



***EAJ Working Group on the Situation of Member Associations***  
**Meeting of the EAJ in Athens, June 1<sup>st</sup> to June 3<sup>rd</sup> 2023**

**Progress Report September 2022 to June 2023**

**1. Introduction**

The last report of the WG covered the period from May to September 2022. This report covers the period from September 2022 to June 2023. During the period under review, the WG dealt with

- European Commission Rule of Law Report 2023
- Judges' Convention
- ENCJ Lunch seminar (21<sup>st</sup> February 2023) on the situation in Poland

**2. RESPONSE to the CONSULTATION QUESTIONNAIRE by the EU COMMISSION for the preparation of the REPORT on the RULE OF LAW 2023**

The working party has drafted the response (of the EAJ) to the consultation questionnaire of the EU-Commission (as it did in the last three years). In the overview of the situation in EU jurisdictions, the report concludes that, in general, after the pandemic had had a major impact on the functioning of the judiciary. during the previous two years, the immediate effects largely faded away during the year 2022. The reports notes that most member states “resumed applying fully any procedural provisions which had been changed or suspended during the time of the pandemic. Member states which had adopted a regime of emergency laws revoked those extraordinary measures and returned to their normal rules and procedures.”

However, there were exceptions to this: “Hungary replaced the covid emergency provisions, which provided the government with extreme powers, by introducing another state of emergency under the pretext of the war in Ukraine.”

Nonetheless, the following is positive:

- “During the covid pandemic judicial review in the Constitutional Courts proved effective in many member states, where laws and regulations and executive orders, which had been adopted in view of the pandemic were either upheld or quashed (Germany, Luxembourg, Slovenia).”
- In almost all member states the use of IT in court proceedings increased and most of the new rules or practices have remained in place even after the restrictions were lifted. Many member states took large steps forward in digitalisation, but often the hasty transformation was incomplete, with deficiencies or gaps in the systems.
- Thanks to the jurisprudence of both European Courts, the common European values as laid down in the basic principles of Article 2 TEU and Article 6 ECHR are becoming ever clearer. This helps to safeguard a common understanding which preserves the possibilities of a common space of freedom and security based on mutual trust.”

Weighing up all the advantages and disadvantages, the report comes to a rather sobering conclusion:

“Overall, however, developments in Europe remain disappointing. This shows that the adoption of the Conditionality Regulation<sup>1</sup> was necessary, and its consequent application is needed. A central element of the monitoring conducted under the Regulation must be that judgments of the Court of Justice and of the European Court of Human Rights are fully implemented by the states concerned. Unfortunately, there are still large deficits in some countries such as Poland and Hungary.

However, events during the last year also show that permanent vigilance is necessary in all member states. There are member states other than Hungary and Poland to which attention should be directed.”

For further information and specific cases in individual jurisdictions see **appendix I**.

### **3. Judges’ Convention**

The last report of the WG stated: At the Porto meeting Peter Schneiderhahn – a member of the WG- recalled the project for a Judges’ Convention by the Council of Europe, highlighting that a Lawyers Convention was going to be approved. He noted that a possible mistake by the EAJ – WG might have been the idea that it could draft alone the text of the Convention and then simply ask the Council to adopt it. The right way would be to popularize the idea at the political level and then offer participation in the political bodies. Peter Schneiderhahn – in agreement with the WG – put himself at the disposal to explore the possibilities of such an initiative. The EAJ- WG *On the Situation of Member Associations* was mandated, together with Peter Schneiderhahn, to explore the best ways to restart the project for a **CoE Convention on the status of judges**.

In a first meeting during the IAJ- meeting in Tel Aviv and in a second meeting in Basel/Switzerland (December 2022) the WG came to the conclusion that political support was needed. Therefore, e.g. parliamentarians should be approached (i.e. members of the Parliamentary Council of Europe [PACE]) who are or might be in favor of a Judges’ Convention. Moreover, the WG approved a paper of Mr. Schneiderhahn which – in the end - could be used as a kind of “manual” in order to explain parliamentarians etc. the request for a convention (see **Appendix II**). The process will go on.

### **4. ENCJ Lunch seminar (21<sup>st</sup> February 2023) on the situation in Poland**

Geri Reissner, member of the WG, and the president of the WG took part in a Webex seminar organized by the ENCJ (European Network of Councils for the Judiciary, [ENCJ | ENCJ - European Networks of Councils for the Judiciary](#) ). The WG Members represented the EAJ in this seminar.

Binningen/Basel, Switzerland, 02/05. 2023

**Stephan Gass**

*Chair EAJ-WG On the Situation of Member Associations*

---

<sup>1</sup> Regulation 2020/2092

## Appendix I: EU-Rule of Law Report 2023, Response of the EAJ



1.EU\_Ruleoflaw-Report23Finalcons[234

## Appendix II: Working Paper “PROPOSAL addressed to THE COUNCIL OF EUROPE for a LEGAL INSTRUMENT on JUDICIAL INDEPENDENCE”

Membership of the Council of Europe is based upon the Rule of Law (Art 3 Statute of the Council of Europe) and requires observance of the guarantee of a fair trial for all citizens (Art 6 ECHR).

To ensure both of these, and to enable the judge to perform the essential duty of a judge to guarantee the freedom of every citizen under the law, it is indispensable for all judges and all judiciaries in all member states to be independent. This is well understood and has been underlined not only within the Council of Europe by recommendation CM/Rec (2010)12 on judges: independence, efficiency and responsibilities by the Committee of Ministers of the Council of Europe but also by the Magna Carta of Judges, adopted by the CCJE in November 2010 and by other international documents as well.

However, notwithstanding the importance of the principle, there is still no legal instrument existing within the Council of Europe which includes a comprehensive and binding definition of judicial independence.

The case – law from the ECtHR is based on the right to a fair trial under Art 6 ECHR, which includes access and judgement by an independent and impartial tribunal established by law. The answers from ECtHR on Art 6 ECHR on questions raised by the parties about the independence of the body judging their case has provided guidance on what is – and especially is not – an independent and impartial tribunal. Some of the cases have been landmarks in ensuring basic principles of judicial independence. These decisions however reflect on judicial independence only through the right to a party on a fair trial. And, as case law must be, they are focused on the questions put before the court in the particular case. But, important as these rulings – and the rulings of the ECJ on the core principles of the European Union on these matters – are, the process of safeguarding judicial independence by case – law is a slow and burdensome way in which to establish broad basic principles and give guidance to member states and citizens.

It is considered that citizens, judges, law makers and administrators in the member states of the Council of Europe do need more than this slow and sometimes uncertain process. They have the right to know what judicial independence comprises in all its aspects and should be able to find out what is meant by judicial independence and impartiality on the basis of agreed standards without having to go through the process of litigating all the way to the European Courts. Courts in the member states should have the benefit of the authority of an adopted legal text when ruling on cases on judicial independence. And law makers and governments should know without the need for a court ruling whether they are interfering in or impairing the independence of the judiciary.

The mounting number of cases before the ECtHR- and the Court of Justice of the European Union – on the topic illustrate that neither the recommendation from 2010, nor the Plan of Action by the Committee of Ministers on the strengthening judicial independence and impartiality from 2016 nor the guidance from the Venice Commission on numerous aspects of judicial independence have been able to restrain infringements of judicial independence in a growing number of member states.

Therefore, the EAJ believes that the time is ripe for the Council of Europe to start procedures for promulgating a legal instrument to safeguard the independence of judges and the judiciary as one of the most important aspects of the Rule of Law. The EAJ also believes that a convention is the proper legal instrument to do this and therefore asks all members of the Parliamentary Assembly of the Council of Europe to begin the process.