Journal für Rechtspolitik 30, 491–501 (2022)
https://doi.org/10.33196/jrp202204049101
JRP 2022, 491

JRP

David Kosař / Attila Vincze*

European Standards of Judicial Governance: From Soft Law Standards to Hard Law**

Abstract: This article aims to describe the effect of the ever-expanding case-law of ECtHR and the CJEU on domestic judicial design and its connection to judicial independence. The right to a fair trial and the right to effective remedy, which are fundamental parts of both legal order, has been interpreted in recent times as a yardstick to evaluate the national judicial system, which also leads to an empowerment of the judges and enforcement of soft law standards. These new instruments were established especially to protect judges in illiberal or transitional democracies but they seem to be more and more relevant for established democracies as well.

Keywords: democratic backsliding; ECHR; effective remedy; fundamental values of the European Union; judicial governance; judicial independence; preliminary reference; primacy of EU law; principle of non-regression; selection of judges.

Norms/Legal texts: Art 2, 7, 19 TEU; Art 267, 325 TFEU; Art 47, 53(3) CFR; Art 6 ECHR.

I. Introduction

Up until very recently, the qualities of a national judicial body were subject to European scrutiny only in the very special constellation of the preliminary reference procedure.[1] It is a commonplace that only those courts and tribunals may refer a question to the CJEU which meet some essential criteria: it needs to be established by law, it needs to be permanent, its jurisdiction needs to be compulsory, its procedure needs to be *inter partes*, it needs to apply rules of law and it needs to be independent.[2] Nonetheless, these were rather thought to be criteria for filtering bodies entitled to submit preliminary references, and served to manage the case-load by excluding administrative bodies, international tribunals, tribunals set up for one particular case from the ordinary judiciary,[3] or questions not truly related to judicial activities,[4] and hence the applied criteria aimed less to describe the qualities of the judiciary in Europe.

This was not necessary either for long time because the judiciary was perceived as a reliable agent of the EU, pushing forward the agenda of the European integration by submitting shrewdly formulated preliminary questions, widening the scope of EU law, filling gaps of the legislation and enforcing the rights of the individuals with due respect for the forms and procedures of national law[5] which designates the courts and tribunals and lay down the detailed pro-

* The research leading to this article has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (INFINITY, grant agreement no 101002660).

** Dieser Beitrag geht auf einen beim Symposion „Aktuelle Fragen zur Justiz und Justizreform" am 13.05.2022 an der Universität Wien gehaltenen Vortrag zurück. Siehe auch JRP 2/2022, 116 ff.

[1] *Jaeger*, Gerichtsorganisation und EU-Recht: Eine Standortbestimmung, EuR 2018, 611 (628).

[2] CJEU 06.10.2015 C-203/14 (*Consorci Sanitari del Maresme*), EU:C:2015:664, para 17 and the case-law cited there.

[3] CJEU 10.12.1965, 61/65 (*Vaassen-Göbbels*), ECLI:EU:C:1966:39; CJEU 06.10.1981 246/80 (*Broekmeulen*), ECLI:EU:C:1981:218; CJEU 17.09. 1997 C-54/96 (*Dorsch Consult*), ECLI:EU:C:1997:413.

[4] *Broberg/Fenger*, Preliminary References, in: Schütze/Tridimas (eds), Oxford Principles of European Union Law. Volume I (2018) 981 (983-987).

[5] *Schütze*, European Union Law (2015), 394-398. *Slaughter/Stone Sweet/Weiler* (eds), The European Courts and National Courts: Doctrine and Jurisprudence (1998).

cedural rules.[6] Therefore, the main questions have been the limits of the respect for national procedural autonomy,[7] the consistent application of the national legal remedies for EU rights and the interference with national law if it does not provide a minimum of effectiveness.[8] Despite all national idiosyncrasies, there was no need for meddling with internal organizational matters of the judiciary because these were supposed to be in line with a rough idea of the rule of law as a precondition for the accession to EU. This idea underlay also the application of the so-called Bosphorus presumption of the equivalence of the effectiveness fundamental rights protection between the ECHR and the EU:[9] besides some technicalities there was no need to doubt the independence and effectiveness of the national judicial remedies.

Nonetheless, the role of the national judiciary as a transmission mechanism between EU rights and national law,[10] which is supposed to offer an effective remedy[11] and to be qualified for preliminary reference procedure, can also trigger the applicability of the EU law for purely organizational matters if they might impair the access to a fair an effective justice. Although it requires some legal gymnastics, the applicability of EU law triggers the obligation of the given Member State to "provide remedies sufficient to ensure effective legal protection in the fields covered by Union law" under Art 19 para (1) TEU and – by application of Art 52(3) of the Charter – to comply with the requirements of Art 47 of the Charter,[12] and as a logical extension, any ambiguities regarding these requirements might be clarified via preliminary ruling, which also enables the court to enquiry as to whether it is an independent court or tribunal in sense of Art 267 TFEU,[13] and in doing so to make the abstract values enshrined in Art 2 TEU[14] operational.

During the last few years the CJEU declared several questions of that design to be admissible and the judgements helped to distil some principles of judicial independence under EU law. The ECtHR does not want to lag behind and also speeded up the development of its case law touching upon judicial governance, mainly through innovative interpretation of notions "tribunal established by law"[15] and judicial independence[16] under Art 6 ECHR.

This article reflects on these far-reaching changes. First, it identifies the leading principles concerning judicial governance in CJEU's and ECtHR's case law. Then it examines the key debates concerning this new strand of case law as well as its effects and challenges to the domestic implementation of these European standards. Finally, it discusses what this new case law means for domestic judicial governance.

II. Leading Principles

First and foremost, as part of the effective judicial protection,[17] there exists a purely European standard of judicial independence,[18] emanating from the guar-

[6] To that effect CJEU 22.10.1998 C-10/97 to C-22/97 (*IN. CO. GE.'90 and Others*) EU:C:1998:498, para 14; CJEU 15.04.2010 C-268/06 (*Impact*) EU:C:2008:223, para 44-45; CJEU 19.03.2015 C-510/13 (*E.ON Földgáz Trade*), EU:C:2015:189, para 49-50.

[7] *Kakouris*, Do the Member States Possess Judicial Procedural "Autonomy", 34 Common Market Law Review (1997), 1389; *Galetta*, Procedural Autonomy of the EC Member States: Paradise Lost? (2010); *Krönke*, Die Verfahrensautonomie der Mitgliedstaaten der Europäischen Union (2013).

[8] *Dougan*, National Remedies before the Court of Justice (2004); *Dougan*, The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts, in: Craig/Búrca (eds), The Evolution of EU Law²(2011) 407 et seq; *Claes*, The National Courts' Mandate in the European Constitution (2005).

[9] *Lock*, Beyond Bosphorus:The European Court of Human Rights'Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights, 10 Human Rights Law Review (2010), 529 et seq.

[10] *Terhechte*, Nationale Gerichte und die Durchsetzung des EU-Rechts, EuR 2020, 569 et seq.

[11] *Potacs*, Zum effektiven gerichtlichen Rechtsschutz beim Vollzug von EU-Recht durch die Mitgliedstaaten, in: FS Schwarze (2014) 717 et seq.

[12] CJEU 20.04.2021 C-896/19 (*Repubblika v Il-Prim Ministru*) ECLI:EU:C:2021:311 para 45; CJEU 15.07.2021 C-791/19 (*Commission v Poland*), ECLI:EU:C:2021:596, para 57. *Mader*, Wege aus der Rechtsstaatsmisere: der neue EU-Verfassungsgrundsatz des Rückschrittsverbots und seine Bedeutung für die Wertedurchsetzung, EuZW 2021, 917 (920).

[13] CJEU23.11.2021C-564/19(IS)ECLI:EU:C:2021:949; CJEU 20.04.2021 C-896/19 (*Repubblika v Il-Prim Ministru*) ECLI:EU:C:2021:311. As *Scheppele* observes the admissibility of those questions help not too much if the judges receive no useful and practical answers: *Scheppele*, The law requires translation: The Hungarian preliminary reference on preliminary references: IS, 59 Common Market Law Review (2022), 1107.

[14] *Payandeh*, Das unionsverfassungsrechtliche Rechtsstaatsprinzip, JuS 2021, 481.

[15] ECtHR 12.03.2019, App No 26374/18, *Astradsson v Iceland*; ECtHR 07.05.2021 App No 4907/18, *Xero Flor w Polsce sp z oo v Poland*, paras 4-63; ECtHR 22.07.2021, App No 43447/19, *Reckowicz v Poland*.

[16] ECtHR 15.03.2022 App No 43572/18 *Grzęda v Poland*; ECtHR 09.03.2021 App No 1571/07 *Bilgen v Turkey*; ECtHR 29.06.2021, App No 26691/18 and 27367/18 *Broda and Bojara v Poland*.

[17] CJEU 19.11.2019 joined cases C-585/18, C-624/18 and C-625/18 (*A K and others*) ECLI:EU:C:2019:982, para 115.

[18] CJEU 19.11.2019 joined cases C-585/18, C-624/18 and C-625/18 (*A K and others*) ECLI:EU:C:2019:982, para 120: "That requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of car-

antees of the ECHR but being a genuine principle of European law, which is part of the primary law and needs to be complied with. In accordance with the well-established principles of the primacy of EU law over domestic one and its direct applicability, these standards also empower national judges to disapply any national measure contrary to those European requirements.[19] Later case-law also clarified that Art 19(1) TEU imposed "a clear and precise obligation as to the result to be achieved"[20] and that obligation is not subject to any condition as regards the independence which must characterize the courts called upon to interpret and apply EU law. Although this might sound quite revolutionary, in the sense that EU law sets standards for the independence of the national judiciary and empowers national courts to enforce them, these are rather preconditions for direct applicability and primacy of EU law, precisely because a non-independent court cannot be an agent of the EU law applying EU law to its best knowledge and conscience if that very court needs to comply with internal political expectations derogating and questioning its decision-making capacity.

Second, it was also clarified in the *Repubblika* case,[21]in which the Maltese system of appointment of judges was scrutinized and declared to be compatible with the EU law, that the Member States are bound by a *principle of non-regression,*[22] and they have to ensure that they do not adopt rules which would undermine the independence of the judiciary.[23] This, in principle, enables to examine every modification of the organization of the judiciary since the accession to the EU, because without an independent judiciary the accession could not have happened, but the details and effects of such an enquiry let the CJEU open.

Third, beyond this negative obligation, a positive one was also adopted, which requires Member States to progress towards EU Rule of Law standards as one of the notable contributions of the (*Forumul Judecătorilor din România) AFJR* judgment[24] to the previous jurisprudence.[25] The *AFJR* case dealt with the reformed disciplinary, civil and criminal liability of magistrates introduced in Romania during 2017-2019, and the CJEU imposed a duty to achieve progress on two key rule of law benchmarks as set out by the CVM Decision: remedying deficiencies in the justice system and the fight against corruption. From these responsibilities a positive duty of progression may be crystallized. More intriguingly, the CJEU in *AFJR* adopted a "cumulative effects doctrine"[26], which is already well-established in comparative constitutional law.[27]

Fourth, regarding the content of those principles, the Court interlinked Article 19 (1) TEU and Article 47 of the Charter with the requirements following from Article 6 ECHR,[28] and developed a more robust understanding of impartiality. Hence, impartiality has a to be examined by a subjective and an objective test. The first one scrutinizes the personal convictions and behaviour of a particular judge, and examines whether the judge gave any indication of personal prejudice or bias in a given case; the second one ascertains whether the tribunal itself and, among other aspects, its composition, offered suffi-

---

dinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded."

[19] CJEU 19.11.2019 joined cases C-585/18, C-624/18 and C-625/18 (*A K and others*) ECLI:EU:C:2019:982, para 164. This was later reiterated and reinforced eg by CJEU 18.05.2021 joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 (*Asociaţia „Forumul Judecătorilor din România"*) ECLI:EU:C:2021:393, para 242.

[20] CJEU 18.05.2021 joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 (*Asociaţia „Forumul Judecătorilor din România"*) ECLI:EU:C:2021:393, para 250 the different versions are in this regard consistent. German: „eine klare und präzise Ergebnispflicht", French: „une obligation de résultat claire et précise", Dutch: „een duidelijke en nauwkeurige resultaatsverplichting".

[21] CJEU 20.04.2021 C-896/19 (*Repubblika v Il-Prim Ministru*) ECLI:EU:C:2021:311.

[22] *Leloup/Kochenov/Aleksejs,* Opening the door to solving the „Copenhagen dilemma"? All eyes on Repubblika v Il-Prim Ministru, European Law Review 2021, 692; *Mader* (FN 12) 921.

[23] CJEU 20.04.2021 C-896/19 (*Repubblika v Il-Prim Ministru*) ECLI:EU:C:2021:311, paras 63-65; CJEU 18.05.2021 joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 (*Asociaţia „Forumul Judecătorilor din România"*) ECLI:EU:C:2021:393, para 162; CJEU 15.07.2021 C-791/19 (*Commission v Poland*), ECLI:EU:C:2021:596, para 51.

[24] CJEU 18.05.2021 joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 (*Asociaţia „Forumul Judecătorilor din România"*) ECLI:EU:C:2021:393.

[25] *Moraru/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, *Asociaţia „Forumul Judecătorilor din România"*, and their follow-up at the national level, 18 European Constitutional Law Review (2022), 82.

[26] See in particular CJEU 18.05.2021 joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 (*Asociaţia „Forumul Judecătorilor din România"*) ECLI:EU:C:2021:393, paras 214, 221-222. See also Opinion of AG Bobek in the same case 23.09.2021, ECLI:EU:C:2020:746, para 248.

[27] See eg *Roznai*, The Straw that Broke the Constitution's Back? Qualitative Quantity in Judicial Review of Constitutional Amendments, in: Linares-Cantillo/Valdivies-Leon/Garcia-Jaramillo (eds), Constitutionalism: Old Dilemmas, New Insights (2021).

[28] CJEU 19.11.2019 joined cases C-585/18, C-624/18 and C-625/18 (*A K and others*) ECLI:EU:C:2019:982.

cient guarantees to exclude any legitimate doubt in respect of its impartiality."[29] This was later refined and highlighted as the necessity of protecting judges from external intervention or pressure liable to jeopardise their independence. From this requirement a principle of appearances was developed, requiring that "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"[30] Further improvement of the criteria proposed GA *Bobek*, who identified an external and an internal aspect of the concept of judicial independence.[31] The external aspect (or independence *stricto sensu*) requires – in his words – "the court to be protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them",[32] whereby the *internal* aspect is perceived rather as an "impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests as regards the subject matter of those proceedings".[33]

The Strasbourg Court has been shaping domestic judicial governance for much longer time.[34] However, until recently it focused primarily on the role of military courts, specifics of advocate generals and other special judicial officers, and disciplining of judges.[35] In doing so, it often had to rely on substantive human rights provisions rather than on various components of the right to fair trial under Art 6 ECHR. That has changed with the broad interpretation of the so-called *Eskelinen* criteria, which determine the applicability of the civil law limb of Art 6 ECHR, and the innovative interpretation of the notions of "tribunal established by law"[36] and judicial independence[37] in Art 6 (1) ECHR. The ECtHR started to view the right to a fair trial as a structural human right[38] and widened the access of judges to it. This led to a significant shift in the Strasbourg case law as most new cases are litigated under structural aspects of Art 6 ECHR rather than under other substantive human rights provisions.

Although the development of European standards in this area is fast and fascinating, there is still room for improvement and for the clarification of the yardsticks and therefore it is no surprise that this line of case-law and the active role of the CJEU and the ECtHR induced a lively debate on several issues.

III. Debates

As a matter of fact, organizational issues fall to a large extent to the powers of the Member States,[39] and therefore it is not surprising that the Member States vehemently opposed the jurisdiction of the CJEU and the admissibility of issues regarding the structure of the national judiciary. This is partly understandable because Art 19 TEU was for a long time understood as a fig leaf. The CJEU although continuously stressed that the EU is a community based on the rule of law in which its institutions are subject to judicial review and the individuals are entitled to effective judicial protection of the rights they derive from the European legal order, and that right is one of the general principles of law stemming from the constitutional traditions common to the Member States,[40] it also was a clear motivation to

[29] CJEU 19.11.2019 joined cases C-585/18, C-624/18 and C-625/18 (*A K and others*) ECLI:EU:C:2019:982, para 128.

[30] CJEU 19.11.2019 joined cases C-585/18, C-624/18 and C-625/18 (*A K and others*) ECLI:EU:C:2019:982, para 197; CJEU 02.03.2021, C-824/18 (*AB and Others*) EU:C:2021:153, para119 and 139; a socio-legal perspective offers *van Dijk*, Perceptions of the Independence of Judges in Europe (2021).

[31] Opinion AG *Bobek* 20.05.2021 joined cases C-748/19 to C-754/19 (*Prokuratura Rejonowa w Mińsku Mazowieckim v WB*) ECLI:EU:C:2021:403, para 172.

[32] Opinion AG *Bobek* 20.05.2021 joined cases C-748/19 to C-754/19 (*Prokuratura Rejonowa w Mińsku Mazowieckim v WB*) ECLI:EU:C:2021:403, para 172.

[33] Opinion AG *Bobek* 20.05.2021 joined cases C-748/19 to C-754/19 (*Prokuratura Rejonowa w Mińsku Mazowieckim v WB*) ECLI:EU:C:2021:403, para 174.

[34] *Kosař/Lixinski*, Domestic Judicial Design by International Human Rights Courts, 109 American Journal of International Law (2015), 713 et seq.

[35] *Kosař/Lixinski* (FN 34) 713 et seq.

[36] ECtHR 12.03.2019, App No 26374/18, *Astradsson v Iceland*; ECtHR 07.05.2021 App No 4907/18, *Xero Flor w Polsce sp z oo v Poland*, paras 4-63; ECtHR 22.07.2021, App No 43447/19, *Reckowicz v Poland*.

[37] ECtHR 15.03.2022 App No 43572/18 *Grzęda v Poland*; ECtHR 09.03.2021 App No 1571/07 *Bilgen v Turkey*; ECtHR 29.06.2021, App No 26691/18 and 27367/18 *Broda and Bojara v Poland*.

[38] *Leloup*, Who Safeguards the Guardians? A Subjective Right of Judges to their Independence under Article 6(1) ECHR, 17 European Constitutional Law Review (2021), 394.

[39] The organizational and procedural autonomy is to a large extent rather a descriptive and less a normative concept, and therefore those fundamental political and constitutional structures covered by the national identity of Art 4 TEU should be constructed narrowly, cf *Augsberger*, Europäisches Verwaltungsorganisationsrecht und Vollzugsformen, § 6, para 21-30, in: Terhechte (eds), Verwaltungsrecht der Europäischen Union[2] (2021).

[40] CJEU 25.07.2002 C-50/00 P (*Unión de Pequeños Agricultores*). ECLI:EU:C:2004:210, para 38-40.

limit the direct actions directly submitted before the courts of the EU which threated to be unmanageable. Hence, Art 19 TEU was created to compel Member States to establish remedies and provide the proper forum ("to plug the gap")[41] for those cases which – due to lacking standing – cannot be handled before the CJEU.

The whole perspective has been revolutionary changed during the last years, and the responsibility of the Member States to unburden the CJEU evolved to an outspoken right to an independent court of the individuals. This, of course, on the one hand, helps to effectuate the values of the EU, but raises, on the other, several issues regarding the proper legal basis in terms of conferral of powers.[42] Article 2 TEU expresses the basic values on which the EU is based upon, and hence logically all provisions of the Treaties have some connection to it. Therefore, the link between the fundamental values and the independence of the judiciary (Art 19 TEU)[43] and the procedural rights of the Charter (especially Article 47) on the one hand and the protection of the financial interests of the EU (Art 325 TFEU) and even the cooperation and verification mechanism reports[44] on the other undoubtedly exists, although it might not be the most obvious or the strongest one. The connection between the fundamental values and the various provisions of the founding treaties does not necessarily explain as to whether an individual right to an independent court and to a fair trial might be constructed and derived form rather organizational arrangements, and it also needs some clarification why insufficient or lacking organizational arrangements might be subject to individual complaints, and as to whether the Art 7 TEU procedure is an exclusive one for enforcing those abstract values mentioned in Article 2 TEU or not?[45]

The question and the debate as to whether some duties of the Member States may or may not establish individually enforceable rights are as old as the legal order of the Union, and practically goes back to the *van Gend en Loos* case (the *effet réflexe* of contractual duties between Member States)[46] and recall all the discussions around the failed implementation of directives and the declaring them to be directly applicable in order to empower and mobilize the concerned individuals for an effective enforcement of EU obligations.[47] Then the CJEU was also between a rock and a hard place, and had to choose between doctrinal niceties on the one hand and the effectivity of the European legal order on the other, and seemed to give a similar answer as today: simple accepted the reality that the monitoring and enforcement mechanisms expressly established by the Treaties are highly politicized, subject to horse-trading and hence the same way ineffective[48] as enforcement actions were ineffective earlier,[49]and, as a consequence, it is necessary to empower those individuals or judges who are keen and eager to engage in the conflicts in order to effectively enforce EU values and norms. The CJEU should be aware of the circumstances of the national judge submitting a preliminary question, foremostly "the systemic political pressures on the national judge" and should give a useful and adequate answer for them otherwise it is nothing more than a political tightrope act.[50]

Doing so, of course, is not without caveats, because the applicable provisions are rather vague – or in the words of GA *Bobek* even "limitless"[51] – opening a wide range of questions. To reduce the second subparagraph of Article 19(1) TEU in the context of judicial independence to "structural breaches which compromise the essence of judicial independence"[52] is in line with the understanding of systemic or generalised deficiencies concerning the judiciary undermining the trust in the judiciary of that given Member State,[53] but that understanding of exceptionality harbours also some obvious risks. First, it requires to address the question of the nature of structural or systemic failures, and to delineate them

[41] *Brown/Morijn*, Case C-263/02 P *Commission v Jégo-Quéré & Cie SA*, 41 Common Market Law Review (2004), 1639 (1649). Simiraly *Lenz/Staeglich,* Kein Rechtsschutz gegen EG-Verordnungen?, NvWZ 2004, 1421 (1426).

[42] *Konstadinides*, The Competences of the Union, in: Schütze/Tridimas (eds), Oxford Principles of European Union law (2018), 191 et seq.

[43] CJEU 27.02.2018, C-64/16 (*Associação Sindical dos Juízes Portugueses*) EU: C:2018:117, para 32.

[44] CJEU 18.05.2021 joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 (*Asociaţia „Forumul Judecătorilor din România"*) ECLI:EU:C:2021: 393.

[45] Arguments for a non-exclusivity see eg *Scheppele/Kochenov/Grabowska-Moroz*, EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union, 39 Yearbook of European Law (2020), 3 et seq.

[46] *Vincze*, Unionsrecht und Verwaltungsrecht (2016) 209.

[47] *Masing*, Die Mobilisierung des Bürgers für die Durchsetzung des Rechts (1996).

[48] Hereto *Scheppele/Kochenov/Grabowska-Moroz* (FN 45) 37-47.

[49] *Haltern*, Europarecht²(2007) 314-387.

[50] Critically *Scheppele* (FN 13) 1107.

[51] Opinion AG *Bobek* 23.09.2020, joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 (*Asociaţia „Forumul Judecătorilor din România")* ECLI:EU:C:2020:746, para 222.

[52] Opinion AG *Tanchev* 24.09.2019, joined cases C-558/18 and C-563/18 (*Miasto Łowicz*) ECLI:EU:C:2019: 775, para 125.

[53] CJEU 25.07.2018 C-216/18 PPU (LM), ECLI:EU:C: 2018:586. Regarding the concept of trust in EU law see *Kullak,* Vertrauen in Europa (2020).

from non-systemic ones, which might simple be a question of right formulation,[54] but it is also capable of decoupling the individual cases from systemic changes and narrowing the opportunities of individual enforcement.[55]

The systemic or structural nature of the violations of judicial independence begs the question of actual application of the law, and how far the normative blueprint corresponds to the reality, how an institutional arrangement, as envisaged 'on paper', seems to comply with the legal requirements of EU law (be it Article 47 of the Charter or Article 19(1) TEU) or that arrangement may be misused in the "particular legal and institutional context of a Member State".[56] Although GA *Bobek* raised very delicate and essential question, he also pointed out that an international court, like the CJEU, is not necessarily in the position to make those assessments[57] because its institutional and constitutional capacity limits the scope of review.[58] First, there is an obvious informational asymmetry in detriment of the CJEU and in favour of the Member State regarding the actual practice and the question how it deteriorates from the normative blueprint, and it is highly unlikely that the CJEU would be in a position to gather all the necessary information to assess the situation properly.[59] Second, the whole procedure would require some interpretation of the domestic law, a duty for which the CJEU is not only ill-equipped but which is not necessarily within its powers.[60] Third, it is hard to overlook that the judgement of the CJEU needs to be enforced at national level which opens the question of cooperation between national and supranational courts.

The debate on the new elements of the Strasbourg case law has so far lacked the same intensity, depth and breadth. The skirmishes between the French courts and the ECtHR concerning the role of *commissaire du government* and other special judicial officers[61] is, in light of the new developments, almost forgotten today. The same applies to the once intense disagreement between the UK and Turkish governments with the Strasbourg case law on military courts.[62] This might change soon though. Many recent cases, where the ECtHR has innovatively developed its case law concerning judicial governance, concerned "usual suspects" of democratic decay in Europe, namely Hungary[63] and Poland.[64] These cases often addressed clear violations of the rule of law and any response from Hungarian and Polish governments was thus viewed as suspicious and illegitimate. As a result, doctrinal developments in the recent ECtHR's case law have often been undertheorized and unchallenged.[65] However, these new principle start biting even other CoE democracies.[66] The ECtHR will thus have to solve similar issues as the CJEU such as the clear determination of the legal basis among the Convention articles and avoiding their overlap, developing benchmarks for assessing

---

[54] Opinion AG *Bobek* 23.09.2020, joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 (*Asociaţia „Forumul Judecătorilor din România"*) ECLI:EU:C:2020:746, para 222.

[55] *Wendel,* Rechtsstaatlichkeitsaufsicht und gegenseitiges Vertrauen, EuR 2019, 111 (119-121).

[56] Opinion AG *Bobek* 23.09.2020, joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 (*Asociaţia „Forumul Judecătorilor din România"*) ECLI:EU:C:2020:746, para 241-244.

[57] Opinion AG *Bobek* 23.09.2020, joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 (*Asociaţia „Forumul Judecătorilor din România"*) ECLI:EU:C:2020:746, para 243.

[58] Cf *Lord Woolf/Jowell/Le Sueur*, De Smith's Judicial Review[6] (2007), para 1-026-1-036; *Allan*, Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review, 60 The University of Toronto Law Journal (2010), 41 et seq.

[59] Notwithstanding the fact the Rules of Procedure of the CJEU theoretically enable to hear witness and expert witness evidence.

[60] CJEU 02.06.2005 C-136/03, *Dörr*, ECLI:EU:C:2005:340, para 46 "it is not for the Court, in the context of a reference for a preliminary ruling, to rule on the interpretation of national provisions or to decide whether the referring court's interpretation thereof is correct (...). The Court must take account, under the division of jurisdiction between the Community Courts and the national courts, of the factual and legislative context, as described in the decision for reference, in which the questions put to it are set".

[61] ECtHR 07.06.2001, App No 39594/98, *Kress v France*; *Bell*, The Role of the Commissaire du Gouvernement and the European Convention on Human Rights, 9 European Public Law (2003), 309 et seq.

[62] *Kosař*, Nudging Domestic Judicial Reforms from Strasbourg: How the European Court of Human Rights Shapes Domestic Judicial Design, Utrecht Law Review 13 (2017), 112 (116-117).

[63] ECtHR 23.06.2016, No 20261/12, *Baka* v *Hungary*; ECtHR 22.11.2016, No 22254/14, *Erményi v Hungary*.

[64] The recent case law of both the ECtHR and the CJEU is too abundant to mention here. Regarding the CJEU, see an (already outdated) summary in *Kochenov/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 (SIEPS 2021). Regarding the ECtHR, see in particular *Xero Flor w Polsce sp z oo v Poland*, paras 4-63; ECtHR 22.07.2021, App No 43447/19, *Reckowicz v Poland*; and ECtHR 15.03.2022 App No 43572/18, *Grzęda v Poland*.

[65] For a rare straightforward criticism, see *Kosař/Šipulová,* The Strasbourg Court Meets Abusive Constitutionalism: Baka v Hungary and the Rule of Law, 10 Hague J Rule Law (2018), 83 et seq; *Kosař/Leloup,* Op-Ed: Saying Less is Sometimes More (even in Rule-of-Law Cases): *Grzęda v Poland*, https://eulawlive.com/grzeda-v-poland-by-david-kosar-and-mathieu-leloup (accessed on 24.08.2022).

[66] See ECtHR 12.03.2019, App No 26374/18 *Ástráðsson v Iceland*; ECtHR 23.06.2022 App No 19750/13, *Grosam v Czech Republic*.

domestic application of law on paper and the relevant "contextual facts", and choosing the right intensity of review. Moreover, a specific Convention-related debate has already started regarding the subjective right of judges to judicial independence,[67] lapse of time and determination of the critical date for the Art 6 ECHR assessment,[68] whether Art 6 ECHR contains the implicit right to abstract review of domestic legislation,[69] and the limits of ECtHR's jurisdiction and the risk of acting ultra vires.[70]

IV. Effects

The real consequences on the domestic level depend on the reception of the judgements of the CJEU by the national (constitutional) courts, which was often described beneficially and optimistically as a judicial dialogue, as an open process of persuasion and argumentation,[71] interactive network[72] there was always some skepticism as to whether courts can have such a harmonious relationship.[73] Recent examples show that national constitutional courts under the pretext of constitutional identity openly or covertly denounce the primacy of EU law.

The German *Bundesverfassungsgericht* denied to follow several judgements of the CJEU because they were contrary to the national constitutional identity[74] or to the human dignity[75] or "simply not comprehensible," "objectively arbitrary" or "not tenable from a methodological perspective",[76] which paved the way for other national constitutional courts as well to be less co-operative. So, while the Hungarian Constitutional Court found ways to sabotage rulings of the CJEU by procrastinating their implementation[77] or empowering the Government to defy them,[78] the Polish Constitutional Court expressly decided not to acknowledge the decisions of the CJEU regarding the organization of national judicial systems because they are allegedly ultra vires and non-binding in Poland[79] and questioned the compatibility of some key treaty provisions including Art 19 TEU with the Polish Constitution. Also the Romanian Constitutional Court took the edge off the decision of the CJEU, and questioned the competence of the CJEU of applying the law in a very case and the outcome of the decision encroaching the exclusive powers of a state to determine "the organisation, functioning and delimitation of powers between the various structures of the prosecution authorities".[80] The prompt answer of the CJEU stating that the effectiveness of the cooperation between the CJEU and the national courts would be in jeopardy if the constitutional court of the Member State could refuse to give effect to a preliminary ruling given by the CJEU, on the basis, inter alia, of the constitutional identity of the Member State and of the contention that the Court has exceeded its jurisdiction[81] empowers the national courts to withstand the rulings of (probably compromised)[82] national constitutional (and probably Supreme or disciplinary) courts. However, this bold stance of CJEU also begs the question how that helps to resolve or heal the underlying political conflict or its nothing more than a vicious cycle in which both national and European courts claim supremacy over the other one without actually solving the problem. One may even wonder whether the judiciary is best placed to address the questions effectively, which also highlights the inaptitude of the political decision-making.

---

[67] See *Leloup* (FN 38) 394 et seq; and *Ducoulombier*, Le droit subjectif du juge à la protection de son indépendance: chaînon manquant de la protection de l'État de droit en Europe?, in: Branko/Motoc/Pinto de Albuquerque/Spano/Tsirli (eds), Procès équitable: perspectives régionales et internationales (2020) 153 et seq.

[68] ECtHR 15.03.2022 App No 43572/18 *Grzęda v Poland*, Concurring opinion of Judge *Lemmens*. See also *Kosař/Leloup* (FN 65).

[69] ECtHR 15.03.2022 App No 43572/18 *Grzęda v Poland*, Concurring opinion of Judge *Wojtyczek*.

[70] ECtHR 23.06.2022 App No 19750/13, *Grosam v Czech Republic*, dissenting opinions of Judges *Eicke, Koskelo* and *Wennerström*.

[71] *Arnull*, Judicial Dialogue in the European Union, Philosophical Foundations of European Union Law (2012), 109 et seq.

[72] *Voßkuhle*, Multilevel cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund, 6 European Constitutional Law Review (2010), 175.

[73] *Poli*, The Judicial Dialogue in Europe: Adding Clarity to a Persistently Cloudy Concept, 11 ICL Journal (2017), 351 et seq.

[74] *Payandeh,* The OMT Judgment of the German Federal Constitutional Court: Repositioning the Court within the European Constitutional Architecture, 13 European Constitutional Law Review (2017), 400 et seq.

[75] *Hong*, Human Dignity, Identity Review of the European Arrest Warrant and the Court of Justice as a Listener in the Dialogue of Courts, 12 European Constitutional Law Review (2016), 549 et seq.

[76] *Feichtner*, The German Constitutional Court's PSPP Judgment: Impediment and Impetus for the Democratization of Europe, 21 German Law Journal (2020), 1090 et seq.

[77] *Chronowski/Vincze,* The Hungarian Constitutional Court and the Central European University Case: Justice Delayed is Justice Denied, 17 European Constitutional Law Review (2021), 688 et seq.

[78] *Vincze*, Unsere Gedanken sind Sprengstoff – Zum Vorrang des Europarechts in der Rechtsprechung des ungarischen Verfassungsgerichts, EuGRZ 2022, 13 et seq.

[79] The judgment of the Polish Constitutional Tribunal of 7 October 2021 in case K 3/21.

[80] *Moraru/Bercea* (FN 25) 107-108.

[81] CJEU 22.02.2022 C-430/21 (RS) ECLI:EU:C:2022:99.

[82] *Spieker*, Werte, Vorrang, Identität: Der Dreiklang europäischer Justizkonflikte vor dem EuGH, EuZW 2022, 305 (309).

The very same considerations apply to the Strasbourg Court, perhaps with even more stringency. The ECtHR does not have the same leverage over "its" Member States like the CJEU, which is backed by the European Commission with a plethora of available sanctions. ECtHR's backlog has been daunting and its legitimacy challenged far more than its Luxembourg counterpart. One may even say that the Strasbourg system of human rights has been going through a backlog, legitimacy, and implementation crises during the past decade.[83] The ECtHR thus must be at its best when it decides on the big rule of law cases and show a great deal of political savviness, nuanced arguments and persuasive reasoning.

V. What It All Means for Domestic Judicial Governance?

Apart from the theoretical debates about the CJEU's and ECtHR's competence, legal basis of their judgments (the relevant articles of TFEU and ECHR), procedural techniques (including interim measures), threshold for structural issues, and domestic consequences in individual cases, the recent case law of these two supranational courts also has important general policy repercussions. In fact, these two courts increasingly structure the debate about domestic judicial governance in Europe. Within few last years they have set new standards for, among other things, selection of judges,[84] criminal,[85] disciplinary[86] and civil[87] liability of judges, role of court presidents,[88] relocation and reassignment of judges,[89] case assignment,[90] and judicial councils.[91]

The big question is what these new standards mean for other than "backsliding States" such as Hungary, Poland and Romania. The answer is particularly poignant for jurisdictions such as Austria, Germany and Czechia that still stick to the allegedly "old-fashioned" Ministry of Justice model of judicial governance. Due to the limited space and since disciplining of judges has already been widely covered in the literature,[92] we will limit our analysis to two partly related issues, selection of judges and judicial councils.

Regarding selection of judges, both the ECtHR and the CJEU acknowledge that the variety of different systems in Europe for the selection and appointment of judges and rhetorically claim that they are not called to review these systems.[93] They also explicitly confirmed that the mere fact that the executive is involved in appointment of judges does not give rise to a relationship of subordination of those judges to the executive or to doubts as to the judges' impartiality, if, once appointed, they are free from influence or pressure when carrying out their role.[94] Yet, both courts showed preference for involvement of an independent body such as judicial appointment commission or a judicial council in selection of judges because they believe these bodies will in principle make the appointments process more objective.[95]

---

[83] *Kosař/Petrov,* The Architecture of the Strasbourg System of Human Rights: The Crucial Role of the Domestic Level and the Constitutional Courts in Particular, ZaöRV 2017, 585 et seq.

[84] CJEU 20.04.2021 C-896/19 (*Repubblika v Il-Prim Ministru*) ECLI:EU:C:2021:311; CJEU 2.3.2021, C-824/18 (*AB and Others*) EU:C:2021:153; CJEU 06.10.2021. C-487/19 (*W Ż*) ECLI:EU:C:2021:798; ECtHR 12.03.2019, App No 26374/18, *Astradsson v Iceland*; ECtHR 07.05.2021 App No 4907/18, *Xero Flor w Polsce sp z oo v Poland*, ECtHR 07.04.2022 App No 18952/18 *Gloveli v Georgia*; ECtHR 23.06.2022 App No 19750/13, *Grosam v Czech Republic*.

[85] CJEU 18.05.2021 joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 (*Asociaţia „Forumul Judecătorilor din România"*) ECLI:EU:C:2021:393.

[86] CJEU 15.07.2021 C-791/19 (*Commission v Poland*), ECLI:EU:C:2021:596.

[87] CJEU 18.05.2021 joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 (*Asociaţia „Forumul Judecătorilor din România"*) ECLI:EU:C:2021:393.

[88] ECtHR 23.06.2016, No 20261/12, *Baka* v *Hungary*; ECtHR 22.11.2016, No 22254/14, *Erményi v Hungary*; ECtHR 25.09.2018 No 76639/11, *Denisov v Ukraine*.

[89] ECtHR 09.03.2021 App No 1571/07 *Bilgen v Turkey*.

[90] ECtHR 12.04.2018 App No 36661/07 and 38433/07 *Chim and Przywieczerski v Poland*, paras 138-142; ECtHR 02.05.2019, App no 50956/16, *Pasquini v San Marino*, paras 103 and 107.

[91] CJEU 19.11.2019 joined cases C-585/18, C-624/18 and C-625/18 (*A K and others*) ECLI:EU:C:2019:982; CJEU 02.03.2021, C-824/18 (*AB and Others*) EU:C:2021:153; ECtHR 15.03.2022 App No 43572/18 *Grzęda v Poland*; CJEU 06.11.2018 App No 55391/13, 57728/13 and 74041/13 *Ramos Nunes de Carvalho E Sá and Others v Portugal;* CJEU 20.07.2021, App No 79089/13 *Loquifer v Belgium*.

[92] *Kosař*, Perils of Judicial Self-Government in Transitional Societies (2016); *Sadurski*, Poland's Constitutional Breakdown (2019); *Zoll/Wortham*, Judicial Independence and Accountability: Withstanding Political Stress in Poland, 42 Fordham International Law Journal (2019), 875 et seq; *Gajda-Roszczynialska/Markiewicz,* Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland, 12 Hague J Rule Law (2020), 451 et seq.

[93] ECtHR 12.03.2019, App No 26374/18, *Astradsson v Iceland*, para 207; ECtHR 07.04.2022 App No 18952/18, *Gloveli v Georgia* , para 51; CJEU 20.04.2021 C-896/19 (*Repubblika v Il-Prim Ministru*) ECLI:EU:C:2021:311, para 56.

[94] CJEU 20.04.2021 C-896/19 (*Repubblika v Il-Prim Ministru*) ECLI:EU:C:2021:311, para 56; CJEU 19.11.2019 joined cases C-585/18, C-624/18 and C-625/18 (*A K and others*) ECLI:EU:C:2019:982, para 133; CJEU 02.03.2021, C-824/18 (*AB and Others*) EU:C:2021:153, para 122.

[95] CJEU 19.11.2019 joined cases C-585/18, C-624/18 and C-625/18 (*A K and others*) ECLI:EU:C:2019:982, para 137; CJEU 20.04.2021 C-896/19 (*Repubblika v Il-Prim Ministru*) ECLI:EU:C:2021:311, paras 66 and 69-73;

Moreover, both courts highlighted the importance of a rigorous process for the appointment of ordinary judges and sanction even not so flagrant procedural irregularities well beyond[96] the Polish[97] scenario of the flagrant attempt to capture the judiciary. Such rigorous process inevitably limits discretion, which implicitly works against a meaningful involvement of the executive and the legislature in selection of judges. Moreover, the ECtHR stretched its *Eskelinen* criteria so as to allow judges themselves to challenge the outcome of judicial competitions and appeal against the rejection of their unsuccessful candidacy for a judicial post.[98]

The current case law of the ECtHR and the CJEU thus leaves many issues of judicial governance open and is subject to competing interpretations. For instance, it is not clear now whether both courts would accept a system of selection of judges, which does not involve an independent judicial appointment commission or a judicial council at all, even in advisory role.[99] We also do not know how detailed the justification must be if the executive or the legislature depart from the ranking of judicial competition and appoint or elect different (lower ranked) candidates.[100] The ECtHR set the bar quite high.[101] Similarly, it is unclear whether the ECtHR requires judicial review of judicial appointments in all Contracting Parties, irrespective of their domestic constitutional rules, as it has been toying with the idea of the right of *judges* to subjective judicial independence.[102]

Similarly, both the ECtHR and the CJEU rhetorically do not require from all Contracting Parties/Member States to adopt a judicial council model of judicial governance as neither the Convention nor the EU law[103] contain any explicit requirement to this effect.[104] What they require is that, when a country establishes a judicial council, the State authorities must ensure its independence from the executive and legislative powers.[105] This means, for instance, that judges should receive a similar protection for their membership in a judicial council as in their normal adjudicatory role.[106] The ECtHR goes potentially further implying that no less than half of the members of such councils should be judges,[107] that these judicial members of judicial councils should be chosen by their peers and thus should acts as representatives of the judicial community,[108] but these arguments were employed more as a conceptualization of the Polish system of judicial governance rather than general principles stemming from the Convention.[109]

It might thus seem that the relevant principles for judicial councils stemming from the ECtHR's and CJEU's case law apply only to those countries that adopted a judicial council model of judicial governance and not to countries such as Austria, Czechia and Germany, which do not have judicial councils. Yet, as we showed above regarding selection of judges, both supranational bodies push for the greater involvement of judges in judicial governance via judicial councils and similar bodies.[110]

ECtHR 21.04.2020 App No 36093/13, *Anželika Šimaitienė v Lithuania*, para 82.

[96] ECtHR 12.03.2019, App No 26374/18, *Astradsson v Iceland,* paras 221-222 and 230; ECtHR 07.04.2022 App No 18952/18, *Gloveli v Georgia*, para 50.

[97] This is the polish scenario cf ECtHR 07.05.2021 App No 4907/18, *Xero Flor w Polsce sp z oo v Poland*; CJEU 19.11.2019 joined cases C-585/18, C-624/18 and C-625/18 (*A K and others*) ECLI:EU:C:2019:982; CJEU 02.03.2021, C-824/18 (*AB and Others*) EU:C:2021:153. This is very different from the background of the cases cited in the previous footnote.

[98] ECtHR 07.04.2022 App No 18952/18, *Gloveli v Georgia*, paras 58-60.

[99] A contrario CJEU 20.04.2021 C-896/19 (*Repubblika v Il-Prim Ministru*) ECLI:EU:C:2021:311, paras 66-72 or a contrario ECtHR 07.04.2022 App No 18952/18, *Gloveli v Georgia.*

[100] A contrario ECtHR 12.03.2019, App No 26374/18, *Astradsson v Iceland*, para 258.

[101] ECtHR 12.03.2019, App No 26374/18, *Astradsson v Iceland*, paras 260-267.

[102] On this matter recently *Leloup* (FN 38) 394 et seq; *Ducoulombier*, Le droit subjectif du juge à la protection de son indépendance: chaînon manquant de la protection de l'État de droit en Europe?, in: Branko/Motoc/Pinto de Albuquerque/Spano/Tsirli (eds), Procès équitable: perspectives régionales et internationales (2020) 153 et seq.

[103] CJEU 20.04.2021 C-896/19 (*Repubblika v Il-Prim Ministru*) ECLI:EU:C:2021:311; CJEU 19.11.2019 joined cases C-585/18, C-624/18 and C-625/18 (*A K and others*) ECLI:EU:C:2019:982, paras 138 and 142-144; CJEU 02.03.2021, C-824/18 (*AB and Others*) EU:C:2021:153, paras 125-131.

[104] ECtHR 15.03.2022 App No 43572/18, *Grzęda v Poland* para 307.

[105] ECtHR 15.03.2022 App No 43572/18, *Grzęda v Poland,* para 307; CJEU 19.11.2019 joined cases C-585/18, C-624/18 and C-625/18 (*A K and others*) ECLI:EU:C:2019:982, paras 138 and 142-144; CJEU 2.3.2021, C-824/18 (*AB and Others*) EU:C:2021:153, paras 125-131.

[106] ECtHR 15.03.2022 App No 43572/18, *Grzęda v Poland,* para 303.

[107] ECtHR 15.03.2022 App No 43572/18, *Grzęda v Poland*, para 305.

[108] ECtHR 15.03.2022 App No 43572/18, *Grzęda v Poland*, paras 305 and 320.

[109] Moreover, these arguments were not necessary to decide the *Grzęda* judgment. See *Kosař/Leloup*, Saying Less is Sometimes More (even in Rule-of-Law Cases): *Grzęda v Poland*, EU Law Live, 31 March 2022, <https://eulawlive.com/grzeda-v-poland-by-david-kosar-and-mathieu-leloup/>, visited 25 August 2022.

[110] Note that even in Austria, Czechia and Germany judges do have their say in judicial governance, but via different bodies than judicial councils. See *Kosař,* Politics of Judicial Independence and Judicial Accountability

Some of these judgments are too sweeping and not so well-reasoned,[111] but only future will tell us how far the ECtHR and CJEU will go, whether they will be willing and able to enforce these new standards also in consolidated democracies[112] and whether countries such as Austria and Germany will pushback[113] against this development.[114]

Notwithstanding the preference by both the ECtHR's and CJEU, the bigger question is whether the judicial council model actually delivers the goods it promises in all environments. There is an emerging consensus that judicial councils with the majority of judges yielded problematic results in many jurisdictions in Central and Eastern Europe as such councils are prone to judicial corporativism.[115] The concept of judicial councils composed of a majority of judges thus has been increasingly questioned not only by governments with potentially sinister intentions, but also in good faith by scholars[116] and civil society in several transitional democracies.[117] Even the Venice Commission started to acknowledge that public confidence in the justice system would suffer if a council for the judiciary is perceived to act out of self-interest, self-protection and cronyism.[118]

That said, the fact that a certain conceptualization of a judicial council has not worked well in post-communist countries does not mean that judicial councils are necessarily wrong. Several Western democracies have recently switched to this model of judicial governance, and they had good reasons for doing so. Even common law jurisdiction such as Ireland is heading into this direction.[119] The post-communist legacy of judicial councils only teaches us a lesson that it is not a good idea to think of a judicial council exclusively as an organ of judicial *self*-governance composed predominantly by judges.

We need to balance democratic legitimacy with independence and limit both politicization and corporativism of the judiciary. The promising way, at least in some jurisdictions, is to reconceptualize judicial councils as fourth branch institutions[120] and include representatives of other legal professions and civil society in their membership.[121] Such understanding would require judicial councils to be independent not only from the executive and the legislature, but also from the judiciary. Judges are not necessarily

in Czechia: Bargaining in the Shadow of the Law between Court Presidents and the Ministry of Justice. 13 European Constitutional Law Review (2017), 96 et seq; *Wittreck*, German Judicial Self-Government — Institutions and Constraints, 19 German Law Journal (2018), 1931 et seq; *Vašek*: Die Richterbestellung in Österreich (2022).

[111] See *Kosař/Leloup* (FN 109).

[112] Both courts have already indicated that they might be willing to do so. See ECtHR 12.03.2019, App No 26374/18, *Astradsson v Iceland*; or CJEU 27.05.2019, C-508/18 (*OG Public Prosecutor's Office of Lübeck*) ECLI:EU:C:2019:456.

[113] On the concept of "pushback", see *Madsen/Cebulak/Wiebusch*, Backlash against international courts: Explaining the forms and patterns of resistance to international courts, 14 International Journal of Law in Context (2018), 197 et seq.

[114] For a potential line of criticism, see *Wittreck*, Empfehlen sich Regelungen zur Sicherung der Unabhängigkeit der Justiz bei der Besetzung von Richterpositionen?, 73. djt I/ G1 et seq.

[115] For an overview, see *Kosař*, Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe, 19 German Law Journal (2018), 1567 et seq.

[116] See: *Spáč/Šipulová/Urbániková*, Capturing the Judiciary from Inside: The Story of Judicial Self-Governance in Slovakia, 19 German Law Journal (2018), 1741 et seq; *Preshova/Damjanovski/Nechev*, The Effectiveness of the 'European Model' of Judicial Independence in the Western Balkans: Judicial Councils as a Solution or a New Cause of Concern for Judicial Reforms, CLEER Working Paper (2017); *Popova*, Politicized Justice in Emerging Democracies: A Study of Courts in Russia and Ukraine (2012); *Castillo-Ortiz*, Councils of the Judiciary and Judges' Perceptions of Respect to Their Independence in Europe, 9 Hague Journal on the Rule of Law (2017), 315 et seq.

[117] See for example: ANTAC, Recommendations towards ensuring accountable and independent judicial governance in transitional societies'; ANTAC, 'Judicial governance in transitional democracies: lessons learnt', <https://drive.google.com/file/d/1KJR7OcXiPRYFLXL0NFNNWaPl96m3zjh_/view>, both visited 25.08.2022.

[118] *Venice Commission*, CDL-AD(2022)010, 'Georgia: Opinion on the December 2021 amendments to the organic law on common courts', para 61. See also: *Venice Commission*, CDL-AD(2022)020, 'Lebanon: Opinion on the draft law on the independence of judicial courts', para 60.

[119] See *O'Brian*, Never let a crisis go to Waste: Politics, Personality and Judicial Self-Government in Ireland, 19 German Law Journal (2018), 1871 et seq; and *Cahillane*, Towards Best Practice: A report on the new Judicial Council in Ireland, Irish Council for Civil Liberties (2022).

[120] See for example: *Bulmer*, Independent Regulatory and Oversight (Fourth-Branch) Institutions, (International IDEA Constitution-Building Primer 2019), <https://www.idea.int/sites/default/files/publications/independent-regulatory-and-oversight-institutions.pdf>, visited 19 July 2022, at p 6 and 12 (accessed 25.08.2022); *Kadlec/Kosař/Šipulová*, Judicial Councils as Guarantor Institutions – Towards a Post-Partisan Understanding of Judicial Governance, (unpublished manuscript, on file with authors, 2022). On fourth branch (or guarantor) institutions more generally, see *Tushnet*, The New Fourth Branch: Institutions for Protecting Constitutional Democracy (2021); *Khaitan*, Guarantor Institutions, 16 Asian Journal of Comparative Law (2021), 540 et seq.

[121] See *Venice Commission*, CDL-AD(2022)010, 'Georgia: Opinion on the December 2021 amendments to the organic law on common courts', para 61; *Venice Commission*, CDL-AD(2022)020, 'Lebanon: Opinion on the draft law on the independence of judicial courts', para 60; and also a more nuanced approach taken by the CCJE in Opinion No 24 (2021), Evolution of the Councils for the Judiciary, para 29.

"impartial thirds"[122] in judicial governance, as they may have their own particular group-interests (for instance, preventing members of other legal professions from entering the judiciary in later stages of their career) and sometimes may even fight between each other within the judicial council to the detriment of the society.[123] Put in simple terms, judicial council should not necessarily be a council composed by members of the judicial branch: complete self-governance without proper checks and balances easily leads to self-empowerment and corruption.

Finally, we have to think beyond judicial councils and study judicial appointment boards, court presidents and other bodies of judicial governance.[124] For instance, Scandinavian countries,[125] England and Wales or the State of Hamburg created judicial appointment boards, in many of which judges have a minority.[126] Only then we can understand what powers judges and other actors actually hold in judicial governance[127] and what institutional solutions work and what do not in a given context.

VI. Conclusion

This article has shown that both the ECtHR and, more recently, the CJEU have been engaging in domestic judicial design. By doing they inevitably judicialized domestic judicial politics and empowered judges vis-à-vis other branches of government.[128] Both courts have also been turning the international soft law standards on judicial governance and judicial independence into hard law, albeit each in its own way. Until recently, they did so mostly against the backsliding countries in relatively straightforward cases. Nevertheless, these new supranational principles of judicial governance are starting to bite even consolidated European democracies. Even Western democracies like Austria and Norway thus have to conduct not only the voluntary "judicial stress-tests" against populist challenges to judicial independence,[129] but also compulsory judicial screening of their compliance with the new CJEU's and ECtHR's standards.

Correspondence: doc. JUDr. David Kosař, Ph.D., LL.M., J. S. D.; Head of Department of Constitutional Law and Political Science, Masaryk University Brno; Veveří 158/70, CZ 611 80 Brno; David.Kosar@law.muni.cz

PD Dr. Attila Vincze, LL.M. senior lecturer, Judicial Studies Institute, Masaryk University Brno; Veveří 158/70, CZ 611 80 Brno; Attila.Vincze@law.muni.cz

[122] See *Shapiro*, Courts (1981) 1-64.

[123] For the best example see *Spáč/Šipulová/Urbániková*, Capturing the Judiciary from Inside: The Story of Judicial Self-Governance in Slovakia, 19 German Law Journal (2018), 1741 et seq.

[124] See *Kosař*, Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe, 19 German Law Journal (2018), 1567 et seq.

[125] See *Wallerman Ghavanini/Grendstad/Schaffer*, Institutions that Define the Policy-Making Role of Courts: A Comparative Analysis of the Supreme Courts of Scandinavia (unpublished manuscript, on file with authors, 2022).

[126] This is the case of the Norwegian judicial appointment board (*Innstillingsrådet for dommere*) and the Judicial Appointments Commission in England and Wales, Judiciary Act of Hamburg §§ 14 et seq.

[127] *Šipulová/Spáč/Kosař/Papoušková/Derka*, Judicial Self-Governance Index: Towards better understanding of the role of judges in governing the judiciary. Regulation & Governance (2022), https://onlinelibrary.wiley.com/doi/epdf/10.1111/rego.12453 (accessed 25.08.2022).

[128] For a similar argument, albeit concerning only the ECtHR, *Kosař/Lixinski*, 109 American Journal of International Law (2015) 713 et seq.

[129] See *Holmøyvik/Sanders,* A Stress Test for Europe's Judiciaries, in: Hirsch Ballin/van der Schyff/Stremler (eds), 1 European Yearbook of Constitutional Law 2019, 289 et seq; *Holmøyvik/Sanders*, A Stress Test for Europe's Judiciaries, VerfBlog 2017/8/23, https://verfassungsblog.de/a-stress-test-for-europes-judiciaries/ (accessed 25.08.2022).

