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CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)

Summary Report on the responses by the CCJE member states to the questionnaire for the preparation of the CCJE Opinion No. 18 (2015):

"The independence of the judiciary and its relations with the other powers in a modern democratic state"

Introduction

In total, 34 questionnaires were returned. The 34 member states who answered the questionnaire were Albania, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Hungary, Iceland, Ireland, Italy, Luxemburg, Malta, Montenegro, Netherlands, Norway, Poland, Rumania, Slovakia, Slovenia, Spain Sweden, Switzerland, Turkey, Ukraine, the United Kingdom (UK) and the former Yugoslav Republic of Macedonia.

In general, according to the answers given, the principles of separation of powers and the independence of the judiciary and the individual judge are - in theory – widely accepted in the member states. In most countries, the separation of powers and the independence of judges are guaranteed in a constitutional document. However, there are considerable differences in the legal provisions and the situation in practice in the respective member states. Such differences are noticeable in many areas:

Contrasting countries with strong constitutional courts (Germany, Slovenia, Rumania) and constitutional judicial review (Albania, Austria, Germany, Norway, Rumania, Slovenia, Slovakia, Spain, the former Yugoslav Republic of Macedonia) with countries with a long tradition of parliamentary sovereignty (e.g. Denmark, Finland, France, Sweden, Switzerland, UK) is one of many examples. Other differences are noticeable when countries with a council for the judiciary and a higher degree of administrative autonomy (e.g. Albania, Belgium, Bulgaria, Croatia, Cyprus, Georgia, Hungary, Italy, Netherlands, Rumania, Slovakia, Slovenia, Spain, the former Yugoslav Republic of Macedonia) are compared with countries where the judiciary is still very much controlled by the respective ministry of justice (Austria, Czech Republic, Germany, Luxemburg, Poland) or by parliament (Switzerland). In some countries, the judiciary is administrated by independent agencies or councils of the judiciary,

while the government exercises some influence (France, Denmark, Estonia, Iceland, Ireland, Norway, Sweden, UK).

In their responses to the questionnaire, the member states have reported a wide range of developments and discussions in relation to the independence of the judiciary and its relations with the other powers of the state. Though the discussions and developments are unique to every member state, a number of topics are identified as being common to several of the member states.

Judicial independence in newer democracies (former Soviet states, new EU member states)[1]
Some member states, particularly new democracies, report the development of the main institutions of their constitutional and judicial system.

Some of those countries are working towards gaining EU membership in the future. In these countries, many institutions have been established for the first time (Albania, Montenegro, the former Yugoslav Republic of Macedonia), or have been reformed after or during major political developments and crises that lead to amendments of the constitution. In Georgia, for example, the constitution was changed in 2010. In Hungary, the constitution was changed in 2011. Ukraine is in a particularly difficult situation at the moment after the conflicts about the constitutional amendments of 2004 in 2010 and 2014 and then the outbreak of a civil war.

In some countries, low trust in the judiciary by the public is a serious problem (Albania, Ukraine, and the former Yugoslav Republic of Macedonia).

In some relatively young democracies, particularly new member states of the EU, many projects of judicial reform have been introduced over the last decade and are still taking place. In many cases, the developments seem very encouraging (Bulgaria, Rumania). In some countries, a strong influence of the executive branch over the judiciary raises difficult questions (Czech Republic, Poland, Slovakia, Slovenia).

Some member states like Croatia, Slovakia and Slovenia report that they have made considerable progress in the independence of the judiciary from the 1990s to reach the European standard. However, now, after joining the EU, these states report a critical and sometimes even hostile atmosphere among politicians towards judges and the judiciary. Politicians claim that judges belong to a secret, untouchable society.

Challenges to judicial independence in established democracies
Other countries, particularly older democracies in Western Europe, give a slightly different picture. Here, the judiciary is often well respected in society, and ~~has~~ there is often a long tradition of judicial independence (Austria, France, Germany, Ireland, Denmark, Norway, Sweden, Switzerland, UK). Judges themselves believe and usually act according to their independence (what the ENCJ-Report[2] describes as “subjective independence”). However, in such countries, rights of the judiciary were often not protected in a constitutional document. Moreover, the judiciary often has neither financial nor administrative autonomy (Austria, Germany). Here, major developments have happened over the last decade. Some countries have introduced councils for the judiciary (Belgium, France, Netherlands), but its membership and powers are still under discussion. In other countries, the independence of the judiciary was improved by the introduction of rights of the judiciary in the constitution

[1] This distinction were inspired by the “Judicial Independence in transition” (Seibert-Fohr ed) 2011.
[2] ENCJ Report 2013-2014, Independence and Accountability of the Judiciary p. 5, 9. The ENCJ Report has developed a set of indicators for the evaluation of the independence and accountability of a judiciary and a state’s judicial system. The ENCJ Report distinguishes between objective independence, which focuses on formal safeguards (like constitutional guarantees) and subjective independence, which concentrates on the perception of both society and the judges themselves.

(possibly Belgium, Norway, Sweden), by an increase on administrative independence (Norway, Ireland, possibly the UK) and by the introduction of councils for the judiciary (Belgium, Bulgaria, planned in the Czech Republic and Ireland). However, the merits and effects of many of those reforms are still under discussion.

Some established democracies have a long tradition of parliamentary autonomy and thus had no tradition of the judicial review of legislation and no constitutional court (Sweden, Switzerland, UK (France used to be such a country as well)). In Sweden and Switzerland, the introduction of constitutional review and the establishment of a constitutional court are under discussion now. In the UK, the Constitutional Reform Act 2005 has considerably changed judicial administration and the system for the appointment of judges.

Financial independence and budgetary problems

In almost all member states, the financial independence of the judiciary and/or severe budgetary cuts are major topics of discussion. In most member states, the budget of the judiciary is still negotiated by the Minister of Justice with the Minister of Finance and approved by parliament. Representatives of the judiciary do not usually negotiate their budget with parliament. The financial situation of the judiciary was raised as a problem in many responses to the questionnaire. The economic crises of the last years lead to cuts in salaries and pensions of judges and/or reductions in financial aid and access to the courts (Ireland, Slovenia, Finland). In other countries, salaries have not been raised for many years (Germany). In many countries, the judiciary is seriously underfinanced (Malta, Ukraine). All those developments affect the independence of the judiciary and its ability to provide judicial services of high quality. In some member states, discussions for more independence of the judiciary have started in recent years (Czech Republic, Ireland, Denmark).

Comments by members of the executive and legislature

According to the responses to the questionnaire, in principle, the independence of the judiciary is respected. However, politicians do make comments that either demand judicial restraint or show little understanding for the role of an independent judiciary. In countries with strong constitutional courts, politicians criticise decisions and demand that courts do not infringe the rights of the executive and the legislative (Germany, Slovenia).

Especially when a case is still pending, judges often cannot defend themselves adequately in order to preserve their impartiality. In some countries, councils for the judiciary (Rumania) or the respective Supreme Court (Poland) defend judges in such cases.

Some countries explain that the unbalanced critical comments of politicians are a serious problem and undermine the necessary trust in the judiciary (Albania, Slovenia, Poland). In the case of the Ukraine, such comments apparently played a role in encouraging violent attacks against judges.

However, some member states explained that critical comments initiated improvements within the judiciary (Belgium, Bulgaria).

Specific questions and the responses

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?

All responses explained that their respective states were based on the principle of separation of powers. In many member states, the principle of separation of powers was expressively stated in the constitution (Albania, Austria, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, Georgia, Germany, Hungary, Iceland, Ireland, Italy, Malta, Montenegro, Poland, Rumania, Slovakia, Spain, Turkey, Ukraine and the former Yugoslav Republic of Macedonia). In other countries, the principle of separation of powers,

though not expressly written down in the constitution, was accepted as a principle (Belgium, France, Netherlands, Norway) by case law or implied in constitutional rules regulating the judiciary next to the legislative and executive powers (Luxemburg) or by regulating the relationship between the powers (Malta, Slovenia, Sweden, Switzerland).

Many member states mention the independence of the judiciary expressively in the constitution (Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Italy, Malta, Montenegro, Norway (since 2014), Poland, Slovakia, Spain, Switzerland, and the former Yugoslav Republic of Macedonia). In other member states, the independence of the individual judge, who is bound only by the law, is mentioned instead or in addition to the independence of the judiciary as a whole (Albania, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Finland, France (guaranteed by the president), Germany, Hungary, Italy, Montenegro, Poland, Slovenia, Spain, Sweden, the former Yugoslav Republic of Macedonia). In other countries, the independence of the judiciary and/or the individual judge is accepted by legislation below the constitutional level (Iceland, Netherlands), or by case law of the Supreme Court (Ireland). In other countries, the independence of judges is accepted as a general principle, but only specific guarantees like rules on involuntary transfer or retirement age are mentioned in the constitution (France, Netherlands, Norway).

In the UK, there is no written constitution as such. However, the independence of judges has long been accepted as a principle of fundamental importance. Appointment, tenure and remuneration of judges have been regulated in acts of parliament going back to 1705. The most important acts today are the Senior Courts Act 1981 and Constitutional Reform Act 2005.

In general, it can be noted that more recent constitutional documents tend to include rules on the separation of powers and the independence of the judiciary in their terms. Often, constitutions even mention a council for the judiciary. In older constitutional documents of established democracies, the principle of separation of powers and of judicial independence is often not expressly written down (Belgium, France, Luxemburg, Netherlands, in Norway provisions on the independence of the judiciary were inserted in 2014 into the constitution of 1814).

Some member states mention specific regulations, some even at the constitutional level, that have an impact on the independence of the judiciary. Some member states, especially new democracies, mention rights to self-administration especially by councils for the judiciary responsible for the removal, appointment and promotion of judges (Albania, Bulgaria, Hungary, Italy, (in France and Montenegro, judges do not have a majority in the council) Netherlands, Slovakia, Slovenia, Spain, the former Yugoslav Republic of Macedonia). In some countries, financial independence is also guaranteed in the constitution (Albania, Bulgaria, the former Yugoslav Republic of Macedonia). In Spain, the General Council of the Judiciary has been regulated in the constitution since 1978. In some member states, councils of the judiciary also have the right to introduce a budget for the judiciary (Bulgaria, the former Yugoslav Republic of Macedonia) in parliament. In Switzerland, the president of the Federal Supreme Court represents the interests of the federal judiciary in the Federal Assembly.

In other countries, the administration of the judiciary is still very much in the hands of the respective ministry of justice (Austria, Germany, Czech Republic). In Germany, however, the independence of judges is protected by a strict system of judicial review of all decisions that may affect a judge's independence, for example in respect to evaluation and promotion.

In some member states, laws on the organisation of the judiciary and the removal of judges are "organic" or "cardinal laws", which means that amendments require a super majority in parliament (2/3: Hungary, the former Yugoslav Republic of Macedonia or 3/5: Albania).

Still other responses mention rules on the liability of judges (Bulgaria, Slovenia, the former Yugoslav Republic of Macedonia) or judicial review of legislative act as an aspect in the separation of powers (Albania, Austria, Germany, Ireland, Rumania, the former Yugoslav Republic of Macedonia).

In Sweden, where the solution of conflicts and the protection of individual rights not only by courts but also by ombudsmen, government agencies and unions have a long tradition, an Ombudsman elected by parliament supervises the implementation and applications of laws. In case of shortcomings, the Ombudsman can issue statements, advisory opinions and – in special cases - initiate legal proceedings. The Chancellor of Justice acts as a kind of ombudsman for the government. However, both the Chancellor of Justice and the Ombudsman cannot change judicial decisions.

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?

Many member states agree that the principle of separation of powers as such and the independence of the judge in exercising his or her duties are not called into question by politicians or the media (Austria, Belgium, Bulgaria, Croatia, France, Poland, Slovenia, Turkey). Member states report a broad range of topics under discussion about the meaning and the application of these principles in practice:

Major development/constitutional reform
Some member states, particularly new democracies, report the development in the main institutions of their constitutional and judicial system. Such developments are taking place either for the first time (Albania, Montenegro, the former Yugoslav Republic of Macedonia) or have taken place after or during major political developments and crises that have led to fundamental amendments of the constitution (Georgia, Hungary, and Ukraine). In Albania, judges are involved only to a very small degree in the developments of laws on the organisation of the judiciary. In Montenegro, draft laws are sent out to courts for comments. Belgium also reports that judges are involved in the drafting process of legislation.

Institutional independence of the judiciary, especially councils for the judiciary
Discussions in many member states address the institutional independence of the judiciary and its right to self-government (Austria, Belgium, Bulgaria, Czech Republic, Estonia, France, Hungary, Malta, Poland, Slovenia). The influence of the government (Norway) or by parliament (Netherlands, Slovenia) on judicial appointments is mentioned critically. Major reforms in the UK and Norway that have cut ties between the judiciary and government are discussed under question 4.

In some member states, the introduction of a council for the judiciary has been discussed (Austria, Czech Republic, Luxemburg, Ireland). In other countries that have introduced such a council already, its role (especially in respect to the appointment of judges of the highest courts, budgetary competences) and membership have been discussed (Belgium, Bulgaria, Croatia, France, Hungary, Netherlands, Slovakia, Slovenia). In Malta, the establishment and membership of a commission for disciplinary proceedings against judges is under discussion. The judiciary insists on having the final say in such proceedings.

Poland reports particular problems in the relationship between the judiciary and the Ministry of Justice, which are described in detail under questions 4, 5 and 6.

Financial problems
Discussions on financial problems, especially those caused by the economic crisis of recent years, were mentioned frequently in the responses (Cyprus, Finland, Iceland, Ireland,

Netherlands, Rumania). Access to courts and legal aid have been reduced in recent years (Finland, Netherlands, UK), the workload increased (Germany, Netherlands) and the judiciary restructured (Finland).

Many member states reported discussions concerning the remuneration of judges (Germany, Ireland, Malta, Slovakia, Ukraine). Sometimes, even constitutional courts are asked to decide on the remuneration of judges (Germany (a case is pending at the Federal Constitutional Court), Slovenia). Salaries for judges have been frozen for many years (Germany, Malta, Poland, Slovenia, the UK for 4 years) or even lowered in the recent past (Ireland, Netherlands, Ukraine). In Slovenia, after two decisions by the constitutional court on the inadequacy of the salaries of judges compared to the salary of other officials, the salaries of judges and other officials were frozen until an improvement of the economic situation. Thus, since 2012, judicial salaries were de facto reduced by 8% and remain at an unconstitutional level. Slovenia also reported a cut of 7,5% of the total budget of the judiciary in 2013 which negatively affected judicial independence because of its effects on the courts' human resources (judges and other staff), technical support, resources for judicial training and pilot projects for the long term improvement of the courts' efficiency. In Malta and Ukraine, the judiciary is chronically underfinanced (in Ukraine by about 30%). In 2014, parliament limited judicial salaries to "15 minimum wages" and in 2015 to "7 minimum wages". Malta spends the lowest percentage of a state's GDP within the EU on its judiciary. According to EU-recommendations, the number of judges in Malta needs to be doubled to cope with the workload. Montenegro also commented on budgetary problems. The pensions of judges in particular are perceived as too low.

In the context of the economic crisis and the increasing debates for institutional independence, claims for an independent budget of the judiciary have been raised in some of the member states (Iceland, Ireland, Spain).

Judicial review of legislative acts

Judicial review of legislative acts was mentioned as a topic for discussion in some member states. Some established democracies have a long tradition of parliamentary autonomy and thus no constitutional court and no constitutional review of legislative or executive acts is possible (Netherlands Sweden, Switzerland, UK – although see below). In some of these countries, the introduction of a constitutional court and/or legislative review has been discussed. In Sweden, the judicial review of legislation by courts was recently introduced. In the Netherlands, Sweden and Switzerland, the introduction of constitutional review and the establishment of a constitutional court is under discussion. In the UK, courts may declare an act of parliament incompatible with the Human Rights Act. In case such a declaration of incompatibility is made, parliament must decide what to do about the act in question. In the UK the courts can declare subordinate legislation to be invalid and can declare many executive actions to be invalid on various legal bases.

In contrast, other member states stress legislative review by the courts as an important aspect of the separation of powers (Albania, Austria, Germany, Ireland, Norway, Rumania, the former Yugoslav Republic of Macedonia). Decisions by constitutional court that defended judicial independence are also favourably mentioned in this context (Albania, Slovakia, Slovenia, Rumania).

Other topics

Other topics for debate were the legitimacy of parliamentary inquiries (Ireland) an increase in powers of prosecutors vis-a-vis judges (Netherlands), the status of prosecutors (France), and the critiques of politicians and the media. The latter topic is discussed under question 3.

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 most member states, politicians criticise decisions of courts (Czech Republic, Malta, Poland, Slovakia, Slovenia, Turkey), especially those by constitutional courts (Austria, Cyprus, Czech Republic, Germany, Slovenia) without starting a general debate on the separation of powers. Specific comments that the judiciary should exercise judicial restraint or moderation are relatively few (they were mentioned by the Netherlands, Germany, Slovenia, Switzerland, sometimes UK). In Germany, the Federal Constitutional Court holds a very strong position and is sometimes criticised for infringing the powers of the legislative and executive. Such criticism was raised especially against decisions of the constitutional court concerning measures taken in the Euro-Crisis. The German executive claimed that it was their prerogative to decide on appropriate measures with their colleagues in Brussels, while the constitutional court scrutinised the measures and ensured that parliamentary consent had to be given to every measure. The German public and media is, however, usually very sympathetic towards the Federal Constitutional Court.

Some countries reported no comments by politicians that demand judicial moderation or restraint (Denmark, Estonia, Georgia, Luxembourg, Montenegro, Rumania). Hungary explained that academics sometimes criticise certain decisions of the judiciary on the uniform interpretation of the law as of legislative rather than judicative character. Iceland and Switzerland stated that critiques against judgements usually lead to amendments of the legislation rather than requests for judicial restraint. Norway underlined its 200 year tradition of constitutional review by courts. Sweden stressed its long parliamentary tradition and its lack of both a constitutional court and legislative review. In this situation, requests for judicial restraint had not been necessary.

Though member states do not generally report claims for more judicial restraint and moderation, many member states report critiques by politicians and the media as a problem. See for that under question 5.

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?

Some countries reported fundamental changes regarding the judiciary. A couple of major themes can be distinguished:

<u>Strengthening of judicial independence</u>
In some countries, judicial independence was strengthened by means of legislative or constitutional reforms. Some countries mention the establishment of a council for the judiciary (Albania, Belgium, France (without a majority of judges) Montenegro, Slovakia) or strengthening of the role of judges in the council for the judiciary (organic law: Georgia, Montenegro).

In other countries, the administration of courts was made more independent by the introduction of special agencies (Norway, Sweden, Denmark, UK). In the UK, the Constitutional Reform Act 2005 changed the organisation of the judiciary fundamentally. The office of the Lord Chancellor was changed so that he ceased to be both judge, minister and politician and many of his judicial or quasi-judicial responsibilities were moved to the senior judge for England and Wales, the Lord Chief Justice or the equivalent in Scotland and Northern Ireland. The Supreme Court was created to replace the Judicial Committee of the

House of Lords. Moreover, the system for the appointment and promotion of judges was fundamentally changed by the introduction of an independent Judicial Appointment Commission. In Belgium, the administration of courts is undertaken by the College des Cours et Tribunaux and its comités de gestion according to agreements concluded with the Ministries of Justice and Finance. However, the presence of representatives of the Ministries of Justice and Finance, who can raise legal proceedings at their ministries, still give the executive some influence.

In some member states, rights of the judiciary or of the individual judge were written down in the constitution (Belgium, Norway, Sweden) or in specific laws. Since such rights had been accepted before in fact, Belgium asked the question, whether the reform had actually changed the law. A constitutional amendment inserted a Bill of Rights in the Norwegian constitution and declared in Art 95 that there was an obligation on the state authorities to secure the impartiality and independence of the judges and the courts. In Sweden, legislative judicial review was introduced. Moreover, the appointment of judges was reformed.

In Georgia, since the constitutional amendments of 2010, judges are appointed for life after a trial period for three years. Before, they were only appointed for tenures of ten years.

Problematic changes

Some legal reforms are perceived as problematic by the member states.

Important reforms were mentioned in relation to the remuneration of judges: In Ireland, by means of a referendum, in 2011, the rules about the remuneration of judges in the constitution were changed in order to decrease the salaries of judges in reaction to the economic crisis. In Hungary, in 2011, new rules for the retirement age of judges were introduced which were declared unlawful by the ECJ. Bosnia and Herzegovina mentioned a draft law on the appointment of prosecutors, which was dropped after critical comments by the ENCJ.

In Hungary, after the constitutional amendments of 2010, the administration of the judiciary was taken away from the National Council for the Administration of Justice and centralised. In Spain, in 2013, a law was adopted that introduced new rules for the election of members of the General Council of the Judiciary. According to the constitution, the president of the Supreme Court presides over the Council. Its other 20 members are elected for a five year term.12 members must be judges; the other 8 are attorneys or other jurists, appointed by a 3/5 majority by parliament. The constitution does not specify how the judges are elected. Until 1985, they were elected by the judges' association, after that parliament appointed judges from a list proposed by the judges' association. According to the new law, every judge with at least 15 years of experience who is supported by at least 25 other judges or a judges' association can apply to be elected by parliament by a 3/5 majority. The Spanish response, but also the GRECO Report[3] cautions that the reform might increase the position of parliament vis a vis the judiciary because the ruling parties in parliament could elect their favourite candidates out of a large number of applicants.

Ukraine is in a special situation as a result of the constitutional amendments of 2004 being in issue in 2010 and 2014. Those conflicts have destabilised the country and caused the introduction of vetting systems, which will be discussed under question 5.

Poland reports particular problems in the relationship between the judiciary and the Ministry of Justice, which administers the courts of general jurisdiction according to an act of primary legislation. The law, which is not a "cardinal" or "organic" law and can thus be changed by a simple majority, has been subject to frequent, fundamental changes. Over 50 changes were

[3] GRECO Eval IV Rep (2013) Para 77-78.

reported since its introduction in 2001, 7 in 2014 alone. Usually, those changes lead to an even greater influence of the Ministry of Justice. The frequency of those changes makes consistent, sustainable developments of the judiciary impossible, Poland argues. Directors of courts were introduced as managers of the court beside the presidents of court. Court directors are not judges but managers and report directly to the Ministry of Justice. Over the years, court directors have received more and more responsibilities. Now, they manage all members of the courts' staff who are not judges and control the courts' budgets and property. Moreover, the Minister of Justice apparently attempts to obtain access to all court records including those in pending cases.

In Rumania, an amendment that increased the number of non-judicial members in the Council for the Judiciary was declared unconstitutional by the constitutional court.
In Slovakia, a new security clearing system was introduced according to which the reliability of judges must be checked by the secret service. "Unreliable" judges can be dismissed from office. During this particular process judges have the same rights as during a disciplinary procedure.

In Slovenia, in 2013, an amendment of the Court Act came into force despite the sharp criticisms of the Slovenian Association of Judges, the Council for the Judiciary and the Supreme Court. The Ministry of Justice had proposed an amendment that introduced "judicial inspection" in the courts. A new Art 65a established a new department at the Ministry of Justice that supervises the organisation of courts and the quality of their work. Though the law requires the Ministry to respect judicial independence, this guarantee is considered insufficient by judges. Inspectors can inspect all kinds of documents including the documents and files of pending cases. Based on its findings, the Ministry of Justice can start disciplinary proceedings and can propose the dismissal of court presidents. According to the Slovenian response to the questionnaire, this amendment is unconstitutional. The Slovenian response also stressed that the amendment had coincided with various convictions of politicians and businessmen of corruption.

The German response reports that the government of the Land Nordrhein-Westfalia wanted to merge the Ministries of the Interior and Justice, but the constitutional court of the Land has declared the merger unconstitutional.

Changes in the organisation of courts
The establishment of administrative courts of first instance was also mentioned (Austria 2014, Bulgaria 2007). The relationship between the constitutional court and other courts was clarified in Hungary. In Rumania, new rules on disciplinary proceedings and on appeals against decisions in disciplinary proceedings were introduced. In Switzerland, a new Federal Supreme Court Act was introduced in 2007.
In Germany, a project for the merger of different branches of the court system (administrative courts and social courts) failed because of a perceived fear of unconstitutionality.

Merger of courts
Other countries reported reforms of court districts, which had lead to a considerable reduction in the number of local courts: Croatia (abolition of 40 courts), Estonia, Finland, Poland (abolition of 79 courts, 25% of Polish district courts) the former Yugoslav Republic of Macedonia (abolition of 16 courts). Such mergers resulted in the involuntary transfer of many judges. In Germany, in the Land Rheinland-Palatinate, a merger of two courts of appeal failed because of the opposition of the judiciary and also political opposition. The project started after an administrative court had decided that the recent promotion of the president of one of the courts to be merged to that position was unlawful. Allegedly, that president of the court had been installed because of his close connections to the Land's prime minister. After he was removed from the presidency, the prime minister introduced the plan to abolish this

very court of appeal. Mergers of local courts are often discussed in Germany as well, but often fail because of the resistance from local politicians.

No changes
Some countries reported no relevant changes (Cyprus, Czech Republic, Denmark, Germany (only reported failed projects) Iceland, Luxemburg, Malta, Netherlands, Turkey).

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.

Some countries plan major reforms of the judiciary in the near future:
Bulgaria mentioned that the judicial strategy reform is still quite general. There are proposals to strengthen judicial independence further and to introduce a "right to a court of full value". In the Czech Republic, a commission under Dr Baxa is working on the reform of the administration of the judiciary, which is still exclusively under the administration of the Ministry of Justice. Montenegro reports that there are proposals to reform the Law of Courts as mapped out in the action plan for chapter 23 – Judicial Reform Strategy 2014-2018, on a reform of the council for the judiciary, on the rights and duties of judges, the selection, appointment and promotion of judges, the evaluation of judges, disciplinary proceedings and the revision of disciplinary decisions. The Montenegrin response reports broad participation by representatives of all three powers of the state and the public, although not also from academic circles.
Ukraine mentions that the former president Yanukovic had made suggestions to reform the judiciary in 2012/13. Despite a positive reaction from the Venice Commission, the proposal failed in parliament. Now, there are new attempts to reform the judiciary, particularly the roles of the Supreme Court and Constitutional Court, the probation periods of judges, and rules on the detention of judges. On October 27th 2014, the President established a Council for Judicial Reform, composed of judges, lawyers, representatives of NGOs, researchers and international experts. The aim is, according to statements by politicians cited in the Ukraine response, to achieve a "complete reboot of the judicial system" to comply with European Standards by 2020 and achieve EU membership.

In Ireland, the introduction of a Council for the Judiciary is planned for 2015. Finland also plans the introduction of a Council for the Judiciary.

Other countries mention selective reform projects. Switzerland mentions the pending of a popular initiative to make the Swiss constitution prevail over international law in Swiss Courts. In Cyprus, a bill is pending concerning the introduction of an administrative court to lighten the workload of the Supreme Court, which is currently responsible for hearing administrative cases.
In Hungary, a re-codification of civil procedure is planned. In the UK, after the important reforms of the Constitutional Reform Act in 2005, a change of the administration of courts is planned that will give more administrative and financial autonomy to judges.

In Poland, further changes on the law concerning the administration of general courts are to be expected. Allegedly, such changes aim at improving the courts' efficiency and the satisfaction of the public. However, such amendments usually lead to budgetary cuts and an even stronger supervision of the courts by the Ministry of Justice.

Albania, Belgium, Croatia, Denmark, Estonia, Finland, France, Germany, Georgia, Iceland, Netherlands, Norway, Rumania, Slovakia, Slovenia, Sweden, Turkey, and the former Yugoslav Republic of Macedonia mentioned no specific projects.

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 the Ukraine, the organisation of the judiciary is being discussed in the context of the future development of the country. Besides the drafts actually being worked on, alternative models, for example by Mykola Melnik, are being debated.

In Austria and Luxembourg, the introduction of a Council for the Judiciary is suggested. However, in both cases, the responses doubted that the projects would be successful.

In Ireland, there are plans to introduce a commission responsible for determining the remuneration of judges following the referendum of 2011. Moreover, in Ireland, a reform of the method of judicial appointments is under discussion. At the moment, the president appoints judges on the proposal of the government, which is itself advised by the Judicial Appointment Advisory Board. It is proposed to give the board a more influential role in the future.

In Malta, a new instrument for the punishment of minor disciplinary offences of judges is under discussion. At the moment, the only possible sanction for a judge's misdemeanour is for his or her impeachment by a 2/3 majority vote in parliament. Since this procedure is cumbersome and often disproportionate, new, more appropriate punishments are to be developed. A commission will decide on punishments. The composition of this commission is being debated at the moment.

In the Netherlands, the application of international law, for example the ECHR, by courts is under discussion. In Iceland, which has now a two level court system (district courts and a Supreme Court), the introduction of a new court of appeal is under discussion. This would mean the introduction of a court system with three levels of jurisdiction. In Albania, a reform of the evaluation of judges is being discussed at the moment.

There are no specific debates beyond the other comments made in the respective responses from Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Demark, Estonia, Finland, France, Germany, Georgia, Hungary, Luxemburg, Norway, Rumania, Slovakia, Slovenia, Sweden, Switzerland, Turkey, and the former Yugoslav Republic of Macedonia. Denmark mentioned, however, that the need for more financial autonomy was discussed when the Ministry of Justice did not allocate the necessary funds for security measures after a violent episode in a courtroom.

Italy has answered questions 4a-c with a simple "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".

Many member states deny that politicians or other relevant groups make such comments (Denmark, Estonia, Finland, Iceland, Luxemburg, Malta, Netherlands (almost none), Norway, Sweden, and Switzerland. Some take the question as an opportunity to attest their politicians high respect towards the judiciary (Czech Republic, Germany, Norway, Switzerland) and the importance of judicial independence in light of the ECHR (Bosnia and Herzegovina). Montenegro explained that such comments only provide proof for the need to further strengthen the judiciary.

However, Poland reported that though politicians never openly questioned the role of the judiciary, they delayed the implementation of constitutional decisions. Turkey reported that in the widest sense, the judiciary was criticised for interfering with the prerogatives of other powers. Cyprus and the UK note that the notion of an independent judiciary is a concept which the media and politicians often find difficult to understand in practice. The UK reports that public opinion oscillates between approval that "judges keep powerful executives in check" and the reproach that "unelected judges tell elected politicians what to do". Georgia affirmed this notion by reporting that comments of politicians on the role of the judiciary very much depended on how happy the respective politician was with the outcome of a particular case. Poland and France reported that public opinion (as reported by the media) was not always favourable to judges because of a perceived lack of "democratic legitimacy". Such opinions were often uttered in connection with investigations against well known personalities. Germany reported that public prosecutors were sometimes criticised in the media for too rigorously pursuing public figures. An alleged scandal and prosecution (concerning an invitation worth about € 700) brought the former Federal President Wulff to resignation. Later, he was acquitted in court.

Many countries mentioned severe criticism by politicians of judges (Netherlands, Rumania, Slovakia, Slovenia, Ukraine, The former Yugoslav Republic of Macedonia). Italy just answered the question with a "Yes". Croatia, Slovakia and Slovenia specifically report that they had made considerable progress in the independence of the judiciary from the 1990s to reach the European standard. After joining the EU, these states, however, report a critical and sometimes even hostile atmosphere among politicians towards judges and the judiciary. In Croatia and Slovakia, parliamentarians, members of the government and academics close to the government often harshly criticise the judiciary, especially the Council of Justice, and disciplinary proceedings. According to their opinion, both should be in the hands of parliament or laymen rather than of independent judges. Judges are accused of being untouchable members of a secret society (Croatia, Slovakia).

In Hungary, the Ministry of Justice announced that it would undertake a systematic analysis of the case law. However, the effects – if any - of this initiative are as yet unclear. It is reported that politicians sometimes urge judges to decide more according to "public feeling" and show more "empathy for the parties" (Cyprus, Poland). Malta, Poland, Slovakia and Slovenia also report that judges are accused of working too slowly. Malta reports that such criticism is particularly unjust because according to EU recommendations, the number of its judges needs to be doubled to cope with the workload.

The Ukraine reported public and political criticism to a severe degree. The judiciary had already been heavily attacked for the decision of the constitutional court in 2010, which declared the constitutional amendments of the "Orange Revolution" of 2004 unconstitutional. Now, after "Euro maidan", judges are mobbed for not swiftly deciding vetting procedures against judges and other officials according to the laws "on restoration of trust in judiciary of Ukraine" and "on purification of government". The constitutionality of those laws is in question. Those laws allow the scrutiny and dismissal of judges and other officials for decisions made during the "Euro maidan" protests. Judges who re-install officials or release officials or judges convicted e.g. under both laws are severely pressured and threatened by politicians who accuse those judges of "confusing the rule of law" and threaten that those judges would be "thrown out of the window," if cases were not decided to their liking. Members of the Ministry of Justice said that together with members of parliament, they came "to talk" with a judge who had not decided a case according to their wishes. The situation is aggravated by violent protestors who, for example, burn tyres in front of court houses, lock judges and their staff inside courts, disturb hearings with loud music and insult and physically threaten judges and their staff. A judge who acquitted a mayor was physically threatened and

pressured to write a letter or resignation and then thrown with the court president into a trash can. The police do not adequately protect judges in such incidents.[4]

Albania, Ukraine and the former Yugoslav Republic of Macedonia admitted that the low confidence of the public in the judiciary caused problems. Shortcomings, for example backlogs, delays and cases of corruption, do still exist despite sincere efforts of the judiciary to improve the situation. Albania specifically bemoans the politicisation, limited accountability of the judiciary to the public, and considerable degree of corruption within the Albanian judiciary and notes that inter-institutional cooperation is lacking. However, that report, as well as reports from other countries (Croatia, Poland, Slovakia, Slovenia), suggest that politicians often criticise the judiciary in order to deviate public opinion from instances of misgovernment of the state or to gain populist points rather than to address specific shortcomings of the judiciary in the public interest. Thus, it seems that low confidence is often unjustly aggravated by the comments of politicians on the campaign trail and sensation seeking media. Slovenia cautioned that constant populist attacks of politicians could undermine the basis of judicial independence in the long run. The former Yugoslav Republic of Macedonia stressed the importance of its Academy of Judges, which offers seminars to help judges to resist pressure from politicians and the media as well as how to resist offers of bribery.

Many member states explained that politicians and the media often comment on procedures and decisions in criminal cases (Cyprus, France, Germany, Netherlands). Some countries mention the comments of politicians (but also of the media and NGOs) on pending cases (Bulgaria, Croatia, France, the UK). Bulgaria reported that the ECHR found that Bulgarian politicians had violated the presumption of innocence with their comments. Some member states stress that politicians often lack sufficient knowledge of the facts (Poland) and aim at gaining populist points by criticising the judiciary (Slovenia). Poland comments that politicians, the media, and NGOs show a lack of understanding of the role of an independent judiciary in such incidents. Malta comments that the judiciary had a particularly bad relationship with the press which reported wrongly and irresponsibly. Appeals by the government and the courts to the press to act more responsibly have not been heeded.

France (but also Slovenia) noted that it is often difficult or even impossible for judges to react adequately to such criticism for fear of appearing to endanger their impartiality. France's response recommends that an independent institution should react (on behalf of the judiciary) to such misguided statements. In Rumania, apparently, the Council for the Judiciary issues press statements in reactions to such statements and even the Constitutional Court urged politicians to exercise more caution in their statements. In Poland, the Supreme Court defended judges against accusations of an opposition party of falsifying local election results.

A lack of public interest can cause problems as well: Austria regrets that there is not enough political and public interest in judicial topics which would enable a true debate on structural reform to take place.

There are also reports of the positive effects of criticism and critical debate between the powers. Belgium reports that serious scandals within the police and judiciary (Dutroux-process) lead to severe criticism in the judiciary. Judicial independence, it was argued then, was used to camouflage severe shortcomings. However, in the end, this criticism helped improving the judicial system by introducing a council for the judiciary as well as new rules on the appointment of judges. In Bulgaria, critical comments by the French ambassador of the handling of bankruptcy cases by a Bulgarian court sparked a thorough investigation and then

[4] See also The Resolution on the Security of Judges in Ukraine by the European Association of Judges, Regional Group of the International Association of Judges, 2014 http://www.iaj-uim.org/iuw/wp-content/uploads/2014/05/EAJ-Resolution-on-judges-security-in-Ukraine_Limassol-2014-amended.pdf

reform of the criticised court and the resignation of its president and vice-president In Luxembourg, a serious scandal concerning deficient cooperation between the police and secret service on the one hand and the judiciary on the other led to the resignation of many politicians and to a landmark victory of the opposition in parliament. Finland and Ireland mentioned that politicians sometimes criticise judgements, but that courts also frequently criticise legislation or the neglect of the legislator to introduce adequate legislation.

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

Questions of budgetary autonomy were at the centre of replies to this question. Almost as a summary for all responses, France stated that financial autonomy was the most important problem for judicial independence today. Judicial independence was given as a reason to introduce a council for the judiciary (Ireland, Luxemburg). In Ireland, the economic crisis of 2011 let to a discussion about more financial independence for the judiciary. The financial crises and serious underfunding of the judiciary and its effect for the independence of the judiciary and access to justice were mentioned in this context again (see for details at question at 2).

In most member states, the budget is drafted by the government (ministry of justice and ministry of finance) and then approved by parliament (Austria, Bulgaria, Bosnia and Herzegovina, Croatia, Cyprus, France, Georgia, Germany, Iceland, Ireland, Italy, Malta, Netherlands, Norway, Poland, Rumania, Slovakia, Slovenia, Spain, Sweden, Turkey, Ukraine, UK).

In countries were there is a council for the judiciary, the council often participates in budget procedures in some ways. In Georgia, the Council for the judiciary and the Supreme Court make suggestions with respect to the budget. In Slovenia, the Supreme Court and in Ukraine the Constitutional Court draft the budget, but the Ministry of Finance proposes a “corrected version” for decision by parliament.
In Belgium, since 2014, the College des Cours et Tribunax (Council of the Judiciary) administrates the courts (via its comités de gestion) and the budget. Every year, the College agrees with the Ministries of Justice and Finance on the budget (which is determined by the Ministry of Justice) and concludes agreements on targets, indicators and workloads. Representatives of the Ministry of Finance supervise financial decisions. The Ministries’ representatives can raise legal complaints at the Ministries against decisions of the Council that violate the law or contract and have financial implications. Belgium suggests that the ministries could influence the substance of the council's decisions.

In Hungary, the president of the National Office for the Judiciary is responsible for drafting the budget which is then "tabled by the Government to the Assembly without modifications". The economic feasibility of the budget is monitored by the Court of Auditors. The president of the National Office for the Judiciary reports every year to the National Assembly, but members of parliament have only a restricted right to ask questions. In Albania, the financial independence of the judiciary is even guaranteed in the constitution.

Administration of courts

In many countries where a council for the judiciary was established, the council is also responsible for the administration of courts (Albania, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the former Yugoslav Republic of Macedonia). In Belgium, the administration of courts is undertaken by the College des Cours et Tribunaux and its comités

de gestion according to agreements concluded with the Ministries of Justice and Finance. As pointed out above, the representatives of the Ministries of Justice and Finance may be able influence of the decisions made by the College. The Court de Cassation has an independent administration.
In some Nordic countries, the administration of the judiciary lies in the hand of an independent agency (Denmark, Iceland, Norway, Sweden, see also Ireland and UK). In Denmark, the Court Administration Agency is under the agency of the Ministry of Justice but independent from it. Among 11 members of the board, 8 are court representatives, one is a lawyer and two have special management and social competences. In Iceland, the Icelandic Judicial Council administrates the district courts while the Supreme Court has an administration of its own. In Norway, the court administration is undertaken by the National Court Administration while appointments are made by the government on the recommendation of the Judicial Appointment Board. In Sweden, the budget, which is drafted by the government and approved by parliament, is spent independently by the National Court Administration. In the UK, Her Majesty's Courts and Tribunals Service (HMCTS) is a separate agency, with an independent chairman and a board which includes a minority of judges and is responsible for the administration of the fabric and non-judicial personnel of the courts and tribunals. But its budget has to be agreed with the Ministry of Justice and the Treasury (Ministry of Finance).

In the Czech Republic, Austria, Estonia, Finland, Germany, Italy, Slovakia, and Spain the budget, the administration including technical support (IT) and sometimes also appointments and disciplinary proceedings (Austria, Czech Republic) are under the responsibility of the government, usually the respective Ministry of Justice. In Spain, the Ministry of Justice and the administrative institutions in the autonomous regions are responsible for the administration and the budget of the judiciary. The General Council for the Judiciary is responsible for appointments, promotions and disciplinary proceedings. It has its own budget to perform its own duties.
In Germany, appointments of judges up to court of appeal level fall within the responsibility of the Lander, usually their ministries of justice. In some Lander, however, parliamentary committees play a role as well. Federal judges are elected by the two chambers of the federal parliament (Bundestag and Bundesrat). In Switzerland, decisions on the budget and the appointment of judges for the federal judiciary are the responsibility of the federal parliament.
In Germany, the IT of courts is provided by the Ministry of the Interior. In the land Nordrhein-Westfalia, courts now work to set up their own system. Moreover, in Germany, the data protection agency and the cour de compete at times exert some influence over the judiciary. However, a robust system of judicial review offers protection for judicial independence.
In Estonia, the Ministry of Justice only announces the competitions for vacant judicial positions. Poland summarised the position there as follows: whilst judges were free when exercising judicial functions like sentencing and adjudicating, other areas were strongly influenced by the executive and legislative. As explained in previous statements, the Ministry of Justice exercises strong influence over the administration of the general courts while the Ministry of Finance is responsible for the judicial budget. Presidents of the highest courts give annual reports in parliament.
Slovakia and Slovenia also mentioned ways (which are problematic) in which the ministry of justice can exercise influence over the courts under question 4a). The report will not repeat those points under this question.

<u>Other influences</u>
In many countries, legislative initiatives regarding the judiciary come from the ministry of justice (Austria, Belgium, Bosnia and Herzegovina).
Croatia bemoans the introduction of extrajudicial bodies with judicial functions that do not meet the prerequisites of Art 6 ECHR. Italy explains that parliamentary investigation committees often undertake judicial functions.

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?

In their final comments, some countries took the opportunity to underline the importance of preserving the rule of law and the independence of the judiciary.
Austria commented that its judiciary worked well, so neither politicians nor the public saw a need for structural reform. However, even though abuse had not yet occurred, the system could be easily abused if a powerful party or politician decided to do so. Germany agreed that the work of courts usually happened outside the public focus. While the president of the Federal Constitutional Court was often present at important state functions, the presidents of local courts were not usually well known.

Belgium commented that the judiciary was sometimes asked for opinions on legislative projects. This way, a fruitful exchange was established between the judiciary and the legislative power. Moreover, established case law could be codified in this way. Rumania and Belgium agreed that mutual respect between the powers was necessary. This required open communication, transparent laws, and healthy administrative structures in the interest of citizens. Bosnia and Herzegovina and Bulgaria underlined the importance to further strengthen judicial independence and the separation of powers. Montenegro stated that the country was on a good way. Now, the judiciary had to provide excellent judicial services to consolidate its place next to the other powers.

Croatia cautioned that achieving and maintaining European standards for the independence of justice was a never-ending story. Always, there was a danger that another power would take control over the judiciary. Slovakia underlined the importance of the work of the CCJE to strengthen and preserve judicial independence. When in opposition, the current government had promised to improve the situation of judges. Later, however, those promises were broken.

The Netherlands states that the balance of powers presupposes a responsive and responsible judiciary. Achieving that required constant attention. In that respect, judges in the Netherlands are concerned about their constantly increasing workload.
Democracy, as Cyprus and Poland pointed out, ultimately depends on the rule of law and judicial independence, even if politicians sometimes disagree with the practical results of that independence. Turkey demanded that the main rules on the relationship between the powers must be clearly set out in the constitution to ensure a well balanced system of separation of powers.

The Czech Republic remarked that there was not so much a problem of the independence of justice in the Czech Republic today, but more a problem with the personal, fiscal, and administrative autonomy of the judiciary. The UK agreed with this sentiment, pointing out that the independence of judges had been respected in the UK for more than 300 years. However, politicians needed to understand that judicial independence does not only mean the freedom to decide individual cases in an independent manner, but it also concerns judicial appointments, remuneration and pensions. Norway stated that its judiciary needed a council for the judiciary with sufficient powers, including the competence to decide on salaries of judges. Poland stated that the administration of judges should be moved from the ministry of justice to a council for the judiciary or to an independent agency as in the Nordic countries. At the least, the constant changes in the law on the administration of the judiciary should stop. The judiciary required stability for its work.

Ireland reported that tensions between the judiciary and executive branch as well as financial cuts in salaries and pensions following the economic crisis and referendum of 2011 had

resulted in a decline in morale among the judges. Fortunately, the situation seemed to improving again now.

Sweden remarked that the country, after a long tradition of parliamentarian sovereignty, had strengthened the judicial power and the protection of human rights under European influence.

The Ukraine highlighted the current vetting procedures as problematic. Soon, judges convicted under the system would turn to the ECHR and should win their cases there. The Ukrainian judiciary was in dire need of reform. The independence of the judiciary needed to be adequately protected from the influences of the executive and the legislative powers.

Many countries chose not to give a final comment (Albania, Estonia, Finland, France, Georgia, Hungary, Iceland, Italy, Luxemburg, Slovenia, Spain, Switzerland, the former Yugoslav Republic of Macedonia).