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CONSEIL CONSULTATIF DE JUGES EUROPEENS (CCJE)

CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)

Compilation des réponses au questionnaire pour la préparation de l'Avis n° 18 (2015) du CCJE intitulé "L'indépendance du système judiciaire et ses relations avec les autres pouvoirs dans un État démocratique moderne"

Compilation of replies to the questionnaire for the preparation of the CCJE Opinion No. 18 (2015) entitled "The independence of the judiciary and its relations with the other powers in a modern democratic state"

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Albania / Albanie

Introduction

The following questionnaire aims at gathering essential information on constitutional provisions and other laws (whether statutory or otherwise) concerning the relations between the three powers of state: judicial on one side, and the executive and legislative powers on the other. Where appropriate, the answers to the questionnaire should also provide information on specific issues and concerns in the respondent country on this topic. Answers will provide important material for the CCJE Opinion No. 18 to be prepared in 2015 as well as for the CCJE's next Situation Report.

1. How does the Constitution, or the other laws of your country, if there is no written Constitutional document, regulate relations between the judicial power on one side, and the executive and legislative powers on the other side?

The Constitution of the Republic of Albania recognizes and guarantees the independence of judicial power by way of a wide range of provisions, which guarantee organizational, administrative and financial independence. The Constitution of the Republic of Albania did not suffice itself solely on the formal affirmation of the independence of the judiciary, but expressly provided for the constitutional guarantees for the accomplishment and implementation of such independence.

The principle of separation and balancing of judicial power constitutes one of the fundamental constitutional tenets. Constitution provides that the governing system in the Republic of Albania is based on the separation and balancing of the legislative, executive and judicial power.

Judicial power, according to the Constitution, is exercised by the High Court as well as by the appeal courts and district courts. The courts have the exclusive right to the function of exerting justice. This function of the courts determined the place of the judiciary in the system of institutions of state power and the status of judges. According to this resolution, judicial power is exercised in a cycle of stages following the principle of the control of lower courts' rulings from higher courts. This norm guarantees the independence of the judiciary, according to which court rulings are controlled only by the higher court and no other body can evaluate the legitimacy and grounds for court rulings, as long as they are not amended or repealed by a higher court. According to the Constitution, judges are independent and subject only to the Constitution and the laws.

Likewise, Constitution stipulates that intrusion in the activity of the courts or judges instigates responsibility pursuant to the law. Through this stipulation, the Constitution prohibits interference with the courts and judges.

The Albania Constitution provide that the organization and functioning of the bodies foreseen by the Constitution are regulated by their relevant laws, which must be adopted by a qualified majority, by the votes of 3/5 of all the members of the Assembly. This provision is an authentic and indispensable prerogative which provides constitutional bodies and institutions, including the judicial power, with a higher level of security, sustainability and efficiency in exercising their duties.

Self-governance is another important component of the independence of the judiciary recognized and guaranteed by the Constitution of the Republic of Albania. The Constitution regulates the composition and competences of the High Council of Justice. The High Council of Justice has the duty to "govern" the judiciary and is the constitutional body positioned at the top of the organizational pyramid of the judicial power. The presence of 9 judges in the composition of the High Council of Justice accomplishes the connection with the judicial corps and makes the court independent from intrusion by any other power. According to the Constitution, the High Council of Justice is the only body that decides on the transfer of judges as well as on their disciplinary responsibility.

Judicial power in the Republic of Albania also enjoys financial independence. The Constitution provides that courts have a separate budget which they propose pursuant to the law and administer themselves.

In addition to the above, the independence of the judiciary is guaranteed by a number of constitutional and legal norms sanctioning the status of the judge. This status generally includes the permanence, incompatibility and immunity from criminal proceedings, as well as several other rights.

As far as High Court judges, Article 140 of the Constitution provides that they can be dismissed by the Assembly by a vote of two thirds of its members for violating the Constitution, for committing a crime, for mental or physical disability, as well as for acts that seriously/gravely discredit the position and persona of a judge. However, the Constitution provides guarantees for a High Court judge from any arbitrary decision of the Assembly, in stipulating that a decision by the Assembly is reviewed by the Constitutional Court which, upon evidence that one of the above causes exists, announces his removal from office.

In order to guarantee the independence of the judiciary in exercising its duties, the law has limited the civil liability of a judge, according to which judges do not respond in a civil suit related to the conduct of their professional duties, with the exception of cases provided for by the law.

2. Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

In last 10 years, there have been several important discussions in Albania to consolidate/improve the justice system. Furthermore, those discussions are pursuing by numerous amendment of the law on the justice system, such as the law on organisation of judicial power, the law on administrative courts, the law on organization and functioning of the High Council of Justice, the law on Magistrate School ect. In the process of drafting of the above-mentioned laws were involved all actors of the system of justice, and stakeholders like MP's, judges, lawyers, scholars, association of judges. However, judges were less involved in this process, because of their limitations of the duty and the workload.

3. Has there been any significant debate on the issue of "judicial restraint" or "judicial moderation" with regard to the exercise of the judicial function vis-a-vis the other powers of the state? In particular, are there examples where public opinion and/or the other powers of state have suggested that the judiciary (or an individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

An example of the intervention of the judiciary which spoke at all levels - government officials, the media and the public, were the decisions taken by the Constitutional Court of Albania:

<u>First Case:</u>

The Constitutional Court examined on 07/04/2009, in public judicial hearing, the case no 6 of act, pertaining to:

Petitioner: Union of Judges of Albania

Interested Entities: Assembly of Albania, Ministry of Justice, Ministry of Finance, Judicial Budget Administration Office;

Subject matter: "Repealing, as being at variance with the Constitution, the sentence "*Basic salary of the first instance court of serious crimes is equal to 50 per cent of the salary of the High Court judge*", and the sentence "*Added to this salary shall, under specific working conditions, be 10 per cent*", of Article 26/2, of the Law no 9877, dated 18.02.2008, "On organisation of the judicial power in the Republic of Albania".

Upon the completion of the judicial examination, Constitutional Court in its Judgment no 26, dated 24.07.2009, decided: "Rejecting the petition for repealing, as at variance with the Constitution, the sentence "*Basic salary of the first instance court of serious crimes is equal to 50 per cent of the salary of the High Court judge*", and the sentence "*Added to this salary shall, under specific working conditions, be 10 per cent*", of Article 26/2, of the Law no 9877, dated 18.02.2008, "On organisation of the judicial power in the Republic of Albania".

<u>Second Case:</u>

The Constitutional Court examined on 11.12.2008, in public judicial hearing the case no 31/16 of act, pertaining to:

Petitioner: Union of Judges of Albania

Interested Entities: Assembly of Republic of Albania, Council of Ministers, High Council of Justice.

Subject matter: Repealing, as being at variance with the Constitution, the Articles 37/2, 38/a, b of the Law no 9877, dated 18.02.2008 "On organisation of the judicial power in the Republic of Albania".

Upon the completion of the judicial examination, Constitutional Court in its Judgment no 20, dated 09.07.2009, of the Constitutional Court decided: "Repealing, as being at variance with the Constitution, the phrase in Article 38, letter "a", of the law no 9877: "*a) The registrar shall appoint and discharge the personnel of judicial secretarial office and the administrative and technical personnel of the services to courts*"; - Rejection of the petition in connection with claiming non-constitutionality of the phrase in Article 38, letter "b" of the Law no 9877: "*b) oversees the process of organisation and documentation of the assignment of judicial cases through lots, as well as signs assignment of the judicial case file to the respective judge*". – Rejection of the petition in connection with claiming non-constitutionality of the phrase in Article 37, point 2, no 9877: "*The registrar shall be appointed and dismissed by the Ministry of Justice*".

4. a) In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?

b) In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the "official" reason for the changes or proposed changes.

c) In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view of introducing changes in the law as referred to under a)?

Actually, the most important measures taken by the Government toward the independence and impartiality of the judiciary, are the amendments of the Law on the High Council of Justice, which address inter alia the mandate of members of the Council, who will now be suspended upon being indicted in criminal proceedings and dismissed if found to have violated the law or the Constitution, and who are not allowed to be promoted or transferred during their term in office nor to exercise a range of activities considered incompatible on conflict of interest grounds; and the amendment of the law on High Court which provide the establishment of a body, which will preselect the potential candidates and will refer them to the President, for the appointment as a judge on High Court.

The above mentioned legal initiatives were approved by the Albanian Parliament, but rejected by the President, motivating that the legal initiatives have restricted the President' power provided by the Albanian Constitution.

5. In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please briefly identify their nature and content and indicate the reaction of the public or media reporting of "public opinion".

The functioning of the judicial system continuously has been subject of politicisation, limited accountability, poor inter-institutional cooperation and corruption. Second my personal perception, the fact that Albanian politicians attack so frequently the judiciary is mostly related to disregard the public opinion by misgovernment of state, than to address properly the shortcomings of the judiciary that faces recently in Albania.

6. **To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budgets, the relevant ministry with respect to information technology in courts, the cour de compte, parliamentary investigations etc. or any other external influence by other powers of the state)?**

The judicial power, except the guarantees regarding its independence, as part of state power is under the influence of other state power such as executive and legislative mainly related to the (i) budget issues and (ii) appointment of the members of the High Court.

(i) As above, the funds made available to the Judiciary shall be approved with the Annual Law of State budget, in total for the entire Judicial Power. The Judicial Budget Administration Office (JBAO) assumes a key role in the process of drafting the draft budget for the Judiciary.

The Judicial Budget Administration Office (JBAO) is led by the Steering Board, being chaired by the Chairman of High Court and has in its composition one member of the High Court elected by the meeting of judges of this Court, two chairmen of Appeal Courts elected by joint meeting of the chairmen of the Appeal Courts, four chairmen of the Judicial District Courts elected by the joint meeting of the chairmen of the Judicial Districts Courts and one representative of the Ministry of Justice. The Steering Board of JBAO breaks down and allocates the budget funds to each court by decision. These funds shall be managed by the courts themselves. JBAO shall, through its specialists, offer unified technical assistance to all the courts at the three levels.

(ii) Regarding the other issue of the influence by Parliament, this influence is related mostly with the appointment and dismissal of the member of High Court. But, so far, there is no case of the dismissal of one of the member of High Court in Albania.

I would like to pay the attention that since January 2013, Parliament has rejected presidential decrees appointing three members of the High Court and the seats concerned have yet to be filled. The motivation of Parliament regarding the rejected presidential nominations is unclear and not related directly to the legal criteria of the candidate, but to the lack of a preliminary inter-institutional dialog among President and Parliament.

7. Do you have any other comments to make with regard to the relations between the judiciary and the other powers of state in your country?

How does the Constitution, or the other laws of your country, if there is no written Constitutional document, regulate relations between the judicial power on one side, and the executive and legislative powers on the other side?

The constitution states that judiciary and executive power are separated. Judges are independent in their jurisdictional tasks. They are also independent in tasks of the administration of courts if tasks of this kind are entrusted to panels of judges by ordinary law. But this possibility was used by the legislator only in a very restrictive way. (assignment of cases, evaluation of judges, non-binding proposals for the appointment of judges to vacant judges posts.).

The role of administrative courts and the Constitutional Court has the usual impact on acts of the executive power. Ordinary laws adopted by the legislator could be challenged at the Constitutional Court regarding their constitutionality.

There is no decisive influence of the judiciary on the budget and the allocation of resources.

Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

There were only few debates.

- The judges association tries whenever possible to raise the problem of the strong structural dependency of the judiciary on the other powers of state. On the occasion of a convent to debate on amendments of the constitution initiated by the parliament, where initially nobody wanted to debate about the position of the judiciary but mainly on other constitutional questions like the federal system of the state, the judges association raised once again the concept of creating a council for the judiciary. The initiative was supported by a conference with the participation of the working party of the CCJE. After some positive reports in the media on this conference the topic disappeared again. Politicians of all parties were not interested at all. Their arguments were that this will lead to a state within the state on the one hand and judges don't have management skills on the other.

- Till the beginning of 2014 Austria had no first instance administrative courts. In general there was a remedy within the administration to a higher instance (e.g. ministry or government of the Bundesland) and from there a restricted remedy to the Supreme Administrative Court (Verwaltungsgerichtshof) which decided as a court of cassation in administrative court matters. The debate to introduce first instance administrative courts lasted decades. It was evident that politicians, especially politicians in some of the Bundesländer were afraid to loose influence. This became also evident in the drafts of several ordinary laws of the parliaments of these Bundesländer. A substantial argumentation pro and contra was missing.

Has there been any significant debate on the issue of "judicial restraint" or "judicial moderation" with regard to the exercise of the judicial function vis-a-vis the other powers of the state? In particular, are there examples where public opinion and/or the other powers of state have suggested that the judiciary (or an individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

Decisions of the Constitutional Court which declare acts of the legislator or the executive power unconstitutional by their nature provoke such reactions, the most severe of which occurred when decisions against the discrimination of homosexuals were taken or when the state was condemned to refund taxes.

Regarding criminal procedures there were (are) several cases, where politicians were/are involved. Whatever the outcome of such procedures is, courts are blamed either by one or by the other political party that the decision is politically biased. When elections are scheduled and a procedure of such kind is scheduled as well courts are blamed to exercise undue political influence.

a) In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?

First instance administration courts have been introduced in 2014 (see above).

b) In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the "official" reason for the changes or proposed changes.

The only proposals are those of the judges association regarding a Council for the Judiciary (see above) or to make the proposals for the nomination of candidates for a vacant position binding. But such proposals are not content of public debate or reflected in academic studies or debates.

c) In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view of introducing changes in the law as referred to under a)?

See under b)

In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please briefly identify their nature and content and indicate the reaction of the public or media reporting of "public opinion".

See above regarding restrains. But there is almost no debate on the structure, relation, balance etc. of the powers of state.

To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budgets, the relevant ministry with respect to information technology in courts, the court de compte, parliamentary investigations etc. or any other external influence by other powers of the state)?

The judiciary has no say regarding the budget. The law on the budget is prepared by the minister of finance who negotiates with the other ministers,, regarding the judiciary with the minister of justice. The allocation of resources is determined by the concept of the minister of justice, who also decides of the major organizational issues e.g. use and equipment of IT.

Do you have any other comments to make with regard to the relations between the judiciary and the other powers of state in your country?

Judiciary works quite well. Therefore nobody outside the judiciary sees any need for structural changes. At the moment the deficit of structural independence is not misused. If any political party wants do take advantage of these deficits it would be easy to do so. As everywhere the situation has its (long-lasting) historical roots. One may be that judges are seen as special qualified public servants and not as office holders of a separate state power. Austrian politicians tend to kill any attempt to strengthen the structural independence with the argument that the individual independence of the individual judge in exercising his/her judicial duties is guaranteed by the constitution, everything more endangers democracy, which foremost empowers the parliament and not the judiciary.

Azerbaijan / Azerbaïdjan

Questionnaire for the preparation of CCJE Opinion No. 18 (2015): The independence of the judiciary and its relations with the other powers in a modern democratic state

1. How does the constitution, or the other laws of your country, if there is no written Constitutional document, regulate relations between the judicial power on one side, and executive and legislative powers on the other side?

The procedures on forming the judiciary power and its independence are determined by the Constitution of the Republic of Azerbaijan and written normative legal acts. According to Article 7 of the Constitution, Azerbaijan is a democratic, legal, secular and unitary republic. State power in the Republic of Azerbaijan is based on the principle of division of powers: the Milli Majlis exercises the legislative power; the executive power belongs to the President; courts exercise the judicial power.

According to provisions of the Constitution, legislative, executive and judicial powers interact and are independent within the ambits of their competences.

Article 8 of the Constitution states that the President of the Republic of Azerbaijan is the guarantor of the independence of the judicial power.

The Milli Majlis establishes general rules concerning the following matters: judicial system and status of judges, general-prosecutor's office, bar, legal proceedings, execution of court verdicts.

The executive and legislative powers have the following competences in appointing judges: President submits proposals to the Milli Majlis about appointment of judges of the Constitutional Court, the Supreme Court and the Courts of Appeal. The Milli Majlis appoints judges of the Constitutional Court, the Supreme Court and the Courts of Appeal. Judges of other courts are appointed by the President.

The Law on "Courts and Judges" contains the rules on forming an independent judicial power. The selection of judges, assessment of their work, promotion, replacement, disciplinary liability etc. are regulated by the Law on "Judicial-Legal Council".

2. Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

A number of conferences, symposiums and round tables have been held on the independence of the judicial power in the last 10 years.

3. Has there been any significant debate on the issue of "judicial restraint" or "judicial moderation" with regard to the exercise of the judiciary function vis-a-vis the other powers of the state? In particular, are there examples where public opinion and /or the other powers of state have suggested that the judiciary (or an individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

As stated before, the judicial power is independent and any pressure and intervention into its work is prohibited. Judges are independent; they are subordinate only to the Constitution and laws of the Republic of Azerbaijan and cannot be replaced during their tenure.

Furthermore, direct and indirect impediment to legal proceedings is considered as an illegal influence, threat and interference. Such kind of intervention entails criminal liability in line with section 32 of the Criminal Code.

4. a) **In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?**

No

b) **In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the "official" reason for the changes or proposed changes.**

No

c) **In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view of introducing changes in the law as referred to under a)?**

No

5. **In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please briefly identify their nature and content and indicate the reaction of the public or media reporting of "public opinion".**

The Decree of 19 January 2006 on "Modernization of the judicial system of the Republic of Azerbaijan" highlights a number of important issues such as the facilitation of the citizens' access to judiciary, reducing workload of judges and provision of courts with new information technologies.

The decree of 13 February 2014 on "Electronic Court Information System" is destined to further expand the citizens' access to judiciary by means of the new information technologies, to ensure transparency and to strengthen control over courts decision.

6. **To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budget, the relevant ministry with respect to information technology in courts, the cour de compte, parliamentary investigations etc.or ant other external influence by other powers of the state)?**

While exercising its authority, the judicial power is not dependent on any state bodies.

7. **Dou you have any other comments to make with regard to the relations between the judiciary and the other powers of state in your country?**

No.

Belgium / Belgique

Introduction

Ce questionnaire vise à recueillir des informations essentielles sur les dispositions constitutionnelles et autres normes (que ce soit législatives ou autres) concernant les relations entre les trois pouvoirs de l'État: le pouvoir judiciaire d'un côté, et les pouvoirs exécutif et législatif de l'autre. Le cas échéant, les réponses au questionnaire devraient également donner des informations sur les questions et préoccupations spécifiques relatives à ce sujet dans les pays concernés. Les réponses constitueront un matériel important pour l'Avis No. 18 du CCJE qui sera préparé en 2015, ainsi que pour le prochain rapport de situation du CCJE.

1) **Comment la Constitution, ou les autres lois de votre pays s'il n'existe pas de norme constitutionnelle écrite, régulent-elles les relations entre le pouvoir judiciaire d'un côté, et les pouvoirs exécutif et législatif de l'autre?**

L'article 151, § 1er, de la Constitution dispose que « les juges sont indépendants dans l'exercice de leurs compétences juridictionnelles ».

Pour le surplus, la Constitution ne règle pas expressément les relations entre les pouvoirs. Toutefois, depuis l'indépendance de la Belgique en 1831, la pratique constitutionnelle a toujours été celle de la séparation des trois pouvoirs de l'Etat : pouvoir législatif, pouvoir exécutif et pouvoir judiciaire, ce qui implique l'indépendance de ces pouvoir les uns par rapport aux autres.

2) Y a-t-il ou y a-t-il eu, au cours des 10 dernières années, un débat important dans votre pays à ce sujet, que ce soit dans le domaine politique/juridique, dans les milieux universitaires/académiques, à travers des ONG ou dans les media?

La question de l'indépendance judiciaire est constamment actuelle. Même si le principe de l'indépendance du pouvoir judiciaire n'est pas remis en cause, force est de constater que la tendance existe d'en redéfinir les contours et les modalities : il n'est pas contesté que le juge est indépendant dans l'exercice de sa mission juridictionnelle (indépendance fonctionnelle), mais l'indépendance de l'institution judiciaire (indépendance institutionnelle) est tout de même mise à mal. Le débat existe bien évidemment dans les différents milieux cités dans l'énoncé de la question.

3) **Y a-t-il eu un débat important sur la question de la « retenue judiciaire » ou la « modération judiciaire » à l'égard de l'exercice de la fonction judiciaire vis-à-vis des autres pouvoirs de l'État? En particulier, y a-t-il des exemples où l'opinion publique et/ou les autres pouvoirs de l'État ont laissé entendre que le pouvoir judiciaire (ou un juge ou un tribunal dans une décision particulière) a interféré de manière inacceptable dans le domaine du pouvoir ou de la compétence discrétionnaire de l'exécutif ou du législatif?**
A l'occasion d'une affaire qui a défrayé la chronique il y a quelques années, le pouvoir exécutif a été soupçonné d'avoir tenté de s'immiscer directement ou indirectement dans l'exercice du pouvoir judiciaire. Cela conduit à la démission du premier ministre et du ministre de la Justice et a donné lieu à un débat politique très intense dont la conclusion est que le pouvoir politique ne saurait en aucun cas s'ingérer dans l'exercice du pouvoir judiciaire. Il y a unanimité là-dessus dans la classe politique.

4) **a) Dans votre pays, au cours des 10 dernières années, y a-t-il eu des changements dans la constitution/loi concernant la justice (dans le sens le plus large: la structure, les tribunaux, les juges) qui ont pu conduire à dire que la relation entre le pouvoir judiciaire et les autres pouvoirs de l'État ou la séparation des pouvoirs dans votre pays ont été affectées?**
b) Dans votre pays, y a-t-il des propositions actuelles de modification de la loi visée sous a)? Dans chaque cas, veuillez indiquer la raison «officielle» pour les changements ou les modifications proposées.
c) Dans votre pays, y a-t-il des discussions sérieuses ou des débats (dans les milieux politiques, par le public en général ou dans les media) en vue d'introduire des changements dans la loi visée sous a)?

La disposition mentionnée dans la réponse à la première question a été adoptée lors d'une modification constitutionnelle de 1998. Auparavant, la Constitution ne disposait rien au sujet de l'indépendance du pouvoir judiciaire, mais la tradition et la pratique constitutionnelles consacraient cette indépendance. A la suite de l'adoption de l'article 151 de la Constitution, l'indépendance du juge dans sa fonction juridictionnelle est certes consacrée. Mais cela n'était pas nécessaire dès lors que la règle de l'indépendance du pouvoir judiciaire était une réalité. A moins qu'on ait, par ce biais, voulu limiter l'indépendance au juge pour qu'elle ne s'étende plus au 'pouvoir' judiciaire, c'est-à-dire à l'institution en tant que telle.

Une réforme importante est celle introduite par la loi du 18 février 2014 relative à l'introduction d'une gestion autonome pour l'organisation judiciaire. Cette loi qui est entrée en vigueur le 1er avril 2014, crée un collège des cours et tribunaux et des comités de gestion compétents pour la gestion des cours et tribunaux. Le but est de permettre au pouvoir judiciaire d'être compétent de manière autonome de sa propre gestion et d'en être responsable, mais force est de constater que les structures mises en place sont telles que la possibilité d'une ingérence dans l'exercice autonome de la gestion des cours et tribunaux, pouvant conduire à une ingérence indirecte, voire directe, dans les prérogatives du pouvoir judiciaire, n'est pas imaginaire. Ainsi, la mise à disposition des moyens financiers sera décidée dans le cadre de contrats de gestion à conclure entre le collège et le ministre de la Justice fixant notamment les objectifs à atteindre par les cours et tribunaux et le mode de mesure et de suivi de la réalisation du contrat de gestion ainsi que des indicateurs utilisés à cet effet. En plus, des représentants du gouvernement (ministre de la Justice et ministre du Budget) sont présents dans les nouvelles structures et ont pour mission de contrôler le collège. Ils participent à ses travaux avec voix consultative et peuvent exercer un recours devant le ministre de la Justice et le ministre du Budget contre les décisions prises qui seraient contraires à la loi ou au contrat de gestion et qui ont une portée financière.

5) **Dans votre pays, des observations importantes ont-elles été formulées par des responsables politiques ou d'autres groupes pertinents concernant le rôle du pouvoir judiciaire et des tribunaux en leur qualité de**

troisième pouvoir de l'État? Si oui, veuillez indiquer brièvement leur nature et leur contenu et indiquer la réaction de l'opinion publique ou les rapports des media faisant état de "l'opinion publique".

Le pouvoir judiciaire a été fort critiqué par les médias et le monde politique qui lui ont reproché son manque d'efficacité, surtout dans des affaires qui ont été vécue douloureusement par l'opinion publique (p.e. l'affaire dite « Dutroux »). L'indépendance du pouvoir judiciaire a été mise en cause à ces occasions au motif que cette indépendance ne pouvait pas être un prétexte pour occulter les défaillances de la Justice. La conséquence en a été la création du Conseil supérieur de la justice et le nouveau mode de nomination des magistrats sur présentation de ce Conseil et ayant pour but une objectivation des nominations, ce qui fut évidemment une évolution positive.

6) Dans quelle mesure, le cas échéant, la bonne administration de la justice est-elle affectée par l'influence des autres pouvoirs de l'État (par exemple, le ministère des finances à l'égard de l'administration des budgets, le ministère compétent en matière de technologie de l'information dans les tribunaux, la Cour des Comptes, les enquêtes parlementaires etc. ou toute autre influence extérieure par d'autres pouvoirs de l'État)?

Comme il est dit dans la réponse à la quatrième question, la gestion des cours et tribunaux est désormais confiée au Collège des cours et tribunaux où siège également des représentants du gouvernement. Ceux-ci doivent veiller à l'orthodoxie budgétaire. Mais il est évidemment que leur présence et le fait qu'ils peuvent s'opposer aux décisions prises par le collège, rend celui-ci tributaire du pouvoir exécutif. En plus, les moyens financiers seront toujours octroyés par le ministre de la Justice dans le cadre de contrats de gestion à conclure avec celui-ci.

7) Avez-vous d'autres commentaires à faire sur les relations entre le pouvoir judiciaire et les autres pouvoirs de l'État dans votre pays?

Si les relations entre les pouvoirs de l'Etat comportent souvent des difficultés, il faut reconnaître qu'il peut comporter des aspects positifs. Ainsi, lorsque des modifications législatives concernant le droit matériel et de la procédure (en matière civile, pénale, commerciale, fiscale etc.) sont envisagées, il arrive fréquemment que les représentants du pouvoir judiciaire envoie au ministre de la Justice et au Parlement ses observations sur les projets en examen. Il arrive tout aussi fréquemment que les commissions de la Justice de la Chambre des Représentants et du Sénat invitent des représentants du pouvoir judiciaire à leur donner un avis sur des projets en examen. Bien sûr, le Parlement est souverain et ne suit pas toujours le point de vue du pouvoir judiciaire (prenons p.e. le cas de la gestion autonome des cours et tribunaux), mais cela produit tout de même un échange très fécond qui peut contribuer à une meilleure législation. En plus, il arrive aussi que la législation est modifiée pour consacrer la jurisprudence des cours et tribunaux. Comme on le voit, la séparation des pouvoirs implique aussi le respect des pouvoirs et la collaboration entre eux.

Bosnia and Herzegovina / Bosnie-Herzégovine

Introduction

The following questionnaire aims at gathering essential information on constitutional provisions and other laws (whether statutory or otherwise) concerning the relations between the three powers of state: judicial on one side, and the executive and legislative powers on the other. Where appropriate, the answers to the questionnaire should also provide information on specific issues and concerns in the respondent country on this topic. Answers will provide important material for the CCJE Opinion No. 18 to be prepared in 2015 as well as for the CCJE's next Situation Report.

1) How does the Constitution, or the other laws of your country, if there is no written Constitutional document, regulate relations between the judicial power on one side, and the executive and legislative powers on the other side?

Bosnia and Herzegovina is a country with a plurality of legal systems on four levels, which is reflected on the judicial system as well. Judicial structures are organized on the state level, on the level of two entities (FBiH and RS), and the Brčko District level. On all these four levels there is a strict separation between the judiciary and the legislative and executive state powers, which means that BiH complies with the principle of the separation of powers. In that context, the BiH judiciary is not a subject of control and management of, and is not dependent on the legislative or executive powers. The Constitutions of BiH, the Entities and the Brčko District Statute provide for the separation of powers in BiH into legislative, executive and judicial powers. One should note that the state-level judicial power is insufficiently defined, for the judicial power on the BiH level is exercised both by the BiH Constitutional Court, as defined by the BiH Constitution, as well as the Court of BiH and the BiH Prosecutor's Office as a regular court and prosecutor's office, which were, as such, not specifically defined in the BiH Constitution, but were subsequently established by the laws enacted in the year 2000.

2) Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

See Question 4.

3) Has there been any significant debate on the issue of "judicial restraint" or "judicial moderation" with regard to the exercise of the judicial function vis-a-vis the other powers of the state? In particular, are there examples where public opinion and/or the other powers of state have suggested that the judiciary (or an individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

No. As in any political system that applies the principle of the separation of powers, on all four (horizontal) levels in BiH the judiciary is a controller of the constitutionality and legality of actions taken by both executive and legislative powers, while the executive and legislative powers are not in a position to oversee the operations of the judiciary. The judicial system in BiH operates in a manner that all decisions of legislative and executive powers are a subject of control and reassessment by the judiciary, and each judgment delivered in that regard is complied with and executed in the manner prescribed by relevant legislation.

4) a) In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?

In 2012, in BiH there was an initiative coming from some of the ruling political parties to alter the procedure of appointment of chief prosecutors on all levels, so as to have the legislative bodies take over the process of their appointment at the proposal of governments, from within the list proposed by the HJPC. In that regard, in 2013 the HJPC sent an inquiry to the European Network of Councils for the Judiciary (ENCJ), asking the ENCJ to provide its opinion on this issue. The European Network has provided a report in which it was specifically pointed out that if the legislative authorities were to appoint chief prosecutors from within the HJPC's list of candidates, at the proposal of the executive authorities, such a procedure would "undermine the internationally accepted principles and standards, risking to endanger judicial and prosecutorial independence, and would undermine public confidence in the judicial and prosecutorial system." Ultimately, there was no change to the procedure of chief prosecutor appointment.

b) In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the "official" reason for the changes or proposed changes.

Currently there are no such proposals.

c) In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view of introducing changes in the law as referred to under a)?

Apart from the aforementioned, not at the moment, no.

5) In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please briefly identify their nature and content and indicate the reaction of the public or media reporting of "public opinion".

The principle of the separation of powers is of crucial importance for the proper operation of the judicial system in general, and it is exactly judicial independence that is a prerequisite for a proper operation of the judiciary and a basic element of the rule of law. The Peace Implementation Council in BiH has identified the independent judiciary as one of the key issues for the establishment of the rule of law in BiH. As such, the BiH judiciary represents an important segment in terms of efficient functioning of the state at all levels, especially in light of its path towards European integrations. Even the European Court of Human Rights has repeatedly pointed out that the respect for the principle of the separation of powers is a crucial principle of an efficient democracy, which must not be brought into question.

6) To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budgets, the relevant ministry with respect to information technology in courts, the cour de compte, parliamentary investigations etc. or any other external influence by other powers of the state)?

There have been several cases where one might speak about a sort of supervision and control exercised by the executive and legislative powers over the BiH judiciary.

One of those cases involves a financial aspect, because the courts do not decide independently about the funds available to them, but those decisions are made by the legislative and executive powers. In BiH we have a so-called treasury system, applicable to all budget institutions in BiH. This means that budgetary beneficiaries, including judicial institutions, do not have the funds at their direct disposal, but create financial obligations in the framework of the previously approved budgets. But what is important to stress is that courts in BiH have the autonomy when it comes to deciding on the salaries of judges, prosecutors and some categories of professional staff members, which is regulated by a special law, exactly in order to avoid treating judicial office holders as civil servants.

As for the appointment of judicial office holders, the judiciary has also preserved its independence in that regard as well, for the appointment of judges and prosecutors throughout BiH is carried out by a separate judicial body – the High Judicial and Prosecutorial Council of BiH (HJPC). The only exception is the appointment of the judges of constitutional courts in BiH, which is carried out by the legislature.

Also, relevant laws stipulate that the Chief State Prosecutor has the right and duty to inform the Parliament, the Presidency and the Council of Ministers about his work and application of law, and that the HJPC President submits annual reports on the situation in the judiciary and the prosecutor's office, including recommendations for its improvement. The report is submitted to the Parliamentary Assembly of Bosnia and Herzegovina, the Council of Ministers of Bosnia and Herzegovina, the Parliament of the Federation of Bosnia and Herzegovina, the cantonal assemblies, the National Assembly of Republika Srpska, the state and entity ministries of justice and the Assembly of the Brčko District of Bosnia and Herzegovina, for their information.

Besides, ministries of justice play an important role in the work of the judiciary, being in charge of drafting, interpreting and monitoring the implementation of judicial regulations, as well as of various responsibilities concerning administrative support to the work of the courts

7) Do you have any other comments to make with regard to the relations between the judiciary and the other powers of state in your country?

I believe that BiH should continue to preserve a strict separation of powers in the country, de iure and de facto, in the manner prescribed by the Constitutions in the country. The separation of the judiciary from the executive and legislative powers guarantees judicial independence. Only as such will the judiciary be able to act as a controller and corrective in the society. There can be no rule of law without an independent judiciary.

Bulgaria / Bulgarie

Introduction

The following questionnaire aims at gathering essential information on constitutional provisions and other laws (whether statutory or otherwise) concerning the relations between the three powers of state: judicial on one side, and the executive and legislative powers on the other. Where appropriate, the answers to the questionnaire should also provide information on specific issues and concerns in the respondent country on this topic. Answers will provide important material for the CCJE Opinion No.18 to be prepared in 2015 as well as for the CCJE's next Situation Report.

1) How does the Constitution, or the other laws of your country, if there is no written Constitutional document, regulate relations between the judicial power on one side, and the executive and legislative powers on the other side?

The principle of separation of powers is proclaimed in the Constitution (adopted in 1991).

It provides that:

State power shall be divided between a legislative, an executive and a judicial branch of government /Article 8/

(1)The judiciary shall protect the rights and legitimate interests of the citizens, the legal persons, and the State.

(2) In the performance of the functions thereof, all judges, jurors, prosecutors and investigating magistrates shall be subservient only to the law.

(3) The judiciary shall be independent and shall have an independent budget /Art.117/

(1) Justice shall be administered by a Supreme Court of Cassation, a Supreme Administrative Court, appellate courts, district courts, military courts, and regional courts.

(2) Specialized courts may furthermore be created by statute.

(3) Extraordinary courts shall be inadmissible /Article 119/

(1) The courts shall exercise review as to the legality of the acts issued and the actions performed by administrative bodies.

(2) Citizens and legal persons may appeal against any administrative act which affects them except such as is expressly specified [as unappealable] by statute /Article 120/

(1) The courts shall ensure equality and adversarial conditions to the parties in a judicial proceeding.

(2) Judicial proceedings shall ensure the establishment of the truth.

(3) All courts shall hear the cases in sessions open to the public, unless provided otherwise by law.

(4) All acts issued in the course of administration of justice shall be reasoned

/Article 121/

The Supreme Court of Cassation shall exercise supreme judicial supervision as to the accurate and equal application of the laws by all courts /Article 124/

(1) The Supreme Administrative Court shall exercise supreme judicial supervision as to the accurate and equal application of the laws in administrative justice.

(2) The Supreme Administrative Court shall rule on all disputes as to the legality of acts of the Council of Ministers and of the individual government ministers, as well as of other acts specified in the law /Article 125/

(1) Judges, prosecutors, and investigating magistrates shall be elected, promoted, demoted, transferred and removed from office by the Supreme Judicial Council.

(2) The President of the Supreme Court of Cassation, the President of the Supreme Administrative Court, and the Prosecutor General shall be appointed and removed by the President of the Republic on a motion by the Supreme Judicial Council for a single term of seven years. The President may not refuse to decree any such appointment or dismissal upon a second motion.

(3) (Amended, SG No. 85/2003) After completing a fifth year in the office of judge, prosecutor or investigating magistrate and upon certification, judges, prosecutors and investigating magistrates shall become irremovable by a decision of the Supreme Judicial Council. They, including the persons covered under Paragraph (2), may be removed from office solely upon:

1. attainment of the age of 65 years;

2. submission of resignation;

3. entry into effect of a sentence imposing a penal sanction of deprivation of liberty for a premeditated offence;

4. sustained actual inability to discharge the duties thereof for a period exceeding one year;

5. grave breach or systematic dereliction of the official duties, as well as actions damaging the prestige of the judiciary.

(4) (New, SG No. 27/2006, declared unconstitutional by the Constitutional Court of the Republic of Bulgaria, judgment promulgated - SG No. 78/2006)

(5) (New, SG No. 85/2003, renumbered from Paragraph (4), SG No. 27/2006) Once acquired, irremovability shall be restored upon resumption of the office of judge, prosecutor or investigating magistrate in the cases of removal under Items 2 and 4 of Paragraph (3).

(6) (New, SG No. 85/2003, effective 1.01.2004, renumbered from Paragraph (5), SG No. 27/2006) The administrative heads in the judicial authorities, with the exception of such covered under Paragraph (2), shall be appointed to the managerial position for a term of five years and shall be reappointable. /Art.129/

(1) The Supreme Judicial Council shall consist of 25 members. The President of the Supreme Court of Cassation, the President of the Supreme Administrative Court, and the Prosecutor General shall be ex officio members of the said Council.

(2) Eligibility for non-ex officio membership of the Supreme Judicial Council shall be limited to jurists of high professional standing and moral integrity who have practised law for at least 15 years.

(3) Eleven of the members of the Supreme Judicial Council shall be elected by the National Assembly, and eleven shall be elected by the judicial authorities.

(4) The elected members of the Supreme Judicial Council shall serve terms of five years. They may not be re-elected immediately upon expiration of the said term.

(5) The meetings of the Supreme Judicial Council shall be presided over by the Minister of Justice. The said Minister shall attend in a non-voting capacity

6) (New, SG No. 12/2007) The Supreme Judicial Council shall perform the following functions:

1. appoint, promote, demote, transfer and remove from office the judges, prosecutor, and investigating magistrates;

2. impose the disciplinary sanctions or demotion and removal from office on judges, prosecutors, and investigating magistrates;

3. organize the continuing education of judges, prosecutors, and investigating magistrates;

4. adopt the draft judiciary budget;

5. determine the scope and structure of the annual reports referred to in Item 16 of Article 84 herein.

(7) (New, SG No. 12/2007) The Supreme Judicial Council shall hear and adopt the annual reports of the Supreme Court of Cassation, of the Supreme Administrative Court and of the Prosecutor General on the application of the law and on the operation of the courts, the prosecuting magistracy and the investigating authorities and shall lay the said reports before the National Assembly.

(8) (New, SG No. 12/2007) The term of office of an elective member of the Supreme Judicial Council shall be terminated upon:

1. resignation;

2. an effective judicial act on a criminal offence committed by the said member;

3. sustained actual inability to discharge the duties thereof during a period exceeding one year;

4. removal from office by reason of breach of discipline or disqualification from practicing a legal profession or activity.

(9) (New, SG No. 12/2007) Upon termination of the term of office of an elective member of the Supreme Judicial Council, a replacement shall be elected from the relevant quota to serve for the remainder of the term of office [of the member whose term of office is terminated] /Article 130/.

The Minister of Justice:

1. shall propose a draft judiciary budget and shall lay the said draft before the Supreme Judicial Council for discussion;

2. shall administrate the property of the judiciary;

3. may propose the appointment, promotion, demotion, transfer and removal from office of judges, prosecutors and investigating magistrates;

4. shall participate in the arrangements for upgrading the qualifications of judges, prosecutors and investigating magistrates;

5. (repealed, SG No.12/2007) /Article 130a/

Upon exercise of judicial power, judges, prosecutors and investigating magistrates shall not incur criminal and civil liability for the official actions thereof and for the acts decreed thereby, save where what is done shall be a premeditated offence at public law /Article 132/.

(New, SG No. 12/2007) (1) There shall be established an Inspectorate with the Supreme Judicial Council, which shall consist of an Inspector General and ten inspectors.

(2) The Inspector General shall be elected by the National Assembly by a majority of two-thirds of the National Representatives for a term of five years.

(3) The inspectors shall be elected by the National Assembly for a term of four years according to the procedure established by Paragraph (2).

(4) The Inspector General and the inspectors may be re-elected, but not for two sequential terms of office.

(5) The budget of the Inspectorate shall be adopted by the National Assembly within the judiciary budget.

(6) The Inspectorate shall examine the operation of the judicial authorities without affecting the independence of judges, jurors, prosecutors and investigating magistrates in the performance of the functions thereof. The Inspector General and the inspectors shall be independent in the performance of the functions thereof and shall be subservient only to the law.

(7) The Inspectorate shall act on its own initiative, on the initiative of citizens, legal persons or state bodies, including judges, prosecutors and investigating magistrates.

(8) The Inspectorate shall present an annual report on the operation thereof to the Supreme Judicial Council.

(9) The Inspectorate shall approach other state bodies, including the competent judicial authorities, with alerts, proposals and reports. The Inspectorate shall make public information on the operation thereof.

(10) The terms and procedure for the election and removal of the Inspector General and of the inspectors, as well as the organization and operation of the Inspectorate, shall be regulated by statute /Article 132a/

The organization and procedure of the Supreme Judicial Council, of the courts, the prosecuting and the investigating authorities, the status of the judges, prosecutors and investigating magistrates, the terms and the procedure for the appointment and removal from office of judges, jurors, prosecutors and investigating magistrates, as well as the exercise of the responsibilities thereof, shall be regulated by statute /Article 133/ (Judicial System Act – adopted 2007, amended and in force now)

2) Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

The principle of separation of powers has never been disputable. However, the question how the separate branches shall cooperate and act on the basis of the system of checks and balances has often been discussed. In the meantime there is a large discussion how the Supreme Judicial Council shall be composed (at present it consists of 25 members – 3 ex officio members (President of Supreme Administrative Court, President of Supreme Court of Cassation, Chief Public Prosecutor), 11 members elected by Parliament, 11 members elected by the judicial authorities (courts, prosecution offices, investigation – Art.130 Constitution) and sitting when deciding on matters concerning only judges or prosecutors (in panel or in two cameras so as

the prosecutors' elected members decide only about prosecutors and the judges' elected members decide only about judges), and which is the proper way of introducing such reform in the legislation.

In January 2015 the Parliament adopted a revised Strategy on Judicial System Reform, proposed by the Minister of justice. It contained problems in the judicial system and measures to be undertaken aiming to strengthen the judiciary, its proper functioning and independence, and a right to court of full value.

3) Has there been any significant debate on the issue of "judicial restraint" or "judicial moderation" with regard to the exercise of the judicial function vis-a-vis the other powers of the state? In particular, are there examples where public opinion and/or the other powers of state have suggested that the judiciary (or an individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

There are no opinions that judiciary has impermissibly interfered in the field of executive or legislative power or discretion. However, through the years there have been cases when high State officials (for example Interior Minister) have commented pending cases, courts' orders (ex. pre-trial detention orders/release on bail) and judgements. The European Court of Human Rights has twice found violation of the presumption of innocence (Art.6.2 ECHR) in cases against Bulgaria because of Interior Minister's comments that certain persons had been guilty – made the day after their arrest and even before they had been brought before a court (Gutsanovi v. Bulgaria - application No.34529/10, Toni Kostadinov v. Bulgaria - application No.37124/10)

4) a) In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?

Administrative jurisdiction reform had been completed in 2007. The 1991 Constitution restored the Supreme Administrative Court as a separate body. In 2007 28 administrative courts started functioning thus forming the separate branch of administrative jurisdiction.

b) In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the "official" reason for the changes or proposed changes.

A Strategy on Judicial System Reform is adopted in January 2015 by the Parliament. It aims strengthening the judiciary, its proper functioning and independence, and a right to court of full value. However at that stage the strategy is quite general, it has just been adopted and is widely discussed - various comments and proposals are made.

c) In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view of introducing changes in the law as referred to under a)? – see answer b)

5) In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please briefly identify their nature and content and indicate the reaction of the public or media reporting of "public opinion".

Serious discussions on the proper functioning of courts and judges were provoked two months ago by the French Ambassador's comment regarding the actions of a particular judge handling bankruptcy proceedings of two companies with French capital. Although it was disputable whether such comment had been permissible, it opened a wide discussion about the proper functioning of that court, its administration, the computer case distribution system applied (as a guaranty for equal work load and an anticorruption measure) and the particular judge running the case. Judges of the court concerned also insisted on carrying out a thorough examination on the court's administration admitting that there had been serious problems which harmed the image of their court, and seeking the head of the court and the vice-heads resignations. This resulted in special measures undertaken by the Supreme Judicial Council – it started inspection proceedings, heard in plenary judges of the court concerned who insisted to introduce the problems, reopened disciplinary proceedings against the judge running the bankruptcy case and temporarily removed her from office. At present a special commission of Supreme Judicial Council members examines the functioning of that court, the problems and the complaints raised – making an on spot investigations and hearing all interested parties.

6) To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budgets, the relevant ministry with respect to information technology in courts, the cour de compte, parliamentary investigations etc. or any other external influence by other powers of the state)?

The judiciary shall have an independent budget. However, the budget of the judiciary shall be adopted by Parliament. Although the Supreme Judicial Council has always proposed draft budget, the Parliament usually adopts the Ministry of Finance draft budget – which provides less finance and leads to insufficient financial security of courts. The appointment and promotion of judges is within the competence of the Supreme Judicial Council; the information technologies in courts are also provided by it and paid by the budget of the judiciary. There is an Inspectorate to the Supreme Judicial Council which has competence, inter alia, to check the organisation of administrative business in courts, the arrangements made for the institution and progress of case files, as well as the disposal thereof within the established time limits, to propose imposition of disciplinary sanctions on judges and administrative heads. The Ministry of justice is in charge of court buildings and security. The Minister of justice shall preside the Supreme Judicial Council meetings and shall attend in a non-voting capacity

7) Do you have any other comments to make with regard to the relations between the judiciary and the other powers of state in your country?

The Strategy on Judicial System Reform is expected to strengthen the judiciary, its proper functioning and independence, and to improve the system of checks and balances. At present it is largely discussed in the political and legal field, in university and academic circles. Comments and proposals are welcomed and will be taken into account. However, as far as legislative measures would have to be undertaken, the final result would depend on the Parliament.

Croatia /Croatie

1. How does the Constitution, or the other laws of your country, if there is no written Constitutional document, regulate relations between the judicial power on one side, and the executive and legislative powers on the other side?

According to Croatian Constitution (Article 4.) in Republic of Croatia powers are organized on the principle of separation of powers between legislative, executive and judiciary. In the same article it I also stated that beside this principle of separation of powers all three state powers should cooperate and act on the basis of mutual checks and balances.

Judiciary power is executed in courts, judiciary is autonomous and independent, courts are deciding only on the basis of constitution, international agreements and laws, powers are invested in judges personally who carry out judiciary duties in courts. (Article 115. and 118.)

2. Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

In Croatia position of judiciary has been strengthen during the process of accession to EU. In that process of negotiations basic changes took place in 2010 with amendments to the Constitution.

Positive changes which judiciary in Croatia enjoy so far attainted several major issues:

- judges are appointed for permanent mandate form the first appointment,
- judges are appointed by judiciary council,
- judiciary council is composed from 7 judges, 2 professors of law, 2 members of the parliament (one form position one form opposition)
- judges in the Council are elected by all judges in secret voting system,
- presidents of courts are appointed by the Council,

- Council decides on disciplinary responsibility of judges,

- judges can be dismissed from office only if they reach age for retirement or such decision is reached after disciplinary proceedings for severe breach of duty

All this changes were signed in the Accession Agreement with all other EU Member States.

Now in the media, from the journalist close to the Government (centre left) and the President of the Republic (centre left) arguments and opinions are leaking that judges are forming a close society, that they act without any control, that they are controlling themselves, that they are practically "untouchable", that appointment of judges should be in the hands in powers of the Parliament on the proposal of the President of the Republic with Council only as advisory role.

These opinions are supported by some NGO-os, and partly by the certain circles in the Academia which are closer to now left Government.

3. Has there been any significant debate on the issue of "judicial restraint" or "judicial moderation" with regard to the exercise of the judicial function vis-a-vis the other powers of the state? In particular, are there examples where public opinion and/or the other powers of state have suggested that the judiciary (or an individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

No to my knowledge, except that very often high governmental officials, members of the Government, MP-ies, representatives of NGO-os take liberty to comment judgments of the courts before they become final with exposing what decision should be.

4. a) In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?

b) In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the "official" reason for the changes or proposed changes.

c) In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view of introducing changes in the law as referred to under a)?

Please see answer under 1.

In the last year new Law on Territorial Jurisdiction of Courts has been introduced and came to force. Consequence of it is that number of first instance courts has been reduced from 67 to 24. Some specialization to second instant courts has been introduced in a sense that only few from 16 of those courts will have authority on family, labour or land register cases.

Judges from courts which have been abolished will be transferred to other courts of same jurisdiction. In my opinion this will be breach of the principle that judges cannot be transferred without their consent because change is so wide and will affect such large number of judges that we cannot understand this phenomenon as sporadic and exception where principle could be bypassed in some extraordinary cases of reorganization in system of courts.

5. In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please briefly identify their nature and content and indicate the reaction of the public or media reporting of "public opinion".

This problem in Croatia exists all the time.

Essence of such comments, which are coming from media who are close to the Government, from the law professors closer to the Government, and some majority MP-ies , challenge validity of position of judges especially way how they are appointed and dismissed form office and the role of Judiciary Council.

6. To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budgets, the relevant

ministry with respect to information technology in courts, the cour de compte, parliamentary investigations etc. or any other external influence by other powers of the state)?

Courts are completely dependent in financial sense to the Ministry of Justice and consequently to the Ministry of Finance. This situation extend to the question of requiring any kind of equipment and courts have no autonomy to procure anything needed for proper regular operation of the courts.

One of the phenomenon is that recent changes to various laws introduce various extrajudicial bodies without those requirements prescribed in Article 6 of ECHR with authority to decide in issues which are essentially reserved to courts.

7. Do you have any other comments to make with regard to the relations between the judiciary and the other powers of state in your country?

Unfortunately I could only with regret emphasize that question of reaching international accepted standards of independence of judiciary is never ending story and that examples through Europe show as that there is constant danger that to other powers will try to minimize achieved levels of independence of judiciary or they will stay very firmly on to position not to introduce changes which could improve level of independence of judiciary in their countries.

In that respect now more than ever it is important to remember that level of guarantees achieved in the county should not be decreased as it is stated in Chapter 1.1., last section of Explanatory Memorandum of European Charter on the statute for judges (1998.)

Cyprus / Chypre

Introduction

The following questionnaire aims at gathering essential information on constitutional provisions and other laws (whether statutory or otherwise) concerning the relations between the three powers of state: judicial on one side, and the executive and legislative powers on the other. Where appropriate, the answers to the questionnaire should also provide information on specific issues and concerns in the respondent country on this topic. Answers will provide important material for the CCJE Opinion No. 18 to be prepared in 2015 as well as for the CCJE's next Situation Report.

1) How does the Constitution, or the other laws of your country, if there is no written Constitutional document, regulate relations between the judicial power on one side, and the executive and legislative powers on the other side?

In the Constitution of 1960, there is an inherent complete separation of the three powers, and this has been recognised repeatedly by the case law of the Supreme Court. The three state powers are governed and regulated by different sections of the Constitution.

2) Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

Yes, this is and has been widely accepted throughout the political and constitutional history of Cyprus. All and any discussions on the matter have never disputed the principle of separation of the three powers.

3) Has there been any significant debate on the issue of "judicial restraint" or "judicial moderation" with regard to the exercise of the judicial function vis-a-vis the other powers of the state? In particular, are there examples where public opinion and/or the other powers of state have suggested that the judiciary (or an individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

No. Any decisions of the courts that deal with and exercise control over executive or legislative acts or aspects relating to their respective fields of power (these judgments or decisions mainly come from the Supreme Court in its administrative or constitutional jurisdiction) are well respected although there always may be voices to the contrary. But no actual debate concerning the above has taken place.

4) a) In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?

b) In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the "official" reason for the changes or proposed changes.

c) In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view of introducing changes in the law as referred to under a)?

No. There is however a pending Bill in Parliament for creating a separate Administrative Court so as to ease the heavy workload of the Supreme Court which according to the Constitution has exclusive jurisdiction to hear and determine all administrative court cases under Article 146 of the Constitution. The idea of creating a separate Court came from the Supreme Court itself and after quite a few discussions the government accepted it and promoted a Bill to that effect.

5) In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please briefly identify their nature and content and indicate the reaction of the public or media reporting of "public opinion".

No. In general there is a lot of respect for the judiciary especially now during the economic crisis as people look to and expect the judiciary to try cases that come to Courts as a result of this crisis, be they of a civil or criminal nature. Mostly what is discussed in the media, by the politicians etc, are decisions that do not accord to the "public feeling" at large and sometimes it is not easy for laymen, even politicians but for their own reasons, to understand the notion of an independent judiciary.

6) To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budgets, the relevant ministry with respect to information technology in courts, the cour de compte, parliamentary investigations etc. or any other external influence by other powers of the state)?

The judiciary in Cyprus is quite independent as indicated above. But this concerns its purely judicial functions. The Minister of Justice has nothing to do with the judiciary, the appointment or promotion of judges, which comes within the exclusive jurisdiction of the Supreme Council of Judicature, a body composed solely of judges. Also the Attorney-General and its Office act in their capacity of state prosecution and adviser of the government. The Attorney-General is a lawyer and his Office employs lawyers acting as advocate of the state. They are not judges. However the Ministry is responsible for the Court buildings and the Court's finances depend on the Ministry of Finance, while Parliament may affect the budget or the general working of the system by voting for or against measures to alleviate the problems. There are no Parliamentary investigations that may affect the judiciary as this is not accepted due to the separation of powers doctrine. There are views voiced that the Courts should have an autonomous and independent budget but this is not easy to attain.

7) Do you have any other comments to make with regard to the relations between the judiciary and the other powers of state in your country?

It is true that executive and legislative functions do not always like the idea of a completely independent judiciary which proves to be the machinery of controlling any arbitrary decisions by both powers. However the separation of powers has many advantages and ultimately any truly democratic society depends on the existence and practical application of the rule of law.

Czech Republic / Republique Tchèque

Introduction

The following questionnaire aims at gathering essential information on constitutional provisions and other laws (whether statutory or otherwise) concerning the relations between the three powers of state: judicial on one side, and the executive and legislative powers on the other. Where appropriate, the answers to the questionnaire should also provide information on specific issues and concerns in the respondent country on this topic. Answers will provide important material for the CCJE Opinion No. 18 to be prepared in 2015 as well as for the CCJE's next Situation Report.

1. How does the Constitution, or the other laws of your country, if there is no written Constitutional document, regulate relations between the judicial power on one side, and the executive and legislative powers on the other side?

These relations are regulated by the Constitution of the Czech Republic, art. n. 81, 82. Formally are all these three powers equal, but in reality the judicial power is the most weak and heavy influenced by the executive power.

2. Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

Yes, it is, but only when some problem of administration of justice must be solved. Czech Republic has no Council of Justice and all important decision are made by the Ministry of Justice. And this is an execution power body. A lot of these decisions are criticized by judges and by media.

3. Has there been any significant debate on the issue of "judicial restraint" or "judicial moderation" with regard to the exercise of the judicial function vis-a-vis the other powers of the state? In particular, are there examples where public opinion and/or the other powers of state have suggested that the judiciary (or an individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

Yes they have been. But all this debates are now only about better administration of justice. Model of administration justice by Minister of justice, who is a politician, is old fashioned and not functional. Politicians are looking for other model, but problem is that they would like to retain their powers towards the justice.

4. a) In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?

No changes have been adopted.

b) In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the "official" reason for the changes or proposed changes.

There was created a commission for improving administration of justice. Now is known only name of its chairman. This is Dr. Baxa, chairman of the Supreme Administrative Court.

c) In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view of introducing changes in the law as referred to under a)?

Discussions are, but I am not sure, if they are really serious.

5. In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please briefly identify their nature and content and indicate the reaction of the public or media reporting of "public opinion".

I don't know about any such comments.

6. To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budgets, the relevant ministry with respect to information technology in courts, the cour de compte, parliamentary investigations etc. or any other external influence by other powers of the state)?

Justice is directly administrated by the Ministry of Justice. All important personal decisions are made here. All financial and budget decisions are made by the Ministry of finance.

7. Do you have any other comments to make with regard to the relations between the judiciary and the other powers of state in your country?

From my point of view there is no such a big problem independence of judges in the Czech Republic. Problem is the administration of justice, it means independence of justice as whole. Especially personal and fiscal independence must be guaranteed by other body then the Ministry of justice is.

Denmark / Danemark

1. How does the Constitution, or the other laws of your country, if there is no written Constitutional document, regulate relations between the judicial power on one side, and the executive and legislative powers on the other side?

The Danish Constitutional Act enshrines the separation of the three powers in article 3.

2. Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

No.

3. Has there been any significant debate on the issue of "judicial restraint" or "judicial moderation" with regard to the exercise of the judicial function vis-a-vis the other powers of the state? In particular, are there examples where public opinion and/or the other powers of state have suggested that the judiciary (or an individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

No.

4. a) In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?

No.

b) In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the "official" reason for the changes or proposed changes.

No.

c) In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view of introducing changes in the law as referred to under a)?

No.

5. In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please briefly identify their nature and content and indicate the reaction of the public or media reporting of "public opinion".

No.

6. To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budgets, the relevant ministry with respect to information technology in courts, the cour de compte, parliamentary investigations etc. or any other external influence by other powers of the state)?

The Court Administration was established as an independent institution in 1999. It is responsible for managing and developing the Courts of Denmark, and it manages the funds, staff, buildings and information technology of the courts.

The Court Administration is governed by a board of trustees and an executive officer.
The composition of the Danish board is laid down in the Court Administration Act. The board has 11 members, eight of whom are court representatives, one is a lawyer and two have special management and social competences. The chairperson of the board is a Supreme Court judge.

The executive officer is appointed by, and may be discharged by, the board of trustees. The executive officer is in charge of the day-to-day management of the Court Administration

The Court Administration is formally organized as an agency under the Ministry of Justice. Nevertheless the Minister of Justice does not have instructive power and may not change decisions made by the Court Administration.

7. Do you have any other comments to make with regard to the relations between the judiciary and the other powers of state in your country?

Following a violent episode in a courtroom during 2014 the courts decided to tighten security measures. When the Ministry of Justice did not allocate funds for security staff some courts expressed an interest to have a budget independent of the Ministry.

Estonia / Estonie

1. How does the Constitution, or the other laws of your country, if there is no written Constitutional document, regulate relations between the judicial power on one side, and the executive and legislative powers on the other side?

The Constitution states the main principle of separation of powers: "The activities of the Riigikogu[1], the President, the Government of the Republic and the courts are organised in accordance with the principles of separation and balance of powers." (Art 4).

2. Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

Yes, there has been discussion about self-governance of the judicial power.

At the moment, Courts of the first instance and courts of appeal (as state authorities) are administered in co-operation between the Council for Administration of Courts and the Ministry of Justice. The budget of the Supreme Court (as constitutional institution) is set independently. According to the State Budget Act "this Act concerning the ministry, the area of government of the ministry and the state authorities shall apply to the constitutional institutions and the authorities in their area of adminis".

Discussions about the self-governace ended up with the Bill of the Courts Act but did not make it to the voting at the Riigikogu (due to the elections which made all bills to drop). Later, no new bills have been introduced.

3. Has there been any significant debate on the issue of "judicial restraint" or "judicial moderation" with regard to the exercise of the judicial function vis-a-vis the other powers of the state? In particular, are there examples where public opinion and/or the other powers of state have suggested that the judiciary (or an individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

No.

4. a) In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?

Last major change concerned courts merger in 2006. There have been relatively minor changes in the courts structure later as well (for example Registration Department reform).

b) In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the "official" reason for the changes or proposed changes.

Not at the moment.

c) In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view of introducing changes in the law as referred to under a)?

Not at the moment.

5. In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please briefly identify their nature and content and indicate the reaction of the public or media reporting of "public opinion".

No.

6. To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budgets, the relevant ministry with respect to information technology in courts, the cour de compte, parliamentary investigations etc. or any other external influence by other powers of the state)?

The main responsibilities of the Ministry of Justice (concerning the first and second degree courts) are:

[1] Parliament of Estonia

- *provide budget for the first and second degree courts;*
- *appoint the courts presidents after having considered the opinion of the full court;*
- *determine the exact location and service areas of courthouses and territorial jurisdiction of courts;*
- *determine the number of judges in each court and their division among courthouses after having considered the opinions of the presidents the courts in whose territorial jurisdiction the court is located;*
- *run the courts information system;*
- *exercise supervisory control over the performance of the duties by the presidents of courts;*
- *approve the standard format for reporting and the term for submission of the courts;*
- *announce a public competition for a vacant position of judge.*

7. Do you have any other comments to make with regard to the relations between the judiciary and the other powers of state in your country?

No.

Finland / Finlande

1. How does the Constitution, or the other laws of your country, if there is no written Constitutional document, regulate relations between the judicial power on one side, and the executive and legislative powers on the other side?

Section 3 of the Constitution of Finland of 11 June 1999 reads as follows:

Section 3 - Parliamentarism and the separation of powers

The legislative powers are exercised by the Parliament, which shall also decide on State finances.

The governmental powers are exercised by the President of the Republic and the Government, the members of which shall have the confidence of the Parliament.

The judicial powers are exercised by independent courts of law, with the Supreme Court and the Supreme Administrative Court as the highest instances.

2. Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

The economic depression has led to restructuring of judiciary. In this connection, the independence of judiciary has become under discussion to some extent. The main concern has focused on people's access to justice. The spirit in this discussion has been positive towards the judiciary and executive powers have been criticized for some measures taken.

3. Has there been any significant debate on the issue of "judicial restraint" or "judicial moderation" with regard to the exercise of the judicial function vis-a-vis the other powers of the state? In particular, are there examples where public opinion and/or the other powers of state have suggested that the judiciary (or an individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

There have been some individual voices (professors) expressing the opinion that judiciary has interfered in the field of legislative power. On the other hand, judiciary has pointed out that legislative power has been reluctant to enact new legislation in cases where, for example, international development in human rights (like *ne bis in idem)* has made it necessary. In cases like this judiciary has had no other choice but take the role of legislative power by giving necessary precedents.

One may also mention that there is no Constitutional court in Finland. The questions which may arise concerning the constitutional aspects concerning a government bill are studied by a parliamentary committee as part of the legislative process. However, according to the Constitution

Section 106 - Primacy of the Constitution

If, in a matter being tried by a court of law, the application of an Act would be in evident conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution.

There have been cases where a Court of law has found some rules included in a parliamentary act to be contrary to the Constitution in a case before the Court although the parliamentary committee has found no such contradiction in its *ex ante* investigation. These cases have been few but they have generated quite a lot discussion in public.

4. a) In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?

b) In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the "official" reason for the changes or proposed changes.

c) In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view of introducing changes in the law as referred to under a)?

As stated above, there has been restructuring of judiciary (like reducing the number of district courts) going on in Finland during the last years, but the question of division of powers has never been brought up.

5. In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please briefly identify their nature and content and indicate the reaction of the public or media reporting of "public opinion".

No, there have not been any such significant comments made by politicians or other relevant groups.

6. To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budgets, the relevant ministry with respect to information technology in courts, the cour de compte, parliamentary investigations etc. or any other external influence by other powers of the state)?

There is no Council of Judiciary in Finland, but the establishment of a Council is under preparation and is (nowadays) supported also by the Ministry of Justice. The budget of the judiciary is prepared by the Ministry of Justice in cooperation with the Ministry of Finance. The Ministry of Justice discusses its plans and proposals with the representatives of judiciary and the budget is finally decided by the Parliament.

The budgetary powers of the Ministry of Justice are wide, but in general we are adapted to work under these conditions. In some cases, however, the Ministry has allocated budgetary resources in a very detailed way which can be questionable from the point of view of the independence of judiciary. Certain allowances may have been "ear-marked" to be used in proceedings against economic criminality, for example, On the other hand, some courts may have demanded extra allowances for certain exceptionally large proceedings. These questions are now under discussion and we hope that there will be some change in this respect.

7. Do you have any other comments to make with regard to the relations between the judiciary and the other powers of state in your country?

No other comments.

France

1) Comment la Constitution, ou les autres lois de votre pays s'il n'existe pas de norme constitutionnelle écrite, régulent-elles les relations entre le pouvoir judiciaire d'un côté, et les pouvoirs exécutif et législatif de l'autre?

L'article 64 de la Constitution française dispose que « le Président de la République est garant de l'indépendance de l'autorité judiciaire ».

Le même texte prévoit que le Président de la République est « assisté par le Conseil supérieur de la magistrature » et que « les magistrats du siège sont inamovibles ».

2) Y a-t-il ou y a-t-il eu, au cours des 10 dernières années, un débat important dans votre pays à ce sujet, que ce soit dans le domaine politique/juridique, dans les milieux universitaires/académiques, à travers des ONG ou dans les media?

On ne peut pas dire que le principe même de l'indépendance du juge soit remis en cause par des débats.

L'attention s'est plutôt portée, soit sur la question de la responsabilité du juge, comme corolaire de l'indépendance qui lui est reconnue, sur la question du statut des magistrats du ministère public, sur la composition et les attributions du Conseil supérieur de la magistrature.

3) Y a-t-il eu un débat important sur la question de la « retenue judiciaire » ou la « modération judiciaire » à l'égard de l'exercice de la fonction judiciaire vis-à-vis des autres pouvoirs de l'État? En particulier, y a-t-il des exemples où l'opinion publique et/ou les autres pouvoirs de l'État ont laissé entendre que le pouvoir judiciaire (ou un juge ou un tribunal dans une décision particulière) a interféré de manière inacceptable dans le domaine du pouvoir ou de la compétence discrétionnaire de l'exécutif ou du législatif?

L'expression publique des magistrats est rarement en cause, car les magistrats n'ont généralement pas l'habitude de s'exprimer sur les affaires en cours (sauf par des communiqués de presse officiels, diffusés dans certaines affaires pénales par le procureur de la République, qui a le droit de le faire).

Ce qui en revanche est plus fréquent, sans qu'il soit possible de donner des exemples précis, c'est la mise en cause d'enquêtes réalisées par les juges, accusés souvent publiquement de chercher à impliquer, sans fondement sérieux, des personnalités dans des affaires pénales.

Le juge lui-même ne peut réagir, pour préserver son impartialité.

Ce qui manque généralement dans ce type de situation où la mise en cause publique a pour but de « déstabiliser » le juge ou « décrédibiliser » son enquête, c'est une réaction d'un organe indépendant habilité à rappeler les principes gouvernant l'action des juges et assurant leur protection.

4) a) Dans votre pays, au cours des 10 dernières années, y a-t-il eu des changements dans la constitution/loi concernant la justice (dans le sens le plus large: la structure, les tribunaux, les juges) qui ont pu conduire à dire que la relation entre le pouvoir judiciaire et les autres pouvoirs de l'État ou la séparation des pouvoirs dans votre pays ont été affectées?

b) Dans votre pays, y a-t-il des propositions actuelles de modification de la loi visée sous a)? Dans chaque cas, veuillez indiquer la raison «officielle» pour les changements ou les modifications proposées.

c) Dans votre pays, y a-t-il des discussions sérieuses ou des débats (dans les milieux politiques, par le public en général ou dans les media) en vue d'introduire des changements dans la loi visée sous a)?

Le changement le plus significatif va apparemment dans le sens d'une plus grande indépendance de l'autorité judiciaire, puisque depuis une loi du 23 juillet 2008, le Conseil supérieur de la magistrature n'est plus présidé par le Président de la République, mais par le Premier président de la Cour de cassation, pour l'ensemble de ses attributions, y compris le pouvoir de proposition pour les nominations aux plus hauts postes de la magistrature.

Toutefois, depuis la même loi, les magistrats de l'ordre judiciaire sont minoritaires au sein du CMS (7 magistrats judiciaires, un membre du Conseil d'Etat désigné par ce Conseil, un avocat désigné par les instances représentatives des avocats, 6 autres personnalités désignées par le Président de la République, le Président de l'Assemblée nationale et le Président du Sénat).

En outre, par suite d'une décision du Conseil constitutionnel, le Premier Président de la Cour de cassation ne participe pas à la délibération pour les nominations des membres de la Cour de cassation, sans être remplacé pour ces nominations par un autre magistrat de l'ordre judiciaire. Les magistrats de cet ordre se trouvent donc paradoxalement en situation de plus grande minorité pour les nominations aux plus hauts postes de la magistrature.

Les magistrats du Parquet ne sont pas non plus, pour les nominations, dans la même situation que les magistrats du siège :

La formation du CSM compétente pour les magistrats du siège fait des propositions pour les nominations des magistrats du siège à la Cour de cassation, pour celles de premier président de cour d'appel et pour celles de président de tribunal de grande instance. Les autres magistrats du siège sont nommés, certes sur proposition du Ministre de la justice, qui doit néanmoins recueillir l'avis conforme du CSM.

En revanche, la formation du CSM compétente pour les magistrats du Parquet ne donne qu'un avis sur les nominations des magistrats du Parquet envisagées par le Ministre de la justice.

5) Dans votre pays, des observations importantes ont-elles été formulées par des responsables politiques ou d'autres groupes pertinents concernant le rôle du pouvoir judiciaire et des tribunaux en leur qualité de troisième pouvoir de l'État? Si oui, veuillez indiquer brièvement leur nature et leur contenu et indiquer la réaction de l'opinion publique ou les rapports des media faisant état de "l'opinion publique".

Il est difficile de donner des exemples précis de ce type d'interférences, assez nombreuses en pratique, comme cela a déjà été indiqué, lorsque des personnalités connues pour leurs activités publiques sont mises en cause, ou lorsque des institutions sont concernées par des enquêtes.

L'attitude de « l'opinion publique », telle qu'elle peut être relayée par les médias, dépend du type d'affaire et de mise en cause. Elle n'est pas en tout cas systématiquement favorable au juge, auquel il est fréquemment reproché un manque de « légitimité démocratique ».

6) Dans quelle mesure, le cas échéant, la bonne administration de la justice est-elle affectée par l'influence des autres pouvoirs de l'État (par exemple, le ministère des finances à l'égard de l'administration des budgets, le ministère compétent en matière de technologie de l'information dans les tribunaux, la Cour des Comptes, les enquêtes parlementaires etc. ou toute autre influence extérieure par d'autres pouvoirs de l'État)?

Le principal problème concerne l'administration de la justice et plus spécialement de son budget :

L'autorité judiciaire n'est pas en principe l'interlocuteur du Parlement pour les questions budgétaires, qui relèvent, pour les juridictions, de l'autorité du Ministre de la Justice.

Il n'y a pas en France, comme le CCJE en a exprimé le souhait dans l'un de ses avis, la possibilité pour la Cour de cassation ou le CSM d'être l'interlocuteur des autorités publiques pour la détermination et l'administration des budgets des juridictions.

7) Avez-vous d'autres commentaires à faire sur les relations entre le pouvoir judiciaire et les autres pouvoirs de l'État dans votre pays?

Georgia / Géorgie

1. How does the Constitution, or the other laws of your country, if there is no written Constitutional document, regulate relations between the judicial power on one side, and the executive and legislative powers on the other side?

The constitution of Georgia (adopted in 1995) is based on the principle of separation of powers and makes a clear distinction among legislative (Parliament), executive (Government) and judicial powers (Judiciary). This distinction is expressed in the strict wording of appropriate articles of the Constitution. For example, Article 78 stipulates that "The Government of Georgia shall be the supreme body of executive power to implement the internal and foreign policy of the country". Article 82 further stipulates "Judicial power shall be exercised through constitutional control, justice and other forms prescribed by law". This principle is also stipulated in organic law of Georgia "On General Courts" Article 1, paragraph 1 of which underlines "Judiciary is independent from other branches of power and it's carried out only by courts".

2. Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

There has been many discussion in relation to the separation of powers and such discussions even led to the constitutional amendments in 2010. However, such amendment did not touch upon the judiciary as an independent power in a sense that it became dependent upon other powers, however, there were some unfavourable issues adopted (see comments below).

The amendments in 2010 changed mainly the powers of President, Government and Parliament. Generally speaking, from presidential republic the country shifted to parliamentary republic.

3. Has there been any significant debate on the issue of "judicial restraint" or "judicial moderation" with regard to the exercise of the judicial function vis-a-vis the other powers of the state? In particular, are there examples where public opinion and/or the other powers of state have suggested that the judiciary (or an

individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

There has not been a debate concerning the judiciary's interference in the field of executive or legislative powers. The fact is that judiciary strictly follows procedural laws which actually do not allow to carry out any such interference other than envisaged by law. For example, when there is a dispute over an administrative act (i.e. act issued by administrative body (a body which basically carries out executive powers)) administrative procedural law allows the court to abolish administrative act and order administrative body to issue a new administrative act. However, as I already noted, this possibility is envisaged in procedural law and is not considered as interference.

4. a) In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?

b) In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the "official" reason for the changes or proposed changes.

c) In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view of introducing changes in the law as referred to under a)?

As I already mentioned, there has been significant constitutional amendments in 2010. It concerned at some point judiciary too, since it allowed appointment of the judges for life time but allowed the possibility of adoption examination period up to 3 years term.

Before that, all the judges were appointed for 10 years. After those amendments the parliament adopted changes in organic law of Georgia "On General Courts" according to which all the judges are appointed for 3 years examination period. This term also concerns those judges whose 10 year term expired and they too are subject to 3 year examination period and a general competition in order to be appointed for life term. Only if judges pass 3 years examination period successfully they can be appointed for life. There are already examples, when the High Council of Justice refused to appoint even for 3 years examination period those judges whose 10 year term expired.

Venice Commission criticized this 3 year examination period in its opinion #543/2009 noting the following -

"88. Article 86 § 2 further introduces a probationary period of "not more than 3 years". This proposal appears to be problematic.

89. The Venice Commission recalls in the first place that the European Charter on the Statute of Judges sets out at 3.3:

"3.3. Where the recruitment procedure provides for a trial period, necessarily short, after nomination to the position of judge but before confirmation on a permanent basis, or where recruitment is made for a limited period capable of renewal, the decision not to make a permanent appointment or not to renew, may only be taken by the independent authority referred to a paragraph 1.3 hereof, or on its proposal, or its recommendation or with its agreement or following its opinion. The provisions at point 1.4 hereof are also applicable to an individual subject to a trial period."

90. The Venice Commission has previously clearly stated that "*setting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way. […] This should not be interpreted as excluding all possibilities for establishing temporary judges. In countries with relatively new judicial systems there might be a practical need to first ascertain whether a judge is really able to carry out his or her functions effectively before permanent appointment. If probationary appointments are considered indispensable, a "refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office". The main idea is to exclude the factors that could challenge the impartiality of judges: "despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value*."6

91. The Venice Commission therefore recommends removing this proposal for a trial period for judges."

Among other Constitutional amendments it's noteworthy to underline that in 2006 there was an amendment adopted according to which the High Council of Judiciary is presided over by the Chairman of the Supreme Court of Georgia and not by the President of Georgia which was a case before.

According to amendments to the organic law "On General Courts", from 6 the non-judge members of the High Council of Justice, 5 are elected by Parliament and 1 is appointed by President. Before the amendments the non-

judge members of the Council used to be the members of Parliament, which is not case now. Non-judge members represent lawyers, scholars, NGO's. The same applies to 1 non-judge member appointed by President.

5. In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please briefly identify their nature and content and indicate the reaction of the public or media reporting of "public opinion".

The comments over the role of judiciary as the third power of the state are very frequent. The content of the comments differs, depending upon the interests of the authors of such comments. Those who received a favourable decision say that the judiciary is a true third power of the state, those who did not – say that judiciary need further reforms.

However, there is no debate about the fact whether or not judiciary should remain the third power. This is, of course, beyond question.

6. To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budgets, the relevant ministry with respect to information technology in courts, the cour de compte, parliamentary investigations etc. or any other external influence by other powers of the state)?

The administration of justice is dependent mostly upon the Ministry of Finance who drafts the budget in general and drafts the budget of the judiciary in particular, with participation of the Supreme Court and High Council of Justice. Later, the budget should be adopted by the Parliament. Therefore, in terms of finances administration of justice depends on two other branches of power.

As for other issues, as mentioned above, the Parliament, sometimes adopts amendments in laws which may influences administration of justice.

7. Do you have any other comments to make with regard to the relations between the judiciary and the other powers of state in your country?

There are not any other comments.

Germany / Allemagne

1. How does the Constitution, or the other laws of your country, if there is no written Constitutional document, regulate relations between the judicial power on one side, and the executive and legislative powers on the other side?

The relevant articles of the German Constitution (Grundgesetz – Basic Law) read as follows:

Article 92: The judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by federal courts provided for in this Basic Law, and by the courts of the Länder.

Article 95, para. 2 (referring to the supreme federal courts): The judges of each of these courts shall be chosen jointly by the competent Federal Minister and a committee for the selection of judges consisting of the competent Land ministers and an equal number of members elected by the Bundestag (i.e. the Federal Parliament)

Article 97: (1) Judges shall be independent and subject only to the law.

(2) Judges appointed permanently to full-time positions may be involuntarily dismissed, permanently or temporarily suspended, transferred, or retired before the expiration of their term of office only by virtue of judicial decision and only for the reasons and in the manner specified by the laws. The legislature may set age limits for the retirement of judges appointed for life. In the event of changes in the structure of courts or in their districts, judges may be transferred to another court or removed from office, provided they retain their full salary.

Article 98, para. 4: The Länder may provide that Land judges shall be chosen jointly by the Land Minister of Justice and a committee for the selection of judges.

Article 101: (1) Extraordinary courts shall not be allowed. No one may be removed from the jurisdiction of his lawful judge.

(2) Courts for particular fields of law may be established only by a law.

As is well known, Germany as yet does not have High Councils of the Judiciary in the sense of an independent body of self-administration of the judiciary.

The responsible cabinet member at the level of the Federation as well as at the level of the Länder is the relevant minister of justice. In some of the Länder, judges are elected by parliamentary committees, sometimes these committees do not only consist of members of parliament but also of a number of judges or representatives of other relevant stakeholders (e.g. members of the bar).

At all levels, so-called staff committees do exist, for non-judicial staff and for judges (Personalräte, Richterräte). At the level of non-judicial staff, these staff committees have a right to be heard and also a power to consent or dissent in any staff decision (appointment, transfer, leave, retirement, disciplinary action, promotion etcetera). It is increasingly being discussed to introduce similar powers for staff committees of judges. The result would be that the court president or the minister would not be able to decide on any such measures without the consent of the committee.

In addition, Germany has a tradition of strict judicial control of any possible staff decision. If, therefore, a civil servant or a judge is unhappy with a decision concerning his or her status (appointment, promotion etcetera), he or she can always seek judicial review. There is a long line of leading cases establishing rather strict control of such decisions, under the aspects of administrative law but also under the aspect of independence of the judiciary.

2. Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

Not really. In the last 10 years, a number of cases concerning adequacy of salaries of the judiciary have been brought before administrative courts. Some of these courts have referred these cases to the Federal Constitutional Court, where they have been heard late in 2014. A decision is expected in the next few months.

3. Has there been any significant debate on the issue of "judicial restraint" or "judicial moderation" with regard to the exercise of the judicial function vis-a-vis the other powers of the state? In particular, are there examples where public opinion and/or the other powers of state have suggested that the judiciary (or an individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

Not on the level of ordinary courts. There is always some discussion with respect to the Federal Constitutional Court and the other institutions like the legislature. The same applies to constitutional courts of the Länder. Legislature and executive power often feel that constitutional courts are excessively interpreting constitutional provisions. One prominent and actual example is the approach of the federal Constitutional Court with respect to European programmes and institutions, especially concerning measures in the wide field of financial crises. European institutions and German members of Parliament maintain that they alone should be responsible whereas the Court sees constitutional limitations which have to be observed despite the general Europe-friendly approach of the German constitution.

4. a) In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?

b) In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the "official" reason for the changes or proposed changes.

c) In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view of introducing changes in the law as referred to under a)?

There have been a few occurrences which may be regarded as of minor importance but which may be considered as examples of watchfulness on one side or as group pressure on the other side, whatever point-of-view one would prefer to take:

(1) A few years ago, in the state of North-Rhine-Westphalia, the prime minister decided to merge the ministries of the interior and of justice. One single person was appointed both minister of the interior (responsible for the executive, especially the police) and minister of justice. The judiciary protested. The opposition brought the case before the constitutional court of the Land. The court held that such a merger was unconstitutional.

(2) There has been some discussion whether some of the five branches of the judiciary (ordinary courts, labour courts, social security courts, administrative courts, tax courts) could be merged. The argument for such move would be to allow more flexible assignments of judges in general courts with special panels and to avoid that judges in one

court would be overworked whereas other judges might not even have an average work load. Again, there has been wide spread protest by judges from the specialized branches of courts. It is argued that the Federal Constitution established five different federal supreme courts and that this implies that these five branches should be maintained at the level of the Länder. So far, in none of the Länder such a merger has been introduced.

(3) Every now and then, ideas of closing smaller courts are being discussed in order to increase effectiveness of the judiciary. Usually, protests come from local authorities and local parliaments who want to keep "their court" in their city. Very rarely such plans are being effectuated. Recently, in Rhineland-Palatinate the prime minister had formed the plan to merge the two (ordinary) courts of appeal. This happened in the aftermath of a lengthy and severe controversy over the appointment of the president of the court of appeal in Koblenz where the minister of justice lost a long battle in the administrative courts. Political protests from the opposition and the judiciary were strong and the government found a way out by establishing an expert commission which, in turn, recommended to keep both courts.

5. In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please briefly identify their nature and content and indicate the reaction of the public or media reporting of "public opinion".

(1) Not really. General impression is that public opinion, especially the media, would defend the judiciary.

(2) On the other hand, criticism with respect to individual court decisions is not uncommon. Wrongful convictions, wrongful decisions on confinement for psychiatric reasons, decisions on child custody with sever outcome, child care cases etcetera are quite often subject of reports and criticism in the media.

(3) Sometimes there is rumour of political influence in courts and, even more so, in actions of the public prosecution. When it comes to criminal investigations against politicians such criticism is not uncommon. It is hard to say whether there is any foundation to it. It could be argued that prosecutors may be more inclined to prosecute politicians and to bring them to trial than to hush up such cases. Fear of media reaction may be one of the causes for this. Also that it is easier to turn responsibility for the outcome over to the courts rather than taking it for a decision not to prosecute. The case of former Federal President Wulff may be an example for this. He was prosecuted and eventually tried for corruption and lost his office. The charge which finally remained in the trial concerned an invitation in the value of about 700 €. Although there was considerable political and media pressure on him to admit to this charge he decided to stand trial and at the end of the day he was acquitted. Although there is always rumour that politicians may try to influence judges there has never in recent years come up evidence to this effect. Personal experience as a court president and a member of a constitutional court is that I have never encountered only the slightest approach to that effect.

(4) In the process of appointment end election of judges which is, as has been pointed out, subject to fairly strict judicial review, politicians sometimes complain that professional evaluations of judges set limits to a free and arbitrary choice of appointments. Recently, a politician is said to have stated that it was, in his view, not acceptable that appointments and careers, up to the highest judicial offices are predestined by marks reached in the evaluation process. From such statements, it may be deducted that some politicians would like to exert more influence into the judiciary if the law would permit them.

6. To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budgets, the relevant ministry with respect to information technology in courts, the cour de compte, parliamentary investigations etc. or any other external influence by other powers of the state)?

(1) The ministry of finance has strong influence because it prepares the draft budget also for the judicial administration.

(2) The ministry of the interior, in most of the Länder, is the responsible government ministry for information technology. The result is that quite often computer technology in the judiciary follows standards and is administered by the ministry of the interior. Only recently a discussion is beginning to arise with the argument that the third power of the state should have its own responsibility for its information technology. In North-Rhine-Westphalia, e.g., the judicial administration is now introducing a central office for information technology at one court of appeal as a service unit for all courts and prosecutions. This office is being set up at the C.A. in Cologne and headed by a judge, vice-president of the court of appeal (who will be something like a chief information officer of the third power).

(3) The Data Protection Office, an independent institution, now and then tries to hold the judicial administration responsible and accountable as if it were an executive branch of government. Such discussions are sometimes difficult but so far the judiciary has maintained its independence also in this respect.

(4) *Likewise the Cour de Compte or budget control office frequently tries to criticize or recommend measures or organisational aspects of the judiciary. One recent example was that the office of budget control argued that stand-by judges for decisions on provisional detention or interlocutory applications etcetera should be positioned in larger cities only because, so they argued, this would reduce stand by time which to some extent counts as working hours. The courts refused such intrusion and replied that organising such judicial service was their prerogative. Budget control offices every now and then point to the fact that court costs (trial costs, legal aid etcetera) may vary significantly from one court to another. Although courts generally act quite cost-conscious they rejected such argument as an intrusion into their independence.*

7. Do you have any other comments to make with regard to the relations between the judiciary and the other powers of state in your country?

No comments of significant importance. It can be observed, however, that in political and social life the courts and their representatives go largely unnoticed. At the highest level, e.g. in state acts, funerals, state visits, it is quite common that the president of the Federal Constitutional Court is present as the representative of the third power. At regional or local level, court presidents are almost ignored.

Hungary / Hongrie

1. How does the Constitution, or other laws of your country, if there is no written Constitutional document, regulate relations between the judicial power on one side, and the executive and legislative powers on the other side?

The Constitution (Fundamental Law) establishes a general framework for the independence, organization and functioning of the judiciary. Article C (1) pronounces that the State is based on the principle of the separation of powers. Judges are independent and only subordinated to law, they shall not be instructed in relation to their judicial activities; they may not be members of political parties or engage in political activities [Article 26 (1)]. Judges are appointed by the President of the Republic on the proposal of the President of the National Office for the Judiciary (see below) and may be removed from office only for reasons and in a procedure specified in a cardinal Act (i.e. an Act adopted by two-thirds of the votes cast in the National Assembly) [Article 26 (1)-(2)]. The President of the Curia (the highest judicial organ) is elected for nine years from among the judges on the proposal of the President of the Republic by the National Assembly with the votes of two-thirds of its members [Article 26 (3)].

The tasks of the central administration of the courts are performed by the President of the National Office for the Judiciary. The President of the National Office for the Judiciary is elected for nine years from among the judges on the proposal of the President of the Republic by the National Assembly with the votes of two-thirds of its members [Article 25 (6)]. The central administration of the courts is supervised by a National Judicial Council composed of the President of the Curia and elected judges [Article 25 (5)-(6)].

Detailed rules for the organization and administration of courts, for the legal status and remuneration of judges are laid down in cardinal Acts: Act CLXI of 2011 on the organization and administration of courts, and Act CLXII of 2011 on the legal status and remuneration of judges.

2. Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

The adoption of the new Fundamental Law of Hungary in 2011, its subsequent amendments and the cardinal laws related to the judiciary stirred widespread debate in Hungary and had some international implications as well. The main issues of contention are well identified in the relevant opinions of the European Commission for Democracy Through Law (Venice Commission): Opinion no. 621/2011 on the new Constitution of Hungary (June 2011); Opinion no. 663/2012 on Act CLXII of 2011 on the legal status and remuneration of judges and Act CLXI of 2011 on the organization and administration of courts (March 2012); Opinion no. 683/2012 on the cardinal acts on the judiciary that were amended following the adoption of opinion CDL-AD(2012)001 (October 2012); Opinion no. 720/2013 on the fourth amendment to the Fundamental Law of Hungary (June 2013).

The most important criticism expressed in various opinions targeted the very wide and mostly discretionary powers of the President of the National Office for the Judiciary as regards staff management, appointment of court leaders, transfer of judges and cases as well as the inadequacy of the National Judicial Council to effectively supervise such activities. Most of this criticism has been addressed through repeated amendments of the relevant legislation that significantly strengthened the National Judicial Council and removed some discretionary powers from the President of the National Office for the Judiciary.

Another issue of contention has been the sudden reduction of the upper-age limit for judges foreseen by Article 12 of the Transitional Provisions for the Fundamental Law. With certain exceptions, these provisions required judges who reached the retirement age (62 years at the time but gradually increasing to 65 years) to actually retire regardless of the upper-age limit for judges (70 years). The European Commission contested the early retirement of around 274 judges and public prosecutors, and the Court of Justice of the European Union upheld the Commission's assessment that this mandatory retirement is incompatible with EU equal treatment law. In July 2012, the Hungarian Constitutional Court also declared these provisions unconstitutional. According to subsequent legislation dismissed judges with a few exceptions had a choice between reinstatement to their previous positions with their previous benefits or a considerable monetary compensation. Most of the judges involved chose the second option.

3. Has there been any significant debate on the issue of "judicial restraint" or "judicial moderation" with regard to the exercise of the judicial function vis-à-vis the other powers of the state? In particular, are there examples where public opinion and/or the other powers of state have suggested that the judiciary (or an individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

Other powers of state have so far not suggested that the judiciary has impermissibly interfered in the field of executive or legislative power and this issue has never been a major concern for the public opinion. However, there is an ongoing debate in the legal academia whether some of the instruments available for the Curia to ensure a uniform interpretation and application of law by the courts and the actual use of such instruments go beyond the prerogatives of the judiciary and are legislative in nature.

4. a) In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?

As mentioned above, the adoption of the new Fundamental Law of Hungary and related legislation has resulted in fundamental changes in the structure and administration of the judiciary. The most important changes concerned the central administration of the judiciary. Previously, such tasks were entrusted to a National Council for the Administration of Justice presided by the President of the Supreme Court. Besides the President, the membership of the National Council included nine elected judges, the Prosecutor General, the Minister of Justice, the President of the Hungarian Bar Association, and two MPs representing the parliamentary committees responsible for constitutional and financial matters. The main reasons cited in favour of the revision of this arrangement were its lack of external accountability and transparency as well as its inefficiency.

Even though the Constitutional Court has long held that it has the right to review the constitutionality of binding instruments available for the Curia to ensure a uniform interpretation and application of law by the courts, and it has on several occasions annulled such instruments, the legal and institutional relationship between the Constitutional Court and the Curia is far from settled. The new Fundamental Law and Act CLI of 2011 on the Constitutional Court now authorizes the Constitutional Court to review, on the basis of a constitutional complaint, the constitutionality of individual court judgments independently of the constitutionality of the law applied. These provisions reopened some of the issues related to the separation of powers.

b) In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the "official" reason for the changes or proposed changes.

The re-codification of Hungarian civil procedure is under way, and this process might result in some structural changes for the judiciary on the level of both institutions and personnel. However, these changes are not likely to affect the relationship of the judiciary and other state powers in general.

c) In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view to introducing changes in the law as referred to under a)?

At the moment, there are no serious discussions with a view to introduce significant changes in the system of checks and balances.

5. In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please briefly identify their nature and content and indicate the reaction of the public or media reporting of "public opinion".

From time to time, MPs and government officials express their dissatisfaction with individual judgments in both civil and criminal matters and occasionally these statements receive a wide media coverage. In 2014, the Minister of

Justice announced that the Ministry will start a systematic analysis of jurisprudence and case law but it remains to be seen what implications this exercise will have on its relationship with the courts.

6. To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budgets, the relevant ministry with respect to information technology in courts, the cour de compte, parliamentary investigations etc. or any other external influence by other powers of the state)?

Since the central administration of the budget for the judiciary is the prerogative of the President of the National Office for the Judiciary, consequently the Ministry for National Economy or the Ministry of Justice has practically no leverage on its implementation. The President of the National Office for the Judiciary also has the right to submit a draft budget for the judiciary in the framework of budgetary planning, and this draft budget must be tabled by the Government to the National Assembly without modifications. The legality and economic feasibility of the courts' financial management is monitored by the Court of Auditors. The President of the National Office for the Judiciary and the President of the Curia is required to report annually to the National Assembly but there is no further room for the National Assembly to exert direct influence on the administration of justice: MPs may not address interpellations or questions to the President of the National Office for the Judiciary and the President of the Curia, and the activities of the judiciary are outside the authority of parliamentary committees of inquiry. The right of inquiry of the Commissioner for Fundamental Rights does not extend to the judiciary either.

7. Do you have any other comments to make with regard to the relations between the judiciary and the other powers of state in your country?

Iceland / Islande

1. How does the Constitution, or the other laws of your country, if there is no written Constitutional document, regulate relations between the judicial power on one side, and the executive and legislative powers on the other side?

According to the Icelandic constitutional law (1944) the powers of the state are divided into three independent parts, the executive power, the legislative power and the judicial power. According to the law about courts (1998) judges are independent in exercising their judicial work and carry it out on their own responsibility. When judges lay judgement on judicial dispute they shall only follow the law. A judicial decision shall only be reviewed by an appeal to higher court.

2. Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

There has been no serious discussion about the independency of the judicial power against the other two powers in Iceland the last 10 years except for a discussion about the financial independence of the judicial power. In Iceland the executive power (government) is strong. The budget of the courts is in reality administered by the executive power although in the end the legislative power has the last word. In that respect the judicial power is relatively weak against the two other constitutional powers.

3. Has there been any significant debate on the issue of "judicial restraint" or "judicial moderation" with regard to the exercise of the judicial function vis-a-vis the other powers of the state? In particular, are there examples where public opinion and/or the other powers of state have suggested that the judiciary (or an individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

There was a discussion in Iceland in the year of 2000 hence to a judicial decision rendered by the Supreme Court of Iceland in a case where the executive power (the government) was on the opinion that the court had gone too far and acted as the legislative power in the court's decision. This discussion led to a change of the law the court had clarified and interpreted.

4. a) In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?
b) In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the "official" reason for the changes or proposed changes.
c) In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view of introducing changes in the law as referred to under a)?

There has been no discussion in Iceland regarding the above mentioned issues.

5. In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please briefly identify their nature and content and indicate the reaction of the public or media reporting of "public opinion".

There has been a discussion about the heavy case load of The Supreme Court of Iceland in recent years and if the court, which is very efficient, is by that reason generally speaking able to guarantee the legal security. Nevertheless no special examples have been given in that respect. In Iceland there are only two levels, District Court (8) and the Supreme Court. This discussion has led to a law proposal where a new level, Higher Court, shall be established so that the levels will be three, District Court, Higher Court and the Supreme Court. If this law proposal will be legalized it will lead to much less case load of the Supreme Court.

6. To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budgets, the relevant ministry with respect to information technology in courts, the cour de compte, parliamentary investigations etc. or any other external influence by other powers of the state)?

The administration of justice is limited by the annual budget proposed by the Government and approved by the Althing (Parliament). In recent years there has been a cut of budget which has affected the activity of the courts. As mentioned in answer to the second question the judicial power in Iceland is weak in that respect. The governing of the district courts is carried out by The Icelandic Judicial Council but The Supreme Court of Iceland is governed by itself. Therefore the governing of the courts is not affected by the Ministry of Justice in their daily work. The courts are neither affected by parliamentary investigations nor other external influence by other powers of the state.

7. Do you have any other comments to make with regard to the relations between the judiciary and the other powers of state in your country?

Ireland / Irlande

1. How does the Constitution, or the other laws of your country, if there is no written Constitutional document, regulate relations between the judicial power on one side, and the executive and legislative powers on the other side?

Both the present Irish Constitution of 1937 and its predecessor, the 1922 Constitution, the first post-independence Constitution enumerates the powers of government as of three distinct types, legislative, executive and judicial. It is true that neither of them actually prescribes in terms a "separation of powers". Nonetheless, in a whole series of cases the courts and in particular the Supreme Court have stated very explicitly that the Constitution of Ireland is founded on the doctrine of the tripartite division of the powers of Government, or the separation of powers. Article 6 of the Constitution provides as follows:

"All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good."

The position of the courts and of the judiciary is dealt with specifically at Articles 34 and 35 of the Constitution. There have been a great number of cases dating back to the early years of the State which have asserted the independence of the courts from executive or legislative control.

2. Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

This issue arose for consideration in the context of changes in the terms and conditions of service of members of the judiciary against the backdrop of a dramatic downturn in the Irish economy. I will return to this in the context of later answers.

However, the most detailed discussion took place in the context of the entitlement of the Oireachtas (Parliament) to conduct public inquiries with potential to attribute blame. The background to this issue becoming the subject of debate was that a mentally ill man was shot dead by members of An Garda Síochána (the Irish Police Service) during the course of a siege. The circumstances of the shooting gave rise to controversy and a committee of the Oireachtas was established to inquire into the circumstances of the incident. However, the entitlement of the

Oireachtas to embark on such an inquiry was challenged by members of An Garda Síochána who had been involved in the siege. The Supreme Court upheld the challenge by gardaí concluding that, by reference to the separation of powers, the Oireachtas had no entitlement to embark on such an inquiry.

The issue came into sharp focus once more when there was a desire to conduct an inquiry into the circumstances in which the State was forced to enter a Troika (IMF/ECB/EU) programme. Following a general election the newly elected government promoted a referendum designed to bestow the power to conduct such inquiries on the Oireachtas. However, the proposal was defeated narrowly by the people in a referendum.

The whole controversy gave rise to quite intense public debate, but it must be said that the issue was whether the Oireachtas was exceeding its remit and then whether the remit of the Oireachtas should be extended and there was no specific suggestion that the courts were exceeding their function or that the role of the courts ought to be confined or restricted. However, there is no doubt that the decision of the Supreme Court in the Abbeylara Siege Tribunal case was very unwelcome in political circles.

It is though the case that there has been no significant body of opinion whether in political, academic or media circles arguing that activist judges need to be brought under control.

3. Has there been any significant debate on the issue of "judicial restraint" or "judicial moderation" with regard to the exercise of the judicial function vis-a-vis the other powers of the state? In particular, are there examples where public opinion and/or the other powers of state have suggested that the judiciary (or an individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

In general this question has to be answered "No", that is not to say that there have not been individual decisions which have given rise to surprise or even disquiet. However, there would be no significant body of opinion in Ireland that would take the view that the judiciary was impermissibly trespassing on the territory of the Executive or Legislature. Indeed, in contrast, there have been a number of occasions where the courts have criticised the Legislature where there was a failure to introduce appropriate legislation because the issue was seen as politically difficult or politically sensitive and as a result issues that were properly for the Legislature and Executive were, by default decided upon by the courts. Public opinion has generally been supportive of the courts on these occasions.

4. ***a) In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?***

b) In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the "official" reason for the changes or proposed changes.

c) In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view of introducing changes in the law as referred to under a)?

(a) A very significant change in the position of the judiciary occurred in the context of the decline in the Irish economy. Significant reductions in the remuneration received by public servants were introduced by Government and were enacted into law. When this first happened members of the judiciary were exempted from the cuts. This was because the Constitution contained a specific prohibition on the reduction of the remuneration of a judge during his or her term of office. Notwithstanding, that the great majority of judges, on a voluntary basis signed up to the cuts, a proposal to amend the Constitution was put to the people and approved in a referendum in October 2011. The new text of the Constitution is as follows:

1. The remuneration of judges shall not be reduced during their continuance in office save in accordance with this section.

2. The remuneration of judges is subject to the imposition of taxes, levies or other charges that are imposed by law on persons generally or persons belonging to a particular class.

3. Where, before or after the enactment of this section, reductions have been or are made by law to the remuneration of persons belonging to classes of persons whose remuneration is paid out of public money and such law states that those reductions are in the public interest, provision may also be made by law to make proportionate reductions to the remuneration of judges.

(b) There are a number of changes under active discussion. To date Ireland has not had a Judicial Council established by statute. However, there is an expectation long promised legislation to establish such a Judicial Council will be introduced and enacted this year.

Secondly, there is a strong view within the judiciary that the changed constitutional position requires that an independent commission should be established with a role in relation to levels of judicial remuneration and the terms and conditions of service generally. A "GRECO" report of November 2014, lent support to this suggestion. It does not appear that there is any real opposition in principle to this suggestion. However, the question of timing is problematic. This is because the Government secured the assent of public sector trade unions to pay cuts and there would be a nervousness about making any structural changes during the currency of that agreement which is due to expire in 2016.

A third area where there is discussion about the need for change relates to the system for appointments. The Constitution provides that judges are appointed by the President on the advice of the Government. However, since 1995, there has been a role for a body known as the Judicial Appointments Advisory Board. The key word here is "Advisory" and the actual final selection of candidates and decisions on appointments is for Government. There has been some discussion on making the system of appointments more transparent so as to avoid the perception that the appointment of judges is subject to political influence. Any conclusions would still seem some distance away, but discussions have centred on extending the role of the Judicial Appointments Advisory Board.

5. In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please briefly identify their nature and content and indicate the reaction of the public or media reporting of "public opinion".

This question has really been addressed in the context of earlier answers and I do not have really have anything useful to add.

6. To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budgets, the relevant ministry with respect to information technology in courts, the cour de compte, parliamentary investigations etc. or any other external influence by other powers of the state)?

The day to day administration of the courts is the responsibility of the courts service, an independent corporate organisation established pursuant to statute, the function of which is to manage the courts and to provide support services for judges, to provide, manage and maintain court buildings and to provide facilities for users of the courts. The Courts Service is dependent for its budget on monies voted by the Oireachtas which occurs following the usual budgetary process involving the Department of Justice, the parent Department for the Courts Service and the Department of Finance. There is a view within the legal community that the Courts Service was hit particularly hard during the economic downturn, though it is very likely that similar feelings are widespread in many different areas of the public service. This has led to suggestions that the courts, as the third organ of State should have a greater autonomy in financial matters. This view has been articulated by the Chief Justice. In the very recent past, a working body has been established to address this issue which is chaired by a judge of the Supreme Court. Discussions on this topic are still at an early stage.

7. Do you have any other comments to make with regard to the relations between the judiciary and the other powers of state in your country?

During the period 2011 to mid 2014 tensions between the executive and the judiciary manifested themselves. This resulted in a significant decline in morale among members of the judiciary generally. This is hardly surprising given the extent of the impact on remuneration, pensions and terms and conditions of service. A further aspect is that the terms and conditions of service of recent appointees, ie. individuals appointed since 2011 are now significantly inferior to the conditions that apply to colleagues who have been serving before that date.

While recent years have not been easy there has been a significant change of mood in recent months and people are looking to the future with a much greater sense of optimism and confidence

Italy / Italie

1. How does the Constitution, or the other laws of your country, if there is no written Constitutional document, regulate relations between the judicial power on one side, and the executive and legislative powers on the other side?

The Italian judicial system is governed by the Italian Constitution and by an organic law (Royal Decree January 30, 1941 n. 12, amended several times over the years, more recently through a reform law of July 25, 2005 n. 150, partially revised by the law of July 30, 2007 n. 111).

The judiciary is an autonomous “order” (the Constitution does not use the word “power”) “independent of all other powers” (and here the reference to being a power of the State is indirect): this is the provision of art. 104 of the Constitution of the Italian Republic. According to the Constitution, “magistrates” (i.e. judges and prosecutors) are holders of the judicial function, which they administer on behalf of the people.

The self-governing body of the judiciary is the High Council for the Judiciary (see answers on behalf of Italy in preparation of CCJE Opinion no. 10), a constitutional body, chaired by the President of the Republic. This body, in accordance with art. 105 of the Constitution, has the task to ensure the autonomy and independence of the judiciary, and to decide on the employment, assignments and transfers, promotions and disciplinary measures for judges and prosecutors.

The principle of independence, neutrality and impartiality of the judge is mentioned not only in art. 104; art. 101 of the Italian Constitution also states: "the judges are subject only to the law."

This formula shows, first, that any judicial decision must be based on legislative requirements, that the court is called upon to interpret and apply. Second, the adverb "only" see, first of all, the concept of “external” independence of the judge, ie independence from any interference extraneous to the law.

On the other hand, the adverb in question wants to recall, also, “internal” independence within the judiciary, i.e. the absence of constraints coming from the judiciary itself.

Article. 107 of the Italian Constitution also states that judges are distinguished only by their different functions. This implies that the judiciary is free from a hierarchical organization in the technical sense, being the judicial power a diffuse power lying with each member.

A further corollary of the independence of the judiciary is also the rule preventing the dismissal of judges, which can not be dismissed or suspended from office or assigned to other courts or functions, if not as a result of decisions made by the High Council.

Another consequence of this principle is that no one can choose the judge by whom to be adjudicated ("no one can be withheld from the judge previously ascertained by law"), nor the judge can choose the subjects to judge.

After the entry into force of the Constitution the law cannot establish new extraordinary or special judges (as required by Article 102). Art. 103 provides for the maintaining of special courts, such as administrative courts, the Court of Auditors and the military courts, existing before the entry into force of the Constitution.

2. Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

Yes.

3. Has there been any significant debate on the issue of “judicial restraint” or “judicial moderation” with regard to the exercise of the judicial function vis-a-vis the other powers of the state? In particular, are there examples where public opinion and/or the other powers of state have suggested that the judiciary (or an individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

Yes.

4. a) In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?

Yes.

b) In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the “official” reason for the changes or proposed changes.

Yes.

c) In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view of introducing changes in the law as referred to under a)?

Yes.

5. In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please briefly identify their nature and content and indicate the reaction of the public or media reporting of "public opinion".

Yes.

6. To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budgets, the relevant ministry with respect to information technology in courts, the cour de compte, parliamentary investigations etc. or any other external influence by other powers of the state)?

The judiciary (both the Court system and the High Council) has no formal or informal power to negotiate the budget for justice.

The Ministry of Justice is, according to the Italian Constitution, responsible for the "organization of justice" and for initiating disciplinary measures on judges and prosecutors (decided upon by a special chamber, of a judicial nature, of the High Council).

As "organizer" of justice, the Ministry has the final word on IT.

However, the High Council has set up an internal articulation dealing with organizational matters, often in contact with the Ministry.

Parliamentary Investigative Committees, sitting often with the investigation powers similar to those of magistrates, have often been created; disputes have arisen when setting up of such Committees concerned facts still pending before the judiciary.

7. Do you have any other comments to make with regard to the relations between the judiciary and the other powers of state in your country?

Luxembourg

1. Comment la Constitution, ou les autres lois de votre pays s'il n'existe pas de norme constitutionnelle écrite, régulent-elles les relations entre le pouvoir judiciaire d'un côté, et les pouvoirs exécutif et législatif de l'autre?

Il n'existe aucune disposition d'ordre constitutionnel qui régule expressément les relations entre le pouvoir judiciaire et les autres pouvoirs. On peut simplement mentionner que, dans un chapitre III, intitulé « De la Puissance souveraine », la Constitution, après avoir mentionné les « prérogatives du Grand-Duc » (par. 1, articles 33 à 45) et « la législation » (par. 2, articles 46 à 48) dispose dans un article 49 (par 3, « De la Justice ») que la justice est rendue au nom du Grand-Duc par les cours et tribunaux et que les arrêts et jugements sont exécutés au nom du Grand-Duc (il est d'ailleurs prévu, dans le cadre d'une importante modification de la Constitution, de biffer cette dernière disposition concernant l'exécution des décisions judiciaires au nom du Grand-Duc).

La Constitution porte, ensuite, dans un chapitre IV, sur la Chambre des Députés (art. 50 à 75), dans un chapitre V, sur le Gouvernement (art. 76 à 83), dans un chapitre Vbis, sur le Conseil d'Etat (art. 83bis), avant d'aborder, dans un chapitre VI, la Justice (art. 84 à 95 ter).

Si la Constitution prévoit une certaine interaction entre les pouvoirs législatif et exécutif, il n'existe pas de disposition spécifique en ce sens en ce qui concerne les relations du pouvoir judiciaire avec les deux autres pouvoirs.

2. Y a-t-il ou y a-t-il eu, au cours des 10 dernières années, un débat important dans votre pays à ce sujet, que ce soit dans le domaine politique/juridique, dans les milieux universitaires/académiques, à travers des ONG ou dans les media?

On peut mentionner un procès retentissant, en 2013-2014, dirigé contre deux membres de la brigade mobile de la police, relatif à une vingtaine d'attentats à la bombe dans les années 1982 à 1985. Une implication éventuelle des autorités policières de l'époque et même des services de Renseignement est en discussion. En tout cas, un refus évident de collaboration de ces services avec les autorités judiciaires à l'époque des faits est apparu.

Ce procès est actuellement en suspens, étant donné que plusieurs représentants de la hiérarchie de la Police de l'époque (pour autant qu'ils sont encore en vie) et de la direction actuelle ont été mis en inculpation. Pratiquement tous les membres de la Direction de la Police ont été contraints à la démission. Le Gouvernement a également démissionné et, fin 2013, il y a eu des élections parlementaires anticipées, avec e.a. comme résultat l'éviction du parti politique au pouvoir depuis plus de 30 années.

Une certaine presse a parlé, à l'occasion de ce procès, d'une « guerre » entre la Justice et la Police (qui aurait, actuellement tourné à l'avantage de la J

3. Y a-t-il eu un débat important sur la question de la « retenue judiciaire » ou la « modération judiciaire » à l'égard de l'exercice de la fonction judiciaire vis-à-vis des autres pouvoirs de l'État? En particulier, y a-t-il des exemples où l'opinion publique et/ou les autres pouvoirs de l'État ont laissé entendre que le pouvoir judiciaire (ou un juge ou un tribunal dans une décision particulière) a interféré de manière inacceptable dans le domaine du pouvoir ou de la compétence discrétionnaire de l'exécutif ou du législatif?

Non

4. a) Dans votre pays, au cours des 10 dernières années, y a-t-il eu des changements dans la constitution/loi concernant la justice (dans le sens le plus large: la structure, les tribunaux, les juges) qui ont pu conduire à dire que la relation entre le pouvoir judiciaire et les autres pouvoirs de l'État ou la séparation des pouvoirs dans votre pays ont été affectées?

Non

b) Dans votre pays, y a-t-il des propositions actuelles de modification de la loi visée sous a)? Dans chaque cas, veuillez indiquer la raison «officielle» pour les changements ou les modifications proposées.

Il est question, depuis plusieurs années, de la création d'un Conseil national de la Justice. Ce Conseil devrait accroître l'indépendance du pouvoir judiciaire, notamment en ce qui concerne la nomination et les promotions des magistrats. Actuellement tous les magistrats sont nommés par le Grand-Duc (art. 90 et 91 de la Constitution), sans que cela n'ait, jusqu'à présent, jamais causé de problème. Un projet de loi est en cours d'élaboration. Il faudra, cependant, au préalable, modifier la Constitution pour permettre cette création. Il est actuellement impossible de dire à quelle date ce processus législatif va aboutir.

c) Dans votre pays, y a-t-il des discussions sérieuses ou des débats (dans les milieux politiques, par le public en général ou dans les media) en vue d'introduire des changements dans la loi visée sous a)?

Non

5. Dans votre pays, des observations importantes ont-elles été formulées par des responsables politiques ou d'autres groupes pertinents concernant le rôle du pouvoir judiciaire et des tribunaux en leur qualité de troisième pouvoir de l'État? Si oui, veuillez indiquer brièvement leur nature et leur contenu et indiquer la réaction de l'opinion publique ou les rapports des media faisant état de "l'opinion publique".

Non

6. Dans quelle mesure, le cas échéant, la bonne administration de la justice est-elle affectée par l'influence des autres pouvoirs de l'État (par exemple, le ministère des finances à l'égard de l'administration des budgets, le ministère compétent en matière de technologie de l'information dans les tribunaux, la Cour des Comptes, les enquêtes parlementaires etc. ou toute autre influence extérieure par d'autres pouvoirs de l'État)?

On peut, à la rigueur, remarquer que le traitement des magistrats est payé par l'Etat et que l'établissement du Budget de la Justice est entre les mains du Ministère de la Justice.

Mais, cette question n'a pas fait l'objet de débats importants et n'a pas posé de problèmes jusqu'à présent. Dans le cadre de la création du Conseil national de la Justice, mentionné sub 4), il est envisagé également de conférer une certaine autonomie de budget à la Justice.

7. Avez-vous d'autres commentaires à faire sur les relations entre le pouvoir judiciaire et les autres pouvoirs de l'État dans votre pays?

Non

Malte / Malta

1) The constitution of Malta provides for complete separation of powers between the three organs of the state. It is provided that no authority may interfere with the decision making role of the judiciary who are independent of the executive. I am not aware of any attempt by the executive to influence any Judge in his decision making process.

2) Government and the Judiciary are in talks for the setting up of a commission to regulate the behaviour of judges and exercise discipline. Discussions are largely centred on the composition of the commission and the extent of its powers, with Government insisting that it wants representatives of the "public" on the commission to promote transparency; who will have the majority on the commission and what powers are to be given to it are the main issues. This matter is also being debated in the media. The stand of the Judiciary is that we accept that the commission will have power to discipline members of the Judiciary, without impinging on our independence, but we are insisting on having the final say on the matter. Government and the media raise doubts as to whether the Judiciary can discipline itself. The appointment of retired Judges to sit on the commission and whether there should be a right of appeal to the Supreme Court are also issues being discussed.

3) There has not been any significant debate on the issue of judicial moderation. It is not the first time that the ordinary Courts, in the exercise of their powers of general review of administrative action, have sanctioned a Government authority for acting unreasonably or against the law, and while certain judgments are criticised by the media, especially by those seen to be in favour of the party in Government, after some time the matter is dropped. It will surface again after some other controversial judgment, but no public debate on the matter has ever been held. It is generally accepted that the State is subject to certain judicial control.

4) To date there are no steps that can be taken against a member of the Judiciary, and they only remedy for any misbehaviour is impeachment by a two-third majority by Parliament. Such an extreme measure was adopted twice, but it failed in both instances. In the first case, the matter took a political tinge and the impeachment motion did not get the required majority, while in the second case, the Judge concerned retired on reaching the age limit before Parliament took a vote on the motion. This situation is seen as being inadequate as it does not provide for less serious acts of behaviour and leaves the matter in the hands of politicians. The idea is that certain disciplinary measures should be available – apart from impeachment – and the how and wherefore is being discussed. If the commission, as originally proposed, will have a majority of State appointees there could be issues affecting the separation of powers. Government seems to have backed down from this original proposal but we are still discussing the composition of the said commission.

5) There have not been significant public declarations affecting the Judiciary, except that the Government frequently repeats that it has no intention of minimizing the independence of the Judiciary.

6) Yes, the Judiciary and the Court administration depend on Government funding which is extremely lacking. Within the European Union, in Malta the percentage of the annual budget dedicated to Justice is the lowest. There are always promises that Government will increase the vote but nothing ever happens. This affects the proper administration of justice in various ways. The number of judges and magistrates is very low in relation to the workload and population. Again, the EU has recommended that the number should be doubled, but nothing has been done. In effect, each Judge and Magistrate is doing the work of two with the resulting delay, which is then seen as our responsibility! Also, since the Court is a government department, recruiting of staff is managed by the Office of the Prime Minister and dismissals through the Public Service Commission, which results in delay and political interference in both processes. Many staff is not up to standard. Anything we as the Judiciary require, including extra shelves or cupboards and IT is subject to control and administration by Government officials, and is, as a result, subject to government bureaucracy and budget limitations. The library budget is extremely low, and our complaints are always met with the stock answer that no funds are available. Few judicial assistants are available, again due to lack of funds. In other words, although no interference is recorded in the decision process by the Judiciary, there are various other factors which control and limit the way the Judiciary operates.

7) The Judiciary in Malta does not have a good relationship with the press. The press pick and choose what and how to report our work, and are not always faithful in their reporting. On one occasion, for example, they gave a false figure representing the number of judgments pending for more than 5 years; we issued a correction, but it took them months to report the true much lower figure. Judgments are not always reported correctly and often given a slant to make the judge or magistrate seen in bad light. Our Judiciary takes the position of not commenting on press reports unless to correct facts connected with administration, but what is said about us and our judgments is generally left unanswered; we do not find it fruitful to enter into polemics with the press. The press, generally, do not have trained personnel and base their reports on what they pick up from Joe public and from certain lawyers who, to improve their own ego, pass on certain information (obviously tainted) about cases to the press; reportage is, often, done without further investigation. Calls for the press to be more responsible have been made even by the Government, but little progress has been seen. The press, also, sometimes picks on a particular case and

sensationalize same, with the result that some sort of pressure is possibly made on the Judge or Magistrate hearing the case.

Montenegro / Monténégro

1. How does the Constitution, or the other laws of your country, if there is no written Constitutional document, regulate relations between the judicial power on one side, and the executive and legislative powers on the other side?

The Constitution of Montenegro ("Official Gazette of Montenegro", No.1 / 2007 of 25.10.2007.), introduced a commitment to a parliamentary system of division of power, through the promotion of division of power based on the principle of division between the legislative, executive and judicial branch. Legislative authority is vested in Parliament, the executive in Government, and judicial in courts. Mutual relations of power is based on balance and mutual control.

The Constitution pays special section to judicial power in the framework of the structure of government. As the basic principles of judicial authority, the Constitution provides the independence and autonomy of the courts, the obligation of the court to rule on the basis of the Constitution, laws and ratified international treaties and a ban to the establishment of extraordinary courts. Autonomy and independence of the courts represents an organizational and functional principle of the separation of judicial and other branches of power. Principle of the obligation of the Court to rule on the basis of the Constitution, laws and applicable international treaties establishes the legality of the work of the courts, as a fundamental principle of their operation.

The Constitution provides for the permanence of the judicial function as a guarantee of the independence of the judiciary, but also provides for the grounds for termination of judicial office and dismissal of judicial duties.

The Constitution stipulates that a judge may not be a MP or perform any other public office or perform some other activity, and can not be a member of a political organization.

The Constitution nominates the Supreme Court as the highest court in Montenegro, and leaves to the Law to regulate its organization and competence. However, the Constitution, as one of the most important functions of the Supreme Court underlines its competence to provide uniform application of law. This means that the Supreme Court should contribute to the realization of the principle of equal treatment and equal decision-making in equal matters, and thus to the principle of legal certainty of legal entities.

The Constitution specifies that judges and court presidents are elected and dismissed by the Judicial Council. The Judicial Council is introduced in the Constitution for the first time in the constitutional system of Montenegro, as an independent and autonomous body, which should ensure the independence and impartiality of judges and courts.

According to Amendment VIII to the Constitution of Montenegro (Official Gazette of Montenegro No.38 of 02.08.2013.) The Judicial Council shall have the president and nine members. The members are: President of the Supreme Court, four judges appointed and dismissed by the conferences of judges, taking into account the equitable representation of judges and courts, four prominent lawyers appointed and dismissed by the Assembly on the proposal of the competent Working body of the Assembly through a public tender and a Minister of Justice. President of the Judicial Council is elected by the Judicial Council by a two thirds majority of its members, who are not holders of judicial office, except that the President of the Judicial Council can not be a Minister of Justice. The President of the Judicial Council shall have a casting vote in the event of an equal number of votes.

The main competence of the Judicial Council is to decide on the appointment and dismissal of judges and ensure the independence and impartiality of courts. In addition to these responsibilities Constitution granted to Judicial Council another six competencies that are indicative of the aforementioned determinations that the Judicial Council performs other tasks stipulated by law.

2. Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

Questions of strengthening the independence, efficiency and functionality of the judicial authorities are a matter of intense discourse of actors of political and judicial scene in Montenegro, in the course of preparation of normative acts and other activities in the field of creation and development of the legal system and the realization of its practical effectiveness. However, the above question asks for a specific response in terms of contribution of political and social actors in the debate on autonomy, independence and impartiality of the courts. In this regard it should be noted that an important political discussion was within the legislative and executive branches. The

judges were consulted in the development of normative solutions as experts - members of working groups involved in drafting legislation in the field of justice. Also, the draft normative acts and proposals were submitted to the courts for their comments. Non-governmental organizations were engaged as partners to public authorities, providing incentives for the introduction or modification of normative solutions, participating in drafting legislation or through the communication of comments or objections to the proposed solutions. It can be said that in this respect there were no observable organized public debates in university and academic circles, except, in general public not quite remarkable activities of the Montenegrin Academy of Sciences and Arts in preparation of a study titled "Montenegro in XXI century - in the era of competitiveness - construction and operation of the state of Montenegro ", published in 2010, in which 60 pages of study is devoted to the judiciary is. In negligibly small number of cases there were the individual positions of the academic community on this issue, which were brought before the media. Also, in the opinion of the Supreme Court of Montenegro, it can be objected to the editorial policy of the media, especially electronic, that did not sufficiently devoted particular attention to the creation of the normative and institutional framework in the field of justice. True, the electronic media in news broadcasts and print media have reported on these activities, giving more or less summary reports. But, the special themed tv shows were absent, when systemic regulations in the field of justice were passed. Especially in this regard drew attention the fact that nor the public service or the independent electronic media have not organized thematic programs on the adoption of constitutional amendments during 2013, although the motive of the framers of the Constitution was to further enhance the independence of the judiciary through its adoption.

3. Has there been any significant debate on the issue of "judicial restraint" or "judicial moderation" with regard to the exercise of the judicial function vis-a-vis the other powers of the state? In particular, are there examples where public opinion and/or the other powers of state have suggested that the judiciary (or an individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

The Constitution provides that an individual legal act shall be in conformity with the law and that the final individual acts enjoys legal protection. Law on Courts, gives the Administrative Court of Montenegro the jurisdiction to decide in administrative disputes on the legality of administrative acts. Against the decision of Administrative Court of Montenegro, the party that participated in the administrative dispute may submit a request for extraordinary review of a court decision, by which the Supreme Court decides.

In the case law so far there were no complaints that the courts in any way contrary to the legal system, interfered with the powers of the executive and the legislative branch, when deciding on the legality of administrative acts.

4. a) In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?

b) In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the "official" reason for the changes or proposed changes.

c) In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view of introducing changes in the law as referred to under a)?

a) After the independence of Montenegro, the Constituent Assembly adopted the Constitution of Montenegro. The Constitution was adopted and entered into force in October 2007.

In order to strengthen the guarantees of independence of the judiciary and creating a consistent constitutional and legal framework in the judiciary, the Parliament of Montenegro on 31 July 2013, adopted and proclaimed the Amendments to the Constitution of Montenegro. Constitutional amendments provided that the President of the Supreme Court shall be appointed and dismissed by the Judicial Council by a two thirds majority on a proposal of the General session of the Supreme Court. Altered is the composition of the Judicial Council in order to eliminate political influence on its work. List of its jurisdiction is expanded. However, the competencies are indicatively enumerated, because they left the option to lay down by the law any other activites for which the Judicial Council would be competent.

Constitutional law for the implementation of Amendments have predicted obligations to harmonize laws with amendments, and gave deadline of only 45 days for adjustment of the Law on the Judicial Council and Law on Courts. In this sense, in September 2013, certain changes were made in order to implement news that constitutional amendments have brought. The changes were related to the creation of conditions for the selection of the Judicial Council and the election of the President of the Supreme Court of Montenegro. These changes represented the first stage at the legislative level to strengthen the independence of the judiciary.

b) At the present time there are ongoing activities for the adoption of new laws - the Law on Courts and the Law on the Judicial Council and rights and duties of judges. This legislative activity is anticipated by a strategic document

for the judiciary. Namely, the Action Plan for the chapter 23 - Judiciary and Fundamental Rights and Judicial Reform Strategy 2014 - 2018, envisages the improvement of legislation regarding the establishment of a unified system of election judges at the state level, on the basis of the procedure which is transparent and based on merit, establishing a periodic evaluation of judges, the introduction of the system of promotion based on the results, and revision of procedures of disciplinary responsibility of judges and the system of disciplinary offenses.

In order to implement the above objectives and integrate the authorities for misdemeanor offences into the court system of Montenegro, we hav drafted proposals of the organizational laws.

The Government of Montenegro in December confirmed the proposals of both these laws, and the procedure of their adoption before the Parliament of Montenegro is in course.

c) Determination of the draft of Law on Courts and Law on the Judicial Council and the rights and duties of judges have preceded the drafting of these laws and extensive public debate on the solutions proposed in the draft law. In the public hearing representatives of all branches of government - legislative, judicial and executive took part. With the proposed laws they made the reports from the public debate. The media have reported on the public debate. We have not noticed significant participation of the academic community in the public hearings, except some small number of individual attitudes in the media.

5. In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please briefly identify their nature and content and indicate the reaction of the public or media reporting of "public opinion".

In the comments of politicians, NGOs and other relevant groups in terms of the role of the courts as the third branch of government, we have shown the need to further strengthen the institutional and judicial independence, on the one hand, and raising the level of judicial responsibility, on the other hand. Such attitudes were identified in media reporting and with public opinion. We did not see the public reaction to sporadic statements by politicians or other actors who unacceptably commented on the work of court in the particular pending cases

6. To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budgets, the relevant ministry with respect to information technology in courts, the cour de compte, parliamentary investigations etc. or any other external influence by other powers of the state)?

Budget funds for the courts are limited by the economic situation in the country. Although there is a tendency to allocate funds to the courts in accordance with the possibilities of the state budget, the level of resources assigned to courts is a limiting factor for servicing the needs of the courts. Therefore, at this moment the courts are faced with inadequate spatial and technical capacities. Although in recent years the level of salaries of judges is raised, salary system in the courts, including administrative staff, does not correspond to the severity and complexity of the exercise of judicial functions. During the work on the Law on salaries in the public sector, which is in preparation, there was an attempt to make the salaries of the judges of the highest level below the level of salaries of the members of other branches of government, contrary to the decisions of the now existing regulations, by which the coefficients of the highest representatives of the three branches of government are equal. Discussions, which were conducted in the meantime, gives the basis for expectations that in finalizing the legal provisions we will comply with the principle of equality of all three branches of government. Retirement of Judges is part of the systemic Law on Pension and Disability Insurance, which does not prescribe any specialty for judges in relation to other addressees of this law. Therefore, the pensions of judges are extremely low, because they does not reach even half of the judicial salaries. We believe that in this respect we should amend the legal framework and adapt it to retirement systems in many countries which link the amount of pension to the amount of the last salary or approximately its height.

We have established an information system in the courts. There is a continuing need for its further development and adaptation. Activities in this regard are being implemented on a satisfactorily manner, in partnership with line ministries and foreign donors.

At the meetings of the working bodies of the Parliament of Montenegro, on several occasions, initiatives to implement control hearing of the President of the Supreme Court of Montenegro were presented. However, they were not related to general issues of functioning of the courts, but the tendency to lead discussions on individual court cases, which would be unacceptable in terms of respect for judicial independence and avoiding external interference in the work of the courts. In response to the working body of the Parliament, the judiciary have put to knowledge to the MP-s that the work of the court in the present case, especially when the court proceedings are pending, can not be a matter of a parliamentary debate.

The Judicial Council has a constitutional obligation to submit to Parliament an annual report on its work and on the overall situation in the judiciary. There were several examples that the discussion on the report is being used for the unacceptable marks on the work of courts in specific cases.

7. Do you have any other comments to make with regard to the relations between the judiciary and the other powers of state in your country?

We estimate that there is a general consensus that in Montenegro we should continue activities to further strengthen the independence, functionality and responsibilities of courts, where all three branches of government must give their full contribution. A challenge lies on the courts to raise the quality of work and judicial responsibility, and the other branches of government, through the creation of sustainable legislation and adequate practical action to make preconditions and contribute to an environment where the courts will be able to make better achieveing its mission to the rule of law. If the trend of what has been done so far in the reform process continues, truely with its additional intensifying, we can expect that the process will result in effects that the judiciary would rise to the level of a reliable guarantor of the field of human rights and the rule of law.

Netherlands / Pays-Bas

1) How does the Constitution, or the other laws of your country, if there is no written Constitutional document, regulate relations between the judicial power on one side, and the executive and legislative powers on the other side?

Although the separation of powers and the independence of the Judiciary are broadly recognized as being fundamental for the Dutch constitutional system, the (written) constitution itself is very concise on these topics. It only states that judges are appointed for life and can only be discharged by decision of the Supreme Court. Other safeguards for the independence of the judiciary and rules with regard to the relations between the judiciary and the other state powers are laid down in legislation at a lower level. The Act on the composition of the judiciary and the organization of the justice system (Wet op de Rechterlijke Organisatie) regulates the relation between the minister of Security and Justice and the Council for the Judiciary and the courts. The authorities of the minister are restricted to the financing of the Judiciary.

At present, an amendment to the constitution is being prepared that aims to better lay down the fundamental right to fair trial before an independent and impartial tribunal.

2) Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

One can observe a growing interest in and discussions on this topic, in politics, academia, the media and in the judiciary. Some examples are the following.

- According to the recent GRECO evaluation report on the Netherlands, the members of the judiciary have a long standing reputation of independence and impartiality, and public trust in their integrity is high. However, GRECO puts forward the recommendation that a restriction on the simultaneous holding of the office of judge and that of member of either Chamber of Parliament be laid down in law.

- According to the recent report “Institutional Safeguards”, the current institutional safeguards for the independence and impartiality of the judiciary require reinforcement, e.g. with regard to ancillary positions of judges and of their financial interests, the position of deputy judges and the allocation of court cases.

- New members of the Supreme Court are appointed from a list of recommendations drawn up by the Supreme Court. The House of Representatives receives the recommendations and forwards its selection (by secret voting) to the government. Until recently this was a formality: the members of the House automatically followed the recommendation of the Supreme Court. The last years there is discussion on this procedure and a tendency to let the House have an active say in the appointment of Supreme Court judges.

- A conference was held on initiative of parliament to discuss the relationship between state powers. The main topic was the need for members of the executive and legislative powers to restrain themselves in their criticism of court verdicts for political profit.

- Periodically there is a debate in parliament on the ‘state of democracy and the rule of law’. In this debate various concerns are expressed with regard to the functioning of the judiciary and of parliament and with regard to the interaction between the powers of state. Issues are, e.g., access to justice (higher court fees, less legal aid,

making the “judicial domain” smaller by transfer of powers to the prosecution), and the workload of judges and its impact on the quality of justice.

3) Has there been any significant debate on the issue of “judicial restraint” or “judicial moderation” with regard to the exercise of the judicial function vis-a-vis the other powers of the state? In particular, are there examples where public opinion and/or the other powers of state have suggested that the judiciary (or an individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

This topic is regularly point of discussion in the Netherlands.

Periodically, some criticism is addressed to the judiciary on the basis that judges go too far in the review and control of decisions of the administration, “the judge must not sit on the chair of the administration”.

In the Netherlands, there is no Constitutional Court and, according to the Constitution, judges are not allowed to evaluate if formal Acts are in accordance with the Constitution. However, judges are allowed to evaluate whether legislation is in accordance with international treaties, like the Convention. At present, there are two diverging proposals to amend the Constitution on this point pending in parliament. The first one aims at introducing a form of constitutional judicial review. The second one aims at restricting the authority of judges to directly apply provisions in international treaties. The second proposal is inspired by political criticism directed towards the ECHR and the national judges; it is claimed that judicial activism infringes “ the primacy of politics”. It seems unlikely that this proposal (as well as the first one) will be adopted by parliament, but it is an important sign of conflicting views on the relations between the powers of state.

4) a) In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?

b) In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the “official” reason for the changes or proposed changes.

c) In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view of introducing changes in the law as referred to under a)?

a) There have been many changes in the laws regarding the judiciary (e.g. new judicial map) but these do not directly affect the relationship between the Judiciary and the other powers of state.

b) No.

c) No, except the discussion mentioned under Question 3 to restrict the application of judges of provisions in international treaties.

5) In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please briefly identify their nature and content and indicate the reaction of the public or media reporting of “public opinion”.

Almost none. One politician expressed in public that his trust in the judiciary would disappear if he were to be convicted for discrimination.

6) To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budgets, the relevant ministry with respect to information technology in courts, the cour de compte, parliamentary investigations etc. or any other external influence by other powers of the state)?

- The relationship between the Judiciary and the Ministry of Security and Justice is regulated by law (see above) and fairly well established. Especially in this period of economic crisis there are budgetary restraints that have a great impact on the administration of justice. As already mentioned under Question 2, there are concerns on issues like access to justice (higher court fees, less legal aid, making the “judicial domain” smaller by transfer of powers to the prosecution), or the workload of judges and its impact on the quality of justice.

7) Do you have any other comments to make with regard to the relations between judiciary and the other powers of state in your country?

• In the Netherlands, the judiciary is conscious of the fact that it must also itself assure its independence, impartiality and professional competences. The balance of the powers of state and the principles of the rule of law presuppose a responsive and responsible judiciary. This is a matter of permanent attention. In this respect, judges in the Netherlands are concerned about the workload and its negative impact on the quality of their work, as is reflected in a Manifesto that approximately 700 judges signed and in a recent report of an audit commission that visited all the courts of the country.

Norway / Norvège

1) How does the Constitution, or the other laws of your country, if there is no written Constitutional document, regulate relations between the judicial power on one side, and the executive and legislative powers on the other side?

The Norwegian Constitution of 1814 is based on the principle of separation of powers between the executive, the legislature and the judiciary. Until May 2014 the principle of judicial independence was not clearly stated in the Constitution, but was presupposed, e.g. in Article 88, after which the Supreme Court pronounces judgments in the final instance, and Article 90, which states that the judgments of the Supreme Court may in no case be appealed. According to the Constitution Article 22, judges may not, except by court judgment, be dismissed nor, against their will, transferred.

Since 1814 the Norwegian Constitution has been amended several times. By amendments in May 2014 the Constitution now inter alia includes basic civil and political rights prescribed for in international Human Rights conventions. One innovation is the new Article 95 stating an obligation for the state authorities to secure the independence and impartiality of the judges and the courts.

2) Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

The independence of the judiciary is well respected by the other state powers and in society in general, as indicated by the aforementioned amendments to the Constitution in 2014.

In 2002, there was a major reform in the administration of justice as the ties between the courts and the Ministry of Justice were detached, inter alia with the aim of making judicial independence more visible to the society. The National Courts Administration was established and entrusted with the task of administering the courts. The Judicial Appointments Board and the Supervisory Committee for Judges were established at the same time. The Norwegian Association of Judges initiated in 2009 discussions on the need for further reforms regarding the independence of judges, especially due to the predominant role of the government in the procedure for appointing judges, as well as in the procedures for selecting judges as members to the board of the National Courts Administration, the Judicial Appointments Board and the Supervisory Committee for Judges. This has been a continuous and ongoing discussion with the other state powers and others, and hopefully it will soon be ended with successful reforms in this field.

3) Has there been any significant debate on the issue of "judicial restraint" or "judicial moderation" with regard to the exercise of the judicial function vis-a-vis the other powers of the state? In particular, are there examples where public opinion and/or the other powers of state have suggested that the judiciary (or an individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

The Norwegian courts have the right and the duty to review the constitutionality of laws when questions in this area arise in connection with cases under consideration. The Norwegian courts undertake constitutional review as well as judicial review of administrative actions. The principle of constitutional review by the courts has prevailed in Norway for almost 200 years. The principle is not stated in the written Constitution, but stems from the practice of the Norwegian Supreme Court and is considered as being a principle of constitutional rank. From time to time this principle is debated.

4) a) In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?

b) In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the "official" reason for the changes or proposed changes.

c) In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view of introducing changes in the law as referred to under a)?

See answers above.

5) In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please briefly identify their nature and content and indicate the reaction of the public or media reporting of "public opinion".

No, as indicated above, the independence of the judiciary is well respected both by the other state powers and in society in general.

6) To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budgets, the relevant ministry with respect to information technology in courts, the cour de compte, parliamentary investigations etc. or any other external influence by other powers of the state)?

The Parliament determines the allocation of resources to the courts, but the influence of the government in this respect is very strong. The amount of resources allocated to the courts has no effect on judges' independence in their adjudication, but of course, the resources distributed have a decisive impact on the proper administration of justice. A poor administration of justice may have long-term negative effects on the public confidence in the courts.

The National Courts Administration is responsible for the operation and maintenance of Court houses and for administrative and technical support for judges and staff. The Parliament may give overall instructions for the tasks that are given to the Courts Administration, but the Courts Administration decides its own priorities within the framework of its resources and various tasks. The National Courts Administration has a very free hand in its administration of the courts. Apart from the usual budget reporting, the Parliament will also keep a check on the courts and the Courts Administration through the Office of the Auditor General, which, in addition to auditing the accounts, also is able to audit the administration in the area of the courts.

Judges are appointed by the government on the recommendation of the Judicial Appointments Board. The remuneration of Norwegian judges is determined by the other state powers. The Parliament determines the salary of Supreme Court justices, while the executive by one of the ministries determines the salary of judges in District Courts and Courts of Appeal.

Neither the legislative nor the executive power has ordered investigations in general concerning judges. The Ministry of Justice emphasized, in its note of 19 October 2006 regarding constitutional barriers for inquiries of the courts, whether such inquiry should be carried out, depends inter alia on:

- the similarities between an inquiry and a reversal of the case,
- the purpose of the inquiry,
- whether such an inquiry is crucial for the public trust of the courts system,
- the time lapse; inquiries could more easily be set up for elder cases,
- whether the courts decision later on has been reversed by the courts themselves

In 2006 an inquiry commission was established by the government related to a specific criminal case where the conviction was reversed by the court of appeal more than twenty years later. The inquiry was limited to the court orders that controlled the procedural matters of the case.

7) Do you have any other comments to make with regard to the relations between the judiciary and the other powers of state in your country?

The vast powers of the government with regard to the procedures for the appointment of judges should be curtailed. The judiciary should be granted a more significant influence in processes concerning selection of judges as members of the Board of the National Courts Administration, the Judicial Appointments Board and the Supervisory Committee for Judges. The arrangement whereby the other state powers fix judges' salaries should be reconsidered. The establishment of a Council for the Judiciary with responsibilities for judges' ethics, disciplinary sanctions against judges, training of judges, and perhaps also the tasks now assigned to the Judicial Appointments Board, should be considered.

Poland / Pologne

1) How does the Constitution, or the other laws of your country, if there is no written Constitutional document, regulate relations between the judicial power on one side, and the executive and legislative powers on the other side?

Constitution of the Republic of Poland (dated 2 April 1997) introduces the classic tripartite division of powers. According to the Preamble to the Constitution, the Constitution is a basic law for the state based on the respect for freedom and justice, cooperation between the authorities and the social dialogue.

The idea of cooperation between authorities is further developed by detailed constitutional regulations, for instance:

Art. 2. The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice.

Art. 10. 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, executive 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.

Art. 173. The courts and tribunals shall constitute a separate power and shall be independent of other branches of power.

Art. 178. 1. Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes.

2. (...)

3. A judge shall not belong to a political party, a trade union or perform public activities incompatible with the principles of independence of the courts and judges.

Since 1997 (that is for 18 years), there were no changes of the Constitution relating to the basic principles of the state system of government, including the position (status) of the judiciary. It may be concluded that at the level of the Constitution relationships between all the branches of power are regulated properly and that the situation is stable.

2. Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

There is no significant discussion regarding the model of the system adopted in the Constitution. It is widely accepted. Nobody questions the idea of separation and balance between the branches of powers (check and balance) as declared in the Constitution.

However, there are discussions regarding ad hoc solutions adopted in ordinary legislation. Judicial system in Poland is regulated by four acts: 1) Law on the system of courts of general jurisdiction (which applies to district, regional and appeal courts), 2) Act on the Supreme Court, 3) Act on administrative courts and 4) Act on the system of military courts (administrative and military courts are situated outside the structure of the courts of general jurisdiction). The most important of these acts – Law on the system of courts of general jurisdiction – regulates functioning of the 11 courts of appeals, 44 regional courts and approximately 300 district courts, as well as the performance of service by nearly 10,000 judges. According to that law (Art. 9), administrative supervision over activities of the court of general jurisdiction is exercised by the Minister of Justice. Discussions focus primarily on what should be meant by the Minister of Justice's "administrative supervision" over courts of general jurisdiction, how far it can go and to what kind of court activities it may apply. It should be emphasized that the Constitution does not regulate administrative supervision over activities of the courts in any way. The adopted model of supervision over the courts is therefore exclusively a political decision expressed in the form of ordinary legislation (government projects adopted as law by the parliament). In Poland, there is no category of so called organic laws (like, for instance, in Spain). System of the courts of general jurisdiction is regulated by an ordinary law that can be at any time changed by the parliament using a simple majority of votes. Since its enactment in 2001, the current Law on courts of general jurisdiction was amended more than 50 times, of which 7 amendments took place in 2014 alone. Permanent changes are criticised by judges (the National Council of the Judiciary, general assemblies of regional and appeal court judges). Also representatives of the world of science (certain professors of the constitutional law) take a critical view about them. The problem lies not only in the frequency of changes, but also

in their direction – usually strengthening position of the Minister of Justice in relation to the judges and courts, and reducing the separate nature of the judiciary and weakening position of the judges.

Majority of these proposed changes to the structure of the courts of general jurisdiction is negatively assessed (by the National Council of the Judiciary, the First President of the Supreme Court, judges' associations), however negative opinions are not taken into account during the legislative process.

Over the past 10 years, some of the solutions proposed by the Minister of Justice and subsequently adopted by the parliament were challenged by the National Council of the Judiciary in the Constitutional Court (for instance principles of supervision over the courts by the Minister of Justice, introduction of dual power in the courts – creating, next to the president of the court, position of the court director appointed by the Minister of Justice and directly reporting to the Minister, the ability to freely establish and abolish courts by the Minister of Justice, and transferring judges without their consent to other courts in connection with changes in the organization of the judiciary). Some solutions were challenged in the Constitutional Court by the First President of the Supreme Court. In constitutional issues the Constitutional Court adjudicates in the plenary session. The Court did not agree with majority of the objections raised by the National Council of the Judiciary, but judgments declaring constitutionality of the solutions proposed by the government were not passed unanimously (there were many dissenting opinions - vota separata).

Discussions on the relationships between the courts (judiciary), the parliament, and the government (authorities having their roots in political elections) take place in the legal and academic communities (especially among scholar lawyers), but also in political circles (e.g. during the meetings of the parliamentary committees in the course of the legislative process) and media (in professional legal journals and newspapers).

3. Has there been any significant debate on the issue of "judicial restraint" or "judicial moderation" with regard to the exercise of the judicial function vis-a-vis the other powers of the state? In particular, are there examples where public opinion and/or the other powers of state have suggested that the judiciary (or an individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

Polish courts recognise and respect separation of powers between the legislative, executive and judicial authorities. They are quite circumspect. Therefore, there are no major public debates on "judicial restraint" or "judicial moderation". Judges in Poland must not belong to political parties nor carry out political activities. According to art. 178 (3) of the Constitution, the judge must not belong to a political party, trade union, or perform public activities incompatible with the principles of independence of the courts and judges. As a rule, judges do not run for parliament (in which case they would have to relinquish the office of a judge), and do not get involved politically. Judges' associations have primarily educational nature – they ensure appropriate attitudes, especially ethical ones.

In the process of adjudication, the courts take into account the fact that some issues require an administrative decision to be issued by the executive and do not interfere with these powers. Administrative courts control administrative decisions only from the formal point of view (regarding their legality), and do not substitute for government or local government The courts take into account in matters falling within their competence (the administrative court may only overrule decision if it is unlawful, but it cannot resolve an administrative case in place of a public administration body). Civil and administrative courts do not assess administrative decisions from the point of view of their reasonableness and fairness.

There is possibility of judicial proceedings before a civil court regarding compensation for a damage caused by wrongful act of public authorities. According to Art. 77 (1) of the Constitution, everyone has the right to compensation for any harm done to him by any action of an organ of public authority contrary to law. The rules governing seeking damages in such a situation are regulated by the Civil Code. According to Art. 417 § 1 of the Civil Code, the State Treasury, a unit of local government or any other legal person exercising public authority under the law is responsible for damage caused by an unlawful act or omission in the exercise of that authority. However, there are some limitations. According to Art. 417 (1) of the Civil Code:

If the damage was caused by the issuance of a normative act, the remedy may be sought after the act was found, in the course of appropriate proceedings, non-compliant with the Constitution, a ratified international agreement or a statute (§ 1).

If the damage was caused by the issuance of a final judgment or a final decision, the remedy may be sought after such a judgment or decision were found, in the course of appropriate proceedings, non-compliant with the law, unless otherwise provided by the law. This also applies to cases where a final decision or a final decision has been issued on the basis of a normative act non-compliant with the Constitution, a ratified international agreement or a statute (§ 2).

If the damage was caused by failure to pass a judgment or issue a decision, when the obligation to pass such a judgment or to issue such a decision results from the law, the remedy may be sought after the failure to pass a judgment or to issue a decision was found, in the course of appropriate proceedings, non-compliant with the law, unless otherwise provided by the law (§ 3).

If the damage was caused by failure to issue a normative act whose obligation to issue is provided by the law, the unlawfulness of the failure to issue that act is found by the court examining the case for damages (§ 4).

As it can be seen from the above-mentioned regulations, before the civil court passes a judgment awarding damages as a result of legislative lawlessness (occurring in the process of issuing normative acts or in connection with the failure to issue such acts), judicial unlawfulness (occurring in the process of judgments being passed by the courts), or administrative unlawfulness (resulting from the issuance of non-issuance of an administrative decision), injustice must be previously identified in the course of a separate procedure. It also imposes restraints on courts in ruling on compensation for damages caused by the actions of the legislative or executive authorities. For example, a compensation for damages caused by a wrongful act of the executive power must be preceded by a statement, made in due manner, that the decision (or failure to issue the decision) was illegal.

The division of powers is treated in a strict way. The judicial power shall not interfere in the activities of the legislature or the executive power. A special court, the State Tribunal, whose members are appointed by the Sejm [lower house of the parliament], adjudicates on matters relating to the constitutional responsibility. The highest representatives of the state (including the Polish President, Chairman of the Council of Ministers, members of the Council of Ministers, that is ministers, members of the parliament, senators, President of the National Bank of Poland, Supreme Commander of the Armed Forces) bear constitutional responsibility before the State Tribunal for violation of the Constitution or law in connection with their offices or in the field of their duties. Furthermore, the Supreme Court determines validity of the presidential and parliamentary elections (including elections to the European Parliament).

There are incidental cases of criticism of the judges for unacceptable interference with the freedom of action of the executive power, but they are recognized by majority of the political scene to be unfounded. For example, in one of the judgements in a criminal case of an alleged corruption (against a famous cardiac surgeon practising cardiac transplantation), a judge sharply criticized actions of the Central Anti-Corruption Bureau regarding the manner in which patients of the accused were interrogated as witnesses (the patients were questioned also late in the evening and at night, and the judge considered this to be a violation of their rights, and compared the situation to the interrogations taking place under Stalinist regime). As it has happened at the time when the current opposition party held power (and also supervised the Central Anti-Corruption Bureau), the part of journalists affiliated with opposition party raised a voice of criticism of the judge.

4. a) In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?

b) In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the "official" reason for the changes or proposed changes.

c) In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view of introducing changes in the law as referred to under a)?

a) In the past 10 years, there were no amendments of the Constitution relating to the judiciary. There were, however, numerous changes in the ordinary legislation concerning organization of the courts and status of the judges, which had an impact on the relationships between the judiciary and other authorities.

Some examples.

1. At the end of 2012, the Minister of Justice issued a regulation abolishing, as from 1 January 2013, 79 small district courts (accounting for 25% of all the district courts in Poland). The judges of these courts (over 500 persons) were transferred by the Minister of Justice to other courts. These changes in the structure of the courts were criticized by many communities (not only judges and the National Council of the Judiciary or associations of judges, but also by local governments - mayors and heads of counties protested against the liquidation of the courts in their cities because existence of a district court elevates the prestige of the place; MPs of the coalition party also protested). Over 320 transferred judges appealed to the Supreme Court from the decision of the Minister of Justice to transfer them without their consent to other courts. The Supreme Court asked the Constitutional Court whether a provision of the Law on the system of courts of general jurisdiction allowing the Minister of Justice to transfer a judge without his/her consent to other court is compliant with the Constitution. To date, the Constitutional Court has not ruled on this issue. Meanwhile, the Minister of Justice has changed and the new minister re-established, effective 1 January 2015, 45 out of 79 abolished courts. Soon subsequent are to be re-established.

The Minister of Justice once again transferred judges to the re-established courts despite the fact that the rule allowing him to do so has been challenged as to its compatibility with the Constitution. The President of Poland came up with an initiative to amend the Law on the system of courts of general jurisdiction which introduces statutory criteria for establishing and abolishing the courts (the criteria in question being the number of inhabitants and the number of cases filed with the court).

2. A few years ago, court directors were introduced as managers who had to relieve the presidents of courts (which are always judges) of the most vexing responsibilities (such as, for example, office equipment purchases, repairs, investments, cleaning of buildings, supervision over supporting staff such as drivers, maintenance workers etc.). Then, the court directors were entrusted with an increasingly broad range of competences (powers and duties) until they became – apart from the court presidents – the second court body. Directors report directly to the Minister of Justice who appoints and dismisses them, determines remuneration for their work, bonuses etc. From the formal point of view, the court president acts as a superior of the court director, but in fact the director retains certain autonomy in relation to the president (e.g. the president may not give orders to the director in some cases).

Director of the court: 1) manages the administrative operation of the court, 2) performs tasks of the unit manager in the field of financial and economic matters, financial control, management of the State Treasury property, and internal audit in these areas; 3) acts as the official superior and takes actions in the field of the labour law, as well as represents the court in this regard to the employees of the court, with the exception of judges, court clerks and judge assistants; 4) determines, in consultation with the president of the court, distribution and the number of individual positions in which the court workers are employed, with the exception of judges, court clerks and judge assistants, in the court departments; 5) represents the State Treasury in terms of the entrusted property and the court tasks.

The biggest problem for the court presidents who are fully responsible for the operation of the courts and the results of their operations is that the director acts as a superior for all employees except judges, court clerks and judge assistants. Therefore, he takes decisions regarding employing and laying off court officers serving judges (secretaries, clerks, as well as heads of secretariats). This gives rise to conflicts of jurisdiction and conflicts between the court presidents and the court directors.

3. Large waves of emotions are being aroused by the Minister of Justice attempts to get access to all court records (including cases pending). The Ministry of Justice wants to have access to files of the pending cases ostensibly to have an opportunity to recognize citizen complaints about activities of the courts (e.g. in order to consider initiation of disciplinary proceedings against a judge). Critics of the idea to provide the Minister of Justice with access to the court records argue that this is an attempt to limit independence of the judiciary.

b) Changes in the Law on the system of courts of general jurisdiction are unending. Currently (January 2015), the parliament works on further drafts of amendments to this act (several projects at a time). These are generally government drafts (rarely presidential projects), and the source of further amendments to the laws regulating the judiciary is primarily the Minister of Justice. The National Council of the Judiciary has no legislative initiative and it can only challenge changes in the system and organization of courts and status of the judges which it considers to be inconsistent with the constitution in the Constitutional Court.

The official reason for the introducing further changes is to improve efficiency and effectiveness of the operation of the courts and reduction in spending on the judiciary from the public funds (budgetary savings). For the latter reason, judges are to be denied reimbursement of commuting from home to the court. Previously, the retirement age of judges was raised (age when a judge becomes a judge emeritus), and their sick leave remuneration were lowered. The changes are supposedly designed to improve citizens' satisfaction with the functioning of the courts. Actually, they strengthen supervision of the Minister of Justice over activities of the courts of general jurisdiction.

c) There is no national debate on amendments to the legislation on judiciary. From the point of view of the general public, administration of justice is not as engaging as operation of the health system, the pension system, state aid for the unemployed or other issues related to the social sphere. Lack of national debate may also result from low legal culture and lack of the citizens' awareness that there is no freedom and rule of law without strong (independent and impartial) courts. Only liquidation of small courts sparked the social debate – also in the popular press magazines. Systemic issues are primarily a domain of experts (National Council of the Judiciary, judges themselves, judges' associations and other non-governmental organizations monitoring operation of the state at different levels, lawyers, members of the parliament, academics communities, especially experts in the field of the constitutional law, that is professors of constitutional law, specialized press, e.g. legal periodicals).

5. In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please briefly identify their nature and content and indicate the reaction of the public or media reporting of "public opinion".

Officially, nobody questions the role of courts in a democratic state of law nor importance of the judiciary as a guarantor of the protection of individual rights. Individual court judgments are criticized – also by politicians, members of the parliament or prominent journalists associated with different political parties, however this criticism often stems from ignorance of the facts of a particular case and the rules of conducting court proceedings and adjudication (e.g. in dubio pro reo principle).

Courts are criticised for their slowness (excessive length of judicial proceedings) and a certain alienation of judges (lack of empathy for the parties to the litigation, adjudicating literally by letter of the law and not according to the ratio legis of an act).

Recently (autumn 2014), the judges were ruthlessly criticized by one of the opposition parties in connection with delaying announcement of the official results of local elections (the National Electoral Commission and regional electoral commissions are made up of judges). There were even accusations thrown against judges that they took part in the falsification of the election results. Therefore, the presidents of the three main courts: the Supreme Court, the Constitutional Court and the Supreme Administrative Court (whose president is also the Chairman of the National Council of the Judiciary) issued a statement defending independence and reputation of judges.

Officially, nobody questions judgments of the Constitutional Court (they are universally binding), however the legislative authorities (parliament) delays their implementation (i.e. bringing legal regulations to accordance with the Constitution).

6. To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budgets, the relevant ministry with respect to information technology in courts, the cour de compte, parliamentary investigations etc. or any other external influence by other powers of the state)?

The mere administration of justice (sentencing, adjudication) is in principle free of any influence of external factors (e.g. political ones). However, functioning of the courts in areas other than sentencing (adjudication) is subject to the influence of the legislative and executive authorities.

Influence of the Minister of Justice on the functioning of the courts has already been mentioned above.

Budgets of the courts are determined on the basis of indicators resulting from the guidelines of the Minister of Finance – e.g. wages of the public sector employees, including court employees/officials have been frozen since 2009 (no increases) (this does not apply to judges who enjoy legally guaranteed annual salary adjustments).

The Supreme Chamber of Control (the Polish Cour de compte) controls public spending, including in the courts which are budgetary units.

Presidents of the highest courts (the Supreme Court, the Supreme Administrative Court, and the Constitutional Court), as well as Chairman of the National Council of the Judiciary, report annually on the activities of these bodies before the parliamentary committees, however, it does not affect in any way independence of the courts and independence of the judiciary.

7. Do you have any other comments to make with regard to the relations between the judiciary and the other powers of state in your country?

Supervision over the courts should be removed from the jurisdiction of the Ministry of Justice and submitted to an authority independent of the executive power – e.g. the National Council of the Judiciary or institutions formed according to the model of the Nordic court administration.

Changes in the Law on the system of courts of general jurisdiction should be kept to a minimum. Constant changes in the organization and structure of the judiciary do not provide stabilization necessary for the proper performance of the court tasks.

Politicians, members of both the parties currently holding power and the opposition parties, should speak out on matters relating to the judiciary, courts and judges, guiding themselves by the interests of the state and the general public rather than ad hoc political objectives. One may not undermine public confidence in the courts and judges as the courts and judges are the mainstay of the power and durability of a democratic state (this is the inscription on the building of the regional court in Warsaw, dating back to the pre-war years).

Romania / Roumanie

1) Comment la Constitution, ou les autres lois de votre pays, s'il n'existe pas de norme constitutionnelle écrite, régulent-elles les relations entre le pouvoir judiciaire d'un côté, et les pouvoirs exécutif et législatif de l'autre?

La Constitution de la Roumanie prévoit à l'art. 1 al. 4 que « l'Etat est organisé selon le principe de la séparation et de l'équilibre des pouvoirs – législatif, exécutif et judiciaire – dans le cadre de la démocratie constitutionnelle ».

2) Y a-t-il ou y a-t-il eu, au cours des 10 dernières années, un débat important dans votre pays sur ce sujet, que ce soit dans le domaine politique/juridique, dans les milieux universitaires/académiques, à travers des ONG ou dans les media?

Ces 10 dernières années, de nombreux débats ont eu lieu dans les médias, du point de vue aussi bien politique, que juridique, des opinions étant exprimées dans les activités des organismes gouvernementaux par des professeurs, concernant les attributions de chacun des pouvoirs et la nécessité de respecter leurs compétences pour assurer leur équilibre.

Vu l'attribution constitutionnelle qui lui est conférée par la Constitution même, à l'art. 146 lettre e, à savoir de 'régler les conflits juridiques de nature constitutionnelle entre les autorités publiques, à la demande du Président de la Roumanie, de l'un des présidents des deux Chambres, du premier ministre ou du Président du Conseil Supérieur de la Magistrature, la Cour Constitutionnelle de Roumanie a eu à se prononcer sur des saisines concernant des conflits entre les pouvoirs de l'Etat. »

Conformément à son attribution susmentionnée, la Cour Constitutionnelle a rendu certaines décisions, dont nous fournissons en exemple la décision n° 53 du 28 janvier 2005, publiée au M.Of. n° 144 du 17.02.2005, constatant que les déclarations officielles du président de la Roumanie, publiée par le journal « Adevărul » n° 4513 du 6 janvier 2005, n'avaient pas donné lieu à un conflit juridique de nature constitutionnelle entre les autorités publiques – le président de la Roumanie et les deux Chambres du parlement de la Roumanie, dans le sens des prévisions de l'art. 146 lettre e de la Constitution ; la décision n° 435 du 26 mai 2006, publiée au M.Of. n° 576 du 4 juillet 2006 où l'on constatait que les déclarations du président de la Roumanie et du premier ministre n'avaient pas donné lieu à un conflit juridique de nature constitutionnelle entre les autorités publiques - autorité judiciaire, d'une part, et Président de la Roumanie et premier ministre, d'autre part, dans le sens des prévisions mentionnées ; la décision n° 284 du 21 mai 2014 publiée au M.Of. n° 495 du 3 juillet 2014, constatant qu'il n'existait pas de conflit juridique de nature constitutionnelle entre le Président de la Roumanie et le Gouvernement de la Roumanie, déterminé par la conduite ou les déclarations publiques du Président de la Roumanie.

Dans le courant de l'année 2014, un projet de révision de la Constitution de la Roumanie a été élaboré, la Cour Constitutionnelle s'étant prononcée sur ce texte par sa décision n°80 du 16 février 2014, publiée au M.Of., Ie partie, n° 246 du 7 avril 2014, où l'instance de contentieux constitutionnel avait constaté le caractère non-constitutionnel de plusieurs dispositions de ce projet, concrètement indiquées.

La Commission Européenne a demandé au Conseil Supérieur de la Magistrature d'exprimer un point de vue sur le projet de Loi concernant la révision de la Constitution de la Roumanie, afin d'inclure ce point de vue dans le futur rapport concernant les projets enregistrés par la Roumanie dans le cadre du Mécanisme de Coopération et Vérification, rapport apportant des arguments au sujet de plusieurs dispositions du projet de nouvelle Constitution.

Voici, dans ce qui suit, quelques-uns des points de vue exprimés par le Conseil Supérieur de la Magistrature de Roumanie :

« En ce qui concerne la détention, réglementée par l'art. 23 al. (3) de la Constitution, le Plénum du Conseil Supérieur de la Magistrature a jugé que la durée de détention ne devrait pas être mentionnée dans la Constitution, mais dans le Code de procédure pénale, ce qui permettrait une plus grande souplesse lors d'une éventuelle procédure de modification, dans l'hypothèse que la pratique prouverait l'insuffisance de la peine fixée.

Subsidiairement, dans l'hypothèse où l'on jugerait que, vu son contenu, la détention serait une ingérence majeure dans la liberté de la personne, ce qui fait que la réglementation de la durée maximale de celle-ci devrait être le fait d'une norme de niveau constitutionnel, le Conseil Supérieur de la Magistrature estime qu'elle devrait être de 48 heures.

Il a été retenu qu'une durée maximum de 48 heures ne poserait pas de problèmes du point de vue de la Convention européenne des droits de l'homme, des durées maximales de détention supérieures à 24 heures, 48 heures sinon 72 heures étant prévues, au niveau européen.

En ce sens, les dispositions de l'art.5 paragr. 3 de la Convention prévoient que la présentation devant le juge ou un autre magistrat, ayant de par la loi des attributions judiciaires, est obligatoire dès qu'une personne est privée de liberté, afin d'éviter la prise de mesures arbitraires ou injustifiées et de la protéger des mauvais traitements pouvant lui être appliqués durant la détention.

L'interprétation de la notion de « dès lors que » a connu une jurisprudence abondante et l'on connait l'importance des décisions rendues par la Cour Européenne dans des causes dirigées contre la Grande-Bretagne et la Turquie.

« Le Plénum du Conseil Supérieur de la Magistrature a jugé qu'il s'imposait d'éliminer de la Constitution la responsabilité matérielle des magistrats, cet aspect devant être réglé au niveau de la loi organique. Il a été indiqué que, dans le cas contraire, il faudrait réglementer aussi au niveau constitutionnel la responsabilité pour les préjudices causés par les représentants des autres pouvoirs de l'Etat.

Il a donc été retenu que l'art. 52 al (3) de la Constitution de la Roumanie, republiée, devrait avoir le contenu suivant : « L'Etat porte une responsabilité patrimoniale pour les préjudices qu'entrainent les erreurs judiciaires ».

Précisons que dans le cadre des débats en marge du Projet de Loi portant sur la révision de la Constitution de la Roumanie, une opinion minoritaire a aussi été exprimée, selon laquelle la responsabilité matérielle des magistrats ne devait intervenir que pour l'exercice de mauvaise foi de leur fonction.

Mentionnons aussi que le Conseil Supérieur de la Magistrature avait précédemment toujours estimé que l'exercice du droit à une action régressive devait continuer à être laissée à la latitude du titulaire de l'action, qu' est l'Etat et ne devait pas devenir un obligation, ceci étant la règle générale de droit, en ce qui concerne l'exercice des droits par leurs titulaires.

En ce qui concerne l'Etat, le système de la responsabilité objective est donc adéquat, l'Etat – en sa qualité d'administrateur du déroulement des activités judiciaires, au niveau législatif, aussi bien que fonctionnel et financier – étant responsable et devant couvrir les préjudices subis en raison des erreurs judiciaires commises par l'exercice, de mauvaise foi ou accompagnée de graves négligences, de sa fonction par un procureur ou juge.

Par contre, toute responsabilité d'une personne (pénale ou civile délictuelle), y compris celle d'un magistrat, doit reposer sur l'idée de culpabilité, s'agissant en l'espèce d'une culpabilité dans l'exercice des attributions professionnelles du magistrat.

En d'autres termes, la responsabilité matérielle du juge ou du procureur ne saurait être engagée objectivement (comme c'est le cas pour l'Etat), mais seulement de façon subjective, uniquement donc dans la situation où celui-ci commet un acte personnel grave, dans l'intention de porter préjudice à autrui, ou dans le cas où il a commis, une faute grave, ayant entrainé une erreur judiciaire déterminante pour porter préjudice.

L'erreur judiciaire se rapporte essentiellement à une solution concernant le fond de la cause, qui ne correspond pas à une réalité juridique ultérieurement établie. Cette erreur n'est cependant pas due, exclusivement et, parfois, même pas partiellement, à l'activité du juge ou du procureur.

Parmi les erreurs judiciaires récentes, certaines étaient dues au fait qu'au moment du jugement et de la condamnation pour tel acte pénal, certaines preuves n'étaient pas accessibles (par exemple l'analyse ADN), ou que des déclarations non conformes à la vérité avaient été faites, ou que l'on avait découvert des faits et circonstances nouvelles, inconnues de l'instance au moment du prononcé de la solution définitive.

La raison d'être des voies d'attaque extraordinaires, capables d'annuler une décision de justice définitive, est justement la circonstance que l'instance du premier procès ne connaissait pas les nouvelles preuves ou les actes, infractionnels compris, liés à la cause, ce qui fait que la solution première correspondait à la situation des faits, tels qu'ils avaient été établis, à partir de l'ensemble des preuves connues à ce moment-là.

Dans certains cas d'erreur judiciaire, vues les preuves possibles et administrées, l'erreur ne serait pas celle du magistrat seul, mais une erreur commune, avant la découverte des faits nouveaux. Mises à part les limites imposées par le stade atteint par les techniques d'investigation qui, dans leur évolution, peuvent infirmer les conclusions antérieures, il ne faudrait pas négliger non plus le facteur humain, qui pèse lourd dans l'ensemble du probatoire, aussi bien dans les causes pénales, que dans celles civiles.

L'on a jugé opportun, en ce sens, de prendre en ligne de compte l'un des principes fondamentaux consacrés par le Conseil Consultatif des Juges Européens, dans le document intitulé Magna Carta des Juges (Principes fondamentaux), selon lequel : « Les erreurs judiciaires doivent être remédiées dans le cadre d'un

système de voies d'attaque approprié. Tout remède portant sur d'autres déficiences dans l'administration de la justice implique uniquement la responsabilité de l'Etat ».

De même, dans l'Avis n°3 du Conseil Consultatif des Juges Européens, soumis à l'attention du Comité des Ministres du Conseil de l'Europe à propos des principes et règles concernant les impératifs professionnels applicables aux Juges et surtout à la déontologie, aux comportements incompatibles et à l'impartialité, il est dit : « Généralement, par principe, les juges devraient être complètement exempts de responsabilité, en ce qui concerne les plaintes les visant directement pour la bonne foi dans l'exercice de leurs fonctions. Les erreurs juridiques, qu'ils concernent la juridiction ou la procédure, dans l'appréciation et l'application de la loi ou dans l'évaluation des preuves, doivent être rectifiées en appel ; d'autres erreurs juridiques, qui ne peuvent être rectifiées de cette manière, doivent conduire, tout au plus, à une plainte du litigant mécontent contre l'Etat ».

La conclusion du CCJE est qu'il « n'est pas bon qu'un juge soit exposé, en ce qui concerne l'exercice de ses fonctions juridiques, à une quelconque responsabilité personnelle, même en dédommagement de l'Etat, à l'exception d'une faute intentionnelle de sa part ».

Le Conseil Supérieur de la Magistrature estime très important, d'autre part, que le texte portant révision de l'art. 52 al. 3 de la Constitution de la Roumanie réunisse les normes européennes en la matière, respecte les opinions/avis constamment exprimés par la Commission de Venise (Commission pour la démocratie par le droit).

Le rapport de la Commission de Venise sur l'indépendance du système judiciaire, n° CDL-AD (2010) 004, soutient en ce sens dans la Partie I e (Indépendance des Juges), au paragraphe 60 du point 8 de la Section III, que les juges devraient pouvoir être rendus responsables uniquement dans le cas où ils ont commis une infraction : pour ce qui est, néanmoins, « des actions civiles dirigées contre eux pour des actes de bonne foi, dans l'exercice de leurs fonctions », ils devraient bénéficier d'une protection, en accord avec les normes générales.

L'opinion de M. James Hamilton, membre suppléant de la Commission de Venise, exprimée lors des débats du Forum Constitutionnel, était que les juges ne sauraient être libres dans leur jugement, s'ils sont obligés de payer d'éventuels préjudices.

D'autre part, après analyse de la façon dont la responsabilité matérielle des magistrats est engagée dans les Etats membres de l'Union Européenne, l'on peut constater qu'il existe des Etats, comme l'Estonie, où la responsabilité civile du magistrat ne saurait être engagée, l'Etat étant celui qui compense les dommages causés aux tiers par les autorités publiques dans l'exercice de leurs attributs de pouvoir (y compris dans la situation spéciale où, dans la procédure judiciaire/le prononcé d'une décision de justice, les magistrats ont commis un acte pénalement incriminé). De même, en Lettonie, le juge ne répond pas financièrement pour les dommages imposés à une personne par une erreur judiciaire. Dans les cas prévus par la loi, les dégâts sont supportés par l'Etat.

Un exemple récent est celui des Pays-Bas, où la responsabilité personnelle des juges a été écartée depuis janvier 2001, ceux-ci profitant d'une immunité en ce qui concerne la responsabilité civile. La personne ayant subi un préjudice peut intenter une action en dommages et intérêts contre l'Etat, mais l'Etat n'a pas de droit récursoire contre le juge coupable, qui ne saurait être tenu pour responsable que du point de vue pénal ou pour raisons disciplinaires.

En France, l'Etat est tenu pour responsable, en principe, pour les préjudices portés par les erreurs judiciaires ; la responsabilité civile du magistrat pour l'acte commis, lié à l'exercice des fonctions judiciaires, ne peut être engagée que dans le cas de l'exercice par l'Etat d'une action récursoire, pour un acte personnel grave, commis dans l'intention de porter préjudice.

En Allemagne, par dispositions expresse, - art. 839 al. (2) du Code civil - la possibilité d'engager la responsabilité pour non accomplissement des obligations, dans le cadre du jugement d'un procès est expressément circonstanciée de façon limitative, comme suit : « Tout fonctionnaire de l'Etat qui, dans le cadre du jugement d'un procès, ne remplit pas les obligations imposées par ses fonctions, ne répond du préjudice qui en résulte que si cette infraction est passible d'une peine punie par la procédure pénale. Cette disposition n'est pas applicable en cas de refus ou de retard dans l'exercice de la fonction contrevenant au devoir professionnel »

Cette cause légale d'exonération est nommée privilège du juge et le champ d'application de cette disposition est très large, car il ne vise pas uniquement la décision de justice, mais aussi toute activité du juge, objectivement liée à la solution d'un litige.

Partant de ces prémisses, l'on a estimé que la modification proposée pour l'art. 52 al. (3) de la Constitution – « (3) L'Etat répond par son patrimoine pour les préjudices causés par les erreurs judiciaires. La responsabilité de l'Etat est établie dans les conditions de la loi, y compris pour les magistrats ayant exercé leurs fonctions de mauvaise foi ou avec une négligence grave. L'Etat exerce le droit récursoire, dans les conditions de la loi ». – ne répond pas

aux impératifs signalés, ce qui fait que la modification de cette disposition constitutionnelle dans le sens proposé ne s'impose pas. »

3) Y a-t-il eu un débat important sur la question de la « retenue judiciaire » ou la « modération judiciaire » à l'égard de l'exercice de la fonction judiciaire vis-à-vis des autres pouvoirs de l'État? En particulier, y a-t-il des exemples où l'opinion publique et/ou les autres pouvoirs de l'État ont laissé entendre que le pouvoir judiciaire (ou un juge ou un tribunal dans une décision particulière) a interféré de manière inacceptable dans le domaine du pouvoir ou de la compétence discrétionnaire de l'exécutif ou du législatif?

Il n'y a pas eu de débat important concernant une ingérence du pouvoir judiciaire dans les compétences d'un autre pouvoir : législatif ou exécutif. Dans leurs prises de position, les représentants des pouvoir législateurs et exécutifs ont souligné qu'ils respectaient les décisions de justice et appliquaient leurs dispositions.

4) a) Dans votre pays, au cours des 10 dernières années, y a-t-il eu des changements dans la constitution/loi concernant la justice (dans le sens le plus large: la structure, les tribunaux, les juges) qui ont pu conduire à dire que la relation entre le pouvoir judiciaire et les autres pouvoirs de l'État ou la séparation des pouvoirs dans votre pays ont été affectées?

b) Dans votre pays, y a-t-il des propositions actuelles de modification de la loi visée sous a)? Dans chaque cas, veuillez indiquer la raison «officielle» pour les changements ou les modifications proposées.

c) Dans votre pays, y a-t-il des discussions sérieuses ou des débats (dans les milieux politiques, par le public en général ou dans les media) en vue d'introduire des changements dans la loi visée sous a)?

a) Il n'y a pas eu de modifications législatives portant sur les structures des organes de la justice, qui affectent l'équilibre de la séparation des pouvoirs dans l'Etat.

Au contraire, la loi n° 304/2004 sur l'organisation judiciaire a été modifiée dans le sens de l'introduction de nouvelles formations de jugement au niveau de la Haute Cour de Cassation et Justice, reposant sur la spécialisation des juges en matière pénale et autres (les complets de 5 juges), un mécanisme pour l'unification de la pratique non unitaire, avec des formations spécifiques, en matière pénale et civile, les complets jugeant les recours dans l'intérêt de la loi ayant 25 juges, tandis que le complet visant des questions de droit au niveau des sections pénales et civiles, étant composé de 9 juges ; on a introduit aussi d'autres dispositions concernant la promotion des juges au niveau de la Haute Cour de Cassation et Justice, en matière de responsabilité disciplinaire, le tout pour assurer l'indépendance des juges et procureurs, pour leur conférer des garanties suffisantes dans l'obtention d'un procès équitable, dans l'intérêt des justiciables.

b) Dans sa décision, la Cour Constitutionnelle a déclaré non constitutionnelles les propositions figurant dans le projet de loi portant révision de la Constitution, en ce qui concerne la compétence du Parquet près la Haute Cour de Cassation et Justice à poursuivre et envoyer en justice, respectivement la compétence de jugement de la Haute Cour de Cassation et Justice concernant les sénateurs et députés ; en ce qui concerne l'augmentation du nombre des membres du Conseil Supérieur de la Magistrature, représentant la société civile ; dans les considérations exposées, la Cour Constitutionnelle « constate que la réglementation constitutionnelle de la compétence à poursuivre et faire passer en jugement le Parquet près la Haute Cour de Cassation et Justice, respectivement la compétence de jugement de la Haute Cour de Cassation et Justice concernant les sénateurs et députés constituent, du point de vue de ces derniers, une garantie constitutionnelle d'ordre procédural, destinée à protéger l'intérêt public, à savoir leur possibilité de légiférer en exerçant leur mandat… Or, en abrogeant les dispositions mentionnées, on a supprimé la garantie constitutionnelle, circonstance qui est de nature à enfreindre les prévisions de l'art. 152 al.2 de la Constitution. .. La Cour constate que les prévisions concernant la compétence de juger de la Haute Cour de Cassation et Justice se retrouvent et sont conservées dans la nouvelle réglementation, pour d'autres dignités publiques : les dispositions de l'art. 96 al.4 concernant la mise en accusation du président de la Roumanie pour haute trahison, respectivement l'art. 109 al. 2 concernant la responsabilité des membres du Gouvernement. Dans cette perspective, la proposition de modifier uniquement les dispositions de l'art. 72 al. 2, concernant la responsabilité des membres du parlement, apparait comme discriminatoire, de nature à créer une inégalité de traitement juridique entre les personnes qui occupent des fonctions publiques importantes… » Pour ce qui est de la majoration du nombre de membres du Conseil Supérieur de la Magistrature, qui représentent la société civile, la Cour Constitutionnelle fait référence à une décision antérieure de la même instance, respectivement la décision n° 799 du 17 juin 2011, se rapportant à au spécifique de l'activité de cet organisme, à propos des implications de l'activité de cette catégorie professionnelle. « L'actuelle proposition conserve le nombre de magistrats du Conseil Supérieur de la Magistrature, mais augmente le nombre de représentants de la société civile, ce qui entraine un changement proportionnel de la représentation au sein du Conseil. » jugeant que ceci est de nature à avoir des effets négatifs sur l'activité du système judiciaire.

5) Dans votre pays, des observations importantes ont-elles été formulées par des responsables politiques ou d'autres groupes pertinents concernant le rôle du pouvoir judiciaire et des tribunaux en leur qualité de troisième pouvoir de l'État? Si oui, veuillez indiquer brièvement leur nature et leur contenu et indiquer la réaction de l'opinion publique ou les rapports des media faisant état de "l'opinion publique".

Le Conseil Supérieur de la Magistrature de Roumanie a réagi fermement, par l'instrument légal que lui confère la loi, afin de défendre l'indépendance du système judiciaire, surtout lorsque les représentants du pouvoir politique ont formulé des accusations ponctuelles, contre les juges et procureurs, concernant les actes procéduraux émis ou, en général, contre le système judiciaire.

Voici quelques exemples des communiqués de presse du Conseil Supérieur de la Magistrature de Roumanie :

- Le 18 septembre 2012, le Plénum du Conseil Supérieur de la Magistrature a admis la demande de défendre l'indépendance du système judiciaire, suite à la présentation dans les médias de certaines affirmations faites par des représentants des partis politiques concernant l'activité du Parquet près la Haute Cour de Cassation et Justice ;

- Le 20 août 2013, le Plénum du CSM a décidé qu'il convenait de défendre l'indépendance et l'intégrité des procureurs de la Direction Nationale Anticorruption, par rapport aux affirmations faites par le vice maire de la ville de Ploiesti, dans une interview accordée, à cette date-là, à la publication on-line « INCOMOD », où il estimait que leurs activités avaient des dessous politiques ;

- « Dans sa séance du 9 octobre 2014, le plénum du Conseil Supérieur de la Magistrature a pris connaissance avec une profonde inquiétude des déclarations lancées dans l'espace public par certains hommes politiques et autres personnes publiques, concernant le déroulement d'enquêtes pénales et la solution de certaines causes figurant au rôle des instances et des parquets. Face à ces déclarations, le plénum du Conseil a analysé dans quelle mesure l'indépendance de la justice était affectée par des activités en déroulement sur la scène politique roumaine, dans un contexte électoral et, en sa qualité de garant de l'indépendance de la justice, il a demandé à tous les acteurs politiques et à toutes les personnes publiques d'éviter d'utiliser la justice ou certains sujets concrets ayant trait à la justice dans les campagnes électorales, respectivement d'éviter de toucher dans leurs disputes politiques à l'indépendance de la justice, qui est un attribut fondamental du système judiciaire… ».

6) Dans quelle mesure, le cas échéant, la bonne administration de la justice est-elle affectée par l'influence des autres pouvoirs de l'État (par exemple, le ministère des finances à l'égard de l'administration des budgets, le ministère compétent en matière de technologie de l'information dans les tribunaux, la Cour des Comptes, les enquêtes parlementaires etc. ou toute autre influence extérieure par d'autres pouvoirs de l'État)?

La bonne administration de la justice en Roumanie a été affectée, du point de vue des sommes du budget allouées aux investissements et à l'embauche de nouveaux juges et procureurs, en ce qui concerne leur financement, dans les conditions de crise financière.

Des demandes d'augmentation du budget ont été formulées par le Ministère de la Justice, qui a souvent reçu des sommes insuffisantes pour améliorer l'aspect du siège des instances et en construire de nouveaux, des efforts financiers étant faits pour mener à bien des travaux entamés, et augmenter le nombre de postes payés.

7) Avez-vous d'autres commentaires à faire sur les relations entre le pouvoir judiciaire et les autres pouvoirs de l'État dans votre pays?

Dans une société démocratique, les relations entre les pouvoirs de l'Etat – législatif, exécutif et judiciaire - sont construites dans le respect des attributions spécifiques des autres, par un processus de collaboration interinstitutionnelle, en établissant des normes concrètes, transparentes, par une communication ouverte, en poursuivant la réalisation des buts qui les animent, chacun, dans l'intérêt des citoyens.

L'équilibre des pouvoirs est assuré uniquement par des mécanismes viables, reposant sur la loi, le pouvoir judiciaire devant être indépendant pour permettre de réaliser une justice équitable, lorsqu'il est saisi par les autres pouvoirs, par les institutions qui les représentent.

Slovak Republic / République slovaque

1) How does the Constitution, or the other laws of your country, if there is no written Constitutional document, regulate relations between the judicial power on one side, and the executive and legislative powers on the other side?

According to the Art. 141 of the Slovak Constitution, Justice in Slovakia is administered by independent and impartial courts and at all levels independently of other state bodies. Under the Art. 143 the judicial system shall be composed of the Supreme Court of the Slovak Republic and other courts, while further details of the judicial system shall be laid down by law. Under the Art. 145 the President of the Slovak Republic shall appoint and recall judges on the basis of a proposal of the Judicial Council of the Slovak Republic; they are appointed without time restrictions.

2) Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

Since 1993 the judicial system in Slovakia was gradually more and more approaching to the European standard. In the nineties were established the councils of judges at all the court levels, in 2002 the Judicial Council, in 2003 was created separate budget chapter of the Supreme Court and in general the position of judiciary has been strengthen during the process of accession of Slovakia to EU in 2004.

But, after the parliamentary elections in June 2010 a wide campaign was launched by the Government directed against judges and courts highlighting the catastrophic state in the Slovak judiciary despite the fact that, the speed of judicial proceedings has been improved at average and the number of pending cases was substantially reduced. This culminated in elaboration of the governmental draft amendments to the statutory laws of judges without any cooperation with the Judicial Council, the authorities of the judicial self-governance or discussion in the professional public about the need for such new arrangements. In addition, these amendments has significantly intervened in the independence of judges and the judiciary particularly in the fields of appointment, nomination and promotion of judges, disciplinary proceedings education and training of judges and remuneration. At the same time raised profanation of judges and the Judiciary by politicians, NGOs and media (for more details please see my letters to former CCJE President Mr. Orlando Alfonso from 3 February and 27 September 2011). Some of these changes have been approved, some of them Constitutional Court declared unconstitutional, some were changed after the general elections in 2012.

But the biggest interference with judicial independence were constitutional amendments approved by the Parliament in 2014 (for more details please see also answer under 4).

3) Has there been any significant debate on the issue of "judicial restraint" or "judicial moderation" with regard to the exercise of the judicial function vis-a-vis the other powers of the state? In particular, are there examples where public opinion and/or the other powers of state have suggested that the judiciary (or an individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

No, as far as I know. However, very often, politicians, NGOs and the media comment on the decisions of the courts even before the judgments become final and express their expectations of how the court should decide in particular case.

4) a) In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?

b) In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the "official" reason for the changes or proposed changes.

c) In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view of introducing changes in the law as referred to under a)?

Yes, in 2011 were adopted amendments to the statutory laws of judges (please see the answer under 2) and in 2014 Slovak Constitution was amended. Positive changes in the Constitution are new creation of the Judicial Council (9 from 18 members are judges elected by their peers) and certain broadening of its competences.

But negative changes are very serious. As I wrote in my letter from 11 June 2014, according to this amendment (art. 154d) all judges must fulfill the condition of their "security reliability". This lies in the fact that judges must ask

for so called “security clearance”, during which Slovak Intelligence Services, the police and the National Security Office will gather about the judge and his family a variety of information, subsequently this information will be evaluated by the secret services and a judges who will be indicated as “unreliable” will then be summoned to the Judicial Council, which will vote on whether the judge can or can not remain in his/her office. During this procedure judge concerned will not be guaranteed any rights as those during the disciplinary procedure. This judicial cleansing should have started from 1 September 2014, but according to the Constitutional Court decision they have been temporarily postponed relating to all judges in office. However the condition of “security reliability” must comply with all new judges. It is a part of competition proceedings.

Second negative change is in art. 136(3), by which the Constitutional Court gives consent only to the taking into custody of a judge. Formerly consent was also required to the criminal prosecution of a judge.

5) In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please briefly identify their nature and content and indicate the reaction of the public or media reporting of “public opinion”.

Unfortunately, the term “third power of the state” in relation to the Slovak judiciary sounds rather ironically. Independence of judges is “explained” by politicians, some NGOs and media in that sense, that judges think they can do what they want, that they act without any control as they are controlling themselves and are in fact an untouchable close society. That is the reason why appointment of judges, nomination, promotion and competition proceedings should be in the hands of executive power, disciplinary proceedings of judges should be public, in disciplinary chamber should seat also laics. There are also voices regarding to the restriction of the remuneration, because in public opinion only judges are responsible for unenforceability of law, for delays etc...The criticism of the court decisions, specific comments expressing doubts about the correctness of judicial decisions, as well as the profaning and offensive statements of the executive and legislature representatives addressed to judges and the judiciary as a whole became a part of everyday life in Slovakia.

6) To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budgets, the relevant ministry with respect to information technology in courts, the cour de compte, parliamentary investigations etc. or any other external influence by other powers of the state)?

Administration of justice in Slovakia is fully dependent on the executive and legislative power. Although the Supreme Court has a separate chapter in state budget the amount of the chapter depends on the decision of the Ministry of Finance. Other courts have not separate chapters and, in financial, staff, material and technical matters are totally dependent on the Ministry of Justice

7) Do you have any other comments to make with regard to the relations between the judiciary and the other powers of state in your country?

Before the parliamentary elections in 2012, the then opposition leaders promised to improve the situation in the judiciary, especially judges working conditions, better legislation and correct errors caused by the previous government. Unfortunately after winning parliamentary elections, none of these promises were fulfilled, on the contrary, changing the Constitution affected the independence of the judiciary in an unprecedented manner.

In my opinion the CCJE and its work is now needed more than ever. The most recent developments not only in Slovakia, but also in some of the other member states gives cause for ongoing concern for the protection of the rule of law.

Slovenia / Slovénie

1) How does the Constitution, or the other laws of your country, if there is no written Constitutional document, regulate relations between the judicial power on one side, and the executive and legislative powers on the other side?

According to the Constitution of the Republic of Slovenia (hereinafter: the Constitution) Slovenia is a state governed by the rule of law (Article 2). Judges are independent in the performance of the judicial function and are bound only by the Constitution and the laws (Article 125) as well as by the general principles of international law and ratified and published international treaties (Article 8). An important prerequisite of the independent judicial system is a constitutional rule against ad hoc tribunals (Article 126, Paragraph 2). The Constitution also enshrines the standard (lawful, natural)-judge principle (See Article 23 of the Constitution: “Everyone has the right to have any

decision regarding his rights, duties and any charges brought against him made without undue delay by an independent, impartial court constituted by law. Only a judge duly appointed pursuant to rules previously established by law and by judicial regulations may judge such an individual") and the principle that judges must not be part of the executive branch of power or bodies of political parties (See Article 133 of the Constitution: "Judicial office is not compatible with office in other state bodies, in local self-government bodies and in bodies of political parties, and with other offices and activities as provided by law.") The principle requiring post-decisional independence of a judgment and its respect by other branches of power is proclaimed by Courts Act (hereinafter: CA). According to the Article 2 of CA, any natural or legal person in the Republic of Slovenia shall respect a final decision of judicial authority. The decisions of judicial authority shall be binding on courts and all other state bodies of the Republic of Slovenia. The enforcement of a court decision cannot be hindered by a decision of another state body.

Status of judges is governed by Articles 125 to 134 of the Constitution and by the Judicial Service Act (hereinafter JSA). Judges are elected by the National Assembly on the proposal of the Judicial Council and their office is permanent until retirement, no later than upon reaching 70 years of age. They have the status of public officials but are independent in the performance of the judicial function and are bound only by the Constitution and laws. Judges enjoy immunity for opinions expressed during decision-making in court. If a judge is suspected of committing a criminal offence in the performance of judicial office, s/he may not be detained or subject to criminal proceeding without the consent of the National Assembly (Article 134 of the Constitution).

The CA and the JSA both address the issue of the independence and impartiality of judges, e.g. by proclaiming that judges must always act in such a way as to safeguard the impartiality and independence of their office and the reputation of the judicial service (Article 2 JSA). The JSA also contains provisions on incompatibilities (Articles 41 to 43) and a prohibition to accept gifts (Article 39).

2) Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

The independence of the judiciary in Slovenia is guaranteed by the Constitution as well as the aforementioned laws, preventing any unconstitutional or unlawful interference with the judiciary by the other two branches. In theory, the representatives of the executive and the legislative branch are committed to the principle of the independence of the judiciary. However, in practice the perception of this principle differs, mostly due to misunderstandings and ignorance of the status and role of judges and the judiciary itself. One can argue that in Slovenia a serious academic discussion on this topic is missing, as, at least so far, most debates have been more or less interest-oriented if not outright populist.

Some discussions have been held within the judiciary to determine whether the Constitution needed to be amended with a view to eliminating the role of the National Assembly in the appointment procedure of judges and increasing the role of the Judicial Council. These discussions did not result in a proposal to change the current system. It is important to stress that the initial election within the judicial service does not raise particular issues, since a single candidate is proposed for election to a post and in practice the National Assembly, who elects the candidate, generally follows the proposals made by the Judicial Council. The role of the National Assembly is therefore mostly of a symbolic nature.

However, the National Assembly also appoints the President of the Supreme Court of the Republic of Slovenia on the proposal of the Minister of Justice, after previously acquiring the opinion of the Judicial Council and the Plenary Session of the Supreme Court, for the period of six years with the possibility of reappointment. The two latest elections to the post of the President of the Supreme Court, when the National Assembly has refused to elect the proposed candidates (two candidates were refused and a third candidate was apparently subject to a smear campaign) have been the occasion of heated political debates in Parliament, which were widely relayed in the press and have fuelled the perception existing in Slovenia that judges could be subjected to political influence.

Bearing in mind that in Slovenia judges may be members of political parties, this role of the National Assembly in the election of higher judges could well be seen as problematic in relation to their necessary independence from the executive and legislative power. The independent position of the judiciary can at least be symbolically weakened by the competence of the legislative branch in cases where certain proposed candidates for higher judicial positions might not be acceptable to the ruling political option.

3) Has there been any significant debate on the issue of "judicial restraint" or "judicial moderation" with regard to the exercise of the judicial function vis-a-vis the other powers of the state? In particular, are there examples where public opinion and/or the other powers of state have suggested that the judiciary (or an individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

Regarding the judicial intervention in government activity, it is worth noting that the legislative and the executive branch, in particular Ministry of Justice, often request the opinion of the judiciary on the draft laws (prior to being passed in the Parliament) and applicable laws as well. Judiciary regularly gives opinions on drafts of the new legislation, with the aim to improve the weaker elements of the legislation as are seen from the judge's perspective. Judges and representatives of the judiciary also often participate in working groups, established by the Ministry of Justice, which are responsible for drafting new legislation. Although the opinions given by the judiciary are taken into consideration they are (too) often not included in the final version of the new legislation.

As mentioned above, judges are often asked to participate in assignments that have a strong association with the executive branch (as explained, they are appointed to the working groups of the Ministry of Justice to study the possible solutions to improve legislation and there are also judges seconded to work to the Ministry of Justice). Although this situation is temporary it could be inconsistent with the judicial function, which requires total independence and impartiality of the judge in adjudicating disputes, so the judges involved should always act with restraint and should always keep in mind the position, that the judiciary must be separated from the other two branches and cannot assume legislative or executive functions.

This extra caution is not needed when law expressly provides that a judge should exercise a certain extra judicial function, such as serving as members or presiding over commissions (e.g. in Slovenia a president of the National Electoral Commission and his deputy must be Supreme Court judges)

Recently there were some discussions over the election of a district judge to a position of a member of National Assembly. She was a candidate on the list of a political party which won the latest elections in Slovenia. According to the provision of the Article 40 of JSA a judge who is elected a member of National Assembly shall have his judicial office, and all rights and duties deriving from judicial service suspended. But this situation nevertheless raised some questions of what will occur if the judge wants to return to the judicial office, since the appearance of independence and judge's impartiality may be affected in the eyes of the public due to her performance as a member of National Assembly. It has to be mentioned that in Slovenia no cooling-off period between the end of service in a legislative (or executive function) and (re)assuming a judicial office is required, which might serve the purpose of separating of powers in the eyes of public.

Finally, it should be noted that the Constitutional Court has been under public scrutiny in this context far more often than the regular courts. It was repeatedly criticized for its excessive activism, in terms that some of its decisions excessively interfered with the competence of the legislative branch.

4) a) In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?

b) In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the "official" reason for the changes or proposed changes.

c) In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view of introducing changes in the law as referred to under a)?

In 2013 Ministry of Justice has proposed an amendment to the Courts Act (CA), which following their formal explanation "aims to achieve greater efficiency of courts and judges by strengthening the autonomy and responsibility of the courts". In the context of these changes it proposed to set up "judicial inspection" to monitor the implementation of judicial administration by the presidents of the courts. Despite sharp (severe) opposition of the Slovenian Association of Judges, Judicial Council and the Supreme Court the original draft was only slightly mitigated. After the National Assembly (Parliament) had adopted amendments to the CA they entered into force on 10th August 2013. These amendments triggered a lot of negative reactions by the judiciary.

Pursuant to the new amendments the CA introduces a new Article 65a, in which the Ministry of Justice establishes a department of the Ministry of Justice with a task to supervise the organization of management of the courts.

The scope of jurisdiction of the department is:

- to exercise control over the administration of justice, in particular with regard to the organization of the management of the courts,

- control of the fulfillment of quality standards of the courts in carrying out matters of the administration of justice,

- to carry out inspection concerning the application of the Courts Fees Act,

- to supervise the application of the Court order and carry out administrative supervision in accordance with the Court order.

As far the latter task is concerned, inspectors (who shall not be judges, but officials - their qualifications are yet unknown) in dealing with these matters shall be authorized to have an insight not only into registers and documents relating to the management of the courts, but also into open files of pending cases. Accordingly, the president of the court may be required or recommended to take certain measures (also not defined yet).

It is true that Article 65a paragraph 5 provides that the department must not infringe the independence of judges, the presumption of innocence and fair trial guarantees, but based on previous bad experiences (when the Ministry of Justice could inspect only files of non-pending cases and only with regard to the application of the Courts Fees Act), the judiciary is convinced that such provision is not a sufficient guarantee.

The judiciary believes that the establishment of this department which is not consistent with the Constitution and the principle of separation of powers leaves the door wide open to the influence and control over concrete cases and presidents of courts by the executive branch. In the grounds of the proposed amendments the Government stated that it is the objective of the department to establish control over the operation of the courts and to enhance the accountability of the courts. Based on the findings of the department, the Minister of Justice may propose the dismissal of presidents of courts or initiate (disciplinary and other) proceedings against a judge. The introduction of such control is not only contrary to the Constitution, but also to the basic principles on the independence of the judiciary, separation of powers and the rule of law as enshrined in numerous international documents. The change of the law coincided with the time when the Slovenian courts convicted several politicians and businessmen of corruption and abuse of office. It should be stressed that the view of the Legislative and legal service department of the parliament supporting the opinion of the judiciary was not taken into account.

Another way in which the executive branch through its majority in the legislative tried to undermine the independence of the judiciary was the decision on the salaries of judges. The issue has given rise to controversy in Slovenia over the past few years. Judges' salaries are set out by the JSA, in accordance with the Public Sector Salary System Act. Changes to the legislation were proposed, which were challenged by judges before the Constitutional Court, mainly for reasons of alleged dis-proportionality between judges' salaries and salaries of officials in other branches of power. The Constitutional Court ruled in favor of the judges, stating that the government had not given convincing reasons for this dis-proportionality, which therefore breached the principle of separation of powers. The government then introduced some changes, which were again challenged, this time by the Administrative Court, before the Constitutional Court. The Constitutional Court declared them unconstitutional, repeating that judges should be treated in a manner comparable to officials of the two other branches of power. As a result, judges' salaries were aligned with those of comparable officials in the legislative and executive powers in 2009, according to a new version of the Public Sector Salary System Act. Following the second decision of the Constitutional Court the new government prepared a new version of the Public Sector Salary System Act in 2009 that significantly changed the classification of salary classes for judges in order to be in line with the requirement of the separation of powers. These classifications were opposed by the opposition in parliament that wanted a referendum on the issue of salaries of judges. The Constitutional Court determined that a referendum on these matters could have unconstitutional consequences. However, due to the current economic situation, the law, which adjusted the salaries of judges with the other two branches of power has been 'frozen' until the economic situation improves, so de facto the salaries of judges remain at an unconstitutional level. Since 1 June 2012, the remuneration of the officials of all three state powers (including judges) has been reduced by 8% for reasons of economy and this will remain in force until economic growth reaches and exceeds the rate of 2.5 % GDP.

5) In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please briefly identify their nature and content and indicate the reaction of the public or media reporting of "public opinion".

It should be noted that Slovenian judges live in a society where criticism of public institutions is the norm. Excessive popular pressure and irresponsible journalists, hungry for sensational pieces, have too often put judges in an unbearable position which threatened their independence. Direct criticism from the media, government or parliamentarians might risk compromising the independence of the judiciary. However, the level of influence is always a question that has to be resolved individually, by the judge deciding upon the individual case. Public expectations about the outcomes of specific cases might have a bearing on the decision of the judge, but this can hardly be proven. Generally, it can be said that so far government action or inaction has only indirectly affected the independence of the judiciary in the sense that there are no known cases, where the decision-making of the judge was directly influenced by the executive.

What is very common and at the same time very problematic, is the general attitude of dissatisfaction with the work of courts and judges. Politicians constantly repeat the fact that the public trust in the judiciary is very low and use this theme to gain political points. Directly, this does not influence the independence of judges, but it might undermine it even further in the long run. The judiciary very rarely responds to criticism. Mainly it does so in cases, where the information used by the critics is manipulated or taken out of the context. In practice, this is done by official statements of the president of the Supreme Court or the Judicial Council.

On the other hand, the lack of trust by the public seems also to be a result of judicial backlogs in the recent past, weak internal management of courts and lack of a public relations policy. Society expects the courts not only to ensure procedural fairness, but also to be efficient. It can be assessed that Slovenia, in spite of current positive trends in this field, is still suffering from excessive duration of litigations and backlogs in civil and criminal justice. This undermines the reputation of the courts in public opinion as well as the legal certainty. Both, the European Court of Human Rights and the Constitutional Court delivered numerous judgements stating that there is a structural defect in the functioning of Slovenian civil and criminal justice and that the right to trial within reasonable time is too often violated.

The level of the political culture in Slovenia still does not meet the standards which exist in democratic states. This was clearly visible in the last few months when severe attacks on the judiciary and judges occurred due to the criminal proceeding in which the leader of the main opposition party was accused of corruption and then sentenced to two years of prison. A part of the political opposition argued in the media that the trial was unfair and illegitimate, politically motivated, and used to abuse the judiciary for political purposes, without presenting any facts or evidences to support their claims. The leader of the main opposition party was pictured as the victim of a legal fiction and it was stated that the Slovenian judiciary has never been properly reformed and that numerous judges and public prosecutors simply continue to work as they did when they began working in communist Yugoslavia. In this context, the judiciary was shown as ineffective, incompetent, politicized, and strong and inappropriate language was also used for describing judges.

This kind of demonization of the judiciary, on the basis of one individual decision could have led to the demolishing of the legitimacy of the judiciary, resulting in paralysis of decision-making process and intimidation of judges. The attacks, especially because they were coming from the representatives of politics, threatened to compromise the independence of the judiciary as a whole, since they exceeded tolerable limits. In this context, questions and several debates were raised on how far the politicians criticism on the judiciary can go in terms of freedom of expression not to interfere with the integrity and the fundamental principles of independence of judiciary.

6) To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budgets, the relevant ministry with respect to information technology in courts, the cour de compte, parliamentary investigations etc. or any other external influence by other powers of the state)?

Since the scope of the executive and legislative branch's control over budgeting of the judiciary is a great indicator of the judicial independence it is important to stress here that Slovenian judiciary is not able to determine its own budget. The main coordinator, proposer and negotiator for the budget of the judiciary and Judicial Council is the Supreme Court of Republic of Slovenia, but the amount of financial resources for the salaries of judges and other judicial personnel and for the operating costs of the courts is in the end determined in the state budget, which is adopted by the General Assembly on the basis of proposal of the Ministry of Finance. The legal basis for the procedure for adoption of the budget are the Public Finance Act and the Regulation for the Basis and Procedures for the Preparation of the Proposal State Budget.

The establishing of the budget may be shown through an eight step scheme:

- Establishing of a macroeconomic framework

- Specifying of the development priorities and tasks of the Government

- Setting up of a framework cross section of the budget in accordance with the program and the plans

- Budgetary Manual of the Ministry of Finance

- Preparing of detailed financial plans of direct budget users

- Negotiations with the Ministry of Finance

- Governmental proposal of the state budget

- Discussion and adoption of the budget and the Law on Execution of the Budget, within Parliament.

The Supreme Court as the entity proposing the financial plans of all the courts has a specific role in this process. Although the Courts Act provides that "the volume of financial resources for the salaries of judges and judicial personnel, and for the operation costs of courts, shall be provided within the framework of the state budget of the Republic of Slovenia for all courts on the basis of financial plans of individual courts at the budget user, the Supreme Court of the Republic of Slovenia", the Supreme Court has limited access to the first four phases, which are crucial. Once the priorities are set, it is impossible to reach important changes in the volume of financial resources during budget negotiations. During these four phases it is only the Ministry of Justice that can influence the decisions of the Government, but it has not sufficient knowledge of the needs of the courts, so the Supreme Court has some influence only by informal ways. The Supreme Court enters the process between the fourth and fifth phase. It proposes a cross section of the budget quota specified by the Government, regarding the judiciary for the following two years. The budget quotas are determined on the level of individual courts, whereby in addition to the initial rules determined by the budget manual, the following criteria are also taken into consideration:

- level of the financial plan of the user for the current year;

- semester realization of the financial plan of the user in the current year.

The Supreme Court also prepares internal manuals for the users as well as internal forms for budgetary items, which may reflect any additional needs for funds along with a short explanation, which is used as a basis for subsequent negotiations with the Ministry of Finance. Then, each court prepares its own financial plan within the framework of the assigned quota in line with the budget items up to the level of a sub-account and submits it to the Supreme Court.

In addition, a complex analysis is prepared of the budgetary expenses and a dialogue is established between the users in regard to a concept for future negotiations. The negotiations with the Ministry of Finance may occur in several phases depending on the divergence between the posed requests on one hand and the possibilities or the constraints posed by Ministry of Finance. If the Ministry of Finance agrees, the additionally provided funds shall be distributed among the courts in line with the proposed priorities. However, if no agreement is reached, the proposed budget of the courts shall be submitted to Parliament, which takes the final decision.

The government's austerity package in 2013 imposed deep spending cuts on the judicial system as a result of fiscal consolidation of public finances. Representatives of the judiciary complained that the cutbacks were decided in a hurry and without proper understanding of the judiciary's needs or the potential consequences of the cuts. The reduction of funds could have seriously jeopardized the already set priorities and objectives of the judiciary, because it was not based on realistic assessments of the needs of the judiciary. The adopted budget for 2013 among others measures also reduced funding to the judiciary by 7.5 percent and lowered the average wage of judges and public officials. Most of the wage cuts affected the Project Lukenda (a temporary project aimed at improving efficiency in the judicial system and reducing court backlogs), which the Government chose not to extend.

Budget cuts can have a significant impact on the functioning of the judicial system, since the reduction of funds can negatively affect the position of the judiciary, as well as long-term efforts to stabilize the judiciary personnel issues. From this point of view the judiciary is in much worse position than the executive or legislative branch. A prerequisite for the implementation of the objectives set in the judiciary is that courts have sufficient human and material resources. Ensuring basic conditions for the work of the court must be one of the priorities of the Government and the National Assembly.

One of the important aspects of indicators of independence of judiciary is also the judicial training. The judges should be provided with theoretical and practical initial and in-service training, entirely funded by the state and an independent authority should ensure, in full compliance with educational autonomy, that initial and in-service training programs meet the requirements of openness, competence and impartiality inherent in judicial office. The Judicial Training Centre in Slovenia is established within the Ministry of Justice and organises training events for judges and prosecutors. Current situation is that the Judicial Training Centre does not have its own budget and its programs have suffered from a budgetary decrease, as a result of the economic crisis.

The annual public budget funds allocated to investments in new (court) buildings is also not part of the budget allocated to the Supreme Court, but to the budget of the Ministry of Justice.

The computerisation of the judiciary is in the authority of the Supreme Court which means that investments in hardware are included in the financial plan of the latter. Considering information technology, the Supreme Court is fully in charge of the computerisation of the judicial system and has been introducing new technologies in courts.

7) Do you have any other comments to make with regard to the relations between the judiciary and the other powers of state in your country?

Spain / Espagne

1) Comment la Constitution, ou les autres lois de votre pays s'il n'existe pas de norme constitutionnelle écrite, régulent-elles les relations entre le pouvoir judiciaire d'un côté, et les pouvoirs exécutif et législatif de l'autre? .

La Constitution Espagnole de l'an 1978 consacre les ***principes d'indépendance, d'impartialité et d'inamovibilité des juges***.

Ces derniers sont indépendants, nommés pour une durée déterminée, responsables de leurs actes et n'obéissent qu'à la loi (article 117 [2]de la Constitution).

Pour ***garantir le principe d'impartialité et le droit à un procès équitable*** [3], le système procédural criminelle espagnol distingue clairement les fonctions d'enquête des fonctions de jugement.

La Constitution (article 127 [4]) impose un ***régime strict d'incompatibilités visant à protéger la profession judiciaire de toute influence indue***. Ce régime est défini plus en détail dans la loi organique 6/1985 sur le pouvoir judiciaire (LOPJ), qui est l'instrument clé régissant l'appareil judiciaire.

Une ***section entière de la LOPJ concerne l'indépendance de la justice et traite notamment de l'inamovibilité, des incompatibilités, de l'immunité et de l'indépendance financière***[5].

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[2] « Art. 117. 1. La justice émane du peuple et elle est administrée au nom du Roi par des juges et des magistrats qui relèvent du pouvoir judiciaire et qui sont indépendants, inamovibles, responsables et soumis exclusivement à l'empire de la loi.
2. Les juges et les magistrats ne pourront être destitués, suspendus, transférés ou mis à la retraite que pour l'une des causes et avec les garanties prévues par la loi.

3. L'exercice du pouvoir juridictionnel, dans tous les types de procès, aussi bien pour rendre un jugement que pour le faire exécuter, incombe exclusivement aux tribunaux unipersonnels et pluripersonnels déterminés par les lois, selon les normes de compétence et de procédure que celles-ci établissent.
4. Les tribunaux unipersonnels et pluripersonnels n'exerceront pas d'autres fonctions que celles indiquées au paragraphe précédent et celles qui leur seront expressément attribuées par la loi en garantie de n'importe quel droit.
5. Le principe de l'unité juridictionnelle est la base de l'organisation et du fonctionnement des tribunaux. La loi réglementera l'exercice de la juridiction militaire dans le domaine strictement limité à l'armée et dans le cas d'un état de siège, conformément aux principes de la Constitution.
6. Les tribunaux d'exception sont interdits. »

[3] Article 24 de la Constitution Espagnole 1978 :
« Art. 24. 1. Toute personne a le droit d'obtenir la protection effective des juges et des tribunaux pour exercer ses droits et ses intérêts légitimes sans, qu'en aucun cas, cette protection puisse lui être refusée.
2. De même, toute personne a le droit d'aller devant le juge ordinaire déterminé préalablement par la loi, de se défendre et de se faire assister par un avocat, d'être informée de l'accusation portée contre elle, d'avoir un procès public sans délais indus et avec toutes les garanties, d'utiliser les preuves nécessaires à sa défense, de ne pas faire de déclaration contre elle-même, de ne pas s'avouer coupable et d'être présumée innocente. La loi réglementera les cas dans lesquels, pour des raisons de parenté ou relevant du secret professionnel, une personne ne sera pas obligée à faire des déclarations sur des faits présumés délictueux. »

[4] « Art. 127. 1. Les juges et les magistrats, ainsi que les procureurs, tant qu'ils seront en service actif, ne pourront pas exercer d'autres fonctions publiques ni appartenir à des partis politiques ou à des syndicats. La loi établira le système et les modalités d'association professionnelle des juges, magistrats et procureurs.

2. La loi définira le régime des incompatibilités des membres du pouvoir judiciaire qui devra assurer leur complète indépendance. »

[5]

« VOLUME IV MAGISTRATES AND JUDGES
PART II Judicial Independence
CHAPTER I Magistrates and Judges as tenured officers
Article 378.
1. Magistrates and Judges are considered tenured officers while they perform judicial duties.

2. Those officers who have been appointed for a certain period of time will be considered tenured officers only for that time.
3. In the events or resignation, leave of absence, transfer and promotion the specific provisions foreseen in this Act will control.

Article 379.
1. Magistrates and Judges will lose their condition in the following cases:
a) If they renounce to the Judicial career. The circumstances foreseen in articles 322 and 357(3) hereunder apply.
b) Loss of Spanish nationality.
c) By virtue of disciplinary sanction which entails their removal from the Judicial Career.
d) If they have been convicted for any malicious offence and imprisoned for this reason. If the term of the conviction does not exceed six months, the Council General of the Judiciary in view of the offence perpetrated may on a justified basis replace the loss of such condition by the sanction foreseen in article 420.1.(d).
e) If they are under incapacitating circumstances, except if they qualify for retirement.
f) Retirement.
2. Removal in the terms foreseen in indents b), c) and d) of this article will require opening proceedings and notification to the Public Prosecutor.

Article 380.
Officers who have lost the condition of Magistrates and Judges for any of the circumstances foreseen in indents a), b), c) and d) of the aforementioned Article may request from the Council General of the Judiciary their reinstatement once they have obtained the rehabilitation foreseen in the Spanish Criminal Code, where applicable.

Article 381.
1. Reinstatement will be granted by the Council General of the Judiciary when the grounds or inexistence of the events which have rise to removal are established, taking into account all circumstances.
2. If reinstatement is refused, proceedings for reinstatement may not be filed again until three years have elapsed since the initial unfavourable resolution given by the Council General of the Judiciary.

Article 382.
The Judge or Magistrate who has been reinstated will be appointed to office in the manner foreseen in this Act.

Article 383.
Suspension of Magistrates and Judges will only take place in the following cases:
1º. When proceedings have been instituted against them for offences perpetrated by them in the discharge of their duties.
2º. When they are convicted for a malicious offence and an imprisonment order has been decreed against them or they are on bail or indicted.
3º. When so decreed in the course of disciplinary or incapacitating proceedings either on a temporary or final basis.
4º. If a final judgment provides as the main or accessory conviction suspension or removal from office.

Article 384.
1. In the cases foreseen in the first two paragraphs of the foregoing article, the magistrate or judge hearing the case will notify it to the Council General of the Judiciary which will decree the suspension after having heard the Public Prosecutor.
2. In the event foreseen in paragraph (4) above, the Court will submit a verbatim transcript of the judgment to the Council General of the Judiciary.
3. Suspension will last in the cases foreseen in paragraphs 1 and 2 above, until an absolutory judgment or non-suit order is entered. In all other cases for all the term of the conviction, sanction or cautionary measure.

Article 385.
Magistrates and Judges will only retire:
One. When they attain the age of retirement.
Two. If they are under permanent disability to perform their duties.

Article 386.
1.Retirement of magistrates or judges when they reach the legal age will be decreed sufficiently in advance to ensure that these officers cease from their duties when they effectively attain seventy years of age.
2. They may also retire when they are sixty-five years old if they request it from the Council General of the Judiciary six months in advance notwithstanding any other early voluntary retirement foreseen in the law.

Article 387.

1. When a magistrate or a judge is under permanent incapacity, the corresponding Board of Governance at the request of the Public Prosecutor or the applicant will submit a retirement proposal to the Council General of the Judiciary.
2. Retirement on the grounds of permanent incapacity proceedings may also be initiated by the Council General ex officio or at the request of the Public Prosecutor.
3. Retired judges due to permanent incapacity may be reinstated and return to active duty if they establish that the reasons for their retirement had disappeared.

Article 388.
Removal, transfer, retirement due to permanent incapacity and reinstatement proceedings will require a hearing with the officer under those circumstances and a report by the Public Prosecutor and the respective Board of Governance notwithstanding any other circumstances which may be considered although the final decision is vested with the Council General of the Judiciary.

CHAPTER II Disqualifying circumstances and prohibitions

Article 389.
The appointment to judicial office either as a magistrate or a judge is incompatible with
1) The exercise of any jurisdiction other than the Judiciary.
2) Any elective or political appointment to the State, Autonomous Communities, Provinces and other local entities or councils included within the structure of any of the above.
3) Remunerated or for profit employment or positions with the State Administration, Parliament, the Royal Staff, Autonomous Communities, Provinces, Councils or other local entities or councils included within the structure of any of the above.
4) Employments of nature at Courts or Tribunals of any jurisdiction.
5) Any remunerated employment, appointment or profession, except teaching and legal research, literary, scientific, artistic and technical papers and publications arising from these pursuant to the provisions on disqualifying circumstances of civil servants working for the Public Administration.
6) Acting as legal counsel or a barrister.
7) Any legal consultancy work, paid or otherwise.
8) Any commercial or business activities even on behalf of a third party.
9) Duties as Manager, Supervisor, Administrator, Director, partner or any other appointment which involves direct, administrative or financial presence in commercial companies or entities, public or private, regardless of their activities or legal status.

Article 390.
1. Individuals who are performing any duties, or holding an office or appointment listed above prior to becoming magistrates or judges must choose within the term of eight days to either one or the other position and resign from the prohibited activity.
2. In the event that they do not inform of the option chosen within the aforementioned term it will be deemed that they have waived their appointment to the judicial career.

Article 391.
Judges who have matrimonial ties between them or a similar emotional relationship, kinship up to the second degree of consanguinity or affinity may not belong to the same Bench or Provincial Court except if by legal mandate or pursuant to the provisions of articles 155 and 198(1) of this Act there are several divisions in which case they may be appointed to different sections, but they may not be in the Bench or Division.
Magistrates or judges who have the same ties or degree of kinship may not be together in the same Board of Governance. This provision applies to Chief Justices.

Article 392.
1. Magistrates and Judges may not take part in appeal proceedings which refer to a resolution given by individuals who have any of the relations mentioned in the preceding Article nor in the last stages of judicial proceedings which by their nature involve making a judgment on the prior proceedings.
By virtue of this principle, the judge should abstain from hearing the matter whenever the foregoing ties are appreciated, and likewise in the event of any of the following circumstances:
a) Examining magistrates are under incompatibility with Criminal Single Judges who will preside the oral hearing on the basis of their preliminary inquiries and also with the Judges of the Section who are also involved in the case.
b) Judges of any Bench either existing functionally or otherwise, which is vested with cognizance of appeals referred to decisions of a jurisdictional body regardless to which division it belongs to are incompatible with the judges and magistrates of that body. Divisions and Sections of the Supreme Court are excluded from the scope of this prohibition.

2. Incompatibility with regard to the relations listed in the preceding article also applies to the following:
a) Chief Justices and Division Judges of the Criminal Jurisdiction of the National Court and Provincial Courts with regard to the Public Prosecutor officers working thereat except in the event that the Provincial Court has more than three sections.
b) Chief Justices and senior judges of Civil and Criminal Jurisdictions with regard to the Chief Prosecutor and the Assistant Prosecutor in that body.
c) Examining magistrates and Single Criminal Judges with regard to prosecutors who have been assigned to the territory where they hold jurisdiction except Judicial Districts in which there are more than five bodies of that nature.
d) Chief Justices, Judges and Magistrates with regard to Court Clerks and other personnel working in the Courts who report directly to them.

Article 393.
Magistrates and Judges may not hold office:
1. In the division of Courts and Tribunals where a legal counsel or a barrister usually acts if they are his spouse or a relative up to the second degree of kinship by consanguinity of affinity. This disqualifying circumstance will not apply to cities in which there are ten or more First Instance and Examining Courts or Divisions with three or more Sections.
2. In a Provincial Court or Court within the territory of their jurisdiction if in any of its boroughs either the judge himself, his spouse, or relatives up to the second degree of kinship by consanguinity or affinity have business interests or vested interests which would make it difficult to perform the judicial duties fairly. Cities of more than one hundred thousand inhabitants are excluded from the above prohibition.
3. At a Bench or a Court in which they have acted as legal counsel or barristers in the last two years prior to their appointment.

Article 394.
1. When an appointment may lead to incompatible positions in the terms foreseen in the foregoing articles, it will be discharged and the magistrate or judge will be subject to a mandatory transfer notwithstanding any disciplinary liabilities incurred.
2. When incompatibility arises by virtue of subsequent events, the Council General of the Judiciary will provide for the mandatory transfer of the magistrate or judge in the event foreseen in paragraph (1) above, or of the last appointed of the remaining ones. Where appropriate it may to the Government the transfer of the incompatible member of the Prosecutor's Office if he had held office for a shorter period of time. Mandatory transfer is subject to not changing his current residence if a vacancy exists, and in that case such vacancy will not be covered by means of a public contest.

Article 395.
Magistrates and Judges may not belong to political parties or trade unions or work in any manner for them, and they must likewise refrain from:
1) Congratulate or reprove powers, authorities, civil servants or local entities in any of their acts in the capacity of members of the judiciary nor attend in such capacity any public meetings or acts which are not of judicial nature, except for those events which purpose is to congratulate the King or which have been convened or to which they may attend following an authorisation by the Council General of the Judiciary.
2) Become involved in legislative elections in any manner other than for voting as any other citizen. Notwithstanding the foregoing, they will perform their duties and tasks arising from their office.

Article 396.
Magistrates and Judges may not disclose circumstances or information pertaining to private individuals or moral persons which they have become aware of in the exercise of their duties.

Article 397.
Competencies regarding authorization, recognition or denial of compatible circumstances in the terms provided in this chapter is vested with the Council General of the Judiciary following a report by the Chief Justice of the respective Court or Bench.

CHAPTER III Judicial immunity

Article 398.
1. Magistrates and Judges in active duty may only be arrested by means of a warrant of arrest issued by a competent judge or in the event of being caught in the act. In the latter case the essential cautionary measures will be adopted and the arrested judge will be submitted to the nearest Examining Court as soon as practicable.
2. All arrests will be notified as expeditiously as possible to the Chief Justice of the Court or the Bench to whom the Judge reports. The judiciary authorities will adopt the necessary measures to provide for a substitute judge.

Article 399.

1. Civil and military authorities will refrain from associating with Magistrates and Judges or request their presence before them.
When a civil or military authority requests any information or statements which may be provided by a magistrate or a judge and which do not refer to their office or duties, the request will be made in writing and they will be received in the official chambers of the judge, prior notice of this.
2. In the case that they request cooperation or assistance due to their office or their jurisdictional functions, it will be provided as expeditiously as possible except if the act that must be carried out is not legal or is detrimental to the authority of the Judge or the Court. Refusal will be reported to the petitioning authority indicating the grounds for such refusal.

Article 400.
When in the course of criminal proceedings it becomes necessary that a magistrate or a judge delivers a testimony and it is legal to do so, they may not refuse it. If the Judicial Authority before whom such deposition is made ranks below the deponent, the latter will be summoned to the chambers of the magistrate or judge, prior notice of the day and hour in which it will take place.

CHAPTER IV Legal framework for professional associations of Magistrates and Judges

Article 401.
Pursuant to article 127 of the Constitution, the free association of magistrates and judges which are members of the Judicature is allowed which will be governed by the following rules:
1) Professional associations of magistrates and judges will have legal personality and full capacity to pursue its ends.
2) Their legitimate ends will be the defense of professional interests of its members in all areas and performance of all manner of activities focused on the administration of justice in general. They may not engage in any political activities nor have any ties with political parties or trade unions.
3) Professional associations of magistrates and judges must have national scope notwithstanding the existence of branches which area of influence will be territory of a High Court of Justice.
4) Magistrates and Judges are free to belong or not to professional associations.
5) Only Magistrates and Judges in active duty may take part in these associations. No magistrate or judge may be affiliated to more than one association.
6) Professional associations of Magistrates and Judges of the Judicature will be validly created as from the moment they are registered in the Register kept to these purposes at the Council General of the Judiciary. Filing will be made at the request of any of the sponsors, who will have to submit its by-laws and a list of affiliated members. Access to the register may only be refused when the association or its by-laws do not comply with the legal requirements thereon.
7) Bylaws must include at least the following provisions:
a) Name of the association
b) Specific ends
c) Organization and representation within the association. Its internal structure and functioning must be democratic.
d) Affiliation procedure.
e) Financial resources and dues.
f) Procedure for designating managing officers within the association.
8) Suspension or winding-up of professional associations will be subject to the general system for associations.
9) In default of a specific provision, the general legal provisions for associations will control.

CHAPTER V Financial independence

Article 402.
1. The State guarantees the financial independence of Magistrates and Judges by means of an adequate remuneration in view of their judiciary duties.
2. It will also provide with a Social Security scheme which protects Magistrates and Judges and their relatives during their active duty period and on retirement.

Article 403.
1. The remuneration system for Magistrates and Judges will be based on the principles of objective assessment, transparency and stability, considering the extent of their dedication to judicial duties, category and length of service in order to determine the appropriate consideration. The degree of responsibility attached to their office and their position will be also considered.
2. In all cases, remuneration paid to Magistrates and Judges will have a fixed component and a variable element based on meeting objectives which assesses their individual performance.
3. The fixed component is broken down in basic and supplementary pay items considering their category, length of service in the judicature of each of its members and the objective characteristics of their office. Basic pay includes

Le Ministère de la Justice (et les instances exécutives compétentes dans les huit Communautés autonomes auxquelles une compétence au domaine de l'administration judiciaire a été confiée) conserve la responsabilité du médecins légistes et autres professionnelles - physiologies, travailleurs sociaux … - , du personnel administratif des tribunaux et de la gestion des bâtiments et des moyens matérielles . Il gère les traitements et les pensions.

Le Conseil Général du Pouvoir Judiciaire - Conseil de la Justice - (CGPJ) (CGPJ) dispose d'un budget distinct qui ne couvre que ses activités propres.

On peut constater que les responsabilités du Ministère de la Justice en ce qui concerne le budget et le processus de décision budgétaire, ainsi que son rôle dans le redéploiement, au cours de l'exercice budgétaire, des fonds entre les tribunaux en fonction des besoins de l'appareil judiciaire, sont perçus par de nombreux membres de la profession comme une menace pour l'indépendance de la justice.

Les textes internationaux contraignants ne prévoient pas formellement l'autonomie budgétaire de l'appareil judiciaire. On estime cependant qu'il est important que l'appareil judiciaire puisse au moins intervenir de manière active et décisive dans l'élaboration et l'affectation de son budget, en tenant compte des besoins et priorités réels au fur et à mesure de leur apparition et en mettant en œuvre les obligations de rendre des comptes qui s'imposent.

Cette participation de l'appareil judiciaire pourrait, par exemple, prendre la forme de fonctions de gestion budgétaire renforcées pour le CGPJ. Cette initiative s'inscrirait dans le droit fil de l'objectif global d'indépendance financière de la justice inscrit dans le chapitre V , Titre II Libre IV de la LOPJ[6].

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salary and length of service. Supplementary pay items include place of residence allowance and specific allowances.
4. The variable component tied to objectives will refer to the individual performance of each magistrate or judge in their jurisdictional and professional duties.
5. Likewise, magistrates and judges may collect special pay if they perform duty magistrates tasks or extraordinary services without being discharged of their functions or replaced.
6. A statute will further develop on the basis of the foregoing paragraphs the remuneration scheme of the judicature officers.

Article 404
Together will all other remuneration items for Magistrates and Judges, the National Budget will include an annual chapter for Justices of Peace and other sums for judiciary staff as required pursuant to the provisions of this Act and to other requirements arising from the administration of justice.

Article 404 bis.
On the basis of the jurisdictional sovereignty principle embodied in article 123 of the Constitution and considering the collegiate nature of the activities carried out by Supreme Court judges in the terms of this Act, their remuneration will be established in accordance with the same scale applicable to other officers of the highest constitutional bodies considering the nature of their functions.

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3. The fixed component is broken down in basic and supplementary pay items considering their category, length of service in the judicature of each of its members and the objective characteristics of their office. Basic pay includes salary and length of service. Supplementary pay items include place of residence allowance and specific allowances.

Elle irait également dans le sens de notre Avis N° 10(2007) du Conseil consultatif de juges européens (CCJE), qui souligne que la mise en place d'un système conférant des compétences financières étendues au conseil de la justice devrait être sérieusement envisagée dans les pays où cela n'est pas déjà le cas. Cet avis précise en outre que les tribunaux ne peuvent être véritablement indépendants que s'ils disposent d'un budget spécifique géré par un organisme indépendant des pouvoirs exécutif et législatif.

2) Y a-t-il ou y a-t-il eu, au cours des 10 dernières années, un débat important dans votre pays à ce sujet, que ce soit dans le domaine politique/juridique, dans les milieux universitaires/académiques, à travers des ONG ou dans les media? .

Voir ci dessous la réponse a la question 4)

3) Y a-t-il eu un débat important sur la question de la « retenue judiciaire » ou la « modération judiciaire » à l'égard de l'exercice de la fonction judiciaire vis-à-vis des autres pouvoirs de l'État? En particulier, y a-t-il des exemples où l'opinion publique et/ou les autres pouvoirs de l'État ont laissé entendre que le pouvoir judiciaire (ou un juge ou un tribunal dans une décision particulière) a interféré de manière inacceptable dans le domaine du pouvoir ou de la compétence discrétionnaire de l'exécutif ou du législatif?

Voir ci dessous la réponse a la question 4)

4) a) Dans votre pays, au cours des 10 dernières années, y a-t-il eu des changements dans la constitution/loi concernant la justice (dans le sens le plus large: la structure, les tribunaux, les juges) qui ont pu conduire à dire que la relation entre le pouvoir judiciaire et les autres pouvoirs de l'État ou la séparation des pouvoirs dans votre pays ont été affectées?

b) Dans votre pays, y a-t-il des propositions actuelles de modification de la loi visée sous a)? Dans chaque cas, veuillez indiquer la raison «officielle» pour les changements ou les modifications proposées.

c) Dans votre pays, y a-t-il des discussions sérieuses ou des débats (dans les milieux politiques, par le public en général ou dans les media) en vue d'introduire des changements dans la loi visée sous a)?

CONSIDÉRATIONS SUR LE POUVOIR JUDICIAIRE COMME LE SEUL POUVOIR QUI APPARAÎT APPELÉ AINSI DANS LA CONSTITUTION ESPAGNOLE DE 1978, ET CONFORMEMENT A SES RELATIONS AVEC LES DEUX AUTRES POUVOIRS DE L'ÉTAT

Il n'y a aucun doute que le principe de l'indépendance du pouvoir judiciaire, est un élément essentiel de l'ordre juridique espagnol, à partir de toute règle de droit et de la Constitution, il souligne graphiquement ***parlant spécifiquement du « Pouvoir Judiciaire», alors que cette dénomination n'apparaît pas lorsque sont considérés les autres deux Pouvoirs de l'état traditionnel, tels que le Législatif*** [7] ***et l'Exécutif*** [8].

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4. The variable component tied to objectives will refer to the individual performance of each magistrate or judge in their jurisdictional and professional duties.
5. Likewise, magistrates and judges may collect special pay if they perform duty magistrates tasks or extraordinary services without being discharged of their functions or replaced.
6. A statute will further develop on the basis of the foregoing paragraphs the remuneration scheme of the judicature officers.

Article 404
Together will all other remuneration items for Magistrates and Judges, the National Budget will include an annual chapter for Justices of Peace and other sums for judiciary staff as required pursuant to the provisions of this Act and to other requirements arising from the administration of justice.

Article 404 bis.
On the basis of the jurisdictional sovereignty principle embodied in article 123 of the Constitution and considering the collegiate nature of the activities carried out by Supreme Court judges in the terms of this Act, their remuneration will be established in accordance with the same scale applicable to other officers of the highest constitutional bodies considering the nature of their functions.

[7] ***TITRE III***
Des Cortes générales
CHAPITRE PREMIER
Des Chambres

« Art. 66. 1. Les Cortes générales représentent le peuple espagnol et se composent du Congrès des députés et du Sénat.

Le pouvoir judiciaire , constitué par le pouvoir d'exercer sa compétence, et son indépendance *repose de tous et de chacun des Juges* dans la mesure où ils exercent une telle fonction, qui s'intègre précisément de l'appareil judiciaire ou sont membres de celui-ci, parce qu'elles sont chargées d'exercer la Juridiction .

Clairement découle de l'article 117.1 de la Constitution, qui ouvre les portes du titre VII [9] de cette Règle

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2. Les Cortes générales exercent le pouvoir législatif de l'Etat, adoptent ses budgets, contrôlent l'action du Gouvernement et remplissent les autres compétences que leur attribue la Constitution.
3. Les Cortes générales sont inviolables. »

[8] ***TITRE IV***
Du Gouvernement et de l'Administration

« Art. 97. Le Gouvernement dirige la politique intérieure et extérieure, l'administration civile et militaire et la défense de l'Etat. Il exerce le pouvoir exécutif et celui de réglementer conformément à la Constitution et aux lois. »

[9] Le libellée de cet Titre VI de la Constitution Espagnole de 1978 , c'est le suivant :

« TITRE VI
Du Pouvoir Judiciaire

Art. 117. 1. La justice émane du peuple et elle est administrée au nom du Roi par des juges et des magistrats qui relèvent du pouvoir judiciaire et qui sont indépendants, inamovibles, responsables et soumis exclusivement à l'empire de la loi.
2. Les juges et les magistrats ne pourront être destitués, suspendus, transférés ou mis à la retraite que pour l'une des causes et avec les garanties prévues par la loi.
3. L'exercice du pouvoir juridictionnel, dans tous les types de procès, aussi bien pour rendre un jugement que pour le faire exécuter, incombe exclusivement aux tribunaux unipersonnels et pluripersonnels déterminés par les lois, selon les normes de compétence et de procédure que celles-ci établissent.
4. Les tribunaux unipersonnels et pluripersonnels n'exerceront pas d'autres fonctions que celles indiquées au paragraphe précédent et celles qui leur seront expressément attribuées par la loi en garantie de n'importe quel droit.
5. Le principe de l'unité juridictionnelle est la base de l'organisation et du fonctionnement des tribunaux. La loi réglementera l'exercice de la juridiction militaire dans le domaine strictement limité à l'armée et dans le cas d'un état de siège, conformément aux principes de la Constitution.
6. Les tribunaux d'exception sont interdits.

Art. 118. Il est obligatoire de respecter les sentences et autres décisions fermes des tribunaux unipersonnels et pluripersonnels ainsi que d'apporter la collaboration requise par ceux-ci pendant le procès et dans l'exécution de leur verdict.

Art. 119. La justice sera gratuite lorsque la loi l'établira et, dans tous les cas, pour tous ceux qui justifieront l'insuffisance de leurs ressources pour passer en justice.

Art. 120. 1. Les actes judiciaires seront publics, hormis les exceptions prévues par les lois sur la procédure.
2. La procédure sera principalement orale, surtout en matière criminelle.
3. Les sentences seront toujours motivées et seront prononcées en audience publique.

Art. 121. Les dommages causés par une erreur judiciaire ainsi que ceux qui seront la conséquence du fonctionnement anormal de l'administration de la justice donneront droit à une indemnité à la charge de l'Etat, conformément à la loi.

Art. 122. 1. La loi organique du pouvoir judiciaire déterminera la constitution, le fonctionnement et le gouvernement des tribunaux, unipersonnels et pluripersonnels ainsi que le statut juridique des juges et des magistrats de carrière, qui formeront un corps unique, et du personnel au service de l'administration de la justice.
2. Le Conseil général du pouvoir judiciaire est l'organe de gouvernement de ce dernier. La loi organique définira son statut, le régime d'incompatibilités de ses membres et leurs fonctions, en particulier, en ce qui concerne les nominations, les promotions, les inspections et le régime disciplinaire.
3. Le Conseil général du pouvoir judiciaire sera formé par le Président du Tribunal suprême qui le présidera et par vingt membres nommés par le Roi pour une période de cinq ans: douze de ces membres seront choisis parmi des juges et des magistrats de toutes les catégories judiciaires, conformément aux dispositions de la loi organique, quatre sur la proposition du Congrès des députés et quatre sur celle du Sénat. Dans les deux cas, ils seront élus à la majorité des trois cinquièmes des membres parmi des avocats et autres juristes dont la compétence est reconnue et qui exercent leur profession depuis plus de quinze ans.

Fondamentale dédié au « ***Pouvoir Judiciaire*** »:

«***La justice émane du peuple et elle est administrée au nom du Roi par des juges et des magistrats qui relèvent du pouvoir judiciaire et qui sont indépendants, inamovibles, responsables et soumis exclusivement à l'empire de la loi***.»

L'indépendance judiciaire (c'est-à-dire, de chaque juge ou Tribunal) dans l'exercice de sa compétence **doit être respecté tant dans l'intérieur de l'organisation judiciaire** (art. 2 du L. O. P. J[10]) **ainsi que par « tous»** (art. 13 du même Loi[11]).

La même Constitution prévoit diverses garanties pour assurer cette indépendance. Tout d'abord, l' 'inamovibilité , qui est leur garantie essentielle (art. 117.2) ; **mais aussi la réserve du Loi pour déterminer la constitution, fonctionnement et gouvernement des cours et tribunaux, ainsi que le statut juridique des magistrats de** (art. 122.1), **et son régime d'incompatibilités** (127,2).

Il n'est pas nécessaire ni possible de procéder ici à un examen détaillé de la situation particulière de l'appareil judiciaire et de ses membres dans la Constitution, bien qu'il devrait être noté **cette indépendance a comme de contrepoids la responsabilité et le confinement strict des juges et des magistrats dans leur fonction juridictionnelle et d'autres spécifiquement attribuées par la loi pour la défense d'un droit quelconque** (art. 117,4), **cette dernière disposition qui tend à garantir la séparation des pouvoirs.**

La vision de l'indépendance du pouvoir judiciaire est partagée en général, par tous les pays de la culture juridique judiciaire espagnole. Mais certains de ces pays ont intégré à leurs constitutions des garanties spécifiques pour s'assurer que l'indépendance n'est pas perturbé par des moyens indirects ou subtiles.

Ce fut le cas de l'Italie dans sa Constitution de 1948, ou Portugal á sa Constitution de 1976 et en partie en suivant son exemple, celui de l'Espagne dans sa Constitution en vigueur de 1978.

Cela, en son article 122.2, prévoit l'existence d'un « ***Conseil général du Pouvoir Judiciaire*** » qu'est ***l'organe de gouvernement de ce dernier*** et ***La loi Organique définira son « … statut, le régime d'incompatibilités de ses membres et leurs fonctions, en particulier, en ce qui concerne les nominations, les promotions, les***

Art. 123. 1. Le Tribunal suprême, dont la juridiction s'étend à toute l'Espagne, est l'organe judiciaire supérieur dans tous les domaines, sauf en ce qui concerne les dispositions sur les garanties constitutionnelles.
2. Le président du Tribunal suprême sera nommé par le Roi, sur la proposition du Conseil général du pouvoir judiciaire, sous la forme que la loi déterminera.

Art.124 . 1. Le ministère public, sans préjudice des fonctions confiées à d´autres organes, a pour mission de promouvoir l´action de la justice en défense de la légalité, des droits des citoyens et de l'intérêt public protégé par la loi, d'office ou à la demande des intéressés, de veiller à l'indépendance des tribunaux et d'obtenir devant ceux-ci la satisfaction de l'intérêt social.
2. Le ministère public exerce ses fonctions par l'intermédiaire des ses propres organes conformément aux principes de l'unité d'action et de la dépendance hiérarchique et, dans tous les cas, à ceux de la légalité et de l'impartialité.
3. La loi définira le statut organique du ministère public.
4. Le Procureur général de l'Etat sera nommé par le Roi, sur proposition du Gouvernement, et après consultation du Conseil général du pouvoir judiciaire.

Art. 125. Les citoyens pourront exercer l'action populaire et participer à l'administration de la justice grâce à l'institution du jury, sous la forme et pour les procès à caractère pénal que la loi déterminera, ainsi que devant les tribunaux coutumiers et traditionnelles.

Art. 126. La police judiciaire dépend des juges, des tribunaux et du ministère public en ce qui concerne la recherche du délit et la découverte et arrestation du délinquant, dans les termes que la loi établira.

Art. 127. 1. Les juges et les magistrats, ainsi que les procureurs, tant qu'ils seront en service actif, ne pourront pas exercer d'autres fonctions publiques ni appartenir à des partis politiques ou à des syndicats. La loi établira le système et les modalités d'association professionnelle des juges, magistrats et procureurs.
2. La loi définira le régime des incompatibilités des membres du pouvoir judiciaire qui devra assurer leur complète indépendance. »

[10] Art 2 LOPJ "1. The exercise of judicial functions, adjudging and enforcing the judgments delivered is vested exclusively in the Courts and Tribunals foreseen by law and in international treaties.
2. Courts and Tribunals will not perform any other functions than those contemplated in the preceding paragraph, they may also act as Registrars, and perform other duties entrusted to them by the law in order to protect any right."
[11] *Art 13 LOPJ "All citizens are obliged to uphold the independence of Magistrates and Judges.".*

inspections et le régime disciplinaire».

Ainsi, les fonctions que doit nécessairement assumer le Conseil sont celles qui plus peut aider le gouvernement pour essayer d'influencer les cours : **d'une part, la promotion possible de certains juges à travers les nominations et les promotions ; ailleurs, toute gêne et de dommages qui pourraient résulter d'inspection et sanctions**.

Le but du Conseil est donc priver le gouvernement de ces fonctions et de les transférer à un organisme distinct et autonome . C'est, bien sûr, une solution possible dans un état de droit, mais comme l'indique dans son arrêt, la Cour Constitutionnelle Espagnole – dit « ***Tribunal Constitucional(TC***) » numéro 108/1986, du 29 juillet: "*... c'est pas sa conséquence nécessaire ou, au moins avec importance constitutionnelle, la plupart des dispositions juridiques actuelles*. ».

De la lecture du texte de la Constitution, on peut obtenir une première conclusion, comme il a été dit, est inscrit sur le plan constitutionnel est l' ***indépendance de chaque juge quand il s'agit d'administrer la justice,*** sans avoir la qualité de "*membres* " du Pouvoir Judiciaire qui est attribué à eux dans certains préceptes, une autre étendue comme le soulignent que ***seuls juges individuellement ou regroupés en collèges, peut exercer la compétence « juger et exécuter les jugements»*** .

En 1980, a été constituée pour la première fois le Conseil Général du Pouvoir Judiciaire, par le biais de la Loi Organique Nº 1/1980 du 10 janvier.

Le Conseil Général du Pouvoir Judiciaire était composé du Président de la Cour suprême, qui présidera et de 20 membres nommés par le Roi pour une période de cinq ans. De ce nombre, 12 entre les juges et magistrats de toutes les catégories judiciaires dans les conditions prévues par la Loi ; quatre sur la proposition du Congrès des députés et quatre sur proposition du Sénat, élu dans les deux cas par une majorité des trois cinquièmes de ses membres, y compris les avocats et autres juristes, chacun d'eux avec plus de quinze années de pratique dans sa profession et une compétence reconnue.

Les douze membres d'origine judiciaire ont été élus parmi les juges et magistrats appartenant à toutes les catégories judiciaires, dans les conditions fixées par la Loi.

Trois juges de la Cour suprême, six juges et trois juges étaient membres du Conseil.

Dans la dit Loi, les membres qui ont leur origine dans l'appareil judiciaire, ont été choisis pour propres juges et magistrats, selon le système suivant :

Les membres du Conseil général d'origine judiciaire ont été élus par l'ensemble des juges et des magistrats qui sont en service actif.

L'élection a été réalisée par vote, égal, direct et secret, admettant le vote par la poste.

Les candidatures étaient censés pour être complète, avec un candidat titulaire et un suppléant pour tous les postes devant être couverts lors de chaque élection.

Les nominations devraient être toujours ouvert, peut les noms de chaque électeur, dans chaque catégorie, combinés de différentes applications.

Le système électoral a été la plupart corrigée afin de permettre la représentation d'un secteur minoritaire.

Les candidatures doivent être soutenus par 10 % des électeurs, comprenant, à leur tour, 5 % au moins de chaque catégorie ou par une Association de professionnels valablement constituée. Personne ne pourrait appuyer la candidature plus d'un.

Ce système, a été remodifié en 1985 , par la Loi Organique du Pouvoir Judiciaire (*LOPJ*) – LO 6/1985 du 1 Juin-, en particulier dans son article 112, paragraphes 1 et 3, avec le libellée suivant :

« 1. les membres du Conseil général du pouvoir judiciaire seront proposés par le Congrès des députés et le Sénat. »

...

3. En outre, chacune des chambres propose, également par une majorité des trois cinquièmes de ses membres, six autres membres élus parmi les juges et magistrats de toutes les catégories judiciaires qui sont en service actif."

On a formé un recours d'inconstitutionnalité , devant le Tribunal Constitutionnel , contre la dit LO 6/1985, par 55 membres du « *Congreso de los Diputados* » , qui prétend entre autres greffes la déclaration l'inconstitutionnalité du nouveau système de désignation des membres de la source judiciaire du CGPJ , en arguant sur cette question. comme suit :

"… *Entienden los recurrentes que estos preceptos, al asignar a las Cámaras la facultad de proponer la totalidad de los veinte vocales del Consejo, vulneran el art. 122.3 en relación con el 66.2 de la Constitución. Por el primero de estos preceptos se dispone, en lo que aquí interesa, que de los veinte miembros del Consejo serán nombrados por el Rey «doce, entre Jueces y Magistrados de todas las categorías judiciales en los términos que establezca la Ley Orgánica; cuatro a propuesta del Congreso de los Diputados y cuatro a propuesta del Senado, elegidos en ambos casos por mayoría de tres quintos de sus miembros entre Abogados y otros juristas, todos ellos de reconocida competencia y con más de quince años de ejercicio en su profesión». El otro precepto constitucional*

invocado por los recurrentes, el 66.2, afirma que «las Cortes Generales ejercen la potestad legislativa del Estado, aprueban sus Presupuestos, controlan la acción del Gobierno y tienen las demás competencias que les atribuya la Constitución». Para los recurrentes si bien es cierto que el art. 122.3 de la Norma Suprema no dice expresamente que los doce vocales del Consejo han de ser elegidos «por» los Jueces y Magistrados y no sólo «entre» ellos, tal imperativo se desprende de la interpretación sistemática, histórica y teleológica del precepto. La inconstitucionalidad del art. 112.1 y 3 de la L. O. P. J. resulta, según los recurrentes, de que estos preceptos atribuyen a las Cortes Generales la facultad de proponer a todos los vocales del Consejo cuando, de éstos, doce debieran ser propuestos por los Jueces y Magistrados y sólo ocho por las cámaras." .

Á l'arrêt 108/1986, du 29 juillet du Plénière du TC , á cet égard, il a été indiqué (FJ 10º) :

"…*Sin entrar en consideraciones sobre el lugar que ocupan las Cortes en un sistema parlamentario y* ***sin negar que el sistema elegido por la L O PJ ofrezca sus riesgos****, como se verá más adelante, debe advertirse que esos riesgos no son consecuencia obligada del sistema. En efecto, para que la argumentación de los recurrentes tuviese un peso decisivo* **sería necesario que la propuesta por las Cámaras de los veinte vocales del Consejo convirtiese a éstos en delegados o comisionados del Congreso y del Senado, con toda la carga política que esta situación comportaría***. Pero, en último término,* **la posición de los integrantes de un órgano no tiene por qué depender de manera ineludible de quienes sean los encargados de su designación sino que deriva de la situación que les otorgue el ordenamiento jurídico.** *En el caso del Consejo, todos sus vocales, incluidos los que forzosamente han de ser propuestos por las Cámaras y los que lo sean por cualquier otro mecanismo, no están vinculados al órgano proponente, como lo demuestra la* ***prohibición del mandato imperativo*** *(art. 119.2 de la L. O. P. J.) y la* ***fijación de un plazo determinado de mandato*** *(cinco años),* ***que no coincide con el de las Cámaras y durante los cuales no pueden ser removidos más que en los casos taxativamente determinados en la Ley Orgánica*** *(art. 119.2).".*

La clé d'argument pour déclarer la validité du système expresse de désignation par les « *Cortes Generales* » , des 12 juges et magistrats d'origine judiciaire avec les précautions appropriées, qui a été défini pour la première fois dans la LO 6 / 1985, se trouve dans le 13º FJ du dit arrêt numéro 108/1986 dans lequel il affirme :

" (…)… *Verdad es que* **del tono de los debates constitucionales e incluso de los que tuvieron lugar con motivo de otros proyectos de Ley y de la insistencia en tales debates en que los jueces y magistrados elegibles lo sean «de todas las categorías de la Carrera Judicial», según el Texto finalmente aceptado, parece deducirse la existencia de un consenso implícito sobre la necesidad de que los doce vocales procedentes de la Carrera Judicial expresasen no sólo diferentes niveles de experiencia por su función y su edad, sino las distintas corrientes de pensamiento existentes en aquélla, pero ese consenso no parece extenderse hasta la determinación del procedimiento adecuado para alcanzar tal resultado, de forma que no se constitucionalizó una fórmula concreta, sino que los constituyentes se limitaron a remitirla a una futura ley orgánica.**

Un resultado en cierto modo análogo es el que se alcanza al intentar la interpretación de la norma contenida en el art. 122.3 según su espíritu y finalidad. El fin perseguido es, de una parte, el de asegurar la presencia en el Consejo de las principales actitudes y corrientes de opinión existentes en el conjunto de jueces y magistrados en cuanto tales, es decir, con independencia de cuáles sean sus preferencias políticas como ciudadanos y, de la otra, equilibrar esta presencia con la de otros juristas que, a juicio de ambas Cámaras, puedan expresar la proyección en el mundo del Derecho de otras corrientes de pensamiento existentes en la sociedad. **La finalidad de la norma sería así,** *cabría afirmar de manera resumida*, **la de asegurar que la composición del Consejo refleje el pluralismo existente en el seno de la sociedad y, muy en especial, en el seno del Poder Judicial.** *Que esta finalidad se alcanza más fácilmente atribuyendo a los propios jueces y magistrados la facultad de elegir a doce de los miembros del C. G. P. J. es cosa que ofrece poca duda; pero ni cabe ignorar el riesgo, también expresado por algunos miembros de las Cortes que aprobaron la Constitución, de que el procedimiento electoral traspase al seno de la Carrera Judicial las divisiones ideológicas existentes en la sociedad (con lo que el efecto conseguido sería distinto del perseguido)* **ni, sobre todo, puede afirmarse que tal finalidad se vea absolutamente negada al adoptarse otro procedimiento y, en especial, el de atribuir también a las Cortes la facultad de propuesta de los miembros del Consejo procedentes del Cuerpo de Jueces y Magistrados, máxime cuando la Ley adopta ciertas cautelas, como es la de exigir una mayoría cualificada de tres quintos en cada Cámara** *(art. 112.3 L. O. P. J.).* ***Ciertamente, se corre el riesgo de frustrar la finalidad señalada de la norma constitucional si las Cámaras, a la hora de efectuar sus propuestas, olvidan el objetivo perseguido y, actuando con criterios admisibles en otros terrenos, pero no en éste, atiendan sólo a la división de fuerzas existente en su propio seno y distribuyen los puestos a cubrir entre los distintos partidos, en proporción a la fuerza parlamentaria de éstos. La lógica del Estado de partidos empuja a actuaciones de este género, pero esa misma lógica obliga a mantener al margen de la lucha de partidos ciertos ámbitos de poder y entre ellos, y señaladamente, el Poder Judicial.***

La ***existencia y aun la probabilidad de ese riesgo, creado por un precepto que hace posible, aunque no necesaria, una actuación contraria al espíritu de la norma constitucional, parece aconsejar su sustitución, pero no es fundamento bastante para declarar su invalidez, ya que es doctrina constante de este Tribunal***

que la validez de la ley ha de ser preservada cuando su texto no impide una interpretación adecuada a la Constitución. **Ocurriendo así en el presente caso, pues el precepto impugnado es susceptible de una interpretación conforme a la Constitución y no impone necesariamente actuaciones contrarias a ella, procede declarar que ese precepto no es contrario a la Constitución.".**

Dans la réforme du système de nomination des membres du CGPJ judiciaires, développée par la Loi Organique 2 / 2001 du 28 juin, les Voyelles d'origine Judiciaire sont restés des élections parlementaires, six par la Chambre des députés et six au Sénat, mais parmi les 36 candidats proposés propres juges ou associations judiciaires [12].

Le système explicité de la relation entre le Pouvoir Judiciaire et le Législatif, dans l'aspect particulier relatif à la désignation par le seconde des Voyelles d'origine judiciaire constituant le CGPJ, a essentiellement été transformé par le biais de la Loi Organique 4/2013 du 28 juin, qui vise la réforme de l'organisation, la structure et les fonctions du CGPJ.

Les principales raisons de la réforme de l'organisation de la structure et les fonctions du ***Conseil Général du Pouvoir Judiciaire*** - ***Conseil de la Justice*** - (***CGPJ***) par la Loi Organique 4/2013, du 28 Juin , Organe Constitutionnel visée à l'article 122 de la Constitution Espagnole 1978[13] , que la Constitution attache la mission de

[12] Artículo 112. [Nombramiento de los miembros del Consejo General del Poder Judicial]
Los doce miembros que conforme a lo dispuesto en el artículo 122 de la Constitución han de integrar el Consejo entre Jueces y Magistrados de todas las categorías judiciales serán propuestos para su nombramiento por el Rey de acuerdo con el siguiente procedimiento:
1. Podrán ser propuestos los Jueces y Magistrados de todas las categorías judiciales que se hallen en servicio activo y no sean miembros del Consejo saliente o presten servicios en los órganos técnicos del mismo.
2. La propuesta será formulada al Rey por el Congreso de los Diputados y el Senado, correspondiendo a cada Cámara proponer seis Vocales, por mayoría de tres quintos de sus respectivos miembros, entre los presentados a las Cámaras por los Jueces y Magistrados conforme a lo previsto en el número siguiente.
3. Los candidatos serán presentados, hasta un máximo del triple de los doce puestos a proponer, por las asociaciones profesionales de Jueces y Magistrados o por un número de Jueces y Magistrados que represente, al menos, el 2 por 100 de todos los que se encuentren en servicio activo. La determinación del número máximo de candidatos que corresponde presentar a cada asociación y del número máximo de candidatos que pueden presentarse con las firmas de Jueces y Magistrados se ajustará a criterios estrictos de proporcionalidad, de acuerdo con las siguientes reglas:
a) Los treinta y seis candidatos se distribuirán en proporción al número de afiliados de cada asociación y al número de no afiliados a asociación alguna, determinando este último el número máximo de candidatos que pueden ser presentados mediante firmas de otros Jueces y Magistrados no asociados, todo ello, de acuerdo con los datos obrantes en el Registro constituido en el Consejo General del Poder Judicial conforme a lo previsto en el artículo 401 de la presente Ley Orgánica y sin que ningún Juez o Magistrado pueda avalar con su firma más de un candidato.
b) En el caso de que el número de Jueces y Magistrados presentados con el aval de firmas suficientes supere el máximo al que se refiere la letra a), sólo tendrán la consideración de candidatos los que, hasta dicho número máximo, vengan avalados por el mayor número de firmas. En el supuesto contrario de que el número de candidatos avalados mediante firmas no baste para cubrir el número total de treinta y seis, los restantes se proveerán por las asociaciones, en proporción al número de afiliados; a tal efecto y para evitar dilaciones, las asociaciones incluirán en su propuesta inicial, de forma diferenciada, una lista complementaria de candidatos.
c) Cada asociación determinará, de acuerdo con lo que dispongan sus Estatutos, el sistema de elección de los candidatos que le corresponda presentar.
4. Entre los treinta y seis candidatos presentados, conforme a lo dispuesto en el número anterior, se elegirán en primer lugar seis Vocales por el Pleno del Congreso de los Diputados, y una vez elegidos estos seis Vocales, el Senado elegirá los otros seis entre los treinta candidatos restantes. Todo ello sin perjuicio de lo dispuesto en el número 2 del artículo siguiente.

[13] Le libellée de l'article 122 de la Constitution Espagnole 1978 c'est :
« Art. 122. 1. La loi organique du pouvoir judiciaire déterminera la constitution, le fonctionnement et le gouvernement des tribunaux, unipersonnels et pluripersonnels ainsi que le statut juridique des juges et des magistrats de carrière, qui formeront un corps unique, et du personnel au service de l'administration de la justice.

2. Le Conseil général du pouvoir judiciaire est l'organe de gouvernement de ce dernier. La loi organique définira son statut, le régime d'incompatibilités de ses membres et leurs fonctions, en particulier, en ce qui concerne les nominations, les promotions, les inspections et le régime disciplinaire.

3. Le Conseil général du pouvoir judiciaire sera formé par le Président du Tribunal suprême qui le présidera et par vingt membres nommés par le Roi pour une période de cinq ans: douze de ces membres seront choisis parmi des juges et des magistrats de toutes les catégories judiciaires, conformément aux dispositions de la loi organique, quatre sur la proposition du Congrès des députés et quatre sur celle du Sénat. Dans les deux cas, ils seront élus à

garantir l'indépendance du Pouvoir Judiciaire dans son ensemble et de chaque Juge, c'est que « …*la situation actuelle exige une transformation en profondeur de sa structure qui permet de mettre un terme aux problèmes qui au fil des années sont devenues évidents, ainsi que de lui fournir une structure plus performante* »

Cette réforme du CGPJ repose sur trois idées : ***Choix exclusif par le Parlemen***t - á l'Espagne appelé « *Cortes Generales* » , sont composées de deux Chambres législatives : « *Congreso de los Diputados* » et « *Senado* » - ***des vingt membres*** , dits « *Voyelles » du* ***CGPJ*** ; ***réduction considérable des pouvoirs du gouvernement autonome de la magistrature*** et ***la limitation du dévouement des Voyelles***.

En ce qui concerne á ***l' Élection Parlementaire unique des vingt Voyelles du CGPJ*** , dans l'exposé des motifs de la dit LO 4 /2013 , il est considéré qu'il s'agit d'un aspect crucial de la réforme, établissant un système électoral qui, d'une part, garantit la possibilité maximale d'une participation au processus de tous et chacun des membres de la magistrature, s'ils sont ou non associés, en revanche, il attribué au Congrès et au Sénat, en tant que représentants de la souveraineté populaire, la responsabilité de la désignation de ces voyelles.

Ce système de choix s'articule sur trois fondements de base.

- Tout d'abord, la nomination des Voyelles du CGPJ , sur la base de critères exclusifs du mérite et de capacité des candidats.
- Deuxièmement, l'ouverture de la possibilité d'être désignés comme Voyelles du CGPJ à l'ensemble des membres de la magistrature, avec un nombre minimum des soutiens d'autres juges et de magistrats ou de toute association judiciaire.
- Et, enfin, à l'examen dans la nomination des membres d'origine judiciaire de la proportion réelle de juges et magistrats associés et non assemblés.

Dans l'exposé des motifs de la LO 4/2013, se justifie l a réforme aux termes suivants :

"…*A la hora de abordar un aspecto crucial de la reforma como es el sistema de designación de los Vocales del Consejo General del Poder Judicial, se ha diseñado un sistema de elección que, por un lado, garantice la máxima posibilidad de participación en el proceso de todos y cada uno de los miembros de la carrera judicial, estén o no asociados, y que, por otro, atribuya al Congreso y al Senado, como representantes de la soberanía popular, la responsabilidad de la designación de dichos Vocales. Este sistema de elección se articulará sobre tres premisas básicas. En primer lugar, la designación de los Vocales del Consejo General del Poder Judicial con arreglo a exclusivos criterios de mérito y capacidad de los candidatos. En segundo término, la apertura de la posibilidad de ser designados como Vocales a la totalidad de los miembros de la carrera judicial que cuenten con un número mínimo de avales de otros Jueces y Magistrados o de alguna asociación. Y, finalmente, la consideración en la designación de los Vocales de origen judicial de la proporción real de Jueces y Magistrados asociados y no asociados.*

Finalmente, tomando en consideración la redacción del artículo 122.3 de la Constitución en la que se señala que los Vocales de origen judicial deben ser elegidos «entre Jueces y Magistrados de todas las categorías judiciales», y partiendo de que ésa es la voluntad de la Constitución, se prevé que los Vocales designados puedan ser Jueces y Magistrados de todas las categorías.".

Pour matérialiser le régime exprimé, on ajouté au LOPJ , un nouveau ***Livre VIII***, appelé «***du Conseil général du pouvoir judiciaire***», consacre son titre II « ***membres du Conseil général du pouvoir judiciaire*** » [14] .

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la majorité des trois cinquièmes des membres parmi des avocats et autres juristes dont la compétence est reconnue et qui exercent leur profession depuis plus de quinze ans. »

[14] Qui se lit comme suit:

« CAPÍTULO I

Designación y sustitución de los Vocales

Artículo 566.

El Consejo General del Poder Judicial estará integrado por el Presidente del Tribunal Supremo, que lo presidirá, y por veinte Vocales, de los cuales doce serán Jueces o Magistrados en servicio activo en la carrera judicial y ocho juristas de reconocida competencia.

Artículo 567.

1. Los veinte Vocales del Consejo General del Poder Judicial serán designados por las Cortes Generales del modo establecido en la Constitución y en la presente Ley Orgánica.

2. Cada una de las Cámaras elegirá, por mayoría de tres quintos de sus miembros, a diez Vocales, cuatro entre

juristas de reconocida competencia con más de quince años de ejercicio en su profesión y seis correspondientes al turno judicial, conforme a lo previsto en el Capítulo II del presente Título.

3. Podrán ser elegidos por el turno de juristas aquellos Jueces o Magistrados que no se encuentren en servicio activo en la carrera judicial y que cuenten con más de quince años de experiencia profesional, teniendo en cuenta para ello tanto la antigüedad en la carrera judicial como los años de experiencia en otras profesiones jurídicas. Quien, deseando presentar su candidatura para ser designado Vocal, ocupare cargo incompatible con aquél según la legislación vigente, se comprometerá a formalizar su renuncia al mencionado cargo si resultare elegido.

4. Las Cámaras designarán, asimismo, tres suplentes para cada uno de los turnos por los que se puede acceder a la designación como Vocal, fijándose el orden por el que deba procederse en caso de sustitución.

5. En ningún caso podrá recaer la designación de Vocales del Consejo General del Poder Judicial en Vocales del Consejo saliente.

Artículo 568.

1. El Consejo General del Poder Judicial se renovará en su totalidad cada cinco años, contados desde la fecha de su constitución. Los Presidentes del Congreso de los Diputados y del Senado deberán adoptar las medidas necesarias para que la renovación del Consejo se produzca en plazo.

2. A tal efecto, y a fin de que las Cámaras puedan dar comienzo al proceso de renovación del Consejo, cuatro meses antes de la expiración del mencionado plazo, el Presidente del Tribunal Supremo y del Consejo General del Poder Judicial dispondrá:

a) la remisión a los Presidentes del Congreso de los Diputados y del Senado de los datos del escalafón y del Registro de Asociaciones judiciales obrantes en dicha fecha en el Consejo.

b) la apertura del plazo de presentación de candidaturas para la designación de los Vocales correspondientes al turno judicial.

El Presidente del Tribunal Supremo dará cuenta al Pleno del Consejo General del Poder Judicial de los referidos actos en la primera sesión ordinaria que se celebre tras su realización.

Artículo 569.

1. Los Vocales del Consejo General del Poder Judicial serán nombrados por el Rey mediante Real Decreto, tomarán posesión de su cargo prestando juramento o promesa ante el Rey y celebrarán a continuación su sesión constitutiva.

2. La toma de posesión y la sesión constitutiva tendrán lugar dentro de los cinco días posteriores a la expiración del anterior Consejo, salvo en el supuesto previsto en el artículo 570.2 de esta Ley Orgánica.

Artículo 570.

1. Si el día de la sesión constitutiva del nuevo Consejo General del Poder Judicial no hubiere alguna de las Cámaras procedido aún a la elección de los Vocales cuya designación le corresponda, se constituirá el Consejo General del Poder Judicial con los diez Vocales designados por la otra Cámara y con los Vocales del Consejo saliente que hubieren sido designados en su momento por la Cámara que haya incumplido el plazo de designación, pudiendo desde entonces ejercer todas sus atribuciones.

2. Si ninguna de las dos Cámaras hubieren efectuado en el plazo legalmente previsto la designación de los Vocales que les corresponda, el Consejo saliente continuará en funciones hasta la toma de posesión del nuevo, no pudiendo procederse, hasta entonces, a la elección de nuevo Presidente del Consejo General del Poder Judicial.

3. El nombramiento de Vocales con posterioridad a la expiración del plazo concedido legalmente para su designación no supondrá, en ningún caso, la ampliación de la duración de su cargo más allá de los cinco años de mandato del Consejo General del Poder Judicial para el que hubieren sido designados, salvo lo previsto en el apartado anterior.

4. Una vez que se produzca la designación de los Vocales por la Cámara que haya incumplido el plazo de designación, deberá procederse a la sustitución de los Vocales salientes que formasen parte de alguna de las Comisiones legalmente previstas. Los nuevos Vocales deberán ser elegidos por el Pleno teniendo en cuenta el turno por el que hayan sido designados los Vocales salientes, y formarán parte de la Comisión respectiva por el

tiempo que resta hasta la renovación de la misma.

5. La mera circunstancia de que la designación de Vocales se produzca una vez constituido el nuevo Consejo no servirá de justificación para revisar los acuerdos que se hubieren adoptado hasta ese momento.

Artículo 571.

1. El cese anticipado de los Vocales del Consejo General del Poder Judicial dará lugar a su sustitución, procediendo el Presidente del Tribunal Supremo y del Consejo General del Poder Judicial a ponerlo en conocimiento de la Cámara competente para que proceda a la propuesta de nombramiento de un nuevo Vocal conforme al orden establecido en el artículo 567.4 de la presente Ley Orgánica.

2. El nuevo Vocal ejercerá su cargo por el tiempo que reste hasta la finalización del mandato del Consejo General del Poder Judicial.

CAPÍTULO II

Procedimiento de designación de Vocales de origen judicial

Artículo 572.

La designación de los Vocales del Consejo General del Poder Judicial correspondientes al turno judicial se regirá por lo dispuesto en la presente Ley Orgánica.

Artículo 573.

1. Cualquier Juez o Magistrado en servicio activo en la carrera judicial podrá presentar su candidatura para ser elegido Vocal por el turno judicial, salvo que se halle en alguna de las situaciones que, conforme a lo establecido en esta Ley, se lo impidan.

2. El Juez o Magistrado que, deseando presentar su candidatura para ser designado Vocal, ocupare cargo incompatible se comprometerá a formalizar su renuncia al mencionado cargo si resultare elegido.

Artículo 574.

1. El Juez o Magistrado que desee presentar su candidatura podrá elegir entre aportar el aval de veinticinco miembros de la carrera judicial en servicio activo o el aval de una Asociación judicial legalmente constituida en el momento en que se decrete la apertura del plazo de presentación de candidaturas.

2. Cada uno de los Jueces o Magistrados o Asociaciones judiciales a los que se refiere el apartado anterior podrá avalar hasta un máximo de doce candidatos.

Artículo 575.

1. El plazo de presentación de candidaturas será de un mes a contar desde el día siguiente a la fecha en que el Presidente del Tribunal Supremo y del Consejo General del Poder Judicial ordene la apertura de dicho plazo.

2. El Juez o Magistrado que desee presentar su candidatura para ser designado Vocal por el turno de origen judicial, dirigirá escrito al Presidente del Tribunal Supremo y del Consejo General del Poder Judicial en el que ponga de manifiesto su intención de ser designado Vocal. El mencionado escrito deberá ir acompañado de una memoria justificativa de las líneas de actuación que, a su juicio, debería desarrollar el Consejo General del Poder Judicial, así como de los veinticinco avales o el aval de la Asociación judicial exigidos legalmente para su presentación como candidato.

Artículo 576.

1. Corresponde a la Junta Electoral resolver cuantas cuestiones se planteen en el proceso de presentación de candidaturas a Vocales del Consejo General del Poder Judicial por el turno judicial y proceder a la proclamación de candidaturas.

2. La Junta Electoral estará integrada por el Presidente de Sala más antiguo del Tribunal Supremo, quien la presidirá, y por dos Vocales: el Magistrado más antiguo y el más moderno del Tribunal Supremo, actuando como Secretario, con voz pero sin voto, el Secretario de Gobierno del Tribunal Supremo.

3. La Junta Electoral se constituirá dentro de los tres días siguientes al inicio del procedimiento de designación

Ce système, a été examinée dans le rapport d'évaluation sur l'Espagne, réalisée par le "***Groupe d'États contre la corruption" del Conseil de l'Europe"*** (***GRECO***) , titulado : ***Prevention de la corruption des Parlamentaires, des Juges et des Procureurs***." (Greco Eval IV Rep (2013) 5F) , adoptado el 6 de diciembre de 2013 y publicado el 15 de enero de 2014. Concretamente en el Capítulo IV , dedicado a la IV. " ***Prevention de La Corruption des Juges" , subepígrafe « Aperçu du système judiciaire »***

Est exposée aux paragraphes 74 à 80 du rapport GRECO (2013 :

« 74. Plus particulièrement, le Conseil général du pouvoir judiciaire (Consejo General del Poder Judicial, CGPJ) est une instance autonome, professionnelle et constitutionnelle, composée pour l'essentiel de juges, qui remplissent des fonctions stratégiques, administratives, de contrôle et de gestion dans le but final de garantir l'indépendance de la justice. La Constitution précise les missions fondamentales du CGPJ, à savoir les nominations, les promotions et les règles disciplinaires applicables aux juges. Au fil des ans, les attributions du CGPJ se sont étendues à la quasi-totalité des aspects organisationnels de l'appareil judiciaire. Toutes les décisions administratives du CGPJ peuvent être contestées devant le Tribunal suprême.

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de candidatos a Vocales del Consejo General del Poder Judicial por el turno judicial y se disolverá una vez concluido definitivamente el procedimiento de presentación de candidaturas, incluida la resolución de los recursos contencioso-administrativos si los hubiere.

4. La Junta Electoral será convocada por su Presidente cuando lo considere necesario. Para que la reunión se pueda celebrar, será precisa la asistencia de todos sus miembros o de sus sustitutos.

5. En caso de ausencia del Presidente, asumirá sus funciones el siguiente Presidente de Sala del Tribunal Supremo en orden de antigüedad. Asimismo, el Magistrado más antiguo y el más moderno serán, en su caso, sustituidos por los siguientes Magistrados del Tribunal Supremo más antiguo y moderno del escalafón, respectivamente. En caso de ausencia del Secretario, será sustituido por el secretario del Tribunal Supremo de mayor antigüedad.

6. Los acuerdos de la Junta Electoral se tomarán por mayoría simple.

7. Finalizado el plazo de presentación de candidaturas, la Junta Electoral procederá a publicar, dentro de los dos días siguientes, la lista de candidatos que reúnan los requisitos legalmente exigidos.

8. La lista será expuesta públicamente en la intranet del Consejo General del Poder Judicial, pudiendo ser impugnadas las candidaturas presentadas dentro de los tres días siguientes a su publicación.

9. Transcurrido dicho plazo, la Junta Electoral resolverá dentro de los tres días siguientes las impugnaciones que se hubieren formulado, procediendo de inmediato a la publicación del acuerdo de proclamación de candidaturas.

Artículo 577.

1. Contra la proclamación definitiva de candidaturas cabrá interponer recurso contencioso-administrativo en el plazo de dos días desde la publicación del acuerdo.

2. El conocimiento del recurso contencioso-administrativo corresponderá a la Sala de lo Contencioso-Administrativo del Tribunal Supremo, que deberá resolver en el plazo de tres días desde su interposición.

Artículo 578.

1. Transcurridos, en su caso, los plazos señalados en el artículo anterior, el Presidente del Tribunal Supremo y del Consejo General del Poder Judicial remitirá las candidaturas definitivamente admitidas a los Presidentes del Congreso y del Senado, a fin de que ambas Cámaras procedan a la designación de los Vocales del turno judicial conforme a lo previsto en el artículo 567 de la presente Ley Orgánica.

2. En la designación de los Vocales del turno judicial, las Cámaras tomarán en consideración el número existente en la carrera judicial, en el momento de proceder a la renovación del Consejo General del Poder Judicial, de Jueces y Magistrados no afiliados y de afiliados a cada una de las distintas Asociaciones judiciales.

3. La designación de los doce Vocales del Consejo General del Poder Judicial del turno judicial deberá respetar, como mínimo, la siguiente proporción: tres Magistrados del Tribunal Supremo; tres Magistrados con más de veinticinco años de antigüedad en la carrera judicial y seis Jueces o Magistrados sin sujeción a antigüedad. Si no existieren candidatos a Vocales dentro de alguna de las mencionadas categorías, la vacante acrecerá el cupo de la siguiente por el orden establecido en este precepto."

75. Aux termes de la Constitution, le CGPJ est dirigé par le Président du Tribunal suprême et constitué de 20 membres nommés pour cinq ans. La Constitution dispose que 12 de ces 20 membres doivent être des juges ; les 8 autres sont avocats ou juristes et désignés à une majorité des 3/5 au Parlement. La Constitution ne précise pas les modalités de désignation des membres appartenant à la magistrature. Le système de nomination a d'ailleurs évolué au fil des ans. Avant 1985, ces membres étaient élus par les juges eux-mêmes. A l'époque, le système a été critiqué, car il donnait une coloration plutôt conservatrice à la composition du CGPJ. Il a donc été réformé afin que la composition du CGPJ soit plus représentative de la société dans son ensemble et d'éviter un gouvernement des juges s'alimentant naturellement. Depuis 1985, c'est le Parlement qui désigne les membres parmi la liste de candidats proposés par les associations de juges.

76. Lors de la mission sur place, le mode de sélection des membres du CGPJ a été cité à plusieurs reprises par les représentants interrogés comme un sujet de préoccupation du fait d'un risque de « politisation » – la critique principale étant que le mode d'élection permettait aux partis politiques de répartir les sièges du CGPJ entre les candidats qu'ils soutiennent. Après sa mission, l'EEG a été informée de l'adoption de la loi 4/2013 du 28 juin 2013 portant réforme du CGPJ, qui a notamment révisé les modalités de nomination des membres du CGPJ appartenant à la magistrature. En vertu de ce texte, si le Parlement reste chargé de la désignation officielle à la majorité des 3/5, tout juge en exercice peut désormais présenter sa candidature dès lors qu'il bénéficie du soutien de 25 juges ou d'une association de juges. Seules les personnes justifiant d'une expérience d'au moins 15 ans dans le domaine juridique peuvent se porter candidates. Après la mission sur place, les autorités ont indiqué que le nouveau système avait permis à un total de 54 juges, dont environ 18 juges non membres d'une association, de participer à l'élection (dans le système précédent, le nombre maximum de candidats s'établissait à 36).

77. L'EEG rappelle la Recommandation CM/Rec(2010)12 du Comité des Ministres sur les juges : indépendance, efficacité et responsabilités, qui consacre l'indépendance des conseils de la justice et préconise qu'au moins la moitié des membres desdits conseils soient des juges choisis par leurs pairs à tous les niveaux de l'appareil judiciaire et dans le respect du pluralisme au sein de celui-ci. Cette recommandation a également été reprise par la Commission européenne pour la démocratie par le droit du Conseil de l'Europe (Commission de Venise)20. A cet égard, l'EEG constate que la récente réforme du mode de nomination des membres du CGPJ permet à tout juge bénéficiant d'un assez grand nombre de soutiens de présenter sa candidature et plus uniquement aux juges proposés par des associations de juges, comme cela était le cas auparavant. En principe, cette évolution pourrait permettre d'élargir la représentation de la magistrature dans la composition du CGPJ, car la moitié des juges espagnols ne sont pas membres d'une association de juges. Parallèlement à cela, le nombre de candidats se présentant à l'élection devant le Parlement pourrait être relativement important, ce qui pourrait accentuer les possibilités de manœuvres politiques au moment du vote. Par ailleurs, le vote à la majorité des 3/5 requis pourrait facilement permettre à un parti politique disposant d'une majorité imposante au Parlement de désigner ses candidats préférés.

78. L'EEG demeure circonspecte quant aux effets que la récente réforme pourra avoir dans le futur et n'est pas certaine que celle-ci permettra effectivement au CGPJ de renforcer son image d'organe non partisan. Même si elle comprend que le rôle du Parlement dans la nomination des membres du CGPJ a pu se justifier pour des raisons historiques, l'EEG renvoie au texte de la Recommandation CM/Rec(2010)12 ci-dessus, qui préconise qu'au moins la moitié des membres des conseils de la justice soient élus par les juges eux-mêmes par le biais d'un système démocratique donnant à chaque juge le droit de vote et le droit d'être élu. L'EEG attire également l'attention des autorités sur l'Avis N° 10(2007) du Conseil consultatif de juges européens (CCJE), qui souligne explicitement le fait que les autorités politiques, telles que le Parlement ou l'exécutif, ne devraient intervenir à aucun stade du processus de sélection. Elle fait par ailleurs remarquer que la mise en place de conseils de la justice vise généralement à mieux protéger l'indépendance de la justice – en apparence et en pratique. En Espagne, le résultat obtenu semble inverse, comme en témoignent les inquiétudes récurrentes de la population en la matière. Il s'agit là d'un point particulièrement préoccupant, alors même que les affaires de corruption se multiplient dans la classe politique.

79. Autre nouveauté introduite par l'amendement de la LOPJ de juin 2013, seuls certains des membres du CGPJ (5 sur 20) travaillent à plein temps. Avant la réforme, tous les membres se consacraient exclusivement à leurs fonctions au sein du CGPJ et toute autre activité professionnelle était exclue. Alors que ce changement d'approche a été motivé, semble-t-il, par une volonté d'accroître l'efficacité du système, certains membres de la profession affirment qu'il a conduit à réduire la capacité de travail du CGPJ et à diminuer encore plus son indépendance.

81. L'EEG estime qu'au vu du rôle décisionnaire fondamental joué par le CGPJ dans des secteurs déterminants de l'appareil judiciaire, notamment en matière de nominations, de promotions, d'inspection et de discipline des juges, il est essentiel que cet organe soit préservé de toute influence politique et considéré comme tel. Lorsque les instances dirigeantes de l'appareil judiciaire n'ont pas la réputation d'être impartiales et indépendantes, cela a un impact négatif immédiat sur la prévention de la corruption et sur la confiance de la population dans l'équité et l'efficacité du système judiciaire du pays. L'EEG est consciente qu'il est trop tôt pour évaluer les effets des

changements récemment apportés au processus de nomination des membres du CGPJ appartenant à la magistrature, mais elle craint que l'impression de politisation du CGPJ, liée au rôle du Parlement dans la procédure, persiste aux yeux de la population. Qui plus est, la réforme a aussi été globalement mal accueillie par la profession. L'élection des membres du CGPJ en novembre 2013 aura été le premier test de la récente réforme. Sachant que cette question est un point de discorde majeur depuis des années et compte tenu du contexte particulier en Espagne, l'EEG considère qu'un suivi étroit s'impose. ***Le GRECO recommande aux autorités d'analyser le cadre législatif régissant le Conseil général du pouvoir judiciaire (CGPJ) et ses répercussions sur l'indépendance effective et perçue de cet organe vis-à-vis de toute influence indue en vue de remédier à toute lacune identifiée. ».***

Alors que dans les épigraphes 83 à 89 du rapport GRECO (2013), dédié à la "*Recrutement, Carrière et les conditions de service* ", est exposée :

« 83. Les juges sont nommés pour une durée indéterminée jusqu'à l'âge officiel de la retraite. Ils ne peuvent être mutés, suspendus, révoqués ou contraints à prendre leur retraite pour d'autres motifs que ceux prescrits par la loi (article 118 de la Constitution).

84. L'accès à la carrière judiciaire repose sur le principe du mérite et de la capacité à s'acquitter des fonctions judiciaires (article 301(1) de la LOPJ). La principale voie d'entrée dans le corps judiciaire est la suivante : (i) concours public exigeant ouvert aux diplômés en droit de nationalité espagnole ayant atteint l'âge de la majorité (18 ans), suivi (ii) d'une période de formation (théorique et pratique) à l'Ecole de la magistrature. Une minorité de juges sont recrutés parmi des juristes expérimentés à la compétence reconnue, qui doivent également suivre la formation dispensée par l'Ecole de la magistrature (article 301(5) de la LOPJ). Tous les candidats doivent attester d'un casier judiciaire vierge.

85. Le processus de sélection vise à respecter les objectifs de transparence et d'objectivité (article 301(2) de la LOPJ). Les organes de sélection compétents (commission de sélection et jury d'examen) ont une composition mixte, réunissant des représentants du ministère de la Justice, des juges, des procureurs et des universitaires. La LOPJ comporte par ailleurs des dispositions incitant à sélectionner et nommer des personnes handicapées en vertu des principes « d'égalité des chances, de non- discrimination et de compensation des conséquences du handicap ». Aux termes de ces dispositions, les procédures de sélection doivent également respecter le principe « d'égalité entre les femmes et les hommes ». La formation initiale et la phase de sélection comprennent un programme de formation pluridisciplinaire et des stages pratiques encadrés dans différentes instances de l'appareil judiciaire (article 307 de la LOPJ). Tous les tests de sélection pour entrer dans la carrière judiciaire ou être promu incluent un chapitre sur le principe de l'égalité entre les femmes et les hommes, en particulier des mesures spécifiques contre la violence de genre (article 310 de la LOPJ). Les candidats qui réussissent la formation théorique et pratique sont officiellement nommés juges par le CGPJ, sur proposition de l'Ecole de la magistrature.

86. En théorie, les promotions au sein de l'appareil judiciaire reposent sur le mérite et les capacités, ainsi que sur la spécialisation et l'efficacité à s'acquitter des fonctions judiciaires (article 316(3) de la LOPJ). En pratique, en application des règles relatives aux concours au mérite (articles 329 et 330 de la LOPJ), l'ancienneté est le principal critère pris en compte pour les promotions et mutations. Cela dit, l'EEG a appris qu'une importance croissante est accordée à la spécialisation dans le cadre de la réforme actuelle de l'appareil judiciaire. L'évaluation des performances des juges repose sur la réalisation d'objectifs quantitatifs. Le système d'évaluation évolue actuellement, passant d'un système organisé à l'échelle des tribunaux à un dispositif plus institutionnalisé.

87. Dans le cas de nominations à de hautes fonctions, à savoir présidents de tribunal provincial, de tribunal supérieur de justice, de la Cour nationale et du Tribunal suprême, les propositions de nomination sont laissées à l'appréciation du CGPJ. Toutes les décisions du CGPJ en la matière doivent être motivées et peuvent être contestées en appel (devant la Chambre administrative du Tribunal suprême) par n'importe lequel des postulants. Les juges du sommet de la hiérarchie judiciaire précités sont nommés pour une période de cinq ans. Le Règlement N° 1/2010 du 25 février 2010 sur les décisions concernant la nomination à de hautes fonctions judiciaires a été adopté pour préciser le pouvoir discrétionnaire du CGPJ en la matière. Il donne des indications sur la notion de mérite et sur les critères de compétence à évaluer lors des décisions de nomination. Toutes les propositions de nomination doivent respecter les principes du mérite et de la capacité à s'acquitter des fonctions judiciaires, d'objectivité, de transparence et de représentation équilibrée des hommes et des femmes.

88. L'EEG salue les mesures positives prises pour améliorer les compétences des professionnels de la justice et garantir la transparence et l'équité de leur recrutement. Le système espagnol d'accès à l'ordre judiciaire est réputé être l'un des plus exigeants d'Europe. L'EEG constate également qu'en principe, les juges et les procureurs sont promus en fonction de leur ancienneté, en particulier aux échelons inférieurs de la hiérarchie. Ceci étant, des questions ont été soulevées lors de la mission sur place concernant une marge d'appréciation potentiellement plus grande laissée au CGPJ pour les promotions de certaines catégories de hauts magistrats (à

savoir, président des tribunaux provinciaux ou des tribunaux supérieurs de justice et juges de la Cour nationale ou du Tribunal suprême) et le risque d'interférences politiques dans les décisions de promotion, qui ne sont pas considérées comme totalement transparentes. Les critiques exprimées à cet égard émanent à la fois de la société civile et des juges eux-mêmes : l'appareil judiciaire est en effet perçu comme indépendant à la base, mais

politisé au sommet, au niveau de ses instances dirigeantes, à savoir au sein du CGPJ et dans les rangs supérieurs de la magistrature. Certains interlocuteurs ont précisé que l'identité de la personne qui serait nommée au poste à responsabilité à pourvoir était parfois connue à l'avance.
89. Les règles internationales ne souffrent aucune équivoque en la matière. Toutes les décisions portant sur les nominations et la carrière professionnelle doivent reposer sur des critères objectifs. Les conseils de la justice doivent faire preuve de la plus grande transparence possible21. L'EEG peine à mettre ces règles en rapport avec la « marge d'appréciation » conférée par la loi au CGPJ pour l'évaluation du mérite et des qualifications professionnelles des candidats dans le cadre de la nomination des hauts magistrats. Ces dernières années, plusieurs tentatives ont été faites, en particulier par le biais d'un règlement de 2010 et de plusieurs décisions du Tribunal suprême, pour affiner les critères sur lesquels le CGPJ doit fonder ces nominations. Les représentants interrogés ont toutefois admis qu'il serait préférable que les critères en question soient spécifiquement inscrits dans la loi et indiqué que les projets d'amendements de la LOPJ comportaient des dispositions en la matière (par exemple, obligation de transmettre un CV, des documents/titres confirmant les compétences, des rapports sur les performances, etc.). L'EEG salue cette évolution réglementaire annoncée. Lorsque les promotions ne reposent pas sur l'ancienneté, mais sur les qualités et le mérite, ces critères doivent être clairement définis et évalués de manière objective. L'EEG estime que la promotion des juges est un élément extrêmement important pour développer la confiance de la population dans l'équité et la transparence des processus judiciaires. Toute suspicion d'influence abusive dans la promotion des juges à de hautes fonctions doit être éliminée. Le GRECO recommande d'inscrire dans la loi des critères objectifs et des règles d'évaluation pour les nominations aux hautes fonctions de l'ordre judiciaire, à savoir, président de tribunal provincial ou de tribunal supérieur de justice et juge à la Cour nationale ou au Tribunal suprême, afin que ces nominations ne fassent naître aucun doute sur l'indépendance, l'impartialité ou la transparence du processus. Lors de la mise en œuvre de cette recommandation, les autorités devront tenir compte des inquiétudes exprimées au paragraphe 80 (recommandation v) sur la politisation perçue du CGPJ. »

Pour effectuer les suivantes « recommandations », en la matière :

v. analyser le cadre législatif régissant le Conseil général du pouvoir judiciaire (CGPJ) et ses répercussions sur l'indépendance effective et perçue de cet organe vis-à-vis de toute influence indue en vue de remédier à toute lacune identifiée *(paragraphe 80) .*

vi. inscrire dans la loi des critères objectifs et des règles d'évaluation pour les nominations aux hautes fonctions de l'ordre judiciaire, à savoir, président de tribunal provincial ou de tribunal supérieur de justice et juge à la Cour nationale ou au Tribunal suprême, afin que ces nominations ne fassent naître aucun doute sur l'indépendance, l'impartialité ou la transparence du processus *(paragraphe 89) .*

Á la date de rédaction de cet dossier - Mars 2015 - , on a rendue pas par les Autorités Espagnoles le rapport sur les mesures prises pour mettre en œuvre les recommandations précitées. Néanmoins on a traduit par les dites Autorités Espagnoles, ce rapport ; la dit traduction en Espagnol , c'est disponible á le suivant « link » :

GRECO Eval IV (2013) ESPAGNE

Les rapports d'évaluation et de conformité adoptés par le GRECO, ainsi que d'autres informations sur le GRECO, sont disponibles sur : www.coe.int/greco/fr.

Par *« L'Association des juges et des magistrats, Francisco de Vitoria, »* a été déposé recours contentieux-administratif - devant la juridiction compétente, devant les tribunaux, spécifiquement la salle de la contentieuse - administrative de la Cour Suprême - *Sala de lo Contencioso - Administrativo del Tribunal Supremo* - , contre les Décrets Royaux suivants :

-N° 930/2013, du 29 novembre, du nomination des membres du Conseil général de pouvoir judiciaire sur la proposition du Congrès des députés, en ce qui concerne les élus juges et magistrats.

-Nº 931/2013, du 29 novembre, du nomination des membres du C.G.P.J. sur la proposition du Sénat, en ce qui concerne les élus juges et magistrats.

-N° 979/2013, 10 décembre, du nomination de président de la Cour suprême et du Conseil général du pouvoir judiciaire.

Le recours contre les deux première fois arrêtés royaux – les RRDD. Nº 930/2013 et Nº 930/2013, 29 novembre - dans lequel sont nommés respectivement membres du Conseil général de la proposition de pouvoir judiciaire au Congrès des députés et le Sénat-, ***on été déclarées irrecevables par Ordonnance du 27 juin 2014,*** délivré par la Chambre du Contentieux-Administratif de La Haute Cour -, manque de les organes juridictionnelles du contentieux - administratifs de la compétence nécessaire pour ces poursuites [(articles 51.1. a) de la Loi Juridictionnelle contentieux – administratif (LJCA) et pour être frappée de recours une activité non soumis à recours [(artículo 51.1.c)].

La Chambre à cet égard affirmant ce qui suit :

"…***el recurrente dirige su impugnación respecto de actuaciones de distinta naturaleza, pues los Reales Decretos de nombramiento de los Vocales del Consejo General del Poder Judicial responden a actuaciones del Congreso de los Diputados y del Senado en el ejercicio de competencias parlamentarias,*** *mientras que el Real Decreto de nombramiento del Presidente del Tribunal Supremo y del Consejo General del Poder Judicial responde al ejercicio de las competencias de este último, lo que resulta determinante a efectos del acceso al control jurisdiccional,* ***que viene delimitado, en primer lugar, por el ámbito material de la Jurisdicción Contencioso-Administrativa****.*

A la definición del ámbito propio, alcance y límites de la Jurisdicción Contencioso-Administrativa, dedica la Ley procesal el Capítulo Primero del Título Primero, señalando en su exposición de motivos que, respetando la tradición y de conformidad con el art. 106.1 de la Constitución , se le asigna el control de la potestad reglamentaria y de la legalidad de la actuación administrativa sujeta a Derecho Administrativo, pero incorpora, además, ciertas novedades, como son: la actualización del concepto de Administración pública y, en lo que aquí interesa, la sujeción al enjuiciamiento de esta Jurisdicción de actos y disposiciones emanados de otros órganos públicos que no forman parte de la Administración, cuando dichos actos y disposiciones tienen, por su contenido y efectos, una naturaleza materialmente administrativa, con el fin de asegurar la tutela judicial de quienes resulten afectados en sus derechos o intereses por dichos actos y disposiciones.

Se delimita así el ámbito de la Jurisdicción Contencioso-Administrativa atendiendo a la actuación de las Administraciones públicas sujeta al Derecho Administrativo, a que se refiere el art. 1.1 y 2 de la Ley Reguladora , y extendiéndose a las actividades desarrolladas por otros órganos públicos que de manera específica se indican por el legislador en el número 3 de dicho art. 1 que, en lo que respecta al Congreso de los Diputados y el Senado, se concretan en la impugnación de los actos y disposiciones en materia de personal, administración y gestión patrimonial sujetos al Derecho público*.*

Pues bien, ***el nombramiento de los Vocales del Consejo General del Poder Judicial no puede incluirse en el ámbito de control de la Jurisdicción Contencioso-Administrativa así definido, por tratarse de una actuación parlamentaria y no estar integrada en ninguno de los supuestos que se acaban de mencionar.***

Efectivamente los artículos 112 y 113 de la Ley Orgánica del Poder Judicial atribuyen al Congreso de los Diputados y al Senado la competencia para la elección de los Vocales del Consejo General del Poder Judicial y la propuesta para su nombramiento por el Rey, constituyendo actos parlamentarios en el ejercicio de las funciones atribuidas al Congreso y al Senado por la Constitución, sujetos, en su caso, a los controles propios de esa actividad parlamentaria, pero no al control de esta Jurisdicción Contencioso-Administrativa, pues no se trata de actos atribuidos a las Administraciones públicas, aun entendidas en el sentido amplio que se establece en la Ley Reguladora, ni de actos políticos sujetos al control de elementos reglados a que se refiere el recurrente, ni constituyen actos o disposiciones en materia de personal o gestión patrimonial de los contemplados en el art. 1.3 de la Ley de la Jurisdicción *.".*

On disant la Chambre qu'il convient encore d'ajouter ce qui suit

"…***El nombramiento de los Vocales del CGPJ (artículo 567 LOPJ), al igual que acontece con el nombramiento de ocho de los doce Magistrados del Tribunal Constitucional (artículo 159.1 CE) o del Defensor del Pueblo o de los Consejeros de Cuentas, se engloba dentro de un ámbito de actividad parlamentaria no legislativa de relación de las Cortes Generales con otros órganos de la estructura constitucional, dentro del sistema de influencias e interrelaciones recíprocas propio de nuestra división constitucional de poderes. Por su misma naturaleza dicha actividad es constitucional y está sometida a controles de la misma naturaleza, pero no al control de esta jurisdicción del orden contencioso-administrativo****.*

La naturaleza de la actividad que desarrollan las Cámaras con estos nombramientos no se aproxima, siquiera en forma analógica, a una actividad materialmente administrativa que se pudiera subsumir en la actividad administrativa impugnable a que se refieren los artículos 25 a 30 de la LRJCA . Y es que este orden de jurisdicción no conoce, en este ámbito parlamentario, conforme a su competencia general (artículos 8 y 9.4 LOPJ) sino conforme a una competencia específica de atribución que es la que establece en su favor el artículo 1.3 a) de la LRJCA . Se ciñe la misma a las pretensiones que se deduzcan contra los

actos y disposiciones en materia de personal, administración y gestión patrimonial sujetos al Derecho público adoptados por los órganos competentes del Congreso de los Diputados y del Senado. La actividad que se impugna no se engloba, como es evidente, en este ámbito objetivo ni las pretensiones que se formulan se corresponden con la naturaleza de la actividad sujeta por lo que no es susceptible de control en vía contenciosa.

Además de la citada Sentencia del Pleno de la Sala de 5 de marzo de 2014 , nuestra jurisprudencia tiene declarado así [por todos, Autos de 24 de marzo de 2014 (Rec. 501/2013), de 9 y 10 de marzo de 2011 (Rec. 553/2010) y de 30 de mayo de 2011 (Rec. 152/2011)] que la intervención parlamentaria en una resolución de las Cámaras que ejercite una de las funciones que la Constitución le atribuye, está fuera del genérico ámbito delimitado para el control jurisdiccional en el artículo 106.1 de la Constitución y tampoco tiene encaje dentro del concreto ámbito de conocimiento que para la jurisdicción contencioso- administrativa delimitan los artículos 1 y 2 de la LRJCA .

No puede sostenerse que esta declaración otorgue un ámbito, que los recurrentes deben querer denominar, ***de inmunidad de control****, porque* ***nuestro Estado social de Derecho diseña una tupida red de controles adecuados a la naturaleza de cada actividad, como son las del propio control parlamentario, adecuado a pretensiones de naturaleza constitucional como las que se esgrimen en el recurso, y, en lo pertinente, las distintas funciones que se atribuyen al Tribunal Constitucional por la vía de los amparos del artículo 42 de su Ley Orgánica, para las decisiones o actos sin valor de Ley de las Cámaras en el caso de que vulneren derechos o libertades susceptibles de amparo constitucional****.*

Por lo que a este orden jurisdiccional respecta, el artículo 117.4 de la CE y el artículo 2.2 de la LOPJ disponen en forma clara y taxativa que los Juzgados y Tribunales no pueden ejercer más funciones que las que expresamente les sean atribuidas por la Ley en garantía de cualquier derecho. ".

Alors comment :

"…***Es cierto que para el nombramiento de los Vocales de procedencia judicial por el Congreso y por el Senado existe un procedimiento previo. Pero también lo es que ese procedimiento previo tiene su depuración jurídica propia, pues termina con la proclamación de candidatos (artículo 576.9 de la Ley Orgánica del Poder Judicial) contra la cual cabe interponer recurso contencioso-administrativo, tal como establece el artículo 577.1 de la misma. Pues bien, las incidencias o ilegalidades o incumplimientos de los requisitos exigidos a los candidatos (v.g. situación de servicio activo, avales de miembros de la Carrera Judicial o de una Asociación, validez de los avales, plazo de presentación de candidatos, memorias justificativas de las líneas de actuación, etc.) pueden alegarse, además de en el trámite de impugnación ante la Junta Electoral (a cuyo efecto se publica la lista de candidatos, artículo 576.8 L.O.P.J .) en el trámite de impugnación en la vía contencioso- administrativa, que se puede iniciar en el plazo de los dos días siguientes a la proclamación definitiva de candidaturas (artículo 577).***

Quiérese decir que estas vías impugnatorias (primero ante la Junta Electoral, después ante la Sala de lo Contencioso Administrativo del Tribunal Supremo) surten el efecto de depurar las candidaturas de los posibles vicios o ilegalidades que contengan, y que, ya depuradas, pasan al Congreso de los Diputados y al Senado exentos de un nuevo control jurisdiccional.

Lo que resta es pura actividad parlamentaria. Es cierto que la ley impone también algunos requisitos que las Cámaras han de cumplir (v.g. toma en consideración del número de miembros de la Carrera Judicial afiliados a Asociaciones, o proporción mínima por categorías judiciales, artículo 578.2 y 3 de la L.O.P.J .), pero se trata ya de requisitos exentos de control jurisdiccional, porque no se refieren en absoluto a materia de personal, administración o gestión patrimonial (artículo 1.3.a) de la Ley Jurisdiccional 29/98), que por expreso deseo de esta norma legal son los únicos actos de las Cortes Generales que pueden ser controlados por la Jurisdicción Contencioso-Administrativa.

Todo lo cual nada tiene que ver con el derecho a la tutela judicial efectiva, el cual no existe por principio allí donde no alcanza la jurisdicción.".

Tout en précisant au fondement en droit cinquième , les motifs au moment considérés dans l'Ordonnance du 2 avril 2014 :

"…***En nuestro auto de fecha 2 de Abril de (recurso 510/13), dijimos lo siguiente:***

"Esos veinte Vocales del Consejo General del Poder Judicial han sido designados por las Cortes Generales (artículo 567.1 de la LOPJ (RCL 1985, 1578 y 2635) *) pero doce de ellos corresponden al denominado turno judicial. Han sido elegidos por las Cámaras pero de entre candidaturas formadas en un proceso previo y ajeno al ámbito parlamentario (artículos 572 a 578 LOPJ) y que, una vez proclamadas en forma definitiva (artículo 577 LOPJ), han sido remitidas a los Presidentes del Congreso y del Senado por el Presidente del Tribunal Supremo y del Consejo General del Poder Judicial (artículo 578 LOPJ).*

En tales circunstancias no cabría excluir, a priori, que, al impugnarse el nombramiento también de esos Vocales del denominado turno judicial del CGPJ, pudiesen suscitarse cuestiones respecto de las que esta Sala pudiese

conocer, según la doctrina de la citada Sentencia de 5 de marzo de 2014 , conforme a la atribución de competencia que nos confiere el artículo 1.3 b) LRJCA y lo dispuesto en el artículo 12.1 b) de la LRJC, como parece corroborar el artículo 572 de la vigente LOPJ y al margen de las cuestiones que se pudieran controlar en ese recurso."

En estos párrafos se apoyan el Ministerio Fiscal y la parte actora para solicitar la admisión del recurso contencioso- administrativo, pero lo cierto es que tales párrafos no constituyen en absoluto la "ratio decidendi" de aquél auto, puesto que en él se concluye precisamente con la inadmisión del recurso contencioso-administrativo en este punto, por falta de jurisdicción; y en todo caso, esos párrafos, debe entenderse aclarados o rectificados en cuanto se opongan a lo razonado y decidido en este que ahora firmamos.".

Enfin, l'Ordonnace , spécifie que :

"… ***la causa de inadmisión no concurre respecto de la impugnación del Real Decreto 979/2013, de 10 de Diciembre, por el que se nombra Presidente del Tribunal Supremo y del C.G.P.J., el cual es fruto de una actuación exclusiva de éste, plenamente sometida por ello al control de esta Jurisdicción Contencioso-Administrativa*** ."

Tras la oportuna tramitación del proceso en sede jurisdiccional, del ***recurso contencioso-administrativo*** interpuesto por la Asociación de Jueces y Magistrados "Francisco de Vitoria", ***contra el Real Decreto 979/2013, de 29 de Noviembre, por el que nombra Presidente del Tribunal Supremo y del C.G.P.J*** , el mismo ***fue desestimado*** mediante Sentencia dictada con fecha 16 de diciembre de 2014, por la Sala de lo Contencioso-Administrativo del Tribunal Supremo (Sección 1ª) , argumentándose de modo sustancial lo siguiente para establecer tal desestimación :

Après le traitement par la Cour du ***recours contentieux-administratif*** **du** processus déposée par l'Association des juges et des magistrats "Francisco de Vitoria", ***contre le Real Décret 979/2013, du 29 novembre, qui nomme le Président de la Cour suprême et du C.G.P.J*** , la même ***qu'il a été rejeté*** par Jugement en date du 16 décembre 2014, par la Chambre du Contentieux-Administratif de la Haute Cour (Section 1) - *TS C-Admivo* - , argumentant substantielle ce rejet :

Au première fondement juridique , *on raisonne* que :

" (…)

De lo dicho en la página 29 de la demanda parece deducirse ***que la ilegalidad que se esgrime en el nombramiento por cuotas de los Vocales del C.G.P.J. (tal como se dice, según las cuotas parlamentarias de los distintos partidos políticos) viciaría también el nombramiento de Presidente del Tribunal Supremo y del C.G.P.J., pues de esa forma (y acudimos a otro pasaje de la demanda, página 15) se habría infringido el artículo 581 de la L.O.P.J . (RCL 1985, 1578, 2635) , que señala que los Vocales del C.G.P.J. no se encuentran ligados por mandato imperativo***.

En el escrito de conclusiones la parte recurrente, aparte de unas extensas consideraciones sobre las consecuencias de la denegación del recibimiento a prueba, resume la ***razón de su impugnación aludiendo a la "ilegalidad por inconstitucional del nombramiento del Presidente del C.G.P.J. el 9 de Diciembre de 2013, que se produciría aunque formalmente tal día los Vocales eligieran a … , realmente el nombramiento estaba ya decidido por Dn. … y Dn. … , antes de que se eligieran a los propios Vocales, siendo razonable concluir que en tal supuesto el C.G.P.J. no ocuparía una posición (no) autónoma sino subordinada a la del resto de poderes del Estado"*** (sic, página 12), ***ocurriendo finalmente que el nombramiento del Sr. Presidente del Tribunal Supremo y del C.G.P.J. habría sido realizado no por los Vocales del C.G.P.J. sino por otras personas***.".

Avant d'étudier ce qui doit être entendu que c'est le seul objet de la plainte, dans la Fondement en droit deuxième les précisions suivantes sont faites :

" (…)

A).- ***La falta de jurisdicción en que apoyamos nuestro auto de 27 de Junio de 2014 , que inadmitió el recurso contencioso- administrativo referido a los nombramientos de los Vocales del C.G.P.J. impide también el examen crítico de los avatares parlamentarios como antecedentes del nombramiento de Presidente del Tribunal Supremo y del C.G.P.J., pues mientras esos nombramientos parlamentarios no se declaren en su caso nulos por el órgano que corresponda*** ***(órgano que no fue precisado en nuestro auto de 27 de Junio de 2014 porque no lo es ningún Juzgado o Tribunal de los que ejercen jurisdicción, según el artículo 26 de la L.O.P.J . (RCL 1985, 1578, 2635) , resultando entonces inexigible la designación que, en su caso, impone el artículo 5.3), mientras eso no ocurra, repetimos, este Tribunal ha de partir de la conformidad a Derecho y de la plena eficacia de los nombramientos de los Vocales del C.G.P.J. realizados por el Congreso y por el Senado***.

B).- *Por esa misma razón*, ***la sentencia del Tribunal Constitucional nº 108/1986, de 26 de Julio (recurso 839/1985) tiene en el presente caso una importancia muy limitada, pues se refiere al sistema de nombramiento parlamentario de los Vocales del C.G.P.J. y no a la elección y nombramiento de Presidente***

del Tribunal Supremo y del C.G.P.J., y aunque aquélla sentencia pone énfasis en los riesgos del nombramiento por las Cortes Generales de los miembros del C.G.P.J. (fundamento jurídico decimotercero, in fine), se refiere a materia que, según hemos dicho, está fuera de este proceso desde que nuestro auto de 27 de Junio de 2014 (RJ 2014, 3639) quedó firme.".

Dans le troisième fondement en droit , ils sont transcrits dans son intégralité , le compte rendu de la C.G.P.J. de la session tenue les 4 et 9 décembre 2013, le premier sur la proposition de candidats et le second sur l'élection du Président de la Cour suprême et le C.G.P.J.

Au fondement en droit quatrième on fait valoir:

"…Esta ***transcripción de las actas es muy útil para evitar la impresión que produce la lectura de los escritos de la parte actora de que aquélla elección puede ser sólo la plasmación servil de lo que otras personas habrían sugerido u ordenado previamente a los Vocales; impresión apuntada por la parte demandante al citar como infringido el artículo 581 de la L.O.P.J , según el cual*** *"los Vocales del C.G.P.J. no estarán ligados por mandato imperativo"* . (***Ningún otro vicio formal o sustantivo --ni la desviación de poder-- se esgrime en este proceso por la parte demandante***, lo que permite presumir que ni siquiera esta aprecia su concurrencia). ***Existencia de un mandato imperativo que habría de conducir necesariamente a la anulación del nombramiento impugnado. Así que el meollo de la cuestión no es si hubo un acuerdo previo entre el Presidente del Gobierno y el Jefe de la Oposición sino si, trasladado hipotéticamente ese acuerdo a los Vocales del C.G.P.J., estos lo asumieron como un mandato imperativo, con voluntad viciada, como cumplimiento de una orden o condición ilegal, con una finalidad (cumplir con lo ordenado por otros) distinta a la fijada para la ocasión por el ordenamiento jurídico (dar cada uno su voto al candidato que en conciencia cree que va a cumplir mejor la alta tarea de Presidente del Tribunal Supremo y del C.G.P.J.)***; *(artículos 560.1.1 ª y 586 de la L.O.P.J .).*

Pero este Tribunal no puede deducir (vistas las actas que se han transcrito) que los 16 Vocales del C.G.P.J. que votaron a favor del Sr. … lo hicieron como un cumplimiento de un mandato imperativo.

Esa conclusión sería ineludible ***si se quiere anular el nombramiento impugnado; no basta con aludir a supuestos tratos políticos en otros ámbitos, ni a citar noticias que adelantaron el nombre del elegido antes de la constitución del C.G.P.J., ni poner énfasis en la circunstancia de la existencia de otra candidata al cargo, (cuya existencia, por cierto, demuestra por sí sola que existió para los Vocales una real alternativa); nada de eso basta, porque hay que buscar la posible causa de anulación del nombramiento impugnado donde únicamente puede estar (y de la que nada dice la parte demandante), a saber, en la propia y específica voluntad de cada Vocal***.".

Et enfin, le fondement en droit cinquième, il affirme ::

"…***Las actas que hemos transcrito, sumamente reveladoras, demuestran que hubo un auténtico debate en el seno del Consejo;*** que hubo, por ejemplo, alguna Vocal que habiéndose adherido en la primera sesión a favor de la *candidata Sra. … votó finalmente al Sr. … , explicando las razones del cambio; que muchos de los Vocales conocían personalmente al Sr. … , por haber coincidido con él en el Tribunal Supremo, (algunos incluso en la misma Sección, con deliberaciones conjuntas durante años) en la Audiencia Nacional, en el Tribunal Superior de Justicia de la Comunidad Valenciana, en determinadas jornadas sobre Fé Pública Judicial y sobre Justicia y Comunicación, etc., y siendo así las cosas, cabría preguntarnos si la voluntad de estos Vocales expresaba en ese momento el acatamiento a un hipotético mandato imperativo o, por el contrario, estaba reforzada en su determinación lícita por el profundo conocimiento personal y profesional que tenían del Sr. … .*

La voluntad libre de los Vocales que votaron a favor del Sr. … no puede ponerse en duda a causa de la teórica existencia de tratos o convenios políticos previos, a la vista de las razones circunstanciadas que todos ellos expusieron en su explicación de voto, como se ve en las actas.

Nada de esto se dice en la demanda, pareciendo que esos hipotéticos tratos, regateos o convenios políticos previos, habrían de determinar sin más la existencia de un mandato imperativo, que viciaría en todo caso la voluntad de los electores.

Las cosas no son así. Nada hay en el expediente administrativo que pueda llevar a esta Sala al convencimiento de que los Vocales del C.G.P.J. que votaron al Sr. … lo hicieran acatando órdenes o cumpliendo condiciones, y, por tanto, con voluntad torcida, sino (según se deduce de las actas) con el ánimo de nombrar para el cargo a un Magistrado del Tribunal Supremo que creían prestigioso y experimentado."

5) Dans votre pays, des observations importantes ont-elles été formulées par des responsables politiques ou d'autres groupes pertinents concernant le rôle du pouvoir judiciaire et des tribunaux en leur qualité de troisième pouvoir de l'État? Si oui, veuillez indiquer brièvement leur nature et leur contenu et indiquer la réaction de l'opinion publique ou les rapports des media faisant état de "l'opinion publique".

Sans préjudice de ce qui précède á l'Espagne on a fait pas des observations importantes , par des responsables politiques ou d'autres groupes pertinents concernant le rôle du pouvoir judiciaire et des tribunaux en leur qualité de troisième pouvoir de l'État .

6) Dans quelle mesure, le cas échéant, la bonne administration de la justice est-elle affectée par l'influence des autres pouvoirs de l'État (par exemple, le ministère des finances à l'égard de l'administration des budgets, le ministère compétent en matière de technologie de l'information dans les tribunaux, la Cour des Comptes, les enquêtes parlementaires etc. ou toute autre influence extérieure par d'autres pouvoirs de l'État)?

Je m'en tiens aux réponses a la réponse « in extenso » , à la question 4)

7) Avez-vous d'autres commentaires à faire sur les relations entre le pouvoir judiciaire et les autres pouvoirs de l'État dans votre pays?

Je n'ai aucun commentaire particulier à faire , à l'écart des réponses fournies là-haut.

Sweden / Suède

1) How does the Constitution, or the other laws of your country, if there is no written Constitutional document, regulate relations between the judicial power on one side, and the executive and legislative powers on the other side?

In Sweden the Constitution consists of four fundamental laws, the Instrument of Government, the Act of Succession, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression. These laws take precedence over all other laws. The organisation and working procedures of the Riksdag (the Swedish parliament) are regulated in more detail in the Riksdag Act, which occupies an intermediate position between fundamental law and ordinary law.

The relationship between the judicial power and the executive and legislative powers is mainly regulated in the Instrument of Government chapter 11. According to art. 3 of that chapter neither the Riksdag (the Swedish parliament), nor a public authority, may determine how a court of law shall adjudicate an individual case or otherwise apply a rule of law in a particular case. Nor may any other public authority determine how judicial responsibilities shall be distributed among individual judges. Art. 4 stipulate that no judicial function may be performed by the Riksdag except to the extent laid down in fundamental law or the Riksdag Act. According to art. 6 permanent judges are appointed by the Government. A permanent judge can only be removed from office when one of two criterions, as set forth in art. 7, are at hand. The first criterion is that when the judge by criminal or gross/repeated neglect is manifestly unfit to hold office, the second is if he or she reached the applicable retirement age or is otherwise obliged by law to resign on grounds of protracted loss of working capacity.

In the aspect of parliamentary control, art. 6 in chapter 13 of the Instrument of Government states that the Riksdag elects one or more Parliamentary Ombudsmen who shall supervise the application of laws and other regulations in public activities, under terms of reference drawn up by the Riksdag. An Ombudsman may institute legal proceedings in the cases indicated in these terms of reference. Courts of law, administrative authorities and State or local government employees shall provide an Ombudsman with such information and opinions as he or she may request. Other persons coming under the supervision of the Ombudsman have a similar obligation. An Ombudsman has the right to access the records and other documents of courts of law and administrative authorities. A public prosecutor shall assist an Ombudsman if so requested. More detailed provisions concerning the Ombudsmen are laid down in the Riksdag Act and elsewhere in law. There is also a Chancellor of Justice (see art. 8 chapter 11 and art. 1 and 6 chapter 12), a non-political civil servant, that comes under the Government. The Chancellor of Justice is an independent authority mainly tasked to act as the Government's ombudsman in the supervision of authorities and civil servants, represent the state in legal disputes, ensure that the limits of the freedom of press and other media are not transgressed and to act as sole prosecutor in cases concerning the freedom of the press and the freedom of expression. An ombudsman can however never change a court ruling or in any way retry a court ruling or dictate how a court or a public agency should act in a particular case.

2) Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

The relationship between the judicial power and the executive/legislative powers has been a more or less constant subject of debate among scholars in university/academic circles. This relationship has also been a subject of debate in the political/legal field. Amongst others, individual judges, representatives for the Swedish Bar Association have written articles in legal journals. Popular subjects have been the extent of judicial review in the

Swedish legal system and the possible introduction of a constitutional court. The debate in the daily press/news coverage has been of a more limited degree. NGO:s, such as Centrum för rättvisa (Centre for Justice), have contributed to the public debate and through litigation brought attention to questions on the rule of law, the Swedish constitution and the basic human rights enshrined there in.

3) Has there been any significant debate on the issue of "judicial restraint" or "judicial moderation" with regard to the exercise of the judicial function vis-a-vis the other powers of the state? In particular, are there examples where public opinion and/or the other powers of state have suggested that the judiciary (or an individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

Sweden has a long tradition of democratic parliamentarian rule. Following this democratic tradition, judicial restraint, have always had a major influence on the relationship between the judicial and the legislative powers. As mentioned above, this has been a subject of debate, especially on the issues of a possible introduction of a constitutional court and other questions concerning judicial review. The latest significant debate centred on the Working Committee on Constitutional Reform's work to conduct a concerted review of the Constitution. The Working Committee was, apart from the traditional inquiry remit, instructed to stimulate debate and encourage public discussion on constitutional issues and on Swedish democracy. The work of the Working Committee resulted in a Swedish Government Official Report containing several proposed amendments to the constitution, several of which were later introduced. However there has been little, if any, debate or situations where public opinion or other powers of the state has suggested that the judiciary has impermissibly interfered in the field of executive or legislative power or discretion.

4) a) In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?

In 2010 several amendments to the constitution were introduced. The judicial power, i.e. the courts, were given a chapter of it's own in the Instrument of Government, chapter 11. This amendment was carried out in order to further emphasise the independence of the Swedish courts. Judicial review in the sense of a court examining acts of law and other regulations in a specific case and their compatibility with rules higher up in the norm hierarchy, such as the constitution, was prior to the 2010 constitutional amendments limited in the way that the courts were only to refrain from applying an act or ordinance if the error was manifest. This requirement was abolished through the 2010 amendments. The appointment of permanent judges has also been subject to change. The possibility for the Government to delegate the matter of appointing judges was removed. Furthermore, a criterion stating that provisions concerning the grounds for the procedure for appointing permanent salaried judges should be laid down in law was introduced. Other changes in the appointment procedure were also introduced, all with the objective of securing a system for appointment that cannot, with regards to the independence of the courts, be called into question. For example, all posts as judges must be announced as vacant and the former procedure, in which higher posts as judges were directly appointed, was abolished.

b) In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the "official" reason for the changes or proposed changes.

There are at the moment no proposed changes of that nature.

c) In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view of introducing changes in the law as referred to under a)?

There are at the moment no major discussions taking place in political circles, the public generally or in the media with a view of introducing changes in the relationship between the judiciary power and the other powers of the state.

5) In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please briefly identify their nature and content and indicate the reaction of the public or media reporting of "public opinion".

There have been no significant comments, on the role of the judiciary as the third power of the state, which has sparked any major reactions in the public or in the media reporting of public opinion. Discussions on these matters have mostly taken place in legal journals, and only occasionally in the daily press.

6) To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budgets, the relevant ministry with

respect to information technology in courts, the cour de compte, parliamentary investigations etc. or any other external influence by other powers of the state)?

The administration of justice is, in a practical matter, affected by the annual budget, as proposed by the Government and approved by the Riksdag. This budget determines the overall budget frame for the courts in Sweden. Following the Swedish tradition of strong independent government agencies the distribution within the Courts of Sweden is solely up to the Swedish National Court Administration. Money can however be given for specific areas, for example to fund the introduction and ongoing management of the Migration Courts. How the money is distributed in the given area is once again solely up to the Court Administration. The Swedish National Court Administration may also be given Government mandates, this may affect the administration in a practical way in that regard that it might take up the Courts of Sweden's resources. Questions concerning information technology fully fall within the discretion of the Swedish courts. Laws may of course stipulate that for example an examination of a witness during a public hearing should be recorded and stored digitally, how and with the use of what technical instrument is up to the Swedish National Court Administration to decide. As stated in the constitution no public authority, including the Riksdag, or decision-making body of any local authority, may determine how an administrative authority shall decide in a particular case relating to the exercise of public authority vis-à-vis an individual or a local authority, or relating to the application of law.

7) Do you have any other comments to make with regard to the relations between the judiciary and the other powers of state in your country?

There have been changes in the relations between the judiciary and the other powers of the state that has been constitutional. For example new courts have been introduced in the area of migration and land and environment, granting individuals a broader access to the courts by making more public agency decisions subject to court adjudication. Case law from the European Court of Justice and the European Court of Human Rights has also influenced the Swedish judicial system and arguably strengthened the judiciary power in relation to the other powers of the state, especially so in the area of accessibility to the courts. The influence of these courts has further enhanced the role of the Swedish courts in the work to protect and enforce human rights. One example where European law has had this influence is the question of tax surcharge and the right not to be tried or punished twice in criminal proceedings for the same criminal offence.

Switzerland / Suisse

1) How does the Constitution, or the other laws of your country, if there is no written Constitutional document, regulate relations between the judicial power on one side, and the executive and legislative powers on the other side?

The Swiss Constitution (dating from 1874 and later partially amended) was totally revised in 1999 and adopted by popular vote and the majority of cantons ("referendum"). The respective competences of and the relations between the three powers are regulated in artt. 143-191c of the Constitution – whereas artt. 136 to 142 of the Constitution address the (considerable) political rights of the citizens: "They may participate in elections to the National Council and in Federal popular votes, and launch or sign popular initiatives and requests for referendums in federal matters" (art. 136 par. 2 Cst.) They can also vote in cantonal referendums and elections to the Council of States and thus participate in the forming of political opinions in their canton.

According to article 148 of the Swiss Constitution the Federal Parliament is the supreme authority of the Swiss Confederation.

(1 "Subject to the rights of the People and the Cantons, the Federal Assembly is the supreme authority of the Confederation."

2 The Federal Assembly comprises two chambers, the National Council and the Council of States; both chambers are of equal standing. ")

The relation between the three powers is characterised by a strict separation of their members. Art. 144 headed "Incompatibilty" stipulates:

" No member of the National Council, of the Council of States, of the Federal Council or judge of the Federal Supreme Court may at the same time be a member of any other of these bodies.

2 No member of the Federal Council or full-time judges of the Federal Supreme Court may hold any other federal or cantonal office or pursue any other gainful economic activity.

3 The law may provide for further forms of incompatibility."

The Federal Assembly elects the judges of the Federal Supreme Court:

Art. 168 par. 1 "Appointments" provides:

"1 The Federal Assembly elects the members of the Federal Council, the Federal Chancellor, the judges of the Federal Supreme Court and, in times of war, the Commander-in-Chief of the armed forces ("the General"). "

As to the term of office (6 years): Art. 144 Cst.: "The members of the National Council and of the Federal Council as well as the Federal Chancellor are elected for a term of office of four years. Judges of the Federal Supreme Court have a term of office of six years."

There is no possibilty of destitution during the term. And in the event of non-reelection the Supreme Court judge is entitled to a pension (35% of the salary in the first year in function up to 50% of the salary after 15 years).

The Federal Assembly exercises the oversight over the Federal Courts: Art. 169 Cst.

"1 The Federal Assembly exercises oversight over the Federal Council and the Federal Administration, the Federal courts and other bodies entrusted with the tasks of the Confederation.

2 Official secrecy does not apply in dealings with the special delegations of supervisory committees provided for by law."

The Federal Assembly determines the expenditure of the Confederation, adopts the budget and approves the federal accounts (Art. 167 Cst. headed "Finance").

The Federal Assembly enacts all significant provisions that establish binding legal rules in the form of a federal act. (Art. 164 "Legislation") - subject to an optional referendum: Art. 141Cst:

" 1 If within 100 days of the official publication of the enactment any 50,000 persons eligible to vote or any eight Cantons so request, the following shall be submitted to a referendum:

1 a. Federal acts; ...".

Federal acts include in particular fundamental provisions on:

g. the organisation and procedure of the Federal authorities.

For example: According to art. 9 of the Swiss Federal Supreme Court Act judges have to retire at the age of 68.

Judicial independence is warranted in Art. 191c Cst. (Independence of the judiciary):

"The judicial authorities are independent in the exercise of their judicial powers and are bound only by the law."

Art. 188 Cst. (Status)

1 The Federal Supreme Court is the supreme judicial authority of the Confederation.

2 Its organisation and procedure are governed by statute.

3 The Federal Supreme Court attends to its own administration.

Under the former constitution it was incumbent to the Federal Council to present the annual report and the financial statements as well as the budget of the Federal Supreme Court to the Federal Assembly. Now it is the President of the Federal Supreme Court who represents the interests of the federal judiciary in Parliament.

2) Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

There is a recurrent discussion about the introduction of constitutional review of federal legislation. The Swiss Federal Supreme Court has authority to control the compliance of cantonal statues with the Constitution, but lacks competence to control the constitutionality of federal statues issued by the federal assembly (and subject to optional referendum). Academics are widely in favour of a constitutional review of federal legislative acts by the Swiss Federal Supreme court. During the debates regarding the entire amendment of the Constitution of 1999 the constitutional control of Federal statutes by the judiciary was discussed in Parliament but finally turned down. In

April 2012 an agency of the Council of States proposed the introduction of constitutional control by abolition of art. 190 Cst.

(Art. 190 (Applicable law) of the Constitution provides: "The Federal Supreme Court and the other judicial authorities apply the Federal acts and international law.")

This proposition was also turned down in the end - after debate.

3) Has there been any significant debate on the issue of "judicial restraint" or "judicial moderation" with regard to the exercise of the judicial function vis-a-vis the other powers of the state? In particular, are there examples where public opinion and/or the other powers of state have suggested that the judiciary (or an individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

Among scholars there is a discussion about the correct method of interpretation of statutory law by the judiciary aiming at the full respect of the intentions of the legislator. The discussion is not targeted against individual judges, but arises sometimes when judicial decisions are criticised.

Public debate is generally focused on specific judicial decisions and more aimed at their material (political) impact. There have been decisions which lead to an amendment of the legislation – which is generally accepted as a good functioning of "checks and balances" between the judiciary and the legislator.

The judges of the Federal Supreme Court who presented themselves to re-election by the Federal Assembly have up to now always (since 1874) been re-elected (one reservation: in the 1990s a judge had to present himself twice before obtaining the necessary votes). But re-elections are sometimes abused to criticise indirectly unpopular judicial decisions – the judges who wrote in a opinion, that international law can prevail constitutional norms obtained clearly less votes than the others in the most recent re-election.

This has been criticised and is not well accepted by public opinion, as it challenges our system.

4) a) In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?

The legislation on the federal judiciary was amended in 2007, above all by a new Federal Supreme Court Act of 17th. June 2007, in force since 1st January 2007. There is no fundamental change as to the Court's independence: the statute confirms in article 25, that the Federal Supreme Court attends to its own administration, recruits its staff and keeps the accounts. The Federal Administration provides and maintains the Court's premises, while the Court itself attends to its logistical needs (Art. 25a of the Federal Supreme Court Act).

b) In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the "official" reason for the changes or proposed changes.

No changes are proposed for the moment.

c) In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view of introducing changes in the law as referred to under a)?

There are preparations for a popular initiative aiming at a constitutional amendment stating that the norms of the Swiss Constitution prevail over international law.

(Popular initiative requesting a partial revision of the Federal Constitution in specific terms.

art. 139 of the Constitution:

1 Any 100,000 persons eligible to vote may within 18 months of the official publication of their initiative request a partial revision of the Federal Constitution.

2 A popular initiative for the partial revision of the Federal Constitution may take the form of a general proposal or of a specific draft of the provisions proposed.

()

5 An initiative in the form of a specific draft shall be submitted to the vote of the People and the Cantons. The Federal Assembly shall recommend whether the initiative should be adopted or rejected. It may submit a counter-proposal to the initiative.)

5) In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please briefly identify their nature and content and indicate the reaction of the public or media reporting of "public opinion".

The role of the judiciary is generally accepted – if particular decisions are criticed in public, then there are in general attempts to change the law. The competence of the judiciary to implement the law in individual cases is not questioned.

6) To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budgets, the relevant ministry with respect to information technology in courts, the cour de compte, parliamentary investigations etc. or any other external influence by other powers of the state)?

The parliament has the competence to procure the financial means and to elect the judges – the administration of justice is in the competence of the Court (Art. 188 par. 2 Cst, see above to 4a).

7) Do you have any other comments to make with regard to the relations between the judiciary and the other powers of state in your country?

"The former Yugoslav Republic of Macedonia"/ « L'ex-République yougoslave de Macédoine »

1. How does the Constitution, or the other laws of your country, if there is no written Constitutional document, regulate relations between the judicial power on one side, and the executive and legislative powers on the other side?

The Constitution of Republic of Macedonia provides in the Art. 8 that the fundamental values of the constitutional order of the Republic of Macedonia are, among others, the division of state powers into legislative, executive and judicial. According to Amendment 25, judicial power is exercised by courts. Courts are autonomous and independent. Courts judge on the basis of the Constitution and laws and international agreements ratified in accordance with the Constitution. Emergency courts are prohibited.

The types of courts, their spheres of competence, their establishment, abrogation, organization and composition, as well as the procedure they follow are regulated by a law adopted by a of two-thirds majority vote of the total number of MP's, Amendment 27 , a judge shall not be held responsible for an opinion given in the process of rendering a court decision. A judge shall not be detained without the consent of the Judicial Council, except when caught in committing a criminal act for which a prison sentence of at least five years is prescribed. The judicial function is incompatible with membership in a political party or with another public function or profession determined by law.

Amendment 28 regulates the status of the Judicial Council. The Judicial Council of the Republic of Macedonia is an independent and autonomous institution of the judiciary. The Council shall ensure and guarantee the independence and the autonomy of the judiciary. The composition of the Council, the terms of office, but the criteria and manner of election, as well as the basis and the procedure for termination of the mandate and dismissal of a member of the Council is determined by law. The office of a member of the Council is incompatible with membership in political parties and with performance of other public offices and professions determined by law.

Amendment 29 regulates the basic competences of the Council. i.e. ...

- elects and dismisses judges and lay judges; determines the termination of a judge's office; elects and dismisses presidents of Courts; monitors and assesses the work of the judges decides on the disciplinary accountability of judges; has the right to revoke the immunity of judges; proposes two judges for the Constitutional Court, from among the judges; and performs other duties stipulated by law. On the election of judges, lay judges and court presidents, equitable representation of citizens belonging the all communities shall be observed. The Council shall submit an annual report for its work to the Assembly of the Republic of Macedonia in from, content and manner determined by law.

According to the Law on courts, the basic principles, regulate that the judicial power shall be exercised by the courts. The courts are autonomous and independent state bodies. They courts are ruling and establishing their decisions on the basis of the Constitution, laws and international agreements ratified in accordance with the Constitution. The procedure before the court is regulated by law and shall be based on the following principles: - legality and legitimacy, equality of parties, - trial within a reasonable period of time, fairness, publicity and transparency, contradiction, two instance procedure, sitting in a panel, oral hearings, directness, the right to defense, that is, representation, free evaluation of evidence, and economy.

The relations between the judicial and the other powers can be seen in the following provisions that regulate the status of the judicial decisions. The judge shall decide impartially by applying the law on the basis of free evaluation of the evidence. Any form of influence on the independence, impartiality and autonomy of the judge in the exercise of the judicial office on any grounds and by any entity shall be prohibited. The legally valid court decision shall have undisputed legal effect. The court decision may only be amended or abolished by a competent court in a procedure prescribed by law. The court decisions shall be binding for all legal entities and natural persons and shall have greater force with regard to the decision of any other body. Everyone shall be obliged to obey the legally valid and enforceable court decision under threat of legal sanctions. Everyone shall be obliged to restrain from commission or omission of an action that obstructs the adoption or enforcement of the court decision. Any state body shall be obliged, when it falls within its competence, to ensure the enforcement of the court decision. The supervision of the enforcement of the court decisions shall be conducted by the court in accordance with the law. The enforcement of a legally valid and enforceable court decision shall be carried out in the fastest and most effective manner possible, and it cannot be obstructed by a decision of any other state body. The court shall raise an initiative for conducting a procedure to assess the compliance of the law with the Constitution when the procedure questions its compliance with the Constitution, and shall inform the next higher court and the Supreme Court of the Republic of Macedonia thereof.

As regard the relation towards legislative power, also, there is a provision that regulates the possibilities for the court to challenge the Law before the Constitutional court. Namely, if the court deems that the law to be applied in a particular case is not in compliance with the Constitution, and the constitutional provisions cannot apply directly, it shall suspend the procedure until the Constitutional Court of the Republic of Macedonia adopts a decision.

On request of the court, in the exercise of its competence, the state bodies and other legal entities shall be obliged to submit all the necessary data, acts or documents at their disposal and required for the procedure, without any postponement.

As regard election and dismissal, this process is in the competence of the Judicial council, exclusively. The judges and presidents of the courts shall be elected and dismissed by the Judicial Council, under the conditions and in the procedure defined by law. The election, that is, dismissal of the judges and the presidents of the courts shall be published by the Judicial Council in the “Official Gazette of the Republic of Macedonia” within a period of 15 days as of the day the election, that is, dismissal is completed. Lay judges shall be elected and dismissed by the Judicial Council, under the conditions and in the procedure laid down by law.

The Judicial Council shall by a decision define the number of judges in each court, upon previously obtained opinion from the general session of the Supreme Court of the Republic of Macedonia and opinion from the session of judges of the respective court.

Following the international documents, but as well, recommendations posed by numerous of international organizations, NGO,s, GRECO, European Commission, progress reports, in order to meet the political criteria for the accessing process to the EU, towards strengthening the independence, impartiality and competence of the judiciary, the authorities in Macedonia, in close cooperation with the judiciary, have introduced, with the amendments of the Law on courts in 2010, and 2013 th, new more strict criteria for entering in the judicial profession and for promoting in the higher instances of the courts. A new merit system, based on knowledge, qualification and results of the work, has been introduced. In brief, the vacancies in the first instance courts, can be filled with the graduated candidates of the Academy, only, and the candidates for posts in the higher positions (Appelate courts, Supreme court, Higher Administrative court, can be, among on- sitting judges, only, with certain, fixed in the Law, years of working stage as judges, they need to take psychological tests and test of integrity, to have international certificate in foreign language).The vacancies in the first instance courts and prosecution offices can be filled with the graduated candidates in the Academy for judges and prosecutors. The concept of the merit system is commencing through the conditions for entering in the Academy (the candidates for entering in the Academy shell be graduated on Law Faculties with master studies completed, with at least 8 grade, achieved during the both phases of the studies, they need to have international certificate in foreign language and passed a bar exam, with at least 2 years working experience and psychological tests and test of integrity. All these strict criteria for entering and promoting in the judicial profession were introduced in order to enhance the independence of the judiciary, but as well, its capacities to be more resistant towards the political pressures.

As an example of a good practice in Macedonia, is the cooperation between the judicial and the other powers, related to the joint and transparent work in the process of preparing the draft laws. The amendments in the Law on courts, but also in all other laws that are related to the status, the rights and obligation of the judges and the Judicial council, are being prepared by the working groups established in the Ministry of justice, that always include judges, as well lawyers and law professors.

The relations toward executive power are regulated through the provisions in ensuring the guarantees for detention and criminal liability of judges. Namely, in the exercise of the judicial office, the judges shall enjoy immunity, a judge cannot be held criminally liable for a stated opinion and manner of deciding during the adoption of a court decision, also a judge cannot detained taken in without an approval of the Judicial Council, unless being caught in commission of a crime for which an imprisonment sentence in duration of at least five years is foreseen. The Judicial Council shall decide upon revocation of the immunity of judges.

The judge shall be suspended from exercising the judicial office while in custody, or while the procedure for the crime for which an imprisonment sentence of at least five years is foreseen, is ongoing. The judge can be suspended from exercising the judicial office in case of initiated disciplinary procedure or dismissal procedure. The decision to suspend the judge from exercising the judicial office shall be adopted by the Judicial Council.

As regards complaints related to the exercise of the judicial office, they are to be reviewed by the bodies to which they are submitted, fast and fair and without presence of the public in the procedure, and judge against whom the complaint is submitted, shall reply within a time period defined by law.

A procedure for damage compensation or another procedure cannot be conducted against a judge or a lay judge, by a party that is not satisfied with the decision of the judge.

As regard relations with the other powers, it is important to refer to the provision that the state shall be held liable for damage caused to the citizens or legal entities, by a judge or lay judge in unlawful exercise of the office. In case of dismissal of a judge, because of the caused damage, the state, by means of a lawsuit, shall require the dismissed judge to return the amount of the paid damage, in the amount defined by the court, in accordance with the law. After the dismissal of a judge who has caused a damage to citizens or legal entities by unlawful operations, in a period of eight days as of the legal validity of the decision on dismissal, the Judicial Council shall notify the State Attorney's Office in order for it to undertake the measures, within the framework of its competences defined by law. That has never been a case in the practice and these provisions will be redrafted, following the GRECO recommendations.

As regard the issue of the competences of the Ministry of justice, in the Law on courts, it is regulated that the activities of the judicial administration shall be carried out by the Ministry of Justice. In order to carry out the activities of the judicial administration, the Ministry of Justice shall communicate with the president of the relevant court. The scope of work of the judicial administration shall include provision of general conditions for exercising the judicial power, and in particular drafting laws and other regulations in the field of organization and work of the courts and the procedure before the courts, adoption of a Court Rulebook, responsibility for continuous training of the judges and the judicial service, provision of material, financial, safety, spatial and other conditions for operation of the courts, carrying out activities related to international legal assistance, enforcement of sentences imposed for crimes, collection of statistical and other data about the work of the courts, supervision over the efficient performance of the works in the court and implementation of the Court Rulebook, supervision of the implementation of the regulations on court deposits and guarantees, reviewing the complaints from the citizens about the work of the courts pertaining to delay of the court procedure or the work of the judicial services, as well as other administrative tasks and activities defined by law. For the purpose of reviewing the complaints of the citizens about the work of the courts pertaining to delay of the court procedure, the Minister of Justice shall form a commission composed of two representatives from the Ministry of Justice and one representative selected by the Supreme Court, for which a report shall be prepared, which shall be prepared by the commission and shall be delivered to the Ministry of Justice in a period of 30 days as of the day of receipt of the complaint, and the Ministry of Justice shall deliver the report to the Judicial Council within a period of three days as of the receipt at the latest. The manner of reviewing the complaints of the citizens about the work of the courts pertaining to delay of the court procedure, shall be regulated by a bylaw, adopted by the Government of the Republic of Macedonia, on proposal of the Minister of Justice.

The Minister of Justice adopts a Court Rulebook, upon previous opinion from the general session of the Supreme Court. The Court Rulebook shall regulate the internal organization of the courts, the manner of operation of the courts, the keeping of case records, as well as the keeping of entry books and other books, the treatment of the documents, forms, the work related to the international legal assistance and acting upon complaints, the calling up and assignment of lay judges, the assignment of regular court translators, interpreters and experts, the keeping of statistics and records and professional development of the personnel, the rules on special marks of the vehicles of the court, the information system of the court, the audio-visual recording of a hearing, as well as other issues significant to the work of the courts. The Ministry of Justice supervises the application of the Court Rulebook.

The Ministry of Justice is ensuring the implementation, maintenance and operation of the information technology system on a single methodological and technical base. A single information technology center, containing a database of all judicial bodies, is being implemented in the Ministry of Justice. The Minister of Justice, by an act, defines the manner of operation of the information technology system in the courts referred.

As regard the financial independence of the judiciary, it is stated that the funds for operation of the courts is provided from the Court Budget, as a separate part of the Budget of the Republic of Macedonia, marked as "Judicial Power". The court budget is being administrated by the Judicial budget council that is composed of president of the Judicial council who is presiding with the Council, The amount of the salaries and the other compensations for the judges in the courts shall be defined by law. The amount of the salaries and the other compensations for the court servants and the other employees in the courts shall be defined by law and collective agreement. The salaries and the other compensations, as well as the weapons, equipment and uniform of the members of the court police shall be provided from the funds of the Budget of the Republic of Macedonia, marked as "Judicial Power". The minister of justice has supportive role for defending the budget in front of the Parliament.

The Judicial council is competent to submit to the Parliament, the request for annual budget for the judiciary (for all courts, Academy for judges and prosecutors and the Council itself), after submitting the draft budget to the Ministry of finance. The Ministry can formulate its comments directly to the Parliament, and the president of the council can defend its position, in front of the Parliament. More independent position is needed in relation to the Ministry of finance as a consolidator in the process of formulating the budget.

Despite the global economic crisis, the salaries of the judges and court administration personnel have not been reduced, in contrary, the salaries of the public administration employees, including the holders of the judiciary, judges and prosecutors have been recently increased for 4 %.

Macedonia is distributing 63,6% of the budget for the courts. The problem is the effective use of these means inside the judiciary. There is a need for further strengthening the relations and negotiations with the Ministry of finance and the Parliament for better strategic planning and spending of the judicial budget. One of the reasons is that Macedonia as a large number of professional judges.

The relation towards the other powers is important through presenting the provisions on the composition, status and competences of the Judicial Council.

The Judicial Council of the Republic of Macedonia is an autonomous and independent judicial body. The Council shall ensure and guarantee the autonomy and independence of the judicial authority, through performing its function in accordance with the Constitution and the laws. Political organization and activity shall be forbidden in the Council. The members of the Council must not carry out any party activity while performing the functions in the Council. The Council through its work shall prevent the political influence in the judiciary.

The Council shall consist of 15 members, out of whom:

- The President of the Supreme Court of the Republic of Macedonia and the Minister of Justice shall be ex officio members;

- eight members of the Council shall be elected by the judges from among their ranks. Three of the elected members shall be members of the communities that are not in majority in the Republic of Macedonia, where the principle of equitable representation of citizens belonging to all the communities shall be observed;

- the Assembly of the Republic of Macedonia shall elect three members of the Council with a majority of votes from the total number of representatives, wherefore there has to be majority of votes of the representatives belonging to the communities that are not in majority in the Republic of Macedonia, and

- two members of the Council shall be proposed by the President of the Republic of Macedonia and elected by the Assembly of the Republic of Macedonia, one of whom shall be a member of the communities that are not in majority in the Republic of Macedonia.

The Minister of Justice as a member of the Council shall participate in the operation of the Council without a right to vote. The work of the Council shall be chaired by President.

The president of the Council shall be elected from among the members of the Council, by a majority of the votes of the members having voting rights, by secret voting. The term of office of the president of the Council shall be two years, without a right to re- election. The Council, on a proposal of the president of the Council, at the same session when a president is elected, shall also elect deputy president who acts for the president in his/her absence. The Minister of Justice and the President of the Supreme Court of Republic of Macedonia cannot be elected as president and deputy president of the Council.

The independence of the Council has been guaranteed through the profile of the judges, members. Namely, any judge who exercises the office of a judge at the moment of publication of the announcement and meets the following requirements: has at least five years of service as a judge and

has positive assessment in the last three years in exercising the office of a judge, given by the Council, can apply to the announcement.

As to the members of the Council, elected by the Assembly of the Republic of Macedonia, as well as the members elected by the Assembly of the Republic of Macedonia on a proposal of the President of the Republic of Macedonia, shall be elected from among the university law professors, attorneys-at-law and other eminent law-graduates.

The term of office of a member of the Council shall terminate:

upon the expiry of the time for which he/she is elected;

on his/her request; by fulfilling the conditions for old age retirement in accordance with law; if, by an effective verdict, he/she is sentenced to unconditional imprisonment of at least six months for a crime, or is imposed a milder punishment for another criminal offense which makes him/her disreputable for exercising the office of a member of the Council;

if it is determined that she/he permanently losses the ability to perform the office, and he/she is elected to another public office or profession.

In the case referred to members elected by the Assembly, the term of office shall terminate when the Council, that is the Assembly of the Republic of Macedonia accepts the resignation at a session.

Towards further strengthening the independence of the judiciary, the recommendations by the EC 2013 Progress report, GRECO Fourth round evaluation report and the complains and critics, contained in the reports of the domestic NGO and international organizations on Macedonia, mostly, as regard the political influence on the process of election, promotion and dismissal of the judges, the National Assembly is in a process of adopting the Constitutional amendments 38 and 39, as regard judiciary, that have been previously submitted to the Venice commission and got positive opinion.

Namely, the composition of the Council has been changed, in order to exclude any political influence in the process of requirement, election and promotion of judges. The minister of justice and the president of the Supreme court as ex-officio, members will not anymore be members of the Council, thus increasing the number of the members, judges in the Council, elected on secret and immediate elections, among the judges from all the instances. The mandate of the members will be 6 years, without possibilities for re-election. The conditions as regard personal and professional integrity and background of the judges, members in the Council, will be increased.

According to this Amendment, the new Council will be composed of 15 members, out of which 10 will be judges, the other 5 candidates for members of the Council, proposed by the President of the State, and Parliament, cannot be among judges, but among law professors, attorneys, and other distinguished lawyers. The Amendment 39, introduces two important novelties following the complains and critics that were posed towards transparency of the process of selection and to reducing the political influence and discretion in the process of dismissal of judges. Following the GREKO recommend. for enhancing the guaranties for judges, in the disciplinary procedure, the Constitutional court will decide on the appeals, against decisions of the Council for election and dismissal of judges, or any other disciplinary measure, imposed to a judge or a president of a court. Also, a new legal remedy – constitutional appeal has been introduced in front of the Constitutional court. The status, competences of this Court will be for the first time regulated with a law, instead of having a situation where the position of the court was regulated with an internal Rulebook.

2. Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

Last past years, Macedonia was mostly criticized for allegedly, lack of independence in the judiciary, political influence, reflected in the process of election and promotion of judges, and for the influence of the other two powers in deciding of some particular cases, lack of transparency of the highest representatives of the judiciary, etc. Without an ambition to elaborate the objectiveness and the validity of the sources of information, reliability of all these reports, because of the different, certain and uncertain motives, powers, political and party interests, behind them, it is obvious, that the authorities of Macedonia, have reacted in a greatest possible, extent, all these critics, with adequate and constant amendments in the Constitution and the laws. For example, the NGO," Reporters without boarders", has commented a first instance decision, on the day, when the Appellate court, was to decide on the appeal, giving a clear example for interference of the international organizations and their pressure on the

judiciary, but, unfortunately, this is not a sole example. Of course, the process of promoting the independence is an ongoing process, and the criteria, recently enhanced, for entering and promotion in higher positions, based on merit system, and improving the quality of the judiciary, in general, cannot be fulfilled over night, but it will take some time. Also, the problem is in the confidence in the judiciary. The GREKO Report has referred to the Euro barometer index, where 68 %of the population does not trust to the judiciary. Despite of all reforms achieved, the judiciary has to put lot of efforts on further improving the quality of the judicial decisions, their elaboration, promoting of the transparency of the judiciary, building good relations with the NGO and the media in order to improve the image of the judiciary, to promote and to present to the public, the good practices (the progress in solving the backlog, introducing IT, better access to justice, publishing the court decisions on the websites, open sessions of the Council when reviewing the complains of the citizens, employing PR,s in the courts, regular press releases, etc.). In comparison with the other powers, the judiciary has less funds to create and realize its own comprehensive communication strategy, that is important for enhancing the trust in the judiciary and towards creating the perception among citizens about its power to be independent towards the other powers.

The relations and communications with the other powers should be improved through regular channels of communication and should be more visible to the public.

It is worth to mention that the pressures on judges and on deciding process, comes mostly from the NGO, s, international organizations and the certain media that are commenting the judicial decisions, even when they are not valid. Also, some lawyers use to comment the judicial procedures, the statements of the witnesses, the behavior of the judges and prosecutors that is an example of pressure and of a violation of the presumption of innocence and the principle of proper administration of justice. There are very rare cases when the politicians have commented the judicial decisions (with an exception of the opposition parties).

The Association of judges very rare, publicly reacts on the statements and comments given by the politicians, the media, NGO and the international organizations on selected judicial procedures and decisions. (only two or three times in the past years).It has been, always through written statements, given to the press.

The Academy for judges and prosecutors plays a key role in the enhancing the independence, and professional competence of the judges. (EC 2013 Progress Report). Following the GRECO 4 round evaluation report, the Academy is organizing a lot of seminars on ethics, conflict of interests that are very important to strengthen the capacities of judges, especially young ones, to become more resistant to the pressures posed by the powers, but also the media, NGO,s , business groups that are potential risks for classical forms of corruption ,through bribe, but also for political corruption in the judiciary.(promoting in higher positions, improper relations with the other powers, getting leading positions etc.)

3. Has there been any significant debate on the issue of "judicial restraint" or "judicial moderation" with regard to the exercise of the judicial function vis-a-vis the other powers of the state? In particular, are there examples where public opinion and/or the other powers of state have suggested that the judiciary (or an individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

No.

4. a) In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?

According to the Law on courts in 2006, the number of the courts with extended jurisdiction was reduced, to 11, out of total 27, that has caused a reaction by those courts, that have become courts with basic jurisdiction. The complains were that the state has been reduced the access to courts by the citizens, but these critics lasted very shortly as the changes were justified with the size of the country, number of the population, the number of pending cases and of course, the most important, the economic condition of the state.

b) In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the "official" reason for the changes or proposed changes.

No.

c) In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view of introducing changes in the law as referred to under a)?

No.

5. In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please briefly identify their nature and content and indicate the reaction of the public or media reporting of "public opinion".

Look above.

6. To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budgets, the relevant ministry with respect to information technology in courts, the cour de compte, parliamentary investigations etc. or any other external influence by other powers of the state)?

Look above.

7. Do you have any other comments to make with regard to the relations between the judiciary and the other powers of state in your country?

No.

Turkey / Turquie

1) How does the Constitution, or the other laws of your country, if there is no written Constitutional document, regulate relations between the judicial power on one side, and the executive and legislative powers on the other side?

According to Turkish Constitution (1982) the powers are organized on the principle of separation of powers between legislative, executive and judiciary. This also has been recognised indisputably by the case law of the Supreme Court. Article 7 of the Constitution states that; "Legislative power is vested in the Grand National Assembly of Turkey on behalf of Turkish Nation. This power shall not be delegated. Article 8 states that; "Executive power and function shall be exercised and carried out by the President of the Republic and the Council of Ministers in conformity with the Constitution and laws." Article 9; Judicial power shall be exercised by independent courts on behalf of the Turkish Nation."

2) Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

The principle of the separation of powers is indisputable accepted throughout the political and constitutional history of Turkey. All discussions on the matter are only going on to make a better system in the prospective new constitution.

3) Has there been any significant debate on the issue of "judicial restraint" or "judicial moderation" with regard to the exercise of the judicial function vis-a-vis the other powers of the state? In particular, are there examples where public opinion and/or the other powers of state have suggested that the judiciary (or an individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

Despite occasionally some Supreme Court and Council of State decisions have been criticized whether they are partial or impartial there has been a concrete article in the Constitution. According to the Turkish Constitution (article 138/3); Legislative and executive organs and the administration shall comply with court decisions; these organs and the administration shall neither alter them in any respect, nor delay their execution.

4) a) In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?

b) In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the "official" reason for the changes or proposed changes.

c) In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view of introducing changes in the law as referred to under a)?

No. Although there has happened some minor amendments regarding administrative structure of the courts (such as number of judges working in the courts, composing members, number of chambers etc.) they did not affect the relationship between the judiciary and the other powers of the state or the separation of powers since those amendments have administrative and functional characters also the relations between the powers and judiciary laid out robustly in the Constitution.

5) In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please bat allriefly identify their nature and content and indicate the reaction of the public or media reporting of "public opinion".

In the widest sense there has been some criticism made by politicians with respect to the role of the judiciary/courts in their capacity. They criticise the courts by claiming that the judiciary interfering the field of legislative and executive.

6) To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budgets, the relevant ministry with respect to information technology in courts, the cour de compte, parliamentary investigations etc. or any other external influence by other powers of the state)?

Courts are pretty much dependent on the financial sense to the Ministry of Justice and consequently to the Ministry of Finance in terms of their equipment requirements. Despite the judiciary is completely independent in terms of conducting its judicial function, in the widest sense the financial dependence of the courts may somewhat affect its independence.

7) Do you have any other comments to make with regard to the relations between the judiciary and the other powers of state in your country?

Since the relationship between the powers is always difficult to manage in practice, it should be regulated robustly and clearly in the constitution/law not to cause crisis between the powers that may harm the trustworthiness of the public. A democratic and law respected state can only be exist in a well-regulated and balanced system of the separation of powers.

United Kingdom / Royaume-Uni

1) How does the Constitution, or the other laws of your country, if there is no written Constitutional document, regulate relations between the judicial power on one side, and the executive and legislative powers on the other side?

The basic law relating to the appointment, tenure, remuneration and pensions of senior judges (of the High Court, Court of Appeal in England and Wales) and the Supreme Court of the UK, and more junior judges in all jurisdictions and their relations with the executive and legislative powers is contained in various Acts of Parliament which date back to 1705. The principal Acts of Parliament are now the Senior Courts Act 1981 and the Constitutional Reform Act 2005.

2) Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

Yes. Fundamental changes were made by the Constitutional Reform Act 2005, which changed the nature of the office of Lord Chancellor, made the Lord Chief Justice the senior judge in England and Wales (instead of the LC), gave more powers to the LCJ and his equivalents in Scotland and Northern Ireland and created the Supreme Court to replace the Judicial Committee of the House of Lords.

3) Has there been any significant debate on the issue of "judicial restraint" or "judicial moderation" with regard to the exercise of the judicial function vis-a-vis the other powers of the state? In particular, are there examples where public opinion and/or the other powers of state have suggested that the judiciary (or an individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

There is continued debate in the media about the exercise of the judicial function vis-à-vis the other powers of the state if it is considered (by one or more commentators) that a judge (or the Court of Appeal or Supreme Court) has impermissibly attempted to reduce the power or discretion of ministers to make subordinate legislation or to make executive orders. This has arisen particularly in the fields of immigration, asylum, extradition, social security law

and housing law. But, potentially, all areas of executive decision making are capable of challenge before courts and when they are this often gives rise to comment. On the other hand, the courts of the UK have no power to strike down primary legislation, although they can declare that a particular Act of Parliament (or part of it) is "inconsistent" with the European Convention on Human Rights. It is then up to Parliament to decide what to do about it.

4) a) In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?

Yes. The most important is the Constitutional Reform Act 2005. There is debate about whether this has brought about more or less power to the judiciary or more or less "separation of powers". There has also been a very recent change in the law concerning judicial pensions which some see as having the power to reduce considerably the independence of the judiciary, because it is more likely to create a "career" judiciary, which will be less independent.

b) In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the "official" reason for the changes or proposed changes.

Yes. There are planned changes to the way that the court structure and finance is managed. It will give more responsibility to the judges in the management of the courts and their financing.

c) In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view of introducing changes in the law as referred to under a)?

Not at present.

5) In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please briefly identify their nature and content and indicate the reaction of the public or media reporting of "public opinion".

As already noted, from time to time there is debate about the "power" of the judges to rule on the application of executive power by the central or local government. Sometimes this is seen as a good thing: "keeping the over-powerful executive in check"; at other times it is seen as being "un-elected judges telling elected politicians what they can and cannot do" and so is seen as being improper. It depends on the topic and which side the media want to take on a particular issue.

6) To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budgets, the relevant ministry with respect to information technology in courts, the cour de compte, parliamentary investigations etc. or any other external influence by other powers of the state)?

Ultimately, the Treasury controls the budget of the justice system in the UK and, to that extent it controls the proper administration of justice. There is a statutory obligation on the Lord Chancellor to provide the means to enable an effective judicial system to operate, but that is always within the confines of "financial constraints".

7) Do you have any other comments to make with regard to the relations between the judiciary and the other powers of state in your country?

Generally speaking, for over 300 years the independence of the judiciary has been respected by the executive and legislative powers. However, politicians do not always appreciate judges deciding cases against them and then make hostile comments. Politicians also do not generally understand that "the independence of the judiciary" means more than simply being able to decide individual cases without fear or influence by politicians or others. It takes patience and much explanation to make them understand that the independence of the judiciary means freedom from interference as to how judges are appointed, ensuring that they are paid enough and have proper pension provisions and ensuring that they have proper facilities to discharge their functions properly.

Ukraine

1) How does the Constitution, or the other laws of your country, if there is no written Constitutional document, regulate relations between the judicial power on one side, and the executive and legislative powers on the other side?

Article 6 of the Constitution of Ukraine (adopted in 1996) stipulates that state power in Ukraine is exercised on the principles of division into legislative, executive and judicial power.

Throughout years of its independence there has been a couple of constitutional reforms but none of them concerned this specified concept of separation of powers.

2) Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

Yes, during past 10 years there has been three "waves" of Constitutional reform. Throughout all this period of time numerous draft laws on amending Constitution has been drawn, working groups consisting of MP's, judges, lawyers, scholars has been created; problems of formation of the constitutional law in Ukraine are subjects for academic research and a separate discipline at law schools.

3) Has there been any significant debate on the issue of "judicial restraint" or "judicial moderation" with regard to the exercise of the judicial function vis-a-vis the other powers of the state? In particular, are there examples where public opinion and/or the other powers of state have suggested that the judiciary (or an individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

A striking example of the intervention of the judiciary of which spoke at all levels - government officials, the media and the public, is the decision of the Constitutional Court of Ukraine of 30.09.2010 №20-rp / 2010 on the abolition of the constitutional reform of 2004. Content and reaction caused by this decision, described in the following answers.

4) a) In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?

The first wave of amending the Constitution took place after "the Orange revolution" in 2004 by restructuring the form of governing of Ukraine into the Parliament-Presidential republic (instead of Presidential-Parliament republic as it drew on the previous edition of the Constitution). Specified amendments concerned separation of powers between executive and legislative powers, namely, the President lost some its authorities by giving it to the Parliament (The Verkhovna Rada). These amendments didn't have a direct impact on judiciary, but it has given rise to a couple of law suits over the legitimacy of such constitutional amendments.

The second wave was in 2010 at the beginning of the Presidential term of Viktor Yanukovich, when the Constitutional Court of Ukraine declared that the Law amending the Constitution in 2004 was inconsistent with the Constitution of Ukraine. Grounds for such a decision were numerous violations of the Regulations of the Verkhovna Rada while MP's have been adopting Constitution amendments in 2004. Again, this particular decision of the Constitutional Court of Ukraine №20-рп/2010 of September 30, 2010 gave rise to a public reaction and further political disputes. This decision actually revoked constitutional reform of 2004.

Afterwards some politicians published information that some judges of the Constitutional Court of Ukraine supposedly "made written statements" that the Administration of the President (Viktor Yanukovich) put them under undue pressure while making the decision on revoking Constitutional reform of 2004 (statement of Arsenii Yaceniuk, the chairman of the political party "Bat'kivshchyna", back in December, 2013).

At the height of the "Revolution of dignity" ("Euro Maidan", 2014) a few days after overthrowing of Viktor Yanukovich President's powers the Parliament of Ukraine though violating some procedural provisions adopted the Law which resumed Constitutional reform of 2004.

Envisaged amendments to Constitution of Ukraine, which took place in 2004 – 2014 themselves haven't amended the Chapter "Justice", but it caused disbalance within judicial system, contradictions of the court practice, numerous law suits and gave serious grounds for purification and reformation of the judicial system.

b) In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the "official" reason for the changes or proposed changes.

In May 2012 the President of Ukraine established the Constitutional Assembly in order to draw the conception of the judicial reform including amendments to the Constitution of Ukraine.

In July 2013 the President of Ukraine Viktor Yanukovich brought before the Parliament of Ukraine a draft law "On the amendments to the Constitution of Ukraine on the enhancement of the guarantee of the independence of judges" amending the Constitution.

Before bringing the draft law to the consideration of Verkhovna Rada the Venice Commission adopted the Opinion 722/2013 (June 13, 2013) concerning this draft law. The Opinion dealt with two separate texts: the draft Law "On the amendments to the Constitution of Ukraine on the enhancement of the guarantee of the independence of judges" and the proposed Changes made by the Constitutional Assembly, which have not taken the form of a legislative text. The draft law "On the amendments to the Constitution...." wery a product of the discussions in the Constitutional Assembly, but are based on a draft prepared by a working group of the Presidential Administration. This could raise doubts with respect to the inclusiveness of the Constitutional Assembly, which could have been avoided if the constitutional Assembly's work had been based on drafts produced by its own working parties.

According to the draft law prepared by the Presidential Administration the Parliament should be divested from electing judges on a lifetime term, instead it contained a provision that "appointment to the position of judge is done for unlimited term by the President of Ukraine upon and in accordance with a motion of the High Council of Justice". This provision stated a ceremonial role of the President in appointing of judges procedure.

Instead the draft law empowered the Parliament to determine the network, to establish, reorganise and abolish the courts of general jurisdiction upon the motion of the President of Ukraine. According to the Constitution all these powers are now in the authority of the President.

The Venice Commission welcomed such changes because "they are in line with the principle of the separation of powers and affirm the balance and co-operation between legislative and executive branches, with the aim of ensuring the independence of the judiciary". (para 13 of the Opinion 722/2013 of June 13, 2013).

Also the draft law deleted the provision concerning probation period of judges which was criticised from outset.

Article 127 proposed to require newly appointed judges to be 30 years old as against the current 25 and to have given years rather than three years' experience.

The draft provided essential changes to the procedure of bringing judges to responsibility. Thus, to arrest or detain a judge the consent of the High Council of Justice should be required instead of the Parliament's consent as it is required by the Constitution.

Also the draft proposed an entirely new composition of the High Council of Justice by total expulsion the representatives of the President and of the Parliament, which under effective Constitution have a right to appoint 3 members each.

For the most part, this draft law prepared by the Presidential Administration was welcomed by the Venice Commission, because it contained provisions in line with international standards and recommendations of the Council of Europe, the Venice Commission made in previous opinions on request of the Ukrainian authorities. Although the Venice Commission recommended to provide safeguards of transparent executing of powers by the High Council of Justice and the High Qualification Commission of Judges, it should contain a provision that the Prosecutor general should not have a vote on matters concerning the career or discipline of judges, that judges should be the subject to the functional immunity only.

The daft passed through the first reading in the Parliament and according to experts' views should have been adopted in February 2014, but MP's voted against it.

There was another draft law #3356-2 in 2013, signed by the leaders and MP's of the opposition (at the time) parties. As against the Presidential draft law it provided some expansion of powers of the Supreme Court of Ukraine, specifically the Supreme court was authorised to decide whether the case should have been brought before the Supreme Court. According to active legislation mentioned above is a competence of the High Specialised Court of Ukraine. But in the meantime this draft contained some doubtful provisions in the view of European standards such as vesting the Supreme Court with powers to give recommendations on applying the legislation.

It was one of the main demands proclaimed during the Revolution of Dignity, which took place in February 2014, to reform judicial system of Ukraine. Nowadays serious discussions, disputes concerning the main trends in judicial reform going on among professional actors: judges, politicians, academic researchers, and although in circles of mass media and society as a whole. The public demands an early reform of the judiciary by updating obsolete and ineffective, in their opinion, system that existed at the time of the previous President (Viktor Yanulovich).

The first thing to look at in the reformation process of judicial system is whether to amend the Constitution of Ukraine or just submit amendments to the law "On the Judicial System and Status of Judges".

April 4, 2014 the Verkhovna Rada of Ukraine has established the Interim Commission for the Preparation of the draft law on amendments to the Constitution of Ukraine. Currently, the Commission has prepared a draft law on decentralization of power, without affecting the judiciary. However, considering the need for the implementation of judicial reform, by the Commission has been receiving proposals to reform the judiciary.

Thus, April 11, the Supreme Court of Ukraine submitted to the Commission its proposals for reforming the judicial system at the constitutional level. The main proposals of the Supreme Court may be distinguished:

• provide a provision that "Courts have jurisdiction over all legal relations arising in the country." This will enable the development of mediation institutions, expansion of the categories of cases to be resolved by arbitration courts and retain legal control by the courts over decisions made by these bodies;

• Restoration of three links system of courts of general jurisdiction, to consist of the Supreme Court, appeal and local courts; withdrawal provisions for construction of general jurisdiction court system on the basis of specialization. Proposed system tends to be more efficient, promotes consideration of cases within reasonable time, and is based on the conclusions of the Venice Commission (paragraphs 45 and 63 of the Opinion of June 15, 2013 № 722/2013);

• To depute powers to sanction the detention or arrest of judges from Parliament to the High Council of Justice. This will limit the political influence of the legislature to the judiciary.

• To establish that appointment of judges for the lifetime term os proceeded only by the President upon the motion of the High Council of Justice. President gets only a ceremonial role.

• Abolishment of the five-year appointment of judges for the first time. The Supreme Court refers to the Opinion CCJE №1 (2001), which emphasized that the practice of most European countries provides for the appointment to full-time until retirement age. It shall also limit the interference of the legislative and executive authorities, members of the High Council of Justice, the High Qualifications Commission, with career development of judges.

• Providing the participation of the judiciary in the setting the state budget of Ukraine. This proposal is also based on the provisions of the para 5 Opinion CCJE №2 (2001).

• Abolishing of the High Qualification Commission of Judges and transferring its authority to the High Council of Justice; exclusion from the High Council of Justice members who are appointed by the president and parliament.

• Vesting the Supreme Court of Ukraine with authorires of legislative initiative is considered as unreasoned. This position is grounded by the fact that in this case the Supreme Court will be involved in the political process, which itself violates the principle of independence of the judiciary;

• Vesting the Parliament with powers to establish, reorganise and abolish courts of general jurisdiction. The provision has also been repeatedly recommended by international institutions, the courts should be established by laws which in the hierarchy of norms are higher than the decrees of the President of Ukraine. As to the present Constitution it is the President of Ukraine who deals with establishment, reorganization and abolishment of courts.

c) In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view of introducing changes in the law as referred to under a)?

Along with mentioned draft laws and proposals it should be cited the examples of initiatives that received less support in professional circles. Thus, in 2012, a member of the Constitutional Assembly Mykola Melnik, along with proposed amendments by Presidential Administration, set alternative ways of judicial reform, namely:

• Abolishing of the Constitutional Court of Ukraine and vesting the Supreme Court of Ukraine with the constitutional jurisdiction;

• appointment of judges to administrative positions (for chairman and deputy chairmen of courts) shall be the competence of judicial self-government bodies, namely, the Council of Judges of Ukraine;

- implementation of the Peace Justice;

- to enshrine the provisions in the Constitution that no one has the right to require the judge to report on the specific case.

Also in June 2014 political party "Freedom" proposed amendments to the Constitution concerning the judiciary:

• providing that the judicial power was vested in the Supreme Court and lower courts established under the Constitution of Ukraine. Delegating the court functions to other bodies or officials is prohibited;

• Creation of two panels of judges who carry out justice in private law and public law relations in appeal courts and in the Supreme Court and;

• election of local judges by citizens of Ukraine;

• appointment of judges to a specified (limited) period of time;

• deleting the provision of the Constitution: "independence and integrity of judges is guaranteed by the Constitution and laws of Ukraine."

With regard to recent developments in the field of judicial reform, it should be noted that October 27, the President established the Council for Judicial Reform, composed of the heads of courts, experienced lawyers, researchers, representatives of NGOs and international experts.

Autumn 2014, Olexander Volkov, the Head of the Department of Judiciary and Legal Policy of the Presidential Administration of Ukraine, former Supreme Court judge, said: "The Council on Judicial Reform is trying to draw principles that are necessary to comply with for Ukraine to achieve by 2020 the EU standards and be able to enter the EU. The objective of the Council is to find instruments by which we can achieve this goal in the judicial system. Not only by correcting some provisions of the current Constitution, but also by understanding what changes we have to introduce to the Basic Law and what result we want to get. "

As the President Petro Poroshenko noted in December 2014: "For a complete reboot of the judicial system, appropriate changes to the Constitution are needed. Let's speed up these positions. "

Similar views the Deputy Speaker of the Parliament of Ukraine Oksana Syroiid shares: "Accomplishment of a full upgrading of the state power - the judiciary and local authorities - is possible only by amending the Constitution of Ukraine. The country can not wait for constitutional changes to autumn next year. ".

January 13th, 2015 the Parliament of Ukraine in the first reading at once adopted the two bills to be the basis of the future law on judiciary – one prepared by the Cabinet of Ministers (the Government) and the other by the President (prepared by the Council on Judicial Reform), but these bills do not provide the amendments to the Constitution of Ukraine.

Regarding recent legislative intentions, January 16, 2015, the Parliament was introduced with a bill on amendments to the Constitution of Ukraine concerning the abolition of immunity of MPs and judges. This draft law provides that a judge can not be arrested and detained without the consent of the High Council of prior to indictment by the court, except for the arrest at the moment of commission of an offence or immediately after committing a serious or especially serious crime against life and health (under current legislation the Parliament gives for permission detention or arrest of a judge); bringing judges to legal liability is carried out on general grounds under common procedure. Judges may not be held legally responsible for acts committed in connection with the administration of justice, except when a judge delivers a knowingly wrongful judgment, breaches the oath or commit a disciplinary offense.

5) In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please briefly identify their nature and content and indicate the reaction of the public or media reporting of "public opinion".

It should be mentioned that in Ukraine the issue of respect for the judiciary in the context of the commenting and assessing decisions of judges and courts by the officials of the executive and the legislature, the media and the public in cases that are still pending is a severe issue.

Unfortunately, examples of incorrect coverage of court performance are widely met. There are some recent statements made by politicians and the media.

In January 2015, the President of the National Security and Defense Council of Ukraine (from February 2014 to May 2014 he has been acting for the President of Ukraine) Oleksandr Turchynov noted that "courts must put an end to the issue of delivering verdicts against corrupt officials, but since the courts are not actually updated and the old troubled corrupt system remained, they cannot do so."

Commenting on the critical importance of amending the Constitution on the functioning of the judiciary, the Deputy Speaker of the Parliament of Ukraine, Oksana Syroiid said: "No less tension in society creates yet uncompleted judicial reform. The problem lies not entirely in corrupted judiciary. Considerable number of the judges still retains its loyalty to the Kremlin. The expulsion such judges of the judiciary is a matter of national security for Ukraine. "

As stated in the answer to question 2, the decision of the Constitutional Court of Ukraine in 2010 for annulment of the constitutional reform of 2004 caused a great resonance in society. During the coup in February 2014 the Parliament by its resolution of 24 February 2014, which restored the Constitution in its edition of 2004, in fact, found that in 2010 the Constitutional Court of Ukraine by its decision to return the Constitution of 1996 changed the constitutional order, and that judges who took this decision breached the oath. The Verkhovna Rada removed from the office five judges of the Constitutional Court, who was elected by the Parliament according to the procedure of composing the Constitutional Court. The Parliament also called on Acting President and Congress of Judges to dismiss judges of the Constitutional Court by these bodies for breach of the oath.

Representative of Ukraine during the year has repeatedly informed CCJE about the situation that was developing in Ukrainian judicial system, in particular, concerning the Law "On restoration of trust in the judiciary of Ukraine" and the Law "On purification of government." As at December 10, 2014 according to the first law the Interim Special Commission that provides vetting for judges, since August 2014 has initiated 172 vettings concerning judges, adopted 8 opinions on breach of the oath and directed them to the High Council of Justice, adopted 2 conclusions on presence of disciplinary offences and forwarded the materials to the High Qualifications Commission of Judges of Ukraine.

According to the Law "On purification of government" officials and officers are subject to verification whether there are grounds for their dismissal under this Law. The stage of undergoing vetting judges has started on December 2014 and has to be completed by December 2015. This law has caused considerable debates among the public, including on its compliance with the provisions of the Constitution of Ukraine.

In November 2014 the Supreme Court of Ukraine filed a constitutional petition for verification of certain provisions of the Law "On purification of government" in compliance with the Constitution. Judges believe that provision for removing from the office their colleagues who during Euromaidan rendered decisions on opting the measures of restraint against activists or passed any politically motivated decisions to arrest political activists is unconstitutional. The Supreme Court considers that the lustration without review the legality of court rulings is a violation of the Constitution of Ukraine. In addition, the same judges to be dismissed in accordance with previously adopted law "On Restoring confidence in the judicial system." are the subject of vetting and then dismissal under the Law “On purification of government”. That is, they suffer double punishment for their actions.

The Plenum of the Supreme Court also decided that simultaneous lustration of members of the High Qualification Commission of Judges and of the High Council of Justice and the front office of the State Judicial Administration only because they have been working during Euromaidan and haven’t quitted, is a violation of the principle of individual responsibility.

Regarding these initiatives some politicians expressed some concerns that the judiciary "put the brakes on" the process of purification of government.

Also in the local courts there are pending cases on reinstatement of officials who had been dismissed under the Law "On purification of government". Currently there are 2 decisions made by local courts on sustaining the claim and the reinstatement of officers. The Ministry of Justice of Ukraine has sharply reacted to the imposition of such a judgment. The Ministry of Justice has addressed the High Qualification Commission of Judges of Ukraine with a demand to bring a judge of the Kharkiv District Administrative Court Valentina Samoilova, who rendered a decision on reinstatement a prosecutor, dismissed under the Law "On cleaning power”, to disciplinary responsibility. Pavlo Petrenko, Minister of Justice of Ukraine, said he would forward the materials on this fact to the Prosecutor General of Ukraine to conduct an investigation for signs of crime in this decision made by the Judge Samoilova. Mr. Petrenko emphasized that the Ministry of Justice would respond to every fact of delivering similar judgments. "In all these cases the Ministry of Justice is going to challenge judgments in higher instance court and to intervene in proceedings. If the actions of judges seem to have signs of disciplinary or criminal offenses, we will address the investigative bodies, and as a member of the High Council of Justice I will initiate proceedings against these judges to bring them to responsibility, "- he said. The Ministry of Justice of Ukraine has also approached the Supreme Court of Ukraine and the Supreme Administrative Court of Ukraine with an initiative to clarify the application of the Law "On purification of government" by judicial bodies.

The Head of the Department on lustration procedures of the Ministry of Justice Tetiana Kozachenko said that judge Samoilova hasn't not figured out the vetting procedures and confused the rule of law. She also noted that, along with three members of Parliament she came to Kharkov to "talk with the judge Samoilova."

The case got extraordinary public reaction and comments of the Ministry of Justice in respect of a judgment which is not enacted, only exacerbate the tension.

Regarding this situation, January 22, 2015 judges of Kharkiv Administrative Court of Appeal addressed the Council of Judges of Ukraine and the Prosecutor General of Ukraine on taking immediate steps to ensure judicial independence at both the administration of justice and after that.

Here are some excerpts from the judges' appeal:

"Later cases of undue pressure on judges has become systematic and frightening, including some cases where representatives of the executive bodies and MPs take part. There is a tendency, when the actions of specified subjects are beyond the powers granted them by law, it results in improper attempt to exercise control over the examination of cases by courts, to cause negative attitude of public to the judiciary of Ukraine and sometimes includes open threats of physical violence. "

"An example of interference in the administration of justice is a message of the MP, Chairman of the Anti-Corruption Committee of Verkhovna Rada of Ukraine Yegor Sobolev made in network" Facebook "on the announcement to visit with another MP Semen Semenchenko and soldiers of battalion "Donbass" Judge Samoilova and judges of Kharkov administrative Court of Appeal. Yegor Sobolev characterizes the court's decision on reinstatement of a prosecutor as a disgusting event that must be stopped, and gives judges of appeal court a "chance" to deliver the lawful, in his opinion, decision. The proceedings in the Court of Appeal on this case was delayed, and Yegor Sobolev in an interview to the national channel said: "Unless the case is won - the judge will be thrown out of the windows." Similar expressions of threatening with the gibbet law has published another MP Simon Semenchenko on January 20 2015. "

"These actions and expressions of MPs, who are representatives of legislative power in Ukraine, appeal to be a direct interference with the administration of justice, the pressure on court and judges."

In their appeal to the General Prosecutor of Ukraine judges of the Kharkiv Administrative Court of Appeal asked to give proper legal assessment of the actions of listed persons concerning the unlawful influence on courts and judges.

It should be noted that in recent years, cases of pressure on judges by holding rallies, meetings, mass actions of citizens before or at the courthouse has increased. Of course, freedom of speech and the right to hold peaceful rallies are strongly maintained in Ukraine, the rights of individuals to open court hearings are respected, but often during these meetings citizens fall outside the scope of rights granted them.

In late December 2014 the judges of Rivne Commercial Court of Appeal addressed the Council of Judges of Ukraine on the matter of resistance in proper administration of justice. Thus, the day of a particular case hearing in front of the court were about 50 people who then chose to attend the court hearing. Throughout the court hearing (3, 5 hours) in front of the court powerful sound equipment was turned on loud music. After the announcement of the judgment the panel of judges, assistant of judges, court session secretary and registrar have been locked in a courtroom by the protesters, who, in addition, addressed threats and insults. Blocking of judges and court staff stopped only after production and transfer of technical record of court hearing to the representative of a party (which supported the protesters).

This extraordinary and threatening situation should get proper legal assessment by the Prosecutor General, Ministry of Internal Affairs of Ukraine; the necessary measures to ensure the safety of judges and judicial apparatus should be taken.

Also, January 19, 2015 Kremenetskiy District Court Ternopil region informed the Council of Judges of Ukraine on some cases of interference in court's and judges' performance. In January, a judge of the court Mrs. L.Varnevych by its judgment released ex-mayor of a town from criminal responsibility. In response to this decision January 16, 2015 a group of people set fire at the entrance to the courthouse using tires, shouted abusive remarks to the judge, and later broke into her office, threatened with physical violence, forced her to write a letter of resignation. Then the "protesters" grabbed Judge L.Varnevych and the President of the court and put them into the trash skip. Law enforcement agencies have not provided adequate protection for judges and court staff, only three employees of the judicial police tried to protect the judges and got injured.

This incredibly blatant case of disrespect for the judges and employing physical violence should have no place in civilised country. Unfortunately, there are some concerns that such situations tend to be repeated, so that the level

of tension and discontent in society is very high, and the statements of some politicians, journalists only promote distrust and contempt for court system.

6) To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budgets, the relevant ministry with respect to information technology in courts, the cour de compte, parliamentary investigations etc. or any other external influence by other powers of the state)?

The problem of proper and adequate funding of courts has existed since Ukraine's independence, but due to recent events (external political disputes, armed conflict in the east), the situation deteriorated.

According to the Constitution of Ukraine (article 130) the State Budget of Ukraine separately sets out expenditures for the maintenance of the courts. According to the Law of Ukraine "On the Judicial System and status of judges" expenditures on the courts in the State Budget of Ukraine shall not be reduced during the current fiscal year.

When making a budget for next year the Constitutional Court of Ukraine, general jurisdiction courts prepare the budget requests for adequate funding for the upcoming year. In case the Ministry of Finance of Ukraine believes that budget requests are not justified, it includes them in the draft State Budget of Ukraine and submits to the Cabinet of Ministers of Ukraine accompanying reasoned conclusions indicating obstacles to meeting these needs.

In practice, courts are sometimes without adequate funding by 30%.

The bill to reform the judiciary pays special attention to the issue of funding the judicial system, many of them proposed involvement of the Council of Judges of Ukraine to the budgeting process.

Also in 2014 against the background of crisis in the country the Verkhovna Rada of Ukraine limited the maximum of judges' remuneration to 15 minimum wages. This act provoked considerable discussion as the Law "On the Judicial System and status of judges" provides that judicial independence is ensured, including material and social security, and the adoption of new laws or amendments to existing laws shall not be diminished content and scope defined by the Constitution guarantees the independence judge.

State Budget for 2015 limits the maximum amount of remuneration of a judge to 7 minimum wage.

These laws "On restoration of trust in judiciary of Ukraine" and the Law "On purification of government" and the position of the executive and the legislative bodies about the "lustration" of judges show a significant influence and pressure on the judiciary.

7) Do you have any other comments to make with regard to the relations between the judiciary and the other powers of state in your country?

As stated above, in November 2014, the Supreme Court of Ukraine forwarded a motion to the Constitutional Court of Ukraine to make an opinion on compliance of certain provisions of the Law of Ukraine "On purification of government" with the Constitution of Ukraine. According to the President of the Supreme Court of Ukraine, Judge Yaroslav Romaniuk, this law has shown the political will of dismissal of judges with violation of the constitutional procedure only because these judges has rendered decisions regarding people who participated in the rallies. This will open the way to the European Court of Human Rights for dismissed judges and certainly they should win these cases. Judges are not against of lustration, but the process must comply with European standards, have to be cautious and must not violate fundamental human rights, and must not be an instrument of political will of high authorities and individual officials.

With regard to the ways of reforming of the judiciary, Mr. Y.Romaniuk sustained position of the Supreme Court of Ukraine and of a considerable part of legal professionals that political circles should not take part in the formation of the judiciary, as it does now (Parliament appoints judges for permanent term, decides whether to arrest, dismiss them, etc.). The High Council of Justice should also be restructured, the majority of which should be composed of judges. However, changes to legislation and by-laws would not help the situation, it is the Constitution that has to be amended. As showed data monitoring "Level of trust in the judiciary" carried out by independent agencies, the level of trust in the judiciary among those who at least once has been involved in court proceedings (parties, lawyers, etc.) is much higher than the level of trust of citizens who have never faced the judiciary and their opinion of the judicial system is influenced by politicians and statements in the media.

As mentioned above inadequate funding of the judiciary and recent legal initiatives to cut salaries of judges also threatens the proper administration of justice in Ukraine and it directly contradicts the Ukrainian and European legislation.

In my personal opinion, Ukraine met the urgent need to reform the judiciary, as some elements of the existing judicial system are outdated, inefficient, and therefore can not meet the standards of an independent and fair trial. It is insufficient to amend current or to adopt new laws, the constitutional reform has to be introduced, but only according to well-considered draft laws on amending the Constitution having regard the opinion of the judiciary The main fear of the judges concerning future judicial reform in Ukraine is not that it would change an accustomed system, but the fact that it could be carried out hastily, lacking sustainable and efficient provisions, and that it can result in dismissal of all the judges of Ukraine or its majority, and that this destroy the pillars of independence of the judiciary.