

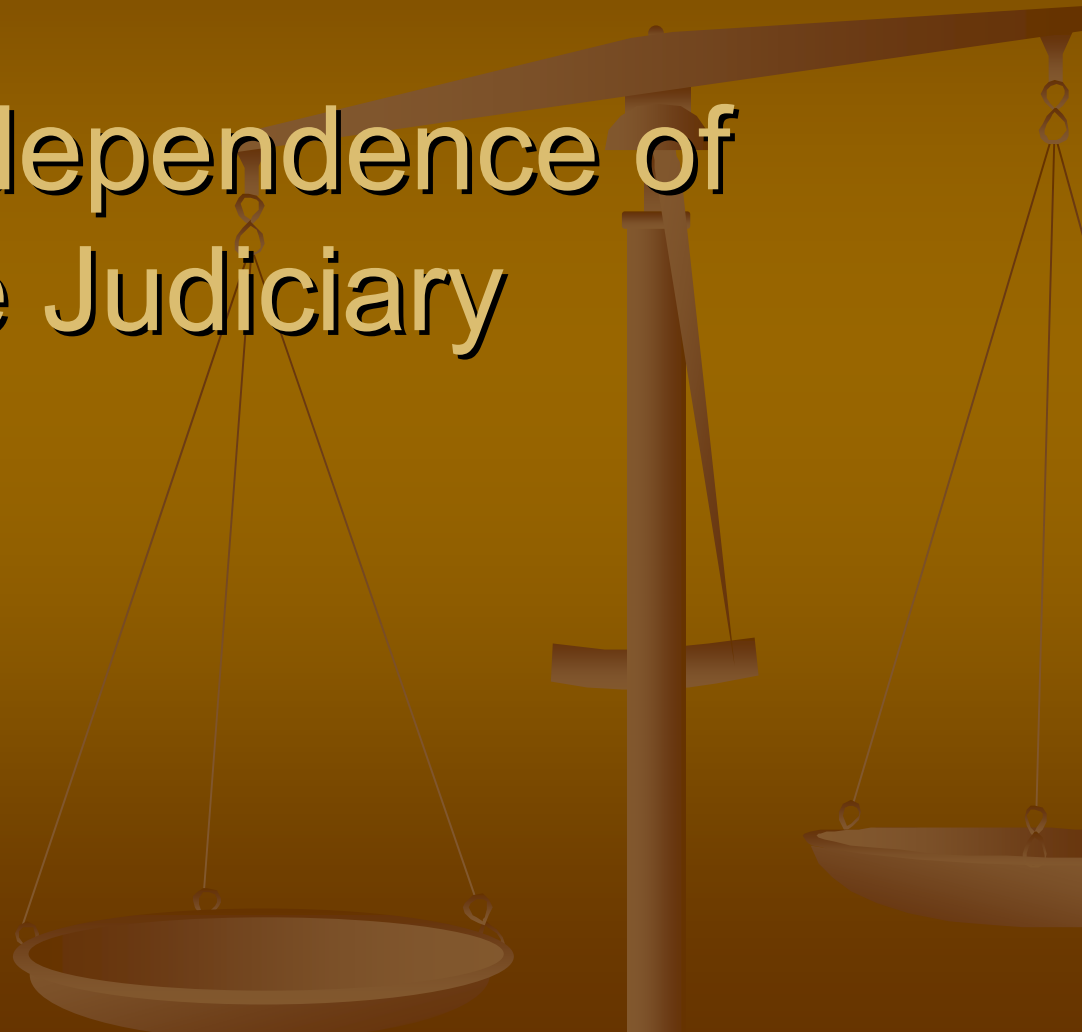
Screening Chapter 23 – Judiciary and
fundamental rights

Croatia & Turkey

7-8 September 2006

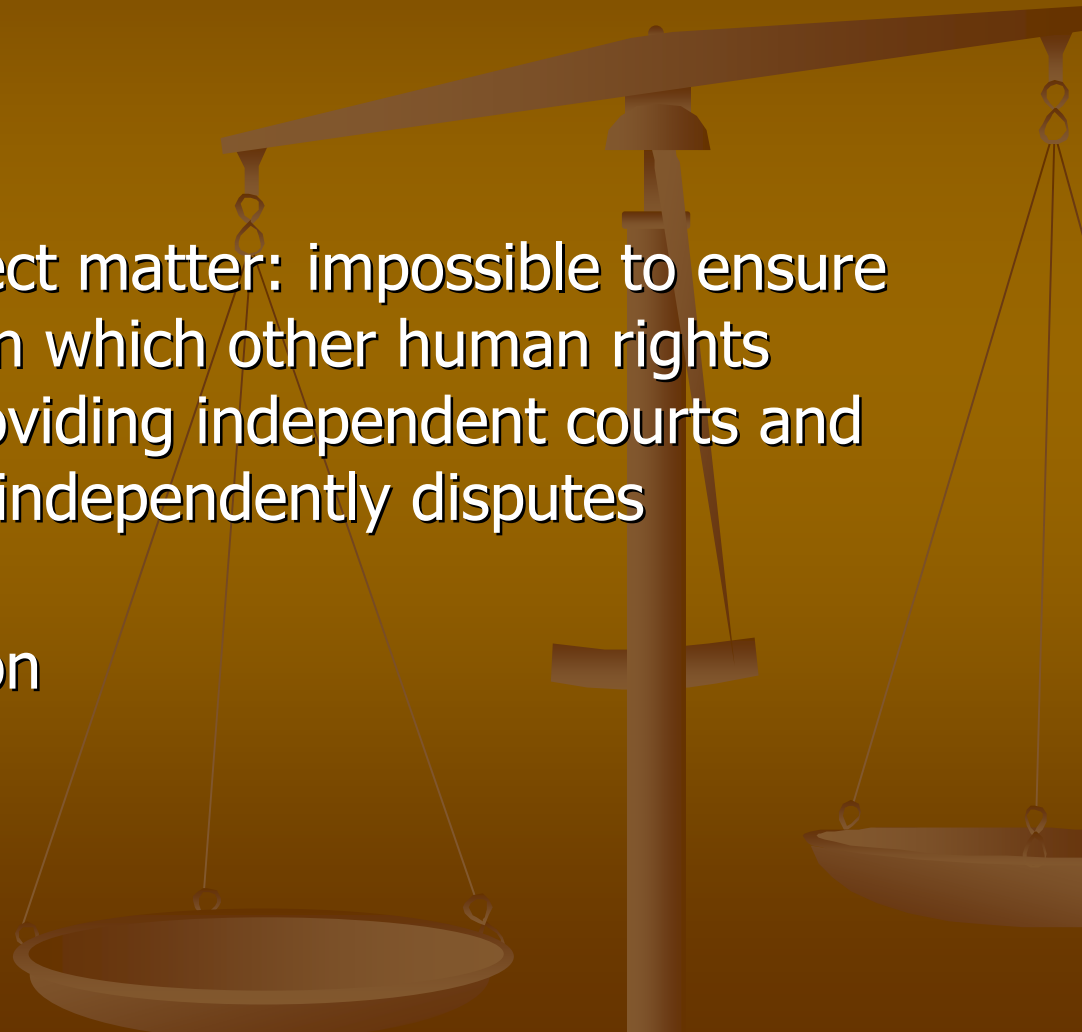
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The Independence of the Judiciary



I. Introduction

- Welcome
- Importance of subject matter: impossible to ensure the rule of law, upon which other human rights depend, without providing independent courts and tribunals to resolve independently disputes
- Order of presentation



II. Legal Basis



■ Article 6 (1) EU

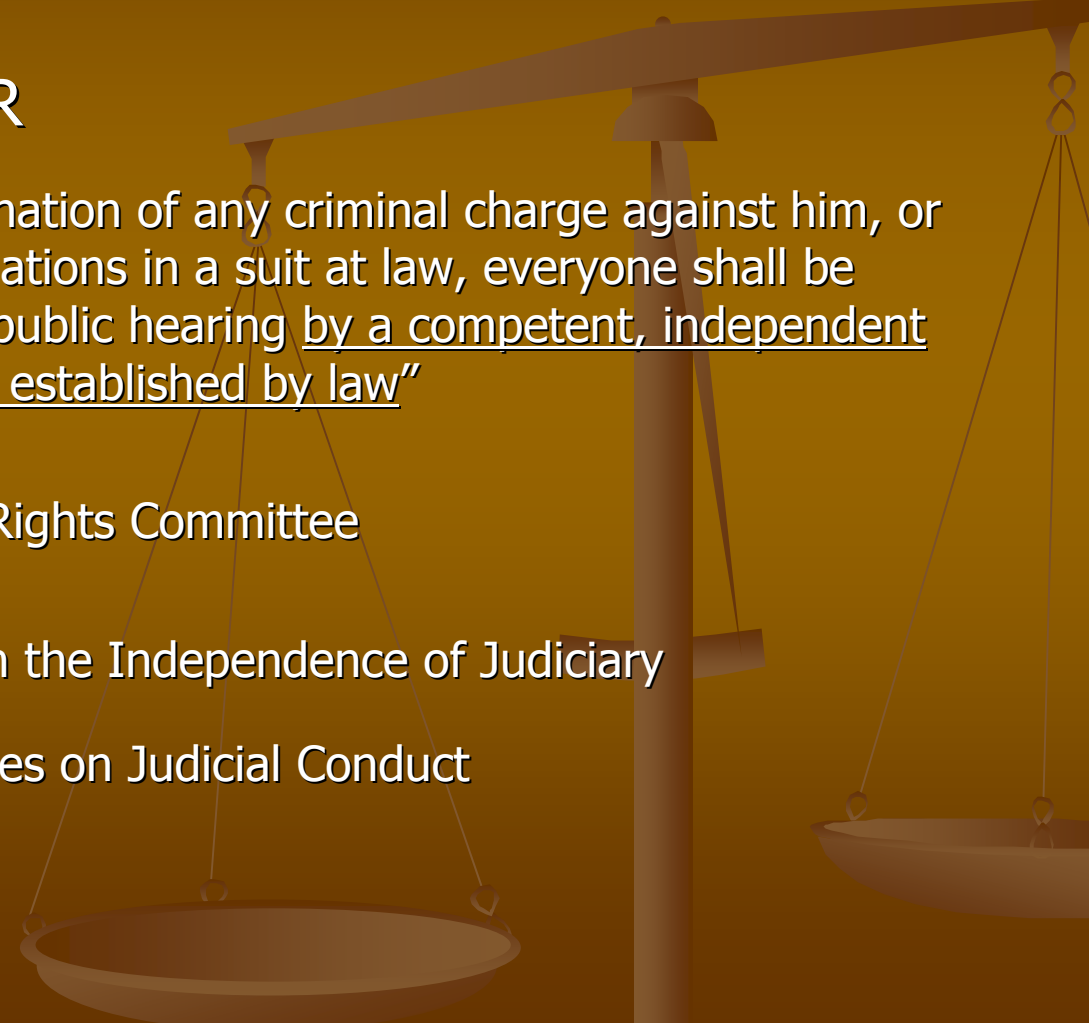
- Rule of law/Etat de droit/Rechtsstaat as opposed to the rule of power
- Separation of powers (legislative/executive/judicial powers)
- Independence of the judiciary

■ Article 6 (1) ECHR

- Text: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". (...)
- Case law by the European Court of Human Rights
- Recommendation No. R (94) 12 of the CoE Committee of Ministers on the Independence, Efficiency and Role of Judges

II. Legal Basis

■ Article 14 (1) ICCPR

- Text: “In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”
 - Views of the Human Rights Committee
 - UN Basic Principles on the Independence of Judiciary
 - UN Bangalore Principles on Judicial Conduct
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III. Content

■ Establishment by law

- Legal basis in constitution and/or parliamentary legislation (details may be laid down by the executive on the basis of parliamentary delegation)
- No ad-hoc tribunals by executive act
- Special criminal tribunals possible under strictly defined circumstances in the law (but note the trend against special tribunals in practice; some EU Member States know of a constitutional prohibition of special tribunals, e.g. Austria, Spain, Portugal, Slovenia, Czech Republic)
- Specialised courts possible (e.g. labour courts, commercial courts, administrative courts, tax courts, land registration courts, etc.)



III. Content

■ Appointment of judges

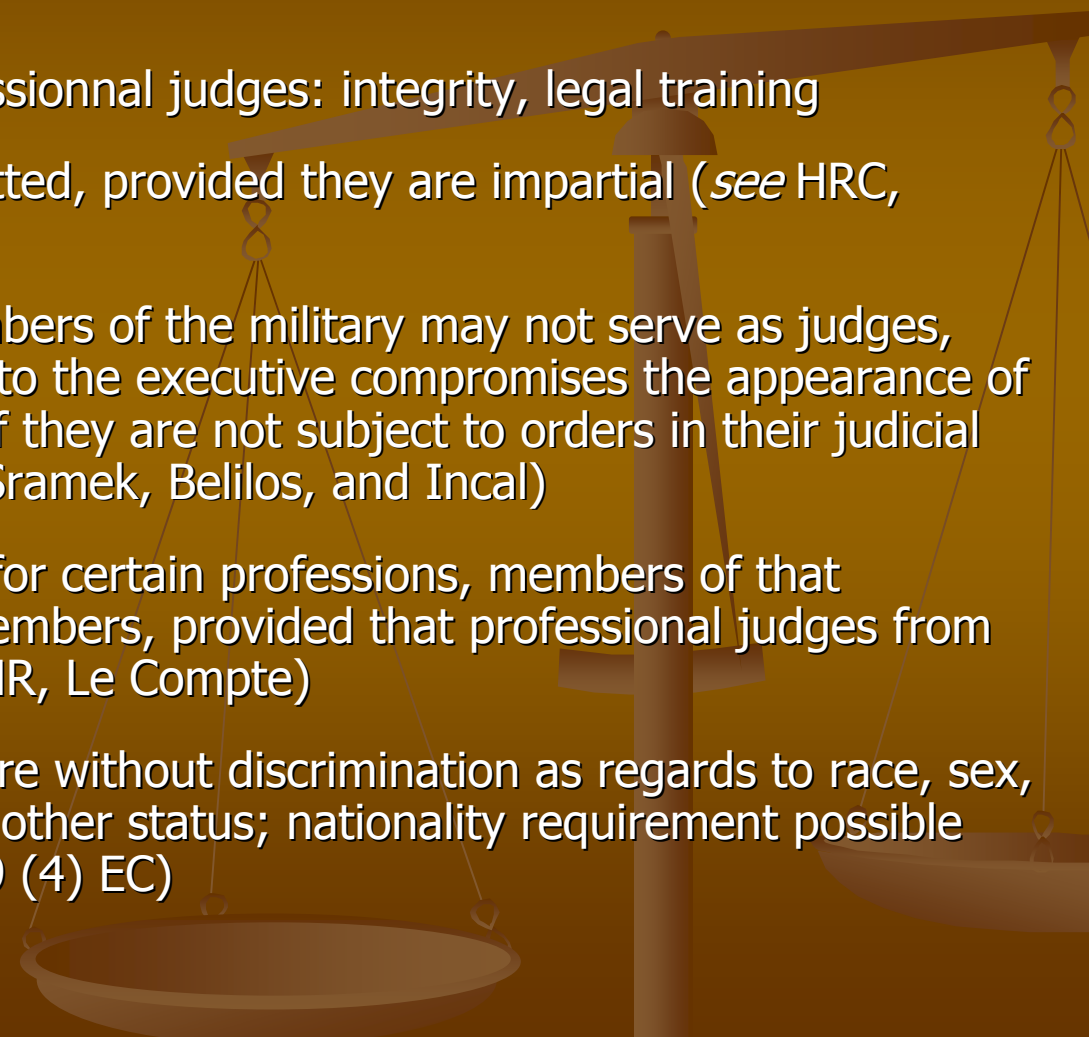
■ Margin of discretion as regards the appointing authority (*see ECtHR, Belilos*):

- (1) judiciary only (e.g. Austria, Latvia, Sweden)
- (2) Both judiciary and non-judiciary (DK, EE, FIN, F, D, HU, IRL, I, LT, NL, PL, P, SI, E)
- (3) Non-judiciary only (only non-EU Member States; important CoE examples: Switzerland)

Judiciary only	Both judiciary and non-judiciary				Non-judiciary only
Austria	Andorra	Finland	Liechtenstein	Portugal	FYROMacedonia
Latvia	Azerbaijan	France	Lithuania	Romania	Georgia
Sweden	Bulgaria	Germany	Moldova	Slovak Rep.	Malta
	Croatia	Hungary	Netherlands	Spain	Switzerland
	Denmark	Ireland	Norway		Turkey
	Estonia	Italy	Poland		Ukraine

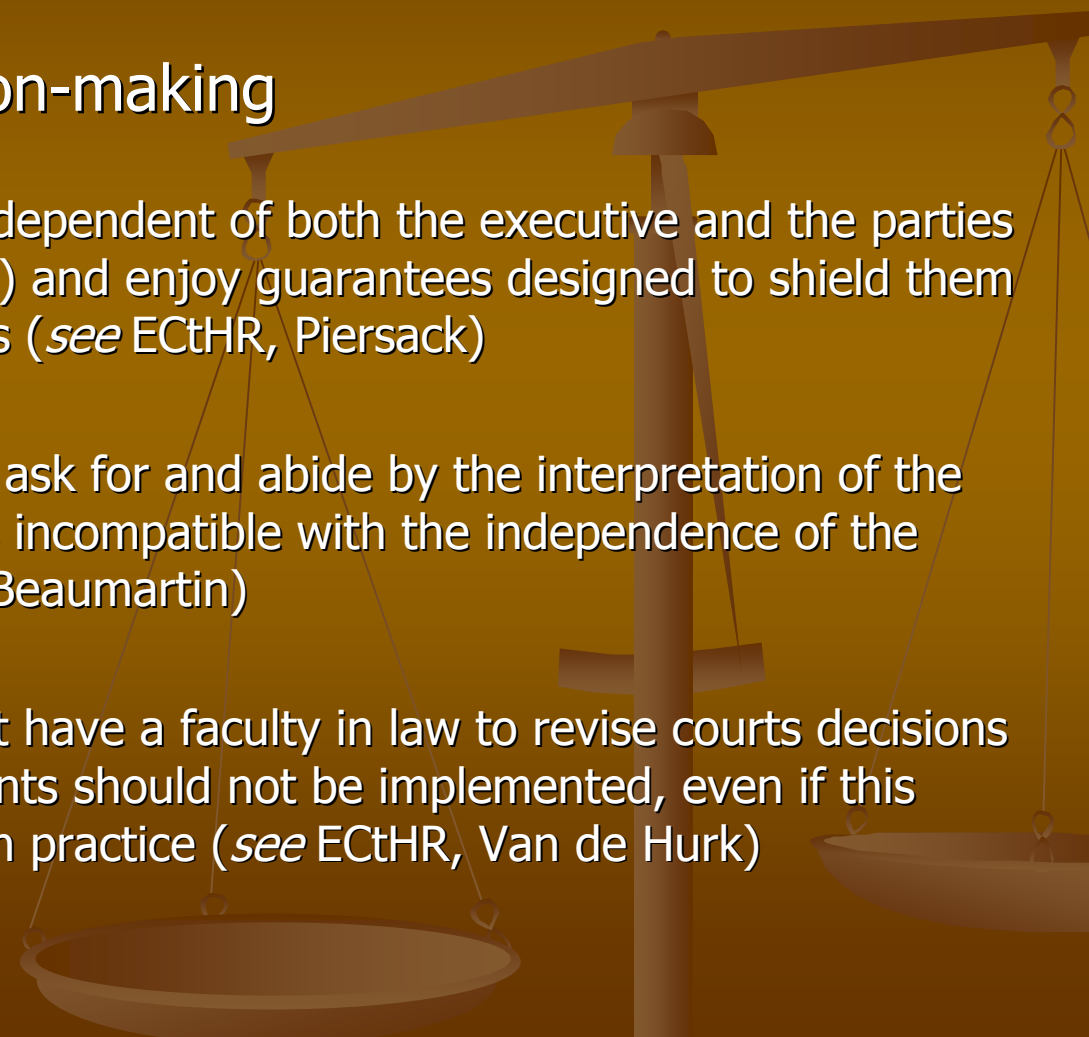
Source: Council of Europe – Table 15 of European Judicial Systems 2002 Report, p. 38

III. Content

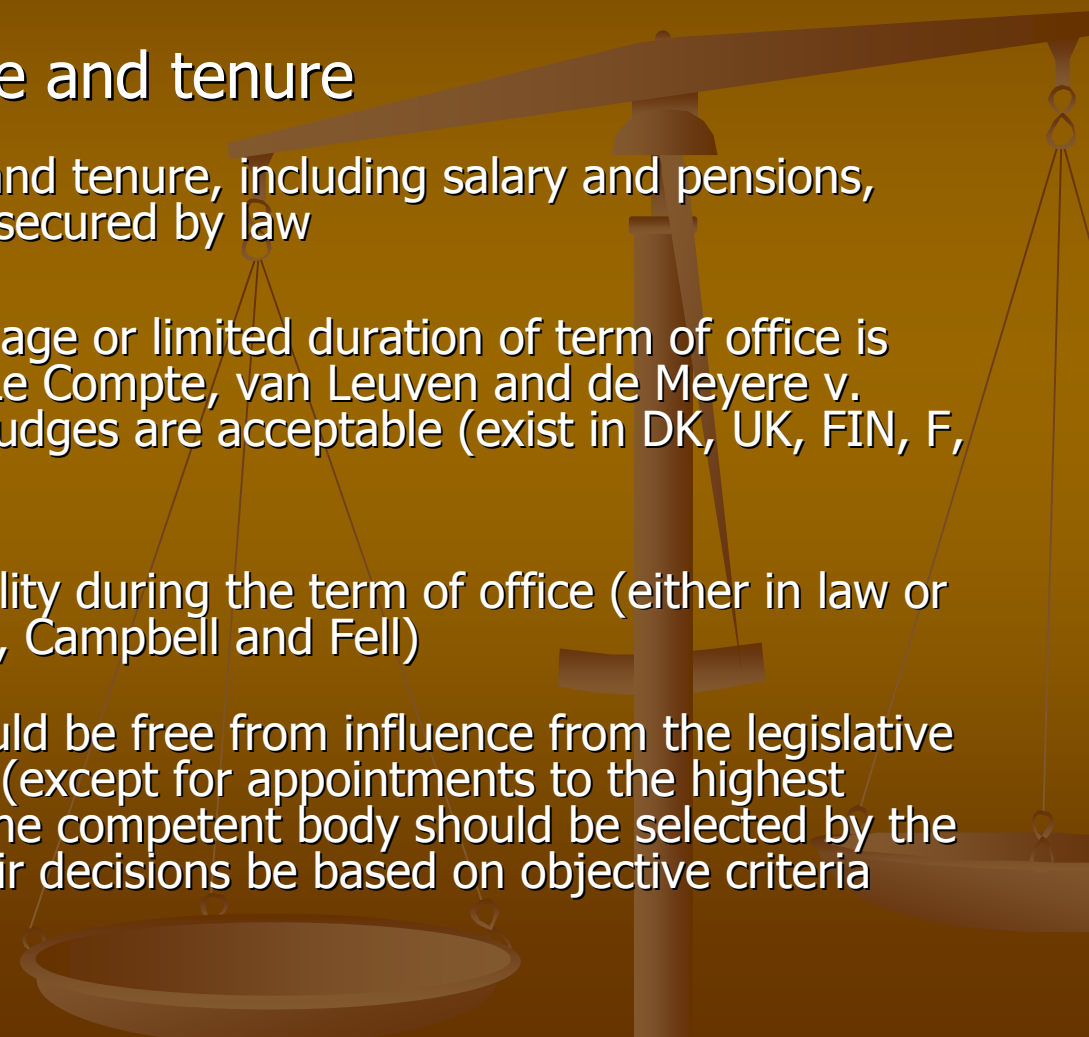
- Qualification of professional judges: integrity, legal training
 - Lay judges are permitted, provided they are impartial (*see* HRC, Karttunen)
 - State officials or members of the military may not serve as judges, since their belonging to the executive compromises the appearance of independence, even if they are not subject to orders in their judicial function (*see* ECHR, Sramek, Belilos, and Incal)
 - In specialised courts for certain professions, members of that profession may be members, provided that professional judges from the majority (*see* ECHR, Le Compte)
 - Appointment procedure without discrimination as regards to race, sex, political conviction or other status; nationality requirement possible (covered by Article 39 (4) EC)
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III. Content

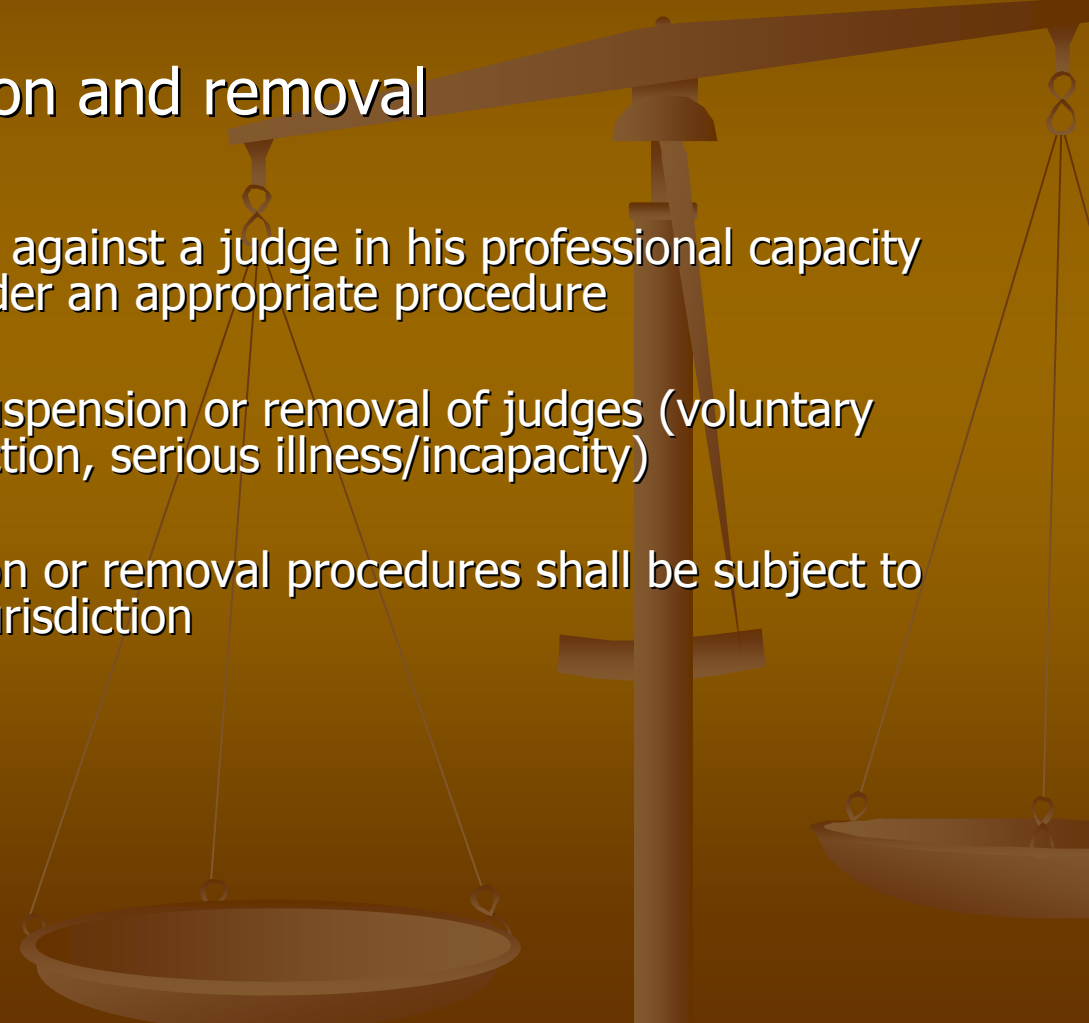
■ Independent decision-making

- The courts must be independent of both the executive and the parties (*see* ECtHR, Ringeisen) and enjoy guarantees designed to shield them from outside pressures (*see* ECtHR, Piersack)
 - The duty for courts to ask for and abide by the interpretation of the executive of the law is incompatible with the independence of the judiciary (*see* ECtHR, Beaumartin)
 - The executive may not have a faculty in law to revise courts decisions or decide that judgments should not be implemented, even if this faculty is never used in practice (*see* ECtHR, Van de Hurk)
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III. Content

- Conditions of service and tenure
 - Conditions of service and tenure, including salary and pensions, should be adequately secured by law
 - Mandatory retirement age or limited duration of term of office is possible (*see* ECtHR, *Le Compte, van Leuven and de Meyere v. Belgium*); temporary judges are acceptable (exist in DK, UK, FIN, F, I, P, S)
 - Principle of irremovability during the term of office (either in law or *de facto* - *see* ECtHR, *Campbell and Fell*)
 - Career of a judge should be free from influence from the legislative and executive powers (except for appointments to the highest courts); members of the competent body should be selected by the judicial power and their decisions be based on objective criteria
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III. Content

- Discipline, suspension and removal
 - Charges or complaints against a judge in his professional capacity shall be processed under an appropriate procedure
 - Limited grounds for suspension or removal of judges (voluntary retirement, penal sanction, serious illness/incapacity)
 - Disciplinary, suspension or removal procedures shall be subject to review to a superior jurisdiction
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IV. Conclusion

- Independence of Judiciary as cornerstone of rule of law
- Strict legal requirements with a considerable level of detail, as illustrated by relevant case law and soft law; particular vigilant standards as regards the establishment by parliamentary law and the prohibition of external influence on decision-making by the judiciary
- Some margin of appreciation, in particular as regards the appointing authority, the details of tenure, grounds for removal and disciplinary proceedings.

