296-B, para. 38; id., *Van de Hurk* v. *the Netherlands,* Judgment of 19 April 1994, Series A, No. 288, paras. 50-52.

391 *Beaumartin* v. *France* (note 390), para. 38.

392 *Van de Hurk* v. *the Netherlands* (note 390), paras. 50-52.

the basis of law is an adequate professional and legal training.[393] Interference with the judicial process, including influence on case assignments from outside the judiciary, is impermissible.[394] This also protects against external efforts to alter the composition of a competent court. Except for judicial review judicial decisions may not be subject to revision.[395]

Since there is a danger that influence is exercised by indirect means it is necessary to provide for means of personal independence, such as security of tenure during one's term of office so that judges cannot be removed from office by the executive branch[396] or at will by other authorities.[397] There is a need for physical security, adequate pension and remuneration which cannot be reduced for reasons relating to the substance of judicial decision-making.[398] Except in respect of abuse of office or status judges may not be disciplined for the content of their judi-

---

[393] See e.g. para. 2 of the Basic Principles on the Independence of the Judiciary, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985).

[394] See e.g. para. 9 of the Basic Principles on the Independence of the Judiciary, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985).

[395] This does not affect the mitigation of sentences and pardons. See e.g. para. 4 of the Basic Principles on the Independence of the Judiciary, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985).

[396] European Commission of Human Rights, *Zand* v. *Austria*, Report adopted on 12 October 1978, DR 15, 70, para. 80; *Campbell and Fell* v. *the United Kingdom* (note 316), para. 80.

[397] Human Rights Committee, *Mikhail Ivanovich Pastukhov* v. *Belarus*, Communication No. 814/1998, U.N. Doc. CCPR/C/78/D/814/1998 (2003), para. 7.3. In this case the dismissal of a judge of the Constitutional Court several years before the expiry of the term for which he had been appointed constituted an attack on the independence of the judiciary.

[398] See e.g. paras. 11-12 of the Basic Principles on the Independence of the Judiciary, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985).

cial decisions.[399] But it is important to keep in mind that this is a form of mediated independence which seeks to ensure that adjudication is made on the basis of law.

Further potential threats to judicial independence are disguised efforts to influence adjudication by manipulating the administration of the judiciary which are also in violation of the right to due process by an independent court. Thus, for example, the financing of the judiciary may not be reduced for matters relating to adjudication. There is a need for structural safeguards provided they are necessary to ensure substantive independence. [400] Apart from the requirement in Article 6 that courts must be established by law,[401] the European Court of Human Rights demands institutional guarantees designed to shield judges from outside pressures.[402] Members involved in the exercise of advisory functions and those involved in the exercise of judicial functions must be separated.[403] Also it is important that adjudication is not made by people subject to executive hierarchies. But apart from the functional distinction between administrative and judicial functions there is no general requirement to separate the entire judiciary from the other branches of government if they perform non-judicial tasks, such as recruitment, budget and other administrative matters. The current international jurisprudence leaves room for different judicial systems provided these basic requirements are met. For example, as long as there is security of office during the period of appointment, life tenure for judges is not mandatory.[404]

---

[399] This also includes a right to due process in disciplinary proceedings. See e.g. para. 17 of the Basic Principles on the Independence of the Judiciary, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985).

[400] *Piersack* v. *Belgium* (note 390), para. 27; ECtHR, *Langborger* v. *Sweden,* Judgment of 22 June 1989, Series A, No. 155.

[401] For the interpretation of this requirement see European Commission of Human Rights, *Zand* v. *Austria,* Report adopted on 12 October 1978, DR 15, 70.

[402] *Piersack* v. *Belgium* (note 390), para. 27; ECtHR, *Langborger* v. *Sweden,* Judgment of 22 June 1989, Series A, No. 155.

[403] ECtHR, *Procola* v. *Luxembourg,* Judgment of 28 September 1995, Series A, No. 326.

[404] ECtHR, *Le Compte, Van Leuven and De Meyere* v. *Belgium,* Judgment of 23 June 1981, Series A, No.43, para. 57.

2. Structural and Institutional Diversity

These international standards can be described as representing a transnational normative consensus.[405] To go beyond this consensus by asking for institutional judicial independence more generally, however, would be difficult to derive from the international due process guarantee. Though it is possible to argue that structures which do not clearly separate the judiciary from the other branches of government may compromise the appearance of independence which is equally important for the rule of law, this argument can easily be overstretched. Appearance may vary from country to country. What is decisive, thus, is the perception of those in whose interest the courts operate, not how judges perceive appearances. Overemphasizing structural separation at the international level may not only be unwarranted but even harmful, if it creates suspicions which have neither been voiced nor been previously relevant in a country.

The insights gained from our comparative analysis lead me to repeat the caveat not to overemphasis structural safeguards. We need to focus on the negative margins of judicial independence.[406] There are good reasons for the European Court of Human Rights to continue its restraint with respect to institutional safeguards. Efforts by others to read the international principle as soliciting a specific model of judicial administration, namely self-governance, have failed to achieve the intended results in practice. At the same time our studies show that alternative models may work in a particular setting, even though at first sight it may be unreasonable from a purely rational point of view. Therefore, the international guarantee should not be misconstrued as providing a blueprint for domestic law. There is a difference between an international norm and the domestic institutional arrangements of its implementation.[407] With respect to the international norm of judicial independence we need to recognize what John Bell described in a different context as "functional equivalence".[408] The interpretation of the right to due proc-

---

[405] See *supra* at III. 2.

[406] For a similar approach in the domestic sphere see Russell (note 336), at 11.

[407] For a similar argument with respect to the rule of law in transitional processes see M. Krygier, Rethinking the Rule of Law after Communism, in: A. Czarnota/M. Krygier/W. Sadurski (eds.), Rethinking the Rule of Law after Communism, 265, at 273 (2005).

[408] Bell (note 348), at 60.

ess before an independent tribunal therefore should be guided by a contextual functionalism. Conceptualizing the international principle of judicial independence as a functional principle which provides for an obligation of result rather than of means helps to identify it as a transnational common norm[409] which nevertheless gives room for diverse and context-specific implementation as long as this results in independent and impartial adjudication.

VII. Conclusion

Guaranteeing judicial independence as a matter of human rights protection is a continuing challenge for all countries committed to liberal democracy. While it seems of particular urgency in countries in transition, the process of identifying its relevant parameters and developing contemporary mechanisms for its implementation is also continuing in established democracies.[410] The title of this book, "Judicial Independence in Transition", thus has a broader meaning. It does not just consider the process of democratization after the end of authoritarian regime, but also the transition of the role played by law and by judiciaries in established democracies as well as the contemporary transition of societies and governance more generally.

With the changing role of law in today's liberal democracy implementing judicial independence requires a continuous evolutionary development.[411] Even though judicial independence has a long tradition in old democracies, new challenges have to be met which are not always adequately addressed by traditional safeguards. Current reforms in judicial administration in Western countries as well as the trend to improve the diversity of the bench and enhance the transparency of its operation are part of a broader phenomenon of modernizing democratic governance

---

[409] For the meaning of this common core see the above-listed standards for substantive independence as well as those aspects of personal and structural independence which are necessary for protecting independent adjudication.

[410] As Gélinas points out with respect to judicial independence in Canada, "this understanding is still evolving, with old practices and rules being challenged by contemporary perspectives, changing requirements and constitutional developments"; Gélinas (note 139), Chapter F.

[411] Shetreet (note 314), at 658.

and of the ongoing search for adequate mechanisms of constitutional democracy.

For all current transitional processes it is important to consider judicial independence as an instrumental principle. It derives its normative force and content from the rule of law in a democratic society. Therefore judicial independence should not be taken literally in the sense of absolute independence. Conceptualizing judicial independence as a parameter of the separation of powers carries the risk of completely isolating it from democratic accountability. Instead independence and accountability are two sides of the same coin. This insight is relevant not only for domestic actors but also for international institutions, such as the OSCE, the Council of Europe and the European Union, which engage in rule of law assistance on the basis of a shared commitment to the rule of law and democracy. Among the lesson learned from the country studies based on past experience is the insight that if transition to liberal democracy is sought, accountability should be adequately reflected from an early point of transition. While in authoritarian regimes judicial accountability outweighs judicial independence there is some risk that in a transitional process which overemphasizes judicial autonomy the balance will tip towards too much independence.[412]

With the increasing role of law and the ensuing role of the judiciary in new democracies questions about the legitimacy of the judiciary are bound to arise. Therefore the principle challenge for judiciaries in transition to democracy is to measure up to their increasing role. With the new function of controlling the other branches of government by way of administrative adjudication and constitutional review, they need to become independent of the executive and legislative branches and at the same time become part of democratic government.[413] Therefore it is necessary to consider alternative means of accountability which can be balanced with judicial independence. Western democracies have started this development in recent decades by decreasing hierarchical structures and strengthening transparency in order to give society means of oversight. Nevertheless balancing judicial independence with accountability is and will remain a challenge for all.

---

[412] For a similar assertion in a different context see P. H. Russell, A General Theory of Judicial Independence Revisited, in: A. Dodek/L. Sossin, Judicial Independence in Context, at 599, 602 and 607 (2010).

[413] In this sense see also Solomon (note 22), at 232.

Despite the complexity of the undertaking to guarantee judicial independence in today's democracy and though the outer limits may be difficult and in fact for each democracy to determine individually, there is a transnational agreement on its essential meaning. The central element of this transnational principle is the notion of substantive independence. It is protection from outside influence on adjudication so that it can be delivered on the basis of the law. Judges must not be subject to coercion, pressure, threats, instructions, interferences, inducements (including corruption) or other indirect means of influence with respect to the interpretation of the law. In order to prevent concealed manipulations it is necessary to protect the personal independence of judges. This primarily involves security of tenure and protection from arbitrary removal during one's term of office. Furthermore, judicial administration may not be abused to influence independent decision-making.

As our analysis shows, the guarantee of these minimum requirements in practice unfortunately is still insufficient in a number of OSCE participating countries. To recognize and prevent such infringements is a task for all those dedicated to the rule of law. It has been the objective of the participants in our project to identify current shortcomings and to communicate lessons learned in an effort to guide future reforms and to assist international actors in the conceptualization of their rule of law strategies. In the end it is for the responsible politicians at the national level and all relevant actors in the realm of the judiciary to develop a commitment to the democratic rule of law and to implement the guarantee of judicial independence domestically.

Appendix

OSCE Office for Democratic Institutions and Human Rights

Max Planck Minerva Research Group on Judicial Independence

KYIV RECOMMENDATIONS ON JUDICIAL INDEPENDENCE IN EASTERN EUROPE, SOUTH CAUCASUS AND CENTRAL ASIA

- Judicial Administration, Selection and Accountability -
Kyiv, 23-25 June 2010

Judicial independence is an indispensable element of the right to due process, the rule of law and democracy. In an effort to support countries in Eastern Europe, South Caucasus and Central Asia in strengthening judicial independence in line with these principles, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) together with the Max Planck Institute for Comparative Public Law and International Law (MPI), organized and hosted a regional expert meeting on Judicial Independence in Kyiv. The meeting was attended by approximately 40 independent experts, among them prominent scholars and senior practitioners from 19 OSCE participating States, and from the Council of Europe and its Venice Commission.

Following an in-depth research of legal systems and practices regarding judicial independence, ODIHR and MPI selected three themes that are of particular relevance for judicial independence: (1) Judicial Administration with a focus on judicial councils, judicial self-governing bodies and the role of court chairs; (2) Judicial Selection – criteria and procedures; and (3) Accountability of Judges and Judicial Independence in Adjudication. The meeting concluded with the adoption of a – non-exhaustive – set of recommendations (enclosed "Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia"). The purpose of these recommendations is to further strengthen judicial independence in the region within the three selected topical areas.

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233, DOI 10.1007/978-3-642-28299-7,

Participating States are invited to review the ideas and guidance contained in the Kyiv Recommendations, identify areas where their practice already corresponds to what is recommended, and share relevant information with ODIHR. ODIHR will accordingly facilitate the exchange of expertise and provide technical assistance for the benefit of participating States that express the interest to further strengthen the independence of their judiciaries by implementing the measures contained in the Kyiv Recommendations.

Part I – Judicial Administration

1. The administration of courts and the judiciary shall enhance independent and impartial adjudication in line with due process rights and the rule of law. Judicial administration must never be used to influence the content of judicial decision making. The process of judicial administration must be transparent.

Judicial Councils, Qualification Commissions and Self-governing Bodies

Division of Competences in Judicial Administration

2. Judicial Councils are bodies entrusted with specific tasks of judicial administration and independent competences in order to guarantee judicial independence. 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 (*see paras 3-4, 8*), promotion and training of judges, discipline (*see paras 5, 9, 14, 25-26*), professional evaluation (*see paras 27-28*) and budget (*see para 6*). 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.

Judicial Selection

3. Unless there is another independent body entrusted with this task, a separate expert commission should be established to conduct written and oral examinations in the process of judicial selection (*see also para 8)*. In this case the competence of the Judicial Council should be re-

stricted to verifying that the correct procedures have been followed and to either appoint the candidates selected by the commission or recommend them to the appointing authority. (*For the recruitment process see paras 21-23.*)

4. Alternatively, Judicial Councils or Qualification Commissions or Qualification Collegia may be responsible directly for the selection and training of judges. In this case it is vital that these bodies are not under executive control and that they operate independently from regional governments (*for the composition see also para 8).*

Discipline

5. In order to prevent allegations of corporatism and guarantee a fair disciplinary procedure, 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. Disciplinary decisions shall be subject to appellate oversight by a competent court (*see also paras 9, 14, 25-26*).

Budgetary Advice

6. Without prejudice to existing responsibilities of the government for proposing the judicial budget and of parliament for adopting the budget, it would be advisable for a body representing the interests of the judiciary, such as 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.

Composition of Judicial Councils

7. Where a Judicial Council is established, its judge members shall be elected by their peers and represent the judiciary at large, including judges from first level courts. Judicial Councils shall not be dominated by appellate court judges. Where the chairperson of a court is appointed to the Council, he or she must resign from his or her position as court chairperson. 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 prosecu-

tors do not belong to the same judicial corps as the 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. The president of the Judicial Council should be elected by majority vote from among its members. The work of the Judicial Council shall not be dominated by representatives of the executive and legislative branch.

Membership of Bodies Deciding on Judicial Selection

8. Members of special commissions for judicial selection (*see para 3*) should be appointed by the Judicial Council from the ranks of the legal profession, including members of the judiciary. Where Judicial Councils, Qualification Commissions or Qualification Collegia are responsible directly for judicial selection (*see para 4*), the members should be appointed to fixed terms of office. Apart from a substantial number of judicial members in this selection body, the inclusion of other professional groups is desirable (law professors, advocates) and should be decided on the basis of the relevant legal culture and experience. Its composition shall ensure that political considerations do not prevail over the qualifications of a candidate for judicial office (*see para 21*).

Membership of Bodies Deciding on Discipline

9. Bodies competent to hear a disciplinary case and to take a decision on disciplinary measures (*see para 5, b*) shall not exclusively be composed of judges, but require representation including members from outside the judicial profession. Judicial members during their time of office shall not perform other functions relating to judges or the judicial community, such as administration, budgeting, or judicial selection. Bodies deciding on cases of judicial discipline must not be controlled by the executive branch nor shall there be any political influence pertaining to discipline. Any kind of control by the executive branch over Judicial Councils or bodies entrusted with discipline is to be avoided. (*See also paras 5, 25-26.*)

Transparency of Judicial Administration

10. The Judicial Council shall meet regularly so that it can fulfil its tasks. Public access to the deliberations of the Judicial Council and publication of its decisions shall be guaranteed in law and in practice.

The Role of Court Chairpersons

11. The role of court chairpersons should be strictly limited in the following sense: they may only assume judicial functions which are equivalent to those exercised by other members of the court. Court chairpersons must not interfere with the adjudication by other judges and shall not be involved in judicial selection. Neither shall they have a say on remuneration (*see para 13 for bonuses and privileges*). They may have representative and administrative functions, including the control over non-judicial staff. Administrative functions require training in management capacities. Court chairpersons must not misuse their competence to distribute court facilities to exercise influence on the judges.

Case Assignment

12. Administrative decisions which may affect substantive adjudication should not be within the exclusive competence of court chairpersons. One example is case assignment, which should be either random or on the basis of predetermined, clear and objective criteria determined by a board of judges of the court. Once adopted, a distribution mechanism may not be interfered with.

Individual Bonuses and Privileges

13. On a long term basis, bonuses and privileges should be abolished and salaries raised to an adequate level which satisfy the needs of judges for an appropriate standard of living and adequately reflect the responsibility of their profession. As long as bonuses and privileges exist, they should be awarded on the basis of predetermined criteria and a transparent procedure. Court chairs shall not have a say on bonuses or privileges.

Limited Role in Disciplining Judges

14. Court chairpersons may file a complaint to the body which is competent to receive complaints and conduct disciplinary investigations (*see para 5, a*). In order to ensure an independent and objective review of the complaint, court chairpersons should not have the power to either initiate or adopt a disciplinary measure.

Limited Term of Office

15. Court chairpersons should be appointed for a limited number of years with the option of only one renewal. In case of executive appointment, the term should be short without possibility of renewal.

Transparent and Independent Selection of Court Chairpersons

16. The selection of court chairpersons should be transparent. Vacancies for the post of court chairpersons shall be published. All judges with the necessary seniority/experience may apply. The body competent to select may interview the candidates. A good option is to have the judges of the particular court elect the court chairperson. In case of executive appointment, an advisory body - such as a Judicial Council or Qualification Commission (*see para 4*) - taking also into consideration views from the local bench, should be entitled to make a recommendation which the executive may only reject by reasoned decision. In this case the advisory body may recommend a different candidate. Additionally, in order to protect against excessive executive influence, the advisory body should be able to override the executive veto by qualified majority vote.

Part II – Judicial Selection and Training

Diversity of Access to Judicial Profession

17. Access to the judicial profession should be given not only to young jurists with special training but also to jurists with significant experience working in the legal profession (that is, through midcareer entry into the judiciary). The degree to which experience gained in the relevant profession can qualify candidates for judicial posts must be carefully assessed.

Improvement of Legal Education

18. Access to the judicial profession should be limited to those candidates with a higher law degree. In the university curriculum more attention should be given to the training of analytical skills. Elements such as case studies, practical experience, law clinics and moot courts should be integrated. The same level of education should be guaranteed in State and private universities, including distant learning programmes. Exter-

nal evaluation of the university curricula may positively contribute to their improvement.

Improvement of Special Training of Judges

19. Where schools for judges are part of the selection procedures, they have to be independent from the executive power. Training programmes should focus on what is needed in the judicial service and complement university education. They should include aspects of ethics, communication skills, the ability to settle disputes, management skills and legal drafting skills. Where a Judicial Council exists, it may adopt recommendations for the legal education of judges. This includes the specification of relevant skills and advice on the continuing education of judges.

20. Special training as referred to in para 19 should also be provided for representatives of other legal professions joining the judiciary.

Recruitment Process

21. In order to ensure transparency in the selection process, the procedure and criteria for judicial selection must be clearly defined by law. The vacancy note, as well as the terms and conditions, should be publicly announced and widely disseminated. A list of all candidates applying (or at least a short list) should be publicly available. The selection body should be independent, representative and responsible towards the public (*see paras 3-4*). It should conduct an interview at least with the candidates who have reached the final round, provided that both the topic of the interview and its weight in the process of selection is predetermined.

22. If there are background checks, they should be handled with utmost care and strictly on the basis of the rule of law. The selecting authority can request a standard check for a criminal record and any other disqualifying grounds from the police. The results from this check should be made available to the applicant, who should be entitled to appeal them in court. No other background checks should be performed by any security services. The decision to refuse a candidate based on background checks needs to be reasoned.

23. Where the final appointment of a judge is with the State President, the discretion to appoint should be limited to the candidates nominated by the selection body (e.g. Judicial Council, Qualification Commission or Expert Commission; *see paras 3-4*). Refusal to appoint such a candi-

date may be based on procedural grounds only and must be reasoned. In this case the selection body should re-examine its decision. One option would be to give the selection body the power to overrule a presidential veto by a qualified majority vote. All decisions have to be taken within short time limits as defined by law.

Representation of Minorities within the Judiciary

24. Generally it would be desirable that the composition of the judiciary reflects the composition of the population as a whole. In order to increase the representation of minorities in the judiciary, underrepresented groups should be encouraged to acquire the necessary qualifications for being a judge. Nobody must be excluded because they are a member of a certain minority group.

Part III – Accountability of Judges and Judicial Independence in Adjudication

Disciplinary Proceedings

25. Disciplinary proceedings against judges shall deal with alleged instances of professional misconduct that are gross and inexcusable and that also bring the judiciary into disrepute. Disciplinary responsibility of judges shall not extend to the content of their rulings or verdicts, including differences in legal interpretation among courts; or to examples of judicial mistakes; or to criticism of the courts.

Independent Body Deciding on Discipline

26. There shall be a special independent body (court, commission or council) to adjudicate cases of judicial discipline (*see para 9*). The bodies that adjudicate cases of judicial discipline may not also initiate them or have as members persons who can initiate them. These bodies shall provide the accused judge with procedural safeguards, including the right to present a defence and also the right to appeal to a competent court. Transparency shall be the rule for disciplinary hearings of judges. Such hearings shall be open, unless the judge who is accused requests that they be closed. In this case a court shall decide whether the request is justified. The decisions regarding judicial discipline shall provide reasons. Final decisions on disciplinary measures shall be published.

Professional Evaluation of Judges

27. Where professional evaluations of judges are performed, they must not be used to harm independent adjudication. The evaluation of judges' performance shall be primarily qualitative and focus upon their skills, including professional competence (knowledge of law, ability to conduct trials, capacity to write reasoned decisions), personal competence (ability to cope with the work load, ability to decide, openness to new technologies), social competence (ability to mediate, respect for the parties) and, for possible promotion to an administrative position, competence to lead. These same skills should be cultivated in judicial training programmes, as well as on the job.

28. Judges shall not be evaluated under any circumstances for the content of their decisions or verdicts (either directly or through the calculation of rates of reversal). How a judge decides a case must never serve as the basis for a sanction. Statistics on the efficiency of court operations shall be used mainly for administrative purposes and serve as only one of the factors in the evaluation of judges. Evaluations of judges may be used to help judges identify aspects of their work on which they might want to improve and for purposes of possible promotion. Periodic exams for judges (attestations) that may lead to dismissal or other sanctions are not appropriate for judges with life tenure.

29. The criteria for professional evaluation should be clearly spelled out, transparent and uniform. Basic criteria should be provided for in the law. The precise criteria used in periodic evaluations shall be set out further in regulations, along with the timing and mechanisms of performing evaluations.

Independent Evaluations

30. While a Judicial Council may play a role in specifying the criteria and the procedure, professional evaluations should be conducted at the local level. Evaluations shall be conducted mainly by other judges. Court chairpersons should not have the exclusive competence to evaluate judges, but their role should be complemented by a group of judges from the same and other courts. That group should consider also the opinions of outsiders who regularly deal with the judge (such as lawyers) and law professors, with respect to the diligence, respect for the parties and rules of procedure by a judge.

31. Evaluations should include review of the judge's written decisions and observation of how he or she conducts trials. Evaluations shall be

transparent. Judges should be heard and informed about the outcome of the evaluation, with opportunities for review on appeal.

Professional Accountability through Transparency

32. Transparency shall be the rule for trials. To provide evidence of the conduct of judges in the courtroom, as well as accurate trial records, hearings shall be recorded by electronic devices providing full reproduction. Written protocols and stenographic reports are insufficient. To enhance the professional and public accountability of judges, decisions shall be published in databases and on websites in ways that make them truly accessible and free of charge. Decisions must be indexed according to subject matter, legal issues raised, and the names of the judges who wrote them. Decisions of bodies deciding on discipline shall also be published *(see also para 26).*

33. To facilitate public trust in the courts, authorities should encourage the access of journalists to the courts, and establish positions of press secretary or media officer. There shall be no barriers or obstacles to journalists attending trials.

Independent Criminal Adjudication

34. The accusatory bias of justice systems in most countries of Eastern Europe, South Caucasus and Central Asia requires remedies. Acquittals are still considered a black mark or failure. To diminish pressure on judges to avoid acquittals, a change in the system of their professional evaluation (and if appropriate, considering changes in the assessment of prosecutors and investigators as well) is strongly recommended. The number of acquittals should never be an indicator for the evaluation of judges. Judges need to gain real discretion in reviewing requests for approval of pre-trial detention. Appellate review of acquittals shall be limited to the most exceptional circumstances.

Internal Independence

35. The issuing by high courts of directives, explanations, or resolutions shall be discouraged, but as long as they exist, they must not be binding on lower court judges. Otherwise, they represent infringements of the individual independence of judges. In addition, exemplary decisions of high courts and decisions specifically designated as precedents by these courts shall have the status of recommendations and not be binding on

lower court judges in other cases. They must not be used in order to restrict the freedom of lower courts in their decision-making and responsibility. Uniformity of interpretation of the law shall be encouraged through studies of judicial practice that also have no binding force.

List of Contributors

Alen, André

Professor of Constitutional Law, Catholic University of Leuven (Belgium); Judge at the Constitutional Court (Belgium)

Allemeersch, Benoît

Professor of Procedural Law, Catholic University of Leuven (Belgium)

Bodnar, Adam

Associate Professor, Warsaw University; Secretary of the Board, Helsinki Foundation for Hum.Rts. (Poland)

Bojarski, Łukasz

Member of the National Council of the Judiciary; Inpris – Institute for Law and Society (Poland)

Coman, Ramona

Assistant Professor of Political Science, Faculty of Social and Political Sciences, Université libre de Bruxelles (Belgium)

Dallara, Cristina

Researcher at the Research Institute on Judicial Systems, Bologna, National Research Council (Italy)

Dalle, Benjamin

Researcher at the Institute for Constitutional Law, Catholic University of Leuven (Belgium)

A. Seibert-Fohr (eds.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 233, DOI 10.1007/978-3-642-28299-7, © by Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V., to be exercised by Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Published by Springer-Verlag Berlin Heidelberg 2012

De Lange, Roel

Professor of Constitutional and Administrative Law, Erasmus University Rotterdam (The Netherlands)

Di Federico, Giuseppe

Professor Emeritus, University of Bologna; Founder of the Research Institute on Judicial Systems, National Research Council (Italy)

Epineuse, Harold

Deputy Secretary General of the Institut des Hautes Etudes sur la Justice (France)

Fleck, Zoltán

Professor of Sociology of Law, Eötvös Lóránd University, Faculty of Law (Hungary)

Garapon, Antoine

Magistrat; Secretary General of the Institut des Hautes Etudes sur la Justice (France)

Gee, Graham

Lecturer in Law, University of Birmingham (United Kingdom)

Gélinas, Fabien

Professor of Constitutional Law, McGill University (Canada)

Hanganu, Sorin

Child Protection Officer, UNICEF Moldova (Moldova)

Hriptievschi, Nadejda

Legal Consultant, Public Defender Office; Lecturer at State University of Moldova (Moldova)

Jackson, Vicki

Carmack Waterhouse Professor of Constitutional Law, Georgetown University (United States of America)

Kachkeev, Maksat
Guest Researcher, East European Law Institute, University of Cologne (Germany)

Kiener, Regina
Professor of Public Law, University of Zurich (Switzerland)

Kühn, Zdeněk
Associate Professor of Jurisprudence, Charles University; Judge at the Supreme Administrative Court (Czech Republic)

Ligi, Timo
Independent Consultant on Court Administration (Estonia)

Müller, Lydia F.
Research Fellow, Max Planck Institute (MPIL), Heidelberg (Germany)

Mouradian, Grigor
Legal Adviser, German International Cooperation (GIZ), Yerevan (Armenia)

Nergelius, Joakim
Professor of Law, University of Örebro (Sweden)

Nußberger, Angelika
Judge at the European Court of Human Rights; Professor for International and Comparative Constitutional Law, University of Cologne (Germany)

Parau, Cristina
Associate Research Fellow, Centre for Socio-Legal Studies and Research Fellow, Wolfson College, University of Oxford (United Kingdom)

Schwartz, Olga
Judicial Reform Consultant, World Bank Moscow Office (Russia)

Seibert-Fohr, Anja

Head of the Minerva Research Group, Max Planck Institute (MPIL), Heidelberg; Lecturer in Law, University of Heidelberg (Germany)

Solomon, Jr., Peter H.

Professor Emeritus of Political Science, Law and Criminology; Member of the Centre for European, Russian and Eurasian Studies, University of Toronto (Canada)

Sykiainen, Elga

Legal Consultant, EU-Russian Cooperation Programme, Moscow (Russia)

Turenne, Sophie

Lecturer in Law, Murray Edwards College, University of Cambridge (United Kingdom)

Vashkevich, Alexander

Associate Professor, Belarusian State University; Former Justice of the Constitutional Court (Belarus)

Wheeler, Russell

Visiting Fellow at The Brookings Institution; President of the Governance Institute, Washington, D.C. (United States of America)

Zimmermann, Dominik

Former Research Fellow, Max Planck Institute (MPIL), Heidelberg (Germany); now IAEA Junior Professional