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Robert Schuman Centre for Advanced Studies
Centre for Judicial Cooperation

WORKING PAPER

TRIAL National Reports
Belgium, Hungary, Italy, Poland, Portugal,
Romania, Slovenia, Spain, The Netherlands

Edited by Madalina Moraru, Mohor Fajdiga and
Federica Casarosa

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European University Institute

Robert Schuman Centre for Advanced Studies

Centre for Judicial Cooperation

**TRIAL - Trust, Independence, Impartiality and
Accountability of Judges and Arbitrators Safeguarding the
Rule of Law under the EU Charter**

National Reports

**Belgium, Hungary, Italy, Poland, Portugal, Romania,
Slovenia, Spain, The Netherlands**

Edited by Madalina Moraru, Mohor Fajdiga and Federica Casarosa

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Abstract

Recent constitutional and legislative changes in several member states are questioning core features of EU rule of law. For the first time ever, the EU institutions have proposed activation of the preventive mechanism in Article 7 TEU against Poland and Hungary, and the European Commission has launched the rule of law conditionality mechanism against Hungary. The jurisprudence of the CJEU finding numerous violations of judicial independence and fundamental rights undermining the rule of law in Europe is growing at a fast pace. Moreover, many preliminary references show the willingness of national courts to engage in judicial dialogue with the CJEU, relying on it to provide harmonised standards and guidelines on the rule of law. However, the future of such interactions is undermined by recent decisions of supreme and constitutional courts limiting the rights of domestic courts to use the preliminary reference procedure and prohibiting their obligation to give effect to EU law based on a tendentious understanding of national constitutional identity. In this context, the TRIAL project has embarked on an ambitious research quest, which resulted in the present Edited Working Paper. It consists of nine country reports which cover the most relevant issues concerning judicial independence, impartiality, accountability, mutual trust and the rule of law in the jurisdictions of the project partners: Belgium, the Netherlands, Hungary, Romania, Italy, Portugal, Poland, Spain and Slovenia. The country reports primarily build on case law identified and analysed during the TRIAL project and published in the CJC database. They outline the current state of affairs and challenges the member states face in the topics covered by TRIAL exposing and analysing specific pressing issues, especially ones that are not yet covered in other reports such as the European Commission's Rule of Law report.

Keywords

Independence, accountability, impartiality, rule of law, EU member states

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Introduction

Recent constitutional and legislative changes in several member states (e.g. Hungary, Poland and Romania) are questioning core features of EU rule of law. For the first time ever, the EU institutions have proposed activation of the preventive mechanism in Article 7 TEU against Poland¹ and Hungary,² and the European Commission has recently launched the rule of law conditionality mechanism³ against Hungary. The jurisprudence of the CJEU finding numerous violations of judicial independence and fundamental rights undermining the rule of law in Europe is growing at a fast pace. So far, we count sixteen references for preliminary rulings only by Romanian courts.⁴ Forty-one infringement procedures and references for preliminary rulings have been addressed by Polish courts and sixteen infringement procedures and references for preliminary rulings have been addressed by Hungarian courts.⁵ This large number of preliminary references shows the willingness of national courts to engage in judicial dialogue with the CJEU, relying on it to provide harmonised standards and guidelines on the rule of law. However, the future of such interactions is undermined by recent decisions of supreme and constitutional courts limiting the rights of domestic courts to use the preliminary reference procedure and prohibiting their obligation to give effect to EU law on the basis of a tendentious understanding of national constitutional identity (e.g. Decision 390/2021 of the Romanian Constitutional Court;⁶ and Polish Constitutional Tribunal Judgment case No. K 3/21). In parallel, the chilling effect of the increasing numbers of disciplinary proceedings and sanctions against domestic judges⁷ engaging in dialogue with the CJEU and giving priority to EU law is endangering the effective application of EU law at the domestic level.⁸ Furthermore, the ECtHR is witnessing an unprecedented number of cases in which applicants challenge government judicial reforms that are infringing on their fundamental rights.⁹ The ECtHR has

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- 1 Commission, Reasoned proposal in accordance with article 7(1) of the Treaty on European Union regarding the rule of law in Poland (Communication) COM (2017) 835 final.
 - 2 European Parliament Resolution of 16 January 2020 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary (2020/2513(RSP)).
 - 3 The rule of law mechanism is set out in Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.
 - 4 E.g. Joined Cases C-83/19, C-127/19, C-195/19, C-291/19 and C-355/19, *Asociația 'Forumul Judecătorilor din România' and Others v Inspecția Judiciară and Others*, 18 May 2021; Joined Cases C-357/19, Case C-379/19, C-547/19, C-811/19 and C-840/19, *Euro box Promotion and Others (Criminal proceedings against PM and Others)*, 21 December 2021. See also the currently pending cases: C-926/19, C-929/19, Cases C-430/21, C-709/21 and C-817/21.
 - 5 For more, see the [CJC Database](#) and [Meijers Committee database](#).
 - 6 See Madalina Moraru & Raluca Bercea, 'The First Episode in the Romanian Rule of Law Saga: Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor Din România, and Their Follow-up at the National Level'* (2022) *European Constitutional Law Review* 1.
 - 7 For an account of the Polish experience, see presentations given at the TRIAL webinars and training workshops by Jaroslaw Gwizdak (Jaroslaw Gwizdak, 'Disciplinary Actions against Judiciary in Poland: The Difficulties in Applying the CJEU Standards, Webinar TRIAL 18 March 2021' <https://www.youtube.com/watch?v=0mK71r_Qmbo&t=1271s> accessed 30 May 2022; Jaroslaw Gwizdak, *Coping with the Authoritarian Takeover of Justice: The Polish Experience*, 20 October 2021 <<https://www.youtube.com/watch?v=awaDZd5QYus>> accessed 30 May 2022. For issues related to pressures faced by Hungarian judges, see Viktor Vadász, 'The Right to Freedom of Expression of Magistrates and Its Challenges for Judicial Independence and Accountability, TRIAL Transnational Workshop: Accountability and Freedom of Expression of Magistrates and Attorneys in Europe' (17-18 June) <https://www.youtube.com/watch?v=WxRFNTrc1zcc&feature=emb_imp_woyt> accessed 30 May 2022.
 - 8 E.g. C-791/19, *Commission v. Poland*, 15 July 2021; C-430/21, *RS (Effet des arrêts d'une cour constitutionnelle)*, 22 February 2022; C-564/19, *IS (Illégalité de l'ordonnance de renvoi)*, 23 November 2021; Joined Cases C-558/18 and C-563/18, *Miasto Łowicz*, 26 March 2020.
 - 9 E.g. *Grzęda v. Poland*, App. no. 43572/18, 15 March 2022.

found the Polish Constitutional Tribunal, two chambers of the Polish Supreme Court, namely the Chamber of Extraordinary Control and Public Affairs and the Disciplinary Chamber, to not constitute tribunals established by law due to the politicised character of appointment of their members.¹⁰ More and more judges and prosecutors are turning to the ECtHR for protection of their judicial independence and fundamental rights.¹¹

Rule of law challenges are not endemic only in the so-called rule of law backsliding countries, but are stretching to all European countries.¹² Recent worrisome developments in Slovenia have raised doubts whether Slovenia could be the next to take the path towards illiberal democracy.¹³ The Spanish General Council of the Judiciary continues to suffer from politicisation resulting from the parliamentary monopoly over the selection of its members. The difference to its Polish counterpart is that a higher (3/5) majority is required in Spain, whereas only an ordinary majority suffices in Poland.¹⁴ The Italian High Council of the Judiciary has also been rightly criticised for being prone to political interference.¹⁵ Portuguese courts still struggle to properly apply ECtHR standards, e.g. in cases regarding freedom of expression of lawyers and the media when they are criticising the judiciary.¹⁶ And even the Dutch judiciary has recently come under criticism from the Venice Commission for its involvement in the childcare allowance scandal.¹⁷

No single Member State has a perfect record in the organisation of the justice system and, as we have seen in the last few years, even the most established democracies, such as the US, are not immune to rule of law backsliding. Therefore, no member state can afford to treat the topics covered by the [TRIAL project](#) as trivial. Moreover, in an interconnected European legal order based on the principle of mutual trust, undermining judicial independence in one member state is of outmost relevance for other member states. As is evidenced by the CJEU judgements in C-216/18 *LM* and C-354/20 *Openbaar Ministerie*, which originated from Ireland

10 *Xero Flor v. Poland*, App. no. 4907/18, 7 May 2021; *Reczkowicz v. Poland*, App. no. 43447/19, 22 July 2021; *Dolinska-Ficek and Ozimek v. Poland*, App. nos. 49868/19 and 57511/19, 8 November 2021; *Advance Pharma v. Poland*, App. no. 1469/20, 3 December 2021.

11 E.g. cases from Romania: *Kövesi v. Romania*, App. no. 3594/19, 5 May 2020; *Panioglu v. Romania*, App. no. 33794/14, 8 December 2020; *Brisic v. Romania*, App. no. 26238/10, 11 December 2018; cases from Hungary: *Baka v. Hungary*, App. no. 20261/12; 23 June 2016; *Erményi v. Hungary*, App. no. 22254/14, 22 November 2016. For current pending cases from Poland, see [Meijers Committee database](#). See also Mohor Fajdiga, Understanding the European Court of Human Rights as a Legal Avenue to Protect Judicial Independence, CJC blogpost (23 December 2021) URL: <https://medium.com/@centerforjudicialcooperation/understanding-the-european-court-of-human-rights-as-a-legal-avenue-to-protect-judicial-independence-ee9d7a699a70>. For an overview of the ECtHR jurisprudence regarding judicial independence and accountability, see Saša Zagorc, *Standards of Independence and Accountability of Magistrates and Lawyers in the Jurisprudence of the ECtHR*, TRIAL Transnational Workshop: Accountability and Freedom of Expression of Magistrates and Attorneys in Europe' (17-18 June) <<https://www.youtube.com/watch?v=nn-iLBIPpKs>> accessed 31 May 2022.

12 E.g. *Guðmundur Andri Ástráðsson v. Iceland*, App. no. 26374/18; C-869/19, *Repubblika*; *Miroslava Todorova v. Bulgaria*, App. no. 40072/13; *Ramos Nunes de Carvalho e Sá v. Portugal*, App. nos. 55391/13, 57728/13 and 74041/13 etc.

13 Samo Bardutzky, Bojan Bugarič, Saša Zagorc, 'Slovenian Constitutional Hardball: Disruptive moves towards an illiberal democracy?', (*Verfassungsblog*) <<https://verfassungsblog.de/slovenian-constitutional-hardball/>> accessed 31 May 2022. See also Jure Vidmar, 'Slovenia's Legal Farce with the Nomination of European Delegated Prosecutors' (*Verfassungsblog*) <<https://verfassungsblog.de/slovenias-legal-farce/>> accessed 31 May 2022.

14 See the Spanish country report, p.156 in this Edited Working Paper.

15 See the Italian country report, p. 56 in this Edited Working Paper.

16 See Rita Gião Hanek, *L.P. and Carvalho v. Portugal, Towards Legal (Un)Certainty and (Mis)Trust?*, TRIAL webinar 18 March <https://www.youtube.com/watch?v=0mK71r_Qmbo> accessed 31 May 2022.

17 The Dutch parliament requested the Venice Commission to give its opinion on the child allowance scandal. See the Dutch country report, p. 181 in this Edited Working Paper.

and the Netherlands, rule of law developments in other member states impact even the countries where rule of law is most deeply entrenched. As mutual trust cannot be blind trust, national judges are in fact called on to act as guardians of European rule of law by ascertaining – sharing with lawyers the evidentiary burden – whether a person sought under a European arrest warrant will be granted effective judicial protection in the requesting state, and whether an asylum seeker can be transferred to a member state with rule of law issues.¹⁸ National courts from across the EU are therefore required to engage in assessment of the ‘health’ of judicial independence and the rule of law in other member states.

In this context, the TRIIAL project has embarked on an ambitious research quest, which resulted in the present Edited Working Paper. It consists of nine country reports which cover the most relevant issues concerning judicial independence, impartiality, accountability, mutual trust and the rule of law in the jurisdictions of the project partners: Belgium, the Netherlands, Hungary, Romania, Italy, Portugal, Poland, Spain and Slovenia. The country reports primarily build on case law identified and analysed during the TRIIAL project and published in the [CJC database](#). They outline the current state of affairs and challenges the member states face in the topics covered by TRIIAL. However, they do not aim to provide an exhaustive picture. They instead expose and analyse specific pressing issues, especially ones that are not yet covered in other reports such as the European Commission’s Rule of Law report. Hence, this report seeks to complement the already existing rule of law monitoring tools. The national reports analysed the caselaw and the legal developments until February 2022.

The purpose of this Edited Working Paper is manifold. It seeks to contribute to raising the awareness of policymakers, judges, prosecutors, arbitrators and lawyers of their roles in preserving and enhancing the rule of law across Europe. It aims to serve as a tool facilitating assessment of the state of judicial independence in member states in the daily work of legal practitioners. The Edited Working Paper is a valuable source for comparative analysis offered to practitioners, policymakers and academics interested in specific questions on the organisation of the judiciary. It contains experiences from backsliding states and so works as a warning sign for other countries. It broadens the perspective from CJEU and ECtHR cases, as it contextualises the issues raised and provides follow-up to the supranational jurisprudence.

For the sake of easier navigation, the structure of the country reports is harmonised. First, a summary of the country report is provided. Then, the reports continue with an introduction to the socio-political context and the broader framework of rule of law challenges for the legal professions. This puts the specific issues later discussed in a broader context. The central part of the reports concerns the relevant issues affecting independence, impartiality, accountability, mutual trust and the rule of law. The final part of the reports contains a general assessment of the current state of affairs and looks towards potential future developments.

The Edited Working Paper is not an ordinary academic output, as it was drafted in collaboration with practitioners who participated in [12 TRIIAL training workshops](#). The partners of the [TRIIAL project](#) owe a special debt of gratitude to practitioners who signalled the relevant national jurisprudence and provided extensive feedback on earlier versions of this Edited Working Paper.

¹⁸ On the topic of mutual trust and the rule of law, see *TRIIAL Webinar of 28 January 2021: Mutual Trust and the Rule of Law: Behind and Beyond the LM Case* (2021) <<https://www.youtube.com/watch?v=5mhaHBji0nM>> accessed 31 May 2022.

NATIONAL REPORT: BELGIUM

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Table of Abbreviations

CFR	Charter of Fundamental Rights of the European Union
CCM	Conseil Consultatif de la Magistrature
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CSJ	Conseil Supérieur de la Justice
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
ICCPR	International Covenant on Civil and Political Rights

1. Summary

This report accounts of the current state of judiciary, their independence, impartiality, and accountability in Belgium. Given that, generally, Belgian courts have historically adopted a Europe-friendly attitude, in line with the sentiment on the political level and in society, the problems that emerge in judgements of various courts do not toll in a particularly worrisome manner. Consequently, both the Europeanisation of constitutional rights and the implementation of international and EU law that potentially restrict fundamental rights, do not spark controversy.¹⁹ In fact, as the follow up to judicial interventions, the latest developments in the rule of law framework of Belgium include the completion of the reform of the selection process for substitute judges and the improvement of the ethical framework for all members of the judiciary.

The previously reported incidents affecting rule of law have been slowly, partially addressed. In May 2021 information was published about possible recordings of meetings between suspects and their lawyers in police stations and consequently the three Belgian bar associations reacted publicly, emphasising the importance of legal professional privilege for the rule of law. A criminal investigation in relation to this issue is currently underway.²⁰ Moreover, the advisory branch of the Council of State continues to face budgetary and human-resources challenges for the effective exercise of its mandate to ensure the quality of legislation.²¹ The Brussels Court of Appeal found that COVID-19 measures were adopted on a correct legal basis, striking down a first-instance judgement.²² Similarly, the Constitutional Court's deemed the COVID-19 adopted measures constitutional and in line with fundamental rights.²³ Lastly, a pandemic law has been adopted to provide a new legal basis for pandemic emergency measures following several opinions by the Council of State and by the new Federal Human Rights Institution. The latter has been established and is now operational with a mandate to protect and promote human rights at the federal level.²⁴

However, the majority of the above-mentioned events, point to the evolution of the judicial system that, as could be claimed, is as close to European Union ideal as possible. If anything, the organization of the administration of justice in Belgium is steadfastly being improved, which in the context of a state of 12 million population featuring a large number of foreigners, three linguistic communities and a federal legal system is, formidable, on the one hand, and at the same time showcases the problems a complex governance structure poses to the quality of system of administration of justice and rule of law guarantees.

In this vein, this report strives to represent the evolutionary process Belgian courts and magistrates have been treading to conjure an inclusive and representative judicial system, which, however, falls somewhat victim to its ideals and success.

19 Patricia Popelier and Catherine Van de Heyning, 'The Belgian Constitution: The Efficacy Approach to European and Global Governance' in Albi and Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (TMC Asser Press 2018) 1225f.

20 European Commission, *2021 Rule of Law Report Country Chapter on the rule of law situation in Belgium*, (COM (2021) 700 final, 2021) 3.

21 European Commission, *2020 Rule of Law Report Country Chapter on the rule of law situation in Belgium*, (COM (2020) 580 final, 2020) 5.

22 Brussels Court of Appeal (FR), 7 June 2021, No 2021/KR/17.

23 Belgian Constitutional Court, 3 February 2022, No 21/2022.

24 European Commission, *2021 Rule of Law Report Country Chapter on the rule of law situation in Belgium*, (COM (2021) 700 final, 2021) 12.

2. The Belgian federal legal system and its judiciary – a brief introduction

This report must begin with the reference to the particularly complex multi-dimensional governance system of the Belgian state. Since its independence in 1830 the country has gradually evolved from a unitarian to a federal state. Specifically, between 1970 and 1993 the unique federal structure via six state reforms was introduced (in 1970, 1980, 1988-89, 1993, 2001 and 2012-2014). What emerged 'is a federal state, composed of communities and regions'.²⁵ The redistribution of power occurred along two lines. The first line relates to language and, more broadly, to culture, leading to the creation of three communities: the Flemish Community, the French Community, and the German-speaking Community. The second line of state reform was historically inspired by economic interests and reflected regional aspirations for a larger degree of autonomy. The establishment of the three regions was the result: the Flemish Region, the Brussels Capital Region and the Walloon Region.²⁶ Most competences in the field of justice are indeed federal and the independence of the judiciary and of the prosecution service is enshrined in Art. 151 of the Constitution. Several judicial institutions have a nationwide reach, including the *Cour Constitutionnelle* or *Grondwettelijk Hof* (hereinafter: Constitutional Court) which controls conformity of all laws with the constitution *ex post*, the judiciary and the *Cour de Cassation* or *Hof van Cassatie* (hereinafter: Court of Cassation), the *Conseil d'État* or *Raad van State* (hereinafter: Council of State) which is the supreme administrative court and advises on all draft laws *ex ante*, the *Cour de Comptes* or *Belgische Rekenhof* (hereinafter: Court of Audit), and the *Service Public Fédéral Finances* or *Federale Overheidsdienst Financien* (hereinafter: Inspectorate of Finance).²⁷ Two federal institutions merit attention given their impact on rule of law guarantees, in particular judicial independence, impartiality and accountability of judges: the Constitutional Court and the High Council for Justice (*Hoge Raad voor de Justitie, Conseil Supérieur de la Justice*).

2.1 Judicial independence in the light of Art. 151 of the Belgian Constitution

Although the explicit mention of judicial independence in Art. 151§1 of the Belgian Constitution was only inserted in the Belgian Basic Law following the constitutional revision in 1998, the principle was already crystallised before. In fact, the 1831 Constitution mandated diverse safeguards such as the irremovability of judges,²⁸ the monopoly of the legislature to legislate, the creation of new jurisdictions, the determination of the magistrates' financial status, and the publicity of hearings.²⁹ More recently in a 1979 judgement the Court of Cassation enshrined independence and impartiality as a general principle of law: "*the impartiality of judges is a fundamental rule of judicial organisation; [...]it constitutes, together with the principle of the independence of judges from other branches of government, the very foundation not only of the constitutional provisions governing the existence of the Judiciary but also of any democratic State; that litigants are guaranteed that judges will apply the law in an equal manner*".³⁰ Thus, articles 151, 152, 154 and 155 of the Belgian Constitution enshrine the essential features of

²⁵ Belgian Constitution of 1998, Art.1.

²⁶ Belgium, a federal state (Belgium.be, official information and services) available at: < www.belgium.be/en/about_belgium/government/federale_staat > accessed on 20 February 2022.

²⁷ OECD, "Executive Summary" in *Better Regulation in Europe: Belgium* (OECD Publishing 2010) 2.

²⁸ Belgian Constitution of 1831, Art 100.

²⁹ *Ibid* Arts 94, 102, 97.

³⁰ Belgian Court of Cassation (2e ch) 14 October 1996, *Pas I*, 1996, 981.

the status of the judiciary in the Constitution, whose purpose is to guarantee the independence of the judiciary, which is essential in a system of separation of powers.³¹ The powers exercised by the High Council of Justice in relation to the public prosecutor's office were also incorporated into Article 151 of the Constitution.

2.2 The Constitutional Court

As the consequence of Belgium's transition from a unitary state to a federal one, judicial constitutional review has been introduced. The main objective was to solve conflicts resulting from the lack of hierarchy of legislative instruments enacted by the various entities of the Belgian state. A *Cour d'arbitrage* (Court of Arbitration) was set up, which would adjudicate disputes between the various legislatures of the federal Belgian state. The *Cour d'arbitrage* could thus examine the compatibility of the legislation introduced by the Federal state, the Communities or Regions with the competences that were assigned to them by the Belgian constitution.³² The jurisdiction of the court gradually expanded and nowadays the *raison d'être* of the Court is no longer the federalisation of the Belgian state alone, but also the judicial protection of its citizens and their fundamental rights. As of 8 May 2007, the *Cour d'arbitrage* was namely rebranded as the Constitutional Court, thus emphasizing its constitutional function in the federal structure rather than the arbitration one.

For judges of the Constitutional Court a double parity is established as mandated by the *Bijzondere Wet* of 6 January 1989 on the Constitutional Court (hereafter 'the Special Act on the Constitutional Court'): on the one hand a linguistic one;³³ on the other hand, one half should consist of "jurists" and the other half of "politicians", which are former members of the federal or community or regional parliament.³⁴

As a prominent actor in the field of independence, impartiality and accountability, the Belgian Constitutional Court continuously seeks to safeguard the conformity of Belgian legislation with these principles. In this regard, it reaffirmed in January 2020 the essential role of the judges' training by ruling that recourse to substitute judges (namely judges with another professional activity, for instance lawyers, participating in the judicial legal system, as will be elaborated upon below) do not breach the principles of judicial independence and impartiality if sufficient safeguards are in place.³⁵ These include the requirement that the selection of substitute judges was sufficiently rigorous, that these professional judges were prevented from ruling cases in which they could have a vested interest, and that they would follow the required training.

31 Belgian Constitutional Court, 15 October 2015, No 139/2015, B.12.2.

32 Maurice Adams and Gerhard van der Schiff, 'Political Theory Put to the Test. Comparative law and the Origins of Judicial constitutional review' (2010) 10(2) *Global Jurist*. Patrick Peeters, 'Expanding Constitutional Review by the Belgian 'Court of Arbitration'' (2005) 11(4) *European Public Law* 475 - 479.

33 The Special Act on the Constitutional Court of 6 January 1989, Art. 31: there are 12 seats distributed among the Dutch and the French speaking communities with the requirement of one of representatives of each groups possessing sufficient knowledge of German. Mixed backgrounds and expertise are required to ensure the principle of judicial constitutional review is met in the eyes of the legislature. For a more extensive commentary, see: Maurice Adams, 'Constitutional and socio-political dynamics in the Netherlands and Belgium' in H. Glaser (ed), *Norms, interests and values: Conflict and consent in the basic constitutional order* (Nomos Verlagsgesellschaft 2015) 8.

34 The Special Act on the Constitutional Court of 6 January 1989, Art. 34.

35 Belgian Judicial Code, Arts. 190, 192 and 322 §2.

2.3 The High Council for Justice

An independent High Council for Justice (operational since 2000) is tasked with the recruitment of the judiciary and with enhancing the quality of justice via control mechanisms such as audits. The Council includes judicial members elected amongst their peers, as well as non-judicial members nominated by the Senate with a two third majority.³⁶ With respect for judicial pluralism, the Council's competences involve the selection of judges and their nominations to other functions, its composition being in line with the recommendations adopted by the Committee of Ministers of the Council of Europe (CoE).³⁷

The Council gives justice-related recommendations to the Government and to Parliament and it selects candidate judges which are then appointed for life by the Government on the proposal of the Minister of Justice. A refusal by the executive to appoint must be based on explicit grounds, such as an irregularity or illegitimacy, and can be challenged before the Council of State. The executive must refer the appointment back to the High Council for a new proposal. The College of Courts and Tribunals, consisting of court presidents elected by their peers, is responsible for the general functioning of the courts.

As outlined in Section 2, the current structure of the Belgian system of administration of justice has been evolving over the years of constitutional reforms, with the ripe institutional structure underlying the constitutional principles of the organisation of the state based on diversity and equal representation. While diverse challenges at the national level remain present, it is visible that Belgium is open to implement the European and supranational guidelines and its commitments and demonstrate the willingness to constantly protect and improve the rule of law, judicial independence, and impartiality. Nevertheless, the real challenge lies in ensuring that detailed arrangements and provisions fully reflect the systemic commitment to rule of law and judicial independence guarantees. This is put to test in numerous contexts outlined in section 3 of this report.

3. Legal issues affecting independence, impartiality, accountability, trust, and the rule of law

3.1. Jurisdictional pluralism and duality of magistracy - between 'standing' prosecutors and 'sitting judges'

As explained in the introductory section above, the legal system of Belgium is characterised by the complexity closely related to its federal structure and historical origins. Furthermore, in the substantive and functional perspective, two additional distinctions further affect the position and the organisation of the work of judges. Firstly, the distinction between the different branches of the judiciary is reflected in the division between the ordinary and other courts. Whereas of relevance, this distinction has not posed problems for the guarantees of fair trial.³⁸ On the other hand, the deeply rooted distinction between the sitting (judges) and standing (prosecutors)

³⁶ Belgian Constitution of 1998, Art 151. There are 44 members in total, of which non-judicial make up for 22. These in turn also are distributed equally among two linguistic communities and are to in turn represent the following professional groups through appointment of 4 lawyers with min. 10 year bar experience, 3 higher education professors with 10 years of experience and 4 members who hold an university or equivalent degree as well as 10 years of relevant professional experience.

³⁷ Committee of Ministers of the Council of Europe, Recommendation CM/Rec (2010) 12 adopted by the Committee of Ministers of the Council of Europe, 17 November 2010 § 27.

³⁸ Belgian Council of State, Decision of 27 May 2008, No 183, Slabbaert 480.

magistracy has been subject of long discussions, the challenges lying in delineating standards applicable to the performance of the functions of two professions.

In fact, whereas Art. 151 of the Belgian Constitution grants the independent status to judges, Art. 153 attributes it to prosecutors, albeit the latter is a weaker status. This is because of the responsibility assumed by the Minister of Justice vis-à-vis the House or Representatives for investigation and prosecution policy. Thus, the independence of the Public Prosecutor's office goes hand in hand with 'the right of the competent minister to order the prosecution and to establish binding guidelines of criminal policy including those of investigation and prosecution character'. Hence, there is an unresolved long-standing debate as to whether the public prosecutors' office is a body that is a part of the judiciary, the executive or both.

The Belgian Constitution broadly explains the relations between the Minister of Justice and the prosecutors³⁹, however, not allowing to determine whether the Public Prosecution Service would belong to the executive or the judiciary. In the 20th century constitutional reforms one can observe the gradual increase in judicial function of prosecutors.⁴⁰

It can be said that the officials of the Public Prosecution Service participate to some extent in the exercise of a 'judicial office', without actually exercising the 'judicial function' themselves. This resonated in ECtHR jurisprudence, the nature of the judicial function as an independent branch of State power and the principle of independence of prosecutors being considered a key element for the maintenance of judicial independence.⁴¹ For the other tasks of the Public Prosecution Service, however, there is no link with the judicial function.

The constitutional status of the Public Prosecutor's Office is thus somewhat hybrid.⁴² As part of the judiciary, it has a very large discretionary power. As part of the executive, there has been a noticeable evolution in the need to limit the discretionary power. Several judgments followed from the Constitutional Court and the Council of State, which addressed the issue but failed to sufficiently clarify the constitutional position of the public prosecutor.⁴³ After all, it leaves open which power the members of the Public Prosecution Service belong to.

In fact, the separation of powers has been occasionally subject of the evaluation by the Constitutional Court. Specifically, in a 2016 Constitutional Court case (Belgian Constitutional

39 See, Art. 151 of the Belgian Constitution.

40 This was in part the follow up to the escape of Dutroux at Neufchâteau on April 23 1998, which was the impetus to the adoption of the Octopus Agreement. By this Agreement, Article 153 of the Constitution became unassailable and it was therefore decided to incorporate the new provisions on the functional independence of the Public Prosecutor's Office on the one hand, and the power of the Federal Minister of Justice to exercise a positive right of injunction and to establish binding guidelines of criminal policy on the other, into Article 151, § 1, subsection 1 of the Constitution, together with the provision on the independence of judges. It must also be noted that Article 151 § 1 of the Constitution only guarantees the independence of the magistrates of the seat (judges) and of the public prosecutor's office. Thus, the provisions on the Public Prosecutor's Office are contained in two articles of the Constitution. On the one hand, Article 151 of the Constitution and on the other hand, Article 153 of the Constitution, which has remained unchanged. There seems that something is missing here. Lieve Gies, 'Up, Close and Personal: The Discursive Transformation of Judicial Politics in Post-Dutroux Belgium' (2003), *International Journal for the Semiotics of Law* 16, 259–284. Christophe Mincke, 'La réforme de l'article 151 de la Constitution: un emplâtre sur une langue de bois? sense ou non-sense de l'affirmation de l'indépendance du ministère public' (1999) *Journal des procès* 18,19. See also the case law of Belgian Council of State: Belgian Council of State, 24 October 1980, No. 20.671 and 20.672, Mille and Croquet.; Belgian Council of State, 8 June 1988, Advise No 18.508/2.

41 *Kövesi v. Romania* App no 3594/19 (ECtHR, 5 May 2020) para 208.

42 Jan Velaers, *De Grondwet - Een artikelsgewijze commentaar*, vol 3 (die Keure / la Charte, 2019) 217.; Marc Verdussen, "Contours et enjeux du droit constitutionnel pénal", *O.C.*, 340.

43 See for example Belgian Constitutional Court, 18 February 2009, No 27/2009, B.2.5.; Belgian Constitutional Court, 7 March 2013, No 36/2013, B.7.

Court, Decision no 83/2016 of 2nd June 2016 ECLI:BE:GHCC:2016:ARR.20160602.3), the defendant argued that he is discriminated against because of art. 216bis and 216ter of the Code of Criminal Procedure, whereby the public prosecutor can still decide whether or not to conclude a 'penal transaction' after the introduction of the public action and without the judicial review as to the reasons for this decision, judges being deprived of their power with regard to public action, on the basis of criteria known only to the public prosecutor and beyond any judicial review. The penal transaction does not equal a conviction and does not appear on the criminal record of those under investigation, allowing a court to end a public prosecution in exchange for the payment of a sum of money. The regime of penal transaction is exclusively applicable to the legal persons, and it is based on the Anglo-Saxon system of the Deferred Prosecution Agreement (DPA). The accused saw in this a violation of the principle of the separation of powers, of the principle of the independence of judges, of the right to a fair trial, of the principle of the right to a good administration of justice, of article 6 of the ECHR and articles 10 and 11 of the Belgian Constitution. In addition, the unlimited discretionary power granted to the public prosecutor after the initiation of public proceedings, on the basis of article 216bis of the code of criminal investigation would be contrary to the principle of legality and foreseeability of the criminal procedure, enshrined in article 12§2, of the Constitution.

The Belgian Constitutional Court in this case considered that no violation of the condition of foreseeability of criminal proceedings, of the right of access to a judge or of the right to a fair trial result from the fact that the public prosecutor can refuse the proposed criminal settlement made by the alleged perpetrator of the facts, without any obligation to state reasons or to check by a judge. In the final part of its considerations, the Court stated: 'an accused does not have the right to demand a penal settlement'. Nevertheless, the Court affirmed that Article 216bis, § 2, of the Code of Criminal Procedure is not compatible with Articles 10 and 11 of the Constitution, combined with the right to a fair trial and with the principle of the independence of the judge, guaranteed by Article 151 of the Constitution and by Article 6 §1 of the ECHR and Article 14, § 1 of the ICCPR.⁴⁴

A further debate surrounding the possible violations of the constitutional independence of the Public Prosecutor's Office and the principle of separation of powers could be witnessed in relation to the criticism voiced against the system of binding directives.⁴⁵ The constitutional legislature rejects this criticism. It assumes that political responsibility for policy lies with the minister and therefore, it is able to lay down guidelines for criminal policy.⁴⁶ The Constitutional Court indicates in its case law that such guidelines are also in keeping with the rule of law. By the Constitutional Court, '[t]he directives determine in a general and abstract manner the policy that the members of the public prosecutor's office must follow in the investigation and prosecution of crimes, and thus contribute to the legal certainty of the people subject to the law (Constitutional Court 2 June 2016, no. 83/2016).'⁴⁷ The guidelines can also relate to the individual investigation and prosecution of criminal cases (Constitutional Court 31 May 2018, No. 62/2018, B.44.1).⁴⁸

44 Belgian Constitutional Court, 2 June 2016, No 83/2016, B.24.

45 Adrien Masset, 'La loi du 4 mars 1997 instituant le collège des procureurs généraux et créant la fonction de magistrat national: que reste-t-il de l'indépendance du ministère public?' (1997), JT 649, 649.; Eliane Liekendael, 'De scheiding der machten aan de vooravond van het derde millennium'(1997-98) RW (553) 553.

46 Jan Velaers, *De Grondwet - Een artikelsgewijze commentaar*, vol 3 (die Keure / la Charte, 2019) 170.

47 Belgian Constitutional Court, 2 June 2016, No 83/2016, B.8.2.

48 Belgian Constitutional Court, 31 May 2018, No 62/2018, B.44.1.

3.2. Functional external independence of the judges towards other branches

The vast majority of the rule of law guarantees concern the determination of balance between the various branches of the government. In the context of judicial independence guarantees it is about determining the red lines in terms of permissible interference by other branches of the government, as well as the framework of principle of legality whenever such interference is possible.

In the Belgian system this is probably the more important and often publicised given the particular federal structure of the state and the representative character of all its institutions, including the judiciary. Thus, the discussions on both the red lines in terms of the interference of the powers in performance of judicial functions and the permissible limitations thereof have taken plenty of attention of the Belgian Constitutional Court. This section outlines the main topics of discussions that have taken place in the 21st Century: (3.2.1) the emphasis on the prohibition of interference of the executive in the adjudicating process triggered by the *Fortis* case, limited permissibility of interference (3.2.2) when retroactivity is concerned and the frames of principle of legality in the contexts of (3.2.3) judicial organisational independence, (3.2.4) budgetary matters and (3.2.5) system of nominations and appointments.

3.2.1. Prohibition of interference of the executive in the adjudicating process

Judicial functional independence prohibits members of the federal government, as well as of regional and communal executives, to exercise pressure or interfere in any way in the judiciary.⁴⁹ It is often a subject of discussion by the legislator, as well as by the judicial order and in the eyes of the public opinion, as demonstrated by the 2008-2009 controversial “Fortis case”.⁵⁰

At the time and as a result of the financial crisis, which caused the failure of the Fortis Bank, the government attempted to sell it to BNP Paribas without the consulting the shareholders. Unsurprisingly, they contested this decision before the President of the Brussels Commercial Court (*Tribunaux de commerce*) and, on appeal, before the Brussels Court of Appeal (*Cour d’appel*). One of the judges of the Brussels Court of Appeal refused to sign the final verdict, which, as a result of the alleged pressure exercised by the executive, was finally pronounced by two judges only. The Leterme government fell under suspicion of influencing the judiciary in the legal proceedings against the bid as the special investigations of the Parliament⁵¹ and High Council of the Judiciary⁵² revealed a high level of interaction exercised between the executive

49 Michaël Mallien ‘L’indépendance fonctionnelle des magistrats’, in Xavier De Riemaeker (ed) *Statut et déontologie du magistrat* (La Chartre, 2020) 121. For the constitutional guarantees see Art. 152 (irremovability of judges), Art. 154 and Art. 155 (rules on remuneration established by law). Belgian Constitution of 1998.

50 For the overview from the company perspective, see: ‘De zaak Fortis’ (2009) 2 Tijdschrift voor Rechtspersoon en Venootschap, 156–158 and 429–430 and from the judicial independence perspective: Marc Bossuyt, ‘The Independence of the Judiciary in Belgium’, in Shimon Shetreet and Christopher Forsyth (eds), *The Culture of judicial Independence* (Brill | Nijhoff 2014). See also: Maurice Adams and Benoit Allemeersch, ‘Re-forming a meritorious elite: Judicial independence, selection of judges and the high council of justice’, in Sophie Turenne (ed), *Fair reflection of society in judicial systems: A comparative study* (Springer 2015) 65 – 91.

51 Rapport de l’enquête parlementaire sur le respect de la Constitution, en particulier le principe de la séparation des pouvoirs, et des lois dans le cadre des procédures judiciaires entamées à l’encontre de la sa Fortis, Doc. parl. Chambre 2008–2009, no. 52-1711/007.

52 Conseil Supérieur de la Justice, Rapport sur l’enquête particulière au fonctionnement de l’ordre judiciaire à l’occasion de l’affaire Fortis, General Assembly of 16 December 2009 as cited in M Bossuyt ‘The Independence of the Judiciary in Belgium’, in Shimon Shetreet and Christopher Forsyth (eds), *The Culture of judicial Independence* (Brill | Nijhoff 2014).

and the magistracy (specifically, correspondence of the Prime Minister and of the President of the Cour de Cassation).

What is interesting though, is that the mentioned investigations did not reveal the illegal pressure from the executive; instead, they demonstrated flaws in the organisation of the judicial processes exposing judges on a bench to the risk that their behaviour will shed light on their independence. In fact, the subsequent criminal proceedings concerning the judges active in Fortis affaire revealed shortcomings in their behaviour (albeit minor).⁵³

In fact, a parliamentary inquiry had been set up to ‘examine whether respect for the Constitution, in particular the principle of the separation of powers, and whether the law was observed in the context of the legal proceedings instituted against Fortis’. Specifically novel questions concerned ‘the conditions under which the parliamentary commission of inquiry can exercise its mission in parallel with judicial (criminal or other) or disciplinary proceedings’, conditions which have been deemed not to exist.⁵⁴ The inquiry concluded that precisely in light of the requirements of separation of powers resulting from the ECHR and the Constitution, if the parliamentary commission were to deviate from this opinion and decide to continue its work without hesitation, ‘it is to be expected that the progress, effectiveness, legality and credibility of its work would be seriously compromised, with regard to the elementary respect for the fundamental rights of the persons involved in this work’.⁵⁵

The parliamentary commission highlighted that there is no shortage of legal avenues to shed light on suspected violations of the separation of powers, affirming that first of all, there is the “Fortis” court case itself, which was still ongoing at the time of writing of the report, as well as the criminal and disciplinary proceedings, the possibility of introducing other procedures and finally, reference is made to the expected developments from the inquiry envisaged by the ‘Commission of advice and investigation’ convened by the High Council for Justice. Moreover, it has been underlined that all these procedures must be carried out in compliance with the Constitution, the laws and human rights, in order to clarify the suspicions of infringement of the separation of powers and, if necessary, to lead to appropriate sanctions, thereby mandating that ‘it is in the arsenal of these procedures that we must draw the means to ensure the triumph of the law and the truth.’⁵⁶

Lastly, it clarified that ‘it cannot therefore be maintained that in our State of law, there is no other way(s) than the parliamentary inquiry to establish the truth. It is still necessary to (1) have the courage to initiate criminal and disciplinary proceedings when one is convinced that offences have been committed; (2) trust the course of justice; and (3) have the patience to wait for the outcome of the proceedings’.

53 Of four judges put to trial before the Court of Appeal in Ghent, three were acquitted, whereas one was found guilty of disclosing professional secret in the form of a draft judgement she shared with a former colleague for a ‘linguistic revision’. Court of Appeal of Ghent, 14 September 2011, No N-20110914-1, confirmed by a judgment of the Court of Cassation, 13 March 2012, P.11.1750.N (available at www.cass.be)

54 Chambre des Représentants de Belgique, Enquête Parlementaire sur le respect de la Constitution, en particulier le principe de la séparation des pouvoirs, et des lois dans le cadre des procédures judiciaires entamées à l’encontre de la sa FORTIS (DOC 52 1711/007, 18 mars 2009) 83.

55 *Ibid* 103f.

56 Chambre des Représentants de Belgique, Enquête Parlementaire sur le respect de la Constitution, en particulier le principe de la séparation des pouvoirs, et des lois dans le cadre des procédures judiciaires entamées à l’encontre de la sa FORTIS (DOC 52 1711/007, 18 mars 2009) 104.

The inquiry concluded that if there is no coordination of all these procedures, which may involve numerous people, there is certainly a risk of conflicting decisions. To avert this danger, there is much more to be expected from the intervention of the High Council for Justice, whose specific and constitutional mission has been emphasized - than from the continuation of the parliamentary inquiry entrusted to the commission. Not holding the inquiry immediately would thus honour the fundamental requirements of the Constitution, the law and human rights, the separation of powers and the Belgian rule of law, thereby refraining from compromising the progress and outcome of these other procedures, which are legally justified.

The findings of the Parliamentary Commission point to the willingness on the part of the Belgian governance and legal system to self-reflect on the entirety of the system and address shortcomings as they present themselves. The *Fortis affaire*, as others described also in this report, serve as a safety valve and the possibility for the public to reassess the functioning of the *trias politica*.

3.2.2. Principle of legality and judicial organisational independence

One critical guarantee in a rule of law-abiding state is the presence of rules relating to the judicial organisation (laying out which jurisdictions with which powers are competent for what, how many there shall be, etc.), as well as to the procedure and to the statute of judges. As notably mentioned in the ECtHR's case *Coëme and others v. Belgium*, it stems from the condition of equality enshrined in Article 6 of the ECHR that these standards must essentially fall within the realm of the legislative, rather than the executive branch.⁵⁷ Furthermore, the principle of legality in these matters is enshrined in the Constitution and can be the subject to constitutional judicial review.⁵⁸

In the 2019 CoE's "Report on judicial independence and impartiality in the Council of Europe member States", the CCJE member in respect of Belgium states that the purpose of the law adopted in 2014, namely establishing the autonomous management of the judicial organisation, was to transfer the justice management to newly created bodies within the judicial organisation: the College of Courts and Tribunals, the College of Public Prosecutors and the Executive Committee of the Court of Cassation. The report points out that the Belgian legislator left it to the government to "determine the scope, phasing and modalities of the transfer of management powers", which after five years after the adoption of the law has not been carried out, thereby raising questions with regard to the principle of the legality of the judicial organisation.⁵⁹ With concern to the system of supervision by the Minister of Justice and the Minister of the Budget over the management acts of the above-mentioned bodies, the management contract represents one significant supervisory instrument. The latter aims at imposing priorities, directing the allocated resources, thus enabling the executive to play a relevant role in the establishment of judicial policies. The law mandates that two Government Commissioners shall attend meetings of the Colleges and have a right of appeal against the decisions of the Colleges to the Minister. According to the report, the system in its current version would appear to raise concerns about the respect for the independence of the judiciary at an organisational level.

57 *Coëme and others v. Belgium* App 32492/96 (ECtHR, 18 October 2000) §98.

58 Pierre Nihoul, 'L'Indépendance Et l'Impartialité du Juge' (2012) 24/1 ERPL/REDP 120.

59 CoE, 'Council of Europe's Report on judicial independence and impartiality in the Council of Europe member States' (2019) 26 §108.

Belgium addressed the point regarding the organisational independence of the Councils for the Judiciary and the court administration in its comment, clarifying that it can neither be affirmed that the Department of Justice has lost its autonomy since 2014, nor claimed that the judicial branch is now treated as a government administration. This is because any act by a minister is subject to administrative and budgetary *ex ante* controls and verifications by the Inspectorate of Finance, a legal requirement which has always been in place.⁶⁰ With regard to the points made in respect of autonomous management, Belgium points out that the aim is to have the resources allocated autonomously by the judiciary itself via a management contract concluded between the Colleges and the Minister of Justice. These colleges will “act as a buffer between the executive and the courts, which develop case law”, without *ex ante* controls but with the possibility to lodge *a posteriori* appeals against decisions of the Colleges “in the event of an illegality or a breach of the management contract.”⁶¹ Moreover, the 2014 law on the introduction of autonomous management of the judicial organisation, as demonstrated by the Court in its jurisprudence (e.g. Belgian Constitutional Court, Decision of 15 October 2015, ECLI:BE:GHCC:2015:ARR.20151015.5), has been declared compatible with the Belgian Constitution, specifically with the principles of separation of powers and of judicial independence, with the principle of legality of the judicial organisation, as well as with Article 6 of the ECHR, with Article 47 of the CFR and with Article 14 of the ICCPR.⁶² Lastly, Belgium admitted that, although the full implementation of autonomous management has been delayed and although no objective workload measurement tool is in place for now, human resources including members of the judiciary are allocated through consultation between the College of the Courts and Tribunals, the College of Public Prosecutors and the Minister.⁶³

3.2.4. Principle of legality and budgetary matters and judicial remuneration

The Belgian Constitutional Court determined on the basis of Arts. 146, 152(1), 154, 155 and 157 of the Constitution the extent and conditions for the interference of the legislative power into the budgetary arrangements governing the judiciary. The Belgian Constitutional Court confirmed that adoption of provisions on remuneration of independent magistrates (just as that of public employees) lies within the remit of powers of the legislature.⁶⁴ The Constitutional Court clarified in its jurisprudence that the fact that Article 152 of the Constitution require the legislature to intervene in the matters of remuneration and pensions, but it does not allow to draw the conclusion that there is a general principle of law according to which every aspect of the administration of the judiciary must be regulated by law and all delegation to the federal government in this regard is ruled out. The delegation of power to the federal government remains in all circumstances compatible with the principle of legality insofar as the authorisation is sufficiently precise and concerns the implementation of measures whose essential elements have been determined beforehand by the legislator.⁶⁵

60 CoE, ‘Council of Europe’s Report on judicial independence and impartiality in the Council of Europe member States’ (2019) 27 §109.

61 *Ibid* 67.

62 Belgian Constitutional Court, 15 October 2015, No 138/2015, B.37, B.40.1, B.44.2.

63 CoE, ‘Council of Europe’s Report on judicial independence and impartiality in the Council of Europe member States’ (2019) 70.

64 Belgian Constitutional Court, 16 May 2013, No 67/2013, B.7.2 and Belgian Constitutional Court, 15 October 2015, No 138/2015, B.40.

65 Belgian Constitutional Court, 15 October 2015, No 138/2015, B.40.

In a 2013 case (Constitutional Court, Decision of 21 May 2013, ECLI:BE:GHCC:2013:ARR.20130516.3) the Belgian Constitutional Court highlighted that, although the principles of the independence of the judiciary and separation of powers are fundamental characteristics of the rule of law, they do not imply that the remuneration and pension conditions of judges cannot be aligned by the legislator competent for the pensions of magistrates, on the scheme applicable to public sector personnel. That case clarified that the revised article 152 of the Constitution requires the salaries and pensions of judges to be determined by law, however this provision does not require that the pension be a continued salary as was the case before the law on remuneration of the 5th of August 1978. In that instance, the Court concluded that a transitional regime can only be considered discriminatory if it results in a difference in treatment that is not subject to reasonable justification or if it carries excessive infringement of the principle of legitimate expectations. The Court affirmed that the distinction made by Parliament is based on an objective criterion, namely the circumstance that the magistrate has or has not reached the age of 55 on the 1st of January 2012. In addition, the distinction made by Parliament has been considered relevant and reasonably justified: On the one hand, the impact of the modification of the quarterly remains within reasonable limits, while on the other hand, the Parliament considered that it would not be fair to submit older magistrates, who are already close to retirement, to the new rules.⁶⁶

Budgetary provisions have a strong impact not only on remuneration of judges, but also on their appointments. In this respect, the Belgian judiciary is assimilated to a government administration since no magistrate, clerk or secretary may be appointed, hired, or promoted without the agreement of the Inspectorate of Finance. Independently from the available budgetary margin, the general basis for establishing this structural balance is provided by a sophisticated mathematical model of expenditure projection, which “does not take into account either the staff framework prescribed by law or the functionally justified nature of a job.” Whereas in some jurisdictions the staff is fully provided, in others it is only about 80% or 90%, depending on the category at stake (Belgian Constitutional Court, Decision of 15 October 2015, ECLI:BE:GHCC:2015:ARR.20151015.5, B.108.2 and B.114.2).⁶⁷ The shortage of judicial and non-judicial staff has the effect of lengthening the time needed to deal with cases, thereby undermining the proper functioning of the judiciary and, consequently, its ability to fulfil its constitutional mission.⁶⁸ With regard to this non-filling of posts, Belgium used as a justification its budget restrictions and the general shortage of applicants, but it underlined that the human resources’ budget allocated to the judiciary (judicial and other staff) grew significantly between 2014 and 2019.⁶⁹

Finally, the impact of the budgetary concerns affects all the elements of the judicature and is even felt on the level of the Constitutional Court. Even though it enjoys normative and operational autonomy, guaranteed by the Constitution and the Special Act on the Constitutional Court (*Bijzondere Wet* of 6 January 1989),⁷⁰ its financial autonomy is *de facto* limited by expenses

66 Belgian Constitutional Court, 16 May 2013, No 67/2013, B.7.2-B12.

67 CoE, ‘Council of Europe’s Report on judicial independence and impartiality in the Council of Europe member States’ (2019) 27 §110.

68 *Ibid.*

69 CoE, ‘Council of Europe’s Report on judicial independence and impartiality in the Council of Europe member States’ (2019) 70f.

70 Belgian Constitution of 1998, Art 142.

cut and a more extensive review on its finances by the Chamber of Representatives than the Special Act on the Constitutional Court allows.⁷¹

Lastly, the Constitutional Court, taking into consideration the reasoning of the ECtHR, found a breach of the right to a fair trial in relation to the independence of the members of the Board for Disputes on Authorisations, more specifically with regard to the delegation to the Flemish Government of the power to determine the remuneration, allowances and compensation of councillors. It affirmed that the mere fact that the Council for Disputes on Licence Authorisations is not part of the judiciary does not mean that it does not have to meet the requirements of independence and impartiality, since the general principle of law that the judge must be independent and impartial applies to all courts. The Court clarified that it follows from the constitution, as well as from Article 6 of the ECHR and the case of *Lavents v. Latvia*, that the competent legislature must itself regulate the essential principles. These include, in the context of the establishment of a court and in light of its independence, the salaries of its members, although, in this respect, reference to a scale or grading system may suffice. It concluded that, by entrusting the entire remuneration system to the Flemish Government, the contested article violates articles 10 and 11 of the Constitution, in combination with the general legal principle of the independence of the judge.⁷²

3.2.5. Principle of legality and system of nominations and appointments

Although the appointment choice of judges is not sufficient on its own to ensure that legal processes make space for the narratives of all social groups, it is nevertheless hard to see how the judiciary can legitimately play its current role without lifting the collective judicial identity-blackout, acknowledging that the identities which make up the judiciary as a group affect courts' judgments and accepting that the over-representation of the same narrow identity group, especially at senior levels, is at least as much a matter of concern as it was over fifty years ago.⁷³ It is probably one of the greatest challenges for the Belgian judiciary to better reflect the societal structure within the composition of its courts. To further reflect on this issue, it is useful to take a closer look at the appointment procedures of judges at various courts in Belgian justice system.

The Constitutional Court consists of six experienced top lawyers and six former politicians. The executive branch can only refuse to appoint the candidate selected by the Superior Council of Justice for explicit reasons (for example, in the event of irregularities) and it cannot decide to appoint another candidate.⁷⁴

The position of the Belgian constitutional judges is safeguarded by an appropriate appointment procedure, a non-renewable mandate for life and solid protection against removal. The appointment procedure gives a role to the Parliament and political parties, which

71 Evelyne Maes, 'The Independence of the Belgian Constitutional Court' (2020) In Ernst Hirsch Ballin, Gerhard van der Schyff, Marteen Stremmer (eds) *European Yearbook of Constitutional Law* (1 T.M.C. Asser Press 2019) 37.

72 Belgian Constitutional Court, 30 June 2014, No 98/2014, ECLI:BE:GHCC:2014:ARR.20140630.4.

73 Lizzie Barnes and Kate Malleson, 'Lifting the Judicial Identity Blackout (2018) 38 OJLS 2, 357–381.

74 It must refer the appointment file to the Superior Council of Justice and request that a new proposal be submitted. The decision of the executive power not to appoint a candidate for the office of magistrate may be challenged before the Council of State. The illegality of the proposal made by the Superior Council of Justice may also be invoked in the context of such legal action.

per se does not limit the judges' independence.⁷⁵ In fact, the legislature or the executive can only influence the composition of the Constitutional Court by changing the retirement age but if the competence or composition of the Constitutional Court needs to be changed, the Specific Act on the Constitutional Court or the Constitution should be amended.⁷⁶ Given the fact that the Constitutional Court is composed by former politicians, the appointment process is necessarily political. 'Particracy' in the Belgian context is, in fact, representative of coalition structure of organs of powers and social tensions, which affect the manner in which candidates are presented and evaluated by the public. The recent 2020 failed appointment procedure of Zakia Khattabi, ex-Ecolo⁷⁷ chair illustrates well this issue. The female politician of Moroccan origins fell short of 3 and 2 votes in a consecutive procedure in the Senate. As a result, the appointment process restarted anew with, probably a very young politician being appointed in her place.⁷⁸

Khattabi's appointment fell through, as it seems, due to an alleged fake news. Apparently, in the words of N-VA⁷⁹ president Bart De Wever, she physically prevented a deportation of an illegal migrant from Tunisia she happened to share the flight with. Even though the AIG (police's inspectorate) denied such representation of events, the 2013 incident together with the fact that she is not a lawyer served as a spring-board to discredit Khattabi as the candidate to the position.⁸⁰ This evokes another trend that can be seen in the appointment system to the highest court positions – mainly that entrenched practice of replication of group-based identity hierarchies from legal practice into the judiciary, which may potentially hamper the inclusive and representative model of the judiciary in Belgium and other countries.⁸¹

3.2.6. The number of judges delivering the ruling is not determinant for the material independence of judges

Lastly, as far as material independence of judges is concerned, in judgement 62/2018, the Constitutional Court dismissed the combined actions for annulment appeals lodged against the so-called '*Potpourri I Law*'. The applicants criticised the generalisation of the exclusive jurisdiction of the courts of first instance and the courts of appeal, except when the chief of police decides to assign a case to a collegiate chamber. According to the applicants, the contested provisions have the effect that litigants who are subject to similar legal proceedings could be tried sometimes by a single judge and sometimes by a collegiate chamber. The discretion thus granted to the chiefs of police infringes upon the principles of foreseeability and legality laid down in the provisions relied on in the plea. The risk of arbitrariness and prejudice to the independence of the courts - which has been emphasised by legal doctrine is, according to the applicants, disproportionate to the objective of eliminating the backlog of

75 Evelyne Maes, 'The Independence of the Belgian Constitutional Court' (2020) In Ernst Hirsch Ballin, Gerhard van der Schyff and Marteen Stremmer (eds) *European Yearbook of Constitutional Law* (1 T.M.C. Asser Press 2019) 37.

76 *Ibid* 20f.

77 French speaking party: Écologistes Confédérés pour l'organisation de luttes originales green in its basic ideas.

78 'N-VA stuurt jonge jurist Willem Verrijdt naar Grondwettelijk Hof De Tijd ([tijd.be](https://www.tijd.be), 22 January 2022) <<https://www.tijd.be/politiek-economie/belgie/federaal/n-va-stuurt-jonge-jurist-willem-verrijdt-naar-grondwettelijk-hof/10358255.html>> accessed 31 January 2022.

79 A relatively new Flemish party *Nieuw-Vlaamse Alliantie*.

80 'Khattabi geen rechter bij Grondwettelijk Hof: 'Dit zal niet zonder gevolgen blijven' De Standaard ([standaard.be](https://www.standaard.be), 17 January 2020) <https://www.standaard.be/cnt/dmf20200117_04809589> accessed 31 January 2022.

81 See the discussion in Lizzie Barnes and Kate Malleson 'The Legal Profession as Gatekeeper to the Judiciary: Design Faults in Measures to Enhance Diversity' (2011) 74 *The Modern Law Review* 2, 245–271.

cases and is, moreover, all the greater in that the experience required to sit as a single judge has been reduced from three to one year. The Court rejected the plea stating that the mere fact that the seat of a court consists of one judge and, in analogous cases, of several judges, does not in itself create a difference in treatment that is contrary to Articles 10 and 11 of the Belgian Constitution. In itself, the number of judges does not determine the quality of the decision rendered.⁸²

3.3 Impartiality

The Belgian Constitutional Court often addresses in its reasoning the criteria of subjective and objective impartiality evoking the well-established standard developed first in 1982 *Piersack* case. In a 2016 ruling (Belgium, Constitutional Court, Decision of the 14th of January 2016 ECLI:BE:GHCC:2016:ARR.20160114.5), the Constitutional Court echoed that impartiality must be assessed in two ways. Subjective impartiality, which is presumed until proven otherwise, requires that in a case on which it must rule, the judge must be free of bias and prejudice and have no interest in the outcome of the case. Objective impartiality requires that there are sufficient safeguards to exclude justified doubts on these points. With regard to objective impartiality, it must be ascertained whether, irrespective of the conduct of the judges, there are demonstrable facts giving rise to a doubt as to their impartiality.⁸³

The extensive analysis of the criterion of impartiality against the background of ECtHR jurisprudence can be found in a 2014 Constitutional Court judgement (Belgium, Constitutional Court, Decision of 30 June 2014, ECLI:BE:GHCC:2014:ARR.20140630.4). The case concerned expedite procedures implying the cancellation of a hearing stage before the Board for Disputes on Authorisations through a decree amending the Flemish Land Use Planning Code in relation to the Council for Disputes on Licence Authorisations.⁸⁴ The applicants claimed among other infringements a violation the right to an independent and impartial judiciary, as enshrined in Arts. 6 and 13 of the ECHR and with Arts 144, 145, 148, 149, 160 and 161 of the Constitution.

With regard to principle of impartiality, the Constitutional Court emphasised that its violation does not require proof of bias. In fact, an appearance of bias may suffice. As ruled by the ECtHR, the perspective of the individual 'is relevant but not decisive. The decisive factor is whether the doubts of the person concerned can be regarded as objectively justified' (ECHR, 21 December 2000, *Wettstein v. Switzerland*, § 44). The Court concluded that, in assessing whether the principle of impartiality has been sufficiently taken into account in the context of simplified procedure, it is necessary to consider the nature and effects of the simplified procedure as a whole. In particular, the composition and organisation of the Board should be considered when challenging the authorisations for land use where a member of the Board must rule on a case that he/she had previously been involved in. However, it reminded that any prior intervention by the judge is not such as to give rise to a justified presumption of bias on the part of the litigant. For the principle of impartiality to be disregarded, the judge's intervention must be such as to create the impression that he or she has prejudged the merits of the case. This ground of the plea was deemed unfounded.⁸⁵

⁸² Belgian Constitutional Court, 31 May 2018, No 62/2018, ECLI:BE:GHCC:2018:ARR.20180531.3.

⁸³ Belgian Constitutional Court, 14 January 2016, No 3/2016, B.10.1.

⁸⁴ The Code introduced a simplified procedure for dealing with appeals that were deemed unnecessary or manifestly inadmissible and appeals for which the Council was considered manifestly incompetent.

⁸⁵ Belgian Constitutional Court, 30 June 2014, No 98/2014, ECLI:BE:GHCC:2014:ARR.20140630.4.

3.4 The interdependence between independence and impartiality

Echoing the established case law of ECtHR, the Court of Cassation considered in a judgement of February 2015 (Cass., 10 February 2015, P.15.0172.N.) that ‘the requirements of independence and impartiality are closely linked, so that the guarantees of the individual independence of the judge can be taken into consideration to assess its objective impartiality’.⁸⁶ One plea in the case alleged an infringement of Article 151(1) of the Constitution and Article 6(1) of the ECHR on the basis that the judgement was previously delivered by a substitute judge, who is a lawyer in his main profession and, in that capacity, a member of the Antwerp Bar Association. For this reason, the party affirmed that it was difficult to assume that he is independent from the civil parties.⁸⁷ The analysis of the judgement led to the conclusion that independence corresponds to a legal mechanism rendering the judicial function effective because of its tendency to maintain the impartiality of the courts and, in this way, to achieve the rule of law. Since judges have no reason to fear neither injunction nor censorship by political powers, by their hierarchical superiors, their peers or anyone else, they can freely judge on the case submitted to them in all objectivity and without prejudice or bias. In this regard, the Belgian internal guidelines guaranteeing judicial independence help to ensure that the litigant is judged with complete impartiality and objectivity.⁸⁸

4. The ethics of judges and accountability system

Not only the system and guarantees that have been put in place in a given context are of relevance whenever analysing the organisation of justice, but also the behaviour of judges, which shall not put at risk the reputation and perception of their independence and impartiality. Thus, ethical professional codes must necessarily be in place, as well as possible disciplinary measures.

4.1. Ethics and code of conducts, the role of Conseil Consultatif de la Magistrature and of Conseil Supérieur de la Justice

The law of 23 March 2019 amending the Judicial Code to improve the functioning of the judiciary and the High Judicial Council came into force on 1 January 2020 and provides for all categories of judges (whether they are sitting, substitute or lay judges) that the duties of their office, the dignity thereof and their respective tasks shall be interpreted in the light of general ethical principles.⁸⁹ Judges are required to take an annual training course on ethics, and each court must indicate in its activity report the initiatives undertaken to ensure respect for ethical standards.⁹⁰ The oversight of whether this indeed is the case lies in the hands of the Conseil Consultatif de la Magistrature.

The *Conseil Consultatif de la Magistrature* or *Adviesraad van de Magistratuur* (hereinafter: CCM) is elected by all Belgian magistrates and is composed of 44 judges, 22 Flemish and 22 Francophone, whose work consists mainly of giving recommendations to the parliament and

⁸⁶ Belgian Court of Cassation, 10 February 2015, AR P.15.0172.N, ECLI:BE:CASS:2015:ARR.20150210.5.

⁸⁷ Belgian Court of Cassation, 10 February 2015, AR P.15.0172.N, ECLI:BE:CASS:2015:ARR.20150210.5, §5.

⁸⁸ Michaël Mallien ‘L’indépendance fonctionnelle des magistrats’, in Xavier De Riemaeker (ed) *Statut et déontologie du magistrat* (La Chartre, 2020) 117.

⁸⁹ Belgian Judicial Code as amended by the law of 23 March 2019, Art 404.

⁹⁰ CoE, ‘Council of Europe’s Report on judicial independence and impartiality in the Council of Europe member States’ (2019) 71.

the minister of justice, either under request by parliament or the magistracy or spontaneously.⁹¹ The CCM often gave advice opposing and criticizing certain legislative proposals that could potentially raise issues. The recommendations were often given in unanimity of the associations of magistrates, the forum, and lawyers' associations.⁹² This practice is laudable from a democratic perspective, thereby highlighting the harmonious cooperation between the Belgian judiciary and the lawyers. In this regard, the CCM underlined in a 2019 memorandum the lack of staff, obsolete computer systems, as well as the declining attractiveness of the judicial profession, the judiciary thus demanding further resources from the government.⁹³

In July 2019 the CCM handed Didier Reyners and Johan Vande La-note (who formed at the time the duo of informers in view of finding a majority at the federal level) a 14-page document, a sort of "grievance memorandum" of the magistrates. The latter continues the lobbying campaign of the representatives of the judiciary started before the elections of May 26. In it, the professionals of the judiciary demand a massive refinancing of their constituted power.⁹⁴

Amongst other competences enshrined in the Judicial Code, CCM was granted the power to recommend Le Conseil Supérieur de la Justice or Hoge Raad voor de Justitie (hereinafter: CSJ) to determine the set of ethical principles binding on the judiciary.⁹⁵ Such deontology as intended under the code is made of two parts in practice. The first part has a direct basis in legislation and includes the constitutional guarantees, the magistrates' oath, and Art.158 of the criminal code on professional secrecy. As it was recalled in this report, the constitution mandates the independence of the magistrature (applying both to judges and the public ministry), which shall not be understood as a privilege for single judges, but rather as a guarantee of democracy and rule of law for the society at large.⁹⁶ The magistrates' oath stems from a 1831 decret which reads "I swear loyalty to the king, obedience to the constitution and to the laws of the Belgian population".⁹⁷ The second part of deontological principles are enshrined in a 2012 booklet named "Guide for magistrates: principles, values and quality (2012)" and is a fruit of the collaboration between the CCM and the CSJ.⁹⁸ These principles include: (1) independence; (2) impartiality; (3) Integrity; (4) reservation; (5) discretion; (6) diligence (understood as availability to work in reasonable terms and time); (7) respect; (8) attention to others; (9) equality, (10) competence.

91 Ministère de la justice, Law of the 8th of March 1999 "Act establishing a Judicial Advisory Council" eli/loi/1999/03/08/1999009315/moniteur.

92 See, *inter alia*, the CCM's advice delivered on 05/04/2020, 16/06/2020, 17/11/2020.

93 Conseil Consultatif de la Magistrature, Mémorandum du Conseil consultatif de la magistrature dans le cadre de la formation d'un nouveau Gouvernement fédéral (2019).

94 Le Soir, 'Fédéral les magistrats remettent la pression' Edition Bruxelles Quotidien No 162, 13 and 14 July 2019.

95 Belgian Judicial Code, Art 305.

96 Belgian Constitution of 1998, Art 151.

97 Décret du 20 juillet 1831 concernant le serment à la mise en vigueur de la monarchie Constitutionnelle représentative, available at: <https://www.lachambre.be/kvvcr/pdf_sections/publications/reglement/Serment%20-%20décret%20NTC.pdf> See, also: Art. 158 code penal regarding professional secrecy.

98 Conseil supérieur de la Justice & Conseil consultatif de la magistrature, "Guide pour le magistrats; principes, valeurs et qualités" D/2012/12847/2 (2012) available at <<https://csj.be/admin/storage/hrj/o0023f.pdf>>.

The values and qualities are the following (a) Wisdom; (b) Loyalty, (c) Humanity, (d) Courage, (e) Seriousness, (f) Prudence, (g) Professional capacity to work, (h) Capacity of listening, and (g) Communication.

4.2 Work in Progress - ethical principles guide for Belgian magistrates

A relevant provision in this regard is art. 305 of the Belgian Judicial Code which affirms that the principle of deontology must be established by the CSJ after the recommendation of the CCM.⁹⁹ According to some scholars, as mentioned before, this may be problematic in light of Art. 404 of the judicial code which dictates a particularly strong link between the deontology on the one side and disciplinary rules, on the other.¹⁰⁰

However, the 2012 guide containing the ethical principles mandates clearly that this is a collection of principles rather than a disciplinary code, which was thus not redacted by disciplinary authorities. In order to address this issue for the future, there is the option to either vote and make the guide binding, thus crystallizing the aforementioned principles as the applicable ones, or adjourning the old principles of 2012 and publish a new guide. It seems that this last option is more desirable, as numerous principles need to be updated to have relevance in the disciplinary fields.¹⁰¹ Considering that certain values and principles are complex to establish, there is a pressing need for an update of these rules. For instance, obliging the judge to be “bold” appears controversial not only because courage finds poor application in practice, but also because similar clauses could be misused and taken as a pretext to dismiss or marginalize judges which “disturb” and criticize other branches of power.¹⁰² In fact, the CCM met with the CSJ to collaborate in the framework of a working group, rather than working separately as per usual. This committee is composed by members of both the CSJ and CCM to reach a common agreement and text, with the aim of developing a guide side by side, starting with “carte blanche” and only taking inspiration from the 2012 document.¹⁰³ This project, which is not approved yet by the CCM and which will have to be sent out to CSJ, consists now of a preparatory work of two and half pages and aims at establishing the principles of ethics and deontology, the CCM having the honour to benefit from the help of two former Judges of the ECtHR.¹⁰⁴ Differently than in France, in Belgium there is no possibility of allowing magistrates to inform themselves and to take advice via phone or written recommendation. After the meeting between the College of Ethics of the Judiciary (of France) and the Advisory Council of the Judiciary on the 11 February 2022, aimed at getting to know the respective systems better, there was consensus among the members of both institutions that it would

99 Belgian Judicial Code, Art 305 “Les principes généraux relatifs à la déontologie des magistrats effectifs et suppléants, des assesseurs au tribunal de l’application des peines, des juges et conseillers sociaux et des juges consulaires sont établis par le Conseil supérieur de la Justice après avis du Conseil consultatif de la magistrature”.

100 Belgian Judicial Code, Art 404 “[...] En ce qui concerne les membres de l’ordre judiciaire visés à l’article 305, les devoirs de leur charge, la dignité de son caractère, et les tâches de leur charge sont interprétés, notamment, à la lumière des principes généraux relatifs à la déontologie”.

101 Honourable Judge Fabrizio Antioco - Member of the Public Prosecutor’s Office (at the Labour Auditorate of Brussels) and President of the French-speaking College of the Conseil Consultatif de la Magistrature, seminar TRIIAL “Judicial ethics and accountability” (15 February 2022).

102 *Ibid.*

103 Honourable Judge Fabrizio Antioco - Member of the Public Prosecutor’s Office (at the Labour Auditorate of Brussels) and President of the French-speaking College of the Conseil Consultatif de la Magistrature, seminar TRIIAL “Judicial ethics and accountability” (15 February 2022).

104 Honourable judge Françoise Tulkens and Honourable Judge Paul Lemmens.

be desirable to allow Belgian magistrates to receive such advice if needed. In fact, the CCM plans on proposing the adoption of a system similar to the French one, where judges can ask for written or oral advice. This would render appropriate the practice of judges receiving recommendations from a specialized body on a specific case, since asking colleagues is not considered opportune. Additionally, the CCM plans to organize a similar meeting that will take place in the Netherlands.¹⁰⁵

4.3 Disciplinary measures and the freedom of expression of judges

A final aspect of deontology is discipline. In fact, in Belgium the CSJ has competence in the field of deontology but not in the area of discipline, as this is prohibited by the Belgian Constitution.¹⁰⁶ Two disciplinary tribunals have been created, namely a Francophone and a Flemish one, as well as two appeal courts, a Francophone and Flemish one. All judges have all one vote, while the president has an additional consultive vote. The appeal courts are competent not only for trying judges but also members of the judiciary (including administrative judicial bodies), additionally they are tasked to produce reports on disciplinary cases.¹⁰⁷ These reports are not public; however, they are sent out to the CSJ, which collects them to develop a single, anonymized report including all past rulings and common practices by the disciplinary appeal courts. This will allow to have picture of the Belgian disciplinary jurisprudence as the report is planned to be published at the end of 2022.

In this context a 2021 case is of particular relevance, concerning a substitute judge who criticized the public ministry in an article entitled “Et juge et soumis” (namely “And judge and subordinate”) published on the newspaper “*Le Soir*” on the 31 January 2019. Affirming that these critics constituted derogatory statements with regard to the body to which the judge belongs and that the so called ‘carte blanche’ article would undermine the citizen’s confidence in the institution of the Public Ministry, a disciplinary sanction has been imposed on the judge on the basis of non-compliance with the requirements of Art. 404 of the Judicial Code.¹⁰⁸ The decision was appealed in front of the francophone disciplinary court, which accepted the appeal, annulling the disciplinary sanction¹⁰⁹.

Firstly, the *tribunal disciplinaire* reminded that the disciplinary authority that imposes a minor sanction does not necessarily have to meet the requirements of Art. 6 ECHR if its decision can be appealed to a disciplinary court, which does *in casu*. In its reasoning the court concluded that, by publishing this contribution, the substitute judge legitimately used his freedom of expression on a sensitive subject that concerns every citizen, namely the requirement of an independent judicial system in a democratic society. The court affirmed that according to his statements, his aim was to alert citizens to the consequences of the reform envisaged by the political authorities, particularly in terms of the separation of powers, since the judiciary would

105 Honourable Judge Fabrizio Antioco - Member of the Public Prosecutor’s Office (at the Labour Auditorate of Brussels) and President of the French-speaking College of the Conseil Consultatif de la Magistrature, seminar TRIAL “Judicial ethics and accountability” (15 February 2022).

106 Belgian Constitution, Art.151(8) “Il y a pour toute la Belgique un Conseil supérieur de la Justice. Dans l’exercice de ses compétences, le Conseil supérieur de la Justice respecte l’indépendance visée au § 1er. 8° à l’exclusion de toutes compétences disciplinaires et pénales:
- recevoir et s’assurer du suivi de plaintes relatives au fonctionnement de l’ordre judiciaire;
- engager une enquête sur le fonctionnement de l’ordre judiciaire.”

107 Belgian Judicial Code, Arts. 411, 411/1, 412.

108 Roi de Bruxelles, disciplinary sanction, 16 April 2019.

109 Tribunal disciplinaire francophone, 04 October 2019, case number not available.

be in a subordinate relationship with the executive. The ruling highlights that in doing so, he did not fail in his duties, nor did he undermine the proper functioning of justice as envisaged by article 404(§2) of the Judicial Code, which is otherwise extremely vague.¹¹⁰ Moreover, he had informed his superior of the publication of his *carte blanche*; the case he mentions in his article is part of the public domain and he has not revealed anything that has not already been widely publicized.¹¹¹ Additionally, given the link of subordination between the Minister of Justice and the Public Prosecutor's Office, it is legitimate to be concerned about the consequences of the proposed reform on the judiciary. Finally, the disciplinary appeal tribunal noted that numerous actors in the justice system have expressed in strong terms the existing malaise and disfunctions without being reproached, all of them and with good reason, thereby recalling that "when democracy and fundamental freedoms are in peril, reserve, yields to the right to indignation".¹¹² For these reasons the court reached the conclusion that the appeal lodged by concerned judge is admissible and well-founded in light of Art. 10 ECHR.

This judgement has been described in the 2020 *Journal Tribunaux* as "both historic [...] and banal." Historic, because for the first time a Belgian court has enshrined the right to freedom of expression for judges, and banal, because it merely transcribes the well-established jurisprudence of the ECtHR.¹¹³ This historical nature of the judgment and the echo it has received have been interpreted by the scholars as a possible reflection of the fact that this freedom has not yet been truly integrated into the Belgian judicial culture. Thus, it could be affirmed that the disciplinary tribunal is merely setting the record straight,¹¹⁴ as in a democratic society, judges not only have the right but also the duty to express their opinion on the functioning of the judicial system. In line with the ruling, a judge who, in an article published in a daily newspaper, alerts citizens to the consequences of a reform envisaged by the political authorities, particularly in terms of the separation of powers, is not failing in his duties or undermining the proper functioning of justice.

5. Other Belgian-specific challenges to judicial independence, impartiality and accountability

5.1 Equality of arms

The principle of equality of arms is an essential element of the right to a fair trial, as it requires a fair balance between the parties, each of whom must be given a reasonable opportunity to present their case on terms that do not place them at a distinct disadvantage to the other.¹¹⁵ This is the first of Belgian law specific issues which affect the exercise of powers of the judiciary and principle of fair trial in general. In a 2010 case (Belgian Court of Cassation, Decision no P.10.0119.N of 27th of April 2010, ECLI:BE:CASS:2010:ARR.20100427.6.), the Court of Cassation dealt with a potential breach of the right to a fair trial and the principle

110 This conclusion is shared by academia and judiciary alike, see "La discipline judiciaire", *Actualités du droit disciplinaire*, 132.

111 Roi de Bruxelles, disciplinary sanction of the 16th of April 2019.

112 Conseil supérieur de la Justice & Conseil consultatif de la magistrature, "*Guide pour le magistrats; principes, valeurs et qualités*" DI/2012/12847/2 (2012) available at <https://csj.be/admin/storage/hrj/o0023f.pdf> 12; "Tribunal disciplinaire francophone, 04/10/2019" (2020/1 *Journal Tribunaux* n 6797) 16.

113 "Tribunal disciplinaire francophone, 04/10/2019" (2020/1 *Journal Tribunaux* n 6797) 16.

114 *Ibid.*

115 Patrick Duinslaeger, 'Het recht op wapengelijkheid' (2015) RW 402, 422.

of equality of arms, resulting from the fact that the Public Prosecutor's Office was admitted by the Court of Assize to a privileged place in the courtroom. The accused appealed to the Court of Cassation on the basis that, since the public prosecutor's office sat in an elevated position in front of the other parties, at the same table as the professional judges and that, additionally, the general counsel representing the public prosecutor's office wore the same black and red toga as the president of the assize court (unlike the assessors of the assize court and the lawyers who wore only a black toga), his right to a fair and impartial hearing had been compromised. Moreover, the defendant alleged that the public prosecutor's office could not be considered as an impartial party on the grounds that both during the examination by default and during the opposition proceedings, the same Advocate General represented the public prosecutor's office, thereby claiming that this particular position provides the Crown with the opportunity to approach the lay jury with more advantages than the accused, or at least that this is the perception the accused has. Finally, the defendant claimed that the fact that the members of the jury do not have the status of a professional judge, have not followed legal training as judges and are not experts in judicial proceedings constitute a reason to doubt their presumed independence and impartiality. The Court of Cassation rejected the appeal and found no violation of the principles of equality of arms, judicial independence, and impartiality and consequently of the right to a fair trial as mandated by the constitution, as well as Art.6§1 ECHR and Art. 14§1 ICCPR, thereby taking into consideration the guarantees and safeguards of a fair trial as required by the ECtHR when assessing the independence and impartiality of the jury. The Court affirmed that the right to a fair trial, which includes the right to equality of arms, implies only that each party to the trial must be able to use the same procedural means and to acquaint itself under the same conditions with the documents and elements submitted for assessment by the judge hearing the case, and to contradict them freely. It does not follow that parties with distinct qualities and interests must always be in the same circumstances to enjoy these opportunities. This decision is of particular importance because it clarifies the question of applicability of independence and impartiality criteria to the members of the jury (*jury populaire; Cour d'assises*)¹¹⁶ and at the same time it takes into consideration the safeguards to the right of fair trial and equality of arms mandated by the ECtHR, such as the oath taken by the members of the jury and the conduct of the proceedings before the assize court by the president, "during which the public prosecutor did not have more rights of intervention than the other parties".¹¹⁷

5.2 The concept of judicial authority under the European Arrest Warrant

In the 2020 CJEU's case *Openbaare Ministerie*, the Luxembourg court inquired whether the Belgian public prosecutor qualifies as an executing judicial authority under Article 6(2) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009.¹¹⁸ The case concerned a preliminary question made in the course of criminal proceedings initiated in Belgium against AZ, a Belgian national, accused of forgery of documents, the use of forged documents and fraud and a request was made by the Netherlands authorities to surrender him pursuant to European arrest warrants. The CJEU concluded that the concept of 'executing judicial authority' constitutes an autonomous concept of EU law which must be interpreted to the effect that it covers the authorities of a Member State which, without necessarily being judges or courts, participate

¹¹⁶ Assize courts are non-permanent courts composed of three judges and a jury of twelve lay citizens examining the most serious criminal cases.

¹¹⁷ Belgian Court of Cassation, 27 April 2010, No P.10.0119.N, ECLI:BE:CASS:2010:ARR.20100427.6.

¹¹⁸ Case C-510/19, AZ [2020] ECLI:EU:C:2020:953.

in the administration of criminal justice in that Member State, acting independently in the exercise of the responsibilities inherent in the execution of a European arrest warrant and which exercise their responsibilities under a procedure which complies with the requirements inherent in effective judicial protection. Nevertheless, articles 6(2), 27(3)(g) and 27(4) of the decision must be interpreted as meaning that the public prosecutor of a Member State who, although he or she participates in the administration of justice, may receive in exercising his or her decision-making power an instruction in a specific case from the executive, does not constitute an 'executing judicial authority' within the meaning of those provisions.¹¹⁹

5.3 Substitute judges and the principles of independence and impartiality

Already in 2015 the Belgian Court of Cassation dealt with the issues of substitute judges (Belgian Court of Cassation, Decision of 19 of March 2015 ECLI:BE:CASS:2015:ARR.20150319.9) and affirmed that the provisions in the judicial code allowing for substitute judges is not in itself contrary to Article 6 §1 of the ECHR which would only be violated on account of the concrete circumstances of the intervention of a substitute judge in a particular case.¹²⁰ Nevertheless, an amendment to the Judicial Code (Law of 23 March 2019) was adopted with the aim of reinforcing the quality of the selection process and the applicable integrity framework. The law abolishes the old system of substitute judges, and it mandates that candidates must pass an exam to become substitute judges, who must follow a compulsory training, including a module on ethics. The law entered into force in January 2020 and two examination sessions of candidate substitute judges were held in 2020, with around one third of candidates succeeding. Additionally, the law provides for the application of the general ethical principles to all categories of members of the judiciary, as well as for ethics training for both regular and lay judges. Several regulations have been adopted concerning the procedures for the organisation of examinations for those wishing to become substitute judges and allowing (lawyers) judges and substitute councillors to sit the oral evaluation examination.¹²¹

The Belgian Constitutional Court's jurisprudence mirrors these developments, and it inquires whether the judicial code's provisions relating to substitute judges are compatible with the principles of independence and impartiality. In a 2020 case before the Belgian Constitutional Court (Decision of the 16th of January 2020, 7/2020, ECLI:BE:CC:2020:7164) certain lawyers attempted to have diverse provisions of the judicial code relating to substitute judges annulled, arguing that lawyers who sit as judges do not provide sufficient guarantees of independence and impartiality as they lack professional ability.¹²² The Court dismissed the grounds of appeal as unfounded and confirmed the legality of the provisions enabling substitute judges, thereby taking into account the ECHR by establishing that the contested rules were justified in light of the right to a final decision within a reasonable time as a fundamental aspect of Art. 6 ECHR.¹²³

The cases confirmed that the appointment of substitute judges was encircled by sufficient guarantees, thereby ensuring that the case law produced was of equal quality. On the basis of a 1999 judgement and a 2012 ruling, the Court affirmed that the exemption from the examination of professional competence necessary for the judges' appointments is thus not unreasonable,

119 *Ibid.*

120 Belgian Court of Cassation, 19 March 2015, No C.10.0597.F, ECLI:BE:CASS:2015:ARR.20150319.9.

121 GRECO Fourth Evaluation Round – Second Compliance Report Belgium (2021) 6f.

122 Belgian Constitutional Court, 16 January 2020, No 7/2020, ECLI:BE:CC:2020:7164.

123 *Ibid* 28-33.

provided that the substitute judges have the requisite professional experience and that they pass an oral assessment examination mandated by the Judicial Training Institute.¹²⁴ While the Court did not comment on the ECtHR's case law brought up by the party, it took into consideration the recommendations of the Group of States against Corruption (GRECO) established by the CoE. It resorted to the latter to justify the amendment to the judicial code by affirming that the legislature wished to provide additional procedural guarantees regarding the recruitment and activity of substitute judges to strengthen the confidence of litigants in the justice system. Here, the Belgian Constitutional Court guaranteed the constitutionally protected principle of independence and impartiality of the judiciary and adequately balanced it against the proper administration of justice, affirming that sufficient procedural safeguards have been adopted to exclude any justified doubt of bias. These guarantees include rules on recruitment, training, and a clarification on the roles of substitute judges, members of the prosecution service and lawyers, making additionally a reference to the system of supervision and sanctions applicable to them.¹²⁵ The European added value of this case and the jurisprudence that followed is profound, emerging in the consistent interpretation given by the Belgian Constitutional Court of all the applicable national and international rules, including Article 6 ECHR and Articles 10, 11 and 151 of the Belgian Constitution.¹²⁶

5.4 The compatibility of holding a trial in prison with the objective and subjective criteria of the principle of impartiality and with the principle of legality

The Constitutional Court analysed in its case law whether the decision by the judge to have the trial taking place in prison breaches the principles of impartiality and legality. The question in a 2016 case (Belgian Constitutional Court, Decision no 6086 of the 14 of January 2016, ECLI:BE:CC:2016:6086) was whether this action, taken on the basis of security risks related to the transportation of the individual to pre-trial detention, compromises his/her impartiality (or the presumption of innocence of the person in pre-trial detention).¹²⁷ Here, the case related to different non-profit human rights organisations as well as lawyers' and magistrates' unions which attempted to have certain provisions of the judicial code relating to the holding of a trial in jail annulled. Their main argument was that the latter would affect their social objectives and breach the principle of impartiality of the judge. The Constitutional Court decided to partially dismiss the appeals regarding the violation of the principle of impartiality of the judge, thereby relying on the ECtHR's jurisprudence. The Court concluded that the possibility of holding a trial in prison is limited to hearings on continued pre-trial detention, removing this option in cases of settlement of the proceedings where the person concerned is detained to address the concerns about the interests of civil parties. Thereby, the Court reasoned that although during the settlement of the proceedings a hearing in prison can be a trying experience for the civil party which is often present, this practice is acceptable from an impartiality point of view because it is surrounded by sufficient safeguards. In light of the contested provisions, it reasoned that in the new prisons the courtrooms are situated at the edge of the security perimeter to guarantee the geographical proximity between the prison and the council chamber and thus the hearing would not take place in the prison itself, but in the premises where the administration is established. It added that, since the court will only sit in prison for security reasons and provided that the person concerned is in pre-trial detention and already resides

¹²⁴ Belgian Constitutional Court, 16 January 2020, No 7/2020, ECLI:BE:CC:2020:7164, B.13.3.

¹²⁵ GRECO Fourth Evaluation Round – Second Compliance Report Belgium (2021) 8.

¹²⁶ Belgian Constitutional Court, 16 January 2020, No 7/2020, ECLI:BE:CC:2020:7164, B.10. – B.13.4.

¹²⁷ Belgian Constitutional Court, 14 January 2016, No 3/2016, ECLI:BE:CC:2016:6086.

on the “prison site”, it will be up to the judge to decide whether or not to hold the trial in prison, considering the security risks involved in transporting the person in question. Thus, the court concluded that the contested provisions, insofar as they allow the Council and pre-trial courts to hold a trial in prison, do not infringe the constitutional and treaty provisions or the general principles of law.

Here, the Belgian Constitutional Court balanced in its analysis the right of the defence and the interest of the parties with the assessment of subjective and objective impartiality of the judge.¹²⁸ While on the one hand, the Court concluded that a decision on whether or not to hold the trial in prison is not likely to have a decisive influence on the judge’s opinion on the merits of the case, on the other hand it upheld the appeal relating to Art. 161 as the latter was applied retroactively, thereby infringing on the principle of legality in criminal matters, guaranteed by Arts. 10, 11 and 12§ 2 of the Constitution, in conjunction with Arts. 5§1, and 6§1 of the ECHR. Taking into account the case law of the Court of Cassation and the fact that article 161 did not introduce any innovation, retroactivity was not considered useful or indispensable to the attainment of an objective in the public interest.

6. Conclusions: Assessment of the State of Rule of Law, Trust, Independence, Impartiality and Accountability in Belgium and Future Developments

Belgium, as one of the founding states of the EU, is definitively a state embracing the heritage of European legal standards. The latter is often indirectly relied upon in the judiciary’s line of case law both at the national and federal level. Additionally, both the Belgian Court of Cassation and the Constitutional Court often make explicit reference to the ECtHR’s latest and landmark judgments when reasoning on the guarantees of the right to a fair trial. The CJEU case law is for now visible to a lesser extent, however, this is likely to change following on the proliferation of the judgements pertaining to status of judges and organisation of administration of justice system in Member States.

There have been since new judicial reforms to address judicial appointment and judicial independence-related issues as required by diverse European institutions and the CoE. The concerns raised by the CoE with regard to the system of supervision by the Minister of Justice and the Minister of the Budget over the management acts of diverse courts in light of the principle of judicial organisational independence have been addressed by the Belgian state, which affirmed that no budgetary *ex ante* controls on the judiciary are in place and that the reform mandating for this system passed the constitutional judicial review as compatible with national and international law.¹²⁹ Although admittedly the full implementation of autonomous management has been delayed and although no objective workload measurement tool is in place for now, Belgium is in the process of tackling these issues.

While new challenges arise in relation to the impartiality and accountability of the judiciary, Belgium shows diligent effort in responding to these challenges. The latest developments in national jurisprudence mirror the established assessment of the state of rule of law. This continuous evolution shows that national courts take part in the lively discussion with European Courts, thereby following the guidelines stemming from these supranational bodies. This becomes clear from the implementation of judgements, in particular the case law concerning

128 *Ibid.*

129 CoE, ‘Council of Europe’s Report on judicial independence and impartiality in the Council of Europe member States’ (2019) 27 §109; Belgian Constitutional Court, 15 October 2015, No 138/2015, ECLI:BE:GHCC:20151015.5, B.37, B.40.1, B.44.2.

substitute judges. The Belgian system aligned with the recommendations under the rule of law report and by the CoE, thereby surrounding the system of substitute judges with diverse administrative and substantive safeguards to comply with Art. 6 ECHR and the CFR. As noted by GRECO, measures concerning recruitment, training, and confusion over the roles of substitute judges, members of the prosecution service and lawyers indeed feature in the Law of 23 March 2019 amending the Judicial Code, which includes a reference to the system of supervision and sanctions applicable to them.

The reflection of the ethical foundation for performance of judicial functions deserves special mention. It will be curious to learn what impact of the elaboration and implementation of the ethical guidelines will have on both the accountability measures and the public's perception of the judicial conduct both within and outside court rooms.

It must be emphasized that the Belgian system remains complex: On the one hand, it constitutionally guarantees access to the court to the different communities, which are culturally and linguistically separated, and, on the other hand, this translates in punctual issues arising from the tensions within and between communities that go beyond the divisions along Flemish/French lines and incorporate the challenges arising from the multi-cultural and multi-rooted society. These are inevitably some of the political challenges underlying the system. Finally, the following elements of the judicial system require further attention: appointment procedures, especially to the highest courts, length of proceedings and equipping the judicial system with adequate human and other resources enabling autonomous management of courts.

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NATIONAL REPORT: HUNGARY

The report was prepared under the TRIIAL project, co-funded by the European Union's Justice Programme (2014-2020)

Prepared by: Zoltán Fleck and Ágnes Kovács



Executive Summary

This national report on Hungary focuses on the basic rule of law values specified in the TRIAL project in relation to the third branch of power, the judiciary. Since 2010, Hungary has become a prime example of decline of democracy and the rule of law. Due to a disproportional election system, Fidesz gained a two-thirds majority in the 2010 parliamentary election and so the Orbán government was able to completely alter the constitutional structure of the country with a new constitution (the 2011 Fundamental Law), nine amendments to it and new regulations on the Constitutional Court and the judicial administration, among many other things. The judiciary could not escape the consequences of this political turn. However, judicial staff cannot be completely and uniformly reshuffled in a short period. Remnants of independence and integrity continue to work in a corrupt institutional setting.

The problems in the basic institutional foundations of judicial independence are first approached through a description of the general system. We then present some typical and well-known cases which illustrate the conflict with the fundamental values of European rule of law. The classic guarantees of judicial independence – appointments, immovability, career decisions and accountability, the allocation of cases and freedom of expression of judges – have developed into a typical set of practical examples.

Coherent conclusions can be drawn from the historical, institutional and case analyses. At the start of the period studied, tension between rule of law expectations and Hungarian practice as described in this country report continued to grow. There is serious doubt about the strength of European judicial cooperation and the training of judges in such circumstances. Institutional pressures and the general legal and political environment seriously relativise the commitment to the principles of European rule of law.

In recent years during the period studied, the commitment of the Hungarian state to implement European judgments has not changed. This is a more powerful message for national judges than any good practice from other states.

This report highlights a sample of the collection of cases identified during the TRIAL project, which are available on the CJC database, and also insights from the TRIAL Hungarian training course.

Introduction: a backsliding of democracy and the rule of law

The Fundamental Law¹³⁰ that entered into force in 2012 was not ideologically neutral. It reflects the will and ideology of the Fidesz-KDNP political coalition and was adopted in a procedure corresponding to this. It was not preceded by any consultation between parliamentary parties or social debate. Orbán's system took advantage of the fact that in Hungary in public law terms constitution-making is not separate from the legislature, and a two-thirds majority in parliament gives full powers to make and amend the constitution.

The Orbán government has steadily and significantly expanded the number of legislative items requiring a two-thirds majority (so called cardinal acts). In contrast to the situation before 2010, it is not only public law and fundamental rights but also policy laws that have been given this entrenched form. This has severely limited the room for manoeuvre of future parliaments and governments not enjoying a two-thirds majority of the seats. The extended two-thirds

130 The Fundamental Law of Hungary, <https://www.parlament.hu/documents/125505/138409/Fundamental+law/73811993-c377-428d-9808-ee03d6fb8178>

catalogue in the Fundamental Law and the politically completely occupied Constitutional Court together make it impossible for another government to pursue policies. At the time of the regime change, the institution of two-thirds acts was motivated by the strong mistrust and fear that was common in the transition period as the regime-changing forces feared a return of communist dictatorship. The Orbán regime is using this institution together with the Fundamental Law and its amendments to stabilise a new authoritarian structure and has made replacement of the constitutional system by an eventually elected new government almost impossible.

Creation of a monopolised public power

Today, there is no longer a single public institution that limits the executive. The Constitutional Court¹³¹ is filled with loyalists, its authority is curtailed, judicial leaders have been removed from the highest courts and administrative positions,¹³² the ombudsman system does not fulfil its role,¹³³ media pluralism is seriously restricted, academic and university freedom is curtailed, the scope for NGOs is reduced, human rights defenders are stigmatised and vulnerable minorities are scapegoated. Even elections cannot be considered to be fair.

Stabilisation of the regime and the creation of its authoritarian character were achieved by several means: restructuring institutions; filling them with party loyalists, if necessary with the help of *ad hominem* legislation; redistributing public funds; buying up independent media; and transferring public functions to private foundations. All these are now protected by the two-thirds limit. The Fundamental Law defines 35 such areas, with 317 cardinal acts passed by parliament since 2012.

Amendments to the Fundamental Law

The Fundamental Law was amended for the first time a few months after its entry into force and then eight more times depending on the political intentions of the moment. The first amendment elevated the highly ideological and political text of the Transitional Provisions into the Fundamental Law. This finished a dispute on the possibility of a constitutional review of the Provisions by the Constitutional Court. After another half year the second amendment (October 2012) made the right to vote subject to prior registration. In January 2013 the Constitutional Court annulled this amendment on the ground that it unlawfully restricted the right to vote. The third amendment (December 2012) made the previously adopted Land Law a two-thirds majority law. It restricted the acquisition of land by non-Hungarians. The fourth amendment (March 2013) introduced a number of controversial provisions that had previously been annulled by the Constitutional Court. The most alarming change concerned the Constitutional Court. It annulled all Court decisions prior to when the Fundamental Law entered into force. The amendment put the Transitional Provisions in the Fundamental Law despite an annulment decision by the Constitutional Court. It incorporated in the constitution a provision restricting the media which the Constitutional Court had also previously ruled unconstitutional. An ideological concept of the family (man, woman, child) was introduced in the Fundamental Law. The Constitutional Court had previously ruled this concept unconstitutionally narrow. It became part of the

131 Chronowski Nóra, Kovács Ágnes, Körtvélyesi Zsolt and Mészáros Gábor, 'The Hungarian Constitutional Court and the Abusive Legalism' (2022) MTA Law Working Papers 2022/7. <https://jog.tk.hu/en/mtalwp/the-hungarian-constitutional-court-and-the-abusive-constitutionalism>, accessed 2 May 2022.

132 Fleck Zoltán, Chronowski Nóra and Bárd Petra, 'The Crisis of the Rule of Law, Democracy and Fundamental Rights in Hungary' (2022) MTA Law Working Papers 2022/4. <https://jog.tk.hu/en/mtalwp/the-crisis-of-the-rule-of-law-democracy-and-fundamental-rights-in-hungary>, accessed 2 May 2022.

133 Global Alliance of National Human Rights Institutes Sub-Committee on Accreditation Report – March 2022 https://www.ohchr.org/sites/default/files/2022-04/SCA-Report-March-2022_E.pdf, accessed 2 May 2022.

Fundamental Law that only a two-thirds majority in parliament can recognise the ecclesiastical status of a religious community. This rule was also previously found to be unconstitutional by the Constitutional Court. This amendment also introduced a provision extending the content of the ban on hate speech, which had repeatedly been ruled unconstitutional by the Constitutional Court. It also introduced conditions for university students to receive financial aid if after graduation they are employed for a defined period. The banning of homeless people from public places is a new provision in the Fundamental Law which was previously found unconstitutional by the Constitutional Court. The exercise of disciplinary and law enforcement powers over Members of parliament by the Speaker of the House through the use of the House Guard became part of the Fundamental Law. The amendment bans the Constitutional Court from reviewing constitutional amendments for substantive conflicts with constitutional principles and only allows review for conformity with procedural requirements regarding an amendment's adoption and promulgation. By 2014, the ruling party had managed to fill the majority of the positions in the Constitutional Court with loyal cadres, thus freeing the new Constitutional Court from the influence of the old practice. The sixth amendment (June 2016) permits the government to issue resolutions affecting state-administration, law-enforcement and national-security organisations and the military for a period of up to 15 days after declaring a terrorism state of emergency even if the parliament has not approved such a form of state of emergency. The seventh amendment (June 2018) declared that alien people cannot settle in Hungary and that protection of Hungary's constitutional self-identity and Christian culture is an obligation of all state organs. For this reason, the 'Stop Soros legislative package' named after Hungarian-American philanthropist George Soros, which was enacted together with the amendment, criminalises non-governmental organisations and activists aiding "illegal migrants in any way." The amendment also criminalises homelessness and prohibits the homeless from living (habitual residence) in public spaces. The ninth amendment (December 2020) stated that "the mother is a woman, the father is a man. A child has the right to self-identity according to his or her sex at birth" and declared that it will ensure an upbringing based on Hungary's constitutional identity and values and Christian culture. It also introduced a narrow definition of public money as the revenue and expenditure of the state, making it possible to privatise formerly state institutions such as universities.

The state of emergency and a limitless executive

During the Covid pandemic the government was granted unlimited regulatory power without oversight by the parliament. The declaration of a state of emergency in March 2020 lacked a proper justification. Later the parliament adopted an Enabling Act and empowered the government with full decree-making powers without precise conditions. During the state of emergency, the government passed decrees that were not linked to the pandemic. The parliament passed laws that curtailed autonomy in the cultural and academic spheres. Also political freedoms, including freedom of expression, were restricted.

According to the Mission Report of the LIBE Committee of the European Parliament on 26/11/2021,

"The rule of law situation in Hungary continued to raise concerns also during the pandemic, as is also highlighted in the resolution of 13 November 2020 on the impact of COVID-19 measures on democracy, the rule of law and fundamental rights. The European Parliament resolution of 16 January 2020 on ongoing hearings under Article 7(1) TEU regarding Poland and Hungary underlined that the hearings have not yet resulted in any significant progress. (...) Important concerns remain over threats to the independence of judiciary and media

freedom. Widespread corruption seems to have led to a parallel state, making it almost impossible to address in the absence of an independent judicial system.”¹³⁴

Administration of the judiciary

The administrative model introduced in 2012 is based on strong centralised power of the President of the National Office for the Judiciary (NOJ), who was elected by the parliament for 9 years. This establishes strong political links with the ruling majority and the possibility of influencing the judiciary. Formally, judicial self-governance remains but the Judicial Council is legally and administratively weak and only has supervisory power over the Office. The last decade has repeatedly shown that political expectations reach the courts. By manipulating the appointment procedure Mrs. Handó, who is President of the Office and a close friend of the Prime Minister, has changed all the administrative leaders according to her political preferences. A large number of court executives and justices of the Supreme Court were forced into early retirement in 2011, which provided the possibility of significantly remaking the composition of the judiciary, with the newly established central court administration appointing new court leaders.

The Constitutional Court later found the law unconstitutional, and the European Commission launched an infringement procedure against Hungary and referred the case to the CJEU, which found Hungary in breach of EU law as the impugned measure constituted age discrimination in the workplace, thereby violating Council Directive 2000/78/EC.¹³⁵ 158 judges turned to the ECtHR on the ground that their forced early retirement adversely affected their professional careers and private lives. However, the ECtHR found these applications inadmissible on all grounds,¹³⁶ *inter alia* by referring to Act XX of 2013, which provided different remedial measures (reinstatement, stand-by posts or compensation) for judges who were affected by early retirement.¹³⁷ From the perspective of judicial independence under Article 19(1) TEU, which unfortunately was not the subject of the infringement procedure, forcing judges into early retirement without any compelling legitimate ground constitutes political intervention in the functioning of the courts and violates the principle of irremovability of judges.¹³⁸

In 2018, the judges elected a new Judicial Council with a strongly critical attitude. It started to seriously scrutinise the practice of the President of the Office. The Judicial Council is the only autonomous body among the public institutions. However, its authority vis-à-vis the Office is weak. Despite this organisational weakness, the Council was able to defend elements of independence.

The general climate in courthouses

The current administration of the judiciary does not exclude the possibility of political interference in courts, mainly because of the excessive powers of the President of the NOJ, who is elected

134 Mission report following the ad-hoc delegation to Budapest, Hungary 29 September - 1 October 2021, Committee on Civil Liberties, justice and Home Affairs https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/LIBE/DV/2021/11-29/MissionreportHungary_EN.pdf

135 CJEU, 6 November 2012, Case C-286/12 *Commission v Hungary* ECLI:EU:C:2012:687.

136 *J.B and others v Hungary* App nos 45434/12, 45438/12 and 375/13 (ECtHR, 27 November 2018)

137 C-286/12 *European Commission v Hungary*.

138 Gábor Halmi, 'The Early Retirement Age of the Hungarian Judges,' in Nicola F and Davies B (eds) *EU law stories* (Cambridge University Press, 2017) 471-488.

by the parliament. This structural weakness has led to serious conflicts between the Judicial Council and the President of the Office. In 2019, the parliament appointed a new person to this post, but the situation has hardly improved. The President has broad powers regarding the appointment of court leaders. For example, he can annul any call for application without the consent of elected judicial bodies. Invalidating applications is a continual practice of the President of the Office. In May 2021 the National Judicial Council expressed its concern:

“In court leadership applications when the President of the NOJ did not accept any of the candidates (invalidated applications), the NJC raises concerns about the lack of unified criteria.

- *The system of criteria stipulated by the NOJ Regulation on Court Administration was not adequately applied.*
- *The NJC finds it worrisome that some of [the] justifications for the invalidating resolutions referred to facts which the candidate had no opportunity to comment on or challenge during the procedure and were based on data that was accessed [by the NOJ President] without the prior approval of the candidate.*
- *The NJC also notes that the President of the NOJ failed to respect deadlines in some of the procedures.*
- *There were no other objections regarding the appointment practice of court leaders and no negative comments on the appointment of judges.”¹³⁹*

The court leaders in question traditionally have very broad powers over substantive issues relating to the status of judges: promotion, aptitude tests, working conditions, remuneration, etc. According to a wiretap transcript of a corruption scandal that broke in January 2022, the President of the Municipal Court of Budapest himself clearly indicated that he can “make life difficult for subordinate judges.”¹⁴⁰ According to the document, the president of the bailiffs’ chamber asked the president of the court to chastise a judge who was a problem for him. The president of the court did not refuse but referred to his limited powers, which at most could make the judge’s professional life difficult. The appointment of this president (Péter Tatár-Kis) had not been supported by the Judicial Council but he was nevertheless appointed by the President of the Office. Moreover, in this criminal case, according to official documents leaked from the investigating organ the President of the Office mediated between the court president and the person who tried to influence judicial decisions. At the moment there are no consequences of the president’s statement.

Research by Amnesty International Hungary based on interviews with judges shows that a climate of fear in the courts is a threat to independence.¹⁴¹

“Unfortunately, there has been increasing pressure on the independent judiciary in recent times. It is unfortunate when politicians talk about prison business, or when they envisage listing judges, or when they call some judges blood judges”

¹³⁹ A summary of the session of the National Judicial Council held via Skype videoconference on 5th May 2021 is available at <https://orszagosbiroitanacs.hu/english/>

¹⁴⁰ Miklósi Gábor, Horváth Bence, ‘A bírót rúgják ki, mert ez vérlázító!’ www.444.hu 21 January 2022 <https://444.hu/tldr/2022/01/21/a-birot-rugjak-ki-mert-ez-verlazito> (accessed 01.03.2022).

¹⁴¹ Fraudulent fear rules among Hungarian judges, Amnesty International, 06 April 2020 <https://www.amnesty.hu/fraudulent-fear-rules-among-hungarian-judges/>, accessed 2 May 2022.

said National Judicial Council spokesman, Csaba Vasvári.¹⁴² In his view, it is also unfortunate that judges are under pressure from within the system, from the administrative leadership. There have been plenty of examples of this in recent times. They include resignations of several members of the National Judicial Council.

At a meeting on 5 January 2022, the National Judicial Council did not support András Zs. Varga, President of the Curia, and proposed that the NJC should issue a statement “in defence of the Fundamental Law and the constitutional order of Hungary” condemning the opposition’s plans for constitutional changes. In an open letter the President of the Constitutional Court asked the head of government to take effective measures to protect constitutional bodies because opposition politicians and experts have said that these bodies would have to be fundamentally changed in the event of an opposition victory. The letter was jointly signed by the Prosecutor General and the President of the Curia. The President of the Curia then tried to persuade the NJC to support this statement.¹⁴³

The aftermath of the Baka case

In 2016, the European Court of Human Rights (ECtHR) ruled that the removal of András Baka from the position of President of the Supreme Court violated the former chief justice’s right to a fair trial and freedom of expression.¹⁴⁴ Baka was removed from office because he had criticised laws passed after 2010 affecting the judicial system. In July 2021 two NGOs send a communication to the Directorate General Human Rights and Rule of Law of the Council of Europe’s (CoE) Department for the Execution of Judgments of the European Court of Human Rights.¹⁴⁵ In this long letter Amnesty International Hungary and the Hungarian Helsinki Committee jointly informed the CoE that the judgment of the ECtHR in the *Baka v. Hungary* case (Application no. 20261/12) had still not been executed: “*The Hungarian authorities not only failed to take any measures at all to implement the judgment, but further deepened the chilling effect on the freedom of expression of judges and continued to undermine the independence of the judiciary in general.*”¹⁴⁶

In September 2021 the Council of Europe issued a decision on the Baka case in its capacity to supervise the execution of the decision and stated that the removal of the president of the highest court had long-term chilling effects on the Hungarian judiciary. The CoE was concerned that the Hungarian government did not take any steps to strengthen judicial independence. The following move in March 2022 would be “stronger” if nothing was achieved.¹⁴⁷ In March 2022 the Committee of Ministers of the Council of Europe issued an Interim Resolution on

142 Országos Bírói Tanács: Egyre több nyomásgyakorlás éri a független igazságszolgáltatást, Telex, 04 February 2022 <https://telex.hu/belfold/2022/02/04/orszagos-biroi-tanacs-nyomasgyakorlas>, accessed 2 May 2022.

143 Zoltan Simon, ‘Hungary Chief Justice Asks Orban to Shield Court From Opposition’ Bloomberg 15 December 2021 <https://www.bloomberg.com/news/articles/2021-12-15/hungary-chief-justice-asks-orban-to-shield-court-from-opposition> , accessed 2 May 2022.

144 *Baka v. Hungary* App no 20261/12 (ECtHR, 23 June 2016) <https://www.icj.org/wp-content/uploads/2016/06/Hungary-CASE-OF-BAKA-v.-HUNGARY.pdf> (accessed 25.04.2022).

145 For further details on the lack of implementation of the ECtHR *Baka* judgment, see the section below, *Judicial appointments and the irremovability of judges*.

146 Hungary has not lifted a hand to implement the *Baka v. Hungary* judgment, Amnesty International 30 July 2021 <https://www.amnesty.hu/hungary-has-not-lifted-a-hand-to-implement-the-baka-v-hungary-judgment/>, accessed 2 May 2022.

147 1411th meeting, 14-16 September 2021 Council of Europe, Committee of Ministers https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a3c123, accessed 2 May 2022.

execution of the judgment of the ECtHR in the *Baka v. Hungary* case.¹⁴⁸ It recalled the absence of safeguards to prevent *ad hominem* legislation terminating judicial mandates and strongly urged the authorities to step up their efforts to introduce measures to ensure proper oversight by an independent judicial body of the decision of the parliament to impeach the President of the Curia. It recalled “once again, the authorities’ undertaking to evaluate the domestic legislation on the status of judges and the administration of courts, and urged them to present the conclusions of their evaluation, including of the guarantees and safeguards protecting judges from undue interferences, to enable the Committee to make a full assessment as to whether the concerns regarding the ‘chilling effect’ on the freedom of expression of judges caused by the violations in these cases have been dispelled.”¹⁴⁹

In October 2020, the parliament elected a new President of the Curia (former Supreme Court). The new president was previously a constitutional judge and a deputy prosecutor general but did not have the judicial experience required to be appointed as a judge. The National Judicial Council rejected this nomination on the ground that he lacked the necessary legal requirements. A year earlier the Government had amended the *ad hominem* law for András Zs. Varga: the requirement of five-year judicial experience was extended to experience gained as a justice or a senior adviser in the Constitutional Court or an international tribunal, and two justices of the Constitutional Court, on their request, could now be appointed to be judges in the ordinary judiciary without participating in any judicial application procedure. The NJC’s opinion on the eligibility of the candidate was not binding.

The Szabó case

In 2018, Gabriella Szabó, a fixed-term judge at the Metropolitan Court, referred a preliminary question to the Court of Justice of the European Union (CJEU) in the case of a Kurdish refugee. Judge Szabó complained to the European Commission claiming that she was fired for political reasons for asking the CJEU for a preliminary ruling related to the ‘Stop Soros’ law.¹⁵⁰ Despite the fact that the Court of Justice of the EU ruled that ‘Stop Soros’ was contrary to EU law,¹⁵¹ the Hungarian Constitutional Court found this law constitutional in 2019. In this verdict the Hungarian Constitutional Court also ruled that the applicability of EU law in Hungary is based on the Hungarian Constitution. In its interpretation of the Fundamental Law, the Constitutional Court took into account the obligations of EU membership and Hungary’s obligations under international treaties but its interpretation of the Fundamental Law could not be undermined by an interpretation by any other body. While the Constitution provided that compliance with EU law was a constitutional obligation, any conflicts could be resolved while respecting constitutional dialogue. However, authentic interpretation of the Hungarian Fundamental Law was the task of the Hungarian Constitutional Court and all bodies and institutions must respect this in their procedures. The Constitutional Court committed itself to constitutional dialogue and in the present case in a spirit of “Europe-friendliness” interpreted the Fundamental Law in such a way that its normative content was also in line with EU law, according to the rationale of the Constitutional Court.

¹⁴⁸ CM/ResDH(2022)47.

¹⁴⁹ Interim Resolution CM/ResDH(2022)47 Execution of the judgement of the European Court of Human Rights *Baka* against Hungary https://search.coe.int/cm/pages/result_details.aspx?objectId=0900001680a5c339, accessed 2 May 2022.

¹⁵⁰ CJEU 19 March 2020, Case C-564/18 *LH Bevándorlási és Menekültügyi Hivatal* ECLI:EU:C:2020:218

¹⁵¹ CJEU 16 November 2021, Case C-821/19 *Commission v Hungary* ECLI:EU:C:2021:930.

Non-compliance with European judgements

The NGO Act and the lex CEU¹⁵² are two typical examples of the failure of CJEU judgments to bring about substantive change. Most of the time the Hungarian state pays the compensation established in Strasbourg judgments but it often remains in arrears – even for years – with so-called general measures. The implementation of these judgments is monitored by the Committee of Ministers. There are currently 53 such ‘pending’ cases in which the implementation of judgments has been found unsatisfactory over the last ten years.

The Pécs-based Emberség Erejével (Cum Virtue Humanitatis) Foundation was denied a €72,000 grant because it refused to declare it had ‘foreign funded’ status. The Tempus Public Foundation, which launched a call for proposals, later added the requirement to declare foreign funding to the application criteria, which the CJEU has declared to be in breach of EU law.¹⁵³ According to the ruling,¹⁵⁴ the legislation also violates the right to the free movement of capital, the right to the protection of personal data and the principle of freedom of association, and therefore “undermines the role of civil society as independent actors in democratic societies, undermining their right to freedom of association, creating a climate of mistrust and limiting the privacy of donors.” In February 2021, the European Commission gave Hungary two months to amend the unlawful NGO Act. In April 2021, the parliament adopted a new NGO Act, which stipulates that the State Audit Office of Hungary (SAO) shall audit NGOs with a balance sheet total of at least HUF 20 million (€50,000) and which are capable of influencing public life. The State Audit Office draws up its own audit plan so it can arbitrarily decide which NGOs to audit and which to spare. Moreover, the law does not specify what the SAO’s audits should cover. The title of the bill hints at its political origin: “on the transparency of civil society organisations engaged in activities likely to influence public life.”

Case-law based analysis

Judicial appointments and the irremovability of judges

In recent years, judicial appointments and appointments of court executives (e.g. presidents, vice-presidents and heads of departments) have been subject to heavy criticism by domestic and international stakeholders. The problems primarily originate in the current model of court administration, which provides the President of the NOJ with significant powers over the selection and promotion of judges. As a general rule, vacant judicial offices must be filled through an open application process.¹⁵⁵ The previous President of the NOJ, Tünde Handó

152 Act XXV of 2017.

153 Act LXXVI of 2017.

154 CJEU 18 June 2020, C-78/18 *European Commission v. Hungary* ECLI:EU:C:2020:476.

155 In recent years, the Fidesz-KDNP government has incorporated special rules into the cardinal laws on the judiciary in order to ‘parachute’ judges into the judiciary by avoiding the ordinary application process. A well-documented example is a late 2019 amendment of the status act, which made it possible for Constitutional Court judges to be appointed to the ordinary judiciary on their own request without participating in any application procedure. In July 2020, eight serving justices of the Constitutional Court were appointed as judges by the President of the Republic, of which only two had any previous judicial experience in the ordinary court system. At any time these judges can decide to leave the Constitutional Court and start working in the Curia. This happened with András Zs. Varga, who became the new Chief Justice of the Curia in 2021 after resigning from the bench of the Constitutional Court. This rule is highly problematic as members of the Constitutional Court are elected by the parliament, and since 2010 this has taken place almost exclusively by votes of the governing parties having a two-third majority in the legislation. As a result, the legislative branch can exert significant influence on the composition of the top court in Hungary. These concerns were raised by the NJC, which requested the withdrawal of the provision but without any effect. Circumventing the application process has also characterised the practice of appointing court executives. The President of

(in office in 2012-2019) established a practice of annulling a large number of calls without providing sufficient justification for her decisions. Many of the controversial annulments were made in processes where there were suitable applicants for the vacancies or the applicant for the leadership position was overwhelmingly supported by the judicial staff of the court affected. It was the National Judicial Council which first raised serious concerns about this practice and carried out an investigation finding several annulments non-transparent and therefore unlawful.¹⁵⁶ International organisations then arrived at the same conclusion.¹⁵⁷ However, there has been a long debate between Hungarian courts over whether the lack of proper reasons made these annulments unlawful and whether such decisions by the President can be challenged before courts. The controversy stems from the text of the relevant law, which requires sufficient reasoning for personnel decisions and provides the possibility of judicial remedies against them while failing to specify annulments among decisions of the President on personnel matters. In a landmark case, domestic courts took opposing views on this issue. The Győr Regional Court of Appeal relied on EU law to justify why the right to access a court and seek a legal remedy must be provided against annulments even if the relevant domestic law does not explicitly specify this kind of decision among the personnel decisions of the President of the NOJ.¹⁵⁸ This court argued that Hungarian law must be interpreted in compliance with EU law considering the rule of law and the principles of effective legal remedy and effective judicial protection stemming from Articles 2 and 19(1) of the TEU and Article 47 of the Charter, and taking into account some recent judgments of the CJEU rendered in cases on judicial independence, judges must have the right to turn to courts against decisions by the NOJ President even in the absence of explicit textual reference in domestic law. Furthermore, this interpretation was also grounded in Articles 6 and 13 of the ECHR and the shared constitutional tradition of EU member states. This court also found that annulments are unlawful if they fail to provide detailed reasoning, for instance if the President of the NOJ merely cites the text of the law as the ground for her decision.

However, other courts, *inter alia* a 5-judge panel of the Curia delivering the final judgment in a review procedure took an opposing stance on this issue and rejected the claim against the President.¹⁵⁹ The Curia first held that, in compliance with the requirement of effective legal protection stemming from the TEU and the Charter, judges have the right to challenge annulments before courts. However, EU law could not be applied in the relevant case as the legal issue in a strict sense, i.e. the question of who can be sued in the proceeding, was purely an internal one without any EU law relevance, so lower courts could not invoke EU law to overrule domestic law, which did not grant judicial remedy against such decisions by the President.¹⁶⁰ The Curia therefore concluded that it is not possible to turn to courts against

the NOJ has used her power extensively to annul application processes and appoint interim court leaders, who then became permanent leaders for a fixed 6-year term by winning the next application procedure. Judicial secondment is also a tool for disguised promotion without an application process. For instance, the President of the NOJ can second judges to higher courts, which can even last for years without filling the respective judicial offices using application processes. Alternatively, the President can transfer judges to the NOJ to do service in the central organ of judicial administration and then appoint the judges concerned to any office within the organisation, again without any application procedure. Both practices have been used regularly by the former President of the NOJ.

156 Decision no. 60/2018 (V.2.) OBT

157 See, for instance, European Association of Judges, 'Report on the fact-finding mission of the EAJ to Hungary' (2019), <<https://www.iaj-uim.org/iuw/wp-content/uploads/2019/05/Report-EAJ-Hungary.pdf>>, accessed 13 April 2022.

158 Decision no. Mf.V.30.054/2020/13/I of the Győr Regional Court of Appeal.

159 Decision no. Mfv.X.10.049/2021/16 of the Curia. The English commentary of the case can be found in the CJC database [here](#)

160 Decisions on personnel matters are listed in Section 76(5) of Act CLXI of 2011.

the President of the NOJ in relation to a decision of hers on annulment, and the judge should have brought the lawsuit against his employer directly. The Curia also stressed that annulment decisions do not require more detailed individualised justification. Therefore, decisions by the President of the NOJ simply citing the general wording of the text of the law are not unlawful. In order to provide further arguments supporting the irrelevance of EU law, the top court relied on two recent decisions of the Constitutional Court, both of which aimed to limit the scope of EU law in relation to Hungarian lawsuits.¹⁶¹ These judgments by the Constitutional Court claim as a general rule that arbitrarily abandoning domestic law in favour of EU law would make the decision in breach of the Fundamental Law and of the right to a fair trial. These rulings also stressed that Hungarian judges cannot rely on individual decisions of the CJEU and extend their scope to domestic cases in order to disregard Hungarian law. These findings of the Constitutional Court were first handed down in a case in which the legal issue did not concern the question of the scope of EU law, so the Constitutional Court clearly overstepped its competence and acted unlawfully by determining the abovementioned requirements. Furthermore, the decisions by the Constitutional Court entail that ordinary courts can expect that their judgments will be quashed by the Constitutional Court if EU law is unduly cited. The Constitutional Court therefore claimed full control over EU law references in ordinary court judgments.

To conclude, the Curia acting as a court of last instance arrived at a highly problematic outcome by falsely characterising the case. While the question was about the legality of judicial appointment procedures, the Curia narrowed it down to declare the legal problem to be a domestic one to which EU law cannot be applied. This approach also resulted in the exclusion of any direct challenge and meaningful remedy against decisions annulling the application procedures. The case in which this issue was at stake is currently pending before the Constitutional Court.¹⁶²

Until 2021, the Hungarian legal framework only provided a very limited possibility for candidates for judicial office to challenge the final outcome of a successful application procedure. In a recent judgment issued in 2021,¹⁶³ the Constitutional Court ruled that the right to access a court and seek a remedy requires special guarantees in the judicial appointment procedure for candidates, and as the ranking is a crucial element in the entire procedure applicants must have the right to challenge the result by relying on procedural irregularities in determining the scores of the candidates and establishing the ranking among them.¹⁶⁴ It is now the legislator who has to take adequate measures to provide judicial control over the appointment procedure in order to bring it into compliance with the abovementioned fundamental rights.

The 2011 Fundamental Law of Hungary protects the irremovability of judges by stating that judges can only be dismissed from office for reasons and in a process specified by cardinal law (an act adopted by a two-thirds majority of the parliament). Nevertheless, from 2010 the

¹⁶¹ See Decisions nos. 11/2020 (VI. 3.) and 16/2021 (V.13.) AB.

¹⁶² Case no. IV/03595/2021, <<http://public.mkab.hu/dev/dontesek.nsf/0/1FEA204E6D0E6228C1258766005AB079>>, accessed 13 April 2022.

¹⁶³ Decision no. 13/2021. (IV. 14.) of the Constitutional Court.

¹⁶⁴ In an application procedure, the local judicial council of the court affected determines the ranking of the candidates based on objective and subjective scores. Subjective scores are given by the judicial council itself after an interview. The candidates are also interviewed by the president of the court, who can propose changes among the candidates ranked first, second and third. If the President of the NOJ intends to deviate from the ranking and propose the second or third candidate to be appointed to judicial office, the consent of the NJC is needed. The application procedure is basically regulated in the status act (Act CLXII of 2011) requiring a two-thirds majority, but the score system is determined by the order of the Minister of Justice, and therefore can be easily amended.

government took measures that seriously undermined the security of judicial tenures. These measures have been extensively discussed even at the international level as cases resulting from them reached European courts. At the end of 2011, not only the President but also the Vice-President of the Curia was prematurely removed from office on the pretext of reorganising the court system years before the expiry of their mandates. While in the case of András Baka his removal was the result of a constitution-level change, the termination of the mandate of Vice-President Lajos Erményi was carried out with statutory changes, also on the ground that the role of the Curia in the judicial system had changed. While his complaint was rejected by the Constitutional Court with a very small margin,¹⁶⁵ he also took his case before the ECtHR, which found that the termination of his mandate as vice-president did not have a legitimate aim. Contrary to the Constitutional Court, the ECtHR did not find convincing the argument that the changes in the competences of the apex court justified the premature termination of the mandate of its vice-president. The ECtHR analysed the case in the light of Article 8 and therefore found that Erményi's right to respect for private life was violated.¹⁶⁶

In 2022, the Committee of Ministers of the Council of Europe issued an interim resolution in relation to the *Baka* case reiterating that Hungary had not provided sufficient safeguards against undue termination of the mandate of leaders of the Curia by *ad hominem* legislation. This finding is also relevant to the Erményi case.¹⁶⁷

In 2012, as a result of an infringement procedure launched by the European Commission against Hungary, the CJEU found that Hungary had violated EU law by forcing almost ten percent of the judiciary into early retirement.¹⁶⁸ While the Hungarian Constitutional Court also declared the law on early retirement unconstitutional, this judgment did not make any difference to the situation of the judges concerned.¹⁶⁹ Judges forced into retirement could not be reinstated in office by force of a judgment by the Constitutional Court, so they filed individual lawsuits before labour courts in order to return to their judicial service. In these proceedings, the Hungarian courts found that the termination of their judicial office was unlawful, but the Curia finally held that courts cannot order reinstatement. Therefore, a formal decision on the appointment to judicial office is needed.¹⁷⁰ This argument held also in relation to leadership positions, which in practice prevented judges from being reinstated to their senior positions as they had already been filled. As was already discussed above, 158 judges affected by the early retirement scheme turned to the ECtHR, but their complaints were found inadmissible.¹⁷¹ The decision can be criticised for failing to address the measure challenged (the early retirement scheme) as a rule of law problem and an issue of judicial independence, and also for the ECtHR's deferential approach, which gave relevance to the remedial measures¹⁷² adopted by the government without looking into the genuine consequences of the dismissal of a large

¹⁶⁵ Decision no. 3076/2013 (III. 27.) AB.

¹⁶⁶ *Erményi v. Hungary* App no 22254/14 (ECtHR, 22 November 2016).

¹⁶⁷ See the Interim Resolution CM/ResDH(2022)47, Execution of the judgment of the European Court of Human Rights in *Baka against Hungary*, adopted by the Committee of Ministers on 9 March 2022 at the 1428th meeting of the Ministers' Deputies, <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a5c339>, accessed 24 April 2022.

¹⁶⁸ CJEU 6 November 2012, Case C-286/12 *Commission v Hungary* ECLI:EU:C:2012:687.

¹⁶⁹ Decision no. 33/2012 (VII. 17.) AB.

¹⁷⁰ Decision no. Mfv. I. 10.204/2013/12 of the Curia, available in the CJC database [here](#).

¹⁷¹ *J.B and others v. Hungary* App nos 45434/12, 45438/12 and 375/13 (ECtHR, 27 November 2018)

¹⁷² Under Act XX of 2013, judges could opt for reinstatement, a stand-by post or lump-sum compensation.

number of judges. The ECtHR did not find relevant the claim under Article 8 that many judges were appointed to senior positions before being forced into early retirement. The ECtHR argued that “*the judicial function constituted the applicants’ fundamental professional role and their other positions, however important and prestigious they might have been and however they might have been subjectively perceived and valued by the applicants, did not relate to the principal sphere of their professional activity.*”¹⁷³ This approach is particularly problematic in relation to the Hungarian judiciary in which career judges work, and in which senior positions involve strong administrative powers and higher remuneration and reputation. Furthermore, Hungarian courts did not order the reinstatement of judges to their previous senior positions, which allowed a significant remaking of the top echelon of the Hungarian judiciary.

Judicial careers and accountability of judges in Hungary

In Hungary, judges are first appointed to a fixed term of three years, and if they are found suitable for judicial office after three years of judging they are appointed for an indefinite term. The Venice Commission has long been critical of appointing judges for a ‘probationary period.’ Judicial independence can be compromised if ‘junior judges’ are subject to pressure to decide cases in a way that is needed for a permanent appointment. In 2012 the Venice Commission raised concerns in relation to the Hungarian rules from the perspective of judicial independence and stressed a demand for special guarantees in the process of judicial evaluation.¹⁷⁴ According to the professional evaluation system, judges are first evaluated after three years and after being appointed for an indefinite term they are evaluated again after three years and then every eight years. It is the judge’s superior who controls the evaluation process and evaluation is linked with promotion. This system has been criticised by some scholars¹⁷⁵ and a recent case has shed light on the problems of professional evaluation and the way the process can be abused to remove recalcitrant judges.

In 2018, Gabriella Szabó, a junior judge appointed for a 3-year term at the Metropolitan Court, referred a preliminary question to the CJEU in the case of a Kurdish refugee. The preliminary question was whether the law known as Stop Soros by creating a new inadmissibility ground was contrary to EU law. Under that law, asylum applications had to be declared inadmissible if applicants arrived via a country where they were not exposed to persecution or any serious harm, or where adequate protection was guaranteed. The Kurdish refugee’s application was rejected by the Hungarian Asylum Authority because he entered Hungary from Serbia. Judge Szabó turned to the CJEU for a preliminary ruling and the CJEU found that the Stop Soros rules were indeed contrary to the EU Asylum Procedures Directive.¹⁷⁶ Even though the CJEU endorsed the referring judge’s interpretation, in 2021 as a result of the professional evaluation after 3 years she was found unsuitable for judicial office and was dismissed. Her term of office ended on 30 June 2021. Gabriella Szabó filed a complaint with the European Commission claiming that she was fired for political reasons for asking the CJEU for a preliminary ruling on the Stop Soros law. On 16 November 2021, as a result of an infringement procedure the CJEU

173 For a critical approach to the decision, see Renáta Uitz, ‘The Perils of Defending the Rule of Law Through Dialogue’ (2019) 15 *European Constitutional Law Review* 1.

174 European Commission for Democracy through Law, Draft opinion on act CLXII of 2011 on the legal status and remuneration of judges and act CLXI of 2011 on the organisation and administration of courts in Hungary, Strasbourg, 2 March 2012, <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2012\)005-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2012)005-e)>, accessed 14 April 2022.

175 Ágnes Kovács, Mátyás Bencze and Zsolt Zódi, ‘Methods of Quality Assessment of Judicial Reasoning in Hungary’ in Mátyás Bencze and Gar Yein Ng (eds.) *How to Measure the Quality of Judicial Reasoning* (Springer, 2018) 187, 191-192.

176 CJEU 19 March 2020, Case C-564/18 *LH v Bevándorlási és Menekültügyi Hivatal* ECLI:EU:C:2020:218.

reiterated its previous verdict concerning the Stop Soros law and found it again in breach of EU law.¹⁷⁷

Judge Szabó told the media that after she had referred questions to the CJEU on the Hungarian asylum legislation she felt pressure within the organisation. Some of her peers even suggested that the preliminary reference should be withdrawn. During her three years at the court, she was not subject to a disciplinary procedure or any extraordinary evaluation process and there were no serious concerns about her professional activity. She was found unsuitable even though a senior court official from the Curia gave a positive opinion about her work.¹⁷⁸ Judge Szabó's case is currently pending before Hungarian courts, and the European Commission is also carrying out an investigation into the issue.¹⁷⁹ The case has revealed that the professional evaluation system lacks adequate safeguards and can be used to put illegitimate pressure on judges to force them to act in compliance with external expectations.

In Hungary, court presidents have the power to initiate disciplinary proceedings against rank-and-file judges for (1) violating obligations related to judicial service or (2) violating or compromising the reputation of the judicial profession by virtue of their lifestyle or behaviour. For court executives, the President of the NOJ can decide whether to propose a disciplinary investigation. So-called service courts adjudicate on disciplinary proceedings. Their members are elected by the NJC from judges proposed in plenary sessions of courts.

Decisions in disciplinary proceedings are not available to the public. The entire procedure takes place behind closed doors. The extent to which the details of the procedure can be made available to the judiciary is currently under discussion in the judicial organisation. In 2021, the NJC decided to propose publication of the essence of disciplinary decisions on the Council website in anonymised and abstract form.

In 2019, Csaba Vasvári, a judge adjudicating in criminal cases, referred questions to the CJEU (*IS* case).¹⁸⁰ In his request for a preliminary ruling he asked the CJEU first about the translation and interpretation requirements in EU law on criminal proceedings concerning foreign nationals, and also referred two questions about the independence of the Hungarian judiciary. The questions on judicial independence concerned, *inter alia*, the status of the President of the NOJ, her administrative powers over court executives and judicial careers, including appointing judges and court leaders, and the problem of low judicial salaries and discretionary bonuses. The request for a preliminary ruling also contained several examples alleging abusive exercise of these powers by the President of the NOJ. The Prosecutor General, however, challenged the lawfulness of the reference before the Curia, which sided with the Prosecutor General holding that the reference for a preliminary ruling was unlawful. The Curia found that the questions concerning the independence of the judiciary were hypothetical, expressed the referring judge's subjective views and did not in any way relate to the facts of the case.¹⁸¹ In the meantime, a disciplinary proceeding was initiated against the judge by his superior, the president of the Metropolitan Court (Fővárosi Törvényszék), which he soon withdrew with

¹⁷⁷ Case C-821/19, *Commission v Hungary (Criminalisation of assistance to asylum seekers)*, 16 November 2021, ECLI:EU:C:2021:930.

¹⁷⁸ Szilárd Teczár, 'A rendszer alkalmatlan' *Magyar Narancs* (Budapest, 16 December 2021) 14.

¹⁷⁹ E-004700/2021 Answer given by Mr Reynders on behalf of the European Commission (21.12.2021) <https://www.europarl.europa.eu/doceo/document/E-9-2021-004700-ASW_EN.pdf>, accessed 18 March 2022

¹⁸⁰ CJEU 23 November 2021, Case C-564/19 *IS* ECLI:EU:C:2021:949.

¹⁸¹ Decision no. [Bt.III.838/2019/11](#) of the Curia.

reference to the “interest of judicial organisation.”¹⁸² As a result of these developments, the referring judge posed two additional questions to the CJEU in relation to the decision of the Curia and the subsequent disciplinary proceeding that threatened the judge with sanctions for making the referral to the CJEU. As to the latter issue, the judge asked whether the principle of judicial independence grounded in EU law precludes bringing disciplinary proceedings against judges for referring questions to the EU court. The Commission argued that this question was irrelevant in terms of resolving the criminal case, and also for the reason that the referring judge failed to provide any information about the effects of the disciplinary proceeding on the continuation of the criminal process before him. However, the CJEU found the question admissible and distinguished the case from the *Miasto Łowicz* case by claiming that a procedural question, i.e. whether the judge must face a disciplinary proceeding if he does not comply with a decision of the Curia, must be decided before addressing the substantive issue in the criminal case. The CJEU then argued in substance that Article 267 TFEU precludes such disciplinary proceedings as these measures may jeopardise the effective exercise of referring questions to the CJEU, judicial independence and the cooperation between courts embedded in the relevant EU law provision and may also deter other national judges from turning to the CJEU, which can undermine the purpose of the uniform application of EU law. The *IS* case is a clear instance of the abusive practice of disciplinary powers used by court presidents in order to put administrative pressure on recalcitrant judges. Although the initial questions about judicial independence were found inadmissible by the CJEU, the EU court made an important contribution to the debate about the general requirements and the current state of judicial independence in Hungary. It is a question today whether the *IS* case will have any impact on the number of requests made by Hungarian judges to the CJEU. The future trend in preliminary references will also be a test of judicial independence in Hungary.¹⁸³

Case allocation and the right to a lawful judge

As was stated above, the new model of court administration introduced in 2012 conferred significant powers on the President of the National Office for Judiciary. Among them, the President was authorised to reassign cases from the originally competent court to another one if the timeliness of justice could be guaranteed by the move. However, this power was heavily criticised by international organisations from the very beginning on the ground that failing any established criteria for case transfer the President could decide at her own discretion. As courts in the central region of Hungary traditionally had to deal with an excessive workload and struggled with a huge backlog for a long time, decisions about case transfers mainly concerned courts residing in Budapest where ‘mega cases’ (complex and difficult legal problems) and cases of great political importance are concentrated. Even though the government sought to provide a constitutional basis for case transfer and incorporated the authorisation in the 2011 Fundamental Law of Hungary, first in the Transitional Provisions and later in the Fourth Amendment adopted in 2013, the Constitutional Court held that this practice violated several aspects of the right to a fair trial, and therefore was incompatible with the Fundamental Law and the European Convention on Human Rights.

182 The documents are available on the website of the Hungarian Judicial Association (MABIE), <https://mabie.hu/index.php/1501-a-szolgaltati-birosag-megszuntette-a-figyelmi-eljarast-a-pkkb-birajaval-szemben>, accessed 18 March 2022.

183 On this approach, see András György Kovács and Gergely Barabás, ‘Why Judicial Independence Matters? Administrative Judiciary: The Transmission Point Between National and EU Law’ (2018) 2 *ELTE Law Journal* 127 <https://eltelawjournal.hu/wp-content/uploads/2019/12/06_Kovacs_Barabas.pdf>, accessed 24 April 2022.

In its *Miracle Europe v Hungary* judgment, the ECtHR also found the power of the President of the NOJ in breach of Article 6 of the European Convention on Human Rights.¹⁸⁴ The ECtHR stressed that due to the lack of clearly defined and objective criteria for reassigning cases, the President could use her power in a discretionary manner, which therefore was not foreseeable. Consequently, the court designated by the President to decide on a case originally in the competence of another court was not a court “established by law,” resulting in violation of the right to a fair hearing.¹⁸⁵

While the practice of case transfer was repealed by the Hungarian legislator in 2013, judicial secondment continues to be used extensively in Hungary, which raises very similar concerns about the right to a lawful judge. According to the latest annual report of the President of the NOJ,¹⁸⁶ court presidents decided on the secondment of overall 388 judges, while the President of the NOJ transferred 83 judges to other courts, most of them from lower courts to an upper tier of the judiciary. In 2020, 43(!) judges were seconded to the Curia, also from lower courts.

Under the current legal framework, judges can be transferred to another court for two main reasons: (1) to provide a balanced workload between courts or (2) for the professional advancement of the judge concerned. Even if the law provides the possibility for court executives (court presidents of regional courts and the President of the NOJ) to decide on judicial secondment without the consent of the judge concerned, according to acting judges the decision is always subject to prior consent of the judge concerned. However, other aspects of the practice of judicial secondment can reasonably be criticised. In principle, temporary secondments should be limited to a short period of time (a maximum of 6 months based on international standards), but in Hungary secondments often last longer and can be prolonged, which makes the status of the judge affected uncertain. This practice is all the more problematic in a system characterised by hierarchies and career judges in which positions in higher courts have greater salaries and reputation. The independence of judges seconded to higher courts (to the Curia for instance) can be put at risk as judges can be subject to indirect pressure to meet the expectations of their superiors for career advancement reasons. The large number of judicial secondments, especially to the Curia, carry a significant risk from the perspective of judicial autonomy and integrity.

In 2016, the Curia found that the principles laid down by the ECtHR in the *Miracle* judgment had to also be applied in relation to judicial secondments. The Curia argued that decisions on judicial secondment must be based on criteria which guarantee the appearance of independence and impartiality. Therefore, secondments must be indicated in the case allocation scheme of the court affected. In the case, an entire judicial panel consisting of three judges was seconded to an appeal court which had to adjudicate on appeal about a ruling delivered by their original court. While the case allocation scheme was amended just after the case was distributed to the seconded judges, the information about which cases would be dealt with by the seconded panel was then published on the court’s website, which the Curia found in compliance with the principles of legal certainty and foreseeability.¹⁸⁷ This argument, which was also reiterated by

184 *Miracle Europe Kft v Hungary* App no 57774/13 (ECtHR, 12 January 2016), see CJC database [here](#).

185 For a detailed analysis of the core arguments of the decision and the concept of internal judicial independence, see Joost Sillen, ‘The concept of ‘internal judicial independence’ in the case law of the European Court of Human Rights’ (2019) 15 *European Constitutional Law Review* 104.

186 2020 Report of President of the National Office for the Judiciary, 17, <https://birosag.hu/sites/default/files/2022-01/obhe_2020_eves_beszamolo.pdf>, accessed 18 March 2022.

187 Decision no. [Pfv.IV.20.118/2016/6](#) of the Curia, see CJC database [here](#).

the Constitutional Court, is not convincing because judicial secondment can have the same effect as case transfer, especially in the case that an entire panel is seconded to another court and considering that cases are not randomly or automatically assigned to the seconded judges (panel). In reviewing the decision of the Curia the Constitutional Court further stated that seconded judges qualify, in principle, as lawful judges since the process of judicial secondment is regulated by law in accordance with basic legal guarantees.¹⁸⁸

In Hungary, case allocation is not fully automatised. Act CLXI of 2011 on the Organisation and Administration of Courts determines the principles of case allocation by stressing that the right to a lawful judge requires case allocation schemes which make it foreseeable which case will be heard by which judicial panel. However, the current legal framework allows court presidents significant discretion to determine the specific rules for distributing cases. For instance, court presidents can make changes to the case allocation scheme without meaningful constraints, and they are not bound by the opinion of the judicial council or the judicial departments of the courts involved either. While doing so, they can even change the composition of judicial panels, which can have effects on the outcomes of cases. The rules on case allocation in the Curia are regularly changing.¹⁸⁹ In recent years, the system established in the Curia has been publicly criticised even from within the judicial organisation,¹⁹⁰ and even though the new President who took office in January 2021 promised to introduce a truly automatised regime, major deficiencies have remained. Until March 2022, in principle cases were dealt with by three-judge panels in the Curia. However, in the case allocation scheme relating to administrative cases judges were assigned to ‘grand panels’ consisting of at least two ordinary three-judge panels. Accordingly, cases were distributed between ‘grand panels,’ in which one of the presiding judges decided which three-judge panel would adjudicate on the assigned case. This practice clearly violated the principles of foreseeability and legal certainty, and the problem has remained in 2022 concerning electoral cases. We also find the same system of non-transparent internal structure of judicial panels in appeal courts, for instance in the Budapest Regional Court of Appeal (*Fővárosi Ítéltábla*), where important cases on press freedom are dealt with on appeal.¹⁹¹ In February 2022, the Hungarian Helsinki Committee revealed that the composition of two judicial panels adjudicating in referendum cases was manipulated in relation to cases which concerned questions on the homophobic transphobic referendum initiated by the government under the guise of ‘child protection,’ which was scheduled on the day of the 2022 general election.¹⁹² For instance, Barnabás Hajas, a recently appointed judge arriving in the Curia from the executive branch without any previous judicial experience, sat on one of the cases even though he was originally assigned to a panel which did not adjudicate on referendum cases. It is arguable that the current regulation on determining case allocation lacks important legal and institutional guarantees.

188 Decision no. 3128/2020 (V. 15.) AB. This approach was later upheld by the Constitutional Court in Decision no. 3099/2021 (III. 22.) AB even though it was again proved that effectively an entire panel was seconded to a higher court in the case concerned.

189 See the website of the Curia of Hungary <<https://kuria-kozadatok.birosag.hu/kozerdeku-adatok/tevenysegre-mukodes-re-vonatkozo-adatok/a-szerv-alaptevenysege-feladat-es-hataskore>> and also ‘Contributions of Hungarian NGOs to the European Commission’s Rule of Law Report,’ March 2021 <https://helsinki.hu/wp-content/uploads/2021/03/HUN_NGO_contribution_EC_RoL_Report_2021.pdf>, accessed 18 March 2022.

190 Viktor Vadász and András György Kovács, ‘A game hacked by the dealer’ (*VerfBlog*, 10 November 2020) <<https://verfassungsblog.de/a-game-hacked-by-the-dealer/>>, accessed 18 March 2022.

191 See the case allocation scheme on the website of the Budapest Regional Court of Appeal, <https://fovarosiitelotabla.birosag.hu/sites/default/files/field_attachment/a_fovaros_i_telotabla_2022_evi_hatalyos_ugyelosztasi_rendje_4.pdf>, accessed 18 March 2022.

192 ‘Áprilisi népszavazás: matt 13 lépésben a jogállamnak’ (*Helsinki Figyelő* – 444, 11 February 2022) <<https://helsinkifigye-lo.444.hu/2022/02/11/aprilisi-nepszavazas-matt-13-lepesben-a-jogallamnak>>, accessed 18 March 2022.

Freedom of speech and the political activity of judges

In 2016, the Grand Chamber of the ECtHR found that Hungary had violated Article 10 of the European Convention on Human Rights when András Baka, the former President of the Supreme Court, was dismissed from office for expressing critical views on the Hungarian judicial reforms.¹⁹³ The ECtHR stressed that Baka spoke up in his official capacity also as president of the national judicial council (National Council of Justice) in relation to issues of great public interest, and his statements about the reforms did not exceed professional criticism so the interference with his right to freedom of expression was not justified.¹⁹⁴

Since the removal of Baka, which took place late 2011, the situation has not improved. Given the restrictive effects of judicial administration and the general legal and political environment, judges' freedom of expression has been reduced to a minimum. The relevant legislation has always been indiscriminately restrictive in terms of the freedom of expression of judges. According to Article 43 of Act CLXII of 2011, *“A judge may not, outside his or her official capacity, publicly express an opinion on a case pending or under consideration before a court, in particular with regard to cases he or she has heard.”* Article 44 (1) further states that *“A judge may not provide information to the press, radio and television on a case before him.”*

These provisions, if we take them literally, not only ban judges from speaking publicly about their cases, but also from reflecting on any court case, be it an old case or one currently pending before other (even international) courts. This restrictive wording inevitably discourages judges from addressing legal cases and from defending themselves before the public if they are targeted from outside the judiciary. Furthermore, the Fundamental Law clearly states that judges cannot be members of any political party and cannot engage in any political activity (see Article 26(1)). Given that Hungarian judges are historically apolitical and socialised in a bureaucratic organisation, there are not only external expectations but also internal and personal incentives originating in judicial self-image to refrain from speaking up on public matters. All these factors have highly adverse effects on their right to freedom of expression, which also hinders the development of a more resilient and assertive judiciary. A few examples may well illustrate the current situation of freedom of expression within the judiciary.

In February 2021 at the beginning of the regular meeting of the NJC, the President of the Curia, an ex officio member of the body, addressed a NJC member for publishing a critical blogpost on case allocation in a famous international public law forum. He suggested that the relevant piece made the issue of case allocation part of a political debate, in particular given the strict monitoring of the Rule of Law situation in Hungary by the European Commission, and therefore requested the judge to “withdraw” the critical statements. Another case shows that in practice the ban on expressing opinions on public issues is almost complete. The NJC decided (by an 8-7 vote) not to send its representative (the spokesperson of the Council) to a discussion after the screening of a documentary on the struggle of Polish judges, as this activity was seen as political by the President of the Curia and some other participants at a Council meeting.

In recent years, pro-government media have launched several attacks against judges who expressed criticism of the current model of judicial governance or rendered judgments unfavourable to the government. It is often members of the National Judicial Council who are targets of smear campaigns because the Council has the right to exercise supervision

¹⁹³ *Baka v. Hungary* App no 20261/12 (ECtHR[GC] 23 June 2016).

¹⁹⁴ Para 171.

over the President of the NOJ and it has already launched several investigations into the practice of court administration and spoken up critically about it. For these reasons, some news outlets financed by close allies of the government have accused judges of engaging in political activity and being critical of the government. There was a judge who was subject to media attacks even for participating in conferences and a project organised by a human rights NGO. The targeted judge filed a lawsuit against the media outlets which called into question his independence. In this case, the Hungarian courts found the claims of the judge justified and argued that the challenged statements concerning his alleged political activity and lack of independence were unfounded and were likely to damage the reputation of the judge.¹⁹⁵ These courts stressed that expressing critical views on court administration, especially on the NOJ and its President, could not be considered political activity or criticism against the government as the Office is separated from the other branches of government. As for other extrajudicial activities, participating in professional events and doing work for organisations as experts did not in themselves compromise the professional integrity and independence of judges. The Hungarian courts also added that even though judges are public figures they do not have to tolerate false or unfounded statements concerning their activities. While these judgments had to assess public statements by judges or judicial activities conducted outside the courtroom, the courts failed to address them as issues of freedom of expression of judges.

In 2018 a prosecutor was removed from office as a result of a disciplinary proceeding initiated against him for sharing and commenting on 3 political posts on Facebook during the 2018 general election campaign. He challenged the decision before the courts, which held that his dismissal was disproportionate considering the gravity of the disciplinary offence and ordered his reinstatement.¹⁹⁶ The Curia upheld the judgments of the lower courts and argued that prosecutors do have the right to freedom of expression and although this right has some limitations they are not determined by law. The Supreme Court held that prosecutors are not prohibited from using social media (Facebook) and two of the three posts were protected by the right of freedom of expression. These posts were shared from a private account in a closed Facebook group and did not classify as political activity because they did not constitute an overt invitation to political action. Only one post was problematic from this perspective and justified disciplinary sanction, but removal was too harsh, so the sentence was reduced by the courts. Article 29(6) of the Fundamental Law states that prosecutors are prohibited from being members of a political party or engaging in political activity. The act on the status of prosecutors¹⁹⁷ defines disciplinary offences similarly to that of the law on the status of judges, which entails that the main findings in this case can be relevant to the scope of freedom of expression of judges on social media.

While freedom of expression is a fundamental right that judges enjoy with certain limitations, court executives, judicial councils and judicial associations have not only the right but also the obligation to speak up against measures or actions that can undermine judicial independence and public trust in the administration of justice. Misunderstandings about the scope of freedom of speech and about the definition of political activity, which is categorically banned for judges, make it difficult for representatives of the judiciary to decide when and how to speak publicly in the interest of the organisation. Of course, we cannot exclude the possibility that other factors

¹⁹⁵ Decision no. 2.Pf.20.516/2019/4 of the Budapest Regional Court of Appeal, available in the CJC database [here](#).

¹⁹⁶ Decision no. Mfv.X.10.015/2020/4 of the Curia.

¹⁹⁷ Article 82 of Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecutor Employees and the Prosecution Career.

such as fear or purely political considerations can explain the inaction of judicial representatives in Hungary.

Attacks on judicial independence traditionally come from outside the judiciary but the independence of individual judges can also be threatened by internal pressures. From the records of NJC meetings it is apparent that also within this self-governing body there are heavy discussions and sometimes disagreements about whether to make public statements concerning issues that can be detrimental to judicial independence. All these dilemmas reflect the “chilling effect”, which still pervades in the daily operation of the judiciary, even in the case of the NJC, which has shown a large amount of resistance and resilience in recent years.

In 2020, the Prime Minister called on the Minister of Justice to not execute final judgments in cases on prison compensation, and denounced judgments delivered in the Gyöngyöspata school segregation case when the review procedure was pending before the Curia.¹⁹⁸ The President of the NOJ and the President of the Curia, the two top leaders of the Hungarian judiciary, failed to speak up against the PM’s attacks and, surprisingly, the NJC also remained silent. Regarding the intensifying political criticism of the administration of justice, President of the NOJ György Senyei argued in an interview that judges must bear the criticism, and speaking up on political matters is strictly forbidden for courts.¹⁹⁹ The President of the Curia stressed that *“it is rather for the benefit than to the disadvantage of the judiciary if it is aware of the social impacts of judgments; the same applies to the public perception of cases. How strong the criticism is and in what style it is rendered depends on the political actors, and neither the Curia nor its president have any control over this.”*²⁰⁰

In March 2022, the NJC adopted a new Code of Ethics which seeks to tackle the problem of the very restrictive understanding of the freedom of expression of judges. The Code contains rules that provide judges who publicly address matters relating to judicial independence and court administration with a shield against any form of retaliation. Article 4(2) with the heading “Public Sphere, Social Media” states the following: *“A judge can freely express her views on the law, the legal system and on court administration, and in particular she can publish, give lectures and teach.”*²⁰¹ This can be understood as an effort to bring the Hungarian legal environment more in line with the *Baka* judgment’s main findings, which is a step that the legislator has so far failed to take. The new Code of Ethics, under the same heading, allows judges to use social media with due diligence to maintain the reputation of the judicial office and public trust in the independence and impartiality of judges.

198 These statements by the PM were made during an international press conference at the beginning of 2020, <https://www.youtube.com/watch?v=hCf_cg0xE3s>, accessed 18 March 2022.

199 Marianna Bíró, ‘A bírói ítéletek kritikáival együtt kell élni’ (Index.hu, 5 February 2020) <https://index.hu/belfold/2020/02/05/obh_elnok_senyei_gyorgy_bemutakozas_miniinterju_birosagok_biroi_fuggetlenseg_itelkezesi_gyakorlat/>, accessed 18 March 2022.

200 <<https://www.youtube.com/watch?v=40a-wg11g9k&t=492s>>, accessed 18 March 2022.

201 Resolution no. 16/2022 (III.2.) OBT, which contains the final version of the new Code of Ethics.

Conclusion

The transformation of the Hungarian Constitutional Court driven by political strategy reached its goal by 2013. Since then, the Constitutional Court has failed to carry out its constitutional duties and it does not limit the power of the executive. Furthermore, the so-called ‘full constitutional complaint’ introduced in 2012 provides a tool for the Constitutional Court to exert strict control over the jurisprudence of the ordinary judiciary by reviewing the constitutionality of judicial decisions. In 2020, the Constitutional Court argued that if judges arbitrarily set aside national law it makes their judgments contrary to the Fundamental Law, and this is the case when they wrongly believe that EU law must be applied or when they seek to solve a perceived norm collision which in fact does not exist.²⁰² This ruling and the Constitutional Court’s recent approach to the primacy of EU law, which entails that the Constitutional Court has the power to review EU law based on fundamental rights considerations, sovereignty and constitutional identity,²⁰³ may not encourage judges to invoke EU law, in particular in cases concerning the status of judges or court administration issues, in which the relevance of EU law is a new development heavily opposed in the official communications of the Hungarian government and high-ranking officials.²⁰⁴ The reactions of the Curia and the court administration to Judge Csaba Vasvári’s preliminary reference can have a chilling effect on judges and deter them from turning to the CJEU in politically sensitive cases, especially when judicial independence is at stake.

The regulation of the central administration of the judiciary introduced in 2012 has seriously limited the scope of self-governance and the authority of the National Judicial Council. The above-mentioned administrative changes and the practice concerning politically important issues made the values of trust, impartiality, independence and integrity of judges relatively weak. There are serious signs of chilling effects and fears in courthouses, and the long period of biased professional in-house socialisation also left a mark on legal practice. Just one example from the jurisprudence: the Budapest Regional Court of Appeal has ruled that an article published in a pro-government newspaper (*Magyar Nemzet*) which described the Labris Lesbian Association, a human rights NGO, as a paedophile organisation did not damage the reputation of Labris. Labris is the publisher of the much-publicised storybook ‘Fairyländ is for Everyone,’ which contains LGBTQI-themed stories for children. In its oral reasoning in the judgment, the court said that the association should bear this criticism because the article which arrived at an arguably provocative conclusion based its argumentation on a statement by the prime minister.²⁰⁵

202 Decision no. 11/2020 (VI. 3.) AB, para 60.

203 Gábor Halmai, ‘National(ist) constitutional identity?: Hungary’s road to abuse constitutional pluralism’ (2017) 8 EUI Working Paper LAW <<https://cadmus.eui.eu/handle/1814/46226>>, accessed 18 March 2022. The Constitutional Court has not gone so far as to overrule any judgment of the CJEU and find it unconstitutional, even though the Minister of Justice sought to achieve this aim in relation to case C-808/18 on Hungarian asylum legislation. See Decision 32/2021 (XII. 20.) AB. For a short commentary on the decision, see Nóra Chronowski and Vincze, Attila, ‘Full Steam Back: The Hungarian Constitutional Court Avoids Further Conflict with the ECJ’ (*VerfBlog*, 15 December 2021) <<https://verfassungsblog.de/full-steam-back/>>, accessed 24 April 2022.

204 See for instance Government Decree no. 1527/2021 (VIII. 2.) on the 2021 Rule of Law Report of the European Commission. In 2020, in a short opinion piece on the CJEU’s interim order suspending the operation of the Disciplinary Chamber of the Polish Supreme Court, András Zs. Varga argued that EU institutions do not have the power to determine the structure of judicial organisation in the member states. András Zs. Varga, ‘Védi vagy kiüresíti a bírói függetlenséget az EU Bírósága?’ (*Mandiner*, 10 April 2020) <https://precedens.mandiner.hu/cikk/20200410_vedi_vagy_kiuresiti_a_biroi_fuggetlenseget_az_eu_birosaga>, accessed 24 April 2022.

205 Eszter Zalan, ‘Budapest ruling seen as normalising anti-LGBTI sentiment’ (*EUobserver*, 3 February 2022) <<https://euobserver.com/democracy/154275>>, accessed 24 April 2022.

Even when the judiciary shows a certain degree of autonomy and professional integrity the government is willing to step in and overrule a judgment with legislation. This happened in the Gyöngyöspata compensation case, in which courts awarded pecuniary damages for school segregation suffered by members of the Roma community. As a response to the judicial verdicts, the parliament amended the Act on National Public Education to prevent courts awarding pecuniary compensation for similar claims in the future and to force them to grant damages only in the form of educational and training services.²⁰⁶ The government launched a harsh anti-Roma campaign²⁰⁷ and put pressure on the courts, especially on the Curia, by formulating clear expectations about the outcome of the case, but the judicial organisation remained almost completely silent. The Hungarian Judicial Association (MABIE) published a very short communiqué highlighting the fundamental principles of the administration of justice.²⁰⁸ The Curia followed suit by referring to the Fundamental Law and the principle of judicial independence in the final verdict.²⁰⁹ Both reactions were very moderate, especially in the light of the severity of the attacks directed at the judicial branch by the executive.

Taking all this into account, the state of judicial independence has not improved during the period under study. As a result of the heavily criticised appointment practice of the President of the NOJ and also the forced retirement of judges, which resulted in the removal of a large number of experienced court executives, the professional integrity of judicial leaders is highly questionable. The position and powers of administrative leaders (especially court presidents) in the Hungarian judiciary are traditionally high: they can effectively determine the working conditions and remuneration of judges. The cases analysed in this report show the inner tensions and hardships involved in coping with the consequences of authoritarian government.

206 See also Hungarian Helsinki Committee, *Non-Execution of Domestic and International Court Judgments in Hungary* (2021) 21– 22, <https://helsinki.hu/en/wp-content/uploads/sites/2/2021/12/HHC_Non-Execution_of_Court_Judgments_2021.pdf>, accessed 24 April 2022.

207 Lilla Farkas, 'The EU, Segregation and Rule of Law Resilience in Hungary' (*VerfBlog*, 8 March 2020) <<https://verfassungsblog.de/the-eu-segregation-and-rule-of-law-resilience-in-hungary/>>, accessed 24 April 2022.

208 The communiqué entitled 'The Fundamental Principles of the Administration of Justice' was published on the MABIE website on 23 January 2020. See <<http://mabie.hu/index.php/1517-az-igazsagszolgalatas-fundamentumai>>, accessed 24 April 2022.

209 Decision no. Pfv. IV. 21.556/2019/22 of the Curia, available in the CJC database [here](#).

NATIONAL REPORT: ITALY

The report was prepared under the TRIIAL project, co-funded by the European Union's Justice Programme (2014-2020)

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The aim of this national report is not to provide a complete picture of the rule of law in Italy. It rather seeks to supplement other existing reports as it discusses the relevant rule of law issues concerning judges, state prosecutors, attorneys and arbitrators through case law, studied and analysed for the purposes of the DG Justice TRIIAL project <https://cjc.eui.eu/projects/triial/>.

I. Short summary

The national report on Italy, starting from an analysis of the socio-political context, deals with some aspects related to the rule of law in Italy in the light of cases collected within the context of the TRIIAL project²¹⁰. In particular, after addressing the broader framework of the rule of law and the ordinary judiciary, the text deals with the following issues: participation of judges and prosecutors in political activities, appointments to leadership positions by the High Council of the Judiciary and review by the administrative judge, freedom of expression, statute of honorary judges, independence and impartiality of the Consiglio di Giustizia amministrativa (judicial council), appointment of the Italian member of Eurojust and Security Decrees, limits to the powers of judges and personal attacks on justices.

II. Introduction: Sociopolitical context and broader framework of RoL challenges for legal professions

1. Sociopolitical context

At the beginning of the 1990s²¹¹, the political system that had emerged World War II came to an end (to such an extent that we might even talk about the end of the ‘First Republic’) as a result of the combined effects of the collapse of Soviet communism and the action of the judiciary (the so-called “Operazione Mani pulite” – “Operation Clean Hands”) directed against the widespread public corruption, which involved numerous exponents of the government parties and of the economic society.

The collapse of the political parties of the first Republic was indeed the result of the *Mani pulite* inquiry, but the frustration of citizens with politics and political actors had been brewing for over ten years. The government parties collapsed because of a loss of legitimacy dating back to the previous decade.

The collapse of the communist regimes in Eastern Europe and the Soviet Union led the Communist Party to disband in 1991, giving birth to the Democratic Party of the Left. In 1993-1994 the Socialist Party and the Christian Democrats also disbanded, while in northern Italy a new political formation emerged, the *Lega Nord*, which endorsed the objective of transforming the State into a federal one.

The introduction of a majority-based electoral system in 1993 led to the formation of two alliances in strong conflict, the centre-right and the centre-left.

210 For an overview of the state of the rule of law in Italy, see the annual report by the EU Commission: Commission staff working document, *2021 Rule of Law Report Country Chapter on the rule of law situation in Italy*, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021SC0716&from=EN>

211 G. Buccini, *Il tempo delle Mani pulite*, Bari, 2021; U. Gentiloni Silveri, *Storia dell'Italia contemporanea 1943-2019*, Bologna 2019; G. Sabbatucci, V. Vidotto, *Storia contemporanea. Dalla Grande Guerra a oggi*. Nuova ediz., Bari 2019; F. Amato, G. Nunziante, V. Vidotto, L. Sacchi, G. Ferroni, M. Pistoia, *Italia*, Enciclopedia Italiana, IX Appendice, Roma 2015, https://www.treccani.it/enciclopedia/italia_res-3eb6f180-4526-11e7-a2fd-00271042e8d9_%28Enciclopedia-Italiana%29/; AA.VV., *Italia*, in *Dizionario di Storia*, Roma 2010, https://www.treccani.it/enciclopedia/italia_%28Dizionario-di-Storia%29/.

In 1992²¹², the conflict with organised crime reached its peak with the killing of judges Falcone²¹³ and Borsellino²¹⁴, which led to the arrest of the most important representatives of the Sicilian Mafia and to the disruption of the Mafia's assassination strategy. The so-called State-Mafia negotiations to put an end to the bombing strategy is still an open chapter.

The lack of confidence in political parties in the following years led to the creation of populist movements such as the 5 Star Movement.

In the course of the 21st century, Italian society has undergone profound changes: partly inherited from the recent past, partly produced by new events, partly a reflection of global transformations, and partly specific. To a large extent, these are trends common to the international context and, in particular, to the rest of Europe: globalisation, immigration, ageing, insecurity, and civil disenchantment.

The way in which Italy has dealt with the COVID-19 crisis has made the State a model of reference for policies aimed at combating the pandemic. This role has been unanimously recognised at European and global level, thanks also to the authority of the government chaired by Mario Draghi²¹⁵.

2. Broader framework of the RoL, challenges for legal professions

The Italian Constitution (1948) provides that “judges are subject only to the law” (Article 101) and that “the Judiciary is a branch that is autonomous and independent of all other powers” (Article 104). All decisions concerning judges and prosecutors (in respect of employment, assignments and transfers, promotions and disciplinary measures of judges) are within the exclusive competence of the *Consiglio Superiore della Magistratura* (High Council for the Judiciary; hereafter, CSM), a body established directly by the Constitution (Article 104)²¹⁶.

The CSM is presided over by the President of the Republic. The First President and the Prosecutor General of the Court of Cassation are ex-officio members of the CSM. Two thirds of the members are elected by all the ordinary judges belonging to the various categories, and one third are elected by Parliament in a joint session from among university law professors and lawyers with at least fifteen years of practice. The Council elects a vice-president from among the members designated by Parliament. Elected members of the Council remain in office for four years and cannot be immediately re-elected. They may not, while in office, be registered in professional rolls, nor serve in Parliament or on a Regional Council.

212 *Borsellino e Falcone: il ricordo 25 anni dopo*, <https://www.rai.it/dl/easyweb/articoli/BORSELLINO-E-FALCONE-IL-RICORDO-25-ANNI-DOPO-32ecfb02-2624-4104-9571-14181c92315c.html>

213 S. Lupo, Falcone, Giovanni, *Dizionario Biografico degli Italiani*, Roma 2013, https://www.treccani.it/enciclopedia/giovanni-falcone_%28Dizionario-Biografico%29/; <https://www.csm.it/web/csm-internet/aree-tematiche/per-non-dimenticare/giovanni-falcone>

214 https://www.csm.it/web/csm-internet/aree-tematiche/per-non-dimenticare/paolo-borsellino?show=true&title=Il%20%22disarmo%22%20dell%27antimafia:%20la%20denuncia%20pubblica%20di%20Borsellino&show_breadcrumb=Il%20%22disarmo%22%20dell%27antimafia:%20la%20denuncia%20pubblica%20di%20Borsellino

215 J. Horowitz, How Mario Draghi Is Making Italy a Power Player in Europe, *New York Times*, April 15, 2021, <https://www.nytimes.com/2021/04/15/world/europe/italy-draghi-eu.html>; ANSA, The Economist crowns Draghi, Italy country of the year, 16 December 2021, https://www.ansa.it/english/news/politics/2021/12/16/the-economist-crowns-draghi-italy-country-of-the-year_0a6663cd-1083-4631-a4aa-fcbab33a7c60.html.

216 AA.VV., *Il governo autonomo della magistratura a sessant'anni dalla legge istitutiva del Consiglio superiore della magistratura (l. 24 marzo 1958 n. 195)*, *Foto it.*, 2019, V, 1; Consiglio superiore della magistratura, *Enciclopedia on line Treccani*, <https://www.treccani.it/enciclopedia/consiglio-superiore-della-magistratura/>

The current text of the rules on the judicial system (Royal Decree no. 12 of 30 January 1941) is the result of amendments introduced between 2005 and 2007, first by the centre-right government (Law no. 150/2005, implemented through several legislative decrees), then with the partial “reform of the reform” by the centre-left government (Law no. 269/2006 and Law no. 111/2007)²¹⁷.

The 2005 reform provided, *inter alia*, for the reintroduction of selective procedures for career advancement within the judiciary, the hierarchisation of the public prosecutor’s office and the substantial separation of the careers of judges and prosecutors. These changes were superseded by the 2006 and 2007 laws.

After these interventions, there were no further legislative changes (with the exception of the reform of the rules on the civil liability of magistrates, Law no. 18/2015).

The debate on the autonomy and independence of the judiciary has always remained open, especially between 2008 and 2011 (last Berlusconi Government) and in the last few years due to a scandal concerning appointments by the CSM (the so-called “Palamara” case, which involved several politicians and magistrates accused of crimes of corruption and influence peddling, one of them being the former public prosecutor and former member of the CSM Luca Palamara²¹⁸). In the first case, the separation of careers between judges and prosecutors was discussed with great insistence (with the presentation of the constitutional bill no. 4275²¹⁹ (House Act 2011), entitled Reform of Part II Title IV). However, no reform ever took place due to the fall of the Berlusconi government and the subsequent end of the legislature²²⁰.

In the most recent case, the solution proposed is to reform the electoral system of the CSM so as to disconnect the dynamics of the representation of magistrates from the so-called “currents”, i.e. the organisations through which magistrates are grouped into associations, in order to reduce their influence in the appointment of council members.

By contrast, there have been no significant innovations in relation to the independence of magistrates of special jurisdictions, where the Government’s role in the appointment to certain positions, such the appointment of a portion of the members of in the Council of State, could appear to be a problem, or their participation in government activities in offices involving direct collaboration with many Ministers..

The clash between politics and the judiciary does not seem to have subsided, on the contrary: the debate is constantly enriched by new investigations and scandals that shake the halls of power. For instance, the proceedings against the former Interior Minister Matteo Salvini, charged with kidnapping following his controversial migration policies; or the recent investigations into the Open Foundation for alleged illegal financing of parties, which involved the former Prime Minister Matteo Renzi.

217 AA.VV., Dieci anni di riforme dell’ordinamento giudiziario, 2016, Foro it., V, 157 ff.

218 Il caso Palamara e lo scandalo delle nomine al Csm, 23 settembre 2021, a cura di Giulia Merlo, giornalista di Domani, <https://www.internazionale.it/notizie/2021/09/23/palamara-scandalo-csm>

219 <https://leg16.camera.it/126?tab=2&leg=16&idDocumento=4275&sede=&tipo=>

220 AA.VV., Il progetto di riforma del titolo IV della parte II della Costituzione nel d.d.l. costituzionale 7 aprile 2011 n. 4275, Foro it., 2011, 241 ff.

III. Legal issues affecting independence, impartiality, accountability, trust and the rule of law

1. Participation of judges and prosecutors in political activities.

The independence and autonomy between the political and the judicial powers is a fundamental cornerstone of the constitutional system. In recent years, however, there has been a continuous conflict between the powers of the State, characterised by an increasing impact of judicial investigations on the dynamics of politics.

According to the late Giovanni Falcone²²¹, “*the Judiciary has always claimed its independence, but in reality has too often allowed itself to be seduced by the enticements of political power*”. This statement perfectly describes the difficult relationship between the judiciary and politics in Italy: the last thirty years of the history of the Republic have in fact seen a succession of judicial events, investigations, trials, and mutual accusations.

In a democratic state based on the rule of law, it is certainly necessary for political and judicial powers to be separate: on the one hand, politics must respect the independence of the judiciary, refraining from any initiative that could hinder or prevent the proper exercise of its role; on the other hand, it is indispensable for the judiciary to be independent, avoiding any possible interference on the part of political power and, therefore, as provided for in Article 104, paragraph 1 of the Constitution, autonomous from all other powers.

1.1. The legal framework

One of the most problematic issues concerns the participation of judges and prosecutors in political life, which has been a constant in Italian history since the *Mani pulite* era.²²²

Over the years, there has been an increase in the participation of magistrates (and former magistrates)—especially public prosecutors—in active politics. This trend has emerged not only as a result of spontaneous candidatures, but also due to co-optation by the political class, which sometimes entrusts magistrates with symbolic or responsible positions, both at the local and central government levels.

The idea behind this strategy is that magistrates may contribute to the governance of public affairs with highly qualified professionalism, thanks to the experience gained in the field of justice, by exercising power with autonomy and independence. As specified by the Italian Constitutional Court²²³, “*magistrates must have the same rights of liberty guaranteed to every other citizen and therefore can, of course, not only share a political idea, but also expressly express their opinions in this regard*”. At the same time, however, the functions exercised and the qualification held by magistrates are not insignificant or without effect on the constitutional order²²⁴. Magistrates, as noted by the Constitutional Court, according to constitutional provisions (Art. 101, para. 2, and Art. 104, para. 1, of the Constitution), “*must be impartial and independent and such values must be protected not only with specific reference to the concrete exercise of*

221 G. Falcone, M. Padovani, *Cose di cosa nostra*, Milano 1991.

222 For an initial assessment, see C. Guarnieri, *Giustizia e politica. I nodi della seconda repubblica*, Bologna, 2003; P. Borgna, M. Cassano, *Il giudice e il principe. Magistratura e potere politico in Italia e in Europa*, Rome, 1997.

223 Corte Cost. 17 July 2009, no. 224, *Foro it.*, Rep. 2009, *Ordinamento giudiziario*, no. 63.

224 Corte Cost. 8 June 1981, no. 100, *Foro it.*, 1981, I, 2360, with a note by Cantisani.

judicial functions, but also as an ethical rule to be observed in all behaviour in order to prevent their independence and impartiality from being justifiably doubted”.

The constitutional principles relating to the right to vote and the guarantee of the electoral mandate, the non-removability of magistrates and the impartiality and independence of judges had already previously been addressed by the Constitutional Court. Decision no. 172 of 26 October 1982²²⁵ declared the challenge to the constitutional legitimacy of Art. 8, para. 2, of Presidential Decree no. 361 of 30 March 1957 to be unfounded: according to this decree, any magistrates, with the exception of those of the higher jurisdictions, who have run in elections for the Chamber of Deputies and have not been elected, cannot exercise, for a period of five years, their judicial functions in the same district in which the elections took place, in reference to Art. 3, 51, paras. 1 and 3, and Art. 107, para. 1, of the Constitution.

The key question therefore revolves around two opposing constitutional principles: on the one hand, a magistrate’s right not to be excluded from the exercise of his or her electoral rights (Article 51 of the Constitution, according to which Italian citizens are eligible for public offices and for elective positions under equal conditions) and, on the other hand, the need to safeguard the image of independence of individual magistrates and the credibility of the judiciary (Article 104 of the Constitution).

1.2. The position of the Constitutional Court.

In judgments nos. 224/2009²²⁶ and 170/2018²²⁷, the Constitutional Court stated that it is neither contradictory nor detrimental to the exercise of political rights to limit the participation of magistrates, albeit under certain conditions, in political life, which includes their standing for election or obtaining positions of a political nature and, at the same time, to consider their membership in political parties and their systematic and continuous participation in party activities to be a disciplinary offence.

The Constitutional Court rejected the claims of unconstitutionality of Art. 3, para. 1, letter h) of Legislative Decree no. 109/2006²²⁸ put forward by the Disciplinary Section of the CSM with reference to Articles 2, 3, 18, 49 and 98 of the Constitution.

According to the Court, it is necessary to preserve the meaning of the constitutional principles of impartiality and independence of magistrates in every aspect of public life. For this reason, the prohibition of membership—or systematic and continuous participation—in political parties, is a safeguard of those principles and as such must concern all magistrates, in whatever position they may find themselves.

In the case of magistrates, the distinction between the exercise of the right to vote and organic affiliation with one of the political parties must remain firmly in place; in the case of magistrates temporarily out of office for the exercise of a political office, it is left up to the prudent assessment of the Disciplinary Section to establish whether in practice such conduct may constitute an effective disciplinary offence.

225 Corte Cost. no. 172 of 26 October 1982, *Foro it.*, 1983, I, 2678, with a note by Messerini

226 <http://www.giurcost.org/decisioni/2009/0224s-09.html>

227 <https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2018&numero=170>.

228 h) membership or systematic and continuous participation in political parties or involvement in the activities of persons operating in the economic or financial sector that may condition the exercise of functions or otherwise compromise the image of the magistrate;

According to the Constitutional Court, while membership in a political party is a fact revealing a stable and continuous adherence of a magistrate to a given political party, the evaluation of the requirements of systematic and continuous participation of the magistrate in the life of a party excludes any automatic sanctioning. This principle applies in particular to magistrates on leave of absence to satisfy the fundamental rights guaranteed by Article 51 of the Constitution.

1.3. The balancing between the protection of the independence of the judiciary and the right of national judges to participate in political life at national level.

In a recent decision, the Court of Cassation (Joint Civil Chambers, no. 8906/2020, 14/05/2020) dealt with the issue of balancing between the protection of the independence of the judiciary and the right of national judges to participate in political life at national level, within the framework provided for by the Italian Constitution.

The Joint Civil Chambers of the Court of Cassation ruled on questions of legitimacy against decisions of the disciplinary section of the CSM.

The applicant, an Italian judge temporarily placed on unpaid leave and who remained outside the working framework of the national judiciary in order to perform several electoral mandates, appealed before the Court of Cassation against a decision of the CSM, which found him guilty of the disciplinary offence consisting in “becoming a member of or taking part continuously and systematically in a political party”, as defined by Italian Legislative Decree no. 109/2006. In fact, the applicant had for several years held various political positions within an Italian political party.

The applicant made seven pleas. The most interesting are the third, the fourth and the seventh pleas on the interpretation and application of Legislative Decree no. 109/2006.

The third plea concerned the incorrect application of the Legislative Decree, as the CSM had not taken into account that being a member of that political party was considered as a prerequisite for becoming a candidate for election to institutional positions.

The fourth plea alleged, in essence, that members of the judiciary temporarily placed on unpaid leave and outside the working framework of the Italian judiciary had been incorrectly included within the scope of application of the Legislative Decree. According to the applicant, that inclusion was the result of an interpretation of the Legislative Decree given by the Italian Constitutional Court, which was not applicable to the case.

With the last plea, the applicant raised a question of constitutionality concerning the Legislative Decree, as it constituted a limit to the right of members of the judiciary to participate in political life at national level as protected by the Italian Constitution.

The Court of Cassation rejected the appeal.

The third plea was considered unfounded, as the issue had already been addressed by the Constitutional Court, which had ruled that the participation of members of the judiciary in the national political life would be ensured to the extent that it did not imply becoming part of and taking part systematically and continuously in a political party. Even if they are placed outside the working framework of the judiciary, national judges must safeguard their independence and impartiality. The fact that a political party requires membership as a prerequisite for being an eligible candidate does not affect the professional duties that a national judge must fulfil.

The fourth plea was equally held to be unfounded. According to the Court of Cassation, the personal scope of application of the Legislative Decree concerned all members of the

national judiciary, with no exception. This was clearly affirmed by the decision of the Italian Constitutional Court in case no. 224/2009.

Finally, the Court of Cassation likewise rejected the question of constitutionality.

Before addressing the pleas raised by the applicant, the Court of Cassation clarified the constitutional principles applicable to the Italian judiciary, in particular as regards the right of its members to stand for election and to participate in political life at the national level. According to the Court, members of the judiciary can neither become the promoters of any political programmes, nor be subject to orders or directives from anyone regarding the way they should judge. Respect for the rule of law implies the independence of judges: internal independence vis-à-vis other judges, and—above all—external independence vis-à-vis the organs that are an expression of political power. Within this framework, the autonomy and independence of the judiciary are conceived as essential to ensuring the impartiality of national judges when they are called upon to apply the law. Indeed, being impartial means judging without prejudices, not letting oneself be influenced by sympathies, personal interests, powers and external interests of any kind: it means judging without expectations of advantages and without the fear of prejudice.

In particular, the exercise of the judicial function imposes on the judge a duty not only to “be” impartial, but also to “appear” as such.

In this regard, the Court of Cassation recalled that the importance of the “public image of impartiality” of the judge had also been underlined by the ECHR in its case law. It is precisely the duty of a magistrate to ensure his or her own “public image of impartiality”, which makes the relationship between judges and politics particularly critical and their participation in the political life of the country extremely delicate.

That balancing is addressed by the Italian Constitution in Article 98, which provides that the national legislator can establish “limitations on the right to join political parties” for judges and other categories of public officials. Therefore, Legislative Decree no. 109/2006 represents an implementation of Article 98 of the Constitution. That means that both the Constitution and the national legislator want national judges to refrain from joining a political party to ensure that they are not perceived as partisan actors and their exercise of jurisdiction cannot be (mis)construed as an instrument of political struggle. The balancing between the right of national judges to participate in political life and the protection of their impartiality and independence thus implies an absolute prohibition against becoming a member of political parties. Otherwise, the conduct of mere participation in political parties will constitute a disciplinary offense only when it can be qualified according to the parameters of “systematic” and “continuous” participation; with regard to the case in question, any automatic sanctioning was therefore excluded.

1.4. The resolution of the High Council for the Judiciary of 21 October 2015 on the return to the judicial function after the end of a political mandate.

In its resolution of 21 October 2015 on the return to the judicial function after the end of the political mandate,²²⁹ the High Council for the Judiciary took a clear position on the relationship between politics and jurisdiction and on the need for a regulatory intervention aimed at redefining

²²⁹ <https://www.csm.it/documents/21768/41479/Delibera+su+rapporto+tra+giurisdizione+e+politica+21+ottobre+2015/84079d84-9dcb-6d8e-646f-fff3486daff9?version=1.0>. Consiglio superiore della magistratura, 21 October 2015, *Foro it.*, III, 2016, 361 noted by G. Grasso.

the entire set of rules concerning the participation of judges in political life²³⁰. The intention was to correct the distortions resulting from the current system. In particular, the resolution focused on the issue of elections to positions in local and regional governments, where the rules differ from those set for parliamentary elections, and the return to judicial office of those who have held public administrative and government positions, have carried out political and parliamentary activities, or have stood in national or local elections.

The matter is under discussion in Parliament as part of the so-called Bonafede reform, which is expected to be the subject of some amendments, as announced by the Minister of Justice.

2. Appointments to leadership positions by the High Council for the Judiciary and review by the administrative judge.

One of the problems of the current setup in the ordinary judiciary concerns the issue of appointments to leadership positions by the CSM. This issue emerged clearly as a result of the Palamara affair, which saw the involvement of politicians and members of the CSM in the procedure for the appointment of the Public Prosecutor of the city of Rome. A number of annulments of appointment decisions by the administrative justice system have caused a stir in public opinion²³¹.

The Constitution states that, according to the rules of the judicial system, the CSM is responsible for the recruitment, assignment and transfer and promotion of magistrates, as well as disciplinary measures against the latter. The importance of the various measures is different. They are resolutions of a body of constitutional relevance, whose presidency is entrusted to the President of the Republic; two thirds of the members are elected by all ordinary magistrates and one third is elected by the Parliament.

230 This is not the first time that the Council has intervened on issues relating to the participation of magistrates in political life.

On 20 November 1986, at the request of the Minister of Justice, the CSM delivered an opinion on the draft law 254 C (drafted by the on. Mammi) and 156 C concerning the prohibition of membership of political parties for magistrates, career soldiers in active service, police officers and agents, diplomatic and consular representatives abroad, the first secondary legislation dates back to ten years later, when, with the decision of 11 March 1996, in order to discourage mainly public prosecutors from embarking on a political career, the CSM prescribed that magistrates who had entered politics should be assigned to collegiate functions when they were reinstated.

The decision of 13 April 2005 replaced the obligation to be assigned to "collegiate" functions with a reference to "judicial" functions, due to the establishment of a single judge of first instance by legislative decree no. 51 of 19 February 1998 and the consequent reduction in the jurisdiction of the bench.

The obligation to assign the magistrate to judiciary functions, considered legitimate by the administrative judge (Tar Lazio, sez. I, 11 October 2013, no. 8779, id., Rep. 2013, item cit., no. 129; 27 April 2006, no. 2991, id., Rep. 2006, item cit., no. 144), was eliminated with the new provisions on transfers (Cons. sup. magistratura 24 July 2014, id., 2015, III, 40).

With the resolution of 28 April 2010, the CSM intervened on the subject of the participation of magistrates in the government of local authorities (municipalities, provinces, regions) and the exercise of political-administrative offices by magistrates who perform or do not perform judicial functions, with the intention of initiating a general reflection and sensitising politics to a modification of primary legislation.

In its deliberation of 21 May 2014, the council rendered an opinion pursuant to Article 10 of Law 195/58 on the candidacy, eligibility and relocation of magistrates in political and administrative elections and in relation to the assumption of national and territorial government offices, with reference to joint bills nos. 116, 273, 296, 394, 546 under consideration by the Senate of the Republic during the 17th legislature.

231 G. Grasso (ed.), *Il governo autonomo della magistratura a sessant'anni dalla legge istitutiva del Consiglio superiore della magistratura (l. 24 marzo 1958 n. 195)*, *Foro it.*, 2019, V, 1, spec. 77 ff.; G. Campanelli, *Il CSM e il conferimento degli incarichi direttivi*, *ibid.*, 82, and A. Travi, *Nozione di legittimità e sindacato sui provvedimenti del CSM*, *ibid.*, 93. Cons. Stato., sent. V, 4 January 2019, n. 97 noted by G. Grasso *Foro it.*, 2019, III, 122.

The CSM enjoys a certain discretionary power, the limits of which are defined by law²³². The extent of its ability to make assessments in relation to the limits of the power of control exercised by the administrative judge. Indeed, the acts of the CSM (with the exception of its disciplinary rulings) are administrative acts. As such, they can be challenged before the courts: administrative courts and, on appeal, the Council of State.

This is a fundamental constitutional principle protecting the interests of those who consider themselves harmed by the resolutions of the CSM. But the discretionary evaluation of the administrative judge cannot replace that of the CSM. As far as appointments are concerned, competence lies with the CSM, not with the judge, whose control concerns conformity with the law. In principle, the boundaries within which the CSM acts first, and then the judge who deals with appeals, are clear. In practice, there are possible flaws in the administrative acts of the CSM, which means that the judge will have an important role in evaluating certain aspects—first of all, the grounds for its resolutions. For some time, the Council of State has tended to extend its scrutiny over the motivations underlying CSM appointments.

The 2015 Consolidated Act on Judicial Leadership²³³ approved by the CSM defined a structured system of general indicators (Arts. 7-13) and specific indicators (Arts. 15-23) of managerial aptitude, depending on the different appointments to be made.

The general indicators include: a) current or previous managerial and semi-managerial functions; b) experience in judicial work; c) experience in collaborating in office management; d) solutions developed in organisational proposals drawn up on the basis of data and information relating to the offices contained in the call for applications; e) organisational and regulatory experience; f) specific training in organisational matters; g) other organisational experience gained outside judicial activity.

The specific indicators define the elements which allow a particular managerial aptitude to emerge in relation to each post. The idea is to draw clearer and more readable career paths, leaving as much space as possible for the conferral of semi-directorial posts at ordinary courts (Art. 15) and appellate courts (Art. 16) and to management posts in small and medium-sized offices (Art. 17). Subsequent steps, in more complex offices (large first instance judicial and prosecutorial management offices, Art. 18; second instance judicial and prosecutorial management offices, Art. 20), require the acquisition of additional management experience. Specialised offices in the fields of juvenile and surveillance courts give priority to professional qualifications and specific experience acquired in the relevant sector (Art. 19), whereas the Supreme Court positions have their own peculiarities (Arts. 21 and 22), as do the appointments as National Anti-Mafia and Anti-Terrorism Prosecutor and Deputy Prosecutor (Art. 23).

Though seniority in the role retains only a residual importance in the case of equivalence of the respective professional profiles, and its relevance as a parameter of evaluation is excluded (Art. 24), the complex set of provisions is designed to bring out the experience acquired by the various aspiring candidates, evaluated on the basis of concrete and measurable data, so as to identify the most suitable person to fill that particular position.

Despite some uncertainties related to the parameter of functions performed outside the role, the system of criteria for the awarding of individual posts (Arts. 27-34), which includes the

²³² See Cons. sup. magistratura, 28 luglio 2015, *Foro it.*, 2016, III, 294, noted by G. Grasso, *Il nuovo testo unico sulla dirigenza giudiziaria alla prova dei fatti: il CSM riforma il CSM*

²³³ Resolution of 28 July 2015, updated to 16 June 2021, https://www.csm.it/web/csm-internet/norme-e-documenti/dettaglio/-/asset_publisher/YoFfLzL3vKc1/content/testo-unico-sulla-dirigenza-giudiziaria

comparative assessment of aptitudes (Art. 26), provides a structured framework of elements to be taken into account for each type of function, while making reference from time to time to specific indicators (Arts. 15-23), i.e. elements to which a “special importance” must be assigned.

While Art. 25 of the Consolidated Act establishes the purpose of comparative evaluation, namely to identify the best candidate to be appointed to an office, Art. 26 provides that the judgment must be comprehensive and unified across the entire professional profile of the magistrate and all the relevant indicators in relation to the individual post put up for competition must contribute to the formulation of the final judgement, through their integrated assessment (paras. 1 and 2).

Given that the law assigned to the autonomous governing body a particularly wide margin of appreciation in assigning positions of executive responsibility, the administrative court cannot overturn the assessment made. However, it can verify how the CSM assessed the factual elements underlying the choice made, in the light of the criteria found in the primary provisions and in the rules contained in the Act adopted by the Council itself. Accordingly, the administrative judge’s judgment of legitimacy must ensure a precise and effective verification of the correct and complete assessment of the legal and factual assumptions constituting the cognitive framework adopted for the purposes of the assessment, the consistency between the elements assessed and the conclusions reached in the deliberation, the logicity of the assessment, the effectiveness of the comparison between candidates, the sufficiency of the reasons given, and thus that account is properly given of the reasons, if any, that support the assessment of better professional skills among the competitors and that therefore rationally lead, in the specific case, to prefer one of them over the others²³⁴.

The text of the Act could certainly be improved, but already in its current formulation, through the series of indicators relating to managerial aptitude, it makes it possible to adequately rule—without going so far as to deny—the discretion allowed to the CSM in appointing the heads of judicial offices, while at the same time guaranteeing a specific review of the choices made that do not comply with the rules that the Council itself has set.

Rules alone are not enough to achieve specific results, and their correct application is also required to achieve an effect corresponding to that which one would like them to produce.

3. Freedom of expression

Freedom of expression is one of the fundamental rights of the individual and a cornerstone of democracy and the rule of law. Like any other constitutionally recognised right, freedom of expression has limits.

How does freedom of expression relate to the magistrate’s duty of confidentiality? To what extent is a judge’s right to express his or her thoughts compatible with the obligation to be guided by criteria of balance, dignity and moderation in all writings and statements intended for publication?

When a judge publicly express reservations about certain behaviours or situations, does he or she have an obligation to refrain from addressing issues within that scope in his or her judicial activity?

²³⁴ Cons. Stato, V, 5 March 2018, no. 1345; Cons. Stato, sez. V, 17 January 2018, no. 271; Cons. Stato, sez. V, 23 January 2018, no. 432; Cons. Stato, IV, 11 February 2016, no. 607.

3.1. Publication of defamatory statements on a discussion forum of a blog: liability of judges

Reference is made, in this regard, to Supreme Court decision no. 6965/2017 of 17 March 2017.

A judge participated in a heated discussion in a blog concerning the professionalism of the President of the local Court, the overall performance of justice and, in particular, of civil justice in the local forum. In doing so, she wrote *“as if all lawyers, without distinguishing between well-trained, competent lawyers and veritable “goats”, were the innocent victims of a Nazi-fascist, despotic and self-referential system, which leaves them neither rights nor operational space”*. The local council of the bar association condemned the use of such an expression and the president, in a letter, complained of an unjustified attack on his members.

The Disciplinary Section of the Judicial Council held the judge responsible for damage to the reputation of the magistracy, and for serious improper conduct in the exercise of judicial functions, pursuant to Art. 2, para. 1, d) and Art. 4, para. 1, d) of Legislative Decree 109/2006. According to the Disciplinary Section, the judge should have avoided participating in a discussion forum due to her position, even more so in case of matters concerning the administration of justice.

The judge appealed against the decision before the Supreme Court, which upheld the appeal, addressing firstly the issue of the victim of the alleged defamation. According to case law, the existence of this offence requires that a specific victim can be identified, though it is not required that he or she be expressly mentioned. Given that in the specific case the victim could not be identified, no penalty could be applicable.

The Court then addressed the question of the judge’s exercise of the freedom of expression, concluding that it did not qualify as exercise of judicial activity even in case of matters related to the administration of justice. In this respect, the court affirmed that the role played by judges must not imply an excessive limitation to their ability to participate in public debate. Only during the exercise of their judicial functions may this be limited, but again according to strict conditions.

3.2. Use of Social networks and disciplinary sanctions

Limits to the use of social networks was considered by the Supreme Court in its decision no. 18987/2017 of 31 July 2017.

The applicant was a judge who published an allegedly defamatory statement against the Mayor of Rome on Facebook. He was subjected to disciplinary proceedings by the Council of the judiciary for defamation.

The disciplinary proceedings ended with a qualification of the statements as defamatory, but given the isolated nature of the episode in the context of a positive professional background, the conclusion was reached that the conditions for the application of the exemption provided for in Art. 3 *bis* of Legislative Decree 109/2006 were met: the offence could not be sanctioned because it was of minor importance. The prosecutor appealed against the decision before the Court of Cassation.

The Supreme Court overturned the decision of the disciplinary section. It clarified that in the case of defamation, the use of words and expressions that can be socially interpreted as offensive is crucial; in the light of Article. 4(1)(d) of Legislative Decree 109/2006, which

addresses the reputation of judges, it is irrelevant that the addressee of the defamatory statements words may not have perceived them to be such.

In other words, what counts is the seriousness of the offence from an objective point of view, regardless of the attitude of the victim. This is a very important aspect that highlights even more how the unwitting use of social networks by a judge cannot go unpunished, because the defamatory nature of the content published damages the reputation of the magistracy as an institution.

4. Statute of the honorary judges.

The honorary judiciary²³⁵ is conceived in the constitutional framework as a temporary office intended to deal with minor and local issues, with the intention of reducing the workload of professional judges, in return for the payment of an indemnity. However, after successive extensions of the appointments, it has ended up constituting a stable, continuous and exclusive contribution within the judicial offices, acting as a substitute to which significant sectors of civil and criminal litigation are assigned.

In addition to the functions of justice of the peace, assigned exclusively to honorary magistrates, in the past, honorary judges of the court (*giudice onorario di tribunale*, GOT) were also used with the assignment of their own cases in the event of significant vacancies in the office staff, both in the civil and in the criminal sectors.

The Public Prosecutor's Offices have used the deputy honorary prosecutor (*vice procuratore onorario*, VPO) to cover the huge number of trial hearings provided for following the reform of the single judge, which abolished the "Preture" and assigned all first instance cases to the Court, primarily to a single judge.

This *de facto* situation, which raises problems of compatibility with the Constitution, due to the almost exclusive nature of the activity carried out by honorary magistrates and the repetition of assignments, has highlighted the problem of their protection as workers, and the Italian legislator has recently intervened following the announced opening of infringement proceedings by the European Commission²³⁶.

4.1. The judgment of the Court of Justice.

The Court of Justice (16 July 2020, C-658/18, *UX v. Gov. Italy*) has identified certain critical aspects of the domestic rules on the employment relationship of honorary judges, which have been followed by a number of judgments of national courts aimed at granting honorary judges greater protection in terms of remuneration and social security²³⁷.

235 G. Grasso, L'incostituzionalità differita della disciplina dei giudici ausiliari di appello e le prospettive di riforma della magistratura onoraria dalla riforma Orlando alla «stabilizzazione» dei magistrati in servizio, *Foro it.*, I, 2022, 94 ff.

236 In particular, in a note dated 15.7.2021, the Commission considers that Italian legislation does not comply with several provisions of the framework agreement annexed to Directive 1999/70/EC on fixed-term work; the framework agreement annexed to Directive 97/81/EC on part-time work; Directive 2003/88/EC on working time and Directive 92/85/EEC on pregnant workers. Considering that the new legislation adopted by Italy in 2017 has not yet provided solutions in this respect, the Commission has decided to initiate infringement proceedings against Italy by sending a letter of formal notice, marking a deadline of 2 months to take the necessary measures, after which the Commission may decide to send a reasoned opinion.

237 Trib. Naples, 26 November 2020, <https://tinyurl.com/u952xpssc>, on the assumption that, due to their duties as justice of the peace, the applicants fell within the notion of "worker" under EU law, declared that they had the right to economic and regulatory treatment equivalent to that guaranteed to comparable workers carrying out similar duties employed by the Ministry of Justice, and ordered them to pay the differences in remuneration, as well as compensation for damages due to the abusive

The question had been raised by the Justice of the Peace of Bologna in an order issued on 16 October 2018, in the context of a procedure instituted to obtain compensation from the Italian Government for the damage caused by the failure to grant paid leave, deemed to be a manifest breach by the Italian State, in conjunction with Clauses 2 and 4, points 1, 2 and 4 of the Framework Agreement on fixed-term work, annexed to Directive 1999/70/EC, Articles 1(3) and 7 of Directive 2003/88/EC, and Article 31(2) of the Charter of Fundamental Rights of the European Union²³⁸. Recognition of damages required a clarification as to whether Italian Justices of the Peace are workers within the meaning of the above-mentioned rules.

As a preliminary ruling, the CJEU clarified that the office of Justice of the Peace fulfils the criteria set forth in its case law as regards the notion of ‘court of one of the Member States’ within the meaning of Article 267 TFEU, based on its legal origin, its permanent nature, the compulsory nature of its jurisdiction, the adversarial nature of the proceedings before it, the application by the Office of legal rules, and its independence²³⁹.

The innovative nature of the Court of Justice’s decision lies in bringing the judicial activity carried out by honorary magistrates within the scope of application of Directive 89/391 and Directive 2003/88, accepting in principle—subject to the consideration of the circumstances of the specific case—that justices of the peace fall within the concept of “worker” under EU law and of “fixed-term worker” within the meaning of the Framework Agreement, for the purposes of the application of the European rules on leave entitlement.

In this regard, it must be stressed that the Court, on the basis of its case law, did not open the way to any stabilisation of the service relationship of honorary magistrates—thus far excluded in the domestic system²⁴⁰—but envisaged the recognition of the status of workers for the purposes of the granting of certain rights, including the right to holiday leave, which are regulated uniformly at European level and linked to this condition.

repetition of the term applied to individual assignments; Trib. Vicenza, 16 December 2020, <<https://tinyurl.com/yx38vn7v>> held that honorary magistrates perform duties comparable to those of professional magistrates and, in the absence of objective reasons for treating comparable situations separately, declared the repetition of fixed-term contracts unlawful due to conflict with the framework agreement annexed to Directive 1999/70/EC, awarding the honorary magistrate the salary differences commensurate with the role of ordinary magistrate with judicial functions (salary class HH03); Trib. Rome, 13 January 2021, <<https://tinyurl.com/4pw5bxy7>> ordered the Presidency of the Council of Ministers to compensate honorary magistrates for non-compliance with Directive 1999/70/EC on fixed-term work, in relation to the limits on the repetition of fixed-term assignments and the prohibition of unequal treatment compared to ordinary magistrates in relation to severance pay, protection against pregnancy, illness and accident, and, until 15 August 2017, also in relation to social security protection, welfare and INAIL cover.

238 In Case C-658/18 *UX a giudice di pace* (justice of the peace) from Bologna raised (inter alia) the following preliminary question: “Does a giudice di pace, when making a request for a preliminary ruling, meet the definition of an ordinary European court having jurisdiction to make a request for a preliminary ruling pursuant to Article 267 TFEU, even though — in breach of the guarantees of the independence and impartiality of ordinary European courts referred to by the Court of Justice in its judgments in *Wilson*, *Associação Sindical dos Juizes Portugueses*, and *Minister for Justice and Equality* — under national law, giudici di pace do not, because of their job insecurity, enjoy working conditions equivalent to those of professional judges, even though they perform the same judicial functions and are included in the national judicial system?”

239 The concept of jurisdiction, to which the right or duty to bring an action before the Court of Justice is subject, has been developed by the Courts of Luxembourg since the judgment of 30 June 1966 in Case 61/65 *Gaëbbels, widow Vaassen v Beambtenfonds voor het Mijnbedrijf*, on the basis of a number of criteria, the verification of which is necessary in order to ascertain whether or not the body in question is in fact a court or tribunal. In particular, in assessing whether the referring body is a ‘court’ within the meaning of Article 267 TFEU, a matter solely of European Union law, the Court takes into account the legal basis of the body, its permanent nature, the compulsory nature of its jurisdiction, the adversarial nature of the proceedings, the fact that the body applies legal rules and that it is independent (CJEU, Case C-245/02, *Banco de Santé*, 61/65, 21 January 2020, *Banco de Santander*, C-274/14, paragraph 51; 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, paragraph 43).

240 See the opinion rendered by the Council of State on the stabilisation of honorary magistrates: Cons. Stato, comm. spec., 7 April 2017, no. 854, Foro it, Rep. 2017, entry Ordinamento giudiziario, no. 59, according to which stabilisation without a competition, in the absence of proven and insuperable needs of the public body, is not constitutionally legitimate.

From this point of view, it is a prospect that has so far been excluded by domestic case law, which has never recognised that honorary magistrates have the status of workers, and can be differentiated on this basis from professional magistrates. In this regard, it has been held that the figure of the honorary magistrate, which has long been present in the judicial system, albeit in various forms, by its nature participates only occasionally and not exclusively in the exercise of the judicial function and is therefore, both from the point of view of the service relationship and from that of the organic relationship, radically different from that of the professional judge²⁴¹.

According to the jurisprudence of the Constitutional Court²⁴², the position of magistrates who perform exclusively judicial functions on a professional basis cannot be compared to that of those who perform honorary functions for the purposes of assessing compliance with the principle of equality²⁴³. Different situations must be regulated differently in order to prevent an approach of forced equal treatment from producing, in turn, new and more serious disparities in legal treatment.

4.2. The Italian government's solution: a bridging solution.

The Government, with the presentation of the amendment to the Budget Law of 2022, later approved by the Parliament (Art. 1, paras. 629-633), granted honorary magistrates who were in service at the time of the entry into force of Legislative Decree 116 of 2017 guaranteed rights as employees—without however equating them to professional magistrates who gained their position on passing a competitive examination—after they had gone through an evaluation procedure.

The measure, whose underlying reasoning is similar to that of the so-called “stabilisation” (placement of precarious staff in service) of teachers through an extraordinary plan aimed at filling all common and support posts in the organisation chart (Law no. 107 of 2015), allows the possibility of opting for the exclusive right to honorary duties until the end of the evaluation procedure, with a payment of a fixed sum. Law no. 107 of 2015 further provides that, at the end of the evaluation procedure, the honorary magistrate may opt for the exclusivity of honorary duties until the age of 70 years, with the payment of a fee based on the salary due to the judicial administrative staff. As an alternative to submitting an application to be confirmed in service, an all-inclusive indemnity will be paid, based on years of service, with the waiver of any further claims.

In all likelihood, the intervention is not the final word on the matter, given the objections already expressed by the professional associations, especially with regard to the pay conditions and the manner and timing of evaluations.

Plausibly, it will be up to the Constitutional Court to assess whether the newly introduced rules are in line with constitutional constraints, while the Court of Justice may have the task of verifying the compatibility of the new rules with the guarantees provided by European legislation.

241 See Cons. Stato, 18 July 2017, no. 3556, in <https://www.giustizia-amministrativa.it/>” <https://www.giustizia-amministrativa.it/>, according to which, while the activity of the professional magistrate is full and exclusive, that of the honorary magistrate is discontinuous, partial and tendentially compatible with other activities, including freelance activities.

242 Constitutional Court, 16 February 2006, *Foro it.*, I, 961 on the causes of incompatibility dictated by the law on the judicial system for ordinary magistrates and those provided for by the special legislation for justices of the peace.

243 Corte cost. ord. 8 November 2000, n. 479, *Foro it.*, 2001, I, 756, and ord. 30 June 1999, no. 272, id., 2000, I, 323.

However, the question of rewriting Legislative Decree 116 of 2017 regarding honorary magistrates (the so-called “Orlando reform”, after the name of the then Minister of Justice) remains on the table and the proposals coming from the ministerial study commission have focused on this.

5. Independence and impartiality of the Consiglio di Giustizia amministrativa for the Sicily Region.

The Italian Constitution²⁴⁴ establishes a system of judicial protection of rights and legitimate interests based on two types of jurisdiction, an ordinary jurisdiction and an administrative jurisdiction (Art. 113(1) of the Constitution).

The bodies of administrative justice are, in the first instance, the Regional Administrative Courts (TAR) and, in the second instance, the Council of State (Art. 100, 103, para. 1, and 125, para. 2, Const.); with regard to the decisions of the TAR of the Sicily Region, the Council for Administrative Justice of the Region of Sicily acts as a court of second instance.

The *Consiglio di Giustizia amministrativa* (Council for Administrative Justice) for the Sicily Region²⁴⁵—which has a special status—combines both jurisdictional and regulatory functions. Besides having jurisdiction for appeals against decisions of the Sicilian Regional Administrative Court (TAR) the *Consiglio* has also a consultative role, as it is the legal-administrative advisory body of the Sicily Region.

According to the applicant in proceedings before the Court of Cassation, the fact that one judge who assessed its case was also representing the Sicily Region (the opposing party) in a joint committee (*Commissione paritetica*) was in contrast with the principles of impartiality (conflict of interest) and independence (appearance of independence) of the judiciary.

The applicant, an association, requested the cassation of a ruling of the *Consiglio di Giustizia amministrativa* that had upheld a judgment of the Regional Administrative Court of Sicily, which had dismissed an action for annulment of regional financing decrees on vocational training projects. The applicant claimed that Article 111, last paragraph, of the Italian Constitution and Article 360 of the Italian Code of Civil Procedure had been violated due to the invalid constitution of the panel of judges of the *Consiglio di Giustizia amministrativa* (additionally, reference was made also to violations of Articles 24, 101, 108 para. 2, 111 para. 1- 2, 117 para.1 of the Italian Constitution and Article 6(1) ECHR, Article 47 CFR and Articles 1 and 2, para. 1, Italian Code of Administrative Procedure).

The Court of Cassation declared the grounds for the appeal to be inadmissible. Judgments of the *Consiglio di Giustizia amministrativa* are appealable in front of that Court only for lack of jurisdiction. This includes cases of invalid composition of the bench but, according to the case law of the Court of Cassation itself, only insofar as they are of particular gravity. This was deemed not to be the case in that circumstance, since the judge concerned enjoyed the status of magistrate and did not have a structural link with the regional administration. Moreover, the *Commissione paritetica* does not exercise legislative functions, as it simply acts as an instrument of cooperation between the State and the Sicily Region.

²⁴⁴ *Giurisdizione amministrativa*, Treccani, *Enciclopedia on line*, in <https://www.treccani.it/enciclopedia/giurisdizione-amministrativa/>; M E. Schinaia, *Giustizia amministrativa*, in Treccani, *Diritto on line* (2014), https://www.treccani.it/enciclopedia/giustizia-amministrativa_%28Diritto-on-line%29/

²⁴⁵ *Consiglio di giustizia amministrativa per la regione siciliana*, Treccani, *Enciclopedia on line*, in <https://www.treccani.it/enciclopedia/consiglio-di-giustizia-amministrativa-per-la-regione-siciliana/>

That said, the Court of Cassation engaged in an assessment of whether judicial independence and impartiality were compromised in such a way as to seriously affect the composition of the bench and thus result in a lack of jurisdiction.

Firstly, it highlighted the importance of the principles of judicial independence and impartiality, as they “constitute a guarantee of legality, justice and equality for the citizens” and thus “represent an essential condition for the exercise of the judicial function.” It stressed that such a model is not only the one outlined by the Italian Constitution but also “the European model of judge, as independence and impartiality are guaranteed by the ECHR (Article 6) and the EU CFR (Article 47)”.

However, it then concluded that such a model was not seriously compromised in the case concerned. Although the participation of the judge in the *Commissione paritetica* was theoretically capable of compromising the appearance of independence and the impartiality (possible conflict of interest), this had not occurred to an extent such as to determine the abnormality of the composition of the bench.

Finally, the Court of Cassation rejected the requests for a preliminary ruling made by the applicant and concerning the interpretation of Article 47 of the Charter (see below—section on judicial interactions techniques), as well as the questions of constitutional legitimacy, which it deemed not to be admissible.

6. Appointment of the Italian member of Eurojust

In its judgment no. 136/2011²⁴⁶, the Constitutional Court dealt with the Italian law concerning the appointment of a magistrate as a member of *Eurojust* (Law 41/2005, on the implementation of Decision 2002/187/JHA, establishing Eurojust). The Minister for Justice selected a member from a shortlist, on which the CSM preliminarily expressed its assessments (“valutazioni”). The Constitutional Court declared that the question of constitutionality was unfounded, because the functions and powers of Eurojust are not genuinely judiciary such as those of public prosecutors²⁴⁷.

7. Security Decrees, limits to the powers of judges and personal attacks on justices

The so-called Security Decree²⁴⁸ (Law Decree 113/2018) and, shortly afterwards, the Security Decree-*bis* (Law Decree 53/2019) were adopted under the so-called yellow-green government (5 Star Movement – Lega Nord), which held office from June 2018 to September 2019. These legislative acts were harshly criticised also by the UN, as they led to a significant reduction in the substantive and procedural guarantees for immigrants and asylum seekers. In particular, they prevented judges from providing protection on humanitarian grounds and dismantled the capillary reception system, strongly geared towards integration, known as ‘SPRAR’ (System of protection for asylum seekers and refugees).

246 <https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2011&numero=136>

247 For some critical considerations, see G. De Amicis, *La Corte Costituzionale nega la natura giudiziaria di Eurojust: una pronuncia discutibile*, *Forum di Quaderni Costituzionali*, 2011, http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/giurisprudenza/2011/0004_nota_136_2011_de_amicis.pdf

248 M. Guglielmi, *Justice in Italy Today by Salvini*, *Report* delivered at the MEDEL meeting in June 2019 (MEDEL is the acronym for *Magistrats européens pour la Démocratie/European Judges for Democracy*); https://www.ilmessaggero.it/politica/salvini_magistrati_migranti_elenco-4539018.html

The adoption of these legislative acts heightened the conflict between the political realm and the judiciary, leading to the opening of criminal proceedings against the Minister of the Interior, Matteo Salvini, followed by attacks on the judiciary by the latter.

On the other hand, apart from the criminal proceedings against Salvini, the Constitutional Court²⁴⁹ examined the questions of constitutional legitimacy raised by the Courts of Milan, Ancona and Salerno regarding the provision precluding the registration of foreigners seeking asylum, introduced with the first “Security Decree” (Law Decree no. 113 of 2018). The Court declared it unconstitutional, as it violated Article 3 of the Constitution in two respects

- due to its intrinsic irrationality, since the censured provision did not facilitate the pursuit of the aims of territorial control declared by the security decree

- on the grounds of unreasonable unequal treatment, because it unjustifiably made it more difficult for asylum seekers to access services, also ones that are guaranteed to them.

Law Decree- no. 130 of 21 October 2020 completely revised the rules under the Security Decrees by introducing urgent provisions on immigration and international protection, also through some amendments to the previous Law Decrees no. 113/2018 and no. 53/2019.

Among the measures relating to immigration, the 2020 Law Decree- establishes that the refusal or revocation of a residence permit cannot be adopted when there are serious reasons tied to compliance with the State’s constitutional or international obligations (while the scope of the prohibition on expulsion is extended). Moreover, the convertibility of certain types of residence permits into work permits is provided for.

IV. Conclusion: General assessment of the state of the rule of law, trust, independence, impartiality and accountability in Italy and future developments

Italy is a mature democracy, where the rule of law is a fundamental value and the judiciary is recognised, at European level, as an autonomous, impartial and prestigious body, due to the quality and professionalism of judges and prosecutors.

Nevertheless, some critical issues are to be found in terms of the relationship between politics and the judiciary, with particular reference to the participation of prosecutors in political activity and the debates on sensitive issues such as those related to immigration (e.g. the adoption of the so-called security decrees), the appointments to leadership roles by the High Council for the Judiciary and the status of the honorary judiciary.

The issue of freedom of expression appears to be particularly important, especially with regard to the use of social networks, even though no specific critical issues have been identified. The autonomy and independence of the judiciary other than the ordinary one is a separate topic.

Particular mention should be made of the upcoming reform of the judicial system, which is part of the strategic measures of the National Recovery and Resilience Plan (NRPP), within the Next Generation EU (NGEU) programme, which will be debated this year in Parliament in order to overcome the critical issues that have emerged in recent years, both in connection with the relationship between politics and the judiciary and with the role and discretion of the CSM.

249 Constitutional Court, judgment 9 July 2020 - 31 July 2020, no. 186.

NATIONAL REPORT: POLAND

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I. Summary

In the light of the fundamental objectives of the TRIAL project, the context of the Polish situation is of particular importance. Since the 2015 parliamentary election and with the 'reforms' undertaken by the Polish government, in particular in the area of the judiciary and the judicial system, Poland, alongside Hungary, has become an infamous centre of problems related to violations of the rule of law, especially by undermining the principles of separation of powers and judicial independence. In this context, study of the Polish case – notably including court cases that arose from violations of the rule of law – seems particularly valuable in order to identify the causes, reconstruct the process and look for constructive solutions to overcome the problem of undermining and violating the rule of law in the European Union.

The literature on Poland's rule of law problems is quite extensive. Many interesting and valuable studies on this subject have been published in the last few years.²⁵⁰ They analyse these problems both from a more general broad perspective²⁵¹ and more specifically focusing on judicial independence,²⁵² judicial accountability²⁵³ and the principle of separation of powers,²⁵⁴ among other things. It is important to emphasise that in accordance with the convention adopted by the TRIAL project, the present national report builds mainly on cases identified by the University of Gdansk (UL) and INPRIS during the project, which are now available in the [CJC database](#).

This report captures a moment in time and identifies evolving trends and promising practices in the fields of rule of law, judicial independence, impartiality, trust and judicial accountability. It does not aim to present an exhaustive picture of the rule of law in Poland but instead aims to complement the existing literature on the subject and the tools already in place, namely the Commission's report on the rule of law,²⁵⁵ the CCJE report on judicial independence and impartiality in Council of Europe member states,²⁵⁶ the Justice Scoreboard,²⁵⁷ the annual

250 See footnotes 2, 3 and 4.

251 L. Pech, P. Wachowiec and D. Mazur, "Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action (2021)," 13 *Hague Journal on the Rule of Law* 1; L. Pech and D. Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case*, SIEPS, Stockholm, 2021-3.

252 T. T. Koncewicz, "Of institutions, democracy, constitutional self-defence and the rule of law: The judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and beyond," *Common Market Law Review* (2016), Volume 53, Issue 6, pp. 1753-1792; M. Ziolkowski, "Two Faces of the Polish Supreme Court After "Reforms" of the Judiciary System in Poland: The Question of Judicial Independence and Appointments," *European Papers*, Vol. 5, 2020, No 1, European Forum, Insight of 2 June 2020, pp. 347-362.

253 F. Zoll and L. Wortham, "Judicial Independence and Accountability: Withstanding Political Stress in Poland," 42 *Fordham Int'l L.J.* 875 (2019).

254 M. Matczak, "Who's next? On the Future of the Rule of Law in Poland, and why President Duda will not save it," *Verfassungsblog*, <https://verfassungsblog.de/whos-next-on-the-future-of-the-rule-of-law-in-poland-and-why-president-duda-will-not-save-it/> accessed 4 May 2022.

255 European Commission 2021 Rule of law report (https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2021-rule-law-report_en) accessed 4 May 2022.

256 Council of Europe: CCJE-BU (2020), Report on the independence and impartiality of the judiciary in the Member States of the Council of Europe (2019 edition).

257 European Commission EU Justice Scoreboard (https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en) accessed 4 May 2022.

thematic reports of the UN Special Rapporteur on the independence of judges and lawyers²⁵⁸ and the ENCJ report.²⁵⁹

It is important to note that the core matters addressed by the TRIIAL project, i.e. independence, impartiality, trust and accountability, remain closely and necessarily linked to the value of the rule of law referred to in Article 2 TEU. Therefore, before proceeding to analyse the jurisprudence in the research areas set out by TRIIAL, it is necessary to provide an overview of the 'Polish problem' from a slightly broader perspective. This report provides a sobering picture of a member state in distress, with a collapsing judiciary and systemic undermining of the separation of powers and checks and balances. This report is therefore a call to arms and a warning. As the EU moves forward and ponders and narrates its myths, the memory of why states joined the European integration project in 1952 is of fundamental importance. Amnesia and an inability to critically retool the language we use when we talk of the core essentials of the European public space and adapt them to the changing world set free and embolden majoritarian politics and in the end shatter one of the founding myths of the first Communities: that of constrained political power and overlapping imperfect consensus. The European elite must move out of their comfort zone defined by institutional tinkering and self-congratulatory patting on the back. Instead, they must finally internalise the hard truth that with everything that has happened in Poland since 2015 the European Union project finds itself at a critical juncture and faces a moment of constitutional reckoning.

The issues raised by Polish courts using the preliminary reference procedure and the answers provided by the Court of Justice critically test the rule of law discourse in the European Union. They revisit the implicit assumptions of the founding fathers that all the member states were and would remain liberal democracies brought together by the existence of certain supranational core values that bind all actors. Given the developments in Poland, and as the case studies below show, these assumptions were counter-factual. Clearly the values spelt out in Article 2 TEU are not shared by all parties to the post-war European supranational settlement. The cases selected and analysed in this report not only reflect this counterfactual reality but also offer a way forward.

When laws and institutions come to serve politicians rather than holding power in check, a cornerstone of the post-war European order is lost. This is where an uneasy question for Poles comes to the forefront. Let us therefore be mindful of what is at stake. Are we still ready to profess our fidelity to the European system governed by the rule of law to which the generation of Poles after WWII aspired and to honour the commitments voluntarily accepted in 2004? Or do we opt for Polesxit, with no going back?²⁶⁰

Asking these questions and reporting on developments in Poland are the most important ambitions we have set for ourselves in drafting this report.

The report has an introduction, three chapters corresponding to the core issues addressed by TRIIAL – i.e. trust, independence and impartiality, and accountability – and a conclusion.

258 The annual thematic reports of the UN Special Rapporteur on the independence of judges and lawyers (<https://www.ohchr.org/en/special-procedures/sr-independence-of-judges-and-lawyers/annual-thematic-reports>).

259 European Network of Councils for the Judiciary Report on Independence, Accountability and Quality of the Judiciary, 2018-2019 (<https://www.encj.eu/index.php/node/250>) accessed 2 May 2022.

260 On Polesxit, see T. T. Konciewicz, *How the EU is Becoming a Rule-of-Law-less Union of States*. From POLEXIT to E(U)EXIT? <https://verfassungsblog.de/how-the-eu-is-becoming-a-rule-of-law-less-union-of-states/>;

On the rubble of the rule of law, EUROZINE, available at <https://www.eurozine.com/on-the-rubble-of-the-rule-of-law/>; *Poland and Europe at a Critical Juncture. What has happened? What is happening? What's next?* available at <https://verfassungsblog.de/poland-and-europe-at-a-critical-juncture-what-has-happened-what-is-happening-whats-next/>, accessed 2 May 2022.

We decided that it would be appropriate to analyse the problem of backsliding of the rule of law in Poland in terms of the fundamental values around which TRIAL was built.

II. Introduction

Today constitutional and supranational law anchored in liberal values face fundamental questions regarding the reasons for insufficiency of institutional settings that are prone to abuse by the majoritarian rule dictated by no-holds-barred majoritarian politics. It is necessary to rethink the dominant paradigms and narratives. Restoration of the rule of law and judicial independence (the constitutional setting) and the embeddedness and anchoring of supranational rule of law are very much first-order problems. In extraordinary times of constitutional tension efforts should be directed to protecting the constitution and its values, and the vexing question of constitutional restoration and/or recapture after democratic retrogression comes to the fore. When the law is not only used to empower, liberate and protect but also to disempower and capture the role of law itself, rule of law, the separation of powers and communal bonds and memories are too affected for the system to regain ('recapture') its liberal credentials. The courts and the public must have something tangible to fall back on. Recapture of the system must be anchored in long-term fidelity, which goes beyond and transcends the events of 'here and now.' In this context, A. Arato and A. Sajó rightly ask "Is a democratic community bound to follow constitutional rules of dubious democratic nature? Or can these be replaced in violation of legality, for example in an extra-parliamentary democratic process? If so, under what conditions?" The integrity of a 'day after' constitution following majoritarian rule of lawlessness looms large. Dealing with a constitution which has been turned into a tool to perpetuate and entrench the governing party's power even in the case of a lost election challenges constitutional doctrine beyond the legality question. Constitutional imagination understood as an uneasy combination of myriad texts, precedents, policies and competences challenges us to look critically at the status quo. How can the essentials of the constitutional order be recaptured without violating the rule of law? This question invites an existential turn in discourse on the shape of our constitutional loyalties and how we tell and retell our story and explain what we are doing to restore the rule of law after a rule-of-lawless period of governance.

The Polish case is important because, as we argue and as the case studies illustrate, the centrifugal tensions faced by the Union in the form of questioning by Poland of the common understanding of the rule of law move beyond the technical and traditional dichotomies of 'market regulation v deregulation' and 'Union competence v member state competence.' Instead it is necessary to zero in on big questions concerning the mega-politics centred around belonging and identity among the European peoples.²⁶¹ The sacrosanct ever closer union among the peoples of Europe seems to be the focal point of a principled disagreement that calls into question the very belonging to the community and its continued existence. This supranational critical juncture brings to the fore not only questions of design and governance (narrative-building and actor fidelities) but also content that embraces shared values (supranational legality), purpose and self-understanding (fight illiberal democracies or accommodate them?).

The cases considered here and the responses from the Court of Justice of the EU to the undermining of the rule of law, independence of the judiciary and separation of powers highlight that the EU constitutional design has 'normative asymmetry' and that supranational legality

²⁶¹ The term 'mega-politics' is taken from R. Hirschl, *The Judicialization of Politics*, in K. E. Whittington, R.D. Keleman and G.A. Caldeira (eds.), *The Oxford Handbook of Law and Politics*, London, 2008, at 123. He points out that judicialisation of 'mega-politics' includes the very definition – or *raison d'être* – of the polity as such and notes the growing reliance on courts to contemplate, for example, the definition of the polity as such vis-à-vis the European supranational polity (at p. 128).

needs important elucidations.²⁶² Back in 1951 the authority to ensure that states remain liberal democracies was not effectively translated into law, which was understandable given the fresh memories of horrors wrought on the continent by World War II. The EU founding fathers thought that these memories would be enough to stave off any backsliding into authoritarianism and that trust could be assumed. History never stops, however. It always moves and today the once unthinkable rise of illiberalism within the EU challenges the original hopes of the European proposal and tests its design.

These introductory remarks provide an important background against which we read the individual cases decided by courts. Our report shows various ways in which courts (both national and supranational) have been responding to these systemic shortcomings by trying to revisit the remedial Treaty framework. What emerges in the end as a result of this jurisprudential dialogue are common threads, which are identified in the concluding remarks of the present report.

III. Trust

Trust is the foundation for building a responsible society. In the Polish legal order, the principle of trust has been interpreted from Article 2 of the Constitution, according to which “the Republic of Poland is a democratic legal state that implements the principles of social justice.”²⁶³ This provision is one of the most frequently cited in judicial justifications. It is also a frequently used standard of control in proceedings before the Constitutional Tribunal. As many as 540 judgments have been based on Article 2 (more than a third of the cases examined in the period 1997-2021).

In practical terms, it is necessary for state activities – making and applying laws – to build citizens’ trust in the state.²⁶⁴ The 2015 political shift has had negative consequences for both law-making and law enforcement. The justice system currently faces many problems that result from both creation and application of law. The main issues are primarily:

1. Appointment of judges with the participation of the National Council of the Judiciary – assessment by the Court of Justice of the European Union, the European Court of Human Rights and the Supreme Court.
2. Recognition by the government and the Constitutional Tribunal that the domestic procedure for appointing judges is consistent with the Constitution, not respecting judgments of the CJEU and the ECHR.
3. Using the procedure before the Constitutional Tribunal as a faster legislative process.
4. Illegal eavesdropping on citizens.

262 T. T. Koncewicz, *Understanding the transnational legal order, (part I): Of pressures and ambitions too*, available at <https://reconnect-europe.eu/blog/understanding-the-transnational-legal-order-part-1-of-pressures-and-ambitions/>; *Understanding the transnational legal order (part II): What kind of a transnational consensus?* <https://reconnect-europe.eu/blog/understanding-the-transnational-legal-order-part-2/>; *Understanding the transnational legal order (part III): the TLO in Europe: a lost cause?* <https://reconnect-europe.eu/blog/understanding-the-transnational-legal-order-part-3/> accessed 2 May 2022.

263 *The Constitution of the Republic of Poland of 2 April 1997*, O. J. 1997 no. 78 pos. 483.

264 J. Węglińska, *Zasada ochrony zaufania obywateli do państwa i do stanowionego przez nie prawa jako dyrektywa poprawnej legislacji*, <https://pzd.iws.gov.pl/wp-content/uploads/2020/07/Justyna-W%C4%99gli%C5%84ska.pdf>, accessed 2 May 2022.

1. Appointment of judges with the participation of the National Council of the Judiciary – assessment by the Court of Justice of the European Union, the European Court of Human Rights and the Supreme Court.

Judges in Poland are appointed by the President at the request of the National Council of the Judiciary for an indefinite term under Article 179 of the Constitution. The role of the Council is to select a candidate and present this candidacy to the President. A candidate who does not have the support of the Council cannot become a judge. The Council consists of 25 members. Parliament has direct influence on the election of 21 of these members. Individuals chosen by the President, the Minister of Justice, the First President of the Supreme Court and the President of the Supreme Administrative Court make up this group. Therefore, the balance of independence is undoubtedly upset by the strong connection between its composition and the legislature.

Changes introduced in the organisation of the National Council of the Judiciary (NCJ), especially the way the Sejm selects members, have resulted in the election of judges being subject to defects that could undermine the right to independent courts and independent judges. In the *A.B., C.D., E.F., G.H, I.J. v National Judicial Council* case²⁶⁵ the Court of Justice ruled that the members of the Council are too closely linked to the legislative and executive powers.

In addition, in the *Dolińska Ficek and Ozimek v Poland* case the European Court of Human Rights (ECtHR) stated “The new extraordinary appeal also raises constitutionality concerns. According to the Supreme Court and the Ombudsman, the law affects the principle of stability of jurisprudence and the finality of judgments, the principle of protecting trust in the state and law, as well as the right to have a case heard within a reasonable time.”²⁶⁶ In this case the applicants alleged a breach of Article 6 § 1 of the Convention because they had applied for vacant judicial posts in other courts and the National Council of the Judiciary had not recommended their applications. Their appeals against the resolutions of the Council were examined by the Chamber of Extraordinary Review and Public Affairs of the Supreme Court. In the applicants’ opinion this Chamber was not an “independent and impartial tribunal established by law.”

The ECtHR made a similar assessment when examining allegations concerning the newly created chamber of the Supreme Court. In the *Reczkowicz v. Poland*²⁶⁷ case the ECtHR decided that the Disciplinary Chamber of the Polish Supreme Court was in breach of Article 6 of the Convention. The applicant was a barrister. She was suspended for three years in disciplinary proceedings. Her case was ultimately dismissed by the Disciplinary Chamber of the Supreme Court. In her opinion, the case had not been heard by a “tribunal established by law.” The ECtHR concluded that the procedure for the NCJ to appoint judges was in itself incompatible with Article 6 § 1 of the Convention because of a lack of legitimacy of the Disciplinary Chamber. The Court concluded that there had been a violation of Article 6 § 1 of the Convention because the Disciplinary Chamber was not a “tribunal established by law.” In reaching its decision, the ECtHR referred to rulings by the Polish Supreme Court in December 2019 and January 2020 and also rulings by the Court of Justice of the European Union and multiple reports and assessments by European and international institutions.

²⁶⁵ CJEU, 2 March 2021, Case C-824/18 *A.B. and Others* ECLI:EU:C:2021:153.

²⁶⁶ Judgment of the ECtHR of 8 November 2021, Appl. Nos. 49868/19 and 57511/19.

²⁶⁷ Judgment of the ECtHR of 22 July 2021, Appl. No. 43447/19.

In the *Advance Pharma sp. z o.o. v. Poland* case the Court held that the applicant was deprived of its right to a tribunal because the case was heard by the Supreme Court in a composition involving a person whose appointment was recommended by the NCJ.²⁶⁸ This case had been heard by the Civil Chamber. The ECtHR has consistently held that adjudication by a judge recommended by the new National Judicial Council constitutes a violation of the right to a fair trial.

Allegations of violations of the right to access a court have also been raised regarding changes in the Constitutional Tribunal. These concerned appointments of judges in the Constitutional Court and them taking the oath before the President despite the fact that the positions were filled by candidates elected by the previous Sejm. The applicant – Xero Flor – in *Poland sp. z o.o.* lodged a constitutional complaint with the Constitutional Tribunal. The company held that its case was examined by a judge who had not been elected in accordance with domestic law. The ECtHR concluded that there had been a violation of Article 6 § 1 of the Convention. In the Court’s opinion, the participation in the proceedings before the Constitutional Tribunal of a judge “whose election was vitiated by grave irregularities” “impaired the very essence” of the right to a “tribunal established by law.” The ECtHR stated “although the right to a “tribunal established by law” was a stand-alone right under Article 6 § 1 of the Convention, a very close interrelationship had been formulated in the Court’s case-law between that specific right and the guarantees of “independence” and “impartiality.” The institutional requirements of Article 6 § 1 shared the common purpose of upholding the fundamental principles of the rule of law and the separation of powers.”²⁶⁹

The above-mentioned cases show that the ECtHR has consistently found that adjudication by judges elected by the National Council of the Judiciary leads to a violation of the right to a fair trial. There are currently over 1,700 judges appointed through this procedure in the justice system (of the 10,000 judges operating in Poland). As a result, citizens may have concerns as to whether their case is resolved by an independent court, and second they are not sure how judgments issued by judges appointed with recommendations by the NCJ will be dealt with in the future.

2. Recognition by the government and the Constitutional Tribunal that the domestic procedure for appointing judges is consistent with the Constitution, not respecting judgments by the CJEU and the ECtHR.

Unfortunately, the above-cited ECtHR decision in *Xero Flor* has not been respected by the Constitutional Tribunal. For example, the Tribunal dismissed a request from the Polish Commissioner for Human Rights to exclude one of the judges. The Commissioner relied on the Court’s judgment in the *Xero Flor w Polsce sp. z o.o. v. Poland* case.²⁷⁰ The Constitutional Court held that “the judgment of the ECtHR of 7 May 2021, to the extent to which it refers to the Constitutional Tribunal, testifies to a lack of knowledge of the Polish legal order, including fundamental systemic assumptions determining the position, system and role of the Polish Constitutional Tribunal. In this respect, it was issued without legal basis, exceeding the ECtHR’s jurisdiction, and constitutes an unlawful interference in the domestic legal order, in particular in

268 Judgment of ECtHR of 3 February 2022, *Advance Pharma sp. z o.o. v. Poland*, Appl. No. 1469/20.

269 Judgment of the ECtHR of 7 May 2021, *Xero Flor w Polsce sp. z o.o. v. Poland*, Appl. No. 4907/18.

270 Decision of the Constitutional Court of 15 June 2021, P 7/20.

issues which are outside the ECtHR's jurisdiction; for these reasons it must be regarded as an inexistent judgment (*sententia non existens*)."

On 27 July 2021 the Minister of Justice/Prosecutor General referred a request to the Constitutional Court to decide on interpretation of Article 6 § 1 of the Convention. In a judgment on 24 November 2021, the Constitutional Tribunal stated that the Convention, to the extent to which the term 'tribunal' used in the Convention includes the Constitutional Tribunal of the Republic of Poland and to the extent to which it encompasses review by the ECtHR of the legality of the process of appointment of Constitutional Tribunal judges in order to determine whether the Constitutional Tribunal is an independent and impartial court established by law, was incompatible with the Polish Constitution.²⁷¹

Interestingly, the Constitutional Tribunal invoked the principle of trust and rule of law, if only in its ruling. In a judgment on 15 April 2021 regarding the possibility for the Ombudsman to perform his tasks after expiry of his term of office, the Constitutional Tribunal referenced the principle of citizen trust in the state and the law it created.²⁷² In addition, in a ruling on 14 July 2021 in which the Constitutional Tribunal declared unconstitutional the safeguards applied by the Court of Justice of the European Union, the Court indicated that the principle of trust was one of the key principles in a democratic state with the rule of law and required legislation to ensure the loyalty of the state to its citizens. The Constitutional Court held that "Article 4(3), second sentence, [of the TEU] in conjunction with Article 279 [of the TFEU] – in so far as the Court of Justice of the European Union *ultra vires* imposes obligations on the Republic of Poland as an EU Member State, by prescribing interim measures pertaining to the organisational structure and functioning of Polish courts and to the mode of proceedings before those courts – is inconsistent with Article 2, Article 7, Article 8(1) and Article 90(1) in conjunction with Article 4(1) of the Constitution of the Republic of Poland, and within this scope it is not covered by the principles of precedence and direct application set in Article 91(1)-(3) of the Constitution."²⁷³

Both cases were highly controversial. It is the Constitutional Tribunal's interpretation of the law that undermines the principle of trust. The rulings of the Court undermine obligations resulting from membership of the European Union and the Council of Europe. They exclude application of the EU Treaties and the Convention to matters related to the judicial appointment procedure.

3. Using the procedure before the Constitutional Court as a faster legislative route

In Poland, we have also had instances of citizens' trust in the judiciary system being weakened by very controversial verdicts. For example, in a judgment by the Constitutional Tribunal on 22 October 2020 in case K 1/20, which related to the possibility of termination of pregnancy,²⁷⁴ the premise²⁷⁵ examined was the subject of work by the Sejm and was to be deleted. However,

²⁷¹ Judgment of the Constitutional Court of 21 November 2021, K 6/21.

²⁷² Judgment of the Constitutional Court of 15 April 2021, K 20/20.

²⁷³ Decision of the Constitutional Court of 15 June 2021, P 7/20.

²⁷⁴ Judgment of the Constitutional Court of 22 October 2020, K 1/20.

²⁷⁵ The term "premise" refers to the possibility of legal abortion, existing in Polish law on the grounds of the act of January 7, 1993 on family planning, protection of human foetus and permissibility of termination of pregnancy, when prenatal tests or

due to numerous protests throughout Poland, the amendment work was abandoned. The planned change was then made in 2020 by the Constitutional Tribunal, which in this situation replaced the Polish Parliament. The ruling resulted in even greater protests and petitions, which, however, did not change the status quo. What is controversial is not only the ruling itself and the staffing of the Constitutional Tribunal but also the use of the Tribunal as an easier legislative route. It shatters any assumption of trust in the state and the separation of powers. It is also worth mentioning that this judgment was not published until 27 January 2021, more than three months after it was issued. Unfortunately, this shows that actions that *de facto* destroy citizens' trust in the state are legalised by the Constitutional Tribunal with the help of the principle of trust (the loyalty of the state to citizens).

4. Illegal eavesdropping on citizens.

Another issue that undermined trust was a search order and pre-trial detention of a lawyer, Roman Giertych, who is known for his unfavourable opinion of the current government, without any guarantees or at least respect for professional secrecy. Moreover, a few months later the public authorities used the Pegasus spyware system against Giertych and prosecutor Wrzosek. There was access to legally protected content without any judicial oversight or justification. The use of spyware is such a dangerous precedent that the European Parliament is preparing to launch a commission to inquire into the matter.²⁷⁶

IV. Independence and Impartiality

Issues of independence and impartiality are closely linked to the principle of trust. Actions taken since 2015 have consistently resulted in threats to independence. This is primarily related to three new laws:

1. The law on amendments to the Act on the Organisation of Ordinary Courts, which strengthens the role of the Minister of Justice, reduces the importance of the collegial bodies of judges and tightens the disciplinary responsibility of judges;²⁷⁷

2. The law on amendments to the Act on the National Council of Judiciary and certain other statutes. The main change was that it replaced the election of 15 members of the NCJ (of the 25 members who sit on the Council) with judges and transferred this power to the Sejm. 23 members of the Council currently are from the legislative and executive authorities. On 6 March 2018 in a single vote the Sejm elected fifteen judges as new members of the NCJ;²⁷⁸

3. The Act on the Supreme Court of 8 December 2017, which modified the organisation of the court by, in particular, creating two new chambers: a Disciplinary Chamber (*Izba Dyscyplinarna*) and a Chamber of Extraordinary Review and Public Affairs (*Izba Kontroli Nadzwyczajnej i Spraw Publicznych*). The judges in the newly created chambers were entirely recommended

other medical prerequisites indicated a high probability of severe and irreversible disability of the foetus or an incurable disease threatening its life (until the foetus becomes capable of independent life outside the pregnant woman's organism); the occurrence of this circumstance was confirmed by a doctor other than the one performing the termination.

276 <https://www.theguardian.com/news/2022/feb/10/eu-close-to-launching-committee-of-inquiry-into-pegasus-spyware>, accessed 2 May 2022.

277 O. J. 2020 no. 2072.

278 O. J. 2021 no. 269.

by the new NCJ.²⁷⁹ Next, amendments to the Law on the Supreme Court which entered into force in February 2020 expanded the competences of both chambers. The Chamber of Extraordinary Review and Public Affairs is now the only body with competence to decide on motions challenging the independence and impartiality of judges, with a special competence to overturn decisions of other courts, including other Supreme Court chambers, which contest the legitimacy of other judges.

1. Modifications to the system for appointing members of the National Council of the Judiciary and judicial independence

All these changes undermine guarantees of judicial independence, the most far-reaching being that concerning filling judicial positions in the NCJ. The Council recommends candidates for judicial office and therefore has key influence on the composition of the judiciary. Any weaknesses in guaranteeing the independence of the Council could impact the right to a fair trial and trust (see the comments above on trust). The lack of adequate guarantees of independence and impartiality has been noted in the jurisprudence of national and international courts. This causes considerable confusion in the domestic legal system.

When the NCJ was first presented with a new method of selecting judges, there were many reservations. The turning point was the ruling of the CJEU in the *A.K. v. NCJ and CP and DO v. SC* cases, in which the Court gave guidelines for national courts to assess whether courts are independent and impartial. After a judgment on 19 November 2019 in which the CJEU clarified the scope of the independence and impartiality requirements in the context of the establishment of the Disciplinary Chamber of the Supreme Court, the Chamber of Labour and Social Security of the Supreme Court concluded that the NCJ was not an authority that was impartial or independent of the legislative and executive branches of power.²⁸⁰ In its opinion, the Disciplinary Chamber of the Supreme Court could not be considered a court within the meaning of domestic law and the Convention.

On 8 January 2020 the Chamber of Extraordinary Review and Public Affairs of the Supreme Court found that a resolution of the NCJ recommending to the President candidates for the post of judge could only be quashed on appeal by a candidate in situations in which the appellant proved that the lack of independence of the NCJ had adversely affected the content of the impugned resolution or if the appellant demonstrated that the court had not been independent or impartial according to the criteria indicated in the CJEU judgment.²⁸¹ Regarding the latter, the Chamber stressed that the Constitution did not allow review of the effectiveness of the President's decisions concerning the appointment of judges.

On 23 January 2020, three joined chambers of the Supreme Court issued a joint resolution. The Court agreed that the NCJ had not been an independent and impartial body and that this had led to defects in the procedure for the appointment of judges carried out on the basis of NCJ recommendations. Regarding the Chamber of Extraordinary Review and Public Affairs, the Supreme Court noted in particular that it was composed solely of judges who were newly appointed through the procedure involving the NCJ established in 2017. Moreover, this Chamber was the only body competent to examine appeals against resolutions of the NCJ concerning recommendations of judges for all the courts in Poland. In consequence, according

²⁷⁹ O. J. 2021 no 1904.

²⁸⁰ See III PO 7/18 – Inpris template available in the CJC database, accessed 2 May 2022.

²⁸¹ Case I NOZP 3/19.

to the resolution, court formations including Supreme Court judges appointed through the procedure involving the NCJ were unduly composed in the meaning of the relevant provisions of domestic law. This also applied to the Disciplinary Chamber.

A resolution of the joint chambers of the Supreme Court has the force of law and is binding on other Supreme Court benches. The resolution of 23 January 2020 implemented the CJEU's judgment in joint cases C-585/18, C-624/18 and C-625/18.

In response to the joint resolution of the three chambers of the Supreme Court, the Speaker of the Sejm petitioned the Constitutional Tribunal to resolve the alleged "conflict of competence between the Sejm and the Supreme Court and between the President of Poland and the Supreme Court."²⁸² On 28 January 2020 the Constitutional Tribunal issued an interim decision which suspended the implementation of the Supreme Court's resolution of 23 January 2020. In addition, the Constitutional Tribunal suspended the prerogative of the Supreme Court to issue resolutions concerning compatibility with national or international law or the case law of international courts of the composition of the NCJ, the procedure for recommending judges and the prerogative of the President to appoint judges. The conclusion was that a person appointed by the President of Poland has indisputable competence to hold judicial office. The decision was not unanimous.

In a decision on 21 April 2020, the Constitutional Tribunal decided that the Supreme Court had no jurisdiction to make a "law-making interpretation" (*wykładnia prawotwórcza*) of legal provisions leading to changes in the structure and organisation of the judiciary system, even if it is connected with a judgement by another international court. Appointing judges was the exclusive competence of the President of the Republic of Poland. He exercised this right on request by the NCJ "personally, irrevocably and without any participation or interference by the Supreme Court."²⁸³ In the end, the Constitutional Tribunal stated that the Supreme Court has no jurisdiction to control the President in his exercise of the competence to appoint a judge. In particular, it should not give a binding interpretation of a legal regulation to specify prerequisites for the President's competence. The decision was not unanimous.

At the same time, the Constitutional Tribunal had to answer a question referred by the Prime Minister concerning the compatibility of the Supreme Court's resolution of 23 January 2020 with the Polish Constitution, the Charter of Fundamental Rights of the European Union and the Convention. In a judgment on 20 April 2020 the Constitutional Tribunal held that the Supreme Court's resolution of 23 January 2020 had been incompatible with the Constitution, Articles 2 and 4(3) of the Treaty on European Union and Article 6 § 1 of the Convention.²⁸⁴ In the Tribunal's opinion, appointing judges is the President's competence and it may not be subject to any type of review. The Court concluded "In particular, the contested resolution of the Supreme Court is incompatible with Article 45 § 1 of the Constitution and Article 6 § 1 of the Convention because in its content it infringes the standard of independence of a court and of a judge (...)" This judgement was also not unanimous. Interestingly, referring to the standards of European law concerning independence and impartiality, the Constitutional Tribunal undermined the application of the CJEU's ruling by the Supreme Court. The Tribunal assumed that neither common courts nor supranational or international courts have competence to examine the method of appointing a judge.

282 Case K 1/20.

283 Case Kpt 1/20.

284 Judgment of the Constitutional Court of 20 April 2020 in case U 2/20.

The aforementioned judgments show the Polish judiciary's precarious position. The European Court of Justice and the European Court of Human Rights both consider the changes made after 2015 to impact the principle of judicial independence. Regrettably, this does not affect reflection on the part of the legislator. It uses the means available, not only legislative ones but also the politicised Constitutional Tribunal to legalise regulations that are contrary to European standards of independence and impartiality.

2. The establishment and activity of the Disciplinary Chamber of the Supreme Court

The changes in the scope of disciplinary proceedings against judges and practice show that disciplinary responsibility, which is intended to support independence, may weaken it. Poland is an example of a situation in which disciplinary liability curtails the independent activity of judges and weakens their status.

Polish disciplinary proceedings against judges were examined by the CJEU in the *Commission v. Poland* case on 15 July 2021.²⁸⁵ The Commission claimed that the Republic of Poland had infringed European law by establishing the new disciplinary regime for judges in the Supreme Court and ordinary courts instituted by legislation adopted in 2017. First, in the Commission's opinion the Disciplinary Chamber of the Supreme Court was not independent and impartial, mainly because the composition of the chamber was appointed on recommendation by the NCJ. Second, designation of the competent disciplinary court is the discretionary competence of the President of that Chamber. Third, the Commission contended that the lack of a guarantee that disciplinary cases would be examined within a reasonable time was a threat to the right of defence of accused judges. Fourth, treatment of the content of judicial decisions as disciplinary offences was also unacceptable in the European Union. Equally dangerous to the principle of judicial independence was the possible initiation of disciplinary proceedings against judges who exercised the right of national courts to address a reference for a preliminary ruling. Therefore, the Commission also claimed that Poland had infringed Article 267 § 2 and 3 TFEU.

In the above case the CJEU issued an interim order.²⁸⁶ According to this Poland should suspend the Disciplinary Chamber of the Supreme Court in disciplinary proceedings relating to judges and refrain from transferring cases pending before the Disciplinary Chamber of the Supreme Court to a judicial formation that does not meet the requirement of independence.

In a judgement of 15 July 2021 the CJEU concluded that the disciplinary regime for judges in Poland was not compatible with EU law. The CJEU held that it "failed to guarantee the independence and impartiality of the Disciplinary Chamber of the Supreme Court, which [was] responsible for reviewing decisions issued in disciplinary proceedings against judges" and "it allowed the content of judicial decisions to be classified as disciplinary offences involving judges of the ordinary courts." Second, Poland had failed to fulfil its obligations under Article 267 TFEU "by allowing the right of courts and tribunals to submit requests for a preliminary ruling to the Court of Justice of the European Union to be restricted by the possibility of triggering disciplinary proceedings."

Following the CJEU judgment of 15 July 2021, on 5 August 2021 the First President of the Supreme Court issued two orders: nos. 90/2021 and 91/2021. They laid down rules on the procedure for keeping court files, registering and assigning cases to judges and appointing

²⁸⁵ CJEU, 15 July 2021, Case C-791/19 *Commission v. Republic of Poland* ECLI:EU:C:2021:596.

²⁸⁶ Order of the Court of 8 April 2020 in Case 791/18, *ibid.*

members of the bench in certain cases in the Disciplinary Chamber. The main aim was to suspend proceedings pending before the Disciplinary Chamber. In both orders the First President of the Supreme Court stipulated “The provisions of the order shall apply until the Court of Justice of the European Union delivers its final judgment in Case C-204/21 or until the introduction in the Polish legal order of amendments rendering ineffective the order of the Vice-President of the Court of Justice of 14 July 2021 (C-204/21R), but no longer than until 15 November 2021.”

The Constitutional Tribunal, the composition of which raises fundamental doubts about the independence and impartiality of judges, issued yet another unprecedented ruling in 2021 on a problem concerning Poland’s violation of EU law. On 7 October in case K 3/21 the Constitutional Tribunal ruled that the interpretation of Articles 1 and 19 TEU by the Court of Justice of the European Union in its rulings on the independence of the judiciary was unconstitutional.²⁸⁷ This ruling was part of a “new anti-EU line of jurisprudence which takes as its point of departure the divergence between constitutional and EU standards, the lack of obligation on the part of the Constitutional Tribunal to make pro-EU interpretations of national legislation and a confrontational attitude to the CJEU and its jurisprudence and EU law.”²⁸⁸ This was a complete negation of the previous pro-EU jurisprudence (pre-2015) on European issues of the Polish Constitutional Tribunal.²⁸⁹ Commentators point out that according to the ruling Polish judges can be disciplined for failing to comply with the decisions of the Polish Constitutional Tribunal if they apply CJEU rulings that include an interpretation of treaty provisions that the Constitutional Tribunal has found unconstitutional.²⁹⁰

Despite the CJEU’s unequivocal judgment, the work of the Disciplinary Chamber was unfrozen on 1 February 2022. The order of the First President of the Supreme Court which partially implemented the CJEU’s decision in case C-294/21 had expired. The First President of the Supreme Court believed that it was up to the government to implement the CJEU’s judgment, not the Supreme Court. The lack of restrictions on the functioning of the Disciplinary Chamber may translate into initiation of proceedings against judges who have ruled in accordance with the ECtHR, the CJEU or the resolution of the joint chambers of the Supreme Court.²⁹¹ For instance, on 16 September 2021 the Supreme Court gave a decision in which it quashed its previous decision and remitted the case to the same court.²⁹² The Supreme Court held that the court dealing with the case had been unduly composed because the judge had been appointed by the President of Poland on a recommendation by the NCJ as established under the 2017 Amending Act. In reaching this conclusion, the Supreme Court applied its resolution of 23 January 2020 and the judgment of the CJEU²⁹³.

287 Judgment of the Constitutional Court of 7 October 2021, K 3/21.

288 M. Florczak-Wątor, *(Nie)skuteczność wyroku Trybunału Konstytucyjnego z 7.10.2021 r., K 3/21. Ocena znaczenia orzeczenia z perspektywy prawa konstytucyjnego*, “Europejski Przegląd Sądowy” 12/2021, pp. 4-11.

289 *Ibid.*

290 *Prawny polexit. TK Julii Przyłębskiej orzekł, że wyroki TSUE są sprzeczne z konstytucją*, <https://oko.press/prawny-polexit-tk-julii-przylebskiej-orzekl-ze-wyroki-tsue-sa-sprzeczne-z-konstytucja/>, accessed 2 May 2022.

291 <https://oko.press/manowska-na-wojnie-z-ue-odmrozila-izbe-dyscyplinarna/>

292 Case no. I KZ 29/21.

293 See also decision of the Supreme Court of 29 September 2021, case no. V KZ 47/21 and judgment of the Częstochowa Regional Court of 24 August 2021, case no. VII Ka 651/21.

In addition, the Supreme Administrative Court decided to annul several of the NCJ resolutions concerning the recommendation of candidates for appointment to the Supreme Court.²⁹⁴ In the Supreme Administrative Court's opinion the NCJ did not offer guarantees of independence from the legislative and executive branches of power in the process of appointing judges. Furthermore, the President of Poland's announcement of vacant positions in the Supreme Court in May 2018, which was done without the Prime Minister's countersignature, was held to be contrary to the Constitution and had resulted in a deficient procedure for judicial appointments. It was further noted that since many members of the NCJ had recently been promoted as presidents and vice-presidents of courts, the entire body had to be regarded as strictly and institutionally subordinate to the executive, represented by the Minister of Justice. The degree of dependence on the executive and legislature was such that it could not be irrelevant when assessing the ability of the judges selected by the NCJ to meet the objective requirements of independence and impartiality required by Article 47 of the Charter of Fundamental Rights.

The *W.Ż.* case also raises several important issues regarding judicial independence.²⁹⁵ In domestic proceedings, *W. Ż.* (a judge) was transferred (without his consent) to another department. The judge was a member of the former NCJ and was critical of the changes in the Polish judiciary. The transfer in this case could therefore be treated as a disciplinary sanction. *W.Ż.* filed an appeal against the decision with the NCJ. The Council discontinued the proceedings on this appeal. On 14 November 2018, *W.Ż.* filed an appeal against the disputed resolution with the Supreme Court – Chamber for Extraordinary Control and Public Affairs. His case was adjudicated by judges appointed by the President pursuant to KRS Resolution No. 331/2018 of 28 August 2018 (see above). This case raises the following issues:

- the use of a transfer to another department as a kind of disciplinary sanction;
- adjudication by judges appointed by the new NCJ;
- adjudication by judges appointed on the basis of a motion included in the resolution which was appealed before the Supreme Administrative Court.

In the judgment of 6 October 2021, the Court held that the transfer of a judge without his consent may violate the principles of irremovability and independence of judges. According to Article 19(1) TEU, judicial independence means that the system of disciplinary responsibility applicable to judges should contain the necessary guarantees to exclude any risk of the system being used as an instrument of political control over the content of judicial decisions. The Court found that "it is necessary for judges to be protected from external intervention or pressure liable to jeopardise their independence. The rules applicable to the status of judges and the performance of their duties as judges must, in particular, be such as to preclude not only any direct influence in the form of instructions but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned, and therefore preclude a lack of appearance of independence or impartiality on their part likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in individuals."²⁹⁶

The procedure for transferring a judge without his/her consent therefore also requires appropriate guarantees of independence. Independence implies the possibility of declaring a

²⁹⁴ In the judgment of 6 May 2021 the Supreme Administrative Court quashed the impugned NCJ resolution no. 330/2018 in case no. II GOK 2/18. See also cases nos. II GOK 2/18; II GOK 3/18; II GOK 5/18; II GOK 6/18 and II GOK 7/18.

²⁹⁵ CJEU, 6 October 2021, in Case C-487/19 *W.Ż.* ECLI:EU:C:2021:798.

²⁹⁶ CJEU, 6 October 2021, in Case C-487/19 *W.Ż.* ECLI:EU:C:2021:798, para 110.

judgment to be null and void “if it follows from all the conditions and circumstances in which the process of the appointment of the single judge took place that (i) the appointment took place in clear breach of fundamental rules which form an integral part of the establishment and functioning of the judicial system concerned, and (ii) of the integrity of the outcome of Resolution 2359 (2021) entitled ‘Judges in Poland and in the Republic of Moldova must remain independent.’”²⁹⁷

The CJEU also referred to the concept of judicial independence in its judgment of 13 January 2022 in the *Ministry of Justice* case.²⁹⁸ Referring to previous case law, the CJEU emphasised that the concept of ‘independence’ has two aspects. The first aspect, which is external, requires the body concerned to exercise its functions wholly autonomously without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever and thus to be protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.

The second aspect, which is internal, is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of the proceedings. This requires objectivity and an absence of any interest in the outcome of the proceedings apart from strict application of the rule of law (judgments of 19 November 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 122 and the case law cited, and of 21 January 2020, *Banco de Santander*, C-274/14, EU:C:2020:17, paragraph 61 and the case law cited).

It is also worth mentioning that after that the Parliamentary Assembly of the Council of Europe decided in 2020 to open its monitoring procedure with respect to Poland, on 26 January 2021 the Assembly called on the Polish authorities to make changes to the functioning of the Constitutional Tribunal and the ordinary justice system according to Council of Europe standards.²⁹⁹ In addition, the Group of States against Corruption (GRECO) on 22 September 2021 adopted an Interim Compliance Report. In GRECO’s opinion its recommendations to amend the provisions on the election of judges to the NCJ and to change the organisation of the Supreme Court have not been implemented.

V. Accountability

1. The problem of judges’ accountability and the Disciplinary Chamber of the Supreme Court in Poland

The issue of professional liability of legal practitioners, and judges in particular, occupies an important place in reflections on the crisis of the rule of law in Poland. In this context, the issue of the functioning of the Disciplinary Chamber of the Supreme Court comes to the fore.³⁰⁰ The

²⁹⁷ Ibid, para 161.

²⁹⁸ CJEU, Judgment of 13 January 2022, C-55/20 *Ministry of Justice* ECLI:EU:C:2022:6.

²⁹⁹ Resolution 2359 (2021) entitled “Judges in Poland and in the Republic of Moldova must remain independent”.

³⁰⁰ By functioning of the Disciplinary Chamber of the Supreme Court we mean all the problems that are related to the fact of creation of the Disciplinary Chamber, the procedure used during disciplinary proceedings before it and the whole new system of judges’ accountability created in connection with the establishment of the Disciplinary Chamber.

Chamber was established as a result of the ‘reforms’ carried out by the ruling party after 2015. Among the most recent case law of the CJEU on the subject, a judgment of 15 July 2021 in a case brought by the European Commission against Poland concerning a new disciplinary responsibility of judges regime in Poland deserves attention.³⁰¹ The European Commission accused Poland of failing to fulfil its obligations under the second paragraph of Article 19(1) TEU by creating a regime of disciplinary liability in which the content of court rulings can be the basis for disciplinary liability of judges and the body appointed to hear disciplinary cases, i.e. the Disciplinary Chamber of the Supreme Court, does not ensure independence and impartiality. In addition, the Commission submitted that Poland had failed to fulfil its obligations under the second and third paragraphs of Article 267 TFEU in such a way that the existing legislation restricts the right of courts to refer to the CJEU for a preliminary ruling by creating a mechanism enabling disciplinary proceedings to be brought in such a situation.

The CJEU’s consideration of the application of Article 19 TEU is noteworthy. The Polish Government took the view that disciplinary proceedings carried out on the basis of the procedural provisions challenged by the Commission were purely internal in nature and that in defining these procedures the Polish authorities were not regulating matters which were covered by EU law. The Court did not share this position. When it came to the applicability and scope of the second subparagraph of Article 19(1) TEU, the CJEU emphasised that the Polish Supreme Court and its Disciplinary Chamber adjudicate on issues relating to the application or interpretation of EU law and that they are part of the Polish system of remedies “in areas covered by EU law” within the meaning of the second subparagraph of Article 19(1) TEU and therefore these courts should satisfy the requirements of effective judicial protection. The Court recalled that “it should be borne in mind that although [...] the organisation of justice in the Member States admittedly falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law and, in particular, from the second subparagraph of Article 19(1) TEU.”³⁰² The Court therefore reiterated that the question of the independence of the judiciary is an issue imminently connected with the values on which the Union is founded. A Member State may organise its justice system as it sees fit, but in compliance with the values which are derived from EU law. This comment by the Court appears to be particularly significant in view of the wider context of Poland’s problems with the rule of law. The Polish government, citing the principle of conferral of competences, maintains the narrative of the exclusive right of Member States to determine their own systems of justice. Consequently, the Polish authorities appear to be completely unable to see or understand that national courts are a necessary and indispensable part of the European justice system. While, therefore, the Member States may shape the structure of their judiciaries and the organisation of their systems as they see fit, they must not do so in contravention of the fundamental values on which the Union is based. Reform at the Member State level must not lead to the independence and impartiality of the judiciary being weakened or nullified, or to judges fearing disciplinary responsibility for the substance of their decisions. Undermining confidence in the fundamental issues on which European law is based in Poland undermines the entire European justice system. It is therefore worth emphasising once again that when reforming the administration of justice in a given Member State, by virtue of Article 19 TEU one also reforms the European system of justice and this must be done with full respect for the values referred to in Article 2 TEU.

301 CJEU, 15 July 2021, in Case C-791/19 *Commission v Poland* ECLI:EU:C:2021:596.

302 *Ibid.*

With this in mind, it should be stressed that the Court found the Commission's claims to all be well-founded and concluded that Poland had failed to fulfil its obligations under EU law. The Court pointed out that the whole context of the reforms of the judiciary in Poland after 2015 raised serious doubts about the independence and impartiality of the Disciplinary Chamber of the Supreme Court. The Court found that in its existing form the Chamber is exposed to direct interference in its activities by the executive and the legislature. The Court emphasised that the composition of the Disciplinary Chamber was fully determined by the new National Council of the Judiciary, which in turn was subject to the influence of political power. The Court also drew particular attention to the fact that the Disciplinary Chamber is intended to consist exclusively of new judges who have not previously served on the Supreme Court. Moreover, these judges will be entitled to high salaries and a particularly high degree of organisational autonomy compared to the conditions prevailing in the other judicial chambers of the Supreme Court.

Particularly dangerous in the Court's view was also the fact that a disciplinary offence subject to examination by the Disciplinary Chamber may also be the content of a judicial decision.³⁰³ This blatantly undermined judicial independence and may constitute a political influence mechanism and put pressure to issue specific rulings.

The Court also pointed out that the regulations according to which the disciplinary tribunal conducts proceedings in the absence of the accused judge and his legal counsel restrict the rights of judges against whom disciplinary proceedings are brought to be heard effectively by the disciplinary tribunal and to benefit from an effective defence before that tribunal. These provisions cannot guarantee that the accused judge will always be able to put forward his views usefully and effectively, if necessary with the assistance of his lawyer, who will himself be afforded a real opportunity to undertake his defence.³⁰⁴

Finally, the Court considered that a rule that exposes judges to disciplinary proceedings merely because they have decided to make a reference to the Court for a preliminary ruling infringed EU law. It infringed their right, and sometimes their duty, to make such a reference to the Court and disrupted the system of cooperation between national courts and the Court of Justice, and in turn undermined the uniform interpretation and full effectiveness of European Union law.

2. The power of disciplinary courts to make a reference for a preliminary ruling under Article 267 TFEU

As was indicated in the introduction to this report, among other things the TRIAL project has the objective of explaining and disseminating knowledge of the EU Charter's potential to ensure and improve standards for the accountability of judges and other legal professionals, ultimately benefiting the rule of law in the member states. In this context, an important case covered by the project is Case C-55/20, in which the Court ruled on 13 January 2022.

In July 2017 the National Prosecutor, who is a First Deputy of the General Prosecutor, requested the Disciplinary Agent of the Warsaw Bar Association ('the Disciplinary Agent') to commence disciplinary proceedings against a member of the Bar: R.G. According to the

303 Paragraph 157, Judgment of the Court (Grand Chamber) of 15 July 2021, in Case C-791/19 *Commission v Poland*, ECLI:EU:C:2021:596.

304 Paragraph 208-210, Judgment of the Court (Grand Chamber) of 15 July 2021, in Case C-791/19 *Commission v Poland*, ECLI:EU:C:2021:596.

National Prosecutor, public statements made by the lawyer in question may have been of a threatening nature and constituted a disciplinary offence. On two occasions the Disciplinary Agent refused to institute such proceedings or decided to discontinue them. Similarly, following appeals by the National Prosecutor and the Minister of Justice, in two cases the Disciplinary Court of the Warsaw Bar Association overturned these decisions and remitted the cases to the Disciplinary Agent for re-examination.

In the third ‘round’ of these proceedings, in which the Disciplinary Court of the Warsaw Bar Association (‘the Disciplinary Court’) is reviewing the Disciplinary Agent’s decision to again discontinue the disciplinary investigation, the Disciplinary Court is seeking to determine whether Directive 2006/123/EC (‘the Services Directive’) and Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’) apply to the disciplinary proceedings pending before it.

The preliminary questions posed by the Disciplinary Court revealed an important issue concerning the problem of lawyers’ liability in the context of European law and the rule of law. The CJEU considered whether the Disciplinary Court of the Warsaw Bar Association is a court in the meaning of Article 267 TFEU.

It should be emphasised that in the present case, both the National Prosecutor and the Polish Government took the view that the request for a preliminary ruling was inadmissible on the ground that the Bar Association Disciplinary Court does not constitute a court or tribunal in the meaning of Article 267 TFEU.³⁰⁵

Referring to an opinion of the Advocate General, the Court addressed several important issues relating to the definition of a court in the meaning of Article 267 TFEU. Recalling its previous case law, the Court first noted that in order to be considered a court, a body must meet the following criteria: it is established by law; it is permanent; its jurisdiction is compulsory; its procedure is *inter partes*; it applies rules of law; and it is independent. The Court held that in the present case the Bar Association Disciplinary Court in Warsaw satisfied these criteria as it was established by law, was permanent, had compulsory jurisdiction and applied rules of law.

This ruling is an important indication that disciplinary bodies meeting the established criteria adjudicating on the liability of lawyers are entitled to request a preliminary ruling. This position strengthens the legal protection guaranteed by EU law in disciplinary proceedings against lawyers. This decision by the Court gives Polish lawyers, including ones conducting various types of proceedings outside the system of justice in the strict sense of the word, an important tool to obtain support from the Court for their rulings. This safety valve can certainly strengthen the sense of independence of lawyers resolving such cases. The CJEU’s open approach to the definition of a court for the purposes of Article 267 TFEU is consequently one of the important elements strengthening the struggle for maintenance of the rule of law in Poland.

VI. Concluding remarks

When analysing the considerations developed so far and observing the case law of the European courts in the Polish cases concerning the issues of trust, independence and impartiality of judges and judicial accountability, it should be borne in mind that the European courts are independent and impartial arbiters that help settle disputes that individual states are unable to resolve for themselves. Confidence in this process was a condition of Poland’s membership of the Union from the start. All states are bound by European law equally and unconditionally,

³⁰⁵ Paragraph 48, Judgment of 13 January 2022, in Case C-55/20 *Ministerstwo Sprawiedliwości*, ECLI:EU:C:2022:6..

not just when it suits them. The Court is an unusually egalitarian space. The language of legal principles controls impulses to promote political interests. This explains why the Court makes the ruling Polish party nervous: in the courtroom it is the power of argument, not arguments of power, that prevails. This argumentative shift was emblematic of the post-war settlement. The dream of the founding fathers was that law, not war, would become the device to reconcile and frame the diverse interests of Member States and ensure that the ‘never again’ mantra would indeed be etched in the fabric of the European continent. When a Member State fails to fulfil its obligations, the others are not permitted to take unilateral action. They cannot close their borders and refuse entry to the maverick state’s citizens or its goods. Instead, Member States must follow due process, wait for a ruling and then adhere to it. This is because, when joining the Union, all prospective Member States sign an agreement with key stipulations concerning recognition of the Court’s jurisdiction. For this commitment to be credible, it is stipulated that respect for the Court’s powers and its rulings works *ex post* (after the judgement has been delivered) and *ex ante* and covers prospective judgments.

This why the importance of the cases decided by the CJEU and the ECtHR in the ‘Polish cases’ clearly goes beyond Poland. Therefore, we will conclude with a more optimistic picture than the one the report has painted. The debacle of the rule of law in Poland has taught us many important lessons and bolstered the rule of law discourse in the EU by firmly anchoring it in judicial independence and impartiality, and the separation of powers. The Polish cases decided so far by the Court and analysed in our report have prompted a paradigmatic shift in the case law and novel readings of Article 19 TEU and Article 2 TEU. When looked at in a holistic fashion, the case law allows us to make the following concluding and synthesising findings.

I. Article 19 (1) TEU and its reference to ‘law’ are linchpins in the emerging case law of the Court. What emerges from the case law as analysed in this report is that this Article has six systemic functions, which then run throughout the whole body of the case law and will affect future developments and jurisprudential dynamics:

1. Article 19 TEU moves EU governance from power-oriented to rule-oriented politics.
2. It stands for ‘supranational legality.’
3. It both empowers and delimits the Court’s powers.
4. It expresses the fundamental idea of judicial protection, which allows the Court to interpret the jurisdictional clauses in the Treaties in a manner that is coherent and constructive.
5. It defines the normative space within which the Court exercises its judicial power.
6. It underscores that courts in the Union are courts of law and that the Union is governed by law.

II. Crucially, Article 19(1) TEU plays a pivotal ordaining role, not simply from the perspective of the Court but also from that of national courts. While the former put Article 19 TEU at the centre of its responses to questions posed by national courts and to infringement actions brought by the Commission, the latter resort to Article 19 TEU as the rationale for their European mandate and as a way to justify the existence of the transnational element in cases referred for preliminary rulings. We note that the Court made an explicit reference to Article 19 TEU as a constitutional basis for shared judicial mandate and responsibility. As a result, independent national courts and tribunals in collaboration with the Court of Justice fulfil a duty entrusted to them jointly of ensuring that in the interpretation and application of the Treaties the law is observed.

III. What emerges from this case law is the importance and centrality of ‘law’ in Article 19 TEU. The case law of the Court analysed in this report reminds us of the way the Court used to speak in the past of the law’s authority, which binds together the union of states, institutions and individuals. As such, the reference to law in Article 19(1) TEU adds a novel argumentative tool for national courts, one that complements the previously dominant reference to the right to an effective remedy.

IV. The novelty of the case law analysed in this report resides in the emerging connection between Article 19 TEU and Article 2 TEU. This connection triggers the jurisdiction of the Court. The case law of the Court explains that Article 2 TEU is justiciable and now forms part of EU law *sensu largo* in accordance with the ‘law’ used in Article 19 TEU. The combination of Article 19 and Article 2 TEU is essential as it leads to a novel reading of the commitments of parties to consensus and its substantive content. Therefore, bringing Article 2 TEU within the scope of art. 19 (1) TEU is one of the most crucial developments analysed here.

V. Article 19 TEU and Article 2 TEU express the value and the principle of the rule of law. The key word used in the case law is ‘essence.’ Effective judicial protection and judicial independence are the essence of the fundamental right to a fair trial. The very existence of effective judicial review is of the essence of the rule of law. For effective judicial protection to be ensured, it is essential that judicial independence must be maintained. The right to a fair trial and judicial independence function as a guarantee of the effectiveness of all EU-derived rights and a safeguard of EU values.³⁰⁶

VI. The case law analysed here puts every Member State under the obligation to ensure by reason of the principle of sincere cooperation set out in Article 4(3) that bodies which as ‘courts or tribunals’ in the meaning of EU law come within its judicial system in the fields covered by that law, are fully independent and meet the requirements of effective judicial protection.

VII. Finally, Member States are obliged by reason of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU to ensure in their territories the full application of and respect for EU law. Member States must provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law in accordance with Article 2 TEU.

When analysed together, points I-VII represent a paradigmatic shift, one that affects the very core of EU law. The rule of law, judicial independence and impartiality and effective protection are mutually intertwined and reinforce one another. Together they contribute to the emergence of a non-negotiable principle in the European public space. As such, they define the essence of membership of the Union and a minimum commonality that binds all parties and actors. We see the elucidation of these principles as the most important contribution of the case law and this report to EU discourse on the rule of law.

306 For a holistic analysis of the case law, consult D. Kochenov and L. Pech, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case*, (Swedish Institute for European Policy Studies, 2021), available at <https://www.sieps.se/en/publications/2021/respect-for-the-rule-of-law-in-the-case-law-of-the-european-court-of-justice/>; T. T. Konciewicz, *L’Union de droit supranational comme premier principe de l’espace public européen. D’une union toujours plus étroite entre les peuples d’Europe mis à l’épreuve?* (La Collection débats et documents de la Fondation Jean Monnet pour l’Europe, 2021) at <https://jean-monnet.ch/en/publication/22e-numero-de-la-collection-debats-et-documents/>; On the Rule of Law Turn on Kirchberg – Part I. What and How has the Court of Justice Been Telling Us About the EU Constitutional Essentials? at <https://verfassungsblog.de/on-the-rule-of-law-turn-on-kirchberg-part-i/>; On the Rule of Law Turn on Kirchberg – Part II. How the Court of Justice is Spelling out the Constitution’s Unwritten Understanding(s) at <https://verfassungsblog.de/on-the-rule-of-law-turn-on-kirchberg-part-ii/>; “The Existential Jurisprudence” of the Court of Justice Moving Beyond the Boats, Embracing the Journey at <https://reconnect-europe.eu/blog/existential-jurisprudence-konciewicz/>, accessed 2 May 2022.

NATIONAL REPORT: PORTUGAL

Trust, Independence, Impartiality and Accountability of judges and arbitrators safeguarding the rule of Law under the EU Charter (TRIAL)



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Executive Summary

This report captures a moment in time by identifying evolving trends and promising practices in the field of the rule of law. The report does not aim to provide an exhaustive picture of the rule of law in Portugal. However, it shows that independent, impartial and accountable institutions in Portugal would benefit from a more citizen-centred equal society oriented towards sustainable growth. It aims to complement the 2020 Rule of Law Report, Country Chapter on the rule of law situation in Portugal,³⁰⁷ the CCJE report on judicial independence and impartiality in the Council of Europe Member States,³⁰⁸ the EU Justice Scoreboard,³⁰⁹ the UNHCR annual thematic reports of the Special Rapporteur on the Independence of Judges and Lawyers,³¹⁰ the ENCJ report,³¹¹ GRECO's Second Interim Compliance Report on Portugal³¹² and the CEPEJ's Efficiency Dashboard.³¹³ Processes taking place at the United Nations level such as pursuing Sustainable Development Goal 16 and the review of the Kiev Recommendations by the Organization for Security and Cooperation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR) have also served as a backdrop to the report.

On 24 March 2022, Portugal completed more days in democracy than under a dictatorship. In political terms, Portugal is a stable parliamentary democracy with a multiparty political system and regular transfers of power between political parties. Civil liberties are generally protected. While these factors are relevant to an understanding of Portugal as a state that respects the rule of law,³¹⁴ the truth is that there are contrasts that can (still) be observed, whether at the social, cultural or economic level.

The Portuguese Constitution ensures a wide set of rights, freedoms and guarantees for all its citizens which are in accordance with Article 2 of the Treaty on European Union. Portugal is also one of the states that proactively defend and promote European consensus, and it upholds EU fundamental rights standards at the EU level. However, on issues related to how its courts apply international obligations and the EU *acquis* there is room to intensify judicial dialogue and cooperation with EU level courts to increase legal certainty. Its courts seldom cite international instruments in key fundamental rights areas such equality and non-discrimination.³¹⁵ They openly diverge from the ECtHR on freedom of expression and freedom of the media. Likewise, references to the Charter are also rare and it is used more *ad abundantiam* than as a decisive

307 See https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters_en

308 See <https://www.coe.int/en/web/ccje/-/2019-edition-of-the-report-on-judicial-independence-and-impartiality-in-the-council-of-europe-member-states>

309 See https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en.

310 See <https://www.ohchr.org/en/special-procedures/sr-independence-of-judges-and-lawyers/annual-thematic-reports>

311 See <https://www.encj.eu/node/250>.

312 See <https://www.coe.int/en/web/greco/-/portugal-publication>

313 See https://public.tableau.com/app/profile/cepej/viz/EfficiencyDashboardv1_0EN/EfficiencyDashboard.

314 See: <https://freedomhouse.org/country/portugal/freedom-world/2021>.

315 "Eurocrimes and rule of law: an opportunity for Portugal to coherently tackle discrimination and hate related offenses at 'home' and in Brussels," Rita Gião Hanek and Vânia Ramos, 8 February 2022, Centre for Judicial Cooperation, Robert Schuman Centre, available at <https://medium.com/@centreforjudicialcooperation/eurocrimes-and-rule-of-law-8312c6f9187> <https://medium.com/@centreforjudicialcooperation/eurocrimes-and-rule-of-law-8312c6f9187>

normative source.³¹⁶ The report also notes that there is room for more dialogue specifically between the Constitutional Court and the ECJ.³¹⁷

In addition, it is true that Portugal often statistically diverges on standards that go hand in hand with the rule of law.³¹⁸ From the socio-economic perspective, of its 10 million inhabitants more than 1.6 million are poor and live on less than 540 euros a month.³¹⁹ The risk of falling into poverty in Portugal increased to 18.4% in 2020,³²⁰ ranking the country below the EU average in terms of decent work, economic growth, the level of poverty, zero hunger, well-being and health.³²¹ ³²² In 2021 Portugal had the fourth largest general government gross debt among OECD countries.³²³ Portugal will indeed benefit from its recovery and resilience plan.³²⁴ It is a unique opportunity.

Together with other project deliverables, the aims of the report are as follows: i) to raise awareness of the strategic impact that judicial cooperation and judicial interaction techniques can have in the effective implementation of the fundamental rights legal framework at the national level, namely through application of the Charter; ³²⁵ ii) to foster national cross-sectoral cooperation; iii) to enhance the ability of legal practitioners to promote the rule of law on a case-

316 The European Agency for Fundamental rights nevertheless noted in its 2021 report that interventions in parliamentary debates in Portugal sometimes use the Charter to “argue for or against the adoption of a bill.” For example, the Charter was used to support a bill that aims to exempt students with disabilities from paying tuition fees; parliamentarians cited the Charter when opposing proposals to legalise euthanasia; others rejected the introduction of a new national charter on digital rights, stating that such an initiative would duplicate rights in other instruments, including the Charter.

317 On 9 December 2020 the Portuguese Constitutional Court referred its first question for a preliminary ruling to the Court of Justice of the European Union (Case no. 711/2020 of 9 December). The Constitutional Court referred to its findings in Case no. 422/2020 recognising the principle of primacy of EU law, the exclusive competence of the CJEU to interpret and assess the validity of EU law through the preliminary ruling procedure instituted in Article 267 TFEU.

318 Referring to Amnesty International’s 2021 report, Pedro Neto, Executive Director of Amnistia Internacional Portugal, stated both that *discrimination is the biggest challenge now* and that *poverty is the deepest form of discrimination*. See <https://expresso.pt/sociedade/2022-03-28-A-discriminacao-esta-tao-enraizada-em-Portugal-que-por-vezes-a-vitima-nem-nota-os-direitos-humanos-segundo-a-Amnistia-Internacional-c2fe91e8>

319 Diário de Notícias (2021), ‘Mais de 1,6 milhões de portugueses são pobres e vivem com menos de 540 euros por mês’ Retrieved from <https://www.dn.pt/sociedade/mais-de-16-milhoes-de-portugueses-sao-pobres-e-vivem-com-menos-de-540-euros-por-mes-14228327.html>. See also United Nations, Department of Social and Economic Affairs, available at https://www.ine.pt/xportal/xmain?xpid=INE&xpgid=ine_destaques&DESTAQUESdest_boui=473574196&DESTAQUESmodo=2

320 *Observador* (2021), ‘Risco de pobreza aumenta para 18,4%’ Retrieved from <https://observador.pt/2021/12/17/risco-de-pobreza-aumenta-para-184/>.

321 According to Eurostat the largest share of people in the EU saying that they were unable to keep their home adequately warm come from Bulgaria (27%), followed by Lithuania (23%), Cyprus (21%) and Portugal and Greece (both with 17%). See <https://ec.europa.eu/eurostat/en/web/products-eurostat-news/-/ddn-20211105-1>. On how Portugal performs regarding the SDGs compared to the EU average, see <https://ec.europa.eu/eurostat/cache/infographs/sdg-country-overview/>

322 Wakelin, E. (2019). Rule of Law and the UN Sustainable Development Goals. *Peace, Justice and Strong Institutions*, 1-9.

323 OECD Government at a Glance, Country Fact sheet, Portugal 2021. See <https://www.oecd.org/gov/gov-at-a-glance-2021-portugal.pdf>

324 See Portugal’s recovery and resilience plan, available at https://ec.europa.eu/info/business-economy-euro/recovery-coronavirus/recovery-and-resilience-facility/portugals-recovery-and-resilience-plan_en

325 The Charter is a tool for “national and local authorities, including law enforcement authorities, rights defenders, legislators, judges and other legal practitioners, and civil society organisations [CSOs] active in fundamental rights. All these key actors for the Charter’s effective application have a role to play in making the Charter a reality in people’s lives.” Strategy to strengthen the application of the Charter of Fundamental Rights in the EU, COM (2020) 711 final, 2 December.

by-case basis;³²⁶ and iv) to contribute to building trust, legitimacy, independence, impartiality and accountability of the judiciary and arbitrators through practice.

The report highlights a sample of the collection of cases identified during the TRIAL project,³²⁷ which are also available on the CJC database.³²⁸ Contributions collected by speakers and participants during TRIAL's webinars, international workshops and cross-border events organised by the other twelve partners in the project and in which ICJP-CIDP participated were determinant in the selection of the practical examples below. It examines the ongoing reforms that Portugal has been implementing, the challenges that still exist and good practices that are aimed at tackling them. It does so in the fields of organisation of the judiciary, civil and criminal matters, and fundamental rights. Special emphasis is put on implementation of EU law at the national level.

This report also reflects some of the discussions and input received during the TRIAL national workshop parts I and II which took place on 4 and 5 November 2021, and on 13 May 2022 in Lisbon, Portugal, entitled "Portugal and the Rule of Law Crisis: next steps?" Complementing the report are the TRIAL blogposts *Eurocrimes and rule of law: an opportunity for Portugal to coherently tackle discrimination and hate related offenses at "home" and in Brussels*³²⁹ and *The Decision No. 268/2022, of the Portuguese Constitutional Court, and the principle of consistent interpretation*.³³⁰ Finally, a group of national experts from different backgrounds and with different areas of expertise were invited to mentor and provide feedback on the report.

The report's main target audience are judges and legal practitioners in general. It focuses on the relevance of non-court-centric approaches to ensure access to justice and demonstrates the increasing role of ombudsmen and arbitrators in effective implementation of EU law at the national level. It seeks to demonstrate that, particularly in the context of strategic litigation, legal practitioners have a role in defending the rule of law.^{331 332}

The topics identified have emerged as areas in which the interaction between Portuguese and European case law reveals trends that may also shape upcoming national and/or EU legislative and policy initiatives. The report might also contribute to public debate on such initiatives at the national level.

326 "Being a European lawyer in times of constitutional reckoning. Of challenges, hopes and ... promises too." Tomasz Koncewicz, Keynote speaker, University of Gdansk, TRIAL project, "Portugal and the Rule of Law Crisis: next steps?" part I, 4 and 5 November 2021.

327 About this Project, see <https://cjc.eui.eu/projects/trial/>.

328 Available at <https://cjc.eui.eu/data/>.

329 Rita Gião Hanek and Vânia Ramos, 8 February 2022, Centre for Judicial Cooperation, Robert Schuman Centre, available at <https://medium.com/@centreforjudicialcooperation/eurocrimes-and-rule-of-law-8312c6f9187>

330 Alfonso Bras, to be published on <https://medium.com/@centreforjudicialcooperation/>

331 The Charter is a tool for "national and local authorities, including law enforcement authorities, rights defenders, legislators, judges and other legal practitioners, and civil society organisations [CSOs] active in fundamental rights. All these key actors for the Charter's effective application have a role to play in making the Charter a reality in people's lives." Strategy to strengthen the application of the Charter of Fundamental Rights in the EU, COM (2020) 711 final, 2 December.

332 "The Charter has strengthened the role of judges as 'guardians of democracy, liberty and justice' in the EU legal order, since judges are called upon to provide effective judicial protection of the rights that EU law confers on individuals, including those recognised by the Charter." Koen Lenaerts, President of the Court of Justice of the European Union, speech at the event "Reinforcing the EU charter: Rights of the people in the EU in the next decade," 7 December 2020.

The Rule of Law

To answer the question ‘what is the rule of law?’ the European Commission in its Communication of 3 April 2019³³³ stated:

The rule of law is enshrined in Article 2 of the Treaty on European Union as one of the founding values of the Union. Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law includes, among others, principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts; effective judicial review including respect for fundamental rights; the separation of powers; and equality before the law. These principles have been recognised by the European Court of Justice and the European Court of Human Rights (ECtHR).³³⁴

The Jacques Delors European Information Centre – Portuguese Ministry of Foreign Affairs has adopted this definition and, for the purpose of the scope of the report, the rule of law should be understood as such.³³⁵

Trust

The Efficiency of the Portuguese Justice System and Access to Justice

Portugal has undertaken several reforms with the aim of increasing the efficiency of its judicial system, thus promoting effective access to justice – in particular in the administrative and tax jurisdiction. However, according to the Efficiency Dashboard of the European Commission for the Evaluation of Justice (CEPEJ)³³⁶ it takes an average of 928 days to resolve an administrative case. Portugal is the EU Country in which it takes the longest to resolve administrative cases in the first instance and one of the three EU countries in which it takes the longest in all instances.

Looking at the 2021 Justice Scoreboard, we see that, despite registering a decrease since 2012 in the time needed to decide on a dispute of an administrative nature, Portugal continued until 2019 to be in the group of Member States where the decision time in these cases is longer.³³⁷ Nevertheless, there are positive data that deserve to be highlighted: (i) numbers of pending civil and commercial proceedings visibly dropped³³⁸ following a constant gradual

333 Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0163&from=PT>.

334 Annex to Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, 11.3.2014, COM(2014) 158 final, and recent case law of the European Court of Justice, Case C-64/16, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*; case C-216/18 PPU, *LM*; case C-619/18, *Commission v Poland* (order of 17 December 2018), citing Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, 11.3.2014, COM(2014) 158 final. Article 19 of the Treaty on European Union establishes an obligation for Member States to ensure effective judicial protection. As set out by the Court of Justice, the very existence of effective judicial protection “is of the essence of the rule of law,” Case C-72/15 *Rosneft*.

335 Available at <https://eurocid.mne.gov.pt/artigos/estado-de-direito>

336 Available at https://public.tableau.com/app/profile/cepej/viz/EfficiencyDashboardv1_0EN/EfficiencyDashboard

337 The 2021 EU Justice Scoreboard, 11.

338 *ibid* 13.

trend; and (ii) the time estimated for the resolution of civil and commercial proceedings in the three instances is among the 10 lowest in the EU and the resolution rates in the court of first instance are among the highest.³³⁹

In the field of public administrative law, statistics suggest the existence of a system that sustains long legal battles between the state and the citizen. This is worrisome as we are bound to interact with public administration services *from cradle to grave*: registering births, marriages and deaths; enrolling in public education; using public healthcare services; obtaining a business licence, paying a traffic or transport fine; accessing social security benefits; adopting a child; filing tax returns; registering to vote; adjusting immigration status.^{340 341}

The data available show that this is a result of a lack of resources, but it also raises questions about the nature of the disparity with private law disputes and the reasons for it. It is not clear whether through capacity building efforts the state may be fostering the adoption of procedures and protocols by civil servants to avoid or solve disputes without resorting to courts and to what extent. Court disputes are costly for both the state and citizens, in particular in a country where the average gross monthly salary is 1361 euros.³⁴²

Access to justice challenges in Portugal are not limited to failing to decide cases in a reasonable time. In the lens of the ECtHR, denial of access to justice has also materialised as *excessive formality* among the judiciary. In the *Dos Santos Calado and Others v. Portugal* and *Amador de Faria e Silva and Others v. Portugal* cases (applications nos. 55997/14, 68143/16) the ECtHR found that the Constitutional Court had been excessively formal in applying the legal framework to hear appeals and that consequently it had deprived the applicants of their right to access a court:

“In the first application the applicant had brought an action in the administrative courts contesting the amount of her retirement pension. Her claims were dismissed. The applicant lodged an appeal with the Constitutional Court which was declared inadmissible. She then lodged an objection with the three-judge committee of the Constitutional Court, which was dismissed. The ECtHR noted that the inadmissibility decision had been based solely on a drafting error, and that despite this error the ground of appeal had been clear from the applicant’s memorial and had been correctly identified by the judges in the dismissal. Consequently, and in accordance with its case-law, the Court held that the approach taken by the Constitutional Court had been excessively formalistic, having deprived the applicant of a remedy afforded by domestic law in respect of the matter at issue. (...)”

“The applicants in the second application are officials of the Roads Department who were acting as de facto inspectors. They complained of the lack of regulations governing their careers. Their complaint was dismissed by the Central Administrative Court for the North region (‘the Central Administrative Court’) and by the Supreme Administrative Court. The applicants lodged an appeal with the Constitutional Court, which was declared inadmissible. That decision was upheld by the three-judge committee. (...)”

339 *ibid* 10.

340 See the OSCE’s [Flowchart: Why Monitor administrative justice?](#)

341 “[E]ffective means of redress against administrative decisions” are “among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings,” OSCE commitments on administrative justice, 1990 Copenhagen document, note 1, paras 5 and 5.10.

342 See https://www.ine.pt/xportal/xmain?xpid=INE&xpgid=ine_destaques&DESTAQUESdest_boui=526268225&DESTAQUES-modo=2

“The ECtHR noted at the outset that the reason cited for the Constitutional Court’s inadmissibility decision had been the applicants’ omission to raise the alleged issue of unconstitutionality during the proceedings before the Central Administrative Court. (...)”

“[I]t nevertheless observed that the applicants had raised an issue of unconstitutionality in their submissions in reply to the Ministries, on account of the difference in treatment between officials in the autonomous regions of Madeira and the Azores and those on the mainland. The Central Administrative Court had not considered this issue and had drawn a distinction between different categories of officials rather than addressing the difference in treatment raised by the applicants between inspectors in mainland Portugal and those in the autonomous regions of Madeira and the Azores. The Court also observed that the Constitutional Court had held that the applicants should have been able to anticipate the decision of the Central Administrative Court, since the issue of unconstitutionality raised by them had been the subject of a recent Supreme Court judgment. However, the Court noted that this case had not concerned the applicants and that the judgment had been given some months before the first judgment which had found in their favour, and which had made no distinction between different categories of officials. Hence, the applicants might well have been surprised by the decision of the Central Administrative Court. Consequently, the Court held that the Constitutional Court had displayed excessive formalism and that there had been a violation of Article 6 1 of the Convention.”³⁴³

From the perspective of gender equality in accessing administrative justice it is of vital importance to understand how men, women, boys and girls are affected in different ways by the judiciary. Furthermore, there may be differences between men and women with regard to vulnerability in administrative proceedings, and the representation or effects of administrative decisions. In *Carvalho Pinto de Sousa Morais v. Portugal*, the ECtHR found that the Portuguese administrative courts’ decision to reduce the amount of compensation awarded to a woman suffering from gynaecological complications because of a medical error had been in violation of Article 14 (prohibition of discrimination) read together with Article 8 (the right to respect for private and family life). According to the ECtHR, the decision was based “on the general assumption that sexuality was not as important for a 50-year-old woman and mother of two children as for someone of a younger age.” The “applicant’s age and sex had apparently been decisive factors in lowering the compensation (...)”^{344 345 346} Any future monitoring or evaluation of administrative justice in Portugal would benefit from mainstreaming a gender perspective. This could contribute to a more responsive and equitable judiciary and public services.

343 Excerpts from the ECtHR press release available at: <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=00366719148874130&filename=Judgment%20Dos%20Santos%20Calado%20and%20Others%20v.%20Portugal%20%20excessive%20formalism%20of%20the%20Constitutional%20Court%20and%20right%20of%20access%20to%20a%20court.pdf>

344 ECtHR Fact sheet on Gender Equality, February 2022, available at: https://www.echr.coe.int/documents/Fs_gender_Equality_ENg.pdf

345 Carayon, Lisa and Julie Mattiussi. «Le prix du genre. Note sous CEDH, Carvalho Pinto De Sousa Morais c. Portugal (Art. 8 et 14).» *La Revue des droits de l’homme. Revue du Centre de recherches et d’études sur les droits fondamentaux* (2018); Duarte, Madalena. «Olhares feministas sobre o Direito e o TEDH: o caso *Carvalho Pinto de Sousa Morais v. Portugal*.» *Araucaria: Revista Iberoamericana de Filosofía, Política, Humanidades y Relaciones Internacionales* 23.46 (2021): 553-570.

346 In the judgement, the ECtHR cited a 2016 report by the Permanent Observatory on Portuguese Justice, drafted at the request of the Commission for Citizenship and Gender Equality, about how the judicial authorities deal with cases of domestic violence. The report “expressed concerns over prevailing legal and institutional sexism. It referred by way of example to a judgement concerning a man who had physically assaulted his wife and the fact that she was having sexual intercourse with other men was viewed as a mitigating factor (pp. 231-32 of the report).” See <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-175659%22%5D%7D>

Finally, in 2022, first instance decisions are still not published in Portugal, and therefore are not accessible in any way or format by the public.³⁴⁷ Even the decisions of higher courts are not published in their entirety, with the criteria for the selection of those that are not published lacking transparency.³⁴⁸

The Implementation of EU Law

Since 2016, Portugal has had an impressive record regarding the implementation of European Union Law, namely in the transposition of directives, as recent data show:

Portugal continued its impressive progress in lowering its transposition deficit (a 97% reduction, from 3.4% in December 2016 to 0.1% in December 2020). In addition, it transposed 16 of the 17 Single Market-related directives (94%) due to have been transposed in the 6 months prior to the cut-off date for calculation (1 June-30 November 2020). Coming from the highest overall transposition deficit 4 years ago, this shows that Portugal made excellent progress in monitoring the timely transposition of directives, although it has some difficulties in transposing directives correctly.³⁴⁹

With the EU average at 1%, Portugal's last transposition deficit was 0.1%.³⁵⁰ In principle, the implementation of EU law should be a guarantee that the rules and provisions are also applied in Portugal. Even so, in the case law there is an assortment of fundamental rights topics on which Portuguese higher courts diverge both from EU law and Portugal's international obligations. Some of these are pillars of the European project such as freedom of movement and non-discrimination.³⁵¹

The Portuguese Personal Income Tax Code (CIRS) still discriminates against taxable persons residing in the territory of a member state other than Portugal. The CJEU has found this to constitute an arbitrary restriction on the freedom of movement of capital within the European Union as established in Article 63(1) of the Treaty on the Functioning of the European Union (TFEU). Although the Court of Justice of the European Union's (CJEU) first judgment concerning Portugal's institutional framework for tax on capital gains from immovable property in *Hollmann* (11 March, C 443/06, EU:C:2007:600)³⁵² should have solved the issue more than a decade ago, a recent preliminary reference submitted by the Centre for Administrative Arbitration (CAAD) brought attention back to the same issue and a decision by the CJEU.^{353 354}

347 A fact that also has imposed limitations on our fact-finding mission.

348 For analysis of demands from the European Union and the Council of Europe regarding the need for States to publish judicial decisions and also the state of the art in Portugal, and thus claiming publication for (i) legal security, (ii) the need for public control over these decisions, (iii) the exercise of the right to appeal, and (iv) influence on future judicial decisions, see Hígina Castelo, *O direito de conhecer a jurisprudência*, Revista do Ministério Público, Lisboa, Ano 41, no. 163 (July-Sept. 2020), 103-131.

349 See [Portugal's Single Market Scoreboard](https://single-market-scoreboard.ec.europa.eu/countries/portugal_en), available at https://single-market-scoreboard.ec.europa.eu/countries/portugal_en.

350 *Idem*.

351 See also Teresa Violante, "How the Data retention Legislation Led to a National Constitutional Crisis in Portugal," 9 June 2022, [Verfassungsblog](#).

352 Available at <https://curia.europa.eu/juris/document/document.jsf?text=&docid=69844&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8118143>.

353 See Centre for Administrative Arbitration, Processo no. 598/2018-T, available at https://caad.org.pt/tributario/decisooes/decisao.php?s_processo=598%2F2018-T&s_data_ini=&s_data_fim=&s_resumo=&s_artigos=&s_texto=&id=4467.

354 The CJEU's decision was contrary to the opinion of the Advocate General (AG) delivered in November 2020. The AG considered that the Portuguese taxation regime applicable to capital gains was not necessarily contrary to EU law: the option to

A preliminary doubt that needs to be dispelled is whether the CAAD is able to present a reference for a preliminary ruling. As is well known, given the complexity inherent in the choice of an unambiguous definition of a ‘national court or tribunal,’ the CJEU has opted for a flexible method by laying down in its case law a set of structural, functional and territorial criteria to categorise bodies as such. On 30 June 1966, in its *Vaasen-Göbbels* judgment (C-61/65, EU:C:1966:39),³⁵⁵ the CJEU indicated five structural criteria: legal origin, permanence, the adversarial principle, the mandatory nature of jurisdiction and respect for the rule of law. These were later joined by independence, the territorial requirement that the body must be located in a member state and the functional requirement that questions referred for a preliminary ruling must be raised in proceedings which must lead to a decision of a judicial nature. Therefore, the criteria for identifying an entity as a ‘national court or tribunal’ within the meaning of Article 267 TFEU make the CJEU able to examine preliminary references submitted by necessary arbitral tribunals such as the CAAD.³⁵⁶

In the case under consideration, the CAAD asked whether the amendments made to Portuguese tax law following the 11 October 2007 *Hollmann* (C 443/06, EU:C:2007:600)³⁵⁷ and the 18 March 2010 *Gielen* (C-440/08, EU: C: 2010: 148)³⁵⁸ judgements were sufficient to remedy the restriction on capital movements identified by the CJEU in these judgments.

According to the CJEU judgment on 18 March 2021 in Case C-388/19, *MK v Autoridade Tributária e Aduaneira*, these provisions still constitute an impediment to freedom of movement and are discriminatory. The procedure that non-residents can opt for – to allegedly have access to the same conditions as residents – is burdensome and discouraging. For the legal tax framework to be considered compatible with the Treaty provisions on the free movement of capital, the difference in treatment must concern situations which are not objectively comparable or must be justified by overriding reasons of general public interest. The CJEU concluded that this was not the case.

Although arbitrators are not formally part of national justice systems, this case shows that they are increasingly dealing with questions of EU fundamental rights and European rule of law standards. In the case, the CAAD played a pivotal role in upholding treaty provisions in Portugal and ensuring legal certainty across the EU.^{359 360}

In the field of asylum and migration there are several issues on which Portuguese courts diverge from the interpretation by European courts. For example, does the burden of proof of the existence of a risk of irreparable harm on return (including persecution, torture, ill-treatment

be treated as a resident taxpayer eliminated any discriminatory tax treatment, provided that taxpayers were informed of this option in a timely and effective manner.

355 Available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A61965CJ0061>

356 See F. Pereira Coutinho, “Os tribunais arbitrais tributários e o reenvio prejudicial,” in ISG – Business & Economics School.

357 Available at <https://curia.europa.eu/juris/document/document.jsf?text=&docid=69844&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8118143>.

358 Available at <https://curia.europa.eu/juris/document/document.jsf?text=&docid=79645&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8118410>.

359 The TRIAL national workshop ‘Portugal and the Rule of law crisis in Europe: next steps?’ held in Lisbon on 4 and 5 November devoted half a day to arbitration and the rule of law.

360 According to the European Commission, “The [Portuguese] tax system remains complex.” For more details, see [2022 Country Report – Portugal, Recommendation for a Council Recommendation on the 2022 National Reform Programme of Portugal and delivering a Council opinion on the 2022 Stability Programme of Portugal](#).

and other serious human rights violations in the destination country of a Dublin transfer) lie with the asylum applicant? According to the Portuguese Supreme Administrative Court it does. This court's case law is at odds with the jurisprudence of European Courts, in both the *C.K. and Others v Republika Slovenija*³⁶¹ and the *M.S.S. v. Belgium and Greece* cases.³⁶²

More specifically, in two cases in 2020 (namely the judgments of 14 January and 27 May)³⁶³ concerning respect for the principle of non-refoulement, the Portuguese Supreme Administrative Court ruled that the burden of proof of the existence of a risk of ill-treatment in the responsible Member State in a Dublin transfer lies with the asylum applicant, i.e. that the applicant is responsible at the outset to prove the existence of severe flaws in the asylum system of the responsible EU member state, and only afterwards is the state responsible for proceeding with further inquiries. This would mean that the Portuguese authorities would not be bound to a general duty to inquire about the situation in the responsible member state. In addition, the Supreme Administrative Court reaffirmed that in these cases the situation in Italy did not amount to a generalised risk of torture or inhuman or degrading treatment, so the principle of non-refoulement was not violated when the Member State responsible was Italy.

In these two cases, the first instance court had ruled in favour of the applicants. It had also resorted to vertical interaction by explicitly quoting CJEU case law, in particular joined cases C-411/10 and C-493/10.³⁶⁴ Additionally, the first instance court explicitly referred to article 4 of the EU Charter to argue that the Immigration and Borders Service should have *ex-officio* investigated whether the conditions in Italy amounted to inhuman or degrading treatment. The decisions by the Portuguese Supreme Administrative Court that followed these judgements were flagged in the European Fundamental Rights Agency's quarterly Migration bulletin as key fundamental rights concerns (1.01.2021-30.06.2021).³⁶⁵

Corruption and Fraud Prevention

GRECO's Second Interim Compliance Report on Portugal published in March 2021³⁶⁶ stated that some of the recommendations addressed to Portugal concerning the fight against corruption had either not been implemented or had only been implemented partially, concluding that Portugal had only achieved minor progress.³⁶⁷ Although it recognised that some steps had been taken in the fight against corruption, the European Commission's 2021 Rule of Law Report's chapter on Portugal also indicated that in comparison with the previous year there were no great advances.³⁶⁸ In the 2021 Corruption Perceptions Index, Portugal obtained a

361 Available at <https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-578/16%20PPU>

362 Available at https://ec.europa.eu/anti-trafficking/case-mss-v-belgium-and-greece-application-no-3069609_en.

363 These judgements were presented by Professor Ana Rita Gil at the TRIAL national event 'Portugal and the rule of law crisis in Europe: next steps?' 4-5 November 2021.

364 Available at <https://curia.europa.eu/juris/document/document.jsf?jsessionid=4561DB162B66D88DA7745B40CDC5A937?-text=&docid=117187&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=9087211>

365 Available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2021-migration-bulletin-2_en.pdf

366 Available at <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680a21605>

367 See GRECO's *Second Interim Compliance Report on Portugal*, pp. 15-16. The Fourth Round Interim Compliance Report was adopted by GRECO at its 70th Plenary Meeting (4 December 2015) and made public on 10 February 2016, following authorisation by Portugal. See <https://rm.coe.int/16806c7c10>

368 Available at https://ec.europa.eu/info/sites/default/files/2021_rlr_country_chapter_portugal_en.pdf

score of 62/100.³⁶⁹ According to the latest OECD Economic Survey, as in other EU member states in Portugal the fight against corruption needs to intensify.³⁷⁰

The National Anti-Corruption Strategy for 2020-2024³⁷¹ was approved in March 2021. The strategy aims to create a coherent robust anti-corruption framework and includes measures to better detect, prevent and prosecute corruption, and to ensure that the judicial system can timely and efficiently respond. Portugal is committed to reforming its institutional corruption framework. One of the final acts that the legislators put forth before parliament was dissolved sought to approve a package of anti-corruption laws, namely Law No. 94/2021 of 21st December.³⁷² This aimed to fulfil Portugal's international obligations, such as those stemming from the UN Convention on the fight against corruption, and to implement EU Directive 2019/1937. It also sought to create prevention of corruption mechanisms by disseminating instruments for the prevention of corruption in public action and in large and medium-sized business activity. This regime removed the implementation of instruments such as compliance programmes from the realm of *soft law*. These instruments include risk prevention and management plans, codes of ethics and conduct, training programmes, reporting channels and the designation of compliance officers.³⁷³

An example of a promising practice is the launch of a new think tank portal by the Attorney General's Office. This is an initiative of the Central Department of Investigation and Criminal Action (DCIAP).³⁷⁴ ³⁷⁵ It has recently issued a document that systematises the think tank's concerns and proposals regarding the governance model of Portugal's Recovery and Resilience Plan, considering DL no. 29-B/2021 of 4 May.³⁷⁶

369 See <https://www.transparency.org/en/cpi/2020/index/prt>

370 Available at https://read.oecd-ilibrary.org/economics/oecd-economic-surveys-portugal-2021_13b842d6-en#page54

371 Available at <https://justica.gov.pt/Estrategia-Nacional-de-Combate-a-Corruptao-ENCC>

372 Available at <https://dre.pt/dre/detalhe/lei/94-2021-176235804>

373 Among the measures provided in the package is that political office holders who commit corruption crimes are prevented from holding political office for 10 years after being convicted. A lengthening of the period of prohibition of the exercise of public positions from 5 to 8 years for public officials convicted of the same type of crimes is another of the measures, as is an extension of the penalty waiver mechanism for defendants who decisively cooperate in the discovery of the truth and in this way contribute in a "relevant way to the proof of the facts." Finally, the criminalisation of unjustified enrichment should be mentioned. This was not the first time that the Portuguese Parliament approved the punishment of illicit enrichment but the deputies believe that, unlike what happened in 2012 and 2015, this legislative act will not be rejected by the Constitutional Court. It focuses not on the creation of a new criminal offence but on the implementation of stricter rules on the declaration of assets and income that holders of political offices and senior public positions are already required to make.

374 See <https://thinktank-fundosue.ministeriublico.pt/>

375 Its aim is to develop effective strategies to prevent and combat fraud using European funds through the adoption of a multidisciplinary cross-sectoral approach. It will identify areas of high risk of fraudulent behaviour, define guidelines for the prevention of fraud in the management and control of European funds, and implement action methodologies to identify fraudulent behaviour. This think tank was presented in general terms by Attorney Ana Carla Almeida at the TRIAL national event 'Portugal and the rule of law crisis in Europe: next steps?' 4-5 November 2021.

376 See *Modelo de Governação do Plano de Recuperação e Resiliência – D.L. N.º 29-B/2021 de 4 de maio*, available at <https://thinktank-fundosue.ministeriublico.pt/atividade/modelo-de-governacao-do-plano-de-recuperacao-e-resiliencia-dl-no-29-b2021-de-4-de-maio>

Independence and Accountability^{377 378}

The High Council for the Judiciary

The High Council for the Judiciary is the state body constitutionally responsible for the appointment, assignment, transfer and promotion of judges and for the exercise of disciplinary action. It is therefore simultaneously a body for the institutional safeguarding of judges and for their independence. It has two deliberative collegiate bodies: the Plenary Council and the Permanent Council. In addition to the President and the Vice President, the High Council for the Judiciary is composed of fifteen members: two members appointed by the President of the Republic; seven members elected by the Assembly of the Republic; and six members elected by Judicial Magistrates.

The 2021 Rule of Law Report notes that the High Council for the Judiciary had made an effort to improve its transparency, which was related to suspicions of interference in the allocation of judicial cases that the 2020 report had flagged.³⁷⁹ The former President of the Lisbon Court of Appeal was accused of manually allocating certain cases involving individuals linked to a major football club with which he had close ties to another judge in the same court.³⁸⁰ However, disciplinary procedures concluded that there was no irregularity.³⁸¹

Some of the shortcomings pointed out by the GRECO report and the 2020 Justice Scoreboard, which highlighted the role played by the High Councils for the Judiciary in the various EU member states, remain. In fact, Portugal is one of a group of eight Member States in which the authority deciding possible sanctions against judges is a judicial council and not a court (specialised or not) or another body composed of judges. Portugal is also one of a group of four member states in which the investigator responsible for a possible disciplinary procedure against a judge is chosen by the High Council for the Judiciary and not by judges (outside this body) or the Minister of Justice. The Justice Scoreboard explicitly stated that the composition of the Judicial Council in Portugal fell short of European standards.³⁸²

Furthermore, the GRECO report laments that there is not more information published regarding the High Council for the Judiciary's disciplinary action – a shortcoming that has limited the analysis in the present report of specific cases included in the CJC Database. Therefore,

377 For an analysis of how judicial accountability can foster public trust, stating that not all citizens are aware of this property of the judicial system and that high levels of independence and accountability can contribute to a rapprochement with the judicial system, see Nuno Garoupa and Pedro C. Magalhães (2021), Public trust in the European legal systems: independence, accountability and awareness, *West European Politics*, 44:3, 690-713.

378 Note that the European Commission makes a link between judicial independence and the Charter (see European Commission (2020), *2020 Rule of Law Report – The rule of law situation in the European Union*, COM(2020) 580 final, Brussels, 30 September 2020, p. 26).

379 See the European Commission's 2020 Rule of Law Report on Portugal, 2-3.

380 Observador (2020), 'Operação Lex. Juiz Vaz das Neves nega ter beneficiado com distribuição de processos,' 22 September 2020. Available at <https://observador.pt/2020/09/22/operacao-lex-juiz-vaz-das-neves-nega-ter-beneficiado-com-distribui-cao-de-processos/>

381 See High Council for the Judiciary, press release of 4 May 2021, available at <https://www.csm.org.pt/wp-content/uploads/2021/05/Nota-a-Imprensa-Plenario-de-4-de-maio-de-2021.pdf>

382 See the 2020 EU Justice Scoreboard, 45-46.

without prejudice to ongoing efforts, there are still challenges related to the independence of the High Council for the Judiciary that ultimately conceptually undermine the rule of law.³⁸³

The Nomination of Judges

A survey conducted by Transparency International Portugal³⁸⁴ concluded that, as of November 2015, there were 23 magistrates appointed as public political officials.³⁸⁵ The Statute of Judicial Magistrates – Law No. 21/85 of 30 July – does not prevent judges and prosecutors from moving into positions in government or returning to their original functions after exercising government functions. The president of the Portuguese Judges' Trade Union Association (ASJP) has expressed concern about the appointment of judges to positions of political trust in government.³⁸⁶ In 2009 the ASJP's publication 'The Ethical Commitment of Portuguese Judges' stressed the need to reinforce the perception of independence and impartiality of judges in relation to other sovereign bodies.³⁸⁷ As the European Commission's 2021 Rule of Law Report pointed out, while it is true that the rules regarding revolving doors were amended in 2019, they only apply to politicians going into the private sector and vice versa but not to judges.^{388 389}

The Portuguese rules on appointments to the High Council of the Judiciary do not differ from those in most EU member states, although the members of these bodies are proposed and elected by judges. Nevertheless, it is important to note recommendation vi) of the GRECO Report, which calls on Portugal to improve the role of the High Council as guarantor of judicial independence, namely by stipulating in law that no less than half of the members should be judges elected by their peers.³⁹⁰

The Statute of Public Prosecution and the Statute of the Judiciary

Portugal has had an *Estatuto dos Magistrados Judiciais* (Statute of the Judiciary) since 1985 and an *Estatuto do Ministério Público* (Statute of the Public Prosecution Service [AB1]) since

383 Patrícia Fragoso Martins focused her intervention on the independence of the judiciary and the possible responsibility of the state for violations of European Union Law, analysing two specific judgements of the CJEU: *Kobler* and *Silva e Brito* during TRIIAL's national event on "Portugal and the rule of law: next steps?" 4-5 November 2021.

384 See <https://www.transparency.org/en/countries/portugal>

385 See the European Commission's 2021 Rule of Law Report on Portugal, p. 2, and The 2020 EU Justice Scoreboard, 41-43.

386 *Visão* (2019), 'Os juizes no Governo são um "incómodo,"' 21 December 2019. Available at <https://visao.sapo.pt/atualidade/politica/2019-12-21-os-juizes-que-saltaram-dos-tribunais-para-o-governo/>

387 See 'Compromisso Ético dos Juizes Portugueses,' available at: <http://www.asjp.pt/2010/04/28/compromisso-etico-dos-juizes-portugueses/>

388 See Law No. 52/2019 of 31 July 2019. This law introduced significant changes in this regard, including a three-year cooling-off period for cabinet members, during which they are prohibited from performing any subordinate work or consultancy functions in international organisations with which they have established institutional relations in public service. Also see the European Commission's 2021 Rule of Law Report on Portugal, 9.

389 See the European Commission's 2021 Rule of Law Report on Portugal, 12.

390 GRECO's 'Second Interim Compliance Report on Portugal,' 8-9. Interestingly, it highlights that there is "little evidence in favour of the widespread assumption that councils increase quality or independence in the aggregate." See Nuno Garoupa and Tom Ginsburg, 'Guarding the Guardians: Judicial Councils and Judicial Independence,' 57 *Am. J. Comp. L.* 103 (2009), pp. 127-130. Nevertheless, these authors ultimately conclude "that councils persist as institutions" because "they involve actors from multiple different arenas [and] the council itself promises that no one institution can easily dominate the judiciary." By the same authors and with similar reasoning, see Nuno Garoupa and Tom Ginsburg, 'Judicial Reputation. A Comparative Theory,' The Chicago University Press, 2015.

1986.³⁹¹ Regarding the latter, although the initial version of the Statute contained rules on incompatibility,³⁹² the truth is that until recently they had not been perceived as satisfactory.³⁹³ This is why an amendment to the Statute that was adopted in 2019 was of crucial importance, as it introduced, among other things, an improvement to the rules regarding the duties and incompatibilities of prosecutors and judges,³⁹⁴ thus contributing to an improvement in the integrity of the judicial system. These improvements were appreciated by the EC Rule of Law report in 2021 and by GRECO.

However, approval of the Statute was accompanied by controversy. An interpretive directive enacted by the General Prosecutor in February 2020, which was suspended and finally approved in November of the same year, established the possibility of instructions being given to hierarchically inferior prosecutors – also including revocation of their decisions. This directive was perceived as jeopardising the autonomy of prosecutors.³⁹⁵ The Union of Public Prosecutors filed a lawsuit with the Supreme Administrative Court to have the directive declared illegal, as it considered that it decisively affected basic principles of criminal procedure, such as the publicity and proceduralism of the enquiry, as well as the defendant's right to defence.³⁹⁶ The decision is still pending.

In addition, according to the Statute, the authority that decides on possible sanctions against public prosecutors is the High Council of the Public Prosecutor's Office. This is not in line with most of the EU member states. While in 18 member states the investigative body (which may even be a special body composed of prosecutors) is chosen by the Attorney General of the Republic, in Portugal, as well as in Bulgaria and Slovenia, the choice is made by the High Council itself.³⁹⁷

Freedom of Speech and the Media, and Pluralism

Several judgments of the ECtHR in the last two decades have determined that there are violations of freedom of speech in Portugal in many cases regarding journalists.^{398 399} The last of these in January 2022 – on famous journalist Freitas Rangel's conviction for statements about associations of judges and prosecutors – breached the European Convention. In 2010, he gave evidence at a parliamentary committee on the topic of freedom of expression and the media in Portugal. Among other wide-ranging testimony, Freitas Rangel stated as follows:

391 See Law no. 21/85 of 30 July and no. 47/86, of 15 October.

392 See Law no. 47/86 of 15 October, articles 60 to 86.

393 See the European Commission's 2021 Rule of Law Report on Portugal, p. 3 and GRECO's 'Second Interim Compliance Report on Portugal,' 12-13.

394 See Law No. 68/2019 of 27 August, Chapter II, Section I.

395 Directive no. 4/2020 of the General Prosecutor.

396 See the [Union's press release](#).

397 See the [2020 EU Justice Scoreboard](#), 51.

398 Pereira Coutinho, Francisco, O Tribunal Europeu Dos Direitos Do Homem E a Liberdade De Imprensa: Os Casos Portugueses (The European Court of Human Rights and Freedom of Press: The Portuguese Cases) (2014), in Carlos Blanco de Moraes, Maria Luísa Duarte and Raquel Alexandra Brízida Castro (eds.), *Media, Direito e Democracia*, Almedina, Coimbra, 2014, pp. 321-361, Available at SSRN: <https://ssrn.com/abstract=2964290>

399 Francisco Pereira Coutinho delivered a presentation on freedom of expression during the TRIAL national event 'Portugal and the rule of law crisis in Europe: next steps?' 4-5 November 2021. Rita Gião Hanek, also delivered a presentation on this topic during the TRIAL webinar on 18 March, 2021.

(...) “Where does the material covered by judicial confidentiality come from? Can it only come from the justice system itself? ..., what I have seen is an extensive and broad political intervention with negative consequences ... They try to limit the decisions of the Attorney-General [Procurador Geral da República] and [to influence] public opinion, and they have privileged relationships with journalists, to whom, from time to time, they pass on documents dealing with various topics.” (...)

In mid-2010:

(...) “the Professional Association of Judges (Associação Sindical de Juizes Portugueses – the ASJP) and the Professional Association of Public Prosecutors (Sindicato dos Magistrados do Ministério Público – the SMMP) separately lodged criminal complaints against Mr Freitas Rangel for “insulting a legal entity” (ofensa a pessoa colectiva). He was convicted in 2012 on two counts of insulting a legal entity by the Lisbon Criminal Court, ordered to pay damages of 50,000 euros (EUR) to each plaintiff and fined EUR 6,000. The court reasoned that it was sufficient for the perpetrator to have acted with general criminal intent (dolo genérico), even just attributing falsehoods, or even offensive value judgments, to the legal entities in question. The judgment was broadly upheld on appeal by the Lisbon Court of Appeal, with the damages being lowered to EUR 10,000 to each plaintiff.

The two professional associations appealed to the Supreme Court, complaining about the amount awarded. The Supreme Court found partly in their favour and increased the damages to EUR 25,000 each, citing the damage to reputation caused.

The damages were paid to the ASJP in full. However, the unpaid balance of the damages to the SMMP were transferred to Mr Freitas Rangel’s estate following his death.⁴⁰⁰

The ECtHR considered that the issues about which the applicant had spoken before the parliamentary committee were of interest to the public. In addition, “*While the wording may have been unfortunate the comments could be interpreted as broader societal critique*” (...).⁴⁰¹

Most of the statements had been the applicant’s opinions “*and political speech is afforded special protection in the Court’s case law.*”⁴⁰² The ECtHR noted that the reasoning of the appellate court had been based solely on the rights of professional associations rather than balancing their rights with those of the applicant. The fine and damages had been wholly disproportionate and had to have had a chilling effect on political discussion. The ECtHR found that the interference had not been necessary in a democratic society. Therefore, according to the assessment of the ECtHR, there had been a violation of Article 10 of the Convention.

400 An excerpt from the ECtHR press release ‘Famous journalist Freitas Rangel’s conviction for statements about associations of judges and prosecutors breached the European Convention’ Available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwilo6v5k4f3AhWFyIUKHe3wDaoQFnoECAMQAQ&url=https%3A%2F%2Fhudoc.echr.coe.int%2Fapp%2Fconversion%2Fpdf%2F%3Flibrary%3DECHR%26id%3D003-7224341-9824772%26filename%3DJudgment%2520Freitas%2520Rangel%2520v.%2520Portugal%2520-%2520Famous%2520journalist%2520Freitas%2520Rangel%25E2%2580%2599s%2520conviction%2520for%2520statements%2520about%2520associations%2520of%2520judges%2520and%2520prosecutors%2520breached%2520the%2520European%2520Convention.pdf&usg=AOvVaw1RFoleq2LYROvnjhjQxw>

401 See <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwilo6v5k4f3AhWFyIUKHe3wDaoQFnoECAMQAQ&url=https%3A%2F%2Fhudoc.echr.coe.int%2Fapp%2Fconversion%2Fpdf%2F%3Flibrary%3DECHR%26id%3D003-7224341-9824772%26filename%3DJudgment%2520Freitas%2520Rangel%2520v.%2520Portugal%2520-%2520Famous%2520journalist%2520Freitas%2520Rangel%25E2%2580%2599s%2520conviction%2520for%2520statements%2520about%2520associations%2520of%2520judges%2520and%2520prosecutors%2520breached%2520the%2520European%2520Convention.pdf&usg=AOvVaw1RFoleq2LYROvnjhjQxw>

402 Ibidem.

What is at stake here is the balance between freedom of expression and the media and the protection of the honour or reputation of public authorities, politicians or judges, and whether public officials are expected to withstand more extensive public criticism than ordinary citizens – although, of course, not in absolute terms.

Other cases have also revealed restrictions on lawyers' freedom of speech vis-à-vis the protection of the honour or reputation of judges. In *L.P. and Carvalho v. Portugal*, it was considered that there had been an infringement of the freedom of expression of two lawyers found liable for criticising two judges while acting in their capacity as representatives. The ECtHR unanimously held that there had been:

(...) “[A] violation of Article 10 (freedom of expression) of the European Convention on Human Rights. The case concerned findings of liability against two lawyers for defamation (L.P.) and for attacking a person’s honour (Mr Carvalho) in respect of two judges, on account of documents drawn up by the lawyers in their capacity as representatives.

The Court found, in particular, that both applicants had been acting in the performance of their professional duties as lawyers. It further considered that the penalties had been apt to have a chilling effect on the profession of lawyers as a whole, especially with regard to lawyers’ defence of their clients’ interests. Consequently, the reasons given by the domestic courts to justify finding the applicants liable had been neither relevant nor sufficient and had not corresponded to a pressing social need. The interference had thus been disproportionate and had not been necessary in a democratic society.” (...) ⁴⁰³

The ECtHR has not explicitly excluded the possibility of a country maintaining criminal defamation laws. However, it has suggested that the imposition of criminal sanctions – depending on the case – can create a disproportionate remedy and therefore result in a violation of Article 10 of the ECHR.⁴⁰⁴

The lower Portuguese courts are increasingly interpreting freedom of speech and criminal code provisions on defamation according to ECtHR decisions and citing ECtHR case law and several other national court decisions and the Charter. For example, the decision by the Évora Court of Appeal in proc. no. 80-16.7GGBJA.E1 of 23 January 2018⁴⁰⁵ referred to consistent interpretation and enforcement of ECtHR standards and explicitly stated that freedom of speech is one of the foundations of democratic states and is protected by the European Charter and the European Court of Human Rights.⁴⁰⁶

It is not clear what criterion will determine which areas are more open to an evolutive interpretation of the Convention and which are not. This poses questions about legal certainty,

403 *L.P. and Carvalho v. Portugal*, (applications nos. 24845/13 and 49103/15).

404 *Belpietro v. Italie*, no. 43612/10 (2013), *Mika v. Grèce*, no. 10347/10 (2013) and *Mariapori v. Finland*, no. 37751/07 (2013), cited in *Defamation and Insult Laws in the OSCE Region: A Comparative Study*, Commissioned by the OSCE Representative on Freedom of the Media, March 2017, available at <https://www.osce.org/files/f/documents/b/8/303181.pdf>

405 Available at: <https://www.direitoemdia.pt/search/show/85460e40bc6b465fda010456fadec93993126fb-75421d49a58004164e549779b>

406 Tribunal da Relação do Porto/Oporto’s Court of Appeal, 31 October 2007, proc. no. 064468. This approach is in line with the ECHR and the relevant ECtHR understanding is not exclusive to courts of appeal but is also present in the higher courts. See the Supremo Tribunal de Justiça/Supreme Court’s Decision, proc. no. 1454/09.5TVLSB.L1.S1, 31 January 2017, in which it is stated that “[n]ational judges are thus bound by the ECHR because, having been ratified and published, it constitutes domestic law which, as such, must be interpreted and applied, taking precedence, in constitutional terms, over domestic law (article 8 of the Portuguese Constitution).” For this very reason, “national judges, when interpreting and applying the ECHR, as conventional judges of first line, should take into consideration the methodological and interpretative references and the jurisprudence of the ECtHR, as its own instance of conventional regulation.”

the long-term impact of dialogue between the ECtHR and national courts, and the European acquis on the definition of the rule of law under article 2 of the Treaty and to what extent it includes human rights as defined in the ECHR and the Charter.

In the legal framework on insult and defamation in Portugal they are still punishable with imprisonment. This was noted in the European Commission's 2020 Country Chapter on the rule of law situation in Portugal.⁴⁰⁷ In certain circumstances, those convicted of the offence of 'false accusation' in Portugal face up to eight years in prison. In addition, Portugal's criminal code provides that defamation and/or insult committed against a public official carries a harsher punishment than the same act committed against a private person.⁴⁰⁸

These cases have been financially costly for both individuals and the Portuguese state. For example, in the above-mentioned *Freitas Rangel v. Portugal* case the Court held that Portugal was to pay the applicant's estate 31,500 euros (EUR) in pecuniary damages and EUR 19,874.23 in costs and expenses.^{409 410}

***The Freedom of Speech of Judges*⁴¹¹**

The freedom of speech of the judiciary is an increasingly contentious topic when upholding the rule of law across the EU – particularly in Poland and Hungary. For this reason, it is also a topic that has naturally taken central stage in the TRIAL project. However, it is one thing to argue for the protection of the freedom of expression of legal practitioners, in particular judges, in cases where rule of law institutions have crumbled but it is another to discuss judges as duty holders (freedom of expression) and duty bearers (duty of reserve). In Portugal, challenges have emerged precisely in the context of the latter, following public interviews or the use of (personal) social media accounts by judges.

Article 7-B (1) and (2) of the Statute of the Judiciary (Law No. 21/85 of 30 July) imposes on the judiciary both a duty of reserve (or discretion) and a duty of confidentiality. When this duty is breached, magistrates can be held liable. In a landmark deliberation of the Plenary of the High Council for the Judiciary of 11 March 2008, the High Council stated that the need to protect and uphold the "impartiality, independence and institutional dignity of the courts and citizens' confidence in justice" is at the core of the duty of reserve.⁴¹² The High Council for the Judiciary concluded that reserve "covers, in essence, statements or comments (positive or negative) made by judges which involve evaluative assessments about cases they are in charge of" (paragraph IV). This has also been the understanding of the Supreme Court of Justice.⁴¹³

407 The European Commission's 2020 Country Chapter on the rule of law situation in Portugal, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020SC0321&from=EN>

408 Defamation and Insult Laws in the OSCE Region: A comparative study, available at <https://www.osce.org/files/f/documents/b/8/303181.pdf>

409 *Freitas v. Rangel* case, Application no. 78873/13, available at [https://hudoc.echr.coe.int/fre#{%22item-id%22:\[%22001-214674%22\]}](https://hudoc.echr.coe.int/fre#{%22item-id%22:[%22001-214674%22]})

410 For more information on this section, consult the CJC Database.

411 This section is based on Tiago Fidalgo de Freitas' presentation on the topic during the TRIAL cross-border event organised by the University of Slovenja devoted specifically to 'Freedom of expression of Legal Professionals: Facing the Rule of Law Challenges in Europe,' 20-21 October 2021.

412 This deliberation can be at http://www.cej.mj.pt/cej/recursos/ebooks/outros/TomolIII_Etica_Deontologia_Judiciaria.pdf

413 See, e.g., Supremo Tribunal de Justiça/Supreme Court's Decision, proc. no. 75/15.8YFLSB, 26 October 2016. The High Council of the Public Prosecution Service has a similar understanding. See [Deliberation of the High Council for the Public](#)

In this context, two recent cases on the freedom of expression of judges have given rise to heated public debate. The first one concerned a judge who was labelled by the media in Portugal a ‘super judge.’ This judge gave an interview to a Portuguese public television station that could be interpreted as raising suspicion about the integrity of the procedure for selecting judges. Although the High Council for the Judiciary initiated disciplinary proceedings, it later decided that the judge’s statements in the media were not in breach of the duty of reserve.⁴¹⁴

The second concerned a statement posted by a Supreme Court Judge on her Facebook personal page regarding the case of a nine-year-old child who had – at the time allegedly – been murdered by her father. The post suggested there was a need to determine whether the child had been sufficiently protected by the judicial system during the process that led to the attribution of shared custody rights. While the judge considered that she was only exercising her right to civic participation as a citizen, in a deliberation on 8 September 2020 the High Council for the Judiciary considered that her statements were in breach of the duty of reserve and decided to apply a sanction – an *unrecorded warning*.⁴¹⁵ The judge did not agree with the application of the penalty and the enquiry procedure was converted into a disciplinary procedure. She is now awaiting a decision on whether the case will go forward or if the disciplinary penalty will be suspended.

Unfortunately, it is difficult to map trends in the approach adopted by the High Council and whether there have been any references to ECtHR jurisprudence. The High Council has only recently started to publish the outcomes of disciplinary proceedings but it still offers no insights into its reasoning.

More information on these cases can be found in the CJC Database.⁴¹⁶

Arbitration and Independence

Law 7/2021 of 26 February introduced an amendment to article 6 of the Legal Regime of Arbitration in Tax Matters,⁴¹⁷ which refers to the appointment of arbitrators. The main purpose of this amendment was to avoid a possible conflict of interest and so strengthen the impartiality

[Prosecution Service, of 15 October 2013](#), and article 102 of the Statute, amended by Law no. 68/2019 of 27 August.

414 See Diário de Notícias (2019), ‘Operação Marquês. Conselho Superior da Magistratura arquiva processo disciplinar a juiz Carlos Alexandre,’ 19 November 2019, available at <https://www.dn.pt/poder/conselho-superior-da-magistratura-arquiva-processo-disciplinar-a-juiz-carlos-alexandre-11532188.html>

415 See Press Release of the HCJ, 8th September 2020, available at <https://www.csm.org.pt/2020/09/09/nota-de-imprensa-conselheira-clara-sottomayor/>

416 For example, in 2017 judges went on strike, which led to several constraints in the administration of justice. This strike sparked public discussion on whether the Portuguese Constitution allows judges to strike. Some scholars claimed that if a judge, like the military, cannot be enrolled in a political party then he also has no right to strike. In addition, judges are not *subordinates* and are therefore not in a position similar to that of workers in private companies or the public administration. They are not employed by the State. They are – like the President of the Republic, members of the parliament and ministers – sovereign bodies. The dispute did not reach the courts, although important legal scholars publicly contested the strike, namely Jorge Miranda, a renowned Portuguese constitutionalist and one of the main authors of the Portuguese Constitution that was approved in 1976. Jorge Miranda, *Jornal Público*, 9 June 2017, available at <https://www.publico.pt/2017/06/09/sociedade/opiniao/os-juizes-nao-tem-direito-a-greve-1775012>. Also see José Joaquim Fernandes Oliveira Martins, *Juízes e greve – Um roteiro*, available at <http://julgar.pt/juizes-e-greve-um-roteiro/>, where an important summary of the various scholarly understandings of this issue can be found.

417 See Decree-Law No. 10/2011 of 20 January, available at https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=1414&tabela=leis&so_miolo=S.

and independence of arbitrators. The amendment was proposed by the CAAD.⁴¹⁸ According to the explanatory memorandum that precedes the proposal,⁴¹⁹ the intention was to “develop and densify the ethical and deontological requirements applicable to the selection and appointment of arbitrators, like assumptions of transparency and rigour, essential for the credibility of the system and the creation of a favourable public perception of its implementation.”

Under the new regime, which is also applicable to arbitrators on administrative matters,⁴²⁰ the appointment of arbitrators by the Deontological Council is now carried out through a public lottery and the chosen arbitrators are drawn from the roster. In addition, trustees and members of a law firm in which one of the members (or a colleague) is also a trustee in the pending tax arbitration proceeding are not eligible for the draw.

Under the previous legal framework, the arbitrator was appointed by the Deontological Council. In addition, it was possible for the appointee to also simultaneously be a lawyer in a law firm representing one of the parties to the proceedings. Nowadays, lawyers who work in large law firms are rarely eligible to be arbitrators as the probability of a colleague being mandated in a pending tax arbitration case is quite high.

This contributes to dissociating large law firms from the resolution of disputes arising from large contracts with the State. The CAAD felt the need for this change, while at the same time agreeing with the Attorney General’s Office to notify the Public Prosecution Service of all arbitral decisions on tax matters to reinforce the independence, exemption and impartiality of arbitrators. This legislative provision also guarantees the necessary degree of publicity and scrutiny and a level of normative stability.⁴²¹

This amendment, therefore, aims at a more robust legal framework protecting the independence and impartiality of arbitration and reflects a growing consensus in Portugal on European and international standards of impartiality. It also results from consistent interpretation and vertical and horizontal judicial interaction at the national and European levels. In this context, a Supreme Court decision⁴²² should be mentioned that quotes not only the Arbitrators’ Code of Ethics approved in 2010 by the *Associação Portuguesa de Arbitragem* [Portuguese Arbitration

418 Which is an institutionalised specialised arbitration centre. The CAAD can settle public law disputes in the administrative and tax areas. In the administrative area, the CAAD is competent to constitute arbitration tribunals to judge on disputes that have as their object legal-administrative matters involving pre-binding entities, as is the case of the Ministries of Justice, Culture and Education and several higher education institutions, and entities that are not pre-bound to the CAAD through an arbitration commitment. In the tax area, the Legal Regime of Arbitration in Tax Matters, approved by Decree-Law no. 10/2011 of 20 January, provides the possibility of resolving disputes involving assessment of the legality of tax acts by arbitration. The Autoridade Tributária e Aduaneira (Customs Authority) has asserted its commitment to tax arbitration under the aegis of the CAAD, which means the provision of a real right of access to arbitration by taxpayers in cases involving sums up to ten million euros.

419 Available at <https://app.parlamento.pt/webutils/docs/doc.pdf?path=6148523063446f764c324679626d56304c334e706447567a-4c31684a566b786c5a793944543030764e554e505269394562324e31625756756447397a5357357059326c68-64476c3259554e7662576c7a633246764c7a4a6b4e5463314f5459334c5459334f4459744e47457a4e6930355932526c-4c5451774e6d4a6c4d6a4d354d7a67774d4335775a47593d&fich=2d575967-6786-4a36-9cde-406be2393800.pdf&Inline=true>

420 See article 181, 4, of the Código de Processo nos Tribunais Administrativo (Code of Procedure of the Administrative Courts), which states that “[t]he duties and impediments provided for in the legal regime of arbitration in tax matters shall apply to arbitrators, with the necessary adaptations.”

421 Crook, John R. ‘Dual hats and arbitrator diversity: goals in tension.’ *American Journal of International Law* 113 (2019): 284-289; Schacherer, Stefanie. ‘Independence and Impartiality of Arbitrators – A Rule of Law Analysis.’ (2018); Sadowski, Wojciech. ‘Protection of the rule of law in the European Union through investment treaty arbitration: Is judicial monopolism the right response to illiberal tendencies in Europe?’ *Common Market Law Review* 55.4 (2018).

422 Proc. no. 170751/08.7YIPRT.L1.S1 of 12 July 2011, available at <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f-003fa814/255f09364af999138025790d00334ff1?OpenDocument&Highlight=0,Tribunal,arbitral,imparcialidade,advogado>

Association (APA)]⁴²³ but also the Association's Recommendations on the Independence and Impartiality of Arbitrators of the Spanish Arbitration Club and the Guidelines on Conflicts of Interest in International Arbitration approved by the International Bar Association in 2004.⁴²⁴

Finally, it should also be noted that these amendments are in line with the case law of international courts and tribunals, which reveals a growing concern about the dangers of party-selected arbitrators in public law and public international law disputes. In this regard, see, for example, the CJEU's Opinion 1/17 of 30 April 2019.⁴²⁵

Checks and Balances in the Application of the Dublin Regulation: Extra-Judicial Cooperation Between Ombudsman Offices across the EU.⁴²⁶

The European Ombudsman has had an increasingly growing role in EU governance and a positive influence on respect for fundamental rights.⁴²⁷ It has been suggested that the EU query mechanism is a form of extra-judicial preliminary reference promoting dialogue between national and EU institutions.⁴²⁸

In this context, the Portuguese ombudsman for the first time consulted the European Ombudsman on how to apply the Dublin Regulation. The case concerned two Afghan citizens who entered the EU through Sweden, fled to Portugal and were intercepted by the Portuguese Immigration and Borders Service (SEF). SEF decided to return them to Sweden immediately, invoking Article 3(2) of the Dublin Regulation. Faced with this decision, the Afghans complained to the Portuguese Ombudsman's Office claiming that if the decision were complied with and they were transferred to Sweden, Sweden would return them to Afghanistan, where they would be persecuted and subjected to ill-treatment. They claimed that Sweden had received them as unaccompanied minors, but since they had now turned 18 they were no longer protected from being sent back to their country of origin. Before issuing a decision the Portuguese Ombudsman asked the Swedish Ombudsman whether the Swedish authorities would indeed return them to Afghanistan. The Swedish Ombudsman did not reply.

In May 2020 the Portuguese Ombudsman decided to submit a query to the European Ombudsman concerning interpretation of the Dublin Regulation 2020: i) could Portugal be held responsible if Sweden returned citizens to Afghanistan and they were persecuted and ill-treated

423 This is the institutional expression of the Portuguese Arbitration Community. It has about 250 members who dedicate themselves professionally and academically to arbitration, which the Association has the statutory mission to study, disseminate and promote. This Code of Ethics, which is binding only on the APA's members, was amended in 2020. The amendment extended the guiding principles of arbitration ethics, to which APA members are bound in their performance in arbitration proceedings, to the representatives of the parties in arbitration proceedings and densified the regime established in the previous Code for arbitrators. See https://www.arbitragem.pt/xms/files/PROJETOS_APA/ebook_codigos-apa_21jan2021.pdf.

424 See Nuno Garoupa, 'Domestic Tax Arbitration: Some Economic Considerations,' in Policy Forum, 2019, 760-765. This article critically calls attention to the circumstance in which the government shapes legal policy that determines the use of different conflict resolution mechanisms when at the same time the government is a party to arbitration.

425 Available at <https://curia.europa.eu/juris/document/document.jsf?docid=213502&doclang=EN>

426 This case was the subject of an intervention by Professor Ana Rita Gil of Lisbon Law School in the TRIAL project national event 'Portugal and the Rule of Law crisis in Europe: next steps?'

427 Avtonomov, Alexei. 'Activities of the European Ombudsman under the Charter of Fundamental Rights: Promoting Good Administration through Human Rights Compliance.' *Laws* 10.3 (2021): 51; Vogiatzis, Nikos. 'The Link Between the Role of the European Ombudsman and Democracy.' *The European Ombudsman and Good Administration in the European Union*. Palgrave Macmillan, London, 2018. 57-84.

428 Athanasiadou, Natassa and Nikos Vogiatzis. 'The EU Queries: A Form of Extra-Judicial Preliminary Reference in the Field of Maladministration?' *German law journal* 22.3 (2021): 441-465.

there? And ii) which country was competent to assess the risk of ill-treatment in Afghanistan, particularly in the light of Article 3 of the Dublin Regulation: Portugal or Sweden? Although the Ombudsman responded positively to the first question stating that Portugal could possibly be held responsible, with regard to the second question it decided to consult the European Commission using the query procedure before replying to the Portuguese Ombudsman. The European Commission answered the European Ombudsman clarifying the interpretation of the Directive, namely that the Portuguese authorities were also responsible for investigating a possible risk of refoulement in the responsible Member-State:

“According to the Commission position, the Dublin Regulation does not confer jurisdiction, nor any general obligation on the administrative authorities of the Member State which are dealing with an application for international protection previously rejected in another Member State to examine that rejection, whether it is a decision of the administrative authorities or that of the courts or tribunals in the Member State responsible. The Commission quoted the European Court of Justice case law on the matter, which underlines the principle of mutual confidence between the Member States, but also recognises some risks in the Dublin system. Indeed, the Court highlighted several times that this system may, in exceptional circumstances, experience major operational problems in each Member State. Therefore, the Court recognised that no transfer could take place in cases where the transferring State *cannot be unaware that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment* if transferred to the responsible Member State.” (...) “the Portuguese authorities must take an “individual decision based on the elements given by the applicant, or which are otherwise available to them.” Finally, the Commission stated that “the [Portuguese] authorities can request information from the other Member States concerning the applicant that is appropriate, relevant and non-excessive to determine the Member State responsible, examine the application for international protection or to implement any obligation arising from that Regulation.”⁴²⁹

Following the European Commission’s understanding, a decision on the query was made in September 2020.⁴³⁰ The decision of the Portuguese Ombudsman is not yet available but seems to be at the forefront of exploring how institutional interaction and dialogue can be a tool for consistent interpretation of EU law in EU members and effective implementation of fundamental rights at the national level.

Conclusions and the Way Forward

The rule of law and implementation of EU law and international standards are a common challenge in all the EU member states. Portugal is no exception; we merely find a different set of expressions of these challenges and good practices.

Portugal still struggles with the effectiveness of its justice system. It is necessary to increase awareness that effective justice systems are at the heart of the rule of law but also crucial for sustainable development and the development of human society at large.

Beyond structural reforms, the Portuguese national authorities would probably also benefit from capacity-building training on pre-litigation efforts and better information and communication in everyday interactions with citizens. Good practices in Portugal show the added value of a

429 Ana Rita Gil, “Query procedures’ in the European Union and the Rule of Law principle,” e-Pública, 2022 (forthcoming).

430 Query from the PT Ombudsman concerning interpretation of the Dublin Regulation. Case Q2/2020/JF – Opened 6 May 2020; Decision 16 September 2020, <https://www.ombudsman.europa.eu/pt/case/pt/56927>.

less court-centric justice system, with ombudsmen and arbitrators contributing to impartial expedited processes, legal clarity and better implementation of EU law.

The lack of public debate on why there are several fundamental rights topics on which Portuguese courts diverge from the ECtHR and/or CJEU case law deserves further enquiry. The independence of the judiciary to decide on a case-by-case basis is not a stand-alone objective. There is nothing in the Portuguese constitutional tradition or legal framework that – in the cases collected – justifies a different understanding of international human rights law obligations or fundamental rights as enshrined in the Charter.

Of the challenges identified by the European Commission in its 2021 Rule of Law Report, Chapter on Portugal, most have undergone or are undergoing legislative structural reform. This demonstrates that the instruments in the European Commission Rule of Law ‘toolbox’ and multilevel dialogue between EU and national authorities can trigger meaningful legislative and policymaking initiatives.

Finally, it should be remembered that “any new legislation is only as good as its implementation.”⁴³¹ While some of the rule of law challenges might still require structural reforms, most of them need to be tackled through timely and effective implementation of the already existing EU legal framework and the Portuguese Constitution. Judges and justice practitioners are centre stage in a full and uniform application of the rule of law as in Article 2 of the TFEU.

⁴³¹ President Ursula von der Leyen, Mission letter to Commissioners, 1 December 2019.

NATIONAL REPORT: ROMANIA

The report was prepared under the TRIIAL project, co-funded by the European Union's Justice Programme (2014-2020)

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This national report builds on cases identified by experts in the National Association of Romanian Bars (NARB) during the [TRIIAL](#) project, which are now available on the [CJC database](#).⁴³²The report analyses both diachronically and synchronically the challenges that the national system has faced in the field of the rule of law (RoL). It does not aim to provide an exhaustive picture of the rule of law in Romania but instead to complement already existing tools, namely the [Commission's 2020 Rule of Law report](#), the [European Commission 2021 Rule of Law Report – Country Chapter on the rule of law situation in Romania. SWD\(2021\)](#), the [CCJE Report on judicial independence and impartiality in the Council of Europe member states](#), [Justice Scoreboard](#), the [UNHR Annual thematic reports of the Special Rapporteur on the Independence of Judges and Lawyers](#) and the [ENCJ report](#). The content of this report represents the views of the authors and is their sole responsibility. The National Association of Romanian Bars is not liable for any use that may be made of the information contained in it.

⁴³² <https://cjc.eui.eu/data/data?country=Romania&type=trial>, accessed 7 May 2022.

I. Summary

Under the Cooperation and Verification Mechanism (CVM),⁴³³ a *sui generis* instrument established at the time of Romania and Bulgaria's accession to the EU to monitor the countries' progress in reforming their judiciaries and fighting corruption, the European Commission has issued several reports on the state of the judicial reforms in Romania. While initially confirming significant advances on the key benchmarks set out in the Annex to CVM Decision no. 2006/928/EC, following a series of amendments to the national justice laws between 2017 and 2019 the European Commission identified several instances of rule of law backsliding in Romania. In this context, multiple layers of institutional tensions have emerged in the Romanian judicial system. Judges in ordinary courts have resorted with increased frequency to strategic dialogue with the Court of Justice of the European Union (CJEU) through preliminary references in order to safeguard themselves from national legislative measures and constitutional jurisprudence which they perceive as threatening their independence and their role as EU law judges, and at the same time undermining the public's trust in the judiciary.

The questions so far submitted by Romanian judges in four waves of preliminary references gave the CJEU opportunities to rule on the effects of special monitoring instruments such as the CVM and to reiterate the principle of primacy of EU law in its interaction with national constitutional jurisprudence. At the same time, they created occasions for the Court to set out the rule of law and judicial independence requirements in the EU Treaties in relation to national provisions concerning the organisation of the judiciary. In parallel, individual requests have been submitted to the ECtHR under Article 34 of the ECHR, some of which touched on general issues within the scope of the RoL while others came from magistrates and allowed the ECtHR to confirm the standards in *Baka v. Hungary*.⁴³⁴ The results of this multi-levelled judicial dialogue have been heterogeneous yet encouraging for the RoL standard at the national level: while (1) the distance between the CJEU and the Romanian Constitutional Court (RCC) appears to have increased,⁴³⁵ (2) several ordinary courts – including the High Court of Cassation and Justice (HCCJ) – have chosen to follow the criteria established by the CJEU and disregard decisions by the RCC that they perceived to be contrary to EU law;⁴³⁶ (3) in response to the European Commission 2021 Rule of Law Report in a memorandum adopted in January 2021, the Romanian Government made a political commitment to address all pending recommendations regarding the justice laws so as to comply with the requirements under the CVM;⁴³⁷ (4) as a tangible result one of the most controversial bodies created by the amendments to the national justice laws, the Section for the Investigation of Offences in the Judiciary (SIJ) was dissolved.⁴³⁸

433 CVM Decision no. 2006/928/EC (Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (notified in document number C(2006) 6569).

434 *Baka v. Hungary* App. no. 20261/12 (ECtHR, 23 June 2016).

435 See *infra* Section V, p. 18 *et seq.*

436 See *infra* Section IV, p. 20.

437 Romanian Government (2021), Input from Romania for the 2021 Rule of Law Report, mentioned as a source in the 2021 Rule of Law Report: The rule of law situation in the European Union, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021SC0724#footnote16>.

438 Law no. 49/2022 on the dismantling of the Section for the Investigation of Offences in the Judiciary and amendment of Law no. 135/2010 on the Criminal Procedure Code, published in the Official Journal, Part I No. 244 of 11 March 2022.

II. Introduction: the socio-political context and the main actors in the legal profession RoL challenges

1. The socio-political context of the legal profession RoL challenges

With the collapse of the communist regime in December 1989, Romania began its transition towards a system of liberal democracy governed by the RoL. A new constitution was adopted.⁴³⁹ It was subsequently amended with a view to meeting the requirements of the NATO and EU accession processes.⁴⁴⁰ Romania became a member of the Council of Europe in 1993 and a party to the European Convention on Human Rights (ECHR) in 1994,⁴⁴¹ it joined the North Atlantic Treaty Organization (NATO) in 2004⁴⁴² and acceded to the European Union (EU) in 2007.⁴⁴³

As a condition for their accession to the EU, a Cooperation and Verification Mechanism (CVM) was established to monitor Romania and Bulgaria's progress in reforming their judiciaries and fighting pervasive corruption at the national and local levels (CVM Decision).⁴⁴⁴ The CVM was designed as a transitional measure, to be lifted when all the relevant benchmarks were reached by the countries monitored. In essence the four benchmarks included in the Annex to the CVM Decision concerned the following:

- ensuring transparency and efficiency in the judicial process, notably by enhancing the capacity and accountability of the Superior Council of the Magistracy, in addition to reporting on the impact of the new civil and criminal procedure codes;
- creating an integrity agency;
- continuing anti-corruption efforts, including investigating high-level corruption;
- adopting measures to tackle corruption at the local government level.

Under the CVM, the European Commission has delivered periodical reports to the European Parliament and the Council of the EU presenting its findings and recommendations on the progress achieved in reaching the CVM benchmarks. In January 2017 the Commission conducted a comprehensive assessment of the steps undertaken by Romania in the ten years of implementation of the CVM and made 12 key recommendations that would allow meeting

439 The text of the new Constitution was adopted by the Constituent Assembly in its session on 21 November 1991. It entered into force following its approval in a national referendum on 8 December 1991.

440 The amendment of the Romanian Constitution was based on the provisions in Law no. 429/2003. It was approved in a national referendum on 18-19 October 2003 and entered into force on 23 October 2003.

441 On its accession to the Council of Europe on 7 October 2003 Romania also signed the Convention for the Protection of Human Rights and Fundamental Freedoms. This was ratified and entered into force on 20 June 1994.

442 Romania's instrument of accession to the North Atlantic Treaty was submitted in Washington D.C. on 29 March 2004.

443 Romania and Bulgaria's Accession Treaties to the European Union were signed on 25 April 2005 and entered into force on 1 January 2007.

444 Commission Decision no. 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, O.J. L 354/56, available at <https://eur-lex.europa.eu/eli/dec/2006/928/oj>. The corresponding instrument for Bulgaria was Commission Decision no. 2006/929/EC, O.J. L 354/58.

the established benchmarks and closing the CVM.⁴⁴⁵ However, in its November 2018 report the Commission concluded that some of the “developments had reversed or called into question the irreversibility of progress, and that eight additional recommendations had to be made.”⁴⁴⁶

Similar findings concerning the erosion of rule of law standards (and consequent backtracking on the progress made in achieving the CVM benchmarks) were consistently present in successive Commission CVM reports until 2019. They were mainly based on the substantial impact of various amendments to the so-called ‘justice laws’⁴⁴⁷ in Romania, which were adopted between 2017 and 2019. These amendments had been introduced mainly using Government Emergency Ordinances, which are exceptional executive instruments involving legislative processes which avoid parliamentary debates and prior constitutional control. They have been widely criticised as constituting political interference in the functioning of the judiciary.⁴⁴⁸

According to the latest European Commission Rule of Law Report following the 2017-2019 amendments of the justice laws, “[m]ajor issues were identified in particular with the creation of a Section for the Investigation of Offences in the Judiciary (SIIJ), the system of civil liability of judges and prosecutors, early retirement schemes, entry in the profession and the status and appointment of high ranking prosecutors.”⁴⁴⁹

In a memorandum adopted in January 2021, the Romanian Government made a political commitment to address all the pending recommendations, including dismantling the SIIJ and other amendments to the justice laws so as to comply with the requirements under the CVM.⁴⁵⁰ As a result, on entrance into force of Law no. 49/2022⁴⁵¹ the SIIJ was dismantled.

2. The main national actors in the legal profession RoL challenges

In the context of successive amendments to the justice laws between 2017 and 2019, several layers of institutional tension emerged as a result of the RoL regression identified in Romania.

445 European Commission 2017 Rule of Law Report – Country Chapter on the rule of law situation in Romania, SWD(2017) 701 final, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1515660096631&uri=CELEX:52017SC0701>.

446 European Commission 2021 Rule of Law Report – Country Chapter on the rule of law situation in Romania, SWD(2021) 724, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021SC0724>, p. 3.

447 Law no. 303/2004 on the statute of judges and prosecutors, Law no. 304/2004 on the organisation of the judiciary and Law no. 317/2004 on the Superior Council of the Magistracy.

448 For an extensive overview of the amendments to the Romanian justice laws and their institutional implications, see Moraru, M. and Bercea, R. (2022), “The First Episode in the Romanian Rule of Law Saga: Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociația ‘Forumul Judecătorilor din România, and their follow-up at the national level”, *European Constitutional Law Review*, doi:10.1017/S1574019622000074, pp. 1-32. See also E.S. Tănăsescu, ‘Romania: From Constitutional Democracy to Constitutional Decay?’ in V. Besirevic (ed.), *New Politics of Decisionism*, Eleven International Publishing, The Hague, 2019, pp. 177-191; E-S. Tănăsescu and B. Selejan-Gutan, ‘A Tale of Primacy: The ECJ Ruling on Judicial Independence in Romania,’ *VerfBlog*, 2021/6/02, <https://verfassungsblog.de/a-tale-of-primacy/>, accessed 23 January 2022.

449 European Commission 2021 Rule of Law Report – Country Chapter on the rule of law situation in Romania, SWD(2021) 724, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021SC0724>, p. 3.

450 *Idem*.

451 Published in the Official Journal of Romania no. 244/11.03.2022, <https://legislatie.just.ro/Public/DetaliiDocumentAfis/252558>, accessed 7 May 2022.

Under the Romanian Constitution (RC), the Superior Council of the Magistracy is the body tasked with guaranteeing judicial independence.⁴⁵² It enjoys exclusive competence in the recruitment and management of the careers of judges and prosecutors and acts as a court in disciplinary proceedings concerning magistrates. As a result of the various amendments to the justice laws, tension emerged regarding among other things the Judicial Inspectorate, a disciplinary body functioning within the internal structure of the Superior Council of the Magistracy. The Judicial Inspectorate became increasingly subject to political influence, both through a strengthening of the powers concentrated in the hands of the Chief Inspector and through politically-motivated appointments to the Inspectorate.⁴⁵³

A distinct source of pressure on the independence of the judiciary resulted from the creation and functioning of the SIIJ, a structure endowed with exclusive competence to investigate criminal offences committed by judges and prosecutors, the institutional design of which rendered it susceptible to political manoeuvring. It was widely criticised internationally.

The changes brought to the justice laws also touched on the accountability regime for judges, who became increasingly vulnerable to civil liability claims for judicial errors under a regulatory scheme deemed by several international monitoring bodies⁴⁵⁴ to create the premises for undermining the independence and efficiency of the judiciary.

These tensions were further compounded by the stance of the Romanian Constitutional Court (RCC), which in its decisions upheld some of the most controversial measures concerning the justice laws and put itself on a course of conflict with the Court of Justice of the European Union by declaring that the CVM Decision was not directly binding as it included mere recommendations.⁴⁵⁵

It was in this setting that the Romanian ordinary courts initiated a consistent dialogue with the CJEU, asking it to clarify various questions concerning both the interpretation and effects of the CVM Decision and the CVM reports, and the compatibility of some legislative measures pertaining to the 2017-2019 justice reforms with RoL standards under the EU Treaties (IV). In parallel, individual requests were submitted to the ECtHR under Article 34 of the ECHR, some of which touched on general issues regarding the RoL while others came from magistrates and confirmed the ECtHR's standards in *Baka v. Hungary* (III). The standards thus acknowledged respond among other things to the position held over time regarding European law by the RCC (V).

452 Articles 133-134 of the Romanian Constitution.

453 For a discussion on the reinstatement of the Chief Inspector through a Government Emergency Ordinance and its consequences on judicial disciplinary proceedings, see Moraru, M. and Bercea, R. (2022), "The First Episode in the Romanian Rule of Law Saga: Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociația 'Forumul Judecătorilor din România, and their follow-up at the national level," *European Constitutional Law Review*, doi:10.1017/S1574019622000074, pp. 7-8.

454 European Commission 2020 Rule of Law Report – Country Chapter on the rule of law situation in Romania, SWD/2020/322, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1602582109481&uri=CELEX%3A52020SC0322>; Venice Commission Opinion no. 924/2018 CDL-AD(2018)017; Venice Commission Opinion no. 950/2019 CDL-AD(2019)014; GRECO Ad-hoc Report, 2018, available at <https://rm.coe.int/ad-hoc-report-on-romania-rule-34-adopted-by-greco-at-its-79th-ple-nary-/16807b7717>.

455 Moraru, M. and Bercea, R., op. cit., p. 11.

III. Legal issues affecting independence, impartiality, accountability, trust and the rule of law brought before the ECtHR

1. Issues of general concern

a) Impartiality: the (subjective) personal impartiality test

Standards of impartiality were addressed in the *Alexandru Marian Iancu v. Romania* case,⁴⁵⁶ in which acts committed by the applicant were examined by the prosecutor in two different files, including two sets of criminal proceedings, because the facts of the cases were not considered to be connected. The applicant complained before the ECtHR of a lack of impartiality of the trial panel regarding one of the judges who sat in both sets of criminal proceedings. While reiterating two tests to assess whether a tribunal is impartial in the meaning of Article 6 paragraph 1 of the ECHR,⁴⁵⁷ the Court established that the behaviour in question of the national judge in both national criminal proceedings did not objectively justify the applicant's fears regarding his impartiality and consequently found no violation of the Convention.

b) Trust: non-discrimination and equality before the law

Non-discrimination and equality before the law were at stake in the *Cința v. Romania*⁴⁵⁸ case, which raised a systemic issue in Romanian Court proceedings. Relying on Article 14 of the Convention read in conjunction with Article 8, the applicant complained that he had been discriminated against on the grounds of his mental illness regarding his right to have contact with his child. The Court noted that at the national level the applicant was perceived as a threat because of his mental illness without further consideration of the concrete circumstances of the case and the family's situation, although national legislation recognises the right to a private life and free exercise of all civil rights for persons with mental disorders. Since international standards and recommendations encourage respect for the equality, dignity and equal opportunities of persons with mental disabilities, the Court reiterated that mentally ill persons represent a vulnerable group whose rights require special consideration by the state authorities and found violations of both Article 8 and Article 14 of the Convention.

c) Rule of law conditionality: trust, judicial transparency and access to efficiently functioning justice

Rule of law conditionality, trust, judicial transparency, access to efficiently functioning justice and procedural safeguards relating to expulsions of aliens were at stake in the *Adeel Muhammad et Ramzan Muhammad v Romania*⁴⁵⁹ case. The case concerned a lack of sufficient safeguards in expulsion proceedings based on national security grounds conducted

456 ECtHR, Application no. 60858/15, *Alexandru Marian Iancu v. Romania* case, 4 February 2020, the case is summarised in the CJC Database, <https://cjc.eui.eu/data/data/data?idPermanent=325&trial=1>, accessed 7 May 2022.

457 The first (subjective) test consists in seeking to determine the personal conviction of a particular judge in a given case. Personal impartiality of a judge must be presumed until there is proof to the contrary. As for the second (objective) test, it involves determining whether, quite apart from the personal conduct of the judge, there are ascertainable facts which may raise doubts as to his or her impartiality.

458 ECtHR, Application no. 3891/19, *Cința v. Romania* case, 18 February 2020, the case is summarised in the CJC Database, <https://cjc.eui.eu/data/data/data?idPermanent=331&trial=1> accessed 7 May 2022.

459 For references to several similar cases forming a cluster and for a detailed analysis of ECtHR Application no. 80982/12, *Adeel Muhammad et Ramzan Muhammad v Romania* case, 15 October 2020, see <https://cjc.eui.eu/data/data/data?idPermanent=335&trial=1>, accessed 7 May 2022.

in 2012. The applicants, Pakistani nationals lawfully residing in Romania at the time were declared undesirable and denied access to Romanian territory for a period of fifteen years. The court noted that the applicants received no information about the reasons for their expulsion and could not access classified documents in the file containing both the application for their expulsion and the domestic courts' decision to order their removal from Romania. These significant limitations of their rights under Article 1 of Protocol no. 7 had not been complemented with sufficient counterbalancing safeguards in the proceedings at issue. The applicants had received no information about the factual reasons for their expulsion or about the conduct of the domestic proceedings and their procedural rights, including that to access classified documents in a file through a lawyer holding security clearance. They had not benefited from effective representation, particularly because their lawyers did not possess the appropriate clearance to consult the relevant classified documents in order to provide the applicants with an effective defence. Moreover, in the manner in which the procedures had been conducted and the reasoning behind the decisions allowing the expulsion, the domestic courts had failed to exercise a sufficient degree of scrutiny of the classified documents in the file and of the credibility and veracity of the facts submitted in support of the expulsion.

2. Romanian magistrates before the ECtHR

a) Independence: untimely termination of a magistrate's mandate, freedom of expression and the right to a fair trial

While various individual complaints adjudicated by the ECtHR raised issues regarding the rule of law at the national level, *Codruța Kövesi v. Romania*⁴⁶⁰ is the leading national case involving magistrates' fundamental rights. In the same line as in *Baka v. Hungary*,⁴⁶¹ former Romanian chief prosecutor Laura Codruța Kövesi claimed before the ECtHR that the main reasons for her removal from the position of DNA chief prosecutor were connected to the exercise of her right to freedom of expression. The Court noted that the measure in dispute was put forward by the Minister of Justice after criticism by the applicant of legislative proposals initiated by the same Minister, and after opening by the applicant of criminal investigations in connection with the use of certain statutory instruments in which the same Minister had been involved. In a reverse perspective, despite that fact that the applicant was the highest anti-corruption office holder in the judiciary, in his report the Minister of Justice contended that the applicant's removal from her leading position was aimed at protecting the rule of law as her behaviour had created a crisis without precedent in the recent history of Romania which had made the country a subject of concern at the national, European and international levels. As in *Baka v. Hungary*, the ECtHR concluded that no legitimate aim could be put forward by the government. As for the proportionality of the sanction, the Court found that the applicant had expressed her views and criticisms of legislative reforms affecting the judiciary on issues related to the functioning and reform of the judicial system and the prosecutor's competence to investigate

460 In February 2018, the Minister of Justice proposed that Kövesi be removed from office, referring among other things to three RCC decisions adopted in connection with the activity of the *National Anti-Corruption Directorate* (DNA) and to public statements she had made. The section for prosecutors of the Superior Council of the Magistracy refused by a majority to endorse her dismissal finding no evidence that her management had been inadequate. In April 2018 the President of Romania in turn refused to sign the dismissal decree, which prompted a complaint to the Constitutional Court by the Prime Minister. In May 2018 in a special procedure regulating legal conflicts of constitutional nature between constitutional organs, in Decision No. 358/2018 the RCC ordered the President to sign the decree on the dismissal, finding among other things that neither the President nor the RCC were authorised to assess the reasons put forward by the Minister of Justice in his proposal. The RCC clarified that the administrative courts could only examine the external lawfulness of the administrative decision issued in the case, more specifically the lawfulness of the procedure but not its utility.

461 *Baka v. Hungary* case, supra note 3.

corruption offences, all of which represented questions of public interest. Her statements did not go beyond mere criticism from a strictly professional perspective. The Court found that the premature termination of the applicant's mandate was a particularly severe sanction which undoubtedly had a "chilling effect" in that it must have discouraged not only her but also other prosecutors and judges from participating in public debate on legislative reforms affecting the judiciary, and more generally on issues concerning the independence of the judiciary. The Court also found a violation of the applicant's right of access to a court as guaranteed in Article 6 § 1 of the Convention, concluding also that the respondent state impaired the very essence of the applicant's right of access to a court owing to the specific boundaries on a review of her case set out in a ruling of the Constitutional Court.

b) Independence: transfers and removal of magistrates, sanctions and legal remedies for individual judges against dismissal decisions

In the *Camelia Bogdan v. Romania*⁴⁶² case, a judge who in 2014 in the line of duty convicted a Romanian politician and businessman to a long prison term for fraud and money laundering was suspended from office in 2017. The reason given for this measure was her participation as an expert in a training course for the Romanian Ministry of Agriculture in 2014 for which she received a fee, a mission previously approved by the president of her court.⁴⁶³ She unsuccessfully tried to challenge the disciplinary proceedings on the ground that the training course in question had been an (admissible) educational activity. Based on a decision by the Judicial Inspectorate, the Romanian Supreme Council of Magistrates (SCM) decided to suspend the applicant from office. The Romanian Constitutional Court shared the view of the Supreme Judicial Council in the proceedings, while the Romanian Supreme Court (HCCJ) later on ruled that the suspension should be terminated and instead the judge should be transferred 400 km from Bucharest. From February 2016, information on the judge's revenue and disciplinary proceedings was repeatedly published and her requests to defend her professional reputation were rejected by the SCM. The ECtHR found a violation of Article 6 ECHR as under the national law in force at the time – which was subsequently amended – there was apparently no remedy for the applicant to challenge her suspension. However, the alleged existence of a national judicial practice which would have enabled the applicant to obtain effective control of the measure by the courts could not be confirmed by the Government. On the contrary, in an example of a previous judgment submitted by the applicant, the HCCJ's analysis appeared to have been limited to a review of legality without examining the necessity or proportionality of the suspension. Therefore, neither national legislation nor national practice at that date provided that such measures could be reviewed by a court. Moreover, the fact that the suspension decision taken at the request of the judicial inspectors was not verified by the courts was confirmed and criticised by the Constitutional Court. As a result, the applicant was deprived of access to a tribunal (ordinary or otherwise) in connection with her suspension from office by the SCM, a measure which did not allow her to serve as a judge for approximately nine months or receive a salary. The government did not put forward any convincing arguments to justify this lack of judicial protection. The mere fact that the applicant's suspension from office was a consequence of her exercising her right of appeal did not constitute sufficient justification. Therefore, the essence of the right of access to a court was affected.

⁴⁶² ECtHR, Application no. 36889/18 *Camelia Bogdan v. Romania* case, 20 October 2020.

⁴⁶³ Paid consulting activity was not allowed according to the judiciary law applicable at the time. Later, the judge also ruled in a case in which the Ministry was a party.

IV. Legal issues affecting independence, impartiality, accountability, trust and the rule of law brought before the CJEU

Four waves of rule of law referrals from Romanian ordinary courts have so far reached the CJEU. In the *Asociația 'Forumul Judecătorilor din România' (AFJR)* joined cases,⁴⁶⁴ the Court of Justice of the EU was asked to assess whether the reforms regarding the disciplinary, civil and criminal liability of magistrates introduced in Romania between 2017 and 2019 may affect the Romanian judiciary's capacity to adjudicate independently and comply with EU rule of law values. The second wave of rule of law referrals focused on the relation between the principle of primacy of EU law and the Romanian Constitutional Court's decisions in the field of fighting corruption.⁴⁶⁵ The third wave of rule of law referrals sought clarification on the Romanian Constitutional Court's power to limit national courts' implementation of preliminary rulings assessing the conformity of the establishment of a new section for the investigation of criminal offences committed by magistrates with EU law judicial independence and rule of law requirements.⁴⁶⁶ The fourth wave concentrated on the conformity of a specific procedure for the promotion of judges to the supreme court with judicial independence and rule of law requirements.⁴⁶⁷

1. The first wave of RoL preliminary references and the AFJR judgment in six joined cases

In what has quickly become a reference case for RoL issues in the European Union, the CJEU's judgment on 18 May 2021 in *Asociația 'Forumul Judecătorilor din România' (AFJR)*⁴⁶⁸ concerned six joined cases in which various Romanian courts submitted preliminary questions related to the legal nature and effects of specific rule of law monitoring instruments (the CVM Decision and its accompanying reports) and to the interpretation and evaluation of certain RoL standards in the EU Treaties. Additionally, the CJEU had the opportunity to reassert the principle of primacy of EU law in relation to decisions by national constitutional courts and to stress national courts' obligation to give full effect to EU rules as interpreted in the case law of the CJEU.⁴⁶⁹

As a starting point, the CJEU clarified that it had jurisdiction to answer some of the preliminary questions related to the organisation of the judiciary in Romania since "although the organisation of justice in the Member States falls within the competence of those Member States, they are nonetheless required, when exercising that competence, to comply with their obligations deriving from EU law."⁴⁷⁰ Therefore, as the Court was asked to discuss the impact

464 ECJ 18 May 2021, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România'*, ECLI:EU:C:2021:393 (AFJR).

465 ECJ 21 December 2021, Joined Cases C-357/19, *Ministerul Public*, Case C-379/19, *DNA*; C-547/19, *CY and others*; Cases C-811/19 and C-840/19, *Ministerul Public*, ECLI:EU:C:2021:1034; C-926/19, *BR and Others*; C-929/19, *CD* (pending).

466 Cases C-430/21, *RS*, ECLI:EU:C:2022:99; C-709/21, *MK*, (pending); C-817/21, *Judicial Inspection* (pending).

467 Case C-216/21, *AFJR* (pending).

468 CJEU Judgment of 18 May 2021, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România'*, ECLI: EU:C:2021:393 (AFJR).

469 *AFJR* judgment, para. 251: "Consequently, where it is proved that the second subparagraph of Article 19(1) TEU or Decision 2006/928 has been infringed, the principle of the primacy of EU law will require the referring court to disapply the provisions at issue, whether they are of a legislative or constitutional origin."

470 *AFJR* judgment, para. 111.

of Romania's justice reforms in the context of its interpretation of primary EU rules (Article 2, Article 4(3), Article 9 and Article 19(1) TEU, Article 67 TFEU and Article 47 of the Charter) and of secondary law (Decision 2006/928/EC), it found that it was competent to do so and that the questions raised were admissible.⁴⁷¹

As far as the effects of the CVM Decision and the CVM reports are concerned, the Court considered that Decision 2006/928/EC, as an act adopted by the European Commission based on the Accession Agreement, was a decision in the sense of Article 288(4) TFEU. The Commission reports based on the CVM were also acts adopted by an EU institution. Consequently, both the CVM Decision and the Commission reports were amenable to interpretation by the Court under Article 267 TFEU irrespective of their legal effects.⁴⁷²

Furthermore, the Court reiterated that the CVM Decision was based on the Accession Act (Articles 37 and 38) and the Accession Agreement, and that the EU institutions were expressly enabled to adopt prior to the accession the measures necessary under the Accession Agreement, including those in Articles 37 and 38 of the Accession Act. Consequently, regarding its legal nature, content and legal effects the CVM Decision fell under the scope of application of the Accession Agreement and it continued to produce legal effects as long as it had not been repealed.⁴⁷³

Concerning the legal effects of the CVM Decision, the Court recalled that under Article 288 TFEU decisions are binding on their addressees in all their elements. As the CVM Decision was addressed to Romania, it imposed on the country an obligation to reach the objectives in its Annex and to present a yearly progress report to the Commission.

The objectives were binding for Romania as the country was under a specific obligation to take adequate measures in order to achieve them, and to refrain from taking any measures that might compromise them. To this end, the Court held that in accordance with the principle of sincere cooperation in Article 4(3) TEU, Romania should pay due regard to the recommendations contained in the Commission's reports based on the CVM Decision.⁴⁷⁴ Consequently, even if the CVM reports were not in themselves binding and enforceable, they were not devoid of any legal effect and should be taken into consideration when they could shed light on the interpretation of EU or national measures.⁴⁷⁵

Several of the questions addressed in the *AFJR* joined cases illustrate how legal issues pertaining to the organisation and functioning of the judiciary are capable of negatively affecting judicial independence and the observance of other RoL standards.

a) Independence and trust: judicial organisation – the external dimension of independence and the doctrine of appearances

In assessing the preliminary questions submitted by the Romanian courts concerning the appointment of the Chief Inspector of the Judicial Inspectorate, the CJEU took the opportunity to paint a detailed picture of how such administrative processes carried out at the national level

⁴⁷¹ Ibid, paras. 110 and 146.

⁴⁷² Ibid, para. 151.

⁴⁷³ Ibid, paras. 163-165.

⁴⁷⁴ Ibid, para. 178.

⁴⁷⁵ Opinion of Advocate General Bobek of 23 September 2020 in joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România'*, ECLI:EU:C:2020:746, paras. 166-168.

may impact the external independence of the judiciary and the general public's perception of it (the doctrine of appearances).

Based on its previous case law,⁴⁷⁶ the Court reiterated the importance of ensuring that courts in the Member States meet the relevant effective judicial protection requirements. It highlighted that to this end the independence of judicial bodies is essential under Article 47 of the Charter of Fundamental Rights of the European Union (CFREU)⁴⁷⁷ and particularly in relation to the executive and the legislature since the principle of separation of powers “characterises the operation of the rule of law.”⁴⁷⁸

In describing the external dimension of independence, the Court recalled its settled case law⁴⁷⁹ in asserting that “it is necessary that judges are protected from external intervention or pressure liable to jeopardise their independence.”⁴⁸⁰ It combined this requirement with the doctrine of appearances:⁴⁸¹ “the rules applicable to the status of judges and the performance of their duties as judges must, in particular, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned, and thus preclude a lack of appearance of independence or impartiality on their part likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in individuals.”⁴⁸² To this end, “the guarantees of independence and impartiality required under EU law presuppose rules that are such as to dispel any reasonable doubt, in the minds of individuals, as to the imperviousness of the body in question to external factors and its neutrality with respect to the interests before it.”⁴⁸³

In line with Advocate General Bobek's Opinion,⁴⁸⁴ when applying these observations to the disciplinary regime for magistrates the Court concluded that the prospect of opening a disciplinary investigation is likely to generate pressure on those who have the task of adjudicating in a dispute. Therefore, it is imperative that the disciplinary investigation body acts objectively and impartially in the performance of its duties and is free from any external influence, including in the appointment of its management. However, threats to independence may arise when national rules have the effect, even temporarily, of allowing the government of a member state to make appointments to the management of the body tasked with disciplinary

476 CJEU Judgments of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, para. 37 and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, para. 52.

477 *AFJR* judgment, paras. 191 and 194.

478 *Ibid*, para. 195.

479 CJEU judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paras. 119 and 139.

480 *AFJR* judgment, para. 197.

481 This was also relied on in CJEU Judgment of 20 April 2021, *Republika*, C-896/19, EU:C:2021:311, para. 53; *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, para. 117.

482 *AFJR* Judgment, para. 197.

483 *AFJR* Judgment, para. 196.

484 AG Bobek's Opinion in *AFJR*, paras 268-269.

investigations and with exercising disciplinary actions against judges and prosecutors in violation of the ordinary appointment procedure under national law.⁴⁸⁵

b) Independence and trust: the establishment and functioning of the SIJ

The test used by the CJEU to assess potential threats to the independence of the judiciary posed by the creation and functioning of the SIJ relied on the same parameters discussed above, namely external independence and the doctrine of appearances.⁴⁸⁶

Regarding trust in the judiciary, the Court stated that an investigative structure such as the SIJ was “capable of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in individuals, in so far as that structure could [...] be perceived as seeking to establish an instrument of pressure and intimidation with regard to judges, and thus lead to an appearance of a lack of independence or impartiality on their part.”⁴⁸⁷

The Court further highlighted that the 2019 CVM Report had found that practical examples of the activities of the SIJ “confirm that the risk referred to in paragraph 216 above – namely, that that section is akin to an instrument of political pressure and exercises its powers to alter the course of certain criminal investigations or judicial proceedings concerning, *inter alia*, acts of high-level corruption in a manner which raises doubts as to its objectivity – has materialised...”⁴⁸⁸

Special emphasis was placed on the relevance of Articles 47 and 48 of the CFREU. In this regard, the Court indicated that among other things the rules concerning investigation of offences committed by judges or prosecutors should include specific safeguards to ensure, on the one hand, that any risk that the SIJ might be used as an instrument for political control over judges and prosecutors are eliminated and, on the other hand, that such competences may be used regarding judges and prosecutors only in full observance of the requirements in Articles 47 and 48 of the Charter of Fundamental Rights of the EU.⁴⁸⁹

The conclusion is therefore that Articles 2 and 19(1)(2) TEU and the CVM Decision must be interpreted as precluding national legislation setting up within the public prosecutor’s office a specialised section with exclusive competence to investigate offences committed by judges and prosecutors if there are no imperative, objective or verifiable reasons connected to the sound administration of justice for setting up such a section. Additionally, specific safeguards must be in place to ensure, on the one hand, that any risk that this section might be used as an instrument of political control over judges and prosecutors is eliminated and, on the other hand, to ensure that such competences may be used regarding judges and prosecutors only in full observance of the requirements in Articles 47 and 48 of the Charter of Fundamental Rights of the EU.

⁴⁸⁵ *AFJR* Judgment, paras. 200-201.

⁴⁸⁶ *Ibid*, para. 212.

⁴⁸⁷ *Ibid*, para. 216.

⁴⁸⁸ *Ibid*, para. 219.

⁴⁸⁹ *Ibid*, para. 223.

c) Independence: the civil liability of judges for judicial errors

In one of the questions referred in case C-397/19, the Court was asked to assess the compatibility with EU law of the legal regime on the personal liability of judges for judicial errors.⁴⁹⁰

The Court began by drawing a distinction between the national rules governing the liability of the state for damage resulting from judicial errors and the legal regime on the personal liability of magistrates for such judicial errors in an action for redress. Regarding the state's liability, as in cases in which the responsibility of the state may be engaged for judicial decisions contrary to EU law, the possibility offered by national law to engage the state's liability for judicial errors was not in principle problematic and did not raise specific threats to judicial independence.⁴⁹¹

On the other hand, regarding the personal liability of judges for judicial errors, the legal regime pertains to the national organisation of justice and falls in the competence of the member states. However, in exercising such powers member states must observe Union law and ensure that the system of personal liability of judges is in accordance with the requirements of independence, effective judicial protection and, more specifically, with the criteria in Article 19 TEU.⁴⁹²

The existence of a principle of personal liability of judges for judicial errors entails a risk of interference with their independence, as it can influence the decision-making of those entrusted to adjudicate. Consequently, the Court underscored that such personal liability of judges for judicial errors should be limited to exceptional cases and framed with objective and verifiable criteria concerning the sound administration of justice. Additionally, such procedures should be accompanied by adequate guarantees to ensure that any risk of external pressure on the content of judicial decisions is avoided so as to prevent any legitimate doubt in public perceptions.⁴⁹³

According to the Court, several safeguards should be in place at the national level for this type of procedure:⁴⁹⁴

clear and precise norms defining the types of behaviour for which the personal liability of judges may be engaged in order to protect their independence and avoid the risk of pressure;

the liability of judges for damage caused during the exercise of their functions should be engaged only in exceptional circumstances for which their serious individual guilt has been duly established;

national rules in such cases must contain adequate guarantees and ensure that such procedures cannot be transformed into instruments of pressure on judicial activity;

the authorities investigating such cases should meet the requirements of objectivity and impartiality and conduct their investigations in observance of these principles;

490 Ibid, paras. 224 *et seq.*

491 Ibid, para. 226. See also the CJEU judgment of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, para. 42.

492 *AFJR* judgment, paras. 229-230.

493 Ibid, para. 233.

494 Ibid, paras. 235-240.

the rights provided in Article 47 of the Charter, particularly the right to defence of a judge, must be fully complied with and the organ deciding on the personal liability of the judge must be a court.

In line with the previous observations, the CJEU concluded that unless adequate safeguards and guarantees of the types indicated above are in place at the national level, such procedures concerning the personal liability of judges are contrary to EU law.

2. The second and third waves of RoL preliminary references

Subsequent to RCC Decision no. 390 of 8 June 2021, the Craiova Court of Appeal⁴⁹⁵ and the Pitești Court of Appeal⁴⁹⁶ submitted new preliminary questions asking the CJEU to clarify whether a national judge can apply EU law even if it would entail disregarding decisions of the RCC. Moreover, judges in various ordinary courts had applied the criteria set out by the CJEU in the *AFJR* judgement and on that account been subject to disciplinary investigations by the Judicial Inspection (conducted by the same Inspector whose appointment was challenged in C-83/19).⁴⁹⁷ Other national courts had applied the *AFJR* criteria in the *Cilfit* case law.⁴⁹⁸ In parallel, a 3-judge section of the High Court of Justice and Cassation chose to follow the Romanian Constitutional Court decision instead of applying the Court of Justice preliminary ruling.⁴⁹⁹

Against this background, the second and third waves of referrals concerned the relation between the RCC and the CJEU, and the relation between national law and EU law.⁵⁰⁰ All the Romanian cases in the second wave of rule of law preliminary references either directly or indirectly raised the negative effects of several RCC decisions between 2016 and 2019 on both final and pending corruption-related cases against politicians and public functionaries.⁵⁰¹

495 C-430/21, *RS*.

496 C-709/21, *MK*.

497 The disciplinary procedure was triggered by a judgement issued by the Criminal and Family Matters Section of Pitești Court of Appeal on 7 June 2021.

498 See judgement no. 532/2001 issued on 14 July 2021 by the Section for Civil, Administrative and Fiscal Matters of Mehedinți County Tribunal in case no. 2122/104/2018. While not referring to the CJEU, the Mehedinți County Tribunal nevertheless gave precedence to the judgement issued by the Grand Chamber of the CJEU. Applying the tests it contains and disregarding Decision no. 390 of 8 June 2021, the national court concluded that the emergency ordinance at issue did not have the effect of conferring on the Government direct power to appoint the Chief Inspector of Judicial Inspection.

499 Romanian High Court of Cassation and Justice, judgement of 8 September 2021, file no. 1916/1/2019.

500 For a detailed analysis, see Raluca Bercea, Case note – Judgement of the CJEU (Grand Chamber) of 21 December 2021 in Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Studia Universitatis Babes Bolyai, Iurisprudentia*, vol. 66, no. 4 (2021), [https://doi.org/10.24193/SUBBiur.66\(2021\).4.1](https://doi.org/10.24193/SUBBiur.66(2021).4.1). See also Bogdan Iancu, *Goat, Cabbage and Wolf. Primacy in Romania*, in *VerfBlog* at <https://verfassungsblog.de/goat-cabbage-and-wolf/> (accessed 7 January 2022) and Bogdan Iancu, *Handle with Care: On the Contextual Preconditions of Rule of Law Restoration*, in *VerfBlog* at: <https://verfassungsblog.de/handle-with-care/> (accessed 7 January 2022).

501 Several decisions by the RCC were thus under scrutiny: Decision 685/2018 (which obliged the national HCCJ to select all five members of a panel judging in appeal corruption cases by drawing lots, not just four of them as was the case until then – at issue in C-357/19, C-547/19 and C-840/19); Decision 417/2019 on the obligation of the HCCJ to set up specialised panels to adjudicate on first instance corruption offences (at issue in C-811/19 and C-840/19); Decision 51/2016 (at issue in C-379/19); Decision 302/2017 (at issue in C-379/19) and Decision 26/2019 (at issue in C-379/19) (the last three prohibit the use by prosecutors and judges of evidence found by way of technical surveillance carried out by specialised bodies even if the use by judges of focus technical surveillance is authorised with concrete limits. In addition, the ordinary courts referred to the fact that RCC Decision 104/2018 suggests that EU law would not prevail on the Romanian constitutional legal order.

In response to the questions addressed to it in the second wave,⁵⁰² the Grand Chamber of the CJEU reaffirmed the Court's exclusive competence to interpret the principle of primacy, the scope of which could neither depend on interpretation of national law provisions nor on interpretation of EU law by national courts that would infringe the Court's judgements. In this context the Grand Chamber referred to the mechanism set out in Article 267 TFEU as the key to the judiciary system established in the Treaties, which enshrines the possibility of dialogue between member state judges and the Court itself ensuring that EU law remains coherent, fully efficient and autonomous while preserving its particular nature.⁵⁰³ The Court therefore interpreted the primacy of EU law as precluding national regulations or practice according to which national ordinary courts are bound by decisions of the national constitutional court and may not of their own authority under penalty of committing a disciplinary offence leave unapplied the case law resulting from these decisions when they consider in the light of an interpretative judgment by the CJEU that such case law is contrary to the second subparagraph of Article 19 (1) TEU, to Article 325 (1) TFEU or to the CVM Decision.⁵⁰⁴

The same ideas are emphasised by the questions addressed by national courts and answered by the CJEU in the third wave of referrals, in which the national courts mainly aimed at finding (1) whether the principle of independence of the judiciary enshrined in the second subparagraph of Article 19(1) TEU read in conjunction with Article 2 TEU and Article 47 of the Charter preclude a provision in national law such as Article 148(2) of the RC as interpreted by the RCC in Decision No 390/2021 of 8 June 2021 according to which national courts have no jurisdiction to examine conformity with EU law of a provision in national law that was found to be constitutional by the RCC and (2) whether the same principle precludes a provision in national law providing for the initiation of disciplinary proceedings and the application of disciplinary penalties regarding a judge for failure to comply with a decision of the RCC in order to apply the primacy of EU law. The responses provided by the CJEU were affirmative in both cases.⁵⁰⁵ The main added value of the third wave of Romanian RoL referrals is therefore the connection that the CJEU made between the principle of primacy, review of the constitutionality of national law by the RCC and that of conformity of national law with EU law by ordinary courts. The issue of disciplinary liability of ordinary judges remained a transversal topic within the general analysis.

V. The positions of the HCCJ and the RCC regarding European RoL standards

A difficulty arising from the rule of law concept consists in its self-referentiality. To circumvent this, Article 152 of the Romanian Constitution declares certain values – among which independence of justice and safeguarding citizens' fundamental rights and freedoms – to be outside the scope of constitutional revision, the Constitutional Court being the guarantor of this. Moreover, through various mechanisms the rule of law in Romania is intrinsically linked with democracy.

502 CJEU, 21 December 2021, Joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19.

503 *Ibid.*, para 254.

504 *Ibid.*, at point 4 in the operative part of the judgement.

505 CJEU, 22 February 2022, Case C430/2, 1ECLI:EU:C:2022:99.

Between 2011 and 2012 the RCC developed a Euro-friendly RoL case law,⁵⁰⁶ at least as it recognised the CVM Decision and the effectiveness of the justice system and fight against corruption benchmarks together with the reports issued by the European Commission as part of the CVM as legally binding and parameters for constitutionality review of some of the justice laws.⁵⁰⁷ Similarly, it constantly endorsed the standards developed by the ECtHR regarding restrictions on human rights allowed only if *inter alia* they are “necessary in a democratic society.”⁵⁰⁸

However, as part of the European ‘constitutional identity’ movement the RCC has gradually departed from loyal dialogue with the CJEU and a correct understanding of both EU law and the constitutional requirements set in Article 148 RC.⁵⁰⁹ First, the RCC defined the concept of ‘constitutional relevance’ in order to separate its competence from the CJEU and to keep national constitutional law apart from the scope of EU law. Under this doctrine, the RCC will only resort to the CJEU case law as an instrument for constitutional review and interpretation if the matter under scrutiny has ‘constitutional relevance’ (see RCC Decisions nos. 1596/2009, 137/2010, 1289/2011 and 2/2012). Second, the RCC established its full jurisdiction over any national provision (including those implementing EU law) that deals with fundamental rights. This stance was combined with clear exclusion of the CJEU from the process despite the undoubted need for cooperation in some hypotheses.⁵¹⁰ Third, the RCC built its independence by considering itself under no obligation to address preliminary questions under Article 267 TFEU (e.g. Decision no. 668/2011).⁵¹¹ Fourth, it used the concept of ‘constitutional identity’ as a limit to any EU interference (e.g. Decision no. 683/2012). All these arguments were then summarised by doctrinal scholars⁵¹² and endowed with much confirming authority, and reused in subsequent RCC case law.

The most recent illustration of the RCC’s use of the sovereignty card is its response to the CJEU’s *AFRJ* judgement. RCC Decision no. 390/2021 reads as follows: “the determination of the organisation, functioning and delimitation of powers between the various structures of the prosecution authorities is a matter for the exclusive competence of the Member State.”⁵¹³ Relying on Articles 11, 20 and 148 (2) and (4) of the RC, the RCC stressed that the priority

506 Decision No. 1519/2011 of 15 November 2011 and Decision No. 2/2012 of 11 January 2012. Even in that period the RCC caselaw was not without fluctuations, as will be discussed. See also Moraru, M. and Bercea, R., *op. cit.*, p. 10-11.

507 Decision No. 2/2012, para. 17.

508 See RCC Decision No. 244/2017 ECHR.

509 These stages are described in Radu Rizoiu and Raluca Bercea, The revival of the rule of law issue. The Romanian report, at the General Congress of the International Association of Comparative Law (2022), forthcoming contribution. For the movement in general, see A. Dyevre, ‘European integration and national courts: Defending sovereignty under institutional constraints?’ (2013) *European Constitutional Law Review*, 9(1), 139-168. Also see Selejan-Gutan, Bianca: The Taming of the Court – When Politics Overcome Law in the Romanian Constitutional Court, *VerfBlog*, 2018/6/06, at <https://verfassungsblog.de/the-taming-of-the-court-when-politics-overcome-law-in-the-romanian-constitutional-court/>

510 For example, in its Decision no. 1258/2009 (followed by Decision no. 440/2014), the RCC found that the national law implementing Directive 2006/24/CE was unconstitutional without asking for a preliminary ruling from the CJEU despite the complex character of the analysis entailed by the sets of standards at issue.

511 See, however, the first referral made by the RCC in case C-673/16 *Coman and Others*, ECLI:EU:C:2018:385, analysed by Raluca Bercea in Comment: under Article 21 EU Charter the CJEU has, for the time being, adopted a rather deferential model of judicial review, in Federica Casarosa and Mădălina Moraru, *The Practice of Judicial Interaction in the Field of Fundamental Rights*, Edward Elgar Publishing, 2022, pp. 230-234.

512 Tudorel Toader and Marieta Safta, *Dialogul judecătorilor constituționali*, Ed. Universul Juridic, București, 2015, pp. 114-124.

513 At para. 79.

of application of EU law should not be perceived in the sense of “removing or disregarding the national constitutional identity,” a guarantee of the fundamental core identity of the Romanian Constitution, which “must not be relativised in the process of European integration.” The RCC further conceived ‘constitutional identity’ as requiring that “the supremacy of the fundamental law” should be granted “throughout Romania.” However, when using the concept of ‘constitutional identity’ the RCC did not clarify either its scope or its content and disregarded Article 148 RCC, which requires compulsory, not elective, precedence of binding EU law in the case of conflict.⁵¹⁴

In the light of the same CJEU judgement, the RCC examined the extent to which the principle of the rule of law, which is expressly enshrined in national law and specifically in Article 1 paragraph (3) of the Romanian Constitution, is affected by the regulation governing the establishment of the SIIJ. The RCC found that the law at issue created a proper system for the “good administration of justice.” Regarding the derogatory nature of the regulation (in terms of appointing the chief prosecutor, delegating and seconding prosecutors to this Section), given the principle of career separation the CCR considered that the legislator’s option did not affect the constitutionality of the law since the principle invoked did not have constitutional consecration and all the other elements regarding the status of prosecutors remained fully applicable to SIIJ prosecutors. In addition, the RCC dismissed the contention that the SIIJ could be perceived as an instrument for pressure and intimidation of judges and found that the regulation establishing the SIIJ was an option of the national legislature in accordance with the constitutional provisions contained in Article 1(3) on the rule of law and Article 21(1) and (3) on free access to justice, the right to a fair trial and resolution of cases within a reasonable time and, implicitly, in accordance with the provisions in Articles 2 and 19 (1) TEU. Far from applying the criteria indicated by the Grand Chamber of the CJEU to assess the independence of a judicial body, the RCC has mainly developed a formalist approach according to which, since the same RoL values are enshrined in both the national constitution and the TEU, review of the constitutionality of national law excludes further questioning of its conformity with EU law by national ordinary courts. In the specific Romanian disciplinary liability regime, non-compliance with decisions of the Constitutional Court by magistrates is considered a disciplinary offence.⁵¹⁵ A systemic risk is therefore triggered by Decision No. 390/2021, which will have a chilling effect on national judges who decide to disapply national provisions held to be constitutional on the basis of the *AFRJ* judgment.

On various occasions, the competence of the HCCJ as the supreme ordinary court in Romania to adopt principled decisions meant to ensure uniform interpretation and application of law with binding effect on all ordinary courts has led to collisions with the RCC’s interpretation.⁵¹⁶ In issuing the very recent Decision no. 41/2022 concerning a former minister accused of corruption,⁵¹⁷ a panel of five judges in the HCCJ departed from an earlier RCC Decision (no. 685/2018) that obliged the national HCCJ to select all five members of a panel judging appeal corruption cases by drawing lots, not just four of them as was the case until then. The above RCC Decision was at issue in the second wave of requests for preliminary rulings (namely C-357/19, C-547/19 and C-840/19), in which the national referring court expressed

514 For an in depth analysis of RCC Decision no. 390/2021, see Moraru, M. and Bercea, R., *op. cit.*, pp. 23-29.

515 Since 2012, disregarding a Constitutional Court ruling has amounted to a disciplinary offence, according to Article 99(§) of Law No 303/2004.

516 For examples of conflicting case law of the two courts, see RCC Decisions no. 369/2017 and 583/2017 and respectively HCCJ Decisions no. 52(HP)/2018 and 2(HP)/2019.

517 On April 7, 2022, file no. 3089/1/2018.

the view that EU law precludes *inter alia* application of Decision No. 658/2018 since it has the effect of setting aside final decisions of the HCCJ delivered by panels of five judges and rendering the penalties imposed in a significant number of serious fraud cases affecting the European Union's financial interests ineffective and non-dissuasive. According to the referring court, this would create an appearance of impunity and even entail a systemic risk of offences going unpunished because they become time-limited, given the complexity and duration of the proceedings prior to delivery of a final judgment following re-examination of the cases concerned. In addition, the principles of judicial independence and legal certainty would preclude Decision No. 685/2018 from having binding legal effect on criminal decisions that had become final on the date on which the decision was delivered, in the absence of serious grounds capable of casting doubt on whether the right to a fair trial was respected in these cases, which was confirmed in the CVM November 2018 report.⁵¹⁸ In this respect, the CJEU found that Article 2 TEU, the second subparagraph of Article 19(1) TEU and Decision 2006/928 were to be interpreted as not precluding national rules or a national practice in which decisions of the national constitutional court are binding on the ordinary courts provided that the national law guarantees the independence of the constitutional court in relation, in particular, to the legislature and the executive, as is required by these provisions. However, these provisions in the EU Treaty and that decision are to be interpreted as precluding national rules under which any failure to comply with decisions of the national constitutional court by national judges in the ordinary courts can trigger their disciplinary liability. HCCJ Decision No. 41/2022 can be considered an endorsement of the CJEU guiding criteria developed in all the Romanian RoL cases, contrary to the stance adopted by the RCC in its Decision No. 390/2021.

VI. Conclusion: A general assessment of the state of the rule of law, trust, independence, impartiality and accountability in Romania, and future developments

Justice reforms detrimental to the RoL in the Romanian context have mainly been challenged through dialogue initiated by the national courts under Article 267 TFEU. The Court of Justice has therefore had the opportunity to clarify the legally binding nature of the CVM Decisions and the interpretative role of the CVM reports, and to provide yardsticks for judicial independence, fair trial and the rule of law. Given the follow-up responses at the national level, the Court of Justice has further clarified that the principle of primacy of EU law applies to both ordinary courts and the RCC, and the latter court cannot limit the formers' EU law mandate. Retaliatory measures against judges exercising their right to address preliminary questions or enforcing preliminary rulings of the Court of Justice have themselves been qualified as contrary to the principle of precedence of EU law. This development is coherent with the ECtHR case law of individual requests filed by magistrates under Article 34 of the ECHR (e.g. *Codruța Kövesi v. Romania*), in which the European Court of Human Rights has found violation of the Convention given the measures adopted at the national level against magistrates who in the line of duty have also exercised their right to freedom of speech. While this multileveled judicial dialogue seems to have resulted in the national authorities being willing to remedy some of the rule of law shortcomings, the chilling effect of the RCC's defiant position regarding recent CJEU judgements might require additional measures from the EU authorities.

⁵¹⁸ Judgement of the Court, ECLI:EU:C:2021:1034, Para 66.

NATIONAL REPORT: SLOVENIA

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The present national report primarily builds on case law identified by the University of Ljubljana (UL) during the [TRIIAL](#) project and which is now available in the [CJC database](#). The report captures a moment in time and identifies pressing issues and evolving trends in the field of rule of law. It does not aim to provide an exhaustive picture of the rule of law in Slovenia but it aims to complement already existing tools, namely the [Commission's Rule of law report](#), the [CCJE Report on judicial independence and impartiality in the Council of Europe Member States](#), the [Justice Scoreboard](#), [UNHR Annual thematic reports of the Special Rapporteur on the Independence of Judges and Lawyers](#), and the [ENCJ report](#).

Summary

Overall, Slovenia has a well-functioning judicial system. The backlog that burdened regular courts in the past has decreased significantly in the last 15 years. The quality of decision-making and public trust in the judiciary has a positive trend despite hostile rhetoric on the judiciary on the part of the media and politicians. The judiciary and the Judicial Council increasingly adhere to EU and ECtHR standards and have recently explored new means of defending judicial independence.

Like any country, Slovenia also faces some challenges affecting judicial independence, impartiality, accountability, trust and the rule of law. The greatest current challenge, which is probably transient in nature, is unlawful blocking of nominations of state prosecutors by the government. A more systemic pressing issue is constant and often uncontained discrediting of courts on the part of the media and politicians, which undermines the public trust in and social legitimacy of the judiciary. Another worrisome development is an increasing backlog at the Constitutional Court and a decrease in its public support resulting primarily from unprecedented polarisation and tense relationships among the Constitutional Court justices, which arguably has its roots in the inadequate process of nominating them. Procedures before the Judicial Council and its decisions still lack transparency. The Judicial Council is underfunded and understaffed and so struggles to adequately perform its constitutional role. Nomination of Supreme Court judges is arguably contrary to EU law, as the parliament has unfettered discretion to turn down candidates that have adjudicated in politically sensitive trials. Since 2018 Slovenia has continued to be involved in illegal pushbacks of migrants to Croatia and has enacted unconstitutional provisions allowing systemic violations of non-refoulement in the case of mass migrant flows.

Despite some signs of rule of law backsliding and other issues affecting judicial independence, impartiality, accountability, trust and the rule of law, it would be false to compare Slovenia with Poland, Hungary or Romania. Slovenia continues to improve in most areas covered by this report. Recent challenges have increased awareness of the importance of the rule of law among the judiciary and the general public. This has potential to create impetus for enhancement of this Article 2 TEU value in the future.

Introduction: the Socio-Political Context and the Broader Framework of Rule of Law Challenges for the Legal Professions

The Socio-Political Context

Slovenia embarked on a journey towards democracy, rule of law and human rights in 1991, when it was the first former socialist republic to break free from the collapsing Yugoslavia. With a commitment to respect the fundamental postulates of liberal democracy and high popular support expressed in a plebiscite,⁵¹⁹ Slovenia secured rapid international recognition. In the transition process, fuelled with the goal of accession to the EU, Slovenia eagerly transplanted Western concepts and succeeded in joining the EU in 2004, and the Monetary Union and Schengen in 2007. It was not until the economic crisis that the weaknesses in the 'success story of transition' really came to light.

From the wider socio-economic and political perspective of the rule of law and trust in the institutions of the state governed by law, one might direct attention to a retention of a very

⁵¹⁹ A large majority (88.5%) of all eligible voters and 95% of the people who voted opted for an independent Republic of Slovenia.

high percentage of socialist elite members that have governed Slovenia ever since the wide-coalition independence Demos government broke up at the end of 1991.⁵²⁰ This contributed to indecisive condemnation of the former undemocratic system⁵²¹ and enabled the other side of the political spectrum to exploit a very profitable way of rallying support with ‘anti-Communist rhetoric,’ which provoked even stronger holding on to the values of socialism, leading to some kind of ‘positive feedback loop.’ This could explain why polarisation is high and the reconciliation process of the nation, which was divided in the civil war which erupted during WW2, is progressing so slowly.

In 2010, the SDS (the Slovene Democratic Party) led by the current PM Janez Janša made a turn to the far right, sympathising with neighbouring Hungary’s *Fidesz* and proved to be the common enemy uniting the left electorate before every general election. This seemed to have led to a situation in which left-wing parties were doomed to rule despite being unable to adopt the reforms necessary to get Slovenia back on the winning track. However, a combination of political miscalculation by the previous PM and a lack of stability of his centre-left government propelled the main opposition party to power right at the beginning of the COVID-19 pandemic in 2020. Since then, the political sphere has polarised to an unprecedented extent. Janez Janša, the current PM, has adopted a disruptive tactic⁵²² that remains uncontained by the other parties in the ruling coalition, whereas the left-wing parties united to topple the government right from the outset of its takeover of power.⁵²³ Slovenia seems to have, hopefully only temporarily, departed from its pro-European path, which is partly evidenced by support for the political narratives of Orbán and Kaczyński at the EU level. Another worrisome development, apart from the inappropriate communications by the PM through his twitter account, is that respect for the value of the rule of law by the government seems to be at the lowest point since communism. Only after months of pressure from EU institutions and the domestic public, which culminated during the Slovene Presidency of the Council of the EU (July 2021-December 2021), did the government decide to comply with a judgment of the Supreme Court (the SC) which called on the government to respect its legal obligation to finance the Slovene press agency (STA) and a final judgment of the Administrative Court (the AC) regarding delegated European prosecutors. The government continues to ignore other final judgments of the courts, e.g. the decision of the Constitutional Court (the CC) that COVID-19 measures adopted by the government lacked a legal basis, and a decision of the SC which confirmed the judgment of the AC that pushbacks of migrants to Croatia are illegal.

Nevertheless, the proportional voting system seems to well protect Slovenia from the constitutional capture of the kind witnessed in Hungary. Against this background, the rise of far-right and far-left parties, evidenced by their success in the last general election,⁵²⁴ seems

520 Exceptions are the rule by right coalitions, led by SDS, in 2004-2008, 2012-2013 and 2020 onwards.

521 An important role in the process alienating Slovenia from communist times is attributed to the Constitutional Court. Its most famous ruling is the *Tito Street case* (Decision U-I-109/10-11 of 26 September 2011, Uradni list RS, št. 78/2011; OdlUS XIX, 26) (available in English at <https://www.us-rs.si/decision/?lang=en&q=U-I-109%2F10&df=&dt=&af=&at=&page=1&sort=&order=&id=110615>).

522 Samo Bardutzky, Bojan Bugarič and Saša Zagorc, ‘Slovenian Constitutional Hardball: Disruptive moves towards an illiberal democracy’ (2021) *VerfBlog*, 2021/4/01 <<https://verfassungsblog.de/slovenian-constitutional-hardball/>>, accessed 4 February 2022.

523 This approach was formalised in September 2021 when left and centre-left parties adopted a political declaration in which they committed to form a new coalition government after the 2022 election among themselves, explicitly excluding from future government any parties in the current coalition.

524 In the 2018 general election, far-left and far-right parties won 38% of the votes and 38 seats in the 90-seat *Državni zbor*.

less alarming. However, the heated and polarised political atmosphere in the country raises concerns about the outcome of the 2022 general election.

The Broader Framework of Rule of Law Challenges for the Legal Professions

The background described has an important impact on the state of rule of law in Slovenia. Despite a positive trend, the courts still suffer from a lack of public trust.⁵²⁵ This can be attributed to various factors. The judiciary and state prosecutors are regular targets of systemic strong unjustified criticism, which is a consequence of a political agenda of discrediting the courts, legitimised through a controversial premise that an absence of lustration⁵²⁶ prevented the construction of a truly independent judiciary and an autonomous state prosecution service. This gained new momentum especially during the trial of *Janez Janša*, the current PM, in the *Patria* case⁵²⁷ and is maintained with the help of individual excesses⁵²⁸ that help to portray the judiciary in the wider sense at least as left-wing, if not communist. In 2014 one commentator observed that there are no limits to how low one can afford to go in criticising judges,⁵²⁹ and since this remark the situation has even deteriorated. Especially since mid-2019, we are

525 According to the 2021 EU Justice Scoreboard, the perception of independence of the Slovenian judiciary among the general public is among the lowest in the EU. Fewer than 50% of people rated its independence as very or fairly good, whereas more than 40% thought it was fairly or very bad (Commission, 'The 2021 EU Justice Scoreboard', COM (2021) 389 2021). However, compared to 2012, trust in the judiciary has improved by 34% and support for the judiciary is still rising. (Valicon ogledalo Slovenije 2012–2018, <www.valicon.net/wp-content/uploads/2019/01/Sporocilo_za_javnost_2019-01-10.pdf> accessed 4 February 2022).

526 The so-called Pučnik amendment (Article 8 (2) of the Judicial Service Act) prevented judges that cooperated with the communist regime in trials in which human rights were violated from gaining life tenure. However, as the Constitutional Court stated in Decision U-I-83/94 of 14 July 1994, Ur. list RS, št. 68/96; OdlUS V, 153, the provision was redundant since other criteria for assessing the work of judges already allowed declarations of inadmissibility of judges on the grounds in the Pučnik amendment. Hence, retention of judges who served under the former system was almost complete (see Bojan Bugarič, 'A Crisis of Constitutional Democracy in Post-Communist Europe: "Lands in-between" Democracy and Authoritarianism' (2015) 13 Int. J. Const. Law 219, 243).

527 The *Patria* affair erupted in 2008, was brought to the courts in 2010 and ended in 2015, when the CC annulled the conviction of Mr. Janša. The trial affected several general elections and was labelled political by some politicians. The most controversial issue was the role of the president of the Supreme Court, who first publicly criticised Janez Janša for attacking the courts and issued an order ensuring he would preside over the panel hearing the *Patria* case. The CC found a violation of the right to an impartial trial (see Decision Up-879/14-35 of 20 April 2015, Uradni list RS, št. 30/2015 in OdlUS XXI, 13. An English commentary on the case can be found in the CJC database [here](https://www.us-rs.si/decision/?lang=en&q=Up-879%2F14&df=&dt=&af=&at=&vd=&vo=&vv=&vs=&ui=&va=&page=1&sort=&order=desc&id=111980). For the full judgment in English, see <https://www.us-rs.si/decision/?lang=en&q=Up-879%2F14&df=&dt=&af=&at=&vd=&vo=&vv=&vs=&ui=&va=&page=1&sort=&order=desc&id=111980>).

528 For example, after the 2018 local elections in Maribor, a judge who had earlier issued secret measures in a criminal procedure against a right-wing candidate for mayor in Maribor attended the post-election reception of the winning candidate. The Ethical Commission of the Judicial Council found that this was contrary to the principles of impartiality and incompatibility (see the Principled Opinion of Su Ek of 22 January 2019 <http://www.sodni-svet.si/doc/NM_KEI_2019_01_22.pdf> accessed 4 February 2022), but no other sanctions were imposed and the judge was even promoted. Another example is a case of two judges who attended a public SD (a political party that succeeded the Communist Party) event and appeared in the group photograph along with the politicians. The Ethical Commission once more found a violation of the principles of impartiality and incompatibility (see the Principled Opinion of Su Ek of 17 June 2019 <http://www.sodni-svet.si/doc/kei/NM_2019_07.pdf> accessed 4 February 2022). Similarly, a photograph of the president of the local court in Ljubljana wearing a Tito partisan hat and waving a Yugoslav flag found its way to the media in 2014. Furthermore, one of the judges, whose function was temporarily frozen, since she was elected a member of parliament, afforded herself a strikingly careless statement. In response to a referendum result, in which people rejected amendment of the family legislation affording same-sex couples the right to marry, after the referendum was allowed by the CC, she wrote on Facebook that "One year [i.e. the period during which the parliament is bound by the will of the people expressed through a referendum] passes fast. In the meantime, we change the constitutional judges." A recent example is a statement by a local court judge who labelled PM Janša as "the great dictator" and "a frustrated specimen with a criminal past" in a private Facebook group. This cost her the leadership of the department at the Local court. Analysis of this case is available in the CJC database [here](https://www.us-rs.si/decision/?lang=en&q=Up-879%2F14&df=&dt=&af=&at=&vd=&vo=&vv=&vs=&ui=&va=&page=1&sort=&order=desc&id=111980).

529 Aleš Galič, 'The Aversion to Judicial Discretion in Civil Procedure in Post-Communist Countries: Can the Influence of EU Law Change it?' in Michal Bobek (ed.) *Central European Judges Under the European Influence. The Transformative Power of the EU Revisited* (Hart Publishing 2015) 99, 115.

witnessing an onslaught on state prosecution and the courts by part of the media close to the government, the PM himself and his political allies.⁵³⁰

Certainly, the low esteem of courts is not exclusively attributable to unwarranted criticism. Other reasons might also be a poor job by court PR services,⁵³¹ lengthy proceedings in high profile cases⁵³² which sometimes fall under the statute of limitation⁵³³ and a lack of transparent resolution of sensitive affairs within the judiciary⁵³⁴ etc. As a consequence, the legal culture remains poor, which is reflected in poor attendance at hearings, evasion of serving judicial documents and a growing number of unimplemented decisions of the Constitutional Court (the CC)⁵³⁵ and other courts.

In such circumstances, one would hope for a response on the part of academia and other eminent lawyers.⁵³⁶ However, the culture of commentating on controversial issues is weak. Lawyers prefer to keep their heads down since public exposure could trigger discreditation and cause a lawyer to be labelled as left-wing or right-wing, which negatively affects a person's

530 An example is that in November 2019 a member of the political opposition (now a member of the ruling party) called the Constitutional Court 'mafia' because it adopted an interim measure temporarily prohibiting the activities of a parliamentary inquiry into allegedly unjustified judicial proceedings brought against a high profile right-wing politician. For more, see infra *Parliamentary inquiry into judges and prosecutors*. Another example is the current Minister of the Interior, who regularly criticises the Constitutional Court. For example, in April 2021 he said that the constitutional judges were incapable of decision-making and that they only issue interim measures and do not decide. Recently, discrediting of courts on the part of the media and the political sphere has been so widespread that it is starting to not be contained by other actors and seems to reflect a new stage in the relationship between the courts and society, which arguably sees this as a new normality. For example after the CC temporarily suspended a regulation which required public servants to be either vaccinated or to have recovered from COVID-19, the PM tweeted that the Constitutional court pays more attention to Tito than to the health of the Slovene people (<https://twitter.com/JJansaSDS/status/1443619747032150017>). Another striking example is the PM suggesting that the Slovene CC is captured similarly to its Polish counterpart in the aftermath of the famous decision of the Polish constitutional tribunal that gave priority to the Polish constitution over EU law. (<https://mobile.twitter.com/jjansasds/status/1446419017103724551>).

531 When Slovenia was condemned before the ECtHR for a violation of the right to a fair trial (Article 6) as a result of a lack of a public hearing before the Supreme Court, the highest instance of the Slovenian judiciary issued a very authoritarian press release stating "We respect only those rulings that persuade by argumentation. The ECtHR's argument in this case is unconvincing. We take other decisions of the courts into consideration and, where necessary, incorporate them in our work." This triggered widespread criticism from academic circles and the general public. Another example is when in December 2021 the government-friendly media launched a story concerning allegedly flawed formal education certificates of B. Masleša, the former president of the SC. The SC responded on twitter that the judge concerned will sue the journalists and give the compensation to charity. This gave further impetus to the media, which now claimed that the SC had already indicated the outcome of the potential lawsuit.

532 The *Patria* case lasted for 5 years, the *Novič* case for 7 years and the *Balkan Warriors* case for 12 years and it is still pending.

533 E.g. the *Patria* case and the *Novič* case. An important factor is Article 91 (2) of the Criminal Code, which prescribes a two-year period of prescription for cases that are quashed by the Supreme Court. This provision, although necessary to safeguard the right to a trial within a reasonable time, proved inadequate in complicated cases. The period was recently extended to 5 years.

534 In the *Novič* case, the first instance judge stated at the public announcement of the judgment that he had been subject to unimaginable pressure from his colleagues and that the case was linked to the summits of the judiciary. The president of the District Court of Ljubljana denied such pressure and the Commission for Ethics of the Judicial Council declared that the statements made by the judge had been inappropriate since they had no factual basis. However, no other explanation or investigation was provided by the judiciary. The case generated much attention among the media, to which the judge gave a few interviews. At least to some extent this enabled the public to get insights into the personality of the judge and to make their own judgement on the merits of the judge's perception of pressure. Another illustration is the recent example of a dispute between two justices of the Constitutional Court. For more, see infra *Independence: Nomination for Rule of Law Positions – Democratic Legitimacy, Transparency, Independence, Constitutional 'Hardball' and more*.

535 According to reports published on the CC's web page, there were 10 unimplemented decisions at the end of 2016, 13 at the end of 2017, 14 at the end of 2018 and 18 at the end of 2020 (Letna poročila Ustavnega sodišča, <<https://www.us-rs.si/mediji-in-javnost/letna-porocila/>> accessed 4 February 2022). See also Decision U-I-248/08 of 11 November 2009, Uradni list RS, št. 95/2009 in OdlUS XVIII, 51, paras. 13-14, in which the CC emphasised the urgency of following its rulings and identified a need to abide by judicial decisions as one of the fundamental postulates of the rule of law at the core of constitutional democracy.

536 Term 'lawyers' is a synonym for all law graduates.

potential to hold public offices in the future. A welcome development in this respect is the establishment of a Legal Network for the Protection of Democracy,⁵³⁷ which connects different legal professionals and offers them a platform from which to defend the rule of law without necessarily exposing themselves to discreditation. Unfortunately, lawyers that are vocal often lack professionalism⁵³⁸ in their public responses, as their comments are sometimes conditioned by their world view or even politically motivated. There is also a lack of public or professional accountability for violations of academic ethics.⁵³⁹

After independence, reorganisation of the courts coupled with the transition to a new legal order based on entirely different values, and the fact that many judges left the courts for advocacy, caused a serious court backlog. Especially from 2005, when Slovenia was condemned by the ECtHR for a systemic violation of the right to a trial within a reasonable time,⁵⁴⁰ the court administration concentrated almost exclusively on efficiency. This significantly shortened judicial proceedings and made the backlog manageable and is therefore rightly regarded as an important success.⁵⁴¹ However, it also had some negative repercussions. The need to immediately recruit many new judges meant that not only the best candidates got life tenure and saturated the system⁵⁴² but also did not advance much overall performance.⁵⁴³ Assessment and promotion focusing on efficiency⁵⁴⁴ favoured high 'productivity.' The efficiency 'slogan' and years of austerity policy are arguably the most important factors behind the weak internalisation of EU and ECHR law and even constitutional law, especially in regular courts.

Due to the lack of a democratic tradition and the strategy of development, many rule of law institutions, especially those with a small personnel,⁵⁴⁵ are weak and undeveloped. Their impact and contribution to the rule of law is predominantly dependent on the people occupying

537 Pravna mreža za varstvo demokracije <<https://pravna-mreza.si/>> accessed 4 February 2022. See also Katarina B. Sternad, 'Pravna mreža za varstvo demokracije' (2021) 100 *Odvetnik* 42.

538 Aleš Novak exposed an example of lack of professionalism in public appearances of prominent lawyers (Aleš Novak, 'Novi ustavnopravni dogmatizem?' (2018) 20/21 *Pravna praksa* 18. An associated problem is that certain renowned academics (ab) use their reputation by writing well-paid one-sided legal opinions.

539 For example, violations of ethics by two high profile lawyers, even though they were proved beyond any doubt, did not seem to entail any negative consequences, since one became President of the Judicial Council whereas the other still occupies a position as an influential legal commentator. (Aleš Novak, 'Razmislek ob rob dvema kršitvama akademske etike pri pravnem pisanju', (2012) 47 *Pravna praksa* 8).

540 *Lukenda v Slovenia* App. no. 23032/02 (ECtHR, 6 October 2005).

541 CEPEJ, Quality management in courts and in the judicial organisations in 8 Council of Europe member states, 10 September 2010, p. 20 <<https://rm.coe.int/16807481e3>> accessed 4 February 2022.

542 As a result, judicial posts are currently almost unavailable to many competent younger lawyers, who are forced to work as support staff with a relatively low salary and wait for years for the Judicial Council to recognise their capacity over that of other candidates. This encourages very talented and devoted candidates to leave the judiciary.

543 Valentina Dimitrova-Grajžl, Peter Grajžl, Janez Šušteršič and Katarina Zajc, 'Court output, judicial stuffing and the demand for court services: Evidence from the Slovenian courts of first instance' (2012) 32 *International Review of Law and Economics* 19.

544 In Judgment I U 1103/2013 of 13 May 2015, the AC decided that dismissal of a judge who complied with all the criteria except the 'productivity norm' was disproportionate. It held that if it were possible to dismiss a judge solely on the basis of inefficiency without primarily adopting less intrusive measures the principle of judicial independence would be violated. See also AC, Judgment I U 1478/2016-19 of 30 August 2017. Both judgments are analysed in the CJC database [here](#) and [here](#).

545 In the last twenty years, many such institutions have been created (for example the Commission for Prevention of Corruption (the CPC), the Advocate of the Principle of Equality, the Ombudsman for public radio and television etc.).

leadership positions and their (few) employees, rather than an established reputation of the institution.⁵⁴⁶

An important factor might also be the inadequate education of lawyers. Faculty exams and the state exam predominantly seek reproduction of memorised data and only rarely require critical thinking and creativity.⁵⁴⁷

Legal Issues Affecting Independence, Impartiality, Accountability, Trust and the Rule of Law

Trust: Transparency of Procedures before the Judicial Council – (In)sufficient Reasoning by the Judicial Council

The Judicial Council (the JC) is a *sui generis* body⁵⁴⁸ which has a central role in a vast majority of issues related to judicial independence. It decides on the evaluation of work,⁵⁴⁹ recruitment, promotion, dismissal etc. of judges. Its decision-making has been criticised for being insufficiently reasoned,⁵⁵⁰ which might not only be a consequence of vague evaluation criteria⁵⁵¹ but also of insufficient resources and a low number of staff.⁵⁵² In a 2019 ENJC survey, 40% of Slovene judges felt that their colleagues had been promoted or appointed other than on the basis of ability and experience.⁵⁵³

546 An example is the CPC. During the time of its former head, Goran Klemenčič (who later became a minister of justice), the CPC could on the one hand be regarded as a thorn in the side of the most powerful politicians, but on the other hand it could also be argued that it overstepped its mandate. Nevertheless, its influence was important. However, when Boris Štefanec took over the CPC, the credibility of the institution rapidly fell due to the fact that the media discovered that until recently he was a member of a political party led by Zoran Janković, the mayor of Ljubljana, who has been charged with many corruption crimes and was on the radar of the CPC during the time of its previous president.

547 Jan Zobec and Jernej Letnar Čerňič, 'The Remains of Authoritarian Mentality within the Slovene Judiciary,' in Michal Bobek (ed.) *Central European Judges Under the European Influence. The Transformative Power of the EU Revisited* (Hart Publishing 2015) 125, 143-144. For example, only during a few exams are students allowed to use legislation. This favours memorisation and prevents students from better developing interpretation techniques, critical thinking and ability to resolve complex legal issues.

548 The Judicial Council is composed of five legal experts elected by the DZ on a proposal of the President of the Republic and six judges elected by their peers, of which two are elected by all the judges, two by first instance judges, one by second instance judges and one by the Supreme Court judges.

549 Along with Personal Councils.

550 Mohor Fajdiga, *Izbira Sodnega sveta: ignorantia rationis nocet?* [Selection by the Judicial Council: ignorantia rationis nocet?] (2021) LXXXI Zbornik znanstvenih razprav 63.

551 Article 28 of the Judicial Service Act prescribes four criteria: (a) working skills and expertise, especially capacity of written and oral expression, analytical thinking, structured work and the extent of expertise; (b) personal characteristics, in particular responsible work, reliability and prudence; (c) social skills, taking particular account of communication and conflict management skills; (d) the ability to perform the functions of a senior position. These criteria are further developed in the Criteria for the quality of work of judges for the evaluation of the judicial service (Ur. l. RS, št. 64/17).

552 Commission, '2020 Rule of Law Report, Country Chapter on the Rule of Law Situation in Slovenia' SWD(2020) 323 final, p. 4.

553 ENJC, 'Independence and Accountability of the Judiciary, ENCJ Survey on the independence of Judges 2019', p. 34 <<https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/Projects/ENCJ%202019%20Survey%20on%20the%20Independence%20of%20judges.pdf>> accessed 4 February 2022.

In the case of nominating the president of the District Court of Celje,⁵⁵⁴ the Administrative Court (AC) established several criteria which the JC should apply to satisfy the minimum requirements of the Constitution and the ECHR.⁵⁵⁵ The decision made the papers⁵⁵⁶ and one of the members of the JC responded in the media stating that the AC had exceeded its role and embarked on a constitutional adventure which does not lead anywhere.⁵⁵⁷

In a subsequent case, Order X Ips 333/2015 of 21 July 2016 concerning promotion to the Supreme Court (the SC), the latter validated the practice of “limited reasoning” of the JC. It held that the JC is only required to explain why it considers a candidate to be the most appropriate without including a comparison with non-selected candidates.⁵⁵⁸ According to the SC, the JC can effectively exercise its role in the system of organisation of state power and assume its share of responsibility for the quality of the judiciary only with such decision-making and standard of reasoning, which presupposes confidence in the JC’s decisions on the selection of the most suitable candidates for judicial office.⁵⁵⁹ This justification is controversial, especially since the JC is overburdened and it is questionable whether it can rigorously assess the merits of candidates.⁵⁶⁰ Furthermore, the SC’s ruling could be regarded as problematic from the point of view of the CJEU’s decision in C-619/18, *EC v. Poland*, paras. 114, 116 and 117, in which the court emphasised the need to give concrete reasons for decisions of the Polish National Council of the Judiciary, and also from the perspective of *Guðmundur Andri Ástráðsson*, in which the ECtHR emphasised the paramount importance of a meritocratic approach to the selection of judges, which is inherent in the very notion of a “tribunal established by law.”⁵⁶¹

With the adoption of an amendment to the Judicial Service Act (the JSA)⁵⁶² in March 2015, which was influenced by GRECO and aimed to make the proceedings of the JC more transparent, a new obligation of the JC was prescribed in Article 18(6): the JC has to write a record of consultation and voting. According to the AC, this implies that the record should contain at least a prevailing reason for the final decision and not necessarily the reasons of

554 Administrative Court, Decision and Order I V U 213/2014-28 of 5 November 2014. English commentary of the case can be found in the CJC database [here](#).

555 Provided that the decision of the JC is not arbitrary or discriminatory, is sufficiently reasoned so that the parties have the right to effective legal remedy before a court and complies with the requirements of the ECHR, the decision of the JC will pass examination by the AC.

556 Majda Vukelić, ‘Sodni svet bo moral skrbneje voditi izbirne postopke’ Delo, 16 January 2015, <<https://www.delo.si/novice/slovenija/sodni-svet-bo-moral-skrbneje-voditi-izbirne-postopke.html>>.

557 Marko Novak, ‘Ustavna avantura Upravnega sodišča’ Delo, 31 January 2015, <<https://www.delo.si/mnenja/gostujoce-pero/ustavna-avantura-upravnega-sodisca.html>> accessed 4 February 2022. Cf. Boštjan Zalar, ‘(Ne)moč argumenta človekovih pravic v sodnih postopkih’ (2019) 91 Odvetnik 12.

558 Supreme Court, Order X Ips 333/2015 of 21 July 2016, para. 22.

559 Ibid, para. 19. In order to justify its decision, the SC relied on the composition, autonomy and qualified (2/3) majority decision-making of the JC.

560 Verica Trstenjak, former AG to the CJEU, resigned as a member of the Judicial Council in 2018 as she felt she could not take responsible decisions due to a systemic lack of time and consideration in the selection procedures. Avbelj even argued that the JC acts more or less as a rubber stamping institution for decisions taken by personnel councils or presidents of the court (Matej Avbelj, ‘Contextual Analysis of Judicial Governance in Slovenia’ (2018) 19 GLR 1901, 1911).

561 *Guðmundur Andri Ástráðsson v Iceland* App. no. 26374/18 (ECtHR [GC] 1 December 2020), paras. 220 and 222.

562 Amendment JSA-M, Uradni list RS, št. 17/2015, 13 March 2015.

individual members.⁵⁶³ For now, the JC does not comply with this obligation, since its records only contain information on final voting but no information concerning consultation. As a result, there is still no possibility of verifying why the JC decided to elect one and not the other candidate.

In a confrontation between the AC and the SC,⁵⁶⁴ the latter prevailed: since the adoption of the *Judicial Council Act*⁵⁶⁵ the competence to review acts of the JC lies solely in the hands of the SC.⁵⁶⁶ In my opinion, the JC should explain in very simple terms why it decided for one and not the other candidate. This would satisfy the demand to quickly fill the vacant post and enable smooth continuation of work, on the one hand, and prevent arbitrary decision-making by the JC, on the other hand.⁵⁶⁷

Independence: Nomination for Rule of Law Positions – Democratic Legitimacy, Transparency, Independence, Constitutional ‘Hardball’ and more

The Slovene legislature (the National Assembly – *Državni zbor*, the DZ)) (and sometimes the executive) retains a strong influence over the nomination of lawyers for key rule of law positions. This is understandable since the institutions need a certain degree of democratic legitimacy. On a proposal by the JC, the DZ elects judges. On a proposal by the SPC, the government nominates prosecutors. On a proposal by the President of the Republic, the legislature nominates Constitutional judges, ECHR judges, CJEU judges, AGs and members of the JC, the SPC, the Commission for the prevention of Corruption (CPC), the Court of Auditors, the Ombudsman, the Information Commissioner and the Advocate of the Principle of Equality, and appoints the members of the National Review Commission for Reviewing Public Procurement Award Procedures (the NRC) without the restraint of a proposal by another body.

An unwritten rule that the legislator (and the government) supports the proposed candidates seemed firm until recently. Now, it has been eroded at least in relation to the highest positions in the judiciary.⁵⁶⁸ The success of many such proposals is open to doubt on the basis of political considerations. In case U-I-225/16 of 6 December 2017,⁵⁶⁹ for example, a SC judge candidate whose nomination was turned down by the DZ due to an individual decision (in a case against a right-wing politician)⁵⁷⁰ lodged a constitutional complaint. The CC held that the principle of separation of powers (Article 3(2) of the Constitution) allows many different solutions for the

563 Administrative Court, I U 563/2019-25 of 28 August 2019, para. 132. This case concerns the nomination of the supreme state prosecutor. The JSA applies to many aspects of the procedure concerning the nomination of state prosecutors. In this area, the AC retained jurisdiction.

564 A similar dispute between the AC and the SC can be observed with respect to decisions of the State Prosecutorial Council, which applies the same criteria for evaluation of work and promotion as the JC (Article 37 (8) of the State Prosecution Service Act). In this case the AC retained judicial control over the acts of the SPC, but the SC can review the decisions of the AC.

565 Zakon o sodnem svetu (Judicial Council Act) (Ur. l. RS, št. 23/17), which entered into force on 20 May 2017.

566 Article 36 (2) of the Judicial Council Act.

567 For a more detailed analysis of the scope of reasoning of the JC, its implications and conformity with European standards, see Mohor Fajdiga, *Izbira Sodnega sveta: ignorancia rationis nocet?* [Selection by the Judicial Council: ignorancia rationis nocet?] (2021) LXXXI Zbornik znanstvenih razprav 63.

568 Since 2015 we have witnessed five such rejections by the DZ.

569 An English commentary of the case can be found in the CJC database [here](#).

570 In the criminal proceedings against Franc Kangler, the candidate for the SC judge upheld a judgment which meant Mr. Kangler was forced to go to prison and lost his mandate in the National Council (upper house of the Slovenian parliament). The Supreme Court later annulled the judgment and ordered exclusion of key evidence from the prosecution.

nomination of judges, as is evidenced by the various systems existing worldwide, and that rejection of the proposed candidate did not violate the Constitution, since it constituted an act of the political discretion enjoyed by the DZ. In their separate opinion, Judges *Jadek Pensa* and *Sovdat* rightly criticised the majority of the CC for failure to address the issue of political discretion of the DZ in the case of promotion of judges from the perspective of separation of powers and judicial independence, especially since the discretion does not originate in the Constitution, but has been “appropriated” by the DZ with the adoption of Article 21 (3) of the Judicial Service Act (the JSA).⁵⁷¹ This practice is dangerous as it might turn into some kind of political cherry picking of candidates instead of appointment on the basis of merit.⁵⁷² This practice is contrary to EU law, which prohibits legislative solutions that allow direct or indirect political control over the content of judicial decisions.⁵⁷³ If this practice becomes more frequent, a more determined response by the CC grounded in CJEU jurisprudence will be crucial.

A recent affair at the Constitutional Court (the Jaklič-Accetto dispute⁵⁷⁴) might have its roots in the process of nominating justices. The current President of the Republic, who arguably excessively inclines towards compromise between the left and the right, proposes candidates on the basis of assumed support in the DZ and not using the criteria of professional capacity and wisdom.⁵⁷⁵ It is in these circumstances that Jaklič and Accetto became CC Justices. Justice Jaklič accused Justice Accetto of lying to the court in the process of deciding whether Justice Accetto should be excluded because of his involvement in the SMC political party during the initial phases of its formation. The affair escalated in the media and had a negative impact on public trust in the most prominent rule of law institution in Slovenia.⁵⁷⁶

However, another potentially problematic pattern was recently revealed by the CC in Decision Up-757/19-14.⁵⁷⁷ The CC heard a complaint by a SC judge candidate, who alleged that the JC (and the SC) violated her right to equal judicial protection (Article 22 of the Constitution) since she was not given access to the opinion of the civil division of the SC, which gave an important advantage to the other candidate. The CC made an empirical analysis and found

571 Cf. CC, Decision Up-679/06-66, U-I-20/07 of 10 October 2007, in which the Constitutional Court decided that the Minister of Justice has to give reasons for turning down a candidate for the president of the court proposed by the JC. Hence, the decision of the Minister of Justice is not an act of unfettered political discretion.

572 Judicial independence could be impaired if judges are careful not to fall into disfavour with politicians if they want to reach the top positions. There are many possible areas of law where this might occur: criminal cases, libel cases and cases concerning vulnerable groups, righting of historical wrongs and other media-exposed cases.

573 C-619/18, *Commission v Poland*, 24 June 2019; C-83/19, Asociația “Forumul Judecătorilor din România, 18 May 2021, C-791/19, 15 July 2021. See also B. Zalar and M. Fajdiga, ‘O zakonitosti in (neodvisnosti) vzpostavljanja sodišč v Sloveniji [On legality and (independence) of establishing courts in Slovenia]’, Delo, Sobotna priloga, 31 July 2021 <https://www.delo.si/sobotna-priloga/o-zakonitosti-in-neodvisnosti-vzpostavljanja-sodisc-v-sloveniji/> accessed 4 February 2022.

574 An English commentary on Decision U-I-59/17-27 of 18 September 2019, where the dispute erupted, can be found in the CJC database [here](#).

575 His approach can at least to some extent be attributed to the atmosphere in the polarised DZ, where it is hard to reach a compromise, especially on CC judge candidates. However, this practice, which started under the former President of the Republic has turned into a non-transparent political bargaining process in which the merits of the candidates seem to be of secondary importance.

576 Bugarič wrote in 2014 that “*contrary to the low prestige of regular courts, the Constitutional Court has evolved into a powerful and respected judicial body*” and that “*the capture of the state by various political and informal groups has progressed to such a dramatic extent that it is undermining the independence and credibility of almost all rule-of-law institutions in the country, with the exception of the Constitutional Court.*” This remark might not hold true now, at least in the eyes of the general public. (Bojan Bugarič, ‘A Crisis of Constitutional Democracy in Post-Communist Europe: “Lands in-between” Democracy and Authoritarianism’ (2015) 13 Int. J. Const. Law 219, 221, 230.)

577 An English commentary on the case can be found in the CJC database [here](#).

that even though under the JSA only the president of the SC is entitled to give an opinion on the candidates, an informal practice had emerged in which the divisions of the SC to which the candidate was to be appointed gave their opinions, which had always been followed by the JC in the previous 10 years even when the president of the SC supported a different candidate. Therefore, the question arises of whether it is the JC or the future co-workers (the SC judges) who select SC judges. If it is the latter, as is suggested by the empirical analysis, is this practice compliant with the constitutional role of the JC and furthermore does it contribute to creating a judicial oligarchy? Interestingly, this issue did not attract attention even in academia, despite the separate opinion of Judges Mežnar and Čeferin explicitly calling for public discussion.

Another potential problem regarding the rule of law is the composition of the State Prosecutorial Council (the SPC). Four members are elected by the state prosecutors themselves, four by the DZ on a proposal by the President of the Republic among the legal experts and one by the Minister of Justice among heads of District State Prosecutor Offices. The majority of the members are elected by politicians, which is problematic since the SPC has the leading role in almost all matters concerning the work of state prosecutors: nomination, promotion, dismissal etc.⁵⁷⁸ Nevertheless, the role of the President of Republic and the fact that the most important decisions of the SPC are subject to a 2/3 majority vote seem to safeguard the institution from capture by various interest groups. In the case of further attempts to weaken the checks and balances, it is very likely that the CC would declare them unconstitutional.⁵⁷⁹

What currently raises concerns in the field of state prosecution is a continuing unlawful refusal and delay by the government to nominate new state prosecutors, which is adversely affecting the capacity of the state prosecution services to adequately fulfil their constitutional mandate.⁵⁸⁰ Another connected issue is the Slovene government's refusal to submit a proposal for the nomination of European delegated prosecutors to the EPPO. In a recent final judgment the AC found that the government had unlawfully rejected the proposal by the SPC for two posts of European delegated prosecutors and had sent the case back to the government for a new "decision."⁵⁸¹ After months of delay, the government finally complied with its obligation under mounting pressure from the EU institutions and the general public. However, the saga might not be over yet, since in November 2021 the government proposed an amendment of the State Prosecution Service Act which would allow recalling the two prosecutors before expiry of their 5-year term.

578 The current system is a direct consequence of a clash between the State Prosecutor General and the Minister of Justice. As a result, the latter limited the powers of the former and granted additional powers to the Minister of Justice and the SPC.

579 In accordance with Decision U-I-42/12-15 of 7 February 2013, in which the CC read independence and autonomy of state prosecutors in Article 135 of the Constitution, it held that Article 135 precludes legislation which would enable unacceptable influence or pressure on state prosecutors in individual cases. This was reinforced by the CC in the recent Decision U-I-214/19-17, Up-1011/19-52 of 8 July 2021, in which it found the parliamentary inquiry into the state prosecutors with regard to concrete criminal proceedings is unconstitutional. An English commentary on these two cases can be found in the CJC database [here](#) and [here](#).

580 According to Article 34 of the State Prosecution Act (the SPA), prosecutors are nominated by the government on a proposal by the Minister of Justice. The Minister of Justice proposes the person who has been selected by the State Prosecutorial Council (Article 33 of the SPA). See also Commission, '2021 Rule of Law Report, Country Chapter for Slovenia' SWD (2021) 726 final, p. 3.

581 Judgment I U 1175/21-21 of 4 October 2021. For more, see Jure Vidmar, 'Slovenia's Legal Farce with the Nomination of European Delegated Prosecutors' (2021) *VerfBlog*, 2021/8/27 <https://verfassungsblog.de/slovenias-legal-farce/> accessed 4 February 2022.

Independence and Accountability: is Removal of Magistrates Limited to Exceptional Cases?

The AC dealt with the productivity norm requirement and the deficient application of evaluation criteria⁵⁸² in cases I U 1103/2013 of 13 May 2015 and I U 1478/2016-19 of 30 August 2017, which originate in the ‘after *Lukenda* era’ but are still very relevant today. In I U 1103/2013, the AC reviewed the JC’s interpretation of the criteria for the evaluation of judicial performance in a case of dismissal of a first instance court judge who failed to comply with the ‘productivity norm’ and the prescribed deadline for issuing judgments. The JC interpreted the criteria as cumulative conditions that had to be fulfilled in order for the judge to be considered fit for judicial function. The AC found that the JC (and the personnel councils)⁵⁸³ adopted an interpretation of the criteria for the evaluation of judicial performance that is contrary to international standards⁵⁸⁴ and the Constitution⁵⁸⁵ since it fails to take into account all the relevant aspects of judicial performance and excessively broadens the scope of dismissals, which should remain an *ultima ratio*. For example, it does not comply with the proportionality requirement applicable in cases of dismissal according to the ECtHR judgment in *Oleksandr Volkov*⁵⁸⁶ and international soft law standards. Even though the decision of the AC seems convincing, the interpretation of the JC prevailed after it was confirmed by the SC in Order X Ips 340/2017 of 18 April 2018 in a ping-pong game between the AC, the JC and the SC.⁵⁸⁷

In I U 1478/2016-19 of 30 August 2017,⁵⁸⁸ the AC was faced with a case of termination of judicial service on the basis of a negative grade. The AC held that the Constitution and the ECHR demand application of the proportionality principle in disciplinary procedures as well as in cases concerning evaluation of judicial service. This was contrary to the practice of the

582 There is a lack of guidance and common standards on the evaluation of judicial service. In practice, this results in diverging strictness of the evaluators and consequently in unequal treatment of judges. This is allegedly evidenced by a 2021 analysis of fast and extraordinary promotion of judges, in which the JC found that in the period 2015-2020 in Celje only 4.8% of judges benefited from fast or extraordinary promotion, whereas in Maribor and Ljubljana the percentage was much higher: 10.2% and 10.3%, suggesting that the evaluators from Celje were stricter (available at: http://www.sodni-svet.si/doc/Analiza_Napredovanje_Sodnikov_Končna.pdf). Another feature of the system of evaluation of judicial service is that in the past the evaluators were excessively collegial, as was admitted by Anton Panjan, the former president of the District Court of Ljubljana and current president of the Higher Court of Ljubljana (Brigita Ferlič Žgajnar, ‘Sodniki brez ocen’ 16 November 2014 <<https://old.delo.si/ozadja/sodniki-brez-ocen.html>> accessed 4 February 2022). This led to a perverse situation in which some judges were fit for judicial service for 20 years and then got a negative grade despite their performance not having drastically changed.

583 Judicial bodies competent to evaluate judicial performance.

584 For a more concrete overview of the international standards invoked, see the English analysis of the case available in the CJC database [here](#).

585 Decisions of the CC Up-132/96 of 24 October 1996 and Up-1096/06 of 13 December 2007.

586 *Oleksandr Volkov v Ukraine*, app. no. 21722/11, 9 January 2013, paras. 182-183.

587 The SC upheld the AC’s judgment I U 966/2016-17, in which the AC (with a different composition to that in Judgment I U 1103/2013) departed from its previous judgments (in this set of proceedings) on the basis of the SC’s Judgment X Ips 404/2014 of 10 December 2015. In Order X Ips 340/2017 the SC held that the principle of proportionality applies only to disciplinary proceedings, that all the sub-criteria do not need to be taken into account and that the applicant did not establish serious consequences of the impugned decision, even though she claimed that removal from her judicial post represented the most severe interference in her judicial service in the sense of Article 49 (3) of the Constitution and that there had been a violation of the right to trial within a reasonable time. The SC upheld the reasoning of the AC in judgment I U 966/2016-17, which gave a wide margin of appreciation to declare a judge ‘incapable of judicial function’ even if the judge in question for example fails to comply with only one of the criteria. For a more detailed description of this line of case law, see the analysis of judgment I U 1103/2013 available in the CJC database [here](#). In I U 1478 2016-19 of 30 August 2017 the AC explained even further the reasons underlying the position that the principle of proportionality is applicable in cases of dismissal on the basis of a negative evaluation of judicial performance. The SC disagreed once more. For a more detailed description and analysis of this case, see the CJC database [here](#).

588 For a more detailed description of case I U 1478 2016-19 of 30 August 2017, see the CJC database [here](#).

JC, according to which proportionality is applicable only to disciplinary sanctions and not to evaluation of judicial service. According to the JC, a judge can either be fit or unfit for judicial service. This practice was upheld by the Supreme Court in Judgment U 1/2018-6 of 7 May 2018. In a recent study in which the JC came up with concrete proposals to improve the normative framework concerning disciplinary liability and proceedings,⁵⁸⁹ it failed to address this contentious dichotomy. The legalistic approach described, according to which different standards apply when reviewing measures that similarly affect judicial independence, was recently confirmed in a SC judgment.⁵⁹⁰

Independence and Accountability: a Parliamentary Inquiry Targeting Judges and Prosecutors

A very recent challenge to the rule of law and the independence of judges and prosecutors was a parliamentary investigation commission established by the National Assembly (*Državni zbor*, the DZ) at the request of thirty MPs.⁵⁹¹ Its mandate was to investigate the political accountability of judges, prosecutors and other state officials for alleged abuse of their functions in the prosecution of a high-profile right-wing politician.⁵⁹² In response to the parliamentary inquiry (the PI), the JC, the State Prosecutor General, the Supreme State Prosecution Office and the Supreme Court demanded a review of the constitutionality of the Act establishing a parliamentary inquiry. The CC first issued two orders temporarily prohibiting continuation of the investigation, one on the basis of a threat to the independence of the judiciary (Article 125 of the Constitution) and the other on the basis of the separation of powers (Article 3 of the Constitution) and autonomy of state prosecutors (Article 135 of the Constitution).⁵⁹³ The final decisions of the CC were *mutatis mutandis* the same with regard to both judges and prosecutors. The CC outlined the limits of the parliamentary inquiry under the principles of separation of powers and judicial independence/autonomy of state prosecutors.⁵⁹⁴ It then

589 For example, the JC proposed a series of amendments to limit the number and scope of disciplinary offences, which are currently framed very broadly, lack precision and are consequently dubious from the perspective of legality. It also proposed to limit the possibility of termination of the judicial function only to the most serious cases. (Sodni svet, 'Izhodišča sprememb in dopolnitev zakonskih določb, ki urejajo disciplinske postopke zoper sodnike' Su DZ 20/2019, Su 62/2021, 4 March 2021 <http://www.sodni-svet.si/doc/disciplinski-organi/lzhodi%C5%A1%C4%8Da%20sprememb%20in%20dopolnitev%20zakonskih%20dolo%C4%8Db,%20ki%20urejajo%20disciplinske%20postopke%20zoper%20sodnike.pdf> accessed 4 February 2022.

590 Supreme court judgment U 3/2021-33, 7 June 2021. The SC rejected the references to ECtHR case law concerning dismissal as irrelevant with the argument that suspension (as this was the measure in the case at hand) is a temporary and not a lasting measure, even though the judge was suspended for almost a year. An English analysis of this case is available in the CJC database [here](#).

591 Article 93 of the Constitution vests 30 MPs with the power to demand a (minority) parliamentary inquiry even when the other MPs are against it.

592 See Act Ordering a Parliamentary Inquiry of 19 July 2019, http://www.pisrs.si/Pis.web/pregledPredpisa?id=AKT_1124 With respect to Franc Kangler, see *infra* U-I-225/16 of 6 December 2017.

593 Order U-I-246/19-11 of 24 October 2019 refers to judges, whereas Order U-I-214/19-17, Up-1011/19-16 of 12 November 2019 refers to state prosecutors.

594 It found that the legislator may investigate questions concerning the judicial branch but is precluded from investigating pending cases and concrete judicial proceedings, even when they are already finished. Even the ordering itself of a parliamentary inquiry that would investigate the propriety and lawfulness of concrete decisions of judges is prohibited even if the decision can no longer be legally challenged. The rationale is that such an inquiry could give the impression that judges will be investigated for decisions that do not conform with the interest of politicians. However, the CC warned that when there is a suspicion that someone who is politically accountable has unacceptably impacted a judicial decision, an inquiry may be started, but it has to focus on this person not the judge, even though in such cases the investigation will by nature touch the judge as well (para. 120). In this way the CC narrowed down otherwise very bold conclusions that could limit the constitutional competence to conduct parliamentary inquiries more than the principle of separation of powers and judicial independence require. The same logic was applied in the case concerning state prosecutors.

found an unconstitutional legal lacuna, namely a lack of legal remedies to challenge the Act establishing a parliamentary inquiry. It ordered the parliament to amend the legislation within a year. For the time being, the CC held that the CC acting on the request of the JC/SPC may review the constitutionality of acts establishing parliamentary inquiries. In fact, the CC exercised this new (temporary) competence immediately: it found that the act establishing the parliamentary inquiry at hand was contrary to the Constitution, since the inquiry aimed to investigate the correctness of concrete judicial decisions and would thus entail political control over the content of judicial decisions.⁵⁹⁵

Independence and Accountability: the Immovability of Judges

In March 2021, the JC heard an individual request for protection of judicial independence under Article 4(2) of the JSA.⁵⁹⁶ The President of the District court of Ljubljana transferred a criminal judge to Kamnik as a sanction for inappropriate conduct out of office⁵⁹⁷ and allocated her cases to other judges. The JC found that the president of the court did not have the legal basis to amend the annual work schedule in order to sanction a judge by transferring her to another town.⁵⁹⁸ As a consequence of this case, the JC decided to require a review of the constitutionality of Article 71 of the Court's Act, which was used as a legal basis for the transfer.⁵⁹⁹ A similar transfer took place in a case of a judge who harshly criticised the prime minister and members of a special scientific group on COVID-19 on Facebook, where her profile was set in such way that only some 50-60 Facebook friends could see but not share her posts. One of her Facebook friends took screenshots of her posts, which ultimately found their way to a member of the ruling party, who sent them to the media. The president of the local court changed the working schedule without any formal procedure, which led to her losing the leadership of one of the departments of the court.⁶⁰⁰

595 In the case concerning state prosecutors, the CC held that state prosecutors cannot be given political or professional instructions in concrete cases by the government or a ministry. It further opined that such pressure and influence could undermine respect for the rule of law and human rights and the right to an independent impartial fair trial. In support, it referred to its previous case law, to *Kövesi v Romania* App. no. 3595/19 (ECtHR, 5 May 2020), para. 208, in which the ECtHR held that the independence of prosecutors is a key element in the maintenance of judicial independence. The CC finally referred to the Rule of Law Report, Opinion no. 13 (2018) of the Consultative Council of European Prosecutors and Council Regulation 2017/1939 concerning the EPPO to conclude that the independence and autonomy of state prosecutors prohibit political interference in their work in concrete cases. For an English analysis of this case, see the CJC database [here](#).

596 Article 4(2) of the JSA: "A judge who considers that his independence has been affected in any way may propose to the Judicial Council to remedy the violation. If the Judicial Council finds that the proposal is justified, it may, depending on its nature, eliminate the violation or request or propose its elimination and publish its finding."

597 At the time of investigation of an apartment for alleged drug-trafficking, the judge was privately in the bar beneath the investigated apartment. The police officer reported that she started to get involved in the house search, asking who was who, accusing the police officers of what they had done wrong and referring to her job and acquaintance with fellow judges.

598 Judicial Council, Decision Su 385/2020 of 4 March 2021.

599 The JC is of the opinion that the principle of immovability of judges, which is one of the guarantees of judicial independence, precludes legislation such as Article 71 JSA, which affords unfettered discretion to the presidents of district courts to transfer judges in the district and local courts by changing the annual work schedule (see case Su 158/2021 of 29 March 2021). The CC is expected to follow the example of the CJEU in C-487/19 W. Ž., 6 October 2021 and find this legislative solution contrary to judicial independence.

600 An English commentary on the case can be found in the CJC database [here](#).

Independence: Protection of the Salaries of Judges, State Prosecutors and State Attorneys

The CC adopted high standards for the material independence of judges in Decision U-I-60/06, U-I-214/06, U-I-228/06 of 7 December 2006,⁶⁰¹ which in some respects resemble the landmark decision of the CJEU in *ASPJ*.⁶⁰² It held that a judicial salary may only be prescribed by statute (*zakon*), that judges must have a real consultative role⁶⁰³ in the process of regulation of their salaries, which is required to be comparable to the salaries in the two other branches of power. Lowering salaries is only justified in exceptional cases on the basis of statute (*zakon*). The somewhat different position of state prosecutors in comparison to judges led the CC to offer the legislator a wider margin of appreciation. Nevertheless, it held that prosecutors must be able to cooperate in the process of adopting legislation concerning their salaries and that the legislator must limit unfettered discretion of the government in the process of regulation of a part of salary for work performance. The CC seemed to have treated the state attorneys similarly to the state prosecutors.

The legislature responded to the decision of the CC by amending the legislation. However, certain aspects were ignored or not given enough attention. Consequently, a high court judge who felt that failure to comply with the decision of the CC adversely affected her legal position brought a case before the Administrative Court, which suspended the proceedings and referred the case to the CC.⁶⁰⁴ In its decision U-I-159/08, the CC confirmed and strengthened its previous decisions U-I-60/06, U-I-214/06 and U-I-228/06. The most pertinent part of its decision concerns the level of judicial salaries compared to salaries in the two other branches of power. The CC once more highlighted that the three branches should be balanced with respect to remuneration. It found that the increase by one salary bracket in the salary of only some judicial functions is insufficient to remedy the unconstitutional lack of balance found in decisions U-I-60/06, U-I-214/06 and U-I-228/06. The CC found that great differences in salaries between the lowest positions in the judiciary and in the two other branches and even in the judicial branch itself are contrary to the principle of separation of powers in Article 3(2) of the Constitution.⁶⁰⁵

The issue of salaries of judges and state prosecutors is still hot. During the first wave of the COVID-19 pandemic, the legislator reduced the salaries of all functionaries except judges, justices of the CC and mayors.⁶⁰⁶ The pay cut was temporary (until the end of the pandemic) and lasted until 31 May 2020. One of the supreme state prosecutors decided to file a demand for a review of the constitutionality of the pay cut to the Constitutional Court (the CC). The CC dismissed the demand for a review of constitutionality due to the lack of legal standing.⁶⁰⁷ In March 2021, the Slovene Judicial Association started a constitutional dispute concerning

601 An English commentary of the case can be found in the CJC database [here](#).

602 C-64/16, *Associação Sindical dos Juizes Portugueses*, 27 February 2018.

603 The DZ is not required to follow proposals by judges, but has to reason its rejection.

604 Administrative Court, Order U 1447/2008, by which the proceedings were suspended, is not publicly available. Only the judgment, which was adopted after the decision of the CC, the Administrative Court, Judgment U 1447/2008 of 2 December 2009 is published.

605 An English commentary on the case can be found in the CJC database [here](#).

606 The government was not excluded but raised its salaries prior to the adoption of the legislation concerned.

607 Decision U-I-94/20 of 14 May 2020.

judicial salaries which are still not compliant with the above-mentioned decisions.⁶⁰⁸ The case is pending at the moment. In October 2021, the JC also required a review of constitutionality by the CC for the same reason.⁶⁰⁹

Trust and accountability: Limitations of Freedom of Expression to Protect the Authority of the Judiciary

Non-criminal pecuniary sanctions for insulting statements: an (in)adequate tool to protect the authority of the court

Until recently, the Slovene judiciary and other legal professionals more or less seemed to agree that in cases of imposition of pecuniary sanctions for insulting remarks directed against a judge by an attorney freedom of expression would not be violated if the attorney could express criticism in a more appropriate way without hampering the right to defence of his/her client. However, the ECtHR found a violation of Article 10 in *Čeferin*,⁶¹⁰ a case concerning an attorney who clearly departed from the above described 'norm'. The Slovene judiciary was faced with a different reality (the ECtHR standards) that demanded a paradigm shift, which would favour freedom of expression to the detriment of protection of the authority of the judiciary.

The CC welcomed the European standards in Up-455/15 of 24 January 2019,⁶¹¹ in which it heard a complaint by an attorney who was fined for writing an offensive appeal. The fine was confirmed by the SC, which found that such wording is not an allowed way of communication, especially in court. Hence it is not protected by freedom of expression and there is no need to weigh the competing interest under the proportionality test. The CC disagreed. It extensively relied on ECtHR jurisprudence. It found that under Article 10 of the ECHR sharp criticism of a judge's work is protected if it is not personally offensive and does not constitute a destructive and fundamentally unjustified attack on the judge.⁶¹² The CC concluded that imposing even a mild fine to protect the authority of the courts should only be allowed in exceptional circumstances due to the chilling effect this could have on the freedom of expression of attorneys and the right to fair trial in Article 6 ECHR.⁶¹³ Criticism, which is expressed in a courtroom or in a judicial remedy and thus entails internal communication between the attorney and the court was declared to enjoy higher protection than criticism expressed, for instance, in the media (in the public eye). Not only the content, but also the context in which statements were made and their form are important.⁶¹⁴ Turning to the facts of the case, the CC highlighted that punishing

608 On the one hand, such attempts are a legitimate route for members of the judiciary and state prosecutors. However, they support a contentious allegation that the judicial association is more a trade union fighting for the benefits of the judiciary than an organisation working to enhance judicial performance and independence.

609 Judicial Council, Press release of 13 October 2021 <<http://www.sodni-svet.si/#/ssvet/objaveMenu10>> accessed 4 February 2022.

610 *Čeferin v Slovenia* App. no. 40975/08 (ECtHR, 16 January 2018). An English commentary on the case can be found in the CJC database [here](#).

611 An English commentary on the case can be found in the CJC database [here](#).

612 The CC based its finding on *July and SARL Libération v France*, App. no. 20893/03 (ECtHR, 14 February 2008), para. 74 and *Morice v France*, App. no. 29369/10 (ECtHR, 23 April 2015), para. 131.

613 The CC invoked *Nikula v Finland*, App. no. 31611/96 (ECtHR 21 March 2002), paras. 46, 52, 54-55 and *Kyprianou v Cyprus*, App. no. 73797/01 (ECtHR, 15 December 2005), paras. 174-175.

614 *Čeferin v Slovenia*, App. no. 40975/08 (ECtHR, 16 January 2018), paras. 54-55 and 62; *Radobuljac v Croatia*, App. no. 51000/11 (ECtHR 28 June 2016), paras. 62 and 66.

an attorney for contempt of court presupposes an assessment by a court of the necessity of imposing a fine in a democratic society in order to protect the authority and impartiality of the judiciary. A subjective assessment that the remarks of an attorney are insulting and that he or she could have expressed the criticism in an appeal in a more appropriate manner therefore does not suffice. As a result, the CC abrogated the order of the SC and remanded the case for new adjudication.

Whether the new approach is embraced by the regular courts is still to be seen. A first impression is that it was accepted with quite some unease. For example, in Order II Up 1/2019/9 of 22 January 2020,⁶¹⁵ the SC seems to follow the pre-*Čeferin* era approach. In this case, a notary who acted as a legal representative of the claimant in administrative dispute proceedings wrote an insulting extraordinary appeal to the SC.⁶¹⁶ The SC fined him for contempt of court. In the reasoning, it first extensively copy-pasted the ECtHR's general principles from Up-455/15. However, the SC held that the position of the ECtHR in *Radobuljac v Croatia*, paras. 62 and 66, where the ECtHR held that criticism which is expressed in a courtroom or in a judicial remedy and thus entails internal communication between the attorney and the court enjoys higher protection, could not be taken into account. The SC continued:

“Quite the opposite. The statements in the extraordinary appeal (or other written application) must be well thought out, aimed at criticising the contested decision and not intended for personal reckoning with the author of the contested act. It may be different at the public hearing, where a party or his or her attorney may be challenged by statements of the opposing party, witnesses, experts or judges, and therefore react emotionally and state something that may be defined as an insult. Therefore, if the legal representative insults the court or judges in his written submission, this only indicates that such allegations are deliberate and, as in the present case, their sole purpose is embarrassing the judges and the panel.”

The SC concluded that a notary, a person of public trust and public authority, should be especially aware of these limitations.

This position of the SC arguably goes against the ECtHR's and the CC's logic of balancing the harm to public confidence and authority of the courts against freedom of expression. The SC's approach seems to emphasise (the wrongfulness of) the statements themselves, whereas the ECtHR and the CC concentrate on the impact these statements could have on public confidence and authority of the courts. Such impact was obviously minimal since the insult appeared in a written legal remedy, which is not publicly available, and could only be seen by the parties and the judges. This begs the question of whether the SC was in fact protecting 'judicial pride' rather than public confidence and authority of the courts. One could of course accept that such excesses of parties in written submissions cannot be tolerated and have to be regarded as destructive and fundamentally unjustified attacks on the judiciary.

615 For more, see the English commentary on case Up-455/15 of 24 January 2019, which also includes Order II Up 1/2019/9 of 22 January 2020. It is available in the CJC database [here](#).

616 He accused the administrative court of “mocking itself” and of “judging in the manner of mockery” “that the chamber imagines that it can distort the facts in this case” and that the judges of the chamber “got a slap on the wrist (sl. “dobil po prstih”) from the real estate lobby and changed their minds under pressure.” He described the first-instance verdict as “professionally incomplete, flawed, insulting, ignorant” and then asked: “Is this really ordered by lobbies who manage to introduce corruption into the legal order by simply enacting it?” Moreover, he criticised the decision of the SC as showing a “low professional level” and stated that “paragraph 12 of its reasoning is the real mockery in the face of law.”

Other kinds of sanctions for insulting statements

The European standards of freedom of expression seem to be inadequately internalised in other settings of collision with the protection of judicial authority and public confidence in the judiciary. In *Cimperšek*,⁶¹⁷ a court expert candidate, complained of the work of the Ministry of Justice, which acted slowly and unprofessionally in the process of nominating new court experts. He sent offensive emails to the ministry.⁶¹⁸ The Ministry replied that he is not fit to become a court expert under Article 87 of the Courts Act⁶¹⁹ due to his emails, the content of his blog⁶²⁰ and the fact that he had forwarded the insulting emails to other candidates. The ECtHR found that the concrete behaviour of a candidate for the title of court expert can be such as to give rise to reasonable doubts as to whether the candidate will perform the work of an expert impartially and diligently. However, it held that neither the Minister of Justice nor the AC gave a detailed statement of reasons why the applicant's exercise of his right to free expression was offensive and as such incompatible with the work of a court expert, and added that no assessment of whether a fair balance was struck between the freedom of expression and protection of authority of the court had been carried out. Hence, Slovenia was found to have violated Article 10 ECHR.

In a case concerning a notorious judge labelled the “enfant terrible of the Slovene judiciary” by the media, the deputy president suspended him from his judicial function due to statements he made in the media and during the public pronouncement of one of his judgments.⁶²¹ Even though one can only agree with the decision of the deputy president, its reasoning was inadequate. It turned a blind eye to the relevant questions of a constitutional nature: judicial independence, freedom of expression of judges, right to a fair trial etc. Therefore, it is highly problematic from the point of view of *Cimperšek v Slovenia*, paras. 66-69, in which the ECtHR found a violation of Article 10 precisely because the national authorities failed to balance competing interests (namely protection of the authority of the court and the right to freedom of expression) and explain why interference with Article 10 was necessary in a democratic

617 *Cimperšek v Slovenia*, App. no. 58512/16 (ECtHR, 30 June 2020). An English commentary on the case is available in the CJC database [here](#).

618 The applicant sent e-mails in which he complained of delays in the proceedings and asked to take the relevant oath (taken by court experts) before the summer holidays. The applicant's taking of the oath was first scheduled for 4 July 2014, but on 30 June 2014 it was rescheduled for 16 July 2014. Subsequently, the applicant sent an email to the Ministry in which he wrote “This is making a fool out of people! This is not how it works in a serious country!” The applicant also sent an email to other candidates who were hoping to become court experts, appraisers and interpreters and were waiting to take the oath, saying “I phoned the State Secretary's Office at the Ministry of Justice on 11 June, but nothing can happen because B.A. [the name of an employee] is on leave, [so] they said in the Cabinet, but we are not important. I suggest that the rest of you call [that office] and seriously complain; they have completely lost it ...”

619 Article 87(3) of the Courts Act provides “Anyone who has behaved or behaves in such a manner where it is possible to justifiably conclude, on the basis of his or her behaviour, that he or she will not perform the work of an expert honestly and with due diligence, shall not be considered to have the required personal qualities to carry out the work of an expert.” Article 16(2) of Court Experts, Certified Appraisers and Court Interpreters Act.

620 The applicant wrote a personal blog named ‘Politics, the kitchen and chicks.’ The Minister noted, inter alia, that “[the applicant] not only writes critical social commentary columns but also writes offensively about State bodies, visible representatives of political and social life, and certain other persons.”

621 *Novič* case (see fn 16). The case concerned a cold-blooded murder on the streets of Ljubljana of a director of the Institute for Chemistry and attracted significant media attention even before it was assigned to the judge in question. The judge stated that the accused had enjoyed a fair trial only because he was willing to ruin his judicial career and explained that he was pressured to condemn him from the moment the case was assigned to him and that these pressures were consequences of decisions coming from the top of the judiciary (the Supreme Court), the headquarters of the state prosecution service and the judicial council. His statements enjoyed large media coverage and a debate on the Slovene judiciary erupted. In the following months, he gave interviews, appeared on TV news etc. and claimed that the “deep state” had captured and instrumentalised the courts for the benefit of elites.

society. The reasoning was improved by the SC, yet the question remains of whether the SC missed an opportunity to confirm the existing European and international standards due to the fact that the statements by the judge in question so clearly overstepped the boundaries of judicial speech.⁶²²

In its decision Up-1128/12-17, the CC heard a constitutional complaint lodged by a nationalist MP against decisions of regular courts in which he was convicted for insulting a state prosecutor on a TV show.⁶²³ The case confirmed the judiciary's lack of affinity with protection of freedom of expression, since the regular courts based their conviction on two contentious assumptions. The first and the second instance courts held that the applicant's criticism was not protected since he lacked sufficient professional qualifications to be able to evaluate the work of the state prosecutor in the given situation. The CC rejected this reasoning by holding that criticism is not reserved solely for lawyers but can be expressed by the lay public. The SC's reasoning was more convincing: it found that the applicant bended and incorrectly summarised the criticised statements of the state prosecutor. As a result, his criticism was not *bona fide* irrespective of the fact that the applicant was a lay person and thus could not be protected since criticism founded on false facts cannot be in the public interest. The CC disagreed and held that despite the fact that the state prosecutor's statements were inadequately summarised, which can be attributed to the lack of legal education of the applicant, his remarks cannot be regarded as not being in the public interest, especially since they had sufficient factual basis.⁶²⁴

Trust: Access to Case Files and First Instance Court Decisions

Decisions rendered by first instance courts are not published in Slovenia except in the field of administrative law. Since 2014, there has been an ongoing project of the Ministry of Justice that aims to establish an artificial-intelligence-run programme for anonymisation of first instance judgments that would enable their long awaited publication. However, it has been stalled in the last few years due to personal data protection considerations.⁶²⁵

Nevertheless, members of the public who are interested could be granted access to first instance decisions under the Public Information Access Act (PIAA), which transposes Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information into the Slovene legal system. Under Article 5 and 6 PIAA, public sector bodies have to provide information of public interest, except in exceptional cases.

622 An English commentary on the case is available in the CJC database [here](#).

623 The courts imposed a pecuniary penalty of 3,060 EUR. The applicant's statements were a reaction to a criminal case against his friend, where in his final words the state prosecutor proposed that the defendant's personality, which manifests in the defendant attacking everybody who thinks differently to him, should be regarded as an aggravating circumstance. The applicant falsely stated that the state prosecutor demanded payment of 5,000,000 SIT for insulting everybody who thinks differently, since it was clear from the record of the hearing that the state prosecutor demanded the payment of 5,000,000 SIT as a side-penalty for the alleged tax evasion. The applicant went on to say that he would not let the prosecutor look after three sheep, since he would be afraid that he would lose two, and that he does not know how this man finished law school, but it seems that nowadays everybody can finish law school and then gets employed at a court or in the state prosecution and stays there "cemented" until his death and nobody can move him despite all foolishness he does.

624 The CC found that a sufficient factual basis existed since in his final words the state prosecutor proposed that the defendant's personality, which manifests in the defendant attacking everybody who thinks differently to him, should be regarded as an aggravating circumstance.

625 An informal explanation was that Slovenia is so small that even if the programme could anonymise all personal data, one could easily found out who the persons involved in the case were.

First instance decisions were considered information of public interest and could be accessed by everybody if the access did not hinder a criminal procedure.⁶²⁶

This changed in May 2020, when the SC issued its judgment in X Ips 4/2020 of 27 May 2020. The SC held that provisions in procedural statutes⁶²⁷ regulating access to casefiles are to be considered *leges speciales* in relation to the PIAA. As a result, only parties to the procedure and others that are able to show legal interest can now access case-file documents. This is understandable in pending proceedings, especially with regard to access to state prosecutors' files. Yet the bold decision of the SC also covered (final) first instance decisions. As a result, access to first instance decisions is *de facto* impossible for interested members of the public. Due to widespread criticism of the SC's approach, the legislator reacted with an amendment of the Criminal Procedure Act to bypass the SC in the field of criminal law.⁶²⁸ How this amendment will be interpreted in practice and whether a similar solution will be adopted in other areas of the law is still to be seen.⁶²⁹

Trust and the Rule of Law: Mutual trust, the Principle of Legality, Prevention of Arbitrariness and Access to Justice in the Field of Asylum Law

Arguably, Slovenia seems the least prone to ensure the rule of law in cases concerning foreigners.⁶³⁰ Since 2018, the Ministry of Justice and the police have been involved in unlawful pushbacks of migrants to Croatian territory. A case concerning a migrant from Cameroon found its way to the Administrative Court. The Ministry relied on a 2006 bilateral agreement between the governments of Slovenia and Croatia that allowed returns of migrants through a fast-track procedure. The court found that this agreement should have been interpreted and applied in accordance with the demands of the Common European Asylum System and the CFREU. It found that the Slovene police violated the applicant's right to asylum (Art. 18 CFREU), the prohibition of collective expulsions (Art. 19(1) CFREU) and the principle of non-refoulement (Art. 19(2) CFREU). Regarding the latter, the AC found that the Slovene authorities could not have been unaware of the Croatian police's brutality towards migrants and the untenable conditions in the Bosnian refugee camps to which the migrants were expelled by the Croatian authorities. Hence, Slovenia should have verified whether a risk of degrading or inhuman treatment existed individually for the applicant before handing him over to the Croatian police, but failed to do so. The Ministry of the Interior unsuccessfully appealed to the SC, which confirmed the judgment of the AC.⁶³¹

626 However, the jurisprudence was inconsistent and the issue of the relation between the PIAA and procedural statutes governing access to case files was unresolved.

627 Contentious Civil Procedure Act, Criminal Procedure Act, Administrative Dispute Act, General Administrative Procedure Act, Non-Contentious Civil Procedure Act etc.

628 Amendment CPA-O includes Article 128(12), which provides "Irrespective of provisions of this Act, everybody may demand access to information of public interest in concrete criminal cases."

629 For a detailed analysis of this issue, see Domen Vajkard Kilar Pahernik et al., 'Analiza dostopa do sodb in dokumentov v sodnih spisih po odločbi Vrhovnega sodišča X IPS 4/2020' (Transparency International Slovenia, Pravna fakulteta, Založba pravne fakultete 2021) <https://www.transparency.si/wp-content/uploads/2021/11/analiza-dostopa-do-sodb-in-dokumentov-v-sodnih-spisih.pdf> accessed 4 February 2022.

630 In *Kurić and Others v Slovenia*, App. no. 26828/06 (ECtHR, 26 June 2012), the ECtHR found that Slovenia violated Articles 8, 13 and 14 of the ECHR. A group of citizens of former Yugoslav republics residing in Slovenia called 'the erased' were erased from the register of residents without the necessary legal basis.

631 An English commentary on the case is available in the CJC database [here](#).

Similar considerations were at stake in Decision U-I-59/17-27 of 18 September 2019, in which the CC reviewed the constitutionality of an amendment of the Aliens Act which allowed the legislator (with a normal majority of all MPs) to declare a special regime lasting up to 6 months in a situation where due to an influx of migrants, public order and public safety could be threatened and could result in an impediment to institutions of the state and its vital functions. The special regime meant that the police could turn down asylum applicants that entered Slovene territory from the neighbouring MS without individual examination of their cases and only after an identity check unless (1) the neighbouring MS's asylum system suffered from systemic deficiencies that could lead to torture, inhumane or degrading treatment, (2) the health condition of the asylum seeker or a family member prevented return to the MS or (3) the police identified the applicant as an unaccompanied minor based on his/her appearance, behaviour or other circumstances. The CC found the challenged provisions to be contrary to Article 18 of the Constitution (Article 19(2) of the CFREU) as they do not guarantee access to a fair and effective procedure which would enable the individual to seek material examination of a risk of torture, inhumane or degrading treatment on return in his/her case.⁶³² In the aftermath of the case, the Aliens Act was amended, but according to NGOs and legal scholars the amendment brought only cosmetic corrections, while the problematic aspects of it remained intact.

Trust: are Rule of Law Challenges Affecting Judicial Cooperation under the EAW Properly Considered?

In 2018, just a few days before the CJEU issued its famous C-216/18 PPU LM judgment, the Higher Court of Maribor heard an appeal against the decision of the first instance court in which the defendant accused of drug-trafficking contested his return under a European Arrest Warrant issued by Poland. He relied on the then still pending LM case and the fact that the EC triggered Article 7 of the TEU against Poland due to serious violations of the rule of law in that MS. The court agreed with the first instance court that the problems the Polish judiciary was facing could not substantiate the lack of confidence in the material independence of the Polish courts in concrete cases such as the one at hand, in which the defendant was accused of drug-trafficking. It also concluded that the LM case could not impact the concrete decision and rejected the appeal.⁶³³ The decision in the case was probably correct, but was insufficiently and incoherently reasoned, especially as the judicial authorities failed to take due account of the pending LM case, which was very similar to the case at hand. Analysis of other cases concerning transferral to Hungary and Poland on the basis of EAWs showed that lawyers did not invoke the argument of systemic deficiencies undermining judicial independence in these MS. Reasons for this could be manifold, ranging from poor payment for these proceedings and lack of time to prepare adequate defence to lack of knowledge on this very specific field and slim chances of persuading the courts.⁶³⁴

632 An English commentary on the case is available in the CJC database [here](#).

633 For a more detailed description of this case, see the CJC database [here](#).

634 This pattern was confirmed in VSK Order I Kp 30101/2020, of 25 September 2020.

Conclusion: a general assessment of the state of rule of law, trust, independence, impartiality and accountability in Slovenia and future developments

As the long-term aim of this national report is to enhance protection of the rule of law and human rights and to strengthen judicial independence and impartiality, trust and accountability of the legal professions, the report mainly focuses on shortcomings of the Slovene legal system. Readers could therefore get the impression that the Slovene judicial system is seriously deficient and inconsistent with EU and ECtHR standards. This impression would be false in spite of the problems Slovenia is facing in the fields covered by this report. Given the lack of a democratic tradition resulting in weak internalisation of the values of rule of law, human rights and pluralism, it would be illusory to expect Slovenia to be perfect. What could and should be expected, however, of the Slovenian justice system is to be able to more or less effectively address the problems it faces and for it to improve in the long term. Even for a very critical person, a fair assessment should in my opinion be that the Slovene legal system is working relatively well and improving, but not unlike other legal systems it has its problems.

The CC recently confirmed its determination to defend the independence of judges and prosecutors in the parliamentary inquiry cases. After initially being lenient in monitoring the government's COVID-19 measures due to scientific uncertainties connected to the virus, the CC has since the first wave played a cardinal role in upholding human rights and curtailing the government's bold solutions despite the enormous backlog. Recent decisions by the Supreme Court show that the SC is willing to shrink the discretion of the JC at least in the sense that it has demanded that its decisions be better reasoned.⁶³⁵ The JC has started to concretely defend the internal independence of judges⁶³⁶ and to be increasingly susceptible to EU and ECtHR standards. This is also true for regular courts.⁶³⁷ Discussion at the level of the general and expert public on the issue of nomination of SC justices in parliament and the problematic practice of the president of the Republic with regard to nominating CC justices is strong and the solution might not be as far ahead as one might think.⁶³⁸ The Ombudsman, civil society and the courts played a very important role in containing illegal practices of the Slovene police on the border.⁶³⁹ An encouraging trend, in addition to shortening the length of judicial proceedings, is that confidence in the judiciary is slowly increasing despite intensification of discrediting of the judiciary on the part of the media and on social networks. The current government's attitude to the rule of law is worrisome. However, this seems to have contributed to a rise in awareness of the importance of the rule of law within and outside the judiciary. This awareness has the potential to stimulate positive developments in the judiciary and in society at large.

635 Supreme Court, Judgment U 1/2021, 17 February 2021; Judgment U 6/2021-8 of 25 May 2021; Judgment U 8/2021-7, 23 August 2021.

636 See *Independence and Accountability: Immovability of Judges*.

637 An example of how the regular courts (and the CC) have conformed their practice with ECtHR jurisprudence is the field of freedom of expression and protection of the authority of the judiciary. See *Non-criminal pecuniary sanctions for insulting statements: an (in)adequate tool to protect the authority of the court*.

638 The current working version of the draft amendments of the JSA and the CA provides that Supreme court judges would no longer be nominated by the DZ but by the JC alone.

639 See *Trust, rule of law: Mutual trust, the principle of legality, the prevention of arbitrariness and access to justice in the field of Asylum law*.

NATIONAL REPORT: SPAIN

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I. Short Summary

This work analyses the Spanish socio-political context and the broader framework of challenges to the rule of law, and using cases collected in the TRIAL project deals with relevant issues related to the rule of law. In the context of European jurisprudence and the creation of a common European space of justice, the work deals with cases related to access to a lawyer in the pre-trial phase in absentia cases, the independence of judges in relation to austerity measures and salary reductions, the tenure and powers of administrative bodies and their capacity to send a preliminary reference, impartiality during trials and the application of exceptional law during the COVID-19 pandemic. In addition, challenges to the rule of law in Spain are analysed using cases related to the country's specific social and political problems, in particular terrorism, the Catalan secessionist crisis and deadlock in the General Council of the Judiciary, which have affected the independence and impartiality of Spanish courts and the principle of legality.

II. Introduction: the Socio-Political Context and the Broader Framework of Challenges to the Rule of Law in Spain

The Spanish Constitution of 1978 (SC) was drafted in the transition period to democracy in the aftermath of the Franco dictatorship. General Francisco Franco died on 20 November 1975, putting an end to a long dictatorship established after the Civil War in 1939.⁶⁴⁰ The Constitution was the outcome of a consensus among the political parties represented in Parliament after the June 1977 election. The drafters were conscious of a need to reach a broad agreement on the basic structural principles of the newly established political order.⁶⁴¹ The main aims were to design a stable democratic system and to ensure the protection of individuals' fundamental rights. On the whole, the key elements in the rationale for the Constitution include (i) a system of representative democracy with separation of powers and the rule of law, (ii) protection of fundamental rights and (iii) territorial decentralisation of political powers in Spain (a quasi-federal model, i.e. *Estado de las autonomías*).

The constitutional text therefore adhered to predominant post-war European constitutionalism and the rule of law became paramount to ensure a limited system of government.⁶⁴² The rule of law is a consubstantial part of the definition of the form of the Spanish state (Article 1.1 SC) and a constitutional principle in the entire Spanish legal system (Articles 9 SC). It adopts the form of specific constitutional mandates binding the judiciary (Article 117.1 SC) and public administration (Article 103.1 SC). In this context, the rule of law permeates the whole institutional framework and decision-making processes and from it derive the principles of independence and impartiality of the Spanish judiciary (Articles 117.1 SC and Article 24 SC).

From the very beginning, this new constitutional system was open to external sources of inspiration and experiences. The SC and the constitutional debates in the transition period to democracy were strongly influenced by German and Italian constitutionalism. Moreover, the Europeanisation of the SC is a well-known phenomenon. On the one hand, the constitutional text itself mandates that fundamental rights must be interpreted in accordance with the human rights treaties ratified by Spain (Article 10.2 SC). Under this mandate the European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights (ECtHR) have been decisive in the interpretation and application of the Spanish constitutional bill of

⁶⁴⁰ Victor Ferreres Comella, *The Constitution of Spain. A Contextual Analysis* (Hart Publishing, 2013) 12-24.

⁶⁴¹ *Ibid.* at 16-23.

⁶⁴² *Ibid.* at 26-29.

rights.⁶⁴³ On the other hand, despite the fact that there is no specific European integration clause in the constitutional text, Article 93 SC allows for the ordinary application of the principles of primacy and direct effect of EU law. Spanish courts, especially lower courts, have relied on the preliminary reference procedure and the Court of Justice of the European Union (CJEU) to solve conflicts between national law and EU law.⁶⁴⁴ The Spanish Constitutional Court (SCC) has been more reluctant to engage in judicial dialogue with the CJEU. It has so far sent only one preliminary reference to the CJEU – the *Melloni* case⁶⁴⁵ – and it does not consider EU law to be a parameter in deciding the compatibility of ordinary legislation and the Constitution.⁶⁴⁶ In addition, the SCC has established that, although the principles of primacy and direct effect of EU law are compatible with Spanish constitutional principles, in some exceptional cases the Spanish Constitution prevails.⁶⁴⁷ In this regard, following the lead of the German Federal Constitutional Court, the SCC established a counter-limits doctrine. According to this doctrine, EU law cannot contravene state sovereignty, the basic constitutional structure or the system of values and fundamental principles enshrined in the Constitution, in particular fundamental rights.⁶⁴⁸ However, the vagueness of the doctrine and the fact that it has never so far been applied in practice limits its practical effects and indicates that the doctrine is seen as a measure for a worst case scenario.

The consensus reached in the transition period was for a long time considered the main value to preserve after the enactment of the Constitution and its enforcement.⁶⁴⁹ The rigidity of the constitutional text and the consensual approach makes amending the Constitution difficult.⁶⁵⁰ Accordingly, the text has only been amended twice, introducing EU-related requirements.⁶⁵¹ The same consensus which has prevented formal amendment of the Constitution also left the constitutional text open-ended with relevant matters agreed on in principle but not in detail. In this context, Spanish courts have been paramount, embracing a living law theory and making

643 Alejandro Saiz Arnaiz, *La apertura constitucional al derecho internacional y europeo de los derechos humanos. El artículo 10.2 de la Constitución española* (Consejo General del Poder Judicial, 1999) 134-71.

644 Fernando Gómez Pomar and Karolina Lyczkowska, 'Spanish Courts, the Court of Justice of the European Union, and Consumer Law' (2014) *Indret, Revista para el Análisis del Derecho* 1, 7-10.

645 Case C-399/11 *Stefano Melloni v Ministerio Fiscal*, ECLI:EU:C:2013:107.

646 Judgment SCC n° 232/2015, of 5 November, ECLI:ES:TC:2015:232, para. 4.

647 Declaration SCC n° 1/2004, of 13 December, ECLI:ES:TC:2004:1D.

648 *Ibid.* at para. 4.

649 Víctor Ferreres Comella, 'Una defensa de la rigidez constitucional' (2000) 23 *Cuadernos de Filosofía del Derecho – DOXA* 32, 32.

650 There are two procedures depending on the constitutional matter to be amended. A qualified procedure (Article 168 SC) is needed to amend the Preliminary Part (general principles of the constitutional system), some content in Part I (fundamental rights enshrined in Division 1), Part II (matters of the Crown) and for a total revision of the Constitution. In these cases, a two-thirds majority of both parliamentary chambers (Congress and Senate) is required to initiate the amendment process. A general election then follows and a two-thirds majority of both chambers must also support the final text. The procedure is completed with a compulsory referendum. A less demanding procedure (Article 167 SC) should be followed for all other matters. This entails a qualified three-fifths majority in both parliamentary chambers (in the case of disagreement between the chambers, an absolute majority in the Senate and a two-thirds majority in the Congress are needed), no general election is required and the referendum is not compulsory.

651 In 1992, Article 13.2 SC was revised to ratify the Maastricht Treaty and grant EU citizens the right to stand as candidates in municipal elections. In 2011, Article 135 SC was amended in the context of the euro crisis to introduce, inter alia, a 'balanced budget rule' as a requirement in the Treaty on Stability, Coordination and Governance.

possible the evolution of the constitutional system over time.⁶⁵² First, especially in the 1980s, Spanish courts developed and consolidated the fundamental principles enshrined in the SC – representative democracy, limited government and political decentralisation.⁶⁵³ Second, courts were protagonists in the fight against the most important challenge to the Spanish constitutional system until the 2000s: national terrorism (Euskadi Ta Askatasuna, ETA).⁶⁵⁴

This historical central role of the Spanish courts has been tested in the three combined crises that have put the Spanish constitutional system under unprecedented stress in the 2000s. In 2008, the euro crisis led to a severe economic and social crisis in Spain. From a political perspective, this crisis signified destruction of the bipartisan political system.⁶⁵⁵ From an institutional perspective, the welfare state was severely affected by the austerity programme⁶⁵⁶ and the political autonomy of the autonomous communities was diminished.⁶⁵⁷ During the economic crisis, the Spanish judiciary had a secondary role and took a deferential stand regarding political powers.⁶⁵⁸ This changed in the other two crises with the Spanish courts and the rule of law becoming protagonists. First, the Catalan secessionist crisis represented a stress test for the Spanish courts. The strategy of the contenders led to a judicialisation of the crisis, with the SCC and the Spanish courts being forced to intervene in multiple spheres of the crisis.⁶⁵⁹ Therefore, how the Spanish courts managed the constitutional crisis was at the centre of a debate in which concerns about the rule of law – particularly judicial independence and impartiality – and the protection of fundamental rights were constant.⁶⁶⁰ Moreover, from the political perspective, during the Catalan secessionist crisis the extreme right-wing party Vox burst into the political arena and since then it has been a relevant actor.⁶⁶¹ The third crisis, the COVID-19 pandemic, has again put Spanish courts in the spotlight and it has also raised rule of law concerns, especially in relation to the – prolific and rapidly changing – restrictive measures adopted and the principles of legal certainty and predictability.⁶⁶² Unlike in the euro

652 Víctor Ferreres Comella, *The Constitution of Spain*, 58-59.

653 *Ibid.* at 227-232.

654 Gemma Ubasart González, 'ETA and state action: the development of Spanish antiterrorism' (2019) *Crime, Law and Social Change* 72, 579-581.

655 Óscar Sánchez Muñoz, 'El fin (momentáneo) del bipartidismo en España: análisis de los resultados electorales de 2015 y 2016' (2017) *Revista Española de Derecho Constitucional*, 109, 237-260.

656 Maribel González Pascual, 'Austerity measures and welfare rights: the Spanish constitutional system under stress,' (2014) *EJSL* 1-2, 116-127.

657 Joan Solanes Mullor, 'Unión económica y monetaria y Comunidades Autónomas: La transformación del principio de autonomía financiera' (2021) *Teoría y Realidad Constitucional* 47, 394-400.

658 Joan Solanes Mullor and Aida Torres Pérez, 'The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance' in Anneli Albi and Samo Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (Springer, 2019), 564-567 and 581-583.

659 Josu de Miguel Bárcena, 'El proceso soberanista ante el Tribunal Constitucional,' (2018) *Revista Española de Derecho Constitucional*, 113, 133-166.

660 Joan Solanes Mullor, 'The Catalan Secessionists' Challenge: Reconciling Their Quest for Independence and Constitutionalism' in Martin Belov (ed.), *Territorial Politics and Secession. Constitutional and International Law Dimensions* (Palgrave Macmillan, 2021), 219-227.

661 The political party Vox gained national momentum in the two general elections in 2019. In April it obtained 24 deputies in the Congress and in November 54. See Alfonso A. López and Gabriel Colomé, 'La extrema derecha hoy: de Europa a España' in Erika Jaráiz Gullías, Ángel Cazorla Martín and María Pereira López (eds.), *El auge de la extrema derecha en España* (Tirant lo Blanch, 2021).

662 Álvaro Perea González, 'Apología de la forma: COVID-19 y seguridad jurídica' (2020) *Diario La Ley* 9657.

crisis, Spanish courts have been active in controlling public action.⁶⁶³ The SCC declared unconstitutional some measures adopted under the constitutional exceptional clause – i.e. the State of Alarm⁶⁶⁴ – and Spanish courts have been active in applying proportionality tests and in monitoring the specific measures adopted by public governments to fight the pandemic.⁶⁶⁵

III. Legal Issues Affecting Independence, Impartiality, Accountability, Trust and the Rule of Law

1. Access to a lawyer in the pre-trial phase in absentia cases

Since the 1980s the SCC has interpreted the right to a lawyer in a way that prohibits representation and defence by a lawyer in the pre-trial phase in the case of non-appearance of the suspect.⁶⁶⁶ In the pre-trial phase (or investigation phase) it is possible to conduct an investigation also in the case of absentia.⁶⁶⁷ Only in the case of personal appearance, either voluntarily or because of an arrest, can the suspect access a lawyer in the pre-trial phase. Therefore, in the case of absentia, the lawyer cannot be present in the investigation or lodge appeals during the pre-trial phase. The SCC has established that this is a correct balance between integrity of the criminal judicial investigation and the rights of the suspect. That is, the SCC considers that in the investigation phase the presence of the suspect is determinant for the success of the judicial investigation and therefore the SC requires the suspect to be present in this phase to trigger the participation of a lawyer.⁶⁶⁸ Use of a lawyer without the presence of the suspect incorrectly tips the balance in favour of the suspect. For the SCC, this is the correct interpretation of Article 118 of the Code of Criminal Procedure – which remains silent on the specific case of the right to access a lawyer in absentia proceedings – in connection with the due process clause in the Spanish Constitution (Article 24 SC).

Against this backdrop, the *VW* case emerges as a relevant case in Spain. *VW* was accused by the police of driving without a license and forgery of documents. In an order of 11 June 2018 the Court of Preliminary Investigation n° 4 of Badalona decided to hear *VW* before the criminal proceedings were brought. After several attempts to summon *VW* were unsuccessful, a national warrant was issued for his arrest. *VW*'s lawyer stated he would appear in the proceedings on behalf of *VW*. However, the Court of Preliminary Investigation stayed the proceedings and decided to send a preliminary reference to the CJEU.⁶⁶⁹ The Court asked whether the interpretation by the SCC of Article 24 SC and Article 118 of the Code of Criminal Procedure – which denied access to a lawyer in pre-trial proceedings in absentia – was compatible with

663 Joan Solanes Mullor, 'Protecting Political Rights during the Covid-19 Pandemic: The Emergence of Strict Scrutiny in Spain' in Kostas Crysoyinos and Anna Tsiftoglou (eds.), *Democracy after Covid. Challenges in Europe and Beyond* (Springer, 2022).

664 Judgment of the SCC n° 148/2021 of 14 July, ECLI:ES:TC:2021:148; Judgment of the SCC n° 183/2021 of 27 October, ECLI:ES:TC:2021:183.

665 Joan Solanes Mullor, 'Protecting Political Rights during the Covid-19 Pandemic.'

666 Judgment of the SCC n° 87/1984 of 27 July, ECLI:ES:TC:1984:87; Judgment of the SCC n° 149/1986 of 26 November, ECLI:ES:TC:1986:149.

667 Article 840 Code of Criminal Procedure.

668 Judgment SCC n° 87/1984 of 27 July, ECLI:ES:TC:1984:87, para. 5; judgment SCC n° 149/1986 of 26 November, ECLI:ES:TC:1986:149, para. 2.

669 Decision of 19 October 2018 of the Court of Preliminary Investigation n° 4 of Badalona.

Article 47 of the Charter and Article 3(2) Directive 2013/48/EU (Access to a Lawyer Directive).⁶⁷⁰ Despite the fact that the Court quoted Article 47 of the Charter, it played a minor role in the argumentation of the court of first instance, which relied mainly on Directive 2013/48/EU.

In *VW* the CJEU analysed, first, whether Directive 2013/48/EU was applicable.⁶⁷¹ On the one hand, the scope of application of the Directive is broad and it applies to any national criminal procedure regardless of whether EU law is affected. In the *VW* case, the proceedings were entirely national, including the warrant issued, which was only national in scope. On the other hand, the Directive also applies to suspects in absentia. Being applicable, the CJEU studied the possibility of denying access to a lawyer to a suspect in absentia in the pre-trial phase.⁶⁷² The CJEU established that there is an exhaustive list of compelling reasons laid down in the Directive which allow denial of the right. This is quite a strict test and only these ‘compelling reasons’ can justify a denial. The Court concluded that no compelling reasons were alleged in the case at hand. Therefore, the CJEU answered the Court of Preliminary Investigation n° 4 of Badalona that national legislation as interpreted by national case law which does not allow suspects in absentia the right to access a lawyer in the pre-trial phase is contrary to Article 3(2) Directive 2013/48/EU and Article 47 Charter.

The CJEU’s answer linking Article 47 Charter and Article 6.1 ECHR was in line with the case law of the ECtHR.⁶⁷³ Strasbourg’s case law is rich in examples making it clear that the right to access a lawyer cannot be made dependent on the presence of the accused.⁶⁷⁴ While states can discourage unjustified absences, they cannot do so by way of denial of legal assistance.⁶⁷⁵ It seems that Strasbourg’s case law discourages balances such as that of the SCC in which limits to access to a lawyer are used to protect the integrity of judicial proceedings. Therefore, delays in this respect, especially in the pre-trial phase, require somewhat strict scrutiny both under Directive 2013/48/EU – through an exhaustively defined ‘exceptionality’ based on enumerated reasons framed by a proportionality test – and the ECHR – through a compelling reasons test or the so-called *Ibrahim* test.⁶⁷⁶

It is clear that the preliminary ruling presented by the Court of Preliminary Investigation n°4 of Badalona was aimed at a change in the case law of the SCC. The contradiction between EU and national law was not at the level of legislation – constitutional or with the rank of law – but in the interpretation by the highest court in the national system. The Court of first instance

670 Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon the deprivation of liberty, and to communicate with third persons and with consular authorities while deprived of liberty [2013] (OJ L294).

671 Case C-659/18 *VW* (*Right of access to a lawyer in the event of non-appearance*) EU:C:2020:201, paras. 22-28.

672 *Ibid.* at paras. 29-48.

673 Magdalena Licková and Joan Solanes Mullor, ‘Limitations to access to justice and Article 47 of the Charter: the right to be advised, defended and represented,’ in Federica Casarosa and Madelina Moraru (eds.), *The Practice of Judicial Interaction in the Field of Fundamental Rights. The Added Value of the Charter of Fundamental Rights of the EU* (Edward Elgar, 2022) 158-159.

674 That was also pointed out by Advocate General Bobek in his Opinion in *VW* (Opinion of Advocate General Bobek in C-659/18 *VW* (*Right to access to a lawyer in case of non-appearance*) EU:C:2019:940, para 48) referring to *Pelladoah v The Netherlands*, App. no 16737/90 (ECtHR, 22 September 1994), para 40; and *Van Geyselghem v Belgium*, App. no 26103/95 (ECtHR, 21 January 1999), para 34. See also *Lala v The Netherlands*, App. no 14861/89 (ECtHR, 22 September 1994), para 33. Compare this with *Galstyan v Armenia*, App. no 26986/03 (ECtHR, 15 November 2007), para 89.

675 *Tolmachev v Estonia*, App. no 73748/13 (ECtHR, 9 July 2015), para 48.

676 For the *Ibrahim* test, based on ‘compelling reasons’ and defined as a particularly stringent one, see *Ibrahim and Others v the United Kingdom*, Apps. nos. 50541/08, 50571/08, 50573/08, 40351/09 (ECtHR, 13 September 2016) para 258.

believed that a change in the national case law of the highest court could be slow and there might be resistance to it. The preliminary reference and the assistance of the CJEU seemed a convenient way to challenge the position of the highest national court, and also a fast way to move forward and accommodate national case law to EU law.

The national case before the Court of Preliminary Investigation n° 4 of Badalona on which the preliminary reference originated is still open. Therefore, there has not been a formal national decision implementing the preliminary judgment of the Court of Justice. The CJEU's answer was not directly applied to the case at hand and there were no following up decisions by Spanish higher courts because the first instance court has not yet decided the case.

2. Austerity measures and the reduction of judges' salaries

In the context of the euro crisis, the salaries of the Spanish judiciary were reduced as a measure aimed at eliminating an excessive budget deficit.⁶⁷⁷ The reduction of salaries was applied differently to different categories of the Spanish judiciary (senior judge of the Spanish Supreme Court, senior judge and ordinary judge). Mr. Escribano Vindel was a senior judge in Barcelona Social Court n° 26 and contested the measure before the High Court of Justice of Catalonia. The applicant alleged that the reduction of salaries violated a series of fundamental rights such as the principle of equality and non-discrimination on the grounds of age – the reduction affected younger judges more severely – enshrined in Article 14 SC, trade-union freedom and the right to collective bargaining (Articles 28 and 37 SC). The applicant also alleged that the cut affected the independence of the judiciary.

On 30 March 2015, the High Court of Justice of Catalonia referred the issue to the SCC. On 15 December 2015 the Constitutional Court declared the referral inadmissible and notoriously unfounded since judges are in different categories and posts, and therefore they are not in a comparable situation.⁶⁷⁸ On 28 December 2017, the High Court decided to send a preliminary reference to the CJEU. In the *Escribano Vindel* case⁶⁷⁹ the CJEU addressed two issues. First, possible discrimination on the grounds of age in the light of Article 21 of the Charter. The CJEU declared that it is possible to cut salaries based on categories. However, to avoid indirect discrimination on grounds of age (because the cut was more severe for inferior categories) it is the task of the national judge to verify the nature of the categories and whether the cut affects younger judges in a greater percentage.⁶⁸⁰ Second, the CJEU also analysed the impact of the cut on judicial independence under Article 19(1) TEU. Again, the Court declared that it is the task of the national judge to verify whether the salary reduction impacts judges' duties and therefore, impinges on their independent judgment.⁶⁸¹

Therefore, the CJEU gave the referring court some margin to make the final decision as to whether national legislation was compatible with the right to non-discrimination and judicial independence. The final judgment of the High Court of Justice of Catalonia was consistent

677 See Article 31 of Royal Decree Law 8/2010 of 20 May on extraordinary measures for reducing the public deficit, amending Law 26/2009 of 23 December on the General Budget. The reduction of salaries approved by urgent legislation was subsequently ratified by Law 39/2010 of 22 December on the General Budget.

678 See Order of the SCC n° 224/2015 of 15 December, ECLI:ES:TC:2015:224A.

679 C-49/18 *Escribano Vindel v Ministerio de Justicia* ECLI:EU:C:2019:106.

680 *Ibid.* at paras. 38-60.

681 *Ibid.* at paras. 61-74.

with the guidelines offered by the CJEU to interpret the rights at stake.⁶⁸² The High Court assessed the cut in the light of the extraordinary situation of the euro crisis and it did not find any real impact on judicial independence or the principle of non-discrimination on the grounds of age. Considering the cut and the living situation of judges at that time, the applicant failed to prove that judicial independence was affected.⁶⁸³ Moreover, the cut was generalised to all civil servants and the comparisons between judicial categories were vague and inconclusive to conclude discrimination on the ground of age.⁶⁸⁴ The High Court referred to the Commission's arguments in the case, the Advocate General's Opinion and also to C-64/16, *Associação Sindical dos Juizes Portugueses* regarding the interpretation of Article 19(1) TEU.⁶⁸⁵

The High Court of Justice used the referrals to the SCC and the CJEU to ascertain whether the national legislation violated any fundamental rights. In particular, the High Court made two successive references to discern whether the national legislation was compatible with the right to non-discrimination and the principle of judicial independence. First, the High Court sought a reply within the national legal system, through the reference to the SCC. Only after the SCC declared the referral inadmissible in substance (judges are in different categories and posts and therefore they are not in comparable situations)⁶⁸⁶ did the High Court turn to the CJEU. This case shows an intense use of judicial dialogue by a lower court interacting both with its highest national court and the CJEU. Beyond the express references by the High Court to the case law of the SCC and the CJEU, in this double interaction two questions should be highlighted: (i) the relationship between the preliminary reference to the CJEU and the question of unconstitutionality to the SSC; and (ii) the outcome of the judicial interaction for the case at hand.

It is now well-established in the SCC case law that in the case that there are simultaneously doubts about the constitutionality of legislation and its compatibility with EU law, the judge must first send a preliminary reference to the CJEU.⁶⁸⁷ The SCC, therefore, gives preference to the preliminary reference and the question of unconstitutionality may follow later. The reasoning of the SCC is that the question of unconstitutionality is only possible regarding legislation that is applicable to the case at hand, and therefore the judge must first solve any applicability issues – i.e. whether the national legislation is contrary to EU law – before asking the SCC about the constitutionality of the legislation and then its validity. In this regard, the SSC was echoing its well-known doctrine that distinguishes between the sphere of applicability of a norm – in which conflicts between EU law and national legislation arise – and its validity – in which the SCC identifies conflicts between the Constitution and national legislation.⁶⁸⁸ Under this doctrine, the High Court should have first sent the preliminary reference to the CJEU, but it was sent approximately two years after the question about unconstitutionality. However, the behaviour of the High Court is understandable because the doctrine of the SCC on the relationship between the preliminary reference and the question of unconstitutionality was framed after

682 Judgment of the High Court of Catalonia n° 949/2020 of 2 March, ECLI:ES:TSJCAT:2020:5663.

683 *Ibid.* para 15.

684 *Ibid.*

685 *Ibid.* para 14.

686 Order of the SCC n° 224/2015 of 15 December, ECLI:ES:TC:2015:224A.

687 See Order of the SCC n° 168/2016 of 4 October, ECLI:ES:TC:2016:168A and Order of the SCC n° 116/2020 of 22 September, ECLI:ES:TC:2020:116A.

688 See Declaration SCC n° 1/2004 of 13 December, ECLI:ES:TC:2004:1D, para. 4.

2016, just after the High Court sent, in 2015, its question of unconstitutionality in the *Escribano Vindel* case.

Regardless of the timing of the references, the result of this judicial interaction was consistent. On the one hand, the SCC found the question of unconstitutionality ill-founded and it did not declare any constitutional violation of fundamental rights. On the other hand, the CJEU granted the national court a margin of discretion to investigate and determine in the case at stake whether there existed possible violations of the principles of non-discrimination and judicial independence. The High Court, in the light of the CJEU's response, did use the discretion allowed and it declared that there was no violation of EU law. The national court, therefore, analysed the allegation of the applicant and it assessed, with the guidance of the CJEU, whether there was an impact on EU fundamental rights. Certainly, the SCC had previously answered that there was no constitutional violation, and its intervention helped the High Court in its assessment of possible violations of fundamental rights regardless of their constitutional or EU nature. In this case, the SCC and the CJEU were aligned and allowed the High Court to accordingly decide the case at hand.

3. Administrative bodies and the possibility of sending a preliminary reference

Beyond Spanish judicial power, administrative bodies and other entities have tried to reach the CJEU through the preliminary reference procedure (Article 267 TFEU). These bodies have called for a substantive analysis of the concept of the judicial body, and therefore they qualify as direct interlocutors with the CJEU. The non-formal stand of the CJEU in this matter has helped the intent of these bodies to engage directly with the CJEU.⁶⁸⁹ It seems clear that, despite the variety of bodies that have followed this path, there is a common intent to strengthen their position in the institutional framework, especially before the Spanish courts. The debate on the nature of these bodies, especially regarding their independence and relationship with other public powers, and their willingness to be recognised as judicial in nature by the CJEU, is aimed at reinforcing their position at the internal institutional level.

The first administrative bodies to launch the debate were the Spanish Tax Tribunals (*Tribunales económico-administrativos*). In the *Gabalfrisa* case in 2000⁶⁹⁰ the CJEU recognised these administrative bodies as jurisdictional in nature and therefore qualified to send preliminary references to the CJEU. Spanish Tax Tribunals were established by law, were permanent, their jurisdiction was compulsory, they followed an *inter partes* procedure, applied the rule of law and they were independent.⁶⁹¹ However, in 2020 in the *Banco de Santander* case, the CJEU changed the criteria and Spanish tax tribunals are no longer allowed to send a preliminary reference.⁶⁹² In *Gabalfrisa* the CJEU did not go in depth into analysis of the independence of these administrative bodies and it was enough that the Tax Tribunals were separate from the corresponding tax administrative department (the decision-maker whose actions were reviewed by the Tax Tribunals). In *Banco de Santander*, instead, the CJEU pointed out that the members of the Spanish Tax Tribunals are not subject to specific and exceptional causes

689 See Case C-54/96 Dorsch Consult v Bundesbaugesellschaft Berlin, ECLI:EU:C:1997:413.

690 Case C-110/98 *Gabalfrisa SL and Others v Agencia Estatal de Administración Tributaria (AET)*, ECLI:EU:C:2000:145.

691 *Ibid.* paras 33-41.

692 Case C-274/14 Banco de Santander SA, ECLI:EU:C:2020:17.

for dismissal and therefore they do not qualify as an independent body.⁶⁹³ Furthermore, the decision of the Tax Tribunals can be challenged through an administrative appeal, and this also adds pressure on the activity of the tribunal.⁶⁹⁴

A similar analysis regarding the Registrar (*Secretario Judicial*) led to the same conclusion: it does not qualify as a judicial body entitled to send a preliminary reference.⁶⁹⁵ First, the CJEU declared that the procedure at hand – for claiming lawyers’ fees – was optional and administrative in nature. Therefore, the CJEU highlighted that action before the Registrar does not preclude a truly judicial action and it does not have the force of *res judicata*.⁶⁹⁶ The CJEU quoted the case law of the SCC, which also had previously emphasised the administrative nature of the proceedings at hand.⁶⁹⁷ Second, the Registrar lacked the requisite of independence because, in the context of lawyers’ claims proceedings, for which it is competent, it acts under the hierarchy principle, that is, it is subject to judicial oversight.⁶⁹⁸ Indeed, the Judicial Secretary performs his/her functions with full objectivity (the internal aspect of independence is fulfilled) but he/she is subordinate when not performing judicial functions (the external aspect of independence is therefore lacking).⁶⁹⁹

Spanish Contractual Tribunals (*Tribunales de contratación pública*) have been more successful so far at qualifying as judicial bodies entitled to send a preliminary reference. In two cases related to Contractual Tribunals of the Autonomous Communities of the Basque Country and Catalonia,⁷⁰⁰ the CJEU recognised that these bodies comply with all the requisites needed under its case law. In both cases, the administrative bodies were considered permanent independent bodies established under a legal provision which adopts their decisions based on exclusively legal criteria following an *inter pares* procedure.⁷⁰¹ Contractual Tribunals are independent, that is, they are not subject to hierarchical constraints and do not receive instructions from third parties. Contractual Tribunals carry out their functions objectively, impartially and entirely autonomously. Regarding the nature of their jurisdiction, under Spanish public procurement law their jurisdiction is optional. Parties can choose between their jurisdiction (special administrative appeal) and an ordinary contentious-administrative action (before a court). However, if the Contractual Tribunal’s jurisdiction is chosen its resolution is binding on the parties. It is important for the CJEU that in practice most parties choose the jurisdiction of the Contractual Tribunals and therefore they *de facto* become the first instance

693 *Ibid.* paras. 65-68.

694 *Ibid.* paras. 72-76.

695 C-503/15, *Ramon Margarit Panicello v Pilar Hernández Martínez*, ECLI:EU:C:2017:126.

696 *Ibid.* paras 33-35.

697 *Ibid.* para. 35 (referring to judgment of the SCC n° 58/2016, of 17 March, ECLI:ES:TC:2016:58).

698 *Ibid.* paras. 36-43.

699 *Ibid.*

700 C-546/16 *Montte SL v Musikene*, ECLI:EU:C:2018:752 (related to the Administrative Board of Contract Appeals of the Autonomous Community of the Basque Country); C-2013/14 *Consorci Sanitari del Maresme v Corporació de Salut del Maresme i la Selva*, ECLI:EU:C:2015:664 (related to the Catalan Public Sector Contracts Board).

701 C-546/16 *Montte SL v Musikene*, paras. 20-25; C-2013/14 *Consorci Sanitari del Maresme v Corporació de Salut del Maresme i la Selva*, paras. 16-31.

in public contractual matters.⁷⁰² For all these reasons, for the CJEU the Spanish Contractual Tribunals meet the criterion of compulsory jurisdiction.

4. Terrorism and Spanish courts

Multiple fundamental rights concerns have been raised in Spain regarding the fight against terrorism, in particular regarding ETA terrorist actions.⁷⁰³ Cases related to the Spanish strategy against terrorism have reached the ECtHR, which has analysed police and court actions from the perspective of the right to life and the prohibition of torture (Articles 2 and 3 ECHR),⁷⁰⁴ the illegalisation of political parties for financing and supporting terrorism from the perspective of freedom of association (Article 11 ECHR)⁷⁰⁵ and penitentiary policies dispersing prisoners considering the rights to privacy and family life (Article 8 ECHR).⁷⁰⁶ After the end of ETA in 2011 and with the rise of jihadism terrorism, the central conflicts became ones between freedom of expression (Article 10 ECHR) and crimes related to supporting terrorism, in particular glorification of terrorist actions or their perpetrators and indoctrination through social networks.⁷⁰⁷

In the context of the rule of law – in particular the principle of legality – the *Del Río Prada*⁷⁰⁸ case had a great impact on the relationship between the European conventional system and Spain. Ms. Río Prada was convicted in 1987 to over 3,000 years of imprisonment for terrorist offences. In accordance with Article 70 of the Spanish Criminal Code of 1973 and its rules on calculating prison terms, she had to be released in 2008. Under these rules, there was a maximum length of imprisonment of 30 years and reductions for good behaviour and

702 C-2013/14. *Consorti Sanitari del Maresme v Corporació de Salut del Maresme i la Selva*, para. 24.

703 See Rogelio Alonso and Fernando Reinares, 'Terrorism, Human Rights and Law Enforcement in Spain' (2005) *Terrorism and Political Violence*, 17:1-2, 265-278.

704 See Yolanda Gandia Mira, 'La prohibición de la tortura: condenas del TEDH al Estado español por la violación del artículo 3 CEDH en su vertiente procesal' (2018) *Actualidad Jurídica Iberoamericana* 9, 500-512. The cases in which the ECtHR found violation of Article 3 ECHR are the following: *González Etayo v Spain*, App. no. 20690/17 (ECtHR, 19 January 2021); *Portu Juanenea T Sarasola Yarzabal v Spain*, App. No. 1653/13 (ECtHR, 13 February 2018); *Beortegui Martínez v Spain*, App. No. 36286/14 (ECtHR, 31 May 2016); *Arratibel Garcandía v Spain*, App. No. 58488 (ECtHR, 5 May 2015); *Etxeberria Caballero v Spain*, App. No. 74016/12 (ECtHR, 7 October 2014); *Ataun Rojo v Spain*, App. No. 3344/13 (ECtHR, 7 October 2014); *Otamendi Egiguren v Spain*, App. No. 47303/08 (ECtHR, 16 October 2012); *Beristain Ukar v Spain*, App. No. 40351/05 (ECtHR, 8 March 2011); *San Argimiro Isasa v Spain*, App. No. 2507/07 (ECtHR, 28 September 2010); and *Martínez Sala and Others v Spain*, App. No. 58438/00 (ECtHR, 2 November 2004).

705 See Mercedes Iglesias Báñez, 'La ley de partidos políticos y el test de convencionalidad europeo. El diálogo entre el Tribunal Constitucional y el Tribunal Europeo de Derechos Humanos en torno a la ilegalización de Herri Batasuna y Batasuna' (2010) *Teoría y Realidad Constitucional* 25, 567-586, and *Herri Batasuna and Batasuna v Spain*, Apps. Nos. 25803/04 and 25817/04 (ECtHR, 30 June 2009); *Etxeberria, Barrena Arza, Nafarroako Autoderminazio Bigunea y Aiarako and Others v Spain*, Apps. nos. 35579/03, 35613/03, 35626/03, 35634/03 (ECtHR, 30 June 2009); *Herritarren Zerrenda v Spain*, App. no. 43518/04 (ECtHR, 30 June 2009); *Eusko Abertzale Ekintza-Acción Nacionalista Vasca (EAE-ANV) v Spain*, Apps. Nos. 51762/07 and 51882/07 (ECtHR, 7 December 2010); *Eusko Abertzale Ekintza-Acción Nacionalista Vasca v Spain (EAE-ANV) 2*, App. no. 40959/09 (ECtHR, 15 January 2013).

706 See Marta Fernández Cabrera, 'La política de dispersión de presos de ETA a la luz de la jurisprudencia del Tribunal Europeo de Derechos Humanos' (2018) *Cuadernos de Política Criminal* 125-II, 107-148; Marta Fernández Cabrera, 'Último capítulo sobre la dispersión de presos de ETA: la respuesta del TEDH' (2020) *Revista General de Derecho Penal* 34; and *Jorge Fraile Iturralde v Spain*, App. no. 66498/17 (ECtHR, 7 May 2019).

707 Article 578 CP apology and 575 CP indoctrination.

708 *Del Río Prada v Spain*, App. no. 42750/09 (ECtHR, 21 October 2013). See Carlos Ruiz Miguel, 'The "Del Río Prada" Judgments and the Problem of Enforcement of the ECtHR Decisions', in Mercedes Pérez Manzano, Juan Antonio Lascurain Sánchez and Marina Mínguez Rosique (eds.), *Multilevel Protection of the Principle of Legality in Criminal Law* (Springer, 2018) 213-234; Andrés Saénz de Santamaría, 'Acercas del Tribunal Europeo de Derechos Humanos y de la tentación de desacreditar al mensajero [a propósito de la STEDH (Gran Sala) en el asunto Del Río Prada c. España]' (2014) *Teoría y Realidad Constitucional* 33, 199-218.

rehabilitation were applicable to this maximum. In 2006, in the so-called ‘Parot doctrine,’ the Spanish Supreme Court reinterpreted these rules as meaning that the reductions should have been applied not to the accumulative sentence of 30 years but to the absolute total term of the sentence.⁷⁰⁹ In the case of Ms. Río Prada, the release was postponed until 2017. In 2013 the ECtHR found a violation of Article 7 ECHR because the application of the new method for calculating reductions had not been foreseeable at the time of the applicant’s conviction and had amounted to retroactive application, to her detriment, of a change that had taken place after the offences had been committed.⁷¹⁰ The ECtHR ordered the immediate release of the applicant and Spain complied with the decision. Moreover, the Spanish Supreme Court decided to revoke the ‘Parot doctrine’ and agreed to apply the previous rules to all convictions decided under the 1973 Criminal Code.⁷¹¹

A conflict involving terrorism and the rule of law, in this case the right to a fair trial and the impartiality of the court, also had repercussions in the national sphere: the *Otegi* case.⁷¹² On 2 March 2010, the applicants were sentenced by the National High Court (*Audiencia Nacional*) to two years’ imprisonment for glorification of terrorism. During this trial, one of the judges on the panel showed partiality against the accused Mr. Otegi Mondragón. The Spanish Supreme Court declared this partiality and annulled the conviction on 2 February 2011. On 16 September 2011, the same applicants were convicted to ten years’ imprisonment for being members and leaders of a terrorist organisation. They were also banned from taking part in elections for the duration of their sentences. These convictions were delivered by the same panel of judges of the National High Court which sentenced the applicants on 2 March 2010. The applicants alleged before the Supreme and Constitutional Courts that the breach of impartiality declared in the first trial also contaminated the impartiality of the judges in the second trial. The Supreme and Constitutional Courts rejected the claim on the grounds that the two trials were based on different criminal charges.⁷¹³

Despite the intense judicial interaction in the *Otegi* case, the conflict between Spanish courts and the ECtHR jurisprudence on impartiality was clear.⁷¹⁴ The SCC analysed the case law of the ECtHR and accepted Strasbourg’s doctrine on impartiality, distinguishing between its subjective and objective prongs.⁷¹⁵ In this analysis, the SCC quoted several cases in the ECtHR jurisprudence.⁷¹⁶ The intent of the SCC was to interpret Article 24 SC (due process clause) consistently with Article 6.1 ECHR and Strasbourg’s case law. In this regard, the SCC integrated Strasbourg’s doctrine in the national constitutional analysis under Article 24 SC. However, the application of its case law was deemed incorrect by the ECtHR in the case at

709 See Judgment of the Spanish Supreme Court n° 197/2006 of 28 February, ECLI:ES:2006:753. Until the decision of the ECtHR in *Del Río Prada*, the SCC analysed a total of 28 constitutional complaints filed by convicts affected by the new doctrine of the Supreme Court. In three cases the SCC allowed the constitutional complaints and the other twenty-five were rejected (see *Del Río Prada*, paras. 45-55).

710 *Del Río Prada*, paras. 77-118.

711 Agreement of the General Chamber of the Spanish Supreme Court of 12 November 2013.

712 *Otegi Mondragon and Others v Spain*, App. no. 4184/15 and four other applications (ECtHR, 6 November 2018).

713 Judgment of the Spanish Supreme Court n° 351/2012 of 7 May, ECLI:ES:TS:2012:2754; judgment of the SCC n° 133/2014 of 22 July, ECLI:ES:TC:2014:133.

714 See Joan Solanes Mullor, ‘The implications of the *Otegi* Case for the Legitimacy of the Spanish Judiciary’ (2019) *European Constitutional Law Review* 15-3, 574-588.

715 SCC n° 133/2014 of 22 July, ECLI:ES:TC:2014:133, para. 3.

716 *Ibid.*

hand. In its decision on the *Otegi* case, the ECtHR rejected the application of its doctrine in the way done by the Spanish courts. In this regard, consistent interpretation failed in the concrete case and the ECtHR found a violation of the right to a fair trial because of a breach of the impartiality principle.⁷¹⁷ The ECtHR took the objectivity perspective and declared that although the two trials involved different charges the context was the same: terrorism. The judge was declared biased in relation to terrorist activity and both trials were related to terrorism. In this regard, there were legitimate doubts for an external observer about the impartiality of the judge.

5. The Catalan secessionist crisis in the Spanish courts

Spanish courts find themselves shouldering the brunt of the task of defusing the Catalan secessionist crisis without really understanding how things got to this point and with some voices even decrying the current situation as wholly undesirable.⁷¹⁸ The response to the Catalan secessionist crisis, one of the most formidable attacks ever to be launched against the Spanish constitutional edifice erected in 1978, has been predominantly judicial in nature. This has put the Spanish judiciary in the spotlight. Therefore, in the end the credibility of the Spanish constitutional system will hinge on the response of the judiciary. In short, Spain is facing a severe constitutional crisis that affects the core values in its constitutional legitimacy – democracy, rule of law, human rights, separation of powers and territorial distribution of powers – and the judiciary is being called on to solve it. The judiciary will surely be blamed if it responds poorly, and if that happens a judicial crisis will only serve to compound the ongoing constitutional crisis.

From the point of view of the rule of law, the judicial processes launched against the Catalan secessionist leaders have been intensively criticised by the secessionist movement. There is a combination of critiques based on partiality of the Spanish courts, their lack of independence and a breakdown of the separation of powers in Spain.⁷¹⁹ The debate has focused on criminal proceedings against the Catalan secessionist leaders, which ended in several criminal convictions.⁷²⁰ After serving part of the convictions, the Spanish Government pardoned those convicted by suppressing the imprisonment sanctions.⁷²¹ In this context, the Catalan secessionist leaders decided to exhaust all the Spanish judicial resources, including the SCC,⁷²² and they also decided to go before the ECtHR, which is currently examining the applications of most of the convicted. At the same time, the CJEU has also been involved in the secessionist crisis. First, some of the Catalan secessionist leaders were members of the EU Parliament and their

717 *Otegi Mondragon and Others*, paras. 58-69.

718 Ángel Munárriz. 'Entrevistas en el 40º Aniversario de la Constitución. Entrevista a Luis López Guerra' (2018) *InfoLibre*, 10 December https://www.infolibre.es/politica/luis-lopez-guerra-espana-confiado-exclusiva-judicial_1_1165177.html accessed 29 January 2022.

719 Joan Solanes Mullor, 'The implications of the *Otegi* Case for the Legitimacy of the Spanish Judiciary,' 580-583.

720 In relation to the 'participatory process' supported by Artur Mas Gavarro's Catalan Government on 9 November 2014 and criminal convictions of members of that Government, see judgment of the Spanish Supreme Court n° 722/2018 of 23 January, ECLI:ES:TS:2019:91. In relation to the 'referendum' held on 1 October 2017 and supported by Carles Puigdemont Casemajó's Catalan Government, see judgment of the Spanish Supreme Court n° 459/2019 of 14 October, ECLI:ES:TS:2019:2997. Finally, regarding the conviction of President Joaquim Torra Pla for disobedience for not removing a banner in an official building when elections were being held, see judgment of the Spanish Supreme Court n° 477/2020 of 28 September, ECLI:TS:2020:2986.

721 See Royal Decrees nos. 456 to 464/2021 of 22 June.

722 See the constitutional complaints decided so far, all of them ratifying the constitutionality of convictions decided by the Supreme Court in 2019: judgments of the SCC nos. 34/2021 of 17 February, ECLI:ES.TC:2021:34; 91/2021 of 22 April, ECLI:ES:TC:2021:91; 121/2021 of 2 June, ECLI:ES:TC:2021:121 and 122/2021 of 2 June, ECLI:ES.TC:2021:122.

immunity was at stake.⁷²³ Second, the CJEU is currently reviewing the proper execution of a European Arrest Warrant (EAW) issued against some of the Catalan secessionist leaders who decided to leave the country to avoid criminal proceedings in Spain.⁷²⁴ It is still uncertain how this Europeanisation of the secessionist crisis may end, and therefore how the ECtHR and the CJEU will review the Spanish courts' decisions. European intervention will be decisive in the solution to the secessionist crisis, and it will be essential for the legitimacy of the entire Spanish constitutional system.

Regardless of the European courts' intervention, the Catalan secessionist crisis has reshaped the doctrine on recusal of judges in the SSC. Before the Catalan secessionist crisis, the SCC had a restrictive interpretation of the causes of recusal of magistrates in the SCC.⁷²⁵ Although the causes for ordinary judges were also applicable to magistrates in the SCC, the latter adopted a prudential stand and declared that its special nature and composition, with judges that could not have the normal judicial career, led to this restrictive interpretation. However, in a striking decision in the middle of the debate on its judgment on the reform of the Catalan Statute of Autonomy of 2006, the SCC changed the doctrine and allowed the recusal of one of its magistrates because he published an academic report on the reform of the Catalan statute.⁷²⁶ In the aftermath of the constitutional complaints reviewing the convictions of the Catalan secessionist leaders, the SCC is coming back to its restrictive interpretation and it has not accepted the recusal of two magistrates that publicly expressed opinions in journal articles and academic publications against the Catalan secessionist movement.⁷²⁷ The SCC again seems to be returning to the restrictive interpretation based on institutional concerns about its special nature and composition, and the difficulties in reaching a minimum quorum to decide in the case of allowing the recusal.⁷²⁸ This restrictive doctrine on recusal and its relationship with judicial impartiality will also be another front line before the ECtHR.

The Catalan secessionist crisis has also created tensions among the judiciary regarding the freedom of expression of judges who expressed political opinions favourable to secession. In 2014 thirty-three judges signed a document supporting the holding of a referendum to decide Catalonia's political future. Although the facts were reported, the General Council of the Judiciary decided not to impose any sanction.⁷²⁹ In contrast with this case, in 2015 the General Council debated expelling, and finally suspended from office, Judge Vidal for a period

723 In the case of Oriol Junqueres Vies, the Spanish Supreme Court sent a preliminary reference to the CJEU, which was decided by its judgment in Case C-502/19, *criminal proceedings against Oriol Junqueres Vies*, ECLI:EU:C:2019:1115. The Supreme Court, interpreting the answer of the CJEU, decided to not recognise the immunity, and it processed and convicted Oriol Junqueres Vies. In the case of Carles Puigdemont Casemajó, Antoni Comín Oliveres and Clara Ponsetí Obiols, the General Court of the European Union is currently reviewing the suspension of the immunity decided by the European Parliament. So far, the General Court has rejected the interim measures requested by the parties against the measure decided by the Parliament (see Order of the Vice-President of the General Court in Case T-272/21 R, ECLI:EU:T:2021:497).

724 Spanish courts sent a preliminary reference asking for the proper interpretation of the EAW on 9 March 2021, taking into account that some Member States – Belgium and Italy – are suspending execution of EAWs. The preliminary reference was admitted by the CJEU, and it is currently under review (Case C-158/21, Puig Gordi and Others).

725 See Order of the SCC n° 394/2006 of 7 November, ECLI:ES:TC:2006:394A; Order of the SCC n° 383/2006 of 2 November, ECLI:ES:TC:2006:383A; Order of the SCC n° 18/2006 of 24 January, ECLI:ES:TC:2006:18A.

726 Order of the SCC n° 26/2007 of 5 February, ECLI:TC:2007:26A.

727 Order of the SCC n° 107/2021 of 15 December 2021, ECLI:ES:TC:2021:107A.

728 *Ibid.* para. 2.

729 Agreement adopted by the Permanent Commission of the Spanish General Council of the Judiciary of 18 June 2015. Point 9.12.

of three years.⁷³⁰ Judge Vidal, together with other jurists, wrote a draft of a Catalan constitution and offered the text to be discussed in multiple actions organised by cultural and political organisations that support Catalan secession (such as *ANC* and *Omnium Cultural*). In fact, the suspended judge participated in more than 100 actions with an unequivocally political symbology, and he was presented as judge of the *Audiencia Provincial* of Barcelona.⁷³¹ The General Council suspended him for infringement of political neutrality and of Article 417.14 of Organic Law no. 6/1985 of 1 July on Judicial Power (OLJP) for “inexcusable ignorance in the fulfilment of judicial duties.” Later, the Supreme Court rejected the academic nature of Mr. Vidal’s actions and considered that they were clearly framed in a political context⁷³² and not just related to questions of the judicial system.⁷³³ Moreover, when the suspension period ended and judge Vidal wanted to return to practising the judicial profession, the General Council denied him reinstatement on the grounds that he did not meet the requirements to pass the aptitude declaration established in Article 367.1 OLJP. The case ended with SCC judgment no. 135/2018 of 12 of December, in which Article 367.1 and parts of Article 367.2 OLJP were declared unconstitutional,⁷³⁴ and therefore judge Vidal was reinstated.⁷³⁵

Finally, from the point of view of the rule of law and the relationship between powers, the Catalan secessionist crisis has also provoked an aggrandisement of the powers of the SCC. In 2015, a reform of the legislative framework of the SCC as a response to contestation of its judgments by Catalan secessionist leaders granted the High Court new sanction powers aimed at facilitating the execution of its judgments.⁷³⁶ *Inter alia*, the SCC is able to issue fines and to suspend public authorities in the case of non-compliance with its judgments.⁷³⁷ The SCC has been cautious in applying these new powers but it expressly declared the reform constitutional and therefore that it is prepared to use them.⁷³⁸ However, there have been voices against the constitutionality of these prerogatives, especially the power to suspend elected public officials and its compatibility with political rights.⁷³⁹

730 Decision of the General Council of the Judiciary of 26 February of 2015.

731 Judgment of Spanish Supreme Court nº 2614/2016 of 14th December. ECLI:ES:TS:2016:5373, para. 1.

732 *Ibid.* para. 12.

733 ECtHR case law has permitted judges to take public positions on political issues which affect the judiciary. See: *Baka v. Hungary*, App. no. 20261/12 (ECtHR, 27 May 2014); *Kudeshkina v. Russia*. App. no. 29492/05 (ECtHR 14 September 2009).

734 Judgment SCC nº 135/2018 of 13 December. ECLI:ES:TC:2018:135.

735 Judgment of Spanish Supreme Court nº 296/2019 of 7th march. ECLI:ES:TS:2019:676.

736 Organic Law nº 15/2015 of 16 October, amending Organic Law 2/1979 of 3 October of the Constitutional Court, for the execution of resolutions of the Constitutional Court as a guarantee of the rule of law. See Esther González Hernández, ‘El artículo 155 CE y la LO 15/2015, de 17 de octubre de reforma de la LOTC: ¿Ineludible reciprocidad o círculo perverso? (2016) *Teoría y Realidad Constitucional* 37, 539-557.

737 Article 92 of Organic Law nº 2/1979 of 3 October, as amended by Organic Law nº 15/2015.

738 Judgment of the SCC nº 185/2016 of 3 November, ECLI:ES:TC:2016:185; judgment of the SCC nº 215/2016 of 15 December, ECLI:ES:TC:2016:215.

739 Ignacio Villaverde Menéndez, ‘Cumplir o ejecutar. La ejecución de sentencias del Tribunal Constitucional y su reciente reforma’ (2016) *Teoría y Realidad Constitucional* 38, 680-681.

6. The COVID-19 pandemic and exceptional law

The COVID-19 pandemic has brought about a challenge to the rule of law and the principle of legality, especially because of the use of exceptional law. The activation of emergency constitutional clauses is not new,⁷⁴⁰ but these constitutional emergency frameworks were not conceived with the idea of sustaining emergency measures with a severe impact on fundamental rights for so long. In the case of Spain, a state of alarm was declared three times during the pandemic.⁷⁴¹ In little over a year (from March 2020 to May 2021), Spain experienced three different states of alarm whereas before the COVID-19 pandemic the clause had been activated under the current constitutional framework only once.⁷⁴²

From the point of view of the rule of law, several questions have been raised in the context of the Spanish constitutional framework. First, debate on the proper use and activation of emergency constitutional clauses has had an impact on the relationship between the executive and the legislative branches. So far, the SCC has declared unconstitutional (i) the mobility restrictions – especially the domicile lockdown – declared during the first state of alarm for being a suspension – not a mere limitation, constitutionally allowed by the state of alarm – of freedom of movement (Article 19 SC);⁷⁴³ (ii) the extension for six months of the third state of alarm for lack of a motivated justification;⁷⁴⁴ and (iii) the delegation of powers to so-called ‘delegated competent authorities’ during the third state of alarm because of a blanket delegation of authority.⁷⁴⁵ These decisions by the SCC are relevant in clarifying the roles of the executive and the legislative branches under exceptional law, and therefore are paramount in knowing the allocation of law-making powers in times of crisis. With its intervention, the SCC has shifted the balance in favour of the legislature and now the government must activate a state of emergency instead of a state of alarm if it wants to apply mobility restrictions. A state of emergency reinforces intervention by the parliament, which must previously authorise its declaration.

740 The clause on exceptional measures in the 1978 Spanish Constitution is in Article 116, which foresees three different tiers depending on the gravity of the crisis: alarm, emergency and siege. This article defines the procedure and authorities competent to declare these constitutional states of exception. Declaring states of alarm and emergency corresponds to government by royal decree of the Council of Ministers but for a state of emergency the Government requires previous authorisation from the Congress of Deputies. In both cases, the Congress of Deputies must approve any extensions. Declaring a state of siege is a competence of the Congress of Deputies and requires an absolute majority. The Constitution is clear in that declaring any of the three states does not alter the normal operation of the constitutional bodies, especially the legislature, which should remain in operation. Moreover, declaration of any state of exception does not modify the regime for the accountability of the Government or public servants.

741 The first state of alarm during the COVID-19 pandemic that affected the entire national territory was declared by the Government on 14 March 2020 and ended on 21 June 2020 (see Royal Decree 436/2020 of 14 March, which the Congress of Deputies or lower house of Parliament successively renewed six times). The second state of alarm, which only applied to certain municipalities in the Autonomous Community of Madrid, was declared by the Government on 9 October 2020 and ended on 24 October 2020 (see Royal Decree 900/2020 of 9 October). Finally, the third state of alarm, again with national scope, was declared by the Government on 25 October 2020 and ended on 9 May 2021 (see Royal Decree 926/2020 of 25 October, renewed once by the Congress of Deputies, Resolution of 29 October 2020, an extension declared unconstitutional by Judgment of the SCC n° 183/2021 of 27 October, ECLI:ES:TC:2021:183, para. 8).

742 Before the states of alarm declared during the COVID-19 pandemic, a state of alarm was declared on 4 December 2010 during an air traffic controllers strike (See Royal Decree 1673/2010, of 4 December).

743 Judgment of the SCC n° 148/2021 of 14 July, ECLI:ES:TC:2021:148, para. 5. The SCC concluded in the same line regarding the third state of alarm and the measures provided for the limitation of groups up to six persons in public spaces (see judgment of the SCC n° 183/2021 of 27 October, ECLI:ES:TC:2021:183, para. 6).

744 Judgment of the SCC n° 183/2021 of 27 October, para. 8.

745 *Ibid.* para. 10.

Second, the pandemic has also affected the relationship between the SCC and ordinary courts. The pandemic has emphasised the clear separation of functions between the SCC and the ordinary judiciary in times of crisis. Before the pandemic, the SCC declared that it has jurisdiction over measures taken directly under the emergency clause, whereas measures decided using ordinary legislation, even if they are exceptional, come under the competence of the ordinary judiciary.⁷⁴⁶ This separation has been confirmed during the pandemic and both judiciaries have been acting within their own jurisdictional boundaries. Therefore, regarding their nature and rank in the system of sources of law, the role of royal decrees issued by the executive branch declaring a state of alarm (and approving exceptional measures) and, second, resolutions issued by the Congress of Deputies extending the state of alarm has been settled. In both cases, the SCC recognised the value of both types of norms and therefore rejected the understanding that they comprised simple regulations – secondary legislation – below the rank of an act of Congress. This was important from the point of view of jurisdiction over the case. The Constitutional Court, not ordinary courts, is the only body with competence to exercise judicial review of norms with the rank of legislation.

Third and finally, Spanish courts have been very active in controlling measures taken by the political branches in fighting the pandemic.⁷⁴⁷ They have used fundamental rights as a powerful tool to review public action. Even political rights, such as the right to hold free elections, have led to annulment of government decisions.⁷⁴⁸ Beyond concrete debates about the specific fundamental rights affected, the pandemic has forced the judiciary to rethink its position in the framework of government checks and balances during instances of exceptional rule. The role of judicial review in times of crisis was unclear before the pandemic, especially because a state of alarm had only been declared once in Spain, in 2010-2011, and its duration and measures were quite limited in scope. Neither the SCC nor ordinary courts had deeply contemplated their role or the proper intensity of judicial review of exceptional measures. The judiciary seems to be moving in the direction of seeing itself as a relevant actor in times of crisis. A pattern of strict judicial scrutiny is emerging in several fields such as reviewing public actions affecting the right to circulation, the right to property, freedom of business and political rights. In reviewing these decisions, both the SCC and ordinary Spanish courts have deployed a substantive version of judicial review, that is, one that engages the political and scientific debates on decisions taken by public authorities. The predisposition of the judiciary to actively engage in public discussion

746 See SCC judgment n° 83/2016 of 28 April, ECLI:ES:TC:2016:83, and SCC Decision n° 7/2012 of 13 January, ECLI:ES:TC:2012:7A.

747 Indeed, ordinary courts of different jurisdictions have intervened, as have courts with different territorial scopes. In particular, the high courts of each autonomous community have been called on to review the different restrictive measures adopted by the regional governments in application of Article 10.8 of Law 29/1998. This provision grants ordinary courts the power to carry out an ex-ante proportionality review of any restrictive public health measure decided by the public authorities. At the same time, the Supreme Court's role had been reinforced by the end of the third and last state of alarm: Article 15 of Royal Decree Law n° 8/2021 of 4 May, introduced a new cassational appeal before the Supreme Court, which may be used against autonomous community high court judgments decided in application of Article 10.8 of Law 29/1998.

748 See judgment of the High Court of Catalonia n° 121/2021 of 1 February, ECLI:ES:TSJCAT:2021:3324. The decision to postpone the Catalan regional elections was made with the approval of the main political parties participating in them and was therefore clearly shared by the political establishment at the time. A legal challenge by minor political parties and private citizens led to annulment of the decision to postpone and the elections were finally held on the originally scheduled date. In reaching its decision to annul the postponement, the High Court of Catalonia exercised strict scrutiny combining formal and substantive analysis. From the formal standpoint, the Court analysed the decision-making process that led to the postponement of the elections and found that the body which took the decision did not have that competence. More important, however, was the substantive analysis. The Court affirmed that, because of the importance of the right to vote in a democracy, postponing an election was only permissible when the public health risk was severe and in the Catalan case found the criterion was not satisfied. The High Court examined the epidemiological statistics – both in the moment the elections were scheduled and when the decision was made to postpone them – and the preventive measures adopted, such as mail-in ballots and health protocols for in-person voting.

during crises could allow citizens a wider window of opportunity to exercise control over public power.

7. The election and composition of the General Council of the Judiciary

The Spanish General Council of the Judiciary is the constitutional body in charge of guaranteeing judicial independence and judges' self-governance (article 122 SC).⁷⁴⁹ The relevance of the General Council – in particular its pivotal role in appointing and promoting judges – has attracted the attention of all the political parties which have tried to control it. Since 2013, the members of the General Council have been elected by the Congress and the Senate with a 3/5 majority – ten members in each chamber – in which the twelve members that are following judicial careers are proposed for election by their own judges, whereas the proposals for the eight jurists come from the Congress and the Senate.⁷⁵⁰ This parliamentary election method has been politicised and has led to a system of political quotas damaging its independent reputation.⁷⁵¹ Despite efforts to amend the method of electing the General Council,⁷⁵² its polarisation has increased dramatically. The result is the current situation in which the General Council has been in an *interim* position since 2018, that is, the political parties have not been able to agree on renewing its membership, which has led to an institutional deadlock.

The inability to renew the General Council has motivated an intense debate on the method to select its members. Although the Government including left-wing parties (*PSOE* and *Unidas Podemos*) defends the current model in which all the members of the General Council are elected by the Parliament, three main judicial associations – the *Asociación Judicial Francisco de Vitoria*, the *Asociación Profesional de la Magistratura* and the *Foro Judicial Independiente*⁷⁵³ – prefer to return to a model in which the judicial members of the General Council are elected by their peers. This proposal was endorsed by several opposition parties, specifically by *Ciudadanos*,⁷⁵⁴ *VOX*⁷⁵⁵ and the *Partido Popular*.⁷⁵⁶ To force negotiation and to overcome the deadlock, *PSOE* and *Unidas Podemos* presented a parliamentary initiative aimed at reducing the parliamentary majority from 3/5 to just an absolute majority in the second round for the

749 The General Council has functions related to the appointment, promotion, inspection and disciplining of judges. It is composed of twelve members who are following judicial careers and eight jurists – lawyers and other law degree graduates such as university professors – with acknowledged competence and over fifteen years of professional experience. The members are elected for a five-years tenure and re-election is not possible. All of them are currently elected by Parliament, even though between 1980 and 1985 the judicial members of the General Council were elected by their peers.

750 See Organic Law nº 4/2013 of 28 June on reform of the General Council of the Judiciary, amending the OLJP.

751 Manuel Gerpe Landin and Miguel Ángel Cabellos Espiérrez, 'La reforma permanente: El Consejo del Poder Judicial a la búsqueda de un modelo' (2015) *Revista Española de Derecho Constitucional*, 103, 13-44; Miguel Ángel Cabellos Espiérrez, 'La reforma inacabada: El Consejo General del Poder Judicial ante su enésima reformulación' (2020) *Revista Española de Derecho Constitucional*, 118, 13-44.

752 Aida Torres Pérez, 'Judicial Self-Government and Judicial Independence: the political culture of the General Council of the Judiciary' (2018) *German Law Journal*, 19, 1770-1771; Gema Rosado Iglesias, 'La Constitucionalización del gobierno judicial: cuarenta años de consejo general del poder judicial, régimen actual y cuestiones pendientes' (2018) *Revista de Derecho Público*, 101, 358.

753 On 6 April 2021 they sent a letter to the EU Commission expressing their preference in the matter.

754 In 2018 (nº 122/000260 of 20 July 2018) and 2021 (nº 122/000186 of 27 December 2021), *Ciudadanos* formulated legislative proposals to the Congress of Deputies to allow the election of the judicial members of the General Council by their peers.

755 Legislative proposal to the Congress of Deputies nº 122/000091 of 23 October 2020.

756 Legislative proposal to the Congress of Deputies nº 122/000092 of 30 October 2020 on reform of the OLJP.

appointment of the judicial members of the General Council.⁷⁵⁷ With such a reduction the governing parties would be able to partially renew the General Council – i.e. the twelve members following judicial careers – without the consent of the opposition parties. However, *PSOE* and *Unidas Podemos* finally withdrew the legislative initiative after the EU Commission, which was questioned by the judicial associations, manifested concerns regarding the effects on judicial independence.⁷⁵⁸

Even though the proposals to amend the election of the General Council were not successful, in 2021 the deadlock in the General Council did lead to approval of a reform which introduced new rules limiting actions by the General Council during the deadlock.⁷⁵⁹ Under the reform, during interim situations the General Council does not have the capacity to appoint judges to certain high court positions. The purpose of the reform was not just to end with a legal deficit but to favour the renewal of the General Council.⁷⁶⁰ Despite the unsuccessful debates on reforming the method of election and limiting the powers of the interim General Council, the renewal of the General Council is still on hold and the reform limiting its powers has been questioned in a constitutional challenge before the SCC by the *Partido Popular*.⁷⁶¹

The deadlock in the General Council has exacerbated its image as a politicised institution, and it has inevitably affected citizen trust in its actions. The debate on the method to elect its judicial members shows the lack of a common model to regulate the government of judicial power, with the positions of right-wing and left-wing political parties differing deeply. The politicisation of the General Council explains the modest level of confidence among Spanish citizens regarding the independence of the judiciary⁷⁶² and the downgrading of Spain from being considered a ‘full democracy’ to a ‘flawed democracy’ in *The Economist Democracy Index*.⁷⁶³ The fall in public confidence and democratic quality does not come without warning, as the EU Commission⁷⁶⁴ and GRECO⁷⁶⁵ have expressed concerns regarding judicial independence and the need to liberate the General Council from undue political influence. Additionally, the ECtHR⁷⁶⁶ and the

757 Legislative proposal to the Congress of Deputies nº 122/000090 of 13 October 2020 by *Unidas Podemos* (presentation 13/10/2020; withdrawal 07/05/2021). Available at https://www.congreso.es/proposiciones-de-ley?p_p_id=iniciativas&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&iniciativas_mode=mostrarDetalle&iniciativas_legislatura=XIV&iniciativas_id=122%2F000090 [21/01/2022]. Article 122.3 SC specifies that a 3/5 majority of the Congress and Senate is needed for the election of the eight jurists but it does not specifically address the majorities needed for the appointment of the twelve members following judicial careers.

758 EU Commission (2021). *Commission Staff Working Document. 2021 Rule of Law Report*, country chapter on the rule of law situation in Spain.

759 Organic Law nº 4/2021 of 29 March to modify the OLJP.

760 *Ibid.*, Preamble, paragraph 5.

761 SCC Informative Note nº 80/2021 of 17 September 2021.

762 In the last Eurobarometers (2019 to 2021), Spanish citizens scored 10% below the EU average regarding confidence in the independence of the judiciary. Whereas 44% of citizens in EU Member States were confident about judicial independence, in Spain just 34% considered the independence of the judiciary fairly good and 32% considered it fairly bad.

763 Democracy Intelligence Unit. (2022). *Democracy Index 2021. The China Challenge*. London: EIU. p. 10.

764 European Commission (2021). *Commission Staff Working Document. 2021 Rule of Law Report*, country chapter on the rule of law situation in Spain.

765 GRECO (2021). *Second Compliance Report. Fourth Evaluation Round*. Corruption, prevention in respect of members of Parliament, judges and prosecutors. March. Recommendations V, paragraphs 36-44.

766 *Dolinska-ficek and Oximek v. Poland* case, Apps. no. 9868/19 and 575511/19 (ECtHR 8 November 2021); *Reczkowicz v. Poland*. App. no. 43447/19 (ECtHR 22 November 2021); *Advanced Parhna SP. Z.O.O. v. Poland*. App. no. 1469/20 (ECtHR 3 February 2022).

CJEU⁷⁶⁷ are forming a new understanding of the composition, election and powers of the judicial councils. These new insights are that the election of the judicial members by their peers seems to be in line with Council of Europe recommendations⁷⁶⁸ and the most suitable method to guarantee judicial independence. There is consensus among Spanish scholars about the need to reform the General Council⁷⁶⁹ to avoid politicisation and blockage, but the political will is still lacking.

8. The General Council and the appointment and promotion of high court magistrates

Although in Spain the promotion of judges is regulated by law and guided by principles of seniority and specialisation (Articles 311.2 and 326.1 OLJP),⁷⁷⁰ the General Council retains discretionary powers to fill some high court positions. As a reaction to several Supreme Court judgments,⁷⁷¹ legislation has been passed aimed at limiting its discretionary powers.⁷⁷² The *Alonso Saura* case resolved by the SCC⁷⁷³ and currently pending before the ECtHR⁷⁷⁴ is a paradigmatic example of how this discretionary power can cause tension from the point of view of due process (Article 6.1 ECHR; Article 24 SC) and the prohibition of discrimination (Article 14 ECHR and Article 1 of Protocol n° 12 to the ECHR; Article 14 SC).

In 2015 the General Council appointed Mr. Pasqual del Riquelme President of the High Court of Murcia.⁷⁷⁵ Ms. Alonso Saura started judicial proceedings against the appointment because she claimed she had better credentials from the point of view of objective criteria (those related to jurisdictional functions). However, the General Council appointed Mr. Pasqual because he was better evaluated according to other criteria which focused on his management

767 Cases C-624/18; C-625/18 and C-585/18. A.K. ECLI:EU:C:2019:982; Case C-791/19, *European Commission v. Republic of Poland*. ECLI:UE:C:2021:596.

768 Opinion no.10 (2007) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society.

769 Restoration of political consensus regarding the selections of persons with unquestionable independence and professional credentials [see Pablo Lucas Murillo de la Cueva. *La independencia y el gobierno de los jueces. Un debate constitucional* (Reus Editorial, 2018); Juan-Luis Gómez Colomer, 'Sobre el nombramiento del presidente y de los vocales del consejo general del Consejo General del Poder judicial. Una reflexión desde el sentido común' (2019). *Teoría y realidad constitucional*, 44, 209-236], renewal of a third of the General Council every two and a half years [see Aida Torres Pérez, *Judicial Self-Government and Judicial Independence: the political culture of the General Council of the Judiciary*, 1783], introduction of a lot system if consensus is not reached or reduction of the influence of judicial associations in the electoral selection process are just some possible reforms that will improve the situation [see Rafael Bustos Gisbert, 'Sobre la independencia Judicial' (2019). *Teoría y Realidad Constitucional*, 44, 393-394; Miguel Ángel Caballos Espiérrez, *la reforma inacabada*, 37].

770 Rosario Serra Cristobal, 'El CGPJ y los nombramientos discrecionales de los magistrados,' in Miguel Revenga Sánchez, (ed.) *El Poder Judicial. VI Congreso de la asociación de constitucionalistas de España* (Tirant lo Blanch, 2009).

771 The Third Chamber of the Supreme Court has been key in monitoring the General Council's agreements by requiring justifications for its decisions. See, *inter alia*, Judgment of the Spanish Supreme Court n° 3171/2006 of 29 May, ECLI:ES:TS:2006:3171; Judgment of the Spanish Supreme Court n° 8911/2007 of 27 November, ECLI:TS:2007:8911.

772 Different elements of objectivity in the promotion of judges have been introduced in several legislative reforms such as Organic Law n° 19/2003 of 23 of December 2003; Organic Law n° 2/2004 of 28 of December 2004; Regulation 1/2010 on the provision of discretionary judicial positions approved by Agreement of the General Council of the Judiciary of 25 February 2010; and Organic Law n° 4/2018 of 28 December.

773 Order SCC n°119/2018 of 13 November, ECLI:ES:TC:2018:119A.

774 *Alonso Saura v. Spain*. App. no. 18326/19 (ECtHR lodged on 27 March 2018).

775 Agreement of the Spanish General Council of the Judiciary of 29 January 2015, para 5.

skills. The Supreme Court annulled the resolution of the General Council.⁷⁷⁶ While the Supreme Court acknowledged that the General Council had a margin of discretion, it found that the objective merits of the applicant were superior to those of the candidate appointed and that the reasoning of the General Council was not enough to justify its decision. In addition, under these circumstances, the fact that the rejected candidate was female required the General Council to give explicit reasons for selecting the male. On 26 May 2016, the General Council issued a new resolution explaining the reasons why the 'action project' submitted by Mr. Pasqual made him a better candidate to occupy the position of President of the High Court of Murcia.⁷⁷⁷ Ms. Alonso Saura filed an appeal before the Supreme Court against the General Council's resolution for failure to enforce the previous judgment and for discrimination on grounds of sex. On 27 June 2017, the Supreme Court declared that its previous judgment had been correctly executed since the General Council had provided the reasons to justify its decision.⁷⁷⁸

The applicant submitted an individual constitutional complaint before the SCC for violation of the right to a fair trial (Article 24 SC), in particular the right to the execution of sentences and the right to non-discrimination on grounds of sex (Article 14 SC). Although the SCC declared the complaint inadmissible, it developed an exhaustive reasoning to explain why violation of the alleged rights was manifestly inexistent. The SCC profusely quoted the ECtHR case law regarding both rights.⁷⁷⁹ The *Alonso Saura* case is also related to gender discrimination and occurred in a national context in which, despite most judges being women (54.85%), only a minority occupied high court positions (just 14 of 69 members of the Supreme Court are women and 2 of 17 of the Autonomous Communities High Court presidencies are occupied by women).⁷⁸⁰ In recent years national legislation has been approved in order to achieve real equality between men and women judges.⁷⁸¹ Nevertheless, the SCC has resolved⁷⁸² that this legislation does not recognise an automatic preference to favour women in cases of equal merits.⁷⁸³ However, Mr. Saura complained before the ECtHR adducing that under Article 1 of Protocol No. 12 to the Convention and Article 14 of the Convention the decision of the General Council of the Judiciary amounted to discrimination on grounds of gender.

776 Judgment of the Spanish Supreme Court n° 1033/2016 of 10 May, ECLI:ES:TS:2016:2039.

777 Agreement of the Spanish General Council of the Judiciary of 26 May 2016.

778 Judgment of the Spanish Supreme Court n° 1136/2017 of 27 June, ECLI:ES:TS:2017:2487.

779 The SCC quoted the following cases: *Flores Quirós v. Spain*. App. no. 75183/10 (ECtHR 19 July 2016); *García Mateos v. Spain*. App. no. 38285/09 (ECtHR 19 February 2013); *Vidal Escoll y Guillán González v. Andorra*. App. no. 38196/05 (ECtHR 29 July 2008); *Jafarov v. Azerbaijân*. App. no. 69981/14 (ECtHR 11 February 2008); *Gjonbocari v. Albania*. App. no. 10508/02 (ECtHR 23 October 2007); *Ruianu v. Romania*. App. no. 34647/97 (ECtHR 17 June 2003); *Ignaccolo-Zenide v. Romania*. App. no. 31679/96 (ECtHR 25 January 2000); *Di Pede v. Italy*. 24550/94 App. no. (ECtHR 26 September 1996).79/96 (ECtHR 25 January 2000); *Inmobiliare Saffi v. Italy*. App. no. 22774/93 (ECtHR 28 July 1999); *Hornsby v. Greece*. App. no. 18357/91 (ECtHR 19 March 1997), *Philis v. Greece*. App. no. 15068/89 (ECtHR 27 August 1991), *Golder v. United Kingdom*. App. no. 4451/70 (ECtHR 7 March 1974).

780 GRECO (2021). *Second Compliance Report*. Recommendation VI, paragraph 53.

781 Organic Law n° 3/2007 of 22 March on effective equality between men and women; Decree n° 1/2010 of 24 February (article 3.1.), approved by the General Council of the Judiciary on regulation of discretionary appointment of judicial organs; Agreement of the General Council of the Judiciary (22 June 2005) related to positive action measures in the General Council and judges' careers; and the Plan for equality in judges' careers approved on 14 February 2013 by the General Council.

782 Order SCC n°119/2018 of 13 November, ECLI:ES:TC:2018:119A. para 8.

783 The SCC referred to CJEU C-450/93 *Eckhard Kalanke v. Freie Hnasesstadt Bremen*, ECLI:EU:C:1995:322; C-409/95 *Hellmut Marschall v. Land Nordrhein-Westfalen*, ECLI:EU:1997:533; C-158/97, *Georg Badeck and others v. Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen*, ECLI:EU:C:2000:163; C-407/98 *Katarina Abrahassom y Leif Anderson v. Elisabet Fogelvist*, ECLI:EU:2000:367.

Two months after the *Alonso Saura* decision, the Parliament approved a reform establishing that for discretionary appointments the General Council will have to determine *a priori* the value of each merit and how the proportion between them will be calculated.⁷⁸⁴ Before the 2018 reform, the General Council had no legal obligation to specify the value of each merit. Therefore, cases like *Alonso Saura* had little chance of being effectively checked by courts. Although GRECO's reports valued these changes positively, they recommended new reforms to further limit discretionary appointments to high court positions. GRECO's reports emphasised that the appointment process is also affected by politicisation of the General Council,⁷⁸⁵ which, independently of objectivity in the process of appointment, contributes to damaging citizen confidence in justice. In a context in which renewal of the General Council is still blocked, as was pointed out above, in 2021 the Spanish Parliament approved a reform that limited the capacity of the General Council to appoint judges to high court positions after its own mandate has expired.⁷⁸⁶

9. The General Council of the Judiciary and the disciplinary liability of magistrates

In 2003 the OLJP was reformed and among the changes a clause was introduced that provided the General Council with the capacity to deny reinstatement of judges suspended in disciplinary actions if they did not pass a declaration of aptitude.⁷⁸⁷ The SCC declared the requirement unconstitutional because it violated the constitutional principle that the disciplinary process must be respected if arbitrariness is to be avoided and judicial independence guaranteed.⁷⁸⁸ Interestingly, the case was presented by Judge Vidal, who was suspended for his participation in drawing up a Catalan constitution.

The SCC considered that the vagueness of the 2003 legislative reform violated the reservation on legislation⁷⁸⁹ established by the constituent power to prevent the instrumentalisation of disciplinary measures against judges.⁷⁹⁰ The vagueness of the clause allowed the General Council to modulate its capacity to sanction judges, but in a way that contravened legal certainty (article 9.3 SC) and the principle of immobility of judges, a prerequisite needed for judicial independence (article 117 SC).

The SCC is habitually reluctant to annul legislation when consistent interpretation in accordance with the Constitution is possible, but in the case at hand the vagueness was considered to be reasonably insuperable.⁷⁹¹ For the SCC, Article 367.1 OLJP conditioned the reincorporation of the judge on a process in which the suspended judge could not anticipate

⁷⁸⁴ Miguel Ángel Cabellos Espiérrez, *La reforma inacabada* (2020), 23-30.

⁷⁸⁵ GRECO (2021). *Second Compliance Report*. Recommendation VI, paragraphs 53-54.

⁷⁸⁶ Organic Law n°4/2021 of 29 March modifying the OLJP on the establishment of a legal regime applicable to the General Council of the Judiciary in *interim* situations.

⁷⁸⁷ Article 104 of Organic Law n° 19/2003 of 23 December on modifying the OLJP.

⁷⁸⁸ Judgment SCC n° 135/2018 of 13 December. ECLI:ES:TC:2018:135.

⁷⁸⁹ *Ibid.* at para. 6.

⁷⁹⁰ See Gema Rosado Iglesias, 'El ejercicio de la función disciplinaria por el Consejo General del Poder Judicial.' In Miguel Revenga Sánchez (ed.), *El Poder Judicial. VI Congreso de la asociación de constitucionalistas de España* (Tirant lo Blanch, 2009), 155-236.

⁷⁹¹ Judgment of the SCC n° 135/2018 of 13 December. ECLI:ES:TC:2018:135. at para. 4.

the requirements needed to be declared competent, an uncertainty that also affected the person in charge of the process because there were no legal criteria to guide the decision on reinstatement. This uncertainty was particularly reflected in the case at hand, in which the suspended judge received two different proposals regarding his reincorporation. In the first one, the Chief of Judicial Staff of the Council accepted reincorporation and considered that the aptitude test was passed as the sanction was exhausted and a non-criminal record existed. In contrast, in the second one the General Council rejected it as it was considered that the nature of the infringement made Mr. Vidal incapable of properly developing the judicial function. The absence of clear legal criteria to define when the declaration of aptitude is approved gave disproportionate discretionary power to the General Council depriving the sanctioned judge of legal certainty to know the requirements needed to be reincorporated. Therefore, the SCC resolution served to reconcile the disciplinary process with the principle of legal certainty.

10. Fair trial

On 27 July 2010, Mr. Blesa Rodríguez, a professor at the Faculty of Pharmacy of La Laguna University, was found guilty of forgery for having presented a falsified curriculum vitae in the framework of a public tender for the allocation of pharmaceutical establishment licenses.⁷⁹² The applicant appealed to the Supreme Court alleging *inter alia* a lack of impartiality on the part of two of the judges sitting on the *Audiencia Provincial* bench. The applicant claimed that Judge A., president of the chamber, had previously sat on the bench that had heard the appeal introduced by the private prosecutor against the suspension of the criminal investigation. The applicant further claimed that Judge Sa. had participated as a substitute judge in the proceedings brought by La Laguna University while being at the same time an associate professor and an employee with administrative duties at the university.

On 20 May 2011 the Supreme Court ruled in the following terms.⁷⁹³ Regarding Judge A., the Supreme Court found that the applicant had failed to challenge the judge even though he had had an opportunity to do so, having been informed of the composition of the bench when it was constituted on 8 June 2010. The Supreme Court pointed out that Article 223(1) OLJP laid down the condition that the disqualification of a judge must be applied for as soon as the grounds for removal were known, failing which the application would be inadmissible. As regards Judge Sa., the Supreme Court held that the circumstances alleged by the applicant did not fall within any of the grounds for challenging the composition of the trial bench prescribed in Article 219 (9) (10) (16) OLJP and neither did they fall within the incompatibility grounds prescribed in Article 389 OLJP. In particular, the Supreme Court found that the applicant had failed to demonstrate that Judge Sa. had any interest in the outcome of the proceedings. The fact that the judge was an associate professor at the university was not sufficient in this regard. The Constitutional Court found the individual complaint inadmissible.⁷⁹⁴

The case was then brought to Strasbourg. The ECtHR ruled the complaint regarding Judge A inadmissible and that there had been a violation of Article 6(1) ECHR regarding Judge Sa.⁷⁹⁵ The ECtHR held that since the judge had had regular, close and remunerated professional relations with the university while performing his duties as a judge in the *Audiencia Provincial*

792 Judgment of *Audiencia Provincial* of Santa Cruz de Tenerife n° 330/2016 of 27 July 2010. ECLI:ES:APTF:2010:1224.

793 Judgment of the Spanish Supreme Court n° 391/2011 of 20 May 2011. ECLI:ES:TS:2010:3341.

794 Order of the SCC of 7 March 2012 (not published).

795 Blesa Rodríguez v. Spain. App. no. 61131/12 (ECtHR 1 December 2015).

of Santa Cruz de Tenerife this circumstance served objectively to justify the applicant's apprehension that Judge Sa. lacked the requisite impartiality.⁷⁹⁶ The ECtHR judgment pointed out the relevance that appearance of impartiality has to citizen confidence in justice, especially in a democratic society. In order to prevent partiality the Spanish legal system regulates a legal framework regarding incompatibilities (Articles 389 to 397 OLJP) and disqualifications (Article 219 OLJP). *Blesa Rodríguez* was useful to clarify situations in which the activity of teaching, in principle compatible with the jurisdictional function, becomes incompatible in the presence of other circumstances such as the existence of a labour relation.

IV. Conclusion

During these last two decades, Spanish courts have been interacting with the ECtHR and the CJEU, the role of which has been indispensable in consolidation of the rule of law. In a global context of first a financial crisis (the euro crisis of 2008) and second a public health crisis (COVID-19), but also in a national context of territorial crisis (the Catalan secession crisis) and terrorism (ETA), interventions by the ECtHR and the CJEU have decisively contributed to defining the scope and limits of the rule of law in Spain. The preliminary reference has become one of the main instruments to guarantee judicial independence (article 19.1 TEU), the integrity of due process (Articles 47 of the Charter and 6.1 ECHR) and determination of the criteria that non-jurisdictional agencies have to meet in order to be considered jurisdictional organs with the competence to initiate a direct dialogue with the CJEU (Article 267 TFEU).

Therefore, against the SCC's interpretation, by means of a preliminary reference the right of access to a lawyer of suspects *in absentia* during the pre-trial phase has been recognised (*VW* case). In addition, national courts have been granted a margin of discretion to investigate and determine whether in certain cases possible violations of the principles of non-discrimination and judicial independence exist (*Escribano Vindel* case), and in a group of cases (*Gabalfrisa SL and others v. AET, Banco Santander SA, Consorci Sanitari del Maresme v. Corporació de Salut del Maresme i la Selva, Montte SL v. Musikene, Ramon Margarit Panicello v. Pilar Hernández Martínez*) it has been established that to consider a non-jurisdictional entity to be jurisdictional and therefore allowed to present a preliminary reference to the CJEU, the entity must be independent in line with the threshold established by the CJEU. In accordance with that threshold, administrative tax tribunals and the Registrar (*Secretario Judicial*) have not been regarded as independent, while administrative contractual tribunals have been considered independent and therefore have the capacity to send preliminary references to the CJEU.

The ECtHR has also developed an essential role in granting the right to an impartial tribunal (*Otegi Mondragon* case), and the right to non-punishment without law (*Rio Prada* case) in a context in which the Spanish strategy against terrorism has created clear tensions with human rights and also regarding the rule of law. The Catalan secession crisis has been another focus of tension that has raised doubts regarding the impartiality of Spanish courts. In fact, the judicial process followed against the Catalan secessionist leaders before the Supreme Court, together with the ramifications of the process, especially the changeable doctrine of the SCC on the disqualification of SCC magistrates and the scope of execution of the European Arrest Warrant (EAW) are cases still pending before the CJEU and the ECtHR, the resolution of which will determine and influence the solution of the Catalan territorial crisis.

⁷⁹⁶ See also *Pescador Valero v. Spain*. App. no. 62435/00 (ECtHR 17 June 2003).

The deadlock in the General Council of the Judiciary because of its politicisation has been one of the main criticisms that Spain has received from both the Council of Europe, through the GRECO reports, and from the European Union, through the Commission's Rule of Law reports. These reports point out that the politicisation of the General Council has damaged citizen confidence in the independence of the judiciary, which is an indispensable element in any democratic society. The multiple legal reforms that have been approved regarding the General Council election formula have clearly been insufficient to solve the problem and they have in turn given rise to greater legal controversy. The politicisation of the General Council has affected its legitimacy and clouded the performance of its functions. Therefore, the discretionary nature of appointments to some high court positions, which has been subject to legal reforms to limit it and avoid cases such as *Alonso Saura*, has contributed to further undermining the confidence of citizens in judicial power, the impartiality of which requires processes governed by merit and capacity.

Last, the COVID-19 crisis has challenged the rule of law and the separation of powers scheme worldwide. However, the Spanish judiciary developed an active role during the management of the crisis making its judgments essential in the protection of fundamental rights. The SCC declared unconstitutional several aspects of the state of alarm, establishing that some restrictions on fundamental rights, especially limitations on mobility, would have to be approved through a state of emergency, on which the initial agreement of parliament is required. In general, Spanish courts have assumed an active role in monitoring the measures adopted by executives during the pandemic. Precisely the active role assumed by courts has consolidated them as relevant actors in times of crisis, with their judicial scrutiny serving to monitor public actions in order to guarantee fundamental rights. In this context of crisis in which the function of national courts has acquired a crucial dimension, the interactions established between the ECtHR, the CJEU and national courts have emerged as an important instrument to find common solutions to judicial controversies. Thanks to these interactions fundamental rights which are key to the well-functioning of courts – due process in general, but in particular judicial impartiality and independence – have been strengthened, although in Spain questions related to the independence of the General Council of the Judiciary and the Catalan territorial crisis remain questions to be solved.

NATIONAL REPORT: THE NETHERLANDS

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Summary

As the Venice Commission has recently stated, in general the Netherlands is a well-functioning state with strong democratic institutions and rule of law safeguards. In terms of citizen trust the Dutch judiciary scores high. This robust system rests on a deeply rooted rule-of-law culture and less on procedures and legal norms. This is both an advantage and a disadvantage. It means that the principles of independence, impartiality and accountability are deeply ingrained in the minds of judges, politicians and the general public, and that accidental instances of undue pressure on courts or political interference are corrected. However, this culture may change and the structural mechanisms and legal safeguards may not be sufficient to protect against such interference.

All this does not imply that internal judicial independence is always fully guaranteed. Especially the transfer of judges within courts, case assignment to judges, disciplinary sanctions by presidents, the promotion of judges and the efficiency-driven way of financing courts may raise concerns.

The judiciary adheres to ECHR and EU standards, which are considered to form part of the higher law of the land. Furthermore, a constitutional amendment is under way. This adds a new sentence to Article 17 of the Constitution reading “Everyone has the right to a fair trial within a reasonable time before an independent and impartial court, to determine his rights and obligations or the merits of a case against him.”

1. The trajectory of judicial independence in the Netherlands

In the Dutch constitutional tradition an independent judiciary is considered to be an essential element of the constitutional state alongside the principle of legality, *trias politica* and protection of fundamental rights.⁷⁹⁷ The Dutch Constitution dates from 1814 and was substantially revised in 1848 and for the last time in 1983. It does not explicitly mention independence of the judiciary as such. However, the principle underlies its Article 117, which states that members of the judiciary are appointed for life and hold office until they resign or reach an age determined by an Act of Parliament. Appointment of judges ‘for life’ dates back to 1814 and is still an important symbol of their independence. However, Article 117 of the Constitution is concerned with the *independence* of the judiciary, not its *impartiality*.

The literature distinguishes between different types of independence provided for in the Constitution.⁷⁹⁸ First, there is the *institutional independence* of the judiciary as a whole. This is regulated in Article 116 of the Constitution. The legislature must set up the judicial organisation with a certain degree of independence, in particular from the government. Therefore, the legislature may not create detailed management powers for the executive. Second, there is *legal independence*. This is in danger if individual judges fear repercussions to their legal position if a ruling displeases the other state powers. This independence is protected by Article 117 of the Constitution. Finally, there is a third form of independence: *functional independence*. Judges are independent in carrying out their duties. Members of the Public Prosecution Service do not have this independence. They may receive substantive general and specific instructions from the Minister of Justice and Security, although this is very unusual in concrete cases and is also subject to limitations and guarantees (Articles 127-128, Law on the Judiciary).

797 Scientific Council for Government Policy, *The Future of the National Rule of Law*, (WRR report no. 63), 2002. See <http://www.wrr.nl/publications>.

798 P.P.T. Bovend'Eert, *Rechterlijke organisatie, rechters en rechtspraak*, Alphen aan den Rijn: Kluwer 2008, p. 17- 32.

In a special situation specified in Article 119 of the Constitution concerning certain crimes committed by Ministers and State Secretaries while in office, the Prosecutor General of the Supreme Court, who is independent from a legal point of view, may also be instructed by the government to prosecute an individual case. For judges, such powers of inquiry are precluded by their functional independence. True functional independence goes far beyond the absence of instructional powers. It requires judges to continue to follow their legal conscience when a case comes under pressure from the media (the Wilders trial⁷⁹⁹ for example) or when they have to consider a possible unjust outcome of a case. Whether the judiciary remains stable even under high pressure is more a matter of *esprit de corps* than of legal rules.⁸⁰⁰

The Constitution deals with the judiciary and how it is organised but does not explicitly mention ‘judicial independence,’ either as an organisational principle or as a fundamental right of citizens. However, the Constitution is currently being amended in this respect. A new sentence will be added to its Article 17 which will read “Everyone has the right to a fair trial within a reasonable time before an *independent and impartial court* to determine his rights and obligations or the merits of a case against him.”⁸⁰¹ It should be remembered, however, that judges are precluded from reviewing the constitutionality of statutory law (i.e. primary legislation adopted by the Parliament acting together with the government). However, they may review the compatibility of such laws with international treaties. It is for this reason that the ECHR is of particular importance in the Netherlands legal order.

The ECHR has been highly influential in both the theory and practice of judicial independence. The fundamental right to a fair trial in Article 6 ECHR has a distinct and therefore a complementary role with regard to the independence of the judiciary. Where the Constitution focuses on institutional and legal independence, the case law of the ECtHR focuses on functional independence. The ECtHR has more or less derived the requirements regarding legal status and institutional independence from this. Lifelong appointments are therefore not an absolute requirement, and in practice this must not lead to a situation in which a judge is no longer able to freely judge a case.

National legal guarantees of the independence of the judiciary are further fleshed out in statutory law, in particular in the Judiciary Organisation Act (*Wet op de rechterlijke organisatie*)⁸⁰² and the Judicial Officers (Legal Status) Act (*Wet rechtspositie rechterlijke ambtenaren*).⁸⁰³ These guarantees are also partly based on European norms.

The Dutch justice system continues to be characterised by a very high level of perceived judicial independence,⁸⁰⁴ and efforts continue to further improve the quality of justice. Recently,

799 Supreme Court, 6 July 2021, ECLI:NL:2021:1036.

800 See, e.g., R Janse, ‘Rechtsstaatcultuur,’ *Netherlands Journal of Legal Philosophy*, 2020, 143-148; *Een sterkere rechtsstaat, verbinden en beschermen in een pluriforme samenleving*, Advies van de Raad voor het Openbare Bestuur (ROB), 2020.

801 Article 17 now reads: ‘No one may be prevented against his will from being heard by the courts to which he is entitled to apply under the law.’ The new sentence will precede the existing sentence.

802 This Act dates from 1827 and was last subject to major amendment in 2001, by the Act on the Organisation of the Judiciary (*Wet op de rechterlijke organisatie*) of 6 December 2001, *Staatsblad* 2001, 582 and the Act on the Council for the Judiciary (*Wet op de Raad voor de Rechtspraak*) of 6 December 2001, *Staatsblad* 581. The new text was published in the *Staatsblad* 2002, 1.

803 Judicial Officers (Legal Status) Act (*Wet rechtspositie rechterlijke ambtenaren*), Act of 29 November 1996, *Staatsblad* 590.

804 See, e.g., Scientific Council for Government Policy, Trust in each other and in society (WRR working paper 26, 2017, page 17) <http://www.wrr.nl/publications>. From 2012 to 2016 trust in the justice system was between 68% and 71%. This is in line with the monitoring of trust in the judiciary by the Council for the Judiciary (not published).

judges have been given more influence in the selection of their president.⁸⁰⁵ Further changes to strengthen judicial independence are under way, as can be seen in the preparation of a constitutional revision to amend the appointment procedure for Supreme Court judges⁸⁰⁶ and a debate on introducing constitutional review in the Dutch legal system.⁸⁰⁷

2. The Judicial System in the Netherlands

The justice system consists of eleven district courts (11), four courts of appeal and the Supreme Court.⁸⁰⁸ Two specialised administrative courts⁸⁰⁹ and the Administrative Jurisdiction Division of the Council of State⁸¹⁰ also perform judicial duties, acting as the highest administrative courts. An independent Council for the Judiciary plays a key role in safeguarding the independence of the judiciary and is tasked with maintaining the quality of the justice system, advising the government and Parliament on proposals regarding the judiciary, negotiating with the Minister of Justice and Security on the budget for the judiciary and allocating financial resources to courts. This applies to all courts except the Supreme Court (which is financed directly by the Minister of Justice and Security) and the Council of State (a High College of State, which is more independently financed).⁸¹¹

2.1. Selection, promotion and appointment of judges

The initial selection of persons for the position of judge is done by the National Selection Committee for Judges (NSCJ)⁸¹² in panels of three judges and three members of society (not politicians or former politicians) with a minimum majority of four votes.⁸¹³ The Council for the Judiciary is responsible for the NSCJ's strategy and appoints and dismisses its selecting members.⁸¹⁴ Once candidates have passed the NSCJ, they must apply to a court. The system ensures influence from society on the initial selection of judges while preventing political influence by distributing responsibilities between the Council for the Judiciary (strategy), the Presidium of the NSCJ (management of the NSCJ), the panels of six in the NSCJ (the selection of judges) and the courts (acceptance by the NSCJ of selected persons in specific judicial positions). Should no court accept a candidate, he or she will not become a judge. This only happens very rarely.

805 See section 2.2.

806 2020 Rule of Law Report, Country Chapter on the rule of law situation in the Netherlands, p. 3.

807 See section 3.3.

808 Article 2, Act on the Organisation of the Judiciary.

809 The Central Appeal Tribunal and the Trade and Industry Appeals Tribunal.

810 The Council also has an advisory branch, which renders opinions on draft legislation.

811 Article 2, Act on the Organisation of the Judiciary defines which courts belong to the Judiciary; the Council of State is not one of them. Article 3, Act on the Organisation of the Judiciary states that the Supreme Court is not under the Council for the Judiciary.

812 At the moment, the National Selection Committee for Judges is composed of ten judge members and eleven non-judge members, among which there is at least one public prosecutor and one attorney. Among the non-judges are the deputy ombudsman, a theologian and three high officials from companies. Four of them are bi-cultural. Almost 50% are female.

813 The decision of a panel cannot be appealed to the NSCJ.

814 Regulation, National Selection Committee Judges, Staatscourant 2020, 45201.

The promotion of judges in district and appeal courts follows a different path. A judge applies for promotion and an internal selection committee of judges selects on the basis of an application letter and interviews with the candidates. The court selection committee advises the board of the court, which ultimately decides.⁸¹⁵ Promotion is therefore dependent on the initiative of the board of the court. Promotion from a district court to a court of appeal follows the same pattern. In this pattern political influence is not possible, but influence by the board of the court is.

Once the board of a court has decided to select a person for a vacancy, the president of the court writes a letter to the Council for the Judiciary which proposes the appointment to the Minister of Justice and Security, who in turn proposes the appointment to the King. There are no statutory rules that forbid the Council of the Judiciary or the Minister from refusing proposals. However, the Council for the Judiciary has never refused a candidate proposed by a court president, and neither has a Minister refused a proposal by the Council for the Judiciary. Nevertheless, the Judges Association (NVVR) is advocating for a legal duty for the Minister to accept the proposal of the Council for the Judiciary.⁸¹⁶

The selection of court presidents is a matter for the Council for the Judiciary. Until 2021, candidates could apply to the Council. The Council would send the candidates to the court's selection committee. They were interviewed by the selection committee (all judges), which advised the Council for the Judiciary on the best candidate for the presidency. Then, the Council interviewed the candidates and selected the new president taking into consideration the advice of the selection committee. New rules have changed this procedure in some respects. First, the Council selects the candidates who it sends to the selection committee. If it does not find a candidate suitable, it does not send him or her to the court selection committee. This committee no longer only consists of judges but of four judges, two staff members and two board members. The president of the committee is a judge and has the casting vote in the case of a tie. Furthermore, the Council has agreed to accept the choice of the court selection committee as "in principle" binding. The Council and the Judges Association wanted to strengthen the influence of court judges on the selection of their president.

Selection and appointment of judges for the Supreme Court has its own procedure. It is the Supreme Court that nominates candidates and makes a proposal to the Parliament,⁸¹⁷ which ultimately selects. This procedure creates a risk of undue influence of party politics. To reduce this risk a bill is pending before Parliament to grant the power to select to a Committee of three persons, one appointed by the Speaker of the Lower House of Parliament, one by the President of the Supreme Court and one by the Speaker and the President jointly. This requires an amendment of Article 118 of the Constitution.⁸¹⁸ The proposal is currently awaiting advice from the Council of State.

All judges are appointed by a decision taken by the King in Council, meaning that the King signs the decision and the Minister of Justice and Security countersigns.⁸¹⁹ It is an unwritten

815 Article 5c, par. 1, Act on the Organisation of the Judiciary.

816 See, e.g., for the selection of members of the Supreme Court: Advice NVVR of 10 March 2020, <https://www.nvvr.org/documenten/adviezen/689.-advies-benoeming-leden-Hoge-Raad-def.pdf>, par 2.1

817 Article 5c, par 6, Act on the Organisation of the Judiciary.

818 Voorstel voor andere benoemingswijze van de leden van de Hoge Raad, <http://www.rijksoverheid.nl>

819 Article 47 of the Constitution.

rule in Dutch constitutional law that the King is not allowed to refuse to sign a proposal from a minister.

2.2. A bill strengthening integrity, independence and impartiality

Judges are required to inform the president of the court of positions they hold outside their office.⁸²⁰ The president has a duty to check whether holding these positions is detrimental to their duties as judges, or to maintaining impartiality and independence or trust therein.⁸²¹

In response to Greco reports, the Minister for the Interior and the Minister for Justice and Security have initiated a bill to further strengthen judicial integrity, independence and impartiality, particularly regarding possible conflicts of interests.⁸²² The internet consultation on the bill ended on 6 January 2022. One of the proposals aims to no longer allow judges to be members of the Senate or of the European Parliament.⁸²³ Judges are already prevented from being members of the lower house of Parliament.⁸²⁴

The bill also aims to strengthen the rules regarding judges' financial interests in line with the rules for civil servants. A judge is not allowed to have financial or equity interests or deal in securities if trust in his or her impartiality or independence would not reasonably be ensured.⁸²⁵ The bill imposes a legal duty to report to the president in the case that such a situation occurs.⁸²⁶

Finally, the bill makes it mandatory for every court to have an integrity policy for judges taking into account guarantees of their independence.⁸²⁷

Based on an act to prevent money laundering and the financing of terrorism, the Minister of Finance has made rules for judges in apex courts and the Council for the Judiciary, their spouses and children and the partners of their children, to explain the origin of their assets.⁸²⁸ These rules do not apply to judges in district courts or courts of appeal.

2.3. The childcare allowance scandal

In the early 2000s the government believed the childcare allowance system was vulnerable to abuse and introduced stricter rules to prevent it. These rules led to many court cases. The highest court for these cases is the Administrative Jurisdiction Division of the Council of State, which – for many years – interpreted these rules very restrictively, holding that citizens who made a minor mistake in representing their financial situation had to pay back all the

820 Article 44 (5) of the Act on the Organisation of the Judiciary.

821 Article 44 (4) of the Act on the Organisation of the Judiciary.

822 Bill on Reinforcement of Judicial Integrity, Independence and Impartiality [*Wet versterking integere, onafhankelijke en onpartijdige rechtspraak*], <https://www.overheid.nl/Consultatie> Wet versterking integere, onafhankelijke en onpartijdige rechtspraak.

823 Article 44 (2) of the bill.

824 Article 44 of the Act on the Organisation of the Judiciary.

825 Article 44c of the bill.

826 Article 44c (3) of the bill.

827 Article 44b bill.

828 Article 1.2 par. c of the Rules for the Prevention of Money Laundering [*Regels voor de preventie van witwassen*] based on the Act for the prevention of money laundering and financing terrorism [*Wet ter voorkoming van witwassen en financiering van terrorisme*], <https://www.wetten.overheid.nl>

allowances ever received, irrespective of the severe consequences for them (enormous debts, bankruptcy, divorce, removal of children from the care of their parents), and despite continual resistance from the district courts. In addition, the algorithms the tax authorities used to detect alleged fraud appeared to disadvantage families of foreign origin.

These practices and the disproportionate consequences for thousands of citizens caught the attention of the Ombudsman and several politicians, and caused upheaval in public debate. Only in 2019 did the Administrative Jurisdiction Division of the Council of State change its strict interpretation of the Act of Parliament. Until then, it had defended its strict stance by arguing that the Act of Parliament concerning childcare allowances did not give any discretion in this respect. These events led to an investigation in Parliament with harsh conclusions for the administration and the tax authorities, the legislature and the Administrative Jurisdiction Division of the Council of State.

A motion to ask an opinion of the Venice Commission was adopted in Parliament, and in a letter on 25 February 2021 the Speaker of the lower house of Parliament for the first time ever requested an opinion of the Venice Commission, on whether countervailing powers had worked sufficiently in the childcare allowance cases. The Venice Commission concluded:⁸²⁹

“134. In general, the Netherlands is a well-functioning state with strong democratic institutions and safeguards for the rule of law. While the shortcomings in individual rights protection uncovered in the Childcare Allowance Case are indeed serious and systemic and involve all branches of government, it appears that eventually the rule of law mechanisms in the Netherlands did work. The reports of the Ombudsman, the Parliamentary committee, and the legislative amendments show the reaction of the different mechanisms in the Dutch system. The rule of law issues revealed by the Childcare Allowance Case are taken seriously by all branches of government, which is very positive. In the interest of its citizens, the Netherlands appears to be capable and willing to address and redress its mistakes. But in this case, this reaction has taken a much longer time than it should have, and serious damage was caused to the families involved and those who attempted to expose the problem faced much resistance.”

Furthermore:

“137. (...) it could be considered whether Article 120 of the Constitution should be amended, or whether another mechanism of constitutional review should be introduced.”

The strict interpretation in the childcare allowance cases was a choice of the Administrative Jurisdiction Division of the Council of State that disproportionately harmed many citizens. The law did not impose this choice, as the Division finally accepted when it changed the strict interpretation. The question arises of whether the events demonstrate problems relating to the absence of judicial constitutional review in the Netherlands and/or a problem in a Council of State that is too close to the executive and not sufficiently protective of individual rights.

As a result of these events, discussion on constitutional review was revitalised. The present government stated in its Coalition Agreement of 15 December 2021 that it would start working on the details of a constitutional review in line with the advice of the State Committee on the Parliamentary System, and it would examine what form best fits the Dutch legal system.⁸³⁰ The reference here is to a 2018 report by the State Commission tasked with a review of the

⁸²⁹ Venice Commission: Netherlands: Opinion on the Legal Protection of Citizens, CDL-AD (2021) 031-e.

⁸³⁰ Coalition Agreement, p 6, <http://www.rijksoverheid.nl>.

functioning of parliamentary democracy, which suggested that a Constitutional Court should be established.⁸³¹ However, given the limited political will to change the constitutional ban in Article 120, Constitution, it remains to be seen whether much will come of this.

3.

3.1. *Internal judicial independence – in the light of ECtHR case law*

When examining whether the Dutch court system has a potentially problematic profile in the light of internal judicial independence, five issues turn out to be particularly relevant: the power to assign (or re-assign) cases to judges, the power to transfer judges to other teams in the court, the power to impose disciplinary penalties or to take initiatives to this effect, the power to promote judges and the power of money. Each of these issues raises concerns from the perspective of judicial independence.⁸³²

a) *The power to assign cases to judges*

The power to assign cases lies with the board of the court,⁸³³ which establishes rules of procedure for this purpose.⁸³⁴ In principle, case assignment is done on the basis of objective criteria but some categories of cases are exempt from this because they require customisation.⁸³⁵ In practice, however, the rules are not hard and fast and the officials who assign cases (or who are mandated to do so) have great discretionary power. Furthermore, in the event that a criminal trial has to be postponed after it has started, for instance because additional witnesses have to be heard, for practical reasons the panel of judges is often changed for the remainder of the trial.

Therefore, Dutch case assignment practice is far from transparent. This can lead to judges being challenged, as happened during the criminal proceedings against Geert Wilders, a member of the lower house of Parliament for the Party for Freedom (PVV), for causing insult and stirring up hatred. The judges hearing the case had been selected based on the criterion that they were not and had never been members of a political party. This raised the question of whether this could be considered a relevant criterion and, if so, what it meant for judges who *were* members of a political party.⁸³⁶

In addition, boards of court are free to assign judges in the court to different teams in the same court. For example, a judge could be assigned to no longer handle criminal cases but only private law cases. As a result, this power functions as a variant of the power to assign cases to a specific judge. In this respect, there may be tensions with European principles on internal judicial independence.

831 *Low Thresholds, High Dikes. Democracy and rule of law in balance, Final report of the State Committee on Parliamentary System* [Lage drempels, Hoge Dijken. Democratie en rechtsstaat in balans, Eindrapport van de staatscommissie parlementaire stelsel], 2018, available at <https://zoek.officielebekendmakingen.nl/blg-867564.pdf>

832 See, e.g., Bovend'Eert, P.P.T., 'Judicial Independence and Separation of Powers: A Case Study in Modern Court Management,' 22(2) *European Public Law* (2016) 333.

833 Art. 41 Wet rechtspositie rechterlijke ambtenaren (Act on the Legal Status of Judicial Officers).

834 Art. 20.1 Wet op de Rechterlijke Organisatie. Since 1 April 2021 this has been done on the basis of Code Case Assignment [Code Zaakstoedeling]

835 Article 4 Code Zaakstoedeling, https://www.rechtspraak.nl/voor_professionals_in_het_recht/zaaksverdeling_en_toedeling/Code_Zaakstoedeling.

836 On this subject, see R.J.B. Schutgens, 'Dit is de rechter die de wet u toewijst,' *RM Themis* (2016) p. 113-114.

b) The power to transfer judges within courts

Most courts have teams for civil law, criminal law, administrative law and family law. The board of the court assigns a judge to a team, and if there are more venues in the court to one of the venues. Usually, courts have a policy that judges have to be able to work in at least two teams. For this reason, and others such as workload, sickness of judges or a team being understaffed, the board may decide to transfer judges from one team to another. This is usually done in agreement with the judge that has to be transferred, but not always. The transfer procedure usually lacks transparency both for judges and the world outside the court. The power to transfer judges may be used to pressure judges.⁸³⁷ A judge who opposes a transfer has the right to appeal to a specialised court, but this is seldom used.

c) The power to impose disciplinary penalties

The power to impose disciplinary penalties can be used as a source of pressure on judges. Until 2018 under Dutch law there were only two types of disciplinary penalties that could be imposed: a written warning or a dismissal. Since the introduction of an Act in 2018 there have been two other disciplinary penalties. The Act introduced the possibility to withhold up to half a month's salary and to suspend a judge from office for the duration of a maximum of three months.⁸³⁸ The old system with just two disciplinary penalties was rightly regarded by the legislator as too limited. The amendment had the aim of responding more adequately to different forms of impermissible behaviour by judges. On the other hand, the fact that a written warning can be imposed by the president of the court has been criticised as it has been held that this institution supervises judges without the conditions for ensuring independence laid down in the Constitution.⁸³⁹ No examples of such pressure are publicly known.

d) The power of money

The courts are financed on the basis of a system that encourages them to work efficiently. Over the last ten years, however, for several reasons the Government has economised on the budget for the judiciary. The effect of this is that there is very high pressure on judges to work as efficiently as possible. Over the last five years it has repeatedly been established in research that judges, especially criminal and family judges, worked structural overtime. These judges claimed that it damaged the quality of their work. To improve this situation the Council asked representatives of judges to establish standards for the quality of judges' work. The standards helped to increase the budget for criminal cases and so lower the workload of criminal judges, but not for family cases. In 2022, the Government acknowledged the judges' protests and the budget for the judiciary was substantially increased.

Another debate concerns the question of whether by exercising their financial powers the Council for the Judiciary and the boards of courts might have excessive influence on the way justice is administered. For example, financial incentives are used to ensure that cases are handled efficiently, making it less economical to handle cases with a three-judge panel instead

⁸³⁷ See, e.g., Case C-487/19, WZ ECLI:EU:C:2021:798; Joined Cases C-748/19 to C-754/19, WB ECLI:EU:C:2021:931.

⁸³⁸ See Staatsblad [Bulletin of Acts and Decrees] 2018, 298. Only the Supreme Court is able to impose these two new disciplinary penalties on judges. All but the written warning can only be imposed by the Supreme Court (Art 46d(2) Wvra).

⁸³⁹ Bovend'Eert, 'Wie bewaakt de bewakers? De nieuwe tuchtrechtregeling voor rechters is ongrondwettig,' NJB 2015/407.

of with a single judge.⁸⁴⁰ Re-assigning cases from a panel to a single judge may also be applied if a court has a backlog, as the corona crisis has shown.

A last issue in this respect concerns the implementation of Code Case Assignment in 2021. In principle Article 6 of the Code requires that a judge to whom a case is assigned has to finish the case. This rule changed the standing practice in many criminal cases with panels of three judges. The Code might lead to a less efficient way of managing criminal cases, and therefore less money for courts (the financial system is based on the output of cases). It is, however, too early to tell whether the Case Assignment Code will suffer from the power of money, or judges because of the increase of their workload, or society because of the increase in the backlog.

3.2. An external perspective – the Dutch contribution to the EU judicial independence debate: adjudicating on the European Arrest Warrant (EAW)

In addition to the very active participation of Dutch judges and lawyers in political discussion of European rule of law problems, one legal contribution stands out. This is the case of the contribution to understanding of the grounds for execution of EAWs following a series of preliminary reference procedures originating from the District Court of Amsterdam (CoA), which since 2014 has had exclusive jurisdiction in the Netherlands to decide on incoming EAWs.⁸⁴¹ The dialogue with the CJEU led to adjustment of the law, transferring the power to issue EAWs away from the public prosecutors' office to an investigative judge, because public prosecutors can be instructed by the Minister of Justice and Security. At the European level, it offered the opportunity to engage in a discussion on how to assess the legal system in another Member State.

There are two preliminary rulings that must be mentioned originating from the Netherlands: *L and P v Openbaar Ministerie*.⁸⁴² and *X and Y v Openbaar Ministerie*.⁸⁴³ In both cases, the Amsterdam District Court essentially sought to convince the Court of Justice to change its position on the two-step test in *Aranyosi and Căldăraru*, which was further developed in *LM*.

In *LM*, at the request of the Irish High Court the Court of Justice devised a two-tier test to deal with risks of violations of a requested person's right to a fair trial.⁸⁴⁴ A real risk to the right to a fair trial should be established on the basis of a general assessment of the justice system in the issuing Member State, with particular attention to the independence of courts (step 1). However, a finding of systemic and generalised deficiencies in this respect does not suffice to discontinue the proceedings. Instead, it creates an obligation to request further information and verify whether the individual concerned might be exposed to a risk *in concreto* (step 2). If a risk exists that the requested person's right to a fair trial may be infringed, the EAW must be postponed and can eventually be annulled.⁸⁴⁵ A central topic in the judgement is the

840 See, e.g., Bovend'Eert, P.P.T., 'Judicial Independence and Separation of Powers: A Case Study in Modern Court Management,' 22(2) *European Public Law* (2016) p. 333.

841 Article 1 par g Overleveringswet. <https://wetten.overheid.nl>

842 Joined Cases C-354/20 PPU and C-412/20 PPU *L and P v Openbaar Ministerie* (*Indépendance de l'autorité judiciaire d'émission*) EU:C:2020:1033.

843 Joined Cases C-562/21 PPU and C-563/21 PPU *X and Y v Openbaar Ministerie* (*Tribunal établi par la loi dans l'État ember d'émission*) ECLI:EU:C:2022:100.

844 Case C-216/18 PPU *LM* [2018] ECLI:EU:C:2018:586.

845 Martufi, Adriano, 'Exploring Mutual Trust through the Lens of an Executing Judicial Authority. The Practice of the Court of Amsterdam in EAW Proceedings' *New Journal of European Criminal Law*, Volume 11, Issue 3, p. 284-285.

independence of the judiciary. In the Court's view, the requirement of judicial independence is part of the essence of the fundamental right to a fair trial. The right is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded. (para. 48). It is clear that the independence of the judiciary forms the essence of a fair trial and the right to effective judicial protection. At the same time, it lies at the very heart of the rule of law.⁸⁴⁶ Without judicial independence, a state legal system can only provide an illusion of the rule of law.

In the *LM* decision the Court of Justice thus developed the *Aranyosi and Căldăraru test*⁸⁴⁷ and indicated that the two-step test is to be applied to assessment of judicial independence and fair trial guarantees in the context of executing European Arrest Warrants.

In December 2020, responding to questions asked by the District Court of Amsterdam on the possibility of refusing surrender with respect to European arrest warrants issued by the Polish authorities, the Court of Justice clarified that the existence of evidence of systemic or generalised deficiencies concerning judicial independence in Poland or of an increase in these deficiencies “does not in itself” justify the judicial authorities of the other Member States refusing to execute any European arrest warrant issued by a Polish judicial authority.⁸⁴⁸ In a ruling on 10 February 2021⁸⁴⁹ the Amsterdam District Court refrained from surrendering a 33-year-old Polish citizen suspected of *inter alia* drug trafficking in his home country. The Dutch Court considered that there was a real risk that his fundamental right to a fair trial would be violated if he was brought to justice in Poland.

In February 2022 the Court of Justice again responded to a preliminary reference from the Amsterdam District Court asking the Court of Justice whether the two-step examination of guarantees of independence and impartiality inherent in the fundamental right to a fair trial was applicable when the guarantee, also inherent in that fundamental right, of a tribunal previously established by law is at issue. The Court used the opportunity to specify the criteria permitting an executing judicial authority to assess whether there is any risk of breach of the requested person's fundamental right to a fair trial, but did not essentially change its position.

4. Implementation of the two-tier test in the Dutch legal order

In the Netherlands, the Framework Decision on the EAW (FDEAW) has been primarily implemented by means of the Dutch Surrender Act (*Overleveringswet*, OLW).⁸⁵⁰ A specialised chamber of the Amsterdam District Court (*Internationale Rechtshulpkamer*, IRK) was given the

846 S. Biernat, *The Assessment of Judicial Independence Following the CJEU Ruling in C-216/18 LM*, available at https://link.springer.com/chapter/10.1007/978-3-662-62317-6_16#Fn1

847 Applying the *Aranyosi* precedent, the CJEU directed the national court to carry out a specific assessment if there “are substantial grounds for believing that he [the surrendered person] will run a real risk of breach of his fundamental right” (para. 75).

848 Joined Cases C-354/20 PPU and C-412/20 PPU *L and P Openbaar Ministerie*.

849 ECLI:NL:RBAMS:2021:420.

850 Wet van 29 april 2004 tot implementatie van het kaderbesluit van de Raad van de Europese Unie betreffende het Europees aanhoudingsbevel en de procedure van overlevering tussen de lidstaten van de Europese Unie (*Overleveringswet*; OLW) Stb. 2004, 195.

role of executing authority in view of its existing competences in the fields of extradition and judicial cooperation in criminal matters.⁸⁵¹

4.1 Court organisation as a facilitator of dialogue and execution of EAWs

The Amsterdam District Court is responsible for the execution of EAWs. The Court has critically engaged in dialogues with European and other courts,⁸⁵² most clearly by making several references for preliminary ruling to the Court of Justice.⁸⁵³

4.2 The Dutch European Arrest Warrant Procedure

On receipt of an EAW, supplemented with a translation in one of the languages accepted by the Netherlands (Dutch or English), it is sent to the Public Prosecutor's Office in Amsterdam for a first scrutiny. A prosecutor in that office is responsible for assessing whether major obstacles exist that prohibit surrender.⁸⁵⁴ He also verifies the completeness of the information on the EAW form and may ask the issuing authority to complete or verify it.⁸⁵⁵ In addition, if the requested person accepts his or her immediate surrender, the prosecutor may directly execute the EAW.⁸⁵⁶ By contrast, if the individual concerned does not accept to follow the procedure, the prosecutor submits the EAW to the Court within three days of its receipt.⁸⁵⁷

In the first hearing, the Court conducts an in-depth analysis of the possible grounds for non-execution of the EAW. If none of the grounds listed in the OLW and the FDEAW can be invoked, the executing authority is under an obligation to allow the surrender. After a final decision has been rendered, Dutch law provides no opportunity to appeal against a decision allowing surrender. The OLW implements all the grounds for refusal listed in Articles 3, 4 and 4a of the FDEAW. However, the Dutch legislature transposed all the optional grounds for refusal as mandatory.⁸⁵⁸

One of the grounds exceeding the scope of the FDEAW concerns the risk of fundamental rights violation on surrender to the issuing Member State. Article 11 OLW prohibits the surrender of a requested person when it would lead to a flagrant violation of one or more fundamental rights guaranteed by the European Convention on Human Rights (ECHR). Arguably, while this

851 See, *inter alia*, Vincent Glerum, *De weigeringsgronden bij uitlevering en overlevering: een vergelijking en kritische evaluatie in het licht van het beginsel van wederzijdse erkenning* (Wolf Legal Publishers, Oisterwijk 2013), 97-99.

852 Jasper Krommendijk, *National Courts and Preliminary References to the Court of Justice* (Edward Elgar, 2021), 162-163.

853 Vincent Glerum, *De weigeringsgronden bij uitlevering en overlevering. Een vergelijking en kritische evaluatie in het licht van het beginsel van wederzijdse erkenning* [The Grounds for Refusal on Extradition and Surrender. A Comparison and Critical Evaluation in the Light of the Principle of Mutual Recognition] (Wolf Legal Publishers 2013) as cited in Krommendijk, *idem*, 162-163.

854 Article 2(3) and Article 3(3) OLW read in conjunction with Article 23(1) OLW. Several mandatory grounds for refusal may apply at this stage (see Article 20 read in conjunction with 23(1) OLW concerning the requested person being younger than 12 years of age).

855 Article 20(1) OLW.

856 Articles 39-43 OLW.

857 Article 23(2) OLW.

858 Joske Graat et al., 'The Netherlands' in Tony Marguery (ed.), *Mutual Trust under Pressure, the Transferring of Sentenced Persons in the EU* (Wolf Legal Publishers, Oisterwijk 2018) 175, 204-205.

provision is meant to prevent the risk of future violations, it might also be invoked in the case of ‘past or completed’ breaches of fundamental rights.⁸⁵⁹

5. National Court Judicial Dialogue

The CJEU’s judgment in *LM* seems to have been received differently in the EU Member State jurisdictions. In some jurisdictions the case has seemingly not received much – or even any – attention in court cases,⁸⁶⁰ but in other countries courts have been more critical. The *LM* judgment was at issue in a number of cases before the Amsterdam District Court.⁸⁶¹ The Court took leading decisions on 16 August 2018⁸⁶² and 4 October 2018,⁸⁶³ by which surrenders to Poland were suspended for the time being. In July 2020, the Court decided to refer two EAW cases to the CJEU, seeking clarification of the CJEU’s approach in *LM* in the light of recent developments involving the deterioration of rule of law in Poland.⁸⁶⁴

In April 2019 the Court decided to surrender the persons requested. Moreover, it acknowledged the general concerns regarding the impact of changes in Poland on the rule of law and concerns regarding the right to a fair trial before the courts in which the transferred person will be tried.⁸⁶⁵ It considered, however, that a risk of breaching the right of the individual person to a fair trial was not demonstrated. It held that neither the personal circumstances of the suspect nor the nature of the offences for which he would be tried justified a negative decision. The Court concluded that the charges related to common criminal offences, so the suspect and the type of offences were not in any way given special attention by the ruling politicians in Poland so as to give rise to inappropriate influence on the judges.⁸⁶⁶ The *LM* test implies that the Court has to ask the national courts of other Member States to comment on their independence.⁸⁶⁷

A review of existing practice indicates that the executing courts do not refrain from asking general questions. In fact, these questions are much more frequent than questions about the person prosecuted and his individual case.

859 Hanne Sanders, *Handboek uitleverings- en overleveringsrecht* (Kluwer, Alphen aan den Rijn 2014), 380.

860 This conclusion results from desk research and replies that the author received from foreign experts in the International Extradition Group in September 2019. The International Extradition Group was initiated by Prof. Dr. Stefano Maffei, University of Parma in 2016 and is a forum for extradition lawyers and scholars all over the world. More information on the group is available at <<https://internationalextradition.org/>>.

861 A. Martufi and D. Gigengack, ‘Exploring mutual trust through the lens of an executing authority: The practice of the Court of Amsterdam in EAW proceedings,’ 11 (2020), NJECL, 294.

862 ECLI:NL:RBAMS:2018:5925.

863 ECLI:NL:RBAMS:2018:7032; see also T. Wahl, ‘Fair Trial Violation: Amsterdam Court Refuses Surrender to Poland,’ <https://eucrim.eu/news/fair-trial-violation-amsterdam-court-refuses-surrender-poland/> .

864 Joined Cases C-354/20 PPU and C-412/20 PPU, “L and P”/Openbaar Ministerie.

865 See, e.g., Rechtbank Amsterdam (Judgments of 16 April 2019), ECLI:NL:RBAMS:2019:2722, para. 5.4.1; 2019:2751, para. 5.4.1; 2019:2794, para. 6.4.2; 2019:2795, para. 4.4.1; 2019:2799, para. 4.4.1.

866 ECLI:NL:RBAMS:2019:2722, supra note 85, para. 5.4.2; 2019:2751, para. 5.4.2; 2019:2794, para. 6.4.3; 2019:2795, para. 4.4.2; 2019:2799, para. 4.4.2.

867 This is actually in contrast with what the court in the *Aranyosi and Căldăraru* case stated. The answers to be given by national courts within the judicial dialogue mechanism were intended to refer to the conditions under which a custodial sentence was to be served. Therefore, they relate to an area for which a separate branch of public administration was responsible: the prison authorities, which remain outside the judiciary.

Conclusions

By way of conclusion, it may be useful to refer to the finding of the Venice Commission that “In general, the Netherlands is a well-functioning state with strong democratic institutions and rule of law safeguards.” In terms of citizen trust the Netherlands judiciary scores high.

Nevertheless, this does not imply that internal judicial independence is always entirely guaranteed.⁸⁶⁸ Especially the transfer of judges within courts, case assignment to judges, disciplinary sanctions by presidents, the promotion of judges and the efficiency-driven way of financing the courts may raise concerns.

⁸⁶⁸ J. Sillen, ‘The concept of ‘internal judicial independence’ in the case law of the European Court of Human Rights,’ (2019) *European Constitutional Law Review*, 15(1), 104-133.

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