

CEELI INSTITUTE
PRAGUE

ADVANCING THE RULE OF LAW

**ADDENDUM TO MANUAL
ON INDEPENDENCE,
IMPARTIALITY AND INTEGRITY
OF THE JUDICIARY**

A THEMATIC COMPILATION OF INTERNATIONAL
AND NATIONAL JURISPRUDENCE

APRIL 2018



Contents

- FOREWORD.....3
- INTRODUCTION.....4
- ABOUT AUTHORS5
- I. 1. CULTURE OF INDEPENDENCE9
 - I. 2. OBLIGATION TO GUARANTEE THE INDEPENDENCE OF JUSTICE10
 - I.3. RULE OF LAW AND JUSTICE12
 - I. 4. THE RIGHT TO A FAIR TRIAL14
 - I. 5. CONDITIONS OF THE INDEPENDENCE OF JUSTICE19
 - I. 6. THE PRINCIPLE OF NATURAL JUDGE.....21
 - I. 7. SPECIAL COURTS.....22
 - I.7.1. MILITARY JUSTICE22
- II. INSTITUTIONAL INDEPENDENCE24
 - II. 1. MEANING AND IMPORTANCE OF THE INDEPENDENCE OF JUSTICE.....24
 - II. 2. FREEDOM FROM UNDUE EXTERNAL INFLUENCE25
 - II. 3. THE PRINCIPLE OF SEPARATION OF POWERS.....26
 - II. 4. THE JUDICIARY AND THE EXECUTIVE32
 - II. 5. THE JUDICIARY AND THE LEGISLATURE37
 - II. 6. FINAL CHARACTER OF JUDICIAL DECISIONS.....39
 - II. 7. INDEPENDENCE AS TO ADMINISTRATIVE MATTERS40
 - II. 8. JURISDICTIONAL COMPETENCE.....41
- III. PERSONAL INDEPENDENCE42
 - III. 1. INDEPENDENCE AS TO DECISION MAKING42
 - III. 2 JUDGES AND OTHER JUDGES OR ADMINISTRATION OF JUSTICE SYSTEM...44
 - III. 3. SELECTION AND CAREER47
 - III. 3.1. BASIS OF APPOINTMENT OR PROMOTION48
 - III. 3.2. THE APPOINTING AND CONSULTATIVE BODIES51
 - III. 3.3. JUDICIAL TRANSFER53
 - III. 3.4. EVALUATION OF JUDGES.....54
 - III. 4. TENURE AND IRREMOVABILITY55
 - III. 5. REMUNERATION OF JUDGES AND FINANCIAL SECURITY59
 - III. 6. FREEDOM OF EXPRESSION AND ASSOCIATION.....63
- IV. COUNCILS FOR THE JUDICIARY64
 - IV. 1. GENERAL MISSION64
 - IV. 2. COMPOSITION OF A JUDICIAL COUNCIL66
 - IV. 3. FUNCTIONING.....70

IV. 4. POWERS	71
V. RESOURCES, EFFICIENCY AND INDEPENDENCE	74
V. 1. GENERAL ASPECTS OF RESOURCES.....	74
V. 2. BUDGET OF THE JUDICIARY	76
VI. DUTIES AND RESPONSIBILITIES (ACCOUNTABILITY)	81
VI. 1. LIABILITY OF JUDGES.....	82
VI. 1.1. JUDICIAL IMMUNITY.....	83
VI. 1.2. DISCIPLINARY LIABILITY	85
VI. 1.3. DUE PROCESS AND APPELLATE REVIEW IN DISCIPLINARY PROCEEDINGS.....	88
VI. 1.4. CRIMINAL LIABILITY	89
VI. 1.5. CIVIL LIABILITY	90
VII. ETHICS OF JUDGES – HOW STANDARDS OF JUDGES SHOULD BE FORMULATED	91
VII. 1. THE VALUES/MERITS.....	91
VII. 1.1. INDEPENDENCE AS CONDUCT	91
VII. 1.2. IMPARTIALITY.....	93
VII. 1.3. INTEGRITY	104

FOREWORD



It is with great pleasure the CEELI Institute publishes this new reference tool, *The Addendum to the Manual on Independence, Impartiality and Integrity of the Judiciary: A Thematic Compilation of International and National Jurisprudence*. This document will now join the original *Manual on Independence, Impartiality and Integrity of the Judiciary: The Thematic Compilation of International Standards, Policies and Best Practices* as an important reference tool for judges, legislators, government officials and legal scholars.

The *Addendum* reflects the ongoing work of the Central and East European Judicial Exchange Network, a project organized by the CEELI Institute which is now in its sixth year of operation. That Network is comprised of some of the best and brightest rising judges from eighteen countries in the region who have come together to share best practices on issues of judicial independence, integrity, accountability, and court management. This project has been made possible through the generous support of the Bureau of International Narcotics and Law Enforcement (INL) at the U.S. Department of State.

In preparing the *Addendum*, the judges continued to apply a uniform methodological approach for their work, this time identifying, researching and referencing relevant jurisprudence from key international and national sources which address standards applicable to the judiciary. The judges continued their approach of cataloging the jurisprudence according to well defined thematic areas. The *Addendum* (like the *Manual*), therefore, provides easily accessible, substantive legal support for issues related to the status, work, rights, and responsibilities of judges.

The *Addendum* represents an extraordinary commitment of time and effort by a core working group of the Network judges who participated in this project. They undertook extensive independent research and editing, coming together periodically at the Institute to coordinate and collaborate on their work. We are deeply indebted to them for their commitment, skill, and insight both in the conceptualization and actualization of this project. This project reflects the underlying mission of the CEELI Institute, as an independent, not-for-profit organization dedicated to assisting legal professionals committed to a rule of law. This kind of innovative effort demonstrates how we work with judges and other legal professionals to support fair, transparent, and effective judicial systems. We remain deeply indebted to the work of the many young judges from across this region who contributed to the drafting of this *Manual*.

Christopher Lehmann

Executive Director, The CEELI Institute, Prague

INTRODUCTION

The document represents a supplement to the *Manual on Independence, Impartiality and Integrity of the Judiciary: The Thematic Compilation of International Standards, Policies and Best Practices* (further referred to as ‘the Manual’) that has been created by a group of judges within the CEELI Institute’s Central and Eastern European Judicial Exchange Network Program. The program has been generously supported by the INL grant. The Manual was first published in June 2015 on the CEELI Institute webpage, and has been regularly updated since then.

The Manual, by referencing more than 140 international standards relevant to the judiciary, provides an easy to use tool for judges, lawyers and legal professionals struggling with these issues. It provides easy-to-access guidance on how particular issues related to judicial independence, impartiality and integrity have been addressed in international instruments and resolved on an international level. Consequently, it provides effective solutions for national systems. The Manual has proved highly useful in societies still undergoing transitions, where the judiciaries are still struggling to assert and establish their full independence, where the laws relevant to the conduct of the judiciaries are still undergoing flux, and where the standards for conduct of the judiciary are not firmly established or clarified.

To continue the work to promote judicial independence, impartiality and integrity the group of Network judges has put significant effort into developing this companion document, which thematically compiles relevant decisions and jurisprudence of international and European courts regarding issues of judicial independence, impartiality, and integrity.

This additional document on jurisprudential standards will show the way in which relevant international standards have been used by different adjudicative authorities, and will provide a useful supplementary tool for widespread promotion of underlying international standards on judicial independence, transparency and accountability. Similar to the Manual, the supplement document will be an up-to-date reference that all legal professionals can use.

A Note on Methodology:

This is a living work which will continue to be updated and revised as new materials and jurisprudence become available. For this first edition of the Addendum, the working group has identified relevant jurisprudence produced by the Venice Commission and available from its online platform CODICES. The working group reviewed hundreds of documents and have selected those relevant to the judiciary. The Addendum is divided according to key topics which are similar to those in the first Manual. Each chapter is also chronologically divided starting with the most recent jurisprudence.

In the next stage, the authors will incorporate jurisprudence from other relevant international, European and national judicial institutions.

Authors

ABOUT AUTHORS

Katica Artuković, Judge, Bosnia and Herzegovina



Katica Artuković was born in Ljubuski, Bosnia and Herzegovina in 1980. She earned her B.A. at Law School in Zagreb, Republic of Croatia in 2003, and passed the judicial service exam in Sarajevo in 2005. She was hired as a judicial intern – a volunteer at the Municipal Court Ljubuski, and became an expert adviser at the same court in 2006, appointed as a judge at the Municipal Court Ljubuski in 2009, is an educator in criminal law at the Center for Education of Judges and Prosecutors in Federation of Bosnia and Herzegovina, co-author of the Manual for judges on intellectual property in BiH, co-author of the book *Security and Legal Protection of the Judicial System in Justice in*

Bosnia and Herzegovina, co-author of the several articles published in a magazine for legal theory and practice in Bosnia and Herzegovina – Law and Justice, member of the expert team for rights of intellectual property - EU IPR Enforcement Project, appointed by the Bosnia and Herzegovina High Judicial and Prosecutorial Council as a member of the Working Group for Security of Judicial Institutions and Judicial Function Holders, and writes doctoral scientific work on the topic of extreme necessity.

Anna Bednarek, Judge, Poland



Anna Bednarek sits as a Judge at the District Court of Warsaw. She previously served as a Judge in the District Court of Warsaw from June 1998 until 2001 and served again at the same Court from April 2007 until January 2009.

From 2009 until 2011, Judge Bednarek served as a EULEX (European Union Rule Of Law Mission In Kosovo) Judge at the Special Chamber of the Supreme Court of Kosovo, having been appointed by the EULEX Head of Mission to be a Member of the EULEX Human Rights Review Panel of which the mandate was to review alleged human rights violations by EULEX Kosovo in the conduct of its executive mandate.

In 2008 Judge Bednarek participated as a trainer with a “Human Trafficking-Training for Judges” Project designed to combat trafficking in human beings and slavery. While in Kosovo, she was also involved in training members of the Kosovo Bar Association.

Judge Bednarek has worked as a Senior Expert in the Office of the Agent of the Polish Government at the European Commission and Court of Human Rights, Human Rights and National Minorities Division, Legal and Treaty Department of the Polish Ministry for Foreign Affairs, and has acted as Project Manager for Amnesty International, leading a project in Poland for the publication of a Human Rights Education Handbook.

Cristi Danileț, Judge, Romania



Cristi Danileț was born in 1975 and has been a judge since 1998. He got his PhD in 2013, in criminal procedure law. Since 2003, he has been a member or leader of a number of different national and international organizations defending the independence of the justice system and promoting the integrity of judges, including Transparency International. Judge Danileț served as a counsellor of the Romanian minister of justice from 2005 to 2007, and as a member of Romanian Judicial Council from 2011 to 2016. Since 2008 he has been a trainer of the National Institute for Judges and Prosecutors in the field of juridical ethics and deontology. He strongly supports programmes such as legal education in schools, mediation, and the role of law for ordinary citizens. At present he serves as a judge in Cluj County Court, criminal division.

He has been a member of the advisory board of the Central-Eastern European Judicial Exchange Network – CEELI since 2012, and led the project - *Manual on Independence, Impartiality and Integrity of Justice: A Thematic Compilation of International Standards, Policies and Best Practices*.

Davor Dubravica, Judge, Croatia



Davor Dubravica is judge in Zadar, Croatia. He received his legal training at the Law Faculty of University of Zagreb, Croatia. During his career he has been given many responsible duties in judiciary, governance and international organizations.

In period 2008-2012 he was Head of the Independent Anti-Corruption Sector of the Croatian Ministry of Justice where was responsible for designing Croatian anti-corruption policy, drafting anti-corruption laws, coordinating and monitoring of the implementation of anti-corruption policy and strategic measures. During Croatian negotiation process for the accession to the EU he was member of the working group for the Chapter 23. Judiciary and fundamental rights, coordinating activities of all involved stakeholders in prevention of corruption field.

Since 2011 he is Chairman of the Regional Anti-Corruption Initiative of Southeast Europe (RAI). Since 2012 he has worked as OECD and EC peer review expert of anti-corruption systems in Georgia, Ukraine, Moldova, Montenegro and Armenia. He was participating in number of international anti-corruption and judicial conferences and working as expert and trainer in international projects in Montenegro, Serbia, Georgia, Kazakhstan, Tunisia, Egypt, Albania, Philippines, Uzbekistan, Morocco and Turkmenistan. Mr Dubravica is member of Croatian delegation in GRECO.

Domagoj Frntić, Judge, Croatia



Domagoj Frntic has been a Judge in the civil and labor courts in Croatia since 1999, after receiving legal training at the Law Faculty of the University of Zagreb. He has also served as Deputy Chairman, and later as Chairman of the Labor Court in Croatia's capital city of Zagreb. He is Disciplinary Judge (Panel for public servants/administrative staff) at the Department of Public Administration, and at the Croatian Chamber of Architects.

Judge Frntic is the author/co-author of many written and oral presentations, as well as of a number of textbooks and manuals, and has been a lecturer (at the University of Zagreb Law School/Faculty, Judicial Academy and at the other institutions) and member of various expert groups or committees, in the areas of civil law, labor/civil servant law, civil procedural law and anti-discrimination law.

He participated in a number of international legal and judicial projects (EJTN, ABA/CEELI, ILAC, IVLP, and others, in Central/Eastern Europe, MENA region, Central Asia and elsewhere) concerning international, anti-discrimination and labor law, judicial ethics, rule of law and court administration/organisation.

Since 2014, Judge Frntic has been an honorary citizen of the state of Nebraska, United States of America.

Marela Jevtović, Judge, Bosnia and Herzegovina



Marela Jevtović was born in Banja Luka, Bosnia and Herzegovina in 1973. She has worked at international and non-governmental organizations as well as governmental institutions. She started her career at the ICRC, UNMO, OSCE, IFOR branch offices in Banja Luka, Prnjavor, Doboj, Brčko - working in the detention and protection department; dissemination department; lecturing on Geneva Conventions, International Humanitarian Law, establishing offices of the OSCE for the first after-war elections; briefing the international elections observers; giving lectures on the electoral rules and

Code of Conduct. After graduating from Belgrade Law School she worked as a lawyer/consultant for various national and international organizations and consulted on protection of civilian victims of war in Bosnia and Hercegovina, drafted Electricity Law and also worked as a defence lawyer at ICTY from 1999 until 2004. She also worked at a Directorate for Privatization of Republic of Srpska, on privatization of strategic enterprises. She was a Head of the department of spatial planning at Čelinac Municipality. She was a Head of the Legal Department at the SERC (State Electricity Regulatory Commission) and represented the Commission in all administrative and judicial proceedings and perform other legal activities within the Commission's jurisdiction.

She is an appointed judge at Banja Luka Basic Court since 2008.

Levente Simon, Judge, National Judicial Council, Hungary



With several years of judicial experience gained in the area of civil case law, and in the last three years in the area of international judicial standards, Levente Simon is happy to have the opportunity where he can use his knowledge and capabilities in order to help the judiciary to understand and accept its role and responsibility. He believes the success of this project can enhance the judicial cooperation which can contribute to mutual confidence.

Working in the court system for 20 years and having experiences of varying length at almost all levels of the court system – from local court to Supreme Court - provides a daily routine in certain areas of law, but to have a good eye on passing judgements one needs more than that. Judge Simon believes that the content of this handbook can provide an additional theoretical basis.

Sophio Tsakadze, Council of Europe, Georgia



Sophio Tsakadze has experience working at both governmental institutions as well as international and non-governmental organizations. She started her career at the Ministry of Justice, Department of Public International Law in Georgia. After 2 years she moved to the Supreme Court of Georgia and served as a Deputy Head of the Analytical Department.

Sophio gives lectures in international treaty law, international criminal law and legal writing at various universities in Georgia. She has several publications in the field of human rights law. Sophio currently works at the Council of Europe Office in Georgia and is coordinating the project on strengthening the Georgian Bar Association.

I.THE RATIONALES OF JUDICIAL INDEPENDENCE

I. 1. CULTURE OF INDEPENDENCE

Article 97 of the Basic Law, concerning the independence of judges, is not a fundamental right within the meaning of § 90 of the Federal Constitutional Court Act. Therefore, a violation of Article 97 of the Basic Law as such cannot be claimed by means of a constitutional complaint. However, the Federal Constitutional Court has already recognised that judges, as a special group belonging to the civil service, are also covered by the scope of Article 33.5 of the Basic Law, which protects the traditional principles of the professional civil service. Article 33.5 of the Basic Law accords judges individual rights similar to fundamental rights to the extent that one can prove the existence of traditional principles of the law on the judicial office, which the legislator would have to observe and which shape the personal legal status of judges. These principles, in particular, include the principle of personal independence and independence in judicial decision-making. However, the traditional principles of the law on the judicial office under Article 33.5 of the Basic Law can only contain such guarantees as protected by the independence of the judiciary within the meaning of Article 97 of the Basic Law. All judges are guaranteed independence in judicial decision-making by Article 97.1 of the Basic Law. According to Article 97.1 of the Basic Law, judges are free from instructions; judicial independence in judicial decision-making is institutionally protected by the guarantee of personal independence pursuant to Article 97.2 of the Basic Law. The statutory provisions on the loss of the judicial position if convicted and on the removal from office in the course of formal disciplinary proceedings are compatible with Article 97.2 of the Basic Law because the premature end of judicial duties results from «a judicial decision» and on grounds and within the form provided by law. As a rule, the independence in judicial decision-making guaranteed in Article 97.1 of the Basic Law only covers the relationship of the judiciary to non-judicial public authority. Therefore, a statute that requires a judge to follow another court's decision does not violate the judge's independence in judicial decision-making. Due to the independence in judicial decision-making guaranteed under Article 97.1 of the Basic Law, a judge may base his or her decisions on his own legal views, even if all other courts – including those at higher tiers – take the opposite view where no binding effect of another court's decision is provided by statute. It is constitutive of the independence of judges that the administration of justice is not uniform. However, pursuant to Article 20.3 of the Basic Law, the judiciary is bound by law and statute. The judge, who is subject to statutory law, is not impaired in his or her independence guaranteed by the Constitution (Article 97.1 of the Basic Law) by being bound in this way, such a binding effect derives from the rule of law. Both being bound by the law and being subject to statutory law shape and specify the exercise of judicial power entrusted to the judges (Article 92 of the Basic Law). Against this background, it is precisely the requirement that courts only base their decisions on law and statutes that judicial independence in judicial decision-making, guaranteed under Article 97.1 of the Basic Law, is meant to ensure compliance with. (*Germany, Federal Constitutional Court, Date of issuance: 14-07-2016, Number of case: 2 BvR 661/16, GER-2016-2-016, [English](#)*)

The judiciary is the only state power assigned to administer justice. No other state institution or official may exercise that function. Only an independent and fully competent judiciary may successfully implement the function assigned to it. (*Lithuania, Constitutional Court, Date of issuance: 12-07-2001, Number of case: 13/2000, 14/2000, 20-22/2000, 25/2000, 31/2000, 35/2000, 39/2000, 8/01, 31/01 [English](#)*)

I. 2. OBLIGATION TO GUARANTEE THE INDEPENDENCE OF JUSTICE

Two constitutional complaints were filed, challenging regulations on the basis of which assistant judges had adjudicated upon the complainants' rights and freedoms. The complainants claimed that the regulations were out of line with the Constitution given the fact that they gave assistant judges and judges equal powers to adjudicate, but at the same time deprived assistant judges of the constitutional guarantee of independence. The Constitutional Court noted that impartiality is an inherent feature of the judicial power and, simultaneously, an attribute of the judge. Loss of it results in the judge being unable to carry out his or her job. Impartiality consists in the objective assessment of parties to proceedings, both in the course of a pending case and while adjudicating. Lack of impartiality of a judge while adjudicating constitutes a particularly gross violation of the principle of judicial independence. If courts are to be perceived by the public as truly independent institutions, it is vital for the administration of justice to be performed in such a way as to remove any potential reservations by parties to proceedings about the independence and impartiality of the Court. The Constitutional Tribunal stated that a statutory regulation, pursuant to which the assistant judge, while adjudicating, shall be independent and subject only to the Constitution and statutes, constituted merely a declaration, which did not provide for an actual and effective independence required by the Constitution. Such a regulation needs to be accompanied by specific legal provisions with regard to the practical assurance of the observance of the individual elements making up the notion of independence. Accordingly, the Constitutional Tribunal declared the provisions in question to be out of line with the Constitution. (*Poland, Constitutional Tribunal, Date of issuance: 24-10-2007, Number of case: POL-2008-1-004; [English](#)*)

In accordance with the principle of the independence of judges (Article 125 of the Constitution), it is appropriate that judges' salaries be regulated only by law. Certain provisions of the Judicial Service Act and the Salary System in the Public Sector Act, which determine that judges' salaries be regulated by an ordinance of the National Assembly, the collective agreement for the public sector, and a Government decree, as well as the provisions of the Ordinance on Officials' Salaries, which regulates judges' salaries as an executive regulation, were pronounced to be inconsistent with the above constitutional principle. It is inconsistent with the constitutional principle of the independence of judges if the legislator only ensures judges protection against a reduction in their basic salary and if it allows additional instances of a reduction of judges' salaries to be determined by an ordinance of the National Assembly. (*Slovenia, Constitutional Court, Date of issuance: 07-12-2006, Number of case: U-I-60/06-200, U-I-214/06-22, U-I-228/06-16, SLO-2009-3-006, [English](#)*)

Judicial independence is an integral part of the judicial status. It is safeguarded by the special practices that define the way judges are elected or appointed and dismissed; prohibition of any kind of influence imposed upon them; protection of their professional interests; special procedure of bringing them to disciplinary liability; ensuring the state protection of their personal safety and that of their families; ensuring the availability of financing and necessary operational conditions and legal and social protection required for judges and courts to function properly; prohibition on becoming members of political parties and trade unions, on taking part in any political activity, on becoming deputies or being simultaneously involved in other activity of certain kinds; bringing to legal liability those who are guilty of disrespect for judges and court; and judicial self-governance.

Judicial immunity is an element of judicial status. It does not constitute a special benefit but rather has a public and legal purpose of ensuring that justice is rendered by courts that are impartial, unbiased and independent.

According to Article 126.1 of the Constitution the scope of judicial immunity is not limited to the guarantee established by part 3 of this article under which no judge may be detained or jailed before a verdict of guilty is delivered unless this is sanctioned by the parliament (Verkhovna Rada). Additional guarantees of judicial independence and immunity other than those established by the Constitution can also be provided by legal regulations. They are found in Article 13 of the Law on the status of judges. They may not be decreased when adopting new or amending existing acts. (*Ukraine, Constitutional Court, Date of Issuance: 01-12-2004; Number of case: 19-rp/2004, UKR-2004-3-021, [English](#)*)

Article 5 of the Constitution provides that, in Lithuania, the powers of the state shall be exercised by the parliament (*Seimas*), the President of the Republic and the government, and the Judiciary. In this and other, the principle of separation of powers is enshrined. The judiciary is the only state power assigned to administer justice. No other state institution or official may exercise that function. Only an independent and fully competent judiciary may successfully implement the function assigned to it. The independence and competence of the judiciary are inseparable from the principle of the independence of judges and courts, entrenched in the Constitution. This principle means that the legislator has a duty to provide for sufficient guarantees to ensure the independence of judges and courts, which would ensure impartiality of courts in adopting decisions, and which would not permit anyone to interfere with the activities of judges and courts while they are administering justice. The judge, who is obliged to consider conflicts arising between individuals, as well as those between individuals and the state, must not only have the highest professional qualifications and an impeccable reputation, but must also be financially independent. The state has a duty to establish such salaries for judges which would be in conformity with the status of the judiciary and judges, the functions exercised by them and their responsibility. The protection of judges' salaries is one of the guarantees of the independence of judges. (*Lithuania, Constitutional Court, Date of issuance: 12-07-2001, Number of case:13/2000, 14/2000, 20/2000, 21/2000, 22/2000, 25/2000, 31/2000, 35/2000, 39/2000, 8/01, 31/01, LTU-2001-2-010*[English](#))

I.3. RULE OF LAW AND JUSTICE

Under the principle of trust, as derived from rule of law, an individual is entitled to expect from the authorities clarity, transparency and respect for principles guaranteeing the protection of human rights.

The essence of procedural justice can be summarised as follows: the possibility to be heard; disclosing the motives for a decision in such a way that the court's reasoning can readily be followed (even where there is no right of appeal against that decision) and ensuring predictability for parties to the proceedings by introducing sufficient coherence and internal logic to the procedures to which they are subjected.

Providing the reasoning for a judicial decision - the decisive component of the right to a fair trial - fulfils several significant functions: it acts as a control mechanism on the court which must demonstrate that its decision is substantially and formally correct and corresponds to the requirements of justice; it documents arguments in favour of the decision; it is the basis of review by courts of higher instance; it encourages individual approval for judicial decision; it fosters a feeling of social trust and democratic control over the administration of justice; and it enforces legal certainty. (*Poland, Constitutional Tribunal, Date of Issuance: 16-01-2006; Number of Case: SK 30/05, POL-2006-1-002, [English](#)*)

The official promulgation of laws in pursuance with the procedure established in the Constitution and laws is a necessary condition for the validity of laws to ensure subjects of legal relations know what laws are valid, the content of those laws, and therefore whether they might follow those laws. The requirement that the validity of promulgated laws be directed to the future and that these laws should not be retroactively valid is an important precondition of legal certainty and an essential element of the rule of law and a law-governed state. The legal principle of non-retroactivity is linked with the constitutional principles of justice and humanity. (*Lithuania, Constitutional Court, Date of issuance: 11-01-2001, Number of Case: 7/99-17/99, LTU-2001-1-001, [English](#)*)

The independence of judges and courts is one of the essential principles of a democratic state governed by the rule of law. The role of the judiciary in such a state is, while administering justice, to ensure the implementation of the law expressed in the Constitution, laws and other legal acts, to guarantee the rule of law and to protect human rights and freedoms. On the other hand, judges and courts are not sufficiently independent if the independence of courts (the institutions of judicial power) is not ensured. According to the principle of separation of powers, all powers are autonomous, independent and capable of counterbalancing each other. A further reason why the judiciary may not be dependent on other powers is the fact that it is the only power formed on a professional but not political basis. It is only when the judiciary is autonomous and independent of the other powers that it exercises its true function, which is the administration of justice. (*Lithuania, Constitutional Court, Date of issuance: 21-12-1999, Number of Case: 16/98, LTU-1999-3-014, [English](#)*)

Only a court of law can pronounce a person guilty of a criminal offence. (*Cyprus, Supreme Court, Date of issuance: 26-11-1997, Number of case: 298, 299, 300, CYP-1999-2-003, [English](#)*)

The right of access to the law and to the courts laid down in the Constitution requires efficient and effective judicial protection. The right of access to the courts derives from the principle of a democratic State governed by the rule of law (and consequently also from the principle of equality) and entails in order to guarantee a fair trial the principles of the equality of the parties and of the *inter partes* procedure. (Portugal, Constitutional Court, Date of issuance: 28-09-1994, Number of case: 529/94, POR-1994-3-015, [English](#))

I. 4. THE RIGHT TO A FAIR TRIAL

The Constitutional Court noted that “In administrative penalty proceedings, the right to a fair trial pursuant to Article 6 ECHR is not violated if the Independent Administrative Panel dispenses with an oral hearing in line with the case-law of the European Court of Human Rights and if the main aim of the applicant’s request for an oral hearing has been considered in its decision.” In the instance case these requirements were met, therefore the Constitutional Court did not find the violation of applicant’s right to an oral hearing. The Court holds that administrative penalty proceedings fall into the scope of this fundamental right. Corresponding to its case-law in these proceedings, Article 6 ECHR is violated if the competent authority (Independent Administrative Panels being a «tribunal» in the sense of Article 6 ECHR convicts the appellant (even only by reprimand) without an oral hearing unless the circumstances justify its absence. The circumstances abound, such as when the case raises no questions of fact or law that cannot be adequately resolved based on the case-file and the parties’ written observations (*ECHR, Döry v. Sweden*, no. 28394/95, 12 November 2002, paragraphs 37 ff). Referring to its Decision VfSlg 19.632/2012, the Court reiterates that, «an oral hearing may be dispensed with if the allegations submitted suggest that a further clarification of the basis for its decision-making cannot be expected by an oral hearing».(*Austria, Constitutional Court, Date of issuance: 27-06-2013, Number of case: B 823/2012-11, AUT-2013-2-001, [English](#)*)

The applicant alleged before the Constitutional Court that a breach of the principle of impartiality and of the right to fair process had occurred because four of the seven judges who heard the appeal had previously intervened in the same case i.e. they had participated in the earlier decision. Supporting its position with jurisprudence from the European Court of Human Rights, the Constitutional Court distinguished between two hypotheses: a situation in which the same judge successively exercises different jurisdictional functions in the same case; and one in which, as the result of an appeal, he or she successively exercises the same jurisdictional functions. The first situation represents the accumulation of functions linked to the prosecution, the fact-finding phase and the trial, or of consultative and jurisdictional functions. The European Court of Human Rights has condemned the successive exercise of consultative and jurisdictional functions. The European Court of Human Rights considers that the simple accumulation of functions is not enough to automatically entail a breach of the right to fair process; an assessment must be carried out of the effective role a judge plays in his or her interventions, in order to determine whether the interested party’s fears are objectively justified. The Constitutional Court observed that judicial impartiality is assessed on the basis of any functions the judge previously exercised in the same case; in the absence of other factors, even the entire history of the prior interventions by specific judges in that case is not sufficient to prove the existence of justified reasons to suspect partiality on the part of those judges. The Court concluded that an interpretation of a norm contained in legislation governing the Administrative and Fiscal Courts to the effect that the composition of the Court that hears appeals on the grounds of contradictory rulings can include judges who intervened in the ruling against which the appeal is being brought, or in the ruling on which the appeal is based, is not unconstitutional. (*Portugal, Constitutional Court, Date of issuance: 07-06-2011, Number of case: 281/11, POR-2011-2-010, [English](#)*)

A public hearing contributes to the right to a fair trial, as it protects parties to proceedings from decisions taken outside the control of the public, thereby strengthening public confidence in judicial institutions. The right to a fair trial includes the right to receive reasoned decisions. *(Serbia, Constitutional Court, Date of issuance: 21-12-2010, Number of case: VIIIU-189/2010, SRB-2011-1-009, [English](#))*

The Code of Civil procedure empowers judges to evaluate evidence freely. An interpretation that allows judges to accord value to testimony for which the witness has provided no grounds means that this rule is not unconstitutional, neither does it undermine the constitutional requirement for fair procedure, or any other constitutional parameter. *(Portugal, Constitutional Court, Second Chamber, Date of issuance: 12-05-2009, Number of case: 248/09, POR-2009-2-006, [English](#))*

Michael Rivera claimed before the U.S. Supreme Court that because of the erroneous denial of the peremptory challenge (a challenge made as a matter of right, without a requirement to show any cause), during selection of the jury trial against him, which resulted in his conviction with the participation of the judge, his lawyer sought to excuse, the Due Process clause of the Fourteenth Amendment to the U.S. Constitution required reversal of the conviction. The Court ruled that the trial court's refusal to excuse a juror did not deprive Rivera of his constitutional right under the Sixth Amendment to the U.S. Constitution to a fair trial before an impartial jury. The Court cited its case law that holds that, unless a member of the jury as finally composed was removable for cause, there is no violation of the Sixth Amendment right to an impartial jury. *(United States of America, Supreme Court, Date of issuance: 31-03-2009, Number of case: USA-2009-1-001, [English](#))*

The three most frequently indicated elements of the right to court are the right to initiate court proceedings, the right to have court procedures framed in an appropriate manner, and the right to obtain a binding court decision. The right to court also includes the right to an appropriately shaped organisation and position of organs considering cases. *(Poland, Constitutional Tribunal, Date of issuance: 24-10-2007, Number of case: SK 7/06, POL-2008-1-004, [English](#))*

All cases (except for those that fall under the jurisdiction of tribunals) shall be considered before competent, impartial and independent courts specified in the Constitution. Independence of courts, above all, means the organisational and functional separateness of the judiciary from other organs of public authority in order to guarantee its full autonomy in terms of consideration of cases and adjudication. In turn, independence of judges means that the judge shall act solely on the basis on the law, in accordance with his or her conscience and personal convictions. *(Poland, Constitutional Tribunal, Date of issuance: 24-10-2007, Number of case: SK 7/06, POL-2008-1-004, [English](#))*

The Court's appellate jurisdiction over "judgments of any other court in Bosnia and Herzegovina" includes jurisdiction not only over all types of decisions and rulings but also

over failures to take decisions where such failures are claimed to be unconstitutional. A court's omission to take a decision on the merits of a claim for a period of five years without giving any justification violates the appellant's right to have his or her civil rights determined by a court within a reasonable time (Article 6.1 ECHR in conjunction with Article II.2 of the Constitution of Bosnia and Herzegovina). In this case, the proceedings were halted in compliance with a ministerial order. (*Bosnia and Herzegovina, Constitutional Court, Date of issuance: 02-02-2001, Number of case: U 23/00 BIH-2001-2-002, [English](#)*)

Right to an independent and impartial tribunal. The composition of the Rent Tribunal in Vaud Canton does not present any objective and organisational incompatibilities with Article 6.1 ECHR. The member of this court representing an association of tenants with which he is connected need not withdraw simply because another employee of the association is assisting one of the litigants, saving the possibility of the association itself having a direct interest in the outcome of the action or of this judge's failing to provide adequate assurances of independence and impartiality in the specific case. (*Switzerland, Federal Court, First Civil Law Chamber, Date of issuance: 09-11-2000, Number of case: 4P.87/2000 SUI-2000-3-010, [English](#)*)

A participant in civil proceedings has the right to make a sound recording of an open oral hearing without the prior consent of the court. (*Slovakia, Constitutional Court, Date of issuance: 12-09-2000, Number of case: ÚS 7/00, SVK-2000-3-005, [English](#)*)

The adversarial principle and the principle of equality of the parties in civil proceedings require that the parties enjoy equal procedural rights, including the right to be heard by a tribunal, at all stages of judicial proceedings, including proceedings in courts with review powers. Accordingly, notice of court hearings not only may, but must, be issued to all parties and persons taking part in the proceedings. (*Russia, Constitutional Court, Date of issuance: 14-04-1999, Number of case: 22-04-1999, RUS-1999-1-003, [English](#)*)

The applicant had been condemned to a term of fifteen years imprisonment, having been found guilty of complicity in the crime of grievous bodily harm followed by death of a person while in police custody. The applicant filed a constitutional application alleging that during the criminal proceedings his right to a fair trial had been breached. The applicant inter alia alleged that the presiding judge in the trial by jury was not objectively impartial. The applicant contended that in the early stages of the jury, the judge delivered certain decisions which instilled the appearance that he was prejudiced against the applicant. The Constitutional Court held that in applying the objective test, what is at stake is the confidence which the courts in a democratic society must inspire in the public and, above all, as far as criminal proceedings are concerned, in the accused. Justice must not only be done; it must also be seen to be done. It further held that according to jurisprudence of the European Convention on Human Rights, the mere fact that a judge has made pre-trial decisions cannot be taken as in itself justifying fears as to his impartiality. What matters is the extent and the nature of those decisions. The Constitutional Court held that notwithstanding this preliminary decision, namely revoking the applicant's bail and ordering his immediate arrest, at no point in time did the judge express an opinion on the character of the applicant. The Court concluded that

when the criminal proceedings instituted against the applicant are examined as a whole, one could safely declare that they were fair. (*Malta, Constitutional Court, Date of issuance: 18-08-1998, Number of case MLT-1998-2-002, [English](#)*)

The impartiality/neutrality of the judge is a fundamental element in the application of the principle of a fair trial. This principle is applicable even to legal proceedings applying individual preventive measures affecting fundamental freedoms (right of abode, personal liberty) in respect of which the Constitution provides for a reserve of jurisdiction (i.e. requires judicial intervention). (*Italy, Constitutional Court, Date of issuance: 01-10-1997, Number of case: 306/1997, ITA-1997-3-009, [English](#)*)

Entrusting a court with the power to initiate criminal proceedings and draw up the charge is not in keeping with the principle of the objectivity and the impartiality of the court, which, as the judicial body, passes judgment in the same proceedings. This is contrary to the constitutional rules on independent judicial review of the protection of citizens' rights during criminal proceedings. The International Covenant on Civil and Political Rights states that everyone charged with a criminal offence shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal (Article 14.1). In particular this means that one of the prerequisites for a fair system for the administration of justice is that the court is only responsible for passing judgment on the criminal charge brought against the person concerned and should not be given the freedom to draw up the charge. (*Russia, Constitutional Court, Date of issuance: 28-11-1996, Number of case: RUS-1996-3-008, [English](#)*)

"Fair trial" - an expression comprising the constitutional principles that govern not only the characteristics of the court from the subjective and objective standpoint but also the rights of action and defence during trial - requires the judge to exercise impartiality and therefore detachment from the case before him. (*Italy, Constitutional Court, Date of issuance: 17-04-1996, Number of case: 131/1996, ITA-1996-1-003, [English](#)*)

In case of a lack of a challenge to the Court of Appeal's impartiality, an appeal in cassation alleging a contravention of the right to a fair trial by an impartial tribunal cannot be upheld. (*The Netherlands, Supreme Court, Date of issuance: 16-05-1995, Number of case: 98.804, NED-1995-2-007, [English](#)*)

In this case the accused complained in cassation proceedings that the Court of Appeal had displayed bias during the trial, and thus he had not been tried by an impartial tribunal within the meaning of Article 6.1 ECHR. The Supreme Court held that the accused could have challenged the Court of Appeal on the grounds of bias, as soon as he had become aware of facts or circumstances which could impair judicial impartiality. As the accused failed to do so, despite the fact that the Appeal Court had expressly apprised him of his statutory right to enter a challenge, it was not possible to sustain a defence to this effect in cassation proceedings. The only exception would have been if special circumstances had existed that provided compelling reasons to believe that one or more of the judges of the Court of Appeal had been biased against the accused, or at any rate that a concern to this effect on the part

of the accused could be justified objectively, which did not apply in the case at hand. (The Netherlands, Supreme Court, Date of issuance: 16-05-1995, Number of case: 98.804, NED-1995-2-007, [English](#))

I. 5. CONDITIONS OF THE INDEPENDENCE OF JUSTICE

Courts must be free from unlawful influence in the administration of justice, and judges must be free from any form of influence, pressure or interference in the performance of their duties. The relevant constitutional provisions must be understood in this way. Constitutional Court judges who have stepped down from that office may take office as Supreme Court judges and are not subject to the requirement of having served fifteen years in judicial office. (Ukraine, Constitutional Court, Date of issuance: 12-07-2011, Number of case: 8-rp/2011, UKR-2011-2-008, [English](#))

All cases (except for those that fall under the jurisdiction of tribunals) shall be considered before competent, impartial and independent courts specified in the Constitution.

Independence of courts, above all, means the organisational and functional separateness of the judiciary from other organs of public authority in order to guarantee its full autonomy in terms of consideration of cases and adjudication. In turn, independence of judges means that the judge shall act solely on the basis on the law, in accordance with his or her conscience and personal convictions. An independent court is composed of persons, in which the law vests the attribute of independence, not only in the form of a declaration, but also by shaping the system that determines the activity of judges, which amounts to a guarantee that is real and effective.

Impartiality is an inherent feature of the judicial power and, simultaneously, an attribute of the judge. Loss of it results in the judge being unable to carry out his or her job. Impartiality consists in the objective assessment of parties to proceedings, both in the course of a pending case and while adjudicating. Lack of impartiality of a judge while adjudicating constitutes a particularly gross violation of the principle of judicial independence.

Three types of *competence* characteristic of courts are listed below:

1. Competencies connected with their fundamental task, that is, implementing the administration of justice;
2. Other competencies conferred by the Constitution;
3. Non-constitutional competencies conferred by statute.

(Poland, Constitutional Tribunal, Date of issuance: 24-10-2007, Number of case: SK 7/06, POL-2008-1-004, [English](#))

The Czech Republic recognises the principles inherent in a democratic state, based on respect for the rights and freedoms of human beings and citizens in a democratic society. People are the source of state power. State power is exercised through legislative, executive and judicial bodies and may be effectively implemented only if the performance of these organs meets certain conditions. The state has an obligation to ensure the real independence of the courts. Such independence is a specific and indispensable attribute of judicial power. According to the Constitution, independent courts exercise judicial power on behalf of the Republic. When performing their office, judges are independent and no one may endanger their impartiality. The principle of the independence of the courts is unconditional, thus eliminating a possibility of encroachment by the executive power. The principle of the incompatibility of certain posts cannot be circumvented by adopting a solution under which a judge, during his or her term of office in other functions, is temporarily suspended from his or

her functions as a judge. An immanent feature of such posts is their continuity. Czech Republic, Constitutional Court, Date of issuance: 18-06-2002, Number of case: Pl. US 7/02, CZE-2002-2-006, [English](#))

Individually, judicial officers must be free to act independently and impartially in dealing with the cases they hear and, at an institutional level, there must be structures to protect courts and judicial officers against external interference. These safeguards must include security of tenure and a basic degree of financial security. Judicial independence can be achieved in a variety of ways and the mere fact that the legislation regulating the independence of lower courts differs from the constitutional provisions regulating higher courts is no reason for holding it to be unconstitutional. The test for assessing judicial independence includes an objective element of appearance or perception. (*South Africa, Constitutional Court, Date of issuance: 11-06-2002, Number of case: CCT 21/01 RSA-2002-2-010, [English](#)*)

I. 6. THE PRINCIPLE OF NATURAL JUDGE

The Portuguese constitutional-law principle of the 'natural judge' or 'legal judge', which is intended to ensure that no case is ever judged by an *ad hoc* court set up for the purpose, or by any court other than the one that is competent on the date of the crime, with that competence decided by the application of the organic and procedural norms containing rules designed to use objective criteria to determine the court that must intervene in each case. The content of this principle does not signify that the judge to whom a given case was distributed necessarily has to intervene in the respective trial. What is essential is that the competent judge be determined on the basis of rules set out in either legislation or other appropriate rules which decide the concrete composition of the judicial body that is going to try a case.

The 'natural judge' principle cannot prohibit changes in the law governing the organisation of the judiciary (including the competence to hear given cases), or the possibility of their immediate implementation, even if this means that specific cases may be heard by a court other than the one that would have been competent at the time when the fact in question occurred.

Such changes in legal rules or the procedural rules governing the way cases are divided up between courts and/or judges can even be valid for pending cases. The point is that a new regime must be valid in general, encompassing an indeterminate number of future cases, and cannot be based on arbitrary reasons which permit the conclusion that the resulting judiciary composition was formed on in an *ad hoc* way.

The important thing when it comes to respecting the natural judge principle is that the judge(s) who is (are) to intervene in a given procedural act must be determined on the basis of rules set out in legislation, or other rules that decide who is going to hear a case, in such a way as to avoid any arbitrariness or discretionary choices when a specific case is attributed to one or more specific judges. This requirement is met by the rules on the choice of judges during court vacations. (*Portugal, Constitutional Court, Plenary, Date of Issuance: 18-11-2015, Number of case: 596/15, POR-2015-3-020, [English](#)*)

I. 7. SPECIAL COURTS

I.7.1. MILITARY JUSTICE

The President of Poland requested the Tribunal to examine the conformity to the Constitution of certain provision of the Act of 11 concerning the granting of powers to access court case files by the Minister of Justice as part of external administrative supervision over military court. The Tribunal held that the challenged provision constituted excessive interference with the principle of the independence of the judiciary as well as the principle of the independence of judges. Consequently, it may threaten the exercise of the individual's right to have his or her case considered by an independent and impartial court and therefore, these provisions were inconsistent with the Constitution. The Constitution grants courts complete independence as regards considering cases and delivering rulings, which also implies that courts are guaranteed to exercise their judicial powers without any interference on the part of other authorities, including the Minister of Justice, i.e. a representative of the executive branch of government. (*Poland, Constitutional Tribunal, Date of issuance: 25-05-2016, Number of case: Kp 5/15, POL-2016-2-005, [English](#)*).

The applicant was a victim of the use of police force during a protest and now was suing the police for this injury. The applicant challenged the constitutionality of military jurisdiction, which determined that military has jurisdiction over criminal cases involving military force, including the police, even when the victim is a civilian and argued, that military jurisdiction does not protect his constitutional rights, specifically the rights to an impartial judge. The Constitutional Tribunal declared that military jurisdiction concerning civilian cases was unconstitutional, because it does not comply with international standards concerning this issue and also does not guarantee the plaintiff's right to due process. The Tribunal determined that the right to be heard by an impartial judge is not safeguarded, because military jurisdiction aims to resolve cases where crimes are committed by military and military legal interests are infringed, which is here not the case. (*United States of America, Supreme Court, Date of issuance: 31-03-2009, Number of case: 07-9995, USA-2009-1-001, [English](#)*).

Constitutional standards and principles do not rule out the existence and functioning of military prosecutor's offices. The provisions governing the composition of courts martial, which are to be made up of independent judges solely obedient to the law, and the rules of procedure followed by such courts entail no infringement of the right to a fair trial. For reasons of good administration of justice and in view of the tendency to limit the jurisdiction of courts martial solely to offences committed by military personnel, a tendency similarly shown by the European Court of Human Rights, it is justifiable to establish the civil courts' jurisdiction to try cases in which persons without military status are accused of offences perpetrated with military accomplices. (*Romania, Constitutional Court, Date of issuance: 20-06-2007, Number of case: 610/2007, ROM-2007-2-002, [English](#)*)

In military criminal procedure, defendants are entitled to choose their defence counsel. If no choice is exercised, they will always be guaranteed defence in court preferably by someone with legal knowledge. The qualification required for properly exercising defence rights is legal

knowledge; neither professional experience nor any other technical knowledge can be considered sufficient for guaranteeing those rights. Whenever possible the defence counsel must therefore be a lawyer. In military criminal procedure, the time allowed for filing appeals, presenting the grounds and submitting documentary evidence is significantly shorter - by approximately a half - than in ordinary criminal procedure. However, the general interests of the military do not make it necessary to limit defendants' defence guarantees or their right of access to the courts in this way. Moreover, given the special nature of military criminal procedure and the fact that particularly severe penalties may be applied, allowing a shorter time for filing appeals than under ordinary criminal procedure is not appropriate (*Portugal, Constitutional Court, First Chamber, Date of issuance: 17-01-1996, Number of case: 34/96, POR-1996-1-001, [English](#)*)

Pointing out that these rights applied fully in military proceedings, the Constitutional Court nonetheless dismissed the appeals, ruling in particular that, in their organisation and mode of operation, the military courts which had dealt with the case met the constitutional requirement of independence from the executive as laid down in Institutional Act 4/1987 on the jurisdiction and organisation of the military courts. In addition, judicial independence was a question not of the origins of those required to perform judicial functions but of the rights and duties which the law vested in them in the performance of their function. (*Spain, Constitutional Court, First Chamber, Date of issuance: 11-07-1994, Number of case: 204/1994, ESP-1994-2-024, [English](#)*)

II. INSTITUTIONAL INDEPENDENCE

II. 1. MEANING AND IMPORTANCE OF THE INDEPENDENCE OF JUSTICE

The Constitutional Court noted that judges of the Constitutional Court are independent in exercising their functions, including decision-making process and they cannot be subject to any investigation with respect to performing their functions in compliance with the Constitution. Neither the Ombudsperson, nor any other public institution, has any constitutional competence to investigate the decision making process of independent judicial bodies. In addition, judges of the Constitutional Court enjoy immunity for decisions made or opinion expressed within the scope of their mandate. Any investigative action, by any public body, as to the decision making process within the Constitutional Court, may seriously jeopardise the independence of the Constitutional Court as the final interpreter of the Constitution. As a conclusion, the Court rejected referral KO 22/15, submitted by the Ombudsperson, as manifestly ill-founded. (*Kosovo, Constitutional Council, Date of issuance: 30-04-2015, Number of case: KO 22/15, KOS-2015-1-007, [English](#)*)

The case arose from an application by the Supreme Court of Justice for the constitutional review of certain provisions on the immunity of judges. The challenged provisions meant that there was no longer any need to obtain the consent of the Superior Council of Magistracy to initiate criminal proceedings against a judge and to carry out detention, forced arrest and searches for specific offences, namely passive corruption and traffic of influence, also for committing administrative offences. The Court noted that the constitutional principle of judicial independence involves the principle of judges' liability. Independence of the judge does not constitute and cannot be construed as a discretionary power or an obstacle to his criminal and disciplinary liability under the law. The Court concluded that the provisions, which dispense with the need to obtain consent from the Superior Council of Magistracy for the Prosecutor General to initiate criminal investigation against judges is justified by the features of investigating corruption cases and do not violate the principle of judicial independence. In terms of the necessity of obtaining permission from the Superior Council of Magistracy for the detention, forced arrest and searches of judges, where criminal offences of passive corruption and traffic of influence may have been committed, the Court stated that subjecting a judge to detention, forced arrest or searches without permission from the Prosecutor General or of the Supreme Council of Magistracy could affect judicial independence. Therefore, the Court concluded that the changes could pave the way for a reduction in the independence of the judge and they thus run counter to the Constitution. (*Moldova, Constitutional Court, Date of issuance: 05-09-2013, Number of case: 22, MDA-2013-3-006, [English](#)*)

It must be underlined that the constitutional principle of the independence of judges, the bearers of which are judges, cannot be regarded as their privilege, but rather as an essential element for ensuring the protection of the rights of parties to judicial proceedings. In addition, the independence of judges is a prerequisite for their impartiality in concrete judicial proceedings and therefore for the credibility of the judiciary as well as the trust of the public in its work. (*Slovenia, Constitutional Court, Date of issuance: 07-12-2006, Number of case: U-I-60/06-200, U-I-214/06-22, U-I-228/06-16, SLO-2009-3-006, [English](#)*)

II. 2. FREEDOM FROM UNDUE EXTERNAL INFLUENCE

More than one-fifth of the members of the Parliament brought Law no. 4771 before the Constitutional Court alleging its unconstitutionality. The Law amended a number of laws on different subjects. According to the one of amendments, among the reasons for the retrial of a case was listed the judgments of the European Court of Human Rights finding violation of fundamental rights and freedoms. In the application to the Constitutional Court, it was alleged that that regulation delegated the right of the Turkish Nation to exercise its sovereignty partly to the European Court of Human Rights. The application on that point was rejected. Since the laws provide that the judges examining cases upon retrial must rule according to their conscience, the impugned provision does not provide for the delegation of sovereignty to other bodies or interference with judicial proceedings and the principle of the independence of the courts is not violated. Therefore, the Constitutional Court found that that provision was not a delegation of the judicial power to the European Court of Human Rights and that it did not infringe the independence of the courts. (*Turkey, Constitutional Court, Date of issuance: 27-12-2002, Number of case: TUR-2003-3-006, [English](#)*).

This judgment relates to extradition. The appellant convicted in the Federal Republic of Germany (the FRG) and sentenced to imprisonment, fled to South Africa and became a South African citizen, giving up his German citizenship. The FRG requested South Africa to extradite him to serve his sentence and to face a further 15 counts of fraud. The President consented to the extradition in terms of Section 3.2 of the Extradition Act 67 of 1962. The appellant attacked the constitutionality of Section 10.2 of the Act, which provides that the magistrate hearing an extradition case must accept a certificate from the appropriate authorities in the foreign state as conclusive proof that they have sufficient evidence to warrant the proposed prosecution. The appellant contended that this infringes his constitutional rights to have a dispute resolved in a fair hearing; to freedom and security of the person; and to a fair trial as an accused person. He also contended that it violates the separation of powers doctrine and judicial independence. The applicant's appeal was dismissed. The Constitutional Court found that a provision in the Extradition Act which provides that the magistrate holding an extradition enquiry must accept a certificate from the appropriate authorities in the foreign state as conclusive proof that they have sufficient evidence to warrant the proposed prosecution does not violate the person's rights to a fair trial, to freedom and security of the person, or to a fair hearing. The provision also does not interfere with the independence of the judiciary or violate the separation of powers doctrine. (*South Africa, Constitutional Court, Date of issuance: 12-12-2002, Number of case: RSA-2002-3-020, [English](#)*).

State power in the Azerbaijan Republic is organised on the basis of the principle of the separation of powers (Article 7.3 of the Constitution). This separation is intended to preserve the guarantees of freedom with a view to preventing the replacement of democracy by autocracy. The principle aims to preclude the possibility of one of the branches of power usurping the powers of another. (*Azerbaijan, Constitutional Court, Date of issuance: 02-03-2000, Number of case: 1/4, AZE-2000-1-002, [English](#)*)

II. 3. THE PRINCIPLE OF SEPARATION OF POWERS

Recent legislation making amendments and additions to the Constitution endows the constitutional values and fundamental principles of the Republic with new content. Strengthening parliamentary control over the Government, along with the institution of constitutional control, is an indispensable trend in the development of a democratic state under the rule of law. The redistribution of powers between the branches of power does not affect the basis of the presidential form of government; the legislation is constitutionally compliant. (*Kazakhstan, Constitutional Council, Date of issuance: 09-03-2017, Number of case: 2, KAZ-2017-1-001, [English](#)*)

The Ombudsperson and the Constitutional Court are situated outside the three classical branches of government. They are not and cannot be involved in the inter-play of the division of power and checks and balances that characterises the three branches of government. These institutions have a specific constitutional status that must be respected by the governing authorities. The same principles apply to other independent institutions enumerated in the Constitution. The Ombudsperson and the Constitutional Court are there to assist the three branches of government in ensuring the rule of law, the protection of fundamental human rights and supremacy of the Constitution. They are specialised and uniquely independent institutions. Consequently, the Government cannot impose identical criteria to them without paying close attention to their specificities guaranteed by the Constitution. Ordering these institutions to place their staff members in positions, grades and job classifications as approved by the Government, without due account being taken of their specificities and uniqueness, is out of line with the constitutional guarantees. (*Kosovo, Constitutional Court, Date of issuance: 08-12-2016, Number of case: KO 73/16, KOS-2016-3-002, [English](#)*)

The Constitution stipulates neither the general dominance of one branch of power over the others or two branches over the third branch nor the dominance of one of the highest-ranking representatives over another. The President of the state, the President of Parliament, the President of the Government of the state, the President of the Constitutional Court and the President of the Supreme Court are the top five state officials. Their duties are not subject to degrees in terms of their significance. Practical consequences of the performance of certain state duties may lead to the need for a differentiated way of regulating the manner of protection of the highest-ranking officials of the five constitutive bodies of the state. However, they are not and may not be a reason to deviate from the constitutional framework and undermine the basic principle of the separation of powers on which the Croatian constitutional state is based. Normative solutions must respect the organic constitution of the state, and within it they may be adjusted to the specific nature of individual state duties, reflecting the real needs for their protection and security. If the Government permits the presidents of the state, the Parliament and the Government the possibility to stay in residential facilities for private purposes, it must offer the same to the presidents of the Supreme Court and the Constitutional Court under the same conditions. This is a matter of principle, and no longer an assessment of political purposefulness. (*Croatia, Constitutional Court, Date of issuance: 12-08-2014 Number of case: U-I-5735-2014, CRO-2014-2-010, [English](#)*)

Under the constitutional principle of separation of powers, the legislative, executive and judiciary powers cannot interfere with each other. They must carry out their tasks in the exercise of state power separately, within the limits of the Constitution, through mutual co-operation. The principle of the separation of powers is aimed at creating a system of governance which would stop abuse of one of the powers. Legislation that draws a distinction between the wages of civil servants of the courts by comparison to civil servants working for the legislative power and executive authorities is out of line with the Constitution. (*Moldova, Constitutional Court, Date of issuance: 10-09-2013, Number of case: 24, MDA-2013-3-007, [English](#)*)

The application of the principle of separation of powers is a prerequisite for the operation of the rule of law. In the Republic of Moldova, the legislative, executive and judiciary powers are separate and they cooperate in the exercise of their competences under the provisions of the Constitution (Article 6 of the Constitution). Article 20 of the Constitution guarantees free access to justice to any person, including the right of litigants to have their cases determined by an independent and impartial court that is free from external influence. Under Article 116.1 of the Constitution, judges of the courts of law are independent, impartial and irremovable in accordance with the law. The persona of a judge is inviolable. Prosecution against a judge may be initiated only by the Prosecutor General, with the consent of the Superior Council of Magistracy in accordance with the Criminal Procedure Code (Article 19 of the Law on the status of judges). Amendments to the Law on the status of judges resulted in there no longer being a necessity to obtain the consent of the Superior Council of Magistracy to initiate criminal proceedings against a judge and to carry out detention, forced arrest and searches for offences of passive corruption and traffic of influence, and for committing an administrative offence. (*Moldova, Constitutional Court, Date of issuance: 05-09-2013, Number of case: 22, MDA-2013-3-006, [English](#)*)

A fundamental principle of the rule of law is the separation of powers, which refers to distinct and unique duties distributed to and exercised by different and independent branches of government to avoid the concentration of all power in the hands of a single authority. Article 6 of the Constitution provides that the Legislative, Executive and Judicial Powers are separate and shall cooperate to carry out assigned prerogatives pursuant to the provisions of the Constitution. Under the powers conferred upon them, each power of government exercises a number of tasks without any interference from the other powers. According to the principle of separation of powers, none of the three powers shall prevail over the others, be subordinated to each other and assume the specific prerogatives of the other. (*Moldova, Constitutional Court, Date of issuance: 09-11-2011, Number of case: 23, MDA-2011-3-007, [English](#)*)

In order to achieve the aims of the principle of the separation of powers, derogations are sometimes permissible from the formal implementation of the principle of separation of powers. These derogations may only be regarded as admissible if they make the realisation of the functions of the state power more efficient, strengthen the independence of one institution of State power from another or secure the functioning of the system of mutual checks and balances that exists between the powers. (*Latvia, Constitutional Court, Date of issuance: 25-11-2010, Number of case: 2010-06-01, [English](#)*)

The Regional Court of the Rokiskis Region asked the Constitutional Court to assess the compliance with the Constitution of the Code of Administrative Law Violations under which, when hearing cases of administrative law violation, courts (judges) must objectively and impartially investigate, examine, and assess the data (evidence) and arrive at a fair conclusion as to the culpability of the person charged with committing the violation. The petitioner pointed out that where a court corrects errors in an investigation made by an institution that has drafted the minutes regarding an administrative law violation and collects the missing evidence, the Court performs the role of accuser. Elements not due to execution of justice then occur in the actions of the Court, and the principles of separation of power and judicial independence are breached. The Constitutional Court found that the impugned provision did not contravene the Constitution. In some cases, the execution of justice cannot depend simply on material provided to the Court, and the judge will need to carry out certain actions, such as compiling missing evidence, in order to investigate the circumstances of the case in a thorough and objective fashion, and to establish the truth. In carrying out such activities, the Court must act in a way that gives no cause for accusations of partiality or influence. (*Lithuania, Constitutional Court, Date of issuance: 28-05-2008, Number of case: LTU-2008-2-002, [English](#)*).

In the instance case the Constitutional Council was examining whether the involvement of the Mediator of the Republic, an administrative authority, in disciplinary proceedings against a judge violated two constitutional principles: the independence of the judiciary and the separation of powers. The institutional act entitled the Mediator of the Republic to "seek all relevant information" from the heads of the courts of appeal and the higher courts. It also provided that, where the mediator considered that the impugned acts qualified as a disciplinary offence, he or she could transmit the complaint to the Minister of Justice for referral to the High Judicial Council (*Conseil supérieur de la magistrature*). The Minister of Justice was then obliged to ask the competent bodies to conduct an inquiry; in cases where the minister was not legally bound to bring disciplinary proceedings, he must inform the mediator thereof by a reasoned decision, and the mediator could then issue a special report published in the official gazette. In view of all the powers thus conferred on the mediator, the Constitutional Council held that the impugned act had breached both the principle of the independence of the judiciary and of separation of powers. (*France, Constitutional Council, Date of issuance: 01-03-2007, Number of case: 2007-551 DC, FRA-2007-1-003, [English](#)*).

A commission of inquiry is set up with a view to recognising and verifying a phenomenon, an event or activity in depth, in order to draw conclusions about the need to approve, amend or add to particular legislation. The exercise of this prerogative by the Assembly is subject to certain limitations. The inquiry should respect constitutional principles, such as separation of powers and the presumption of innocence. The Assembly does have the power to resolve to set up a commission of inquiry to investigate certain issues. However, it should be careful to exercise this competence within the framework of its constitutional functions and to respect the constitutional principles that regulate the activity of the organ under investigation. (*Albania, Constitutional Court, Date of issuance: 04-12-2006, Number of case: 26/06, ALB-2007-2-002, [English](#)*)

The three independent branches of government are the legislature, the executive and the judiciary. The way they function can only be changed by the Grand National Assembly, not by amendment of the Constitution by the ordinary National Assembly. The proper procedure for dismissing a judge should give the interested parties a say in the decision. In other words the procedure should provide from the outset for the possibility of challenging the findings of the parliament. It is inadmissible that in respect of this essential part of the Constitution, *preventive* measures are rejected in favour of *post factum* appeals to the Constitutional Court. In the light of the above, the Court considers it necessary to protect the Constitution against amendments not in keeping with its fundamental principles and declares the impugned decision in violation of the Constitution. (*Bulgaria, Constitutional Court, date of issuance: 13-09-2006, Number of case: 06/06, BUL-2006-3-002, [English](#)*)

Amendments to constitutional provisions restricted in their effect to the judiciary and aimed at restructuring, improvement of content and clearer definition or clarification of the different functions of various judicial organs and their interaction with other institutions do not result in changes to the form of state government. They may be passed by the Ordinary National Assembly (not by the Grand National Assembly), provided that the balance between the powers is not disrupted and that the fundamental principles underlying the constitutional model of the State are respected. (*Bulgaria, Constitutional Court, Date of issuance: 01-09-2005, Number of case: 07/05, BUL-2005-3-004, [English](#)*)

The procedure under which the Minister of Justice confers on a lay judge the duty of substituting for a judge of a particular district (or city) may cast doubt on the potential independence of the appointed judge from the executive power, as well as on the legitimacy of the decisions adopted by him/her. At the time the regulation allowing the Minister of Justice to appoint a lay judge to the office of judge was incorporated into the Law on the Judiciary, the legislator did not sufficiently assess other means that could be used to ensure the functioning of the judiciary in accordance with the requirements of an independent court and to avoid the potential influence of the executive power on the court. Even though at the time the impugned legal provision was adopted there were not enough judges in Latvia because of insufficient funding, the procedure for appointment of lay judges provided for by that legal provision is not proportionate to the aim of reaching the number of judges established by law, as it does not ensure the independence of judges who have been appointed to office in such a way. (*Latvia, Constitutional Court, Date of issuance: 05-11-2004, Number of case: 2004-04-01, [English](#)*)

In Romania, only the Principal State Prosecutor may exercise the extraordinary remedy of an application to set aside final court decisions, in view of his/her role in representing the general interest of society and defending the legal order and the citizens' rights and freedoms. Decisions taken by the Principal State Prosecutor to suspend enforcement of final court decisions (*res iudicata*) prior to the formal application to set aside these decisions violated the principle of the separation of powers within the State. (*Romania, Constitutional Court, Date of issuance: 24-09-2002, Number of case: 259/2002, [English](#)*)

The independence of judges and courts is one of the essential principles of a democratic

state governed by the rule of law. The role of the judiciary in such a state is, while administering justice, to ensure the implementation of the law expressed in the Constitution, laws and other legal acts, to guarantee the rule of law and to protect human rights and freedoms. On the other hand, judges and courts are not sufficiently independent if the independence of courts (the institutions of judicial power) is not ensured. According to the principle of separation of powers, all powers are autonomous, independent and capable of counterbalancing each other. A further reason why the judiciary may not be dependent on other powers is the fact that it is the only power formed on a professional but not political basis. It is only when the judiciary is autonomous and independent of the other powers that it exercises its true function, which is the administration of justice. (*Lithuania, Constitutional Court, Date of issuance: 21-12-1999, Number of case: 16/98, LTU-1999-3-014, [English](#)*)

The principle of the separation of powers means that the legislative, executive and judicial powers must be separate and sufficiently independent, but also that there must be a balance between them. Institutions have powers corresponding to their purpose. The particular content of the institution's powers depends on its position in the institutional system. (*Lithuania, Constitutional Court, Date of issuance: 03-06-1999, Number of case: 19/98, LTU-1999-2-009, [English](#)*)

A declaration by the executive, under Section 35.2 of the Offences Against the State Act 1939, that the ordinary courts are inadequate to secure the effective administration of justice, is essentially political in nature. While not entirely beyond the reach of judicial control, the courts should be extremely reluctant to review such a declaration. (*Ireland, Supreme Court, Date of issuance: 18-12-1996, Number of case: 369/1995, IRL-1996-3-004, [English](#)*)

The petitioner filed a complaint with the Constitutional Court, alleging that his right to trial within a reasonable time (Article 48.2 of the Constitution) had been violated by the respective courts of general jurisdiction, which commenced the proceedings in 1977 but failed to complete them before the petition was filed in 1995. The respective domestic court rejected the petitioner's arguments and argued that the Constitutional Court lacked the authority to proceed in the matter, as it would thus interfere with the principle of judicial independence. The Constitutional Court noted that only an instruction or an order given to a judge constitutes an interference with judicial independence. The independence of a judge in his/her decision-making cannot be made superior to the constitutionally guaranteed rights of natural and legal persons. The exercise of judicial independence has to be in balance with constitutionally guaranteed rights. Therefore, the scrutiny by the Constitutional Court of whether the respective ordinary courts have sufficiently observed rights related to judicial proceedings cannot be deemed an interference with judicial independence even if such scrutiny takes place during the course of these proceedings (*Slovakia, Constitutional Court, Date of issuance: 25-10-1995, Number of case: PL. ÚS 19/94, SVK-1995-3-006, [English](#)*)

The principles of the separation of powers and of the independence of the judiciary, taken together, mean that decisions of the judicial power may not be substituted by decisions of bodies belonging to any other power, and that judges are not subordinate to any other public

authority. (Slovakia, Constitutional Court, Date of issuance: 27-01-1995, Number of case: PL. ÚS 14/94, SVK-1995-1-001, [English](#))

The statutory provisions regulating the jurisdiction of the Ombudsman do not allow the investigation by him of the functioning of the courts. The Constitutional Court has already emphasized several times the importance of judicial independence, especially the stability and neutrality of the judiciary. The role of the Ombudsman is to guarantee, through the control of the administration, the realisation of rule of law and the protection of individual rights. There is only a limited possibility of abusing judicial power in civil law countries. The independent judiciary is constitutionally protected against any external influence. Therefore the regulation, declining to confer on the Ombudsman any power of control over the judiciary, is in conformity with the principles of the separation of powers and judicial independence. Although in Sweden, and in a few countries following the Swedish model, the Ombudsman has certain powers to control the judiciary, most countries rejected the original Swedish solution, and have implemented regulations similar to those existing in Hungarian law. (Hungary, Constitutional Court, Date of issuance: 29-03-1994, Number of case: 17/1994, HUN-1994-1-004, [English](#))

II. 4. THE JUDICIARY AND THE EXECUTIVE

External access to court case files affects the administration of justice by courts, as both the course and effect of the basic activity of courts, namely adjudication, are reflected in court case files. The Constitution grants courts complete independence as regards considering cases and delivering rulings, which also implies that courts are guaranteed to exercise their judicial powers without any interference on the part of other authorities, including the Minister of Justice, i.e. a representative of the executive branch of government. (*Poland, Constitutional Tribunal, Date of issuance: 25-05-2016, number of case: Kp 5/15, POL-2016-2-005, [English](#)*)

The independence of judges, embodied in the Constitution (Article 151 of the Constitution) and in the general principle of separation of powers, is functional in nature and does not, as a matter of principle, prevent the legislative and executive branches, within the limits of their authority under the Constitution, from taking measures to secure the proper functioning of the judicial branch, particularly with regard to its management and financing.

The purpose of the legislation was to decentralise and transfer management responsibility of the judicial budget and staffing. Other than in the case of the Court of Cassation, the level of funding and other resources of the judiciary were laid down by the Minister of Justice, in consultation with, on the one hand, the college of court judges and, on the other, the college of prosecutors, based on management contracts. The colleges were then responsible for apportioning the financial and other resources concerned between the judicial entities within their remit, based on management plans drawn up at local level. Parliament thereby sought to ensure that the independence of the courts *vis-à-vis* the prosecution service, and vice versa, was maintained. (*Belgium, Constitutional Court, Date of issuance: 15-10-2015, Number of case: 138-2015, BEL-2015-3-011, [English](#)*)

The principles of the separation of powers and the independence of the judiciary rule out the possibility of joining the judiciary and judges with the executive branch. Therefore, a legal regulation allowing the temporary assignment of judges to work at the Ministry of Justice is unconstitutional, as is a regulation that does not contain a means of protecting court officials from temporary removal from office by the Ministry of Justice, and a regulation permitting the President of the Republic to determine the number of vice chairmen of the Supreme Court. A time limit for holding the office of chairman or vice chairman of a court is not, in and of itself, inconsistent with the principle of the separation of powers, if it is comparable to the term of office of other officials in an independent position and if there is a commensurate regulation of stricter conditions for an early suspension from temporary office. (*Czech Republic, Constitutional Court, Date of issuance: 06-10-2010, Number of case: Pl. US 39/08, CZE-2010-3-012, [English](#)*)

Taxi-driver was stabbed to death by C., who was free despite a warrant for his arrest issued by cantonal judge Z. which had not been immediately executed. The Attorney General of the Canton of Zurich subsequently asked the cantonal parliament to authorise the opening of a criminal investigation against Z. for negligent homicide. The parliament refused

permission. The right to life on the one hand affords protection against the state and, on the other, imposes an obligation on the latter to ensure the fullest possible protection of its citizens, investigate offences against life and prosecute those responsible (recital 2.1). Where offences against life are concerned, any privilege granted in the context of criminal proceedings is inconsistent with the right to life. Consequently, the state must balance the interest in bringing criminal proceedings against the interest in impeding them. Thus, when an application is made for leave to prosecute, the state must, whatever the applicable procedure, guarantee that both the accused (person enjoying privileges) and the victim's next of kin are able to exercise their procedural rights (recitals 2.2 and 2.3). (Switzerland, Federal Court, Court of Criminal Law, Date of issuance: 06-02-2009, Number of case: 6B413/2008, SUI-2009-2-003, [English](#))

The procedure under which the Minister of Justice confers on a lay judge the duty of substituting for a judge of a particular district (or city) may cast doubt on the potential independence of the appointed judge from the executive power, as well as on the legitimacy of the decisions adopted by him/her. (Latvia, Constitutional Court, Date of issuance: 05-11-2004, Number of case: 2004-04-01, LAT-2004-3-008, [English](#))

In the course of proceedings involving an appeal against a decision of the High Council of Justice, the Supreme Court stayed the proceedings and made a reference to the Constitutional Court asking to assess whether certain provisions of the law, granting Minister of Justice right to carry out inspections in the courts and right to make proposals for the dismissal of judges, ran counter to the independence of the judicial power and violated the principle of the separation of powers. The Constitutional Court held that the fact that the Minister of Justice carries out verification of alleged violations by judges and presents proposals for disciplinary proceedings is not unconstitutional because the Minister has no right to vote and the High Council of Justice is free to decide on his or her proposals, thereby guaranteeing judges due process of law in disciplinary proceedings. Assessing the content of the impugned provisions, the Constitutional Court stated that the Albanian Constitution guarantees the independence of the judicial power, granting judges the right of being untouchable and irremovable from office without reasonable grounds, as well as the prohibition of criminal proceedings without the authorization of the High Council of Justice. Only courts have the right to review judicial decisions. (Albania, Constitutional Court, Date of issuance: 27-05-2004, Number of case: 11, ALB-2004-2-002, [English](#)).

The claimant brought a constitutional claim arguing that that legal provision providing that in case of a vacancy or a temporary absence of a judge of a district (or city) court the Minister of Justice may assign a lay judge who meets the requirements for appointment as judge of a district (or city) court as set out in the Law to fulfill the duties of judge of a district (city) court consent was unconstitutional. The Constitutional Court noted that the procedure under which the Minister of Justice confers on a lay judge the duty of substituting for a judge of a particular district (or city) may cast doubt on the potential independence of the appointed judge from the executive power, as well as on the legitimacy of the decisions adopted by him/her. At the time the regulation allowing the Minister of Justice to appoint a lay judge to the office of judge was incorporated into the Law on the Judiciary, the legislator did not sufficiently assess other means that could be used to ensure the functioning of the judiciary in accordance with the requirements of an independent court and to avoid the potential influence of the executive power on the court. Even though at the time the impugned legal

provision was adopted there were not enough judges in Latvia because of insufficient funding, the procedure for appointment of lay judges provided for by that legal provision is not proportionate to the aim of reaching the number of judges established by law, as it does not ensure the independence of judges who have been appointed to office in such a way. Therefore, the impugned legal provision was declared unconstitutional. (*Latvia, Constitutional Council, Date of issuance: 05-11-2004, Number of case: 2004-04-01, LAT-2004-3-008, [English](#)*).

In the course of proceedings involving an appeal against a decision of the High Council of Justice, the Supreme Court stayed the proceedings and made a reference to the Constitutional Court with a request to strike out Article 6/9 of the Law "on the organisation and function of the Ministry of Justice," as well as Articles 31/1, 31/3 and 16/1.c of the Law "on the organisation and functioning of the High Council of Justice", on the ground of incompatibility with the Constitution of the Republic of Albania. In its reference, the Supreme Court stated that the Minister of Justice's right to control the activity of ordinary courts and his or her right in relation to disciplinary proceedings against judges ran counter to the independence of the judicial power and could be considered as an infringement of the separation of powers because the body competent for disciplinary proceedings against judges is the High Council of Justice.

Assessing the content of the impugned provisions, the Constitutional Court held that the Albanian Constitution guarantees the independence of the judicial power, granting judges the right of being untouchable and irremovable from office without reasonable grounds, as well as the prohibition of criminal proceedings without the authorisation of the High Council of Justice. Only courts have the right to review judicial decisions. The High Council of Justice may take disciplinary measures against judges only in cases where their court decisions are associated with acts and conduct that seriously discredit the profession and position of judge and the authority of the judicial power. That being so, the Constitutional Court considered that the provisions dealing with the subject of control did not speak of control of the decision-making activity, but of inspection as to the administration of justice. The Constitutional Court dismissed as unfounded the Supreme Court's claim that the Minister of Justice's right to carry out inspections in the courts and his or her right to make proposals for the dismissal of judges violated the principle of the separation of powers. According to the Constitutional Court, the principle of separation of powers not only implies their separation, but also their balance. Thus, those powers should cooperate in order to accomplish their goals, and should respect and control each other. Those powers should cooperate with and control each other to the extent that their constitutional functions are not affected.

The decisions of judges should conform only to the Constitution and laws. In order to ensure the best results, mechanisms have been introduced to ensure that pressure is not applied from inside or outside the judicial power. The Albanian Constitution has entrenched the independence of the different state powers, putting the emphasis on the independence of the judicial power. The establishment of the High Council of Justice is a component element of that principle. The fact that the Minister of Justice carries out verification of alleged violations by judges and presents proposals for disciplinary proceedings is not unconstitutional because the Minister has no right to vote and the High Council of Justice is free to decide on his or her proposals, thereby guaranteeing judges due process of law in disciplinary proceedings. (*Albania, Constitutional Court, Date of issuance: 27-05-2004, Number of case: 11, ALB-2004-2-002, [English](#)*).

Intervention by the executive power in the organisation and activities of courts is contrary to the Constitution and therefore unacceptable. (*Bulgaria, Constitutional Court, Date of issuance: 16-12-2002, Number of case: 13/02, BUL-2002-3-003, [English](#)*)

The dispute between the former national President and the judicial authorities over the President's actions to uphold the presidential prerogatives in respect of declarations which he made while in office and on which successive rulings were made at the expiry thereof, has a constitutional character in that it raises the issue of determining the respective functions, set forth in the Constitution, of the national President and of the judiciary. The Court of Cassation, as a State power, has the capacity to hear the proceedings brought in order to rule on this dispute. (*Italy, Constitutional Court, Date of issuance: 24-10-2002, Number of case: ITA-2002-3-004, 455/2002, [English](#)*)

The appellant during criminal proceedings against him challenged the independence and impartiality of judge I.S., a member of the court, on the grounds that I.S. was simultaneously employed at the Ministry of Justice, but the Supreme Court rejected his objection, stating that the judge was temporarily relieved of his or her duties at the Ministry of Justice. Following the Supreme Court ruling, the regional court tried the appellant's case in the same composition, found him guilty and sentenced him to thirteen years' imprisonment without remission. The appellant lodged a complaint with the Constitutional Court, which was ultimately upheld. The Constitutional Court noted in particular that the function of judge is a constitutional office and that the holding of such office is incompatible with the holding of any other constitutional office, including one in a government department. This principle derives from the principle of separation of powers and is intended, from the point of view of judicial independence and impartiality, to ensure that court decisions are not influenced by other bodies of the state. Referring to the case-law of the European Court of Human Rights principally the Judgments in the cases of *Delcourt v. Belgium* (1970) and *Ferrantelli and Santangelo v. Italy* (1996) the Constitutional Court stressed that the key issue in the case in question was that of inadequate objective impartiality. In the view of the Court, it was unacceptable to combine the two offices, even where a judge was temporarily relieved of his or her duties at the Ministry of Justice in order to decide pending cases. (*Slovakia, Constitutional Court, Date of issuance: 15-06-2000, Number of case: III. ÚS 16/00, SVK-2000-2-004, [English](#)*)

Under no circumstances may a person with duties at the Ministry of Justice simultaneously sit as a judge in a court of law, even where a judge was temporarily relieved of his or her duties at the Ministry of Justice in order to decide pending cases. (*Slovakia, Constitutional Court, Panel, Date of issuance: 15-06-2000, Number of case: III. ÚS 16/00, SVK-2000-2-004, [English](#)*)

It is the task of the Minister of Justice, not of the courts, to decide whether or not to grant a request for extradition. The court is however competent to advise the Minister in this matter. (*The Netherlands, Supreme Court, Date of issuance: 17-12-1996, Number of case: 103.862, NED-1997-2-002, [English](#)*)

The President shall not interfere with the process of personnel administration of other branches of power. To do so would provide an imbalance in the separation of powers and lead to an excess of executive power. (*Belarus, Constitutional Court, Date of issuance: 10-10-1996, Number of case: J-41/96, BLR-1996-2-009, [English](#)*)

A provision of a decree issued by the Minister of Justice was challenged because it made it possible for the Minister of Justice, a member of the executive branch, to award or recommend judges for honours for their judicial activity. This was found to violate the constitutional principle of judicial independence. The Constitutional Court held that it was contrary to the constitutional principle of judicial independence if any member of the Government can award honours to judges or recommend judges for honours without the real participation of the judicial branch. (*Hungary, Constitutional Council, Date of issuance: 21-10-1994, Number of case:46/1994, HUN-1994-3-016, [English](#)*).

Provisions based on which the executive was able to remove a judge who, whilst holding office, "had departed from the principle of independence", were declared inconsistent with the constitutional principles of independence and irremovability of judges. Moreover, the provisions in question violated the principle of the separation of powers and the principle of a democratic state ruled by law. (*Poland, Constitutional Tribunal, Date of issuance: 09-11-1993, Number of case: K 11/93, POL-1993-S-001, [English](#)*)

II. 5. THE JUDICIARY AND THE LEGISLATURE

All public authorities are bound to exercise their powers as set by law in compliance with the constitutional provisions concerning the separation of State powers and, consequently, to refrain from any action that might lead to an interference with the powers of other public authorities. The Public Ministry is not competent to conduct criminal investigation activities regarding the legality and appropriateness of a normative act adopted by the legislator. Such a situation would empty of content the constitutional guarantee concerning the immunity that is inherent to the act of decision-making in the legislative process, which benefits the members of the Government, such guarantee being specifically intended to protect their mandate against possible pressure or abuse committed against those holding the office of ministers, whereas such immunity ensures their independence, freedom and security in exercising the rights and obligations under the Constitution and laws. (*Romania, Constitutional Court, Date of issuance: 27-02-2015, Number of case: 68/2017, ROM-2017-1-002, [English](#)*)

The Parliament, as supreme representative body of the people and sole legislative authority of the country, cannot replace the judicial power, respectively solve, by own rulings, disputes lying within the competence of the courts. The legislator cannot amend, suspend or void the effects of certain final and irrevocable rulings. (*Romania, Constitutional Court, Date of issuance: 21-11-2012, Number of case: 972/2012, ROM-2012-3-007, [English](#)*)

Under the Constitution, when Parliament implements the constitutional powers relating to the dismissal of the President of the Supreme Court from office upon expiry of his term of office, and when the corresponding individual act of application of law regarding this issue is adopted during a parliamentary session, Members of Parliament are under an obligation to act in such a way that Parliament would be able to dismiss the President of the Supreme Court upon the expiry of his or her term of office. Otherwise, their mandate as Members of Parliament would be used to disregard the requirements arising from the Constitution and the oath they swore as Members of Parliament. In cases where it has been objectively ascertained that the term of office of the President of the Supreme Court has expired, there are no constitutionally justifiable circumstances under which non-dismissal of the President of the Supreme Court from office once his or her term of office has expired would be compatible with the Constitution. (*Lithuania, Constitutional Court, Date of issuance: 15-05-2009, Number of case: 13/04-21/04-43, LTU-2009-2-004, [English](#)*)

The Chamber of Deputies and the Senate lodged a complaint of «conflict of the attribution of functions between state powers», within the meaning of Article 134.2 of the Constitution, against the Court of Cassation and the Court of Appeal of Milan, claiming that these authorities of the judiciary had «exercised functions vested in the legislature» and, at the very least, interfered with Parliament's prerogatives by their action. In their judgments, the courts in question determined the conditions rendering it permissible to interrupt the artificial feeding and hydration treatment to which a patient in a vegetative coma is subjected. Considering that judicial power had been exercised with the aim of modifying the legislative system in force and had thus encroached on the purview of the legislature, the Chamber of Deputies and the Senate appealed to the Constitutional Court. (*Italy, Constitutional Court,*

Date of issuance: 08-10-2008, Number of case: 334/2008, ITA-2008-3-003, [English](#)

In attempting to define by way of ordinary legislation constitutional provisions, such as the concept of legitimate interest, as provided by Article 146 of the Constitution and as interpreted by the jurisprudence of the Supreme Court, Parliament entered the sphere of the exclusive jurisdiction of the judiciary. Such legislation is an impermissible attempt to interpret constitutional provisions and at worst an effort to amend the Constitution by transforming the Recourse for Annulment to an *actio popularis*. (Cyprus, Supreme Court, Date of issuance: 15-01-2008, Number of case: 1/2008, CYP-2009-2-001, [English](#))

The prohibition for Members of Parliament from being representatives in court proceedings in order to protect the rights of parties to civil proceedings, is in conformity with the Constitution because it prevents the activities of the courts from being called into question by Members of Parliament, who, by their authority, might influence the court, by breaching the constitutional principle of the independence and impartiality of judges. (Moldova, Constitutional Court, Date of issuance: 06-11-2003, Number of case: 24,MDA-2003-3-009, [English](#))

The consecutive exercise of advisory and judicial functions within one body, such as a Council of State, does not raise an issue under Article 6 ECHR as regards objective impartiality where the advisory opinion cannot reasonably be interpreted as expressing views on, or amounting to a preliminary determination of, any issues decided in the subsequent judicial proceedings. (Council of Europe, European Court of Human Rights, Grand Chamber, Date of Issuance: 06-05-2003, Number of case: 39343/98, 39651/98, 43147/98, 46664/99, ECH-2003-2-005, [English](#))

The impugned provisions of the law prohibit criminal and administrative proceedings against a member of parliament, the implementation of other criminal and administrative procedural measures and the transfer of a case to a court without the consent of the parliament of the entity of the Federation, which is in effect granted full discretionary powers in such matters, in breach of the Constitution. The parliament of the entity of the Russian Federation should participate in the procedure of waiving the immunity of a member only for actions performed by him or her in the exercise of his or her office. Granting the right to initiate criminal or administrative proceedings to the parliament, which is neither a prosecution body nor a judicial body, is incompatible with the objectives of the irremovability of members of parliament. It is all the more unacceptable when consent is required in order to transfer a case to court, or to allow its examination by a court. (Russia, Constitutional Court, Date of issuance: 12-04-2002, Number of case: RUS-2002-2-005, [English](#))

II. 6. FINAL CHARACTER OF JUDICIAL DECISIONS

The refusal of the Parliament of Romania – Chamber of Senate to enforce a ruling of the High Court of Justice and Cassation can lead to an institutional blockage in the light of the constitutional provisions enshrining the separation and balance of powers and equality before the law. (Romania, Constitutional Court, Date of issuance: 21-11-2012, Number of case: 972/2012, ROM-2012-3-007, [English](#))

In Romania, only the Principal State Prosecutor may exercise the extraordinary remedy of an application to set aside final court decisions, in view of his/her role in representing the general interest of society and defending the legal order and the citizens' rights and freedoms.

Decisions taken by the Principal State Prosecutor to suspend enforcement of final court decisions (*res iudicata*) prior to the formal application to set aside these decisions violated the principle of the separation of powers within the State. (Romania, Constitutional Court, Date of issuance: 24-09-2002, Number of case: 259/2002, ROM-2002-3-006, [English](#))

A final and binding judgment can only be set aside (*reformatio in peius*) for a convicted or released person) on the grounds of one-sided or incomplete preliminary investigation where there are new or recently disclosed facts or where a serious judicial error was made. The failure to combine the sentence imposed under the new judgment with the non-served part of the sentence resulting from the previous judgment is considered to be a serious judicial error. (Russia, Constitutional Court, Date of issuance: 17-07-2002, Number of Case:, RUS-2002-2-006, [English](#))

The accused contended that his case was not being heard by independent judges on the grounds that he faced in his criminal case with a number of judges who have already assessed his reliability as a witness in a different criminal case against a fellow suspect. The Supreme Court take into account the fact that in the case against the fellow suspect, the accused, acting as a witness, had testified that the statement he had previously made to the police was incorrect, as it had been obtained through intimidation and the promise of a reduced sentence. In his own case he reiterated this position. However, he found himself facing a division of the Court of Appeal two members of which had formed an opinion on this position before, giving their reasons and having first investigated it, and who had therefore already given their opinion on the reliability of the accused in the case at hand. In the view of the Supreme Court, under these special circumstances it must be concluded that the fear of the accused as to the Court's partiality was objectively justified, and that on these grounds there had been a violation of Article 6.1 ECHR and Article 14.1 of the International Covenant on Civil and Political Rights. (The Netherlands, Supreme Court, Date of issuance: 14-10-1997, Number of case: 105.128, NED-1998-1-002, [English](#)).

II. 7. INDEPENDENCE AS TO ADMINISTRATIVE MATTERS

The provision of Article 20.5 of the Law vesting the President with authority to appoint a judge to a position of court chairman or court deputy chairman, and to dismiss him or her from this position, conflicts with Article 106 of the Constitution because under Article 106.31 of the Constitution, the authority of the President derives solely from the Fundamental Law. (Ukraine, *Constitutional Court*, Date of issuance: 16-05-2007, Number of case: 1-rp/2007, UKR-2007-2-001 [English](#))

In accordance with the Constitution, the period for which the President of the Republic, on a motion from the Supreme Judicial Council, appoints the chairpersons of the supreme courts and the Chief Prosecutor, is seven years. This period had been determined taking into account the newly introduced ban on re-election. Such a period is the interval of time during which the three magistrates take up and perform their respective duties. It expires with the expiry of the seven calendar years and then comes the end of the mandate of the appointed persons which also puts an end to their powers and their further exercise is impermissible. It cannot be extended by law. (Bulgaria, *Constitutional Court*, Date of issuance: 05-04-2005, Number of case: 02/05, BUL-2005-1-002, [English](#))

A rule whereby a civil case which is filed again after having been withdrawn would be assigned to the judge to whom it was previously assigned would in any case require a decision on the merits as to whether the civil case is the same as the one previously submitted and withdrawn. The question of the identity of a case or claim in a lawsuit is known to be one of the most difficult practical and theoretical questions, the resolution of which would introduce in the process of assignment of cases to individual judges numerous criteria and, consequently, uncertainty. In addition, the plaintiff who has withdrawn his action and has filed it again with a view to excluding the judge having been initially assigned to the case would not be prevented even by such an arrangement from making such a manoeuvre: for, in filing an action again, the plaintiff always has the possibility of partly modifying the action and, consequently, the identity of the claim, without running any other risk than that of the rejection of the part of the claim newly introduced.

It is therefore evident that such a solution would introduce into the process of assignment of cases uncertainty and would consequently decrease the accountability and automatic nature of the assignment of cases. It is true that the possibility for a party to exercise influence by certain procedural acts on the assignment of judges may jeopardise the principle of trial by an impartial judge. If, however, a judge who is not impartial has been selected, the other party may enforce his or her right to an impartial court on the basis of the rules on the disqualification of judges. (Slovenia, *Constitutional Court*, Date of issuance: 23-02-1995, Number of case: U-I-209/93, SLO-1995-1-004, [English](#))

II. 8. JURISDICTIONAL COMPETENCE

The ordinary courts at each successive level of jurisdiction up to the Court of Cassation has full competence to determine whether liability of the President of the Republic arises in the instant case or whether it must be excluded because the President's act was performed «in the discharge of his office», as provided by Article 90 of the Constitution. (*Italy, Constitutional Court, Date of issuance: 24-05-2004, Number of case: 154/2004, ITA-2004-2-003, [English](#)*)

Granting the Central Electoral Commission a right to determine jurisdiction, independently and at its own discretion, in certain cases relating to the protection of citizens' electoral rights is contrary to the principle of the separation of powers and the independence of the judiciary. The resolution of the issue of whether to initiate judicial proceedings must lie exclusively with the court itself. (*Russia, Constitutional Court, Date of issuance: 25-02-2004, Number of case: 4, RUS-2004-3-002, [English](#)*)

The case was heard by the Constitutional Court on an application by the Supreme Court, which requested a ruling on the constitutionality of certain provisions of the Federal Law on "the main measures guaranteeing citizens' electoral rights" and the Code of Civil Procedure. In its application the Supreme Court pointed out that the Act gave the Central Electoral Commission discretion to determine jurisdiction in cases relating to the protection of electoral rights, thus violated the principle of the separation of powers and the independence of the judiciary. The Court ruled that the impugned provisions were contrary to the Constitution and stated that granting the Central Electoral Commission a right to determine jurisdiction, independently and at its own discretion, in certain cases relating to the protection of citizens' electoral rights is contrary to the principle of the separation of powers and the independence of the judiciary. The resolution of the issue of whether to initiate judicial proceedings must lie exclusively with the court itself. (*Russia, Constitutional Court, Date of issuance: 25-02-2004, Number of case: 4, RUS-2004-3-002, [English](#)*).

III. PERSONAL INDEPENDENCE

III. 1. INDEPENDENCE AS TO DECISION MAKING

The procedure under which the Minister of Justice confers on a lay judge the duty of substituting for a judge of a particular district (or city) may cast doubt on the potential independence of the appointed judge from the executive power, as well as on the legitimacy of the decisions adopted by him/her. (*Latvia, Constitutional Court, Date of issuance: 05-11-2004, Number of case: 2004-04-01, [English](#)*)

The Attorney General of the Republic filed a direct action, challenging regulation on the basis of which judges could carry out the investigation and evidence gathering in cases of criminal prosecution where there is a possibility of violation of privacy or confidentiality rights, granted by the Constitution or by law, concerning fiscal, banking, financial or electoral information. The petitioner claimed that the impugned provision violated the principles of the impartiality of the judge. The Court granted the action and held that in cases of criminal prosecution where there is a possibility of violation of privacy or confidentiality rights, concerning fiscal, banking, financial or electoral information, investigation and evidence gathering carried out by judges violates the principles of the impartiality of the judge and of the publicity of proceedings, as enshrined in the Constitution. Allowing the judge to personally engage in the collection of evidence that may later serve as the foundation of his own ruling would jeopardise the judge's impartiality and therefore due process in the criminal justice system (*Brazil, Federal Supreme Court, Date of issuance: 12-02-2004, Number of case: ADI 1.570, BRA-2009-1-009, [English](#)*).

A Minnesota attorney, seeking to be a candidate for judicial office, challenged the constitutionality of the announce clause in federal court, alleged that the clause violated his rights of free speech under the First Amendment to the Constitution. According to this clause, candidates for judicial offices, including incumbent judges, are prohibited from stating their views on disputed legal or political issues. The State of Minnesota had identified two interests that were sufficiently compelling to justify the announce clause: preserving the impartiality of the State's judiciary, and preserving the appearance of the impartiality of the State's judiciary. The Supreme Court examined three potentially applicable meanings of the term "impartiality" and found that the announce clause failed the strict scrutiny test under each. As to the first possible meaning - a lack of bias for or against either of the parties to a judicial proceeding - the Court concluded that the announce clause was not narrowly tailored to serve impartiality in this sense because it does not restrict speech for or against particular parties, but instead interfered with speech for or against particular issues. The Court acknowledged that a party taking a particular stand on a legal issue is likely to lose if that issue is central to the case in question; however, this would not be due to any bias by the judge against that party or favoritism toward the other party because any party taking that position would be likely to lose. The Court concluded that the second possible meaning - the absence of preconception in favour of or against a particular legal view - did not serve a compelling state interest because a judge's lack of predisposition regarding the relevant legal issues in a case has never been viewed as a necessary component of equal justice.

Any prosecutor, while acting in a civil dispute, cannot perform the function of a representative of the State, as the State is not party to the civil dispute to be decided by the Court. As a consequence, the prosecutor comes to be «a helper», a supporter to one party of the dispute. This in fact means that the position of the supported party is stronger in comparison to the position of the counter-party. This disadvantage is not in conformity with Article 47.3 of the Constitution according to which all parties to any proceedings shall be treated equally before the law.

Moreover, the participation of a prosecutor in civil proceedings is also not in conformity with Article 141.1 of the Constitution. Under this provision «The judiciary shall be administered by independent and impartial courts.» The principle of the independence of the judiciary means *inter alia* that a judge may not be exposed to third-party interests and may not take third-party interests into consideration when passing judgment. If a judge asks a prosecutor to step into the proceedings, this judge exposes himself to influences from the third party. In this manner the independence and impartiality of the judge, and the judiciary as well, is infringed. (Slovakia, Constitutional Court, Plenary, Date of issuance: 10-09-1996, Number of case: PL. ÚS 43/95, SVK-1996-3-006, [English](#))

III. 2 JUDGES AND OTHER JUDGES OR ADMINISTRATION OF JUSTICE SYSTEM

The independence of judges (Article 151 of the Constitution) and the requirement for independent and impartial tribunals in Article 6 ECHR do not apply to court registrars. The independence of judges, embodied in the Constitution (Article 151 of the Constitution) and in the general principle of separation of powers, is functional in nature and does not, as a matter of principle, prevent the legislative and executive branches, within the limits of their authority under the Constitution, from taking measures to secure the proper functioning of the judicial branch, particularly with regard to its management and financing. Geographical transfers of judges must be accompanied by a series of measures to safeguard their independence, including entitlement to an adequate remedy against transfer decisions. (*Belgium, Constitutional Court, Date of issuance: 15-10-2015, Number of case: 138/2015, BEL-2015-3-011, [English](#)*)

Eskisehir 1st Criminal Judicature of Peace applied to the Constitutional Court claiming that the legal provision establishing a new judicial organ, the «criminal judicature of peace» (authorised to take decisions which need to be taken by a judge in the investigation phase), leaves the outcome of the investigations conducted in Turkey to the initiative of the political power and that this situation, *inter alia*, breaches the principles of judicial independence.

Considering that such judges are appointed by the High Council of Judges and Prosecutors (the HCJP) and have the legal guarantee of judges enshrined in the Constitution as all other judges, the Constitutional Court indicated that there is no ground which would lead to the conclusion that these judges' offices are considered to have a different status to those of other judges in respect of independence and that guarantees for their independence have been undermined. The Court indicated that it cannot be asserted that these criminal judicatures of peace suffer from a lack of objective impartiality *vis-a-vis* the regulations ensuring independency and included in the Constitution and law provisions to which criminal judicatures of peace are subject and the guarantees ensuring independence and impartiality of judges to take office therein. The Court also specified that the allegation of subjective independence, which is completely associated with the personal conduct of the judge, may only be asserted in the cases being dealt with on the basis of concrete, objective and plausible evidence, and that the matter of subjective impartiality, which is discussed in the relevant procedural law, falls outside the scope of constitutional review. Consequently, the Court rejected the request for annulment of the provision relying on the above-mentioned grounds. (*Turkey, Constitutional Court, Date of issuance: 14-01-2015, Number of case: 2015/12, TUR-2015-3-003, [English](#)*)

A very important component of judicial independence, as enshrined in the Constitution, is that all judges have equal legal status when administering justice, and are not subordinate to any other judge or to the President of any court. (*Lithuania, Constitutional Court, Date of issuance: 09-05-2006, Number of decision: 13/04-21/04-43/04, [English](#)*)

The Court has, for the first time, reviewed the constitutionality of a uniformity decision by the Supreme Court. Uniformity decisions by the Supreme Court aim at securing a uniform and

comprehensive interpretation of certain laws, and according to Article 47.2 of the Constitution, they are binding upon lower courts. (*Hungary, Constitutional Court, Date of issuance: 14-11-2005, Number of case: 42/2005, HUN-2005-3-009, [English](#)*)

The claimant brought a constitutional claim arguing that that legal provision providing that in case of a vacancy or a temporary absence of a judge of a district (or city) court the Minister of Justice may assign a lay judge who meets the requirements for appointment as judge of a district (or city) court as set out in the Law to fulfill the duties of judge of a district (city) court consent was unconstitutional. The Constitutional Court noted that the procedure under which the Minister of Justice confers on a lay judge the duty of substituting for a judge of a particular district (or city) may cast doubt on the potential independence of the appointed judge from the executive power, as well as on the legitimacy of the decisions adopted by him/her. At the time the regulation allowing the Minister of Justice to appoint a lay judge to the office of judge was incorporated into the Law on the Judiciary, the legislator did not sufficiently assess other means that could be used to ensure the functioning of the judiciary in accordance with the requirements of an independent court and to avoid the potential influence of the executive power on the court. Even though at the time the impugned legal provision was adopted there were not enough judges in Latvia because of insufficient funding, the procedure for appointment of lay judges provided for by that legal provision is not proportionate to the aim of reaching the number of judges established by law, as it does not ensure the independence of judges who have been appointed to office in such a way. Therefore, the impugned legal provision was declared unconstitutional. (*Latvia, Constitutional Council, Date of issuance: 05-11-2004, Number of case: 2004-04-01, LAT-2004-3-008, [English](#)*).

Justice is a state function performed by the Supreme Court of Justice and the other judicial authorities established by law, in the name of the law, and solely by judges. It is therefore not possible to assign the power of trial or the function of determining cases to anyone but judges. Assistant magistrates, appointed by the Minister of Justice, have the status of public servants and thus can only perform a supporting function when cases relating to labour disputes and litigation are determined by a judge. In fact they are only entitled to a consultative vote in the reaching of decisions and are not entitled to engage in any activity connected with delivery of judgment, which is set aside by the Constitution for judges alone. Participation by assistant magistrates in the trying of certain cases, with a deliberative vote and the ability to outvote the judge, owing to the composition of the Court, is contrary to the principle of impartial justice in that these officials do not serve the law or have the guarantees of independence laid down by the Constitution (in the case of judges, immunity from dismissal and disqualification from other public office or private employment and from political party membership). (*Romania, Constitutional Court, Date of issuance: 20-11-2001, Number of case: 322/2001, ROM-2002-1-001, [English](#)*)

The independence and competence of the judiciary are inseparable from the principle of the independence of judges and courts, entrenched in the Constitution. This principle means that the legislator has a duty to provide for sufficient guarantees to ensure the independence of judges and courts, which would ensure impartiality of courts in adopting decisions, and which would not permit anyone to interfere with the activities of judges and courts while they are administering justice. (*Lithuania, Constitutional Court, Date of issuance: 12-07-2001, Number*

of case: 13/2000, 14/2000, 20-22/2000, 25/2000, 31/2000, 35/2000, 39/2000, 8/01, 31/01
[English](#))

The administrative authorities referred to in Article 175.1.b of the Labour Code cannot have the status of judicial organs, since it was they themselves that adopted the measure terminating the contract of employment. (Romania, Constitutional Court, Date of issuance: 18-05-1994, Number of case:59/1994, ROM-1994-2-003, [English](#))

III. 3. SELECTION AND CAREER

Article 83 of the Constitution states that judges are to be independent and subject only to the law. It also obliges the legislator to set out clear guidance, in legislation on the judicial system, for the development of judges' careers. The absence of such rules or a margin of appreciation for the executive power when deciding on the development of a judge's career may jeopardise the independence of judges. (*Latvia, Constitutional Court, Date of issuance: 18-10-2007, Number of decision: 2007-03-01, [English](#)*)

III. 3.1. BASIS OF APPOINTMENT OR PROMOTION

The Constitution and the legislation provide an exhaustive list of requirements for those wishing to be part of the selection process for appointment as judges. The legal mechanism for selecting judges includes an assessment not only of their theoretical knowledge of the law and readiness to administer justice, but also of their personal and moral characteristics. *(Ukraine, Constitutional Court, Date of issuance, 12-06-2013, Number of case: 4-rp/2013, UKR-2013-2-004, [English](#))*

Persons who are elected as judges in Serbia must fulfil three specific conditions for election; it is up to the High Judicial Council to assess how well they meet the criteria. The right of applicants who are not appointed as judges to receive substantiated decisions about the termination of their judicial function is an element of the right to a fair trial and should be safeguarded in the election process. *(Serbia, Constitutional Court, Date of issuance: 28-05-2010, Number of case: VIIIU-102/2010, SRB-2010-3-008, [English](#))*

Judges in Russia are independent, irremovable and inviolable. Under international standards and domestic legislation, candidates must satisfy specific requirements such as impartiality, honesty, competence and integrity. The system in place was designed to ensure that the best candidates were chosen. This was the task of the appointments boards. Their decisions were presumed legal, fair and well-founded. Their independence and unaccountability did not mean that their decisions were arbitrary.

The Constitutional Court stated that a refusal to recommend a candidate for a post of judge must be based on objective circumstances. The appointments board must give reasons for its refusal. The right to challenge this decision in the courts has a basis in law. The reasons for the appointments board's decision must therefore be clearly stated. An unsubstantiated refusal would deprive the court seized of the matter of the possibility of reviewing the decision on the merits and would thus make the constitutional right to legal protection a mere formality. *(Russia, Constitutional Court, Date of issuance: 24-03-2009, Number of case: RUS-2009-1-002, [English](#))*

Article 83 of the Constitution states that judges are to be independent and subject only to the law. It also obliges the legislator to set out clear guidance, in legislation on the judicial system, for the development of judges' careers. The absence of such rules or a margin of appreciation for the executive power when deciding on the development of a judge's career may jeopardise the independence of judges. *(Latvia, Constitutional Court, Date of issuance: 18-10-2007, Number of decision: 2007-03-01, [English](#))*

The conditions for promotion to the office of judge at the High Court of Cassation and Justice, including the requirement to have been a judge for the past two years, constitute discriminatory treatment in favour of judges and an infringement of the constitutional principle of equality before the law.

Pursuant to the constitutional principle of equal rights before the law, the Court found that judges and prosecutors were in the same legal situation, with the result that the requirement to have served as a judge for the last two years, and hence to be serving as a judge on the date of the application for promotion, constituted discrimination contrary to the Constitution. *(Romania, Constitutional Court, Date of issuance: 28-11-2006, Number of case: 866/2006, ROM-2006-3-004, [English](#))*

Under the Constitution, where a person has grossly violated the Constitution, breached the oath or committed a crime whereby the Constitution has also been grossly violated and the oath has been breached, and the person has been removed in accordance with the procedure for impeachment proceedings from the office of the President of the Republic, President or a justice of the Constitutional Court, President or a justice of the Supreme Court, President or a judge of the Court of Appeal, or has had his or her mandate of member of the parliament (*Seimas*) revoked, that person may never be elected President of the Republic, or member of the parliament, and may never hold the office of justice of the Constitutional Court, justice of the Supreme Court, judge of the Court of Appeal, judge of another court, member of the Government or State Controller. Such a person may never hold the offices established in the Constitution that require the taking of the oath provided for in the Constitution before taking office. The Constitution does not establish that a person, who has been removed from office, or has had his or her mandate of a member of the parliament revoked in accordance with the procedure for impeachment proceedings for the commission of a crime by which the Constitution has not been grossly violated and the oath has not been breached, may not be elected President of the Republic. *(Lithuania, Constitutional Court, Date of issuance: 25-05-2004, Number of case: 24/04, LTU-2004-2-004, [English](#))*

In the Constitution, the dichotomy between election and appointment of a professional judge designates different procedures for holding an office of judge and different forms of acts on this matter, which are ratified accordingly by the President of Ukraine or the parliament (Verkhovna Rada). The concept of "appointment of judges to hold office", as used in Article 131.1.1 of the Constitution, shall be understood as relating to those persons appointed by the President of Ukraine for the first time as a professional judge of a court of general jurisdiction for the term of five years. *(Ukraine, Constitutional Court, Date of issuance: 16-10-2001, Number of case: 14-rp /2001, UKR-2001-C-003, [English](#))*

A requirement that a High Court judge be appointed as the head of a special unit investigating state corruption, undermines the independence of the judiciary and the separation of powers and is therefore unconstitutional. *(South Africa, Constitutional Court, Date of issuance: 28-11-2000, Number of case: RSA-2000-3-017, [English](#))*

The obligation of judges with professional experience of up to 10 years to sit a professional qualification exam is based on the right of the legislator to define the professional qualifications necessary for the various levels of judges. Such an exam does not lead to differentiation between entitlements to constitutional rights, because the aim of the exam is not to threaten those rights but to ensure the appropriate levels of qualification of judges, and this is in conformity with the Constitution. The concept of professional insufficiency involves

more than a mere failure to take the exam. The latter cannot be the sole means of assessing professional ability. (*Albania, Constitutional Court, Date of issuance: 05-11-1999, Number of case: 59,ALB-1999-3-007, [English](#)*).

III. 3.2. THE APPOINTING AND CONSULTATIVE BODIES

It is acceptable for the power to recruit candidates for the judiciary and the Public Prosecution Service to remain with the Ministry of Justice, provided that the candidates do not perform judicial functions. The introduction of an oral examination for the recruitment of candidates for the above does not contravene the Constitution. It may assist in determining some of the qualifications that candidates need. The Supreme Council of Judges and Public Prosecutors has power over judges and public prosecutors directly after they are appointed. The Ministry of Justice has power over them during their two-year probationary period. (*Turkey, Constitutional Court, Date of issuance: 07-02-2007, Number of case: E.2005/47, K.2007/14, TUR-2007-3-003, [English](#)*)

The Minister of Justice has the power to make a decision to assign a judge to the Supreme Court. However, when exercising this power, he must bear in mind that such decisions and their coming into force require the prior assent of the Chief Justice of the Supreme Court as a condition *sine qua non*, in the sense of satisfying the statutory requirements imposed on ministerial decisions. The Minister's act of assigning a judge to the Supreme Court can accordingly be described as a contingent act. A fundamental defect in, or the absence of, the act upon which it is contingent will constitute an incurable defect. The exercise of the subsumed authority of the Chief Justice of the Supreme Court, which of necessity precedes the decision of the Minister of Justice, constitutes the carrying out of the Chief Justice's competences. Thus, the conflict can be considered as a positive one in the sense that the Chief Justice asserts (and the Minister of Justice calls into question), the fact that he has this exclusive competence. Where this is not respected, or the issue is evaded, the Minister's decision will lack a statutory basis. The Chief Justice of the Supreme Court, as an organ of another organ, also has exclusive authority to lodge petitions to resolve any conflict of competence, where he is of the view that a dispute has arisen due to disregard of the authority the law has conferred upon him. The Constitutional Court is the judicial body for the protection of constitutionalism. A situation cannot be allowed, where a serious conflict of competence between two important state organs, representing the judiciary on the one hand and the executive on the other, remains unresolved merely because nobody seems to have been authorised to make a decision. In a democratic law-based state, which the Czech Republic has declared itself to be, it is inconceivable that such an arbitrary act could not be reviewed and overturned, even though it was quite clearly illegal or unconstitutional. The Minister of Justice may be the state organ authorised to issue a decision assigning a judge to the Supreme Court, but he must first obtain the assent of the Chief Justice of the Supreme Court. (*Czech Republic, Constitutional Court, Date of issuance: 12-12-2006, Number of case: Pl. US 17/06, CZE-2006-3-012, [English](#)*)

The Constitutional Court dealt with the following question: does the responsibility for selecting the candidate for judge of the Constitutional Court or the Supreme Court fall to the President of the Republic; and, should the Assembly be restricted to the examination of the case only from a formal point of view or should that examination be based on the candidate's merits? In the latter case, the examination made by the Assembly may result in the rejection of the candidate for judge. According to the Constitutional Court, the Constitution used the term "consent" to describe what the Assembly grants in reference to the selected candidates. "Consent" means "approval, acceptance", so this term should imply a kind of consensus

between the constitutional bodies involved in the process of appointment of judges to the highest courts.

The Constitutional Court underlined the fact that the persons drafting the Constitution did not intend to leave the appointment of such judges exclusively to one body. They wished to choose a method that would eventually ensure a greater independence of those courts. In that context, the involvement of the Assembly of Albania in the process was aimed at balancing the power of the President of the Republic to appoint such judges. That is in harmony with the principle of the separation and balancing of state powers provided for by Article 7 of the Constitution.

Moreover, the Constitutional Court dwelt on the scope of the Assembly's examination of the candidates for judges of the highest state courts. The Constitutional Court emphasized the fact that the participation of the Assembly in the process of appointment of judges goes beyond a simple legal verification of the process and is in harmony with the political nature of that body and the fact that Albania is a Parliamentary Republic. The Assembly should verify not only the legal validity, but also the merits of the selection made by the President of the Republic. Both of these bodies should be guided by the principle of constitutional loyalty (*Verfassungstreue*) in order to ensure a qualitative and appropriate composition of the highest courts of the state. (*Albania, Constitutional Court, Date of issuance: 18-01-2005, Number of case: 2, ALB-2005-1-002, [English](#)*).

General meetings of judges, prosecutors and staff aim at unifying the practice of law enforcement and improving judges' qualifications. They cannot be transformed into employment agencies for legal professions. Such an approach may strike at the foundations of the administration of justice. Pursuant to the Constitution, only the Public Prosecutor's Office has the power to bring charges and take steps which may give rise to criminal liability, as well as gather, check and assess any information in accordance with the requirements of the Code of Criminal Procedure. It is therefore contrary to the Constitution to grant one-fifth of the members of the Judicial Service Commission the right to request the lifting of judicial immunity. Intervention by the executive power in the organisation and activities of courts is contrary to the Constitution and therefore unacceptable. (*Bulgaria, Constitutional Court, Date of issuance: 16-12-2002, Number of case: 13/02, BUL-2002-3-003, [English](#)*)

The provision which stipulates that the President of the Supreme Court of the Republic shall be appointed at the proposal of the Government of the Republic is not unconstitutional. (*Croatia, Constitutional Court, Date of issuance: 15-02-1995, Number of case: U-I-143/1995, CRO-1995-1-004, [English](#)*)

Under Hungarian law, the Minister of Justice has several powers in appointing the presidents of the courts at different levels. The amendment to the Judiciary Act in 1991 introduced new self-governing institutions (judicial councils), but did not abrogate the Minister's powers. Therefore claimants challenged the constitutionality of the Act. The Constitutional Court upheld the validity of the law, but defined the constitutional requirements of the appointments. The appointment of judges by another branch (e.g. the executive) must be counterbalanced by the judiciary or by another branch. In the case of participation by the judiciary, their opinion should substantially determine the appointment. (*Hungary, Constitutional Court, Date of issuance: 11-06-1993, Number of case: 38/1993, HUN-1993-2-011, [English](#)*)

III. 3.3. JUDICIAL TRANSFER

Geographical transfers of judges must be accompanied by a series of measures to safeguard their independence, including entitlement to an adequate remedy against transfer decisions. *(Belgium, Constitutional Court, Date of issuance: 15-10-2015, Number of case: 138/2015, BEL-2015-3-011, [English](#))*

III. 3.4. EVALUATION OF JUDGES

The process of transitional re-evaluation for all the judges and prosecutors as well as the members of the Constitutional Court, the High Court and the General Prosecutor, which includes a control of the legality of assets and a control of his or her proficiency, is not unconstitutional. (*Albania, Constitutional Court, Date of issuance: 18-01-2017, Number of case: 2/2017, ALB-2017-1-001, [English](#)*)

Where a disciplinary measure has been imposed in order to encourage the offender (the judge) not to commit an offence again, his/her committing that offence again shows that the judge in question does not react to the measure imposed and that there is a possibility that he/she will commit that offence again. Consequently, such a disciplinary measure should be taken as a criterion for the dismissal of a judge from his/her office.

While assessing the competence and ethics of a judge, the State Judicial Council acquires information from the Ministry of Justice on results achieved, the number of cases settled and the quality and timeliness of proceedings. Assessment of judges' work without taking into consideration decisions of higher courts delivered on appeals lodged against decisions of judges whose work is under scrutiny eliminates the possibility of the State Judicial Council's acting as a higher instance reviewing the decisions and work of higher courts. (*"The former Yugoslav Republic of Macedonia", Constitutional Court, Date of issuance: 17-03-2004, Number of case: U.br. 123/2003, MKD-2004-1-002, [English](#)*)

III. 4. TENURE AND IRREMOVABILITY

Inviolability, security of tenure and proper pecuniary security are the guarantees of judges' independence and impartiality. The status of judges is not a matter of personal privilege, but the means of securing, for every Russian citizen, judicial protection of their rights and freedoms. The legislator was competent to regulate their term of service, but in exercising this competence must take into consideration the rightful expectations of the interested parties. Judges who took office prior to the Law of 25 December 2008 had anticipated that the time for which they had worked as prosecutor, investigating judge or lawyer would be included in the calculation of their length of service, but the application of the Law altered the position. Furthermore, for those judges who had claimed their right to retirement before 10 January 2009 (effective date of the Law), length of service encompassed their work as prosecutor, investigating judge or lawyer. Conversely, judges who had made the same request after that date were denied the calculation of their length of service. This was contrary to the constitutional principles of equality and fairness. (*Russia, Constitutional Court, Date of issuance: 20-04-2010, Number of case: RUS-2010-1-003, [English](#)*)

The provisions of the Law on the Status of Judges allowing retired judges to be appointed to dispense justice are unconstitutional. The terms "judge" and "retired judge" cannot be regarded as synonyms because retired judges retain only the title of judge, the guarantees of immunity and membership of the judicial community.

The three-year term of office of newly appointed judges is actually a trial period. This trial period is necessary to bring out any deficiencies which may prevent the appointment of a judge for life. However, the main basis for refusing to recommend an indefinite appointment is an assessment of the judge's moral and professional qualities.

For these reasons, a retired judge whose term of office has expired and who had not been given an indefinite appointment cannot be called upon to take up his duties again. This privilege is reserved for judges with "honoured" status who have retired after completing a minimum of 10 years' service. (*Russia, Constitutional Court, Date of issuance: 16-07-2009, Number of case: RUS-2009-2-003, [English](#)*)

A first instance judge complained to the Supreme Court about a decision by the High Council of Justice on the disciplinary measure of reprimand. The Supreme Court of Albania suspended the judgment and asked the Constitutional Court to assess the constitutionality of the above provision, and in particular the part that entitles judges to complain to the Supreme Court against any type of disciplinary measure. The Court ruled that Article 34.1 of Law 8811, which deals both with complaints made by judges against disciplinary measures taken against them and the jurisdiction of the Supreme Court, exceeded the limits imposed by the Constitution, both in form and content. Furthermore, the Court concluded that this article infringed the principle of hierarchy of norms. The Court has expressed similar views in recent cases, namely "that which the Constitution is unwilling to do, cannot be done by the law. It cannot be said that there have been omissions without mentioning such cases..." (Decision no. 212 of the Constitutional Court, dated 29.12.2002, Official Digest, 2002, p. 206).

The Court ordered that Article 34.1, giving the right to judges to complain to the Supreme Court against other types of disciplinary measures, should be repealed on the grounds of its incompatibility with the Constitution disciplinary measure. (*Albania, Constitutional Court, Date of issuance: 09-11-2005, Number of case: 29, ALB-2005-3-005, [English](#)*)

1. The rule that judges and public prosecutors elected to the Judicial Service Commission may not continue to serve as judges or public prosecutors during their elected term of office means, in effect, that they lose this status and that the Commission ceases to represent the judiciary and becomes a purely administrative body.
2. The fact that members of the Judicial Service Commission are required to choose between their management functions in courts or prosecutors' departments and membership of the Commission violates the principle that judges and prosecutors are irremovable.
3. The termination or shortening of the terms of office of judges or public prosecutors with management functions violates the principle of separation of powers enshrined in Article 1.4 of the Constitution, and the principle that prosecutors and judges are irremovable.
4. The fact that judges and prosecutors must retire on reaching the standard public sector retirement age, even when they do not satisfy the other retirement criteria, amounts to discrimination against them by comparison with other groups, and violates the principle of irremovability enshrined in Article 125.1 of the Constitution and in international texts on judges.
5. The fact that members of the national legal service retired on grounds of age may not continue to work as judges or prosecutors, combining their professional income and pensions, constitutes discrimination:

-between judges and prosecutors in receipt of service pensions and other pensioners;

-between judges and prosecutors in receipt of service pensions who engage in another professional activity, and judges and prosecutors in receipt of service pensions who do not.

(Romania, Constitutional Court, Date of issuance: 06-07-2005, Number of case: 375/2005, [English](#))

The claimants in the instance case are citizens of Georgia and the Public Defender of Georgia. The subject of the dispute was the constitutionality of Article 852.1 of the Organic Law on the Courts of Ordinary Jurisdiction. In accordance with the impugned provision of that organic law, the President of Georgia may confer "judicial authority" for a term of 18 months on a person who has passed the qualification exam for judge or whose qualifications have been certified by decree of the President in accordance with a procedure and requirements laid down by legislation. The Constitutional Court declared the impugned provision unconstitutional, stating that the possibility of conferring judicial authority on a person for a limited period of time by way of an order of the President has negative affect on that person's independence. Appointment of a judge for a long period of time or indefinitely is significant for the prevention of illegal interference in his/her activities. The time limit is a factor that strengthens a judge's belief in his/her independence due to the inviolability of his/her activity over a long period of time. A person "administering judicial authority" enjoys less social protection guarantees than a judge appointed for a term of 10 years. Article 29.1 of the Constitution provides that "every citizen of Georgia shall have the right to hold any state position if he/she meets the requirements established by legislation". This right may not be infringed by regulations or any other piece of legislation. *(Georgia, Constitutional Council, Date of issuance: 26-02-2003, Number of case: 1/1/138, 171, 179, 209 GEO-2003-3-002, [English](#)).*

Judges who terminated their service because they had reached the end of their term of office as judges, or retired for reasons compatible with their status as judges, are equally eligible for lifetime monthly allowances, if they held office as a judge for at least ten years and if, even if this occurred after they left this office, they have reached the age of 50 (for women) or 55 (for men). Before reaching this age a person who terminates their service as judge may take on another paid professional activity.

As for the period served as a State notary, the Court observed the following: in laying down the rules for calculating seniority to establish the monthly lifetime allowance for judges at the time of starting retirement, the legislator included fairly and lawfully the period of service as a judge, as well as periods served in other legal professions in state organisations. Subsequently, in regulating such matters in detail, it specifically indicated that this seniority includes periods served in the courts or judicial bodies, including as a prosecutor, investigating judge or lawyer. Seniority acquired in serving as a State notary with a university-level legal background was sometimes omitted. *(Russia, Constitutional Court, Date of issuance: 19-02-2002, Number of case: RUS-2002-2-002, [English](#))*

Having regard to the constitutional provision giving the National Judicial Council the exclusive competence to decide on relieving a judge of his duty after reaching a certain age, the legislator may not provide otherwise by law. *(Croatia, Constitutional Court, Date of issuance: 19-12-2001, Number of case: U-I-55/2001, CRO-2002-1-006, [English](#))*

The provisions of the Law on the High Council of Justice, under which the High Council of Justice is a legal entity and has its own staff, as well as the provisions under which the High Council of Justice examines and decides on the dismissal of judges, and may impose penalties on them other than penalties provided for by law, including disciplinary sanctions against prosecutors, are in compliance with the Constitution of Ukraine. The provisions of the Law whereby a national deputy of Ukraine and the Authorised Human Rights Representative of the parliament (*Verkhovna Rada*) may forward to the High Council of Justice a submission seeking the dismissal of a judge, and the provisions whereby such submissions may constitute sufficient grounds for opening disciplinary proceedings, are not in compliance with the Constitution of Ukraine. The High Council of Justice cannot address a decision on the inaptitude of a judge to the authorities that elected the judge unless the decision has been made on the basis of an application for the judge's dismissal. *(Ukraine, Constitutional Court, Date of issuance: 21-05-2002, Number of case: 9-rp/2002, UKR-2002-2-009, [English](#))*

One of the essential features of the rule of law is the protection of the rights and freedoms of individuals. The norms regulating impeachment must not only create an opportunity to remove a person from office or to revoke his mandate but also an opportunity to ensure that person's rights. Impeachment proceedings can be considered to be in line with the principles of the rule of law when they are fair. It means that the individuals concerned must be equal before both the law and the institutions carrying out impeachment and have the right to be heard and a legally guaranteed opportunity to defend their rights. If the principles of a fair judicial process were not followed in the course of impeachment, this would go against the requirements of the rule of law. *(Lithuania, Constitutional Court, Date of issuance: 11-05-1999, Number of case: 3/99-5/99, LTU-1999-2-008, [English](#))*

The Constitutional Tribunal was asked to assess the constitutionality of the Act, introducing an additional age limit (65 years), which required judges to obtain the acceptance of the National Council of Judges in order to remain in their positions. In the Tribunal's opinion, there were no grounds for suggesting that granting such competence to the National Council of Judges could cause an infringement or a risk of infringement to the principle of the independence of courts. Such interpretation is additionally strengthened by the fact that the Tribunal's decision is issued in the course of a preliminary review. Therefore, allowing judges to remain in their positions after the age of 65 years (but before reaching the age of 70 years) subject to the consent of the National Council of Judges does not infringe the principle of independence of the judges, constituting the constitutional principle of the independence of the courts. (*Poland, Constitutional Tribunal, Date of issuance: 24-06-1998, Number of case: K 3/98, POL-1998-2-014, [English](#)*)

The independence of judges as well as of courts is one of the most significant principles of democracy and of a State governed by the rule of law. The independence of judges includes guarantees for the judges' tenure. The termination of the powers of judges in Lithuania is possible only on the grounds established by the Constitution. (*Lithuania, Constitutional Court, Date of issuance: 22-12-1994, Number of case: 27/94, LTU-1994-3-021, [English](#)*)

1. Provisions based on which the executive was able to remove a judge who, whilst holding office, "had departed from the principle of independence", were declared inconsistent with the constitutional principles of independence and irremovability of judges. Moreover, the provisions in question violated the principle of the separation of powers and the principle of a democratic state ruled by law.

2. The rules on appointing presidents and vice-presidents of the courts of general jurisdiction (amended by the provisions at issue) were found to be contrary to the principle of the independence of the judiciary, which is one component of the constitutional principle of the separation of powers (the provisions in question diminished the powers of the judicial service commission and expanded the position of the Minister of Justice in appointing the presidents of the courts). (*Poland, Constitutional Tribunal, Date of issuance: 09-11-1993, Number of case: K 11/93, POL-1993-S-001, [English](#)*)

III. 5. REMUNERATION OF JUDGES AND FINANCIAL SECURITY

Financial support for judges after retirement as part of their legal status is not a personal privilege, but a means of ensuring, on a constitutional basis, the independence of judges. It is provided to guarantee the rule of law and in the interests of parties who approach the Court for fair, impartial and independent justice. The constitutional status of judges and former judges entails their proper financial support, which should guarantee the implementation of fair, independent and impartial justice.

The legislator may provide for cases of termination of assignment and payment (or partial payment) of lifelong monthly monetary allowances for judges, but only on grounds that directly affect the status of judges, such as the entry into legal force of a guilty verdict against a judge or termination or resignation in connection with the re-election of judges.

Judges availing themselves of the constitutional right to work following retirement, established by Article 43 of the Constitution, cannot be deprived of the guarantees of independence of judges, in particular adequate financial security. Legislation providing for a cessation of payment of lifelong monthly monetary allowance of former judges working in certain positions is contrary to the purpose of the establishment of constitutional guarantees for the material security of judges as an element of their independence. Furthermore, it does not satisfy the principle of a single status for all judges as it imposes a difference between those former judges that work and those that do not work. (*Ukraine, Constitutional Court, Date of issuance: 08-06-2016, Number of case: 4-rp/2016 UKR-2016-2-006, [English](#)*)

The legislature delegated its constitutional power to determine the basis for judicial salaries to the government, enabling the latter to freely regulate this issue through decisions. Granting the political executive (the government) the competence to directly influence the determination of judicial salaries means *a priori* that relations between the two branches of state power (executive power that is the political executive, and judicial power) are laid on foundations that are objectively unacceptable in a democratic society. The principles of the separation of powers and the rule of law, in light of the Constitution, require that the judiciary be independent.

Requirements of legal security and the rule of law demand that the legal norm should be accessible and predictable, such that people understand their real and specific rights and obligations, so they can act accordingly. (*Croatia, Constitutional Court, Date of issuance: 18-07-2014, Number of case: U-I-4039-2009 et al, CRO-2014-2-009, [English](#)*)

A group of opposition Members of Parliament and the Prosecutor General argued before the Constitutional Court that a law adopted by the parliament which made as much as 15% of the remuneration of constitutional authorities, including judges, directly dependant on the amount of the budget deficit was violating the principle of judicial independence and the rule of law. The Constitutional Court found that the acceptance that judges may be «punished» because of the government's economic policy or the legislation responsible for budget management incorporates an arbitrary and non-foreseeable component into their remuneration, and this is contrary to the principle of judicial independence in connection with the principle of rule of law. (*Slovakia, Constitutional Court, Date of issuance: 11-12-2013, Number of case: ÚS 99/11, SVK-2014-2-002, [English](#)*).

Various legislative provisions concerning the reformation of the pension system have resulted in deterioration in the pension benefits and lifelong monetary allowances for retired judges. They are in violation of the principle of the independence of judges. (*Ukraine, Constitutional Court, Date of issuance: 03-06-2013, Number of case: 3-rp/2013 UKR-2013-2-003, [English](#)*)

Adequate remuneration is an aspect of judicial independence, which may be compromised when judicial officers lack financial security. The constitutional separation of powers means that judicial officers should not be forced to engage in salary negotiations with the Executive. (*South Africa, Constitutional Court, Date of issuance: 23-05-2013, Number of case: CCT 91/12; [2013] ZACC 13, RSA-2013-2-012, [English](#)*)

The requirement to ensure the appropriate remuneration of judges is linked not only to the principle of the independence of judges, but also to the qualification and competence requirements set for and the restrictions imposed on judges. The principle of the separation of powers prohibits the executive power from deciding on issues, which directly influence the actions of judiciary and the functioning of courts, including issues of funding. The prohibition on decreasing judges' remuneration during the term in office does not mean that any actions by the legislator which might have a negative impact on judges' remuneration are absolutely prohibited. (*Latvia, Constitutional Court, Date of issuance: 18-01-2010, Number of case: 2009-11-01, LAT-2010-2-001, [English](#)*)

The appellant was the judge suspended of payment of salary, pending an assessment of the circumstances of the criminal case instigated against him. He argued before the Supreme Court that the failure to pass legislation which would allow for the payment of a salary or another equivalent compensation to a judge whose service agreement has been suspended for the period of criminal proceedings was unconstitutional. Due to the restriction on performing other official duties, denying a judge a salary during suspension from duties would deprive him or her of any income whatsoever and it was in breach of the state's obligation to establish the guarantees for the independence of judges. The Supreme Court stated that the independence of judges means, on the one hand, a privilege for each judge, which is necessary in order for them to perform the duties expected of them, but on the other hand, it also serves the interest of all those who count on the fairness of the administration of justice. The Court held that the Constitution does not allow for a conclusion that guarantees of judicial independence do not apply during suspension from judicial duties, therefore the failure to pass legislation was unconstitutional. (*Estonia, Supreme Court, Date of issuance: 14-04-2009, Number of case: 3-3-1-59-07, EST-2009-1-005, [English](#)*).

In accordance with the principle of the independence of judges (Article 125 of the Constitution), it is appropriate that judges' salaries be regulated only by law. Certain provisions of the Judicial Service Act and the Salary System in the Public Sector Act, which determine that judges' salaries be regulated by an ordinance of the National Assembly, the collective agreement for the public sector, and a Government decree, as well as the provisions of the Ordinance on Officials' Salaries, which regulates judges' salaries as an

executive regulation, were pronounced to be inconsistent with the above constitutional principle.

It is inconsistent with the constitutional principle of the independence of judges if the legislator only ensures judges protection against a reduction in their basic salary and if it allows additional instances of a reduction of judges' salaries to be determined by an ordinance of the National Assembly. *(Slovenia, Constitutional Court, Date of issuance: 07-12-2006, Number of case: U-I-60/06-200, U-I-214/06-22, U-I-228/06-16, SLO-2009-3-006, [English](#))*

The right of a retired judge to a pension and a monthly allowance secures the independence of working judges. Pecuniary aid and social protection granted to a judge at the expense of the state budget (salary, pension, monthly allowance etc.) secures his/her high status and independence. Subject to Article 126 of the Constitution, Article 11.3 of the Law on Status of Judges and Article 14.8 of the Law on Judicial System shall be treated as securing the achieved level of independence of the judiciary and prohibiting adoption of new laws and other statutory acts, amendments, cancellation thereof or restriction of any current guarantees of independence of judges, including arrangements for their legal protection, material and social support. *(Ukraine, Constitutional Court, Date of issuance: 11-10-2005, Number of case: 8-rp/2005, UKR-2005-3-008, [English](#))*

The right of a judge who has resigned to receive a monthly life allowance is a legal right, and the taxation and non-taxation of this income fall within the legislator's competence. Thus, enactments governing the taxation of judges' monthly life allowance do not violate a judge's right to social assistance and protection and do not contravene the principle of the independence of the judiciary. *(Moldova, Constitutional Court, Date of issuance: 19-09-2002, Number of case: 34, MDA-2002-3-003, [English](#))*

The petitioners, Vilnius City Court of the First District, the Higher Administrative Court and the Vilnius Regional Administrative Court, doubted whether certain legal provisions establishing a reduction in the remuneration of judges were in compliance with the Constitution. The petitioners emphasized that any attempts to reduce the salary or other social guarantees of judges, or to cut the budget of the judiciary, are interpreted as infringement of the financial guarantees of the principle of independence of judges and courts. The Constitutional Court ruled that the disputed norms conflicted with the principle of a state governed by law and noted that the judge, who is obliged to consider conflicts arising between individuals, as well as those between individuals and the state, must not only have the highest professional qualifications and an impeccable reputation, but must also be financially independent. The state has a duty to establish such salaries for judges which would be in conformity with the status of the judiciary and judges, the functions exercised by them and their responsibility. The protection of judges' salaries is one of the guarantees of the independence of judges. *(Lithuania, Constitutional Court, Date of issuance: 12-07-2001, Number of case: 13/2000, 14/2000, 20/2000, 21/2000, 22/2000, 25/2000, 31/2000, 35/2000, 39/2000, 8/01, 31/01, LTU-2001-2-010 [English](#))*

Provisions of the Act on the structure of common courts providing for rules of determining judge's remuneration are compatible with the Constitutional order to assure judges' working conditions and remuneration correspond with the dignity of their office and the scope of their duties. *(Poland, Constitutional Tribunal, Date of issuance: 04-10-2000, Number of case: P 8/00, POL-2000-3-021, [English](#))*

The whole complex of guarantees consolidating the independence of judges and courts is established in the Constitution, the Court Law and other laws. The material independence of a judge and other social guarantees are among them. Therefore the laws of many countries establish, according to common criteria, the remuneration of judges separately from other officials of the State. Conditions to prevent interference with the actions of a judge or a court deciding a case must be created on the basis of the guarantees for the independence of judges. Violation of any of the above-mentioned guarantees may cause damage to the administration of justice and the guarantee of the rights and freedoms of individuals. Therefore any attempt to reduce the remuneration of judges or other social guarantees, or to limit the financing of courts, are interpreted as an encroachment upon the independence of the judiciary.

The awarding of a premium is a form of individual incentive by the means of which the motivation of employees is stimulated in order to achieve certain results. Candidates for the premium are selected individually, and the size of a premium is usually fixed individually. It is however not permissible to grant judges incentives in connection with the administration of justice. Therefore the awarding of a premium for judges is incompatible with the principle of independence of the judiciary. *(Lithuania, Constitutional Court, Date of issuance: 06-12-1995, 3/95, Number of case: 3/95, LTU-1995-3-010, [English](#))*

A provision of a decree issued by the Minister of Justice was challenged because it made it possible for the Minister of Justice, a member of the executive branch, to award or recommend judges for honours for their judicial activity. This was found to violate the constitutional principle of judicial independence. The Constitutional Court held that it was contrary to the constitutional principle of judicial independence if any member of the Government can award honours to judges or recommend judges for honours without the real participation of the judicial branch. *(Hungary, Constitutional Council, Date of issuance: 21-10-1994, Number of case: 46/1994, HUN-1994-3-016, [English](#)).*

III. 6. FREEDOM OF EXPRESSION AND ASSOCIATION

Article 9 of the Constitution states that there are several different types of association with varying activities and goals. The formation of associations and the running of their activities is determined by their statutes and subject to the law. The law may establish certain binding conditions with regard to the establishment of associations and the running of their activities, including rules on the categories of persons allowed to be members of various associations, which cannot be overridden in their statutes. The right to freedom of association of categories of persons who are not allowed to form or join certain types of association as they may be members of other types of association is not infringed.

The right of the founding members of trade union organisations to apply to the courts through the intermediary of a specially authorised person amounts to a privilege granted to such persons by parliament, not a violation of the right of free access to the courts. Founding members may waive this privilege whenever they so wish, carrying out procedural formalities directly and individually and appearing in court in person. *(Romania, Constitutional Court, Date of issuance: 25-03-2004, Number of subject: 147/2004, ROM-2004-2-003, [English](#))*

IV. COUNCILS FOR THE JUDICIARY

IV. 1. GENERAL MISSION

The Constitution specifies that the Supreme Judicial Council shall manage the judiciary and uphold the independence of judges, prosecutors and investigating officers so that they can perform their functions, protecting the rights and legitimate interests of citizens, corporate entities and the State. The Supreme Judicial Council's administration activity shall ensure the efficient performance of its Constitution-assigned functions in relation to the personnel, budget and organisation. The assignment of this activity to institutions outside the judiciary would violate the principles of the separation of powers and judicial independence. (*Bulgaria, Constitutional Court, Date of issuance: 07-07-2015, Number of case: 13/2014, BUL-2016-1-001, [English](#)*)

Certain provisions of the legislation governing the High Council of Justice were challenged for lack of compliance with the Constitution. Under particular scrutiny were those pertaining to the powers of the High Council of Justice to demand and obtain from courts copies of court cases, and those relating to challenges to acts or omissions on the part of Parliament, the President and the High Council of Justice. These provisions might run counter to the principle of judicial independence and impartiality. (*Ukraine, Constitutional Court, Date of issuance: 11-03-2011, Number of case: 2-rp/2011, UKR-2011-1-002, [English](#)*)

The principle of separation and balance of powers, set out in Article 7 of the Constitution, gives the three branches of government (legislative, executive and judicial) autonomy in the exercise of their functions. It allowed for mutual assistance where necessary, in order to achieve maximum efficiency, and resulted in power being distributed to several entities, with different tasks and functions. Irrespective of changes in government, the principle of the separation and balance of powers should remain constant. The High Council is predominantly composed of judges, which helps to ensure judicial independence and to avoid interference from other state powers. It is desirable to keep the three branches of power separate so that they can assist each other in fulfilling their respective constitutional mandates. There is no incompatibility between the mandate of a member of the High Council and the day to day exercise of the function of judge. The constitutional draftsmen took steps to ensure that this would not be the case, and accorded priority to the principle of judicial independence.

Several members of the Albanian Parliament asked the Constitutional Court to assess the compliance with the Constitution of an amendment to the Law on the Composition and Working Practices of the High Council of Justice (HCJ). They suggested that this infringed the principle of self-regulation of the judiciary and that it was in conflict with the regulations set out within the Constitution governing the composition and working practices of the High Council of Justice. The change in the legislation meant that members of the HCJ who were also judges had to devote themselves to their Council work full-time and stop working as judges. They could resume their judicial work at a later stage. Parliament made this change with a view to avoiding a conflict of interest between the role of judge and that of Council member.

The Court went on to stress that judicial autonomy and independence constitute an effective guarantee for the rights of citizens. These guarantees are expressed within Article 147 of the Constitution. This article states that the regulation of the judiciary is within the remit of the High Council of Justice. In effect, the HCJ is at the pinnacle of the organisational pyramid of judicial power. To this end, the High Council is predominantly made up of judges and is therefore very closely connected with the judiciary. The constitutional draftsmen intended to keep the courts independent of the legislative and executive powers.

Judicial self-regulation is only feasible if the principle of democracy is respected. Thus, note must be taken of the wishes of the sovereign. The sovereign not only approves the legislation governing the composition and working practices of the judiciary but also the appointment of members of the High Court and its President. In addition, three members of the High Council of Justice are voted into place by the sovereign. A good example of the working relationship between the executive and the High Council is to be found in the context of disciplinary proceedings against judges. These are taken upon the initiative and with the participation of the Minister of Justice, and it is the Chairman of the Council who appoints the judges of the first and second instance courts. (*Albania, Constitutional Court, Date of issuance: 22-05-2006, Number of case: 53/06, ALB-2006-2-001, [English](#)*)

1. Suspending the activities of the existing Supreme Judicial Council and replacing it by a new Supreme Judicial Council are not unconstitutional because the new composition of the Council is more truly representative of all the judicial bodies that have recently been set up.

2. Measures taken by the Supreme Judicial Council in respect of the rights of members of the judiciary are administrative measures and are therefore subject to review by the Supreme Administrative Court. (*Bulgaria, Constitutional Court, Date of issuance: 14-01-1999, Number of case: 01/99, BUL-1999-1-001, [English](#)*)

IV. 2. COMPOSITION OF A JUDICIAL COUNCIL

Having regard to the main feature of the Superior Council of Magistracy as a collegial body, its members' term of office expires at the end of a period of 6 years, thus on the same date for all members. Therefore, those who acquire membership in the Council during the period of 6 years, occupying a vacancy within the collegial body, will fulfil their legal and constitutional powers as from the date of validation or election, as the case may be, for the remaining period up to the expiry of that period. Any contrary interpretation is unconstitutional, in the sense that each member of the Superior Council of Magistracy can be validated or elected for a term of office of 6 years, which elapses individually, independently of the other members' term of office. *(Romania, Constitutional Court, Date of issuance: 02-06-2016, Number of case: 374/2016, ROM-2016-2-003, [English](#))*

One provision of a law amending provisions on the functioning and composition of the High Council of Justice is unconstitutional. The reasons provided in the offending provision for the discharge of the members of the Council are not clear and do not guarantee due process of law during a proceeding for their discharge. Under those conditions, this provision is not in harmony with the principle of legal certainty, concerning the clarity of the content of a legal norm, and as such it is unconstitutional and should be repealed. Other challenged provisions are not unconstitutional. The election of the deputy chairman of the Council solely from among members of the Assembly (parliament) reflects the practice of the Council, since its creation, of always selecting the deputy chairman from the ranks of the members elected by the Assembly. The automatic suspension of any judge who is a defendant in a criminal trial does not violate the presumption of innocence or the principles of due process, and serves the aim of preserving public trust in the administration of justice. *(Albania, Constitutional Court, Date of issuance: 24-04-2015, Number of case: 23/2015, ALB-2015-1-002, [English](#))*

The procedure for dismissing members of the Higher Council of the Judiciary must be established sufficiently clearly and explicitly in legislative terms to prevent such members from being exposed to possible pressure and to prevent the independence, freedom and security of such members, in the exercise of their and obligations under the Constitution and legislation, from being affected. *(Romania, Constitutional Court, Date of issuance: 04-04-2013, Number of case: 196/2013, ROM-2013-1-002, [English](#))*

The case concerned age limits for tenure of certain positions within the High Council of Justice, and procedures for re-election. Members of the High Council of Justice are elected to the office of the Chairperson, Deputy Chairperson and Section Secretary of the High Council of Justice for a three-year term, these roles are elected, and there is no provision within the Law for the possibility of early dismissal of members of the High Council of Justice from these offices once they have reached a certain age. *(Ukraine, Constitutional Court, Date of issuance: 18-09-2008, Number of case: 18-rp/2008, UKR-2008-3-020, [English](#))*

The list of grounds for terminating the authority of a member of the High Council of Justice by the body that appointed him or her is exhaustive. There are no other grounds for termination of authorities than those provided for by law. The provisions of this legislation should be interpreted as reading that a decision to terminate the authority of a member of the High Council of Justice in the event of his or her violation of the oath is taken by the body that appointed him or her. Under the law, the High Council of Justice is not obliged to provide the body concerned with an assessment of such facts and a decision concerning the presence of grounds for termination of authority. Constitutional proceedings concerning an official interpretation of the term "immoral act" within the above legislation should be terminated, based upon provisions of the Law on the Constitutional Court. The constitutional petition did not comply with the requirements under this law and the Constitution. *(Ukraine, Constitutional Court, Date of issuance: 17-04-2008, Number of case: 7-rp/2008, UKR-2008-1-008, [English](#))*

The principle of separation and balance of powers, set out in Article 7 of the Constitution, gives the three branches of government (legislative, executive and judicial) autonomy in the exercise of their functions. It allowed for mutual assistance where necessary, in order to achieve maximum efficiency, and resulted in power being distributed to several entities, with different tasks and functions. Irrespective of changes in government, the principle of the separation and balance of powers should remain constant. The High Council is predominantly composed of judges, which helps to ensure judicial independence and to avoid interference from other state powers. It is desirable to keep the three branches of power separate so that they can assist each other in fulfilling their respective constitutional mandates. There is no incompatibility between the mandate of a member of the High Council and the day to day exercise of the function of judge. The constitutional draftsmen took steps to ensure that this would not be the case, and accorded priority to the principle of judicial independence. *(Albania, Constitutional Court, Date of issuance: 22-05-2006, Number of case: 53/06, ALB-2006-2-001, [English](#))*

1. The rule that judges and public prosecutors elected to the Judicial Service Commission may not continue to serve as judges or public prosecutors during their elected term of office means, in effect, that they lose this status and that the Commission ceases to represent the judiciary and becomes a purely administrative body.

2. The fact that members of the Judicial Service Commission are required to choose between their management functions in courts or prosecutors' departments and membership of the Commission violates the principle that judges and prosecutors are irremovable.

3. The termination or shortening of the terms of office of judges or public prosecutors with management functions violates the principle of separation of powers enshrined in Article 1.4 of the Constitution, and the principle that prosecutors and judges are irremovable.

4. The fact that judges and prosecutors must retire on reaching the standard public sector retirement age, even when they do not satisfy the other retirement criteria, amounts to discrimination against them by comparison with other groups, and violates the principle of irremovability enshrined in Article 125.1 of the Constitution and in international texts on judges.

5. The fact that members of the national legal service retired on grounds of age may not continue to work as judges or prosecutors, combining their professional income and pensions, constitutes discrimination:

- between judges and prosecutors in receipt of service pensions and other pensioners;

- between judges and prosecutors in receipt of service pensions who engage in another professional activity, and judges and prosecutors in receipt of service pensions who do not.

(Romania, Constitutional Court, Date of issuance: 06-07-2005, Number of case: 375/2005, [English](#))

In the course of proceedings involving an appeal against a decision of the High Council of Justice, the Supreme Court stayed the proceedings and made a reference to the Constitutional Court with a request to strike out Article 6/9 of the Law "on the organisation and function of the Ministry of Justice," as well as Articles 31/1, 31/3 and 16/1.c of the Law "on the organisation and functioning of the High Council of Justice", on the ground of incompatibility with the Constitution of the Republic of Albania. In its reference, the Supreme Court stated that the Minister of Justice's right to control the activity of ordinary courts and his or her right in relation to disciplinary proceedings against judges ran counter to the independence of the judicial power and could be considered as an infringement of the separation of powers because the body competent for disciplinary proceedings against judges is the High Council of Justice.

Assessing the content of the impugned provisions, the Constitutional Court held that the Albanian Constitution guarantees the independence of the judicial power, granting judges the right of being untouchable and irremovable from office without reasonable grounds, as well as the prohibition of criminal proceedings without the authorisation of the High Council of Justice. Only courts have the right to review judicial decisions. The High Council of Justice may take disciplinary measures against judges only in cases where their court decisions are associated with acts and conduct that seriously discredit the profession and position of judge and the authority of the judicial power. That being so, the Constitutional Court considered that the provisions dealing with the subject of control did not speak of control of the decision-making activity, but of inspection as to the administration of justice. The Constitutional Court dismissed as unfounded the Supreme Court's claim that the Minister of Justice's right to carry out inspections in the courts and his or her right to make proposals for the dismissal of judges violated the principle of the separation of powers. According to the Constitutional Court, the principle of separation of powers not only implies their separation, but also their balance. Thus, those powers should cooperate in order to accomplish their goals, and should respect and control each other. Those powers should cooperate with and control each other to the extent that their constitutional functions are not affected.

The decisions of judges should conform only to the Constitution and laws. In order to ensure the best results, mechanisms have been introduced to ensure that pressure is not applied from inside or outside the judicial power. The Albanian Constitution has entrenched the independence of the different state powers, putting the emphasis on the independence of the judicial power. The establishment of the High Council of Justice is a component element of that principle. The fact that the Minister of Justice carries out verification of alleged violations by judges and presents proposals for disciplinary proceedings is not unconstitutional because the Minister has no right to vote and the High Council of Justice is free to decide on his or her proposals, thereby guaranteeing judges due process of law in disciplinary proceedings. *(Albania, Constitutional Court, Date of issuance: 27-05-2004, Number of case: 11, ALB-2004-2-002, [English](#)).*

According to the Constitution, court judges will be appointed by the King in Council, and they can only be dismissed by court judgment. According to the Civil Service Act, judges can be appointed temporarily in special situations and for special purposes. These special temporary appointments do not violate the Constitution's principle that judges should be independent

and irremovable. (Norway, Supreme Court, Date of issuance: 23-03-1995, Number of case: 31/1995, 415/1994, [English](#))

The elected members of the Supreme Judicial Council serve terms of five years. They must not be removed until completion of their term of office. (*Bulgaria, Constitutional Court, Date of issuance: 15-09-1994, case number: 8/94, BUL-1994-3-004, [English](#)*)

IV. 3. FUNCTIONING

The State Prosecutors' Council has the character of a «court» (tribunal) because it directly decides on the rights and obligations of bearers of prosecutorial functions; therefore, its decisions and procedures are subject to the requirements of a fair trial. (*Serbia, Constitutional Court, Date of issuance: 18-07-2012, Number of case: VIIIU-421/2011, SRB-2012-3-003, [English](#)*)

IV. 4. POWERS

The Judicial Council is an authority that is intended for the exercise of the independence of the judicial branch of power. It also has the role of directing personnel policy in terms of judicial posts and the posts of court presidents. If, therefore, only one candidate fulfilling the requisite conditions comes forward, following an invitation for applications, the Council is not obliged to propose them to the Minister if it does not believe that person to be a suitable candidate for the office of court president. The Minister can only appoint as president a candidate put forward by the Judicial Council. This establishes a balance that is in conformity with the Constitution, which prevents excessive influence by the executive branch of power over the appointment of courts' presidents. There has been no breach in this instance of the doctrine of separation of powers. (*Slovenia, Constitutional Court, Date of issuance: 10-10-2007, Number of case: Up-679/06 and U-I-20/07, [English](#)*)

The High Council of Justice is the only body that has the authority to take disciplinary measures against judges, regardless of which body carries out verification of alleged infringements by judges and presents proposals for taking disciplinary measures. The High Council of Justice is free not to accept any proposals for taking disciplinary measures, if it is convinced that there has been no violation. The Council proceeds by guaranteeing judges due process of law, in accordance with all democratic standards. It also has the right to carry out inspections if it considers them necessary. Therefore, the fact that the Minister of Justice has the right to make inspections and the right to present proposals as to disciplinary proceedings against judges is not unconstitutional. The Minister of Justice has no right to vote. He or she may only propose disciplinary measures to the High Council of Justice. It is always the High Council of Justice that decides, guaranteeing impartiality during the decision-making process, an important principle of due process of law. (*Albania, Constitutional Court, Date of issuance: 27-05-2004, Number of case: 39/04, 2835, ALB-2004-2-002, [English](#)*)

The provisions of the Law on the High Council of Justice, under which the High Council of Justice is a legal entity and has its own staff, as well as the provisions under which the High Council of Justice examines and decides on the dismissal of judges, and may impose penalties on them other than penalties provided for by law, including disciplinary sanctions against prosecutors, are in compliance with the Constitution of Ukraine. The provisions of the Law whereby a national deputy of Ukraine and the Authorised Human Rights Representative of the parliament (Verkhovna Rada) may forward to the High Council of Justice a submission seeking the dismissal of a judge, and the provisions whereby such submissions may constitute sufficient grounds for opening disciplinary proceedings, are not in compliance with the Constitution of Ukraine. The High Council of Justice cannot address a decision on the inaptitude of a judge to the authorities that elected the judge unless the decision has been made on the basis of an application for the judge's dismissal. (*Ukraine, Constitutional Court, Date of issuance: 21-05-2002, Number of case: 9-rp/2002, UKR-2002-2-009, [English](#)*)

The Constitutional Court decides on conformity of both statutory and individual legal acts of the Parliament (Verkhovna Rada) and the President of Ukraine to the Constitution. The individual legal acts of the head of the state and parliament on the appointment, election and dismissal of judges have a constitutional and legal nature. The acts of the Higher Council of Justice, as to pre-term dismissal of judges considering the provisions of Article 55 of the Constitution, may be subject to adjudication by general courts. (*Ukraine, Constitutional Court, Date of issuance: 27-03-2002, Number of case: 7-rp/2002 UKR-2002-1-007, [English](#)*)

Under the Constitution, members of the judiciary, including the President and members of the Supreme Court of Justice, are appointed by the President of the Republic or the parliament following a proposal submitted by the Judicial Service Commission. The basic principle on which the state is organised and run is that the legislature, the executive and the judiciary shall be separate (Article 6 of the Constitution). Areas in the south of the Republic of Moldova may be granted special forms and conditions of autonomy in accordance with special provisions as to their status enacted in the form of organic laws (Article 111 of the Constitution). Gagauzia's exercise of its powers is circumscribed by the Constitution. The Judicial Service Commission appoints, transfers, promotes and disciplines judges (Article 123 of the Constitution). (*Moldova, Constitutional Court, Date of issuance: 06-05-1999, Number of case: 24, MDA-1999-2-002, [English](#)*)

The judiciary has its own budget and the Minister of Justice is therefore not entitled to manage any part of it. Disciplinary action may not be taken against members of the judiciary who have broken their oath, so as not to create an environment in which they are unable to interpret and enforce the law in full accordance with their conscience and convictions. Measures taken by the Supreme Judicial Council in respect of the rights of members of the judiciary are administrative measures and are therefore subject to review by the Supreme Administrative Court. Suspending the activities of the existing Supreme Judicial Council and replacing it by a new Supreme Judicial Council are not unconstitutional because the new composition of the Council is more truly representative of all the judicial bodies that have recently been set up. (*Bulgaria, Constitutional Court, Date of issuance: 14-01-1999, Number of case: 01/99, BUL-1999-1-001, [English](#)*)

The State Judiciary Council itself decides on the motion for the disqualification of its president and/or of its members in disciplinary proceedings conducted before it against a president of a court or a judge. Denial of disqualification in cases of disciplinary proceedings before the State Judiciary Council would mean the acceptance of partial judges in some cases, which would be a violation of the constitutional right to a fair trial before an impartial tribunal. (*Croatia, Constitutional Court, Date of Issuance: 08-01-1997, Number of case: U-IV 947/1996, CRO-1997-S-001, [English](#)*)

The Judicial Service Commission is the organ which represents, manages and administers the organisation of the courts and ensures that the courts are independent and function properly. The Judicial Service Commission referred to the Constitutional Court a dispute about powers between itself and the government, for it took the view that it had power to manage the budget allocated for the administration of justice. In the event of a dispute

between constitutional organs about the exercise of a power, the Constitutional Court's decision shall assess that disputed power and assign it to one of the parties, without taking the place of the legislature. (*Andorra, Constitutional Court, Date of issuance: 16-12-1994, Number of case: 94-I-CC,AND-2001-2-001, [English](#)*).

Under Hungarian law, the Minister of Justice has several powers in appointing the presidents of the courts at different levels. The amendment to the Judiciary Act in 1991 introduced new self-governing institutions (judicial councils), but did not abrogate the Minister's powers. Therefore claimants challenged the constitutionality of the Act. The Constitutional Court upheld the validity of the law, but defined the constitutional requirements of the appointments. The appointment of judges by another branch (e.g. the executive) must be counterbalanced by the judiciary or by another branch. In the case of participation by the judiciary, their opinion should substantially determine the appointment. (*Hungary, Constitutional Court, Date of issuance: 11-06-1993, Number of case: 38/1993, HUN-1993-2-011, [English](#)*)

V. RESOURCES, EFFICIENCY AND INDEPENDENCE

The law setting out the annual State budget for 2015 is unconstitutional as it does not provide sufficient funding for the judicial authorities. The annual budget must ensure the financial resources required for the functioning of all institutions established by the Constitution, including the judicial authorities, in keeping with the fundamental principles of the constitutional system; namely, the rule of law, the supremacy of the Constitution, the separation of powers, the independence of the judicial authorities and the specific features of the functions assigned to them by the Constitution. (*Bulgaria, Constitutional Court, Date of Issuance: 14-07-2015, Number of case: 03/15, BUL-2015-2-001, [English](#)*)

V. 1. GENERAL ASPECTS OF RESOURCES

Adequate remuneration is an aspect of judicial independence, which may be compromised when judicial officers lack financial security. The constitutional separation of powers means that judicial officers should not be forced to engage in salary negotiations with the Executive. (*South Africa, Constitutional Court, Date of issuance: 23-05-2013, Number of case: CCT 91/12, RSA-2013-2-012, [English](#)*)

Determining the work hours for judges by their workload falls within the scope of the legislator's regulatory freedom. The constitutional obligation to ensure an appropriate amount of free time, which constitutes an element of the right to rest, does not concern compensation for overtime, as the norms included in Article 66.2 of the Constitution protect the conditions of work, and not remuneration that is granted for that reason. (*Poland, Constitutional Tribunal, Date of issuance: 07-05-2013, Number of case: SK 11/11, POL-2014-1-001, [English](#)*)

The law on the state budget can not amend other laws, terminate their implementation or cancel them. For objective reasons, such actions lead to inconsistencies in legislation and consequently impede and curtail human and civil rights and freedoms. If it is necessary to terminate the implementation of laws, to add to or alter them, or to recognise them as invalid, this should be done by separate legislation. The disputed provision of the Law deprived judges of this right in 2008 and, therefore, of one of the guarantees of their independence. The Constitutional Court took the view that the procedure for calculating a monthly increment for length of service introduced in the analyzed part of the Law resulted in a decrease of its amount, as a "position salary" is only part of a judge's monthly earnings. Such a decrease results in a diminution of a judge's overall salary and is a restriction on the existing guarantees of judicial independence. (*Ukraine, Constitutional Court, Date of issuance, 22-05-2008, Number of case: 10-rp/2008, UKR-2008-2-011, [English](#)*)

The Constitution defines the mechanism for securing the funding of the judicial authorities, to be used by the parliament (Verkhovna Rada), which is responsible for approving the national budget, amending it and monitoring its execution. The execution of the budget comes within the sphere of competence of the Cabinet of Ministers. (*Ukraine, Constitutional Court, Date of issuance: 24-06-1999, Number of case: 6-rp/1999, UKR-1999-2-004, [English](#)*)

The whole complex of guarantees consolidating the independence of judges and courts is established in the Constitution, the Court Law and other laws. The material independence of a judge and other social guarantees are among them. Therefore the laws of many countries establish, according to common criteria, the remuneration of judges separately from other officials of the State. Conditions to prevent interference with the actions of a judge or a court deciding a case must be created on the basis of the guarantees for the independence of judges. Violation of any of the above-mentioned guarantees may cause damage to the administration of justice and the guarantee of the rights and freedoms of individuals. Therefore any attempt to reduce the remuneration of judges or other social guarantees, or to limit the financing of courts, are interpreted as an encroachment upon the independence of the judiciary.

The awarding of a premium is a form of individual incentive by the means of which the motivation of employees is stimulated in order to achieve certain results. Candidates for the premium are selected individually, and the size of a premium is usually fixed individually. It is however not permissible to grant judges incentives in connection with the administration of justice. Therefore the awarding of a premium for judges is incompatible with the principle of independence of the judiciary. (*Lithuania, Constitutional Court, Date of issuance: 06-12-1995, 3/95, Number of case: 3/95, LTU-1995-3-010, [English](#)*)

V. 2. BUDGET OF THE JUDICIARY

Legislative provisions which allow the Cabinet of Ministers to define, at its own discretion, the expenditure of the State in terms of the financing of courts and judges, violate the principle of the separation of powers and pose a threat to judicial independence and thus run counter to the Constitution. *(Ukraine, Constitutional Court, Date of issuance: 08-07-2016, Number of case: 5-rp/2016, UKR-2016-2-007, [English](#))*

Financial support for judges after retirement as part of their legal status is not a personal privilege, but a means of ensuring, on a constitutional basis, the independence of judges. It is provided to guarantee the rule of law and in the interests of parties who approach the Court for fair, impartial and independent justice. The constitutional status of judges and former judges entails their proper financial support, which should guarantee the implementation of fair, independent and impartial justice. The legislator may provide for cases of termination of assignment and payment (or partial payment) of lifelong monthly monetary allowances for judges, but only on grounds that directly affect the status of judges, such as the entry into legal force of a guilty verdict against a judge or termination or resignation in connection with the re-election of judges. Judges availing themselves of the constitutional right to work following retirement, established by Article 43 of the Constitution, cannot be deprived of the guarantees of independence of judges, in particular adequate financial security. Legislation providing for a cessation of payment of lifelong monthly monetary allowance of former judges working in certain positions is contrary to the purpose of the establishment of constitutional guarantees for the material security of judges as an element of their independence. Furthermore, it does not satisfy the principle of a single status for all judges as it imposes a difference between those former judges that work and those that do not work. *(Ukraine, Constitutional Court, Date of issuance: 08-06-2016, Number of case: 4-rp/2016 UKR-2016-2-006, [English](#))*

The law setting out the annual State budget for 2015 is unconstitutional as it does not provide sufficient funding for the judicial authorities. The annual budget must ensure the financial resources required for the functioning of all institutions established by the Constitution, including the judicial authorities, in keeping with the fundamental principles of the constitutional system; namely, the rule of law, the supremacy of the Constitution, the separation of powers, the independence of the judicial authorities and the specific features of the functions assigned to them by the Constitution. *(Bulgaria, Constitutional Court, Date of Issuance: 14-07-2015, Number of case: 03/15, BUL-2015-2-001, [English](#))*

The legislature delegated its constitutional power to determine the basis for judicial salaries to the government, enabling the latter to freely regulate this issue through decisions. Granting the political executive (the government) the competence to directly influence the determination of judicial salaries means *a priori* that relations between the two branches of state power (executive power, that is the political executive, and judicial power) are laid on foundations that are objectively unacceptable in a democratic society. The principles of the separation of powers and the rule of law, in light of the Constitution, require that the judiciary

be independent. Requirements of legal security and the rule of law demand that the legal norm should be accessible and predictable, such that people understand their real and specific rights and obligations, so they can act accordingly. (*Croatia, Constitutional Court, Date of issuance: 18-07-2014, Number of case: U-I-4039-2009, CRO-2014-2-008, [English](#)*)

The law that imposed salary reductions on judges as part of the country's austerity measures was neither a tax law nor generally applicable without discrimination and therefore amounted to an adverse reduction of the judges' remuneration. (*Cyprus, Supreme Court, Date of issuance: 14-06-2013, Number of case: 397/2012 and 480/2012, CYP-2014-2-001, [English](#)*)

The powers of Parliament to elect and dismiss judges are not encroached upon by legislative provisions governing the judiciary and the status of judges which relate to the order of voting. (*Ukraine, Constitutional Court, Date of issuance: 21-06-2011, Number of case: 7-rp/2011 UKR-2011-2-007, [English](#)*)

One of the safeguards of judicial independence, which is contained in Article 126.1 of the Constitution, is that judges are accorded financial and social protection by the state, by means of salary, pension and monthly allowances, as well as the future expectation of the status of a retired judge. Their right to pension security constitutes an important safeguard for the independence of acting judges. Constitutional rights and freedoms are guaranteed, and the state must not adopt any legislation that would result in existing rights and freedoms being abolished or reduced in content and volume. (*Ukraine, Constitutional Court, Date of issuance: 18-06-2007, Number of case: 4-rp/2007, UKR-2007-2-004, [English](#)*)

The independence of courts and tribunals vis-à-vis other branches of power (Article 173 of the Constitution) is not intended to serve the judicial power *per se* (i.e. the organs exercising such power) but, rather, to ensure an individual's constitutional right to court (Article 45.1 of the Constitution). The administration of justice, as exercised by courts, and the Constitutional Tribunal's judicial competences fall within the state's basic functions and, as such, should be financed by public funds. Organs of the judicial power and their accompanying organisational structures are entirely maintained by the state budget and are obliged to transfer to the budget all revenues obtained from their activity (e.g. court fees). The legislative power has a democratic mandate to decide upon the destination of public funds originating from the imposition of public levies on citizens. Concomitantly, the Council of Ministers, as an executive organ, occupies a strong position within the constitutional system as regards financial policy. This position is specified by Article 221 of the Constitution (the Council of Ministers' exclusive right to initiate legislative proceedings regarding the Budget Act), Article 220.1 of the Constitution (prohibiting the *Sejm*, i.e. the first chamber of Polish Parliament, from increasing the budget deficit above that envisaged in the draft Budget Act), and Article 219.4 of the Constitution, read in conjunction with Article 146.4.6 of the Constitution (the Council of Ministers' exclusive competence to pursue the State's financial policy and to manage the implementation of the budget). Accordingly, it is permissible for the Council of Ministers to undertake actions to survey the uniformity of public funds management within all public finance sector units, including judicial units. The regulation of financial control and internal audit within the courts and Constitutional Tribunal must, however, take account of the

specific nature of these units, given the independence of the judicial power vis-à-vis the executive. Matters concerning the division of tasks between the executive and judicial powers in the course of budget implementation must be regulated by statute (Article 219.2 of the Constitution). Such statutes must, firstly, correspond to the requirements of sufficient specificity so as to categorically guarantee the judicial power that the Council of Ministers will not interfere authoritatively in areas concerning important prerogatives of the judicial power. Secondly, these statutes must deal with conflicts of competence, including potential conflicts, and introduce appropriate instruments to prevent such conflicts and contribute to the resolution thereof. Thirdly, each of the instruments through which the executive influences the judicial power should be precisely regulated; in particular, it must be indicated who possesses the right to exert such influence, which matters are subject to such influence and what are the effects of such influence. Fourthly, statutes regulating such matters must be characterised by particularly diligent fulfilment of requirements concerning the legislative procedure. Insofar as concerns the "separateness" of the judicial power's position in relation to the drafting and implementation of the Budget Act, and supervision of such implementation, the Constitution endows the legislative power with considerable discretion. The limits of such discretion are: on the one hand - the need to ensure uniformity of the public finances system, as required by the constitutional provisions, and the inviolability of the Council of Ministers' obligations and competences as the sole organ established to pursue the state's financial policy; and, on the other hand - the prohibition on making the position of judicial organisational units equal to that of units subordinate to the executive power. (*Poland, Constitutional Tribunal, Date of issuance, 09-11-2005, Number of case: Kp 2/05, POL-2005-3-011, [English](#)*)

Article 5 of the Constitution provides that, in Lithuania, the powers of the state shall be exercised by the parliament (*Seimas*), the President of the Republic and the government, and the Judiciary. In this and other, the principle of separation of powers is enshrined. The judiciary is the only state power assigned to administer justice. No other state institution or official may exercise that function. Only an independent and fully competent judiciary may successfully implement the function assigned to it. The independence and competence of the judiciary are inseparable from the principle of the independence of judges and courts, entrenched in the Constitution. This principle means that the legislator has a duty to provide for sufficient guarantees to ensure the independence of judges and courts, which would ensure impartiality of courts in adopting decisions, and which would not permit anyone to interfere with the activities of judges and courts while they are administering justice. The judge, who is obliged to consider conflicts arising between individuals, as well as those between individuals and the state, must not only have the highest professional qualifications and an impeccable reputation, but must also be financially independent. The state has a duty to establish such salaries for judges which would be in conformity with the status of the judiciary and judges, the functions exercised by them and their responsibility. The protection of judges' salaries is one of the guarantees of the independence of judges. (*Lithuania, Constitutional Court, Date of issuance: 12-07-2001, Number of case:13/2000, 14/2000, 20/2000, 21/2000, 22/2000, 25/2000, 31/2000, 35/2000, 39/2000, 8/01, 31/01, LTU-2001-2-010, [English](#)*)

If it is the case, as stated in Article 2.1 of the Charter of Fundamental Rights and Basic Freedoms, that the Czech State is founded on democratic values, then it must be emphasised that one of the extraordinarily important democratic values is the independence of the judiciary. This principle includes a whole range of aspects which together should create the conditions necessary for courts to fulfil their roles and duties, in particular in the

field of the rights and freedoms of the individual (Article 1 of the Constitution). Certain of these aspects can be entirely material in nature, even though all of these aspects naturally include material implications as well. This applies, for example, to remuneration, in relation to which Act no. 268/1998 Sb. on the Removal of the Additional Salary Instalment for the Second Half of 1998 represents in the Constitutional Court's view a breach of the "inalienable" right of judges to a salary that cannot be reduced. By this Act, the parliament in effect categorised judges as "state bureaucrats". Such a means of proceeding on the part of the legislature (which, moreover, has occurred repeatedly) is then in reality nothing more than the devaluation of one of the basic democratic principles: that of the independence of the judiciary. (*Czech Republic, Constitutional Court, Date of issuance: 15-09-1999, Number of case: Pl. US 13/99, CZE-2000-1-001, [English](#)*)

The aim of the functional separation of public authorities into legislative, executive and judicial branches is the delimitation of responsibilities between the different organs of the public authorities and the prohibition of the appropriation of full state powers by any one of these authorities. In Ukraine, justice is dispensed exclusively by the courts. The Constitution embodies the principles of the independence of judges as the organs of the judicial authority and of non-interference in the administration of justice. The special arrangements for the funding of the courts represent one of the constitutional guarantees for the independence of judges. This guarantee mechanism is represented by the State's duty to ensure the proper financial and material conditions for the functioning of the courts and the judges by making provision in the national budget for the expenditure pertaining to the maintenance of the courts. The centralised procedure for the funding of the judicial organs by means of the national budget to a level which guarantees the necessary economic conditions for the full and independent administration of justice and the financing of the needs of the courts (expenditure for trials, running costs, maintenance and repairs, security, logistics, postal expenses etc) is designed to ensure the freedom of the courts from any outside influence. This procedure is aimed at ensuring judicial activity on the basis of the principles and provisions of the Constitution.

The absence of established criteria for the financing of the courts by the central government cannot serve as a justification for the legislative or executive authorities to define the relevant figures arbitrarily, since the necessary amounts in the national budget for the upkeep of the courts cannot be reduced to a level which fails to comply with the constitutional provisions regarding the funding of the judicial system. The budgetary appropriations for the maintenance of the judiciary are directly protected by the Constitution and cannot be reduced by the organs of the legislative or executive authorities below the level which ensures the complete and independent administration of justice in accordance with the law.

While it is true that the power to assess whether an expert opinion is necessary or desirable lies with the courts and that they accordingly have the right to request such an opinion on their own initiative, and while such an opinion is often an essential instrument for the exercise of their jurisdiction when scientific knowledge is required, the order issued by a municipal court in the particular case examined by the Court (see summary) called for verification of judgments that had already been given by official technical and scientific bodies; the court was therefore using procedural rules for inappropriate ends by creating a conflict with the procedures - for scientific experimentation - established by law (see summary). The authority of another state organ may be usurped or undermined both as a result of the practical consequences of the action or behaviour at issue, and in relation to "the intrinsic nature of the claims" which brought about the conflict (see cross-references). The Court in no sense wishes to dispute the role of the courts in protecting rights, including rights *vis-à-vis* the public authorities; however, in the case referred to it for examination, a court's undue exercise of its powers of investigation led to unquestionable interference in the sphere of the executive,

particularly with regard to the authority of technical and scientific bodies with official responsibility for medical trials (see summary). (*Italy, Constitutional Court, Date of issuance: 02-04-1999, Number of case: 121/1999, ITA-1999-1-004, [English](#)*)

The judiciary has its own budget and the Minister of Justice is therefore not entitled to manage any part of it. (*Bulgaria, Constitutional Court, Date of issuance: 14-01-1999, Number of case: 01/99, BUL-1999-1-001, [English](#)*)

By reducing federal budget expenditure for the judicial system, the Government and the Ministry of Finance fail to guarantee the complete and independent administration of justice and the smooth functioning of the judiciary, thereby diminishing the confidence of the Russian people in the state and ultimately jeopardising the human and civil right to judicial protection guaranteed by the Constitution, because the realisation of the constitutional provisions on ensuring the judicial protection of human and civil rights and freedoms is inseparably linked to the creation by the state of the necessary conditions for the functioning of the courts.

Given the principle universally recognized in international law of the independence of the courts, it should be borne in mind that the Vienna Declaration and Action Programme adopted at the Second World Conference on Human Rights (June 1993) consolidates this principle of the need for proper financing of institutions responsible for the administration of justice. Article 2 of the federal Law of 30 March 1998 "on the ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the protocols thereto" stipulates that as from 1998, the federal budget must provide for the necessary increase in allocations for the operation of the federal judicial system for the purpose of applying legal rules fully in keeping with the Russian Federation's commitments arising from its accession to the Convention and its Protocols. (*Russia, Constitutional Court, Date of issuance: 16-06-1998, Number of case: RUS-1998-2-005, [English](#)*)

VI. DUTIES AND RESPONSIBILITIES (ACCOUNTABILITY)

1. In principle, a piece of legislation that has been incorrectly interpreted and applied in a particular case neither constitutes nor is taken to include excessive use of judicial authority and abuse of the official position of a judge, even when another person suffers damage or where material gain is obtained.

2. Whether an abuse of judicial authority occurred requires a showing that the judge's decision exceeds the boundaries of what is acceptable, is absurd in itself and obviously, in the interpretation and application of legislation, or favours the resolution of a specific legal issue to the benefit or detriment of a party in the proceedings.

3. An essential element for the «abuse of the position of judge» claim is that the substantive or procedural breach evidently affected the legal position of one of the parties in the proceedings, resulting in the discriminatory treatment of the other party (e.g. the judge consciously/deliberately acted contrary to the principle of the equality of arms of the parties).

4. In terms of the judge's responsibility for the «abuse of position», it is not relevant whether as a result of his or her action (or omission) the aim of exceeding the official authority (of the judge) was accomplished. It is a formal criminal offence concluded at the time the act was committed. Furthermore, there must be (indisputable) awareness on the part of the judge about how his or her legal opinion issued in the interpretation and application of the piece of legislation may affect the outcome of the proceedings, and his or her awareness and intention to obtain material gain for others or to cause damage to others.

5. Therefore, the fact that a judge issues an opinion concerning the application of legislation, which might be contrary to case-law and related positions, may not in itself indisputably mean that the «judge had the intention» of abusing his or her official position. (*Croatia, Constitutional Court, Date of issuance: 22-01-2015, Number of case: U-III-5614/2013, U-III-5577/2013, [English](#)*)

VI. 1. LIABILITY OF JUDGES

The constitutional principle of judicial independence necessarily involves the principle of responsibility. Judges must be subject to the law, including disciplinary liability, in order to exercise their power responsibly. Likewise, the constitutional status of magistrates imposes specific requirements, including good reputation, as a prerequisite of access and promotion in the profession.

Authorities entitled to carry out disciplinary action include the Judicial Inspection, the Minister of Justice, the President of the High Court of Cassation and Justice, and the Prosecutor General of the Prosecution Office attached. Extending the scope to include the High Court of Cassation and Justice and regulating the powers of the new holders of the rights to carry out the disciplinary action are not likely to infringe on the constitutional provisions. The reason is that the mentioned authorities do not acquire power of decision with respect to disciplinary sanctioning of judges and prosecutors, and the role of the court to adjudicate over disciplinary liability rests with the Superior Council of Magistracy, given its role as guarantor for judicial independence. *(Romania, Constitutional Court, Date of issuance: 11-01-2012, Number of case: 2/2012, ROM-2012-1-001, [English](#))*

VI. 1.1. JUDICIAL IMMUNITY

Draft laws on amending Article 80 of the Constitution to limit or abolish members of Parliament and judicial immunity relate only to their special status and do not affect the content of the constitutional human and citizens' rights and freedoms. Therefore, the draft laws do not contradict the requirements of Article 157.1 of the Constitution. Committing a grave or especially grave crime against life or health of an individual by a judge is a reasonable basis for detention at the moment of or immediately after the commission of the offence. *(Ukraine, Constitutional Court, Date of issuance: 16-06-2015, Number of case: 1-v/2015, UKR-2015-2-006, [English](#))*

Criminal proceedings against a judge who has delivered a manifestly erroneous decision that has not been set aside or annulled are unconstitutional. The Court noted that the principles of the security of office and immunity of judges ensure the autonomy and independence of the judiciary and serve as a guarantee of the interests of justice. The Constitution gives the legislature the right to establish a special procedure for criminal proceedings against a judge. The judge incurs liability only once this decision has been recognised as erroneous or arbitrary. If this is not the case, the proceedings against the judge deny the definitive and mandatory nature of the final judgment delivered on behalf of the state. Proceedings against a judge constitute interference by the organs of the executive. This violates the principles of independence and justice guaranteed by Article 10 of the Constitution. *(Russia, Constitutional Court, Date of issuance: 18-10-2011, Number of case: 23, RUS-2011-3-008, [English](#))*

The rationale behind the principle of the immunity of judges is not simply to protect them from other branches of government, but also to protect them from those participating directly in court proceedings. The immunity from liability of judges is a limitation on access to court in situations where judges have been sued for opinions they have stated or court decisions they have issued. Such limitations on access to court are legitimate to the aim being pursued, which is the protection of the independence of courts and judges. In the context of the separation of powers, the independence of judges (as bearers of the judicial function) from any other form of authority represents a fundamental principle of the independence of the judiciary. *(Serbia, Constitutional Court, Date of issuance: 18-02-2010, Number of case: Uz-1283/2008, SRB-2011-1-003, [English](#))*

The significance of judicial immunity is particularly profound in countries where democracy and mechanisms for the separation of powers have not yet been consolidated. Independence of judges and courts may exist without the need for the institution of immunity in countries of mature democracy, where the understanding of the separation of powers is already entrenched, and where there is a high degree of legal and political culture. These factors minimize the political risk of abusing the possibility of a judge's removal from office owing to the content of judgments delivered by them. *(Poland, Constitutional Tribunal, Date of issuance: 28-11-2007, Number of case: 39/07, [English](#))*

The provisions of Article 126.2 of the Constitution are to be understood as safeguarding the independence of judges in relation to rendering justice and prohibiting any acts towards them on the part of public authorities, institutions and organisations, local governments and their officials, individuals or businesses aimed at preventing a judge from carrying out his or her professional duties or making a judge biased in order to produce an unjust decision. *(Ukraine, Constitutional Court, Date of Issuance: 01-12-2004; Number of case: 19-rp/2004, UKR-2004-3-021, [English](#))*

General meetings of judges, prosecutors and staff aim at unifying the practice of law enforcement and improving judges' qualifications. They cannot be transformed into employment agencies for legal professions. Such an approach may strike at the foundations of the administration of justice. Pursuant to the Constitution, only the Public Prosecutor's Office has the power to bring charges and take steps which may give rise to criminal liability, as well as gather, check and assess any information in accordance with the requirements of the Code of Criminal Procedure. It is therefore contrary to the Constitution to grant one-fifth of the members of the Judicial Service Commission the right to request the lifting of judicial immunity. Intervention by the executive power in the organisation and activities of courts is contrary to the Constitution and therefore unacceptable. *(Bulgaria, Constitutional Court, Date of issuance: 16-12-2002, Number of case: 13/02, BUL-2002-3-003, [English](#))*

The provision of the Law whereby criminal proceedings cannot be instituted against a judge without the consent of the Appointments Board is one of the guarantees of judges' inviolability.

The Appointments Board is the judges' body which ensures that legislation on the status of judges is applied. The requirement of consent from the Appointments Board concerned for the institution of criminal proceedings against a judge does not go beyond the guarantees which may be considered necessary and sufficient to ensure judges' inviolability.

The Appointments Board's refusal to give its consent to criminal proceedings against a judge may be challenged by appealing to the Supreme Appointments Board. A provision of the Constitution states that appeals may be brought before the courts against the acts and decisions of State bodies, local self-government bodies, public associations and officials which result in a violation of the rights and freedoms of citizens or prevent citizens from exercising such rights and freedoms. There are no exceptions to this constitutional principle. *(Russia, Constitutional Court, Date of issuance: 07-03-1996, Number of case: RUS-1996-1-003, [English](#))*

VI. 1.2. DISCIPLINARY LIABILITY

In the instance case the legal issue to be examined by the Constitutional Court is whether the provision of the law on the Status of Judges, stipulating that a judge commits a disciplinary offense when his/her opinion is found by the European Court of Human Rights to be in violation of fundamental human rights and freedoms, violates constitutional principles of independence, impartiality and immovability of a sitting judge. According to the meaning of the contested legal norm, condemnation of the Republic of Moldova through the decision of the European Court of Human Rights implies disciplinary liability of judges. The Constitutional Court emphasized that judges shall enjoy immunity in the exercise of justice. Such immunity would be undermined if a decision to cancel or modify a judge's court decision becomes a determining reason to sanction the judge and render him /her liable for an opinion that was expressed during his/her administration of justice and through an issuance of a decision. Thus, judges cannot be constrained to exercise their powers under the threat of sanction, as that may influence their ultimate decision. In exercising their duties, the judges must possess unhampered freedom to resolve cases impartially in accordance with the law and their own assessment of the facts. According to principle of international law, any miscarriage of justice must be found and fixed as a priority by effective remedy. In light of evolutionary and dynamic approach to the European Convention on Human Rights by the European Court of Human Rights, «automatic» accountability of judges is inadmissible in such cases without demonstrating the objective and subjective sides of the disciplinary breach. The Constitutional Court concluded that disciplinary accountability of judges based on a European Court of Human Right's decision without evidence that the law was violated by a judge deliberately or through gross negligence, constitutes an inadmissible interference in the implementation of the principles of independence, impartiality and immovability of the judge. (*Moldova, Constitutional Court, Date of issuance: 07-06-2011, Number of case: 12, MDA-2011-2-002, [English](#)*)

Disciplinary proceedings against judges and prosecutors, including their dismissal, are not contrary to the Constitution. However, the sanctions must be proportionate to the seriousness of the offence and applied in accordance with established legal procedure. International law provides that judges may be suspended or relieved of their duties only in the event of an inability to fulfil their judicial functions, conduct incompatible with their status, criminal offences or serious violations of disciplinary rules. The judge cannot be the subject of disciplinary proceedings in the form of a dismissal for judicial error in cases where the irregularity of the judicial act does not stem from conduct incompatible with judicial status. (*Russia, Constitutional Court, Date of issuance: 28-02-2008, Number of case: RUS-2008-2-002, [English](#)*)

Article 64 of the Constitution guarantees the independence of the judiciary. The principle of separation of powers is set out in Article 16 of the Declaration of the Rights of Man and of the Citizen of 1789. Neither principle rules out the possibility of legislation extending judges' disciplinary liability to their judicial activity, by providing that they may be liable for a serious, deliberate violation of a procedural rule constituting an essential guarantee of the rights of parties to proceedings. However, these principles do prevent the institution of disciplinary proceedings where a violation has not previously been recognised by a final judicial decision. Article 16 of the Declaration of 1789 and Article 64 of the Constitution guarantee the

independence of the courts and the specific nature of their functions. These cannot be interfered with by parliament, government or any administrative authority. In the case under consideration the authors of the institutional act had made the Mediator of the Republic, assisted by a committee, responsible for hearing complaints lodged by parties to proceedings. The legislation did not allow the mediator to express opinions on judicial decisions. It did, however, entitle him to "seek all relevant information" from the heads of the courts of appeal and the higher courts. It also provided that, where the mediator considered that the impugned acts qualified as a disciplinary offence, he or she could transmit the complaint to the Minister of Justice for referral to the High Judicial Council (*Conseil supérieur de la magistrature*). The Minister of Justice was then obliged to ask the competent bodies to conduct an inquiry; in cases where the minister was not legally bound to bring disciplinary proceedings, he must inform the mediator thereof by a reasoned decision, and the mediator could then issue a special report published in the official gazette. In granting all these powers to the mediator, the authors of the institutional act had breached both the principle of separation of powers and that of independence of the judiciary. (*France, Constitutional Court, Date of issuance: 01-03-2007, Number of case: 2007-551 DC, FRA-2007-1-003, [English](#)*)

In the course of proceedings involving an appeal against a decision of the High Council of Justice, the Supreme Court stayed the proceedings and made a reference to the Constitutional Court with a request to strike out Article 6/9 of the Law "on the organisation and function of the Ministry of Justice," as well as Articles 31/1, 31/3 and 16/1.c of the Law "on the organisation and functioning of the High Council of Justice", on the ground of incompatibility with the Constitution of the Republic of Albania. In its reference, the Supreme Court stated that the Minister of Justice's right to control the activity of ordinary courts and his or her right in relation to disciplinary proceedings against judges ran counter to the independence of the judicial power and could be considered as an infringement of the separation of powers because the body competent for disciplinary proceedings against judges is the High Council of Justice.

Assessing the content of the impugned provisions, the Constitutional Court held that the Albanian Constitution guarantees the independence of the judicial power, granting judges the right of being untouchable and irremovable from office without reasonable grounds, as well as the prohibition of criminal proceedings without the authorisation of the High Council of Justice. Only courts have the right to review judicial decisions. The High Council of Justice may take disciplinary measures against judges only in cases where their court decisions are associated with acts and conduct that seriously discredit the profession and position of judge and the authority of the judicial power. That being so, the Constitutional Court considered that the provisions dealing with the subject of control did not speak of control of the decision-making activity, but of inspection as to the administration of justice. The Constitutional Court dismissed as unfounded the Supreme Court's claim that the Minister of Justice's right to carry out inspections in the courts and his or her right to make proposals for the dismissal of judges violated the principle of the separation of powers. According to the Constitutional Court, the principle of separation of powers not only implies their separation, but also their balance. Thus, those powers should cooperate in order to accomplish their goals, and should respect and control each other. Those powers should cooperate with and control each other to the extent that their constitutional functions are not affected.

The decisions of judges should conform only to the Constitution and laws. In order to ensure the best results, mechanisms have been introduced to ensure that pressure is not applied from inside or outside the judicial power. The Albanian Constitution has entrenched the independence of the different state powers, putting the emphasis on the independence of the judicial power. The establishment of the High Council of Justice is a component element of that principle. The fact that the Minister of Justice carries out verification of alleged violations

by judges and presents proposals for disciplinary proceedings is not unconstitutional because the Minister has no right to vote and the High Council of Justice is free to decide on his or her proposals, thereby guaranteeing judges due process of law in disciplinary proceedings. (*Albania, Constitutional Court, Date of issuance: 27-05-2004, Number of case: 11, ALB-2004-2-002, [English](#)*).

This judgment deals with the institutional independence and constitutional legitimacy of the South African magistracy in the light of certain statutory provisions applicable to magistrates. The issue was raised when three applicants challenged criminal proceedings against them, contending that magistrates do not comply with the standard of independence prescribed by the Constitution for the judiciary. The Constitutional Court did not find the impugned provisions inconsistent with the Constitution. The Constitutional Court stressed that although judicial independence should be considered through the eyes of the reasonable, well-informed, thoughtful observer, this observer had to be sensitive to the country's complex social realities, in touch with its evolving patterns of constitutional development and guided by the Constitution, its values and the distinction it draws between different courts. Judicial independence can be achieved in a variety of ways and the mere fact that the legislation regulating the independence of lower courts differs from the constitutional provisions regulating higher courts is no reason for holding it to be unconstitutional. The test for assessing judicial independence includes an objective element of appearance or perception (*South Africa, Constitutional Court, Date of issuance: 11-06-2002, Number of case: CCT 21/01, RSA-2002-2-010, [English](#)*)

Disciplinary action may not be taken against members of the judiciary who have broken their oath, so as not to create an environment in which they are unable to interpret and enforce the law in full accordance with their conscience and convictions. (*Bulgaria, Constitutional Court, Date of issuance: 14-01-1999, Number of case: 01/99, BUL-1999-1-001, [English](#)*)

Criminal procedural guarantees are not directly applicable to disciplinary procedure. Under the Constitution anyone who has disciplinary proceedings taken against him is entitled to a hearing and to defend himself. He is also entitled to adversarial proceedings, to consult the file and to a court or tribunal. Imposing two different penalties, one disciplinary, the other criminal, for the one offence did not contravene the *ne bis in idem* principle. (*Portugal, Constitutional Court, Date of issuance: 23-03-1995, Number of case: 161/95, POR-1995-1-005, [English](#)*)

Motion brought by members of parliament for interpretation of Article 56 of the Constitution concerning the right of magistrates to legal defence under the Supreme Judicial Council Act. The petitioners asked the Court to rule whether the absence of provisions in the Act about the magistrates' right to defence render it unconstitutional and whether the Act is in breach of Article 56 guaranteeing the right of citizens to legal defence. The right to defence of legitimate interests is a fundamental, universal and personal right of all citizens. Judges, prosecutors and examining magistrates enjoy this right on an equal footing. (*Bulgaria, Constitutional Court, Date of issuance: 17-05-1994, Number of case: 3/94, [English](#)*)

VI. 1.3. DUE PROCESS AND APPELLATE REVIEW IN DISCIPLINARY PROCEEDINGS

Where a judge is absent from a session of the High Council of Justice where his or her disciplinary case is being heard, the case may be heard in his or her absence and this does not represent encroachment on the guarantees of judicial independence or inviolability. *(Ukraine, Constitutional Court, Date of issuance: 16-06-2011, Number of case: 5-rp/2011U UKR-2011-2-005, [English](#))*

While conducting constitutional proceedings in connection with an appeal against a decision to suspend a judge from office and a decision on the disciplinary liability of a judge, the Constitutional Court functions like an ordinary court of appeal. In so doing, the right of the Council of the Court dealing with the case to establish the existence or non-existence of facts supporting a finding as to a violation of the constitutional rights of the appellant is not limited by special formal rules for giving evidence. The court's decision on the appeal excludes the right of the appellant to lodge a constitutional complaint. *(Croatia, Constitutional Court, Date of issuance: 27-05-2002, Case number: U-IX-163/2002, [English](#))*

The Court had to deal with proceedings for annulment brought by some judges in post at Eupen, a municipality in the German-speaking region, against a law of 7 May 1999 amending the provisions of the Judicial Code on the disciplinary system applying to judges.

The Court decided that a law which makes no provision for a German-speaking section of the National Disciplinary Board responsible for disciplinary proceedings against judges, but which does provide for the presence within the Board of a German-speaking judge when the Board is dealing with proceedings against a judge who has proven his knowledge of German and requested the benefit of proceedings in German, is not contrary to the constitutional principles of equality and absence of discrimination (Articles 10/11 of the Constitution). *(Belgium, Constitutional Court, Date of issuance: 31-05-2001, Number of case: 74/2001, [English](#))*

Under the Judiciary (Organisation) Act, the Judicial Service Commission (JSC), sitting to decide on a disciplinary measure against a judge, is required to summons the judge concerned and hear his or her side of the case. Two judges who sat on the JSC panel that disciplined a judge subsequently also sat in the joint chamber of the Court of Cassation, which rejected the judge's appeal. The Constitutional Court found that there had been a violation of the judge's right to be heard by the JSC, and of the principle of a fair trial inasmuch as two judges who were members of the JSC panel also sat in the joint chamber of the Court of Cassation. *(Albania, Constitutional Court, Date of issuance: 04-06-1999, Number of case: 43,ALB-1999-3-006, [English](#))*

VI. 1.4. CRIMINAL LIABILITY

Proposed legislation introducing amendments to the Constitution would not pave the way to the rights and freedoms of individuals being ruled out or fettered. Under Article 126.3 of the Constitution, a judge cannot be detained or arrested without the consent of Parliament until a guilty verdict is handed down by a court. The proposed wording gives the High Council of Justice the power to consent to a judge being detained, kept in custody or arrested pending the verdict unless the judge has been detained in flagrante delicto or immediately afterwards. The amendments to Article 126.3 of the Constitution were the subject matter of proceedings of the Constitutional Court, in which it examined the compliance of the draft Law on amendments to the Constitution regarding the immunity of People's Deputies and judges with Articles 157 and 158 of the Constitution and held that consenting to temporary restrictions on the freedom and the right to free movement of judges does not pose a threat or obstacle to human rights and freedoms. The draft Law also proposed consolidating within the Constitution a provision making it impossible to make judges liable for decisions they have rendered, unless a crime or a disciplinary offence has been committed; the Constitutional Court suggested that this did not represent a fetter on individual rights and freedoms. The draft Law proposed consolidating within the Constitution the perpetuity of a person holding the office of judge. The term of office of a judge of the Constitutional Court is a subject of regulation of the proposed wording of Article 148.6 of the Constitution. (*Ukraine, Constitutional Court, Date of issuance: 20-01-2016, Number of case: 1-v/2015, UKR-2016-1-001, [English](#)*)

VI. 1.5. CIVIL LIABILITY

The Constitutional Court noted in particular that questions of compensation for damage caused by violation of everyone's right to a fair trial were governed by Articles 6 and 41 ECHR and Article 3 Protocol 7 ECHR. It followed from these provisions that the state must assume liability for the court's error which led to the judgment and to ensure that the unlawfully convicted person was compensated, regardless of the judge's responsibility. However, the Convention did not oblige states themselves to compensate on the same terms (i.e. for any judicial error, regardless of the judge's responsibility) damage caused in the administration of justice in civil proceedings.

The contested provision must be examined and applied strictly in accordance with the provisions of the Constitution. When examining actions for reparation of damage caused by the unlawful actions (or omissions) of the courts in civil proceedings, if such actions did not relate to the adoption of decisions on the merits, the courts must not absolutely link the constitutional right to compensation by the state to personal responsibility on the part of the judge as established by a court judgment. Unlawful actions or omissions by a judge (including unlawful seizure of property, failure to adhere to reasonable time-limits in court proceedings, improper disclosure of procedural documents, unlawful delay in executing a judgment) must, in accordance with the present decision and with Articles 6 and 41 ECHR, be regarded as a violation of the right to a fair trial, entailing compensation for the person concerned. (*Russia, Constitutional Court, Date of issuance: 25-01-2001, Number of case: RUS-2001-1-004, [English](#)*)

VII. ETHICS OF JUDGES – HOW STANDARDS OF JUDGES SHOULD BE FORMULATED

VII. 1. THE VALUES/MERITS

VII. 1.1. INDEPENDENCE AS CONDUCT

In order to preserve public confidence in the judicial power, it is essential that judges, in their speech, maintain a clear distance from political competition at any level, including the local level. Judges cannot take part in the campaigns of individual politicians, political parties, political movements or election groupings. Nor can they make post-election statements with a view to influencing future coalitions. (*Czech Republic, Constitutional Court, Date of issuance: 15-09-2016, Number of case: I. US 2617/15, CZE-2016-3-007, [English](#)*)

The principle of an independent judiciary is an essential requirement of a democratic state governed by the rule of law. A statutory provision that limits a judge's ability to represent parties to proceedings or other persons involved in them is therefore legitimate and commensurate with the aim pursued, namely the protection of the independence, impartiality and fairness of judicial decision making and the dignity of judicial office. In its Judgment of 7 September 2010, the Plenum of the Constitutional Court dismissed a petition from the disciplinary panel of the Supreme Court seeking the repeal of § 80.5.b of Act no. 6/2002 Coll., on Courts, Judges and Lay Judges and State Administration of the Courts, and Amending Certain Other Acts (hereinafter, the "Act on Courts and Judges"), specifically the part that reads that a judge may not represent parties to court proceedings or act as the representative of the injured party or a party involved in court or administrative proceedings, with the exception of statutory representation and cases that involve representation of a secondary party to proceedings to which the judge himself or herself is a party. According to the petitioner, the contested provision impermissibly and beyond the framework of the norms of the constitutional order (Article 82.3 of the Constitution and Article 44, first sentence, before the semi-colon, of the Charter) prevents judges from taking any procedural steps in proceedings when representing persons related to them or other persons. Moreover, the Act draws an impermissible distinction between situations where the judge is himself or herself a party to a case and where he or she is not. The petitioner contended that in these cases, such conduct by a judge cannot violate the dignity of judicial office or endanger or weaken confidence in independent, impartial and fair decision making. The Constitutional Court considered its case law on the principle of independent and impartial courts, and noted that in view of the provisions of the Constitution and the Charter referred to by the petitioner, it cannot be considered unconstitutional for a statute to forbid a judge from acting as a representative, as mediator for a resolution of a legal dispute or as attorney of a party to proceedings. The Constitution and the Charter expressly permit further limitations to be provided by statute. The Constitutional Court found the specific limitations on a judge's ability to represent other persons in proceedings legitimate, as a judge is under an obligation to conduct himself or herself in his or her personal life in such a manner that his or her conduct does not violate the dignity of the judicial office and does not endanger or weaken confidence in independent, impartial, and fair decision making. The Constitutional Court pointed out that the term "independence" must be interpreted in accordance with the case law of the European Court of Human Rights from an objective viewpoint (viewed in terms of how independence and impartiality may appear to an external observer). The office of a judge is a public office, and if a judge was allowed to represent people, even if they were related to him or her, the possibility could not be ruled out of a breach of the dignity of judicial office and it could also threaten and weaken confidence in independent, impartial and fair decision

making by the courts. In the Constitutional Court's opinion the limitation under review imposed on judges is also in line with the promotion of the constitutional values mentioned above. (*Czech Republic, Constitutional Court, Date of issuance: 07-09-2010, Number of case: ÚS 22/09, CZE-2010-3-010, [English](#)*)

VII. 1.2. IMPARTIALITY

In order to preserve public confidence in the judicial power, it is essential that judges, in their speech, maintain a clear distance from political competition at any level, including the local level. Judges cannot take part in the campaigns of individual politicians, political parties, political movements or election groupings. Nor can they make post-election statements with a view to influencing future coalitions. (*Czech Republic, Constitutional Court, Date of issuance: 15-09-2016, Number of case: I. US 2617/15, CZE-2016-3-007, [English](#)*)

The applicant submitted a complaint to the Constitutional Court *inter alia* claiming a violation of his right to fair trial. He challenged the judge's bias to the objective principle because the same judge was president of the tribunal that decided on the complaint and was also the member of the panel that decided on the revision. The Constitutional Court noted that the fact that a judge, in the same case, participated in the procedure of second-instance and in the procedure of revision, may raise legitimate doubts as to the judge's impartiality and thus prejudice the principle of the court's impartiality. According to the case-law of the European Court of Human Rights the existence of such rules in the law manifests the legislator's concern to remove all reasonable doubts as to the impartiality of judges or courts and constitutes an attempt to ensure impartiality by eliminating the causes for such concerns. Further, according to the constant case-law of the European Court of Human Rights, the existence of impartiality for the purposes of Article 6.1 ECHR must be determined according to a subjective and objective test. Also, the fact that a particular judge had different roles in particular phases of a particular case may in certain circumstances bring the impartiality of the court into question, which is assessed in each particular case. The Constitutional Court noted that the existence of procedures for ensuring impartiality of the court, namely, the rules regulating the withdrawal of judges in particular cases is a relevant factor which must be taken into account. Accordingly, a failure to abide by these rules means that the case has been heard by a tribunal whose impartiality may be open to doubt. The Constitutional Court found that the right of the applicant to a fair trial, in the part relating to the court's impartiality, guaranteed by the Constitution and [Article 6.1 ECHR](#) was violated. (*Montenegro, Constitutional Court, Date of issuance: 28-12-2015, Number of case: 305/13, MNE-2016-1-001, [English](#)*)

Some property owners brought proceedings in the rent tribunal of the Canton of Geneva. During one of the hearings, they became aware that the division with jurisdiction to decide such disputes was to be presided over by a judge who, before entering the Geneva legal service, had been a lawyer in Geneva and had worked, in particular, for the tenants' association, Asloca. The applicants applied for withdrawal of the judge because of her links with Asloca and its lawyers. Ultimately, Federal Court examined this issue and dismissed the appeal. The Federal Court ruled that only objective circumstances may be taken into account and the purely subjective impressions of the party requesting a judge's withdrawal cannot be a determining factor. An application cannot be made for the presiding judge of a division of the rent tribunal to be withdrawn on the sole ground that he or she worked previously as a lawyer for the Swiss tenants' association, Asloca. A relationship of friendship or enmity between a judge and a lawyer can only constitute a ground for withdrawal if there are ties between the two whose closeness and nature are such as to raise objective fears that the judge may be influenced during the conduct of the proceedings and in his or her decision.

(Switzerland, Federal Court, Date of issuance: 31-01-2012, Number of case: 4A672/2011, SUI-2012-2-006, [English](#)).

The applicant submitted a constitutional complaint before the Constitutional Court challenging the judge's impartiality from an objective standpoint, as the judge in the case at issue was a member of the panel that decided about the review and of the panel that ruled in the proceedings following the complaint. There is a consistent case-law by the Constitutional Court to the effect that the existence of impartiality for the purposes of [Article 6.1 ECHR](#) must be determined according to a subjective test where regard must be given to a specific judge's personal convictions and behaviour (i.e. whether he or she held any personal prejudice or bias in a given case) and according to an objective test, where assessment is undertaken as to whether the tribunal itself and its composition offered sufficient guarantees to exclude any legitimate doubts over its impartiality. The Constitutional Court noted that assessment is necessary, in carrying out the objective test, as to whether, aside from the judge's conduct, ascertainable facts exist to cast doubt over his impartiality. In this connection, the Court noted relevant legislation stipulating the reasons for exemption of judges. According to the abovementioned law, a judge cannot adjudicate a case in which he or she has been involved at a lower instance or in some other judicial capacity. Therefore, the Constitutional Court found that a situation where, in the same proceedings, a judge has participated in the adjudication of the complaint and in subsequent review proceedings could cast doubt over his or her impartiality and that of the Court, giving rise to potential for a breach of the right to a fair trial. It accordingly upheld the constitutional complaint. *(Montenegro, Constitutional Court, Date of issuance: 08-12-2011, Number of case: MNE-2011-2-001, [English](#)).*

The applicant alleged before the Constitutional Court that a breach of the principle of impartiality and of the right to fair process had occurred because four of the seven judges who heard the appeal had previously intervened in the same case i.e. they had participated in the earlier decision. Supporting its position with jurisprudence from the European Court of Human Rights, the Constitutional Court distinguished between two hypotheses: a situation in which the same judge successively exercises different jurisdictional functions in the same case; and one in which, as the result of an appeal, he or she successively exercises the same jurisdictional functions. The first situation represents the accumulation of functions linked to the prosecution, the fact-finding phase and the trial, or of consultative and jurisdictional functions. The European Court of Human Rights has condemned the successive exercise of consultative and jurisdictional functions. The European Court of Human Rights considers that the simple accumulation of functions is not enough to automatically entail a breach of the right to fair process; an assessment must be carried out of the effective role a judge plays in his or her interventions, in order to determine whether the interested party's fears are objectively justified. The Constitutional Court observed that judicial impartiality is assessed on the basis of any functions the judge previously exercised in the same case; in the absence of other factors, even the entire history of the prior interventions by specific judges in that case is not sufficient to prove the existence of justified reasons to suspect partiality on the part of those judges. The Court concluded that an interpretation of a norm contained in legislation governing the Administrative and Fiscal Courts to the effect that the composition of the Court that hears appeals on the grounds of contradictory rulings can include judges who intervened in the ruling against which the appeal is being brought, or in the ruling on which the appeal is based, is not unconstitutional. *(Portugal, Constitutional Court, Date of issuance: 07-06-2011, Number of case: 281/11, POR-2011-2-010, [English](#)).*

The Constitutional Court dismissed a petition from the disciplinary panel of the Supreme Court seeking the repeal of the certain provisions of the law, prohibiting the judge representing parties to court proceedings or acting as the representative of the injured party. The Constitutional Court found the specific limitations on a judge's ability to represent other persons in proceedings legitimate, as a judge is under an obligation to conduct himself or herself in his or her personal life in such a manner that his or her conduct does not violate the dignity of the judicial office and does not endanger or weaken confidence in independent, impartial, and fair decision making. The office of a judge is a public office, and if a judge was allowed to represent people, even if they were related to him or her, the possibility could not be ruled out of a breach of the dignity of judicial office and it could also threaten and weaken confidence in independent, impartial and fair decision making by the courts. The Constitutional Court held that the limitation under review imposed on judges was in line with the Constitution. (*Czech Republic, Constitutional Court, Date of issuance: 07-09-2010, Number of case: ÚS 22/09, CZE-2010-3-010, [English](#)*)

The applicant was a victim of the use of police force during a protest and now was suing the police for this injury. The applicant challenged the constitutionality of military jurisdiction, which determined that military has jurisdiction over criminal cases involving military force, including the police, even when the victim is a civilian and argued, that military jurisdiction does not protect his constitutional rights, specifically the rights to an impartial judge. The Constitutional Tribunal declared that military jurisdiction concerning civilian cases was unconstitutional, because it does not comply with international standards concerning this issue and also does not guarantee the plaintiff's right to due process. The Tribunal determined that the right to be heard by an impartial judge is not safeguarded, because military jurisdiction aims to resolve cases where crimes are committed by military and military legal interests are infringed, which is here not the case. (*United States of America, Supreme Court, Date of issuance: 31-03-2009, Number of case: USA-2009-1-001, [English](#)*)

In some cases, the execution of justice cannot depend simply on material provided to the Court, and the judge will need to carry out certain actions, such as compiling missing evidence, in order to investigate the circumstances of the case in a thorough and objective fashion, and to establish the truth. In carrying out such activities, the Court must act in a way that gives no cause for accusations of partiality or influence. (*Lithuania, Constitutional Court, Date of issuance: 28-05-2008, Number of decision: 39/06, [English](#)*)

Two constitutional complaints were filed, challenging regulations on the basis of which assistant judges had adjudicated upon the complainants' rights and freedoms. The complainants claimed that the regulations were out of line with the Constitution given the fact that they gave assistant judges and judges equal powers to adjudicate, but at the same time deprived assistant judges of the constitutional guarantee of independence. The Constitutional Court noted that impartiality is an inherent feature of the judicial power and, simultaneously, an attribute of the judge. Loss of it results in the judge being unable to carry out his or her job. Impartiality consists in the objective assessment of parties to proceedings, both in the course of a pending case and while adjudicating. Lack of impartiality of a judge while adjudicating constitutes a particularly gross violation of the principle of judicial independence. If courts are to be perceived by the public as truly independent institutions, it is vital for the

administration of justice to be performed in such a way as to remove any potential reservations by parties to proceedings about the independence and impartiality of the Court. The Constitutional Tribunal stated that a statutory regulation, pursuant to which the assistant judge, while adjudicating, shall be independent and subject only to the Constitution and statutes, constituted merely a declaration, which did not provide for an actual and effective independence required by the Constitution. Such a regulation needs to be accompanied by specific legal provisions with regard to the practical assurance of the observance of the individual elements making up the notion of independence. Accordingly, the Constitutional Tribunal declared the provisions in question to be out of line with the Constitution. (*Poland, Constitutional Tribunal, Date of issuance: 24-10-2007, Number of case: SK 7/06, POL-2008-1-004, [English](#)*)

A judge's duties are not compatible with a job which has no bearing on the role of a judge. For example, a judge's right to administer justice is incompatible with the function of organising and holding elections. It is therefore not appropriate to include judges in electoral commissions as the Constitution suggests. This would conflict with the administration of justice and the independence of the judiciary. It could also result in conflicts of interest between judges, and make it difficult for judges and courts to remain impartial when resolving electoral disputes. (*Armenia, Constitutional Court, Date of issuance: 07-11-2006, Number of case: DCC-664, ARM-2006-3-002, [English](#)*)

Advocates, litigants, lay members of the Industrial Disputes Tribunal, two Trade Unions and two Employers' Federations filed complaints with the Supreme Council of Judicature, against the Presiding Judge of the Industrial Disputes Tribunal of Nicosia (hereinafter referred to as "the Judge"). They alleged misconduct in the exercise of his judicial functions. The complainants alleged that the Judge's constant and frequently contentious interventions and his comments during trials revealed bias and lack of impartiality, and distorted the fairness of proceedings. Having considered all the evidence adduced and all the material facts before it, the Council concluded that there had been misconduct on the Judge's part. This consisted of discourteous behaviour in the courtroom, lack of due consideration to parties to proceedings, witnesses, counsel and lay members of the Court. He had also made remarks on a constant basis demonstrating favouritism, prejudice and bias and, significantly, a keen interest in the outcome of cases. These acts amounted to serious breaches of judicial conduct, prejudicial to the administration of justice. The Council accordingly held that the Judge's acts and misconduct constituted sufficient grounds for his impeachment and removal from office. It was stressed that a Judge's decisions should not be influenced by his personal views, beliefs or opinions he may hold on various issues. Judges should discharge their functions with due respect to the principles of equal treatment of parties, non-bias, honesty, integrity and impartiality, so as to safeguard the fundamental right enshrined in Article 30 of the Constitution that everyone is entitled to a fair trial. Judges should act impartially in all circumstances, thus protecting the independence and integrity of the judiciary, which are crucial features of the administration of justice. The purpose of these proceedings was not to punish Judges but to uphold the high standard of justice. (*Cyprus, The Supreme Council of Judicature, Date of issuance: 19-09-2006, Number of case: CYP-2006-3-001, [English](#)*)

The Constitutional Court noted that a judge's duties are not compatible with a job which has no bearing on the role of a judge. For example, a judge's right to administer justice is incompatible with the function of organizing and holding elections. It is therefore not

appropriate to include judges in electoral commissions as the Constitution suggests. This would conflict with the administration of justice and the independence of the judiciary. It could also result in conflicts of interest between judges, and make it difficult for judges and courts to remain impartial when resolving electoral disputes. The Constitutional Court held that the provisions of Electoral Code, which allow for judges to be appointed to serve as members of central or regional electoral commissions, are in conflict with the Constitution.

The President of the Republic lodged an appeal before the Constitutional Court and claimed that the second sentence of Article 7.2.1 of the Law on "Human Rights' Defender", which stated: "...S/he may request information on any case that is at the stage of trial and submit recommendations to a court, so as to guarantee the right of citizens to a fair trial as enshrined in the Constitution of Armenia and norms of International Law" contradicted Articles 39 and 97.1 of the Constitution, as it violated the principles of independence of the court and equality as between the parties to the case. The applicant mentioned that analysis of the law-enforcement practice indicated that the term "information" was interpreted in a broader sense during the practical application of the provision in dispute. The Constitutional Court decided that the right of the Defender to request information from courts and submit recommendations to courts is not caused by the necessity to administer independent and impartial justice, and it creates an inter-legislative contradiction. The practice of law enforcement demonstrates that this provision interferes with the functions of the judiciary and it is not in conformity with the Constitution. "The right of the Defender to request information from courts should be satisfied, if it does not interfere with judicial proceedings, if it does not concern the administration of justice by a concrete case, and if it does not concern the material and procedural issues of the examination of the case under the judicial consideration." According to the Court, the international constitutional judicial practice on the disputed issue indicated that "the independent judicial system is protected constitutionally from any external intervention; therefore prescribing any authority for the Ombudsman to review the courts is not compatible with the principles of separation of powers and independence of the courts." (*Armenia, Constitutional Court, Date of issuance: 06-05-2005, Number of case: DCC-563, ARM-2005-2-001, [English](#)*).

The company, a party of a dispute, raised doubts as to the impartiality of the Supreme Administrative Court and argued that three of its five members, namely Justices X, Y and Z, who rejected their request concerning holding an oral hearing, had previously been involved in the subject of the dispute in their former positions at the Ministry of Finance and at the Court of Justice of the European Communities and were therefore biased in that respect. The complaint of the lack of impartiality was then handled by the Court with another set of judges, who examined the complaint and ruled that a prior responsibility for producing a legislative proposal based on political considerations cannot be considered to cast doubt on the judicial impartiality of a person called on to determine a dispute over the application of the same legislation. The Court noted that objective impartiality within the meaning of the Convention implies that an objective observer has no reasonable doubts as to the impartiality of the Court. However, it is not easy to draw definite conclusions from the case-law of the European Court of Human Rights in this respect. What one might gather from the case-law is that where a judge has previously been involved in the subject of the dispute, the question of impartiality must be assessed in view of his position and function at that time (see the Judgments of the European Court of Human Rights, *Procola v. Luxemburg* and *Kleyn and others v. the Netherlands*). (*Sweden, Supreme Administrative Court, Date of issuance: 04-02-2005, Number of case: 3841-04, SWE-2005-1-001, [English](#)*).

The Attorney General of the Republic filed a direct action, challenging regulation on the basis of which judges could carry out the investigation and evidence gathering in cases of criminal prosecution where there is a possibility of violation of privacy or confidentiality rights, granted by the Constitution or by law, concerning fiscal, banking, financial or electoral information. The petitioner claimed that the impugned provision violated the principles of the impartiality of the judge. The Court granted the action and held that in cases of criminal prosecution where there is a possibility of violation of privacy or confidentiality rights, concerning fiscal, banking, financial or electoral information, investigation and evidence gathering carried out by judges violates the principles of the impartiality of the judge and of the publicity of proceedings, as enshrined in the Constitution. Allowing the judge to personally engage in the collection of evidence that may later serve as the foundation of his own ruling would jeopardise the judge's impartiality and therefore due process in the criminal justice system (*Brazil, Federal Supreme Court, Date of issuance: 12-02-2004, Number of case: ADI 1.570, BRA-2009-1-009, [English](#)*)

The applicant was a judge of the Court of Quebec against whom chief judge of the Court of Quebec laid a complaint with the Judicial Council, alleging that she breached the Code of Ethics. The applicant argued that the provisions of the Quebec Courts of Justice Act, allowing the chief judge of the Court of Quebec to lodge a complaint with the Judicial Council against a judge of that court, violated the principles of judicial impartiality and independence. The Supreme Court dismissed the appellant's appeal and stated that, it cannot be concluded from an examination of the powers conferred on the chief judge of the Court of Quebec by the Courts of Justice Act that they might compromise the impartiality of members of the Judicial Council or the committee of inquiry in dealing with a complaint lodged by the chief judge". The Supreme Court held that where the chief judge makes use of the disciplinary process by taking the initiative of laying a complaint, there is no reason to think that the Council and its committee do not, in the eyes of a reasonable and well- informed observer, have the impartiality required to carry out their duties (*Canada, Supreme Court, Date of issuance: 14-12-2002, Number of case: CAN-1996-1-002, [English](#)*)

The Constitutional Court was asked to determine whether a requirement that a High Court judge be appointed as the head of special unit investigating state corruption, undermines the independence of the judiciary and the separation of powers and is therefore unconstitutional. The Constitutional Court proceeded to set out the relevant factors in considering whether it is constitutional to assign a non-judicial function to a judge and took the view that the factors should be given a weight appropriate to the nature of the function that the judge is required to perform, and the need for that function to be performed by a person of undoubted independence and integrity. Ultimately the Court is required to determine whether or not the functions are incompatible with the judicial office, and if they are, whether there are countervailing factors that suggest that the performance of such functions by a judge will not be harmful to the institution of the judiciary. Although it was clear that the head of the SIU should be a person of integrity, judges are not the only persons with that attribute. Furthermore, the functions required to be performed by the head of the SIU, which include a duty to investigate and litigate on behalf of the state are, by their very nature, partisan. Having taken all these factors into account, the Constitutional Court concluded that the appointment of the judge as head of the of special unit investigating state corruption, was incompatible with his judicial office and contrary to the separation of powers required by the Constitution. (*South Africa, Constitutional Court, Date of issuance: 28-11-2000, Number of case: RSA-2000-3-017, [English](#)*)

Finally, the Court found that a third possible meaning of "impartiality" - the quality of maintaining an open mind to competing arguments on a particular issue - was under inclusive in that it allowed appreciable damage to that purportedly vital interest to remain unprohibited. In this regard, the Court rejected the argument that statements made in an electoral campaign, as opposed to statements that might have been made by a future candidate in other settings, are uniquely destructive of the quality of open-mindedness. In sum, the Court concluded that the announce clause could not survive strict scrutiny under any reasonable construction of the term "impartiality" and therefore found it invalid under the First Amendment. (*United States of America, Supreme Court, Date of issuance: 27-06-2002, Number of case: 01-521, USA-2002-2-007, [English](#)*).

The complainants contested a decision on the exclusion of judges from hearing and deciding matters and objected that the court's actions violated their constitutional right to a judge as properly guaranteed by law. The Constitutional Court noted that decisions on cases of alleged bias must be based exclusively from an objective viewpoint. It is not admissible to rely only on doubts concerning the relationship of judges to the case under review or persons directly affected by the act. There must also be a substantive legal analysis of the facts leading to such doubts. A judge can be excluded from hearing and deciding a matter only when it is evident that the judge's relationship to the matter, the parties or their representatives, is of such a nature and intensity that, despite his statutory duty, he will be unable or incapable of making a decision independently and impartially. The judge's relationship to the matter, or to the parties or their representatives, must be evaluated from two interconnected angles: the nature of the relationship, and whether it appears that the judge is heavily involved in the matter. In the given case the Constitutional Court was convinced that the judges were able to decide the complainant's matter without bias and impartially, therefore, the petition was granted. (*Czech Republic, Constitutional Court, Date of issuance: 03-07-2001, Number of case: II. US 105/01, CZE-2001-2-011, [English](#)*)

The Constitutional Court was asked to determine whether a requirement that a High Court judge be appointed as the head of special unit investigating state corruption, undermines the independence of the judiciary and the separation of powers and is therefore unconstitutional. The Constitutional Court proceeded to set out the relevant factors in considering whether it is constitutional to assign a non-judicial function to a judge and took the view that the factors should be given a weight appropriate to the nature of the function that the judge is required to perform, and the need for that function to be performed by a person of undoubted independence and integrity. Ultimately the Court is required to determine whether or not the functions are incompatible with the judicial office, and if they are, whether there are countervailing factors that suggest that the performance of such functions by a judge will not be harmful to the institution of the judiciary. Although it was clear that the head of the SIU should be a person of integrity, judges are not the only persons with that attribute. Furthermore, the functions required to be performed by the head of the SIU, which include a duty to investigate and litigate on behalf of the state are, by their very nature, partisan. Having taken all these factors into account, the Constitutional Court concluded that the appointment of the judge as head of the of special unit investigating state corruption, was incompatible with his judicial office and contrary to the separation of powers required by the Constitution. (*South Africa, Constitutional Court, Date of issuance: 28-11-2000, Number of case: RSA-2000-3-017, [English](#)*)

Mr. Tous Aguiló was convicted on several charges of fraud and obtaining by illegal means. In the course of the hearing, the criminal court summoned as a witness a person who was involved in the facts of the case and had been mentioned by various individuals but whom neither the prosecution nor the defence had called to give evidence. The defendant appealed before the Constitutional Court. The Constitutional Court ruled that the criminal court's action did not violate either the basic right to judicial impartiality, which is part of the right to a trial with all guarantees, or the adversarial principle. The Court held that, in certain well-defined circumstances the law allows judges to call evidence in the course of a criminal hearing. Unless this practice is combined with inquisitorial action or reflects a bias in favour of either the prosecution or the defence, it does not violate either the right to judicial impartiality or the adversarial principle". (*Spain, Constitutional Court, Date of issuance: 10-07-2000, Number of case ESP-2000-2-023, [English](#)*)

The appellant during criminal proceedings against him challenged the independence and impartiality of judge I.S, a member of the court, on the grounds that I.S. was simultaneously employed at the Ministry of Justice, but the Supreme Court rejected his objection, stating that the judge was temporarily relieved of his or her duties at the Ministry of Justice. Following the Supreme Court ruling, the regional court tried the appellant's case in the same composition, found him guilty and sentenced him to thirteen years' imprisonment without remission. The appellant lodged a complaint with the Constitutional Court, which was ultimately upheld. The Constitutional Court noted in particular that the function of judge is a constitutional office and that the holding of such office is incompatible with the holding of any other constitutional office, including one in a government department. This principle derives from the principle of separation of powers and is intended, from the point of view of judicial independence and impartiality, to ensure that court decisions are not influenced by other bodies of the state. Referring to the case-law of the European Court of Human Rights principally the Judgments in the cases of *Delcourt v. Belgium* (1970) and *Ferrantelli and Santangelo v. Italy* (1996) the Constitutional Court stressed that the key issue in the case in question was that of inadequate objective impartiality. In the view of the Court, it was unacceptable to combine the two offices, even where a judge was temporarily relieved of his or her duties at the Ministry of Justice in order to decide pending cases. (*Slovakia, Constitutional Court, Date of issuance: 15-06-2000, Number of case: III. US 16/00, SVK-2000-2-004, [English](#)*)

The proceedings before the court concerned an appeal by the President of the Republic of South Africa against a decision of the High Court which had reviewed and set aside his decision to appoint a commission of inquiry into the management of the South African Rugby Football Union (SARFU). One of the respondents filed an application for the recusal of certain members of the court on the grounds that he had a "reasonable apprehension" that members of the court could be biased against him in favour of the President. The Court dismissed each of the allegations upon which the perception of alleged bias was founded and stated that, a litigant has the right to apply for the recusal of a judge where there is a reasonable apprehension that the judge will not decide a case impartially. This, however, does not give the litigant the right to object to a case being heard by a particular judge, simply because the litigant believes that such a judge would be less likely to decide the case in the litigant's favour than would another judicial officer drawn from a different segment of society". The Court held that a judge is under a duty to withdraw from a case on the grounds of perceived bias, where a reasonable, informed person would reasonably apprehend that the judge would not decide the case impartially. This is in accordance with the constitutionally protected right to a fair trial. However, if there are no valid grounds for such an apprehension,

judicial officers are under a duty to decide the case before them. (*South Africa, Constitutional Court, Date of issuance: 07-05-1999, Number of case RSA-1999-2-005, [English](#)*)

The proceedings before the court concerned an appeal by the President of the Republic of South Africa against a decision of the High Court which had reviewed and set aside his decision to appoint a commission of inquiry into the management of the South African Rugby Football Union (SARFU). One of the respondents filed an application for the recusal of certain members of the court on the grounds that he had a "reasonable apprehension" that members of the court could be biased against him in favour of the President. The Court dismissed each of the allegations upon which the perception of alleged bias was founded and stated that, a litigant has the right to apply for the recusal of a judge where there is a reasonable apprehension that the judge will not decide a case impartially. This, however, does not give the litigant the right to object to a case being heard by a particular judge, simply because the litigant believes that such a judge would be less likely to decide the case in the litigant's favour than would another judicial officer drawn from a different segment of society". The Court held that a judge is under a duty to withdraw from a case on the grounds of perceived bias, where a reasonable, informed person would reasonably apprehend that the judge would not decide the case impartially. This is in accordance with the constitutionally protected right to a fair trial. However, if there are no valid grounds for such an apprehension, judicial officers are under a duty to decide the case before them. (*South Africa, Constitutional Court, Date of issuance: 07-05-1999, Number of case RSA-1999-2-005, [English](#)*).

The Code of Criminal Procedure establishes the impartiality of the judges. The judge may not investigate the case at any phase of the procedure in cases where he was formerly the victim, the civil claimant or respondent in that case, or if he participated in the case as a witness, prosecutor, an expert etc. Under such circumstances the judge must withdraw from the case. (*Lithuania, Constitutional Court, Date of issuance: 05-02-1999, Number of case: 5/98, [English](#)*)

The applicant had been condemned to a term of fifteen years imprisonment, having been found guilty of complicity in the crime of grievous bodily harm followed by death of a person while in police custody. The applicant filed a constitutional application alleging that during the criminal proceedings his right to a fair trial had been breached. The applicant *inter alia* alleged that the presiding judge in the trial by jury was not objectively impartial. The applicant contended that in the early stages of the jury, the judge delivered certain decisions which instilled the appearance that he was prejudiced against the applicant. The Constitutional Court held that in applying the objective test, what is at stake is the confidence which the courts in a democratic society must inspire in the public and, above all, as far as criminal proceedings are concerned, in the accused. Justice must not only be done; it must also be seen to be done. It further held that according to jurisprudence of the European Convention on Human Rights, the mere fact that a judge has made pre-trial decisions cannot be taken as in itself justifying fears as to his impartiality. What matters is the extent and the nature of those decisions. The Constitutional Court held that notwithstanding this preliminary decision, namely revoking the applicant's bail and ordering his immediate arrest, at no point in time did the judge express an opinion on the character of the applicant. The Court concluded that when the criminal proceedings instituted against the applicant are examined as a whole, one could safely declare that they were fair. (*Malta, Constitutional Court, Date of issuance: 18-08-1998, Number of case MLT-1998-2-002, [English](#)*)

The Constitutional Court was addressed by the person who was detained by the policemen of the police headquarters in Vienna for trying to resist arrest. This person subsequently filed a complaint against the action of the policemen with the Independent Administrative Tribunal of Vienna. Before the Constitutional Court the applicant was arguing that his right to a fair trial by an independent and impartial tribunal established by law was infringed by the dismissing of his complaint by the single member of the Independent Tribunal who was a lawyer of the police headquarters until being appointed a member of the aforementioned Tribunal and who would probably return to his former office. The Constitutional Court found that there had been no breach of the rights alleged but that the single member of the Independent Administrative Tribunal issuing the impugned decree did not satisfy the requirements embodied in the term «independent authority». A civil servant of the police headquarters, on leave from this position during his time as a member of the Independent Administrative Tribunal and entitled to review the legality of actions taken by members of the same police headquarters, may be seen as loyal to his former and possibly future colleagues. The Constitutional Court overruled the impugned decision. (*Austria, Constitutional Court, Date of issuance: 02-10-1997, Number of case: B 2434/95, AUT-1997-3-007, [English](#)*).

It is contrary not only to the constitutional principle of judicial independence but also to the separation of powers if the Minister of Justice and the Public Prosecutor have a discretionary power to decide whether a lawyer in both private and commercial practice can act as a legal representative before a court or prosecution service where he or she was employed as a judge or a prosecutor. (*Hungary, Constitutional Council, Date of issuance: 14-11-1996, Number of case: 52/1996, HUN-1996-3-010, [English](#)*).

The office of judge of the municipal court is not incompatible with the office of president of the electoral commission, since the judge who is appointed as president of the electoral commission has no opportunity by law to decide as a judge in cases involving unlawful activities of the electoral commission. (*"The former Yugoslav Republic of Macedonia", Constitutional Court, Date of Issuance: 23-10-1996, Number of case: U.216/96, MKD-1996-3-007 [English](#)*)

In this case the accused complained in cassation proceedings that the Court of Appeal had displayed bias during the trial, and thus he had not been tried by an impartial tribunal within the meaning of Article 6.1 ECHR. The Supreme Court held that the accused could have challenged the Court of Appeal on the grounds of bias, as soon as he had become aware of facts or circumstances which could impair judicial impartiality. As the accused failed to do so, despite the fact that the Appeal Court had expressly apprised him of his statutory right to enter a challenge, it was not possible to sustain a defence to this effect in cassation proceedings. The only exception would have been if special circumstances had existed that provided compelling reasons to believe that one or more of the judges of the Court of Appeal had been biased against the accused, or at any rate that a concern to this effect on the part of the accused could be justified objectively, which did not apply in the case at hand. (*The Netherlands, Supreme Court, Date of issuance: 16-05-1995, Number of case: 98.804, NED-1995-2-007, [English](#)*)

According to the constitutional complaint, the Constitutional Court considered whether the procedures laid down in the impugned Act could infringe the right to an impartial judge, since the legislation made it possible for a juvenile judge who had previously imposed restrictions on the fundamental rights of a child against whom proceedings were being taken or who had examined the child before the court hearing to hear and decide the case proper. In accordance with the case-law of the European Court of Human Rights in the *Nortier* case, the Constitutional Court found that the objective impartiality of a juvenile judge was not infringed by the fact that he had been concerned in certain aspects of the investigation as well as in the «principal hearing», even though he had imposed certain restrictions on a child at the public prosecutor's request, since the rule that both parties should be heard was respected. The decision referred to the case-law of the European Court of Human Rights regarding judges' impartiality, which had been somewhat refined since the *Haudschildt* judgment in the sense that impartiality was to be determined not abstractly but on a case by case basis. As a result, in the *Nortier* case, the European Court of Human Rights had decided that there had not been a violation of Article 6.1 ECHR since a distinction could be drawn between the material grounds for the interim measures imposed and the merits of the case, while the child's lawyer had a right of appeal to a higher court. (*Spain, Constitutional Court, Date of issuance: 17-03-1995, Number of case ESP-1995-1-012, [English](#)*)

A previous judgment and the expression of views by a judge does not necessarily prejudice his opinion on constitutional and legal matters in a later judgment, especially in the case of judges of the Supreme Court, and it is not an impediment for the same judge to try a case between the same or other litigants in which the same legal point is raised. (*Cyprus, Supreme Court, Date of Issuance: 29-11-1994, Number of case: 1912, [English](#)*)

VII. 1.3. INTEGRITY

A judge must act in a manner that does not diminish his own reputation or that of the judiciary, regardless of time and place. (*Croatia, Constitutional Court, Date of issuance: 14-08-2003, Number of case: U-IX-2534/2003, [English](#)*)