YEARBOOK OF ESTONIAN COURTS 2018

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FOREWORD

Dear reader,

The 2018 Yearbook of Estonian Courts has been published—this time we will take a closer look at the judicial system itself, in particular, its reliability and independence.

The current judicial system was established by the constitution and was approved by an overwhelming majority in the 1992 referendum. This system is based on the principles of balance and the separation of powers. No branch of power can increase their discretion on the account of other branches and, most importantly, the cannot stop the other branches from exerting control over their decisions. According to section 146 of the Constitution of the Republic of Estonia, the sovereign task of judicial power is the administration of justice, but it must also ensure the compliance of laws with the constitution, as stated in section 152. With this, judicial power is given the task of ensuring that executive and legislative powers do not become uncontrollable. On the other hand, the executive and legislative branches have been given levers to keep judicial power in its place and to prevent the rule of law from developing into a judicial dictatorship. In recent years, several European countries have shown alarming tendencies. The independence of courts, as a branch of power, is being called into question and there are attempts to turn the courts into a mere catspaw of political power. These are attempts to remove the filter between citizens and the arbitrariness of the authority of state. Even in Estonia, there are forces that are, through use of indiscriminate rhetoric, trying to demonise judicial power and accuse the courts of being uncontrollable and arbitrary on the account of other branches of power.

Consequently, this year's articles partly address judges' critical self-reflection with regard to the opportunities of improving the internal control of the judiciary and the monitoring of quality and the internationally adopted standards designed to ensure the reliability of judgments. We are also seeking to answer the question concerning what judges themselves can do to maintain confidence in judicial power and preserve its good public image.

In the opening article, Anu Uritam, Judge of the Harju County Court, provides a thought-provoking overview of two legal systems where judges are elected, the United States of America and Bolivia. In the United States of America, a judicial system with judiciary elections was established as far back as the 19th century. Bolivia, however, is an example of a country where this model was adopted more recently. The article highlights problems that have arisen in both legal systems in relation to the election of judges. It leads to the conclusion that elections are not a

suitable method for finding just and unbiased judges. However, such a regulation can very easily undermine the independence of the judicial system.

Julia Laffranque, Judge of the European Court of Human Rights, writes about the practice regarding the autonomy of the European Court of Human Rights. The author provides numerous examples to explain the meaning of the independence of the judicial system to persons who seek help from the court to defend their rights and how unjustified restrictions on autonomy may call into question the role of the courts, as guarantors of human rights. Judicial independence is not a private luxury or a privilege of judges, but a guarantee that people who turn to court receive fair solutions to their problems. The article shows how multifaceted and complex judicial independence is, but also how important it is to constantly make efforts to maintain the autonomy of courts.

Julia Laffranque's focus piece on the European Court of Human Rights is supplemented by an article written by Oliver Kask, a judge sitting on the Tallinn Circuit Court and member of the Venice Commission, who addresses the measures that ensure the personal independence of judges, as well as matters related to restricting guarantees. In doing this, he mainly draws upon the positions of the Venice Commission. The article discusses limits set on judges and their responsibilities, but also judges' official benefits and aspects pertaining to the duration and integrity of the judicial office, as well as the guarantees of independence, neutrality and reliability of the judiciary. The author admits that, currently, the independence of judges is generally well-ensured in Estonia compared to the rest of Europe and the public has also been kept up-to-date with the relevant information.

In addition to the articles on the main topic, the yearbook also includes the traditional statistical overview of the work of courts in 2018.

The editorial board would like to offer its sincere thanks to Managing Editor Karin Leichter who, in addition to the authors of the articles, made a significant contribution to the making of this yearbook.

Happy reading,

— Andres Parmas,
Editor-in-Chief of the 2018 Yearbook of Estonian Courts

Chapter I
YEARLY SUMMARY

DEVELOPMENT OF THE LEGAL AND JUDICIAL SYSTEM

Presentation at the Plenary of Judges, Tartu, 8 February 2019

— *Dr. iur.* VILLU KÕVE, Chief Justice of the Supreme Court of Estonia

Dear colleagues and guests,
honoured members of the Riigikogu
and Minister of Justice,

Today, I am making my first presentation as the Chief Justice of the Supreme Court. At first, I was supposed to fill in for the former Chief Justice Priit Pikamäe, but by now it is clear that I have a more permanent connection to the position of the Chief Justice of the Supreme Court. I will try to perform my duties with the same dignity Priit Pikamäe showed before me. Today, I would firstly like to give you a brief overview of the developments concerning the judiciary and the judicial system in 2018, followed by a short description of what I wish to focus on during my tenure—what to facilitate and what to keep an eye on.

Judiciary

The Estonian judicial system continues to have 242 judge seats, of which 236 are currently filled. Judges tend to leave their position mainly due to retirement, which led to the departure of a total of 10 judges in 2018, seven of whom left from courts of first instance, one from a circuit court and two from the Supreme Court. One colleague was discharged on other grounds and impeached.

Last year, two competitions were announced to fill the vacant judge seats, one of which has now ended. No competition has failed due to lack of candidates, on the contrary, the average number of candidates for one judge seat, both in the courts of first instance and circuit courts, is five. Applications of sworn advocates formed 11 and those of prosecutor's four of all candidacies. An increase in the number of representatives of other fields entering into judge competitions is most welcome. A total of 37 people took the judge's examination, 11 of whom passed. As a result of the competitions, last year, the Estonian president appointed Alan Biin, Laura-Liis Sarapuu, Elina Elkind, Andrea Lega, Maarja-Liis Lall and Ants Mailend as Judges of the Harju County Court, Kristiina Kask as Judge of the Tartu County Court, Liina Naaber-Kivisoo as Judge of the Viru County Court and Tristan Ploom as Judge of the Tallinn Administrative Court. Former Judge of the Harju County

Court, Meeli Kaur, and former Judge of the Tartu Administrative Court, Janar Jäätma, assumed office as members of the Tallinn Circuit Court.

Changes have been and are still being made in the Supreme Court, too. Firstly, I would like to mention that the reconstruction work of the buildings of the Supreme Court has started, which is why the court has moved into the premises at Veski 32. The construction work should be completed in little over a year and we expect to move back into the old building in the spring of 2020. The Supreme Court is also undergoing a generational change of judges. Indrek Koolmeister, member of the Administrative Law Chamber, retired on 30 June, as did Lea Kivi, member of the Criminal Chamber, on 1 November 2018. Heiki Loot commenced work as Judge of Administrative Law Chamber on 3 December 2018, and Velmar Brett assumed the office of Judge of the Criminal Chamber on 1 February this year.

I wish our new colleagues good luck and all the best in their new positions!

This year also brought along a change of leadership in the Tartu Administrative Court. From 1 January 2019, it is managed by a former member of the same court—Sirje Kaljumäe. I would hereby like to offer my thanks to the former Chairman of the Tartu Administrative Court, Kadri Palm, for her excellent work managing the court.

A generational change in the judiciary also marks an increase in the number of retired judges. To date, the number of former judges who receive a judge's pension has risen to 110. I would like to thank all of the retired judges attending this Plenary of Judges today.

New judges and competitions

A generational change in the judiciary has been talked about for several years and it continues to be very topical. Over the coming five years, 56 more judges will reach the age of retirement in addition to the existing 18. This is a great number, which also signifies the great responsibility we have upon shaping the judiciary—we need to find the brightest jurists fit for taking on the task of administrating justice in the coming decades.

Dear colleagues, with this in mind, I have a request for you. The Courts Act prescribes that leaving judges must give at least six-month notice. My request, however, is that you let us know of your plans to leave office sooner. This would allow us to plan the filling of positions better, ensure smoother administration and guarantee that judge seats are promptly filled. Since the law prescribes a six-month deadline, nobody can be made to communicate their wish to leave earlier, but we could implement a best practice to give a one-year notice.

There is also a question regarding how many judge competitions the judicial system needs each year. Currently, there are two competitions every year—one in spring and the other in autumn—which means that a great number of candidates apply at the same time and the simultaneous assessment of the candidates gives the opportunity to single out the best of the best. At the same time, it has been hinted that there should be three competitions per year, so that judge seats could be filled more smoothly. This is clearly a question that should be discussed further in our judicial system.

I would also like to draw attention to the opportunities for judges to advance up their career ladder, as the Supreme Court is to undergo great changes. Eerik Kergandberg, member of the Criminal Chamber, and Malle Seppik, member of the Civil Chamber, are set to retire in September this year. Yours truly also left a seat vacant in the Civil Chamber. Civil Chamber member Jaak Luik has also expressed his wish to retire from December 2019. The Supreme Court will soon begin to fill the vacant positions and everyone who feels that they have the knowledge and calling are welcome to apply.

Salary

The question of the indexing of judge salaries has also found a solution—there is hope that salaries are not going to decrease. I think that the problem lies in the remuneration related to the length of service, rather than the basic salary. This is something I would like to tackle further in order to determine whether the new government and the *Riigikogu* can support the establishment of remuneration for seniority. Hopefully, we will see the establishment of call-out fees for the judiciary, i.e. additional charges in a situation where a judge needs to be available outside of their working hours in order to fulfil any unforeseen or urgent service duties set forth in the law. The respective draft legislation (776 SE) is currently introduced to the legislative proceeding at the *Riigikogu*.

The salaries of court officers continue to be relevant, too. As a result of indexing, the salaries of judges will be raised in April 2019, which, in turn, increases the salaries of judicial clerks. However, the increase in the salaries of judicial clerks has not been met with agreement at the Ministry of Finance, which is why the judicial system needs to be prepared to face the question of a decoupling of the salaries of judges and judicial clerks again over the years to come.

If we cannot be satisfied with the salaries of judges and judicial clerks today, we can at least accept them, but the low salaries of the remaining court officials continue to be worrisome. According to salary surveys, the average salaries of several court official groups are around 20–40% lower than the market's average at a similar job. At the end of 2018, the Ministry of Justice found a way to somewhat

increase the salaries of court officers, but this question certainly requires further attention.

Membership of self-governing bodies

Last year there were several shifts within the judicial system—judges of courts of first instance moved to courts of appeal—that have also influenced the membership of judges' self-governing bodies. As a result of the appointment of the former Judge of the Harju County Court Meeli Kaur as Judge of the Circuit Court, we currently have to choose a judge of a court of first instance to the Disciplinary Chamber of Judges. At the end of 2018, former Judge of the Tartu Administrative Court Janar Jäätma was appointed member of the Tallinn Circuit Court, which is why there is a need to appoint a judge of a court of first instance to the judge's examination committee. Due to the appointment of Judge Sirje Kaljumäe as the Chairman of the Tartu Administrative Court and her withdrawal from the position of the substitute member of the Council for Administration of Courts, we also need to fill this position with a person who is a judge of a court of first instance.

Formation of the first membership of the Judicial Ethics Council is something entirely new. At today's Plenary of Judges, we can decide whether to amend the applicable Judges' Code of Ethics and convene the Judicial Ethics Council. If the Plenary supports the amendment of the Code of Ethics in the proposed manner, we can appoint the first membership of the Ethics Council today, which will allow for the body to immediately commence work. Members of the Ethics Committee can be both active and retired judges and I am happy to announce that several dignified former and current colleagues have agreed to apply for membership.

I thank all current and former judges who have agreed to apply.

On future development

To date, I have been involved in the administration of justice and, above all, adjudication of civil matters for 17 years. The office of the chief justice of the Supreme Court will give me the opportunity to relax, distance myself from civil proceedings and address the development of the judicial system and the Supreme Court as a whole. I admit that assuming the office of the chief justice came to me as a surprise, which is why my current thoughts on the development of the judicial system are somewhat unrefined. I wish to gather these thoughts and educate myself, also in criminal and administrative law, in order to determine the best and most suitable way for the judicial system to move forward. I am certainly planning on visiting all of our courts and courthouses to listen to your concerns and opinions. I hope that the new deputy general of the Ministry of Justice is able to join me during these visits.

The judicial system will face several challenges in the near future, including demographic decline, increased mobility of people, the advancement of artificial intelligence and IT solutions, and the changing nature of court actions. All of this calls for us to develop a broader understanding of what kind of courts and court proceedings we wish to see in the future. I wish to cooperate with the Council for Administration of Courts and the Ministry of Justice in order to get different ideas, analyse them and use them in decision making. Our objective should be to ensure that the judicial system functions without any interruptions and that court cases are settled correctly, fairly, within reasonable time and with as little cost as possible. We should also try to increase people's confidence in the legal system—to educate people and raise their legal awareness.

I do not have any revolutionary plans. I do not wish to make radical changes to the judicial system or the constitutional order. I find that our current judicial system, including the system for administrating courts, is completely reasonable. I think that it is right that the Estonian government is responsible for the functioning and funding of the courts. Naturally, it would be ideal if the judicial system itself had the right to say how much money it needs to function and the respective sum was then allocated from the state budget, but as long as this option does not exist, I am going to support the current court administration model.

Judicial system funding

In my opinion, it cannot be said that the judicial system as a whole is underfunded or that the state has made cuts on the account thereof. Therefore, there is not much hope for the judicial system to receive additional funding in the coming years. It seems to me that we have to manage with the existing resources and analyse whether and how we can cut costs or redistribute funds within the system.

I find that the relationship between the salary of judges and the national average has considerably shifted. This problem of the judicial system was also understood by members of political groups in the *Riigikogu*, whom I met with before my appointment. We should discuss within the judicial system how to improve judges' salary conditions. One question is whether the judicial system wishes to diverge from the Salaries of Higher State Servants Act. Personally, I think that the removal of the salaries of judges and judicial clerks from the act is a double-edged sword. On the one hand, this may create the possibility of a one-off larger pay raise, but on the other hand, we cannot guarantee that the salaries remain competitive in the future. We should think collectively whether and on what conditions the judicial system could agree to detach the salaries of judges and/or judicial clerks from the law. Additionally, we should seek the most reasonable ways to use the funds allocated to the judicial system.

People

The question that I currently find the most important concerns the people who work within the judicial system. We should think, both in the short and long term, how many and what kind of people we need. The number of people working in the judicial system is influenced by, for instance, demographic trends, people's increasing mobility, the number and structure of court cases and the adoption of IT solutions. I think we should already start thinking of these aspects if we wish to make long term decisions with regard to our staff and budget.

We should consider what the proportion of judges and court officials in the Estonian judicial system should be, i.e. how many judges and court officials we actually need. There are different models used throughout Europe. One solution is placing a high value on judge seats, which means that there are few judges who mostly have universal training. In this system, judges are supported in their daily work by a strong and vast network of specialists and officials and the job of the judge is largely done by court officials. Another widely used model employs a considerably larger number of judges, all of whom have an important role. This system is used in Germany, where judges do not generally receive assistance, which is why they prepare their own decisions. To me it seems that Estonia is somewhere between these two systems—we have a relatively large number of both judges and court officials. We should analyse whether our current system is sustainable in the long term. We should also think about what to do to cut costs in the judicial system if such a need should suddenly arise. I think these questions require thorough analysis and the court system, as a whole, needs a proper contingency plan.

The education of Estonian judges is also important. The reality is that the number of the representatives of the so-called old system where everyone studied only law from the first to the fifth year is diminishing. Students have increasingly more say in preparing their curricula and combining two different specialities is becoming more popular. Additionally, students can study both in Estonia and abroad. We need to think what requirements judges should meet, how to compare education obtained in different countries and institutions of higher education and how to introduce people who have not studied only law but are ready to acquire the missing knowledge to the judicial system. What should we do if we want judges to have a good knowledge of Estonian law? This question is actually closely related to the general quality of law education, which affects representatives of other legal professions in addition to the judicial system.

I have said before that judges are not mere officials who only write decisions in the quiet of their offices. Judges should be brave and not afraid of participants in proceedings, organise hearings as required and be prepared to explain the reasons and the reasoning behind their judgments to people, if such a need should

arise. I fear that judges will become more anonymous as the share of written proceedings increases. We do not see or hear from judges and participants in proceedings know nothing about them. If we should suddenly find ourselves in a situation where there is a need to hold a hearing, it may happen that the judge is not able do it. All of this should be considered when choosing future judges. I think that the system should include people with as different backgrounds as possible and find ways to prepare even those who have perhaps not previously encountered oral proceedings for the judiciary. Our training should ensure that judges are able to make difficult decisions without worrying about what the media writes about them.

Lifelong education is an integral part of being a judge. How to best organise it? Both Estonian and European legislators increasingly establish more legal provisions, the number of which has been unfathomable for people for a long time. I have the habit of scanning both *Riigi Teataja* and the Official Journal of the European Union and the amount of information presented therein every morning. What I see intimidates me. Even if someone wanted to keep up to date with everything published in the Official Journal of the European Union, it is simply not physically possible, because each day brings so much new information. We should find solutions for the efficient management of this flood of information. Perhaps this is where solutions related to artificial intelligence could be of use? How can we ensure that judges can promptly receive information on both law-making and court practice necessary for their work? For instance, questions pertaining to civil proceedings rarely make it to the Official Journal of the European Union, but when they do, the information is very important. I think we should pay more attention to the forwarding and exchange of information, as well as motivating judges to improve their knowledge.

If we briefly stop to consider motivating people, I think that in addition to salaries, we should talk about judges' pensions. Judges' special pension has acquired a bad taste among both politicians and the public, but I think that we should apply a certain pension fund payment system to judges. This would make the profession of judge somewhat more attractive. On the other hand, although judges are appointed for life, we should also find a way to ensure that those who can no longer do this job leave the system at the right time. We should avoid the situation described in a popular song, where a court hearing was held by an old grey bear who forgot everything and understood nothing and ensure that people can retire with dignity and are replaced by a new generation.

The topic of court registers and assistant judges has long been close to my heart. I was deeply disturbed by the experiment conducted in this field by the Ministry of Justice, where registers as state institutions have collectively been sent to work from home. I am very interested in the positive and negative results of this

project. What could the state as a whole learn from it in order to make decisions on staff? In my view, the downside of the new system is the lack of a new people: a new generation cannot enter the picture in a situation where the profession of assistant judge cannot be learned in school or at work, because there simply are not any jobs as such. At the same time, it is evident that a great number of land registry officials who were appointed in 1992 and 1993 are to retire soon. This is actually the last chance to find the necessary new talents, as there are very few people who have extensive knowledge about mortgage, disposition, usufruct and servitude. I feel that working from home is not sustainable and the impact of this project should be analysed thoroughly. In principle, we could close all institutions (e.g. banks, law offices and courts) and make people work remotely. I admit that the new system certainly has its strengths, such as the opportunity to organise one's time in flexible manner, but we should explore its influence on the quality of the system as a whole.

Another thing that I have thought a lot about in relation to staff—which may not be very popular—concerns lay judges in civil matters, mainly those where judges have a great discretionary power, for instance, disputes related to children and families. Perhaps the trustworthiness and public acceptance of decisions made in such cases would be greater if lay judges are involved in passing the judgment? I think we should at least consider it.

Court network

The question about the organisation of the court network, is likely important to many. How many courts and courthouses should Estonia have? As I said, I am planning on visiting all of the courts and courthouses to form my own opinion in this matter. I think that the administration of justice should be as close to the people as possible. Naturally, this raises the question of how many resources it requires and what this closeness actually means. I feel that in the case of some disputes it is very complicated and unreasonable to move the administration of justice away from the people. Here, we can once again use disputes between neighbours and those related to children and family matters as an example. At the same time, the financial aspect plays a great role and if we can replace relatively costly oral proceedings with remote proceedings, we probably do not even need all of the existing courthouses in their current form. This is certainly a field that needs to be analysed thoroughly before making any changes.

The distribution of work between judges is also a vital question. Even though judges' salaries are the same, the workload varies from court to court. We should find a way to redistribute court cases in order to make the workload more even.

Man v. machine

We have invested quite a lot of time and money in developing the Court Information System and paperless proceedings. I believe that in the long term, court proceedings will become paperless, but currently the user-friendliness of information systems is still lacking. The main problem lies in the digital processing of large court cases, because we need smarter solutions to tackle all of this information. We could also benefit from solutions that give judges an overview of the current state of the court cases they are hearing. For example, if a judge is hearing a hundred cases, then it is very difficult to manage them all. Information technology and artificial intelligence could be of assistance if they are intelligently-made and work for users on the basis of the inner logic of court proceedings.

I am slightly disturbed by the fact that we are increasingly relying on software developers and I do not favour the idea of people becoming extensions to computers. It is not right to amend laws and reorganise court proceedings based on the needs and requirements of information technology. On the contrary, IT solutions should be created on the basis of real-life needs. Take digital signature for example. The current solution is terribly time-consuming. We have made calculations that show that if justices of the Supreme Court signed regulations on the acceptance of court cases digitally, each judge would spend an average of 60 minutes on signing each week. Due to the above, we all continue to sign these regulations by hand.

I have also thought about whether we could use smaller service providers when developing digital solutions in the future. Large state institutions such as the Centre of Registers and Information Systems are simply too slow and clumsy.

Food for thought for legislators

As a judge of civil matters, I see that there is a dire need to modernise the agreement between Estonia and the Russian Federation on legal aid and the legal relationship in civil, family and criminal matters. We see that more and more people are beginning to take advantage of the shortcomings of this agreement, for instance, by referring claims to Russia. This has become an everyday practice. I understand that the amendment of this agreement may not be that easy, but we should try to move in this direction.

As an equally bold idea, I propose that we start changing the joint property system. We should change the accretion community (economic joint property) into a lawful property system, so that the property system does not obstruct bankruptcy or execution proceedings.

We also need to make changes in the fixing of procedure expenses and the delivery of the state's legal aid and court documents. Likewise, we should develop extrajudicial proceedings—in the case of actions where the application of law is not a priority (for instance, disputes related to family and children), we could use another functioning dispute resolution model instead of court proceedings, which would help us to restore legal certainty more quickly.

Dear colleagues, I have presented an overview of my preliminary thoughts. As you can see, I do not have a specific programme and you are welcome to share your good ideas, as the development of the judicial system is our shared concern and responsibility.

Thank you for your attention.

Chapter II
INDEPENDENCE OF THE COURTS

ON THE ELECTION OF JUDGES IN THE UNITED STATES OF AMERICA AND BOLIVIA

– Anu Uritam, Judge of the Harju County Court

A well-known American anecdote tells the story of President Dwight D. Eisenhower's conversation with a journalist who asked whether the president had made any mistakes during his time in office. "Yes, I made two mistakes and both of them are sitting on the Supreme Court," responded Eisenhower. In the anecdote, the president referred to two famous judges of the Supreme Court: Earl Warren and William Brennan.

Earl Warren was an influential jurist, who served as the Chief Justice of the Supreme Court of the United States from 1953 to 1969. Thanks to Warren, the Supreme Court issued a unanimous decision in the *Brown v. Board of Education of Topeka* case, which declared racial segregation in American schools unconstitutional. In the 1960s, Earl Warren helped to pass several judgments aimed at ensuring basic human rights in both criminal proceedings and private matters.[1]

William Brennan was a member of the Supreme Court from 1956 to 1990 and he is also known as an advocate of progressive ideas, abolishment of the death penalty and the right to abortion. Brennan took part in the passing of several important judgments that changed the history of US law, including in the *New York Times Co. v. Sullivan* [2] case, which was the first to emphasise the importance of press freedom and set the standards for resolving actions submitted against the press by public officials. Owing to his close friendship with Earl Warren, Brennan was jokingly referred to as the Deputy Chief of the Supreme Court.

Leaving the anecdote aside, the above clearly shows how much influence judges of the highest instance can have on the development of a country and its legal system. The impartiality of specific persons, i.e. their ability to base their judgments on laws, their conscience and the circumstances of the action rather than the public opinion or the incumbent political power, is even more important than their personal characteristics.

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1 Read more about *Brown v. Board of Education of Topeka* at https://supreme.justia.com/cases/federal/us/349/294/ (26.01.2019).

2 Read more about *New York Times Co v. Sullivan* at https://supreme.justia.com/cases/federal/us/376/254/ (26.01.2019).

The Estonian public has recently been introduced to the idea of the election of judges, which could somehow bring judicial decisions more in line with people's values. There are few countries in the world where judges are elected. In addition to the United States, judicial elections are also held in Switzerland and Bolivia. Even though the judges of the Supreme Court of Japan are appointed, they have to undergo a re-election later, i.e. obtain permission to continue in their position via a referendum.

The US is generally considered one of the strongest democracies in the world. This inevitably raises the question of whether the election of judges has had any negative effects on the state and its functioning. This article aims to provide an overview of how the US ended up electing its judges and the questions that have risen recently in relation to this system. It also addresses the reform in Bolivia, which led to the election of judges and the results thereof.

Judicial election systems and historical background

Firstly, it must be emphasised that not all US judges are elected. Namely, the US has two separate judicial systems: one at federal and the other at state-level. The Constitution of the United States laid the groundwork for federalism, according to which the authority of the state is divided between the federal government and state governments. The resolving of some questions falls within the exclusive competence of the federal government. For instance, the adjudication of bankruptcy cases is regulated by federal laws. If the resolving of certain issues does not specifically fall within the competence of the federal government, they belong to the jurisdiction of state governments. State laws cannot contradict the Constitution of the United States. The primary task of federal courts is to interpret the national constitution and federal laws.[3]

Although the two judicial systems function nearly independently, they operate in similar ways. Both systems have their own hierarchy: they include courts of first, second and third instance. Most civil and criminal matters are heard in state courts of first instance. Decisions of such courts can be appealed against within the state judicial system up to the state supreme court. The system of federal courts also features courts of three instances, which resolve legal disputes that arise on the grounds of federal laws. The Supreme Court of the United States is the highest and ultimate instance of court. A dispute resolved in a state court can be appealed to the federal court only in exceptional circumstances: this can be done if the dispute calls into question the compliance of a state law with the Constitution of the United States.

3 Read more about the role and structure of federal courts https://www.uscourts.gov/about-federal-courts/court-role-and-structure.

The appointment of federal judges is regulated by the Constitution of the United States. Federal judges are appointed by the president, whose decision has to be approved by the majority of the Senate. Federal judges are appointed for life. Their salary must not be reduced and they can be impeached only in the case of a serious violation and in accordance with the prescribed procedure.[4] The primary objective of a lifetime appointment is to ensure that judicial power is independent from other branches of power.

The method for appointing or electing state judges differs by states. There are states where judges are appointed by the governor or legislator, taking into account the candidate's work experience and education. There are also states where judges are elected on the basis of a certain election system. The states where judges are elected use either partisan or non-partisan elections.[5] In some states, judges need to participate in elections in order to continue in their position: these are used to decide whether the judge has earned it. Many states use combined election systems.

In the case of partisan elections, judges are usually elected as part of political general elections. To this end, judges are added to the lists of the parties supporting them alongside with other candidates. In the case of non-partisan elections, judicial candidates do not reveal the party that supports them. Certain geographic trends with regard to the election or appointment of judges can also be detected. Southern states usually hold partisan elections. Non-partisan elections are more common in the north-western part of the country and appointment by governors in mainly north-eastern states. Overall, it can be said that nearly all of the judges in the United States are elected using one method or another.

Historically, differences between state systems are due to factors that have had all kinds of impacts on different periods. Immediately after the American War of Independence[6], state judges were appointed either by legislators or the executive power in the person of state governors. The spread of, what is also known as, Jacksonian democracy[7] in the 1830s introduced a change in this system. The next changes in judiciary elections were implemented in the Progressive Era in 1890–1920, which was characterised by widespread social activism and political reforms. After the 1940s, election systems took their current form.

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4 Federal Judges. United States Courts. – https://www.uscourts.gov/faqs-federal-judges (26.01.2019).

5 A more detailed overview of judicial elections in different states can be found at http://www.judicialselection.us/ and https://ballotpedia.org/State_judicial_elections,_2018 (26.01.2019).

6 The American War of Independence lasted from 1775 to 1783 between Great Britain and its 13 North American colonies and resulted in the United States Declaration of Independence.

7 Jacksonian democracy is a political ideology of the 19th century, which was based on the understandings of an average, common man. President Andrew Jackson and his supporters are regarded as the creators of this school of thought. The heyday of Jacksonian democracy lasted from 1828, when Jackson was elected president, up to when slavery became a topical issue in 1854.

The triumph of the idea of judicial elections has largely been associated with Jacksonian democracy, which had a fundamental effect on the United States' political culture. In 1824, the long-dominant Democratic-Republican Party divided into the supporters of Andrew Jackson, who laid the groundwork for today's Democratic Party, and the supporters of John Quincy Adams and Henry Clay, who founded the current Republican Party.[8] The following period was characterised by the concept of political equality based on the ideas of President Andrew Jackson, which aimed to end the monopoly of government by elites. During the Jacksonian Era, most white men of European origin gained the right to vote. However, this political movement did not support the rights of Native and African Americans. On the contrary. Jacksonian democracy is said to be a source of inspiration for many political movements of the 19th and 20th centuries, including populism.[9] Donald Trump, the incumbent President of the United States of America, has been referred to as a follower of the Jacksonian school of thought.[10]

President Andrew Jackson wished to extend the scope of executive power, on the account of Congress, while also ensuring greater public involvement in the governing of the state. Consequently, supporters of Jacksonian democracy demanded that judges be elected rather than appointed. It was believed that the will of the people must always prevail. Jacksonians believed that the central government opposed individual liberty and the independence of the individual needed to be restored. Today's populist ideology also emphasises the role of the people, as opposed to the role of the elite. Populism is usually defined as an ideology, which sees 'the people' as a morally good power and as an alternative to the corrupt 'elite'. The concept of 'the people' is often nationally defined. Populists prefer referendums in all possible questions.[11] Therefore, it is not surprising that the idea of judicial elections is nowadays favoured by populist parties and political groups.

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8 See e.g. US History. Jacksonian Democracy and Modern America. – http://www.ushistory.org/us/23f.asp (26.01.2019).

9 R. W. Merry. Andy Jackson's Populism. – *The American Conservative*, 03.05.2017. – https://www.theamericanconservative.com/articles/andy-jacksons-populism/ (02.02.2019).

10 See e.g. A. Metcalf. Is Donald Trump The Andrew Jackson of Our Time? – *The Chronicle of Higher Education*, 06.11.2018. – https://www.chronicle.com/blogs/linguafranca/2018/11/06/is-donald-trump-the-andrew-jackson-of-our-time/ (02.02.2019), but also J. Tebbe. Trump's Jacksonianism and Its Needed Response. *Liberal Currents*, 11.04.2017. – https://www.liberalcurrents.com/trumps-jacksonianism-and-its-needed-response/ (02.02.2019).

11 T. Saarts. Ühe minuti loeng: mis on populism. (*One minute lecture: what is populism.*) *ERR Novaator*, 17.10.2016. – https://novaator.err.ee/259658/uhe-minuti-loeng-mis-on-populism and M. Rice-Oxley, A. Kalia. How to spot a populist. – *The Guardian*, 03.12.2018. – https://www.theguardian.com/news/2018/dec/03/what-is-populism-trump-farage-orban-bolsonaro (02.02.2019).

Thanks to the success of Jacksonian democracy, in 1832, Mississippi became the first state in which judges were elected. This was followed by New York in 1846, which brought about rapid changes in other states. When the Civil War began in 1862, judges were elected in 24 of 34 states.[12]

At first, judicial elections were, above all, justified by the need to ensure the independence of the courts, which became particularly topical after the decision in *Marbury v. Madison*.[13] With this, for the first time, the Supreme Court of the United States granted courts the right not to pass laws that are in conflict with the national constitution. It was also believed that local communities should trust judges and judges must be held responsible for their communities. Both of the aforementioned factors were strongly connected to the popularity of Jacksonian ideas.

Judicial elections were initially held as partisan elections.[14] As time passed, people started to view judges elected via partisan elections as political tools, which is why they began to look for alternative solutions. Non-partisan elections, first held in 1873 in the State of Illinois, became a popular substitute. As judges were thought to stand above politics, the reform turned out to be popular. Non-partisan elections were seen as a way to end corruption, while also continuing to hold judges accountable to the people. By 1927, 12 states held non-partisan judicial elections.[15]

Nevertheless, judicial elections still raised problems, which led to the emergence of the third election method, i.e. the system of retention elections proposed by the American Society of International Law. It was hoped that the system of retention elections would maintain the positive side of elections, i.e. the accountability of judges to the community. At the same time, the system was to free judges from any issues related to the organisation of election campaigns. In 1940, Missouri became the first state to approve the new combined system, which is currently used, in some form, by 20 states.[16]

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12 M. DeBow, D. Brey, E. Kaardal, J. Soroko, F. Strickland, M. Wallace. The Case for Partisan Judicial Elections. – Federalist Society for Law and Public Policy Studies, 01.01.2003. – https://fedsoc.org/commentary/publications/the-case-for-partisan-judicial-elections (02.02.2019).

13 Read more about *Marbury v. Madison* at https://supreme.justia.com/cases/federal/us/5/137/ (26.01.2019).

14 S. S. Newman, D. M. Isaacs. Historical Overview of the Judicial Selection Process in the United States: Is the Electoral System in Pennsylvania Unjustified. – *Villanova Law Review* 2004, Vol 49/1. – https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1251&context=vlr (02.02.2019).

15 L. Zaccari. Judicial Elections: Recent Developments, Historical Perspective, and Continued Viability. – *Richmond Journal of Law and the Public Interest* 2004, Vol 8/1, pp 138–156. – https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1082&context=jolpi (04.02.2019).

16 Read more about retention elections at https://ballotpedia.org/Retention_election.

Current opinion on judicial elections in the US

Estonia has also acquired a party whose political agenda includes a proposal to introduce judicial elections. At first glance, this seems to be an idea that cannot seriously influence or call into question the functioning of the democratic regime. One may always refer to the United States, where judicial elections have been carried out for more than 100 years and where it has become a part of the daily functioning of the state and the rule of law. Nevertheless, this is a rather superficial conclusion that does not consider the impact of elections on the independence of courts and also to the development of the legal system.

In reality, the election of state judges in the United States has become an issue that has, at least in the last few decades, brought about a serious debate between the supporters and critics of the system. The supporters of the system claim that elections give people the right to vote in judicial elections and hold judges accountable to them. The critics, however, find that judicial elections give various influence groups the opportunity to manipulate the judicial system and partisan elections introduce political reasoning in judgments. Questions that are actually important in administrating justice get lost in campaigning, which results in judicial decisions that are politically founded or socially isolated.

In addition to the debate around whether elections are necessary and appropriate, there is also a discourse on what kind of elections are the best from the perspective of ensuring the independence of the judicial system. Critics of partisan elections find that judge candidates are too involved in party politics. Critics of non-partisan elections believe that if campaigns are not linked to parties' political programmes, the focus on individual questions, as a result of which judges will begin to make important decisions that are isolated from society.

There is no doubt that there are legal scholars in the US who do not recommend rushing into amending the system of judicial elections. "I'm not uncritical of the American system and we obviously have excesses in terms of politicisation and the campaign financing system," said David O'Brien, Professor of Judicial Politics at the University of Virginia. "But these other systems are also problematic," he continued. "There's greater transparency in the American system."[17] According to him, the selection of judges is influenced by political considerations that are unknown to the public, which is why the American system is more transparent. This understanding overlooks the fact that in most democratic countries, judges are appointed on the basis of legal requirements by officials or bodies elected via democratic elections. Above all, the appointment of judges can be based on

17 A. Liptak. US voting for judges perplexes other nations. – *The New York Times* 25.05.2008. – https://www.nytimes.com/2008/05/25/world/americas/25iht-judge.4.13194819.html (04.02.2019).

candidates' professional competence, which may not be a priority in the case of elections.

Consequently, a common opinion in the United States is that the professional competence and work quality of appointed federal judges is better than those of elected state judges. This has led to a situation where many participants in proceedings attempt to find a way to refer their action to some federal rather than a state court.[18] Federal court proceedings are thought to be more rational and predictable than state court proceedings. It also appears that voters care little about the knowledge or experience of judge candidates upon casting their vote. Renowned American legal scholar Nathan Roscoe Pound is thought to have said, as early as in 1906, that since courts are dragged into politics and judges are forced into becoming politicians, several legal systems have almost lost traditional confidence in the courts.[19]

In 2009, Professors Brandice Canes-Wrone from the University of Princeton and Tom S. Clark from the Emory University published an article entitled *Judicial Independence and Non-partisan Elections* in *Wisconsin Law Review*, in which they analysed the relationship of judicial elections with later decisions. Having assessed almost 6,000 abortion-related judgments by state courts in 1980–2006, they came to the conclusion that public opinion in the question of abortion influenced courts' judgments in states where judges were elected on the basis of a non-partisan system. Such connections were not detected in states that used partisan elections and thus the authors considered partisan elections to be better. In any case, we can conclude from the article that elections have a considerable impact on the independence of courts and the impact of elections on the independence of judges within this type of system is what has been criticised the most. The media offers countless examples of such influence.

One example is the 2004 elections in West Virginia, where Justice Warren McGraw lost to the opposing candidate Brent Benjamin. The campaign against McGraw was built on a judgment in which he voted in favour of freeing a convicted child molester on probation. A group called *And For the Sake of the Kids* was formed, which spread ads criticising this decision. The campaign was funded by a CEO of a large coal company, whose business was facing several actions in the Supreme Court of the State of Virginia.[20]

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18 W. Olson. Judicial elections: a dissenting view. 17.07.2008. – http://www.pointoflaw.com/archives/2008/07/judicial-elections-a-dissentin.php (02.02.2019).

19 B. Canes-Wrone, T. S. Clark. Judicial Independence and Non-partisan Elections. – *Wisconsin Law Review* 2009, No. 1, pp 21–65.

20 C. Morello. W.Va. Supreme Court Justice Defeated in Rancorous Contest. – *Washington Post*, 04.11.2004. – http://www.washingtonpost.com/wp-dyn/articles/A23669-2004Nov3.html?noredirect=on (04.02.2019).

The 2009 article "Getting Campaigns Out of the Courtroom"[21], described an anecdotal case where a lawyer and their client were waiting for a newly assigned judge to hear their case. When the judge appeared, the lawyer whispered to his client that he was worried because the opposing lawyer had supported the judge's election campaign. After a brief pause, the client whispered back: "So why didn't you contribute?".

In fact, as of the second half of the 2000s, the media has published numerous pieces and survey results that address the negative aspects of judicial elections in one way or another. People have complained about the significant increase in the cost of campaigns and changes in the content thereof. Interestingly, it has also been reported that frequent election campaigns distract judges from performing their duties, because they need to find supporters and conduct campaigns outside of their day job.

In 2013, the American Constitution Society[22] compiled *Justice at Risk: An Empirical Analysis of Campaign Contributions and Judicial Decisions*[23], which analysed the impact on contributors to judges' election campaigns to later judicial decisions. The results revealed that there was a substantial connection between the judgments of selected judges and the interests of the companies that supported their campaigns. The larger the financial contribution, the greater the pressure applied to judges. Such a correlation existed in the case of both partisan and non-partisan elections. A total of 75% of voters and 46% of judges thought that contributions made to campaigns by stakeholders had a certain impact on decisions.

Notable connections between the business groups that contributed to the elections of judges of state supreme courts were detected above all in relation to the election of judges who specialise in business law. The analysis of the American Constitution Society revealed that business groups who make greater financial contributions to judges are treated with greater sympathy in court proceedings. During this study, former member of the Alabama Supreme Court, Sue Bell Cobb, even expressed their conviction that politicisation is a great threat to the administration of justice: "Judges would have to be saints to ignore the political reality. And judges aren't saints."

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21 R. Heim. Getting campaigns out of the courtroom. – *The Philadelphia Inquirer,* 18.06.2009.

22 American Constitution Society. – https://www.acslaw.org/ (04.02.2019).

23 J. Shepherd. Justice at Risk. An empirical analysis of campaign contributions and judicial decisions – Key Findings. – American Constitution Society For Law And Policy, 2013. – https://www.acslaw.org/wp-content/uploads/old-uploads/originals/documents/Justice%20at%20Risk%20One-Pager%20Final.pdf (02.02.2019).

According to a similar study conducted by the Brennan Centre for Justice[24], around 90% of Americans believe that contributors to judges' election campaigns influence later judicial decisions, which is why state courts no longer consider the different interests of communities.[25] Each year, the centre conducts studies of campaign costs.[26] The results have shown that the costs of running for state supreme courts have increased by a factor of 2.5 in the period between 2000–2009. The Brennan Centre for Justice has concluded that the rise in campaign costs have made judicial elections increasingly political. For instance, the same studies reported that in January 2017, at least one of the 20 state supreme court judges held an election campaign that cost a million dollars. The influence of state supreme courts cannot be underestimated in the US legal system, because despite the existence of federal courts, nearly 95% of all court cases are resolved in state courts. This raises a justified question of how independent supreme courts actually are in the states where judges are still elected.

The 2012 study *Partisan Judicial Elections and the Distorting Influence of Campaign Cash*[27], published by the Centre for American Progress, finds that the supreme courts of several states, including Alabama, Texas, Ohio and Michigan, were dominated by conservative judges who favoured corporate defendants over individual plaintiffs when passing judgments in damage compensation claims. The number of conservative judges exceeded the number of democratic judges by nearly twofold in at least six states that hold partisan elections. The study results show that many state supreme courts have come to include groups of liberal and conservative judges, which means that their judicial decisions reflect clear ideological conflicts. This leads to the conclusion that politics has entered courts, where it can even be seen to have a dominating role. Judges are no longer impartial in their passing of judgments.

The article "The Trouble with Electing Judges"[28], published in *The Economist* in 2014, states that of all things in which America is exceptional, the practice of electing judges is one of the least obvious and most striking. The article explores the judicial elections in Tennessee that unexpectedly turned political. Three judges were attacked during the campaign with claims that they are Obama-loving

24 This is a non-profit and non-partisan institute of politics and law operating at the New York University, which aims to ensure democracy and independence of courts. The centre is named after former Justice of the Supreme Court of the United States William J. Brennan.

25 The study is available at https://www.brennancenter.org/issues/fair-courts.

26 Buying Time – Campaign Ads. Brennan Centre for Justice. – https://www.brennancenter.org/analysis/buying-time (04.02.2019).

27 B. Corriher. Partisan Judicial Elections and the Distorting Influence of Campaign Cash. Centre for American Progress, 25.10.2012. – https://www.americanprogress.org/issues/courts/reports/2012/10/25/42895/partisan-judicial-elections-and-the-distorting-influence-of-campaign-cash/ (02.02.2019).

28 The trouble with electing judges. – *The Economist*, 23.08.2014.

liberals, even though such conclusions could not be drawn on the basis of their decisions. The attacked judges responded by increasing their campaign expenditure to one million dollars. In the same article, Wallace Jefferson, former Chief Justice of the Supreme Court of Texas, describes one of the visits he made to a law office in Texas during his campaign. Jefferson asked lawyers to support his campaign. The office agreed, but Jefferson was told that since his opponent is a judge of the local circuit court with whom lawyers often communicate, they also support them. The article gives reason to conclude that even law offices can no longer manage without mandatory participation in election campaigns.

The rise in judges' campaign costs in recent years has been mainly linked to three factors. Firstly, in the 1980s, the United States underwent a great legal reform in questions related to the compensation for damage. This caused a significant increase in court actions.[29] Due to the increase in both the number of actions and procedure expenses, companies began to contribute more to judicial election campaigns, hoping to gain more favourable decisions.

Another significant factor is thought to be the decision in *Republican Party of Minnesota v. White*[30], which ruled that the requirement of the State of Minnesota, according to which judicial candidates had no right to express their opinion in legal and political questions, was unconstitutional. Namely, the State of Minnesota had adopted the Code of Judicial Conduct, which forbade candidates from announcing their views in questions on which they could later pass judgments on as a judge. In 1996, Gregory Wersal ran for associate justice of the Minnesota Supreme Court. During his campaign, he published several writings criticising the judgments of the Minnesota Supreme Court and he was accused of violating the Code of Judicial Conduct. In 1998, Wersal ran again for the same position, having previously disputed the ethics requirement, which restricted his freedom of speech. The United States Supreme Court agreed with Gregory Wersal's claim that the restrictions on free speech prevented him from waging a meaningful campaign.

The third factor that has influenced the rise of campaign costs is considered to be the 2010 Supreme Court decision in *Citizens United v. Federal Elections*

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29 See e.g., S. D. Sugarman. United States Tort Reform Wars. – *The University of New South Wales Law Journal* 2002, Vol 25/3. – https://www.law.berkeley.edu/files/United_States_Tort_Reform_Wars_A.TORTS.pdf (02.02.2019) and W. K. Viscusi, R. J. Zeckhauser, P. Born, G. Blackmon. The Effect of 1980s Tort Reform Legislation on General Liability and Medical Malpractice Insurance. – *Journal of Risk and Uncertainty* 1993, Vol 6. – https://law.vanderbilt.edu/files/archive/120_The-Effects-of-1980s-Tort-Reform.pdf (02.02.2019); The Congress of the United States. The Effects of Tort Reform: Evidence from the States. – https://www.cbo.gov/sites/default/files/108th-congress-2003-2004/reports/report_2.pdf (02.02.2019).

30 Read more about *Minnesota v. White* at https://supreme.justia.com/cases/federal/us/536/765/.

Commission[31]. In the disputed case, the conservative non-profit organisation, Citizens United, wanted to air an advertisement criticising Hillary Clinton immediately before the 2008 Democratic primary election, in which Clinton's candidacy was established. However, the federal law prohibited organisations from making any expenses on campaigns aimed to criticise a candidate 30–60 days prior to elections. The Supreme Court assumed the position that the law was unconstitutional, even though it deemed the requirement to disclose the name of the sponsor of television advertisements justified.

Overall, it can be said that the decisions of the United States Supreme Court have curiously paved the way to the extension of judicial elections and the increase of campaign expenditure. Such situations undoubtedly call the impartiality of judges sharply into question. If a judge promises during their election campaign to resolve matters of one type or another in a prescribed way, they essentially promise to resolve some future cases on grounds other than law.

In their 2017 article, "Electoral Cycles among US Courts of Appeals Judges"[32], Professors Carlos Berdejo and Daniel L. Chen analysed judicial decisions and found that judges impose 10% more severe punishments in criminal matters if they were facing elections. Therefore, the hypothesis about the impact of elections on the independence of courts is not only a theoretical train of thought but a fact.

In 2009, the Supreme Court ruled in *Caperton v. A.T. Massey Coal Co.*[33] that Brent Benjamin, Justice of the West Virginia Supreme Court, should have withdrawn from the action that concerned the contributors to his campaign. Namely, the judge had received donations from a company called Massey Energy, which was accused of fraud. Upon passing the judgment, he voted for the company. The United States Supreme Court found that the West Virginia Supreme Court must review the case and Judge Benjamin had to withdraw. To date, this judicial decision has been hailed by critics of the election system as a prime example of the buying of judges and the lack of actual impartiality.

In a way, the Supreme Court tried to use the Caperton decision to resolve problems related to the increase in judicial election campaign expenses. Unfortunately, the cases reported by the press give no reason to believe that problems have disappeared. Consequently, James Nelson, Justice of the Montana Supreme

31 Read more about *Citizens United v. Federal Elections Commission* at https://supreme.justia.com/cases/federal/us/558/310/.

32 C. Berdejó, D. L. Chen. Electoral Cycles among US Courts of Appeals Judges. – *The Journal of Law and Economics* 2017, Vol 60/3, pp 479–496. – https://www.researchgate.net/publication/323352935_Electoral_Cycles_among_US_Courts_of_Appeals_Judges (02.02.2019).

33 Read more about *Caperton v. A.T. Massey Coal Co.* at https://www.supremecourt.gov/opinions/08pdf/08-22.pdf.

Court, has said that parties and stakeholders are increasingly seeking to plant their 'own judges'.[34] Nelson has criticised the decisions of the Supreme Court, which have brought along an increase in judicial election campaign expenditure, including the decision in *Minnesota v. White*.

All in all, it can be said that the positive sides of the election of US state judges are difficult to find. Campaigns are becoming more and more costly and it seems that judges are frequently forced to consider the pressure applied by stakeholders when passing judgments. Voters, however, do not necessarily vote for candidates with the best expertise. Many of the aforementioned studies give reason to believe that elected judges tend to make decisions that are based on public opinion and the preferences of parties who supported them, rather than the specific circumstances of the dispute and the law. Taking into account the ideological orientation of the contributing party upon making decisions has led to political polarisation in state supreme courts.

Historically, judicial elections have been considered necessary for making judges accountable in front of the public and prevent them from using their powers arbitrarily. Unfortunately, it is hard to believe that these goals can be achieved via elections in today's society. Elections of the 21st century, the era of television and the Internet, are not comparable to the elections in 1923, when the first state began to elect judges. Nowadays, it is impossible to win elections without large sums of money and this is often the most important aspect influencing the independence of elected judges.

The Bolivian example

Is it possible to recreate a judicial election system like that of the United States in today's democratic countries? As an empirical experiment, everything that can be imagined by a human mind is likely possible. Unfortunately, there are no successful examples of such an experiment in today's world.

In recent decades, only one country has decided to begin electing judges via general elections—Bolivia.[35] According to observers, as far as democracy is concerned, judicial elections have brought along the subjugation of the judicial system to political power instead of positive developments.

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34 E. Whitney. Nelson: 'Dark Money' Ruining Supreme Court Elections. *Montana Public Radio*, 29.12.2014. – http://www.mtpr.org/post/nelson-dark-money-ruining-supreme-court-elections (02.02.2019).

35 Freedom in the World 2018: Bolivia. – https://freedomhouse.org/report/freedom-world/2018/bolivia (04.02.2019).

Reforms in the Bolivian judicial system began after the election of Evo Morales as president in 2005.[36] Following the election, Morales left an impression of a progressive and responsible leftist Latin American leader. In contrast to the developments in Venezuela, the policy of Morales was seen as moderate. Morales' ability to include Bolivian native peoples, who form 60% of the country's population, in governing the state, initially gave him the reputation of an internationally popular reformer. When Evo Morales assumed office in 2006, he promised to grant local indigenous peoples more power by creating a new constitution. January 2009 saw a referendum that approved the new constitution prepared under the leadership of Morales.[37]

Many observers feel that Evo Morales' 2009 constitution has significantly weakened the judicial system.[38] The new constitution declared the country the Plurinational State of Bolivia where 36 indigenous languages are recognised as official languages. The constitution allowed the president to remain in office for only two terms.[39]

As it was said, Bolivia's new constitution set forth the election of judges via public general elections with simple majority. Candidates cannot run a campaign or belong to political organisations. Depending on the court for which they are running for, judicial candidates need to be at least 30 or 35 years old and have a law degree and worked as a practicing lawyer or as a university lecturer. Judges are appointed for six years and according to the constitution, they cannot be re-elected for a new term. Disciplinary supervision over judges is conducted by the Council of the Ministry of Justice, the members of which are also elected via general elections from among candidates proposed by the Plurinational Legislative Assembly. Members of Evo Morales' party found that judicial elections make courts more responsible and increases the efficiency of proceedings.

The first judicial elections in Bolivia took place on 16 October 2011.[40] This was the first-time judges were elected in a Latin American state. The second elections

36 J. Forero. Coca Advocate Wins Elections for President in Bolivia. – *New York Times*, 19.12.2005. – https://www.nytimes.com/2005/12/19/world/americas/coca-advocate-wins-election-for-president-in-bolivia.html (04.02.2019).

37 M. I. Nagel. The Bolivian Legal System and Legal Research. – http://www.nyulawglobal.org/globalex/Bolivia.html (02.02.2019).

38 J. Wolff. Challenges to Democracy Promotion: The Case of Bolivia. Carnegie Endowment for International Peace, 03.03.2011. – http://carnegieendowment.org/files/democracy_bolivia.pdf (02.02.2019).

39 The English translation of the 2009 Bolivian Constitution is available at https://www.constituteproject.org/constitution/Bolivia_2009.pdf.

40 L. Pásara. Judicial Elections in Bolivia: A Second Attempt. Justicia en las Américas, 20.07.2017. – https://dplfblog.com/2017/07/20/judicial-elections-in-bolivia-a-second-attempt (02.02.2019).

were held on 3 December 2017. The turnout of the last elections (84.2% of citizens entitled to vote, which is a somewhat larger turnout than in 2011, when 59.27% cast their vote) was great, but surprisingly, nearly two third of the ballots were either empty or invalid.[41] Such results undoubtedly show that the public support towards the policy of Evo Morales has plummeted.[42] Despite a low number of valid ballots, the elections were considered effected. Due to a large share of invalid ballots, none of the elected candidates actually gained more than 10% of the votes.

In February 2016, i.e. prior to the judicial elections, a referendum was held in Bolivia. Evo Morales wished to get the people behind a constitutional amendment, which would allow him to run for president for a third consecutive term. The results of the referendum rejected the planned amendments.[43] The president responded to this by essentially ignoring the results of the people's vote. Evo Morales' party filed an application to the country's highest court to annul the legal restrictions on the limits of the terms of officials. His justification was that they violate human rights.[44] The new judges of the Bolivian Constitutional Court responded by issuing a decision in November 2011, which annulled the results of the 2016 referendum and the limits of the terms of all officials with public duties, ruling that they violate human rights.[45] Additionally, the court found that Evo Morales' first two terms as president in 2006–2010 do not count anyway, because the new constitution was adopted as late as 2009.[46]

"All people that were limited by the law and the constitution are hereby able to run for office, because it is up to the Bolivian people to decide," Macario Lahor Cortez, Head of the Plurinational Constitutional Court, justified the decision.[47] The judgment was final and could not be appealed.

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41 L. Pásara. Bolivian Judicial Elections: Another Edition. Justicia en las Américas, 14.12.2017. – https://dplfblog.com/2017/12/14/bolivian-judicial-elections-another-edition (02.02.2019).

42 D. Ramos. Bolivians spoil ballots in judicial vote to protest Morales. – *Reuters*, 04.12.2017. – https://www.reuters.com/article/us-bolivia-politics/bolivians-spoil-ballots-in-judicial-vote-to-protest-morales-idUSKBN1DY2I5 (02.02.2019).

43 N. Casey. Bolivian President Concedes Defeat in Term-Limit Referendum. – *The New York Times*, 24.02.2016.

44 L. Blair. Evo for ever? Bolivia scraps term limits as critics blast 'coup' to keep Morales in power. – *The Guardian*, 03.12.2017. – https://www.theguardian.com/world/2017/dec/03/evo-morales-bolivia-president-election-limits (04.02.2019).

45 Bolivia court allows President Evo Morales to seek fourth term. – *BBC News*, 29.11.2017. – https://www.bbc.com/news/world-latin-america-42161947 (02.02.2019).

46 O. D. C. Stuenkel. Bolivia's democracy at risk. Carnegie Rising Democracies Network, 20.06.2017. – https://carnegieendowment.org/files/RDN_Stuenkel_Bolivia_06192017.pdf (02.02.2019).

47 D. Ramos, M. Machicao. L. Cohen. Bolivian court clears way for Morales to run for fourth term. – *Reuters*, 29.11.2017. – https://www.reuters.com/article/us-bolivia-politics/bolivian-court-clears-way-for-morales-to-run-for-fourth-term-idUSKBN1DS2ZX (10.02.2019).

A few days later Evo Morales announced that he will run again in the 2019 elections. If Morales is elected, he can remain in office until 2025. Considering the above, it is no exaggeration to conclude that the Bolivian judicial system is under the influence of the incumbent political regime and judicial elections have played a decisive role in this.

In conclusion, the Bolivian experiment can be regarded as a warning to everyone who wishes to introduce judicial elections. This is not a measure for reinforcing democracy but a solution that may be a fast track from a democracy to a dictatorship even if judges are not involved in debilitatingly costly election campaigns.

Former member of the United States Supreme Court, Judge Sandra Day O'Connor, has strongly criticised judicial elections. She has stressed that the election of judges may not ensure that fair and impartial people assume office. "Judicial independence doesn't happen all by itself. It's tremendously hard to create, and easier than most people imagine to destroy".[48] This is likely the best possible answer to the question of whether judicial elections are suitable for Estonia.

48 S. Day O'Connor. Remarks on Judicial Independence. – *Florida Law Review* 2006, Vol 58/1, pp 1–6. – http://www.floridalawreview.com/2010/sandra-day-oconnor-remarks-on-judicial-independence/ (02.02.2019).

INDEPENDENCE OF THE COURTS BASED ON THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS[1]

— Prof. Julia Laffranque, Judge at the European Court of Human Rights

Independence of the courts is a cornerstone of the rule of law and ensures protection of people's rights.

The views expressed in this article are based on international legal instruments, such as the UN's Basic Principles on the Independence of the Judiciary[2] and various documents of the European Union and the European Council [3], including opinions of the Consultative Council of European Judges (CCJE)[4], as well as the author's decades worth of experience as a justice of the Supreme Court in Estonia, as a judge at the European Court of Human Rights (ECtHR), and as president of the Consultative Council of European Judges.

Independence of the courts constitutes one of the inseparable foundations of the rule of law, ensuring that those in need have the right to have recourse to

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1 The article represents the author's personal opinions and not an official position of the European Court of Human Rights. I have written many international publications on this topic that have been of assistance in the writing of this article and which I recommend for additional reading. See, e.g., J. Laffranque. – N. A. Engstad, A. Lærdal Frøseth, B. Tønder (edit.). Judicial Independence in Europe: Principles and Reality. – Eleven International Publishing, 2014, pp. 127–148.

2 Basic Principles on the Independence of the Judiciary endorsed by the UN General Assembly on 29 November 1985. – https://www.un.org/ruleoflaw/blog/document/basicprinciples-on-the-independence-of-the-judiciary/ (15.02.2019). Bangalore Principles of Judicial Conduct, 2002. – https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf (15.02.2019).

3 Charter of Fundamental Rights of the European Union. – OJ C 326, primarily Art. 47; European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). – RT II 2010, 14, 54, primarily Art. 6. See also the Committee of Ministers of the Council of Europe adopted recommendation CM/Rec (2010) 12 on judges: independence, efficiency and responsibilities (17.11.2010); European Charter on the statute for judges 1998 DAJ/DOC 98 (23) and Council of Europe. Plan of Action on Strengthening Judicial Independence and Impartiality CM (2016) 36 final (13.04.2016). Venice Commission's reports on the independence of the judicial system are certainly of interest, further information on these can be accessed at https://www.venice.coe.int/webforms/events/.

4 See at CCJE's webpage: https://www.coe.int/en/web/ccje/ccje-opinions-and-magna-carta and in Estonian at the Supreme Court's webpage: https://www.riigikohus.ee/et/oigusalased-materjalid/rahvusvahelised-dokumendid; primarily CCJE's Magna Carta of Judges (2010)3 final (17.11.2010). – https://rm.coe.int/16807482c6 (15.02.2019).

the courts. For human rights to be tangible, those who allege that their rights have been violated must have the opportunity to have recourse to law-enforcement authorities, including the courts. The right to have recourse to the courts must be ensured both institutionally as well as procedurally. The first, and most important, aspect in the right to have recourse to the courts is the very fact that the judiciary/court is autonomous, independent, and impartial. Second, there must be actual access to legal remedies and the right to a fair hearing within a reasonable time, and also legal aid, if necessary.

Independence of the courts is a matter of principle and mentality. It derives from the nature of democratic rule of law: the recognition of separation of legislative, executive, and judicial powers. Independence of the courts must be just as self-evident as the air we breathe. It is not the privilege of the courts or judges, but serves the interests of fair and impartial administration of justice. The independence of the courts reflects the state's attitude towards its people and institutions, as if it was a litmus paper for the democratic rule of law. When there are issues with democracy it is felt immediately in regard to independence of the courts and vice versa. It is unfortunate that this obvious principle, that has been cast in stone in terms of international standards as well as national constitutions, must be repeated time and again due to the inclination of being forgotten or even violated.

Independence of the courts must be ensured on the basis of law, at the institutional level, and at the level of the everyday operation and administration of a court. Independence of the courts is intrinsically related to the objective and subjective sides of judicial impartiality. This is being increasingly considered as the judiciary's financial, administrative, and personnel-based independence; thus, it is not just substantive independence in delivering a judgment, but also material independence in maintaining the courts. Independence of the courts is related to the independence of other law-enforcement authorities, and, in turn, depends on how independent, with regard to the specificity of their field of activity, lawyers, prosecutors, court experts, and also bailiffs, who must enforce and execute the judgments, are. At the same time, independence of the courts does not exempt the judiciary from liability and the requirement of transparency regarding their work. The quality of a court judgment has enormous importance with regard to the independence of the courts. The judicial power and courts must not only be independent, they must also appear that way.

Next, we will observe more closely how independence of the courts is seen in the case-law of the European Court of Human Rights. I will concentrate primarily on the independence of the courts, a little also on the impartiality of the judiciary.[5]

5 It must be said that considering the vast extent of the ever-expanding case-law of the ECtHR, this analysis does not aspire to be definitive. The article presents a selection of the most important judgments and decisions as of 15.02.2019.

Article 6 of the European Convention on Human Rights (ECHR) forms the basis of many principles, which, to varying extents, also relate to the independence of the courts, alas, it is not possible to discuss all of those principles in a single article.

I. Essence of the independence of the courts

1.1. General principles of independence of the courts

According to Art. 6 § 1 of the ECHR, in the determination of an individuals civil rights and any criminal charge against an individual, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Here it must be noted that in many cases ECtHR has extended ECHR's scope of application to include administrative court proceedings, and to some extent, constitutional courts as well. In its case-law, the ECtHR has explained that it is not only the duty of courts to ensure the independence of the courts, but it must also be supported by the other branches of state power—the legislature and executive—as well as all other representatives of public authority, who, regardless of their level of operation, must respect and abide by the decisions of the courts, even when they do not agree with them. Independence of the courts, with regard to their authority, is indispensable and carries influence in a society's attitude towards the courts. Declaring independence and impartiality in the constitution is not enough, the said principles must inseparably belong to the everyday administrative attitudes and practices.[6]

1.2. Independence of the courts and the separation of powers

1.2.1. Independence of the courts from the legislature

Although the separation of powers between political organs of government and the judiciary is of great importance in the ECtHR's case-law, the ECtHR does not prescribe to Member States of the Council of Europe what theoretical constitutional requirements such independence should adhere to. ECtHR always assesses such matters according to the specific case at hand.[7] In the view of the ECtHR, judges may be appointed by parliament, but once appointed, they must be independent and not be subordinate to instructions received from the legislature.[8] For example, the fact that an expert member of the composition of a court of appeal, usually composed of professional judges, is a member of parliament, does not mean that the court is dependent and partial *per se*.[9]

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6 See ECtHR judgment 23465/03, *Agrokompleks v. Ukraine*, § 136.

7 ECtHR judgment 23614/08 *Henryk Urban and Ryszard Urban v. Poland*, § 46.

8 ECtHR judgment 65411/01, *Sacilor Lormines v. France*, § 67; ECtHR decision 10526/02, *Filippini v. San Marino* and 28972/95, *Ninn-Hansen v. Denmark*.

9 ECtHR judgment 47221/99, *Pabla Ky v. Finland*, §§ 31–35.

1.2.2. Independence of the courts from executive power

Under no circumstances can the executive power influence the outcome of court proceedings.[10] The mere fact that judges are appointed by the executive power does not in itself mean a violation of Art. 6 of the ECHR, as is the case with legislative power.[11] The appointment of judges by the executive power is permissible, provided the judges are free from any pressure being exerted by the executive power when carrying out their adjudicatory role.[12] The same holds true for the appointment of presidents of the court.[13]

Interference in the duties of the judiciary may also take the form of violation of the principle of presumption of innocence. For example, in the case of *Konstas v. Greece*[14], the Minister of Justice, answering a question of the opposition during a plenary debate in Parliament, expressed that the Greek courts had boldly and resolutely convicted the applicant, even though proceedings were still pending at the appeal instance. In the opinion of the ECtHR, the statement made by the Minister of Justice gave the impression that the Minister was satisfied with the judgment reached at the first instance and wanted the Court of Appeal to uphold that judgment. This meant that political power had interfered in the judicial process.

1.3. Independence of the courts and composition of a court: independence of the courts from itself

It is the opinion of the European Court of Human Rights that the engagement in judicial duties by part-time judges and lay judges is not a violation of Art. 6 § 1 of the ECHR, as well as (the fact) that the composition of a judicial panel may include, in addition to the presiding judge, experts and, for example, public servants as well as representatives of interested institutions.[15]

Art. 6 § 1 of the ECHR sets out the requirement for the judicial: "tribunal established by law", also means "tribunal established in accordance with law"[16], in which case, independence is infringed if the supreme court, for example,

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10 ECtHR judgment 48553/99, *Sovtransavto Holding v. Ukraine*, § 80 and 33176/96 *Mosteanu and others v. Romania*, § 42.

11 ECtHR decision 23695/02, *Clarke v. the United Kingdom*; ECtHR judgment 23614/08, *Henryk Urban and Ryszard Urban v. Poland*, § 49; 7819/77 and 7878/77 *Campbell and Fell v. the United Kingdom*, § 79; 2312/08 and 34179/08 (GC) *Maktouf and Damjanovic v. Bosnia and Herzegovina*, § 49.

12 ECtHR judgment 31001/03, *Flux v. Moldova* (No. 2), § 27.

13 See ECtHR judgment 38240/02, *Zolotas v. Greece*, § 24.

14 ECtHR judgment 53466/07, *Konstas v. Greece*.

15 This, in itself, does not render the named composition as partial, see ECtHR judgment 6878/75 and 7238/75, *Le Compte, Van Leuven and De Meyere v. Belgium*, §§ 57–58 and 47221/99; *Pabla Ky v. Finland*, § 32; 16047/10, *UTE Saur Vallnet v. Andorra*.

16 See 11879/85, *Rossi v. France*. European Commission of Human Rights decision of 6.12.1989, Decisions and Reports 63, p. 105.

adjudicates the case before only five judges instead of a composition comprised of seven members, as required by law.[17] "Established by law" does not only include the legal basis for establishing a court, but also the requirement according to which a court must adhere to the provisions which regulate its activity[18], and in all cases, the composition of the panel.[19] As a rule, not complying with the national law on the establishment, competence and jurisdiction of courts, leads to a violation of Art. 6 § 1 of the ECHR.[20]

The internal independence within the court is discussed far less than the independence of the courts from legislative and executive power. This is often like a closed circle covered by a veil, yet dependence between judges is of great danger. The ECtHR finds that internal independence requires that judges be free from directives or pressures from fellow judges, which may primarily come from persons who have administrative responsibilities in a court such as, for example, the president of the court or chairman of a panel. The absence of sufficient safeguards ensuring such independence may lead the ECtHR to conclude that doubts as to the independence and impartiality of a court are objectively justified.[21] However, if president's of the court perform only administrative and managerial functions, which are strictly separated from judicial functions, and there is a mechanism in place that ensures that the president of the court cannot arbitrarily spread cases between judges, then independence should not be an issue.[22]

For example, the court case of *Daktaras v. Lithuania* [23] saw the establishment of the fact that the president of the court had influenced the adjudication of a case the proceedings of which were not under his competence. The ECtHR confirmed that in the administration of justice a judge must not be subordinated to the instructions of the president of the court in a specific court case.

1.4. Independence of the courts from participants in the proceedings

The ECtHR has emphasised that the notion of independence of the courts includes not only independence from other branches of power, but also independence from the participants in the proceedings.[24] For example, if the composition of

17 ECtHR judgment 23103/07, *Momčilović v. Serbia*.

18 29458/04 and 29465/04, *Sokurenko and Strygun v. Ukraine*, § 24.

19 ECtHR decision 31657/96, *Buscarini v. San Marino* and 63486/00, *Posokhov v. Russia*, § 39.

20 ECtHR judgment 19334/03, *DMD GROUP, A.S. v. Slovakia*, § 61 and 34973/06, Šorgić *v. Serbia*, § 63.

21 ECtHR judgment 23465/03, *Agrokompleks v. Ukraine*, § 137; 24810/06, *Parlov-Tkalčić v. Croatia*, § 86; 42095/98, *Daktaras v. Lithuania*, § 36; 62936/00, *Moiseyev v. Russia*, § 184.

22 ECtHR judgment 24810/06, *Parlov-Tkalčić v. Croatia*, §§ 88–95.

23 ECtHR judgment 42095/98, *Daktaras v. Lithuania*.

24 ECtHR judgment 8790/79, *Sramek v. Austria*, § 42; ECtHR decision 28972/95, *Ninn-Hansen v. Denmark*.

a court includes a person who is in a subordinate employment position with a participant in the proceedings, it is legitimate to presume that the court may not be independent and such a situation seriously affects the confidence which the courts inspire in society.[25]

1.5. Independence of courts and military courts: independence of courts and arbitral courts

The ECtHR has urged the Member States of the Council of Europe to act with caution in establishing military courts and, in particular, to ensure that serious human rights violations and torture are excluded from their jurisdiction.[26] The ECtHR is also cautious about military courts because military courts may involve impartiality issues due to relationships of subordination. For example, if the composition of a military court includes an officer who is subordinated to military discipline and who is appointed hierarchically by a superior and to whom constitutional guarantees for judges do not extend, then such a court is not independent or impartial within the meaning of Art. 6 of the ECHR.[27]

Impartiality is also doubtful for a court composed of members of the armed forces that tries civilians, even if the military judge has only participated in rendering interlocutory, not a final decision.[28]

The ECtHR's judgment in the case of *Mutu and Pechstein v. Switzerland*[29] involved the issue of the independence of courts of arbitration for sport and the selection of judges thereto. The first applicant was a professional football player who had to pay his club a very large sum of money for a unilateral breach of contract. The second applicant was a speed skater who was punished with a two-year ban from competition for use of doping. Both applicants raised the question of independence of the composition and procedure of a private court of arbitration for sport. The ECtHR found that both cases fell within the scope of application of Art. 6 of the ECHR and the competence and jurisdiction of the ECtHR. However, the ECtHR did not find a violation because the specific courts of arbitration / judges adjudicating the matter were sufficiently independent and impartial and their judgments could be appealed at the Federal Supreme Court of Switzerland. A partial violation was still established with respect to the second applicant because an oral hearing was not held.

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25 ECtHR judgment 8790/79, *Sramek v. Austria*, § 42.

26 ECtHR judgment 32514/12, *Mikhno v. Ukraine*, § 165.

27 ECtHR judgment 1154/04, *Gürkan v. Turkey*, §§ 13–20.

28 ECtHR judgment 47533/99, *Ergin v. Turkey (No. 6)*, § 49; 22678/93, *Incal v. Turkey (GC)*, § 72; 57250/00, *Iprahim Ülger v. Turkey*, § 26; especially 46221/99, *Öcalan v. Turkey (GC)*, § 115.

29 ECtHR judgment 40575/10 and 67474/19, *Mutu and Pechstein v. Switzerland*.

II. Independence of the courts and impartiality of the court

The ECtHR finds that independence and impartiality are tightly related to one another, and often views them together.[30] The requirements of independence and impartiality apply equally to professional judges as they do to lay judges and jurors,[31] but also to other persons related to the administration of justice, such as assessors and judicial clerks.[32] Ensuring impartiality is also important in disciplinary proceedings initiated against a judge, e.g. in disciplinary proceedings against the president of a court—because it concerns the functioning of the judiciary at the highest level.[33]

Impartiality means that the court is free from any prejudice and subjectivity.[34] How can we assess impartiality? In the Grand Chamber case of *Micallef v. Malta* [35], the European Court of Human Rights specified parameters for impartiality, which are known as subjective and objective tests. Alas, subjective and objective impartiality cannot always be differentiated, often coming down to the facts and circumstances of a particular case.

2.1. Subjective test

The subjective test refers to the examination of a judge's personal conviction and conduct, i.e. whether a judge holds a bias or is prejudiced with respect to a given matter that's being adjudicated. Applying the subjective test, the ECtHR emphasises that the personal impartiality of a judge is always presumed, i.e. impartiality of a judge is presumed until there is proof to the contrary; the same holds true to courts in general, it is presumed that the court is free of prejudice.[36] Next, the ECtHR must ascertain whether the evidence presented to contest impartiality is sufficient, for example, whether a judge has displayed hostility or ill will toward somebody, or has arranged for a matter to be brought before them for adjudication

30 See ECtHR judgment 39343/98, 39651/98, 43147/98, 46664/99, *Kleyn and others v. the Netherlands (GC)*, § 192; 22107/93, *Findlay v. the United Kingdom*, § 73; 65411/01, *Sacilor Lormines v. France*, § 62; 21722/11, *Oleksandr Volkov v. Ukraine*, § 107.

31 See ECtHR judgment 11179/84, *Lanborger v. Sweden* (plenary), §§ 34–35 and 48843/99, *Cooper v. the United Kingdom (GC)*, § 123; 14191/88, *Holm v. Sweden*, § 30.

32 ECtHR judgment 46575/09, *Bellizzi v. Malta*, § 51.

33 ECtHR judgment 58688/11, *Harabin v. Slovakia*, § 133.

34 See ECtHR judgment 33958/96, *Wettstein v. Switzerland*, § 43; 17056/06, *Micallef v. Malta* (GC), § 93.

35 ECtHR judgment 17056/06, *Micallef v. Malta* (GC), § 93. See also ECtHR judgment 63246/10, *Nicholas v. Cyprus*, § 49.

36 See ECtHR judgment 6878/75, 7238/75, *Le Compte, Van Leuven and De Meyere v. Belgium*, § 58; 17056/06, *Micallef v. Malta (GC)*, § 94; 33771/02, *Driza v. Albania*, § 75; 73797/01, *Kyprianou v. Cyprus (GC)*, § 119.

for personal reasons.[37] In cases where it is difficult to rebut the presumption of subjective impartiality, objective impartiality provides further necessary guarantees. Since proving subjective partiality is complicated, the ECtHR has in most cases applied the objective test.

2.2. Objective test

This test determines whether, irrespective of the judge's personal conduct, there are ascertainable facts which would verify doubts as to the court's impartiality.[38] The objective test determines whether the court itself, including its composition, offered sufficient guarantees to exclude any legitimate doubt as to their impartiality.[39] When deciding whether a court is impartial, the standpoint of those claiming the opposite is taken as a basis, yet it is not decisive. What is decisive is whether the fear of the court's partiality can be held to be objectively justified.[40] The objective test mostly concerns hierarchical or other links between the judge rendering a judgment in the matter and other actors in the proceedings, and as with independence, appearance is also important for impartiality, i.e. that a court is not only impartial but also appears to be so.[41] In assessing a judge's independence from an objective standpoint, it must be determined if the judge has previously participated in deciding matters based on the same factual circumstances.[42]

In a democratic society, it is of utmost importance that courts inspire confidence in the public. Thus, any judge of whom there is even the slightest legitimate reason to fear a lack of impartiality, must withdraw, and the court which handles the request for the judge to withdraw must consider the arguments presented in the request for withdrawal.[43]

It is important to have a procedure regulating the withdrawal of judges at a national level.[44] If the applicant wants to cast doubts regarding impartiality, the

37 See ECtHR judgment 9186/80, *De Cubber v. Belgium*, § 25.

38 ECtHR judgment 28194/95, *Castillo Algar v. Spain*, § 45.

39 ECtHR judgment 73797/01, *Kyprianou v. Cyprus (GC)*, § 118; 8692/79, *Piersack v. Belgium*, § 30; 57067/00, *Grieves v. the United Kingdom (GC)*, § 69; 29369/10, *Morice v. France (GC)*, § 73.

40 ECtHR judgment 19874/92, *Ferrantelli and Santangelo v. Italy*, § 58; 13396/87, *Padovani v. Italy*, § 27.

41 ECtHR judgment 17056/06, *Micallef v. Malta (GC)*, § 97; 28194/95, *Castillo Algar v. Spain*, § 45; 29369/10, *Morice v. France (GC)*, § 78.

42 ECtHR judgment 34973/06, Šorgić *v. Serbia*.

43 See ECtHR judgment 17056/06, *Micallef v. Malta (GC)*, § 98 and 58688/11, *Harabin v. Slovakia*, § 136.

44 For further information see ECtHR judgment 71615/01, *Meznaric v. Croatia*, § 27 and 21722/11, *Oleksandr Volkov v. Ukraine*, and 38191/12, *A. K. v. Liechtenstein*, §-s 82–83 (on withdrawal of chief justices in countries with small judiciary).

applicant must pass the procedure for the possible withdrawal of the judge.[45] Upon doubt of a judge's impartiality, a request for the withdrawal of the judge should be filed.[46] Sometimes a higher court can make reparations and remedy the failings related to the partiality of a first-instance court. Alas, this is not the case when a higher court refuses to quash the judgment of a lower court and upholds it.[47] If the higher court deems the withdrawal of a court as justified then, in the case of subsequent proceedings between the same participants, the same composition of the court should also withdraw.[48] In the matter of impartiality, it is not decisive whether the court's composition is comprised of a single judge or a panel of judges—in view of the secrecy of the deliberations, it is extremely difficult to ascertain the actual influence a specific judge might have had in adjudicating the case.[49]

A judge's independence and impartiality can be called into question in two types of circumstances, in cases of a functional and personal nature. Additionally, in a structural sense, the entire court may be partial. This was the case in Bulgaria where the ECtHR determined that although four of the judges taking part in the second criminal case initiated against the applicant had not taken part in the assessment of the previous criminal proceedings against the applicant, their professional ties with the judges who adjudicated the first case (judges of the same court), against whom a civil action had been lodged had, in turn, been suspended, prompted sufficient misgivings in the applicant with regard to the court's impartiality.[50] The applicant had, in fact, been in pre-trial detention longer than the actual punishment imposed on him, and he claimed damages pursuant to civil procedure.

2.3. Situations of a functional nature

First, the discussion centres on situations of a functional nature, such as the exercise of different functions by the same person in court proceedings or hierarchical or other links to other participants in the proceedings. Next, we discuss situations of a personal nature that involve the judge's conduct in a particular case or their ties with other parties or their representatives. As in the case of the objective and subjective tests, the lines between situations of functional and personal nature

45 ECtHR judgment 58590/11, *Zahirović v. Croatia*, §§ 31–37.

46 ECtHR judgment 1956/06, *Leontin Pop v. Romania*.

47 See ECtHR judgment 73797/01, *Kyprianou v. Cyprus (GC)*, § 134; 9186/80, *De Cubber v. Belgium*, § 33; 22107/93, *Findlay v. the United Kingdom*, §§ 78–79.

48 ECtHR judgment 33530/06, *Pohoska v. Poland*.

49 See ECtHR judgment 29369/10, *Morice v. France (GC)*, § 89.

50 See ECtHR judgment 28417/07, *Boyan Gospodinov v. Bulgaria*, §§ 54–60 (the criminal court was impartial in the adjudication of a criminal case, since it was concurrently the respondent in civil court proceedings for damages initiated by the applicant).

are hazy. The complexity of drawing a line is illustrated, for example, by the differences between the ECtHR's guides on Article 6 for criminal and civil cases with regard to that topic. For example, impartiality matters regarding the judge's family members are discussed under situations of personal nature in the guide for civil cases, yet in the guide for criminal cases, they are found under situations of a functional nature.[51]

Questions regarding functional impartiality have risen with the ECtHR, for example, in cases where the courts, in addition to their judicial function, also carry out advisory functions. The most famous case in that regard is *Procola v. Luxembourg*,[52] where the ECtHR found a violation. After that, Luxembourg separated the High Administrative Court, adjudicating administrative cases, from the Council of State that renders opinions on all bills. If a judge has acted in the same case both in a non-judicial and judicial capacity, the ECtHR examines how much time has passed between the two functions and what the judge's role in the other functions was. Direct involvement in the passage of legislation, or of executive rules in a pending court case, may cast doubt on the impartiality of the judge.[53] For example, in the court case of *McGonnell v. the United Kingdom*, the ECtHR established a violation because the judge had directly participated in the adoption of a development plan that was the object of court proceedings.[54] If one and the same person is connected to two parallel proceedings, being the judge in one and the opposing party's representative in the other, the applicant's fear that the judge may view the applicant as the opposing party may be justified.[55] Even worse is a situation where such doubling has taken place in the framework of the same proceedings. For example, the adjudication of a constitutional complaint by a judge who, at the beginning of the proceedings served as an advisor to the applicant's opposing party, was deemed by the ECtHR as being in violation of impartiality.[56]

As for different judicial functions, the ECtHR has found that they must be assessed on a case by case basis. The mere fact that a judge has also made pre-trial judgments in a case, for example, featuring the pre-trial detention of a suspect, does not raise doubts as to the judge's impartiality. What is important is the extent and

51 See Guide on Article 6 of the ECHR. Right to a fair trial (civil limb), 31.12.2018. – https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf (22.01.2019); Guide on Article 6 of the ECHR. Right to a fair trial (criminal limb), 31.12.2018. – https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf (22.01.2019).

52 ECtHR judgment 14570/89, *Procola v. Luxembourg*, § 45.

53 ECtHR judgment 28488/95, *McGonnell v. the United Kingdom*, §§ 52–57.

54 Ibid, §§ 55–58.

55 ECtHR judgment 33958/96, *Wettstein v. Switzerland*, §§ 44–47.

56 ECtHR judgment 71615/01, *Mežnarić v. Croatia*, § 36.

nature of the particular judgments that are made.[57] Thus, a judge's participation in the adjudication of a person's application during pre-trial does not automatically mean the judge's partiality when the case is adjudicated on merits.[58] However, a problem may arise when the judge sits in succession on two different cases concerning the same facts and circumstances.[59] In the court case of *Golubović v. Croatia* [60], in which the ECtHR found a violation, the applicant, a professor of philosophy at the Faculty of Philosophy of the University of Zagreb had, in two separate civil proceedings, first contested the suspension of his employment for six months and subsequently his dismissal. Both actions were dismissed, but in deciding over his appeal, the Zagreb County Court included a judge who had participated in previous civil proceedings which had resulted in an unfavourable outcome for the applicant.

In criminal proceedings there are no issues with regard to a judge being part of similar court proceedings that, nevertheless, are not linked to the actual case. However, problems with a lack of judicial impartiality arise when previous decisions have somehow provided pre-assessments on the accused in the pending proceedings or if, in other proceedings, a judge has already expressed an opinion on the guilt of the accused.[61] If there are grounds to doubt a judge's impartiality due to involvement in previous proceedings, then such doubts will not be erased with time, either. For example, a two-year gap is not a sufficient safeguard against partiality.[62] It is not in itself incompatible with the requirements of impartiality if the same court that first rendered a decision on the merits of a case subsequently decides on the admissibility of an appeal against the same decision.[63] The same holds true in circumstances where a judge was once a prosecutor, except, of course, if they dealt with a matter they subsequently have to adjudicate as a judge.[64] However, participation of the same judge in both the investigation and trial stage may raise doubts as to the judge's impartiality.[65]

The fact that judges have expressed opinions on a case while adjudicating it collegially does not mean that the entire composition is partial. In such situations,

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57 ECtHR judgment 14396/88, *Fey v. Austria*, § 30; 12981/87, *Sainte-Marie v. France*, § 32; 13924/88, *Nortier v. the Netherlands*, § 33; 30865/96, *Jasiński v. Poland*, §§ 54–58.

58 ECtHR judgment 22875/02, *Romenskiy v. Russia*.

59 ECtHR judgment 46845/99, *Indra v. Slovakia*, §§ 51–53.

60 ECtHR judgment 43947/10, *Golubović v. Croatia*.

61 ECtHR judgment 21369/04, *Gómez de Liaño y Botella v. Spain*, §§ 67–72; 21698/06, *Kriegisch v. Germany*; 11082/06, 13772/05, *Khodorkovskiy and Lebedev v. Russia*, § 544; 32271/04, 32271/04, *Poppe v. the Netherlands*, § 26; 75737/01, *Schwarzenberger v. Germany*, § 42; 19874/92, *Ferrantelli and Santangelo v. Italy*, § 59.

62 See ECtHR judgment 17574/07 and 25235/07, *Dāvidsons and Savins v. Latvia*, § 57.

63 ECtHR judgment 2065/03, *Warsicka v. Poland*, §§ 38–47.

64 ECtHR judgment 8692/79, *Piersack v. Belgium*, § 30.

65 ECtHR judgment 37537/13, *Borg v. Malta*, § 89.

the ECtHR will also look at other factors, for example, the number of judges who had previously expressed opinions on the case, and what their function was in ruling on the case.[66] Such a view of the ECtHR can also be criticised. Thanks to modern cinema (Sidney Lumet′ directed the big screen adaptation of Reginald Rose's courtroom drama "12 Angry Men") we know of the possibility where one individual, although a sworn-in juror, might influence the other eleven and turn the whole judgment on its head.

Therefore, doubts as of the partiality of one or several judges should not be decisive if they are raised. In any case, a partial member, even when in a minority, may influence the composition. For example, although the court case of *Fazlı Aslaner v. Turkey* involved a bench of thirty-one judges, only three of whom had already dealt with the case at an earlier stage, the ECtHR still found a violation. Firstly, no justification had been given for the need to include the three judges in the case, and secondly, one of those three judges had been the presiding judge.[67] The situation is problematic when the entire composition has previously rendered preliminary decisions with respect to the applicant, and sometimes, the partial overlapping of the functions of prosecutor and judge in some countries may create confusion.[68] A violation of the ECHR is a circumstance involving the absence of a prosecutor during trial with the court also performing the function of the prosecuting authority, since the judge is the ultimate guardian of the proceedings and the independent organisation of the prosecution is the task of the public authority.[69]

The right to an impartial court does not mean that the supreme court may not, while adjudicating the case, send it back to the same court, or even the same composition. The supreme court is not required to necessarily select a new jurisdiction when sending a case back.[70]

However, the judicial system must always ensure that judges are reminded of their prior involvement in adjudicating a case. For example, a case where a judge at the Higher Court in Slovenia adjudicated the same case, though different aspects of it, nine years later at the Supreme Court, constituted a violation of

66 ECtHR judgment 36073/04, *Fazlı Aslaner v. Turkey*, §§ 36–43; see also ECtHR judgment 22330/05, *Olujić v. Croatia*, § 67 and 77050/11, *Pereira da Silva v. Portugal*, §§ 59–60.

67 ECtHR judgment 36073/04, *Fazlı Aslaner v. Turkey*, § 40–43.

68 147/07, *Kamenos v. Cyprus*, §§ 104–109.

69 ECtHR judgment 926/08, *Karelin v. Russia*, §§ 51–85.

70 ECtHR judgment 2614/65, *Ringeisen v. Austria*, § 97; 4455/10, *Marguš v. Croatia (GC)*, §§ 85–89; 17602/91, *Thomann v. Switzerland*, § 33; ECtHR decision 18306/04, *Stow and Gai v. Portugal*. However, if national law prescribes an obligation that in certain circumstances a case must be sent back to another court, then the question may arise of whether the high court, by disregarding that obligation, can be viewed as a court established by law; see ECtHR judgment 58442/00, *Lavents v. Latvia*, § 115.

the ECHR.[71] The ECtHR found that, although there is no evidence to suggest the judge's personal impartiality in the case, an objective test must be carried out to examine such factors as the judge's dual role in the proceedings, the time which elapsed between the two participations, and the extent to which the judge was involved in adjudicating the case.[72] The ECtHR pointed out that the judge had been a member of the panel of the Higher Court which upheld the opposite party's appeal and, nine years later, a member of the panel of the Supreme Court when the applicant contested the Higher Court's judgment on points of law. The ECtHR acknowledged the elapse of nine years, yet found that the role played by the judge was very significant in both proceedings, being the presiding judge in the Higher Court's panel and the rapporteur of the Supreme Court panel. The judgments reached on both occasions concerned the merits of the case and in view of the above, the impartiality of the court was open to doubt, not only in the eyes of the applicant but also objectively. The ECtHR noted that there is no indication in the case-file that the judge was aware of or reminded of her prior involvement in this particular case and stressed the importance of creating safeguards to ensure that judges are reminded accordingly.[73]

The ECtHR also found a violation of the judiciary's impartiality in the case of *Toziczka v. Poland*, where a judge at the higher instance assessed the legality of his previous interpretation of substantive law at the lower instance.[74] Preventing such incidents should be obvious, and one would think that they rarely occur, but, surprisingly, there are still similar examples to be found in ECtHR's case-law. For example, in the court case of *Nova Gorica v. Slovenia*[75], one of the constitutional court's judges adjudicating the case had previously participated in the adjudication of the same case at the court of appeal.

Examples of situations of a functional nature from the treasure trove of ECtHR's case-law also includes a case involving Estonia. In the case of *Dorozhko and Pozharskiy v. Estonia*,[76] the ECtHR found that there were objectively justified doubts as to the impartiality of the trial court presiding judge, since her husband had been the head of the team of investigators dealing with the applicant's case. However, differentiating between situations of a functional and personal nature is complicated in this case. With that thought in mind, it is the right time to segue into the topic of examining situations of a personal nature.

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71 ECtHR judgment 35016/05, *Peruš v. Slovenia*.

72 ECtHR judgment 75617/01, *Švarc and Kavnik v. Slovenia*, § 40; 40984/07, *Fatullayev v. Azerbaijan*, § 139; 32181/04 and 35122/05, *Sigma Radio Television Ltd v. Cyprus*, §§ 174–175.

73 ECtHR judgment 35016/05, *Peruš v. Slovenia*, § 39 and see also ECtHR judgment 54857/00, *Puolitaival and Pirttiaho v. Finland*, § 44.

74 ECtHR judgment 29995/08, *Toziczka v. Poland*.

75 ECtHR judgment 50996/8, *Nova Gorica v. Slovenia*.

76 ECtHR judgment 14659/04 and 16855/04, *Dorozhko and Pozharskiy v. Estonia*, §-s 56–58.

2.4. Situations of a personal nature

It is clear that if a judge has a personal interest in a case, an impartial hearing of the matter cannot be guaranteed.[77] Doubts may also arise if a judge has professional, financial, or personal ties with a party or the party's representative.[78]

Blood ties with persons associated with the proceedings is one significant reason to have grounds for casting doubt as to a judge's impartiality. Whether these doubts are always justified depends greatly on the circumstances and various conditions of the particular case, for example, whether the judge's relative has been involved in the case concerned, the relative's position in, e.g., the law firm related to the defence of the participant in the proceedings, the size of the law firm, its internal organisational structure, the financial significance of the case for the law firm, any potential financial interest for the relative, etc.[79]

Thus, the ECtHR has found that the court's impartiality was threatened when the son of the presiding judge on a panel deciding on the applicant's appeal was a prosecutor in a previous case initiated against the applicant.[80] In light of this and similar court cases, the ECtHR has emphasised the need for a system that ensures that a judge is not handed a case linked to the judge's family members and that judges should take measures to check whether such conflict exists.

However, the fact that a judge has blood ties with a member of a law firm representing a party to a case, and not with the actual lawyer representing the party (the judge's son was a trainee in the law firm of the lawyers representing a party in the proceedings) does not automatically constitute a violation of Art. 6 § 1 of the ECHR. It must be taken into consideration whether the judge's relative was associated with the defence in the relevant case or not, what the position within the law firm was, whether there was remunerated for the duties/traineeship or not, the details regarding the size of the firm and its internal organisational structure, and the organisation of the work (could there be speculation that even a lawyer not involved in the case could communicate with the lawyers), and what financial significance did the pending court case have to the law firm.[81]

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77 ECtHR judgment 11179/84, *Langborger v. Sweden* (Plenary), § 35; 21257/93, 21258/93, 21259/93, 21260/93, *Gautrin and others v. France*, § 59.

78 ECtHR judgment 62435/00, *Pescador Valero v. Spain* (professional relations), § 27; 32263/03, *Tocono and Professorii Prometeisti v. Moldova*, § 31; 17056/06, *Micallef v. Malta (GC)*, § 102; 33958/96, *Wettstein v. Switzerland*, § 47; 39731/98, *Pétur Thór Sigurðsson v. Iceland*, § 45.

79 See, e.g., ECtHR judgment 63246/10, *Nicholas v. Cyprus*, § 62; 5856/13, *Ramljak v. Croatia*, §§ 29, 38–39.

80 ECtHR judgment 23532/14, *Dainelienė v. Lithuania*.

81 ECtHR judgment 5856/13, *Ramljak v. Croatia*, §§ 29, 38–39; see also ECtHR judgment 63246/10, *Nicholas v. Cyprus*, § 62.

The court case of *Sigurdsson v. Iceland* [82] involved a matter where the applicant lost a dispute against the National Bank of Iceland in the Supreme Court, while it emerged that the husband of a judge who was sitting in the case had ties with the National Bank of Iceland. The husband of the judge who sat on the case was, in fact, the guarantor of certain loans, and had attempted to reach settlements with the creditors, including the National Bank of Iceland, issued debt certificates, including two mortgaged properties belonging to his wife, and sold the debt certificates to a private undertaking. The National Bank of Iceland, together with another creditor, had accepted 25% of the debt's repayment and released the judge's husband from the remaining debts. In the view of the ECtHR, the partiality of the judge was not proven, the amount of the loan was also not very large. However, the ECtHR did find it problematic that the judge had helped her husband to secure an agreement with the bank by mortgaging her property and thereby achieving a significant erasure of the debts, whereat the applicant's case was already pending at the Supreme Court. In view of the above, there was at least the appearance of a link between the National Bank of Iceland and the judge and thus, Article 6 § 1 of the ECHR had been violated.

The fact that judges know other colleagues who have participated in a previous adjudication of the same case, or sometimes even share the same offices, is not in itself sufficient to conclude that the rules of impartiality have been violated.[83] In a very small country, a judge may concurrently perform the functions of a judge and a lawyer on a part-time basis, provided they are not performing these functions concurrently in the same court case. The mere fact of such part-time division of work does not raise doubts as to the judge's impartiality.[84]

It does not necessarily follow from the fact that a judge has some personal knowledge of one of the witnesses that they will be prejudiced as to that person's testimony. Again, each particular case must be analysed separately.[85] However, criminal proceedings against the applicant in a court where the victim's mother was a judge (although, of course, not being part of the composition adjudicating the case) were found to be in violation with the principles of an independent and impartial judiciary, as set out in Art. 6 § 1 of the ECHR.[86]

The ECtHR assigns great importance to the impartiality of the judiciary, of course. At the same time, the ECtHR is convinced that the contestation of the courts'

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82 ECtHR judgment 39731/98, *Pétur Thór Sigurðsson v. Iceland.*

83 See ECtHR judgment 63151/00, *Steck-Risch and others v. Liechtenstein*, § 48.

84 See ECtHR judgment 46575/09, *Bellizzi v. Malta*, § 57.

85 See ECtHR judgment 22399/93, *Pullar v. the United Kingdom*, § 38 (the jury included a subordinate of a witness for the prosecution) or ECtHR judgment 52999/08 and 61779/08, *Hanif and Khan v. the United Kingdom*, § 141 (the jury included a police officer).

86 ECtHR judgment 45959/09, *Mitrov v. the former Yugoslav Republic of Macedonia*, §49.

impartiality should not lead to paralysis of the country's judicial system, especially in small jurisdictions, such as Cyprus or Liechtenstein, where the administration of justice could be unduly hampered by the application of excessively strict standards.[87] It would be beneficial if matters regarding impartiality are contested at the outset of the proceedings, so that the necessary measures can be taken as early as possible.

Personal attitude or prejudice can also be manifested by the judge's choice of words during the proceedings and this may lead to a violation of the principle of impartiality.[88]

It is interesting to note that instances where judges themselves may have raised prior doubts in their own impartiality have not lead to the violation of Art. 6 § 1 of the ECHR.[89]

The ECtHR has found that the mere fact a judge has previously belonged in a party is not sufficient to cast doubt as to the judge's impartiality, especially, if there are no connections between the judge's previous political affiliation and the court case being adjudicated.[90]

Incidents that are related to the personal nature of a judge's impartiality are also partially tightly interwoven with the topics of independence of the courts and freedom of expression, which we will now take a closer look at.

III. Independence of the courts and freedom of expression

In carrying out their duties judges must be extremely discrete and restrained so as to preserve the image of an independent and impartial court. They should refrain from commenting on cases in the media and must not let themselves be provoked into doing so.[91] If, for example, the president of the court uses phrases in public that are unfavourable with respect to the adjudication of the applicant's case and raise doubts as to the judge's impartiality, then it is a case of violation of Art. 6 § 1 of the ECHR.[92] At the same time, the ECtHR found no violation of

87 ECtHR judgment 38191/12, *A. K. v. Liechtenstein*, § 82 and ECtHR judgment 63246/10, *Nicholas v. Cyprus*, § 63.

88 See ECtHR judgment 8001/07, *Vardanyan and Nanushyan v. Armenia*, § 82.

89 See ECtHR judgment 2775/07, *Rudnichenko v. Ukraine*, § 118 and ECtHR judgment 68955/11, *Dragojević v. Croatia*, §§ 116–123.

90 ECtHR decision 4184/15, 4317/15, 4323/15, 5028/15, 5053/15, *Otegi Mondragon and others v. Spain*, §§ 25–29.

91 See also ECtHR judgment 58442/00, *Lavents v. Latvia*, § 67.

92 ECtHR judgment 58442/00, *Lavents v. Latvia*, § 119. In this judgment, the judge criticised the applicant's counsel and wondered publicly why the applicant had declared themselves innocent.

Article 6 of the ECHR in a case that involved statements made to the press by a number of members of the law enforcement authority and a paper published by the National Association of judges and prosecutors criticising the political climate in which the trial had taken place, the legislative reforms proposed by the government, and the strategy of the defence, but not making any pronouncement as to the applicant's guilt.[93]

In the case of *Zagrebačka Banka v. Croatia*,[94] the applicant found that the High Commercial Court had been partial, inter alia, because one judge had made statements in the media concerning the case, primarily in the newspaper *Novi list* and the television programme 'Kontraplan'. The ECtHR examined whether that judge had been involved in the court's composition who rendered the key judgments with respect to the applicant, and established that at that time the judge was no longer the President of the High Commercial Court and the only judgments that the judge was involved in were later overturned by the Constitutional Court.

Additionally, the ECtHR did not find a violation in a case where a juror had made comments about the case in a newspaper after sentencing in the same case.[95] However, a violation was found in a case where a juror, who knew the victim and had commented on the victim's personal character.[96] The ECtHR has also found violation of the ECHR in a case in which a judge who sat on the Court of Cassation bench had previously supported a judge who had rendered a judgment against the applicant in the same criminal matter.[97]

Despite the described requirement of restraint in commenting on a given court case, the judges, too, hold the right to the freedom of expression which lies within the scope of protection of Art. 10 of the ECHR. Thus, a judge may, and in some cases even has the obligation to, express an opinion in general legal and judicial matters. The court cases of *Kudeshkina v. Russia* [98] and *Baka v. Hungary* [99] involved the application of sanctions against judges who had publicly criticised the judicial system and the planned reform of the judicial system in those countries. Kudeshkina, against whom disciplinary proceedings were opened, was dismissed from office. Former judge at the European Court of Human Rights and President of the Supreme Court of Hungary, Baka, was relegated from the position of President of the Supreme Court to essentially the chairman of the panel. The ECtHR found in

93 See ECtHR decision 45291/06, *Previti v. Italy*, § 253.

94 ECtHR judgment 39544/05, *Zagrebačka Banka v. Croatia*, §§ 174–175.

95 ECtHR judgment 66847/12, *Haarde v. Iceland*, § 105; ECtHR decision 78480/13, *Bodet v. Belgium*, §§ 24–38.

96 ECtHR judgment 1176/10, *Kristiansen v. Norway*, §§ 56–61.

97 ECtHR judgment 29369/10, *Morice v. France (GC)*, §§ 79–92.

98 ECtHR judgment 29492/05, *Kudeshkina v. Russia*.

99 ECtHR judgment 20261/12, *Baka v. Hungary*.

both cases that those countries had violated the judges' freedom of expression. As for Baka's removal from office in the alleged interest of the court's authority and independence, in the opinion of the ECtHR, it served quite the opposite interest and also lacked legal purpose. Baka had expressed his opinion specifically about legislative reforms affecting the judiciary and his statements did not cross the boundaries of professional criticism. Thus, his premature removal from office also had a suppressing effect on the freedom of expression.

However, the case of *Di Giovanni v. Italy*[100] which, similar to Kudeshkina's court case, also concerned the initiation of disciplinary proceedings against a judge who had made critical remarks in the press, concluded with a different judgment of the ECtHR. In that case, the applicant did not, as a matter of fact, criticise the judicial system at large, but a colleague. The ECtHR did not find that this was a case of violation of the judge's freedom of expression, all the more because the applicant was not dismissed and only received a warning. In the view of the ECtHR, a judge's criticism of their colleague in the press can rightly lead to disciplinary proceedings.

Freedom of expression does also mean that not only judges have the freedom to express their opinions in certain matters, but others also have the right to criticise the judge, considering, thereby, certain ethical limits and respect to the court as an institution. In the court case of *Narodni List D.D. v. Croatia*[101], the ECtHR found that by punishing the publisher that published the article in which the judge was criticised, the publisher's freedom of expression is violated. The ECtHR is of the opinion that except for gravely damaging and unfounded attacks, this cannot have the effect of prohibiting individuals from criticising the court/judges and the entire judicial system due to public interest. One significant example in this regard is ECtHR's judgment in the case of *Morice v. France*.[102] In this case, the ECtHR found that the lawyer's freedom of expression (Art. 10 of the ECHR) had been violated and that the court proceedings were unfair, because the bench included a judge who had not been previously announced as sitting in the composition. In the press, the lawyer Morice expressed the opinion that there is a "connivance", a collaboration/agreement between the judge and the public prosecutor, and cast doubt on the judge's independence, which led to the French courts to convict him for defamation of a civil servant and prescribe a penalty and compensation for damages in the respective amounts of 4,000 and 7,500 euros. The ECtHR examined the applicant's status as a lawyer, whether the statement was made in the interest of a public discussion (this case involved the making of value judgments not statements of fact on a topic

100 ECtHR judgment 51160/06, *Di Giovanni v. Italy*.

101 ECtHR judgment 2782/12, *Narodni List D.D. v. Croatia*.

102 ECtHR judgment 29369/10, *Morice v. France (GC)*.

of public interest), what the content of the statements was, and the punishment for the defamation. The ECtHR also examined the role of the lawyer, and on the other side, the authority of the court and the relations and mutual respect between judges and lawyers.

The court case of *Słomka v. Poland*[103] involved the applicant's 14 day custodial penalty for contempt of court and shouting out statements against the court during a trial against communist-era generals. The ECtHR found that the applicant's actions were targeted to criticise the judicial system for what he deemed as the absence of justice and did not directly constitute contempt for the judges. The ECtHR was also troubled by the fact that the applicant was penalised by the same judges during whose trial he was shouting, and that he was not granted the opportunity to justify his actions. A later decision by the Court of Appeal did also not remedy such grave procedural shortcomings, due to which the circumstances prompted objectively justified fears that the court is not impartial. A violation of Art. 6 § 1 of the ECHR was established. Art. 10 of the ECHR was violated because a violation of the applicant's right to freedom of expression was not necessary in the democratic society.

The ECtHR did also establish a violation of Art. 10 of the ECHR in a judgment delivered in the case of *Pais Pires de Lima v. Portugal.*[104] The applicant was a lawyer who thought that by claiming compensation for damage pursuant to civil procedure the court had violated the lawyer's freedom of expression. The lawyer had attacked the judge's personal and professional honour and reputation by using words "corruption" and "crook". The ECtHR found that although the national courts had sufficient grounds to claim the lawyer's civil liability and the lawyer could not support the statements with evidence, the amount (50,000 euros) ordered for payment for the benefit of the court was disproportionally large.

In the court case of *Sergey Zubarev v. Russia*,[105] the lawyer Zubarev brought a defamation action against a judge who had requested the Bar Association to initiate disciplinary proceedings against the lawyer due to his conduct in civil court proceedings. The judge had found that Zubarev had delayed the proceedings and was absent from court without good cause. The Russian courts refused to accept Zubarev's claims of defamation, finding that as a presiding judge in the civil matter, the judge had judicial immunity. Zubarev lodged an application with the ECtHR claiming that his right of access to a court has been restricted. The ECtHR, however, did not find a violation.

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103 ECtHR judgment 68924/12, *Słomka v. Poland*.

104 ECtHR judgment 70465/12, *Pais Pires de Lima v. Portugal*.

105 ECtHR judgment 5682/06, *Sergey Zubarev v. Russia*.

IV. Parameters for the independence of the courts

Whether a court is independent is assessed under several different parameters. The ECtHR has primarily pointed out four important criteria: the manner of appointment of the members of the court, the duration of their term of office, whether they are sufficiently safeguarded against possible external influences, and the fact that the court presents an appearance of independence is also important.[106]

4.1. Appointment of judges

Although in general, Member States have some playing room in the appointing of judges, ECtHR is still examining whether it corresponds to the requirements of Art. 6 § 1 of the ECHR and whether independence and impartiality are ensured.[107] As has already been discussed, the appointment of judges by the legislature or executive power is not in itself in conflict with the principle of independence, but only if it is restricted to appointment and does not influence the actual judicial duties of the judges.

4.2. Term of office of judges

The ECtHR has not specified how long the term of office of a judge should last, but it should be stable and a judge must not be transferred to another position against their will during the term of office, even if it is not necessarily prescribed by law. This is an obvious principle and a judge should have every guarantee that this does not happen.[108] The ECtHR has, though, accepted that the composition of a court adjudicating war crimes included transferred international judges, whose term of office was set for two years with the option of being re-elected—a mechanism for administering justice that was temporary in nature and comprising an international component in one specific country.[109] At the same time, the ECtHR did not tolerate that the composition of a court included assessors who the Minister of Justice could remove at any time and there were no guarantees protecting them against such arbitrary exercise of power by the Minister.[110]

In the previously discussed court case of *Baka v. Hungary*[111], the ECtHR also considered Art. 6 of the ECHR, applying it, inter alia, to disputes concerning judges. The

106 ECtHR judgment 21722/11, *Oleksandr Volkov v. Ukraine*, § 103; 8790/79, *Sramek v. Austria*, § 42.

107 ECtHR judgment 62936/00, *Moiseyev v. Russia*, § 176.

108 ECtHR judgment 65411/01, *Sacilor Lormines v. France*, § 76; 34197/02, *Luka v. Romania*, § 44; 7819/77 and 7878/77, *Campbell and Fell v. the United Kingdom*, § 80.

109 ECtHR judgment 2312/08 and 34179/08, *Maktouf and Damjanović v. Bosnia and Herzegovina (GC)*, § 51.

110 ECtHR judgment 23614/08, *Henryk Urban and Ryszard Urban v. Poland*, §§ 51, 53.

111 ECtHR judgment 20261/12, *Baka v. Hungary*.

ECtHR found that the applicant who lost his position as President of the Supreme Court due to an amendment of law had the right to serve until the expiry of his term of office, referring thereby to the independence of judges and that judges are prohibited from being transferred to another post without their consent.

Baka had no opportunity to contest the premature termination of his mandate in an ordinary court or any other judicial body—this arose from law (the Transitional Provisions of the Fundamental Law of Hungary and the Organisation and Administration of the Courts Act, the adherence of which to the principles of the rule of law the ECtHR had grounds to doubt). In the ECtHR's opinion, international instruments refer to the fact of how important it is for judges to have the opportunity to contest dismissals and removals before an independent body.

4.3. Guarantees for judges against external and internal pressure and influencing

As already noted, the judiciary must be independent from the legislature and executive branches of power, and judges from other judges and presidents of court. Such a lack of pressure should be assured not only at an organisational level, but also in essence and in terms of competence. For example, the fact that in France only the Ministry of Foreign Affairs has the exclusive right to interpret international agreements was deemed as a violation by the ECtHR.[112] Also, the amendment during court proceedings of a legal provision bearing decisive importance in the adjudication of a court case may be legislature's interference in administration of justice[113], whereat public interest is not a sufficient argument for legislative interference.[114]

4.3.1. Independence of the courts and financial resources

The court case of *Savickas and others v. Lithuania*[115] involved the matter of a 30% reduction to the remuneration of judges. The 1999 case was not adjudicated by the Lithuanian courts until 2010, finally providing the applicant with a partial win. The ECtHR had to adjudicate the matter of the length of the proceedings, but since in the meantime Lithuania had introduced the option to receive compensation for unreasonably prolonged proceedings, the ECtHR found that the applicants had not exhausted all the legal remedies. The ECtHR also saw no problems with

112 ECtHR judgment 5287/89, *Beaumartin v. France*.

113 See ECtHR judgment 17972/07, *Arras and others v. Italy*; 23658/07, 25724/07, *Csacchia and others v. Italy*.

114 ECtHR judgment 19264/07, *Natale and others v. Italy*.

115 ECtHR judgment 66365/09, 12845/10, 29809/10, 29813/10, 30623/10, 28367/11, *Savickas and others v. Lithuania*.

regard to the right of protection of property and Art. 1 of Protocol 1 of the ECHR. In the view of the ECtHR this was a temporary measure due to the extremely difficult economic and financial situation in Lithuania where primarily education, healthcare, social welfare and other societal needs were in need of funds. The damage sustained by judges was also not too extensive and such budget cuts did not threaten the judiciary's independence and impartiality. The ECtHR was satisfied by the fact that the Lithuanian government had acted in the public interest. The ECtHR also emphasised that the budget cuts did not only affect the judges, on the contrary, it was part of an extensive programme to mitigate poverty, an interim measure was not disproportional and did not threaten the judges' standard of living.

4.3.2. Independence of the courts and the liability of judges: the initiation of disciplinary proceedings against judges

The ECtHR has found that a judge's immunity against civil liability does not constitute a violation of the right of access to a court/administration of justice.[116] Still, according to the ECtHR it is possible that the limited liability of judges for damage caused while performing judiciary duties and the civil law immunity may, in certain cases, be in violation of ECHR's Article 13—the right to an effective remedy to protect themselves.[117]

Alas, the ECtHR has also had to deal with cases where judges of ECHR Member States have been accused of abuse of power, corruption, and committing criminal offences.[118] However, in most occasions, the ECtHR did not have to decide on the merits of these cases, but on the fairness of court proceedings conducted with respect to the judges as suspects, on the gathering of evidence, the possible abuse of the presumption of innocence, and conditions of detention.

Harabin v. Slovakia[119] is an example from the ECtHR's case-law concerning disciplinary proceedings initiated against judges, which involved disciplinary proceedings initiated in the Constitutional Court against the President of the Supreme Court of the Slovak Republic. It began with Harabin refusing to let the Supreme Court be audited by the Ministry of Finance, finding that the audit should be carried out by the Supreme Audit Office. Both Harabin and his opposing party, the Ministry of Justice, filed a request for the constitutional judges to

116 ECtHR judgment 33400/96, *Ernst and others v. Belgium*.

117 ECtHR judgment 29392/95, *Z and others v. the United Kingdom (GC)*; 19673/03, *Gryaznov v. Russia*.

118 For corruption see ECtHR judgment 39820/08, 14942/09, *Shuvalov v. Estonia* and ECtHR judgment 37379/02, *Pop Blaga v. Romania* (former judge was a detainee).

119 ECtHR judgment 58688/11, *Harabin v. Slovakia*.

withdraw.

The Constitutional Court did not satisfy the request, basically preferring the preservation of the court's quorum in hearing the disciplinary matter to the independence of the court and found Harabin guilty, reducing his annual salary by 70%. The ECtHR criticised the Constitutional Court for excessive formalism, and overlooking the requests for withdrawal, and not being sufficiently able to remove doubts as to the partiality of its members. In the case, the ECtHR deemed it most noteworthy that these were disciplinary proceedings initiated against the president of the country's highest court, which means that public trust for the administration of justice was under threat at the highest level.

As for the disciplinary proceedings initiated against judges, the ECtHR is of the opinion that a disciplinary panel deliberating the case must certainly include judges, and disciplinary panels must also conform to the requirements of independence and impartiality.

The ECtHR's Grand Chamber found a violation in the case of *Ramos Nunes de Carvalho e Sá v. Portugal*[120] since the Supreme Court of Portugal had failed to call a hearing in exercising supervision on decisions adopted in disciplinary matters by the High Council of the Judiciary, and the supervision had been limited in the first place. Yet, the majority of the ECtHR did not find a violation in what referred to alleged partiality and a lack of independence because the President of the Supreme Court carried out double functions, also concurrently holding the position of President of the High Council of the Judiciary.[121] In this case the High Council of the Judiciary had imposed on the applicant, during the time she had been a judge, a disciplinary punishment constituting a penalty and temporary removal from work. The Applicant's appeal with the Supreme Court was unsuccessful because, according to the latter, the Supreme Court cannot exercise supervision on matters of fact, but can only ascertain whether the establishment of facts is reasonable.

This court case is of great interest in terms of the topic of the independence of the courts. The case began with the matter on how to make a career as a judge and how to evaluate a judge, including during maternal leave. A question was also raised on the alleged insulting of the inspector, who had to conduct the evaluation, by the judge, and the proportionality of the punishment for it. The applicant found that appeals against the disciplinary decisions adopted by the High Council of the Judiciary should be filed with the Supreme Administrative Court not the Supreme Court, as well as that the members of the Supreme Court cannot be independent since they, too, can become the objects of disciplinary investigations

120 ECtHR judgment 55391/13, 57728/13, 74041/13, *Ramos Nunes de Carvalho e Sá v. Portugal (GC)*.
121 Ibid.

of the High Council of the Judiciary. The ECtHR determined that the respective division of the Supreme Court had been established on the basis of the Status of Judges Act and objective criteria, such as the judges' seniority and their membership of a particular division and that the President of the Supreme Court did not sit in this *ad hoc* division, and that, in practice, the members of this division were formally appointed by the most senior Vice-President of the Supreme Court. The applicant had also not alleged that the members of the division hearing her case had been acting on the instructions of the President of the Supreme Court or had otherwise been influenced by him. It could also not be presumed that those judges were specially appointed with a view to adjudicating her case, thus, doubting the court's impartiality and independence was not justified. The ECtHR did also point out that, contrary to the case of *Oleksandr Volkov v. Ukraine*[122], no structural deficiencies or signs of partiality can be detected in how the High Council of the Judiciary of Portugal performs its role regarding the career of Supreme Court judges and disciplinary matters. The independence of the courts is ensued under the Constitution, as well as other laws that cover judiciary ethics and discipline. The ECtHR finds it highly improbable that the judges of the Supreme Court might one day find themselves before the High Council of the Judiciary in disciplinary matters, because judges of the Supreme Court are highly qualified and usually at the end of their career.

In the court case of *Terrazzoni v. France*[123], the ECtHR had to resolve a matter regarding the protection of a judge's privacy in connection with disciplinary proceedings. Namely, the disciplinary proceedings against the judge involved the use of evidence obtained in regard to another criminal case by way of wire-tapping a phone and the judge was not a party to that criminal case. However, the ECtHR did not find a violation since the wire-tapping was legal and permission of the court was obtained, the judge was also offered the chance to submit their version of the telephone conversation and the judge would have had the option to request the removal of the material from the disciplinary proceedings.

4.3.3. Independence of the courts and the dismissal of judges

The ECtHR's case-law also includes cases of dismissal of judges of the Convention's Member States. The court case of *Kudeshkina v. Russia*[124] involved a judge who was dismissed from office because she dared to criticise the Russian judiciary in the media. In 2009, the ECtHR delivered a judgment in which it found that Russia had violated Kudeshkina's freedom of expression, and ordered a compensation for the benefit of the applicant, but the judgment did not directly mention the topic

122 ECtHR judgment 21722/11, *Oleksandr Volkov v. Ukraine*.

123 ECtHR judgment 33242/12, *Terrazzoni v. France*.

124 ECtHR judgment 29492/05, *Kudeshkina v. Russia*.

of reinstatement. The consequence of that is that regardless of a positive judgment from Europe, Kudeshkina has still not regained her job, and upon retirement will not receive the retirement benefits prescribed for judges. Kudeshkina lodged another application with the European Court of Human Rights but the latter found that the matter belongs within the competence of the Committee of Ministers of the Council of Europe who are liable for the execution of judgments.[125]

The ECtHR was bolder in the case of *Oleksandr Volkov v. Ukraine*[126] and prescribed in the conclusion, inter alia, that Volkov, judge of the Supreme Court of Ukraine, who, in violation of the ECHR, including the outcome of unlawful electronic voting, had been dismissed from his position, was to be reinstated. As of now, this has allegedly been fulfilled. These were, as a matter of fact, extraordinary circumstances. Usually, the ECtHR cannot require the reinstatement of anyone, nor the release of someone from punishment, but in this case, the ECtHR deemed the re-adjudication of the matter in Ukraine as impossible, so extraordinary measures had to be applied and Ukraine was required to reinstate the judge.

In another court case initiated against Ukraine, *Denisov v. Ukraine*[127], heard before the ECtHR Grand Chamber, the ECtHR found that the dismissal of the president of the Ukrainian—or to be more exact, the Kyiv Administrative Court of Appeal—constituted a violation of the ECHR. The ECtHR considered the application under Art 6 § 1 of the ECHR, which sets out the right to a fair trial, but deemed a part of the application, lodged under the right to respect for private life (Art. 8 of the ECHR), as inadmissible, not agreeing with the applicant that his dismissal significantly disturbed his private life. The ECtHR did also not deem the loss in wages and prestige as severe enough to warrant the application of Art. 8 of the ECHR. However, the ECtHR found a violation with regard to Art. 6 § 1 of the ECHR, and in its reasoning, drew parallels to the previous case involving Ukraine—*Volkov v. Ukraine*—finding that the body who dismissed the judge, the Council of Administrative Court Judges, was not sufficiently independent and impartial.

4.4. Appearance of independence

In addition to all of the above, it is important to still reiterate that the administration of justice not only has to be independent and impartial, it must also appear as such. This is, primarily, to inspire confidence and trust in society[128], but equally in the participants in the proceedings, for example, the accused in the case of

125 ECtHR decision 28727/11, *Kudeshkina v. Russia (No. 2)*.

126 ECtHR judgment 21722/11, *Oleksandr Volkov v. Ukraine*.

127 ECtHR judgment 76639/11, *Denisov v. Ukraine*.

128 See ECtHR judgment 9186/80, *De Cubber v. Belgium*, § 26.

criminal proceedings.[129] Here, the ECtHR takes the participants' standpoint into account, even though it may not be decisive in itself. What is decisive is whether the "fear" of the party to the proceedings about a court's lack of independence is objectively justified.[130] For the ECtHR, the litmus paper in such a test is what is known as an objective observer: if in the view of an "objective impartial observer" there is no problem with independence, then such a problem does indeed not exist.[131]

V. Consequences of the absence of independence of the courts and the remedying thereof

If the independence of courts/judges is not assured, it will lead to a violation of Art. 6 § 1 of the ECHR, but it may also lead to the violation of some other procedural provision prescribed by said Convention. For example, there was an issue of the independence of military courts in Turkey in regard to the procedural aspect of Art. 2 (Right to life) of the ECHR, but unlike finding a discrepancy with Art. 6 § 1 of the ECHR, the majority of the Grand Chamber found no violation.[132]

The ECtHR is of the opinion that, in certain exceptional cases, lack of independence of a court at the first instance can be remedied with proceedings at a higher court instance.[133] In practice, this is still very complicated because independence should be ensured at all court instances and during the entire course of proceedings, including interim relief.[134] A better solution is the re-opening of proceedings, and reviewing of judgments. In some cases, ECtHR deems the establishment of the court composition's illegality as sufficiently fair compensation,[135] in other cases compensation for damage is ordered, in exceptional cases countries are required to perform specific actions, such as general remedies of the situation (be it the amendment of law or other such actions) if the problem is structural and systematic, and/or the reinstatement of a judge who had been baselessly removed from office.

VI. The independence of courts and international courts, primarily the European Court of Human Rights

To prevent the occurrence of an Orwellian situation where *all animals are equal, but*

129 ECtHR judgment 29279/95, *Şahiner v. Turkey*, § 44.
130 ECtHR judgment 65411/01, *Sacilor Lormines v. France*, § 63; 22678/93, *Incal v. Turkey (GC)*, § 71.
131 ECtHR decision 23695/02, *Clarke v. the United Kingdom*.
132 ECtHR judgment 24014/05, *Tunç v. Turkey (Mustafa Tunç and Fecire Tunc) (GC)*.
133 ECtHR judgment 7299/75, 7496/76, *Albert and Le Compte v. Belgium*.
134 ECtHR judgment 9168/80, *De Cubber v. Belgium*.
135 ECtHR judgment 31848/07, *Zeynalov v. Azerbaijan*.

some animals are more equal than others, international courts, including the ECtHR that adjudicates matters regarding independence of other courts, must also be and appear independent. This has also been stressed by, for example, Lord Jonathan Mance[136], a long-serving judge of the Supreme Court of the United Kingdom, as well as by the CCJE in their Opinion N°5 on "Law and Practice of Appointments to the European Court of Human Rights".[137] International courts play a vital role and their members bear a great responsibility not only in the application and interpretation of one legal system but in a much wider sense. The European Court of Human Rights has even been likened to Europe's conscience. Therefore, independence and impartiality is of utmost importance in such courts as well. Judges elected to international courts do not represent their countries but the legal systems. When, for the selection of judges to the European Court of Human Rights, countries have to nominate three candidates, for the position of a judge of the Court of Justice of the European Union, countries nominate only one candidate. So, it is all the more necessary that the procedure to find suitable candidates is transparent and fair not only at a European-wide, but also national, level. In both cases, candidates undergo a European-wide hearing before a relevant committee. It is important that not only the selection of judges, but also their actions during their term of office, as well as their prospects at the end of their term of office to find work corresponding to their experience and qualification regardless of the judgment they delivered with respect to their country, would ensure the independence and impartiality of international judges.[138]

How can we better ensure the independence of the courts?

As previously stated, the independence of the courts is a matter of mentality, and if I may add, of legal culture. As usual with changes in mentality, the creation of a legal culture that holds independence of the courts and impartiality in that

136 L. J. Mance. – N. A. Engstad, A. L. Frøseth and B. Tønder (edit.). The Independence of Judges. – Eleven International publishing, 2014, pp. 55–64.

137 Consultative Council of European Judges Opinion N° 5 (2003): on Law and Practice of Appointments to the European Court of Human Rights. – https://www.riigikohus.ee/sites/default/files/elfinder/dokumendid/ccje2003op5.pdf (16.02.2019).

138 See also J. Limbach, P. Cruz Villalon, R. Errera, A. Lester, T. Morshchakova, S. Sedley, A. Zoll. Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights. – Interights, May 2003. In a decision adopted at the 1195th meeting of the Committee of Ministers of the Council of Europe, the Committee of Ministers called upon the Member States of the Council of Europe to address appropriately the situation of judges of the ECtHR once their term of office has expired. They should have the opportunity to perform work corresponding to their high qualification. See also B. Cilevičs. Reinforcement of the independence of the European Court of Human Rights. – Committee on Legal Affairs and Human Rights, Doc. 13524, 5.06.2014. – http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20933&lang=en (16.02.2019).

respect takes much longer, sometimes even generations[139], than the adoption of constitutions and other laws prescribing it. By examining the case-law of the European Court of Human Rights, it was possible to acquire an understanding of issues related to the judiciary's independence in Europe. It is at times surprising that a basic principle such as the independence of the judicial power may sometimes not receive proper respect even in countries with well-established democratic traditions.

Therefore, to ensure the independence of the courts, work has to be done each day. We, the judges, must constantly cultivate that independence, develop it throughout our career. The case-law of the ECtHR is rather case-based, although, certain main criteria have formed, on the basis of which one can assess whether a court's independence and impartiality is assured. An array of splendid international materials, listed at the beginning of the article, has already been adopted, but those fine ideas should not only remain on paper, they should become, be, and stay a reality.

In addition to the judges' mentality and attitude toward independence, one of the engines to propel the application of noble principles is the training of judges. This is also helpful in the sculpting and strengthening of mentality. The teaching of this should actually start much sooner, at university rather than in the framework of follow-up/in-service training, and basic principles of respecting other people should already be taught at home and in school.

In addition, communication and co-operation between the judges at the European and wider international level, sharing of best practice-related experiences, and searching for common solutions to problems are of great importance. Together they are also stronger in having a dialogue with other public authorities. All kinds of associations and networks for judges are certainly of help, as is self-control. Defending colleagues from baseless attacks should not be inappropriate, but, it does not mean one should close one's eyes if the judiciary is threatened by politicization or corruption.

Independence of the courts is usually not the most popular topic among the public, but as already noted, it should under no circumstances be viewed as a luxury of privilege of the judges, but rather as security that persons having recourse to the courts find a fair solution to their concerns. The public must not get the impression that judges have always *got each other's back* no matter what. Alas, a high and untouchable profession does not automatically mean that the person occupying it is ethical and honest, but we should certainly strive for that.

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139 See M. Bobek. The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries. – European Public Law 2008, Vol. 14/1, pp. 99–123.

HOW TO ENSURE THE INDEPENDENCE AND IMPARTIALITY OF A JUDGE?

Some viewpoints based on international standards

— Oliver Kask, Judge of the Tallinn Circuit Court

Introduction

Recently, both in Estonia and elsewhere in the world, there has been a lively debate about the limits of the independence and control of the administration of justice, and the separation and the balance of powers. The background to this is not so much a dissatisfaction with the methods of interpreting the law or the types of evidence that can be admitted, but rather the content of the substantive law applied by the courts, and the principles expressed in the constitution of the law (protection of fundamental rights, democracy, separation of powers, the principle of social state) which have not been put under question over a long period of time.

This debate is characterised by more widely known issues of the independence of the courts of Poland, Hungary, Romania, and Turkey, as well as the fact that disputes over the extent of the independence of the court have been passed on from parliaments to the judicial institutions. We can refer to the decisions of the Grand Board of the Court of Justice in 2018 in C-64/16[1], C-216/18[2] and C-619/18[3]—all of which concerned the independence of the court. In the past, out of international courts, the European Court of Human Rights has dealt with the independence of the courts, but these disputes have taken place with countries where the rule of law and democracy have been honoured for a shorter period.

From a legal philosophy point of view, the starting point for the independence of the administration of justice is fairly doubtless: it must be ensured that the case is handled impartially, without the decision on the individual case compromising the rights or legal certainty of minorities. Adjudication of the matter by an impartial and independent court is a fundamental right pursuant to both the European Convention on Human Rights[4] (ECHR) and the EU Charter

1 Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, C-64/16, EU:C:2018:117, request for a preliminary ruling.

2 Judgment of 25 July 2018, LM, C-216/18, EU:C:2018:586, request for a preliminary ruling.

3 Order of 15 November 2018, *Commission v. Republic of Poland*, C-619/18, EU:C:2018:910, request for interim measures.

4 European Convention for Human Rights. - SG II 2010, 14, 54.

of Fundamental Rights.[5] In addition to the fact that in the case of a particular dispute, it is necessary to be impartial in respect of the parties to the dispute, the independence of administration of justice from other branches of power is necessary. Thus, for ensuring the impartiality and independence of the court from the institute of removal alone, it is also necessary to ensure the institutional independence of the entire system of the administration of justice. The European Commission's Justice Scoreboard 2018, drawn up by the European Commission, indicates that the independence of justice is a requirement deriving from the principle of effective legal protection and the right to judicial protection. This will ensure equality, predictability and legal certainty, which will also help to create a favourable investment environment.[6]

However, as far as specific solutions are concerned, different countries are not always the same in ensuring the judicial independence of the courts. It is possible to place greater emphasis on some aspects that have not been given a bearing in another country. The independence of the court can be judged from a number of aspects which, taken together, guarantee the independence of justice. The Chancellor of Justice has explained that the Constitution[7] § 147 (4) gives the legislature a wide discretion in the furnishing of the guarantees of the independence of judges. From the existence of such a margin of discretion, it must be concluded that there may be a choice between several different ways and methods. These include the independence of the courts as an institution, the incompatibility of posts, the certainty of a judge's office and the certainty of judges' fees and other benefits. If one of the factors is less secure in some countries, another factor can guarantee sufficient independence. Therefore, on the whole, all questions must be taken into account when assessing the independence of the court. In order to consider the independence of the judicial system, it is not enough to be able to encounter all the functioning elements in the judicial system in another legal order with the fair administration of justice. Courts, as a whole, are easily affected from outside.

Apart from a number of decisions by the European Court of Justice and the European Court of Human Rights, the independence of the courts and judges has been addressed in numerous international recommendations and documents of international institutions. Some of them that can be mentioned are the general principles of the independence of the judicial power of the United Nations in 1985[8],

5 Charter of Fundamental Rights of the European Union. – 2012/C 326/02.

6 The 2018 EU Justice Scoreboard. Luxembourg: Publications Office of the European Union, 2018, p. 41. – https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_en.pdf (27.02.2019).

7 Constitution of the Republic of Estonia. – SG I, 15.05.2015, 2.

8 Principles of the independence of judges, approved by the UN General Assembly on 29 November 1985. – https://www.un.org/ruleoflaw/blog/document/basicprinciples-on-the-independence-of-the-judiciary/ (27.02.2019).

the European Charter on the Statute for Judges [9] (Charter), the Recommendation of the Committee of Ministers of the Council of Europe on Judges[10], the Magna Carta of Judges[11], the Code of Conduct for Judges[12], as well as other documents.[13] The international institutions that can be named in Europe alone are the Council of Europe European Commission for the Efficiency of Justice (CEPEJ), the Consultative Council of European Judges (CCJE) and the Venice Commission. It is not difficult for those interested to find the relevant information, but it is difficult to decide which of the many documents can be considered important and how to get a systematic overview of them.

The issue of the independence of judges has been discussed both in Estonian media[14] and within Estonian legal literature.[15] The Supreme Court has also explained the principle of the independence of courts in several cases. Some of them have been resolved in the Supreme Court en banc, so that some justices of the Supreme Court have maintained a dissenting opinion.[16] Thus, the scope of application of the principles in practice is not free of discussion. The decisions of the European Court of Human Rights outline the general, theoretical viewpoint of the Court, but the decisions assess the wider picture of the rule of law and the independence of the courts in a particular country, from which conclusions are drawn. Therefore, the conclusions made on the other CoE Member States are not unambiguously transposable.

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9 European Charter on the Statute for Judges 1998 DAJ / DOC 98 (23). – https://rm.coe.int/16807473ef (27.02.2019).

10 Recommendation of the Committee of Ministers of the Council of Europe on Judges: Independence, Effectiveness and Responsibility of Judges, CM/Rec (2010) 12 – https://rm.coe.int/16807096c1 (27.02.2019).

11 Magna Carta on Judges (2010) 3 final, the European Judicial Consultative Council (17.11.2010). – https://rm.coe.int/16807482c6 (27.02.2019).

12 Bangalore Principles of Judicial Conduct, 2002 – https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf (15.02.2019).

13 See, for example, a collection of documents: International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors. Practitioners Guide No. 1. International Commission of Jurists, 2007. – https://www.refworld.org/pdfid/4a7837af2.pdf (27.02.2019).

14 See e.g. P. Pikamäe. Kohtuvõimu piiridest ja seadusandlikust lobisemisvajadusest (*The limits of the judicial power and the need for legislative babble*). – Sirp, 13.04.2018.

15 R. Narits, U. Lõhmus. – Ü. Madise (edit.). Constitution of the Republic of Estonia. Executive commentary 4th supplemented publication Tallinn: Juura 2017, § 147; U. Lõhmus. Kohtuvõimu sõltumatus ja kohtuhaldus. (*Judicial Independence and Judicial Administration.*) – Riigikogu Toimetised, 3/2001; T. Raudsepp. Kohtuliku rippumatuse tagamise teisene tasand. (*Secondary level of guaranteeing judicial independence.*) – Juridica 1999, No 9, pp 438–441.

16 See, e.g., RKÜKO (*Judgment of the Supreme Court en banc*) 14.04.2009, 3-3-1-59-07; RKÜKO 04.02.2014, 3-4-1-29-13, RKÜKm (*Ruling of the Supreme Court en banc*) 21.04.2015, 3-2-1-75-14, RKPJKo (*Judgment of the Constitutional Review Chamber of the Supreme Court)* 08.05.2018, 5-17-43 / 12.

Below, an explanation of one part of the guarantee of the independence of courts—personal independence—has been provided. The issues that are not addressed are institutional guarantees of independence, including the adequacy of court administration, funding, court officials and information systems, as well as the internal work organisation of courts, which may affect the independence of the administration of justice, including the mechanism of case-sharing, issues with the redistribution of work and the role of court leaders. The principle of the impartiality of the judge, meaning that in case of a particular dispute, the judge's interest in resolving the matter must be avoided, as well as the fact that an institute of removal exists for that purpose, have not been taken into consideration. However, if one side of the dispute is a state (executive power), drawing a line between these two principles is problematic. The article does not attempt to give an exhaustive overview of international standards and national practices in the implementation of all aspects of the principle of judge's independence. Thus, issues related to judge training, the boundaries of disciplinary action, criminal and civil liability, ways of guaranteeing the independence of the judge within the judicial body, as well as issues related to the broader ban on the judge's external influence, have been left out of the article. It should be noted, however, that the latter is one of the main guarantees and key issues in the practice of assessing the independence of judicial power.[17]

The Estonian judicial system is small and simple. Restrictions on the professional activities of all judges are regulated in the same way. Although the method of appointment is different, the basic regulation of the independence of judges is the same in the courts of all instances. There is no such simplicity in many other countries. In countries where specialised tribunals or administrative courts are separate from other court branches also at a higher instance, the standards ensuring judges' independence are also often different as a result of historical development. Thus, the control mechanisms for appointing judges and checking their suitability, as well as issues relating to remuneration and transfer, may vary. Therefore, the article does not aim to map out all the solutions for guaranteeing the independence of judges. Since it makes more sense to learn from generalisations and theory, views that are based on theory and have developed internationally have been expressed on different topics. Therefore, the article is mainly based on recommendations and reports from international organisations. These are not binding sources of law, so there are no laws in compliance with these standards in all countries. The nature of the standards does not require their exact literal and exhaustive adherence, but in the event of any deviation, there should be some other lever that will help to guarantee

17 See, e.g., H.-G. Heinrich. The Role of Judicial Independence for the Rule of Law. CDL-JU (98) 44, 02.12.1998. – https://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(1998)044-e (27.02.2019).

the independence of the court. Or, there must be a convincing justification for a different approach.

Since the author has, for a long time, been a member of the Venice Commission, the emphasis is on the views of this institution. However, this does not mean that the author considers them better or more correct than other international recommendations. It should be noted, however, that among the members of the Venice Commission, representatives of the academic world, judges (including constitutional judges, whose independence is often guaranteed by different rules) as well as politicians can be found. Therefore, there is much less criticism on the standards being biased to the benefit of the judges than in the case of CCEJ. As the number of international recommendations and documents concerning the independence of judges is very high, only a few of them have been cited.

A judge's term of office

While in 1994 the Committee of Ministers of the Council of Europe recommended the appointment of judges for life (up to retirement) or for a fixed period, the CCJE already explained in its Opinion No. 1 that European practice is predominantly the appointment of judges until retirement age, and this approach is best in line with the requirement of the independence of judges.[18] This view was also endorsed by the Venice Commission considering that exceptions should be allowed only in limited cases, such as the constitutional judges.[19] As a general rule, the Commission has considered the appointment of judges for a certain period of time as jeopardising the independence of the court.[20] However, if a judge is appointed for a fixed term, the term shall be at least 10 years and no second term shall be allowed.[21] In the 2010 Recommendation of the Committee of Ministers, it was considered necessary, in the case of appointment of judges for a fixed term, to extend the term of office only on the basis of objective criteria.[22]

However, there is no one single model that could be considered a guarantee of the independence of judges or in the appointment of judges. In various international standards and recommendations, the objectivity of the criteria for the selection of judges and the personal qualities of the candidate, such as qualifications,

18 Opinion No. 1 of the Consultative Council of European Judges (2001) on standards concerning the independence of the judiciary and the irremovability of judges, § 48.

19 Council of Europe Commission Report on Democracy through Law (Venice Commission) CDL-AD (2010) 004, § 35.

20 Opinion No. 230/2002 of the Venice Commission, CDL-AD (2003) 019, § 39.

21 Opinion No. 320/2004 of the Venice Commission, CDL-AD (2005) 003, § 105.

22 Recommendation of the Committee of Ministers of the Council of Europe on Judges: Independence, Effectiveness and Responsibility of Judges, CM/Rec (2010) 12, p 51.

knowledge and the skills required for the work of the judge, including the ability to remain dignified, have been considered important. Discrimination in the selection of candidates is prohibited.[23] On the screening of candidates, a lot of emphases is put on the procedural side, including on the independence of the selection board from the executive power.

Probationary period

The application of a probationary period for judges has also been questioned. According to Article 3.3 of the Charter, the probationary period must be sufficiently short and, when making the decision regarding the judge not to remain in office, an independent Council for Administration of Courts must have the right to make the final decision, or at least its position must be heard. However, the Charter states that the application of a probationary period will jeopardise the independence and impartiality of judges. In the 1983 Universal Declaration on the Independence of Justice, adopted in Montreal,[24] the probationary period was clearly considered to be contrary to the requirement of the independence of the judge, and it was considered necessary to phase it out. The Venice Commission also considered the application of the probationary period as incompatible with the principle of independence.[25] However, the Commission has acknowledged that this must not be seen as completely contradictory to European standards and that the probationary period can play an important role, particularly in countries with a new judicial system, in assessing the suitability of a judge. It is also necessary to provide for strict guarantees in the case of provision of a probationary period, and the removal of a judge during a probationary period must be based on objective criteria and must follow the same procedural requirements as the removal of a judge otherwise. When weighing the evaluation of performance and the independence of judges, the latter must be preferred. A better solution than the probationary period has been considered, in the shape of the regulation in place in Austria according to which, a person, before taking the position of a judge, must work in the judiciary system in a role assisting a judge, during which his/her suitability for the office is assessed.[26] However, according to the Venice Commission, the application of the probationary period is certainly not permitted in courts other than the courts of the first instance.[27] The five-year length of the probationary period has clearly been considered as being too long.[28]

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23 Ibid, pp. 44–45.

24 Montreal Declaration. Universal Declaration on the Independence of Justice, 1983. – https://www.icj.org/wp-content/uploads/2016/02/Montreal-Declaration.pdf(27.02.2019).

25 Opinion No. 403/2006 of the Venice Commission, CDL-AD (2007) 028, § 40.

26 Ibid, § 43.

27 Opinion No. 202/2002 of the Venice Commission, CDL-AD (2002) 015, § 5.

28 Opinion No. 550/2009 of the Venice Commission, CDL-AD (2010) 003, § 46.

Promotion and evaluation

Recommendations of the Committee of Ministers of the Council of Europe and the opinions of the CCJE justify the promotion of judges only on the basis of competition and the objective criteria laid down by law, which are the same as those used for judging candidates to be appointed as a judge.

The Venice Commission, as well as other international institutions dealing with the independence of the courts, has considered the evaluation of judges to be in line with European standards. It can only be carried out by a collegial body under the judicial power, not by the executive power or the head of the court. Many countries, including Denmark, Sweden, Finland, the United Kingdom, Ireland, the Netherlands and, to some extent, Spain, have developed a system for overall evaluating the effectiveness of judicial proceedings instead of evaluating judges. However, the evaluation is necessary to provide judges with adequate training opportunities and also to make decisions on the promotion of judges, and the evaluation provides the judges with sufficient feedback to improve their work.[29] The evaluation of judges should not be seen as a mechanism for subordinating or influencing judges.[30]

Release of judges from office

The compulsory retirement of judges from a certain age is common practice in Europe, even if the constitutions provide for the appointment of judges for life. In most cases, this age limit is between 65 and 75 years. For example, in the Netherlands and the United Kingdom, the age limit is 70, but if this age is reached, the judge can apply for resumption for another five years. The Venice Commission has been critical in individual cases of granting derogations, as the question arises in case the majority of the judges so requests, instead of a derogation involving discretion and, therefore, the risk of misuse, the mandatory retirement age should be raised.[31] The introduction of a significantly different retirement age for judges at courts of different instances is also deplorable, as it may lead to an attempt to resolve the case in a way that would please the body deciding on promotion, to ensure the continuation of the service in the court where continuing work is possible.[32] The statutory solution in Hungary, where judges were not allowed to adjudicate cases within the last six months before retirement, was also subject to criticism.[33]

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29 Venice Commission Opinions No 355/2005, CDL (2005) 066, § 30; No. 528/2009, CDL-AD (2009) 023, §§ 10 and 11; No. 629/2011, CDL-AD (2011) 012, § 55; No. 751/2013, CDL-AD (2014) 007, § 11; No. 712/2013, CDL-AD (2014) 008, § 84.

30 Opinion No. 723/2013 of the Venice Commission, CDL-AD (2013) 015, § 68.

31 Opinion No. 218/2002 of the Venice Commission, CDL-AD (2002) 026, § 57.

32 Opinion No. 747/2013 of the Venice Commission, CDL-AD (2013) 034, § 30.

33 Opinion No. 663/2012 of the Venice Commission, CDL-AD (2012) 001, § 95.

The early release of a judge must normally only be possible in the case of a conviction or be imposed as a disciplinary penalty. In either case, the decision maker must not be outside a third power. The disciplinary penalty must be statutory and proportionate.

In some cases, the Venice Commission has had to clarify the admissibility of evaluation of the suitability of judges for office. It can only be an exceptional measure in a situation where the independence and credibility of the judicial system in a particular country is under serious doubt. Such an evaluation must also be carried out by an independent body authorised to administer justice.[34] However, such an evaluation must, of course, be based not on judges' views or beliefs, but on possible disciplinary offenses or crimes that have not been properly addressed in due time. A general assessment of the suitability of judges and their re-appointment to resume office is not allowed.[35]

The international recommendations do not offer many answers to the question of whether to allow a judge to be removed from office during disciplinary proceedings or criminal proceedings. Given that such a removal could jeopardise the independence of the judge, it must also be decided by an independent body. It protects the credibility of the court and prevents any doubt that a particular case will be dealt with impartially and independently. However, the possibility of appeal must be guaranteed for the judge both in the case of early release and removal from office[36] and, in the event of removal from office, a decent income for subsistence.[37] The procedure of removal from office can only be started by an independent body in order to prevent the politicisation of the measure and the influencing of judges.

The transfer of a judge to another court is permissible only in exceptional cases. Article 3.4 of the Charter states that, in principle, a judge may not be appointed to another court position or transferred to another court, including promotion, without his/her consent. Exceptions must be provided by law and may be related to disciplinary penalties, modification of the judicial system, or temporary transfer to a neighbouring court to improve the outcome of its work, whereas the maximum period of the transfer time must be fixed.

A justification such as "ensuring administration of justice" or "in the interests of the administration of justice" for transferring a judge to another court, or removal from office for the purposes of the reorganisation of the work or closure of a

34 Opinion No. 868/2016 of the Venice Commission, CDL-AD (2016) 036.

35 Opinion No. 747/2013 of the Venice Commission, CDL-AD (2013) 034, § 48.

36 Venice Commission report CDL-INF (2001) 017, § 63.

37 Opinion No. 615/2011 of the Venice Commission, CDL-AD (2011) 007, § 56; RKÜKo 3-3-1-59-07.

court, has been considered to be too general. Decisions concerning the service must be transparent and predictable. In the event of a reduction in the number of judges or the closure of a court, the judges in office must be able to continue their service in the court of the same instance. If there is no such option, the rules on the removal of a judge from office, transfer to another (including lower instance) court and temporary removal from office, until a vacant position of a judge appears, must be clearly and proportionately prescribed by law. The judge must also have the right to appeal on this issue.[38] If on the day of the closure or the reorganisation of the court, there are no vacant judge positions to be offered, the possibility of offering a vacant position of a judge if it occurs within a reasonable time must be taken into account. Pending retirement in other courts must also be taken into account, and more than one possible position of a judge must be offered to the judge. Thus, in case of a loss of the current position, the judge must have options for selection. Transfer to another court without consent must take preference over removal from office.[39] If a judge is transferred to another court, there must be clear criteria in place in the law, including the duration of the transfer, the number of cases in both courts and the number of cases to be settled by the judge to be transferred.[40]

The presumption of admissibility of transferring to another court does not have to have the judge's own consent, but the consequence of not giving consent must not be the removal from office.[41] The Venice Commission has considered the Courts Act of Northern Macedonia, which allows a judge to be transferred to another court for up to one year, to be appropriate. In doing so, the Commission has pointed out that successive transfers to different courts should be prohibited in order to prevent misuse of the regulation, e.g., by limiting the number of transfers to one transfer during the period of five years.[42]

It is also important to assess who decides the transfer of the judge and in what procedure to ensure the independence of justice. The transfer should be decided by an independent Council for Administration of Courts, and the judge should also have the right to challenge a transfer that is without consent.

Salary, pension, and other income

The importance of adequate income has been emphasised in all international standards addressing the independence of courts. Clauses 6.1–6.4 of the Charter

38 Opinion No. 663/2012 of the Venice Commission, CDL-AD (2012) 001, § 79.
39 Opinion No. 747/2013 of the Venice Commission, CDL-AD (2013) 034, § 29.
40 Opinion No. 773/2014 of the Venice Commission, CDL-AD (2014) 031, § 36.
41 Opinion No. 747/2013 of the Venice Commission, CDL-AD (2013) 034, § 17.
42 Opinion No. 944/2018 of the Venice Commission, CDL-AD (2018) 033, § 19.

require that judges who perform their duties must receive remuneration at a rate that is fixed and sufficient to protect them from pressure on their judgments and, more broadly, on their behaviour. The remuneration must support their independence and impartiality. The amount of the remuneration may vary according to the seniority of the judge, the duties of the judge and their importance, which are assessed on the basis of clear criteria. In addition, social guarantees must be provided for judges in the event of sickness, maternity leave, incapacity for work, old age and death. An old-age pension must, if the length of service of the judge is of the required length, be such that it corresponds as far as possible to the last salary of the judge.

The Venice Commission has considered it necessary for the salaries of judges to be guaranteed at a rate commensurate with the dignity of their office and the size of their duties. Rewards and benefits in kind are not allowed for judges when it comes to discretion, since although the individual needs of a judge may be taken into account when providing benefits in kind, this may lead to misuse. The Committee of Ministers of the European Council has recommended that the salaries of judges should not be linked to the outcome of their work, as this may affect their independence.[43] It is also required to provide for the remuneration of judges by law. According to the European Court of Justice, the salary of judges, which corresponds to the importance of the tasks they perform, is an integral part of the independence of the courts.[44]

The salaries of judges in different countries vary not only because of the cost of living or differences in GDP, but also for historical reasons. Salaries may be affected by the payment of other social guarantees and the factors arising from the nature of the work of the judge, such as how many cases are expected to be resolved by the judge. Comparative data on the income of judges working in the countries of the European Council is collected and published by CEPEJ. Literature investigating the US judicial system[45] has pointed out that the independence of a judge, and the impeccable quality of the work of the courts, do not depend solely on the size of salary.[46] Although the private sector pays more to lawyers than to judges, the probability of one leaving the office of a judge is not very high.[47]

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43 Recommendation of the Committee of Ministers of the Council of Europe on Judges: Independence, Effectiveness and Responsibility of Judges, CM/Rec (2010) 12.

44 Judgment of 27 February 2018, *Associação Sindicaldos Juizes Portugueses v. Tribunal de Contas*, C-64/16, EU:C:2018:117, paragraph 45, request for a preliminary ruling.

45 For salary levels there, see: https://en.wikipedia.org/wiki/Federal_judge_salaries_in_the_United_States.

46 S. J. Choi, G. M. Gulati, EA Posner. Are Judges Overpaid? The Skeptical Response to the Judicial Salary Debate. - Journal of Legal Analysis 2009, Vol 1/1, pp. 47–117.

47 J. M. Anderson, E. Helland. How Much Should Judges Be Paid? An Empirical Study on the Effect of Judicial Pay on the State Bench. - Stanford Law Review 2012, Vol. 64, pp. 1277–1341

In contrast to the Charter and the Committee of Ministers' recommendations, the CCJE, in Opinion No. 1 (2001) p. 62 has considered it necessary to provide for a prohibition on reducing the salaries of judges and, at least de facto, to increase it, taking inflation into account. However, the CCJE noted that the prohibition on salary reduction is not provided for in the law of multiple countries (including in the Nordic countries), and the relevant norms are needed especially in new democracies. The Venice Commission has considered this prohibition to be normal and desirable for guaranteeing the independence of judges.[48] However, the Commission has explained that in exceptional circumstances, e.g. in times of economic crisis, salary reduction cannot be considered to be contrary to the principle of the independence of judges.[49] In the US, the reduction of the salary of judges is only allowed in a few states; it is forbidden in federal courts. In some states, reductions in salaries are allowed only on the condition that the salary of all the civil servants is equally cut.[50] The Court of Justice, in the judgment referred to, considers a temporary reduction of salaries of all senior civil servants, including judges by 3.5% and 10% for two years, permissible in order to reduce the budget deficit. It was considered that there was an important public interest in reducing salaries, it was provided by law in a clear size and in a temporary manner, and it concerned representatives of all branches of power, not just the judges. The Supreme Court's decision in case no. 5-17-43 considers that salary reduction is also permissible unconditionally if the general salary requirements are met. The Supreme Civil and Criminal Court of Greece considered a reduction in salary between 2.5 and 25% disproportionate and unconstitutional.[51]

The recommendations of international organisations have not reflected on the question of what income must be guaranteed for judges for the time he/she is removed from office due to disciplinary proceedings or criminal charges. As explained by the Supreme Court en banc in case no. 3-3-1-59-07, securing income to ensure the independence of the judge is necessary due to the fact that the judge is forbidden to do auxiliary work. However, the decision of the Supreme Court en banc was not unanimous.

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48 Opinion of the Venice Commission, CDL-AD (1995) 074rev, § 19.

49 Opinion No. 598/2010 of the Venice Commission, CDL-AD (2010) 038, §§ 16–20.

50 Salary Reductions. Amended state constitutional provisions regarding reductions to judicial salaries. – https://www.ncsc.org/microsites/judicial-salaries-data-tool/home/special-reports/salary-reductions.aspx (27.02.2019).

51 Greece: Supreme Court rules that salary cuts for judges are unconstitutional. European Foundation for the Improvement of Living and Working Conditions. https://www.eurofound.europa.eu/de/publications/article/2014/greece-supreme-court-rules-that-salary-cuts-for-judges-are-unconstitutional (27.02.2019).

Prohibition of auxiliary work and restrictions on business

Prohibition of out-of-office activities or auxiliary work is due to the need to prevent the judge from being influenced from outside the judicial system. In general, all international standards recommend prohibiting the threat, pressure and other unacceptable influence of a judge when resolving a case. It must be ensured that the judge makes the decision only on the basis of law and conscience. Restrictions of out-of-office activities and business restrictions are set to prevent the risk of such influence. However, there is no single understanding of the extent of such restrictions across Europe. Both the CCJE[52] and the Venice Commission[53] have stated that there are different approaches and that the topic is being discussed. It covers two areas: whether participation in political debate and action and out-of-court paid activities could be acceptable.

In Italy, judges must not do auxiliary work, except to be Members of Parliament. At that time, however, they are exempt from the duties of a judge and may only return to office after the expiry of their mandate as a member of parliament. Judges who have become popular in the media (e.g., those who have been dealing with corruption issues) have also launched a political career after removal from office, although in this case the issue of the independence of the judge has been raised.

In the case of other occupational or activity restrictions, of course, it is forbidden to work permanently in other branches of power, as well as in the private sector. However, such prohibitions are not absolute. Often, they are set out in the law only with the abstract proviso that the auxiliary activities should not compromise the independence and credibility of the judge. The Venice Commission has not considered it justified to prohibit judges from belonging to the governing bodies of non-profit organisations and charities or being a member of such organisations.[54] In the case of paid activities, the rules are stricter, and the rules of incompatibility of agencies should be clearly stated in the law in order to prevent a judge from being unduly influenced. It is necessary to prohibit activities that lead to the prohibited influence or give the impression of such an influence. In deciding on the admissibility of the second job, if there is no clear list provided in the law, the final decision-making power must remain with the independent Council for Administration of Courts.[55] According to the Code of Conduct for US Judges, judges are allowed to take part in non-profit activities provided that it is not an organisation that is expected to be more frequently involved in litigation, moreover, the judge's activities in such an organisation must not consist

52 Opinion No. 1 of the Consultative Council of European Judges (2001) on standards concerning the independence of the judiciary and the irremovability of judges 1, p. 63.

53 Opinion of the Venice Commission, CDL-AD (1995) 73rev, § 10.

54 Opinion No. 712/2013CDL-AD (2014)008 of the Venice Commission, § 712.

55 Ibid, § 97.

in figuring out funding schemes.[56] In the US, a judge may be involved in a business (including investing and earning income from property) provided he/she refrains from transactions that damage the position of a judge or lead to frequent contracts, including those from a business relationship with potential participants in the proceedings. The judge must also refrain from using information that has become known to him/her due to his/her office to help the business. Helping in family businesses and thereby bringing financial benefits is allowed.[57] A judge in the United States may also belong to different government commissions if such action concerns only the law, the legal system, or the administration of the courts. But even then, the judge must bear in mind that his/her actions would not reduce the independence and credibility of the court.[58]

In general, judges are not allowed to act as arbitrators or representatives in the court unless the person being represented is a family member. In the US, judges are not allowed to act as a representative in court even in this case.[59]

It is permissible, in accordance with international standards for judges to operate in the academic and scientific world. Judges are allowed to provide training and to present their views in both legal and other areas. Such activities may also involve sharing legal expertise with other public bodies. The Venice Commission considers that the restriction on participation in research is excessive.[60] However, in Portugal, such activities are also limited: the judge may not be remunerated for pedagogical or research work, and all other activities must be authorised by the independent Council for Administration of Courts.[61]

According to European standards, it is common for judges to be experts in various committees and working groups of international organisations (even the CCJE or the Venice Commission), as well as belonging to several associations of supreme courts. There is clearly no need to impose a prohibition on participation therein, as the purpose of such organisations is not to influence the judge in an unacceptable manner in resolving court cases, but to support the independence, professionalism, and efficiency of the courts.

In any case, international standards require the declaration of income from auxiliary activities in order to avoid the risk of corruption.

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56 Code of Conduct for United States Judges. United States Courts, p. 4B,. – https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges (27.02.2019).

57 Ibid, p 4.D.

58 Ibid, p 4.F.

59 Ibid, p. 4.A.5.

60 Opinion No. 328/2004 of the Venice Commission, CDL-AD (2005) 005, §§ 6–7.

61 Article 216 of the Portuguese Constitution see more at https://www.wipo.int/edocs/lexdocs/laws/en/pt/pt045en.pdf.

In Estonia, as in several other countries, a judge is allowed to temporarily leave the office of a judge to work in another state office, in particular in the Ministry of Justice. In Turkey, for example, the use of this opportunity is quite common. In this respect, the Venice Commission has considered it important that the range of judges' rights and obligations in these two offices, one of which requires independence and the other working in a hierarchical system, would be clearly delineated.[62]

In some countries there is an ongoing debate on whether judges should be allowed to act in a law firm or as a professional representative after leaving the office of a judge. There are countries where such restrictions have been set. There is no general international standard on this issue, and the general rule is that the judge's activities after leaving office must not jeopardise the impartiality of the administration of justice.

Restrictions on freedom of expression and association

The European Court of Human Rights has explained that, upon ensuring the independence of the courts and the separation of powers, it is important to carefully assess the extent of restrictions on the freedom of expression of judges in light of Article 10 of the ECHR.[63] Particular attention should be paid to the profession of the specific person, the content of the disputed expression and its context, and the nature and severity of the sanctions imposed, as well as the (disciplinary) procedure.[64] The judge may not only have the right, but also the duty to express an opinion to the public on laws relating to the administration of justice or the judiciary, so that punishing or terminating service of a judge for a critical opinion may be unacceptable. However, judges must be restrained due to their position in their academic presentations and prevent the authority and impartiality of the judiciary from being questioned by the public. However, if the expression of opinion raises an important debate in society, highlighting significant shortcomings in the administration of justice and the work of the courts, the freedom of expression of the judge must be considered more important than any interest in maintaining the authority of the administration of justice. Freedom of expression must also be considered with more weight if the views expressed are unlikely to have any impact on past, pending or future cases.[65]

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62 Opinion No. 610/2011 of the Venice Commission, CDL-AD (2011) 004, § 47.

63 ECtHR judgment 62584/00, *Harabin v. Slovakia*.

64 ECtHR judgment 28396/95, *Wille v. Liechtenstein*; 47936/99, *Pitkevich v. Russia*; 29492/05 *Kudeshkina v. Russia*; 20261/12, *Baka v. Hungary*.

65 ECtHR judgment 38406/97, *Albayrak v. Turkey*.

Both the CCJE and the Venice Commission have produced reviews and reports on restrictions on the freedom of expression and freedom of association of judges.[66]

While other restrictions discussed above and the guarantees of the independence of judges are listed in the law books, restrictions on freedom of expression and organisational membership have, on many occasions, been left to the discretion of the judges themselves—or of the body administering a disciplinary penalty. Codes of ethics that help guide a judge to make decisions on issues permitted or prohibited are widespread and, in some countries, prescribed by law. As pointed out by the CCJE, ethical requirements are often considered to be helpful in determining disciplinary liability. Hence, the dichotomy of positive law and ethics taught at universities is not very clear, at least when deciding on the behavioural restrictions of judges. However, the Magna Carta (p. 18) explains that ethical rules should not be subject to disciplinary liability. But the general principles of the permissible and forbidden behaviour of judges are also predominantly established at the law level.

In codes of ethics, communication with the media and the public on ongoing court cases and court decisions, as well as speaking on other issues, are usually the focus of attention.

The most common restrictions on freedom of expression are the obligation to hold the secrecy of chambers and professional secrecy, including the obligation to keep personal data confidential and to protect the dignity of the administration of justice. It is often forbidden to comment on pending cases. In Romania, judges must not publicly explain their own decisions. If there is no such prohibition in the law, the codes of ethics are much less restrictive, favouring the activity of the judges in communicating with the public in matters of the administration of justice. Restrictions are intended to prevent overly critical statements on the procedure of the administration of justice or on court decisions. For example, in Russia, one is allowed to express a critical attitude in mutual communications regarding the judiciary.[67] Participation in public debates on the functioning of justice, the legal system and the administration of justice (e.g., the Code of Ethics for Croatian Judges) is customarily allowed.

In Sweden, a distinction is drawn between the statements of a judge in issues related to the office and the freedom of expression. In the first case, if a judge expresses views on the administration of justice or on a case, he/she must act as

66 Opinion No. 3 of the Consultative Council of European Judges (2002): on professional conduct of judges, especially on ethics, inappropriate behaviour and impartiality; Report on the Freedom of Expression of Judges. – https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)018-e.

67 Opinion No. 806/2015 of the Venice Commission, CDL-AD (2015) 018, § 24.

an authority, following the rules of public authority and ensuring equal treatment. The use of freedom of expression can only be spoken about if the relationship of opinion with the administration of justice is not obvious. Of course, drawing such a line is difficult in practice. If a judge expresses opinions that attract the attention of the public, there may be doubts as to his/her suitability to adjudicate certain types of cases impartially, and this may be the basis for his/her removal from office.[68]

In other cases, apart from the administration of justice, a judge is required to give opinions in a way that does not prejudice the administration of justice. The judge's behaviour during free time must also meet the same requirement.

Expressing a political opinion is not forbidden in Germany, but when doing so, the judge must not highlight his/her profession. In Germany, a judge is also allowed to stand for election. Upon becoming a Member of the Parliament, the judges' powers will be suspended. However, freedom of expression is restricted by the condition that the judge must not undermine the confidence in the impartiality of justice in his/her statements.[69] In several countries (e.g., Austria, Turkey, and Russia) a judge is forbidden to criticise the state or the legal system or to demonstrate unfaithfulness towards them; moreover, the inadmissibility of such an expression may be related to the purpose that a judge may not jeopardise his/her good name or honour or the integrity of the administration of justice. In Lithuania, a judge must not publicly express his/her political views or give the impression that he/she is affected by any political ideology.

As for restrictions on the freedom of association, restrictions on party membership are the most common. However, in Germany, for example, such a ban does not exist. In Switzerland and Austria, participation in political activities is not prohibited for a judge, but in Austria, judges have themselves, in their own ethical standards, considered it advisable to abstain from party-related and political activities. The situation is the same in the UK. Legal provisions that limit a judge's political activity are much stricter in Eastern and Central European countries, where such flexibility is not favoured due to a historical 'telephone law' experience. The Venice Commission has acknowledged the absence of a single standard and recommended that, if judges wish to become Members of Parliament, they would be removed from office before running, in order to prevent their impartiality from being called into question after their candidacy has proved unsuccessful.[70] In Malta, a judge must not belong to associations that have a political orientation. In Poland, Slovakia, and Ukraine, judges must not belong to a trade

68 Ibid, § 33 et seq.

69 Ibid, § 46 et seq.

70 Opinion No. 480/2008 of the Venice Commission, CDL-AD (2008) 039, § 45.

union.[71] However, in several other countries, the right of judges to join associations is expressly permitted by law. Operating restrictions in different organisations are mainly related to the condition that the activity must not undermine the authority of the judiciary (e.g., in Ukraine) and that such permission must be given to a particular judge for belonging to a particular organisation. In the Magna Carta (c. 12), the CCJE has emphasised the right of judges to belong to national and international associations of judges, whose task is to protect the mission of the judiciary in society.

The admissibility of using social media is usually not dealt with separately. The Code of Ethics for Croatian judges explicitly permits it under the conditions that apply to the freedom of expression of the judge in general. So, a judge must be equally respectful of the administration of justice and colleagues in both traditional and social media; he/she must also refrain from disclosing professional secrets via social media.

Separate attention needs to be given to the problems associated with whistle blowing. The cases brought before the European Court of Human Rights usually concern government officials. Judges simply do not possess a lot of information that would be of interest to the public and sensitive information that they would not be able to disclose in court decisions, if they so wished. At least in theory, however, the same rules apply to judges as in the case of other civil servants, source protection prohibits public authorities from searching the source of anonymous information from the judiciary if the disclosure is not a criminal offense.

In conclusion

The Estonian public and judiciary have been periodically notified of comparative assessments of the independence and efficiency of judicial systems in different countries.[72] Both in the European Commission's justice scoreboard of EU Member States[73], as well as in the CEPEJ report—which is more superficial in assessing the independence of justice[74]—Estonia has been positively characterised, not only by the efficiency of its administration of justice but also by its independence. The *World Justice Project*, however, has drawn up a world ranking list in terms of

71 Opinion No. 806/2015 of the Venice Commission, CDL-AD (2015) 018, § 13.

72 See more https://www.kohus.ee/et/kohtute-tohusus.

73 The 2018 EU Justice Scoreboard. Luxembourg: Publications Office of the European Union, 2018. – https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_en.pdf (27.02.2019).

74 Study No 26 of the European Commission for the Efficiency of Justice of the European Council, based on data from 2018. - https://rm.coe.int/rapport-avec-couv-18-09-2018-en/16808def9c (27.02.2019).

the rule of law—as is the case in many other areas.[75] The independence of the court is assessed in this ranking in several categories. Estonia ranked 12th among 113 countries surveyed last year. So, when evaluating the functioning and independence of the Estonian judicial system, there is no reason for criticism, at least in comparison with other countries. At the same time, we must not rest on our laurels as far as the current situation is concerned.

75 *World Justice Project Rule of Law Index 2017–2018*, available at https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf.

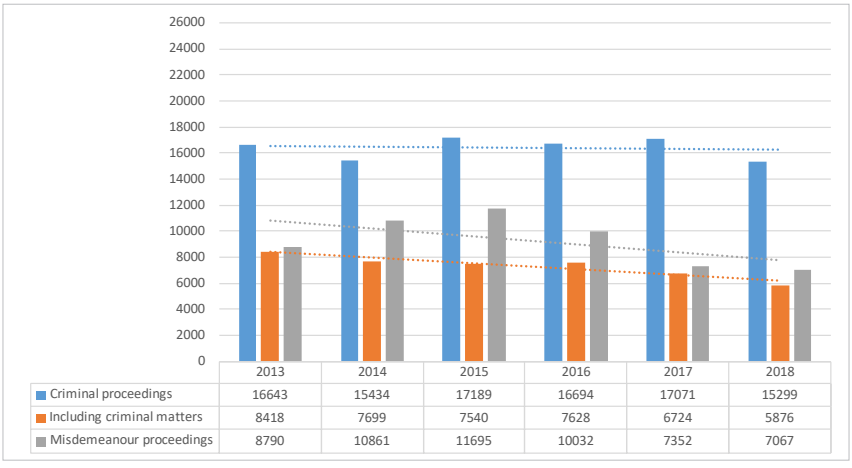
Chapter III
STATISTICS

A SUMMARY OF THE PROCEDURAL STATISTICS OF THE COUNTY, ADMINISTRATIVE AND CIRCUIT COURTS 2018: RESOLVED CASES AND THE AVERAGE WORKLOAD OF A JUDGE

— Külli Luha, Analyst of the Courts Division of the Ministry of Justice

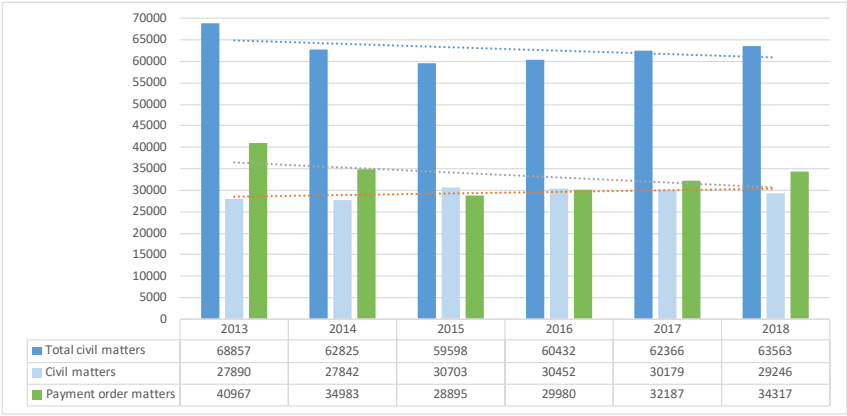
In 2018, 29,246 civil matters (3.1% less than in 2017) and 34,317 cases of expedited procedures of payment orders (6.6% more than in 2017), 15,299 criminal proceedings (10.4% less than in 2017), including 5,876 criminal matters (12.6% less than in 2017) and 7,067 misdemeanour matters (3.9% less than in 2017) were brought before county courts for resolution. A total of 2,478 (17.0% less than in 2017) were brought before the administrative courts.

The figures below illustrate the number of criminal and misdemeanour matters, civil matters and administrative matters brought to county courts over the last six years. The trend line in the figures shows the change in the workload of the courts during this period.



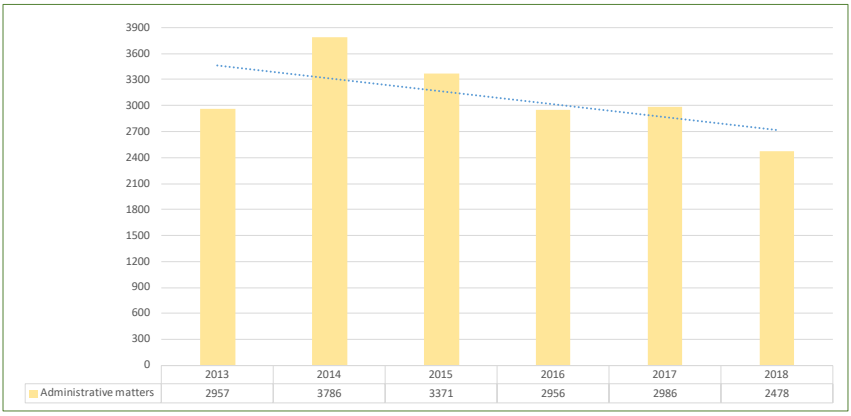
	2013	2014	2015	2016	2017	2018
Criminal proceedings	16643	15434	17189	16694	17071	15299
Including criminal matters	8418	7699	7540	7628	6724	5876
Misdemeanour proceedings	8790	10861	11695	10032	7352	7067

Figure 1. Dynamics of the total number of offenses received by county courts, 2013–2018



	2013	2014	2015	2016	2017	2018
Total civil matters	68857	62825	59598	60432	62366	63563
Civil matters	27890	27842	30703	30452	30179	29246
Payment order matters	40967	34983	28895	29980	32187	34317

Figure 2. Dynamics of the total number of civil matters received by county courts, 2013–2018[1]

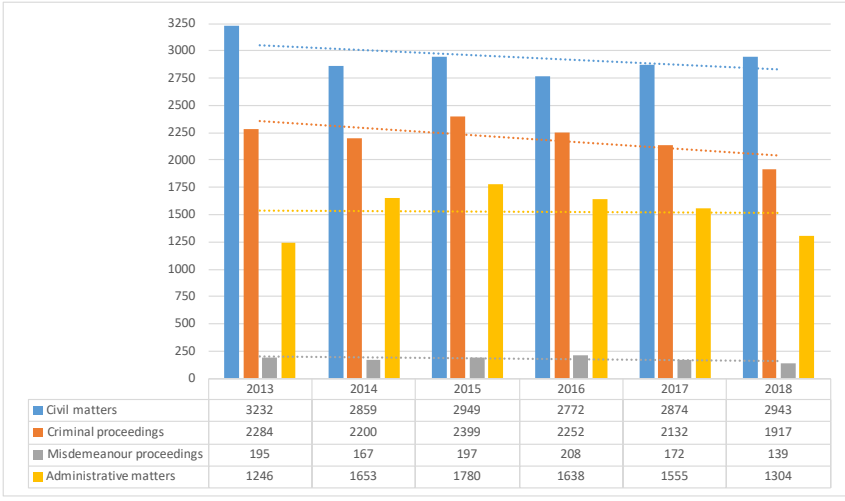


	2013	2014	2015	2016	2017	2018
Administrative matters	2957	3786	3371	2956	2986	2478

Figure 3. Dynamics of the number of cases received by the administrative courts, 2013–2018

A total of 2,943 civil matters (2.4% more than in 2017), 1,304 administrative matters (16.1% less than in 2017), 1,917 criminal proceedings (10.1% less than in 2017) and 139 misdemeanour matters (19.2% less than in 2017) were received by the circuit courts in appeals and appeals against court rulings. Figure 4 shows the change in the number of cases received by circuit courts over the last six years in all types of proceedings, with the trend lines in the figure showing the change in the workload of circuit courts.

1 This figure reflects the total number of cases submitted to civil court proceedings in county courts, including to the Pärnu Circuit Court and to the Haapsalu courthouse submitted cases for e-payment order expedited procedures; supervision proceedings are not included.



	2013	2014	2015	2016	2017	2018
Civil matters	3232	2859	2949	2772	2874	2943
Criminal proceedings	2284	2200	2399	2252	2132	1917
Misdemeanour proceedings	195	167	197	208	172	139
Administrative matters	1246	1653	1780	1638	1555	1304

Figure 4. Dynamics of the total number of cases received by county courts, 2013–2018

More detailed data on the procedural statistics of the courts of the first instance and the courts of appeal in 2018 by type of procedure are published online.[2]

Adjudication of cases in county courts: civil matters

A total of 29,134 civil matters were adjudicated in county courts, of which 14,364 were adjudicated in Harju County Court, 3,440 in Pärnu County Court, 6,640 in Tartu County Court and 4,690 in Viru County Court. Half of the cases adjudicated in the county courts, or 53%, were adjudicated during the action (all together 15,471 action cases were adjudicated), of which 26.6% were adjudicated by default judgment. A total of 43.3% of civil matters were adjudicated in proceedings on petition, one-tenth of which were international legal aid cases. Cases of settled preliminary legal aid / securing an action constituted 1.5% of the adjudicated cases, the total number of evidentiary proceedings was 33, i.e., 0.1% of the adjudicated cases, and 141, i.e., 0.5% of the adjudicated cases were letters of the request of other courts.

In 2018, there were essentially no differences in the distribution of adjudicated cases compared to previous years. In the county courts, most of the cases adjudicated were cases of the law of obligations (33.4% of the adjudicated cases) and family law cases (22.4% of the adjudicated cases) and cases relating to the General Part of the Civil Code Act (13.0% of the adjudicated cases). The remaining 31.2% was split between enforcement, bankruptcy, company law, labour law, property law, international legal aid and other civil matters (Figure 5).

2 See more https://www.kohus.ee/sites/www.kohus.ee/files/elfinder/dokumendid/i_ja_ii_astme_kohtute_2018._a_statistilised_koondandmed.pdf.

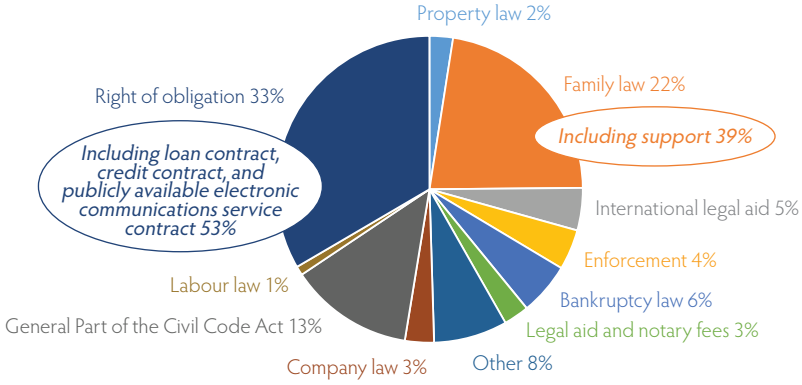


Figure 5. Civil matters resolved in county courts in 2018

The average length of proceedings of civil matters adjudicated in courts in 2018 was 99 days—including 117 days in Harju County Court, 81 days in Pärnu County Court, 74 days in Tartu County Court and 96 days in Viru County Court. In county courts, 15,473 civil matters were adjudicated with an average time of proceedings of 139 days. The cases with the longest duration of proceedings in the action are the civil matters adjudicated in, what is known as, full-length proceedings. The following table shows the time taken to adjudicate the above civil matters and the percentage of long proceedings by the court:

Court	Number of actions resolved in full-length proceedings	Average duration of proceedings in days	The number (and percentage) of cases adjudicated in which the proceedings lasted more than 365 days
Harju County Court	1729	320	553 (31.9%)
Pärnu County Court	349	220	52 (14.9%)
Tartu County Court	583	217	90 (15.4%)
Viru County Court	574	247	112 (19.5%)
County courts total	**3235**	**278**	**807 (24.9%)**

Based on the content of the civil matters adjudicated in the action, the longest proceedings were intellectual property proceedings (467 cases were adjudicated with an average duration of 297 days) and bankruptcy proceedings (164 cases were adjudicated with an average duration of 297, right of succession proceedings (100 cases were adjudicated with an average time of 298 days), and company law proceedings (216 cases were adjudicated with an average duration of 277 days). The quickest cases to be adjudicated were family law cases (3,757 cases were adjudicated on average in 116 days) and the law of obligations cases (9,738 cases were settled on an average of 127 days).

A total of 12,617 civil matters were adjudicated in county court proceedings on petition, including proceedings terminated through the approval of a compromise in 186 cases with an average time of 128 days. The cases for securing action / preliminary legal protection cases were adjudicated within an average of four days. At the same time, the speed of county courts in adjudicating these cases differ greatly. For example, in the Harju County Court, the above-mentioned cases were adjudicated within three days, on average. In Pärnu and Viru County Courts they took an average of six days. The court's letters of request were settled within an average of 14 days, and cases of pre-trial taking of evidence were settled within 49 days, on average.

In 2018, a total of 1,306 international legal aid cases (service of documents, collection of evidence, requests for enforcement orders, state legal aid in cross-border cases, European payment orders) were adjudicated in county courts.

In 2018, a total of 12,400 supervision proceedings were conducted in county courts, of which 49.4% were supervision proceedings regarding the activities of a guardian of an adult with restricted active legal capacity, 18.8% were supervision proceedings over the activities of a minor's guardian, 14.1% were bankruptcy proceedings, and 12.7% were debt release proceedings of natural persons. The following table shows the breakdown of supervision proceedings by type of court:

YEAR 2018 SUPERVISION PROCEEDINGS IN COUNTY COURTS	
Type by content	**Number**
Harju County Court	4675
Pärnu County Court	2265
Tartu County Court	3054
Viru County Court	2406
Total number of supervision proceedings	**12 400**
Debt release proceedings of a natural person	*1571*
Supervision of the activities of a minor's guardian	*2337*
Supervision of a liquidator's activities	*385*
Supervision of the activities of a guardian of an adult with restricted active legal capacity	*6121*
Supervision of the activities of a guardian of the assets of an absent person	*7*
Supervision of bankruptcy proceedings	*1750*
Supervision of the application of estate management measures	*131*
Supervision of reorganisation proceedings	*26*
Supervision of debt restructuring proceedings	*72*

Adjudication of cases in county courts: criminal and misdemeanour matters

In the county courts, a total of 15,092 criminal matters were adjudicated, which were divided into the following types of proceedings: 38.1% of the cases adjudicated were criminal matters (22.2% of criminal matters were submitted for expedited procedure), 27.4% were cases of a judge in charge of execution of court judgments, 28.4% were cases of a preliminary investigation judge, 4.7% were cases of international cooperation and 1.4% were other criminal proceedings (Figure 6).

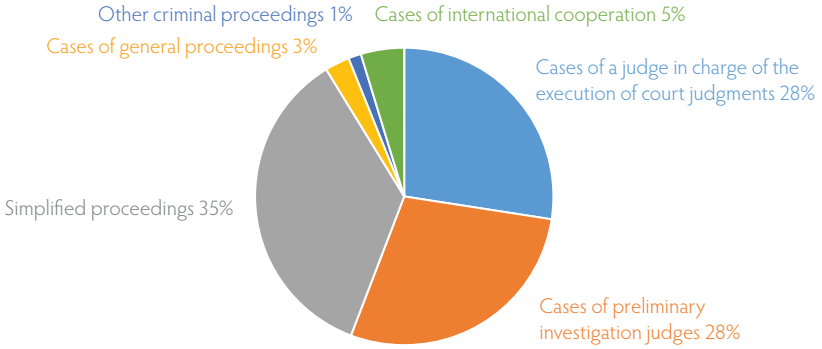


Figure 6. Criminal proceedings resolved in county courts, 2018.

A total of 5,749 criminal matters were adjudicated in county courts, of which 2,252 were settled in Harju County Court, 909 in Pärnu County Court, 1,373 in Tartu County Court and 1,215 in Viru County Court. More than two-thirds (4,051 criminal matters) of criminal matters were adjudicated in settlement proceedings (including 681 in expedited proceedings), 1,188 in alternative proceedings (including 546 in expedited proceedings), 105 in summary proceedings (including 49 in fast expedited) and 405 in general proceedings. On average, 216 days were spent in county courts to resolve cases of general proceedings, including 14.8% of cases lasting over 365 days. The average length of 5,084 criminal matters resolved in simplified proceedings was 29 days. The table below shows the number of cases that have been adjudicated in general proceedings and the length of proceedings taken for the resolving thereof.

Court	The number and average duration of proceedings (in days) of cases in general proceedings					
	With 1 accused person		With 2-5 accused persons		With more than 5 accused persons	
	Number of cases	Average duration of proceedings	Number of cases	Average duration of proceedings	Number of cases	Average duration of proceedings
Harju County Court	88	180	25	320	2	451
Pärnu County Court	72	174	13	201	–	–
Tartu County Court	101	166	19	265	2	952
Viru County Court	59	272	22	308	2	531
County courts total	**320**	**191**	**79**	**284**	**6**	**644**

A total of 4,283 cases of a preliminary investigation judge were adjudicated, of which 35.3% were search cases (1,513 search requests), 23.8% arrest cases (1,021 requests) and 14.5% cases for an extension of the time limit (620 requests).

In 2018, a total of 711 international cooperation cases (most of them, i.e., 64.5% are applications for foreign legal aid and 24.3% for declaring execution of a judgment of a foreign country permissible) were adjudicated. In 79 cases, the issues of extradition of property or persons were decided. The average time taken for the proceedings of international cooperation cases last year was 22 days.

A total of 6,771 misdemeanour matters were adjudicated in county courts, of which 3,159 were adjudicated in Harju County Court, 895 in Pärnu County Court, 1,243 in Tartu County Court and 1,474 in Viru County Court. The average time taken to adjudicate misdemeanour matters was 48 days and the average time to adjudicate misdemeanour complaints was 66 days. A total of 2,900 misdemeanour matters and misdemeanour complaints were adjudicated in county courts, which were essentially divided as follows: 68.5% were traffic misdemeanours, 10.1% were misdemeanours against public health, 4.9% were misdemeanours against property, 3.0% were misdemeanours against public peace and 13.5% were other misdemeanours.

Adjudication of cases in administrative courts

A total of 2,477 administrative matters were adjudicated in administrative courts in 2018, of which 1,284 were adjudicated in the Tallinn Administrative Court and 1,193 in the Tartu Administrative Court. In essence, most of the cases resolved were law enforcement cases (34.2% of the cases resolved), 14.2% of the cases were

tax law cases, 10.6% of population cases, 6.6% of planning and construction cases, 4.4% of public commercial law cases and 14.0% was made up of other resolved administrative matters (Figure 7).

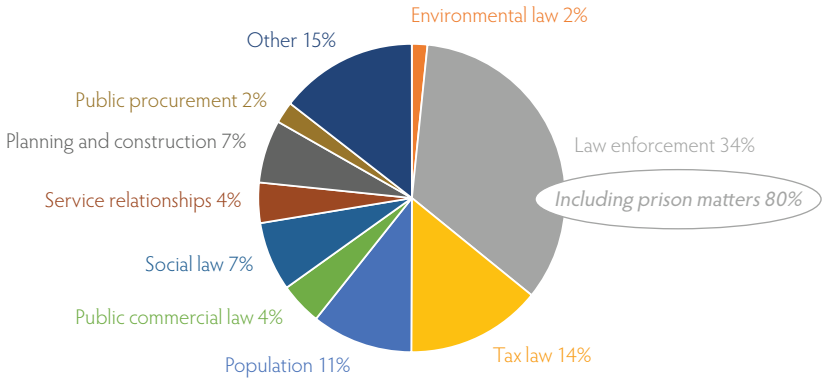


Figure 7. Cases resolved in administrative courts, 2018

The highest number of complaints resolved was made by imprisoned persons, with a total of 681 (ca. 36% less than in 2017), of which 107 were resolved in the Tallinn Administrative Court and 574 in the Tartu Administrative Court. A total of 613 complaints of imprisoned persons were rejected, were returned to the applicant without processing or the court proceedings were terminated, and 18 complaints were partially or fully satisfied.

The average length of administrative proceedings in 2018 was 123 days in Tallinn Administrative Court and 102 days in Tartu Administrative Court. The average length of proceedings in administrative matters resolved was as follows:

Court	The number of essentially solved administrative matters	Average duration of the proceeding (in days)	The number (and percentage) of resolved cases in which the proceedings lasted over 365 days
Tallinn Administrative Court	472	226	67 (14.2%)
Tartu Administrative Court	315	231	63 (20.0%)
Administrative courts total	**787**	**228**	**130 (16.5%)**

When it comes to the content of administrative matters, the longest proceedings were in cases of environmental law (average time of proceedings 351 days), ownership reform cases (301 days), planning and construction cases (273 days) and service relationship cases (262 days). The shortest proceedings were in public procurement cases (average duration of proceedings 47 days).

Adjudication of cases in circuit courts: civil matters

In 2018, a total of 2,820 civil matters were adjudicated in circuit courts (1,941 in Tallinn Circuit Court and 879 in Tartu Circuit Court), including 1,267 civil matters in appeal proceedings and 1,550 civil matters in appeals against the court ruling.

More than one-third of the cases substantively resolved by the circuit courts were cases of the law of obligations (33.8% of the resolved cases), cases of family law were 14.9%, enforcement law cases 9.0% and property law cases equalled 8.2% of the resolved cases. The remainder of civil matters (cases of bankruptcy, company and labour law and the cases related to the General Part of the Civil Code Act and international law cases) accounted for a third of the civil matters resolved (Figure 8).

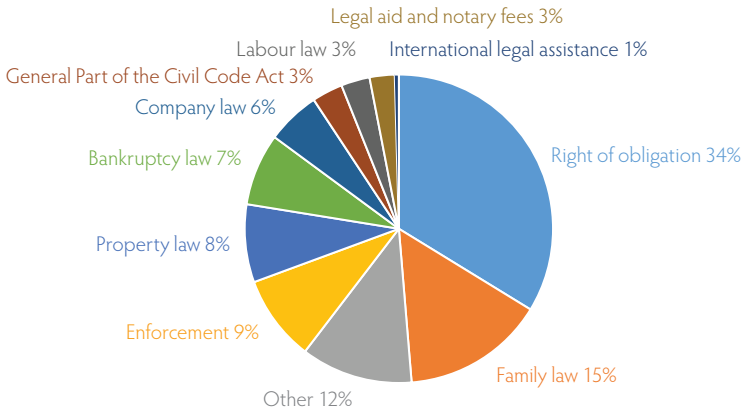


Figure 8. Civil matters resolved in county courts, 2018

In circuit courts, civil matters in appeal proceedings were adjudicated on for average in 155 days (163 days in Tallinn Circuit Court and 138 days in Tartu Circuit Court) and, on average, in 41 days in appeals against court rulings (52 days in Tallinn Circuit Court and 18 days in Tartu Circuit Court). A total of 30 appeal proceedings were conducted by the Circuit Court with a duration of more than 365 days (22 appeal procedures in the Tallinn Circuit Court and 8 in Tartu Circuit Court).

Adjudication of cases in county courts: criminal and misdemeanour matters

In 2018, a total of 1,935 criminal proceedings were adjudicated in circuit courts (1,025 in Tallinn Circuit Court and 910 in Tartu Circuit Court), including 468 criminal matters in appeal proceedings, 1,303 cases in appeals against court rulings and 165 cases initiated by circuit courts.

Approximately one-third of the cases resolved in circuit courts were cases of a judge in charge of the execution of court judgments (30.8% of the resolved cases), and about a third were criminal matters (30.7%). Also, the preliminary investigation judge cases (25.4%) and complaints against the activities of the Prosecutor General (7.5%) accounted for one third (Figure 9).

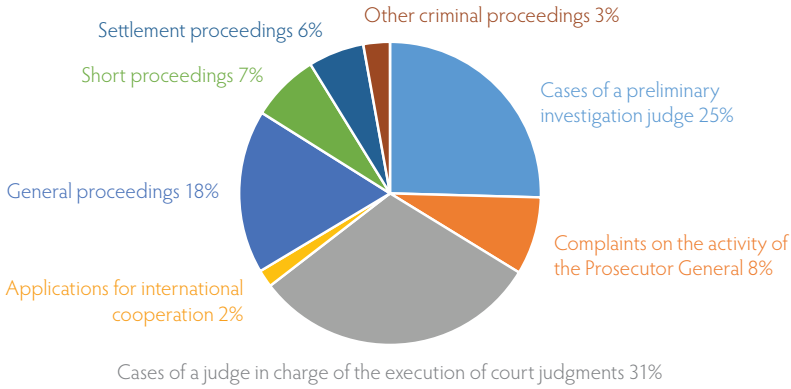


Figure 9. Criminal proceedings resolved in circuit courts, 2018

Criminal matters in appeal proceedings were adjudicated, on average, within 44 days (368 days in Tallinn Circuit Court and 55 days in Tartu Circuit Court). The rest of the cases in appeals against court rulings were adjudicated on average within 16 days (18 days in Tallinn Circuit Court and 15 days in Tartu Circuit Court). In appeal proceedings, a total of 226 general procedural cases were adjudicated in circuit courts within an average of 68 days (including 131 cases in the Tallinn Circuit Court, on average within 59 days, and in Tartu Circuit Court 95 on average within 81 days). In the Tartu Circuit Court, an appeal proceeding in a criminal case in a general proceeding lasted 579 days.

A total of 138 misdemeanour proceedings were resolved, of which 69 were brought before both circuit courts.

Adjudication of cases in circuit courts: administrative matters

In 2018, a total of 1,447 administrative matters were adjudicated in circuit courts (759 in Tallinn Circuit Court and 688 in Tartu Circuit Court), including 618 administrative matters in appeal proceedings and 829 administrative matters in appeals against court rulings.

In essence, mostly law enforcement cases were adjudicated in circuit courts (36.4% of the adjudicated cases), of which most of the cases were prison cases (a total of 468 complaints of prisons were settled). Tax law cases (15.6% of adjudicated cases) and population cases (10.6%) also accounted for a larger share. In total, planning, and construction, environmental law, public procurement, public commercial law and population cases accounted for a total of 26.7% of all adjudicated cases, and other administrative matters accounted for 10.7% (Figure 10).

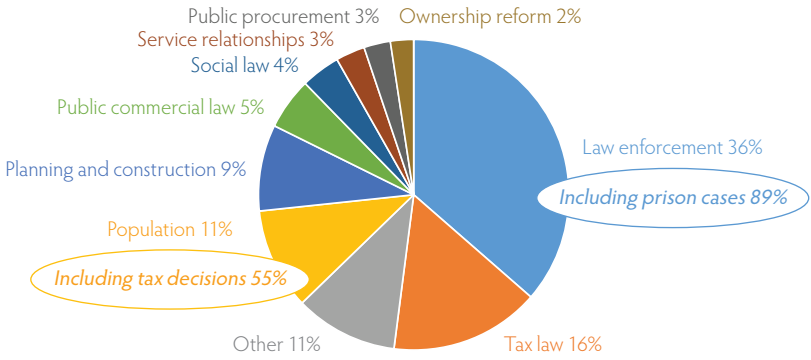


Figure 10. Administrative matters resolved in circuit courts in 2018

In circuit courts, administrative matters were adjudicated in appeal proceedings on average within 233 days (222 days in Tallinn Circuit Court and 252 days in Tartu Circuit Court) and on average within 33 days in appeals against court rulings (35 in Tallinn Circuit Court and 31 days in Tartu Circuit Court). 15.0% of the total number of cases adjudicated in the appeal proceedings lasted more than 365 days, including 14.7% in Tallinn Circuit Court and 13.4% in Tartu Circuit Court. Among the long appeal proceedings, Tallinn Circuit Court and Tartu Circuit Court had the highest number of tax law cases (14 appeal proceedings and 23 appeal proceedings, respectively).

The workload of the office of a judge on the basis of cases that arrived in 2018

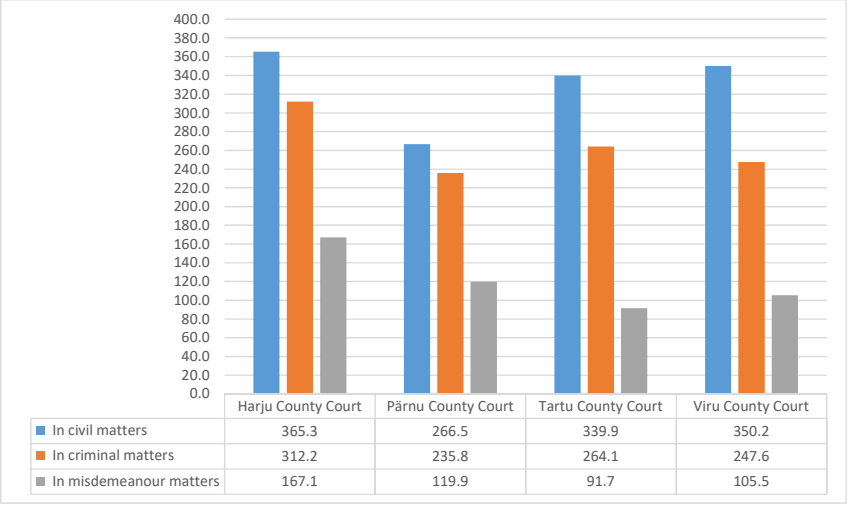
In 2018, civil matters were distributed in county courts between a total of 85.5[3] judges, including 39.6 in Harju County Court, 13.0 in Pärnu County Court, 19.9 in Tartu County Court and 13.0 in Viru County Court. Criminal and misdemeanour matters were distributed in county courts between a total of 56 judges, including 20.1 in Harju County Court, 8.0 in Pärnu County Court, 14.0 in Tartu County

3 The calculation is based on the specialisation of judges and on vacant posts and long-term absences (over 3 months).

Court and 13.9 in Viru County Court. There is a total of 150 judge offices in county courts, but given the vacant posts of judges and the resulting suspension of distribution of cases and long-term absences, the proportion of vacant posts in county courts was 5.7% (including 9.5% in Harju County Court, 3.1% in Tartu County Court and 3.9% in Viru County Court. In Pärnu County Court, all positions were filled.

In 2018, an average of 365.3 cases were handed over to each judge that had resolved civil matters in Harju County Court, 266.5 matters in Pärnu County Court, 339.9 matters in Tartu County Court and 350.2 matters in Viru County Court. On average, 312.2 criminal matters and 167.1 misdemeanour matters were brought to the table of each judge dealing with offenses, 235.8 and 119.9 respectively in Pärnu County Court, 264.1 and 91.7 respectively in Tartu County Court and 247.6 and 105.5 matters respectively in Viru County Court.

Figure 11 shows the judge's annual workload in comparison with county courts.



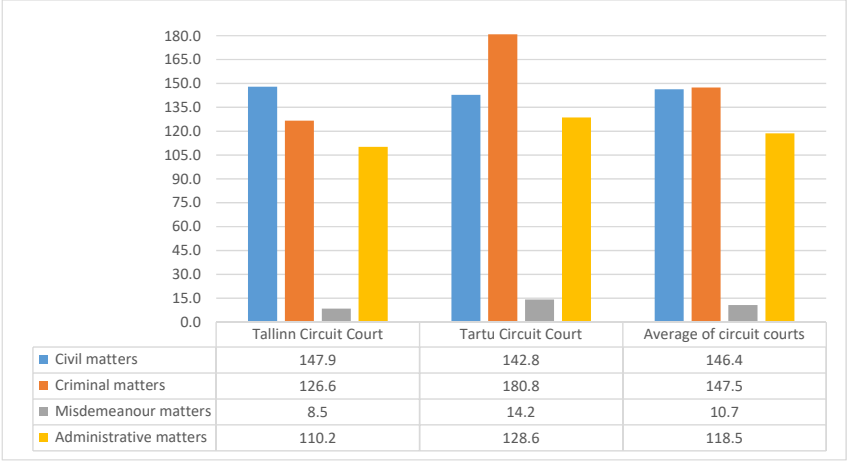
	Harju County Court	Pärnu County Court	Tartu County Court	Viru County Court
In civil matters	365.3	266.5	339.9	350.2
In criminal matters	312.2	235.8	264.1	247.6
In misdemeanour matters	167.1	119.9	91.7	105.5

Figure 11. The statistical workload of the county court judge based on the cases arrived in 2018

In 2018, administrative matters were distributed between a total of 23.6 judges, including 14.7 judges at Tallinn Administrative Court and 8.9 judges at Tartu Administrative Court. Last year, an average of 88.8 administrative matters at Tallinn Administrative Court and 131.8 administrative matters at Tartu Administrative Court were brought to the tables of each administrative judge.

	The number of administrative matters arrived	The number of statistical posts	The percentage of vacancies	The workload of a statistical post
Tallinn Administrative Court	1305	14.7	13.5%	88.8
Tartu Administrative Court	1173	8.9	11.0%	131.8
Average of administrative courts	**2478**	**23.6**	**12.6%**	**105.0**

In the appeal proceedings and appeals against the court rulings, an average of 147.9 civil matters were brought to the table of each judge of the Civil Chamber in 2018 in Tallinn and 142.8 in Tartu. On average, 126.6 criminal proceedings and 8.5 misdemeanour matters arrived on the table of each judge of the Criminal Chamber in Tallinn Circuit Court, and an average of 180.8 criminal and 14.2 misdemeanour matters arrived on the table of each judge of the Tartu Circuit Court. Judges of the Administrative Chamber of Tallinn Circuit Court had to adjudicate a total of 110.2 appeals and appeals against court rulings, and the judge of the Administrative Chamber of Tartu Circuit Court had to resolve a total of 128.6 appeals and appeals against court rulings.



	Tallinn Circuit Court	Tartu Circuit Court	Average of circuit courts
Civil matters	147.9	142.8	146.4
Criminal matters	126.6	180.8	147.5
Misdemeanour matters	8.5	14.2	10.7
Administrative matters	110.2	128.6	118.5

Figure 12. The statistical workload of a circuit court judge based on the cases that arrived in 2018

Taking into account the vacant posts and the consequent suspension of distribution of cases and long-term absences, civil matters were assigned in circuit courts to a total of 20.1 judges, including 14.1 in the Tallinn Civil Chamber and 6.0 in the Tartu Civil Chamber. Misdemeanour matters were distributed between a total of

13 judges of the Criminal Chamber, including eight judges in the Tallinn Criminal Chamber and five judges in the Tartu Criminal Chamber. Administrative matters were distributed to 11 judges, including six judges in the Tallinn Administrative Chamber and five judges in the Tartu Administrative Chamber.

REVIEW OF SUPREME COURT CASES, 2018

— Signe Rätsep, Chief Specialist of the Legal Information and Judicial Training Department of the Supreme Court
— Kristi Aule Parmas, Chief Specialist of the Legal Information and Judicial Training Department of the Supreme Court

Statistical information characterising the work of the Supreme Court is collected on the basis of procedural requests submitted to the Supreme Court and reviewed cases. The information of the reviewed cases and requests for proceedings are collected in three types of court proceedings: civil, administrative and offence proceedings. In constitutional review proceedings, information is collected only on the cases reviewed. In the case of requests for proceedings, appeals in cassation, appeals against court rulings and applications for review, state legal aid applications and applications for legal aid are considered. Records of reviewed cases are kept by court cases.[1]

Review of requests for proceedings in the Supreme Court Chambers

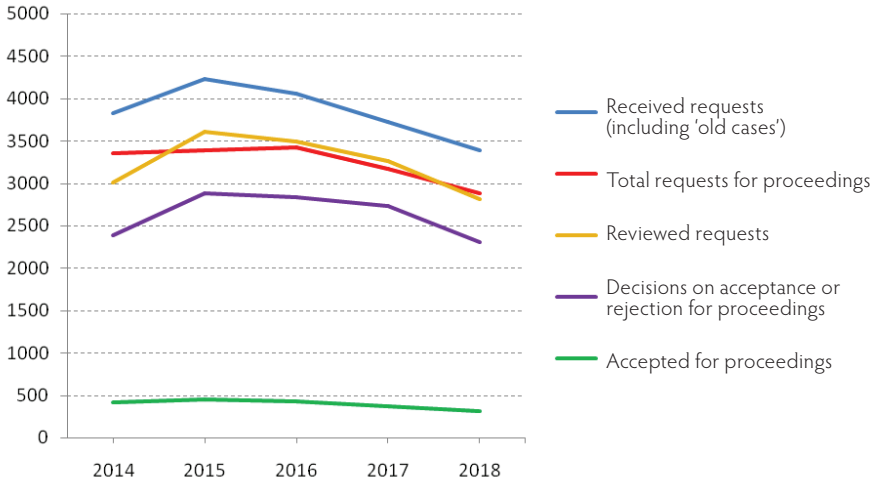


Figure 1. Review of requests for proceedings in the Supreme Court between 2014–2018

1 More detailed information on requests for proceedings and on review of court cases in the Supreme Court since 1993 is available on the website of the Supreme Court at https://www.riigikohus.ee/et/riigikohus/riigikohtu-tegevust-iseloomustav-statistika. As the development of the statistical environment of the Supreme Court is underway at the time of writing this article, the statistics presented in the article may differ somewhat from the statistics on the website of the Supreme Court.

According to the law, the Supreme Court has the right to decide whether or not to process the submitted request for proceedings in order to ensure the legality of lower court decisions, the harmonisation of judicial practice and to further develop procedural law.

In 2018, 14% of the requests (315 out of 2,308) of all requests to be processed or rejected were processed. In comparison: In 2017, 13% of the requests (367 out of 2,728), in 2016, 15% of the requests (432 out of 2,839) and in 2015, 16% of the requests (457 out of 2,877) were processed. The year before, this indicator was 2% higher, i.e. 18% (422 requests out of 2,391 were processed). The ratio of requests processed to requests resolved has decreased between 2014–2018.

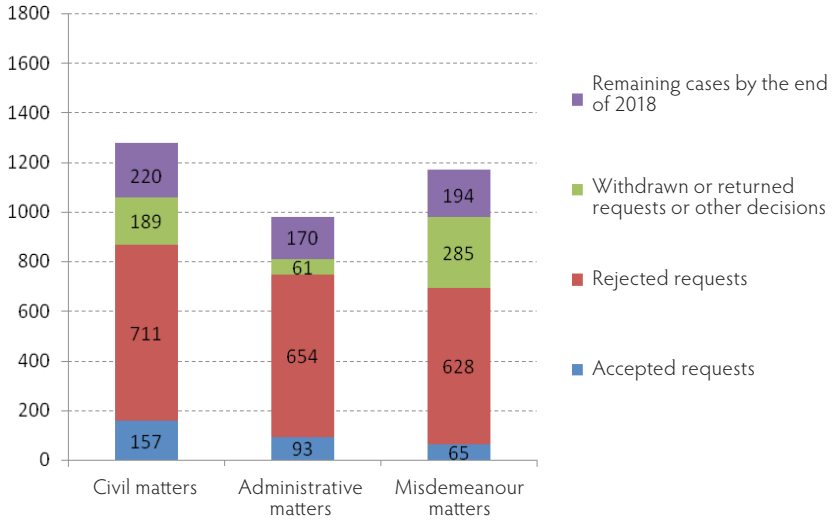


Figure 2. Review of requests for proceedings by types of proceedings, 2018

The work of the Civil, Administrative Law and Criminal Chamber of the Supreme Court was characterised by a high number of pending cases in 2018, as in previous years (see Figure 2).

There were a total of 1,246 requests for proceedings in process in the Civil Chamber (1,355 in 2017, respectively), of which 1,054 were filed in 2018. The Chamber reviewed 1,028 requests (1,162 in 2017). The acceptance or rejection to process was decided for 868 requests (993 in 2017, respectively), of which 157 were accepted for processing (196 in 2017).

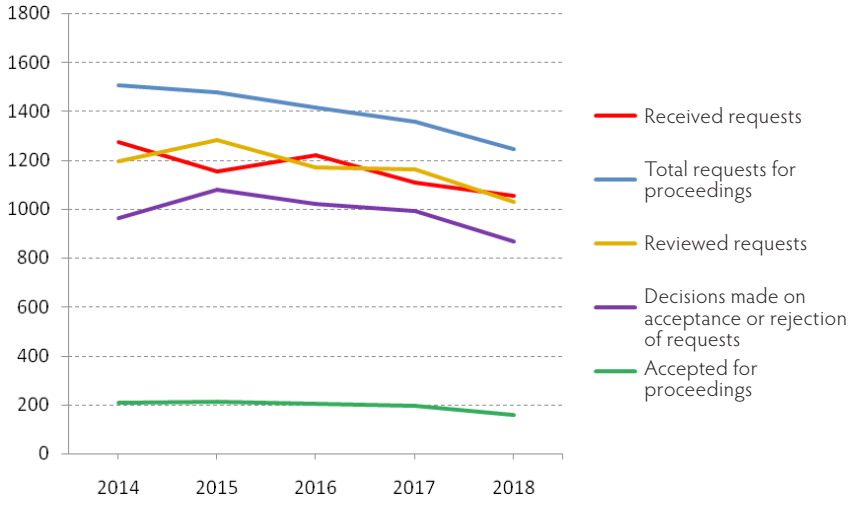


Figure 3. Review of requests for proceedings in the Civil Chamber of the Supreme Court

There were a total of 974 requests for proceedings in process in the Administrative Law Chamber (1,120 in 2017, respectively), of which 829 were filed in 2018. The Administrative Law Chamber reviewed 804 requests (984 in 2017). The acceptance or rejection to process was decided for 747 requests (921 in 2017, respectively), of which 93 were accepted for processing (80 in 2017).

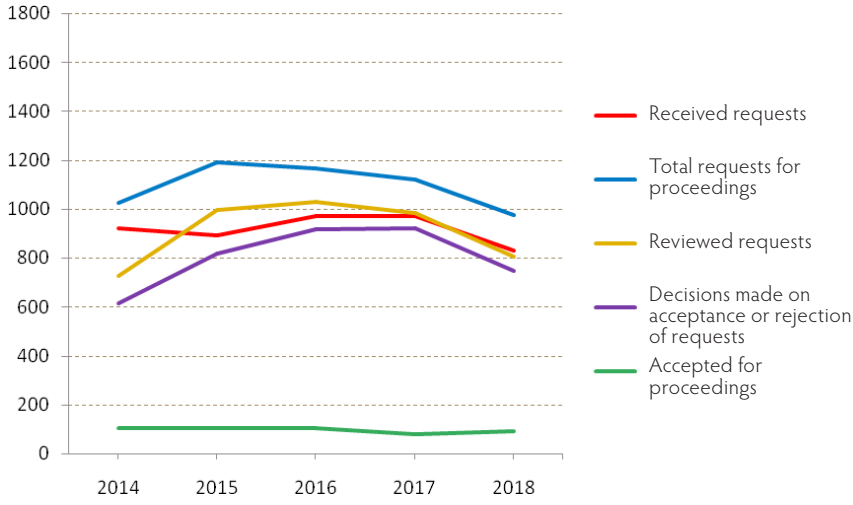


Figure 4. Review of requests for proceedings in the Administrative Law Chamber of the Supreme Court

There were a total of 1,170 requests for proceedings in process in the Criminal Chamber (1,243 in 2017, respectively), of which 994 were filed in 2018. The Chamber reviewed 976 requests (1,114 in 2017). The acceptance or rejection to process was decided for 693 requests (814 in 2017, respectively), of which 65 were accepted for processing (91 in 2017).

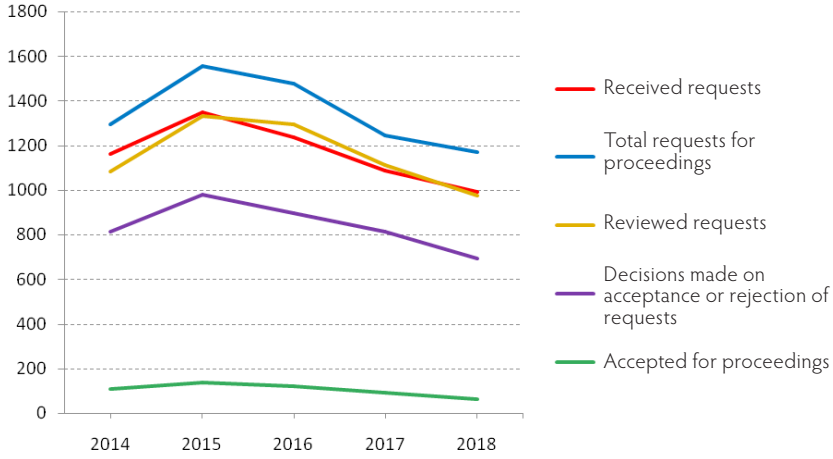


Figure 5. Review of requests for proceedings in the Criminal Chamber of the Supreme Court

Results of reviews of cases in Supreme Court Chambers

Constitutional review proceedings

In the constitutional review procedure, eight cases were reviewed by the Supreme Court in 2018. Table 1 below shows the results of these constitutional review cases in more detail. In the cases reviewed by the Constitutional Review Chamber and the Supreme Court en banc, the appeal was satisfied in three cases, when the disputed provision of the legal act was declared unconstitutional. Three appeals were not satisfied, and one petition was rejected without review. In one case, the proceeding was terminated due to the withdrawal of the petition.

		Total	% of cases reviewed	Legislative acts	Regulation of Government of the Republic	Local Government Act	Refusal to issue a legislative act	Decision or act of the National Electoral Committee	Ministerial order
Constitutional review proceedings reviewed in 2018		8	100%	4		1	1	1	1
Applicant	Chancellor of Justice	1	13%			1			
	Court	6	75%	4			1		1
	Local government council	0	0%						
	Other person	1	13%					1	
Result	Satisfaction of the request or recognition of the unconstitutionality of the provision	3	38%	2					1
	Rejection of the request; denial of unconstitutionality of the provision	3	38%	2		1			
	Rejection of the request without review	1	13%				1		
	Termination of proceedings	1	13%					1	

Table 1. Results of Constitutional Review Cases in 2018

Review of cases in the Criminal, Administrative Law and Civil Chambers

A total of 59 offence cases were adjudicated in the Criminal Chamber, 49 of them were criminal and 10 were misdemeanour matters. A total of 154 cases were adjudicated by the Civil Chamber. The Administrative Law Chamber reviewed 80 administrative matters.

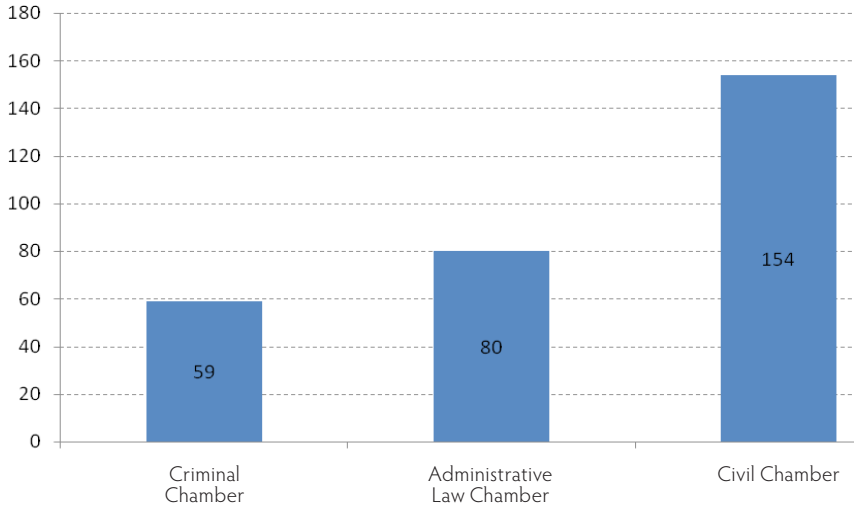


Figure 6. Review of cases brought to the Criminal, Administrative Law and Civil Court, 2018