Judicial Independence in the EU Accession Process

Table of Contents

I. Introduction 16

A. The Importance of Judicial Independence 16

B. Achieving Independence and Accountability 18

C. Issue Areas for the Candidate States 20
1. Weak Commitment to a Culture Based on the Rule of Law 21
2. Insufficient Institutional Independence 23
3. Undue Executive Interference 24

D. Using Accession to Identify Developing European Standards 26
1. Existing EU Standards 27
2. International Standards 28
3. Developing Standards for the Union 31

II. Constitutional and Legal Foundations of Judicial Independence 33

A. Guarantees of the Separation of Powers, or Independence 33

B. Representation of the Judiciary 34

C. Extraordinary and Military Courts 35

D. The Role of Constitutional Courts 36

E. Rules on Incompatibility 37

III. Administration of the Court System and Judicial Independence 40

A. Loci of Administrative Responsibility 40
1. Principal Administration by the Ministry of Justice 41
2. Administration by a Judicial Council ... 42

IV. Financial Autonomy and Level of Funding 46
A. Budgeting Process 46
B. Work Conditions 48
C. Compensation 49

V. Judicial Office 51
A. Selection Process 51
B. Tenure, Retirement, Transfer, and Removal 54
1. Tenure 54
2. Retirement 55
3. Transfer 55
4. Removal 56
C. Evaluation and Promotion 57
D. Discipline 58

VI. Intra-Judicial Relations 61
A. Relations with Superior Courts 61
B. Case Management 62

VII. Enforcement and Corruption 64
A. Enforcement 64
B. Corruption 65

VIII. Recommendations 66

Judicial Independence in the EU Accession Process

I. Introduction

This Overview and the accompanying Country Reports assess the state of judicial independence in ten countries applying for membership in the European Union, in light of the Union's own evolving standards.

When one considers that prior to 1989 each candidate State had a judiciary politically subordinated to the Government and the ruling Communist party, the progress achieved in reforming the court systems of these States has been impressive. Of course, just over ten years after the political transformation, the organisational reform of the courts and the elaboration of guarantees of judicial independence are still in progress.

The European Commission has identified progressive improvement in the role and functioning of the courts as one of the political criteria by which prospective members are to be considered. The Commission has repeatedly expressed concern about the slow pace of court reform in the candidate States. The major problems it has identified have been the considerable backlog of pending cases, the length of proceedings, and deficiencies in the execution of judgements.

In short, the Reports primarily urge candidate States to increase the efficient processing of claims before their courts. The Commission has paid less attention to what distinguishes the judiciary from other branches of the State: the need for courts and judges to be independent and impartial. None of the candidate States considered in these Reports has a fully effective *and* fully independent court system.

A. The Importance of Judicial Independence

The Copenhagen criteria do not explicitly mention judicial independence, and yet it is difficult to imagine how a State could achieve "stability of institutions guaranteeing ...the rule of law" without an independent judiciary, or how it could effectively combat

corruption without impartial judges. It is clear that the EU values both judicial independence[1] and judges' impartiality.[2]

Moreover, if efficiency is understood not simply as the speed with which cases are decided but the quality of those decisions and their contribution to the goals of a just society, then the degree to which the independence and impartiality of the judiciary and individual judges are guaranteed becomes a crucial measure of performance.

The judiciary occupies a unique position in a democratic society. It is called upon to decide disputes that cannot or should not be left to the political branches[3] or private individuals. It upholds the law for all – and in so doing, it also safeguards the rights of individuals and minority groups of all types against the excesses of majoritarianism. This sometimes requires judges to confront the interests of the political branches or powerful individuals, but because judges are not democratically elected, they must derive their authority and legitimacy from different sources than do the political branches; one of judges' most important sources of legitimacy and authority is their independence.

Meaningful independence (and public perception of that independence) is essential to the judiciary's legitimacy as a guarantor of rights and freedoms. If the judiciary is not independent of the executive and legislature, it cannot properly restrain those branches. If courts are not seen as independent (and impartial), citizens will not turn to them to resolve their problems, but may seek recourse through political or extralegal means.

---

1 For example, on 24 April 2001, EU Commissioner for Enlargement Guenter Verheugen told journalists in Brussels that the EU is worried by possible infringements of the judiciary's independence in Romania; two days later, in Bucharest, he reiterated the EU's concerns and promised to continue monitoring the matter. *Adevarul*, 27 April 2001; *Romania Libera*, 28 April 2001.

2 These Reports assess both judicial independence and judicial impartiality, which requires that judges not have any prejudicial connections to or views of any party to a dispute, whether because of involvement in a previous stage of the case or a personal pecuniary connection to a party or the issue. While analytically distinct concepts, in practical application independence and impartiality are closely related and raise analogous problems. Compare D.J. Harris, M. O'Boyle, and C. Warbrick, *Law of the European Convention on Human Rights* (1995), p. 234. See e.g. *Piersack v. Belgium*, ECHR Judgement of 1 October 1982 (App. No. 8692/79), A 53; *Daktaras v. Lithuania*, ECHR Judgement of 10 October 2000 (App. No. 42095/98 [2000]) (finding a violation of Article 6(1) in a case in which the President of the Criminal Division of the Supreme Court both lodged a cassation petition and convened the Chamber hearing the case; and holding that a tribunal must be impartial from an objective viewpoint – that is, it must offer sufficient guarantees to exclude any legitimate doubt as to its impartiality).

3 For convenience, these Reports refer to the "political branches", meaning the whole of the legislative and executive branches. This includes the civil service, which is professional rather than political, but whose senior management is politically appointed.

The legislature and the executive themselves have a direct interest in judicial independence; they often need the judiciary to resolve problems which do not have easy political solutions – but the judiciary can do this only if all parties see it as a neutral arbiter, independent of the branches and parties which have turned to it in the first place.

The importance of judicial independence extends beyond the political; economists have noted the importance of an independent and impartial judiciary to a stable and prosperous economy. Individuals and institutions must be able to rely on predictable justice – free of the vagaries of political interference or economic influence by either party – in the adjudication of their claims. In societies struggling to reform their economies, judicial independence contributes to the confidence, security and predictability of economic transactions.

B. Achieving Independence and Accountability

In the communist period, the judiciary's position was defined by its political subordination, but an independent judiciary must be incorporated into society in a different fashion, not only freeing it, but also integrating it as an equal member.

Independence serves important social needs; it is not, properly speaking, an end in itself or a way to secure the professional position of judges for their own benefit, but rather a means to achieve the goals of a just and prosperous society. For this reason, independence needs to be complemented with means to ensure that judges and the judiciary as a whole comport with society's democratic principles and legitimate interests: even as they are independent, in other words, judges need to be accountable to society.

It is sometimes suggested that accountability and independence are inherently contradictory. In fact there need be no contradiction between them because the initial grant of independence is actually limited, extending only to judges' core decision-making function within their court,[4] and to such further areas as are necessary to ensure that there is no improper influence on that function. Indeed, unless judges are somehow accountable, society will likely view their independence as a danger and seek to curtail it.

As judges are given limited independence for specific, if fundamental, social purposes, and not for its own sake, accountability to society and the instrumental independence

---

[4] Compare e.g., Lord Irvine of Lairg, "Introduction", Judicial Organisation in Europe (Council of Europe, May 2000), p. 7 ("Central to the rule of law is the basic conception that judges must be independent of government, with absolute power *over the decisions taken in their own courts*, which can only be overturned by equally absolute decisions of senior judges in higher courts[.]")(emphasis added).

which society affords judges can be, to a great extent, complementary. This is achieved by precisely defining spheres of competence, creating transparency without control, and encouraging free debate about, without improperly interfering with, judicial decisions.

Defining Competence: The judiciary's proper roles include settling disputes among private parties, and also ensuring the justice and legality of the acts of the democratically accountable branches; courts therefore serve a monitoring or policing function. Since a monitor who is not independent of those being monitored cannot be effective, it is necessary to define spheres of competence in which judges may act without fear of influence from the political branches or parties to disputes. Judges' core competence is the power to decide cases requiring application or interpretation of law. Where influence or restrictions on judges do not impair that function,[5] either directly or indirectly, or where they actually contribute to independence,[6] they are acceptable.

Creating Non-Controlling Transparency: Judicial independence requires that the points of contact between the judiciary and the outside world are transparent and regularised: transparent, so that observers can see clearly the effects of the interaction, and regularised, so that to as great a degree as possible, decisions can be anticipated with some certainty.[7] A marginally greater level of political involvement in personnel and administrative concerns is acceptable where it is governed by objective, transparent rules promulgated in advance and applied uniformly.

External influence is best directed through "soft" methods aimed at ensuring that the judiciary, the other branches, and society remain apprised of each others' views on judicial

---

5 Thus, societies may for example provide for the removal of physically or mentally incompetent judges or judges who have committed violent crimes. Compare "United Nations Basic Principles on the Independence of the Judiciary", adopted by the seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan from 26 August to 6 September 1985 and endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 (hereafter "UN Basic Principles", Art. 18 (judges shall be subject to removal for incapacity or behaviour rendering them unfit to discharge their duties); Recommendation No. R. (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges, 1994 RGE 648 94 (hereafter "CoE Recommendations"), Principles V.3.c. (judges' responsibility to withdraw from cases due to health problems or the "interests of justice") and VI.2 (providing for removal due to incapacity or criminal behaviour).

6 Legitimate restrictions actually preserve judicial independence and impartiality by insulating the judge from pressures. Thus, society may require that judges be impartial and follow ethical codes designed to ensure that they have no improper contacts with parties to cases. See e.g.UN Basic Principles, Art. 15 (providing that "[t]he judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties...").

7 Legitimacy is also partly derived from transparent appointment procedures and operations. Indeed, it can be argued that these elements of legitimacy should logically precede the full grant of independence.

affairs without directly intervening in judges' activities. Judges' decision-making and administrative functions should be transparent, with regular reporting to the legislature and executive on the use of budgeted funds and the activities of the courts. Accountability within the judiciary – through appeals and uniformity decisions – should also be transparent. Requiring judges to issue reasoned opinions allows the public to follow the courts' processes without intervening.[8]

Allowing Public Debate: Criticism of judicial decisions, and of judicial institutions, is an important aspect of accountability that is consistent with judges' core independence. Judges are afforded independent discretion to decide difficult cases; that does not mean that everyone agrees with each decision. Yet in some of the candidate States, judges seem to believe that criticism from any quarter is an infringement on their independence. To be sure, the very purpose of courts is to provide regularised, fair venues for distributing justice, and unchecked public pressure on a judge to decide a particular way in a particular case defeats that purpose; even when channelled through the media, it can place undue pressure upon judges.[9]

Yet media criticism is one effective way to convey different views to the judiciary, even about particular judgements, without violating its freedom to adjudicate. So long as public commentary on cases does not cross into advocacy for disregarding judicial outcomes, or suggestions that judges ought not have the right to rule as they see fit, it should not be seen as undue interference.

Even criticism by the executive or legislature is appropriate, if conveyed in a spirit which unambiguously confirms the judiciary's right to decide freely, and the full preparedness of the other branches to uphold and execute its judgements. In a society in which such sentiments are not automatically assumed, it may be appropriate for public officials to qualify any criticisms they make with explicit reaffirmation of their support for the principle of judicial independence.

C. Issue Areas for the Candidate States

Judicial reforms begun in the early 1990s have not occurred in isolation; they are part of a larger political and social restructuring in each candidate State that is still continuing.

[8] Written opinions are a good example of society's prerogative to make rules outside the core decision-making competence: requiring a written opinion places a burden on judges, but does not restrict their right to decide how they see fit – it only requires them to inform society of the reasons underlying decisions.

[9] See UN Basic Principles, Art. 2; CoE Recommendations, Principle I.2.d.

Judicial independence must be understood in this larger context. While each State presents a unique set of circumstances, a number of common features mark the region as a whole and should be kept in mind when developing standards designed to encompass all of Europe's efforts to achieve a real degree of judicial independence.

Significant progress has been made towards the goal of a truly independent judiciary integrated in and accountable to a democratic society. In each State, constitutional and legislative guarantees of the judiciary's independence are in place and accepted, and the traditional civil law systems of the region have been revitalised, with the courts playing an increasingly active role. Novel institutional arrangements to increase the autonomy of the judiciary in its relations with the other branches of the State have been developed in several States. The status of the judiciary has been considerably enhanced through improvements in salary and expansion of its sphere of competence. At the same time, the average speed with which judges dispose of cases has also improved. Courts are increasingly viewed as legitimate fora for the determination of disputes.

The areas in which the candidate States still fall short – and the causes – are many, and vary from State to State. Notwithstanding the significant progress noted above, three broad problems continue to impair the development of fully independent judiciaries across the accession region: 1) weak commitment to a culture based on the rule of law; 2) insufficient institutional independence of and material support for the judiciary. In all these areas, the elaboration of clear EU standards is essential to the success of reform; and 3) undue executive interference with the administration of the judiciary.

1. Weak Commitment to a Culture Based on the Rule of Law

One legacy of the pre-1989 period common throughout the region is a weak commitment to a culture based on the rule of law. All the candidate States were ruled by communist dictatorships from just after the end of the Second World War until the end of the 1980s. Although the severity of the regimes differed greatly over time and from State to State, in all of them, the pre-war civil law system and judiciary[10] were subordinated to the executive and through it to the supra-political authority of the Communist Party.[11] In these systems based on the unity of power, the subordination of judges to politicians and of law to politics extended from mundane administration to matters at

[10] Even prior to the communist period, the principles of the rule of law and separation of powers were only partly respected throughout most of the region.

[11] Forms commonly found in some civil law systems – such as combination of judicial and prosecutorial functions, full review, uniformity of decision, and civil service status for judges – were retained in the communist period.

the core of judicial decision-making. The continuing effects of this history on public and political ideas about the judiciary, and on judges' view of their role, should not be underestimated.

In the communist period, judges were generally viewed as functionaries, and few individuals imagined a judge might issue a decision fundamentally at odds with the official political line. These perceptions persist; many politicians and citizens still assume that judicial processes should or do hew to current political priorities and that judges implement State policy.[12] These perceptions contribute to popular distrust of judges.

There is also a widespread perception that corruption – another symptom of a weak legal system – is endemic in the judiciary of several candidate States, as in some member States. Rapid and destabilising economic changes, the weakness of new political institutions, and the legacy of a system in which the law was not an impartial protector of rights have encouraged corrupt practices in all walks of life, including adjudication and enforcement. Indeed, anecdotal evidence suggests that corruption among judges and administrative staff is particularly acute in Bulgaria, the Czech Republic, Latvia, Lithuania, Romania, and Slovakia, though it is widely thought to be present in all candidate States;[13] certainly, perceptions of corruption further reduce trust in the courts.

This lack of public and political trust can have serious consequences for judicial independence, as it undermines support for needed reforms and can encourage incursions on judicial prerogatives. In Bulgaria, for instance, a number of initiatives threaten judges' independence. A draft law proposes to abolish judges' right to appeal adverse disciplinary rulings, and the principal Act regulating the judicial system has been amended twice in order to alter the composition of the country's judicial council prior to the expiry of its members' terms. Consideration is even being given to lifting judges' constitutional immunity from prosecution in order to curb perceived widespread corruption. Decisions in the Czech Republic (1996), Lithuania (1998) and Hungary (2000) to extend lustration screening procedures against judges in part responded to continuing distrust of judges who had served under communism. However, so many years after the transitions began, such decisions raise inevitable concerns that screening is politically motivated. In Slovenia in 1999, some Members of Parliament sought unsuccessfully to abolish judicial tenure, arguing that it encourages inefficient adjudication.

---

[12] Political actors have attempted to influence the outcome of individual cases (Latvia, Poland), remove individual judges or court presidents (Slovenia), alter the composition of judicial governance bodies through legislation (Bulgaria) or otherwise restore executive control over the judiciary (Estonia, Hungary, Slovenia). Reference by politicians to "shared responsibilities" is also quite frequent.

[13] In the absence of clear definitions and standards, even within the EU, it is difficult to establish actual levels of corruption.

In many candidate States, relations between the media and the judiciary are quite strained,[14] reflecting an imperfectly developed understanding of the two institutions' roles in a democratic society. For their part, judges frequently interpret any criticism as an improper intrusion on their independence. At the same time, accusations by judges that journalists lack the necessary knowledge in matters of law and are unaware of the value of judicial independence have some basis.[15]

2. *Insufficient Institutional Independence*

Meaningful judicial independence rests not only on large principles and social attitudes, but on careful attention to the effects of administrative structures regulating the judiciary.

Courts are often poorly positioned to defend themselves against incursions on their independence, because they have little influence over the institutions which administer their budget and individual judges' careers. Although independence is not incompatible with executive or legislative oversight, at a minimum courts should have meaningful involvement in their own administration, while procedures for budgeting, discipline and administration should be designed to circumscribe legislative and executive discretion.

The problem of insufficient institutional independence is especially acute in the Czech Republic, Estonia, Latvia, and Romania, as well as Slovakia, where the situation is in flux following recent constitutional amendments.

Many candidate States have developed independent judicial councils to administer the judiciary on matters such as discipline, court management, appointments and promotions. Councils can be a useful solution to the problems of executive interference. Some councils, however, while nominally independent, are composed primarily of individuals appointed by the executive or legislature; it is reasonable to question these councils' ability to represent or administer the judiciary. Where States choose not to create truly independent judicial councils, they must ensure that the alternatives contain explicit and robust institutional guarantees for the neutrality of procedures applied to the judiciary, provide judges with meaningful input, and ensure that independence is maintained in fact.

---

[14] In Slovenia, however, the media has advocated strengthening judicial independence and supported judges' efforts to persuade Parliament to adopt an adequate budget for the judiciary in 1999.

[15] It is reported from several countries that the media do a poor job of informing the public about criminal cases and legal concepts, such as the presumption of innocence. The tension between media and courts is partly due to the lack of appropriate channels of communication; as it is generally forbidden for judges to comment on the cases they try, court spokesmen might be employed to bridge the gap.

Even where candidate States have created independent bodies or vested the judiciary with administrative powers, they have almost always maintained the budget process as a matter of executive and legislative discretion, not limited by clear procedures and without significant input from judges. Judges chronically short of funds are more susceptible to outside influence from parties prepared to offer bribes for preferential treatment. In turn, this makes the judiciary less trustworthy as a neutral arbiter, and reduces public support.

Standards for the proper level of material support for the judiciary are necessarily contextual, and of course it is both normal and proper that ultimate budgetary authority should rest with the legislature. Nonetheless, one can identify in international norms a requirement – and in European practice a determination – that courts shall have sufficient funding to ensure their smooth operation[16] and that judges earn a salary comporting with the dignity an independent judiciary requires.[17] This means that judicial salaries should be competitive with the professional alternatives available to judges, and that judges should not be made vulnerable to influence due to economic need. One of the best ways to ensure this is for legislatures and executives to commit to particular levels of funding, and to incorporate judicial submissions into the budget deliberation process.

Many of the candidate States fall short of these standards, especially in the provision of materials;[18] salaries, however, have improved considerably. While no candidate State has achieved fully satisfactory levels of material support, standards remain particularly low in Bulgaria, Latvia, Lithuania, Romania, and Slovakia, and to some degree in Poland.

Of course, insufficient institutional independence and material support are in part symptoms of the larger problem of executive control; where another branch is responsible for the judiciary, it will always have incentives and opportunities to make the judiciary a lower priority, unless public expectations demand otherwise.

3. Undue Executive Interference

A related legacy of the pre-1989 period, and one of the most prominent threats to the consolidation of fully independent judiciaries in the candidate States, is the continuing, pervasive influence of the executive, and especially Ministries of Justice, in the adminis-

---

16 See UN Basic Principles, Art. 7; UCJ, Art. 14.

17 See UN Basic Principles, Art. 11; CoE Recommendations, Principle III.1.b.; UCJ, Art. 13.

18 There is tremendous variation within each country, with some courts being well-supplied and others receiving little assistance. This variation itself opens up opportunities for targeted and improper influence through selective financial support.

tration of the judiciary and in the selection, promotion, and disciplining of judges. Even in States in which there have been legislative changes increasing the formal independence of the judiciary, there has been an observable tendency for the executive to try to retain or reclaim powers through appointments, influence on the composition of judicial oversight bodies, and new legislation.

The problem of ministerial control is especially acute in the same countries in which the judiciary's institutional independence is poorly established: the Czech Republic, Estonia, Latvia, and Romania. Elsewhere, there are still concerns, and only in Hungary and perhaps Slovenia has this problem been minimised. Lithuania is in transition towards a system giving the courts full administrative autonomy; in Slovakia, the executive retains almost total administrative control at present, but recent constitutional amendments seem to require the creation of a judicial council with far-reaching administrative authority.

There is no absolute reason why the executive cannot be involved in, or even principally responsible for judicial administration – in many member States it is. However, absent an established and proven tradition of forbearance by the executive in its relations with the courts, such involvement should be discouraged. The specific historical circumstances of the region show that the interaction of executive and judiciary often harms judicial independence. Because the Ministry of Justice was the agent of control over the judiciary under the Communists and judges operated in a culture of deference, it may be preferable to make an unambiguous break with that tradition, rather than trusting to internal institutional reform.

Part of the solution is to clearly insulate the judiciary from undue executive (or legislative) involvement through unambiguous constitutional guarantees and the creation of institutions – within the judiciary or with substantial judicial representation – to administer the judiciary and judges' careers in a neutral manner. In most States, the broad outlines of such systems are formally in place, although important legislative and institutional improvements can still be made. Locating independent administrative bodies at the constitutional level helps to insulate them from politically motivated alteration. In addition, courts should be given the means to develop their management expertise, so as to remove one of the principal arguments for continued executive involvement. This is an area in which international support could be of critical importance.

Equally important, however, is an atmospheric change: The continuing assumption – both in the other branches and in the judiciary – that executive involvement in judicial administration is both necessary (because the judiciary is ill-prepared to administer itself) and desirable must be confronted and rejected. Politicians must publicly affirm the importance of an independent judiciary, enact legislation supporting it, and refrain from making inroads on the judiciary's prerogatives. Judges must refute political criticisms,

not by censuring them, but by demonstrating that they are prepared to administer themselves with professionalism and restraint, and to make themselves accountable to society.

D. Using Accession to Identify Developing European Standards

Many of the issues identified in these Reports are only *potential* opportunities for undue interference. It is an indication of the still unsettled status of the judiciary in these States that these potential problems – emanating from structures similar or even identical to those in more mature democracies, including some in the EU – continue to generate legitimate concern. In some other countries, time and practice have occasionally confirmed that the risk is only theoretical, and that the general respect for rule of law, the dignity of judicial office, and the proven interest of other branches in supporting independence are sufficient to ensure that interference does not occur.[19]

Determining the acceptability of a given arrangement requires clear articulation and understanding of the standards the EU wishes to apply to itself and its candidates. The candidate States are under an effective obligation to fulfil the Copenhagen criteria, but the EU has yet to elaborate any standards by which candidate States' efforts – or member States' continuing performance – can be measured. More precise standards are necessary to encourage a uniformly high level of respect for judicial independence across Europe.

This is not a problem; it is an historic opportunity. The accession process not only provides impetus to the candidate States to further solidify their transitions to the rule of law, it also encourages the EU as a whole to recognise common standards upon which continuing membership is properly grounded. By identifying political criteria for membership, the EU emphasises that it is more than an economic partnership of convenience, but a true community of values shared across Europe; it is the challenge of accession which makes it possible to express and advance those values.

Within the proper limits of its legal authority, the EU should identify European-wide standards by which it intends to measure judicial independence on a continuing basis. These should include the few required minimums, the few prohibited practices, and the much more numerous options for achieving judicial independence which comport with the Union's principles and goals for itself.

---

[19] Compare UCJ, Art. 11 (2) (requiring that provisions for the administration of the judiciary and disciplinary proceedings must be carried out by independent bodies "[w]here this is not ensured in other ways that are rooted in established and proven tradition[.]").

Such standards need to reaffirm universal and European values while taking proper account of the differing historical and political contexts throughout the continent. To distinguish between formal and real risks to judicial independence, they must address and account for law and practice in the candidate States and the member States. At the same time they must define the core guiding principles essential to the preservation of judicial independence in any context. Both within Europe and beyond, standards exist or can be identified.

1. *Existing EU Standards*

The EU has not developed extensive or definitive legal standards or recommendations for judicial independence. The recent Charter of Fundamental Rights of the European Union[20] "recognises"[21] standards that would guarantee the right to a fair hearing before an independent and impartial tribunal established by law, and to an effective remedy.[22] However, while the European Council "would like to see the Charter disseminated as widely as possibly amongst the Union's citizens[,]"[23] the Charter is not binding and as yet has no defined legal status.

Where the EU has been silent, however, the current member States' own varied domestic practice provides important guidance and a basis for developing an objective assessment consistent with the EU's values.

To the degree that member States' own judicial structures have been generally supposed to fall within the (undefined) bounds of acceptable practice, they may provide examples which candidate States could emulate to bring their systems within acceptable bounds. So, for example, arrangements for the judiciary modelled upon a current member State's system – in the way that Romania's system has borrowed heavily from French models – might reasonably suggest that the candidate State's practice was at least as acceptable as that member State's, unless there were compelling contextual reasons to conclude otherwise. To a significant degree, the member States provide 15 models presumptively in accord with the as yet unvoiced standards of the Union.

---

[20] Charter of Fundamental Rights of the European Union, *signed and proclaimed by* the Presidents of the European Parliament, the Council and the Commission at the European Council meeting in Nice, on 7 December 2000 (2000/C 364/01) (hereafter "EU Charter on Fundamental Rights").

[21] EU Charter of Fundamental Rights, Preamble.

[22] EU Charter of Fundamental Rights, Art. 47.

[23] "Citizens' rights – fundamental rights", portal site of the European Union, <http://europa.eu.int/abc/cit1_en.htm> (accessed on 23 August 2001).

At the same time, in some cases, the combination of particular factors which distinguish the candidate States – especially the debilitating legacy of communism and the unsettled political transition – may suggest or require solutions which would be unacceptable in current member States. It is conceivable that a practice identical to one in a member State might be inadequate; for example, the United Kingdom's "unwritten constitution" might not provide sufficient clarity in a country emerging from communist rule. It may be, in other words, that simply copying member States' practice will not be sufficient *or* necessary to create truly independent judiciaries. However, where a practice departs from a common standard, the burden should be on the deviating State clearly to explain itself.

It is not within the scope of these current Reports to conduct a comprehensive survey of member States' practice relating to an independent judiciary. Yet until clear EU standards are elaborated, this will be the most effective means of clarifying, for all States, what the content of Europe's commitment to judicial independence ought to look like, and EU recommendations to the candidate States should be grounded upon such an analysis.

2. International Standards

In addition, there are a number of internationally recognised standards, in the form of recommended guidelines, emanating from bodies generally enjoying a high level of support from the EU and its member States. These guidelines offer points of reference in assessing State performance in supporting judicial independence.

Taken as a whole, these standards identify the basic principles embodying judicial independence: the individual judge's authority to decide cases free of interference; separation of powers and entrenchment of judicial independence in the constitutional order; administrative independence and inclusion of judges in the budget process; the "fundamental independence" of the judiciary (that is, protection against arbitrary abolition of courts or revision of their decisions); and intra-judicial independence (that is, judges' right to make decisions without undue interference from higher courts). In addition, the standards address the related issue of judicial impartiality and note the responsibility of an independent judiciary to be accountable to society.

a. International Covenant on Civil and Political Rights, Article 14

Article 14 of the International Covenant on Civil and Political Rights[24] – the ICCPR – establishes a universal right to a hearing before a "competent, independent, and impartial

[24] International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of December 1966, entered into force 23 March 1976.

tribunal established by law[,]" which implies that States are obliged to create the conditions for judges to adjudicate independently. The general principles in the ICCPR do not elaborate on the content of independence or impartiality in any detail; the General Comment from the Office of the High Commisioner for Human Rights on Article 14 suggests a more detailed range of requirements, however.[25]

b. UN Basic Principles

Among the most prominent standards are the UN Basic Principles on the Independence of the Judiciary, adopted in 1985. As a resolution of the General Assembly, the Basic Principles represent a non-binding formulation of the community of States' minimum aspirations for the judiciary; it would be difficult to contemplate a legitimate and independent judicial system fundamentally at odds with the Basic Principles.

c. Council of Europe Recommendations

The Council of Europe's Recommendations on the Independence, Efficiency and Role of Judges were adopted in 1994. They establish minimal standards similar in content to the Basic Principles, although the CoE Recommendations provide considerably more elaboration about options for fulfilling its recommendations.

The Council of Europe Recommendations, adopted when the process of political transformation and integration of the candidate States was already well underway or anticipated, are an expression of recommended obligations for the States in the Council of Europe. Although they draw upon the same international sources as do the Basic Principles, they are a European product, and as such reflect more closely the values and aspirations of the EU and the candidate States – all members of the Council of Europe. The Recommendations are, for example, much more explicit in suggesting the appropriateness of self-governing judicial councils as a means of administering the judiciary and in proposing rules for case allocation.

d. ECHR Jurisprudence

Article 6 of the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms[26] – known as the European Convention on Human Rights

---

[25] Office of the High Commisioner for Human Rights, "Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14)": 13/04/84. CCPR General comment 13. (General Comments) (21st session, 1984).

[26] European Convention for the Protection of Human Rights and Fundamental Freedoms (*signed* 4 November 1950; *entered into force* 3 September 1953; amended 21 September 1970, 20 December 1971, and 1 January 1990, 213 UNTS 221, ETS 5), Art. 6 (1) ("[E]veryone is entitled to a fair and public hearing...by an independent and impartial tribunal established by law.").

– elaborates standards for court proceedings, which have implications for judicial independence. Article 6 is binding on States which have ratified the Convention, including all member States and candidate States.

Building upon Article 6, cases arising before the European Court of Human Rights (ECHR) established under the Convention address questions of judicial independence and impartiality. Prominent among them are *Findlay v. United Kingdom* and *Bryan v. United Kingdom*.[27] The *Bryan* judgement sets forth a number of principles essential to the independence of the judiciary:

37. In order to establish whether a body can be considered "independent", regard must be had, *inter alia*, to the manner of appointment of its members and to their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence.[28]

Other ECHR cases also address an important aspect of judicial independence that often receives less attention: the threat to an individual judge's independence from within the judicial hierarchy itself – what is known as internal or intra-judicial independence. *Sramek v. Austria*, establishes that full independence also requires a sufficient organisational separation from the executive branch.[29] In general, ECHR jurisprudence tends to look to the substantive conditions for an independent judiciary, rather than considering the formal provisions of law determinative.[30]

ECHR jurisprudence is binding on the individual member States who are before the Court in their capacities as States Parties to the Convention in the particular case. More broadly, though, ECHR cases provide clear guidance to other States Parties about acceptable models and practices for their judiciaries. Since Maastricht, it has been clear that "the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ... and as they result from the constitutional traditions common to the member States, as general principles of Community Law."[31] ECHR decisions interpreting the text of the Convention are generally accorded great weight, even though the European Court

---

27 *Findlay v. United Kingdom*, ECHR Judgement of 25 February 1997 (No. 110/1995/16/706), Reports 1997-1. *Bryan v. United Kingdom*, ECHR Judgement of 22 November 1995 (No. 44/1994/491/573), A335-A.

28 *Bryan v. United Kingdom*, para. 37.

29 See *Sramek v. Austria*, ECHR Judgement of 22 October 1984 (No. 5/1983/61/95), A84, para. 74.

30 See D.J. Harris, M. O'Boyle, and C. Warbrick, *Law of the European Convention on Human Rights* (1995), pp. 232–33.

31 Art. F(2), Treaty of Maastricht, renumbered Art. 6(2), Treaty of Amsterdam.

of Justice – the European Union's supreme judicial body – is not legally obliged to follow them.[32]

e. Judges' Association Charters

Of some further assistance in formulating standards relating to judicial independence are the guidelines proposed by international judges' associations, in particular the European Charter on the Statute for Judges, adopted by the European Association of Judges,[33] and the Universal Charter of the Judge, adopted by the International Association of Judges.[34] Both Charters identify an expansive range of aspirational rights and obligations designed to promote maximum judicial independence; in so doing, they advocate a model considerably more weighted in favour of judicial autonomy over accountability than can be reconciled with most State practice, among member States or elsewhere.

3. Developing Standards for the Union

One should be cognisant of the limits of these standards when assessing judicial independence in individual States, or when extrapolating to the EU's position. The international standards are non-binding recommendations; absent clear, binding EU requirements, they provide valuable indicia of judicial independence, but no more.

As a consequence, individual States are left with broad discretion in designing institutions to ensure judicial independence. The EU might usefully clarify existing standards, where possible within its mandate, for the whole Union. Taking the EU Charter of Fundamental Rights as a starting point, this should include a clear statement both of the binding rules which the EU is prepared to call on members and candidates to respect, and of the areas in which it has no interest as a Union. It might include instances of the range of acceptable practices, with reference to existing examples.

In giving voice to its standards, the EU should ensure that each allows a qualitative assessment as to whether judicial independence is in fact being respected. Constitutional, legislative, and institutional provisions are meaningless if judges nonetheless feel

32 See Opinion of Darnon AG in Case 374/87, Orkem (1989), ECR 3351, cited in D. Spielmann, "Comparing ECJ and ECHR Case Law", in P. Alston, ed., *The EU and Human Rights*, 1999, p. 762.

33 The Charter (hereafter "ECSJ"), established in 1998, is not a Council of Europe document, but was developed by the European Association of Judges under the Council's auspices through the THEMIS Plan, and published by the Council [DAJ/DOC (98) 23]. Both the European Association of Judges for Democracy and Freedom (MEDEL) and the *Ecole Nationale de la Magistrature* of France (ENM) participated in the development of the ECSJ.

34 Hereafter UCJ.

compelled to rule in a particular party's favour. Contrariwise, the absence of any particular provision does not necessarily mean a State is failing to meet its obligations, if the total circumstances show that independence nonetheless obtains. This is particularly so given the multiplicity of approaches within the EU to forming judicial bodies.

In applying its standards, the Commission's assessments should be qualitiative and fair. No State should be told it is failing to develop an independent judiciary without also being told why it is failing, and what it can do to remedy the matter.

II. Constitutional and Legal Foundations of Judicial Independence

A. Guarantees of the Separation of Powers or Independence

Most standards on judicial independence recommend that the independent role of the judiciary and individual judges be defined in the constitution of the State, or at an equivalent level.[35] Although not necessary to a system of judicial independence – as EU member States' own practice shows – formally establishing in the constitution that the judiciary is a separate power or is independent of the legislative and executive branches helps protect against politically motivated interference. Lack of constitutional clarity leaves the judiciary continually at risk of incursion by other branches. At a minimum, where the judiciary does not formally constitute a separate and equal branch, the superior branch must embrace limits on its own action such that judges considering cases are able to exercise their own judgement, subject only to the provisions of the law itself.[36]

Basic guarantees of judicial independence are set forth in the Constitutions of all the candidate States, while statutory provisions on the courts often form part of the constitutional order and enjoy special status.[37] Some of the candidate States' Constitutions explicitly declare the separation of powers among executive, legislative, and judicial branches (Bulgaria, Slovenia), while a few (Estonia, Poland) also provide for a "balance" of powers. There is no express separation of powers in the Czech, Hungarian, Latvian, Romanian, or Slovak Constitutions. Consistent with international standards,[38] some Constitutions also formally guarantee the *independence* of the judicial branch as such (Bulgaria, Poland) or of the

---

35 See e.g. UN Basic Principles, Art. 1; CoE Recommendations, Principle 1 (2)(a); UCJ, Art. 2; ECSJ, Art. 1, 2. *But note* the ECHR generally finds no violation where the judiciary has substantive – though not formal or textual – independence, as is the case in some member States. See *Sramek v. Austria*, para. 38 (1984). In connection with removing a court or tribunal official, that it is sufficient if protections against removal are "recognised in fact and that the other necessary guarantees are present." See *Campbell and Fell v. UK,* ECHR Judgement of 28 June 1984, A80, para. 80.

36 UN Basic Principles, Arts. 1, 2, 4; CoE Recommendations, Art. 2(a)–(b); UCJ, Arts. 1–4. None of the international standards refer to separation of powers, calling instead for *independent* judges or judiciaries.

37 In Slovenia and Hungary, for example, adoption and amendment of the law on the organisation of courts require a special quorum of Parliament.

38 UN Basic Principles, Art. 1. There is no consistent member State practice on a formal declaration of the judiciary's independence.

courts (Estonia,[39] Lithuania,[40] Slovakia[41]); other Constitutions do not.[42] In accordance with European standards,[43] all Constitutions proclaim the independence of individual judges. Accordingly, in the performance of their judicial duties judges are subordinated only to the Constitution and the law.

Notwithstanding their textual diversity, all Constitutions provide distinctive tasks for each branch or for judges, and in practice all candidate States consider their judiciaries effectively separate. In any event, it should be clear that the judiciary can operate independently even where it is not formally identified as a *separate* power, as long as it enjoys explicit and robust guarantees of independence.

In spite of this, explicit reference in the Constitution to separation of powers or to the institutional independence of the judiciary in some form seems preferable as a safeguard against attempts to weaken judicial independence. Indeed, because past circumstances have shaped the political and legal cultures of the candidate States quite differently from those of most member States, an explicit separation of powers seems essential. Comprehensive separation of the branches would prove effective in shielding courts from the potentially negative effects of political processes still undergoing transformation, and give Constitutional Courts a powerful argument to defend judicial independence.

B. Representation of the Judiciary

If a State fails to identify a clear representative for the judiciary in its relations with the other branches, it runs the risk that significant constitutional and legislative protections of independence will be eroded, as there will be no interlocutor to restrain the other branches from acting in ways which limit the scope of judicial prerogatives.

---

39 The reference is to "courts" – a term which has not been defined. CONST. REP. ESTONIA, Art. 146.

40 The Constitution provides that "judges and courts" are independent "[w]hen administering justice." CONST. REP. LITHUANIA, Art. 109.

41 The references are to courts and judges, not the branch as a whole. CONST. REP. SLOVAKIA, Arts. 141 (1) and 144 (1).

42 There is no such provision in the Constitutions of Hungary, Latvia, or Slovenia. However, in Latvia the Law on Judicial Power proclaims that "an independent judicial power exists alongside the legislative and the executive power." Law on Judicial Power, Art. 1 (1). Moreover, the Constitutional Court has clearly elaborated a principle of the separation of powers. Decision of the Constitutional Court, Case No. 04-07 (99), State Gazette, 29 March 2000. In Hungary, the Constitution defines the functions of the judiciary in such a way as to imply its separation (CONST. REP. HUNGARY, Chap. X.), and it has been so interpreted by the Constitutional Court. Decision 51/1992 (X.23) of the Constitutional Court (ruling that there can be no political connections between the judiciary and the political branches).

43 CoE Recommendations, Principle I.

There is no consensus practice within the EU as to how the judiciary is to be represented in its relations with the other branches of the State. In some member States, a clearly defined constitutional representative is identified, while in others representation is more informal. In some, the judiciary is represented by the executive; in others, it represents itself, through special bodies such as a judicial council, or through the higher courts. Independent bodies are the preferred approach of the international judges associations; councils can also be an effective means of including lower court judges in the representation process, and are increasingly employed in member States.

Likewise, among the candidate States several models of judicial representation are employed: representation by the Ministry of Justice (Czech Republic, Estonia, Latvia); by the Ministry and the judicial council (Poland, Romania, Slovakia,[44] Slovenia); by the leading courts alone (Lithuania[45]) or by the judicial council alone (Bulgaria, Hungary). However, many of these bodies are only informal representatives of the judiciary (as in the Czech Republic, Estonia, and Poland), since their functions are not clearly defined in the Constitutions or laws, and representative functions are often in fact dispersed among different institutions or individuals.[46]

Althought each of these models can in theory be effective in representing the judiciary, in practice excessive reliance on the executive branch creates the risk that the judiciary will be given lesser priority in negotiations on a range of issues on which the interests of the judiciary and the executive may conflict, from budgets to resolution of disputes over competencies. A separate and independent branch ought to represent itself, and not rely on the other branches for that representation.

C. Extraordinary and Military Courts

A basic precondition of judicial independence is that only courts established by law should be permitted to administer justice,[47] and this principle is set forth in all the candidate States' Constitutions. Bulgaria, Estonia, and Slovenia expressly prohibit the establishment of extraordinary courts. Lithuania restricts the establishment of extraordinary courts to special circumstances.

---

44 Pending implementation of the February 2000 constitutional amendment creating a judicial council, the judiciary is represented by the Minister and the President of the Supreme Court.

45 The representational function is in transition, following a 1999 constitutional court decision which invalidated parts of the courts law, which has yet to be replaced.

46 In some States, such as Estonia, the Supreme Court is represented separately.

47 See e.g. EU Charter of Fundamental Rights, Art. 47; ICCPR, Art. 14; UN Basic Principles, Art. 5, European Convention on Human Rights, Article 6(1).

In certain states, military courts which are insufficiently independent from the executive exercise broad jurisdiction over cases which properly should be brought before civilian courts.[48] Military courts, traditionally a means of skirting formal judicial protections, have been abolished in the Czech Republic, Lithuania and Slovenia.[49] In Bulgaria, Romania and Slovakia,[50] military courts continue to exercise broad powers, including over cases brought against the police.[51] Poland also has military courts, and in Hungary, military judges sit within the regular court system.

Because military courts generally have a closer connection to the executive through the military hierarchy, they pose two problems. First, military judges in these courts have less independence. Second, the operation of military courts reduces the jurisdiction falling under civilian courts protected by guarantees of independence, or may create an alternative forum whose jurisdiction is vaguely defined.

D. The Role of Constitutional Courts

Reviewing legislation and measures taken by the executive for compliance with the Constitution is the prerogative of the new constitutional courts in most candidate States;[52] throughout the last decade, constitutional court decisions played a major role in defining the competences and the independence of courts.[53] Consistent with member State practice, constitutional courts in the candidate countries are normally outside the ordinary court system, and are not considered courts in the strict sense. Parliamentary and executive involvement in the selection of constitutional court judges is therefore generally more direct, and the justices always serve limited terms.[54]

---

48 Military courts are subject to the same requirements of judicial independence as civilian courts. Compare *Findlay v. United Kingdom*, ECHR Judgement of 25 February 1997 (No. 110/1995/16/706), Reports 1997-1. See Office of the High Commisioner for Human Rights, “Equality before the courts and the right to a fair and public hearing by an independent court established by law” (Art. 14): 13/04/84. CCPR General comment 13. (General Comments) (21st session, 1984).

49 Latvia allows military courts, but has not passed the requisite legislation to allow their operation.

50 Military courts in Slovakia are considered to form part of the regular court system.

51 There has been some improvement in Romania, in that the Supreme Court is now the court of last resort for military court cases.

52 In Estonia the Constitutional Review Chamber of the Supreme Court exercises the functions of a constitutional court.

53 A Constitutional Court decision was decisive in the reform of Lithuania’s system of judicial administration, for example, while Court rulings have clarified questions of the separation of powers or the judiciary’s independence in Hungary and Latvia.

54 In Estonia, justices of the Constitutional Review Chamber are elected to five-year terms from among the Supreme Court justices by the Supreme Court *en banc*.

In part as a consequence of their closer connections to political matters, the relation between the constitutional courts and ordinary courts is problematic in some countries, centring on questions about whether the ordinary courts are subject to constitutional court rulings and whether interpretation of laws is the exclusive prerogative of constitutional courts. In Hungary, representatives of the judiciary have strongly criticised the Ministry of Justice for proposing a Government bill which would allow the Constitutional Court to review decisions of the Supreme Court aimed at ensuring uniform interpretation of legal provisions. The Supreme Court (in Romania) and lower courts (in Poland) have rejected the view that decisions of the Constitutional Court bind the judicial branch.

Where States establish a separate quasi-judicial institution like a constitutional court, closely connected to the executive or the legislature, then that court's influence over the judiciary must be limited in the same way as for the political branches to ensure that it does not unduly interfere with judges' proper scope of decision-making. Vesting judicial review in the ordinary courts (as in Estonia) eliminates the risk that other branches will influence the judiciary through this channel.

Of course, to the degree one considers a constitutional court to have proper adjudicative functions, it should have guarantees of its independence just as any ordinary court.

E. Rules on Incompatibility

Personal or professional affiliations outside the judiciary inevitably raise the potential for conflicts of interest that can make it difficult for judges to remain impartial. Where those affiliations are with another branch, it may also be difficult for judges to remain truly independent without jeopardising their careers outside the judiciary. Most standards therefore explicitly recommend limitations on judges' outside activities,[55] although the jurisprudence of the ECHR and the practice of member States do not support an absolute prohibition against judges working in the political branches.[56]

Most candidate States place restrictions on judges' holding offices in the executive, parliament, or the civil service. Not all crossover is prohibited, however; several countries allow judges to work within the Ministry of Justice (Czech Republic, Poland, Slovakia).

---

55 UCJ, Art. 7 (1). UN Basic Principles, Art. 8, suggests that judges' rights of association and assembly may be limited by the requirement that they "preserve the dignity of their office and the impartiality and independence of the judiciary." These same standards do not exclude judges' associations. UCJ, Art. 12; UN Basic Principles, Art. 9.

56 See e.g. *Ettl v. Austria*, ECHR Judgement of 23 April 1987 (No. 12/1985/98/146), A 117, para. 38; *Engel and Others v. Netherlands*, ECHR Judgement of 23 November 1976, A 22.

In the Czech Republic and Slovakia, judges routinely work in the Ministry of Justice while retaining their status as judges; Estonia and Latvia are planning to introduce the practice. In Poland, judges may work for the Ministry and continue to adjudicate cases; such a practice seriously undermines judges' independence.

Rules on incompatibility also limit the ability of judges to hold elective office – the practice in most, but not all member States. In general, judges who wish to hold elective office must resign from the bench. However, in some candidate States a judge may merely suspend service (Slovakia, Slovenia) and then return to the judiciary later. This encourages an unduly close relationship with the other branches.

The rules on incompatibility notwithstanding, in several States judges may be appointed to different commissions or committees for elections (Bulgaria, Latvia, Poland, Romania) or human rights (Latvia, where a member of the Supreme Court is a consultant). Obviously, the opportunity to select particular judges to serve on committees affords other branches an opportunity to reward or punish judges for inappropriate reasons. In Bulgaria, commission work can provide significant remuneration, which increases the potential for inappropriate incentives and influence. Preferably, commission work should not be remunerated.

It is common among candidate States – as among member States – that judges are not allowed to be members of political parties or to be engaged in political activities. Although the ban on party membership was introduced as a reaction to the communist past, the prohibition is still perceived as a genuine guarantee of independence. In the member States, too, limitations on judges' political affiliations are common. There are no such prohibitions in the Czech Republic[57] and Slovenia.

All candidate States place restrictions on judges' outside commercial or professional activities; all allow judges to engage in academic, scientific or artistic work. These provisions are consistent with international standards, and generally contribute to ensuring that judges are impartial, and are seen to be.

Disclosure: Although there are no international or European standards on the practice, financial disclosure may be an effective way to increase the accountability of judges and combat corruption without impinging upon their independence. In order to enhance transparency of judicial income and with the aim of preventing corruption, some candidate States have introduced acceptable disclosure rules for all judges (Lithuania, Poland, Slovakia). This is particularly important in countries where allegations of judicial

[57] Except for constitutional court judges, who may not join parties.

corruption are relatively frequent. However, in some countries, current disclosure rules are not sufficient (Bulgaria, Romania). Thus in Romania, judges at the beginning and the end of their office have to file a *secret* financial declaration; obviously this will do little to curb corruption so long as the results are not made public. There are no disclosure requirements in Slovenia or the Czech Republic.

III. Administration of the Court System and Judicial Independence

A. Loci of Administrative Responsibility[58]

Unless bodies responsible for administering the courts are prevented from using their authority to influence judges' decision-making, judicial independence will, over time, be undermined. Vesting administrative authority in another branch unnecessarily increases the incentives and opportunities to exert undue influence. Granting independent bodies self-administrative powers under transparent procedures would reduce the risk of political interference, while still allowing political representation that encourages accountability.

There is no consensus practice among member States as to how the judiciary is to be administered. In some member States, the judiciary is administered by the executive; in others, it fulfils these functions itself, through special bodies or the higher courts. International standards are not in consensus on the recommended form of administration, as some explicitly call for the judiciary to be administered by an independent body representing judges,[59] while others merely call for it to be organised in such a way as not to compromise the independence of judges, but do not identify a clearly preferable method,[60] or allow for a variety of models.[61] All the standards suggest that at a minimum, the judiciary should have some form of meaningful input into its administration.

[58] This Section principally focuses on the bodies responsible for general issues of administration. Specific issues of self-governance – such as appointments, case management discipline, and budgeting – are considered in separate Sections, and only mentioned here in passing.

[59] ECSJ, Art. 6.

[60] UCJ, Art. 11(1), but noting further that "[w]here this is not ensured in...ways that are rooted in established and proven tradition, judicial independence...would be carried out by independent bodies that include substantial judicial representation." Id., Art. 11(2).

[61] CoE Recommendations, Art. 2(c).

Among the candidate States several models are in use:[62] administration by the Ministry of Justice (Czech Republic, Estonia, Latvia,[63] Slovakia[64]); administration by the Ministry and at least to some extent the judicial council (Bulgaria, Poland, Romania, Slovenia[65]); and administration by the judicial council (Hungary). In Lithuania, the situation is in considerable flux following a 1999 Constitutional Court ruling that invalidated parts of the courts law, but has yet to be replaced; in the interim, the advisory Council of Judges has taken on certain managerial tasks pending completion of a new law on the judiciary.

All the States have vested at least some administrative responsibilities in court presidents or councils; however, in general, administrative authority has not been fully transferred from the executive, and budgetary responsibility remains very much in the hands of the legislative and executive branches.[66] An independent judiciary is possible under each of these systems, as the experience of member States partly shows, so long as the administrative body is prevented, by transparent procedures, from interfering with the core decision-making independence of the judge.

1. Principal Administration by the Ministry of Justice

In some candidate States, the Ministry of Justice is the principal administrator of the judiciary (Czech Republic, Estonia, Latvia, Slovakia). This model has allowed the executive indirectly to affect core judicial decision-making through its control of what should be purely administrative decisions, both legally and beyond its formal mandate.

In some other States in which the Ministry of Justice retains an important role alongside other bodies (Poland, Romania, Slovenia), an avenue for improper executive interference in judicial administration remains open. In Poland, for example, a number of tasks, such as administrative supervision of court presidents, review of case backlogs, and

---

[62] This list is quite similar to that above concerning the Representation of the Judiciary; although some States, such as Slovenia, divide these functions, they are generally joined in the same body.

[63] The Conference of Judges, as a self-governing organisation, also has some very limited advisory and election powers. It examines issues of judicial practice and submits requests to the Supreme Court Plenum for explanations on application of law; it elects members of the Judicial Qualification Board and the Judicial Disciplinary Board.

[64] Slovakia has recently amended its Constitution in a manner that requires reform of the administrative supervision of the courts, but the necessary implementing legislation has not been passed.

[65] Slovenia's system divides administrative authority among a judicial council, the Ministry of Justice, and the Supreme Court.

[66] Budgetary powers are discussed at length in Section IV, below.

elaboration of the judiciary's draft budget remain with the Ministry of Justice. In Slovenia, the Minister of Justice, who retains only limited supervisory powers over the administrative activity of court presidents, recently attempted to extend his competence to assessing the efficiency of courts' operations,[67] which would have opened up the possibility for the executive to selectively scrutinise courts. In Romania, judges report that inspectors from the Ministry intimidate them and interfere with their decisional independence by examining case files to verify the correct application of the law.[68]

2. Administration by a Judicial Council

One alternative to control by any one branch is to establish completely independent bodies not located within any branch. As in France and Italy, most candidate States have established judicial councils – usually composed of members appointed or elected by the various branches – to administer some of the functions of the judiciary. Some – Bulgaria, Hungary, Poland, Romania, and Slovenia – have vested their councils with substantial powers to varying degrees.

Although not the only means of ensuring administrative independence, councils can limit the role of the executive and legislature in the daily work of courts, thus removing one of the principal avenues for outside influence, while at the same time allowing some representation of views and interests from outside the judiciary. The international judges' associations recommend independent bodies representing judges as the most effective way to ensure judicial independence,[69] and several member States have such councils.

However, not all candidate States' councils work in the same way. The design of a council affects its ability to ensure judicial independence – many councils (such as Bulgaria's) have too few resources or personnel to take over administrative responsibilities formerly handled by large ministerial staffs. Hungary has accorded its council nearly exclusive authority, while four other States divide administrative powers between the council and the Ministry of Justice. In other States, councils exercise only limited administrative, supervisory, disciplinary, or advisory functions.

---

[67] The opposition of the Supreme Court, the Association of Judges and the Judicial Council forced the Government to withdraw the proposal.

[68] Information from five district court judges, April 2001, Bucharest; statement of participants at OSI roundtable meeting, 26 March, 2001, Bucharest. *Explanatory Note: OSI held roundtable meetings in a number of candidate countries to invite critique of country reports in draft form. Experts present included representatives of the government, the Commission Delegations, representatives of the judiciary, and civil society organisations. References to this meeting should not be understood as endorsement of any particular point of view by any one participant.*

[69] UCJ, Art. 11(2); ECSJ, Art. 6.

a. Councils with Nearly Exclusive Authority: Hungary

On one end of the spectrum is Hungary's powerful National Council of Justice, which exercises most of the judicial functions previously performed by the Ministry of Justice. The Council is in charge of tasks related to the administration of courts and the selection, promotion, evaluation and training of judges; court presidents and panels have some responsibilities as well. The Council's budgetary responsibility is much more limited; it submits a draft budget for the courts to the Government.

According to some critics the operations of the Council – which has a large staff – are overly bureaucratic and actually increase the administrative burden on judges. Some argue that it is actually the Office of the Council which wields real power, and not the Council itself. Many of the employees of the Office used to work at the Ministry of Justice, and it has been alleged that their mentality still reflects that of the prior system, when courts were clearly subordinated to the bureaucracy of the Ministry.

b. Councils with Broad Responsibility: Bulgaria, Poland

Continuing down the spectrum from maximum responsibility, two States have created judicial councils with broad powers relating to the independence of the judiciary. Bulgaria's Supreme Judicial Council has very broad formal competencies: it determines the number of judges, submits a draft budget for the judiciary to the Government, makes proposals to the State President concerning appointment of the Presidents of the Supreme Court and of the Supreme Administrative Court, and acts as the disciplinary authority for the judiciary. The Council appoints and dismisses judges, and can lift judges' immunity if requested by the General Prosecutor. However, the Bulgarian Council represents the entire magistracy, including prosecutors and investigators. In addition, the Council only meets occasionally and has very limited staffing and resources, which has left the door open for the executive with its greater resources. The Ministry indeed maintains effective control of many administrative functions, and in certain areas, the dual sources of administrative authority have created confusion.

The National Judicial Council of Poland has less power than its counterpart in Bulgaria. It has competence over some personnel and status issues, such as reviewing applications for judicial posts, making recommendations to the State President for appointments, and deciding on the transfer of judges. As noted above, responsibility for budgets, supervision of court presidents, and training remain with the Ministry of Justice.

c. Mixed Systems: Slovenia

In Slovenia, administration is divided among the Supreme Court, the Ministry of Justice, and the Judicial Council. The Council decides most significant personnel and status issues affecting the judiciary; the Supreme Court submits the courts' budget to the executive, although the Council gives Parliament an advisory opinion on the budget.

d. Councils with Limited Powers: Lithuania, Romania

Other States have created councils whose administrative powers – and powers to ensure judicial independence – are more limited. In Lithuania, the Council of Judges advises the State President concerning appointment, promotion, transfer and dismissal of judges, and elects the members of the Judges' Examination Commission. Upon receipt of a complaint from a judge, the Council makes an assessment as to whether judicial independence has been violated. The draft Law on Courts would significantly expand the administrative authority of the Council of Judges and a new National Court Administration, substantially reducing the influence of the executive. In the absence of a new Law on Courts, the Council has in practice taken on somewhat broader powers than are defined in its formal remit.

In Romania, the Superior Council of the Magistracy acts as a disciplinary agency and nominates judges for appointment by the State President, but has no other administrative or supervisory powers, which remain with the Ministry of Justice.

e. Advisory Councils: Slovakia

Slovakia's Council of Judges is a purely advisory body; its ability to support judicial independence rests on publicity and inter-branch relationships. A recent amendment to the Constitution expands the Council's powers to include nomination of judicial candidates, assignment and transfer of judges, proposals for the removal of judges, and establishment of disciplinary tribunals. However, enabling legislation has not yet been passed, and the precise scope of the Council's new powers is not clear.

f. Composition of Judicial Councils

Just as the powers of the councils are varied, so are the modes of their formation, which may have a significant impact on their independence and effectiveness. Obviously, if the purpose of a council is to minimise the influence of the political branches, it does little good to populate it with appointees directly beholden to the Government or Parliament.

Most councils have a mixed composition – including judges and some combination of prosecutors, lawyers, or State officials – and divide the power to elect members among the judiciary, executive and legislature. This ensures accountability through meaningful involvement of the political branches, and a measure of independence for the judiciary. Some councils have a majority of judges (Hungary, 10 to 5;[70] Lithuania,

[70] The Supreme Court elects one delegate and nine judges are elected by the plenary sessions of judges organised on the county level. The Council has five permanent non-judge members: the Minister of Justice, the General Prosecutor, the President of the National Bar Association and two members of Parliament.

all; [71] Poland, 17 to 8;[72] Romania, 10 to 5;[73] Slovenia, 6 to 5[74]), while in Bulgaria judges have only minority representation.[75] Creating a council with a majority for the executive or legislature can defeat the purpose of separating administrative functions from the political branches.

Some States (Hungary, Lithuania, Slovenia) ensure that the whole judiciary is represented – a procedure which may help reduce the risk of illegitimate internal interference with judicial independence by giving judges of all levels a voice on the administrative or rule-making body – while Romania gives disproportionate weight to the higher judiciary, which does little to diminish the risks of intra-judicial interference.

---

71 All members are judges; however, the executive may have some influence on the composition of the Council as the State President and the Minister of Justice each appoint two judges to the Council.

72 Four members elected from the Sejm, two from the Senate, as well as the Minister of Justice.

73 In Romania, the Council represents the magistracy, including prosecutors. In that context, it is appropriate that judges have only part of the representation – although, of course, a joint administration for judges and prosecutors subject to the executive poses its own problems for judicial independence.

74 Five lawyers elected by the National Assembly.

75 The 25-seat Council has 13 representatives of the magistracy, but this includes judges, prosecutors, and investigators, so there are only about six judges (counting the Presidents of the Supreme and Supreme Administrative Courts *ex officio*). Eleven of the 12 non-magistracy seats are elected by Parliament, and the General Prosecutor is a member *ex officio*; thus, members beholden to the legislature or executive hold a clear majority.

IV. Financial Autonomy and Level of Funding

A. Budgeting Process

Whatever the constitutional posture of a State towards judicial independence, the judiciary's freedom to operate independently can be seriously undermined if it is unduly beholden to other branches for its material well-being. Parliament can alter the overall funding of the courts; the executive can distribute funds unevenly among courts. Although it is normal – and entirely consistent with European practice[76] – for the judiciary to receive funding solely through parliamentary appropriations and executive disbursements, these processes can be used to punish or reward courts for the behaviour of particular judges. The mere knowledge that this can happen may operate to discourage judges from ruling against the other branches' wishes.

In the candidate States, responsibility for formulating the budget for the judiciary and allocating it to individual courts is, as a general rule, in the competence of the same body that controls the administrative operation of the ordinary court system.[77] Accordingly, where the Ministry of Justice has full or shared administrative control of the courts, it formulates the judiciary's budget, allocates resources to individual courts, and supervises how resources are spent (Czech Republic, Estonia, Latvia, Poland, Romania, Slovakia).

Where judicial councils exercise significant administrative control over courts (Bulgaria, Hungary), they are involved in the budgeting process to a significant degree. In Hungary the National Council of Justice drafts the courts' budget and submits it to the Government. The Government is not bound by the Council's draft, though it is obliged to give Parliament reasons for deviating from the Council's proposal.[78] In Bulgaria the draft budget of the judicial branch is drawn up by the Supreme Judicial Council. The Bulgarian

---

[76] International standards are largely silent on the specific role of the judiciary in the budgeting process. UN Basic Principles, Art. 7, provides only that the State shall ensure adequate resources, but does not recommend a particular process. The UCJ requires that the judiciary have an opportunity to "take part in or to be heard on decisions" relating to the its material support. Art. 14.

[77] In most of the candidate States, higher courts have separate budget chapters (except the Czech Republic); constitutional courts have separate chapters in all candidate States. In Lithuania, the Constitutional Court ruled that the courts' financial independence required the Government to create a separate budget for them rather than allocating their funding through the Ministry of Justice. Ruling of the Constitutional Court of 21 December 1999, Official Gazette, 1999, No. 109-3192.

[78] It has been reported that the Government has not always complied with this requirement.

constitutional court has held that the Government is obliged to incorporate the Council's proposal into the draft budget without alteration and submit it to the National Assembly. However, the Government may also formulate its own proposals and objections, and in practice Parliament has adopted the Government version.

In Slovenia the National Council of Justice and the Supreme Court share responsibilities for budgetary issues: the Supreme Court prepares and submits the budget to the Government; during parliamentary debate, representatives of the Supreme Court and the Council participate in the sessions of the competent parliamentary committee. Lithuania is in transition, with courts submitting their budgets directly to the Ministry of Finance.

There is no evidence that these models guarantee more effective representation of the judiciary's material interests than other approaches. In no case does a council have effective control over the budget proposal for the judiciary as a whole, and of course budgets are ultimately subject to legislative determination. In all these countries judges are left without representation at the crucial stage when the budget is discussed in the Cabinet. In Slovenia in 1998, for example, the refusal of the Minister of Justice to take part in budget negotiations almost resulted in the closure of district and regional courts.

Clear and detailed protections should be in place to ensure that funding is not used to punish judges or to chill their decision-making. Placing authority for the preparation of budget recommendations in the hands of an independent body – such as a judicial council – can limit the executive's ability to curtail judicial independence. Parliament will still appropriate funding, but solutions such as mandatory funding levels or multi-year or block appropriations can reduce the scope for legislative interference.

Where budgets are prepared without significant involvement by judges, leading politicians should publicly demonstrate support for depoliticisation of court funding through appropriate legislation and executive action. The political branches should commit to specified levels of funding, or specified and objective formulae for determining funding which remove the issue from the political sphere. At all levels, high levels of transparency and greater regular input from judges in budget preparations would raise the costs for parties seeking to influence the judiciary through budgetary pressure.

There is no clear standard concerning the proper level of funding for the judiciary as a proportion of the State budget. It may be possible to derive a standard about protecting funding levels against arbitrary reduction.[79] While it is difficult to identify a common

[79] Compare UCJ, Art. 13 (1); ECSJ, Art. 8.

approach, no member State has reduced the budget for administering the courts in recent decades.[80] (In this regard, Poland is of note: the judiciary's percentage share of the current budget – 1.37 – is reduced to 1.29 in the next budget.) However, even in candidate States whose funding for the judiciary has remained steady, the effective amount of funding has declined, since the increased number of judges and dramatic expansion of the courts' caseload has not been accompanied by a proportional increase in budget allotments.

B. Work Conditions

International standards call for courts to have sufficient funding to ensure their smooth operation,[81] and member State practice is consistent with those standards. It is evident that well-trained, knowledgeable and skilful judges who are not overworked are in a better position to resist undue influence than their less competent colleagues. Poor work conditions can threaten judicial independence; in some cases, the standards may be so low as to dramatically reduce the efficiency of the courts, increase the incentives for corruption as a means of circumventing inefficient and overworked courts, and therefore increase public and political support for closer control of the judiciary's operations. In addition, poor work conditions can limit judges' ability to defend their independence by forcing them to devote excessive effort to basic issues of administrative upkeep, and can threaten their impartiality by making them reliant on assistance from outside parties.

Although salaries in the candidate States have generally increased over the past decade, the conditions under which judges perform their duties are still poor. Many judges work in dilapidated offices with minimal equipment or staff support; in some cases, even basic legal texts, such as official gazettes, are not available. In parts of Romania, for example, four to six judges share a single office. In Bulgaria, Latvia, Lithuania, and Slovakia extremely poor conditions are reported, and in Poland, small courts are much better equipped than large courts. Poor conditions are reported from all countries. There are often considerable differences among courts in any single country, and courts in the capitals often suffer the greatest shortage of space.

In almost every country, the caseload of the average judge appears to have increased substantially since 1990. Staffing levels, material resources and improvements in technology have not kept pace with the immense increase in the number of cases to be handled by courts. In Latvia, these heavy caseloads and the resulting backlogs appear

[80] Information from Giuseppe Di Federico, Director of the Research Institute on Judicial Systems of the National Research Council, University of Bologna.

[81] See UN Basic Principles, Art. 7; UCJ, Art. 14.

to contribute to routine violations of procedural guarantees (such as timely appeals and review of pre-trial detention), weakening public support for the work of the judiciary.[82]

It seems that the candidate States have largely failed so far to remedy the under-investment during four decades of communism. Partly as a consequence of this the courts remain unacceptably inefficient, subject to corruption, and therefore more exposed to incursions on their independence. Poland and Hungary in particular have made some progress in countering these problems, though there too conditions are poor.

C. Compensation

A sufficient salary is a necessary safeguard against the risk that impoverished judges will be compelled to sell justice to make ends meet; in addition, salary often correlates with prestige, which can help inoculate judges against attempts at improper influence, especially from parties to disputes. Although judicial salaries need not match those of the political branch exactly, there is a good argument that ensuring equivalent salaries usefully reinforces the perception of equality among the separate branches. International standards variously call for salaries to be "commensurate with the dignity of [the] profession"[83] or simply "adequate[.]"[84] However, protection against salary reductions is generally not provided for in member States.[85]

In all candidate States, judges' salaries have been increased considerably over the last ten years and they are now usually more or less comparable to those of members of Parliament or civil servants in leading positions.[86] In Latvia, for instance, the salary of Supreme

[82] Although there are differences across the region, each country suffers to some degree from the problem of backlogs deriving from increased workloads. In Estonia the backlogs are linked to the situation of the Russian population, as it is in the mostly Russian-speaking industrial north-east where a disproportionate number of judicial posts have gone unfilled, leaving the existing judges extremely overburdened. In Hungary and Latvia the capitals suffer from the heaviest overload.

[83] CoE Recommendations, Principle III.1.b.

[84] UN Basic Principles, Art. 11; ECSJ, Art. 8 (where adequate means that it must "ensure that the Judge has true economic independence...").

[85] Only Ireland constitutionally prohibits cutting judges' salaries. Information from Ernst Markel, Presiding Justice of the Supreme Court of Austria.

[86] In Poland judges, who receive lower pay than Members of Parliament, have filed more than 500 claims before the courts and the Constitutional Tribunal invoking provisions of the Constitution requiring that judges' compensation corresponds to the dignity of their office and their responsibilities, claiming that these provisions require the various branches' salaries to be equivalent. In its review of the question, the Tribunal did not find any such violation.

Court justices is equal to the highest amount civil servants in the first category receive, while regional court judges get 85 percent of that amount; salaries are supplemented by additional payments varying according to the judge's level, although judges sometimes do not receive the full amount of the supplemental payments to which they are entitled. Judges in Poland and Slovenia in particular have raised complaints that their salaries are incommensurate with their positions.

V. Judicial Office

The procedures for regulating the course of a judge's career – from appointment through various promotions to retirement – should, properly, be insulated from political considerations; yet unless proper safeguards are in place, the discretion which inevitably attaches to the decisions affecting the judge's career provides opportunities for other actors to punish or reward judges based on the substance of their rulings.

A. Selection Process

Over time, a purely political process for selecting new judges can skew the judiciary unduly in favour of the body controlling selections, especially if that body exercises continuing institutional influence on judges' careers. Yet denying the political branches any say in the selection of judges risks isolating the judiciary from the democratic society which it serves – and indeed, the potential intrusion is relatively minor, as, by itself, bias in selection does not restrict the judge's subsequent independence on the bench. Certainly, international standards and member State practice do not prohibit the involvement of the political branches in initital selection of judges.[87]

Among candidate States, there are two aspects of the selection process that are problematic from the point of view of judicial independence: probationary periods for new and untested judges,[88] and political involvement in appointments to higher courts.

Probationary Periods and New Judges: Probationary appointment is seen in many countries of Europe as a necessary means of screening out individuals unfit for office and not as a threat to judicial independence. Several member States employ probationary periods during which guarantees of independence are restricted. It is often

---

[87] See *Campbell and Fell v. UK*, ECHR Judgement of 28 June 1984, A80 (holding that appointment by the executive is permissible and even normal). Compare UN Basic Principles, Art. 10 (requiring that appointees be persons of "integrity and ability" and that selection not be for "improper motives" or discriminatory); CoE Recommendations, Principle I.2.c. (recommending that the selecting authority be "independent of the government and the administration[,]" but noting that "constitutional or legal provisions or tradition" may allow judges to be appointed by political authorities and recommending in such cases that the process be transparent and independent in practice); UCJ, Art. 9 (requiring appointment according to objective criteria based on proper professional qualification[,]" but also implicitly allowing for this to be done by political bodies in accordance with "established and proven tradition[.]").

[88] Probationary periods can be considered as a problem of tenure.

noted that new judges lack sufficient experience and maturity responsibly to handle a broad grant of independence. Certainly, because society grants independence to judges in order to secure impartial decisions on important issues, it may reasonably expect that its judges are prepared to use their independence responsibly, and not as a license.

Although there are important variations, in most of the candidate States the path to a judgeship requires a probationary period of several years before a decision concerning a life appointment is made; the Czech Republic, Slovakia, and Slovenia alone grant permanent tenure upon appointment.[89]

Clearly, however, for the duration of the probationary period judges may feel an incentive to consider the effects upon their careers of decisions that displease officials in charge of determining who receives permanent appointment. The gains in ensuring a high quality corps of judges must be weighed against the potential for harm to judicial independence. This is especially the case as there are a number of steps States could take to improve the quality and professional maturity of incoming judges, thus obviating or minimising the need for post-appointment intrusions on judicial independence.

Rather than persist in limiting independence on the grounds that young new judges are unable to handle it, States might work to alter the profile of incoming judges to eliminate the problem of judicial irresponsibility at the outset, in recognition of the fact that judicial independence has taken on a newly recognised importance in a democratic society. In other words, guarantees of independence would not be limited to accommodate the pool of judges, but the other way around. The system would aim to produce judges who can adjudicate responsibly, not limit their ability to do so on the grounds that they cannot.

Ideally, transparent and neutral approval procedures – preferably vested in a body not involved in the further evaluation or promotion of judges during their careers – should be applied to probationers; the political acceptability or preferability of judges' rulings should play no part in the determination. Specifically, training for candidates should be extended, and age limits and experience requirements increased where possible.[90] Expanding the period of in-court training (during which candidates exercise

---

[89] Poland does not have formal probationary periods, but inasmuch as candidates for judgeships must first work as assessors – and exercise adjudicatory powers like a judge – in effect the problems attached to probation can occur there as well.

[90] Where financial resources allow, increasing judicial salaries – besides its inoculatory effects against corruption – can also encourage older, more established attorneys with greater life experience to consider judicial careers, thus reducing the problems associated with young judges.

no core decisional powers by themselves) and reducing the period of probation, as in the German model, or even eliminating probation altogether, can minimise the potential for improper and unnecessary interference. In general, the decision about judges' maturity should be made before they begin working, while mechanisms for removal afterwards should be disfavoured, as they inevitably open the door to abuse, which chills the decisional independence of all judges, including those who are competent.

Where probation is retained, it should be understood that it is only a mechanism to weed out incompetent judges, and cannot have any political content. Therefore, it seems improper to vest any decisional authority in the political branches after they have made the initial appointment.[91] Instead, since evaluating probation is a technical matter, it ought to be done by a commission composed of judges and legal professionals applying clear and neutral criteria. And, of course, since the purpose of probation is to identify incompetent judges, there is little reason to keep probationary restrictions in place for several years.

Appointments to Higher Courts: In many candidate States Supreme Court justices and constitutional court judges are appointed by parliamentary vote.[92] These processes are inherently political, and because appointment to these courts is effectively a form of promotion from lower courts, lower court judges may feel incentives to rule in ways which please the political authorities responsible for elevating judges to higher courts – a problem noted in Estonia in connection with its Supreme Court. Supreme Court judges in Romania are appointed by the State President for *renewable* six-year terms, which opens the door to influence like that experienced by probationary judges.

Although the process of selecting judges can never be completely isolated from political considerations – and need not be – political involvement in selection should be cabined within neutral, objective, and transparent standards. Dividing the selection process into nominating and appointing phases, with different bodies or branches responsible for each phase, can limit the risks of undue political influence.[93] Judicial independence is compatible with a wide range of selection processes so long as they are coupled with an unambiguous commitment to the principles that judges, once selected, are no

---

[91] In Estonia, for example, the State President makes initial appointments, but has no involvement in the decision to review a judge at the end of the probationary period – thus keeping the decisional authority in the hands of legal professionals.

[92] In Estonia, Supreme Court judges are elected by Parliament upon the proposal of the President of the Supreme Court, who is also elected by Parliament, upon the nomination of the State President.

[93] See CoE Recommendations, Principle I.2.c(2); but see ECJS, Art. 4 ("No outside influence and, in particular, no political influence, must play any part in the appointment of Judges.").

longer beholden to their political supporters for maintenance in their position, and must not be the subject of attempts to influence decisions in a particular case.[94]

B. Tenure, Retirement, Transfer, and Removal

1. Tenure

If judges believe that their job security depends upon the decision of a political actor, they may feel pressure to rule in a manner showing their loyalty and worthiness. Apart from the probationary period, ordinary judges have tenured irremovability until retirement in all candidate States; this is seen as an essential guarantee of independence, in accordance with the consensus practice among EU member States[95] and international standards.[96]

There are countervailing tendencies, however. In Slovenia members of Parliament have questioned the rationale of permanent tenure and proposed a constitutional amendment to abolish judicial tenure, though it is unlikely to pass.[97] The principle of lustration – though probably a unique case – can threaten judges' security of tenure.[98]

Throughout the region, most of the provisions dealing with judicial tenure seem designed, on their face at least, to respond to legitimate administrative and disciplinary concerns and to the need for accountability. Again, as with other administrative matters, clarity and objectivity of standards are probably more important than the specific requirements.

---

[94] The obvious exception is the institution of (re-)elected judges. However, with the possible exception of the quasi-political constitutional court and probationary regular judges, a clear preference against re-election of judges following the expiry of their term, where they do not have life tenure, would seem in concert with European values. Compare CoE Recommendations, Principle I.3. At a minimum, if a judge is subject to renewal, including through the probationary mechanism, that renewal must not be contingent, in any fashion, on the substantive conclusions the judge reached in any particular case.

[95] Information from Giuseppe Di Federico, Director of the Research Institute on Judicial Systems of the National Research Council,University of Bologna. The consensus practice applies to professional judges, not lay judges (such as justices of the peace in Italy, or administrative tribunal magistrates in England).

[96] UN Basic Principles, Arts. 11, 12.

[97] According to the author of the proposal, judicial backlogs are a result of judges' permanent term, which is not counterbalanced by adequate mechanisms for judicial accountability.

[98] See Section V.B.4.a.

2. *Retirement*

In most candidate States judges may be permitted to continue on the bench after reaching the normal retirement age at the discretion of the judicial administration,[99] a practice which introduces unnecessary risks to judges' independence.[100]

If judges' living standards drop dramatically following retirement, the possibility of extension may present a genuine threat to judicial independence, particularly if there are no precisely defined criteria for continuation. It is possible that selective extension will be used to remove politically undesirable judges, or to encourage pliability. This risk is particularly salient in Bulgaria, where a proposal to dismiss a judge after the retirement age does not have to be supported by reasons and where, at the same time, judges have incentives to continue working as pensions are very small. Similar problems obtain in the Czech Republic, Latvia, Romania[101] and Slovakia. Adequate pensions would reduce concerns about discretionary retirement, although the best approach is to mandate a retirement age without exception; the political branches should not have the discretion to retain or release judges after they become eligible for retirement.

3. *Transfer*

The security offered by tenure may be vitiated if judges can be transferred without cause. All member States restrict the practice of permanently transferring judges without their consent to disciplinary reasons or re-organisations that eliminate courts;[102] however, the rules for temporary transfers are much less restricted.

Generally among candidate States, judges may not be transferred from one court to another during their term in office without their consent; transfers are generally permitted under limited circumstances such as disciplinary sanctions or the reorganisation of courts. Some States allow temporary transfers without a judge's consent

---

[99] No extension beyond mandatory retirement is allowed in Estonia, Hungary, Lithuania and Slovenia.

[100] International standards would seem to favour a strict mandatory retirement. See UN Basic Principles, Art. 12; CoE Recommendations, Principle I.3.

[101] Romania does have a mandatory retirement age for judges; however, the retirement age for the popoulation as a whole is lower , and judges may serve up to the higher maximum retirement age for judges only at the discretion of the judge's court president (with the exception of Supreme Court justices).

[102] Compare CoE Recommendations, Principle I.2.f (providing that "[a] case should not be withdrawn from a judge without valid reasons...").

(Lithuania[103]), sometimes without sufficient procedural guarantees (as in Bulgaria and Hungary[104]).

4. Removal

Permanent removal of judges is generally performed by the appointing or electing body, and, consistent with international standards[105] and most EU practice,[106] is generally limited to instances in which judges have been found guilty of a criminal offence,[107] have seriously breached their obligations, or for health reasons are permanently prevented from performing their duties. The provisions generally seem procedurally sound.

a. Lustration

In most candidate States, the composition of the judiciary has changed considerably since the end of Communism. The number of judges has increased substantially, and in most countries their average age is quite young, due to mandatory or encouraged voluntary retirement of judges politically active during the communist period (Czech Republic, Poland), political screening processes for judges (Czech Republic, Estonia), administration of oaths (Estonia) or declarations (Poland) concerning activities during the communist period, and active recruitment of younger candidates (Romania).

The process of politically motivated screening is by no means complete. For example, in 2000 Hungary extended its existing lustration law, screening certain officials who

---

103 Under the draft Law on Courts the State president, on the advice of the Council of Judges, would be able to transfer judges for up to six months without their consent, if necessary to ensure the functioning of the court. However, it is not clear how often such a transfer could occur.

104 The National Council of Justice may transfer a judge once every three years to another court for up to one year in "the interests of the administration of justice." Act LXVII on the Legal Status and Remuneration of Judges, 1997, Art. 17.

105 UN Basic Principles, Art. 18; CoE Recommendations, Principle VI.2.

106 In most member States, removal may be effected only on disciplinary or disability grounds, or upon penal conviction for serious offences. There are two main exceptions. In England and Wales judges sitting in the High Court and the Court of Appeals may be removed by the Crown following a vote by both houses of Parliament, but this rather complex procedure has been successfully invoked on only one occasion. A similar procedure in Germany, with impeachment by the *Bundestag* and a final decision by the Constitutional Court, has never been employed. Information from Giuseppe Di Federico, Director of the Research Institute on Judicial Systems of the National Research Council, University of Bologna.

107 In Bulgaria the judge must be sentenced to imprisonment.

worked in the communist regime, to include ordinary judges.[108] There is concern that submitting judges to ideological screening ten years after the change in regime has no legitimate purpose.[109]

Because it may allow the legislature or executive to remove sitting judges from office based on political or ideological criteria, lustration or screening represents a potentially serious intrusion into the independence of the judiciary. Judges are forced out of office, sometimes without having violated any law, without regard to their competence. Such actions might violate international norms concerning the independence of judges.[110]

However, the relatively limited exercise of lustration seen in candidate States in the past decade does not seem to violate any standard embraced by the EU. Germany still has screening and lustration provisions in place, and most judges who served in the German Democratic Republic have resigned their posts. This has not generated any reaction from the EU or member States.[111] In addition, a number of member States have provisions screening or barring from public office "Nazis", "fascists", or their collaborators.

Considered in the context of the rapid transition from communist systems that denied the independence of the judiciary and actively involved judges in systems of political oppression, a tailored and temporally limited screening seems compatible with the *creation* of an independent judiciary. However, where lustration is expanded over time, or is increasingly unrelated to precisely defined activity during the communist period, as in Hungary, it may interfere with the *maintenance* of an independent judiciary.

C. Evaluation and Promotion

As with initial selection procedures, where standards for promotion[112] are not regularised and transparent, promotion and the rewards it brings can be held out as an incentive for a judge to issue rulings pleasing to those deciding which judges advance. In addition,

---

108 The original version from 1994 only covered the President of the Supreme Court.

109 The Czech Republic and Lithuania extended lustration laws covering judges in 1996 and 1998, respectively.

110 See UN Basic Principles, Art. 10; CoE Recommendations, Principles I.2.c. and VI.2.

111 Information from Giuseppe Di Federico, Director of the Research Institute on Judicial Systems of the National Research Council, University of Bologna.

112 This Section considers both promotion in salary and rank within a court and appointments to higher courts, which, consistent with practice in many member States, is not formally considered a promotion in most candidate States.

because higher judges review lower court decisions, and often have administrative authority, there are added incentives for political actors to influence the advancement of judges to higher positions if clear and neutral procedures are not in place to prevent them.

International standards call for advancement to be based on factors such as experience and ability.[113] Within member States with career systems similar to those in the candidate States, advancement is based on specific norms intended to regulate the process in a fair way,[114] although nowhere is discretion fully eliminated by formal regulation.

Judicial posts in the candidate States are usually filled by career judges who are progressively promoted. Although it is reported that assessments for promotion are in most cases made on objective criteria, such as the judge's integrity, ability and experience, there are considerable differences in the precision and clarity with which criteria for assessing performance are defined. Lack of clear criteria increases the risk of arbitrary, politically biased decisions. Moreover, assessments often consider the rate of reversal by higher courts. While this may be a relevant factor in certain contexts, where higher court judges have influence on promotions (as in Estonia), excessive reliance on this criterion may encourage undue deference by lower judges interested in promotion, which may impinge upon their decisional independence.

In Bulgaria, Latvia, and Slovenia,[115] criteria for assessment and promotion are poorly defined. In Romania, by contrast, criteria for assessing judges' performance are clear and detailed, while few quantitative measures of performance are set except caseload and time served; however an exceptionally high reversal rate may lead to a poor assessment rating.

D. Discipline

Simplistic models of judicial independence might suppose that *any* attempt to punish a judge infringes judicial independence. This is certainly not the view of the international standards,[116] nor does it comport with member States' practice. When a judge acts in

---

[113] UN Basic Principles, Art. 13; CoE Recommendations, Principle I.2.c. (noting also that it is preferable for evaluative decisions to be made by the judiciary itself); UCJ, Art. 9; ECSJ, Art. 5.

[114] Information from Giuseppe Di Federico, Director of the Research Institute on Judicial Systems of the National Research Council, University of Bologna.

[115] In Slovakia, under a recent amendment to the Constitution, appointments would be made by the State President upon nomination by the Judicial Council. However, the Minister of Justice would still appoint court presidents, and there would be no clear assessment standards.

[116] See UN Basic Principles, Art. 17–20; CoE Recommendations, Principle VI; UCJ, Art. 11.

a manner inconsistent with judicial office, accountability requires disciplinary action or removal; independence requires only that this be done in a way which, over time, does not discourage other judges in the free exercise of their judicial function.

The candidate States' laws on judicial conduct generally oblige judges to refrain from conduct that compromises the dignity of judicial office. For example, Bulgaria's provisions – which sanction unjustified delays,[117] acts that diminish the reputation of the judicial branch, and offences and omissions in the discharge of their official duties[118] – are fairly typical of those in other candidate States, although there is considerable variation in their precision. In Slovakia, there are no detailed rules on what constitutes a disciplinary offence, whereas in Romania the law is quite specific.

This general imprecision in elaborating grounds for disciplinary action stems in part from the absence of official codes of judicial ethics. Certainly, this is not a problem only in the candidate States; in general, member States do not have enforceable codes of judicial ethics which would lay out precisely the grounds for disciplinary action. Usually, norms regulating behaviour on and off the bench are framed by the legislature in general terms and leave room for discretion, the exercise of which has not raised serious concerns.[119]

In all candidate States except Romania and Slovenia,[120] codes of ethics have only unofficial status and do not constitute direct grounds for disciplinary action. In Hungary none have been adopted. The Romanian regulation is unique in that the Law on the Organisation of the Judiciary explicitly states that grave violations of the rules of the Magistrates' Code of Ethics also qualify as disciplinary offences.

In theory, insufficiently formulated rules of conduct invite prosecution of judges for trumped-up disciplinary offences.[121] This is to some extent counterbalanced by procedural safeguards consistent with international standards[122] and legislative practice among EU States. Thus, in all candidate States judges have the right to present their arguments

[117] Undue delay is one of the most common causes for disciplinary proceedings in most candidate States.

[118] Bulgaria's Judicial System Act, Art. 168.

[119] Information from Giuseppe Di Federico, Director of the Research Institute on Judicial Systems of the National Research Council, University of Bologna.

[120] Some ethical principles are identified in the Judicial Service Act (Arts. 37–39); moreover a draft Code of Judicial Ethics was adopted by the Slovenian Association of Judges on 8 June 2001.

[121] An example of the potential for this kind of problem may be a case from Estonia, in 2000, in which the Ministry of Justice initiated disciplinary proceedings against a judge, alleging unnecessary delay in a court case. The Ministry was itself a party to the case in question. The judge was ultimately cleared of wrongdoing. Judges' Disciplinary Commission, Estonia, Case No. 3-8-11-1.

[122] UN Basic Principles, Arts. 17, 19; CoE Recommendations, Principle, VI; UCJ, Art. 11(3); ECSJ, Art. 9.

at oral hearings; they may be assisted by counsel and may appeal against decisions of the disciplinary body (except in Latvia; Bulgaria is currently considering a ban on appeals).

Indeed, in practice it is not arbitrary disciplinary punishment which raises concerns across the region, but rather the *reluctance* of disciplinary bodies – composed in most countries of fellow judges – to find judges responsible for offences.[123] Disciplinary accountability should not be seen as a threat to judicial independence. On the contrary, an insufficiently self-critical approach and failure to enforce ethical rules jeopardise independence by weakening public trust and encouraging the other branches to limit their support for judicial independence, as has been seen in Bulgaria and to a lesser degree in Slovenia.

[123] In Slovenia, for example, although disciplinary proceedings against judges have been initiated on a number of occasions, no judge has been convicted of a disciplinary transgression; instead, some judges have quietly resigned following investigations. The procedures strongly favour confidentiality – valuable in protecting public confidence in *individual* judges, but damaging to its confidence in the whole judiciary's accountability. In Poland, too, procedures favour confidentiality over accountability.

VI. Intra-Judicial Relations

Individual judges' freedom to decide cases before them as they see proper can be affected not only by the legislature and executive, but also by actors within the judiciary itself. Although international standards recognise that there are appropriate limits on judicial independence in the form of appellate proceedings,[124] they also reaffirm the decisional independence of individual judges,[125] who may feel constrained in the exercise of their independent judgement by the expectations of higher courts if, as is often the case, members of those courts exercise control over the career path of lower judges.

A. Relations with Superior Courts

An individual judge's decisional independence may be unduly interfered with by higher judges or courts, as well as by other branches of the State. Numerous instances in which higher courts have administrative authority over lower judges are noted elsewhere in this Report. In addition, higher judges may influence lower court judges through informal consultations which, though not always violating a judge's independence, do limit transparency and accountability in the decision-making process.

As in civil law countries in general, including those within the EU, uniformity of judicial decisions is highly valued and is enforced through various mechanisms in the candidate States. Each State maintains a comprehensive system of appeal. As a general rule, appeal courts review the judgements brought before them in full, checking both whether the facts have been correctly established and whether the inferior court made a correct legal assessment.[126] Most candidate States also provide for a cassation review on procedural grounds. In addition appeal courts in most countries may give specific instructions on how to proceed on re-trial,[127] as well as binding general directives concerning the application of law.[128] Many judges consider binding instructions in particular to be an attempt by the higher courts to limit individual judges' scope of deliberative freedom, in a manner

[124] UN Basic Principles, Art. 4; CoE Recommendations, Principle I.2.i.; UCJ, Art. 4.

[125] UCJ, Art. 1, 2, 4; CJE, Art. 1. See *Findlay v. United Kingdom*, paras. 75–77.

[126] In the Czech Republic, as of 1 January 2001 the system of full appeal was replaced by the partial appeal system, which reviews only the legality of lower court decisions.

[127] In Estonia this right is limited. In the Czech Republic and Hungary, the appeal court may also order that criminal cases be re-tried by a different panel.

[128] Except Estonia and Slovakia, although in Slovakia the Supreme Court publicises selected cases of general importance to which courts are expected, but not legally required, to conform.

which ought properly be done only by legislation. However, binding instructions do not necessarily limit judges' independence.

Outside of these entirely legitimate mechanisms for ensuring accurate and consistent results, however, judges often employ informal consultations. In the majority of candidate countries there is no prohibition against lower court judges consulting with those of higher courts.[129] In Romania, higher courts are forbidden to give lower court judges instructions regarding a case outside the appeals process; nevertheless lower court judges regularly consult with higher court judges on particular cases. These practices encourage uniformity of decision, but often at the cost of reducing transparency and accountability, as well as (where such "consultations" take place at the initiative of higher court judges) curtailing lower courts' decisional independence. (This is a particular problem where higher court judges decide on promotions and rates of reversal are considered in the assessment process, as in Estonia.)

B. Case Management

The nominally administrative task of case management can have important effects for judicial independence and impartiality; during the communist period, case assignment was one area in which political intervention was most prevalent. The power to assign cases can be used to ensure favourable or unfavourable hearings; it can also be used to punish uncooperative judges. International standards recommend that caseload administration be a purely internal matter;[130] all member States leave case assignment to the judiciary, but there is no consensus practice on using neutral procedures.[131]

Generally among candidate States, the authority supervising court administration also has the task of setting overall norms for caseloads. Thus in Slovenia and Hungary the Judicial Councils determine the norms, but in the Czech Republic the Ministry of Justice sets each court's or judge's caseload, with court presidents ensuring compliance – which means the executive influences caseload administration, contrary to international standards.

[129] The Czech Republic and Romania do have such prohibitions.

[130] UN Basic Principles, Art. 14; CoE Recommendations, Principle I.2.e. (recommending random distribution).

[131] Information from Giuseppe Di Federico, Director of the Research Institute on Judicial Systems of the National Research Council, University of Bologna.

There has been an encouraging development towards random assignment of cases as a further guarantee of impartiality and independence. In Estonia, Lithuania[132] and Slovenia random assignment is already the rule; in Hungary and Slovakia some court presidents employ random allocation, and the Czech Republic and Latvia have recently introduced random assignment systems. In Bulgaria and Romania court presidents assign cases at their discretion, and the assignment system remains insufficiently transparent, with considerable room for court shopping and bribery.

[132] In Lithuania, the court president may select from among three methods for assigning cases, and may change methods once a year.

VII. Enforcement and Corruption

A. Enforcement

There are no clear international standards on enforcement of judicial decisions, although the general requirement that judges' decisions not be subject to revision[133] could be understood as implying the need for them to be enforced. In general the standards assume that courts should be supported in their work.[134]

Enforcement is not necessarily a judicial function, and may be a responsibility of the executive. However, where court rulings are not respected, individuals will inevitably come to view the courts as ineffective, and will seek alternative fora for their disputes, decreasing courts' legitimacy. In practice, citizens gain no benefits from guarantees of judicial independence if judges' decisions have no impact. Contrariwise, effective enforcement improves public confidence in and support for independent courts.

All the candidate States face problems with enforcement, especially of civil judgements. In part this is a consequence of courts' expanded competencies and concomitant increases in the caseload that have not been matched by modernisation of the enforcement system.[135] Enforcement mechanisms have generally not been subject to the same degree of sweeping reform as other elements of the judicial process, although some States (Czech Republic, Estonia, Slovakia) have reformed their systems for enforcement (such as by introducing private enforcement) in an effort to improve efficiency.

In some States, such as Romania, Bulgaria, and Slovenia, even decisions requiring action by the Government are sometimes ignored, or enforcement is seriously delayed. (In no case does it appear that candidate States refused to enforce final criminal judgements.) In Bulgaria, for example, the Supreme Administrative Court has had to resort to imposing statutory fines on high officials – including regional governors and even cabinet ministers – following their failure to fulfill obligations arising from court

---

[133] UN Basic Principle, Art. 4; CoE Recommendations, Principle I.2.a.i.

[134] The European Court of Human Rights has held that failure to execute a court judgement may breach Article 6 (1) of the European Convention on Human Rights. See e.g. *Hornsby v. Greece*, ECHR Judgement of 19 March 1997 (App. No. 18357/91), Reports 1997/II (noting also that execution is to be considered "an integral part of the trial", para. 40).

[135] For example, in Lithuania between 1994 and 1999 the number of cases subject to execution increased more than 200 percent, while the number of court bailiffs increased only 30 percent.

decisions. In Slovenia, non-compliance with court decisions is partly a matter of governmental policy in response to budget limitations, as the Ministry of Finance must sign off on any judicial or non-judicial settlement to which the Government agrees. In a similar manner, as of the end of 2000, thirteen rulings of the Constitutional Court were not being enforced because Parliament had failed to enact new legislation.[136]

B. Corruption

Society's interest in having judges adjudicate cases free of undue influence is not only threatened by other State actors; in many countries, bribery and intimidation by private parties pose an equal or even greater threat. All international standards seek to ensure that judges decide cases impartially, relying only on the facts and the law.[137] All member States have provisions against bribing or intimidating judges, and also against judges administering justice in exchange for money; nonetheless, in some member States, corruption and the threat it poses to judges' impartiality are considered serious problems.

Likewise, there is a widespread perception that corruption is endemic in the judiciary of several candidate States, especially in Bulgaria, the Czech Republic, Latvia, Lithuania, Romania, and Slovakia. Certainly, all candidate States have sanctions against corrupt activity in the courts, but supervisory mechanisms to ensure judges' impartiality – such as disclosure of assets and clear rules on recusement – as well as transparent procedures for tracking cases to prevent delays (a common cause of bribes) are weak in most States.

---

[136] Legal Information Centre of the Constitutional Court, Report No. 143/00-1 from 27 March 2001,

[137] UN Basic Principles, Art. 2; CoE Recommendations, Principle I.2.d (also calling for sanctions against "persons seeking to influence judges in any manner"); UCJ, Art. 3 and 5; ECSJ, Arts. 2–3.

VIII. Recommendations

This Overview suggests a number of ways in which the accession process could contribute to judicial independence in the candidate countries and the EU itself. Following are several of the most important; all begin from the premise that accession is a positive development whose potential to spark needed reform should be reinforced.

To the European Union

Clear Standards

The EU should clarify requirements and standards for judicial independence. It or its member States acting individually should make the UN Basic Principles and CoE Recommendations binding.

Member States' Practices

A comprehensive survey of member States' practice relating to an independent judiciary should form one of the bases of any effort to elaborate EU standards clarifying, for all States, the content of Europe's commitment to judicial independence; EU recommendations to the candidate States should be grounded upon such standards.

To EU Candidate States

Legal Culture and Judicial Capacity

In candidate States, the continuing assumption that political involvement in judicial administration is necessary and desirable must be confronted and rejected. Courts should be given the means to develop their management expertise to counter arguments for executive involvement. International support could be of critical importance in this area.

Political Support

Politicians must publicly affirm the importance of an independent judiciary by enacting legislation supporting it, and refrain from making inroads on the judiciary's prerogatives.

Accountability to Criticism

Judges must refute political criticism, not by censuring all complaints, but by demonstrating that they are prepared to administer themselves with professionalism and restraint, and to make themselves accountable to society.

Constitutional Guarantees

Constitutional guarantees should unambiguously identify independence and separation of powers, and independent administrative bodies should be given constitutional status.

Constitutional Courts

Where States establish a separate quasi-judicial institution like a constitutional court closely connected to the executive or the legislative, ordinary courts should be protected against political intrusions on their independence, just as against any other political body.

Judicial Councils

States should consider creating independent judicial councils to administer the judiciary. Where States choose not to create such councils, they must ensure that the alternatives contain robust institutional guarantees for the neutrality of procedures applied to the judiciary, and that judges have meaningful input in their administration and discipline.

Remuneration

Judges' salaries should be competitive with the professional alternatives available to them; judges should have the materials necessary for effective adjudication.

Funding

Clear and detailed protections should be in place to ensure that funding is not used to punish judges or to chill independent judicial decision-making. Placing some or all authority for preparing budget recommendations with an independent body – such as a judicial council – can limit the executive's ability to curtail judicial independence.

Where budgets are kept in the competence of the legislature and executive, those branches should commit to specified levels of funding, or specified, objective and non-political formulae for determining funding. Leading politicians should publicly support the depoliticisation of court funding with appropriate legislation and executive action. In addition, mandatory funding levels and multi-year or block appropriations disbursed by a body independent of the executive and legislature should be considered to reduce the possibility of political interference with judicial authority through the budget process.

Appointment of Judges

Transparent and neutral approval procedures should be applied to probationary judges and applicants for promotion; the political acceptability of judges' opinions should play no part in determinations about tenure. In-court training periods for judge candidates should be extended, to reduce the felt need for probationary periods.

Tenure

Whenever possible, ordinary judges ought to have life tenure from their first appointment. Where judges are appointed for a fixed term, except possibly in the case of the constitutional court and probationary judges, a clear preference against re-election of judges following the expiry of their terms would seem in concert with European values.

Where probation is retained, it should be clearly understood that it is a mechanism to weed out incompetent judges, and cannot have any political content. Evaluating probation should be a non-political matter, and decisional authority should be vested in a commission of judges and legal professionals applying clear and neutral criteria.

At a minimum, renewal of judicial appointment must not be contingent on the political acceptability of the substantive conclusions the judge reached in any particular case.

Retirement

If a retirement age is specified, it should be mandatory; the political branches should not have the discretion to retain or release judges after they become eligible for retirement.